EN

UNIDROIT Working Group on International Investment Contracts

Public consultation feedback

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

PUBLIC CONSULTATION FEEDBACK

(prepared by the UNIDROIT Secretariat)

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I. INTRODUCTION

1. This document contains an overview of the comments submitted to the UNIDROIT Secretariat during the public consultation on the draft UNIDROIT-ICC Principles and Model Clauses for International Investment Contracts (IICs) that was launched on 24 June 2026. The consultation was open for 12 weeks, until 15 September 2026.

2. The purpose of the consultation was to:

- Promote the participation of public and private stakeholders in the final stage of the drafting process;
- Raise awareness about the instrument;
- Seek stakeholders' feedback on whether the instrument adequately addresses the current legal issues and relevant practical aspects arising throughout the entire life-cycle of IICs;
- Ensure that the instrument provides a balanced legal framework both for States and private investors;
- Ensure that the instrument is well-suited to application in different contexts, including developing economies, emerging markets and developed economies, from both civil and common law jurisdictions;
- Identify any legal issues or practical aspects relating to IICs that might have gone unnoticed, but whose inclusion in the instrument could be relevant.

3. Views were welcome from all interested parties. In light of the technical content of the instrument, feedback was especially welcome from stakeholders representing:

- States and governmental bodies, including State entities;
- International and supranational organisations, and International Financial Institutions;
- Chambers of commerce and business and industry associations;
- Non-Governmental Organisations and bodies representing local communities;
- Global and regional arbitral institutions;
- Academics and think-tanks.

4. Respondents were allowed to provide feedback on any part of the draft instrument. Comments could be provided in English or French and had to be submitted to the UNIDROIT Secretariat at IICs-consultation@unidroit.org. Respondents were asked to submit their comments in a Word document or equivalent open access text editor, specifying for each comment to which Chapter, Section, Principle, paragraph number or Model Clause it referred. Respondents were invited to use the "template for the submission of comments" available on the consultation webpage. The webpage indicated that comments received during this consultation process would be made public, and that the name of respondents would be made public unless expressly requested otherwise.

5. The summary table of submissions below sets out the 40 submissions received (including two late submissions), as well as substantive comments extracted from an online consultation

event.[1] The comments are categorised by Chapter, Section, Principle, Model Clause or paragraph in the remainder of this document.[2] The comments have been included in this document verbatim. Comments or remarks of a general nature have been included in the Part 'General Comments'.

II. SUMMARY TABLE OF SUBMISSIONS

#	Name	Affiliation	Country	No. of pages	Submission date
1	Pablo Parrilla Nicolás E. Bianchi	Partners, PBX International Law	Argentina	5	14/07/2026
2	Mohamed Gomaa	President Judge, Court of Appeal, Egyptian Ministry of Justice	Egypt	4	31/07/2026
3	Natalia Alenkina	Associate Professor, American University of Central Asia	Kyrgyzstan	2	23/08/2026
4	Walter Arévalo-Ramírez	Director of Postgraduate Program in International Law, Universidad del Rosario Submitted on behalf of Faculty of Law at Universidad del Rosario	Colombia	5	25/08/2026
5	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates	13	26/08/2026
6	BAWEA Ikadri Michel	Director of Legal Affairs / Head of Legal, MIFA S.A. (Agricultural Financing Incentive Mechanism)	Togo	5	26/08/2026
7	Dr. Víctor Manuel Bernal Callejas	Directive Council, Colombian Academy of International Law (ACCOLDI) Submitted on behalf of ACCOLDI	Colombia	20	26/08/2026
8	Comments made during Latin American States' Representatives Roundtable		Brazil Ecuador	5	04/09/2026

[1] The Latin American States' Representatives Roundtable on the Draft UNIDROIT-ICC Principles for International Investment Contracts, organised online by the ICC Institute and UNIDROIT on 4 September 2026, with the participation of representatives from Brazil, Ecuador and Peru, three Working Group Members, members of the UNIDROIT Secretariat, and audience members (see also Study L-IIC – W.G. 9 – Doc. 3 add. 2). In addition, the Houston Place of Arbitration and UNIDROIT organised an online consultation event on the draft instrument on 9 September 2026, with four Working Group Members, 41 audience members, members of the UNIDROIT Secretariat, and the Founder of the Houston Place of Arbitration as a moderator (see Study L-IIC – W.G. 9 – Doc. 3 add. 3).

[2] Where submissions did not use the consultation template or otherwise specify to which Chapter, Section, Principle, paragraph number of Model Clause the comment(s) referred, the Secretariat has placed the comment(s) in the location in this document that it considered most appropriate.

			Peru		
9	Coordinator: Antolín Fernández Antuña Contributors: Leandro Caputo Guido Carducci Piero Fortino Rodrigo Hesse Aracelly López Yaqi Ma Enrique Márquez Karen Páez Hernán Pérez Loose Marco Alejandro Plaza Huélamo Marian Portero Joyce Pamela Poves Laura Pujols Adolfo Pulgar Soarez Ian Signori Gorriti	Club Español e Iberoamericano del Arbitraje (CEIA)	Argentina China Colombia Costa Rica Dominican Republic Ecuador Italy Peru Spain USA	109	10/09/2026
10	Carolina Fabara	Associate to GRN Think Tank Programme in International Trade, Investment & Corporate Governance	Ecuador	2	11/09/2026
11	Dr. Shashikala Gurpur[3] (Professor and Director; Dean, Faculty of Law) Research Team: Dr. Vivek Nemane, Prof. Palak Mishra (Faculty), Krish Vikram, Gauri Sreenivasan (Students)	Symbiosis Law School, Symbiosis International (Deemed University), Pune	India	17	11/09/2026
12	Nasr Ashoush[4]	Ph.D. holder from the University of Burgundy, France and Judge at the Egyptian Council of State	Egypt	12	11/09/2026
13	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and	Spain / United Kingdom	5	12/09/2026

[3] For ease of reference, the remainder of this document refers only to Dr. Shashikala Gurpur.

[4] The respondent submitted, together with his comments on the draft instrument, his dissertation entitled "Les relations entre l'État et ses entités devant l'arbitre international" (2026). This dissertation is shared separately with the Working Group (see Study L-IIC – W.G. 9 – Doc. 3 add. 1).

		Social Sciences, Middlesex University London; Co-Convenor of the Interest Group on International Business and Human Rights, European Society of International Law (ESIL); and Former Adviser to the House of Lords on the UK-EU Treaty (Level Playing Field provisions)[5]			
14	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain	15	12/09/2026
15	Vlatko Tokarev	Attorney at Law | PhD candidate at Ss. Cyril and Methodius University of Skopje | LL.M (Cantab)	Republic of North Macedonia	2	14/09/2026
16	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy Advisory Consultant	Lebanon	8	14/09/2026
17	Prof. Dr. Eckart Brödermann	Partner, Brödermann Jahn Professor, University of Hamburg, LL.M. (Harvard), Maître en droit (Paris V); FCIArb. (London); Attorney-at-law (New York); Certified Specialist for International Business Law, Germany	Germany	2	14/09/2026
18	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden	5	14/09/2026
19	Roman Zykov (Mansors law firm) Sergey Morozov (Deputy Chairman RAA IAWG; BGP Litigation) Nataliia Soldatenkova, Elizaveta Shegay, Anastasia Alexandrova (EPAM law firm) Stepan Sultanov and	Russian Arbitration Association, Investment Arbitration Working Group (RAA IAWG)	Russian Federation	34	14/09/2026

[5] For ease of reference, the respondent is referred to in this document by their first position only.

	Anastasiia Riabova (KIAP law firm) Sergey Alekhin (ELWI law firm)				
20	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia	7	15/09/2026
21	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	International Law Division, Institute for Legal Strategy and Science, Vietnam[6]	Vietnam	10	15/09/2026
22	Herfried Wöss (Wöss & Partners), Gerardo Lozano Alarcón (GLA Arbitraje)	Latin American and Iberian (LAI) Regional Chapter of the ICC Institute of World Business Law (LAI Regional Chapter)	Austria Mexico USA	5	15/09/2026
23	Gustavo Andrés Piedrahita	Director, *Centro de Arbitraje y Conciliación*	Colombia	2	15/09/2026
24[7]	Felipe de Andrade	PhD Fellow of the Research Foundation Flanders (FWO), PhD researcher at the University of Antwerp and KU Leuven	Belgium	6	15/09/2026
	Nathan Willems	PhD researcher, Institute of Private International Law, KU Leuven			
25	i3T - Industry, Infrastructure, and Innovation for Strategic Transformation (i3T)[8]		Mexico	9	15/09/2026
26	The International and Comparative Law Research Center (ICLRC)		Russian Federation	6	15/09/2026
27	Mariana Names Bettiol	Academic, Federal University of Rio Grande do Sul	Brazil	2	15/09/2026
28	Ivana Savić	External PhD candidate, Leiden University	Serbia	9	15/09/2026
29	Héctor Luis Pittman Villarreal	Peer Reviewer	Peru	1	15/09/2026

[6] The views expressed are solely those of the authors in their personal capacities and do not represent the official position of the Institute or any other organisation or authority.

[7] The respondents submitted their comments jointly in a single document.

[8] The full submission is shared separately since it provides a section "General framework", in addition to the specific comments provided in the consultation template (see Study L-IIC – W.G. 9 – Doc. 3 add. 1).

30	Saniya Sharma[9]	Founder & Executive Director, Alt Platform Collective	United Kingdom	153	15/09/2026
31	Jorge González Carvajal, José Gregorio Torrealba, Maria Amparo Grau, and Jose Ignacio Hernandez	*Asociación Venezolana de Arbitraje* (AVA) and *Asociación Venezolana de Derecho Administrativo* (AVEDA)	Venezuela	12	15/09/2026
32	Ayşe Şehnaz Kart	PhD Candidate in Public Law, Hacettepe University Faculty of Law; Attorney-at-Law	Türkiye	4	15/09/2026
33	Alfredo Bullard, Huascar Ezcurra, Bruno Doig, Inmaculada Posada, and Ignacio Enrique Tovar	Law firm Bullard Falla Ezcurra + (BFE+)	Peru / Spain	21	15/09/2026
34	José Miguel Júdice, Álvaro Castellanos Howell, Ana María Ordóñez, Santiago Montt, Nicolás E. Bianchi, Amaia Rivas, and José Ángel Rueda	*Centro Internacional e Iberoamericano de Arbitraje de Madrid* (CIIAM), Working Group on Investment and State Arbitration Comments submitted by Members of the CIIAM Working Group in their personal capacity[10]	Argentina Chile Colombia Guatemala Portugal Spain	26	15/09/2026
35	David Amable Morán Bovio	Commercial Law Professor / University of Cádiz	Spain	2	15/09/2026
36	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru	14	15/09/2026

[9] The respondent submitted, together with her comments on the draft Instrument, a Position Paper to which she makes reference in her comments. The Position Paper is shared separately (see Study L-IIC – W.G. 9 – Doc. 3 add. 1), so that the cited sections can be consulted where necessary.

[10] The relevant members of the CIIAM Working Group submitted a cover letter providing further information on the submission and its contributors. The following disclaimer was included in their submission: "This document compiles the comments and proposals prepared by several practitioners who are members of the Working Group of the Madrid International and Ibero-American Arbitration Centre (CIIAM) in Madrid (Spain). Commentators submit their comments and proposals on their personal capacity and their comments and proposals should be attributed to neither CIIAM nor any other organization they are affiliated with."

37	The European Association of Private International Law (EAPIL)[11]			36	15/09/2026
38	Edwin Nemesio Álvarez Román	Business attorney and international arbitration practitioner at ENARLAW Arbitration, Mexico City,	Mexico	3	15/09/2026
39	Kenya National Chamber of Commerce & Industry (KNCCI)[12]		Kenya	3	17/09/2026
40	International Labour Organization (ILO)			18	25/09/2026

[11] The EAPIL submitted a Position Paper, primarily drafted by Olaf Meyer (University of Applied Sciences Frankfurt, Germany), Albert Henke (Università degli Studi di Milano, Italy), Can Eken (Durham University, UK) and Fahira Brodlija (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Germany/Bosnia and Herzegovina), and which benefitted from the contributions of Cayetana Santaolalla Montoya (University of Navarra, Spain) and Pavel Boulatov (White & Case, LLP, Kazakhstan). The Position Paper was developed by these experts in their personal capacities and approved by the EAPIL Scientific Committee on 10 September 2026. The comments in the paper have been integrated in this document. The full Position Paper is nevertheless also shared with the Working Group separately (see Study L-IIC – W.G. 9 – Doc. 3 add. 1).

[12] The respondent submitted, together with the KNCCI's comments on the draft Instrument, an IISD background note of July 2026. The latter is shared separately (see Study L-IIC – W.G. 9 – Doc. 3 add. 1).

III. COMMENTS CATEGORISED BY CHAPTER

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	GENERAL COMMENTS				
1.	**General comments**	The draft Instrument is a valuable and carefully balanced piece of work, and the decision in Introduction, paragraph 82 not to define an IIC formally is, with respect, the right one. This submission offers one structural observation and a number of specific drafting suggestions that follow from it. The Instrument is illustrated throughout by reference to a recurring group of sectors: resource extraction, oil and natural gas, construction, telecommunications, water management and electric power distribution (Introduction, paragraph 12; Chapter 1, paragraph 100). Those sectors share a feature that is not universal. In each of them, the host State's regulatory conduct is very largely a matter of domestic policy choice. There is a second and economically significant class of IIC in which that is not so. In civil aviation and in outer space activities, the host State contracts as a party while simultaneously discharging supervisory duties owed under a binding international treaty regime. Its regulatory measures during the life of the contract are frequently not discretionary but compelled. The draft Instrument does not presently accommodate this class of case, and the consequences appear in three places: in the sector illustrations, in the stabilisation framework of Chapter 6, and in the treatment of financing in Chapter 7. The suggestions below are offered as refinements consistent with the Instrument's own logic rather than as objections to it.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
2.	**General comments**	**Covering note** I write in a personal academic capacity. I have also contributed comments to the position paper submitted by the Working Group of the European Association of Private International Law, and this response is confined to matters outside the scope of that paper, so that the two complement rather than repeat each other. The comments share one starting point, set out in the first General Comment. The draft designates the applicable law by agreement of the parties and treats that designation as settling the position for the life of the contract. An international investment contract runs for decades. Over that period the content of the designated law changes, the parties' power to be bound by their own agreement changes, and the assets in which their rights are held may change form. UNIDROIT has met all three in the Principles on Digital Assets and Private Law (2023), which the present draft cites nowhere. The second General Comment asks for one thing. The Instrument should state what happens to the parties' position when the law beneath their contract moves. I refer to that provision as an intertemporal default. It is a single sentence, and UNIDROIT has already drafted it, for a different subject matter, in Principle 5(2)(e) of the 2023 Principles. One consequence is worth stating at the outset, because it is the clearest evidence that the gap is practical rather than theoretical. Chapter 6 builds a regime on the premise that the parties may freeze the content of host-State law. It does not say whether freezing operates as a temporal restriction on the choice of law or as the incorporation of identified provisions as contractual terms. The two readings produce different results, because incorporated terms yield to the mandatory rules of the governing law and a temporal restriction on the applicable law does not.	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Two ICSID tribunals, four months apart, on comparable Peruvian guarantees, adopted one reading each. Duke Energy v Peru extended the guarantee to the settled application of the frozen provisions. Aguaytia v Peru confined it to a dated snapshot of the legislative framework creating no substantive rights. Nor is the divergence confined to those awards. The Institut de Droit International stated the second reading expressly for contracts between private persons in 1991, and had left the question open for contracts with a State in 1979. The question is at present answered at the enforcement stage, by whichever tribunal is later seised. An intertemporal default would answer it at the drafting stage. This is developed in the fourth comment. A word on balance, which is the axis of the project. A stated default favours neither side. It benefits whoever drafts against it, and in a stabilisation negotiation that is usually the State, which is being asked to give something up and can price it only if it knows what it is starting from. The comments on insolvency run both ways for the same reason: one concerns what the State's counterclaims are worth when the investor fails, the other what the investor's protections are worth when the entity on the State side fails. None of the comments asks the Working Group to resolve the questions raised, and only two propose drafting. Each of the others says where a sentence or a short paragraph of Commentary would sit. Every citation and paragraph reference has been checked against a primary source.[13]			
3.	**General comments**	These comments address a single question, presented in three specific comments because it arises at two places in the draft. The question is where the Instrument draws the line between a party's want of the right to dispose	Ayşe Şehnaz Kart	PhD Candidate in Public Law, Hacettepe	Türkiye

[13] The respondent adds: "If it would assist the Working Group ahead of its ninth session, I would be glad to prepare a short comparative note, of no more than two pages, setting out the two readings of a stabilisation clause side by side with the arbitral and institutional material bearing on each, together with the proposed wording of the intertemporal default and its consequences for Principle 23."

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		of assets, which Chapter 4 treats as not affecting validity, and two neighbouring matters: consequences of mandatory law that places a right in respect of a public asset outside private disposition, and the distinct questions of a State party's capacity and the authority of a State organ or entity acting for it. Comment 2 concerns the limit of the Model Clause recommended by Principle 12; Comments 3 and 4 concern the two neighbouring cases which paragraph 285, as drafted, may be read to absorb. The three are offered as one point and may be adopted together or separately. None requires any change to the black-letter text or to the Model Clauses: each seeks only an addition to, or a clarification in, the commentary.		University Faculty of Law; Attorney-at-Law	
4.	**General comments**	The guide is a strong Instrument with the potential to offer practical solutions to several current problems faced by the legal community in the investment regime crisis. As a general suggestion, I believe more model-clauses pertaining specifically to developing and least developed States would be beneficial. There are significant challenges faced by these economies that might hinder the fulfilment of the extensive list of obligations, and it would be important for the guide to acknowledge that (see comments on Principle 20). That is also relevant considering that many emerging economies are moving away from BITs, and looking for alternatives (such as investment contracts).	Mariana Names Bettiol	Academic, Federal University of Rio Grande do Sul	Brazil
5.	**General comments**	BFE+ considers the Principles to be a highly valuable and ambitious contribution to the development of a more coherent framework for international investment contracts. In particular, the Instrument usefully seeks to incorporate into the contractual relationship certain protections, standards, and policy considerations that have been developed across the broader framework of international investment law, including investment	Alfredo Bullard, Huascar Ezcurra, Bruno Doig, Inmaculada Posada and Ignacio	Bullard Falla Ezcurra +	Peru / Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		treaties and domestic investment legislation, but that have not traditionally been articulated with the same level of detail as contractual obligations At the same time, BFE+ observes that this approach raises a broader drafting issue that appears across several Principles. Treaty standards are often formulated at a relatively high level of generality. Concepts such as fairness, non-discrimination, proportionality, legitimate regulatory objectives, or appropriate adaptation may deliberately remain open-textured, with their precise content subsequently developed and applied by international tribunals in light of the particular circumstances of each case. From a transaction-cost perspective, this degree of generality is understandable. Investment treaties are designed ex ante to govern a potentially wide and heterogeneous universe of future investments, projects, sectors, and risks. Attempting to specify in advance the precise allocation applicable to every possible circumstance would be prohibitively costly and, in many cases, impracticable. The transaction-cost calculus is different, however, in an inter partes contractual relationship. By the time an IIC is negotiated, the parties ordinarily possess substantially more information regarding the identity of the investor, the characteristics of the project, the applicable regulatory framework, and the principal risks associated with the investment. This greater availability of project-specific information reduces the costs of tailoring contractual terms and allows the parties to allocate risks with substantially greater precision than would ordinarily be possible in a treaty negotiated for an indefinite class of future investments. Broadly formulated standards that may be appropriate at treaty level may therefore generate unnecessary uncertainty when translated directly into contractual	Enrique Tovar		

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		obligations, particularly as regards the allocation of specific risks, and the consequences of breach. This distinction also bears on the Principles' Principles' function as default rules. Default rules should reduce transaction costs by supplying terms that parties would commonly adopt and, where appropriate, by promoting the exchange of information needed for efficient risk allocation. Their value therefore lies in providing sufficiently determined contractual baselines, rather than reproducing the indeterminacy that may be justified at treaty level. BFE+ therefore suggests that, where the Principles translate treaty-inspired protections or policy standards into contractual obligations, the Instrument should favour a more defined allocation of rights, obligations, and risks. Open-ended concepts may remain useful, but their contractual operation should, where possible, be accompanied by objective criteria, identifiable limits, or clearer guidance as to the conduct required from each party. This would preserve the Instrument's broader policy objectives while adapting them to the distinct function of a negotiated contractual framework.			
6.	**General Comments**	The draft's most successful feature is its conscious departure from the traditional structure of investment treaties. The draft identifies four elements of balance: 1) investor protection; 2) State regulatory autonomy; 3) reciprocal obligations; 4) reciprocal remedies. It also recognizes that many IICs are not actually negotiated between parties of equal bargaining power. In public tenders and administrative contracts, the State may dictate most of the contractual terms. The Instrument expressly acknowledges this problem and proposes that the Principles	Edwin Nemesio Álvarez Román	Business attorney and international arbitration practitioner at ENARLAW Arbitration, Mexico City,	Mexico

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		function as a benchmark for designing tender documents and State contract templates. We consider this is one of the strongest aspects of the draft. However, there is a conceptual tension. The Instrument says that balance is embedded in the contract, even where the contract is effectively imposed through a tender. That proposition requires qualification. A contract can be formally reciprocal while being substantively asymmetrical. For example: i) the State may have unilateral modification powers; ii) the investor may bear financing and construction risk; iii) the State may control permits; iv) the State may control tariffs; v) the State may possess termination powers; vi) the investor may have limited ability to negotiate; vii) the State may be protected by sovereign immunity; viii) the investor may have extensive capital at risk. Thus, contractual symmetry does not necessarily equal economic or institutional symmetry. We should distinguish between formal reciprocity of contractual rights and remedies from substantive balance taking into account bargaining power, allocation of project risks and the public law position of the State. That distinction is particularly important for developing economies and PPPs projects.			
7.	**General comments**	The instrument does not develop thoroughly financing architecture within the contract's cycle life. A major IIC–particularly infrastructure, energy, mining, transportation or PPP projects–is often structured around non-recourse or limited-recourse project finance. In this regard, the investor who bears the financing and capital at risk through lender agreements, it would be relevant to address all the financing	Edwin Nemesio Álvarez Román	Business attorney and international arbitration practitioner at ENARLAW	Mexico

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		agreements related to the project that undoubtedly such financing agreements will have a deep impact within the cycle life of the contract. For that reason, I'll mention a few but not exhausted elements that the Instrument should expressly address: 1) Lender Direct Agreement; 2) Security over Contractual Rights; 3) Assignment of Receivables; 4) Security Interests; 5) Lender Consent Rights; 6) Step-in-Rights; 7) Cure Periods for Lenders; 8) Replacement of the Project Company; 9) Substitution of the Concessionaire; 10) Direct Agreements between State, Investor and Lenders; 11) Termination Payments; 12) Debt Repayment upon Termination; 13) Treatment of Secured Creditors.		Arbitration, Mexico City,	
8.	**General comments**	The Instrument focuses on Human Rights aspects like environment, climate change, employment, indigenous, public consult in local communities, but it does not touch relevant aspects related with Mega-Projects like cybersecurity, digital infrastructure, intellectual property, and taxation. And for taxation I don't mean to fiscal stabilization provisions. Perhaps the current provisions of the Instrument could be usable for essential IICs or complex infrastructure/PPP. However, when the State and Investors face with high impact natural resources/energy projects or Mega-Projects, it is necessary to bear in mind the aforementioned elements that in the end they would have a great impact in the community or municipality's daily life. Probably, the solution should not be to simplify the substantive Principles, but perhaps to provide tiered implementation of the Instrument according to the nature of the project.	Edwin Nemesio Álvarez Román	Business attorney and international arbitration practitioner at ENARLAW Arbitration, Mexico City,	Mexico
9.	**General comments**	The Instrument wants simultaneously to achieve high sustainability standards, strong investor protection, State regulatory freedom, and contractual stability.	Edwin Nemesio	Business attorney and international arbitration	Mexico

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Those objectives are compatible in principle. But they can conflict economically. For example: a new environmental standard may require USD $100 million of additional investment. Who pays? 1) the investor? 2) the State? 3) Taxpayers? Lenders? Some combination? The Instrument recognizes that sustainability obligations have economic costs and must be incorporated into the project model. But I would recommend that the final instrument explicitly introduces the concept of economic proportionality and project bankability. A sustainability obligation should be evaluated against 1) the nature of the project; 2) project size; 3) risk; 4) expected revenue; 5) financing structure; 6) technological feasibility; 7) cost; 8) availability of alternatives; 9) impact on consumers/public finances.	Álvarez Román	practitioner at ENARLAW Arbitration, Mexico City,	
10.	**General comments**	In conclusion, the Instrument constitutes a strong and potentially important framework for the substantive architecture of international investment contracts. Its principal strength is its movement away from predominantly unilateral investor protection towards a system of reciprocal rights and obligations, while preserving a meaningful degree of regulatory space for States and giving sustainability a central role. The Instrument would be considerably strengthened if it evolved from a set of substantive principles and model clauses into a broader architecture for international investment contracts, supported by sector-specific modules involving experts from project finance, trade, construction, cybersecurity, intellectual property, green energy, oil and gas, electricity, and others areas related to Mega-Projects, as well as a lifecycle risk matrix, and a map of the principles against the actual lifecycle of an IIC.	Edwin Nemesio Álvarez Román	Business attorney and international arbitration practitioner at ENARLAW Arbitration, Mexico City,	Mexico

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Such an approach would enhance its usefulness in developing economies, emerging markets and developed economies alike, and would facilitate application across both civil-law and common-law jurisdictions.			
11.	**General comments**	We consider the initiative valuable and timely, and our comments are offered in support of it. Our overall position is set out in the accompanying Position Paper and may be summarised as follows. An IIC occupies a **normative middle** at the intersection of domestic law, treaty obligations, international standards and established contractual practice. We do not consider that the Instrument can substitute for treaty or domestic law protections, or that it should at this stage constitute the governing law of an IIC. Its greatest value lies in providing a **common contractual reference point within that normative middle** — assisting parties to identify risks, allocate responsibilities and design workable contractual mechanisms, rather than restating protections that arise elsewhere. Three consequences follow. First, the **functional architecture** should be clearer: the Principles should carry the substantive prescription, the Commentary should explain and contextualise it, and the Model Clauses should demonstrate implementation. At present, provisions which appear normative sit alongside commentary which sometimes contains the substantive rule and Model Clauses which occasionally introduce further content. Second, **evaluative standards** such as "appropriate", "reasonable", "necessary" and "adequate" should, where practicable, be accompanied by ascertainable criteria; otherwise the substance of the obligation is delegated to a later adjudicator rather than provided to parties at the point of negotiation. Third, the Instrument's greatest opportunity lies at the **deal-making stage** — before risks crystallise and before drafting is	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		finalised — which is also where it can most meaningfully address the asymmetry of bargaining power the Instrument itself recognises. We therefore favour a **sequenced development**: clear and practicable guidance now, supported by a model IIC, sector-specific tools and Model Clauses; with the legal function of the Principles reassessed as they are applied and tested through contractual practice. We also identify areas requiring further development, including price and cost escalation, temporary relief and interim measures, technology, confidential information and intellectual property, sanctions, insurance and the contractual architecture on which bankability depends.			
12.	**General comments**	**Consultation period.** The consultation period was very short, particularly given the need to disseminate the Draft among States, defence agencies, consultancies, and other relevant stakeholders. This limited timeframe may have been especially challenging for countries in the Global South, including Venezuela.	Jorge González Carvajal	AVA	Venezuela
13.	**General comments**	**Languages of consultation.** The Instrument should not have been circulated for consultation only in English. It would have been important to make it available in the languages of countries that receive foreign investment, including Latin American countries, which may later consider adopting this type of instrument as a regular means of structuring relations with investors.	Jorge González Carvajal	AVA	Venezuela
14.	**General comments;** **Chapter 5; and** **Chapter 6**	J. INVESTMENT CONTRACT NEGOTIATION AND IMPLEMENTATION: STATE CONSIDERATIONS BEYOND THE FOUR CORNERS OF THE CONTRACT (CLARIFICATIONS AND FURTHER NUANCES IN THE PIICS) 1. GENERAL COMMENTS: THE VALUE OF, AND MEASURES FOR, CONSISTENCY IN INVESTMENT POLICY-MAKING AND INTERPRETATIONS	EAPIL		

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		States as contracting parties to investment contracts are in the unique position of placing themselves in negotiations with private investors, concerned only with private economic interest, while balancing a variety of public interests (financial, economic, political, social, as well as climate change and energy transition policies and international obligations).[14] While the PIICs meaningfully contribute to the systemic integration of sustainability standards as contractual obligations,[15] it is important to ensure that they do not become another layer of obligations which cannot be enforced against either party (as explained in the sections below). At the same time, the competent institutions negotiating specific investment contracts are often not aware of other international treaty commitments or investment treaty standards concluded by their government, or the broader investment protection framework of the relevant country. This significantly elevates the risks of investment claims filed against the state for acts, omissions, and measures of sectoral or local institutions with direct jurisdiction over the relevant investment project. This is even more challenging in decentralized States with several levels of government operating semi-autonomously, which can mean that the institutions negotiating international treaties, those negotiating investment contracts and those representing the State in international investment disputes are not mutually coordinated, nor do they apply consistent policies and standards to their foreign investment contracts.[16]			

[14] C. Tan, C. Lixin and D. Salim, 'States as Contractual Counterparties' in C. Tan, H. K. Dhillon and R. Tan Xi'en (eds), *Practical PIL – Public International Law and its Implications for Businesses* (Jus Mundi 2025) 35–39. <https://jusmundi.com/fr/document/publication/en-chapter-3-states-as-contractual-counterparties> accessed 17 August 2026.

[15] As indicated in previous sections, the main advantage of the PIICs approach to enable the direct enforceability of sustainability standards as contractual obligations, is the avoidance of pursuing them through the public international law route.

[16] S. Sulejmanović and I. Gardašević, 'The Reform of Investment Protection Treaties in the Western Balkans' in F. Brodlija and A. Ramić (eds), *International Investment Law and Dispute Resolution in The Western Balkans: Regional Prospects for a European Future* (Nijhoff International Investment Law Series, Vol. 27, 2025) 31–35.

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		Since many developing States are working on expanding their rate of energy production through renewable energy sources, and seeing more sustainable investments, it is of crucial importance to ensure a transparent, balanced and predictable contractual and legal framework to lower regulatory risks and avoid costly ISDS disputes, such as the dozens of RE claims against Spain (in the so-called Spanish Renewables Saga).[17] As case reports from leading international arbitration institutions (such as ICSID) are highlighting the growing rate and significance of contract-based investment claims against States, it is more important than ever to provide viable and predictable models for States to effectively conclude sustainable IICs, and to avoid inconsistencies that could lead to investment disputes.[18] These circumstances highlight the need for certain specific State measures, policy and institutional arrangements to be made in governments seeking to enhance the consistency and coherence of investment protection policies, in order to effectively operationalize and capitalize on much-needed foreign investment in the sectors of key importance for sustainable economic development.[19] When properly designed and implemented, IICs can be leveraged to accomplish a rich mosaic of public and private benefits, while contributing to the strategic direction of the Host State under the applicable domestic and international legal frameworks. The legal and institutional structures enabling such outcomes are created before the pen hits the paper			

[17] The World Bank and the International Energy Charter, *Enabling Foreign Direct Investment in the Renewable Energy Sector: Reducing Regulatory Risks and Preventing Investor-State Conflicts* (2023) 13–33.

[18] See for example, ICSID, *Background Paper: Contract-Based ICSID Arbitration* (ICSID, Special Issue of ICSID Caseload Statistics, 2026). <https://icsid.worldbank.org/resources/publications/contract-based-icsid-arbitration?utm_source=chatgpt.com> accessed 17 August 2026.

[19] As provided by Art. 31(3)(c) of the Vienna Convention on the Law of Treaties. On systemic integration of sustainability, environmental protection and human rights international instruments in international investment treaties see G. Gismondi, *Systemic Integration in Investment Treaty Arbitration: Promise, Limits, and Practice*. <https://ssrn.com/abstract=6934439> accessed 17 August 2026.

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		during contract negotiations. Some of these considerations are outlined below.[20] In order to ensure compliance with investment contracts and to avoid investment disputes (along with their inherent costs, and potential damage awards worth hundreds of million or even billions of USD),[21] it is important that each State maintains consistent investment protection standards across all of its international instruments of consent, from its international investment treaties, foreign investment legislation to its investment contracts.[22] This will ensure the significant modernization of any of these instruments (including those inspired by the proposed PIICs), and prevent potential claimant investors from circumventing the policy restrictions introduced in e.g. modernized investment contracts, through umbrella clauses under unreformed investment treaties with lower standards, which are more favourable to the claimant investor.[23]			

[20] UNCITRAL WG III has compiled the existing State practices in devising legal and institutional structures for the prevention and mitigation of investment disputes, coupled with an escalation framework for investment arbitration. See generally, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), *Compilation of best practices on investment dispute prevention and mitigation* UNCITRAL, March 2023) <https://uncitral.un.org/sites/default/files/media-documents/uncitral/wg_iii_compilation_on_dispute_prevention_and_summary.pdf> accessed 17 August 2026.

[21] See e.g. A BIICL empirical study, based on 400 investment arbitration awards issued in ICSID, UNCITRAL and ICSID annulment proceedings (from June 2017 to May 2020), building on previous empirical studies conducted by Allan & Overy. M. Hodgson, Y. Kryvoi and D. Hrcka, *2021 Empirical Study: Costs, Damages and Duration in InvestorState Arbitration* (The British Institute of International and Comparative Law (BIICL), costs: 9-25; damages claimed and awarded: 26-31; duration 32-34 (June, 2021) <https://www.biicl.org/documents/136_isds-costs-damagesduration.pdf> accessed 17 August 2026.

[22] This definition of 'instruments of consent' is adopted by the UNCITRAL Working Group III on ISDS reform, as an umbrella term covering any legal instrument through which States submit to the jurisdiction of investment arbitration, which most frequently means investment treaties, legislation and contracts.

[23] International Institute for Sustainable Development (IISD) and United Nations Environment Programme (UNEP), *A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda* (IISD, 2016) <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/> accessed 17 August 2026; Umbrella clauses are provisions common in old-generation international investment treaties reinforcing the treaty parties' commitments to the investors of the other treaty party, undertaken outside of the treaty itself, usually in investment contracts, concessions and other legal instruments. Such clauses effectively elevate contractual investment protection guarantees to the applicable treaty protection, allowing the investors to take advantage of broader treaty standards as the basis of their claims. See generally, 'XV. Umbrella Clauses', in B. Sabahi, N. Rubins et al., *Investor-State Arbitration* (2nd edn, OUP 2019), 486 – 51.

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		This would not only perpetuate legal uncertainty and increase the risks of investment disputes, but it would also cancel out the progress governments make through policy and institutional reforms, aligned with their agendas for sustainable economic development.[24] Inconsistent standards can also lead to inconsistent interpretations by the parties and arbitral tribunals, thus endangering the viability of the contractual equilibrium and escalating investment disputes.[25] 2. EXPANDING CONSISTENCY THROUGH THE INSTITUTIONAL AND PROCEDURAL SPECTRUM OF DISPUTE PREVENTION AND MANAGEMENT IN INVESTMENT CONTRACTS The consistency and coherence of treaty/contract interpretation and the resulting outcomes in investment arbitration were also noted as concerns of States which were universal enough to become a staple of the investor-State dispute settlement (ISDS) reform at the UNCITRAL Working Group III (ISDS Reform).[26] However, in light of the procedural focus of this multilateral reform process, the proposed solutions are primarily reserved for the post-award appeals and review of arbitral awards, rather than any pre-emptive policy tools or institutional mechanisms. Thus, each State should invest in developing its internal response systems and safeguards to ensure that its IIC negotiations, implementation and remedies are interpreted correctly by both contracting parties and any potential adjudicator deciding a dispute.			

[24] U. Karabiyik, 'The Evolving Role of Umbrella Clauses in Investment Treaties: A Shift Toward Regulatory Autonomy' [2025] 18 *Contemporary Asia Arbitration Journal* 199–266. <https://ssrn.com/abstract=5802342 or http://dx.doi.org/10.2139/ssrn.5802342> accessed 17 August 2026.

[25] UNCTAD, *IIA Reform Accelerator* (UNCTAD 2020). (UNCTAD) <https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf> accessed 17 August 2026.

[26] Regular updates, working documents and adopted reform instruments are available on the Working Group III: Investor-State Dispute Settlement Reform, <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 17 August 2026. Also *see* generally, UNCITRAL WGIII, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters (UNCITRAL, 28 August 2018) 7 <https://undocs.org/en/A/CN.9/WG.III/WP.150> accessed 17 August 2026..

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		The Commentary to the PIICs and particularly the multi-tiered dispute resolution mechanism should highlight the need to expand the dispute resolution spectrum to include the early grievance stage, and include communication roadmaps, focal points and coordination bodies as express contractual remedies for potential disputes. Such a preliminary policy and institutional framework, coupled with clear, balanced and well-defined contractual clauses, can help maximize the benefits of the application of the PIICs.[27] In this sense, it may be useful to expressly mention in the PIICs the need for consistent policymaking across all instruments of consent, as well as the commentary to specific provisions of the PIICs Model Clauses.[28] This would also be aligned with the most recent UNCTAD[29] recommendation for modern investment treaties geared towards sustainable economic development, as well as treaties which are already concluded, including the CETA [30] and the modernized Energy Charter Treaty.[31]			

[27] UNCTAD, *International Investment Agreements Reform Accelerator* (UNCTAD 2020) 11. <https://investmentpolicy.unctad.org/publications/1236/international-investment-agreements-reform-accelerator> accessed 17 August 2026.

[28] While there are references to this effect in the PIICs commentary already, it is important to re-emphasize it in the context of the three most common instruments of consent, especially where the reform of the investment protection framework is confined to the investment contracts, while the legislation and investment treaties continue to maintain unreformed standards. In this context, the contractual language will have to be additionally calibrated with provisions to preclude the lowering of modernized standards through the effects of unreformed treaty or contractual standards.

[29] See generally, UNCTAD, *Investment Policy Framework for Sustainable Development* (UNCTAD, 2015) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiMqJjytqqWAxWYKFkFHfHUD5MQFnoECBkQAQ&url=https%3A%2F%2Finvestmentpolicy.unctad.org%2Finvestmentpolicy-framework&usg=AOvVaw1hi55qp2-2QSNrSNympUaF&opi=89978449> accessed 17 August 2026;

[30] The Comprehensive and Economic Trade Agreement between Canada and the European Union (2018) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjMpMr3taqWAxXIMVkFHXNwLaAQFnoECBkQAQ&url=https%3A%2F%2Finvestmentpolicy.unctad.org%2Finternational-investment-agreements%2Ftreaty-files%2F5380%2Fdownload&usg=AOvVaw1hx9y2AoCvWHKhyF6hv8Tz&opi=89978449> accessed 17 August 2026.

[31] See Energy Conference, *Energy Charter Treaty* (revised in 2025). <https://www.energychartertreaty.org/modernisation-of-the-treaty/> accessed 17 August 2026.

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		Therefore, the PIICs could effectively create a negotiating tool to reaffirm consistency in international investment protection instruments, as channelled through contractual arrangements.[32] Otherwise, and to the extent that the international investment treaty network of a specific jurisdiction remains dominated by unreformed, old-generation treaties which are set in vaguely defined terms, it would be a rare situation where a well-crafted umbrella clause could serve to leverage the PIICs provisions adopted in the contract between the parties, until the investment treaties are modernized as well. Importantly, where the contracting parties have documented their negotiation history, it can serve as a valuable interpretive tool for the parties and the arbitrators in the context of contractual investment disputes, but also as a signal of evolving policy directions of the respondent State. 3. SUBSTANTIVE PRINCIPLES AND MODEL CLAUSES In addition to the framework and procedures for dispute resolution, there is also a number of substantive principles and measures that can be expanded further in the PIIC Model Clauses or in the commentary, to ensure the effectiveness of the substantive provisions of IICs, and to lower the dispute risks. This is particularly important for States in the context of investment claims under the fair and equitable treatment provisions of the old-generation investment treaties, and the legitimate expectation standards.[33]			

[32] As envisioned in Principle 2 para. 7 of the PIICs.

[33] I. Reynoso, *Spain's Renewable Energy Saga: Lessons for international investment law and sustainable development* (International Institute for Sustainable development, November 2019)<https://www.iisd.org/itn/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-lawand-sustainable-development-isabella-reynoso/> accessed 17 August 2026; for a more comprehensive analysis of the substantive and procedural issues related to the RE cases against Spain, see F. Balcerzak, *Renewable Energy Arbitration – Quo Vadis? Implications of the Spanish Saga for International Investment Law* (Nijhoff International Investment Law Series, Vol. 2, 2023).

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		For example, while States are increasingly averse to including stabilization clauses in their more recent investment treaties and contracts, investment arbitration awards have shown that arbitral tribunals have nevertheless interpreted broad treaty language and circumstances surrounding the specific investment project (including representations and assurances by the government) to create the effects of a stabilization clause. Therefore, it is important to ensure that IICs that are aligned with the PIICs and Model Clauses preclude any such interpretations, unless the contracting State intended to expressly agree otherwise in the specific IIC, as expressly defined in the contract itself. In the PIICs themselves, for example, the language to this effect can be provided in the preamble, or as a model provision in and of itself.[34] 4. COMMENTS ON THE SUSTAINABLE INVESTMENT PRINCIPLES AND MODEL CLAUSES In relation to the provisions governing sustainability obligations for both the investors and States, it is important to ensure that contractual commitments in this respect should not remain purely aspirational and ultimately non-enforceable for potential breaches by either party. Considering the fact that the existing international instruments are primarily binding on the member States (as confirmed in the landmark ICJ advisory opinion, granting the right to climate change protection as a human right), any desired extension of these duties to the investors will have to be expressly defined and enforced through binding national legislation and contractual remedies.[35]			

[34] For example: '[For greater certainty,] unless expressly agreed otherwise by the parties to this contract, none of its provisions shall be interpreted as a stabilization clause, nor shall they create any investor expectations of creating the effects of a stabilization clause.'

[35] International Court of Justice (ICJ), *Obligations of States in respect of Climate Change*, Advisory Opinion (2025) <https://www.icj-cij.org/case/187> accessed 17 August 2026.

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		In this sense, the PIICs should ensure that the specific investor obligations that they negotiate for specific IICs are reinforced by regulations, standards and procedures against which the general international sustainability framework (still largely soft law), binding on States, can be properly enforced as a contractual obligation.[36] Otherwise, general references to the applicable international conventions entered into by the State will lead to the circular application of vague and non-enforceable standards which remain binding only among States. In such a scenario, the desired effects of contractual sustainability obligations of the investors would remain out of reach, and ineffective beyond the pages of the contract itself. To the extent the specific jurisdiction has not adopted national legislation or sectoral regulation providing specific sustainable development and public interest obligations of foreign investors, or established Nationally Determined Contributions ('NDCs') under the Paris Agreement, which requires the member States to outline and communicate their post-2020 measures and regulations to combat climate change, [37] actionable obligations and remedies for investors can be specified in bespoke mechanisms of the relevant IIC. In such provisions, the contracting parties can incorporate, expressly or by reference, the specific provisions of the international legal instruments, which would otherwise only provide obligations for States, as contractual obligations of both parties. Thus, rather than aspirational and best-effort			

[36] E.g. The United Nations Framework Convention on Climate Change (1994); the most recent stocktaking of the known Nationally Determined Contributions (NDCs) under the Paris Climate Agreement (2015) showed that there is a need for more progressive and ambitious establishment of national NDCs to meaningfully accomplish the climate change mitigation goals set for 2030 and beyond. See generally, UNFCCC, *Paris Agreement and NDCs* (2025) <https://unfccc.int/> accessed 17 August 2026.

[37] United Nations Climate Change, *Nationally Determined Contributions* (NDCs), available at <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs> According to the NDC registry, there are currently 341 notified and active NDCs around the world.

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		commitments on either side, the concrete sustainability rules could be enforced and remedied as contractual breaches. The Commentary to the PIICs could clarify and encourage such express contractual language to give effect to the relevant IIC sustainability obligations. An additional benefit would be the avoidance of circular references to non-binding State obligations or soft law, which can create difficulties in dispute resolution proceedings, for determining the applicable law under rules of private international law. In jurisdictions where governments have adopted NDCs with accompanying rules and enforcement mechanisms, these can also serve as a reference point for becoming mutually binding on the State and private investors under the relevant IIC. It is important to bear in mind that, although it is the instinct of State parties, even in contract negotiations with private entities, to approach the balance of interests and powers from their sovereign perspective, the contract should remain a bargain of balanced and mutual rights and obligations of both parties (although it is clear that the State maintains a superior sovereign position and leverage throughout). Considering the fact that the ambitious goals of sustainable development and energy transition require immense contributions of private capital, the normative and contractual burden and transaction risks should not be fully shifted to the investors, to the effect of alienating or dissuading potentially beneficial sustainable investment projects. Therefore, the rights and obligations of both parties should be balanced and enforced with a view towards maintaining long-term benefits from foreign investments in public interest. Such a reference should be expressly stated in the PIICs commentary on negotiating principles. In addition to the benefits during the implementation phase of the investment project, clear and balanced protection standards and robust			

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		dispute resolution mechanisms can protect the State against forum shopping in the event of investment claims. Namely, if the investor considers the contractual framework too restrictive and less favourable than the framework of the applicable (old generation) investment treaty, they may initiate investment arbitration based on qualifying their claims as breaches of treaty standards. This is even more likely where the relevant treaty includes an 'umbrella clause' which allows investors to elevate a contractual claim to a breach of the investment treaty. This would not only circumvent the improved substantive standard, but also miss the opportunity to benefit from the multi-tiered dispute resolution mechanism provided in the Model Clauses. Although it is commendable that the PIICs and Model Clauses are constructed in light of the lessons learned from the existing concerns with treaty-based investment arbitration[38] (e.g. expressly protecting the States' right to regulate, the calibration and express carve outs from the most sensitive investment protection standards, such as indirect expropriation and full protection and security, the omission of the broad 'fair and equitable treatment' provision otherwise found in old generation investment protection agreements, etc.),[39] the determinative factor for the effectiveness of future IICs will be their adaptations to the specific parties and project in question. States should take advantage of the benefits of direct negotiations with foreign investors and design the substantive and procedural framework which will carry forward their policy goals as well as the viability of sustainable investment projects. Importantly, by creating a stable and			

[38] The multilateral State deliberations on the identified concerns and reform of the investor-State dispute settlement (ISDS) have been unfolding since 2018 within the UNCITRAL Working Group III (ISDS Reform), based on a set of issues that the member States considered worthy of concrete reform efforts. See generally, UNCITRAL Secretariat Note A/CN.9/WG.III/WP.166/Add.1 - Reform options (Tabular presentation) (2019), available at <https://docs.un.org/en/A/CN.9/WG.III/WP.166/Add.1>.

[39] UNCTAD IIA Reform Accelerator (2020), available at <https://investmentpolicy.unctad.org/publications/1236/international-investment-agreements-reform-accelerator>.

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		internationally recognized legal framework, the parties will avoid challenging battles under private international law rules in cases of disagreements or disputes arising from the contract. In addition, although the qualifications and limitations to the substantive provisions are meant to reduce the risk of investment claims against the contracting State, the additional language can also cause interpretive issues. The alternative language, replacing vague and broad standards with equally undefined terms, can be counterproductive when applied to concrete matters in dispute. To prevent such an outcome, it may be useful to provide a glossary or definitions of the main terminology in the PIICs and/or Model Clauses, which is intended to carry legal force and effects beyond declarative or aspirational notions (particularly for the provisions and standards matching those in old-generation investment treaties). Should the official commentary to the PIICs serve as the instrument for clarification and policy background for interpretive purposes, binding on the parties and the arbitral tribunals, this should be expressly stated in the PIICs text itself. For these and other considerations outlined above, on both substance and procedure, it may be useful to modify the existing provisions or add 'for the avoidance of doubt' or 'for greater certainty' provisions, which would expressly define the intended scope of the specific provisions, to the exclusion of any discretionary interpretations. **Recommendation 12: Cross-cutting policy issues** *a) The modernized and improved substantive and procedural standards in the IICs should be systemically integrated in all instruments of consent (treaties, national legislation) for consistency in policy and procedure.*			

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		b) The desired sustainability obligations of the investor and State should be matched with national law rules and procedures for their enforcement, to ensure their effective compliance. *c) To give effect to the parties' international sustainability obligations, the IIC should expressly acknowledge their binding nature and specify the remedies available in the event of noncompliance. This should also be made explicit in the PIICs and reflected in a separate Model Clause.* *d) The PIICs commentary on negotiating principles should note that the rights and obligations of both parties should be balanced and enforced with a view towards obtaining the public interest benefits from foreign investments.* *e) The PIICs could effectively create a negotiation tool to reaffirm consistency in international investment protection instruments, as channelled through contractual arrangements.* *f) If the PIICs are intended to serve as a negotiation and interpretation instrument binding on both the parties and arbitral tribunals, this should be expressly stated in the PIICs text.* *g) The relevant clarifications on both substance and procedure can be provided as 'for the avoidance of doubt' or 'for greater certainty' provisions, to limit discretionary space for inconsistent interpretations.*			
15.	**General comments**	I welcome the opportunity to provide comments on the draft instrument on international investment contracts, in response to the UNIDROIT public consultation. I provide these comments in my personal capacity as an international legal and policy consultant, drawing on my experience in international investment law, including more than 15 years as Lebanon's chief negotiator of bilateral investment treaties. I have also advised on	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy	Lebanon

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		investment protection, dispute prevention, and dispute resolution matters, and I am a CEDR-certified mediator. **I. Comment on the structure and accessibility of the Instrument** I would suggest considering certain adjustments to enhance the accessibility, coherence, and user-friendliness of the instrument, particularly for practitioners and stakeholders who may consult it as a practical reference tool. ***1. Consider developing the instrument as a standalone document*** The instrument would, in my view, be easier to consult and apply if it could operate as a self-contained document, without requiring readers to constantly refer to the UNIDROIT Principles of International Commercial Contracts (UPICC), especially considering the various possible cases well described in #92. To this end, consideration could be given to incorporating directly into the instrument the relevant UPICC provisions and related guidance, either in their current form or adapted as appropriate to the specific context of IIC. This would facilitate accessibility and ensure that users can rely on a single comprehensive reference document. ***2. Consider a clearer and more structured organization*** The readability of the instrument could also be enhanced through a clearer internal structure. One possible approach would be to organize the instrument in the following sequence: ✓ Overarching principles; ✓ Model clauses; ✓ Guidance and explanatory comments.		Advisory Consultant	

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		The guidance could then refer systematically to the relevant principle or model clause by number. Such an approach would allow users to easily navigate between the normative principles, the contractual options provided, and the accompanying explanations. ***3. Consider streamlining the guidance*** The guidance sections could benefit from further simplification and consolidation. In certain instances, the text could potentially be made more effective by streamlining the content, eliminating unnecessary duplication, and strengthening practical guidance to better support users of the instrument. A more concise drafting style may enhance the instrument's usability, particularly for practitioners who will consult it in the context of negotiating and drafting investment contracts. Overall, these suggestions are intended to further strengthen the practical value of the instrument and facilitate its use as an accessible and valuable reference tool for States, investors, and practitioners involved in IIC. […] **Conclusion** I would first like to commend the drafters for an exceptionally well-developed and carefully considered instrument. I hope you will nevertheless bear with me for playing devil's advocate from a somewhat different perspective. I believe that testing the text in this way is a useful means of further consolidating an already very solid draft.			
16.	**General comments**	**II. International investment contracts and international investment agreements**	Carol Khouzami	Former Lebanon BITs Chief	Lebanon

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		The draft instrument raises an important question regarding the relationship between International Investment Contracts (IICs) and International Investment Agreements (IIAs), including bilateral investment treaties (BITs) and newer generations of investment agreements. In my view, IICs should be considered complementary to IIAs rather than substitutes for them, with Principle 32 addressing the avoidance of parallel or sequential proceedings and clarifying the interplay between these two legal instruments. In fact, 1. A potential concern is that an increased reliance on IICs could lead to a fragmentation of investment protection regimes, with different investors benefiting from different levels of protection and assuming different obligations depending on their respective negotiating capacity. This issue may be particularly relevant in developing countries, where large multinational enterprises may possess significantly greater technical, financial, and negotiating resources than the host State. 2. The Instrument guidance clearly states in #99 to 102 that IICs apply to high-value, long-term investment contracts, outing aside smaller-scale foreign investments or investments undertaken by smaller enterprises, which may not involve the negotiation of complex investment contracts. 3. Since IICs are not always subject to mandatory publication requirements, reliance on contractual instruments may raise questions regarding transparency, accountability, and consistency, particularly where contracts involve public resources, strategic sectors, or projects with significant social or environmental impacts. The instrument could usefully address whether certain transparency standards or disclosure principles should apply to IICs.		Negotiator, Legal and Policy Advisory Consultant	

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		Hence, IIAs and domestic legal frameworks should continue to provide the fundamental legal baseline applicable to foreign investment, including core principles relating to investment protection, non-discrimination, sustainable development, human rights, labor standards, and environmental protection. IICs may then play an important complementary role by addressing project-specific commitments, such as technology transfer, know-how development, local capacity building, employment and training obligations, or commitments towards affected communities. It would be important for the instrument to clearly affirm the complementary role of IICs within the wider framework of international investment law.			
17.	**General comments**	**Building Capacity on IICs** The effectiveness of IICs depends not only on the quality of contractual drafting but also on the capacity of the parties to negotiate balanced and sustainable agreements, as well as on the understanding and capabilities of the institutions responsible for their implementation. Capacity building should therefore be considered a key element in ensuring that such contracts achieve their intended objectives and are effectively implemented in practice. Such capacity-building efforts should extend beyond the immediate negotiating teams. They should target government officials involved in the negotiation, approval, implementation, monitoring, and management of investment contracts, including representatives of line ministries, investment promotion agencies, regulatory authorities, state-owned enterprises, public financial management institutions, and, where relevant, subnational authorities. Members of government legal departments and attorney general offices should also receive specialized training on contract drafting, risk allocation, dispute prevention, and dispute management.	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy Advisory Consultant	Lebanon

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18.	**General comments**	Considering Government's contribution (allocation of public resources) to the investment project, this should be weighed against its level of involvement in decision making vis a vis the mode of project implementation, i.e. – 1) Concession contracts, 2) Joint Venture Agreements, 3) Share Purchase Agreements, 4) Construction contracts, and 5) Public-Private Partnerships. Ultimately, Government's contribution could be earned through revenue share or dividends in order to leave the business decision making or operations (running of the project) entirely to the investor/private party. Considering for instance, that the mode of implementation for the project is a PPP, and Government contributes Viability Gap Funding (VGF) to the project, its contribution is merely making the project, which was economically viable only, commercially viable. That is facilitating for the project and the investor to have appetite to invest in the project. Government may not expect a return on the VGF contribution as the VGF mainly reduces the CAPEX, unless in instances where the revenues for the investment project would permit, enabling Government to earn revenue share or dividend on the VGF.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
19.	**General comments**	The legitimate interest of all stakeholders – state entities/parties and the private investor lie or is protected in the allocation of appropriate risks between the parties and to the party that is able to manage the risk, considering the investment project is a foreign investor funder project or joint venture between the state and investor – parties. In that connection, the undersigned is ready to offer to prepare a "Generic Risk Matric Allocation for all modes of investment – 1) Concession contracts, 2) Joint Venture Agreements, 3) Share Purchase Agreements, 4) Construction contracts, and 5) Public-Private Partnerships, to enable the IIC's relevance in all aspects of investment projects.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia

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20.	**General comments**	Right after Chapter 5 'Rights and Obligations' and before Chapter 6 'Change of Circumstances', a Chapter on 'Risks and Risk Matrix Allocation' should be added specifying the Principle and Model Clause.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
21.	**General comments**	The undersigned participated in the International Investment Agreements (IIA) training in 2004 facilitated by the Common Market for Eastern and Southern Africa (COMESA) which culminated for member countries preparing and developing the COMESA Common Investment Area (CCIA) to which the undersigned was an Economist in the Ministry of Commerce, Trade and Industry and was a desk officer for Zambia and part of the CCIA secretariat. IIAs and BITs are the foundation and fundamentals upon which the IIC sits. The IIC is a very important document for various investment modes and practical investment scenarios.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
22.	**General comments**	Chapters should be added on the proposed inclusion of Principles and Model Clauses indicated in Chapter 2, A Introduction Section 121, such that, a chapter on 'Shareholder Equity'. In this same vein to note that Shareholder equity ties to Compensation.	Solomon J. Simutowe	Assistant Director – Project Development Promotion,	Zambia

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				Public-Private Partnership Office, Ministry of Finance and National Planning	
23.	**General comments**	Broader public interest mainly lies in the pricing of the commodity or user fees/tariffs when it comes to a service in terms of value for money and affordability before sustainable investment – environmental, social, governance and human rights factors. If a balance between the investor rights and broader public interest has to be created, value for money and affordability of the commodity or service in addition to risk allocation as well as sustainability investment principles are key.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
24.	**General comments**	Propose to include a Chapter on the 'Scope of the Investment Project' and its accompanying Principle and Model Clause, right after Chapter 4 'Validity'. The Scope of the Investment Project should have sub-titles for 1) Project description, 2) Scope specifying quantity and output/capacity, 3, Facilities, and 4) Technical Specifications and Standards. Just to add that, the Scope also enhances the undertaking and appreciation of the Rights and Obligations between the parties and once or if reflected in the 'Asset Register'.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and	Zambia

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				National Planning	
25.	**General comments**	The Principle strictly distinguishes IICs from Bilateral Investment Treaties (BITs) or International Investment Agreements (IIAs). While IIAs are inter-State treaties governed by public international law, an IIC is a private law contract with contractual consequences, governed by the rules of law chosen by the parties. The Instrument builds on the UNIDROIT Principles of International Commercial Contracts 2016 (UPICC), drawing on their general contractual framework while introducing specialised provisions where the public-interest dimensions and particular characteristics of investment contracts require adaptation. Notably, consistent with Article 1.6(1) UPICC, interpretation should have regard to the Instrument's international character and the need for uniform application. Its concepts should therefore be understood within their international contractual context, without automatically importing meanings specific to a single domestic legal system.	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam
26.	**General comments**	The Instrument addresses the predominantly investor-protective orientation of traditional investment treaties by establishing reciprocal contractual commitments, thereby the *principle of proportionality* is ensured between public and private actors. Both parties may incur liability for non-performance and seek appropriate remedies, including through counterclaims where the relevant jurisdictional and procedural requirements are satisfied.	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam
27.	**General comments**	The Instrument seeks to reconcile contractual stability with the State's authority to regulate in good faith for legitimate public purposes, including public health, environmental protection, human rights and labour standards. Its treatment of stabilisation emphasises the need to define the scope and consequences of regulatory commitments carefully. Sustainability is incorporated throughout the contractual lifecycle, from negotiation and due	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam

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		diligence to performance, monitoring and remedies. Environmental protection, climate considerations, social responsibility, human rights and anti-corruption commitments form part of this framework, with their legal effects depending on the wording of the relevant provisions.			
28.	**General comments;** **Chapter 8, Section B; and** **Cross-reference to the UNIDROIT Principles on Digital Assets and Private Law**	The Instrument's conflict-of-laws architecture is party-facing and static. Principle 28 designates a law by agreement of the parties, and the Commentary treats that designation as settling the position for the life of the contract. Both features suit an ordinary commercial contract. An IIC is not one. It runs for decades, and over that period three things change that a party-facing and static rule cannot absorb. The content of the designated law changes, which is the subject of Chapter 6. The parties' power to be bound by their own agreement changes, which is what insolvency does. And the assets in which the rights are held may change form, at which point the questions stop being party-facing at all. UNIDROIT has met all three, within the last three years, in the Principles on Digital Assets and Private Law (2023). Principle 5(2)(e) provides that where the applicable law changes after a digital asset is issued or created, 'proprietary rights in the digital asset that have been established before that change are not affected by it'. Principle 5(6) provides that, notwithstanding the opening of an insolvency-related proceeding, the applicable law 'governs all proprietary issues in respect of digital assets with regard to any event that has occurred before the opening of that insolvency-related proceeding', and 5(7) preserves the insolvency rules on ranking, avoidance and enforcement. Principles 5(1)(a) and (b) make the designation travel with the asset and with the system on which it is recorded, rather than with a contract. Commentary 5.4 states that the usual connecting factors 'usually have no useful role to play' for intangibles that have 'no physical situs', and that adopting them 'would be incoherent and futile'. I am not suggesting that this Instrument should govern digital assets. The suggestion is narrower. UNIDROIT has lately	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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		worked out a way of handling change over time inside a conflicts rule, and an instrument written for contracts of twenty-five years would gain from the same technique. The draft cites the 2023 Principles nowhere, contains no reference to digital assets, tokenisation or distributed ledger technology, and says nothing about what happens to the parties' legal position when the applicable law, or its content, changes during the life of the contract. The following comment sets out what such a provision would say.			
29.	**General comment;** **Chapter 8, Section B, Principle 28;** **Commentary paras. of Principle 28; and** **Chapter 6, Section B,** **Principle 23**	This is the only comment in this response that asks for a new rule, and I refer to it as an intertemporal default. The Instrument fixes the content of an applicable law at a point in time in exactly one place: Principle 4(3) preserves the special form requirements of the applicable domestic law, and of the investor's constitutional documents, 'at the time of the conclusion' of the IIC. It does this nowhere else, and not for the governing law. The date of conclusion appears again in Chapter 6 and in the force majeure provisions, but there it fixes the moment at which foreseeability is assessed, not the content of any law. The silence is not peculiar to this draft. Article 42(1) of the ICSID Convention, written in 1965 for disputes between a Contracting State and a national of another Contracting State, provides that the tribunal 'shall decide a dispute in accordance with such rules of law as may be agreed by the parties' and, failing agreement, applies 'the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. It is the most invoked applicable-law provision in disputes of this kind. It says which rules of law. It does not say as of when. Chapter 6 then builds a whole regime, in Principle 23, on the premise that the parties may freeze the content of host-State law, without saying what the position is if they do not. A stabilisation clause is drafted against a default the Instrument has never stated. UNIDROIT has already written that default, for a different subject matter, in Principle 5(2)(e) of the 2023 Principles. Transposed, it would read roughly as follows, in two sentences, and would sit in the Commentary to Principle 28 or as a	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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		further paragraph of it: 'A choice of law is a choice of that law as it stands from time to time, unless the parties have agreed otherwise. Where that law, or the content of that law, changes after the conclusion of the IIC, rights and obligations established under the previously applicable law before that change are not affected by it, unless the parties have agreed otherwise.' The first sentence is declaratory. It states the position the Instrument already assumes and nowhere writes down. The second is the proposal. Stating the default makes Principle 23 intelligible. A stabilisation clause becomes what it is in practice, a negotiated departure from a known baseline, instead of a device whose legal mechanism is characterised for the first time by whichever tribunal is later seised. Commentary 5.17 to the 2023 Principles adds that where the applicable law changes, 'transitional provisions that ensure that the same law applies to all such digital assets at all times would be essential'. There is a precedent for drafting the distinction, and for drafting only half of it. Article 10 of the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985 remits to the law governing validity the question whether the applicable law may be replaced by another, and the Explanatory Report by A. von Overbeck records that the article 'does not deal with the possible changes that the legislator or case law might bring in the contents of the law which was initially applicable', and that the words 'replaced by another law' were chosen 'in order to show clearly that this did not refer to a change in the text of the law' ((1986) 25 International Legal Materials 593, paras 97 and 102). A Hague instrument written for a relationship that lasts therefore separated the two questions on purpose and answered one of them. The other is the one that matters for an IIC, because the counterparty controls the legislature. One consequence is worth setting out, because it shows what the default would do to a provision the draft already has. Principle 23(2)(2) has two limbs. The first forbids the State to reduce or remove the tax, customs or other fiscal incentives 'given to the investor'. The second provides that changes made to the fiscal laws			

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		that substantially reduce the economic returns shall not apply to the investor. An incentive conferred on this investor under the law in force at the conclusion of the contract is a right established under that law, and the default would preserve it without any clause. A general fiscal regime is not a right; it is the background against which the investment was priced, and no default preserves it. Stating the default would therefore tell the parties which of the two limbs they actually need to negotiate for. The first would become declaratory. The second is what a stabilisation clause is really about. A contract meant to last twenty-five years should say, once, what happens when the law beneath it moves. The argument is developed at length in C. Santaolalla Montoya, 'A Choice Made Once: Party Autonomy and the Passage of Time in Long-Term State Contracts' (working paper, September 2026), SSRN abstract no. 7428379.			
30.	**General comments**	**OUR RECOMMENDATION:** KNCCI supports UNIDROIT-ICC consultation process and calls for development of a predictable and bankable investment contracts while preserving the legitimate regulatory space and promoting balanced, enforceable investor and State/Municipal obligations. **1. Background** UNIDROIT, in collaboration with the International Chamber of Commerce (ICC), is consulting stakeholders on a draft Instrument intended to provide principles and model clauses for International Investment Contracts between States and private investors. The matter was forwarded for KNCCI review and input, together with an IISD background note setting out concerns on the current draft. The IISD note identifies positive elements in the draft, particularly its effort to integrate sustainability obligations across the life of an investment contract, but raises concerns regarding the consistency and enforceability of sustainability provisions, the scope of investor protections, stabilisation, valuation and remedies, dispute resolution, and the consultation timeline.	KNCCI		Kenya

		2. Overall KNCCI Position KNCCI supports the development of a clear and internationally recognised framework for International Investment Contracts because greater contractual certainty can improve investor confidence, reduce transaction costs and support long-term investment. However, the framework should not create an imbalance in which investors receive broad and enforceable protections while environmental, social, climate, community and governance obligations remain largely aspirational. KNCCI calls for the development of a balanced, pro-investment and pro-sustainable-development framework that: • protects legitimate investor expectations and contractual certainty; • recognises the host State's domestic law and legitimate regulatory authority; • establishes proportionate and enforceable sustainability obligations; • promotes local economic participation, enterprise development and skills transfer; • provides clear and proportionate remedies and valuation principles; and • offers balanced and effective dispute-resolution frameworks. […] **L. Consultation and Implementation Timeline** Given the length of the document and the potential long-term impact of the draft Instrument, KNCCI calls for adequate/additional time or a further consultation phase to allow governments, private-sector organisations and stakeholders from developing economies to assess its legal, commercial and developmental implications thoroughly. **4. Way Forward** We confirm KNCCI's intention to participate in the consultation process. We are willing to share with relevant Government investment authorities to support coherence between private-sector and public-sector perspectives during the consultation process. **5. Conclusion** The proposed UNIDROIT-ICC Instrument presents an important opportunity to improve international investment contracting. KNCCI supports a		

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		framework that strengthens investment confidence without requiring host States to surrender legitimate regulatory authority or assume disproportionate fiscal and legal risk.			
	INTRODUCTION				
31.	**Paras. 3, 10, 11-14, 15-17. 34-35, 39**	**Scope and definition of international investment contracts.** The instrument approaches the concept of IIC from a teleological perspective, without limiting its legal form or the industry in which IIC may appear. We consider that this is an appropriate construction of the IIC concept. The commentary properly emphasizes the *ius publicum* elements and the distinctive features surrounding IICs, such as the duration, high value, public interest dimension and asymmetry between the parties due to the participation of States or State-related entities. Also, the instrument adequately addresses the categories of administrative and public contracts, which are important categories under Hispano-American administrative law. Accordingly, the application of the instrument is not contingent or affected by the internal qualification of the contract. In addition, the instrument acknowledges that contracts derived from bidding processes might be regarded as IIC, despite of the fact that the State unilaterally designs the conditions of the resulting contracts. In this issue, the instrument accomplishes an additional function by providing a good practices standard for the design and implementation of terms and conditions and contractual models that can positively influence the equity of the offered clauses.	Maria Amparo Grau and Jose Ignacio Hernandez	AVEDA	Venezuela
32.	**Paras. 15, 16, 81, 82, 99, 101, 107**	**Scope and definition of international investment contracts.** The Instrument does not appear to identify categorically the elements that make a contract an international investment contract. In particular, it does not define the concepts of "investor" or "investment", and it appears to contemplate that both administrative or public contracts and private law	Jorge González Carvajal	AVA	Venezuela

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		contracts may qualify as investment contracts. This lack of precision may create uncertainty in cases where the Instrument has not been expressly chosen as the applicable standard under Principle 2. Clearer defining elements would assist the parties and, where relevant, the adjudicator in determining when the Instrument should apply in the situations described in Principle 2(2), (3), (4), and (5).			
33.	**Section A, paras. 3-5; Section B, Commentary para. 17**	The intended function of the Instrument should be clarified. Is it intended as guidance for contractual drafting and practice, or as an applicable body of law? B.13 appears to emphasise the standardisation of contractual practice rather than the creation of a coherent body of governing law.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
34.	**Section A, para. 7**	We do not consider that the Instrument can substitute for treaty protections or protections available under domestic law. Paragraph 8 more accurately describes its role: the Instrument may guide parties in incorporating comparable protections into the contractual framework.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
35.	**Section A, para. 7**	The Instrument may help State entities and States address certain asymmetries that are reported under treaties. However, the direct contractual relationship between State/State entities and investors may also create other forms of asymmetry – for instance location of bargaining power. This should be expressly acknowledged.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
36.	**Section A, para. 9**	A further aspect of modernisation that should be addressed is the increasing use of technology in investment-related activities and contractual practice.	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

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				Platform Collective	
37.	**Section B, para. 12**	Paragraph 12 lists the sectors in which IICs are said to arise. Civil aviation and space activities do not appear, and the Instrument as a whole makes no reference to aviation, aircraft or satellites. Both sectors present the four characteristics that paragraph 12 itself identifies as justifying specialised treatment. Airport concessions are routinely granted for terms of thirty years or more against capital commitments in the billions, with a State authority as grantor and frequently as a continuing equity participant. Satellite capacity and ground segment agreements, launch site development agreements and national carrier joint ventures follow the same pattern. That these are genuine IICs is confirmed by the disputes they have produced. In ADC Affiliate Ltd v Republic of Hungary (ICSID Case No. ARB/03/16, Award, 2 October 2006) the contract concerned the construction and operation of terminals at Budapest airport under an agreement with a State agency. In Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (ICSID Case Nos. ARB/03/25 and ARB/11/12) the subject matter was the NAIA Terminal 3 build, operate and transfer concession. In Deutsche Telekom AG v Republic of India (PCA Case No. 2014-10, Interim Award, 13 December 2017; Final Award, 27 May 2020) the underlying contract was an agreement of 28 January 2005 for the lease of S band satellite capacity, concluded with Antrix Corporation Ltd, the commercial arm of India's Department of Space, and terminated on 25 February 2011 on stated grounds of public interest.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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		It is respectfully suggested that civil aviation and space activities be added to the illustrative list in paragraph 12.			
38.	**Section C, para. 23**	The emphasis on the State's right to regulate, contrasted with the investor's interests in predictability and stability, risks obscuring the inherent power asymmetry between the parties when both parties sit down to negotiate a contract. As flagged above, the Instrument should acknowledge this asymmetry explicitly in a principle.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
39.	**Section C, paras. 18-23**	The discussion of regulatory freedom could distinguish measures adopted within the State's policy discretion from measures undertaken to comply with applicable legal obligations. Human rights/rights of the child, environmental, public health and climate obligations may require regulatory action notwithstanding effects on an existing investment. An IIC cannot alter the content of obligations arising independently under applicable law, although it may regulate contractual consequences associated with conduct taken in compliance with those obligations, subject to applicable law and the contractual framework. The Instrument should therefore ensure that provisions concerning contractual stability, renegotiation and remedies do not unnecessarily deter or impede such compliance. This distinction is particularly relevant to the rights of the child. Under the Convention on the Rights of the Child (CRC), as interpreted by the CRC Committee in General Comments Nº 16 and 26, States may be required to regulate business conduct and take preventive measures in relation to reasonably foreseeable environmental harm affecting children.	Ivana Savić	External PhD candidate, Leiden University	Serbia
40.	**Section D, para. 26**	Local content requirements are listed among the mechanisms through which the Instrument addresses the interests of local communities. Local content is also an instrument of industrial policy, and its function in building	i3T		Mexico

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		productive capabilities is distinct from its function in distributing project benefits. Locating it exclusively within the third-party interest framework limits how it can be drafted and to what it can be attached.			
41.	**Section D, para. 26**	The recognition of affected third parties and stakeholder consultation processes are welcome developments. Where persons affected by an investment are also rights holders under applicable human rights law, including children under the CRC, that status should remain visible. The terminology of stakeholders should not obscure the distinct legal position of affected rights holders, particularly in relation to impact assessment, participation, grievance mechanisms and remediation.	Ivana Savić	External PhD candidate, Leiden University	Serbia
42.	**Section D, para. 27**	The draft states that contractual embedding ensures that the State and Investor 'share responsibility' for the human rights dimensions of the investment. The formulation of 'shared responsibility' could be specified to reflect the distinct legal bases of the parties' respective obligations and responsibilities. The State and Investor may each bear obligations or responsibilities concerning the human rights impacts of an investment, including CRIA, but these arise from different legal sources and need not have the same scope. The State may be bound by international and domestic legal obligations, while the Investor may be subject to contractual obligations, obligations under applicable domestic law and responsibilities reflected in international responsible-business standards. Contractual allocation of sustainability obligations should therefore remain without prejudice to obligations and responsibilities arising independently of the IIC.	Ivana Savić	External PhD candidate, Leiden University	Serbia
43.	**Section D, para. 31**	We understand the objective of positioning IICs within broader sustainable development objectives – which generally reflects treaty practice (e.g. preambular language in certain treaties). However, we question whether this is the appropriate basis for structuring sustainability obligations.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		The focus should instead be on the **proportionate allocation of responsibility** between the parties. E.32 seeks to address the balance between rights and obligations, but does not sufficiently connect this balance to proportionality. The reference to proportionality in D.39 is comparatively late and cursory.			
44.	**Section E, para. 37**	The Introduction states that the stabilisation carve-out protects qualifying measures while the investor retains other contractual remedies for non-performance. The relationship between Principle 23(3) and other contractual remedies would therefore benefit from clarification. In particular, the commentary could address whether, and in what circumstances, a claim under another contractual provision may arise solely from the effects of a regulatory measure falling within the carve-out. Without such clarification, there is a risk that the practical protection afforded by the carve-out could be reduced through the operation of other remedial provisions.	Ivana Savić	External PhD candidate, Leiden University	Serbia
45.	**Section E, para. 38**	We are concerned by the emphasis on awarding States equivalent remedies through sustainability obligations. This concern is particularly relevant given that several sustainability provisions appear broadly framed and potentially open-ended, creating a risk of disproportionate counterclaims against investors. We do not consider this to be the intended function of the Instrument. A preferable approach would be to emphasise a balanced allocation of rights and obligations, supported by clearly defined contractual standards and remedies.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
46.	**Section E, para. 39**	The draft combines proportionality and scalability of sustainability obligations with 'strong investment protections balanced by reasonable exceptions.' The proposed scalability of sustainability obligations should	Ivana Savić	External PhD candidate,	Serbia

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		distinguish additional contractual sustainability commitments from requirements arising under applicable law. Project size, risk and party capability may appropriately inform the scope of additional contractual undertakings. Where applicable law itself establishes proportionate or risk-based requirements, those requirements govern. Thus, contractual scalability should not be understood as reducing requirements independently imposed by applicable law. For the same reason, the characterisation of sustainability safeguards as reasonable exceptions to investment protection should be framed carefully where those safeguards give effect to applicable legal obligations, including obligations concerning human rights and the rights of the child.		Leiden University	
47.	**Section F, para. 42**	Since IIC are a category of State Contracts, a mention to public interest should be made for the purposes of the interpretation of the Instrument, which is not contemplated in Article 1.6(1) of the UPICC as it is aimed at private contracts.	José Gregorio Torrealba	AVA	Venezuela
48.	**Section F, paras. 40-44**	We question the way in which the relationship between the UPICC and the Instrument is characterised. The UPICC has been extensively developed and applied as a body of transnational contract law. The Instrument appears instead primarily directed towards standardising contractual drafting practices and supplementing applicable domestic and international law. These are distinct functions and should not be conflated. **The greatest value of this Instrument lies in serving as guidance on negotiation, execution and implementation of an IIC** – a purpose that is distinct from serving as a body of principles governing substantive obligations. See our Position Paper for detailed comments on this issue.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
49.	**Section G, para. 49**	We do not consider that the Instrument should serve as the primary applicable law. Its current character is principally that of guidance for	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

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		contractual practice rather than a sufficiently developed body of law capable of serving as primary governing law.		Platform Collective	
50.	**Section H, paras. 54-62**	Our detailed comments on dispute resolution are set out against the relevant Principles. At this stage, we suggest reviewing the application of the principle of symmetry of rights. **We have particular reservations about conferring broad rights to bring counterclaims based on obligations that are not sufficiently defined.** This concern is particularly relevant to the sustainability provisions, where broadly framed obligations may create scope for disproportionate counterclaims.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
51.	**Section H, para. 61**	The draft recognizes a procedural symmetry between the parties as it grants unequivocal legitimacy to the State to bring claims and counterclaims. This is a great feature of the document.	Héctor Luis Pittman Villarreal	Peer Reviewer	Peru
52.	**Section I,** **paras. 63-70**	We agree that corroboration is an appropriate function of the Instrument. We nevertheless have concerns regarding its neutrality. **In our view, the Instrument may not be power-neutral where sustainability standards are broadly or ambiguously defined, or timelines are controlled by State/State entity proposals.** We also question the characterisation of the Instrument as performing a gap-filling function. If the Instrument is not intended to operate as primary law (which we submit should be the case), it cannot fill gaps in primary law. It can, however, guide parties towards the adoption of advanced and clearly defined standards in carrying out investments, provided that compliance with those standards is consistent with mandatory law.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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53.	**Section K, para. 80**	Dans la pratique, il est opportun pour les États précisent la notion d'État dans leurs TBI, en établissant notamment des listes précises d'organes étatiques. Ils devraient également préciser la qualification des entités économiques stratégiques, à savoir les sociétés d'État, les banques centrales et les fonds souverains. Une telle démarche permettrait de limiter la marge d'interprétation des arbitres, qui se trouveraient ainsi contraints de se conformer strictement à ces définitions. l'État est une entité mouvante constituée d'organes structurels et fonctionnels, à laquelle se rattachent des émanations indépendantes. Cette définition englobe les aspects organique, matériel et factuel de la notion d'État. Je vous invite à lire la these[40] jointe au courriel à partir de la page 21[41]	Nasr Ashoush	Ph.D. holder from the University of Burgundy, France and Judge at the Egyptian Council of State	Egypt
54.	**Section K, para. 82**	Paragraph 82 explains that no formal definition of an IIC is offered so that the Instrument remains broadly applicable and adaptable, and identifies instead a set of common characteristics. That approach is welcome and is well suited to a heterogeneous category of contracts. In practice, however, the illustrative sector list repeated in paragraph 82 will carry considerable interpretive weight, and a reader operating in an unlisted sector may reasonably doubt whether the Instrument is addressed to them. The point is not merely presentational. Commercial space activity, spaceport	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

[40] The respondent submitted, together with his feedback on the draft instrument, his dissertation entitled "Les relations entre l'État et ses entités devant l'arbitre international" (2026). This dissertation is shared separately with the Drafting Committee and the Working Group.

[41] Courtesy translation into English (Secretariat): In practice, it is advisable for States to clarify the concept of the "State" in their BITs, notably by establishing precise lists of state organs. They should also specify the classification of strategic economic entities—namely state-owned enterprises, central banks, and sovereign wealth funds. Such an approach would limit the scope for interpretation by arbitrators, who would thereby be compelled to adhere strictly to these definitions. The State is a dynamic entity composed of structural and functional organs, to which independent emanations are linked. This definition encompasses the organic, substantive, and factual aspects of the concept of the State. I invite you to read the thesis attached to the email, starting from page 21.

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		development and privately operated airport and air navigation infrastructure are among the fastest growing categories of long term State investor contracting, and a number of States have recently enacted dedicated authorisation frameworks for them, including the United Arab Emirates in Federal Law No. 12 of 2019 on the Regulation of the Space Sector, the United Kingdom in the Space Industry Act 2018 and New Zealand in the Outer Space and High altitude Activities Act 2017. If the Instrument is to be future proofed in the sense that Section K intends, the illustrative list is the natural place to signal that these sectors are within its contemplation.			
55.	**Section K,** **para. 82**	Paragraph 82 states that "(…) This Instrument does not provide a formal definition of an IIC, nor does it set out qualifications for an investor. This approach reflects a conscious decision to ensure that the Instrument remains broadly applicable and adaptable". Yet in paragraph 99, states that "(…) On the other side, the party would be one or more investors. The investor may be an entity incorporated, having its place of business, control of business, or principal activity outside the host State or inside the host State (e.g., an investor that is located in a foreign jurisdiction may operate through a local company in the host State or be otherwise associated with it under specific circumstances)", providing such a definition that also encloses the category of an "Investor" to legal person, striping the possibility of a natural person to be considered an "investor" and therefore be protected by these principles.	Ian Signori Gorriti	Member of CEIA	Peru
56.	**Section L**	The draft doesn't clarify if the official commentary is an integral part of the principles or merely an additional and optional interpretative body. Paragraph 84 appears to hint that the role of the UPICC would be complementary and subsidiary, yet the read from the rest of the draft of the ICCs leaves another sense. In paragraph 94, the draft expressly mentions	Ian Signori Gorriti	Member of CEIA	Peru

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		that "It also recalls that, pursuant to Article 1.5 of the UPICC, certain UPICC provisions are mandatory in nature and remain so in the context of IICs", making those provision mandatory and integral part of the IIC Principles; once again but this time expressly mentions that the UPICC are a mandatory part in the context of the IIC Principles, what should be not only on the commentary, but textualized in the Principles itself. Paragraph 97 however, mentions that "This "Instrument" comprises Principles, commentary, illustrations, and Model Clauses. Therefore, references to "this Instrument" include all such elements", making no reference to the UPICC as part of the instrument. This as previously stated is incongruent with the text and spirit of the previous paragraph and the principles´ functionality (that require the UPICC to be complete) and generates more doubt about what is or not and integral and inseparable part of the IIC Principles. Then paragraph 103 ends up mentioning "Consequently, when the parties to an IIC refer to these Principles, such a reference is also intended as a referral to the UPICC applying to issues not settled in this Instrument.". To be more explicit, paragraph 115 (when dealing with the possibility of modification and exclusion to the principles – commentary to principle 2) states literally that "A limited number of provisions of the UPICC are mandatory in nature (see Article 1.5 of the UPICC), i.e., their importance in the system of the UPICC is such that parties should not be permitted to exclude or derogate from them as they wish. This includes, for example, Article 1.7 of the UPICC on good faith and fair dealing (…). Since this Instrument incorporates the UPICC for issues of general contract law, those mandatory provisions of the UPICC also remain mandatory in the context of IICs". Making the confusion more notable, and the argument in favour of a necessary and explicit recognition of the UPICC as integral part of the IIC Principles, more dire. Further down, the whole text of the commentary of principle 28 mentions that the IIC Principles "include", "refers" and "incorporates" the UPICCs and even a few of the explanations			

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		(E.g., paragraph 597) jump to the UPICCs as justification of said commentary, as it was an integral part and indivisible of the IIC Principles. Therefore, in order to maintain clarity in the IIC Principles, the principles itself should mention and reflect the obligatoriness of the application of the UPICC in a general manner (as a default mandatory incorporation, leaving the possibility that to exclude or modify their application where this Instrument expressly provides otherwise or where the parties expressly exclude or modify their application), avoiding possible future discussions about its pertinence.			
57.	**Section L**	**Introduction - Section L:** From the perspective of the UNIDROIT Principles of International Commercial Contracts ("UPICC"), the project is remarkable and extremely well done. It uses the UPICC as general principles and rules of law on general contractual issues and supplements or amends them (in a standardized form pursuant to and in line with article 1.5 UPICC) with due regard to the special needs of a specific contract form, notably investment contracts. The description in Section L (at mn. 86 et seq.) is excellent.	Prof. Dr. Eckart Brödermann	Professor, University of Hamburg	Germany
58.	**Section L, paras. 84-91**	We suggest including a table or index identifying: (i) provisions of the UPICC that have been modified; (ii) provisions for which additional explanation has been provided; and (iii) provisions that are considered inapplicable to IICs. This would make the relationship between the two instruments clearer and the exercise more coherent.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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CHAPTER 1. GENERAL PROVISIONS CONCERNING THE INSTRUMENT					
59.	**General comments**	The Instrument offers a valuable framework for balancing contractual predictability, public interests and sustainable investment. Its relationship with UPICC should be made easier to navigate. A concise comparative table should identify provisions applied as-is, provisions accompanied by additional commentary, and provisions that have been amended or replaced. The order of precedence among specific contract clauses, the Instrument, the UPICC, and relevant mandatory rules must be presented consistently throughout the document.	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam
60.	**Paras. 15, 16, 81, 82, 99, 101, 107**	**Scope and definition of international investment contracts.** Vagueness in the definition of an international investment contract	Jorge González Carvajal	AVA	Venezuela
61.	**Section A, para. 92; and** **Section B, Principle 1**	The first paragraph of the introduction states that "It also clarifies that, unless otherwise provided, the provisions of the UPICC (2016 version) apply to IICs.", making it seem as if the UPICC where not an integral part of the IICs Principles but rather a optional additional source to be incorporated, yet giving the impression that bits lack of incorporation (or better said the exclusion of it) wouldn't generate issues attending to their complementary qualities. But latter the same introduction mentions that in some cases "the UPICC provision is not repeated but should be deemed incorporated into this Instrument" in other cases "the UPICC provision is briefly recalled and additional guidance is provided by means of commentary and, where appropriate, a Model Clause", and only where the UPICC do not cover a subject deemed necessary, then and only then "an IIC-specific Principle is provided".	Ian Signori Gorriti	Member of CEIA	Peru

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		In paragraph 94, the draft expressly mentions that "It also recalls that, pursuant to Article 1.5 of the UPICC, certain UPICC provisions are mandatory in nature and remain so in the context of IICs", making those provision mandatory and integral part of the IIC Principles; once again but this time expressly mentions that the UPICC are a mandatory part in the context of the IIC Principles, what should be not only on the commentary, but textualized in the Principles itself. These treatment in the commentary is in our opinion, ambiguous; given that states an apparent "optionality" in the incorporation (or exclusion) of the UPICC from the IIC Principles, but the explanation of the relationship between them shows a clear dependency of the IICs Principles to the UPICC, where the last ones don't appear to be (and in fact are not) optional but rather integral and necessary for the IIC Principles to fulfil their job. Paragraph 97 however, mentions that "This "Instrument" comprises Principles, commentary, illustrations, and Model Clauses. Therefore, references to "this Instrument" include all such elements", making no reference to the UPICC as part of the instrument. This as previously stated is incongruent with the text and spirit of the previous paragraph and the principles´ functionality (that require the UPICC to be complete) and generates more doubt about what is or not and integral and inseparable part of the IIC Principles. Then paragraph 103 ends up mentioning "Consequently, when the parties to an IIC refer to these Principles, such a reference is also intended as a referral to the UPICC applying to issues not settled in this Instrument.". As previously stated, in order to maintain clarity in the IIC Principles, the principles itself should mention reflect the obligatoriness of the application of the UPICC in a general manner, avoiding possible future discussions about its pertinence. It is important to notice that in order to secure the correct manifestation of the will of the parties, textualism should be imperative when dealing with on choosing a regulation for the contract; asking the parties to assume or			

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		considered in some cases the principles incorporated, depending on the interpretation that one could make from a principle (having in mind that no principle has a indication of which category it falls under and if in that principle is an integral part or just a recommendation), seems risky and contrary to the intent of the IICs Principles' goal of creating a predictable and stable normative frame to help the parties better regulate their contracts. And is of special importance for the correct application of other chapters. For example, Ch. 8 regarding choice of law and dispute settlement; where principle 28 allows the choosing of this IIC Principles as rules of law for the contract, yet without the UPICC, these principles would be crippled and most probably generate an enormous amount of laguna or gaps that in turn would create a more complicated dispute settlement scenario, not only failing to fulfil the IIC Principles´ goal but also making the exact opposite in their cripple application. Given the integral part that the UPICC (or at least some of those principles) play into the IIC Principles scheme, those necessary principles (of the UPICC) that fall into the first 3 categories detailed in the first paragraph of Ch. 1 introduction, should be included in the IICs Principles text literally if their relevance is such that their exclusion would render helpless, ineffective or inapplicable the IICs Principles by itself, or make the goal for the creation of these principles irrelevant. Proposed wording: "Principle 1 Scope of the Instrument and relationship with the UPICC. 1) This Instrument sets forth rules and guidance on issues relevant to international investment contracts (IICs). A choice of, or reference to, this Instrument or to the IIC Principles, entails the mandatory application of the UPICC, as an integral and supplementary part of this Instrument, except			

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		where this Instrument expressly provides otherwise or where the parties expressly exclude or modify their application. (2) For the purposes of this Instrument, an IIC is a contract between a party on the State side, on the one hand, and a foreign investor, on the other. (3) Where appropriate, this Instrument modifies the application of specific provisions of the UNIDROIT Principles of International Commercial Contracts (UPICC) to account for the specificities of IICs. (4) Issues not settled in this Instrument shall be settled in accordance with the UPICC."			
62.	**Section B,** **Principle 1**	**Scope and the definition of an IIC.** Principle 1(2) adopts a deliberately broad, open-textured definition of an international investment contract (IIC): a contract between a party on the State side and a foreign investor. The illustrative references in the commentary to concessions, joint ventures, share-purchase agreements, construction contracts and public-private partnerships should remain examples rather than an exhaustive classification. This approach gives the Instrument sufficient flexibility to accommodate new financing and project structures, although some uncertainty at the margins is unavoidable. **The State-side party.** The inclusion of a 'party on the State side', rather than only the State itself, is commercially realistic. IICs may be concluded by ministries, State-owned enterprises (SOEs), sovereign wealth funds, public authorities or special-purpose entities. The final commentary should, however, explain more clearly how to distinguish a functionally State-connected entity from an enterprise acting as an ordinary commercial counterparty. Relevant considerations may include the entity's legal basis, assigned public functions, authority over public assets, the nature of the	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		transaction, and the degree of State direction or control. No single factor, including ownership, should be treated as automatically decisive. **Contractual status and attribution.** The classification of an entity as a party on the State side for the Instrument must be kept distinct from attribution under public international law. Attribution is governed by the applicable rules of State responsibility, including Articles 4, 5 and 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. It should not be replaced by private-law concepts such as apparent authority, privity or veil-piercing. In *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, the tribunal analysed the National Highway Authority under Articles 4, 5 and 8 and treated the different bases separately (Decision on Jurisdiction, paras 119-130). The commentary should therefore explain that contractual authority, the scope of the Instrument and international-law attribution answer different questions. **Practical drafting response.** The commentary could encourage parties to state expressly whether an SOE or other State-linked entity is acting for itself, on behalf of the State, or with specified State authority. Such a clause cannot conclusively determine attribution under international law or override mandatory domestic law, but it can allocate contractual risk and reduce later disputes about authority and status. **Opt-in and incorporation.** The current draft is not silent on voluntary adoption. Principle 2(1) and its commentary expressly contemplate application by party agreement and incorporation of the Principles as contractual terms (official June 2026 consultation draft, p. 24, paras 104-105). The final text would nevertheless benefit from a cross-reference in the commentary to Principle 1. It should distinguish: (i) contracts that satisfy Principle 1(2); (ii) other contracts whose parties incorporate all or part of the Principles or a Model Clause; and (iii) provisions that require adaptation			

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		because they presuppose a State-side party or domestic approval process. A short optional incorporation clause could require the parties to identify the adopted provisions and any necessary adaptations. **UNIDROIT Principles of International Commercial Contracts (UPICC) edition and temporal operation.** The draft identifies the 2016 edition of the UPICC as the supplementary rules (official June 2026 consultation draft, p. 21, para. 92). Principle 1(4) should state that edition expressly or cross-refer unambiguously to the commentary. The Instrument should also say whether the reference is static or dynamic. A sound default would be the UPICC 2016, with later editions applying only when the parties expressly agree. This protects consent and domestic approval requirements while preserving party autonomy. ***Key References.*** *Official June 2026 UNIDROIT-ICC consultation draft, pp. 21 and 24, paras 92 and 104-105; International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Articles 4, 5 and 8, annexed to UN General Assembly Resolution 56/83 (12 December 2001); Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), paras 119-130.*			
63.	**Section B,** **Principle 1**	**Principle 1: Definition of ICCs** While Principle 1 identifies only one defining element of an ICC—namely, that it is concluded between a State (or a State entity) and a foreign investor—the Guidance proposes additional characteristics in paragraph 99. In particular, it indicates that ICCs are 'typically concluded in relation to projects of public interest or public purpose' and are 'generally long-term and high-value contracts'. Although these characteristics are presented as typical rather than mandatory, and the parties remain free to conclude an ICC governed by the	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy Advisory Consultant	Lebanon

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		UNIDROIT Principles in different circumstances, their inclusion in the Guidance merits some attention. The Guidance may gradually acquire a degree of soft-law authority and, in practice, influence the understanding of what constitutes an ICC. As a result, foreign investment contracts that do not involve projects of public interest or public purpose, or that are not considered long-term or high-value, could potentially be perceived as falling outside the intended scope of the Instrument. Moreover, the notions of "public interest", "public purpose", and "high-value agreement" are themselves open to interpretation. For example, can an investment in a luxury resort be regarded as serving a public interest or public purpose? If so, these concepts risk becoming extremely broad. Similarly, what constitutes a "high-value" agreement? Such an assessment is inherently relative and may depend on a variety of factors, including the size of the host country's economy, the characteristics of its investment market, and the economic significance of the investment in the local context. In this respect, one possible drafting improvement would be to replace the term "high-value agreement" with "economically significant agreement". Unlike "high-value", which may suggest a fixed or absolute monetary threshold, "economically significant" would better reflect the contextual nature of the assessment and would naturally allow consideration of the size and economic circumstances of the host State. An investment that is economically significant in a small or developing economy may not have the same absolute value as an investment in a larger economy, yet may have an equally important impact in the local context. This terminology would therefore better capture the intended objective while avoiding an unnecessarily restrictive interpretation of the scope of ICCs.			
64.	**Section B,** **Principle 1**	We suggest reconsidering the characterisation of the Instrument as comprising "rules and guidance". **If the Instrument is intended to serve as "rules", it should avoid using "principles" and rebrand**. We support	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

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		such rebranding, and a re-orientation of purpose – as indicated in our Position Paper. We understand the Working Committee's decision not to define "investor", "State party" or "investment". However, some guidance on limitation on scope may be necessary to ensure that the rights and obligations imposed are proportionate to the nature and scale of the investment. We anticipate that certain investment-related contractual issues may fall outside both this Instrument and the UPICC. Principle 1(1) should therefore clarify that the Instrument addresses the specific contractual issues within its scope, while Principle 1(4) could clarify that general contractual issues not addressed by the Instrument may be addressed by the UPICC.		Platform Collective	
65.	**Section B, Principle 1; and Principle 2**	C. A NEW SET OF PRINCIPLES BY UNIDROIT – PURPOSE, LEGAL NATURE, AND MODES OF APPLICATION 1. PURPOSE The Principles and Model Clauses for International Investment Contracts are a new set of rules developed by UNIDROIT and the International Chamber of Commerce at the intersection of public international law and international commercial law. The project seeks to contribute to the application development of more modern and consistent approaches to the Instrument drafting of international investment contracts (IICs). A particular focus is placed on the relationship between the UNIDROIT Principles of International Commercial Contracts (UPICC) and provisions typically used in IICs, as well as primary on recent developments in international investment law, for including the reasons set out increasing emphasis placed on corporate social responsibility and sustainability.	EAPIL		

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		The current draft comprises eight Chapters and a total of 33 Principles. This statement by the European Association of Private International Law (EAPIL) is limited to those aspects of the PIICs that have a specific connection with private international law. 2. LEGAL NATURE When the first edition of the UPICC was published in this document 1994, their legal nature was far from clear. By choosing the term 'Principles' as the legal form, UNIDROIT had, in a sense, created a new category of uniform law. Today, more than 30 years later, the strengths and weaknesses of the UPICC are much better understood.[42] At the same time, a number of other instruments have emerged that bear the name 'Principles' but have been developed by different organisations, based on different methodologies, addressing different legal issues, and achieving very different degrees of success in legal practice. Principles of law therefore constitute a much less homogeneous category of uniform law than treaties or model laws. The mere designation of an instrument as 'Principles' does not, in itself, permit conclusions to be drawn as to its legal function or mode of operation. Rather, the particular characteristics of the respective instrument must be taken into account.[43] This is also true of the PIICs. Despite the involvement of the same organisation and the terminological affinity with the UPICC, they differ from UNIDROIT's well-known flagship instrument in several respects. The UPICC cover the entire field of general contract law and therefore need to be sufficiently flexible to apply to sales and service contracts as well as to complex and rare contract types. The new instrument, by contrast, is tailored			

[42] See, most recently, E. Brödermann and P. Mendoza Montano, 'From Soft Law Formulation to Implementation as Hard Law, The Case of the UNIDROIT Principles of International Commercial Contracts', forthcoming September 2026

[43] J. Basedow, Uniform Law (Mohr Siebeck 2024) 384.

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		to a highly specialised area of law. It must therefore achieve a considerably higher degree of adaptation for investment contracts if it is to gain acceptance among those involved in drafting such instruments. In addition, the PIICs were developed in a considerably shorter period of time than the UPICC and are not conceived as a comprehensive restatement. It would therefore be misguided to derive the legal function and practical significance of the PIICs solely from experience with the UPICC. Nevertheless, experience with the UPICC may be of considerable importance for the new PIICs. Even without specific provisions on IICs, the UPICC have already established a place for themselves in investment arbitration proceedings. The case law in this area has by now been analysed comprehensively on several occasions.[44] The experience gained from these cases can therefore serve as an important point of reference for the further development and practical application of the new PIICs. 3. MODES OF APPLICATION The best starting point for assessing how the PIICs operate is the catalogue of their modes of application contained in the PIICs themselves. This closely follows the corresponding provision in the UPICC. The Instrument should best starting point for assessing how the PIICs operate only is the catalogue of their modes of application contained in a supplementary capacity and should not independently constitute the PIICs themselves. This closely follows the contractual terms governing corresponding provision in the parties' UPICC.			

[44] P. Bernardini, 'Unidroit Principles and international investment arbitration' [2014] 19 Unif. L. Rev. 561 ff.; A. Rei- nisch, 'The Relevance of the UNIDROIT Principles of International Commercial Contracts in International Invest- ment Arbitration' [2014] 19 Unif. L. Rev. 609 ff.; M.C. Malaguti, 'Principios Unidroit a través de los laudos de arbitraje internacional de inversiones' [2023] Cuadernos de Derecho Transnacional 10 ff.; G. Cordero-Moss and D. Behn, 'The Relevance of the Unidroit Principles in investment arbitration' [2014] 19 Unif. L. Rev. 570 ff.; J. A. Moreno Rodríguez, 'The UNIDROIT Principles in investment arbitration' in B. Köhler, R. Gulati and T. John (eds), The Elgar Companion to UNIDROIT (Edward Elgar 2024) 206 ff.

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		A formal difference is immediately apparent. In Principle 2(3)uniform law, it is customary to define the scope of an instrument in its first provision (see, for example, Art. 1 CISG). In the UPICC, we suggest clarifying what however, the provision on scope was transformed, in a last-minute decision, from 'Article 1.1' into a 'Preamble' . The rationale was to emphasise the soft-law character of the UPICC.[45] A soft-law instrument cannot itself establish its scope in a binding manner. The UPICC therefore cannot prescribe their own application in certain cases or exclude it in others. In the PIICs, this consideration does not appear to have played a comparable role. Their scope is instead described in Principles 1 and 2. In substance, this different formal structure is unlikely to make a difference. Nevertheless, in the interests of coherence between the closely interconnected instruments, it may be worth considering transforming Principles 1 and 2 into a Preamble as well. Principle 2 identifies a total of seven possible modes of application. The first six largely follow the Preamble to the UPICC; para. 7, by contrast, introduces an additional function of the new Principles. a) Choice of the Principles by the Parties According to Principle 2 para. 1, ' [t]hese Principles apply to IICs where the parties have agreed that their contract shall be governed by them or where the parties have incorporated them in their contract.' Thus, as in the UPICC, the express choice of the PIICs by the contracting parties is mentioned first. Its position at the outset should not, however, be confused with its practical frequency. In the case of the UPICC, an express choice as the applicable law			

[45] G. Parra-Aranguren: 'Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts' [1995] 69 Tul. L. Rev. 1239, 1248.

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		has so far gained acceptance only to a limited extent.[46] Although corresponding cases can be found in the relevant databases, their number hardly suffices to speak of an established practice. Other modes of application play a considerably greater role in practice. The prominent position of an express choice is therefore explained less by its practical frequency than by its fundamental legal effect: such an agreement constitutes the most direct form in which the parties can make the Principles the governing regulatory framework of their contract. At the same time, a linguistic change is noticeable compared with the Preamble to the UPICC. Both instruments use the mandatory 'shall' for an express choice of law and thereby distinguish it from the less mandatory 'may' used for the subsequent modes of application. In the PIICs, however, 'shall' appears at a different point in the sentence. Whereas in the UPICC it forms part of their own claim to applicability, the new wording places greater emphasis on the fact that the application of the PIICs is based on an agreement between the parties. A practical difference is unlikely to result from this shift in grammatical focus. Indeed, the wording of the PIICs appears preferable. It is more closely aligned with the classic formulation of choice of law clauses ('the contract shall be governed by') and makes it clearer that a distinction must be drawn between the parties' agreement, on the one hand, and the resulting application of the PIICs, on the other. A second particularity is that the new Principles expressly mention the possibility of a choice by incorporation (*'materiellrechtliche Verweisung*'). The problem addressed here is already familiar from the application of the UPICC.[47] Most legal systems do not permit parties, in proceedings before			

[46] F. Dasser, 'Unidroit Principles of International Commercial Contracts (PICC): Applicability and application' in B. Köhler, R. Gulati and T. John (eds), The Elgar Companion to UNIDROIT (Edward Elgar 2024) 132, 145.

[47] R. Michaels in S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015), Preamble I para. 34.

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		state courts, to choose a non-state set of rules as the applicable law. This does not necessarily mean, however, that such a choice is entirely without effect. Rather, it may be treated as an agreement to make the PIICs part of the contract.[48] This changes their position within the hierarchy of legal sources. As contractual terms, the PIICs merely displace the non-mandatory provisions of the applicable national law; unlike a genuine choice of law, however, they remain subject to the mandatory rules of national contract law. In practice, an express incorporation of the UPICC does not play a significant role. Individual UPICC rules have occasionally been incorporated into contracts,[49] but this situation is already covered by Principle 2 para. 7 of the PIICs. Moreover, a choice of law in favour of the UPICC is frequently combined with an arbitration clause in order to benefit from the greater freedom of choice in arbitration proceedings. A comparable development can be expected for the adjudicator PIICs. b) Application as General Principles and lex mercatoria Principle 2 para. 2 of the PIICs corresponds verbatim to determine the corresponding passage in the Preamble to the UPICC. In IICs, the parties sometimes choose general principles or the *lex mercatoria* as the governing law, often in combination with national law. In this way, they seek to create a greater scope for taking account of the particularities of cross-border contractual relationships. In investment law, such an approach appears even more plausible than in commercial law. National law, uniform law and public international law typically intersect here. A mixture of such norms is therefore by no means unusual. As regards the UPICC, the prevailing view is that they cannot, as a whole, be equated with			

[48] See Recital 13 Rome I Regulation. See also UNCITRAL, HCCH and UNIDROIT, *Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts* (2021), note 56.

[49] See, e.g., Joseph Charles Lemire v Ukraine, ICSID Case no ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010).

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		either the *lex mercatoria* or general principles of law. They can, however, be used as a possible source of such principles.[50] A comparable discussion will presumably arise with regard to the PIICs. In particular, it will have to be clarified whether and to what extent they may be relied upon as an expression of 'general principles of law recognized by civilized nations' within the Instrument meaning of Art. 38(1)(c) of the Statute of the International Court of Justice.[51] c) Application in the Absence of a Choice of Law Principle 2 para. 3 governs the application of the PIICs in the absence of a corresponding choice of law. Compared with the otherwise largely identical provision in the Preamble to the UPICC, it contains a noteworthy qualification through the insertion of the words 'where appropriate'. The UPICC generally allow recourse to them even in the absence of a choice of law. Whether such objective application is permissible depends on the applicable rules of private international law. Even where those rules permit a decision on the basis of non-state rules, the situation is less clear than in the case of an express choice. The parties may, for example, have deliberately refrained from choosing a governing law because they shared the assumption that a particular national law would apply. Applying the Principles might therefore come as a surprise to them. For this reason, it has been recommended in			

[50] M.J. Bonell, *An International Restatement of Contract Law* (3rd edn, Transnational Publishers 2005) 211; UN- CITRAL, HCCH and UNIDROIT, *Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts* (2021) note 132.

[51] A.M. Steingruber, El Paso v Argentine Republic: UNIDROIT Principles of International Commercial Contracts as a Reflection of 'General Principles of Law Recognized by Civilized Nations' in the Context of an Investment Treaty Claim; [2013] 18 Unif. L. Rev. 509 ff.; G. Cordero-Moss and D. Behn, 'The Relevance of the Unidroit Principles in investment arbitration' [2014] 19 Unif. L. Rev. 570, 5

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		relation to the UPICC that arbitrators discuss this issue with both parties and give them sufficient opportunity to comment.[52] In the case of the PIICs, this issue is not sufficiently clarified by the mere insertion of 'where appropriate' . Nor does the Commentary on the provision elaborate on the point. It merely notes in general terms that contracts, and IICs in particular, today almost invariably contain a choice of law clause. The PIICs would benefit from a clarifying explanation of this issue in the Commentary. **Recommendation 1: Application in the Absence of a Choice of Law Clause** *The Commentary could clarify the applicability of the PIICs in case the underlying IIC does not provide an express choice of law clause.* d) Further Modes of Application According to Paras (4)-(6) Paragraphs 4, 5 and 6 of the new Principles again correspond verbatim to the respective passages of the Preamble to the UPICC. They therefore raise no distinct private international law issues beyond those already known from the UPICC. e) Model for Negotiators Principle 2 para. 7 of the PIICs introduces the new function of serving 'as a model for negotiators of IICs' . The UPICC did not expressly provide for a corresponding use, although their practical significance in its this respect has been emphasised in the literature on several occasions. It has been suggested, for example, that the UPICC be used as a checklist for drafting			

[52] J.A. Moreno Rodríguez, 'The UNIDROIT Principles in investment arbitration' in B. Köhler, R. Gulati and T. John (eds), *The Elgar Companion to UNIDROIT* (Edward Elgar 2024) 206, 210; E. Brödermann and P. Mendoza Montano, 'From Soft Law Formulation to Implementation as Hard Law, The Case of the UNIDROIT Principles of International Commercial Contracts', forthcoming September 2026, at fn. 107.

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		international contracts or that individual clauses be incorporated directly into contracts. They could also serve as a translation aid, given that the UPICC have been translated into numerous languages. Furthermore, they could facilitate communication between lawyers from different legal systems by providing a common point of reference for explaining rules that appear unfamiliar to the other side.[53] These functions can readily be transferred to the PIICs. Particularly in view of the different legal backgrounds of the actors involved in drafting IICs, this model function may be of considerable practical importance. D. THE RELATIONSHIP BETWEEN THE UPICC AND THE PIICS A separate and particularly important issue for practical application concerns the relationship between the new Principles and the UPICC. Principle 1 paras. 3 and 4 structures this relationship as one between *lex specialis* and *lex generalis*. Thus, insofar as the Investment Contract Principles contain special rules for IICs, those rules prevail over the general rules of the UPICC. Where, by contrast, they do not consider a modification of the UPICC necessary (para. 3), or do not regulate a particular issue at all (para. 4), the general rules of the UPICC apply on a supplementary capacity basis. UNIDROIT has adopted an approach here that it had already pursued in the Principles of Reinsurance Contract Law (PRICL). There, too, Art. 1.1.2 PRICL supplements the special rules by referring to any express agreements the general rules of contract law contained in the UPICC. While the UPICC originally refrained entirely from providing rules for specific types of contracts, the trend now appears to be towards combining them			

[53] M.J. Bonell, 'The Unidroit Principles in Practice: The Experience of the First Two Years' [1997] Unif. L. Rev. 34, 38; M. Fontaine, 'Les Principes UNIDROIT, guide de la rédaction des contrats internationaux' in Institute of International Business Law and Practice (ed.), *The UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (ICC 1995) 73 ff.; H. van Houtte, 'The UNIDROIT Principles as a Guide to Drafting Contracts', ibid., 115 ff.

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		with rules for highly specialised types of contracts. Unlike, for example, sales law, both reinsurance law and the law of investment contracts are regarded as areas with relatively low regulatory density regarding general contract law, which can sometimes make them appear difficult to navigate.[54] This makes them particularly receptive to supplementation by general principles of contract law. This structure, however, has an important consequence for the choice of law: A choice of the PIICs also entails a choice of the UPICC. The official Commentary confirms this interpretation, albeit somewhat unobtrusively at the end of para. 103 and in the comments on the Model Choice of Law Clauses (paras. 593 ff.). This consequence, in particular, appears problematic. For the contracting parties, it may come as a surprise that choosing the PIICs encompasses not only the 33 Principles adapted for IICs, but also incorporates another soft-law instrument comprising a total of 211 articles on general contract law. This may be particularly relevant where the parties intended, by choosing the PIICs, merely to 'denationalise' the national law applicable to their contract (frequently the law of the host state), without intending to incorporate an additional general body of rules into their contract. Nor can it simply be assumed that all persons involved in drafting IICs are familiar with the UPICC. Investment law is, in particular, a mixed field in which actors are often involved whose primary expertise lies in public international law rather than commercial law. Such an effect could also jeopardize or create disputes about the validity or interpretation of the IICs			

[54] For reinsurance law see D. Cerini, 'Duties and Remedies in the Principles of International Commercial Contracts (PICC) and the Principles of Reinsurance Contract Law (PRICL) – Notes for a Comparison' [2020] 25 Unif. L. Rev. 21, 25; for investment law M.J. Bonell, 'International Investment Contracts and General Contract Law: A Place for the Unidroit Principles of International Commercial Contracts?' [2012] 17 Unif. L. Rev. 141.

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		negotiated by reference to the PIICs, especially for government agencies or State-owned enterprises entering into such contracts with foreign investors. Against this background, the incorporation of the UPICC deserves support, but also warrants greater transparency. In particular, the black-letter text itself should make it clearer that a choice of the Investment Contract Principles simultaneously entails the supplementary application of the UPICC, unless the contracting parties opt out of their application in the context of an IIC. **Recommendation 2: The Relationship between the UPICC and the PIICs** *The black-letter text itself should make it clearer that a choice of the Investment Contract Principles simultaneously entails the supplementary application of the UPICC, unless the contracting parties opt out of their application in the context of an IIC.*			
66.	**Section B, Principle 1,** **Commentary para. 99**	La notion d'État, en constante évolution, ne saurait faire l'objet d'une définition statique. Au-delà de son cadre formel, l'État se définit par ses activités. L'évolution de ses activités s'accompagne parfois de l'émergence de nouvelles entités dont la qualification soulève des incertitudes. Par exemple, les fonds souverains sont des dispositifs d'investissement à vocation spéciale appartenant aux gouvernements et créés à des fins macroéconomiques. Ils détiennent et gèrent des actifs pour atteindre des objectifs financiers stratégiques, tout en adoptant diverses structures juridiques et institutionnelles. À notre connaissance, les tribunaux arbitraux n'ont pas encore eu à se prononcer sur la qualification de ce type d'entité. Dans l'affaire Rumeli c. Kazakhstan, l'État défendeur avait soutenu que les requérants ne pouvaient être considérés comme des ressortissants d'un autre État contractant, au sens de l'article 25 de la Convention CIRDI, au motif qu'il s'agissait de	Nasr Ashoush	Ph.D. holder from the University of Burgundy, France and Judge at the Egyptian Council of State	Egypt

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		sociétés contrôlées par le fonds turc d'assurance des dépôts d'épargne (TSDIF), une agence gouvernementale turque, le litige opposant in fine deux États, la Turquie et le Kazakhstan. Sans trancher explicitement le statut du TSDIF, le tribunal a rejeté cet argument. Il a considéré que les demandeurs constituaient des entités commerciales indépendantes, estimant que le degré de contrôle exercé par le gouvernement turc sur les requérants ne les privait pas de ce statut69. Étant un forum dédié au règlement des différends entre personnes privées et États, tout tribunal CIRDI doit, aux fins de sa compétence, vérifier que l'entité étatique concernée constitue soit un organe de l'État, soit une émanation de celui-ci dont les actes sont attribués à l'État. La problématique de compétence se pose également en arbitrage commercial lorsqu'une entité étatique est impliquée. La question centrale qui émerge est la suivante : qui est la partie à l'arbitrage ? L'État lui-même et/ou l'une de ses entités ? Cette entité peut être un organe de l'État, comme le gouvernement central, ou une émanation de l'État à l'image d'une société privée détenue et contrôlée par l'État.[55]			

[55] Courtesy translation into English (Secretariat): The concept of the State is constantly evolving and cannot be defined statically. Beyond its formal framework, the State is defined by its activities. The evolution of these activities is sometimes accompanied by the emergence of new entities whose classification gives rise to uncertainty. For example, sovereign wealth funds are special-purpose investment vehicles owned by governments and established for macroeconomic purposes. They hold and manage assets to achieve strategic financial objectives while adopting various legal and institutional structures. To our knowledge, arbitral tribunals have not yet had to rule on the classification of this type of entity. In the *Rumeli v. Kazakhstan* case, the respondent State argued that the claimants could not be considered nationals of another Contracting State within the meaning of Article 25 of the ICSID Convention, on the grounds that they were companies controlled by the Turkish Savings Deposit Insurance Fund (TSDIF)—a Turkish government agency—meaning the dispute was ultimately between two States: Turkey and Kazakhstan. Without explicitly ruling on the status of the TSDIF, the tribunal rejected this argument. It held that the claimants were independent commercial entities, finding that the degree of control exercised by the Turkish government over the claimants did not deprive them of that status. As a forum dedicated to resolving disputes between private parties and States, any ICSID tribunal must, for jurisdictional purposes, verify whether the State entity in question constitutes either an organ of the State or an emanation thereof whose acts are attributable to the State. Jurisdictional issues also arise in commercial arbitration when a State entity is involved. The central question that emerges is: who is the party to the arbitration? The

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67.	**Section B, Principle 1,** **Commentary paras. 99-100**	The Instrument recognizes the particular nature of IICs and their frequent connection to projects of public purpose or public interest. That public dimension is not yet reflected, however, in a sufficiently explicit reference to industrial development or public value as a legitimate objective of contractual structuring. i3T therefore proposes including the possibility that IICs contribute to legitimate objectives of productive development, innovation and the creation of public value.	i3T		Mexico
68.	**Section B, Principle 2; and** **Section D,** **Principle 3**	**Normative hierarchy and mandatory law.** Principle 3(1) establishes a hierarchy among the Instrument, express contractual terms, and usages or practices between the parties. The relationship with mandatory law should be stated with equal clarity. The draft already recognises this limit: the commentary to Principle 2 makes incorporation subject to mandatory provisions of the otherwise applicable law, and the choice-of-law commentary confirms the continuing application of mandatory national, international and supranational rules (official June 2026 consultation draft, p. 24, para. 105; p. 170, para. 597). The recommendation is therefore one of clearer placement and cross-referencing, rather than the addition of an omitted rule. **Recommended clarification.** The commentary should distinguish three categories. First, ordinary provisions of the Instrument operate as default rules that the parties may modify or exclude. Second, provisions identified by the Instrument or by the parties as non-excludable derive their contractual force from the parties' adoption of the framework. Third, mandatory and overriding mandatory rules derive their force from the	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

State itself and/or one of its entities? This entity may be a State organ, such as the central government, or an emanation of the State, such as a private company owned and controlled by the State.

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		applicable legal order and apply independently of party agreement. Constitutional rules, public-procurement requirements, budgetary controls, capacity rules and approval requirements may fall within the third category, depending on the relevant legal system. **Effect.** This clarification would preserve party autonomy without suggesting that the Instrument creates State capacity or permits circumvention of mandatory domestic requirements. It would also make clear that usages and practices cannot displace provisions the parties have retained as binding, while neither contractual terms nor usages can override genuinely mandatory external law. ***Key References.*** *Official June 2026 UNIDROIT-ICC consultation draft, p. 24, para. 105, and p. 170, para. 597; UNIDROIT Principles of International Commercial Contracts 2016, Articles 1.4, 1.5, 1.8 and 1.9.*			
69.	**Section B,** **Commentary paras. 99 and 100**	Paragraph 100 repeats the sector list discussed above and the same suggestion is respectfully made. It may also be worth observing that the functionally neutral description of the party on the State side, in paragraph 99 and in Introduction paragraph 80, fits these sectors particularly well. In aviation and space the counterparty is very often an entity of precisely the intermediate kind those paragraphs contemplate: an airports authority, a civil aviation authority, a national space agency or a State owned satellite operator, holding public assets or discharging public functions without being an organ of the State in the strict sense. The Devas and Antrix agreement referred to above is a clear example. A short illustration drawn from one of these sectors would demonstrate the intended breadth of the State side definition more effectively than the present examples, which are drawn from sectors in which the counterparty is typically a ministry or a State enterprise.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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70.	**Section B, Principle 2**	We suggest reconsidering the application of the Instrument as primary law, for the reasons set out in this document and in our Position Paper. In particular, **we strongly disagree with the suggestion in paragraph 105 that the Principles may be implied as contractual terms**. The Instrument should operate only in a supplementary capacity and should not independently constitute the contractual terms governing the parties' relationship. In Principle 2(3), we suggest clarifying what is meant by "appropriate". **In our view, this should refer to circumstances in which the Instrument is being applied in its supplementary capacity**. The Principle should also clarify that it is for the adjudicator to determine whether and to what extent the Instrument is applicable in its supplementary capacity in the circumstances of the dispute (subject to any express agreements by parties).	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
71.	**Section B,** **Principle 2**	Principle_2 Application of the Principles (1) "These Principles apply to IICs where the parties have agreed that their contract shall be governed by them or where the parties have incorporated them in their contract." Remarks: although the Commentary helps in part, this draft rule is not sufficiently clear in distinguishing its two distinct scenarios and related roles of the UPIIC. Suggested clearer alternative draft: "These Principles: apply to an IIC where the parties to it have agreed that it shall be governed by them and the relevant rules of private international law allow a choice of non-State rules; or apply, in their entirety or in part, as content of an IIC where the parties to it have incorporated them. "	Guido Carducci	Member of CEIA	Italy

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		Principle 2"(4) They may be used to interpret or supplement international uniform law instruments." One may object that, rather than the UPIIC, each international uniform law instrument decides on its own how it could be "interpreted" or "supplemented". So decided, for instance, Governments in drafting and adopting CISG, art. 7, within UNCITRAL. This draft rule (4) fails to express the need of consistency between the international uniform law instrument and the UPICC retained in such interpretative or supplementary roles. Suggested clearer alternative draft: "(4) They may be used to interpret or supplement international uniform law instruments that share similar philosophy and principles."			
72.	**Section B,** **Principle 2.1**	Principle 2 appears to establish a general rule of non-mandatory application, while the Commentary introduces mandatory UPICC provisions without clearly identifying their normative status within the IIC Principles. Following this, paragraphs 113 and 115 seem contradictory, para. 113 stating that "The rules laid down in these Principles are non-mandatory in nature. Accordingly, the parties may, in any given case, exclude their application in whole or in part, or modify their content to adapt them to their specific needs." And later on, para. 115, sentencing the exact opposite by stating that "A limited number of provisions of the UPICC are mandatory in nature (see Article 1.5 of the UPICC), i.e., their importance in the system of the UPICC is such that parties should not be permitted to exclude or derogate from them as they wish. This includes, for example, Article 1.7 of the UPICC on good faith and fair dealing (…) Since this Instrument incorporates the UPICC for issues of general contract law, those mandatory provisions of the UPICC also remain mandatory in the context of IICs". This is ambiguous and lacks clarity to avoid rendering the exclusion and modifications possibility,	Ian Signori Gorriti	Member of CEIA	Peru

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		useless. For example, let's think about a dispute scenario, the parties agree to arbitration and the contract states that the ICCs principles are to be the law of the contract. As such, the arbitrator finds that the parties agree to exclude some part of the principles dealing with sustainability or the UPICC as a whole; according to the principle, the exclusion would be valid and therefore the arbitrators must carry out like this disposition didn't exist and rely on other sources. But if they go to the commentary, then the exclusion would become invalid, given that those dispositions are mandatory. What is the arbitrator to do? Even if those exclusions were accepted as valid or invalid, the mere fact that there is such an ambiguity and lack of clarity in the text of the instrument, could generate vices in the will of the parties, and be the basis for any allegation of possible violation of rights, when applied by any adjudicator. In short, the draft does not provide sufficient guidance as to the hierarchy between the operative Principle and the incorporated UPICC provisions.			
73.	**Section D,** **Principle 2(2) – (3),** **Commentary paras. 106 – 107**	**Application of the Principles** Principle 2 goes too far when it suggests that an agreement to apply "general principles of law, the lex mercatoria or the like" may amount to a choice of the UNIDROIT – ICC Principles. The same difficulty arises when the parties have made no governing-law choice and the Principles are said to apply "where appropriate." On the Draft's own explanation, either route could end with the Principles operating as the substantive law of the contract. That is difficult to justify from an arbitral standpoint. A reference to general principles of law is not, without more, a reference to this particular instrument. General principles, lex mercatoria, transnational law and the UNIDROIT – ICC Principles overlap, but they are not interchangeable. Paragraph 106 would be safer if it treated the Principles as possible evidence or an expression of relevant general principles, rather than as an instrument	ACCOLDI		Colombia

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		the parties are "deemed" to have chosen. Paragraph 107 should also make clear that, absent party choice, any resort to the Principles remains subject to the applicable conflict-of-laws or arbitral rules and to the parties' opportunity to address the governing law. That small change matters. It would make a later due-process or excess-of-mandate objection considerably harder to sustain.			
74.	**Section B,** **Principle 2(3)**	Generally, state contracts will be governed by the domestic law of the state party to the contract. This is usually provided for in statutes or statutory instruments. If there is no explicit provision, the rules of Conflict of Laws should apply to determine de applicable law. In this context, Principle 2(3) appears to have no *effet utile.* Also, the provision gives adjudicators a power that would allow them to circumvent the applicable conflict of law rules. Finally, States may perceive this device as a new attempt to internationalisation of state contracts and add resistance to the adoption of the Instrument. In the case of the absence of a choice-of-law clause and a default provision favouring the application of the law of the state party to the contract, the Instrument could be applied after the adjudicator has determined the applicable law to interpret or supplement it as provided for in Principle 2(5)	Jorge González Carvajal	AVA	Venezuela
75.	**Section D,** **Principle 3**	As far as I know, "practices" (in other Instruments: v.gr., CISG or UPICC, see Ilustration 1 to UPICC Article 1.9) are linked mainly (as the Principle 3.1 stated) to those that the contract parties developed ("which they have established between themselves") during their contractual relationship. Paragraph 119 clarifies the limited use of "practices" in ICC context. But along the Instrument it could be identified instances where the relationships between the parties could generate practices (and eventually quite important ones). So can be seen within the area of communications	David Amable Morán Bovio	Commercial Law Professor / University of Cádiz	Spain

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		between the parties and among the investors and local communities and stakeholders (v.gr., paragraphs 232, and Model Clause 2.2.6.9.b and c). But not only in that circle. The proposal should it be to try to orientate that limited use of "practices" in paragraph 119, to be opened to other "practices" that could be evolved during the ICC contractual live.			
76.	**Section D, Principle 3**	At paragraph 119, the Commentary clarifies that a State's general contracting policy or practice is conceptually distinct from a practice established between contractual parties. We suggest that the Commentary take the logical next step and clarify that the former falls outside the scope of Principles 3(1) and 3(2). **In Principle 3(2), the "unreasonableness" standard is absent. This appears warranted and is consistent with Article 1.9(2) of the UPICC.**	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom
CHAPTER 2. GENERAL PRINCIPLES APPLICABLE TO IICS					
77.	**Section A, para. 121**	The General Principles and Model Clauses applicable to IICs should also include the following for the Investment Project: a) Conditions Precedent, b) Scope of Investment Project, c) Risks and Risk Matrix Allocation, d) Asset Register, e) Performance Standards,	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and	Zambia

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		f) Shareholders Equity, g) Project financing (equity debt; financial close; project mode – concession, joint venture, PPP, etc; concession period if applicable; interest rate; interest rate; exchange rate; escrow account; etc); and h) Compensation		National Planning	
78.	**Section B,** **Principle 4**	**Approval of modifications.** Principles 4(5) and 14 should be read in a manner that protects domestic approval requirements without making every technical amendment commercially impracticable. The commentary could invite the parties to distinguish material amendments - such as changes to the State's financial exposure, duration, scope, guarantees or substantive obligations - from administrative or technical changes that do not materially increase legal or financial exposure. Any contractual threshold must remain subject to mandatory domestic approval rules.	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India
79.	**Section B,** **Principle 4**	**4(2).** The Instrument requires an IIC to be "accessible". We suggest that this be supplemented by a requirement that the IIC also be **"comprehensible"** to the parties. **4(3).** There is a risk that a special requirement could be raised at a late stage and used to withhold approval or disrupt negotiations. We suggest requiring such special requirements to be communicated to the parties at the earliest reasonable opportunity, so that the parties can assess and plan for their potential impact on the approval process. **4(4).** An IIC should not merely be "concluded", but **"validly concluded and approved"**. Information concerning the competent bodies and applicable approval requirements should be made available to the parties at the earliest reasonable opportunity, allowing them to plan accordingly. While conclusion of the IIC may be confirmed by one of the means specified, **we suggest that confirmation must be made in one of those forms**,	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		to ensure evidence and traceability of consent. This would help avoid a situation in which the absence of an approval is invoked months later as a basis for challenging the validity of the IIC. **4(5).** The provision should expressly cover any subsequent modification, variation or amendment of the IIC and clarify that such changes must be made by mutual agreement of the parties to the underlying IIC. **Any modification, variation or amendment should likewise be validly executed and approved by the competent bodies**, with information concerning the relevant approval requirements disclosed to the parties, and should be confirmed through one of the means specified in Principle 4(4). The Model Clause should also expressly cover any modification, variation or amendment.			
80.	**Section B,** **Principle 4(1)**	The term "*such as electronic mail*" could be broadened to "*such as electronic communication*" (it would include messengers, sms, etc). Alternatively, "such as electronic mail" could be abandoned because it is absorbed by a broader term "*confirmation via electronic means*"	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation
81.	**Commentary paras. 99, 122, 128 and 160**	**Contract form and formation.** The provisions concerning the "form" of the contract may be better placed in the chapter addressing contract formation. In the case of the State or State-owned enterprises, consent is subject to the principle of legality and to compliance with the formal requirements necessary to establish that such consent has been validly expressed. Compliance with those requirements is what allows the contract to be regarded as properly formed and binding on the State party.	Jorge González Carvajal	AVA	Venezuela
82.	**Section B,** **Principle 4(4)**	By considering that the IIC is considered binding when "approved" by the competent bodies of the host state, the text could be interpreted as giving the award of the contract the same force than the contract itself. If the	José Gregorio Torrealba	AVA	Venezuela

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		contract has been awarded through a bidding process, the award should not be interpreted as granting any rights to the successful bidder. As mentioned in Paragraph 82, 128 and 150 of the Instrument, one of the features of the IICs is that they are linked to long-term, high value projects. The Instrument should be used to push for more transparency in the award of this kind of projects and therefore, the use of public bidding proceedings. Being that the case, the Instrument should reflect that the IICs are considered binding when the contract has been signed by both parties.			
83.	**Section B, Form Model Clause**	Usually, and for the purposes of accountability and transparency in dealing with public funds, the public procurement legislations have included a limit for the modification of the scope of the contracts. The idea is that the contractor and the competent public officer do not increase the scope or the amount of the contracts freely after a bidding process has been concluded. A reference to such limits should be made in the model clause. Also, it is advisable that the instrument contemplates the scenario where the contracting authority modifies the contract unilaterally for reasons of public policy or to protect or satisfy the public interest. In this scenario, the contractor should be entitled to compensation. **Recommendation:** This Contract may be modified by mutual agreement in writing. Writing includes electronic communications such as electronic mail. A modification may be confirmed by [*select one or more: physical signature, exchange of letters, secure electronic signature, or via electronic communications such as electronic mail*]. A modification shall be considered binding and in force when approved by the	José Gregorio Torrealba	AVA	Venezuela

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		competent bodies of the Host State and the Investor, as may be applicable. **The contracting authority can modify the contract unilaterally for purposes of public policy, the protection or satisfaction of public interest. In this case, the contractor shall be entited to compensation to keep the economic balance of the contract.** **A modification shall be made only in accordance with the applicable law, including any applicable public procurement or public contracting rules. In particular, a modification shall not materially alter the nature or object of the Contract, or its scope or price, where such modification would have required the Contract to be subject to a different award procedure, or to be awarded under materially different conditions, had the modified terms formed part of the original procurement or award process.**			
84.	**Section B,** **Principle 4(1)-(3); and** **Commentary paras. 127-132**	Principle 4 sets a writing requirement, treats it as met by an electronic communication, and preserves in paragraph (3) any special form requirements of the applicable domestic law at the time of conclusion. The structure is right. The Commentary stops short of drawing out what follows from it. Where the counterparty is a State, domestic form requirements are often more demanding than writing: notarisation, entry in a public register, publication, or approval by a legislative body. Non-compliance may go to validity rather than to proof. An IIC concluded by an exchange of electronic mail can therefore satisfy Principle 4(2) and still be ineffective under the law preserved by Principle 4(3). One further point. The United Nations Convention on the Use of Electronic Communications in International Contracts (2005), to which the Commentary refers for the meaning of electronic communication, has twenty-one States parties. None is a European Union Member State, and they do not include the United States, the United Kingdom, Japan or China. The Convention serves here as a definition, not as an operative instrument, and functional equivalence will	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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		usually rest on the domestic law designated by the applicable conflicts rule. Suggestion: a sentence in the Commentary making clear that Principle 4(2) governs the form of the agreement and not its validity under the law preserved by Principle 4(3), and advising parties to check the host State's form and approval requirements before relying on electronic conclusion.			
85.	**Section C**	Unlike Principle 4, Principle 5 is expressly framed as a recommendation. This should be reflected in its structure and drafting technique. Rather than merely inviting the parties to address contractual interdependence, the Principle should identify the mechanisms through which interdependence is ordinarily regulated and establish a rebuttable presumption, subject to an express opt-out.	Rodrigo Hesse	Member of CEIA	Peru
86.	**Section C**	Where two or more contracts form part of the same IIC, those contracts should be presumed to be interdependent, unless the parties expressly agree otherwise. This presumption should apply, at least, to: (i) consistent interpretation and contractual hierarchy; (ii) the applicable law; (iii) the arbitral seat; (iv) compatible institutional arbitration rules; (v) joinder and consolidation; and (vi) the allocation of risks and remedies arising from non-performance. The draft already recognizes that contractual fragmentation may generate inconsistent obligations and parallel proceedings.	Rodrigo Hesse	Member of CEIA	Peru
87.	**Section C**	The presumption should be limited to coordination. It should not, by itself, merge separate contracts, create joint and several liability, amend the rights and obligations under another contract, or extend an arbitration agreement to a non-signatory. Any such consequence should require express agreement by the parties to the affected contract. This is particularly important where the contractual network includes lenders, suppliers, subcontractors, purchasers or other third parties. Under Peruvian arbitration law, an arbitration agreement must be in writing, and its extension to non-signatories depends on the relevant circumstances establishing consent	Rodrigo Hesse	Member of CEIA	Peru

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88.	**Section C**	The Principle should also identify two specific contractual mechanisms for addressing the adverse effects of fragmentation. First, the parties should be encouraged to include consolidation, joinder and coordination provisions in all relevant contracts. These provisions should identify the applicable institutional rules, provide for a common seat and appointing mechanism, and expressly address the constitution of a multiparty tribunal. The relevant rules should adopt an equal-treatment standard in the constitution of the tribunal, consistent with the approach associated with the Dutco case. This is essential because consolidation may otherwise result in an arbitral tribunal constituted in a manner that was not accepted by all parties. The need for express drafting is reinforced by the fact that, absent agreement to the contrary, the arbitral tribunal may not consolidate arbitrations or hold joint hearings under Peruvian law. The applicable procedure must also preserve equality among the parties.	Rodrigo Hesse	Member of CEIA	Peru
89.	**Section C**	Secondly, the Principle should refer expressly to pass-through clauses and to horizontal allocation-of-responsibility provisions. In cases of vertical interdependence, a pass-through clause may allow the party suffering the loss to bring a direct claim against the party whose act or omission caused the loss, instead of requiring the first affected party to pursue a remedy against an intermediate contracting party, followed by a second claim by that intermediate party against the original wrongdoer. Such clauses should identify the relevant duties, the beneficiaries of the direct right, the available remedies, applicable limitations and defences, and the relationship between the direct claim and the underlying contracts. In cases of horizontal interdependence, the contracts may establish a regime of shared responsibility where an act or omission under one contract causes collateral harm to parties or assets connected with another contract. The parties should specify whether responsibility is several, joint and several,	Rodrigo Hesse	Member of CEIA	Peru

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		proportionate or otherwise allocated by reference to causation, control, benefit or insurance coverage. These consequences should not arise merely from the economic connection between the contracts.			
90.	**Section C**	The choice-of-law provisions should also be coordinated. The parties should be encouraged to subject the contractual network to the same governing law, unless a different law is demonstrably more appropriate for a particular contract. The same law should ordinarily govern the interpretation of the interdependence provisions, while the law applicable to each arbitration agreement and any mandatory rules should be addressed expressly. The draft already acknowledges the desirability of a common governing law while recognizing that specific contracts may require a different law.	Rodrigo Hesse	Member of CEIA	Peru
91.	**Section C,** **Principle 5**	**Interdependent project contracts.** Principle 5 correctly recognises that an IIC may form part of a wider network of interdependent project contracts. The June 2026 draft already includes a detailed Model Clause addressing interdependence, including consequences of non-performance or invalidity, governing law and dispute resolution (official draft, pp. 31-33, paras 138-141 and the accompanying Model Clause). The issue is therefore not the absence of legal tools, but whether the available options are sufficiently complete and adaptable for complex projects. **Recommended additions.** The Model Clause could present modular options addressing: (i) identification of project contracts and their order of priority; (ii) conditions precedent across contracts; (iii) cross-default, cross-termination and suspension; (iv) the consequences of invalidity, amendment or termination of one agreement for the others; (v) information-sharing and notice; and (vi) coordinated dispute-resolution mechanisms. No consequence should automatically extend to a contract whose parties have not consented to it.	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		Multiple parties and legal systems. Project agreements may involve different parties, governing laws and fora. The commentary should therefore warn that a clause in one contract cannot, by itself, amend another contract, bind a non-party or create arbitral consent. Parties seeking a coordinated regime should use consistent clauses across the relevant agreements and obtain the consent of every affected party. The Model Clause should also offer a fallback rule for inconsistent provisions while preserving mandatory law. ***Key References.*** *Official June 2026 UNIDROIT-ICC consultation draft, pp. 31-33, paras 138-141 and the Model Clause on interdependent contracts.*			
92.	**Section C,** **Principle 5**	E. THIRD-PARTY ISSUES In their various parts, the PIICs recognize that international investment contracts are frequently embedded in a network of interdependent contracts and relationships that extend beyond the original signatories, and emphasize the need for procedural coordination through multi-tier dispute-resolution mechanisms, waivers of parallel remedies, and consolidated counterclaims. This approach is commendable as a means of achieving legal certainty and avoiding fragmented or inconsistent outcomes. However, there are several respects in which the PIICs do not sufficiently address the consequences of such choices under private international law, particularly where those choices interact with rules of a different nature (public international law, mandatory rules, sovereign immunity) or apply differently depending on whether the applicable law is chosen by the parties, determined by an arbitral tribunal, or determined by a domestic court. Third-party issues under the PIICs raise four main distinct private international law issues, discussed in turn in the following sections. 1. INTERDEPENDENT CONTRACTS	EAPIL		

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		Principle 5 rightly encourages parties to regulate the interdependence of multiple contracts forming a single investment project, including by aligning their governing law and dispute resolution clauses.[56] However, the commentary does not address what should happen where such coordination is imperfect or absent — a situation that is common rather than exceptional. Where connected contracts are ultimately governed by different laws or referred to different dispute resolution fora, a form of *dépeçage* ensues, which the PIICs do not currently discuss. The commentary could indicate a default interpretive rule/approach (presumption of consistency, the effect utile principle, or a hierarchy-of-contracts default: for instance, a presumption that ambiguous terms or absence of certain provisions in some of the contracts for the same project are to be interpreted consistently with the 'contract governing the overall investment) to reduce the risk that formal fragmentation defeats the parties' economic intentions, as Principle 5 itself recognizes may occur (paras. 134-136).[57] **Recommendation 3: Interdependent Contracts** *The Commentary should indicate a default interpretive rule/approach (presumption of consistency, the effect utile principle, or a hierarchy-of-contracts default to reduce the risk that formal fragmentation defeats the parties' economic intentions, as Principle 5 itself recognizes may occur (paras. 134-136).* 2. THIRD-PARTY BENEFICIARY RIGHTS A further, more fundamental issue concerns the enforceability of rights conferred on non-signatories, in particular local communities, through contractual mechanisms such as grievance mechanisms or community			

[56] S. Vogenauer in idem (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015), Ch. 5, Sec.2.

[57] UNIDROIT, Working Group on International Investment Contracts, 7th Session, Summary Report, Study L-IIC WG7 Doc 4, parr. 91-93.

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		benefit agreements. Those mechanisms presuppose that the applicable law recognizes rights in favour of non-signatories. This is not universal: while many civil law systems permit a stipulation *pour autrui* (cf. UPICC Arts. 5.2.1-5.2.6), a number of common law systems traditionally adhere to privity of contract, subject to statutory exceptions.[58] The PIICs do not clarify (i) whether they intend the UPICC provisions on third-party rights to apply by default under Principle 1(4), or (ii) how a contractual third-party mechanism interacts with rules of the host State protecting the same interests (environmental, human rights, or community-protection legislation) that may qualify as overriding mandatory provisions, applicable irrespective of the law chosen to govern the IIC. The commentary to Principle 5 might consider expressly addressing both points, rather than leaving them to be inferred from Principle 1. **Recommendation 4: Third-party Beneficiary Rights** *The Commentary to Principle 5 should expressly address: (i) whether they intend the UPICC provisions on third-party rights to apply by default under Principle 1(4), or (ii) how a contractual third-party mechanism interacts with rules of the host State protecting the same interests (environmental, human rights, or community-protection legislation) that may qualify as overriding mandatory provisions, applicable irrespective of the law of the IIC.*			
93.	**Section C,** **Principle 5 and Accompany**	The Principle should clarify what is meant by **"interdependence"**. If the purpose of the Instrument is to provide guidance to parties, the relevant concepts should be sufficiently descriptive to allow parties to identify when contracts forming part of an investment project are interdependent and what consequences should follow from such interdependence.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

[58] H. Kötz, *European Contract Law* (2nd edn, OUP 2017); S. Vogenauer in idem (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015), Artt. 5.2.1 - 5.2.6.

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	ing Model Clause	**In particular, we suggest considering whether the Principle should refer to "material interdependence"**, rather than interdependence generally. Investment projects will routinely involve contracts that have some degree of factual or commercial connection. Not every such connection should require coordination of contractual terms. The Principle should therefore identify the circumstances in which interdependence is sufficiently material to warrant coordination, for example where the performance, validity, enforceability or termination of one contract materially affects the performance of another contract forming part of the investment project. The Principle should also identify, on a non-exhaustive basis, the contractual matters that may require coordination as a consequence of such material interdependence. The Commentary already identifies matters including interpretation, non-performance, invalidity, illegality or unenforceability, choice of law and dispute resolution (paragraph 123). We suggest that these matters be reflected in the Principle itself. A descriptive, non-exhaustive approach would be consistent with the drafting approach adopted in the UPICC, including Article 3.3.1(2). **The Principle should then provide that, where material interdependence exists, the parties shall consider and, where appropriate, regulate the relationship between the relevant contracts**. Without such a prescription, the Principle risks remaining largely aspirational, despite the importance of contractual coordination to the coherence of governing law, dispute resolution and contractual remedies. The Principle should refer to an **"investment project"**, rather than an IIC. In practice, an investment project is likely to comprise a suite of contracts, only some of which may constitute IICs. We therefore suggest that the Principle provide: **"Where an investment project consists of multiple contracts, the parties to an IIC shall…"**			

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		The Principle should also address the position of **third-party contracts**. Parties to an IIC may regulate the relationship between themselves in relation to interdependent contracts to which they are both parties. Where an interdependent contract involves a third party, however, the parties to the IIC cannot directly regulate the contractual relationship between the third party and another party. We therefore suggest that the Principle clarify that, where appropriate, parties to an IIC should **procure, to the extent contractually possible, that the interdependence of relevant contracts is taken into account in contracts concluded with third parties**. An example clause could be, **"Where an investment project involves contracts with third parties that are materially interdependent with an IIC, the parties to the IIC should, to the extent contractually possible, procure that such interdependence is appropriately reflected in those contracts."** **Model Clause** We suggest replacing **"complex of contracts"** with **"suite of contracts"**. We do not consider that paragraph (4), concerning termination, operates appropriately. Termination should be governed by the termination provisions of the relevant contract. The unenforceability of an interdependent contract may constitute a trigger for termination where the applicable contractual provisions so provide – but this must be contractually agreed each time and under each contract. We suggest deleting paragraphs (5) and (6). These provisions are not drafted as operative contractual terms, but rather resemble explanatory or preambular provisions.			

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		Instead, the Model Clause could include an operative provision requiring the **choice-of-law and dispute-resolution provisions of interdependent contracts to be aligned, to the extent appropriate, with those contained in the IIC designated as the primary contract**.			
94.	**Section C,** **Principle 5,** **Model Clause 6**	The current text does not appear to have an effect different than to highlight that there are different contracts and different dispute resolution clauses. The clause should create an obligation for the coherent interpretation of the dispute resolution clauses and even the possibility to consolidate claims arising out of different interdependent contracts and arbitral proceedings.	Jorge González Carvajal	AVA	Venezuela
95.	**General comments on sustainability**	**C. Make Sustainability Obligations Clear and Operational** Sustainability obligations should be clearly defined, proportionate to the nature and risk of the investment, measurable where practicable, aligned with applicable standards and capable of monitoring and enforcement. The draft should avoid excessive reliance on "best efforts", "endeavour", "preferably" or optional language where a clear contractual obligation is appropriate. **K. Stakeholder and Community Considerations** Project-affected communities and other relevant stakeholders should be appropriately recognised, especially in projects involving land, infrastructure, natural resources and essential services. The framework should, however, provide defined procedures and responsibilities so that community engagement does not create indeterminate or unlimited liability.	KNCCI		Kenyar
96.	**Section D,** **Principle 6**	In recent months, several advisory opinions have been issued. Two of the most significant are the Advisory Opinion of the International Court of Justice (ICJ) and the Advisory Opinion of the Inter-American Court of Human Rights (IACtHR). It is worth paying attention to both advisory opinions because, although they address the same subject—which is even regarded as a matter	Sergio García Long	UNIDROIT Correspondent for Peru	Peru

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		of universal concern—their scope differs. This distinction is noteworthy: while the ICJ has a broad jurisdictional reach, the IACtHR focuses on the Americas. This factor should not be overlooked, as the IACtHR's opinion goes further in its substantive content—possibly due to the greater need for environmental protection in developing nations. For instance, the IACtHR's advisory opinion refers to a healthy climate, a concept not yet mentioned in the ICJ's advisory opinion. These developments should be viewed as essential background and an opportunity to refine the text of Principle 6, which remains overly broad in its use of terms such as "environment", "sustainable", "climate change", and the like. More specific concepts should be incorporated — particularly those promoting enhanced environmental protection, a matter of urgent contemporary importance. Furthermore, regarding Principle 10, mention is made of preventive measures alongside mitigation measures. Therefore, it would be appropriate to include "prevention" in Principle 6(2).		Pontifical Catholic University of Peru	
97.	**Section D, Principle 6**	The Principle should be anchored in the **sustainability objectives and obligations of the host State**, and in the assessment of the investment's actual and potential impacts. **6(1) – Impact assessment and scope of sustainability matters.** Rather than requiring parties to "consider" unspecified "factors", the Principle should require the parties to **assess the environmental, social, governance and human rights impacts of the investment in the host State**. This would give 6(1) determinate content and establish a clearer connection with Principle 11 on impact assessment. The enumeration of sustainability matters should also be made **consistent across the Instrument**. The relevant subject matter is currently expressed differently in at least six places:	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		• Principle 6(1): environmental, social, governance and human rights; • Principle 6(3): human rights, environment, health and safety of people and workers, protection and development of local communities, and anti-corruption; • Principle 11(1)–(2): environmental (including climate change), social and human rights; • Principle 22: environmental, social, human rights and climate-change-related matters; • Principle 23(3): human rights, public health, environment, climate change and labour standards; and • Paragraph 25: human rights, environmental protection (including climate change), social responsibility and good governance (including anti-corruption). No two formulations are identical. In particular, health and safety, climate change, public health and anti-corruption appear inconsistently across the provisions. As Principle 6 appears to provide the foundation for the sustainability provisions that follow, we suggest that its enumeration should provide a coherent baseline for the Instrument, with subsequent provisions adopting the same terminology. Where the UPICC prescribes the content of a standard, it generally does so with greater precision; a similar approach would improve consistency and predictability here. **6(1) – Nature of the obligations.** Paragraph 148 confirms that the language of Principle 6 is aspirational. In our view, this is difficult to reconcile with the stated objective of providing guidance capable of influencing			

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		contracting practice. The Principle should instead be sufficiently **prescriptive and operational** to guide implementation. We suggest distinguishing between the two sources of applicable standards by reference to their **legal character**, rather than their relative stringency: (a) the parties shall pursue the investment in accordance with the applicable domestic law of the host State, including its mandatory rules; and (b) the parties shall endeavour to pursue the investment in accordance with the international standards identified in the IIC concerning responsible business conduct, sustainable investment and climate change. The Principle should further state, in operative terms, what the Commentary currently states in explanatory terms: that the applicable international standards should be **clearly identified in the IIC and relevant related contracts**. **6(3) – Proportionality.** We suggest that paragraph (3) provide that the parties shall include in the IIC sustainability obligations appropriate to the **size, scale, duration, sector, nature and impact of the investment**, directed towards enhancing its social, economic and environmental benefits for the host State. This important qualification appears in the Commentary but should be reflected in the Principle itself. **Responsible business conduct plan** We suggest introducing a requirement for the investor, in cooperation with the State party, to develop a **responsible business conduct plan** identifying the metrics by which the investment's contribution to the sustainable development objectives of the host State is to be assessed. Principle 21 requires monitoring and reporting on the implementation, updating and adaptation of sustainability obligations, but does not identify a			

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		benchmark against which implementation is to be measured. Paragraph 146 refers to monitoring against the attainment of the UN Sustainable Development Goals. A responsible business conduct plan would provide the necessary link between the objectives identified at the outset and subsequent monitoring. The plan should be distinct from, although prepared alongside, the management and mitigation plan contemplated by Principle 11(2), which is directed primarily towards mitigating adverse impacts rather than measuring positive contributions. The terminology of "responsible business conduct" is also consistent with the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct referred to in paragraphs 149, 210 and 229. **State obligation to provide information** The Principle should also impose an obligation on the State party to make available to the investor information reasonably necessary to comply with applicable domestic law and the international standards identified in the IIC. This could include a designated point of contact or information facility. The compliance obligations contemplated by the Chapter cannot be meaningfully discharged without access to applicable regulatory requirements, permitting procedures and relevant baseline environmental and social information, much of which will be held by the State. The Instrument already recognises elements of such an obligation. Paragraph 220 contemplates investment facilitation mechanisms; paragraph 540 refers to one-stop shops and ombudspersons; the Model Clause to Principle 19 requires the State to make available specified government-held information; and paragraph 242 recognises that the State may have superior access to relevant local information.			

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		We suggest consolidating these elements into an express obligation in Principle 6, supported by a Model Clause. This would also address an imbalance in the Chapter: Section D.2 contains extensive Model Clauses addressing investor obligations, but none addressing corresponding obligations of the State party, notwithstanding that Principle 20 is expressly framed in terms of "Joint obligations". **"Implying commitments"** The final sentence of paragraph (1) states that the Principle "is to be understood as implying commitments for each party", without specifying the nature or source of those commitments. This formulation risks suggesting that the Principle itself generates contractual obligations, which appears difficult to reconcile with paragraph 143, which describes the Principle as having interpretative value and informing the specific obligations contained in the contract. We suggest that the Principle identify the relevant commitments expressly: namely, the due diligence obligations under Principle 11, the responsible business conduct plan described above, and the sustainability obligations specifically incorporated by the parties into the IIC. **Status and function of the Principle** The register of Principle 6 should also be clarified. Paragraph 143 states that Principle 6 is intended to be reflected in the preamble of the contract and to have interpretative value. However, a provision that prescribes matters to be assessed, requires identification of applicable standards, requires preparation of a plan and imposes an information obligation on the State party is more appropriately framed as an **operative provision** than as preambular material.			

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		We suggest the Principle be treated as operative, with the Model Preamble language in Section H of Chapter 2 carrying the interpretative function. That is a clearer division than the present arrangement, in which a Principle drafted in mandatory terms is described in the commentary as intended for the preamble. **The parties may also wish to address capacity-building commitments** as part of the sustainability framework, including commitments concerning local employment, training, skills development and technology or knowledge transfer. Such commitments should be calibrated to the nature of the investment and the availability of relevant skills in the host State. The Instrument should avoid assuming that local hiring or other localisation requirements are necessarily appropriate in every investment, while recognising their potential importance to the developmental objectives of particular investments. Where local employment commitments are adopted, parties should also consider the circumstances in which specialised personnel may be recruited from outside the host State, particularly where the requisite skills are not reasonably available locally.			
98.	**Section D,** **Principle 6**	**Principle 6: Sustainable Investment** The overarching commitment to sustainable investment referred to in paragraph 143 is, in my view, the type of commitment that should primarily be reflected in a State-to-State IIA. The same observation applies to the other general principles and commitments discussed in the following sections. These overarching policy commitments are particularly well suited to treaty instruments negotiated between States. The reason is that State-to-State IIAs are negotiated within a public international law framework and are generally subject to greater transparency and public scrutiny. This institutional setting makes it more likely that commitments relating to sustainable development, environmental	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy Advisory Consultant	Lebanon

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		protection, labour standards, human rights and other public policy objectives will be retained in the final agreement. By contrast, investment contract negotiations take place between a State and an individual investor, often in a confidential setting. Where the host State might have limited bargaining power or is under significant economic pressure, broader public policy commitments may be more susceptible to dilution, omission or adaptation to the specific circumstances of the investment project. This distinction does not imply that IIAs invariably include such commitments or that investment contracts should not. Rather, it reflects the different functions, negotiating dynamics and institutional contexts of the two instruments. The rationale is twofold. First, in a State-to-State agreement, each State is generally more willing to commit to the highest international standards—or even beyond (see comments below)—without being confronted with the bargaining power of a multinational investor seeking to assume the lowest possible level of commitment. Second, IIAs are public instruments. As such, they carry reputational implications, and States have an interest in demonstrating their commitment to high international standards.			
99.	**Section D,** **Principle 6**	**Principle 6: Sustainable Investment** Another point I would like to raise concerns the guidance provided in the instrument regarding the expression "the highest international standards." The guidance explains that this wording does not exclude situations where domestic standards are higher, stricter, or more ambitious. If that is the intention, why not reflect it directly in the text of the preamble by referring to "the highest international or domestic standards, whichever is more ambitious"? This would provide greater clarity and ensure that the commitment always refers to the highest applicable standard.	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy Advisory Consultant	Lebanon
100.	**Section D,**	The reference to the "highest international standards" creates some uncertainty, particularly for long-term investment contracts. As the	Enrique Márquez	Member of CEIA	USA

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	Principle 6(2); and **Commentary paras. 147-149**	Commentary recognizes, those standards may come from different sources, may include both hard and soft law, and may change over time. Paragraph 149 helps address the issue by encouraging the parties to identify the standards that apply to their project. The Instrument could go one step further and encourage the parties to state how conflicts among standards will be resolved and whether later amendments or successor standards will apply. That would give the parties greater certainty without limiting their ability to adopt demanding sustainability commitments.			
101.	**Section D,** **Principle 6(1); and** **Commentary paras. 143 and 145**	Principle 6(1) could be clearer about the legal effect of the commitments it describes. The text states that the Principle implies commitments for each party, while paragraph 145 further distinguishes the softer language of Principle 6 from the binding sustainability obligations set out elsewhere in the Instrument. These formulations could lead to different views on whether Principle 6 creates an independent contractual obligation. The text should clarify whether the Principle itself is intended to be enforceable or instead to guide interpretation of the parties' specific sustainability obligations.	Enrique Márquez	Member of CEIA	USA
102.	**Section D,** **Principle 6**	**Selection and legal effect of sustainability standards.** Principle 6 appropriately treats sustainability as a fundamental aspect of an IIC. Its commentary already explains that the parties 'shall endeavour' to follow the highest international standards, that those standards may include hard and soft law, that they may evolve over time, and that implementation should take account of the parties' size and means (official June 2026 consultation draft, pp. 34-35, paras 143-145). The remaining issue is operational: how should parties select among competing international, national and sector-specific standards, and what legal effect should each selected standard have? **Recommended drafting.** The Model Clauses should encourage the parties to identify the applicable standards in the IIC or an annex and to specify	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		whether each standard: (i) is incorporated as a binding contractual obligation; (ii) informs an existing duty, such as reasonable efforts or due diligence; or (iii) serves only as voluntary guidance or evidence of reasonable conduct. Mandatory domestic law and any stricter standard expressly agreed by the parties should remain unaffected. **Changes over time.** Where an external standard may be amended during a long-term project, the contract should state whether the incorporated version is fixed or automatically updated. If updating is permitted, the clause should include notice, consultation and adaptation procedures, together with an allocation of resulting costs. This would preserve the draft's intended flexibility while reducing uncertainty about the content and timing of contractual obligations. ***Key References.*** *Official June 2026 UNIDROIT-ICC consultation draft, pp. 34-35, paras 143-145; OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023); International Finance Corporation, Performance Standards on Environmental and Social Sustainability (2012).*			
103.	**Section D,** **Principle 6; and** **Commentary paras. 143-149**	The benchmark for sustainability is the set of highest international standards that the parties identify in the contract or an exhibit, drawn from instruments such as the UN Guiding Principles, the OECD Guidelines and the UN Global Compact. Nevertheless, Host State law enters through Principle 8 and the reservation of mandatory rules, which leaves domestic standards operating as a floor beneath a negotiated international benchmark. i3T suggests that the law of the host State, as it stands and as it develops, be stated as the reference against which performance is assessed, with international instruments supplementing that law where applicable. Consideration should also be given, wher14e relevant to the nature of the project, to sustainable productive development, productive and	i3T		Mexico

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		technological capabilities, innovation, local supplier development, supply chain resilience and the creation of public value.			
104.	**Section D, Principle 6, Para. 148, footnote 6**	It was not entirely clear what the term "human, social rights" refers to. If the intention is to emphasize the labour dimension, the formulation "human rights and labour rights" may be preferable. Furthermore, the footnote currently mentions a selection of ILO Fundamental Conventions ("the Forced Labour Convention; the Freedom of Association and Protection of the Right to Organise Convention; the Occupational Safety and Health Convention"), but it was not clear on what this selection was based. It would be preferable to refer to all ILO Fundamental Conventions here: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Occupational Safety and Health Convention, 1981 (No. 155); Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).	ILO		
105.	**Section E,** **Principle 7**	The obligations under this Principle should be anchored in **compliance with applicable law**. Without such a reference point, the scope of the obligation is uncertain. This is consistent with our comments on Principle 6: the first point of reference should be applicable law, most likely the mandatory laws of the host State. The Principle should also require the parties to an IIC to **identify clearly the international anti-corruption standards with which compliance**	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		is contractually required. This would provide greater certainty as to the standards against which compliance is to be assessed. We question why, notwithstanding the Commentary's recognition that an audit right may be difficult to obtain, the Principle does not expressly contemplate a **contractual corruption audit right**, the parameters of which are agreed by the parties. The Principle should clarify how such a right is to operate where exercised by a private investor against a State party, and vice versa, having regard to the potential asymmetry of power and access to information. For example, the parties could agree in advance on access to specified categories of documents and periodic reporting sufficient to enable investigation of suspected corruption. As currently drafted, it is unclear how the audit right would be practically exercised by a private investor against a State party, creating a risk that the provision operates primarily for the benefit of the State. **Model Clause** The Model Clause does not identify the standard against which the **sufficiency of remedial action** is to be assessed. An objective standard should be provided. This is particularly important where corruption affects an investment outcome rather than merely resulting in a discrete contractual breach. For example, if corruption causes an investor to lose a renewal tender, the Model Clause should clarify what remedy is contemplated: compensation, cancellation or re-running of the tender process, or another contractual remedy. **The Model Clause should provide a sufficiently clear test for determining whether preventive measures are adequate.** Consideration could be given to whether the measures identified in Article 11 of the ICC Rules on Combating Corruption 2023 provide an appropriate benchmark.			

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		The termination trigger in paragraph 3 should also be clarified. In particular, it should be clear whether the occurrence of the specified event produces immediate termination or instead triggers the termination mechanism under the relevant contract, including any applicable notice or cure requirements. Finally, the Model Clause should clarify the basis on which **contractual consequences** are to be determined. If the consequences are to be determined by an arbitral tribunal, the Clause should identify the contractual or other objective criteria against which the tribunal is to assess the appropriate consequence. As drafted, it is unclear how such consequences are to be determined.			
106.	**Section E,** **Principle 7; and** **Commentary paras. 150-152**	Principle 7 addresses both an IIC procured through corruption and corruption occurring during performance, but the consequences may be quite different. The Model Clause generally provides for notice and an opportunity to take remedial action before suspension or termination. That approach may work for some misconduct during performance, but corruption in procuring the IIC may affect the validity of the contract from the outset, particularly where mandatory law applies. The Instrument should distinguish these situations and clarify how the Model Clause interacts with rules governing the validity of a contract procured through corruption.	Enrique Márquez	Member of CEIA	USA
107.	**Section E,** **Principle 7,** **Model Clause Option 1 para. 4; and**	The remedies in Options I and II should be aligned unless the difference is intentional. Option II expressly preserves the non-breaching party's right to compensation for damages following suspension or termination, while Option I does not contain comparable language. Because the two options provide alternative means of implementing the same anti-corruption framework, the difference creates uncertainty as to whether different remedial consequences are intended. If no substantive distinction is intended, Option I should include the same reservation of the right to damages.	Enrique Márquez	Member of CEIA	USA

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Option 2 para. 3				
108.	**Section E,** **Principle 7,** **Model Clause Option 1 para. 4;** **Option 2 para. 3; and** **Commentary para. 155**	Related to the comment on Principle 7 above, the Model Clause could provide clearer guidance on what types of corruption are capable of remedial action. Paragraph 155 recognizes that many illicit practices can be remedied without ending the contractual relationship. That will not necessarily be true where the corrupt conduct affected the award or formation of the IIC or where applicable mandatory law requires a particular consequence. The Commentary should make clear that the opportunity to remedy a breach does not override consequences imposed by applicable mandatory law.	Enrique Márquez	Member of CEIA	USA
109.	**Section F,** **Principle 8**	The scope and function of this Principle should be clarified. As drafted, the term **"specific arrangements"** is ambiguous and could encompass arrangements of a purely internal or contractual nature. However, the Commentary appears to contemplate arrangements involving public bodies and operating as a **lex specialis**. We suggest that the Principle clarify the nature of the arrangements to which it applies. The requirements applicable to such arrangements should also be clarified. Where the relevant arrangement involves a State or public body and is intended to operate as a lex specialis, it may be necessary to distinguish between approval and **ratification or other formal requirements necessary for its validity under applicable law**. The Principle should not assume that approval alone is sufficient.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		We also suggest clarifying whether "specific arrangements" refers to (i) arrangements having a special legal status under applicable public law, or (ii) arrangements that have been translated into contractual terms in the IIC. The Commentary at paragraphs 166–167 appears to emphasise the allocation of risk arising from such arrangements, whereas the Principle itself does not presently allocate that risk. If the intention is to allocate this risk to the State party, the Principle should provide that, where an IIC has been **validly concluded and approved in accordance with Principle 4**, the State party shall ensure that any specific arrangements incorporated into the IIC as contractual terms have been duly authorised and are legally valid and enforceable, subject to applicable mandatory law. Finally, the Principle should recognise that whether a particular arrangement constitutes an applicable lex specialis, and whether it has the requisite legal effect, may itself be a matter of legal interpretation. The Principle should therefore distinguish between the **existence and validity of the arrangement** and the subsequent question of its legal interpretation and application.			
110.	**Section F,** **Principle 8**	**Principle 8: Specific arrangements duly approved by the competent bodies** This Principle will surely not be applied in the same way depending on whether the host State has strong public-sector institutions and well-established administrative and constitutional processes, or whether it has weaker public-sector institutions and less established processes. In fact, my concern would be that, if financial or taxation measures are included in the ICC, this could automatically trigger the need for parliamentary approval. In a country with unstable or insufficiently established legislative and regulatory processes, this could result in a	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy Advisory Consultant	Lebanon

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		cumbersome process that might become subject to, and ultimately a victim of, political tensions in the host State. As a result, ratification of such an ICC could be delayed or even prevented for reasons unrelated to the investment, or only indirectly related to it, and which may not be rational from an investment perspective. This is an additional concern to the one I raised previously regarding the fact that the negotiation of an ICC could become a bargaining process, depending on which party has greater negotiating leverage. Here again, in countries with weak public institutions or limited bargaining power, there is a risk that a multinational company could effectively impose its own terms on the host State. Moreover, commitments and measures that the investor is expected to undertake throughout the life of the investment, as well as measures that the public sector may be required to implement, might remain merely "ink on paper" if the relevant measures are not adequately supported, facilitated, or enabled by the applicable regulations and by the mechanisms for their implementation on the ground. In the absence of such an enabling framework, it may simply be impossible to implement the commitments in practice. As an instance, #188, 'an thorough evaluation of the Environmental, social, and human rights impact of the investment' is a case in point. In many countries, there is not even a clearly established benchmark or regulatory framework defining the minimum level of environmental assessment or the scope of the environmental obligations that a company is expected to meet vis-à-vis the host State. In such circumstances, including an environmental commitment in an ICC does not necessarily mean that the commitment can be effectively implemented or monitored in practice.			

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		In fact, #164 confirms that the measures included in the ICC, and the ICC itself once signed, will remain valid notwithstanding the fact that they may deviate from rules of the host State that are generally applicable in the relevant area. However, this raises an important practical concern: the host State must have supervisory and regulatory bodies with the capacity to monitor and verify that the commitments undertaken under the ICC are duly implemented. Another concern is that an ICC could become an excessively long and complex instrument, incorporating a wide range of commitments and detailed provisions. This could make the agreement difficult for both the investor and the host State to follow, monitor, and implement throughout the life of the investment, particularly as circumstances and regulatory requirements evolve. Furthermore, as reflected in Principle 21, the implementation of an ICC may itself require a substantial institutional and administrative framework on the ground, with several mechanisms having to be established to monitor compliance with the agreement. This raises a broader question as to the proportionality of such an approach: how large or significant would an investment need to be to justify the time, resources, and institutional arrangements required? As noted previously in the commentary, the negotiation of an ICC could itself take several years, followed by the establishment and operation of the mechanisms necessary to monitor and implement it.			
111.	**Section F,** **Principle 8; and**	**Specific arrangements approved by competent bodies** The phrase "valid and enforceable" is doing too much work here. Approval by the competent bodies is relevant, but it should not be presented as conclusive.	ACCOLDI		Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Commentary paras. 160 – 166	Parliamentary approval, or approval by another public authority, does not necessarily cure every defect affecting an investment contract. Constitutional limits, procurement requirements, anti-corruption rules, fiscal competence, rules governing public property and other mandatory public-law constraints may still apply. The point is not merely theoretical. In an arbitration, an investor could invoke Principle 8 to argue that the validity of a fiscal or regulatory commitment was settled once and for all by the approval process. I would qualify the sentence rather than discard it. For example: "shall be recognised as valid and enforceable to the fullest extent permitted by the applicable constitutional, administrative and other mandatory rules of the host State." This keeps the practical value of Principle 8 while avoiding the implication that official approval operates as a complete validation mechanism.			
112.	**Section G,** **Principle 9**	In our view, the first prescription under this Principle should be that the parties establish clear and specific notice provisions, including the relevant address, place of business and designated recipient for notices. In relation to Principle 9(3), we suggest clarifying that the rules set out in that paragraph apply only in the absence of clearly defined contractual notice provisions. This is important because, where the contract specifies a place of business or address for notices, receipt should ordinarily be determined by reference to that provision. An investor may also have multiple places of business, making a default rule based on a party's place of business potentially uncertain. This ties back to our comment that the Principles shouldn't aim to be the UPICC, but be formulated as guidance on understanding the purpose behind specific contractual mechanisms.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		The Principle should also address the consequences of defective, late or ineffective notice. In particular, it should clarify the position where effective notice cannot reasonably be given—for example, because the relevant ministry or government office is inaccessible, or the designated recipient has left office. We suggest that the Commentary address circumstances in which a party has taken reasonable steps to give notice but is nevertheless unable to effect delivery in accordance with the Principle or the contract, including whether such reasonable efforts may be sufficient to preserve the legal effect of the notice. In the Model Clause, we suggest that the reference to informal communications should also be subject to a delivery requirement, rather than requiring only that the communication be in writing. This would help distinguish the existence of a written communication from its effective receipt			
113.	**Section G,** **Principle 9(2)**	Should there be a provision on the parties' responsibility to keep information about their address/responsible persons up to date? In relation to public bodies of a Host State, this information may change from time to time due to reorgs in the system of public bodies, their names and responsible persons. The proposed language "For the purpose of paragraph (2), a notice "reaches" a person when delivered at that person's place of business or mailing address indicated in the IIC or by any other means agreed by the parties."	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation
114.	**Section H,** **Commentary paras. 173-184**	**Model Preamble Language** **Paragraph 1.** We suggest that the opening paragraph be anchored in the objective of furthering the development goals and priorities of the host State, rather than in a general expectation that an investment should generate benefits for the host State. The latter may create an open-ended and potentially disproportionate burden on the investor. The preamble should	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		instead frame the relationship in terms of identified host-State objectives and proportionate responsibilities of the parties. **Paragraph 2.** The word "complex" appears to be missing. In addition, "peculiarities" is vague and could be replaced with "complexity", which more clearly describes the characteristics of international investment projects. **Paragraphs 4, 5, 7 and 8.** These paragraphs appear to be repetitive and could be consolidated into two paragraphs. The first could address the requirement that investments comply with applicable domestic laws and contribute to clearly identified goals of the host State. The second could address the parties' endeavour to comply with clearly identified international standards relating to responsible investment and sustainable development. **Paragraph 6.** The reference to ensuring that the "freedom of investment" should be guaranteed is unclear. We suggest clarifying what this is intended to mean. If the intention is to promote investment while ensuring an appropriate framework of legal protection and predictability, this should be stated expressly. **Paragraph 9.** In our reading, cooperation and good faith are distinct standards. We therefore suggest that the paragraph refer to the parties cooperating and acting in good faith, rather than treating cooperation as an aspect of good faith. **Paragraph 10.** We suggest recognising expressly that the predictability and stability of the conditions governing an investment are essential to the successful performance of the investment obligations assumed under the contract. This would also provide an appropriate counterbalance to the obligations placed on investors elsewhere in the Instrument. **Risk allocation and proportionality.** More generally, we suggest that the preambular language expressly recognise the importance of appropriate risk			

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		allocation and proportionality in determining the obligations of the parties. In particular, obligations should be proportionate to the nature, size, scale, duration, industry and sector of the investment and its actual or potential impacts. This would provide an overarching principle for interpreting the more specific obligations contained in the Instrument.			
CHAPTER 3. FORMATION					
115.	**General comments** [59]	A Chapter on 'Conditions Precedent' and its accompanying Principles and Model Clauses should apply to both parties.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
116.	**Section A, paras. 185-191**	Overall, Chapter 3 addresses the correct formation-stage issues, but it currently combines: (i) pre-contractual duties; (ii) conditions to contract effectiveness; and (iii) continuing obligations during performance and post-closure. This creates uncertainty as to when each duty arises, whether it is binding before conclusion, and which remedies apply. The Chapter should distinguish clearly between: (a) duties governing negotiations; (b)	Aracelly López	Member of CEIA	Costa Rica

[59] This comment was provided on the Introduction but seems to fit better under Chapter 3. See also the comment of the same respondent under Chapter 2 regarding Conditions Precedent.

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		conditions precedent to effectiveness or commencement; and (c) obligations that survive formation and are governed by Chapters 5 and 7. Proposed edit: add at the end of paragraph 185: "For each Principle and Model Clause, the parties should identify whether the obligation applies during negotiations, constitutes a condition precedent to effectiveness or commencement, or continues during performance or after closure, and should specify the consequences of non-compliance." This clarification would improve legal certainty across civil-law and common-law systems and reduce jurisdictional disputes concerning the legal character of pre-contractual obligations.			
117.	**Section B,** **Principle 10**	The standard of 'intentionally mislead' is problematically narrow. It falls short of the broader duty of good faith under Article 1.7 of the UPICC and creates an unintended safe harbour for negligent misrepresentation during negotiations (e.g., an investor that negligently overstates its technical capacity would escape liability under this standard). The carve-out permitting policy changes during negotiations (para. 206) presents a further risk: absent any procedural obligation to notify the other party of material policy shifts, a State may withdraw from advanced negotiations after the investor has incurred substantial reliance expenditures, with no accountability beyond the general (and now diluted) duty of good faith. The commentary fails to reconcile this carve-out with Article 1.8 of the UPICC on inconsistent behaviour. Recommendation: (a) replacing "intentionally mislead" with "mislead, whether intentionally or through gross negligence"; (b) requiring written notice of material policy changes within a reasonable period;	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		and (c) adding an express provision that reliance expenditures incurred on the basis of documented pre-contractual commitments remain recoverable notwithstanding the carve-out.			
118.	**Section B,** **Principle 10**	1)"*Throughout the negotiations*" may need a clearer legal scope, perhaps "In negotiating and seeking to conclude the Investment Contract" rather than simply "throughout the negotiations." Because "throughout" could create an argument about when negotiations begin and end, particularly where there are preliminary discussions, term sheets, governmental approvals, parliamentary processes, etc. 2) "*This includes the duty to cooperate*" is potentially too broad. A general duty to "cooperate" during negotiations could potentially be interpreted as requiring a party to make concessions, facilitate agreement, disclose information, or continue negotiating when it no longer wishes to do so. UPICC's formulation in 5.1.3. is much more restrained, i.e. cooperation is required where it "may reasonably be expected", precisely to prevent the duty from upsetting the parties' allocation of interests and responsibilities. The proposal to amend the language to the following: "*including, where reasonably required in the circumstances, to cooperate in the conduct of the negotiations...*" 3) "*To not intentionally mislead*" may be too narrow. "Intentionally mislead" sets a very high threshold: intent would have to be established. That leaves out conduct such as: (a) reckless misrepresentation; (b) knowingly allowing a material misunderstanding to persist; (c) withholding information where disclosure is reasonably required; (d) making a representation that was initially true but subsequently became materially inaccurate, etc. The proposed language: "*not knowingly or recklessly misrepresent, conceal or*	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation

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		otherwise materially mislead the other party..." This would meet the good faith standard under the UPICC.			
119.	**Section B,** **Principle 10**	Good faith has always been a problematic issue in uniform law instruments. While the UPICC provide for its broad and express recognition, this is a matter of choice. In other instruments, such as the CISG, good faith does not play the same role; for instance, there is no concept of pre-contractual good faith. It is a significant point, as doctrines such as good faith—and others like hardship—tend to divide Civil Law and Common Law systems, although there are certainly many nuances in between. Above all, one must bear in mind the adversarial position of the parties and the aleatory nature of negotiations, as described by E. Allan Farnsworth.[60] Each party seeks to satisfy its own interests and, despite this, may reach an agreement—though such an outcome is not guaranteed. Consequently, the result of the negotiations cannot be predicted with certainty. Above all, it must be remembered that contract law is grounded in freedom, meaning that each party is free to decide with whom to contract—or not—and is free to break off negotiations at any time before the contract is concluded. In such a context, the concept of pre-contractual good faith is incomprehensible. In any case, if specific instances of bad faith are identified in the negotiations, instead of resorting to the general concept of pre-contractual good faith, it is better to refer to those specific situations. Note that this is already done in Principle 10 when it states that "In this context, this includes the duty to cooperate and to not intentionally mislead, accepting that each party is entitled to achieve its reasonable objectives. In particular, the change of policy of the negotiating parties during the negotiation process	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru

[60] E. Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 Colum. L. Rev. 217; E. Allan Farnsworth, 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws' (1995) 3 Tul. J. Int. Comp. L. 47.

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		shall not by itself be considered to be contrary to good faith or fair dealing." The question that arises is: why mention "good faith and fair dealing" at the outset if specific situations are subsequently identified as contrary to pre-contractual good faith? It is better to adopt a specific approach rather than relying on a general clause. As Robert Summers explained, good faith is best understood as a negative concept—an "excluder"—used to define situations that run counter to good faith, rather than simply stating in advance that the parties must act in good faith, without providing further guidance.61 Furthermore, since specific situations are already mentioned, it is no longer necessary to make prior reference to good faith to justify that those situations are grounded in it. Such a reference is unnecessary; on the contrary, it merely creates a fiction of a common element—good faith—whereas the advisable approach is to "cut the umbilical cord" so that each situation possesses autonomy.62 Above all, if a "duty to cooperate"—which is already a general duty—is mentioned, it is not advisable to also include another general duty, such as "good faith and fair dealing" to supposedly justify it. In other words, one establishes a general duty (good faith and fair dealing) that justifies the existence of another general duty (cooperation). It is better to have just one rather than two general duties. Alternatively, one might consider resorting to the concept of "reasonableness"—an objective notion—as opposed to good faith, which is a subjective concept encompassing notions of justice and equity that are			

61 Robert Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Virginia Law Review 195.

62 Simon Whittaker and Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape' in Reinhard Zimmermann and Simon Whittaker (eds), Good Faith in European Contract Law (Cambridge University Press 2000) 7.

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		ambiguous and fail to guarantee legal certainty.63 For example, Principle 15 states that "Parties to an IIC shall perform their obligations under the contract in good faith and not act arbitrarily or unreasonably," thereby invoking the concept of reasonableness; however, Principle 15 follows the trend seen in the UPICC and PECL of combining the concepts of good faith and reasonableness—an approach that creates additional complications, as it would be preferable to choose one over the other.			
120.	**Section B,** **Principle 10**	**Scope of the Principle.** The Principle is currently difficult to distinguish from the language of the Model Clause and should be reformulated at a more general level. It should not assume that negotiations are taking place; rather, it could provide that "Where parties negotiate an IIC…". This is particularly important because the Instrument uses "negotiation" in several different contexts, including formation of the IIC, renegotiation under Principle 20(3), renegotiation to restore economic equilibrium under Principle 23(2), and renegotiation in circumstances of hardship. It is therefore unclear whether Principle 10 is intended to apply to negotiations occurring during the life of the contract. This distinction matters because we anticipate protection for a change of position to operate differently in a renegotiation than in the initial bargaining process. We suggest that Principle 10 be expressly confined to negotiations for the conclusion of the IIC, with subsequent renegotiations addressed separately. **Good faith and cooperation.** We understand the duty of good faith and the duty to cooperate as independent concepts and therefore question the language that, "In this context…this includes the duty to cooperate and to not intentionally mislead." This appears to treat cooperation and non-	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

63 Hugh Beale, 'General clauses and specific rules in the principles of European contract law: the "Good Faith" clause' in Stefan Grundmann and Denis Mazeaud (eds), General clauses and standards in European contract law: comparative law, EC law and contract law codification (Kluwer Law International 2006). Also Mindy Chen-Wishart and Victoria Dixon, 'Good Faith in English Contract Law: A Humble "3 by 4" Approach' in Paul B. Miller and John Oberdiek (eds), Oxford Studies in Private Law Theory: Volume 1 (Oxford University Press 2020) 187.

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		misleading conduct as components of, or a definition of, good faith and/or fair dealing. The relationship between these standards should instead be clarified. **Reasonable objectives.** The reference to "reasonable objectives" is potentially too broad. Objectives pursued in negotiations may take many forms. We suggest clarifying whether this is intended to refer, for example, to reasonable commercial, business and compliance objectives. **Relationship with the UPICC.** It is unclear whether the Principle is intended to modify or supplement Articles 1.8 and 2.1.15 of the UPICC. If so, this should be stated expressly. In particular, consideration should be given to including a principle concerning inconsistent behaviour during negotiations. Parties should generally remain free to depart from a negotiating strategy or position, provided that they do not do so in bad faith. It is also unclear how the Principle operates where one party has reasonably relied on the negotiations and incurred expenditure or mobilised resources in anticipation of the IIC being concluded. **Intention to conclude.** The Principle should preserve the prohibition on negotiating without intending to conclude a contract. As drafted, it protects a party's freedom to depart from its negotiating position but does not restate the corresponding limitation. Article 2.1.15(2) of UPICC provides that a party which negotiates without an intention to conclude the contract may be liable in damages. That limitation is an important counterweight to the freedom contemplated by the third sentence and should appear alongside it, including where negotiations are used to obstruct or delay the other party's pursuit of alternatives. **"Change of policy" and "change of position".** We suggest replacing "change of policy" with "change of position" or "change of negotiating position". As drafted, the Principle refers to "the change of policy of the			

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		negotiating parties", although only a State ordinarily changes public policy. The Commentary appears to intend the provision to apply reciprocally: paragraph 199 refers to a State changing its strategy or policy, while paragraph 200 recognises that investors may change their business strategy. Paragraph 206 also uses the term "position". "Change of position" would therefore better reflect the intended reciprocal application. **Different justification for State and investor conduct.** A related substantive question is whether changes in position by States and investors should receive identical protection. A State's change of policy may constitute an exercise of public functions, and paragraph 197 justifies the proposed protection partly by reference to the regulatory space afforded to States, drawing an analogy with the treatment of stabilisation clauses in the ALIC Guide. That reasoning does not apply in the same way to an investor's change of commercial strategy. The Commentary should therefore explain why an investor's change of commercial strategy warrants protection on identical terms, including where the change occurs at a late stage of negotiations. **Allocation of pre-contractual costs.** Consideration should also be given to the allocation of costs incurred during negotiations. Where a party is permitted to depart from its negotiating position without breach, the other party's expenditure will ordinarily not be recoverable. Paragraph 209 notes that, in competitive bidding, requirements for bidders to provide security can regulate the consequences of withdrawal, but no equivalent mechanism is contemplated for negotiated IICs. An express allocation of pre-contractual costs—for example through break fees, reimbursement thresholds or cost-sharing arrangements—could provide a more balanced mechanism without reintroducing liability under Article 2.1.15(2), while reflecting ordinary practice in transactions of this scale.			

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121.	**Section B,** **Principle 10; and** **Commentary paras. 194-209**	The final sentence of Principle 10 is too categorical. A change of policy should not, by itself, establish bad faith; however, it should not operate as a safe harbour where a party has knowingly induced reasonable reliance, withheld material information, acted inconsistently without notice, or used the policy change as a pretext. The present wording may unduly dilute Articles 1.7, 1.8 and 2.1.15 of the UPICC and may produce an imbalance in favour of the State party. Proposed edit for the final sentence: "A change of policy or strategy during negotiations does not, by itself, constitute bad faith or unfair dealing. In assessing the parties' conduct, regard shall nevertheless be had to all relevant circumstances, including the timing and transparency of the change, any specific assurances given, reasonable reliance induced, applicable procurement or administrative-law requirements, and whether the change was invoked as a pretext to mislead or discriminate." The same qualification should be reflected in paragraphs 197-206 and in the Model Language.	Aracelly López	Member of CEIA	Costa Rica
122.	**Section B,** **Principle 10,** **Model Language for pre-contractual documents**	The sentence stating that a party "may not be held" in breach of good faith if it departs from its negotiating position or fails to obtain approval is overbroad and may be read as excluding liability even where the party negotiated without authority, concealed a foreseeable approval obstacle, or intentionally prolonged negotiations. It should also preserve mandatory domestic procurement, administrative and pre-contractual liability rules. Proposed edit: "A Party's departure from its negotiating position, or failure to obtain an approval required for conclusion of the definitive agreement, does not of itself constitute a breach of good faith, provided that the Party has disclosed the approval requirement and any material change of position without undue delay, has not intentionally misled the other Party, and has complied with applicable mandatory rules. Nothing in this clause excludes liability for	Aracelly López	Member of CEIA	Costa Rica

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		negotiations conducted in bad faith under the applicable law or Article 2.1.15 of the UPICC."			
123.	**Section B,** **Principle 10,** **Model Language for pre-contractual documents**	"Unless otherwise provided, the terms of this [MoU/LoI/etc.] are not binding on the Parties, and are subject to a [name of definitive agreement/formal agreement] being executed in writing between them and duly approved by the competent bodies." SGL Comment: Given that the Principles generally favor the written form, it is necessary to specify in the article's drafting that the final contract concluded by the parties must be in writing. This is particularly relevant in disputes regarding contract negotiations — where one party withdraws without concluding a final agreement, yet the other party claims that a contract was formed in practice (which is often possible where there is freedom of form). Consequently, a contractual formality is often introduced via a "subject to" clause to clarify that no rights or obligations arise between the parties until a written contract has been concluded. Furthermore, this is often accompanied by a merger clause to indicate that the parties' agreement is embodied in the written document, irrespective of prior negotiations or other pre-contractual documents. I would recommend adding a cross-reference to Principle 13 regarding the "entire agreement".	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru
124.	**Section C and D; and** **Chapter 7,** **Section E**	**Sustainability** There is still no settled law on sustainability. The European supply chain legislation is currently under revision. The issue is the large number of legal sources that are not harmonized, may contradict each other and are difficult to apply in a meaningful way due to the lack of codification. The applicable norms under this chapter should be clearly defined. The wording in the Model	Herfried Wöss (Wöss & Partners)	LAI Regional Chapter	Austria / Mexico / USA

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		Clause (para. 225) referring to the "highest international standards on sustainability, as required by various international and national laws, guidelines, and protocols applicable to the Parties" does not seem to comply with basic standards of legal certainty. It appears that copying the already very detailed World Bank / IFC standards and contract clauses should suffice. This is without prejudice of the environmental, social and health standards in force in the country of the project site. As mentioned in paragraph 366, the model clause on environmental and climate commitments is among the most comprehensive in the IIC Principles. One may wonder if that may not lead to an imbalance, in case the IIC Principles exceed best practices applied by the World Bank and the Multilateral Development Banks. This is also related to the model clause on third-party beneficiaries.			
125.	**Section C,** **Principle 11**	**Consultation, participation and Free, Prior and Informed Consent (FPIC).** Principle 11 rightly emphasises consultation with affected communities and engagement with Indigenous Peoples. The final commentary should distinguish ordinary consultation from FPIC. FPIC is a specific standard concerning Indigenous Peoples; it should not be used as a synonym for consultation with all affected groups unless the parties deliberately adopt that broader requirement. The commentary should also explain how the parties should proceed when consent is qualified or withheld, while avoiding any implication that the Instrument displaces applicable international or domestic law. **Timing and renewed engagement.** Consultation should be treated as an ongoing process across the investment life cycle rather than a single disclosure event. The Model Clauses should identify circumstances requiring renewed consultation or, where applicable, renewed FPIC, including material changes in project design, location, impacts or mitigation measures. They should also provide accessible grievance mechanisms and protections against retaliation.	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		Meaningful disclosure and representation. Engagement is meaningful only when affected persons receive timely information about material environmental, social and economic impacts in a form and language they can understand. The process should allow questions, reasoned responses and consideration of community concerns; one-way communication is insufficient. Where representatives participate, the parties should take reasonable steps to verify that the method of representation is legitimate and consistent with the community's own decision-making processes, while ensuring that marginalised voices are not excluded. ***Key References.*** *United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295 (13 September 2007), Article 32; International Finance Corporation, Performance Standard 7: Indigenous Peoples (2012).*			
126.	**Section C,** **Principle 11**	**General Assessment** Principle 11 makes a valuable contribution by embedding sustainability due diligence — including a dedicated climate change component — into the pre-contractual phase of international investment contracts, and by extending the obligation across the full project lifecycle. Particular strengths include: • The explicit integration of climate change as a component of, rather than an adjunct to, environmental and social due diligence. • The temporal scope of the obligation, which runs from project preparation through implementation and for a reasonable period thereafter (para 210), avoiding a static, one-off conception of due diligence. • The proportionality safeguard in para 215, which ties the scope of obligations to the risk, size and nature of the project.	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom

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		• The express linkage between the investor's private-law due diligence process and the host State's public-law authorisation/ESIA regime (para 216), which is a genuinely useful structural bridge not always made explicit in comparable instruments. The comments below identify points where, in our view, the drafting would benefit from further precision, cross-referencing, or alignment with the evolving hard-law landscape, in order to strengthen the Principle's operability and reduce interpretive uncertainty for both investors and host States. […] **Concluding remarks** "Principle 11 represents a substantial and well-structured step toward embedding sustainability — including climate — due diligence into international investment contracts at the pre-contractual stage. The comments above are offered in a constructive spirit, with the aim of tightening definitional clarity, resolving internal tensions (notably around FPIC, public disclosure, and the climate/human-rights standard asymmetry), and ensuring the Principle interoperates coherently with the fast-evolving body of binding due diligence law. We would welcome the opportunity to discuss any of these points further with the drafting committee."			
127.	**Section C,** **Principle 11**	When it comes to climate change, greater specificity would be beneficial. For instance, a review of the Advisory Opinions issued by the International Court of Justice and the Inter-American Court of Human Rights reveals differences regarding the specific human rights implicated and affected by climate change. While the discourse initially referred generally to the right to the environment, it subsequently specified the right to a healthy environment, and later refined this further to refer to the right to a healthy climate. Furthermore, the jurisprudence of international courts is recent and, as such,	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru

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		still evolving. If Principle 11—and other Principles addressing the issue—merely contain a general reference to "climate change", the term's inherent ambiguity could be exploited to technically fulfill obligations while implementing inadequate measures, a practice that does not foster contractual sustainability.			
128.	**Section C,** **Principle 11**	**1. The timing of the due diligence obligation should be clarified.** We identified an inconsistency between paragraph 213, which says due diligence should operate "as early as possible" and at latest before commencement of a new project, and paragraph 16 of the Model Clause, which contemplates completion when finalising the Contract and, at minimum, as a condition precedent to commencement of works. We suggested settling whether the obligation to conclude due diligence is **pre-contractual or pre-commencement**, particularly because the Commentary says the assessment may shape the contract and its sustainability commitments. We also noted the treatment of post-contractual sustainability liability: the reference to "a reasonable period of time after the investment has ended" is vague, particularly given decommissioning and rehabilitation obligations. We suggested that the period be fixed by agreement in the IIC and that the Commentary address its relationship with applicable limitation periods. **2. The entities to which due diligence applies should be identified.** We noted that the Principle itself does not specify whether the assessment extends to subsidiaries, project companies, business partners, subcontractors and suppliers, although the Commentary and Model Clauses suggest that it does. We suggested identifying the entities covered and adopting a **tiered approach,** reflecting the nature of the relationship and the investor's leverage.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		3. The impact assessment should refer to host-State requirements and standards agreed in the IIC. We noted that the Principle requires an impact assessment and management plan without identifying the standards against which it is to be prepared. The Commentary refers to host-State authorisation/ESIA regimes and various international methodologies. We suggested that the assessment be prepared in accordance with **host-State requirements and international standards identified by the parties in the IIC**, with the parties encouraged to specify those standards. **4. Stakeholder engagement / FPIC should be expressed more precisely.** We suggested that paragraph (3) be expressed prescriptively and reflect the consent element of **free, prior and informed consent (FPIC)**. We identified an inconsistency between the black-letter provision, which describes FPIC principally as active involvement, and the Commentary's formulation recognising the right of Indigenous peoples to give or withhold consent. We also noted the inconsistency between "local communities and Indigenous populations" in the Principle and "Indigenous peoples" in the Model Clause. We further suggested that the Principle address what happens where consent is withheld and what circumstances trigger **fresh consultation when the management/mitigation plan is subsequently updated**. **5. The outputs of consultations should be published, subject to defined exceptions.** We suggested making consultation outcomes publicly available, subject to appropriate protections for privacy, confidentiality and stakeholder security. This would give effect to the Commentary's existing references to public accessibility and protection against retaliation/security risks.			

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129.	**Section C, Principle 11**	The comprehensive approach to sustainability due diligence is strongly welcomed. The Instrument already grounds the Investor's corporate sustainability due diligence in the UN Guiding Principles on Business and Human Rights and other responsible business standards. This provides an appropriate basis for integrating the child specific dimension developed under the CRC, as interpreted by the CRC Committee, including in General Comments Nº 16 and 26. General Comment Nº 26 calls on States parties to ensure that child-rights impact assessments (CRIA) are undertaken in relation to environment-related legislation, policies, projects and decisions, and to require businesses to undertake child rights due diligence concerning environmental impacts. The Instrument could give contractual effect to these requirements and expectations in the context of international investment contracts. Where an investment may affect children, the environmental, social and human-rights assessment should therefore expressly incorporate CRIA or an express child-specific component. Such assessment should address, where relevant, direct and indirect, cumulative, long-term and differentiated impacts on children and should inform prevention, mitigation, monitoring and remediation throughout the investment lifecycle. The Model Clause could accordingly identify children expressly among potentially affected rights holders and stakeholders and require, where relevant, child-sensitive, age-appropriate, accessible and safe methods of participation, with due weight given to their views.	Ivana Savić	External PhD candidate, Leiden University	Serbia
130.	**Section C, Principle 11**	i3T supports the pre-contractual due diligence requirement, the environmental and social impact assessment, the human rights due diligence report, and the application of free, prior and informed consent to consultations with Indigenous peoples. The assessment contemplated is directed at identifying and mitigating adverse impact. i3T proposes a fourth consideration of the due diligence, being an assessment of the project's productive linkages, of the local supply	i3T		Mexico

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		capabilities it could draw on, and of the technology transfer it could support would give the parties the information needed to draft the obligations proposed below, and would fit the same pre-contractual moment.			
131.	**Section C, Principle 11 (general comment)**	**D. Complete Material Due Diligence Before Contract Execution** Material environmental, social, legal, financial and sustainability due diligence should, as far as practicable, be completed before execution of the investment contract so that both the State and investor can make informed decisions before becoming legally bound.	KNCCI		Kenya
132.	**Section C,** **Commentary para. 210**	**Limited engagement with binding (hard-law) due diligence instruments** ***Provision(s) concerned:*** *Commentary para 210 and throughout* **Comment:** The Commentary grounds the due diligence obligation exclusively in soft-law instruments (UNGPs, UN Global Compact, OECD Guidelines). Since the drafting of this Study, binding due diligence obligations with extraterritorial reach — notably the EU Corporate Sustainability Due Diligence Directive — have entered into force and are likely to apply directly to a significant subset of investors covered by future IICs. The Principle does not address how its own standard is intended to interact with such binding obligations investors may independently owe (e.g., as a floor, as an alternative compliance pathway, or as a source of interpretive guidance). **Suggested action:** Add a paragraph to the Commentary acknowledging the emerging body of binding due diligence law and clarifying that compliance with such binding obligations, where applicable to the investor, should be treated as at least satisfying (and informing the content of) the due diligence	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom

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		standard under Principle 11, to avoid duplicative or conflicting compliance burdens.			
133.	**Section C,** **Principle 11(2); and** **Commentary paras. 211, 216-217**	**Due diligence as a continuous process versus the ESIA as a discrete deliverable** ***Provision(s) concerned:*** *Principle 11(2); Commentary paras 211, 216–217* **Comment:** The Commentary at times appears to conflate the due diligence obligation — which, consistent with the UN Guiding Principles, is properly understood as an ongoing, iterative process of identifying, preventing, mitigating and accounting for risk — with the production of a single ESIA report and management plan. As drafted, a reader could conclude that the investor's due diligence duty is substantially discharged by submission of the ESIA at the pre-contractual stage, notwithstanding the continuous monitoring obligation set out separately in para 225. **Suggested action:** Clarify, either in the chapeau of Principle 11 or in an introductory paragraph of the Commentary, that the ESIA and management plan are a documented output of the due diligence process at a given point in time, and are without prejudice to the continuous nature of the underlying obligation. A cross-reference to the continuous monitoring provisions (Chapter 5, Section D.3) at the point where the ESIA duty is introduced (para 216) would help.	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom
134.	**Section C,** **Principle 11(1)**	Principle 11 is located in the formation chapter but states that due diligence applies during implementation and for a reasonable period after the investment has ended. This risks overlap and inconsistency with Principle 21 and raises uncertainty regarding survival, limitation periods and remedies. Proposed edit: divide the rule into two linked obligations. Principle 11 should	Aracelly López	Member of CEIA	Costa Rica

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		govern due diligence before conclusion or commencement, while Chapter 5 should govern continuing monitoring and post-closure obligations. "Before conclusion of the IIC, or at the latest before commencement of Project Operations where the applicable law permits, the Investor, with the cooperation required from the State Party under paragraph (4), shall conduct risk-based sustainability due diligence. The IIC shall provide for the continuation, periodic review and post-closure survival of the resulting obligations in accordance with Principles 20 and 21." The expression 'for a reasonable period' should be replaced by an objectively determinable period or criteria, including the nature and latency of the relevant risks, applicable law, and the closure and remediation plan.			
135.	**Section C,** **Principle 11(1)-(2)**	The text alternates between 'must perform', 'is responsible for' and aspirational language in the commentary. It should state a uniform standard of conduct rather than imply strict liability for all adverse impacts. It should also incorporate the proportionality principle in the operative provision, not only in commentary. Proposed edits for paragraphs (1) and (2): "(1) The Investor shall conduct risk-based sustainability due diligence appropriate to the nature, scale, location and reasonably foreseeable impacts of the Project. The State Party shall cooperate in good faith and shall timely provide information, access and institutional assistance within its authority that are reasonably necessary for that process. (2) The due diligence shall include, where proportionate and required by applicable law or the standards identified in the IIC, environmental and social impact assessments, a climate-risk and vulnerability assessment, human-rights due diligence, and management and mitigation plans." This formulation is more scalable for developing economies and small or lower-risk projects while preserving a meaningful minimum standard.	Aracelly López	Member of CEIA	Costa Rica

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136.	**Section C,** **Principle 11,** **Commentary paras. 210 and 216**	**Undefined "highest international standards" and unallocated consequences of State non-cooperation** ***Provision(s) concerned:*** *Commentary paras 210, 216* **Comment:** The reference to "the highest international standards" (para 210) is not defined and may generate disputes over the applicable benchmark, particularly given the range of instruments listed (UNGPs, Global Compact, OECD Guidelines, sectoral and national standards) which are not always aligned in content or rigor. Separately, para 216 identifies that the investor's ESIA should feed into the host State's authorisation regime, but where no such regime exists, the only stated consequence is that "the investor should raise the issue at the negotiating stage" — which is not a substantive remedy and leaves a potentially significant due diligence gap unaddressed. **Suggested action:** Consider (a) providing an indicative, non-exhaustive hierarchy or set of criteria for resolving conflicts between referenced standards, and (b) specifying a fallback due diligence benchmark (e.g., the UNGPs as a floor) to apply where the host State has no ESIA authorisation regime, rather than leaving the matter to negotiation alone.	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom
137.	**Section C,** **Principle 11,** **Commentary paras. 211, 216 and 218**	**Inconsistent terminology across the Principle and Commentary** ***Provision(s) concerned:*** *Commentary paras 211, 216, 218* **Comment:** The terms "sustainability due diligence," "corporate sustainability due diligence," "environmental and social impact assessment (ESIA)," and "environmental impact assessment (EIA)" are used at various points in ways that appear interchangeable but are not formally equated, which may create	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex	Spain / United Kingdom

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		ambiguity given the instrument's likely function as a reference text cited by States and investors. **Suggested action:** Consider adding a short definitions clause (or a consolidated note in the Commentary) fixing the relationship between these terms — e.g., confirming that "sustainability due diligence" is the overarching process, of which the ESIA is a documented output — and using terms consistently thereafter.		University London	
138.	**Section C,** **Principle 11,** **Commentary para. 212**	**Asymmetry between the human rights and climate due diligence standards ("sphere of control" limitation)** ***Provision(s) concerned:*** *Commentary para 212* **Comment:** Paragraph 212 limits investor climate-related obligations under the IIC to "activities within its sphere of control." This is narrower than the standard applied elsewhere in the Principle for human rights and social due diligence, which (per the UNGPs referenced in para 210) extends to impacts the investor causes, contributes to, or is directly linked to through its business relationships — potentially reaching value-chain or Scope 3-type exposure. As drafted, climate obligations appear to be held to a more limited standard than social and human rights obligations within the same Principle. **Suggested action:** Clarify whether this asymmetry is intentional. If so, the Commentary should state the policy rationale (e.g., practical limits on an investor's ability to control third-party emissions). If not, consider aligning the climate standard with the "cause/contribute/directly linked" formulation used for human rights impacts, calibrated as appropriate by the proportionality principle in para 215.	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom

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139.	**Section C,** **Principle 11(3); and** **Commentary paras. 221-241**	The current text applies FPIC to "local communities and Indigenous populations" generally and states that it permits communities to approve or reject a project. That formulation does not accurately reflect the differentiated status of consultation and consent across international instruments and domestic legal systems. UNDRIP Article 32(2) addresses consultation and cooperation in good faith with Indigenous peoples, through their representative institutions, in order to obtain FPIC before approval of projects affecting their lands, territories or resources. The instrument should not automatically extend an identical consent standard to every local community or imply a universal veto. Proposed edit: "The consultation process shall be timely, meaningful, inclusive, culturally appropriate, accessible and free from coercion, and shall be conducted in accordance with applicable law and the international standards expressly identified in the IIC. Where Indigenous peoples may be affected, consultation shall be conducted through their representative institutions with the objective of obtaining free, prior and informed consent in the circumstances in which such consent is required by applicable law or the identified international standards." The commentary should distinguish consultation, seeking consent, and circumstances in which consent is legally required.	Aracelly López	Member of CEIA	Costa Rica
140.	**Section C,** **Principle 11(3); and** **Commentary paras. 221 and 224**	**FPIC applied uniformly to "local communities and Indigenous populations"** ***Provision(s) concerned:*** *Principle 11(3); Commentary paras 221, 224* **Comment:** The free, prior and informed consent (FPIC) standard is applied in the text to both Indigenous populations and local communities generally. Under current international law and practice, FPIC as a consent-based (rather than	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex	Spain / United Kingdom

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		purely consultative) standard is most firmly established in relation to Indigenous peoples (in line with UNDRIP); the standard generally applicable to non-Indigenous local communities under comparable instruments (e.g., ILO Convention 169-influenced practice) is meaningful consultation rather than a consent requirement. Additionally, the Principle does not address the legal consequence where FPIC is sought and withheld — in particular, whether the project may proceed notwithstanding withheld consent, and if so, on what basis. **Suggested action:** Consider distinguishing the applicable standard as between Indigenous populations (FPIC) and other local communities (meaningful, good-faith consultation, potentially with enhanced procedural safeguards) unless the drafting committee intends to adopt a uniformly higher standard as a matter of policy — in which case this choice should be stated expressly in the Commentary along with its rationale. In either case, the Commentary should address the legal consequence of withheld consent/objection following consultation.		University London	
141.	**Section C,** **Principle 11,** **Commentary para. 212**	**No mechanism for cumulative or multi-project climate impact assessment** ***Provision(s) concerned:*** *Commentary para 212* **Comment:** Paragraph 212 acknowledges that the host State may enter into other contracts, including with different investors, that also affect climate objectives, and states that IIC commitments should be "balanced" accordingly. However, Principle 11 as drafted only requires assessment of the impact of the individual investment; no mechanism is provided for aggregating or assessing cumulative climate (or environmental/social)	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom

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		impact across multiple concurrent or sequential investments in the same sector or region. **Suggested action:** Consider adding a provision, or a cross-reference to State-level obligations elsewhere in the instrument, requiring the host State to make available information on other authorised or pending projects with potentially overlapping climate or environmental impact, so that cumulative effects can be factored into the individual investor's due diligence assessment where relevant.			
142.	**Section C,** **Principle 11,** **Commentary paras. 222-223**	**Tension between public accessibility of consultation records and protection of at-risk stakeholders** ***Provision(s) concerned:*** *Commentary paras 222–223* **Comment:** Paragraph 222 states that information collected during stakeholder consultations "should be publicly accessible," while para 223 separately recognises that consultation may create "security risks or risks of retaliation in hostile or repressive contexts." The two statements are not reconciled: as drafted, a reader cannot tell whether public accessibility is subject to redaction or anonymisation where safety concerns arise, or whether it is an unqualified requirement. **Suggested action:** Amend para 222 to make explicit that public accessibility of consultation records is subject to appropriate redaction, aggregation or anonymisation where disclosure would create security, privacy or retaliation risks for stakeholders, consistent with the safeguard already acknowledged in para 223.	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and Social Sciences, Middlesex University London	Spain / United Kingdom
143.	**Section C,**	The proposed regime places primary responsibility on the Investor but does not state with sufficient precision the State Party's corresponding duties, even though the State controls public records, land and tenure information,	Aracelly López	Member of CEIA	Costa Rica

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	Principle 11; and **Model Language under Principle 11**	permitting, security, access to communities, and inter-agency coordination. This may create an unbalanced allocation of risk and may allow the State to benefit from its own failure to cooperate. Proposed new paragraph: "The State Party shall: (a) disclose, subject to lawful confidentiality restrictions, material information within its possession or control relevant to the assessment; (b) identify competent authorities and applicable approval procedures; (c) facilitate lawful access to affected areas and stakeholders; (d) avoid interference with independent assessment and consultation; and (e) notify the Investor without undue delay of material changes in law, policy or known conditions. A failure to provide required cooperation shall be taken into account in determining responsibility, causation and remedies." The IIC should also allocate costs and specify which party bears responsibility for government-led consultation duties.			
144.	**Section C,** **Principle 11,** **Model Language under Principle 11 paras. 3-16**	The Model Language contains numbering defects, moving from paragraph 4 directly to paragraph 7, and it lacks a clear hierarchy among applicable domestic law, mandatory approval procedures and contractual standards. In addition, paragraph 10 uses 'warrant' for continuing disclosure duties, terminology that may have divergent effects across legal traditions. Proposed edits: (i) renumber the clause consecutively; (ii) replace "warrant" with "shall disclose"; and (iii) add: "In the event of inconsistency, mandatory rules and legally required assessment or consultation procedures prevail. Contractual standards apply cumulatively to the extent that they are compatible with those rules. Completion, review or approval of contractual due diligence does not replace any statutory authorisation or relieve either Party from obligations imposed by applicable law."	Aracelly López	Member of CEIA	Costa Rica

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		This is necessary for neutral operation in civil-law and common-law jurisdictions.			
145.	**Section C,** **Principle 11,** **Model Language under Principle 11 para. 1; and** **Commentary paras. 215 and 226**	Scope and proportionality of sustainability due diligence. Model Language para. 1 provides that sustainability due diligence should be appropriate to the Project's size and circumstances. The proportionality criteria could better reflect the nature and significance of potential sustainability impacts, since a relatively small project may still generate significant environmental or socioeconomic impacts depending on the Project's location and affected communities, as well as the duration, reversibility or cumulative nature of the impacts. For example, a relatively small project may have significant impacts if it affects a community's principal water source, a sensitive ecosystem or the livelihoods of a vulnerable population, including communities or ecosystems located beyond the immediate Project Area. Recommendation: Specify that proportionality should take account of the nature and significance of potential adverse sustainability impacts, including their likelihood, magnitude, duration, reversibility, cumulative effects and geographic or community reach, together with the Project's size and circumstances.	Marian Portero	Member of CEIA	Spain / USA
146.	**Section C,** **Principle 11,** **Model Language under**	Scope of the sustainability impact assessment. Model Language para. 2 appropriately focuses on identifying, preventing and mitigating adverse effects. However, Commentary para. 228 also recognises the positive impacts of a Project. Considering relevant positive impacts would provide a more complete basis for defining sustainability objectives and contractual commitments without reducing the priority given to adverse impacts. From an impact-assessment perspective, positive impacts should, where reasonably practicable, be identified and expressed as measurable expected outcomes for affected people or the environment, rather than	Marian Portero	Member of CEIA	Spain / USA

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	Principle 11 para. 2	merely as Project activities or outputs. Depending on the Project, relevant indicators could include, for example, average travel time saved per user, net employment created or sustained, changes in household income, tonnes of CO_2e avoided per year, reductions in specified water-pollutant concentrations or compliance with applicable water-quality thresholds, or hectares of habitat restored to an agreed ecological condition. Recommendation: Include a requirement that, where relevant, the assessment should also identify positive sustainability impacts and corresponding measurable outcome indicators, providing a more complete basis for defining the sustainability objectives and commitments to be incorporated into the IIC.			
147.	**Section C,** **Principle 11, Model Language under Principle 11 para. 2**	*Suggested wording:* The due diligence shall serve the purpose of assessing the risks of potential adverse effects of the Project on the environment (including the potential impact of the Project on climate change), the health and safety of people and workers, and the human rights of the communities and individuals affected **or potentially affected** by the investment (and its supply chain), **including children where they may be affected**, with a view (i) to prevent these risks if they can be avoided or (ii) to put in place adequate mitigation measures to minimise the consequences of adverse effects that cannot be avoided. **Where children may be affected, the assessment shall, where relevant, take into account differentiated, cumulative and long-term effects on children.** The due diligence shall also cover related topics where relevant, such as governance aspects (including issues of corruption and local community development).	Ivana Savić	External PhD candidate, Leiden University	Serbia
148.	**Section C,** **Principle 11,**	Integration of stakeholder consultation into the impact assessment. Model Language para. 3 requires stakeholder consultation but does not expressly state that consultation is an input to the identification and assessment of risks and significant adverse impacts, consistent with para. 7	Marian Portero	Member of CEIA	Spain / USA

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	Model Language under Principle 11 para. 3; and **Commentary para. 230**	and the Commentary (paras. 234 and 236). From an impact-assessment perspective, this information can help assess whether consultation provides a sufficiently representative input, for example by considering the number or proportion of identified affected communities or stakeholder groups consulted and the consultation rounds undertaken. Recommendation: State that information obtained through early consultation should inform the identification and assessment of risks and significant adverse impacts on affected communities and Indigenous populations. Where appropriate, the assessment should also document the groups consulted, the extent and timing of consultation, and how relevant consultation findings were taken into account.			
149.	**Section C,** **Principle 11,** **Model Language under Principle 11 para. 3; and** **Commentary para. 229**	Baseline and measurement framework. Model Language para. 4 requires the relevant assessments and reports, together with the related management and mitigation plan, but does not expressly establish baseline conditions or a framework for measuring identified significant impacts. From an impact-assessment perspective, the baseline should identify the relevant reference conditions and, where appropriate, the reference date or period against which identified significant impacts will be measured. Depending on the Project, this could include, for example, pre-Project water-quality parameters, existing employment or livelihood conditions, background air quality, or the extent and condition of affected habitats. Recommendation: The assessments should establish appropriate baseline conditions and use relevant indicators, units of measurement, data sources and methodologies to measure and, where reasonably practicable, quantify identified significant impacts. This would provide a consistent and traceable basis for the management and mitigation plan and subsequent monitoring.	Marian Portero	Member of CEIA	Spain / USA

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150.	**Section C, Principle 11,** **Model Language under Principle 11 para. 4**	*Suggested wording:* 4. In accordance with the relevant applicable law and agreed standards and methodology, the Investor shall prepare, with the cooperation of the State Party, an environmental and social impact assessment (ESIA), a climate change risk and vulnerability assessment, and a human rights due diligence report, **including a child-rights dimension where children may be affected**, as well as the related management and mitigation plan, including a local community resettlement plan (if necessary) and a decommissioning plan, serving the purposes highlighted under paragraph 2. **Where children may be affected, appropriate child-sensitive, age-appropriate, accessible and safe methods should be used to enable their meaningful participation, where relevant.**	Ivana Savić	External PhD candidate, Leiden University	Serbia
151.	**Section C,** **Principle 11,** **Model Language under Principle 11 para. 7**	Ongoing consultation and follow-up. Model Language para. 7 establishes consultation as an ongoing process throughout the Project lifecycle but does not explain how stakeholder input informs subsequent monitoring and follow-up. In the context of FPIC, Commentary para. 240 already provides for the participation of affected communities in monitoring mechanisms to ensure compliance with agreed terms during Project implementation. The Model Language could further clarify how information obtained through ongoing consultation feeds into the monitoring of identified impacts. Such information can complement quantitative and technical monitoring data, help identify emerging or previously unidentified impacts, and assist in interpreting differences between expected and observed outcomes. Recommendation: Indicate that ongoing consultation should systematically inform the monitoring of identified impacts, including the assessment of their evolution and of variances in relevant impact indicators over time, to support the review and adaptation of management and mitigation measures.	Marian Portero	Member of CEIA	Spain / USA

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152.	**Section C,** **Principle 11,** **Model Language under Principle 11 paras. 11, 3-4; and** **Commentary paras. 214, 218, 229 and 243**	Role and scope of impact study experts. Model Language para. 11 requires impact study experts with relevant track records and familiarity with impact assessment methodologies to assist with sustainability due diligence, but does not expressly define their technical role in assessing significant impacts. Recommendation: Define the technical role of impact study experts to include, as appropriate, support for establishing baseline conditions and indicators, selecting and applying appropriate methodologies, and assessing and, where reasonably practicable, quantifying significant impacts. Key data, assumptions and uncertainties should be clearly documented.	Marian Portero	Member of CEIA	Spain / USA
153.	**Section C,** **Principle 11,** **Model Language under Principle 11 para. 13**	Mitigation plan and measurable commitments. Model Language para. 13 requires the mitigation plan to translate due diligence results into mitigation measures and allocate implementation responsibilities, but does not specify the elements needed to make those measures measurable and monitorable. In particular, the plan should distinguish between indicators used to verify implementation of a mitigation measure and indicators used to assess whether that measure is achieving its intended result. For example, relevant indicators could include completion of a treatment system and resulting water quality, hectares of habitat restored and their condition, or the proportion of affected households whose livelihoods have been restored. Recommendation:	Marian Portero	Member of CEIA	Spain / USA

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		As appropriate to the identified significant impacts, the mitigation plan should specify the measures, measurable targets and indicators, implementation timeframes, monitoring arrangements and estimated costs, including, where appropriate, the expected level of performance or impact reduction and the criteria and timeframe against which achievement will be verified.			
154.	**Section C,** **Principle 11,** **Model Language under Principle 11 paras. 13-16**	The clause states that completion of due diligence and agreement on the mitigation plan shall 'preferably' be reached when finalising the Contract and 'at the minimum' be a condition precedent to commencement. The legal consequences of non-satisfaction, waiver, partial satisfaction, disagreement, or delay caused by one party are not addressed. Proposed edit: "Unless the Parties specify otherwise, completion of the assessments identified in this clause and approval of the initial Management and Mitigation Plan are conditions precedent to commencement of the affected Project Operations, but not to the existence of the IIC. The IIC shall specify: (a) the evidence required to establish satisfaction; (b) the competent authority or person entitled to confirm satisfaction; (c) whether and by whom a condition may be waived; (d) the long-stop date; (e) interim protective measures; and (f) consequences of non-satisfaction, including where caused or contributed to by either Party." This avoids disputes over validity, effectiveness, commencement and arbitral jurisdiction.	Aracelly López	Member of CEIA	Costa Rica
155.	**Section C,** **Principle 11**	**Absence of stated consequences for non-compliance / relationship to remedy and liability provisions** ***Provision(s) concerned:*** *Principle 11 generally* **Comment:**	Prof. Belén Olmos Giupponi	Professor of International Economic and Environmental Law, School of Law and	Spain / United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Principle 11 sets out detailed process obligations (assessment, consultation, FPIC, management planning, monitoring) but does not itself indicate whether these are obligations of conduct (assessed on the adequacy and good faith of the process followed) or of result, nor how a failure to comply interacts with remedy or liability provisions found elsewhere in the instrument. **Suggested action:** Add a cross-reference within the Commentary to the chapter(s) addressing breach, remedy and liability, and clarify — even briefly — whether Principle 11 is intended to establish an obligation of conduct or of result, to guide both drafting consistency and future interpretation/application.		Social Sciences, Middlesex University London	
156.	**Section D,** **Principle 12**	The Model Clause on legal capacity contains a disclosure standard that is biased against the investor. Under the proposed language, a party is not in breach of good faith if it fails to disclose information 'that was not requested by the former' (para. 263). This creates a risk: the State, which controls the regulatory and institutional framework, possesses material information (e.g., pending legislative changes) that the investor cannot know to request. The current formulation rewards the party with superior access to information (typically the State) for remaining passive. This contradicts the Instrument's stated objective of balancing the parties' positions. Recommendation: (a) imposing an affirmative duty to disclose information material to legal capacity that the disclosing party knows or ought to know is relevant, regardless of whether it was specifically requested; (b) establishing a rebuttable presumption that the State has superior knowledge of the scope and limits of its own entities' authority; and (c) drafting a separate Model Clause for IICs concluded through competitive bidding, where the information asymmetry operates differently	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		and bidders have limited ability to conduct due diligence on the State's internal organisation.			
157.	**Section D, Principle 12**	It is not uncommon to include a provision in IICs that the Host State (or state owned entities) should procure and warrant that all necessary approvals to negotiate and sign an IIC are in place (an executive body approval/permit, approval of a state or municipal legislative body, approval via public consultations and vote, etc).	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation
158.	**Section D, Principle 12**	The principle suggests that only "obligations" shall be spelled out in the IIC. The suggestion is to spell out also "the rights", so the entire agreement would cover "the rights and obligations" of the parties.	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation
159.	**Section D, Principle 12**	**Principle 12 is not formulated as a principle.** It provides that parties "may wish to include wording" of a particular kind. As paragraph 189 acknowledges, it is therefore a recommendation that parties address authority and capacity contractually, rather than a substantive principle. This illustrates the broader difficulty of distinguishing the normative and descriptive functions of the Instrument. If the purpose of Principle 12 is to guide parties in addressing a recurring source of disputes, it should provide more substantive guidance as to the matters that should be addressed and the contractual mechanisms through which they may be addressed. **We suggest that Principle 12 recommend that parties address authority and capacity through due diligence, representations and appropriate contractual consequences.** For example: (1) Each party should take reasonable steps to verify the authority, and scope of authority, of the other party to negotiate and conclude the IIC and	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		the commitments under it, including by examining publicly available information. (2) Each party should respond to reasonable enquiries concerning its authority and the scope of that authority within a reasonable period of time. (3) Each party should make appropriate representations concerning its authority and capacity to negotiate and conclude the IIC and the commitments under it, and the IIC should specify the consequences of any inaccurate representation or failure to disclose a relevant restriction on authority. This would give clearer effect to the due diligence approach described in paragraph 259, while recognising that the Model Clause is principally concerned with **representations and the allocation of contractual risk** arising from uncertainty as to authority and capacity. **The consequences identified in paragraph 267 should also be made more visible.** The Commentary states that diligent verification may affect the level of investment protection and whether an investor's expectations that the State will be bound by ultra vires conduct are legitimate. This is a significant consequence of the contractual arrangements contemplated by Principle 12 and should be clearly explained alongside the recommended contractual provisions. **Tender processes should also be addressed expressly.** Paragraph 265 recognises that the proposed wording may not be appropriate in competitive bidding and that the State's disclosure obligation in that context is broader than information expressly requested by the bidder. Given the significance of tendered investment contracts, this distinction should be reflected in the Principle or Commentary. In particular, restrictions on the authority of the			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		relevant State body should be disclosed irrespective of whether the bidder has specifically requested that information.			
160.	**Section D,** **Principle 12**	The Model Clause on legal capacity contains a disclosure standard that is biased against the investor. Under the proposed language, a party is not in breach of good faith if it fails to disclose information 'that was not requested by the former' (para. 263). This creates a risk: the State, which controls the regulatory and institutional framework, possesses material information (e.g., pending legislative changes) that the investor cannot know to request. The current formulation rewards the party with superior access to information (typically the State) for remaining passive. This contradicts the Instrument's stated objective of balancing the parties' positions. Recommendation: (a) imposing an affirmative duty to disclose information material to legal capacity that the disclosing party knows or ought to know is relevant, regardless of whether it was specifically requested; (b) establishing a rebuttable presumption that the State has superior knowledge of the scope and limits of its own entities' authority; and (c) drafting a separate Model Clause for IICs concluded through competitive bidding, where the information asymmetry operates differently and bidders have limited ability to conduct due diligence on the State's internal organisation.	Marco Alejandro Plaza Huélamo	Member of Club Español e Iberoamericano del Arbitraje (CEIA)	Spain
161.	**Principles 4, 8, 12 and 14**	**Governing law of capacity.** The capacity and authority of a State, SOE or public official to conclude an IIC may be governed by mandatory domestic constitutional, statutory or administrative rules, even when the merits of the contract are governed by another law or by non-State rules. The commentary should state that a choice-of-law clause cannot itself confer a power that the relevant domestic law withholds. This is consistent with the HCCH Principles on Choice of Law in International Commercial Contracts,	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		which exclude the capacity of natural persons and do not purport to resolve every question of public authority. **A proportionate duty to verify.** Principle 12's duty to verify should establish a minimum standard of reasonable diligence rather than an absolute obligation to prove authority in every case. Relevant steps may include examining publicly available legislation, constitutive instruments, delegations, approval documents and official registers, and seeking written confirmation where a material uncertainty is apparent. The commentary should preserve the effect of applicable domestic rules concerning actual authority and apparent authority. **Comparative caution.** *Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)*, illustrates the strict position under United States federal law that persons dealing with the Government may be charged with knowledge of limits on an agent's authority. That rule should be identified as a jurisdiction-specific example, not generalised to all civil-law, common-law or public-procurement systems. **False assurances and attribution.** A false assurance of authority may support contractual or pre-contractual remedies against the person or entity making it, subject to the applicable law. Whether the same conduct is attributable to the State under public international law is a separate question governed, where applicable, by the rules of State responsibility. Attribution does not itself establish that the official or SOE possessed contractual authority; conversely, failure to establish attribution does not necessarily defeat a private-law claim against the contracting entity. The commentary should make this separation explicit. ***Key References.*** *HCCH Principles on Choice of Law in International Commercial Contracts (2015), scope provisions and commentary; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); International Law*			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Articles 4, 5 and 8.			
162.	**Section D, Principle 12; Commentary para. 246**	Paragraph 246 states that, where one party is a State, State law determines whether a State organ or entity acting for it has authority to bind the State, while legal capacity is regulated by the domestic law applicable to the party. The distinction matters. Article 3.1.1 excludes lack of capacity from the UPICC validity chapter, and its official Comment confirms that matters such as *ultra vires* continue to be governed by the applicable law. That Comment also directs the distinct question of the authority of organs or officers to bind an entity to Comment 5 on Article 2.2.1. The UPICC thus treat capacity and authority as separate questions with separate homes. Principle 12 recommends wording on verification of capacity and on 'acknowledging the legal capacity of the other party within the scope of authority ascertained in the manner agreed between the parties'. The Model Clause cannot override mandatory domestic capacity or authority rules, but may structure verification and, subject to applicable law, allocate risks associated with supplied information and reasonable reliance. An acknowledgment of that kind therefore operates within the law identified by paragraph 246. A concise closing sentence could read: 'Wording of this kind cannot cure a want of capacity or authority under the law referred to in paragraph 246; it may regulate verification and, subject to applicable law, allocate risks associated with supplied information and reasonable reliance.' This clarification would preserve legitimate reliance-based risk allocation without allowing party agreement to cure a defect that the applicable law treats as incurable.	Ayşe Şehnaz Kart	PhD Candidate in Public Law, Hacettepe University Faculty of Law; Attorney-at-Law	Türkiye
163.	**Section D,**	La participation de l'État à une procédure arbitrale impliquant l'une de ses entités peut résulter de fondements juridiques variés. Selon les	Nasr Ashoush	Ph.D. holder from the	Egypt

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Principle 12, **Commentary para. 246**	circonstances, cette participation découle soit du comportement ou du statut de l'entité étatique elle-même, soit des actes propres de l'État, révélant une implication directe ou une volonté de se lier à la convention d'arbitrage. Il convient ainsi de distinguer les situations dans lesquelles l'État est attrait à l'arbitrage en raison du comportement de son entité, de celles dans lesquelles c'est le comportement propre de l'État qui justifie sa qualité de partie à la procédure. Il s'agit des hypothèses dans lesquelles l'État lui-même se retrouve impliqué dans la procédure arbitrale, non pas comme demandeur, mais comme défendeur, du fait du comportement ou du statut de l'une de ses entités. Cette implication nécessite évidemment que l'opérateur étranger dispose du consentement de l'État en faveur de l'arbitrage. Elle résulte ensuite, soit d'un mécanisme d'attribution, conduisant à imputer les actes de l'entité à l'État (§ 1), soit de la reconnaissance que l'État peut être engagé par les actes ou comportements de ses entités, même en l'absence d'attribution formelle. P. 201 et s. de la thèse.[64]		University of Burgundy, France and Judge at the Egyptian Council of State	
164.	**Section D,** **Commentary para.246-267**	**Legal capacity and competence of State entities.** Although the Instrument appears to proceed from the premise that apparent authority does not, as a rule, create obligations for State entities or organs, the provisions on legal capacity could benefit from greater technical precision. In the case of the State and its organs, contractual capacity is more accurately understood as competence, governed by the principle of legality.	Jorge González Carvajal	AVA	Venezuela

[64] Courtesy translation into English (Secretariat): State participation in arbitration proceedings involving one of its entities may stem from various legal grounds. Depending on the circumstances, such participation arises either from the conduct or status of the state entity itself, or from the State's own acts—revealing direct involvement or an intention to be bound by the arbitration agreement. A distinction must therefore be drawn between situations where the State is drawn into arbitration due to the conduct of its entity, and those where the State's own conduct justifies its status as a party to the proceedings. These are cases where the State itself becomes involved in the arbitration proceedings—not as claimant, but as respondent—due to the conduct or status of one of its entities. Such involvement obviously requires the foreign operator to possess the State's consent to arbitration. It arises either from an attribution mechanism, whereby the entity's acts are imputed to the State (§ 1), or from the recognition that the State may be bound by the acts or conduct of its entities, even in the absence of formal attribution. (See pp. 201 et seq. of the thesis.)

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Accordingly, the Instrument should distinguish more clearly between the investor's legal capacity, on the one hand, and the State's capacity or competence to enter into the contract, on the other.			
165.	**Section D,** **Principle 12; and** **Commentary paras. 246-267**	The proposed allocation places a potentially excessive burden on each party to investigate the other party's authority and may inadvertently validate a State's reliance on undisclosed internal limitations. It should distinguish legal capacity, actual authority, approval requirements, apparent authority and attribution, which are separate questions governed by different legal regimes. The Model Clause should not declare categorically that a party is not bound beyond authority 'as ascertained' by the other party, particularly where mandatory law protects good-faith reliance or where the State party controlled the relevant information. Proposed edits for the final two paragraphs of the Model Clause: "Each Party acknowledges that questions of capacity, authority and required approvals are governed by the applicable mandatory law. Each Party shall exercise reasonable diligence, having regard to the information reasonably available to it, and may rely on certificates, legal opinions, official records and specific assurances supplied by the other Party unless it knew, or could not reasonably have been unaware, that they were materially inaccurate. Nothing in this clause prejudices any rule of apparent authority, estoppel, attribution, good faith or State responsibility that cannot validly be excluded."	Aracelly López	Member of CEIA	Costa Rica
166.	**Section D,** **Commentary**	Dans un grand nombre de cas, les investisseurs étrangers réalisent leurs investissements dans l'État d'accueil par le biais d'un contrat conclu avec l'une de ses entités. Les violations de ces dispositions contractuelles peuvent parfois servir de fondement non seulement à des litiges contractuels, mais également à des recours fondés sur la violation d'un traité. Cette dualité	Nasr Ashoush	Ph.D. holder from the University of Burgundy, France and	Egypt

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	paras.247; and **Chapter 8,** **Section C.4,** **Commentary para. 635**	complique la tâche d'un tribunal arbitral saisi sur le fondement d'un traité international lorsqu'il doit statuer sur sa compétence. Face à un différend impliquant à la fois l'État et l'une de ses entités, doit-il se déclarer compétent pour statuer sur la violation du contrat par l'entité ? Ou doit-il se limiter à l'examen de la violation du TBI par l'État ? Autrement dit, quel est l'impact du contrat conclu par une entité étatique sur la compétence d'un tribunal arbitral à l'égard de l'État. la distinction matérielle entre les réclamations contractuelles et conventionnelles, ainsi que la distinction personnelle entre l'État et ses entités, augmentent le risque des procédures parallèles. Il est donc préférable de privilégier une approche économique plutôt que des distinctions juridiques strictes. À cet égard, il est dans l'intérêt des parties, notamment dans les litiges d'investissement, de privilégier l'approche économique du critère de la triple identité. En effet, les litiges contractuels et conventionnels sont souvent si étroitement liés qu'ils ne peuvent être dissociés. Plutôt que d'appliquer des tests d'identité rigides, une analyse globale tenant compte des parties concernées, des bases juridiques invoquées, des objectifs poursuivis et des faits sous jacents est nécessaire pour prévenir une prolifération des procédures et le risque de décisions incompatibles. Cette approche holistique devrait se traduire dans les TBI par des clauses de consolidation à portée étendue, permettant de regrouper, devant un même tribunal, tant les différends contractuels concernant les émanations de l'État que les différends conventionnels visant l'État lui-même. Concernant la litispendance, les États doivent également insérer des clauses reprenant cette approche, afin de permettre au tribunal arbitral de décliner sa compétence lorsqu'un autre tribunal arbitral ou une instance nationale a déjà été saisie de l'affaire. À défaut de telles dispositions, il paraît difficilement concevable qu'un tribunal arbitral s'arroge, de sa propre		Judge at the Egyptian Council of State	

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		initiative, la faculté d'adopter une telle approche holistique de la triple identité des parties, de l'objet et de la cause.[65]			
167.	**Section D,** **Principle 12,** **Commentary para. 248**	Les tribunaux arbitraux sont confrontés au dilemme suivant : pour retenir la responsabilité de l'État, ils doivent parfois lui attribuer un acte licite émanant d'une entité étatique. Plutôt que d'appliquer les règles d'attribution, inadaptées en l'espèce, ils peuvent dans certains cas recourir au mécanisme de représentation qui constitue le fondement juridique approprié. Si la personnalité morale laisse entendre que l'émanation agit pour son propre compte, cela n'exclut pas pour autant qu'elle puisse également représenter l'État. En revanche, si la représentation est une relation entre deux personnes morales distinctes où l'une agit pour le compte de l'autre, cette démarche ne saurait s'appliquer aux organes étatiques. En effet, ces derniers ne possèdent pas d'existence juridique indépendante de l'État, du moins de point de vue du droit international. Voir p. 270 et seq de la thèse. En cas de libellé imprécis de la clause parapluie, outre le mécanisme d'attribution, les tribunaux arbitraux devraient considérer également le	Nasr Ashoush	Ph.D. holder from the University of Burgundy, France and Judge at the Egyptian Council of State	Egypt

[65] Courtesy translation into English (Secretariat): In many instances, foreign investors make investments in a host State through a contract concluded with one of its entities. Breaches of such contractual provisions can sometimes serve as the basis not only for contractual disputes but also for claims grounded in treaty violations. This duality complicates the task of an arbitral tribunal seized on the basis of an international treaty when it must rule on its jurisdiction. When faced with a dispute involving both the State and one of its entities, should the tribunal assert jurisdiction to rule on the entity's breach of contract? Or should it limit itself to examining the State's breach of the BIT? In other words, what impact does a contract concluded by a State entity have on an arbitral tribunal's jurisdiction over the State? The substantive distinction between contractual and treaty-based claims, as well as the distinction regarding the parties involved (the State versus its entities), increases the risk of parallel proceedings. It is therefore preferable to favor an economic approach over strict legal distinctions. In this regard, it is in the parties' interest—particularly in investment disputes—to prioritize the economic approach inherent in the "triple identity" test. Indeed, contractual and treaty-based disputes are often so closely intertwined that they cannot be disentangled. Rather than applying rigid identity tests, a comprehensive analysis—taking into account the parties involved, the legal bases invoked, the objectives pursued, and the underlying facts—is necessary to prevent a proliferation of proceedings and the risk of inconsistent decisions. This holistic approach should be reflected in BITs through broad consolidation clauses, enabling the grouping before a single tribunal of both contractual disputes concerning State entities and treaty-based disputes targeting the State itself. With regard to *lis pendens*, States must also include clauses reflecting this approach, so as to enable the arbitral tribunal to decline jurisdiction when the matter has already been referred to another arbitral tribunal or a national court. In the absence of such provisions, it is difficult to conceive of an arbitral tribunal taking it upon itself to adopt such a holistic approach regarding the triple identity of the parties, the subject matter, and the cause of action.

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		mécanisme de représentation. Si l'entité agissait au nom de l'État lors de la conclusion de l'engagement, l'État lui-même sera tenu de le respecter, ce qui pourra déclencher la clause parapluie. Dans le cas contraire, cette clause restera inopérante.[66]			
168.	**Section E, Principle 13**	I see a problem with the reference to good faith in Principle 13—where it states that "no additional obligations may be implied into the contract on the basis of the pre-contractual phase, of considerations of (…) a duty of good faith"—given that reference is invariably made to Article 1.7 of the UPICC regarding good faith, which stipulates that "(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty." Consequently, the supplementary application of good faith under the UPICC remains to be clarified, as UNIDROIT-ICC Principle 13 implies that good faith could be dispensed with. For instance, Article 2.1.17 (Merger clauses) UPICC does not mention good faith ("A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.")	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru
169.	**Section E,**	We would welcome clarification as to the intended function of Principle 13. As we understand it, the underlying proposition is that parties may	Saniya Sharma	Founder & Executive	United Kingdom

[66] Courtesy translation into English (Secretariat): Arbitral tribunals face the following dilemma: to establish State liability, they must sometimes attribute to the State a lawful act performed by a State entity. Rather than applying rules of attribution—which are ill-suited to this context—they may in certain cases resort to the mechanism of representation, which constitutes the appropriate legal basis. While legal personality implies that an entity acts on its own behalf, this does not preclude it from also representing the State. However, since representation is a relationship between two distinct legal persons—where one acts on behalf of the other—this concept cannot apply to State organs. Indeed, the latter do not possess a legal existence independent of the State, at least from the perspective of international law. See p. 270 et seq. of the thesis. In cases where an umbrella clause is imprecisely worded, arbitral tribunals should consider the mechanism of representation alongside the mechanism of attribution. If the entity acted on behalf of the State when the commitment was entered into, the State itself will be bound to honor it, potentially triggering the umbrella clause. Otherwise, the clause will remain inoperative.

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Principle 13	determine in the IIC the extent to which their pre-contractual conduct and communications may be relied upon in interpreting the contract or in determining obligations arising under it. Paragraph 271 appears to identify this as the rationale for the Principle, but this proposition is not clearly stated in the Principle itself. If this is the intended purpose, we suggest that the Principle be reformulated in these more normative terms, with the Model Clause providing an example of how parties may give effect to it. In its current form, the Principle largely reproduces the Model Clause and does not clearly identify the guidance it is intended to provide.		Director, Alt Platform Collective	
170.	**Section E.1,** **Principle 13; and** **Section E.2,** **Principle 14**	The distinction between 'interpreting' an ambiguous contractual term (permitted under the entire agreement clause) and 'implying' a new obligation (restricted under Principle 13) is theoretically sound but practically unworkable. Arbitral tribunals usually derive implied obligations through interpretive reasoning (e.g., by construing a broad cooperation clause as imposing specific ancillary duties). The commentary provides no operational criteria for adjudicators to distinguish between the two, creating a gap that is particularly acute in IICs where the long-term nature of the relationship inevitably generates situations not expressly addressed in the contract. Furthermore, Principle 14 on writings in confirmation fails to address the common practice of exchanging side letters, agreed minutes, or protocols during IIC negotiations that do not purport to 'confirm' the contract but rather record understandings on specific operational matters. Recommendation: (a) providing a clear test (such as the 'reasonable expectations of the parties at the time of contracting' standard) for distinguishing interpretation from implication;	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		(b) expressly addressing the legal status of side letters and agreed minutes, specifying whether they are subject to the same approval requirements as contract modifications; and (c) clarifying that the entire agreement clause does not operate to exclude evidence of fraud, corruption, or misrepresentation in the pre-contractual phase.			
171.	**Section E.1,** **Principle 13; and** **Commentary paras. 268-273**	Principle 13 risks permitting an entire-agreement clause to restrict the non-derogable duty of good faith under Article 1.7(2) of the UPICC and may unduly exclude pre-contractual material relevant to interpretation, fraud, corruption, mistake, authority, or compliance with mandatory rules. The distinction between using prior statements to interpret the contract and using them to create additional obligations should be stated expressly. Proposed edit: "The parties may agree that the written IIC constitutes their entire agreement and that prior negotiations do not create independent contractual obligations. Such a clause does not preclude the use of prior statements or conduct to interpret ambiguous terms, establish a ground affecting validity, prove corruption or intentional misrepresentation, determine authority or required approvals, or apply mandatory rules. No implied obligation may contradict an express term, but the clause does not exclude obligations arising from mandatory good faith, cooperation, or law." The phrase 'or are obvious' should be deleted because it is indeterminate and may generate inconsistent results.	Aracelly López	Member of CEIA	Costa Rica
172.	**Section E,** **Principle 14**	We support the objective of this Principle, but would welcome clarification as to its intended scope and relationship with Principle 13. As currently drafted, the Principle, its commentary and its Model Clause appear to address	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

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		somewhat different propositions, while parts of the commentary substantially repeat matters already addressed under Principle 13. In our view, **Principle 13 is concerned primarily with the pre-contractual phase**, including the extent to which pre-contractual conduct or communications may affect the scope or interpretation of contractual obligations. Principle 14 appears to address a different situation: **communications or documents issued after conclusion of the IIC which purport to confirm, add to or alter its terms**. This is more naturally understood as a question of contractual modification. If this is the intended distinction, we suggest that Principle 14 state the relevant proposition more clearly. In particular, a document purporting to confirm an IIC should not, by itself, add to or alter its terms; any such addition or alteration should take effect only where it has been agreed by the parties and validly approved and executed in accordance with the requirements applicable to modification of the IIC. The current Principle appears to focus only on applicable approval requirements, whereas the essential point is that **approval alone cannot constitute agreement to a modification**. The Principle should therefore address both agreement and any applicable approval and execution requirements. We also suggest that the commentary and Model Clause be brought into line with this proposition. At present, the commentary and Model Clause appear to contemplate a stronger rule—that additional or altered terms introduced through a purported confirmation are ineffective—than the black-letter Principle itself. Finally, we suggest reviewing the placement and heading of Principle 14. If its subject matter is post-contractual modification rather than the relevance of the pre-contractual phase, it may be more appropriately located alongside		Platform Collective	

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Principle 4, or otherwise separated from Principle 13. The discussion in the commentary that substantially duplicates Principle 13 could then be streamlined accordingly.			
173.	**Section E.2, Principle 14; and Commentary paras. 274-275**	Principle 14 currently provides that additional or different terms in a confirmation are 'subject to' approval requirements. That formulation may imply that such terms can become effective through silence if no approval is legally required. For high-value IICs, additions or alterations should require express written agreement by authorised representatives and any applicable approval. Proposed edit: "A writing sent after conclusion of the IIC that purports to confirm the IIC does not add to or alter its terms unless the additional or different term is expressly accepted in writing by duly authorised representatives of both Parties and all approval requirements applicable to a contractual modification have been satisfied. Silence, performance or failure to object does not by itself constitute acceptance, except to the extent required by applicable mandatory law." This should be aligned expressly with Principle 4(5).	Aracelly López	Member of CEIA	Costa Rica
174.	**Section E.3, Commentary paras. 276-278; and Model Clause**	The Model Clause automatically refers failed open-term mechanisms to arbitration. Not every open term is suitable for arbitral determination, and an arbitral tribunal may lack an objective contractual standard or authority to create a term. Technical or valuation matters may be better suited to expert determination, while policy-sensitive matters may require renewed approval by competent State bodies. Proposed edit: require the parties to classify each open term and identify: (a) the determining person or institution; (b) objective criteria and data; (c) interim performance; (d) time limits; (e) review standard; and (f) approval requirements. Suggested text:	Aracelly López	Member of CEIA	Costa Rica

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		"If the agreed mechanism fails, the matter shall be determined by [independent expert/arbitral tribunal] applying the criteria set out in [Annex]. The determination shall not amend matters reserved by mandatory law to a competent public body, and any resulting modification shall satisfy the approval requirements applicable under Principle 4(5). Pending determination, the Parties shall continue performance under the last applicable term to the extent lawful and practicable."			
175.	**Section E, Commentary paras. 276 - 278**	We would welcome clarification of the relationship between paragraphs 276–278 and the existing provisions of the UPICC. The commentary appears to address three distinct questions: (i) the existence and validity of an IIC where certain terms remain open; (ii) the parties' continued performance notwithstanding such open terms; and (iii) the distinction between determining whether the contract is valid and determining the terms which remain to be agreed or otherwise made definite. These questions would benefit from being addressed separately. To the extent paragraphs 276–278 concern the circumstances in which a contract may be concluded notwithstanding that certain terms remain open, this appears substantially to reflect the approach in UPICC Article 2.1.14 and could appropriately be addressed through the existing framework concerning contract formation. There is, however, a distinct issue arising from the nature of long-term investment projects. Such projects may be structured in phases, with certain terms deliberately left open at the time the IIC is concluded because they depend on information, approvals, technical specifications or other circumstances arising at a later stage. In such circumstances, the fact that certain terms remain open should not necessarily undermine the existence or validity of the IIC, provided that the contract establishes a sufficiently clear mechanism by which those terms are subsequently to be determined.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		We therefore suggest considering whether the Instrument should include a clarificatory principle addressing this particular feature of IICs. Such a Principle could recognise that an investment project may involve phased performance and terms that are intentionally left open, while requiring the IIC to provide a mechanism for making those terms sufficiently definite, consistent with the approach reflected in the UPICC. This would also help distinguish the validity of the IIC as a whole from the subsequent determination of particular open terms, and avoid suggesting that the existence of open terms necessarily raises the same question as whether the contract itself is valid.			
176.	**Principles 10 and 13**	**Relationship between Principles 10 and 13.** Principle 10 imposes duties of good faith and fair dealing during negotiations and identifies bad-faith negotiation or termination as a potential source of liability. Principle 13 permits a merger clause governing the content and interpretation of the concluded contract. The commentary should confirm that a merger clause does not, without clear and legally effective language, retrospectively immunise bad-faith conduct occurring during negotiations. **Comparative foundation.** Principle 10 is closely aligned with Article 2.1.15 of the UPICC and is comparable to Article 2:301 of the Principles of European Contract Law. Comparative treatment nevertheless differs. French law addresses the conduct and termination of negotiations in Civil Code Article 1112 and states the general duty of good faith in Article 1104. Common-law systems often address similar conduct through more specific doctrines, including misrepresentation, estoppel, confidentiality obligations or an express agreement to negotiate. The commentary should present this divergence without suggesting that either legal family has a single uniform rule.	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Bad faith and policy change. The statement that a mere change of policy does not constitute bad faith is a useful safeguard for State parties. It should not, however, operate as an absolute safe harbour. Liability may still arise if the change is used dishonestly, as a pretext, or in a manner intended to induce detrimental reliance while the party has no genuine intention to continue negotiations. The focus should remain on conduct, knowledge and reliance rather than on the mere failure to conclude the IIC. **Recoverable consequences.** The commentary should identify the governing remedial principle without claiming a near-uniform comparative position. The UPICC permits recovery of losses caused by negotiation or termination in bad faith. French Civil Code Article 1112 expressly excludes compensation for the benefits expected from the unmade contract and for the lost chance to obtain those benefits. The Instrument should state whether Principle 10 similarly excludes expectation-based claims and should address reasonable wasted costs and other proven reliance loss. Any treatment of forgone opportunities should be cautious and subject to proof and applicable law. **Characterisation.** For disputes governed by European Union private international law, Article 12 of the Rome II Regulation treats culpa in contrahendo as a distinct category connected to the law applicable to the contract or prospective contract. The commentary may usefully flag that characterisation and choice-of-law questions remain for the applicable forum. ***Key References.*** *UNIDROIT Principles of International Commercial Contracts 2016, Article 2.1.15; Principles of European Contract Law, Article 2:301; French Civil Code, Articles 1104 and 1112; Regulation (EC) No. 864/2007 (Rome II), Article 12 and recital 30.*			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	CHAPTER 4. VALIDITY				
177.	**General comments**	**General comment – application of the UPICC validity rules to IICs.** It was suggested that Chapter 4 more systematically recognise the particular legal consequences of having a State or State entity as a contracting party. While general contract-law principles remain relevant, rules developed primarily for private commercial relationships should be tested, and where necessary adapted in their application, in light of the exercise of public authority, mandatory domestic law, public resources and long-term regulatory responsibilities. The objective should not be to assimilate IICs to ordinary commercial contracts, but to identify where the public-law dimension calls for a differentiated approach. [*Secretariat: please see below three specific comments on mistake, validity of mere agreement, and restitution in case of illegality*].	Comment made during Latin American States' Representatives Roundtable		Ecuador
178.	**General comments**	This chapter does not contemplate avoidance/ilegality consequences for third parties or for financing arrangements (e.g., lender step-in rights, security interests) explicitly, even though these are addressed for termination in Chapter 7, for example. Due to the fact that IICs are often project-financed, this may be worth considering. Maybe a cross reference in Chapter 4 will suffice.	Álvaro Castellanos Howell	CIIAM / Consortium Legal	Guatemala
179.	**Section A,** **paras. 279–313**	We recognise that the validity, illegality and subsequent restitution of an IIC will principally be determined by the applicable mandatory rules of law, including the relevant provisions of the UPICC. We nevertheless suggest that Chapter 4 contain at least one Principle expressly addressing the validity of an IIC. This is particularly important because an IIC sits at the intersection of contractual autonomy, mandatory domestic law and applicable international law.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		1. A Principle should address validity and mandatory law. The Principle should clarify that the validity of an IIC is subject to the mandatory rules of the applicable domestic and international legal framework, and that contractual agreement cannot validate a term or arrangement which is prohibited by such rules. The Principle could also clarify the relationship between contractual invalidity and subsequent consequences, including restitution. This would provide an appropriate bridge between the contractual rules of the UPICC and the public-law requirements which may govern an investment project. **2. Unequal bargaining position should be expressly recognised.** The commentary appropriately recognises that unequal bargaining power may be relevant to the validity of an IIC, particularly where one party has materially greater bargaining power or the investor is presented with non-negotiable State contractual terms. We suggest that this consideration be reflected in the Principle itself. The Principle should recognise that, in assessing validity, regard may be had to circumstances in which a party's consent was materially affected by unequal bargaining position, including where the contractual terms were imposed on a take-it-or-leave-it basis or where the disadvantaged party had no reasonable opportunity to understand or negotiate material provisions. This would also complement the Instrument's wider recognition of bargaining asymmetry and ensure that contractual autonomy is not treated as an assumption that the parties necessarily negotiated on equal terms. **3. The relationship with the UPICC should remain clear.** We do not suggest that Chapter 4 reproduce the detailed UPICC rules on mistake, fraud, gross disparity, illegality or restitution. Rather, a short Principle should			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		identify the particular considerations relevant to IICs and confirm that the applicable mandatory legal framework remains controlling. The Model Clauses, where appropriate, can then address contractual mechanisms for managing the consequences of invalidity or illegality, including severability, restitution and the preservation of unaffected contractual obligations. 4. Given the long-term nature of many international investment contracts, the parties should consider whether the duration and characteristics of the investment warrant mechanisms for **periodic review of the contractual framework.** Such mechanisms may allow the parties to revisit specified assumptions, performance indicators, regulatory conditions and risk allocations at predetermined intervals or upon defined changes in circumstances. Periodic review should not necessarily entail renegotiation of the contract, but may provide a structured opportunity to identify and address emerging issues before they develop into material contractual disputes. The Instrument should therefore distinguish between **adaptation triggered by exceptional circumstances**, such as hardship or force majeure, and **periodic review undertaken as part of ordinary long-term contract management**.			
180.	**Section A,** **para. 281**	A public tender qualification is asserted but not developed. This paragraph states that where an IIC follows a public tender, "certain rules on defective consent may not operate in their ordinary manner"; but the chapter does not explicit which rules or to what extent. Maybe drafters can consider further elaboration or cross-referencing to where (if it is the case) these issues are addressed.	Álvaro Castellanos Howell	CIIAM / Consortium Legal	Guatemala

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
181.	**Section A, para. 280; and Section B, Commentary para. 293**	Interaction with declarations and assurances (reps and warranties) clause is flagged but not explained or supported with an illustration, unlike threat and gross disparity, which each get one. Due to the relevance such clauses are stated to be IIC practice in other chapters (e.g., Principle 8, Chapter 2); an appropriate illustration could usefully show how a representations-and-warranties clause might pre-empt, restrict or interact with a mistake claim.	Álvaro Castellanos Howell	CIIAM / Consortium Legal	Guatemala
182.	**Section B**	**UPICC Article 3.1.2 – Validity of mere agreement.** The relationship between validity by mere agreement and mandatory domestic public-law requirements should be expressed more clearly. In the case of a State party, consent may depend on requirements concerning competence, approvals, and technical or legal assessments. Where domestic law attaches consequences concerning validity, enforceability or otherwise to non-compliance with such requirements, the principle of validity by mere agreement should not displace those consequences.	Comment made during Latin American States' Representatives Roundtable		Ecuador
183.	**Section B,** **Commentary para. 283**	By adding "Subject to any formalities"... this could contradict or create confusion with the fact that no other requirements — such as consideration or cause — are needed, which is the essence of this article: that contracts are formed, modified, or terminated without the need for other requirements under domestic law. Perhaps a distinction should be drawn between "formality" and "requirement", or the phrase "Subject to any formalities, substantive or procedural requirements imposed by the domestic law of the host State or by the internal rules governing the investor…" should simply be deleted.	Laura Pujols	Member of CEIA	Dominican Republic
184.	**Section B,** **Commentary para. 285**	A clarification should be added regarding "If any initial impossibility to perform…"	Laura Pujols	Member of CEIA	Dominican Republic

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
185.	**Section B,** **Commentary para. 285 (read with para. 287)**	Paragraph 285 restates Article 3.1.3 UPICC: the validity of an IIC is not affected merely because performance was impossible at conclusion, and 'the fact that a party lacked legal title or the right to dispose of the relevant assets at that time does not invalidate the contract'. For the ordinary case, that result is consistent with Article 3.1.3. Official Comment 2 explains: 'Indeed, a contracting party may, and often does, acquire legal title to, or the power of disposition over, the assets in question after the conclusion of the contract. Should this not occur, the rules on non-performance will apply.' A separate inquiry arises where an IIC purports to confer a right in respect of a public asset which applicable mandatory law does not permit any contracting party to confer—for example, a purported long-term right of private exploitation over land in the public domain where that law expressly excludes the creation or conferral of that category of right. Consequences imposed by such mandatory law outside private disposition are not determined by Article 3.1.3 alone. They should be assessed under the applicable mandatory law and paragraph 287; paragraph 285 should not be read as resolving that separate inquiry. That division is internal to the official Comment on Article 3.1.3 itself: Comment 1 addresses initial impossibility arising from a legal prohibition, providing that validity turns on whether the prohibiting law is intended to invalidate the contract or merely to prohibit performance — the proposition restated at paragraph 287; Comment 2 addresses want of legal title or power of disposition — the proposition restated at paragraph 285. A short clarification confirming that paragraph 287, not paragraph 285, governs the consequences imposed by such mandatory law outside private disposition would confirm that the draft preserves that division.	Ayşe Şehnaz Kart	PhD Candidate in Public Law, Hacettepe University Faculty of Law; Attorney-at-Law	Türkiye

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
186.	**Section B, Commentary para. 285 (read with para. 279)**	The second neighbouring case concerns capacity or authority. The two should not be collapsed: capacity concerns the State party, while authority concerns the State organ or entity acting for it. Official Comment 2 to Article 3.1.3 states: 'Cases where the power of disposition is lacking must be distinguished from those of lack of capacity. The latter relate to certain disabilities of a person which may affect all or at least some types of contract concluded by it, and falls outside the scope of the Principles (see Article 3.1.1).' As noted above, Article 3.1.1 leaves *ultra vires* questions to applicable law, while paragraph 246 addresses State-organ authority under State law. The UPICC thus treat capacity and authority as separate questions with separate homes, neither of which is the initial-impossibility rule restated at paragraph 285. A cross-reference in or after paragraph 285 could confirm that paragraph 285 does not resolve the separate questions of a State party's capacity or the authority of a State organ or entity acting for it. Those questions remain governed by the law identified in paragraph 246, consistently with paragraph 279 and Principle 12.	Ayşe Şehnaz Kart	PhD Candidate in Public Law, Hacettepe University Faculty of Law; Attorney-at-Law	Türkiye
187.	**Section B,** **Commentary para. 286**	When it says "...Under those provisions…", does this refer to both Chapter 7 of the UPICC (Non-performance) and to the principles of this Instrument? Both are mentioned previously.	Laura Pujols	Member of CEIA	Dominican Republic
188.	**Section C,** **Commentary para. 289**	**UPICC Articles 3.2.1 and 3.2.2 – Mistake.** The commentary should make clear that an investor's unfamiliarity with, or misunderstanding of, host-State law should not ordinarily constitute a ground for avoidance where the investor is sophisticated, professionally advised and expected to carry out appropriate legal and regulatory due	Comment made during Latin American States' Representatives Roundtable		Ecuador

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		diligence. This would be particularly relevant in jurisdictions in which ignorance of the law does not excuse non-compliance. ***Response during the discussion.*** *A Working Group member clarified that the Draft was not intended to treat mere ignorance of host-State law as a sufficient ground for mistake and recalled the strict requirements governing mistake under the UPICC. The UNIDROIT Secretariat likewise recalled the high threshold applicable under the UPICC.*			
189.	**Section C,** **Commentary para. 290**	Regarding the disclosure of legal information, two issues could be noted. First, it is unclear the purpose of requiring a State to provide detailed information on its legal regime, given that domestic laws are presumed, as a matter of law, to be known and binding. The obligation to become informed about the applicable legal regime would appear to rest primarily with the bidder. Second, imposing a detailed disclosure duty on the State may create difficulties in federal systems. For example, where the bidding process is conducted by the federal State, it may be able to describe its own legal regime, but issues may arise from the interpretation of provincial rules, such as those governing connection to the energy grid. Similar concerns may arise in relation to grid-connection guidelines issued by privately owned transmission companies. The State conducting the bid is not in a position to provide detailed information on these matters. Placing this obligation on the State could create expectations among bidders that exceed what it is reasonable for a State to disclose and to a bidder to rely on.	Leandro Caputo	Member of CEIA	Argentina
190.	**Section C,** **Commentary para. 299**	Suggested wording: "In case of contract avoidance, Article 3.2.14 of the UPICC provides that avoidance has retroactive effect."	Laura Pujols	Member of CEIA	Dominican Republic

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
191.	**Section D,** **Model severability clause**	Consider cross-checking or verification of consistency between Model Clause in this chapter against the more detaile severability clause included in the interdependent contracts model clause in Chapter 2 (Principle 5)	Álvaro Castellanos Howell	CIIAM / Consortium Legal	Guatemala
192.	**Section D,** **Commentary para. 308; and** **Model Severability Clause**	Adjudicators' power to readapt the contract should be limited to those readaptation proposals made by the parties in the litigation. As drafted, this model clause might be interpreted as granting competence on the adjudicator to make a sua sponte adaption of the contract, which it should not, since doing that shall fall outside its scope of power.	Leandro Caputo	Member of CEIA	Argentina
193.	**Section E**	**UPICC Articles 3.3.1 and 3.3.2 – Illegality and restitution.** Particular caution should be exercised in granting restitution where illegality results from corruption and the applicable law does not determine the consequences. It was suggested that consideration be given to a strong presumption against restitution in case of corruption. More generally, the application of the rules on illegality and restitution should reflect the public-law implications of a State or State entity being a contracting party.	Comment made during Latin American States' Representatives Roundtable		Ecuador
194.	**Section E,** **Commentary para. 312**	It is not entirely clear whether "may" and "should" imply the same possibility of applying or taking into account the criteria in 3.3.1(3): "The criteria laid down… may also be used in the context of IICs. Hence, if an IIC is declared illegal and the question of whether restitution should be granted arises, the adjudicator should take into consideration the following criteria:… "	Laura Pujols	Member of CEIA	Dominican Republic
195.	**Section E,**	Investor faces a twofold situation: on the one hand, the claim for illegality and the purported seriousness of the alleged environmental damage and on the other hand, the obligations committed vis à vis the licensing authority.	Leandro Caputo	Member of CEIA	Argentina

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Commentary para. 312; and **Second Illustration**	The illustration seems to suggest that should the environmental claim be raised several times announcing the possibility of a severe damage, claim that at the end of road success, the investor should stop moving forward with the investment. However, until a competent authority order through a valid act to cease the investment, the investor is committed to fulfil its obligations vis à vis the licensing authority. Otherwise, investor shall put itself in the situation of being fined by the authority meanwhile the illegality claim is not decided on one side or the other. This is a matter that Stated should handle by determining that in these sorts of claims legal standing as respondents shall be vested jointly with the licensor and the licensee.			
CHAPTER 5. RIGHTS AND OBLIGATIONS					
196.	**General comments** [67]	Under Chapter 5 'Rights and Obligations', proposition to include also, the 'Obligations of the Foreign Investor' as follows: A. Funding, A1 Fund the project, A2 Manage and operate the investment, etc. B. Cost of the Project Investment indicating the cost breakdown, i.e. CAPEX, Working Capital, Design fees, Management fees and Legal fees, etc. Further, obligations of the Foreign Investor may include the investor putting up 'Climate Resilience Infrastructure' considering the complexity of Force Majeure and recent global developments that may derail the project's future success should, for instance flooding occur and destroy infrastructure and where two parties fail to reach an agreement on whether such an event is a force majeure or is as a result of climate resilience infrastructure not having been put in place.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia

[67] This comment was provided on the Introduction but seems to fit better under Chapter 5.

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
197.	**General comments**	**Chapter 5 – Tender documents and model contracts.** The Instrument should be understood not only as a tool for negotiating individual contracts but also as a benchmark for authorities preparing tender documents and model contracts. In many Peruvian projects, the substantive terms are fixed before bidders enter the process; the provisions of Chapter 5 may therefore have their greatest practical impact at the tender-design stage rather than at the subsequent negotiation stage.	Comment made during Latin American States' Representatives Roundtable		Peru
198.	**General comments**	**A. Preserve Contractual Certainty and Investor Confidence** The Instrument should protect investors against arbitrary State action, unlawful termination, discrimination and unlawful expropriation. At the same time, those protections should be precisely defined so that bona fide, non-discriminatory public-interest measures on taxation, labour, public health, competition, environmental protection, climate change and related matters do not automatically trigger compensation.	KNCCI		Kenya
199.	**Section B,** **Principle 15**	We support the objective of this Principle. The duty to perform in good faith and the associated duty to cooperate are appropriate in the context of long-term investment contracts involving sequenced and interdependent performance. Our principal recommendation concerns the **content of the standards introduced by the Principle**. **1. The standards should be elaborated in the Principle itself.** Principle 15 introduces the standards of good faith, cooperation, arbitrariness and reasonableness, but does not indicate what conduct falls within them. Paragraphs 319, 320 and 324 provide useful guidance, identifying, among other matters, lack of justification, abuse, caprice, bias or prejudice, disproportionate exercise of rights, disregard of due process, and conduct	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		intended to delay or frustrate performance. We suggest that these considerations, appropriately condensed, be reflected in the Principle itself. This should be a general drafting approach throughout the Instrument: **where a Principle introduces an open-ended standard, the Principle should provide sufficient guidance as to its content and limits**, rather than leaving its meaning principally to the Commentary. **2. The limits of the standards should also be stated.** The Principle should clarify that the duty to cooperate does not alter the allocation of obligations agreed by the parties or contradict express contractual terms, and that performance in accordance with the contract does not, merely because it adversely affects the other party, constitute a breach of good faith. These qualifications are important to prevent the standards from being used to challenge the legitimate exercise of contractual rights. **3. The role of proportionality should be clarified.** If proportionality is intended to constrain the exercise of contractual rights under Principle 15, this should be stated expressly and its relationship with the treatment of proportionality elsewhere in the Instrument clarified.			
200.	**Section B, Principle 15**	As a preliminary point, it is important to note that the good faith at issue here—within the context of international investment law—differs from good faith in international trade or domestic law. Furthermore, it involves a general duty of contractual good faith, distinct from other concepts such as good faith regarding integration, correction, or interpretation, as well as pre-contractual good faith or good faith as a criterion for interpreting an international instrument.[See Sergio García Long, 'Towards a formalistic approach of good faith in comparative contract law' (2024) 35 European Business Law Review 947.] Given the existence of various established notions of good faith, greater precision is therefore required in Principle 15.	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		This is an opportunity to take a critical look at good faith, given that commercial contracts do not operate in the same context as international investment contracts. An investment contract may involve a State from a Common Law jurisdiction—such as England—that would be unwilling to submit to the UNIDROIT-ICC Principles if they incorporate a broad concept of good faith. Furthermore, instead of merely referring to good faith, some guidance or a definition could be included. Even English legal scholars such as Ewan McKendrick explain that the problem lies not in good faith itself, but in the content of good faith.[Ewan McKendrick, 'Good Faith in the Performance of a Contract in English Law' in Larry DiMatteo and Martin Hogg (eds), Comparative Contract Law: British and American Perspectives (Oxford University Press 2015) 196. Also Ewan McKendrick and Qaio Liu, 'Good Faith in Contract Performance in the Chinese and Common Laws' in Larry DiMatteo and Chen Lei (eds), Chinese Contract Law. Civil and Common Law Perspectives (Cambridge University Press 2017) 72; John Cartwright, 'Good Faith in English Contract Law: Lessons from Comparative Law?' in Edwin Peel and Rebecca Probert (ed), Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC (Oxford University Press 2023) 23.] For example, if good faith is understood as honesty and cooperation, one might assume that everyone would agree on it. In construction international contracts, Clause 10.1 NEC3 and clause 10.1 NEC 4 make reference to "mutual trust and cooperation" instead of good faith. Likewise, if good faith means loyalty to the contract rather than to the parties, then there would be no issue. However, this needs to be made clear; certainly, doubts arise if the term "good faith" is used without further qualification. Above all, contractual good faith in international investment law must take into account the particular circumstances of the agreement in question, including its relational or long-term nature. While the presence of good faith			

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		might be more readily justified in such a context, it is nonetheless preferable to have guidelines, definitions, or references to specific situations, such as cooperation. Perhaps, instead of invoking good faith, one could refer to the specific situations that would give rise to concern. For instance, Principle 15 already specifies the obligation "not to act arbitrarily or unreasonably"; this suggests that the concern in investment law is that parties might behave in an arbitrary or unreasonable manner, and consequently, explicitly mentioning good faith would no longer be necessary. Above all, the Model Clause already incorporates the recommendation I make by including four specific situations that would run counter to contractual good faith—such as a lack of cooperation, the frustration of the contract's purpose, or the abusive exercise of rights. Perhaps the Model Clause should be Principle 15, and not the other way around.			
201.	**Section B,** **Principle 15**	Principle 15 suffers from a fundamental internal contradiction with the stabilisation framework in Chapter 6. The commentary states that "a party performing the IIC according to its terms, even though such performance may negatively affect the other party, does not violate by itself the principle of good faith" (para. 324). Yet the economic equilibrium clause in Principle 23(2) is triggered precisely when lawful State conduct (the adoption of regulatory measures) disrupts the contractual balance. The Instrument thus simultaneously holds that such conduct does not breach good faith (Principle 15) and that it triggers a renegotiation obligation with potential compensation (Principle 23(2)), without explaining how these two propositions coexist. This ambiguity might generate disputes over whether a given State measure engages only the stabilisation framework, only the good faith standard, or both (with materially different remedial consequences). Furthermore, the Model Clause's prohibition on exercising rights "in an abusive, disproportionate, or vexatious manner" (sub-para. (c))	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		introduces concepts drawn from civil law traditions that have no clear equivalent in common law systems and lack any definitional guidance in the commentary. Recommendation: (a) inserting an express hierarchy provision clarifying that Principle 15 is without prejudice to the specific remedial frameworks in Chapters 6 and 7; (b) defining 'arbitrary', 'unreasonable', and 'abusive' conduct with reference to objective criteria adapted from the UPICC; and (c) expanding the illustrative examples to include contemporary categories of dispute such as digital regulation, selective enforcement, and retroactive environmental standards.			
202.	**Section B,** **Principle 15**	1) The term "arbitrary or unreasonable" lacks certainty and also lacks degree of severity of misconduct. To reduce uncertainty there can be added a criteria of "manifestly" "arbitrary or unreasonable" 2) "to act" may be understood as referring only to affirmative conduct and therefore may not capture a party's failure to take action where action is required. The comments could clarify that, for the purposes of the provision, "to act" encompasses both affirmative conduct and, where the circumstances or the IIC so require, a failure to act. This makes clear that a party may breach the obligation not only by doing something improperly, but also by remaining passive when good faith requires it to take reasonable action.	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation
203.	**Section B,** **Principle 15; and**	The commentary specifies that performance contrary to good faith includes conduct that is unsupported by justification, based on bias or prejudice, disproportionate to the originally intended result, or in willful disregard of due process. These are the elements through which the fair and equitable treatment standard has been developed in treaty arbitration. Their appearance in a contractual good faith Principle invites the transposition of	i3T		Mexico

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Commentary para. 319	that case law into contract-based adjudication, affecting the objectives and goals of the instrument.			
204.	**Section B,** **Principle 15,** **Commentary para. 323**	The examples given on breaches by the state relate to the allocation of risks between the state party and investor, which clearly if risks are introduced in the IICs, which party is responsible for each risk or which risk(s) are shared, addresses this concern.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
205.	**Section B,** **Principle 15,** **Commentary para. 324**	Proposes a Principle and Model Clause on 'Project Performance Standards' during construction or preparation phase of the project and implementation/operation period, specifying the expectations and applicable penalties (mostly financial penalties) for non-performance of the set/agreed standards by each party, e.g. low demand, state delaying on renewal of permit or license, etc.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
206.	**Section B,**	Declarations, Assurances, and Undertakings do not work in business, unless in jurisdictions with no laws, regulations and policies to facilitate for Foreign Direct Investment or International business.	Solomon J. Simutowe	Assistant Director – Project	Zambia

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	Principle 15, **Commentary para. 325**	In that regard, Obligations and Rights, Risk allocation, Performance Standards, including Conditions Precedent takes care of Declarations, Assurances, and Undertakings.		Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	
207.	**Section C,** **Commentary paras. 327, 328 and 329; and** **Principle 16**	Principle 16 could/is adequately covered under Asset Risk, Political Risk, Force Majeure, and Insurance Risk in the Risks and Risk Allocation Matrix. Of course, state should provide in addition to the above, as stated in the IIC document, asset and physical security and security to personnel of the investor in high-risk areas or business environments, or where such conditions do not exist, should such a situation arise.	Solomon J. Simutowe	Assistant Director – Project Development Promotion, Public-Private Partnership Office, Ministry of Finance and National Planning	Zambia
208.	**Section C,** **Principle 16**	We support the inclusion of a contractual protection and security obligation and the calibration in paragraph 328 to the host State's available resources, institutional capacity and security context. We suggest, however, that the scope and operation of the obligation be clarified. **1. The temporal operation and standard of the obligation should be clarified.** It is unclear when the State's obligation to provide protection and security begins and ends. The reference to personnel and assets "in relation to the IIC" does not establish the relevant period, which may be particularly	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		important for investments developed and implemented in phases. We suggest that the parties be directed to define in the IIC the period during which the obligation applies, having regard to the nature and lifecycle of the investment. The Principle should also make clear that this is a continuing, risk-based due diligence obligation, the intensity of which varies according to the prevailing security context and threats which are known or ought reasonably to be known to the State. **2. The reference point for "necessary" should be clarified.** The commentary links the required level of protection to the State's resources, institutional capacity and security context, while the Model Clause refers to protection necessary to enable the investor to perform the IIC. We suggest that these considerations be brought together, with the required protection assessed by reference to what is reasonably necessary to enable performance of the IIC, having regard to the circumstances of the host State. The level of protection should also be proportionate to the nature, scale, duration and risk profile of the investment. **3. The parties should define the personnel and assets protected.** Rather than prescribing categories in the Principle, we suggest that the IIC identify the personnel and assets to which the obligation applies. This is particularly important where an investment project involves contractors, subcontractors or a suite of interdependent contracts. The IIC should clarify, where relevant, which project personnel and assets fall within the protection obligation and how protection operates across interdependent parts of the project. **4. The distinction between physical and legal security should be clarified.** We understand the commentary to distinguish the physical protection and security contemplated by Principle 16 from other forms of			

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		legal security. It would be helpful for the Instrument to state more clearly what the obligation does and does not encompass. In particular, ensuring legal protection should not, by itself, satisfy an obligation to provide physical security, and the provision of physical security should not necessarily be treated as providing legal security. The commentary could provide examples illustrating this boundary. **5. The alternative formulation for State enterprises should be reconsidered.** Where the counterparty is not the State, the Model Clause requires the entity to take "necessary steps to persuade" the State to provide protection. We suggest that the parties instead define the steps to be taken, including, where appropriate, agreed forms of request or communication to the relevant State authorities. The commentary should also clarify the due diligence expected before the IIC is concluded. In particular, the investor should assess whether the State entity has any legal, institutional or practical ability to influence or procure physical protection from the State. Where it does not, the parties should be encouraged to address that limitation expressly in the IIC and allocate the resulting security risk accordingly. This would avoid treating an undertaking to "persuade" the State as an assumption of responsibility that the State entity may have no realistic ability to discharge.			
209.	**Section C,** **Principle 16; and Model Clause**	It is advisable to consider the specific circumstances found in developing countries. A phenomenon known as the "privatization of public security forces" often occurs in those nations; this means that, under the law, police officers–for instance–may be hired by a private company (the investor) to provide private security services during their time off. This option represents a source of income for the officers, particularly in countries where police pay is low.	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru

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		The problem arises when confrontations occur involving the investor's assets and private security personnel. In areas where local communities are present, protests often break out – sometimes spiraling out of control – resulting in injuries or even deaths among community members, security personnel, and third parties. When a community member is the victim, for instance, and a lawsuit for damages is filed against the investor, a primary defense raised is that the security officer is an employee of the Ministry of the Interior and the State; as such, the officer bears direct liability, while the Ministry of the Interior and the State bear indirect liability under the doctrine of vicarious liability. In that context, the provision of security by the State for the benefit of the investor would be counterproductive for the State itself, as it would entail an assumption of liability – or, viewed differently, an obligation to hold the investor harmless against damages arising from the provision of such security. Consequently, Principle 16 and the Model Clauses are problematic in their current form; the wording needs to be adjusted in light of the foregoing.			
210.	**Section C,** **Principles 16-19**	The two-tier Model Clause structure for investment protection (imposing a direct obligation on States but only a 'best efforts to persuade' obligation on State enterprises) creates a protection gap that is likely to arise in the majority of IICs. In practice, most IICs are concluded not with the State directly but with State-owned enterprises, agencies, or other entities that may exercise substantial public authority without being formally the State. The 'best efforts to persuade' standard is difficult to enforce, and places the evidentiary burden on the investor to demonstrate that the enterprise failed to take sufficient steps (a near-impossible task given the opacity of intra-governmental communications). Moreover, the 'prompt, adequate and effective' compensation standard for expropriation, while consistent with the Hull formula, will conflict with domestic legal standards in numerous host	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		States that apply 'just compensation', 'fair value', or 'appropriate indemnity' standards. The Instrument provides no guidance on how this conflict is to be resolved when the IIC is governed by domestic law. Recommendation: (a) replacing 'best efforts to persuade' with 'commercially reasonable efforts', coupled with a presumption of State attribution where the enterprise exercises delegated public authority or acts under State direction; (b) requiring the State enterprise to include in the IIC an undertaking by the State itself to be bound by the investment protection obligations; and (c) addressing the interaction between the contractual compensation standard and divergent domestic law standards in the commentary, with guidance on interpretation by arbitral tribunals.			
211.	**Section C.1,** **Principle 16**	**Principle 16 – Physical Protection and Security.** The standard of obligation should be clarified. Peruvian legislation applicable to hydrocarbon projects requires the State to provide security "to the extent possible", which was characterised as an obligation of means rather than an obligation of result. By contrast, wording requiring the State to "ensure" physical protection and security could be read as imposing a higher standard. Guidance would assist States in determining whether existing domestic obligations satisfy the Principle or require additional contractual implementation.	Comment made during Latin American States' Representatives Roundtable		Peru
212.	**Section C.1 and Section C.2, Model Clause:**	The issue that gives rise to this comment is the ambiguity of the "obligation of conduct" to "take necessary steps to persuade the State". The model clauses for State-owned enterprises (SOEs) or other State-related entities establish an "obligation of conduct" to "take necessary steps	Ana María Ordóñez	CIIAM / Martínez Quintero Mendoza	Colombia

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	"Model Clause where a State enterprise or other entity related to the State is the counterparty"; **Commentary to Principle 16 (para. 330) and Principle 17 (para. 336)**	to persuade the State" regarding physical protection and expropriation. [[The [name of the State enterprise or other entity related to the State] undertakes to take necessary steps to persuade the State …]]. The commentary correctly identifies this as an "obligation of conduct and not result" [[In such situations, the counterparty has an obligation of conduct and not result.]]. However, the instrument provides no definition or guidance on what constitutes "necessary steps". This ambiguity could be a significant source of future disputes, as it leaves critical questions unanswered: - What level of effort is required? Is a formal letter sufficient, or is active and sustained advocacy expected? - What specific actions are considered "necessary" (e.g., formal meetings with ministries, submission of legal/economic reports, use of internal channels of influence)? - How can an investor verify compliance with this obligation? - How would an arbitral tribunal assess whether the SOE has diligently fulfilled its duty? To address this ambiguity, it is recommended that the drafters include an additional commentary to provide guidance on the scope of this obligation. This would not change the nature of the obligation (of conduct), but it would establish a clearer and more objective standard of diligence. The proposed commentary could suggest that "necessary steps to persuade" may include, among others, the following actions by the State-related entity:		González Laguado & De La Rosa	

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		(a) Formal and Timely Communication: Notifying the competent State organs in writing and without delay of the State's contractual obligations and the negative consequences that a measure (such as expropriation or failure to provide security) would have on the investment project. (b) Substantive Advocacy: Presenting reasoned legal, economic, and technical arguments to the relevant government bodies, demonstrating why the proposed measure is detrimental or contrary to the State's interests and its contractual commitments. (c) Use of Internal Channels: Actively using its institutional relationships and communication channels with the government to advocate for the respect of the contract and to seek alternatives to the harmful measure. (d) Duty of Documentation and Transparency: Maintaining a detailed record of all actions taken to persuade the State and, upon reasonable request from the investor, providing evidence of such actions, subject to applicable confidentiality limitations. (e) Proactive and Timely Action: Undertaking these actions proactively and diligently as soon as it becomes aware of a potential State measure that could adversely affect the investor. Including such guidance would provide greater legal certainty for both the investor and the State-related entity. It would also offer a concrete benchmark for arbitrators to assess compliance, thereby strengthening the practical utility and robustness of the model contract.			
213.	**Section C.2, Principle 17**	We welcome the recognition in paragraph 331 that the protection under Principle 17 is contractual in nature and that breach gives rise to contractual remedies under Chapter 7. However, the present formulation illustrates a broader concern with the Instrument: **if the Principles are intended to provide governing substantive standards, the provision is**	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		insufficiently developed; if, as we suggest, they are intended primarily to guide the negotiation and drafting of IICs, the Principle should be reframed accordingly. The central question for the parties should be **what they intend "expropriation" to mean in the particular contractual relationship.** The Principle should therefore direct the parties to define the scope and content of the protection, rather than purporting to supply a complete expropriation standard. In particular, the Model Clause should invite the parties to address, as appropriate: • what constitutes **direct expropriation**; • what constitutes **indirect expropriation** and the test to be applied; • the treatment of measures which substantially deprive the investor of the use, value or enjoyment of its investment; • the distinction between expropriation and the State's legitimate exercise of its regulatory powers; and • the investment, assets and contractual rights to which the protection applies. The level of detail in the **India Model BIT**, for example, demonstrates the extent to which an expropriation provision may need to articulate these matters if it is intended to provide a workable standard. Principle 17 presently provides considerably less guidance, while its Model Clause risks appearing to establish a substantive standard without resolving the questions necessary to apply that standard in practice. We therefore suggest that **Principle 17 be expressed as a drafting and negotiation principle**: parties should clearly identify what they understand by expropriation and should specify the circumstances in which contractual			

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		protection against direct and indirect expropriation is intended to arise. The Commentary can then identify the principal drafting choices and the Model Clause can provide an illustrative formulation for parties wishing to adopt them. The Commentary should also draw the parties' attention to the possibility that **treaty and contractual expropriation protections may coexist**, and encourage them to determine expressly whether the contractual standard is intended to incorporate, replicate or operate independently of any applicable treaty standard. This is particularly important where the investor may separately waive treaty-based recourse under Principle 32. Finally, the treatment of **State entities and other State-related counterparties** should be made consistent across the Chapter. Where the counterparty is not itself the State, the Instrument should clearly distinguish between an obligation to procure or ensure State conduct and an obligation merely to use reasonable efforts to secure that conduct, and explain the contractual consequences of each. **In our view, the principal value of Principle 17 should be to help negotiators construct a clear, deliberate and practicable contractual expropriation clause, rather than to establish an incomplete stand-alone expropriation standard.**			
214.	**Section C.2, Principle 17**	BFE+ considers Principle 17 to provide a useful framework for addressing expropriation in the context of IICs, but submits that several aspects of its scope would benefit from further clarification in order to enhance predictability in its application. *First*, the Instrument should clarify whether indirect expropriation requires the exercise of sovereign authority or may also arise from conduct undertaken by the State in its capacity as a contractual party. This distinction is particularly important in the context of IICs, where the State may	Alfredo Bullard, Huascar Ezcurra, Bruno Doig, Inmaculada Posada and	Bullard Falla Ezcurra +	Peru / Spain

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		simultaneously exercise public powers and perform ordinary contractual functions. Without further guidance, the current formulation may create uncertainty as to whether conduct such as the termination, modification, or non-performance of contractual obligations may fall within Principle 17 merely because the contractual counterparty is the State. BFE+ therefore recommends that the commentary expressly address the relationship between indirect expropriation and purely contractual conduct, and identify the circumstances, if any, in which the latter may come within the scope of the Principle. *Second*, if contractual conduct may qualify as expropriatory, the Instrument should clarify how Principle 17 interacts with the other provisions of the IIC. In particular, it should address whether conduct expressly authorised by the contract is necessarily excluded from the scope of indirect expropriation and whether the same conduct may simultaneously constitute a breach of another contractual obligation and an expropriation. Clarification on these issues would avoid uncertainty as to the relationship between overlapping contractual protections and remedies. *Third*, BFE+ recommends clarifying the meaning of "assets of the investor in relation to the IIC". The expression may be understood narrowly, as referring only to assets specifically committed to or deployed in the relevant investment project, or more broadly, as encompassing contractual rights, licences, shares or other corporate interests, receivables, intellectual property, and other rights connected with the IIC. The scope of the protected assets may materially affect the operation of Principle 17 and should therefore not be left uncertain. The commentary should either define the expression or provide an illustrative, non-exhaustive list of the principal categories of assets that it is intended to cover. *Fourth*, BFE+ suggests clarifying the obligation applicable to State-owned enterprises to "take necessary steps to persuade the State". The current	Ignacio Enrique Tovar		

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		formulation does not make clear whether this is an obligation of result or an obligation of conduct. If the latter is intended, the Instrument should further specify the level of effort required, including whether the enterprise is expected to use reasonable efforts, best efforts, or another standard. Greater precision on both points would allow compliance to be assessed by reference to a defined level of performance and would avoid uncertainty as to the extent to which a State-owned enterprise may be held responsible for a State decision ultimately beyond its control. In sum, BFE+ recommends that Principle 17 and its commentary: (i) clarify the treatment of contractual conduct by the State for purposes of indirect expropriation; (ii) explain how Principle 17 interacts with other contractual rights, obligations, and remedies where contractual conduct may also qualify as expropriatory; (iii) define more precisely the scope of "assets of the investor in relation to the IIC"; and (iv) clarify whether the obligation imposed on State-owned enterprises is one of result or conduct and, if the latter, specify the applicable standard of efforts.			
215.	**Section C.2, Principle 17**	**G. Clarify Expropriation and the Right to Regulate** The Instrument should distinguish genuine unlawful expropriation from legitimate public-interest regulation. Bona fide, non-discriminatory and proportionate regulatory measures adopted in accordance with law should not automatically be treated as indirect expropriation merely because they affect profitability or commercial expectations.	KNCCI		Kenya
216.	**Section C.2, Principle 17; and Model Clause**	"Where the counterparty to an IIC under these Principles is a State, that counterparty shall not expropriate or nationalise or take other measures which have the same effect or are tantamount to expropriation or nationalisation, <u>of the covered investment</u> unless" Principle 17 begins by stating: "Where the counterparty to an IIC under these Principles is a State, that counterparty shall not expropriate or	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic	Peru

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		nationalise or take other measures which have the same effect or are tantamount to expropriation or nationalisation, of the assets of the investor in relation to the IIC unless…". In this regard, the phrase "of the assets of the investor in relation to the IIC" should be replaced with "of the covered investment"; otherwise, the reference to "assets of the investor" might be construed as limited strictly to assets, potentially restricting the scope to the direct expropriation of assets—which is, in fact, one of the rarest forms of expropriation, given that indirect or de facto expropriations (involving an impairment of the investment's value) are far more common. For these reasons, the use of "covered investment" in expropriation clauses has become the standard in international investment agreements. It is worth noting that "covered investment" is used in Principle 18(2)(a) and (b). Another important aspect is that regulations regarding expropriation tend to be extensive because there are significant issues to address—some of which are not mentioned in Principle 17 or the Model Clauses. For instance, the 2012 United States Model BIT prohibits expropriation unless the four classic conditions are met; however, the subsequent paragraph elaborates on the details of compensation. This is crucial, as compensation is arguably the sole protection against expropriation, making it in the parties' interest to have its terms clearly defined. Article 6. Expropriation and Compensation 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and		University of Peru	

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		(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3). 2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. 3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) - converted into the currency of payment at the market rate of exchange prevailing on the date of payment - shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS			

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		Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement. Another relevant matter is how a case of indirect expropriation is assessed. Given the complexity of the issue, various BIT models include a specific provision addressing it; for instance, Annex B (Expropriation) of the 2012 United States Model BIT states the following: 3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. 4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.			

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		Above all, it is important to consider the final paragraph of Annex B (Expropriation) of the 2012 United States Model BIT—which addresses exceptions to expropriation, such as the exercise of police powers—to recognize that a State, in exercising its regulatory authority to protect public interests, does not engage in expropriation and is therefore not liable for compensation. This point is addressed in paragraphs 334 and 335, though it would be advisable to incorporate it into Principle 17. The final paragraph of Annex B states the following: (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. As can be seen, there are various important aspects that should be incorporated into the text of Principle 17. These are not matters that would lead to over-regulation of the subject of expropriation, but rather necessary elements whose inclusion will provide certainty to the parties.			
217.	**Section C.2,** **Principle 17; and** **Commentary paras. 331–336**	**Contractual protection against expropriation** The contractual expropriation standard also needs a more careful account of attribution. The Draft treats a breach of Principle 17 as contractual non-performance, which is relatively straightforward where the State itself signed the contract. The analysis becomes harder when the contractual counterparty is an SOE, regulator, concession authority or another legally distinct public entity. A sovereign act by Parliament, a court, the tax authority or a different ministry cannot automatically be treated as a contractual breach by that counterparty. The text would benefit from separating three situations:	ACCOLDI		Colombia

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		• acts of the contracting State itself; • acts of State organs for which the State has expressly undertaken contractual responsibility; and • acts of legally distinct State entities over which the contractual counterparty has no contractual control. If the parties want protection that reaches beyond the acts of the contractual counterparty, the cleaner solution is a State guarantee or an express sovereign undertaking. Attribution should not be expanded by implication.			
218.	**Section C.2,** **Principle 17; and** **Commentary paras. 334**	i3T supports the statement that a measure is not of the nature of expropriation where it is a legitimate exercise of regulatory freedom adopted in good faith for the protection of the public interest without discrimination against the investor. We recommend that considerations of national development be considered as well as part of the regulatory freedom of the countries.	i3T		Mexico
219.	**Section C,** **Principle 18**	We welcome the inclusion of a payments and transfers provision. However, the Principle largely reproduces a protection commonly found in investment treaties, without sufficiently explaining **why such a provision may be appropriate in an IIC or what contractual choices the parties should make in structuring it**. We suggest that the Principle should instead be framed as guidance for negotiators. The Commentary should explain the circumstances in which parties may wish to provide a contractual right to make and receive payments and transfers, and the matters which should be addressed in giving effect to that right, including the categories of payments and transfers	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		covered, applicable currency and conversion arrangements, timing, and relevant regulatory restrictions. In particular, the treatment of **balance-of-payments difficulties warrants reconsideration**. Investment treaties commonly address balance-of-payments measures as a distinct and temporary exception to the general freedom of transfers, subject to specified conditions and safeguards. Principle 18(4)(g) adopts a materially different formulation, while the Model Clause does not appear to reflect the temporary character and associated safeguards ordinarily found in such provisions. The reason for this departure is not apparent. We therefore suggest that the Commentary explain the policy rationale for the proposed approach and, if the balance-of-payments exception is retained, clarify its **temporary and exceptional character**, including the circumstances in which such restrictions may be imposed, their proportionality to the relevant difficulties, and their removal once those circumstances cease to exist. More generally, the Model Clause should not purport to provide a complete, stand-alone payments and transfers standard. Its purpose should be to **identify the principal contractual issues which parties should consider and provide an adaptable formulation through which those issues can be addressed in the context of the particular investment**. **Balance-of-payments safeguards.** The Instrument should distinguish between the different circumstances in which temporary safeguard measures may be required in response to monetary or balance-of-payments difficulties. Contemporary investment agreements distinguish, for example, exceptional temporary measures relating to monetary and exchange-rate policy from safeguards adopted in response to serious balance-of-payments or external financial difficulties. The latter may be subject to safeguards			

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		concerning necessity, non-discrimination, proportionality, avoidance of unnecessary damage to the other party's interests, and progressive withdrawal as conditions improve. They may also be accompanied by **notification, a timetable for removal and prompt consultations** concerning the circumstances giving rise to the measures and their continued application. Principle 18(4)(g) presently provides a substantially less developed framework. If the intention is to depart from the approach reflected in contemporary treaty practice, the rationale for doing so should be explained. Otherwise, the Commentary should identify the principal **contractual choices** which parties may wish to address when structuring a balance-of-payments safeguard, including the circumstances triggering the safeguard, its duration, substantive limitations, notification and consultation requirements, and the conditions for its withdrawal.			
220.	**Section C.3,** **Principle 18**	**Principle 18 – Payments and Transfers** The closed list of public-interest exceptions to the investor's right to make payments and transfers was considered a potentially useful model. Peru currently provides foreign investors with a broad guarantee of free transfer of capital and profits without prior authorisation. A contractual approach incorporating defined exceptions could provide a more qualified formulation of that guarantee.	Comment made during Latin American States' Representatives Roundtable		Peru
221.	**Section C,** **Principle 19**	BFE+ supports the cooperative framework established by Principle 19, while considering that certain formulations should be refined to delineate more clearly the scope of the State party's obligations and avoid interpretations that extend beyond what the Principle appears intended to require. *First*, the Instrument should clarify the function of the requirement that the investor be treated in a "fair and non-discriminatory" manner. In the context of Principle 19, this language should not be understood as establishing an	Alfredo Bullard, Huascar Ezcurra, Bruno Doig,	Bullard Falla Ezcurra +	Peru / Spain

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		autonomous standard of protection separate from the specific cooperation obligations set out in the Principle. Rather, fairness and non-discrimination should qualify the manner in which those concrete obligations are performed. Absent such clarification, the provision could be interpreted as creating a broader and independent contractual standard whose content and consequences extend beyond the cooperation framework established by Principle 19. BFE+ therefore recommends that the commentary expressly clarify the ancillary character of this requirement. *Second*, BFE+ suggests reconsidering the formulation requiring the State party to ensure the "issuing [of] all permits". Such language may be understood as imposing an obligation to guarantee a particular administrative outcome, irrespective of the applicable legal requirements or the allocation of authority among competent public bodies. This would be particularly problematic where permits depend on statutory conditions, technical assessments, or decisions entrusted by law to authorities other than the contractual counterparty. The obligation should instead focus on facilitating and processing the required permits in a timely manner, within the powers and responsibilities of the relevant State party, without prejudging compliance with applicable legal requirements or the ultimate determination of the competent authority. *Third*, the coordination obligation would benefit from greater clarification as to both its substantive scope and its interaction with the applicable administrative framework. It is unclear whether the State party is merely required to use the procedures and powers available under existing law, or whether Principle 19 may require it to establish ad hoc mechanisms, modify existing procedures, or designate specific officials to facilitate coordination with other public authorities. In BFE+'s view, the obligation should be framed by reference to the measures reasonably available to the State party within its legal powers and the	Inmaculada Posada,and Ignacio Enrique Tovar		

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		existing regulatory framework, without requiring it to guarantee the conduct or decisions of authorities over which it lacks competence or control. The Instrument should also clarify how this contractual obligation interacts with administrative law and administrative jurisdiction. In particular, it should address whether a tribunal constituted under the IIC may reassess administrative decisions for purposes of determining compliance with Principle 19, whether contractual proceedings may proceed in parallel with administrative or judicial review, and whether exhaustion of those avenues is required before a breach of the coordination obligation may be established. Guidance would also be useful as to how potentially inconsistent determinations by contractual tribunals and competent administrative or judicial authorities should be addressed. In sum, BFE+ recommends that Principle 19 and its commentary: (i) clarify that "fair and non-discriminatory" treatment qualifies the performance of the specific cooperation obligations and does not establish an autonomous standard of protection; (ii) replace any obligation to guarantee the issuance of permits with an obligation directed at timely facilitation and processing within the State party's competence; and (iii) clarify that coordination obligations extend only to reasonable measures available to the State party and do not amount to a guarantee of the conduct of authorities beyond its competence or control.			
222.	**Section C, Principle 19**	Our principal concern is that the current Principle appears to combine several distinct obligations without sufficiently defining their content, standard or consequences. **1. The Principle should be divided into three distinct obligations.** As drafted, Principle 19 appears to combine three different concepts: (i) the **operationalisation of the investment**; (ii) **State cooperation and administrative facilitation** necessary to operationalise it; and (iii) **fair**	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		and non-discriminatory treatment in the exercise of those functions. These operate at different levels and should be distinguished. In our reading, operationalisation concerns the broader objective of enabling the investment to be implemented and performed. Facilitation concerns the particular forms of administrative cooperation and assistance through which that objective may be achieved. Fair and non-discriminatory treatment, by contrast, is a standard governing the manner in which the State exercises its administrative functions. A State may therefore provide the relevant administrative assistance but do so in a discriminatory manner; conversely, it may act fairly and without discrimination but fail to provide a particular form of facilitation required for performance of the IIC. This distinction is particularly important given para 341's statement that Principle 19 creates a new cause of action. The Instrument should permit the parties and an adjudicator to identify with sufficient precision **which obligation has been engaged, what conduct constitutes breach, and what contractual consequences follow**. The present formulation risks treating these different obligations as a single composite duty. We therefore suggest that Principle 19 be divided into three Principles addressing respectively: • operationalisation of the investment; • State cooperation and administrative facilitation; and • fair and non-discriminatory treatment in the administration of the investment. The Model Clause should reflect the same distinction rather than combining the three obligations into a single undertaking.			

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		2. Operationalisation and facilitation should be defined separately. The Principle should explain what is meant by "operationalise" and "administrative facilitation", rather than leaving these concepts to be inferred from the commentary and Model Clause. The phrase **"in all matters necessary"** should also be reconsidered. We suggest referring instead to matters necessary **to perform the IIC or the investment project**. Otherwise, the provision could develop into an open-ended cooperation obligation extending beyond the subject matter of Principle 19 and potentially cutting across other Principles addressing particular State or investor obligations. **3. The Principle should distinguish the obligations where the counterparty is the State and where it is a State entity.** The definition of "State party" at paras 80 and 99 appears to encompass State enterprises and other entities that may not have the legal or institutional capacity to perform governmental functions. An entity that cannot issue permits, grant immigration permissions or direct another government ministry cannot properly be subject to an obligation to achieve those outcomes. The Principle should therefore identify, separately, what operationalisation and facilitation require where the counterparty is: (a) the State itself, with the relevant governmental powers; and (b) a State entity or enterprise, whose ability to procure governmental action may be limited. For a State entity, the obligation should relate to the steps that the entity is legally and practically capable of taking to facilitate operationalisation, including making specified requests to the relevant State authorities, providing information within its control, coordinating matters within its			

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		competence, and using agreed mechanisms to seek governmental assistance. This would also provide greater consistency with Principles 16 and 17, which recognise the distinction between an obligation undertaken by the State and an obligation of a non-State counterparty to take steps to procure or encourage State action. **4. There should be separate Model Clauses for State and State-entity counterparties.** The distinction should be reflected directly in the Model Clauses. We suggest two Model Clauses rather than a single provision applying to all "State parties". The **State Model Clause** should separately identify: • the State's obligation to facilitate operationalisation of the investment; • the specific administrative assistance to be provided; • the standard applicable to those obligations; and • the fair and non-discriminatory administration standard, if retained. The **State-entity Model Clause** should instead identify the actions that the State entity is capable of undertaking to operationalise and facilitate the investment, including any obligation to make specified requests or take specified steps to obtain governmental assistance. It should not imply an obligation to procure an outcome beyond the entity's legal or practical control. This would also allow the parties to allocate expressly the risk that a State entity is unable to procure a particular governmental action, rather than leaving that question to be determined after the event.			

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		5. The facilitation obligation should be subject to a calibration. The black letter presently imposes a "duty to operationalise and sustain the investment", which reads as an obligation of result. The Model Clause, however, states that the State's obligation is one of best efforts, while para 344 explains that some matters may be beyond the State's direct control. The drafters therefore appear to have recognised the appropriate distinction but have not reflected it consistently in the Principle. **6. Failure to facilitate should not automatically constitute non-performance.** The Model Clause currently appears to make non-performance principally dependent upon failure to act within a reasonable period following notice. We question whether this provides a sufficiently developed mechanism for determining breach. Not every administrative failure will affect the investment or performance of the IIC. A failure to provide a particular form of assistance that has no material effect on the project should not, without more, give rise to a contractual non-performance claim. The Principle or commentary should therefore distinguish between: • failure to facilitate that materially impedes, delays or otherwise affects performance of the IIC or investment project; and • administrative non-facilitation that does not materially affect performance. The Model Clause should also provide greater guidance on how performance is to be assessed, including, where appropriate, the nature of the assistance requested, the State party's legal and institutional capacity, the steps reasonably available to it, the urgency and materiality of the matter, and the effect of the alleged failure on performance of the IIC or investment project.			

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		7. The fair and non-discriminatory treatment obligation should be separately defined. If retained as a separate Principle, this limb requires its own content, comparator and limitations. Para 343 acknowledges that the language aligns with fair and non-discriminatory treatment principles in international investment law, while para 341 states that Principle 19 creates a new cause of action. Non-discrimination requires a comparator, but the Principle identifies none. It should be clear whether the relevant comparison is with domestic investors, other foreign investors, or investors in like or similarly situated circumstances. Principle 23(3)'s reference to "similarly-placed investors" at para 414 may provide a useful basis for consistent terminology. The Principle should also clarify whether bona fide and non-discriminatory regulatory measures are capable of engaging this obligation. Principle 17 contains a regulatory carve-out at para 334, while Principle 23(3) contains a closed list of circumstances. The absence of any comparable qualification in Principle 19 could give the treatment standard a significantly broader operation than the other investor-protection provisions. We also note that Introduction paras 23 and 33 state that the Instrument articulates investor protection through contractual mechanisms rather than through treaty-based standards such as fair and equitable treatment. If Principle 19 is intended to introduce a contractual fair and non-discriminatory treatment standard, its relationship with that stated approach should be expressly addressed. **8. The relationship with stabilisation should be clarified.** Para 341 states that Principle 19 is related to stabilisation clauses but creates a new cause of action in the event of breach. The same governmental measure could therefore potentially constitute both a failure of administrative			

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		facilitation and a change affecting the economic equilibrium of the investment under Principle 23(2). The commentary should explain whether the two Principles may be invoked cumulatively, how their respective thresholds are to be applied, and whether the regulatory carve-out in Principle 23(3) has any application to a claim under the fair-treatment or facilitation limbs of Principle 19. More fundamentally, the Instrument should avoid allowing an administrative facilitation obligation to operate as an indirect stabilisation protection unless that is expressly intended and the parties have agreed to the relevant allocation of risk. **9. The Model Clause should identify the consequences of each type of breach separately.** If Principle 19 is intended to create distinct causes of action, the Model Clause should reflect that structure. A failure to take agreed administrative steps, a failure to use best efforts to operationalise the investment, and discriminatory administration are different forms of conduct and may require different contractual consequences. The Model Clause should therefore avoid a single general provision under which any failure connected with administration constitutes non-performance. Instead, it should identify the relevant obligation and, where appropriate, permit the parties to specify the applicable notice, cure, materiality and remedial provisions. This would preserve the practical utility of the Principle while avoiding a broad and uncertain cause of action arising from administrative deficiencies that have no material connection with performance of the investment. **10. The overall structure should distinguish objective, means and standard.** We suggest that the revised provision adopt a clear hierarchy:			

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		operationalisation identifies the objective; **facilitation and cooperation** identify the means by which that objective is to be supported; and **fair and non-discriminatory treatment** establishes the standard governing the State's exercise of those functions. Each should have its own defined content, applicable standard and consequences of breach. The same architecture should be reflected in separate Model Clauses for State and State-entity counterparties. This would make Principle 19 considerably more predictable in operation and would allow the parties to determine, at the drafting stage, precisely what obligations they are undertaking and what risks remain outside their control. **11. Consultation and periodic review.** We suggest that the Principle also recognise the value of structured consultation and, where appropriate, periodic review mechanisms in long-term investment relationships. Such mechanisms are reflected in contemporary investment treaty practice and can provide a structured means of addressing changes affecting the investment over time. State cooperation and assistance may be required not only at the commencement of an investment but throughout its implementation, particularly where contractual commitments depend upon regulatory conditions, public infrastructure, sustainability objectives or capacity-building. The parties should therefore be encouraged to consider whether the IIC should establish periodic consultation and review mechanisms through which implementation issues can be identified and addressed before they crystallise into disputes.			
223.	**Section C.4,** **Principle 19**	**State Cooperation and Reasonable Administrative Coordination** **Observation** The implementation of a long-term investment may require the intervention of several public authorities even where a particular ministry, agency or	BAWEA Ikadri Michel	Director of Legal Affairs / Head of Legal, MIFA S.A. (Agricultural	Togo

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		State entity is the immediate public counterparty. The involvement of every relevant authority may not always be identifiable exhaustively when the investment contract is concluded. **Suggested clarification** The Commentary could clarify that, where appropriate, reasonable administrative facilitation may include efforts by the State Party to coordinate or facilitate engagement with competent public authorities whose intervention is reasonably necessary for implementation of the investment, including where that need emerges during the life of the project. This should remain an obligation of reasonable cooperation. It should not amount to an absolute guarantee by the State Party of every decision or action of every public authority, nor interfere with the lawful exercise of regulatory or administrative powers. The clarification would recognise that, particularly in complex investments, effective State cooperation can require institutional coordination beyond the immediate public counterparty.		Financing Incentive Mechanism)	
224.	**Section C.4,** **Principle 19,** **Commentary paras. 341-343**	**Recommendation**: It is recommended to clarify in the commentary to Principle 19 (paragraphs 341–344) and in the Model Clause on state cooperation and assistance (in sub-paragraph (a) or an additional sub-paragraph) that the State's duty to facilitate administrative processes (including permitting, licensing, land rights, and rights of access) is without prejudice to: (i) the State's duty to observe due process, administrative fairness, and the Rule of Law; (ii) mandatory domestic constitutional law requirements governing administrative procedures; and	Vlatko Tokarev	Attorney at Law | PhD candidate at Ss. Cyril and Methodius University of Skopje | LL.M (Cantab)	Republic of North Macedonia

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		(iii) the respect and protection of the legal rights of third parties (including local communities, property owners and affected stakeholders). **Brief reasoning**: While the State's duty to support the investor in the smooth realisation of the investment project is of undoubted importance, fast-track procedures must not be pursued at the expense of legal certainty for third parties, statutory due process, or respect for the host State's constitution. In major international investments, administrative assistance provisions concerning land acquisition, rights of access, environmental permits, and operational clearances frequently intersect with the legal rights of local communities, property owners and other relevant stakeholders. There is a risk that Principle 19 and its corresponding Model Clause can be interpreted as a type of "endorsement" of special arrangements for specific investments which undermine or bypass mandatory consultation periods, environmental and social impact assessments, and statutory procedural safeguards for third parties. Clarifying that State assistance should operate strictly without prejudice to procedural fairness, domestic constitutional compliance and third-party rights reinforces the fine balance between the interests of the State and investors that the UNIDROIT/ICC Instrument seeks to strike.			
225.	**Section C.4,** **Principle 19;** **Commentary paras.**	Principle 19 and its Model Clause address State cooperation and assistance, and sub-paragraph (d) of the Model Clause deals with access to utilities and infrastructure. The drafting reflects sectors in which the critical State controlled inputs are physical connections to electricity, water and transport networks. In aviation and space the critical inputs are of a different character. They are regulatory entitlements that the State holds at the international level and	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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	341-343; and **Model Clause**	must obtain or defend on the investor's behalf: traffic rights under bilateral air services agreements, airport slots, radio frequency assignments and satellite network filings submitted to the International Telecommunication Union through the notifying administration, and registration of a space object under the Registration Convention of 1975. Sub-paragraph (a) covers permits, licences and authorisations generically, but these entitlements are not ordinary domestic permits. The State cannot simply issue them. It must act within a multilateral coordination process whose outcome depends on third States and on an international organisation. It is suggested that the commentary to Principle 19 acknowledge this category, and that it clarify that where the entitlement required by the investor depends on an international coordination or allocation process, the State's obligation is properly understood as one of best efforts rather than of result. A bracketed limb to that effect in the Model Clause would assist parties in these sectors and would avoid the State assuming an obligation it has no power to perform.			
226.	**Section C.4,** **Principle 19; and** **Relevant Model Clauses on contribution to local development / local**	**Making Local Development Commitments Operational: From Local Content to Supplier Bankability** **Observation** The Draft appropriately recognises local development as an important dimension of sustainable investment. A practical implementation issue is whether qualified local suppliers have the financial and operational capacity to perform the opportunities created by local procurement commitments. In developing economies, local SMEs, cooperatives and other economic actors may have genuine commercial opportunities while remaining unable to mobilise the working capital necessary to perform them. Constraints may include insufficient legal formalisation, lack of acceptable collateral, technical	BAWEA Ikadri Michel	Director of Legal Affairs / Head of Legal, MIFA S.A. (Agricultural Financing Incentive Mechanism)	Togo

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	procurement	or certification gaps, and financing processes that are not aligned with production or performance cycles. A local procurement commitment may therefore create a market opportunity without necessarily creating an investable local supplier. **Practical perspective** Experience with agricultural value-chain financing in West Africa shows that a credible purchase or off-take arrangement with an established buyer can improve a financial institution's visibility over the commercial destination of production and expected cash flows. This can contribute to supplier bankability, although it does not eliminate credit or performance risk. Depending on the circumstances, complementary mechanisms may include due diligence, risk-sharing or credit enhancement, insurance, technical assistance and monitoring. Timing is also material. Financing made available only after the period in which production or performance costs must be incurred may be formally available but operationally ineffective. **Suggested approach** The Commentary accompanying Principle 19 and the relevant Model Clauses could invite parties, where appropriate, to consider not only local procurement targets but also reasonable measures that enable qualified local suppliers to perform the resulting opportunities, including: • supplier identification and capacity assessment; • technical assistance and support towards relevant quality or certification requirements; • commercially appropriate purchase or off-take arrangements; • reasonable cooperation, where commercially appropriate, with financial institutions to facilitate appropriately structured and timely financing; and			

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		• periodic assessment of supplier-development objectives. This should not require the investor to finance local suppliers or guarantee their obligations, nor relieve suppliers from legitimate quality, performance, integrity or commercial-viability requirements. **Suggested optional model-clause language** "Where appropriate, having regard to the nature of the Investment and local market conditions, the Parties shall consider reasonable measures aimed at strengthening the capacity of qualified local suppliers to participate effectively in the Investment. Such measures may include technical assistance, support towards applicable quality and certification requirements, commercially appropriate purchasing arrangements, and reasonable cooperation aimed at facilitating access to financing. Nothing in this provision shall require the Investor to finance or guarantee the financial obligations of a local supplier."			
227.	**Section D**	**Principles 20–22 – Gradual implementation of sustainability obligations.** Support was expressed for the ambitious Principles. At the same time, doubt was expressed on whether it would be feasible (acceptable to investors) to include such aspects in an IIC at once – especially in countries (such as Peru) where IICs are the result of competitive public tenders and the room for negotiation is limited or non-existent. It was noted that human-rights due diligence, local-content commitments and community-development arrangements could strengthen the legitimacy and resilience of long-term investment projects. At the same time, it was suggested that the sustainability obligations in Chapter 5 progressively rather than as a single comprehensive package. A sequenced approach, allowing sustainability	Comment made during Latin American States' Representatives Roundtable		Peru

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		requirements to be progressively incorporated into model contracts or domestic policy and legislation might be more workable.			
228.	**Section D**	**Principles 20–22 – Institutional capacity and implementation.** Implementation should take account of the institutional and administrative capacity of State entities negotiating and supervising IICs. While environmental requirements are already present in some Peruvian contracts, obligations relating to human-rights due diligence, local employment, sustainability committees, grievance mechanisms and community-development agreements may require additional expertise and institutional capacity. Companion implementation guidance for State parties was considered important, including institutional-capacity checklists and tiered sustainability packages for smaller projects.	Comment made during Latin American States' Representatives Roundtable		
229.	**Section D**	The Instrument contains no Principle and no Model Clause on technology transfer. Technology transfer is among the principal channels through which foreign investment is expected to contribute to the host country's development, and it is a subject that contracting parties negotiate in practice. i3T proposes a Principle in Chapter 5 covering the licensing of technology to local firms, joint ventures, the training of local personnel and suppliers, research and development conducted in the host country, and the qualification of domestic producers to supply the project, accompanied by a Model Clause with measurable content and a timetable. In addition, where appropriate, to allow IICs to designate local firms or entities as recipients.	i3T		Mexico
230.	**Section D, Principle 20**	I. MANDATORY RULES AND PUBLIC POLICY[68]	EAPIL		

[68] Regulation (EC) No 864/2007 (Rome II), Arts 14(1)(b) and 12.

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		As a general rule, the applicable law determines the mandatory rules governing the contractual relationship. However, the PIICs could clarify which legal system determines the application of mandatory rules, including the respective relevance of the law chosen by the parties, the law of the forum, and the law of the place where the investment is carried out. In this respect, the position may differ significantly between arbitration and proceedings before State courts. One observation supports the approach the PIICs take to sustainability issues. The sustainability provisions rest on making obligations contractually enforceable rather than in reliance of public law. Recent developments in European Union law have strengthened that choice. Art. 29(7) of Directive (EU) 2024/1760 originally made the national rules transposing the civil liability provision of overriding mandatory application where the law applicable to the claim was not the law of a Member State.[69] That paragraph, together with the harmonised liability rule in Art. 29(1), was deleted by Directive (EU) 2026/470 of 24 February 2026, and civil liability has been referred back to national law.[70] The conflict of laws route to enforcing sustainability standards across borders has therefore narrowed. That makes the contractual route the PIICs propose more important, and not less. A good example relates to Chapter 5, Model Clause 4.1 ('Labour standards') and its commentary (paragraph 358); Introduction, Section I (the corroborative-function discussion, paragraphs 68 – 70). An international treaty, e.g. a chapter in a free trade agreement on labour relations, may impose binding obligations on a State as a matter of international law, while lacking direct effect in that State's domestic legal order, such that it can typically be enforced only through the treaty's own			

[69] Directive (EU) 2024/1760 of 13 June 2024, OJ L, 2024/1760, 5.7.2024, Art. 29(7) as originally adopted.

[70] Directive (EU) 2026/470 of 24 February 2026, in force 18 March 2026; consolidated text CELEX 02024L1760-20260318.

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		inter-State dispute settlement mechanism, not by domestic courts, a commercial arbitration tribunal, or by private parties. Model Clause 4.1 requires the investor to follow 'internationally recognised labour standards enshrined in the International Labour Organization agreements or any other international agreement to which the Government of the Host State is or becomes a party.' This wording is broad enough to capture the hypothetical FTA labour chapter and effectively sidesteps the direct-effect problem through an ordinary incorporation-by-reference contractual technique. This is an effective tool, but the Draft does not explain why it works, nor does it flag two related risks. First, the clause's forward-looking language ('or becomes a party') automatically incorporates future agreements the investor may not have anticipated at signing. Second, the clause gives no guidance on how an adjudicator should interpret 'standards enshrined in' a treaty whose authoritative interpretation may be separately and differently addressed by the treaty's own State parties (for example through a Joint Committee interpretation) in a parallel inter-State process. Therefore, the commentary to Model Clause 4.1 could be supplemented as follows: 'The reference in this Model Clause to standards "enshrined in" an international agreement operates as an incorporation by reference into the contract. This has the effect that the investor's obligation derives from the IIC itself, and is enforceable through the IIC's own dispute-resolution mechanism, independently of whether the referenced international agreement has direct effect in the domestic legal order of the Host State or is otherwise enforceable only through an inter-State dispute settlement mechanism under that agreement's own terms. Parties should nonetheless be aware that (i) referencing agreements the Host State "becomes" a party to in the future may bind the investor to standards not reasonably foreseeable at the time of contracting, and parties may wish to consider			

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		whether such future incorporation should instead be addressed through the stabilisation and renegotiation framework in Chapter 6; and (ii) where the content or meaning of the referenced international agreement is contested, the adjudicator resolving a claim [under this Model Clause] will need to interpret that content independently for contractual purposes, and is not bound by any interpretation the Host State may advance in a separate, inter-State proceeding under the referenced agreement.'			
231.	**Section D,** **Principle 20**	BFE+ considers sustainability considerations to be an important component of long-term IICs and supports the adaptive approach reflected in Principle 20. At the same time, the obligation to respond to evolving sustainability standards requires greater precision as to its scope, allocation of risk, and interaction with other contractual mechanisms. *First*, the Instrument should clarify who determines whether a development qualifies as an "emerging international sustainability standard" and when an adjustment to the parties' contractual obligations becomes "necessary". Both expressions leave significant room for disagreement. It is unclear, for example, whether the relevant standard must derive from a binding international instrument, whether widely accepted non-binding standards may suffice, or whether developments in industry practice may also be taken into account. Similarly, the determination that contractual adaptation is "necessary" may involve significant technical, economic, and legal judgments. BFE+ recommends that the commentary identify the relevant criteria and clarify whether this assessment is to be made jointly by the parties or, in case of disagreement, through the contractual dispute resolution mechanism. The Instrument should also address the relationship between emerging international sustainability standards and the host State's domestic legal framework. In particular, it should clarify whether Principle 20 is intended	Alfredo Bullard, Huascar Ezcurra, Bruno Doig, Inmaculada Posada, and Ignacio Enrique Tovar	Bullard Falla Ezcurra +	Peru / Spain

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		merely to require adaptation within the framework of applicable domestic law or whether it may impose contractual sustainability standards that exceed those required by the host State's legislation. If the latter is intended, the circumstances and limits of such an elevated contractual standard should be expressly identified. *Second*, Principle 20 should address more expressly the allocation of the economic consequences of adaptation. Where compliance with new sustainability standards requires substantial additional expenditure that was neither contemplated nor reasonably foreseeable when the IIC was concluded, those costs should not automatically be borne entirely by the investor. Such an allocation could materially alter the economic basis of the investment and undermine the viability of long-term projects. BFE+ therefore considers that, where adaptation imposes significant and unforeseen costs, the Instrument should provide for renegotiation or another appropriate economic-adjustment mechanism, taking into account the magnitude of the additional burden and its impact on the economic assumptions underlying the IIC. *Third*, the Instrument should clarify the relationship between the adaptation obligation under Principle 20 and stabilisation or economic-equilibrium clauses. A potential tension arises where the investor is required to adapt its obligations to emerging sustainability standards while, at the same time, the contract protects the economic assumptions on which the investment was made. The two mechanisms should not operate independently in a manner that requires the investor to absorb substantial regulatory or sustainability-related costs while depriving it of contractual rights specifically designed to address significant changes in the project's economic equilibrium. BFE+ recommends that the commentary explain how these provisions are intended to operate together and confirm that the obligation to adapt under			

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		Principle 20 does not, by itself, exclude the application of an otherwise applicable stabilisation, renegotiation, or economic-equilibrium mechanism. In sum, BFE+ recommends that Principle 20 and its commentary: (i) establish clearer criteria for identifying an "emerging international sustainability standard" and determining when contractual adaptation is "necessary"; (ii) clarify the allocation of significant costs arising from such adaptation, including the circumstances in which they may justify renegotiation or economic rebalancing; and (iii) expressly address the interaction between the adaptation obligation and stabilisation or economic-equilibrium provisions.			
232.	**Section D, Principle 20**	Principle 20 is the only provision in Chapter 5 expressly addressing the joint contribution of the State party and the investor to sustainability. Its present formulation, however, does not clearly establish the respective responsibilities of the parties. Paragraph (1) makes the State party's cooperation conditional upon sustainability commitments having already been included in the IIC; paragraphs (2) and (3) address climate change and future sustainability developments principally through best-efforts obligations; and the State party's role is generally expressed as supporting the investor's performance. This is difficult to reconcile with the structure of Section D, which is expressly concerned with "Sustainability obligations requiring the cooperation of the State party and the investor". The Model Clauses in Section D.2 provide detailed obligations for the investor concerning environmental and social matters, human rights, labour, health and safety and community engagement, but there is no corresponding Model Clause setting out the State party's contribution. Paragraph 346 similarly indicates that the obligations in this Section will fall primarily within the responsibility of the	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		investor, with the State undertaking its best endeavours to support the investor. We therefore suggest that Principle 20 be reconsidered to identify more clearly **(i) the respective responsibilities of the State party and the investor, (ii) the content and standard of the State party's cooperation, and (iii) the limits of what either party can reasonably be expected to anticipate or control.** **1. The State party's obligation to cooperate should have identifiable content.** Paragraph (1) provides that the State party and the investor shall cooperate to perform sustainability obligations included in their IIC. The obligation to cooperate is important, but it is unclear what acts are contemplated on the part of the State party. The Instrument already provides a useful model in Principle 19. There, the State party's duty to cooperate and facilitate is expressed at Principle level and the accompanying Model Clause identifies matters such as permits and approvals, government-held information, personnel, utilities, infrastructure and inter-agency coordination. A similar approach would make Principle 20 substantially more workable. Depending on the nature of the investment project, State cooperation could include: (a) providing information concerning applicable sustainability requirements, regulatory procedures and relevant environmental or social conditions; (b) communicating material regulatory, environmental or policy developments in a timely manner; (c) designating an appropriate governmental point of contact for sustainability-related matters;			

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		(d) facilitating permits, approvals or other administrative processes necessary to implement agreed sustainability measures; and (e) where appropriate, supporting research, technology deployment or other measures relevant to the sustainability objectives of the investment project. The precise obligation should, however, depend upon the State party's legal and institutional capacity. A State entity should not be required to achieve an outcome which is outside its legal authority or practical control. The Principle should distinguish between an obligation to **take specified steps** and an obligation to **achieve a particular result**, consistently with Articles 5.1.4 and 5.1.5 of the UPICC. **2. The Principle should address the information asymmetry between the State and the investor.** The State may possess information which is particularly relevant to the investor's ability to perform sustainability obligations but which the investor cannot reasonably obtain independently. The commentary itself recognises this advantage, referring to circumstances where the State has better local insight or access to information, and identifying matters such as geological data, maps, subsoil, forests and watercourses. Paragraph 540 similarly refers to one-stop shops and ombudspersons established by States. This should be reflected more clearly in the Principle. Where the State party possesses, or produces, information reasonably necessary for the investor to assess or perform its sustainability obligations, the State should make that information available subject to applicable confidentiality and legal restrictions. This is particularly important because an obligation imposed upon the investor to anticipate and adapt to future developments cannot reasonably operate on the assumption that the investor has access to the same information as the State. A State-issued forecast, projection or other official			

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		information concerning matters materially relevant to the investment project may provide a significantly more reliable basis for planning than an investor's independent prediction. We therefore suggest that the State party's cooperation obligation include the timely provision of relevant official information and forecasts within its possession or control, where reasonably necessary for performance of the IIC. **3. The parties should be expected to agree sufficiently specific sustainability obligations.** Paragraph (1) applies only to obligations "included in their IIC". We agree that contractual sustainability obligations should be sufficiently specific before contractual consequences can attach to them. However, this creates a difficulty if the Instrument encourages sustainability commitments without providing a clear mechanism through which the parties identify and agree those commitments. We suggest that Principle 20 be read together with Principle 6 so that the parties identify, at the appropriate stage of the investment project, the sustainability objectives and obligations relevant to that particular investment and determine the respective contributions required from each party. This would also provide a clearer foundation for Principles 21, 26 and 33, which depend upon the existence of sufficiently identifiable sustainability obligations. **4. The State party should not be treated solely as supporting the investor's sustainability obligations.** The State's own conduct can materially affect the sustainability performance of an investment project. For example, the State may control the regulatory framework, public			

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		infrastructure, permitting processes or other conditions necessary for the investor to implement agreed sustainability measures. The Principle should therefore recognise that sustainability may require obligations on both sides of the contractual relationship. Where appropriate, the State party might undertake not to waive, relax or fail to enforce applicable environmental, labour or human rights requirements for the purpose of attracting or retaining the investment. Such an obligation would need to be carefully framed so that it does not prevent legitimate changes in law or regulatory policy. More generally, the Principle should distinguish between: • the **investor's responsibility** for matters within its sphere of control; • the **State party's responsibility** for matters within its legal and institutional authority; and • **joint responsibilities**, where achievement of the agreed sustainability objective depends upon cooperation between the parties. This would give more substantive meaning to the heading of Principle 20. **5. Paragraph (2) should use an ascertainable climate standard.** The formulation that the investor should ensure that its activities "do not contribute to increasing adverse effects on climate change" is difficult to apply. It provides no clear baseline, benchmark or scope for determining the investor's contribution. The commentary elsewhere adopts more identifiable concepts, including climate-change mitigation and adaptation, best available science, national emission-reduction targets and the climate goals of the Paris Agreement. We			

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		suggest that paragraph (2) instead refer to compliance with applicable host-State legislation and emissions standards and, where the parties have agreed to them under Principle 6, clearly identified international standards. The obligation should also be expressly limited to activities within the investor's sphere of control or responsibility. The commentary recognises that the State may enter into other contracts involving activities that affect the same climate objectives. If an investor's obligation is measured against a national emissions target, there may therefore be no principled basis for determining what proportion of the target is attributable to that particular investment project. The contractual obligation should instead be connected to identifiable activities, obligations and standards applicable to the investment. **6. The obligation to "anticipate and adapt" in paragraph (3) requires substantial clarification.** We question what is meant by requiring the parties to "anticipate and adapt to future developments and emerging international sustainability standards". First, it is unclear what developments the **State party or State entity** is expected to monitor or anticipate. The investor may reasonably be expected to undertake due diligence, use available forecasts, monitor technological developments and assess foreseeable economic or political risks. But there must be a limit to what an investor can realistically be expected to predict, particularly where the relevant development is outside its control and could not reasonably have been anticipated when the IIC was concluded. Secondly, anticipation and adaptation are different concepts. A party may be able to monitor a development without being able to predict its timing or consequences, and may be able to identify a risk without possessing the			

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		means to respond to it. The Principle should not retrospectively treat an event as foreseeable merely because it occurred. We therefore suggest distinguishing between: (a) **monitoring** relevant developments and standards that fall within the party's sphere of responsibility; (b) **reasonable anticipation**, based on information reasonably available to the party at the relevant time; and (c) **adaptation**, where a reasonably foreseeable development materially affects the agreed sustainability obligations or the ability to perform them. The State party's position requires particular consideration. Where the State itself issues forecasts, projections, regulatory plans or other official information concerning matters materially relevant to the investment, the investor should be entitled to rely upon such information to the extent reasonably appropriate. The State should also communicate material developments within its knowledge or control which are reasonably necessary for the investor to comply with its contractual sustainability obligations. This would provide a more balanced approach than placing an open-ended obligation on both parties to anticipate future developments without identifying either the information available to them or the steps they are expected to take in response. **7. Adaptation should not create an unlimited mechanism for reallocating contractual risk.** If future developments require the parties to modify their sustainability obligations, the Principle should clarify how such modification occurs. Principle 4(5) requires modifications to be agreed, validly executed and approved through the applicable procedures. An			

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		obligation to "adapt" cannot therefore itself amend the contractual allocation of obligations. The Principle should also address the consequences where adaptation requires material additional expenditure or changes the economic assumptions underlying the investment. In particular, the relationship between adaptation under paragraph (3) and the economic equilibrium provisions in Principle 23 should be clarified. The parties should be encouraged to establish, when agreeing the IIC, a mechanism for determining how the cost and risk of subsequent sustainability requirements will be allocated. **8. Monitoring, adaptation and remediation should be distinguished.** The Instrument presently uses "mitigation" in different senses and moves between prevention, mitigation and remediation without always distinguishing them. We suggest the Chapter adopt a consistent framework under which the parties: **prevent** adverse impacts where reasonably possible; **mitigate** impacts which cannot reasonably be prevented; and **remediate** impacts which occur. Climate-change mitigation should remain separately identifiable. Principle 20 should principally address the parties' continuing cooperation in achieving agreed sustainability objectives, while Principles 11, 21 and 26 can address impact management, monitoring and remedies respectively. **9. Proportionality should be incorporated into the Principle.** The obligations imposed under Principle 20 should be proportionate to the nature, scale, duration, sector and actual or potential sustainability impacts			

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		of the investment project. This is particularly important for adaptation obligations, which could otherwise impose potentially open-ended obligations on the investor or State. **10. Economic viability and cost allocation should be addressed.** Paragraph 361 recognises that sustainability obligations may impose significant costs which must be incorporated into the financial model of the project. It also recognises the need to balance economic viability with social and environmental objectives. We suggest that the parties should identify, when concluding the IIC, the principal costs associated with agreed sustainability obligations and how those costs are to be allocated. The IIC should also provide a mechanism for addressing material additional costs arising from subsequent changes to sustainability requirements. Where substantial remediation obligations are contemplated, the parties should consider whether appropriate financial security is required, including environmental bonds, guarantees, escrow arrangements or other agreed security. **11. Human rights and other sustainability matters should be reflected at Principle level.** Principle 20's substantive language is predominantly climate-focused, although the wider Chapter addresses human rights, labour standards, health and safety, community engagement and environmental protection. If Principle 20 is intended to establish a framework of joint sustainability obligations, its scope should correspond more closely to these matters. The Model Clauses can then provide the detailed obligations appropriate to particular projects.			

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		12. Predictability should be reconciled with adaptation. The commentary identifies predictability and stability as important to preservation of the investment relationship, while paragraph (3) requires adaptation to future developments. These objectives may come into tension where a new sustainability requirement materially affects the investment project. The Principle should therefore clarify that adaptation is subject to reasonable predictability and should not, without an agreed contractual mechanism, result in an unanticipated and material reallocation of contractual risk. Where a change results from a State measure or change in law, the relationship with Principle 23 should be expressly addressed. **13. The standard applicable to the State party should be harmonised throughout Chapter 5.** The State's obligations are described in different terms across the Chapter, including "cooperate", "best efforts", "strong support and assistance" and "best endeavours to support". These expressions may carry different implications under the UPICC. We suggest that a consistent standard be adopted and that the distinction between obligations of means and obligations of result under Articles 5.1.4 and 5.1.5 of the UPICC be expressly reflected. This is particularly important for State entities, which may lack authority to control the actions of other State organs. **14. The heading and structure should be reconsidered.** If Principle 20 is revised to give substantive content to the State party's obligations, its present heading may still be appropriate, provided that the Principle clearly distinguishes between: (i) obligations of the State party; (ii) obligations of the investor; and			

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		(iii) obligations requiring joint action. Alternatively, the Working Group may wish to separate the State party's cooperation obligations from genuinely joint sustainability obligations into separate Principles. In either case, the Model Clauses should provide corresponding mechanisms for both sides of the contractual relationship rather than primarily elaborating the investor's obligations.			
233.	**Section D,** **Principle 20**	This section is one of the most important in the guide, as it exemplifies its core idea of presenting a more balanced relationship between investor and State, contrary to the traditional BITs. In this sense, the suggested model clauses are extremely detailed. Paragraph 361 specifically determines that the State has to consider that the Investor may not have the necessary funds to comply with all of the extensive requirements, and the parties must discuss "an adequate balance between the economic viability of the project and the desire for a high social impact of the project". The phrasing could be clearer, to determine the extent to which the States are expected to assist an investor financially in regards to the essential obligations of social and environmental nature. However, that raises concerns specifically for developing and least developed countries, which are, traditionally, the hosts of investments. That is to say, they face significant socioeconomical struggles, and might not be able to meet these high demands. At the same time, they depend on foreign investment to grow, and complying with high social/environmental standards is of utmost importance. The guide could offer model-clauses alternatives for such cases, for instance.	Mariana Names Bettiol	Academic, Federal University of Rio Grande do Sul	Brazil
234.	**Section D,** **Principle 20, Model Clause and Principle 22**	Principles 20 and 22 refers to "best efforts." This notion has already generated various theoretical and practical complications in national and international contracting. The concept of "best efforts" comes from Common Law and is used in practice to derogate from the regime of absolute–or strict–contractual liability, so that the debtor is not objectively	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic	Peru

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		liable for any breach. Conversely, in Civil Law, contractual liability is usually subjective and distinguishes between obligations of means and obligations of results. In this regard, it has been common to compare the duty of best efforts with obligations of means; for example, the English version of Article 5.1.4 of the UPICC regulates the "duty to achieve a specific result" and "duty of best efforts", while the French version says "obligation de résultat" and "obligation de moyens". One might think that there is an exact equivalence between a "obligation de moyens" and a "best effort", however, this is not the case. There is debate within Civil Law systems as to whether a "best efforts" clause merely requires the performance of ordinary diligence or is an agreement to heighten the standard of care. Certainly, this would give rise to difficulties in defining compliance with–or breach of–the duty, as well as in determining the amount of compensation for any such breach. Alternatively, the specific actions required of the debtor could be set out precisely. For example, the Model Clause on environmental and climate commitments is complex because it refers to various specific actions a party must undertake – an approach preferable to using a vague standard, especially one foreign to Civil Law jurisdictions.		University of Peru	
235.	**Section D, 1, Principle 20, para. 361**	The draft states that the parties must balance the economic viability of the project against the 'desire for a high social impact'. Paragraph 361 could distinguish the financing and allocation of compliance costs from the determination of the level of compliance required. Applicable legal requirements, including those concerning human rights and the rights of the child, environmental protection, public health and climate, may properly be reflected in project pricing and financial structuring. Their observance should not, however, depend on the parties' preferred balance between project viability and the 'desire for a high social impact. That formulation is better	Ivana Savić	External PhD candidate, Leiden University	Serbia

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		suited to additional contractual sustainability commitments than to compliance with applicable law.			
236.	**Section D,** **Principle 20(3); and Commentary paras. 347 and 370**	The obligation to anticipate and adapt to emerging international sustainability standards is expressed as a best-efforts undertaking, with the commentary making the adaptation obligation subject to the stabilization provisions of Chapter 6. The commentary also provides that commitments are to be articulated proportionately to the size and capabilities of the parties. Taken together these qualifications make the evolution of the applicable standard a matter for renegotiation or periodic review, governed by criteria of proportionality, good faith, materiality and ability to perform, without every update in itself constituting a stabilization or compensation event. It is therefore proposed to require, where reasonable and proportionate, flow-down contractual clauses, monitoring, auditing and corrective action plans in respect of relevant sustainability and productive development obligations expressly linked to the project.	i3T		Mexico
237.	**Section D,** **Principle 20-22**	**Operationalising sustainability obligations.** Principles 20-22 provide a useful framework for cooperation, monitoring and supply-chain responsibility. The final commentary should more precisely allocate responsibilities, define the required standard of conduct and ensure proportionality to the size, type and risk profile of the investment. **Principle 20 - cooperation.** The parties should establish procedures for exchanging information when regulatory, scientific or technological developments materially affect the project's sustainability profile. Cooperation should not permit either party unilaterally to impose a new substantive obligation. Material changes should instead trigger notice, consultation and any agreed adaptation procedure.	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		Principle 21 - monitoring. The Model Clauses should identify minimum monitoring elements, including reporting intervals, access to relevant information, preservation of records, independent verification where proportionate, correction of inaccurate reports and procedures for responding to material non-compliance. Monitoring should be risk-based and should protect legitimately confidential information. **Principle 22 - supply chains.** The investor's obligations concerning contractors, subcontractors and suppliers should be framed as due-diligence or reasonable-efforts duties unless the parties expressly agree to a result obligation. Relevant measures may include risk-based screening, contractual safeguards, audit rights, escalation, corrective-action plans and responsible termination. The investor should not be treated as strictly liable for every third-party breach, but should be accountable for failing to take the measures required by the agreed standard. ***Key References.*** *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023); International Finance Corporation, Performance Standards on Environmental and Social Sustainability (2012).*			
238.	**Section D,** **Principle 20-22; and** **The associated Model Clauses**	**Recommendation: make gender-responsive and inclusive sustainable development an express, operational element of the Chapter 5 sustainability framework.** The draft is commendably ambitious in treating sustainability as a shared and enforceable contractual responsibility, rather than an aspirational recital. It recognises human rights, labour, local communities, environmental protection, climate action and good governance. However, the Chapter should expressly require the parties—where proportionate to the project's risk, scale and sector—to identify, prevent, mitigate, monitor and remedy gender-differentiated impacts, and to promote women's meaningful participation in the economic benefits generated by the investment.	Carolina Fabara	Associate to GRN Think Tank Programme in International Trade, Investment & Corporate Governance.	Ecuador

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		A generic reference to human rights or local communities is not sufficient. Investment projects in infrastructure, extractives, energy, agriculture, digitalisation and public services often affect women differently: through access to land and livelihoods, unpaid care burdens, workplace safety, exposure to gender-based violence and harassment, displacement, consultation barriers, and unequal access to procurement, employment, training, finance and grievance mechanisms. Unless the contract requires a gender-responsive assessment and implementation process, these impacts may remain legally invisible even where the project formally complies with general sustainability commitments. **Suggested addition to Principle 20 (or a new Principle 20 bis):** "Where appropriate in light of the nature, scale, sector and foreseeable impacts of the investment, the State Party and the Investor shall cooperate to ensure that sustainability commitments are gender-responsive and inclusive. They shall: (a) assess and address gender-differentiated human rights, labour, environmental and community impacts; (b) ensure meaningful, accessible and culturally appropriate participation of women and groups in vulnerable situations in consultation, monitoring and grievance processes; (c) adopt measures to prevent and address discrimination, gender-based violence and harassment linked to the investment; and (d) promote equitable access to project-related employment, training, local procurement and community-development benefits. The parties shall establish proportionate indicators, reporting arrangements and remedial measures to give effect to these commitments." **Suggested corresponding Model-Clause language:** "The Parties shall implement the Sustainability Plan in a gender-responsive and inclusive manner. The Plan shall include, where proportionate to the			

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		Project, baseline and periodic assessments of gender-differentiated impacts; accessible and safe stakeholder-engagement and grievance mechanisms; measures to prevent and respond to gender-based violence and harassment; and measurable measures to promote women's equal access to decent work, training, local procurement and community benefits. Compliance shall be monitored through agreed indicators and periodic reporting, without prejudice to applicable law and internationally recognised human-rights standards." This addition would materially strengthen the Instrument's contribution to sustainable investment. It would transform inclusiveness from a general policy aspiration into a practical contractual discipline: due diligence, participation, measurable implementation, monitoring and remedy. It would also improve legal certainty for both parties by identifying ex ante the relevant social risks, performance indicators and procedures for curing non-compliance. Most importantly, it would help ensure that IICs deliver not only investment protection and economic returns, but also fair and durable development outcomes for the people whose lives and livelihoods are directly affected by the project.			
239.	**Section D,** **Model Clauses**	**Third-party beneficiaries and procedural consent.** The Model Clause appropriately permits identified local communities, Indigenous Peoples, workers or other persons to receive and enforce specified contractual benefits. The official commentary already contemplates designation of beneficiaries and selected procedures (official June 2026 consultation draft, p. 109, para. 368 and the accompanying Model Clause). The final text should nevertheless distinguish substantive beneficiary status from standing, jurisdiction and consent to arbitration. **Substantive rights.** The clause should identify the beneficiaries or an objectively ascertainable class, the precise rights they may enforce, any	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		conditions or limitations, available remedies, and whether the contracting parties may amend or revoke the benefit without beneficiary consent. Enforceability remains subject to the applicable law. **Forum and consent.** A third-party benefit does not automatically establish consent to arbitration. Where direct arbitration is intended, the clause must clearly specify the offer and method of acceptance, the covered disputes, the administering rules, the seat and any preconditions. Article II of the New York Convention concerns an agreement in writing; it does not itself create third-party-beneficiary rights. *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs and First Options of Chicago, Inc. v. Kaplan* underline the need to establish consent under the applicable legal framework. **Nonsignatories.** GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, 590 U.S. 432 (2020), held narrowly that the New York Convention does not prohibit the application of domestic equitable-estoppel doctrines permitting enforcement by non-signatories. It should not be cited for a broader proposition that beneficiary status automatically creates arbitral jurisdiction. **Grievance mechanisms.** The Model Clause may also provide accessible non-judicial grievance procedures, participation in proceedings initiated by a contracting party, or access to domestic courts. Such mechanisms should complement, not obstruct, any independent rights and remedies available under applicable law. ***Key References.*** *Official June 2026 UNIDROIT-ICC consultation draft, p. 109, para. 368; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article II; Dallah Real Estate and Tourism Holding*			

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		Co. v. Ministry of Religious Affairs [2010] UKSC 46; First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, 590 U.S. 432 (2020).			
240.	**Section D.2,** **2.1 Model Clause on the respect, protection and promotion of human rights para. 1**	Geographic scope of Project impacts. Para. 1 refers to persons impacted by the Project in the "Project Area and neighbouring areas". However, Project impacts may extend beyond neighbouring areas, for example through downstream water effects, air emissions, ecosystem impacts, livelihoods or access to natural resources. This appears difficult to reconcile with Commentary para. 363, which describes the obligation as covering the full range of individuals and communities likely to be affected by the Project. In practice, the geographic scope of an impact may depend on its pathway and reasonably identifiable reach rather than physical proximity to the Project. A similar proximity-based approach appears in Section D.2.4, para. 9.1. This could exclude affected persons or communities from the relevant obligations. Recommendation: Provide that the relevant geographic and community scope should reflect the reasonably identifiable extent and pathways of Project impacts, rather than physical proximity alone, consistently with the identification of potentially affected stakeholders under Principle 11.	Marian Portero	Member of CEIA	Spain / USA
241.	**Section D.2, Model Clause 2.1, Para. 1**	- The current enumeration mixes general categories ("all individuals", "right holders") with specific groups ("workers", "Local Community", "Indigenous Peoples"). A cleaner structure would be to start with "all individuals and groups who are, or may be, affected by the Project", and then identify particular groups. - "Weaker categories" could sound pejorative in this context. We would suggest replacing it with "workers in vulnerable situations" or "vulnerable groups of workers". - Instead of "all individuals, right holders, workers…", it may be preferable to use the term "right holders" after the specific categories, e.g. "…Indigenous Peoples, and other rights holders." This would avoid	ILO		

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		suggesting that right holders constitute a separate category from workers, indigenous peoples, etc. - The original sentence is quite complex, containing both (a) identification of the protected persons/groups and (b) identification of the relevant rights. Separating these would makes the clause easier to read and interpret. - We would also suggest using the language of the ILO MNE Declaration, para. 30, which states that investors should promote equality of opportunity and treatment in employment by making "qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels." The rephrased sentence could read: "The Investor commits to respect, protect and promote the human rights of all individuals and groups who are likely to be impacted by the Project in the Project Area and neighbouring areas, including workers, with special regard to women and workers in vulnerable situations, the Local Community, Indigenous Peoples, and other rights holders. Such rights include, in particular, those relating to health, labour, education, welfare, including childcare, and the security of persons and groups. Investors furthermore undertake to promote equality of opportunity and treatment in employment by making qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels."			
242.	**Section D.2, Model Clause 2.1, Para. 2**	We suggest replacing "including through a specific gender policy" (which seems to imply that elimination of other bases of discrimination would not be grounded in policy) with "including a specific commitment to gender equality". The rephrased text could read: "The Investor undertakes to avoid causing or contributing to adverse impacts on such rights and to adopt appropriate measures to prevent discrimination and promote equality for marginalised	ILO		

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		and vulnerable categories, including a specific commitment to gender equality."			
243.	**Section D.2, Model Clause 2.1, Commentary para. 363**	The fifth sentence refers to the ILO Declaration on Fundamental Principles and Rights at Work. However, given the relatively general nature of the Declaration for the purposes of establishing contractual obligations, it may be preferable to refer additionally to the ILO Fundamental Conventions. The following formulation is therefore suggested: "the ILO Declaration on Fundamental Principles and Rights at Work and the related ILO Fundamental Conventions". The relevant Conventions could then be listed in an accompanying footnote (please see the previous comment).	ILO		
244.	**Section D.2, Model Clause 2.2., Para. 1**	For reasons of consistency and completeness, it would be advisable for this clause to expressly encompass all five Fundamental Principles and Rights at Work. The provision could accordingly be reformulated as follows: "The Investor commits to respect the applicable labour and social legislation in the Host State and to uphold the highest international standards identified as applicable to this Contract in agreement with the State Party, in particular as regards employment and working conditions, livelihood, basic services and healthcare, and the fundamental principles and rights at work recognized by the ILO, namely freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and a safe and healthy working environment."	ILO		
245.	**Section D.2, Model Clause 2.2., Para. 3.1(a)**	We suggest drawing more specifically on the guidance for companies provided in the ILO MNE Declaration, para. 38, which takes a more expansive approach to expectations of investors in host countries, where training is a critical contribution to economic and social development. The relevant wording could read as follows:	ILO		

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		"(a) ensure that relevant training is provided for all levels of workers employed by them in the host country, as appropriate, to meet the needs of the enterprise as well as the development policies of the country, including programmes for women adapted to their needs. Such training should, to the extent possible, develop generally useful skills and promote career opportunities and lifelong learning. This responsibility should be carried out, where appropriate, in cooperation with the authorities of the country, employers' and workers' organizations and the competent local, national or international institutions."			
246.	**Section D.2, Model Clause 2.2, Para. 4.1**	It is suggested that the provision be revised to align its terminology more closely with the ILO normative framework. In particular, "ILO agreements" could be replaced by a reference to the ILO Declaration on Fundamental Principles and Rights at Work and the relevant ILO Conventions. It is also suggested that the wording on freedom of association be aligned with ILO terminology and expressly refer to the effective recognition of the right to collective bargaining. Finally, the provision could clarify that respect for the fundamental principles and rights at work is not contingent upon the Host State's ratification of the relevant ILO Conventions. This could read as follows: "The Investor, its Affiliates, contractors and subcontractors shall follow internationally recognized labour standards, including the principles and rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as amended in 2022, and the relevant ILO Conventions, as well as the provisions of any other applicable international agreement to which the Host State is or becomes a party. In particular, they shall respect freedom of association and the effective recognition of the right to collective bargaining, including the right of Workers to establish and join organizations of their own choosing for the promotion and protection of their occupational interests."	ILO		
247.	**Section D.2, Model**	To ensure consistency with the relevant ILO standards on forced labour and child labour, the provision could be further refined. In particular, the	ILO		

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	Clause 2.2., Para. 4.2	reference to forced labour could be complemented by an express reference to ILO Convention No. 29. The provision could also distinguish between the minimum age for admission to employment or work, in accordance with ILO Convention No. 138, and the prohibition and elimination of the worst forms of child labour, as defined in ILO Convention No. 182. Finally, the language concerning hazardous work could be aligned with the terminology of Conventions Nos. 138 and 182 by referring to "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals" of children. This could read as follows: "The Investor, its Affiliates, contractors and subcontractors shall not use or permit the use of forced or compulsory labour, as defined in the ILO Forced Labour Convention, 1930 (No. 29), or child labour. In particular, they shall comply with the minimum age for admission to employment or work established in accordance with the ILO Minimum Age Convention, 1973 (No. 138), and shall prohibit and eliminate the worst forms of child labour, as defined in the ILO Worst Forms of Child Labour Convention, 1999 (No. 182), including work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."			
248.	**Section D.2, Model Clause 2.2, Para. 4.3**	The provision could be refined by referring specifically to the ILO Guidelines on Occupational Safety and Health Management Systems of 2001, which provide practical guidance for the establishment, implementation and improvement of OSH management systems at the organizational level. The proposed wording would also expressly provide for the participation of Workers and their representatives, which ILO-OSH 2001 identifies as an essential element of an OSH management system. "The Investor shall adopt, implement, maintain and continually improve an occupational safety and health management system, with the participation of Workers and their representatives and taking into account the ILO	ILO		

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		Guidelines on Occupational Safety and Health Management Systems (ILO-OSH 2001). The occupational safety and health management system shall meet or exceed [IFC Performance Standard 2] and [the World Bank Group Environmental, Health and Safety (EHS) Guidelines], or any other relevant standard identified and agreed by the Parties as applicable to the Project.			
249.	**Section D.2, Model Clause 2.2., Para. 4.4**	To align the provision more closely with relevant ILO standards and guidance, a number of refinements could be considered. In particular, "retribution" could be replaced by "remuneration", and the employment contract could be required to set out more clearly the essential terms and conditions of employment, including working hours and rest periods, remuneration and its payment, leave entitlements, termination conditions, and applicable social security and other employment-related benefits. Consideration could also be given to removing the seven-day threshold for temporary Workers, so that the requirement applies irrespective of the duration of employment. Finally, the general reference to an "appropriate welfare scheme" could be replaced by more precise references to applicable social security and employment-related benefits, in accordance with applicable law, applicable collective agreements and relevant international labour standards. The rephrase clause could read: "The Investor shall provide each Worker, including temporary Workers, with a written contract of employment, in a language and form that the Worker understands, clearly setting out the terms and conditions of employment. The contract shall specify, at a minimum, the nature and place of work, working hours and rest periods, remuneration and the method and frequency of its payment, leave entitlements, the duration of the contract, where applicable, the conditions governing its termination, and applicable social security and other employment-related benefits. Such terms and conditions shall comply with	ILO		

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		applicable law, applicable collective agreements and relevant international labour standards."			
250.	**Section D.2, Model Clause 2.2., Para. 4.5**	The provision could be further refined by addressing sick leave and maternity-related leave as distinct entitlements. In this regard, the three-month service requirement could be reconsidered, with a view to avoiding the exclusion of workers in temporary or other short-duration forms of employment. The provision could also reflect the specific protections under ILO Convention No. 183 concerning leave in the event of illness, complications or risk of complications arising out of pregnancy or childbirth, as well as ILO Recommendation No. 191 concerning time off for pregnancy-related medical examinations. It may also be appropriate to clarify that the stipulated entitlement constitutes a minimum and does not affect any more favourable rights available under applicable law or collective agreements. The rephrased provision could read as follows: "The Investor shall provide Workers with paid sick leave in accordance with applicable law and relevant international labour standards, without discrimination on the basis of the nature or duration of their employment. In addition, women Workers shall be permitted to take such leave from work as is necessary to attend medical examinations relating to pregnancy, without loss of remuneration or other employment-related benefits, in accordance with applicable law. Leave shall also be provided in cases of illness, complications or risk of complications arising out of pregnancy or childbirth, consistently with the principles reflected in the ILO Maternity Protection Convention, 2000 (No. 183)."	ILO		
251.	**Section D.2, Model Clause 2.2., Para. 4.6**	The drafting may benefit from closer alignment with the maternity protection framework established by ILO Convention No. 183. Rather than referring generally to "paid maternity leave", the provision could separately address the minimum period of leave and the level of income protection during that period. Convention No. 183 provides for at least 14 weeks of maternity leave	ILO		

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		and, where benefits are determined by reference to prior earnings, a minimum level of two-thirds of those earnings. This could read as follows: "The Investor shall ensure that women Workers are entitled to maternity leave of not less than 14 weeks, together with cash benefits during such leave in accordance with applicable law and, where such benefits are calculated by reference to previous earnings, at a rate of not less than two-thirds of the Worker's previous earnings."			
252.	**Section D.2, Model Clause 2.2., Para. 5.1**	The non-discrimination provision could be brought into closer alignment with ILO terminology by referring to discrimination in "employment and occupation" and by expressly covering both direct and indirect discrimination. The list of prohibited grounds could also be adjusted to reflect the grounds expressly identified in ILO Convention No. 111, while retaining additional grounds where broader contractual protection is intended. It may also be useful to replace "HIV/AIDS status" with "real or perceived HIV status", consistently with ILO Recommendation No. 200, and to refer more broadly to terms and conditions of employment alongside recruitment, remuneration, training, promotion, termination and retirement. This could read as follows: "The Investor shall not engage in, support or tolerate any direct or indirect discrimination in employment or occupation, including in recruitment, remuneration, access to vocational training, promotion, terms and conditions of employment, termination of employment or retirement, on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, disability, age, family responsibilities, marital or family status, pregnancy or maternity, trade union membership or activities, gender identity, or real or perceived HIV status, or on any other ground prohibited by applicable law."	ILO		
253.	**Section D.2, Model**	The provision could be revised to reflect more closely the principle set out in ILO Recommendation No. 111 that employers should not practise or	ILO		

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Clause 2.2., Para. 5.2	countenance discrimination in employment and occupation. To give practical effect to this principle, the clause could refer more broadly to appropriate measures to prevent and address discrimination, while retaining procedures for reporting and addressing complaints and corrective or disciplinary measures as possible means of implementation. The revised text could read: "The Investor shall adopt, implement and communicate a policy prohibiting the forms of discrimination referred to in paragraph 5.1 and shall take appropriate measures to prevent and address such discrimination, including through procedures for reporting and addressing complaints and, where appropriate, corrective or disciplinary measures."			
254.	**Section D.2, Model Clause 2.2., Para. 5.3**	Model Clause 5.3 could be refined to reflect more precisely the relevant ILO standards. In relation to pregnancy testing, ILO Convention No. 183 prohibits requiring a pregnancy test or certification of pregnancy as a condition of recruitment, subject to limited exceptions for work that is prohibited or restricted for pregnant or nursing women or that presents a recognized or significant health risk. With regard to HIV, ILO Recommendation No. 200 provides more broadly that HIV testing or screening should not be required of workers, jobseekers or job applicants. The provision could therefore distinguish between these two situations and reflect the respective scope of the applicable standards. A rephrased version could read: "The Investor shall not require pregnancy testing or certification of pregnancy as a condition of recruitment, except where permitted under applicable law in respect of work that is prohibited or restricted for pregnant or nursing women or that presents a recognized or significant risk to the health of the woman or child. The Investor shall not require HIV testing or other forms of screening for HIV from Workers, jobseekers or job applicants."	ILO		

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
255.	**Section D.2, Model Clause 2.2., Para. 5.4**	Mode Clause 5.4 could be aligned more closely with Article 8 of ILO Convention No. 183 by extending the protection against dismissal beyond the fact of becoming pregnant or taking maternity leave. The Convention protects women during pregnancy, maternity leave and a prescribed period following their return to work, except where termination is based on grounds unrelated to pregnancy, childbirth and its consequences, or nursing. The clause could therefore be reformulated to reflect this broader protection. A rephrased version could read: "The Investor shall not terminate the employment of a woman during pregnancy, maternity leave, or a period following her return to work, except on grounds unrelated to pregnancy or childbirth and its consequences or nursing."	ILO		
256.	**Section D.2, Model Clause 2.2., Para. 5.5**	Model Clause 5.5 could be adjusted to reflect Article 10 of ILO Convention No. 183, which requires such time to be counted as working time and remunerated accordingly. Furthermore, Article 10 only provides for one or more daily breastfeeding breaks, or a daily reduction in working hours and does not prescribe a one-year maximum period. The expanded text could read: "The Investor shall provide one or more daily breaks for breastfeeding mothers after the birth of the child. Such breaks or reduction in working hours shall be counted as working time and remunerated accordingly."	ILO		
257.	**Section D.2, Model Clause 2.2., Para. 5.6**	The provision could be aligned more closely with ILO Convention No. 190 by framing the prohibition around "gender-based violence and harassment", as defined in Article 1(1)(b) of the Convention, which expressly includes sexual harassment. Sexual exploitation and sexual abuse could be retained as additional specifically prohibited forms of conduct. Consistently with Article 9 of Convention No. 190, the provision could also require the adoption and implementation of a workplace policy in consultation with Workers and their representatives. The policy could address appropriate preventive measures,	ILO		

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		reporting and complaint procedures, protection against retaliation, remedies and, where appropriate, disciplinary measures, reflecting the preventive and remedial framework of Articles 9 and 10. Finally, its scope could extend beyond conduct "of and by" Workers to conduct occurring in the course of, linked with or arising out of work, including conduct involving third parties, consistently with the scope of Convention No. 190. We also propose to cite Convention No. 190 in the commentary so the source and authoritative body to interpret it are clear. The rephrased text could read: "The Investor shall adopt and implement, in consultation with Workers and their representatives, a workplace policy to prevent and address gender-based violence and harassment, including sexual harassment, sexual exploitation and sexual abuse. The policy shall apply to conduct occurring in the course of, linked with or arising out of work, including conduct involving third parties, and shall provide for appropriate prevention measures, reporting and complaint procedures, protection against retaliation, remedies and, where appropriate, disciplinary measures. For the purposes of this clause: (a) "Gender-based violence and harassment" means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately and includes sexual harassment. (b) "Sexual exploitation" means any actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes, including, but not limited to, profiting monetarily, socially, or politically from the sexual exploitation of another. (c) "Sexual abuse" means actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."			

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		(d) "Sexual harassment" means any unwelcome conduct of a sexual nature, whether verbal, non-verbal or physical."			
258.	**Section D.2, Model Clause 2.2., Para. 6.2**	In addition to installing and using the relevant safety devices and equipment, the Investor could be required to maintain them, consistently with the employer's responsibility under Article 16 of ILO Convention No. 155 to ensure, so far as is reasonably practicable, that machinery and equipment under its control are safe and without risk to health. Additionally, consistent with Article 21 of this Convention, it could be clarified that occupational safety and health measures required for the protection of Workers shall not involve any expenditure for them. The revised text could read as follows: "The Investor shall install, use and maintain such recognised modern safety devices and equipment and observe such recognised modern safety precautions as are provided for under the applicable law and observed under Good Industry Practice. Occupational safety and health measures required for the protection of Workers, including the provision of safety devices and equipment, shall not involve any expenditure for Workers."	ILO		
259.	**Section D.2, Model Clause 2.2., Para. 6.3**	The provision could be reformulated to reflect more closely Articles 13 and 19(f) of ILO Convention No. 155. In particular, the expression "recuse themselves from tasks they consider dangerous" could be replaced by the Convention's more precise standard of a work situation which the Worker has reasonable justification to believe presents an imminent and serious danger to life or health. The provision could also expressly protect Workers from undue consequences for removing themselves from such situations and clarify that they should not be required to return until necessary remedial action has been taken. Pregnancy-specific risks could be addressed separately under clause 6.4.	ILO		

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		The revised text could read as follows: "A Worker who has reasonable justification to believe that a work situation presents an imminent and serious danger to the Worker's life or health shall be entitled to remove himself or herself from that situation and shall be protected from undue consequences for doing so. The Worker shall promptly report the situation to the immediate supervisor or other designated person and shall not be required to return to the work situation until necessary remedial action has been taken."			
260.	**Section D.2, Model Clause 2.2., Para. 6.4**	The provision could be refined by clarifying that it applies where such work may prejudice the health of the Worker or her child. The provision could also incorporate the risk-assessment approach reflected in Article 3 of ILO Convention No. 183 and the protective measures contemplated in paragraph 6 of Recommendation No. 191, including elimination of the risk, adaptation of working conditions, transfer to suitable alternative work without loss of pay and, where necessary, paid leave. This would also accommodate the pregnancy- and breastfeeding-related risks currently referred to in clause 6.3, allowing that provision to focus on the general protection afforded to Workers in situations presenting an imminent and serious danger to life or health under ILO Convention No. 155. The revised text could read as follows: "Pregnant and nursing Workers shall not be required to perform hazardous or arduous work that may prejudice their health or that of their child. The Investor shall assess workplace risks to the safety and health of pregnant and nursing Workers and their children and, where a significant risk is identified, shall take appropriate measures to eliminate the risk or, where this is not feasible, adapt working conditions, transfer the Worker to suitable alternative work without loss of pay or, where necessary, provide paid leave in accordance with applicable law."	ILO		
261.	**Section D.2, Model**	The provision could be made more specific by reflecting Article 19(d) of ILO Convention No. 155 and paragraph 10(b) of Recommendation No. 164,	ILO		

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	Clause 2.2., Para. 6.5	which address appropriate occupational safety and health instruction and training, taking account of Workers' functions and capacities. It would also be useful to require information and training to be provided in a language and form readily understood by Workers and, consistently with Article 21 of Convention No. 155, at no cost to them. The revised text could read as follows: "The Investor shall provide its Workers with appropriate information, instruction and training in accordance with the applicable law and generally accepted health and safety procedures and practices, taking into account their functions and capacities and the occupational hazards and risks to which they may be exposed, including those associated with [specify depending on the type of investment project, e.g., the management of chemicals, the operation of machinery, equipment, and infrastructure,] and the provision of first aid. Such information, instruction and training shall be provided in a language and form readily understood by Workers and at no cost to them."			
262.	**Section D.2, Model Clause 2.2., Para. 6.8**	The provision could be refined by providing Worker representatives with reasonable paid time to perform their health and safety functions, as contemplated by paragraph 12(2)(i) of ILO Recommendation No. 164. In this vein, a sentence could be added along the following lines: "Worker representatives shall be provided with reasonable paid time necessary to perform their health and safety functions." Consideration could also be given to omitting the prescribed male/female co-chairing arrangement, while retaining the requirement for equitable representation of women and men, so as to allow greater flexibility in the Committee's internal organization.			
263.	**Section D.2, Model**	This section is confusing. The subtitle refers to "Livelihood" but the subsection is addressing, inter alia, housing. "The Investor shall provide secure, safe, and suitable residential facilities for women and men Workers			

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	Clause 2.2., Para. 7.1	and related secure tenure, adequate sanitation, including indoor bathrooms, energy for cooking, heating, lighting, food storage and waste disposal, and safe areas for children's recreation, including by building new facilities or restructuring available ones, if so agreed. The Investor shall ensure that all public spaces and shared sanitation facilities are well-lit, secure, and safe." It seems that there should be qualifying language, since in general it is preferable that workers be able to choose their own housing where there is a functioning housing market. Therefore, we suggest wording such as "In situations where there is no local housing market for workers to seek accommodation…." Also, the ILO MNE Declaration sets out in paragraph 41 the expectation that "Where the employer provides workers with basic amenities such as housing, medical care or food, these amenities should be of a good standard." We suggest including this language.			
264.	**Section D.2,** **2.3 Model Clause on local sourcing of goods and services**	The clause incorporates disciplines drawn from government procurement law. Paragraph 1 requires that local enterprises be given opportunities in competition with foreign entities, which restates a non-discrimination rule. Paragraph 2 conditions any preference on local goods and services being offered on terms equal or better than imported alternatives as to price, quality, availability and performance. Paragraph 4 deems local supply equal in price where its cost does not exceed the imported cost by no more than ten per cent. A clause in these terms operates where domestic suppliers already meet international benchmarks, which is the situation in which a local content requirement is least needed. Most developing countries are not parties to the WTO Government Procurement Agreement and have not accepted these disciplines. i3T recommends redrafting the clause based on the principle of local development, removing the equivalence conditions and the price band, and	i3T		Mexico

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		aligning the clause around supplier qualification, phased local content targets and a timetable.			
265.	**Section D.2,** **2.3 Model Clause on local sourcing of goods and services**	This Model clause contains language that — if incorporated into investment contracts concluded by a State that is a Member of the World Trade Organization (WTO) — may be inconsistent with that State's obligations under WTO agreements. Under Paragraph 2, the Contractor commits to give preference to local goods and services when engaging in procurement related to the Project covered by an investment contract. Even though this commitment is conditional, it requires local goods and services to be preferred in certain situations over other goods and services, including those of foreign origin. Moreover, under Paragraph 4, the Contractor will be obliged to prefer local goods and services even if they are priced up to 10% higher than imported alternatives, calculated as specified in that Paragraph, provided that the other conditions are met. This may give local producers and service providers an incentive to offer their goods and services at higher prices, knowing that they may still benefit from the preference. These requirements under Paragraphs 2 and 4 give local goods and services a competitive advantage over goods and services of foreign origin (that may be considered like in WTO terminology), according foreign goods and services less favourable treatment. The commentary to the Model clause states in Paragraph 365 that the above conditionality "is essential to ensure compatibility with the international trade framework". However, this conditionality does not appear to sufficiently address concerns about possible incompatibility, since a preference remains mandatory in certain circumstances. With that in mind, the practice of incorporating the Model clause in investment contracts may be considered inconsistent with the State's	ICLRC		Russian Federation

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		national-treatment obligations under Article III:4 of the General Agreement on Tariffs and Trade (GATT), Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), and, subject to the State's relevant specific commitments and limitations, Article XVII:1 of the General Agreement on Trade in Services (GATS). In *Canada – FIRA*, the GATT 1947 panel found that private contractual obligations undertaken by investors towards a State (such seems to be the legal nature of the Contractor's commitment at issue as well) may give rise to that State's responsibility under the GATT (see *Canada – Administration of the Foreign Investment Review Act*, GATT 1947 Panel Report, paras 5.4–5.11). The WTO jurisprudence did not depart from this approach. As a result, the Model clause's potential to produce WTO-inconsistent results may discourage its wider use by WTO Member States. At the same time, it must also be acknowledged that the Model clause has an understandable development objective, consistent with the aims commonly pursued by States in attracting foreign direct investment. This objective could also be supported, while reducing the identified legal risks, through a commitment to facilitate local suppliers' participation in procurement on a non-discriminatory basis, as already reflected in Paragraph 1. It is thus suggested that consideration be given to shifting the focus of this Model clause towards such a facilitation commitment. Considering that WTO membership is not universal, the above suggestion may not be equally relevant to all States. It is therefore also proposed that the Model clause offer two alternatives in square brackets: a facilitation commitment and a preference commitment, with the choice depending on the host State's applicable international obligations, including those arising			

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		from WTO membership. The considerations governing that choice could be explained in the commentary to the Model clause.			
266.	**Section D.2,** **2.3 Model Clause on local sourcing of goods and services**	This Model clause does not fully accommodate situations in which a State is party to a regional trade agreement (RTA) requiring its parties to accord national treatment to one another's goods and services. RTAs are understood here broadly to include, inter alia, the constituent treaties establishing regional economic integration organizations, such as the European Union and the Eurasian Economic Union. As discussed above (see Comment No. 1 to this Model clause), the requirement to prefer local goods and services over those of foreign origin, even where the latter are priced lower, gives local goods and services a competitive advantage. The practice of incorporating the Model clause in investment contracts may be considered inconsistent with the State's obligations under an applicable RTA to accord national treatment to other parties' goods and services, or to ensure the free movement of goods and services, subject to the agreement's scope and content. For example, such obligations are provided for in the Treaty on the Eurasian Economic Union, including Article 28 and paragraphs 21–23 of Annex N 16. In simpler terms, such RTAs may require their parties to treat qualifying goods and services from other parties as their own. As a result, the understanding of what is local may be different to such States, and such situations are not expressly covered by the Model clause. It is therefore suggested that Paragraph 2 expressly provide for an option to extend the preference to qualifying regional goods and services, as follows (proposed additions are highlighted): "In particular, in the procurement related to the Project with external vendors, suppliers and subcontractors, the Contractor shall give preference	ICLRC		Russian Federation

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		to goods that are produced or available in [the Host State]/[the Host State and other State parties to [the identified applicable treaty or regional organization of economic integration] and services that are rendered by natural or legal persons which are, or which are controlled by, [members of the Local Community]/[Citizens or Residents of the Host State]/[Citizens or Residents of the Host State and other State parties to the identified applicable treaty or regional organization of economic integration], provided that such goods and services are offered on terms equal [comparable] to or better than imported goods and services with regard to price, quality, availability at the time and in the quantities required, and performance. The Investor shall further give preference to local goods and services supplied by [women]/[Indigenous Peoples]." Corresponding adjustments may also be needed throughout the Model clause where applicable, including in the language providing for the facilitation commitment proposed in Comment No. 1 to this Model clause. The suggested changes would help give effect to the concern for compatibility with applicable regional trade agreements expressed in Paragraph 365 of the commentary to the Model clause. They do not, by themself, resolve the WTO-compatibility concerns identified in Comment No. 1 in relation to goods and services from other WTO Members.			
267.	**Section D.2,** **2.3 Model Clause on local sourcing of**	**E. Recognise Local Economic Development** The Instrument should recognise, where appropriate and consistent with applicable law, local sourcing, SME participation, local employment, supplier development, skills development, technology transfer and community development. These requirements should remain project-specific, commercially realistic and mutually agreed.	KNCCI		Kenya

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	goods and services				
268.	**Section D.2,** **2.4 Model Clause on environmental and climate commitments paras. 2.3 and 3.4**	**Paragraph 2.3.** Section 2.3 of the model clause refers to "the distinct or shared benefits for the Local Community from improvements to methods of production". In international environmental law (particularly regarding biodiversity, genetic resources and traditional knowledge, see further in Nagoya Protocol), companies and researchers are subject to benefit sharing obligations toward the provider country or traditional community of origin. This legal framework makes a distinction is made between monetary and non-monetary benefits. Recommendation: adopt monetary/non-monetary distinction in Section 2.3. This would align the language of the clause with host State's international environmental law commitments and any statutory obligations investors may already hold arising from the use of genetic resources associated with traditional knowledge, along with similar obligations. **Paragraph 3.4** This clause creates an obligation on the investor to provide technical support and capacity development. The ambition of environmental and climate change commitments goes beyond enabling access – it aims to facilitate the dissemination and deployment of climate change adaptation and mitigation technologies (see ie Art 10.2 Paris Agreement). Capacity building alone may not be sufficient for this: Local Community and Local Parties may also require some form of knowledge transfer. Recommendation: list knowledge transfer as a separate form of investor's support even if between brackets. The rewritten sentence would be: "*The Investor shall contribute annually to providing technical support, capacity building [and knowledge transfer, as appropriate for the Project]…"*	Felipe de Andrade	PhD Fellow of the Research Foundation Flanders (FWO), PhD researcher at the University of Antwerp and KU Leuven	Belgium

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269.	**Section D.2,** **2.4 Model Clause on environmental and climate commitments para. 2.4**	Performance triggers and verification for Environmental Performance Payments. Para. 2.4 allows an Environmental Performance Payment for either implementing an agreed improvement or achieving an environmental outcome. These are different performance triggers. Although para. 2.3 refers to indicators and time-bound targets, para. 2.4 does not expressly require the payment agreement to specify whether payment is triggered by implementation or achievement of an outcome, or how the relevant trigger will be verified. From a measurement perspective, the payment mechanism should establish a traceable chain between the agreed performance trigger, the indicator or target used to measure it, the measurement period and method, verification of achievement, and the resulting payment. Recommendation: Provide that any Environmental Performance Payment agreement should identify the specific performance trigger and verification process and, where payment depends on an environmental outcome, specify the applicable indicators and targets, or other objective achievement criteria, including, where relevant, the baseline or reference condition, measurement period and method for verifying achievement, consistently with continuous monitoring under Principle 21.	Marian Portero	Member of CEIA	Spain / USA
270.	**Section D.2,** **2.4 Model Clause on environmental and climate commitments para. 2.5**	Measurement and integrity of carbon and environmental credits. Para. 2.5 addresses the generation, ownership and sale of GHG Reduction Benefits, but does not specify how they are to be quantified, verified and tracked. These elements are important to establish the environmental integrity and economic value of carbon or other environmental credits. For example, a GHG-reduction activity could establish the relevant baseline, quantify reductions or removals in tonnes of CO_2e over a defined monitoring period, obtain independent verification and have the resulting credits issued and tracked in a registry. Section D.2.5, para. 5(d)(iv), also refers to	Marian Portero	Member of CEIA	Spain / USA

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		ownership or co-ownership of verified carbon credits by the Local Community, which should be reconciled with the co-ownership and allocation arrangements in para. 2.5. Recommendation: Provide that GHG Reduction Benefits and other environmental credits follow an identified standard or methodology, with appropriate measurement, independent verification and tracking, including, where relevant to the type of credit, additionality, permanence or durability, avoidance of double counting and, where applicable, registry tracking. Ownership and allocation arrangements should also be consistent across the relevant clauses.			
271.	**Section D.2,** **2.4 Model Clause on environmental and climate commitments paras. 3.1-3.2**	Measurement of progress towards the net-zero target. Para. 3.2 requires an assessment of whether the Project is "on track" to achieve net-zero emissions, but the basis for that assessment is not specified. While para. 3.1 provides for annual GHG reporting, it does not define the Project emissions boundary, base year or pathway, or the treatment of residual emissions, removals and GHG Reduction Benefits. In particular, it is unclear whether GHG Reduction Benefits under para. 2.5 may be counted towards progress in reducing Project emissions or are to be treated separately. Recommendation: Where a net-zero target is included, clarify the methodology and parameters used to assess progress towards it, including the Project emissions boundary, base year, interim emissions trajectory and treatment of residual emissions, removals and GHG Reduction Benefits, including how any such Benefits are accounted for in measuring progress towards the target.	Marian Portero	Member of CEIA	Spain / USA
272.	**Section D.2,** **2.4 Model Clause on**	Attribution of environmental damage at Project closure. Para. 10.2 attributes to Project Operations any Environmental Damage identified in the Final Environmental Audit but not in the Initial Environmental Audit. However, a change observed over the Project lifecycle does not, by itself, establish its cause or the extent of the Project's	Marian Portero	Member of CEIA	Spain / USA

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	environmental and climate commitments paras. 9.1 and 10.2	contribution. Environmental conditions may also be affected by natural processes, third-party activities or other external factors. Where attribution is not self-evident, relevant evidence may include the timing and location of the damage, the nature of the pollutants or impacts identified and their consistency with Project activities, as well as periodic audit and monitoring data. This is particularly relevant because para. 9.1 defines Environmental Damage as damage caused by Project Operations. Recommendation: Clarify that the difference between the Initial and Final Environmental Audits should inform, but not by itself determine, the attribution assessment, and that attribution at Project closure should also consider relevant lifecycle monitoring data and other available evidence, taking account of material contributing factors, to determine the extent of Environmental Damage attributable to Project Operations.			
273.	**Section D.2,** **2.4 Model Clause on environmental and climate commitments paras. 11.1 and 11.3**	Determination and periodic review of the Environmental Damage Bond. Para. 11.1 requires an Environmental Damage Bond but does not indicate how its amount should be determined, reviewed or adjusted. For long-term Projects, environmental risks, remediation requirements and associated costs may change over time, affecting the adequacy of the financial security. Recommendation: Provide that the initial Bond amount should be based on Project-specific estimates of remediation, restoration and compensation costs, reflecting reasonably foreseeable environmental risks and current cost assumptions, and that its adequacy should be periodically reviewed, informed by relevant monitoring and audit data, and where necessary adjusted to reflect material changes in the Project, environmental risks, remediation requirements or associated costs.	Marian Portero	Member of CEIA	Spain / USA
274.	**Section D.2,**	With respect to Chapter 5, Section D.2.5, the draft should distinguish more clearly between: (i) consultation processes that must be conducted by the State under applicable domestic or international law; (ii) the Investor's	Hernán Pérez Loose	Member of CEIA	Ecuador

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	2.5 Model Clause on Community Development Agreements	community engagement and due diligence; and (iii) the negotiation of a Community Development Agreement ("CDA"). The current drafting may blur the distinction between these processes. In particular, paragraph 1 requires the Investor to enter into a CDA before Project Operations commence; paragraph 5 subjects its negotiation to the principle of free, prior and informed consent; paragraph 7 allows advance commitments concerning benefits such as roads, electricity, hospitals and productive projects; and paragraph 8.2 allows the competent authority to impose a CDA where no agreement has been reached. Ecuador's experience demonstrates the practical relevance of this issue. In Kichwa Indigenous People of Sarayaku v. Ecuador, the Inter-American Court of Human Rights held that consultation is a State responsibility that cannot be delegated to a private company, much less to the company interested in exploiting the relevant resources. Similarly, in Judgment 1296-19-JP/25 concerning Oil Block 22, the Constitutional Court of Ecuador found that the authorities had emphasised the project's economic benefits; offered healthcare, education, maintenance of airstrips and scholarships; and entered into a USD 3 million social commitment with a person who did not legitimately represent all the affected Waorani communities. The Court found that these actions compromised the free and informed nature of the consultation and reiterated that consultation is a non-delegable State obligation. In light of this experience, we suggest incorporating the following clarifications: A CDA and any community engagement undertaken by the Investor should neither replace, be treated as evidence of compliance with, nor result in the			

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		delegation of consultation or consent procedures for which the State is responsible. The Investor's obligation should be to negotiate in good faith and use all reasonable efforts to enter into the CDA. Economic benefits, public services or infrastructure commitments should not be offered or made conditional for the purpose of obtaining the community's support or consent. For these purposes, we recommend incorporating the following safeguard: "No provision of this Contract, no stakeholder engagement process and no Community Development Agreement shall be construed as replacing or delegating a consultation, participation or consent procedure that must be conducted by the State Party or by a competent authority pursuant to applicable domestic law. The Investor may provide information or support under the direction of that authority." This clarification seeks to strengthen the project's legal and social legitimacy through an appropriate allocation of responsibilities among the State, the Investor and the affected communities.			
275.	**Section D.2,** **2.5 Model Clause on Community Development**	The phrase "remedies available under the applicable law" is broad and does not clarify the types of remedies that may be invoked or whether their application should be subject to a proportionality requirement. This creates a risk of disproportionate or arbitrary State action (see *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04*, paras. 442-543; *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2*, paras.116-147), particularly where Community Development	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam

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	Agreements	Agreements (CDA) obligations concern complex social or environmental commitments whose implementation may depend on local circumstances and may be capable of being cured or mitigated. The provision should recognize the Investor's right to cure a fundamental non-performance or additional period for performance, in line with Articles 7.1.4 and 7.1.5 the UNIDROIT Principles of International Commercial Contracts (UPICC) before the State resorts to other remedies.			
276.	**Section D.2,** **2.5 Model Clause on Community Development Agreements paras. 1 and 5(d)(vii)**	Sequencing of consultation and the Resettlement Plan. Para. 1 contemplates finalisation of the Resettlement Plan before the CDA is concluded, while para. 5(d)(vii) provides for consultation with the Local Community for the development of that Plan. This creates uncertainty as to when the Plan should be developed and how community consultation should inform it. It is also difficult to reconcile with Principle 11, which provides that stakeholder consultation should begin early enough for its results to inform Project-related decisions. Recommendation: Align the sequencing of paras. 1 and 5(d)(vii) so that consultation with the affected Local Community takes place during the development of the Resettlement Plan and informs its content before finalisation.	Marian Portero	Member of CEIA	Spain / USA
277.	**Section D.2,** **2.5 Model Clause on Community Development Agreements paras. 2**	Measurement of CDA outcomes. Para. 5(f) requires operational goals and metrics to measure progress under the CDAP, together with implementation and expenditure reporting, but does not expressly indicate whether the metrics should include outcome indicators linked to the socio-economic objectives of the CDA. Implementation or expenditure metrics may demonstrate delivery without showing whether the intended community outcomes have been achieved. Recommendation: Clarify that, where appropriate, CDAP monitoring should include outcome indicators linked to the agreed socio-economic objectives of the CDA, with relevant baselines and targets where established, to inform the review and	Marian Portero	Member of CEIA	Spain / USA

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	and 5(f)-(g)	adjustment under para. 5(g). Examples may include changes in employment or income, livelihood conditions, or improved access resulting from Project-supported infrastructure, depending on the objectives of the CDA.			
278.	**Section D.2,** **2.5 Model Clause on Community Development Agreements paras. 5(d)(vii) and 6(c)**	Economic displacement and livelihood restoration. Para. 5(d)(vii) focuses on displacement of people occupying land. This may exclude economic displacement where Project Operations result in loss of land, assets or access to natural resources leading to loss of income or livelihoods without physical relocation. Although para. 6(c) protects access to resources and traditional economic activities, it does not specify how such livelihood impacts should be assessed or restored. IFC Performance Standard 5 expressly distinguishes economic from physical displacement. From an impact-assessment perspective, relevant factors include affected livelihoods, baseline income or production, the nature and duration of the loss, and restoration measures. Recommendation: Clarify that, where relevant, resettlement and livelihood-restoration planning should address both physical and economic displacement, including identification of affected livelihoods and relevant baseline conditions, measures to restore or improve affected persons' livelihoods, and monitoring of restoration outcomes.	Marian Portero	Member of CEIA	Spain / USA
279.	**Section D,** **Principle 21**	Principle 21 would benefit from being recast as a substantive normative principle rather than primarily as a direction to establish a monitoring mechanism. At present, it is not sufficiently clear **what the parties are required to monitor, what the State party is required to do, what the monitoring report is intended to establish, or what constitutes non-compliance and its consequences**. The Principle should therefore identify three elements: **(i) the substantive obligations being monitored; (ii) the assistance and support the State party is required to provide; and (iii) the consequences of failure to comply with those obligations or to provide the required**	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		assistance. This would also make the relationship between Principle 21 and Principle 20 clearer. **1. The State's assistance obligation should be defined.** The Instrument recognises that the State will ordinarily possess the powers, influence and information necessary to support implementation of the investor's sustainability obligations (para 346). The Principle should therefore specify the assistance the State party is expected to provide, rather than referring variously to "cooperation", "best efforts", "strong support and assistance" and "best endeavours to support". In particular, it should identify the types of assistance contemplated — for example, access to relevant governmental information, engagement with local authorities and communities, facilitation of consultations, and coordination where the exercise of public powers is required. The standard applicable to that obligation should also be consistent with Articles 5.1.4 and 5.1.5 of the UPICC, particularly as to the distinction between an obligation of means and an obligation to achieve a specific result. "Strong support" does not provide an ascertainable standard. **2. The purpose and object of monitoring should be clear.** The monitoring mechanism should monitor the **sustainability obligations agreed in the IIC and the management and mitigation plan adopted by the parties**, rather than the pre-contractual due diligence process itself. Due diligence is the process through which risks and impacts are identified; the agreed obligations and plan are what can subsequently be implemented, monitored and updated. The Principle should also explain the purpose of the monitoring report. It should record, at a minimum, the implementation of agreed obligations, progress against the management and mitigation plan, identified impacts			

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		and benefits, measures taken in response to identified risks, and any matters requiring the plan or contractual commitments to be updated. **3. The Principle should identify what non-compliance means.** The current drafting establishes a monitoring mechanism without clearly establishing the substantive standard against which compliance is assessed. It should distinguish between: • failure by the investor to implement an obligation expressly undertaken in the IIC; • failure by the State party to provide assistance or support expressly required under the IIC; • adverse impacts or non-compliance by third parties which the investor was required to prevent or mitigate through agreed measures; and • circumstances in which a party has complied with an obligation of means but the intended outcome has nevertheless not been achieved. The Principle should further clarify whether a finding of non-compliance is itself a breach of the IIC and, if so, what contractual consequences may follow. Without this, the monitoring process risks becoming primarily informational, without a clear connection to the parties' substantive contractual obligations. **4. Monitoring should extend to impact and benefit, not merely compliance.** The Principle should also address the project's impact on local communities and the benefits intended to accrue to them. The Chapter already recognises that due diligence should consider positive project impacts, including local community development commitments (para 228), while para 367 recognises that project impacts may be unevenly distributed			

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		between communities. These concepts should be reflected in the Principle itself rather than remaining largely in the commentary. Where the IIC contains community-development, local-content or benefit-sharing commitments, the monitoring mechanism should assess their implementation and distribution, including where relevant whether benefits are reaching the communities or groups identified in the IIC. **5. The State's role in community engagement should be substantive.** The Principle should provide that the State party shall facilitate the investor's engagement with local communities where the exercise of State powers, access to information, governmental coordination or local institutional involvement is required. This is particularly important where the State possesses information or public-law powers that the investor cannot independently obtain or exercise. The obligation should nevertheless be calibrated to the State party's legal and institutional capacity and should not make the State responsible for outcomes beyond its control. **6. Monitoring should be joint and the grievance mechanism should have a defined status.** As the obligations being monitored may be obligations of both parties, oversight should not rest solely with the investor. A Joint Sustainability Committee or equivalent mechanism could provide the appropriate forum for reviewing compliance, impacts, community concerns and proposed updates. The status of the grievance mechanism should also be clarified. The black-letter Principle should identify whether such a mechanism is required, rather than leaving its inclusion optional in the commentary while making it mandatory in the Model Clause. If the mechanism is intended to provide			

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		affected communities with a means of raising concerns, its basic effectiveness requirements should also be identified. **7. The monitoring framework should be proportionate and economically viable.** The Principle should incorporate the proportionality recognised elsewhere in the Instrument, including the risk, size, nature and duration of the project and the respective capabilities of the parties. Monitoring requirements should not be uniform irrespective of the project's scale or risk profile. The parties should also identify at conclusion how the costs of agreed monitoring and community-engagement obligations will be allocated, including the costs of subsequent updating and adaptation of the management and mitigation plan. This is important because the Instrument contemplates that the plan may be revised during the life of the investment; an allocation of costs made only at contract formation may therefore be insufficient. **Overall, Principle 21 should move from establishing a monitoring mechanism to defining the substantive framework that the mechanism is intended to implement.** The Principle should make clear **what the investor must do, what assistance the State must provide, what is being measured and reported, what constitutes non-compliance, and what contractual consequences may follow**. The Model Clause can then provide the drafting mechanism through which those obligations are operationalised.			
280.	**Section D, 3, Principle 21,** **Commentary para. 370**	Paragraph 370 requires management and mitigation plans to respond to new factual conditions, scientific evidence and evolving sustainability standards, while making such adaptation subject to the stabilisation framework where relevant. The relationship with Principle 23(3) should therefore be clarified. Where continuous monitoring identifies a need for regulatory, preventive or remedial action required under applicable law, or falling within the carve-out	Ivana Savić	External PhD candidate, Leiden University	Serbia

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		in Principle 23(3), implementation of that action should not be made conditional upon completion of any stabilisation, renegotiation or economic-equilibrium process. The commentary could clarify that such processes may address contractual consequences where applicable but should not delay measures required to prevent or address harm. This is particularly relevant where monitoring reveals new, cumulative or previously underestimated environmental or human-rights risks affecting children or other affected rights-holders.			
281.	**Section D.3,** **Principle 21,** **Model Clause on Continuous Sustainability Monitoring paras. 1-4**	Monitoring sustainability outcomes and performance. Principle 21 and the Model Clause appropriately provide for continuous monitoring of sustainability commitments and management and mitigation measures, but do not expressly require assessment of whether those measures are achieving their intended results. A measure may be implemented as planned without producing the expected environmental or socio-economic outcome. Recommendation: Provide that, where relevant, continuous monitoring should compare actual sustainability performance and outcomes against applicable targets and indicators and, where established, relevant baseline conditions, and use the results to inform any necessary review or adjustment of management and mitigation measures.	Marian Portero	Member of CEIA	Spain / USA
282.	**Section D.3,** **Principle 21,** **Model Clause on joint sustainabili**	Paragraph 3 concerning the Composition of the Committee provides for mandatory representation of the State and the Investor, while allowing local community representatives and key stakeholders directly affected by the Projects to participate only "optionally, […], as agreed by the Parties." It is understandable that including "key stakeholders directly affected" requires prior contextual assessments to identify qualifying stakeholders, thereby justifying the need for the Parties' consent. However, leaving local community representation rests solely with decisions of the Investor and	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam

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	ty committee	the State risks marginalizing or entirely disregarding their voices and legitimate interests. We therefore recommend two options of amendment: - The participation of local community representatives should be made mandatory, at least as observers with voice, in projects that inherently entail substantial adverse impacts on fundamental rights and livelihoods, which should be well defined or specified in the domestic laws. - Local community representation should be established as an default rule, accompanied by an explicit, narrow list of exceptions where such involvement may be excluded. In both options, the model clauses should identify the relevant settings—impact assessment, sustainability monitoring and decisions on material project changes, and also the subjects of representatives from local community. If supported by these safeguards, the recommendation could improve the identification of local risks and accountability for sustainability commitments.			
283.	**Section D,** **Principle 22**	**General observation.** We welcome the clarification at para 374 that the obligation is one of means, discharged through appropriate commitments in the IIC and supply contracts. Our concerns are that the Principle does not specify the process by which the obligation is to be discharged, the standards by which performance is to be assessed, or the limits of the obligation. These omissions are particularly significant given the remedial provisions in Chapters 7 and 8. **1. The Principle should establish a risk-based process.** As drafted, Principle 22 appears to state an outcome — compliance by subcontractors and suppliers — without explaining how the investor is expected to achieve	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		it. Supply chains associated with major investment projects cannot be addressed uniformly. We suggest the Principle require the investor to: (a) scope the relevant supply chain and identify actual and potential adverse impacts on the environment, human rights, labour standards and climate; (b) assess and prioritise those impacts by reference to severity and likelihood; (c) take measures to prevent impacts that can be avoided and mitigate those that cannot, directing efforts to measures likely to be most effective; and (d) use and, where necessary, seek to increase its leverage over subcontractors and suppliers. Much of this appears in the commentary at para 375, including policies, audits, monitoring, training and capacity-building. What is missing is the initial scoping and prioritisation which determines where those measures should be directed. We suggest aligning this process with the due diligence framework in Principle 11. The Model Clause to Principle 11 expressly addresses impacts of "the investment (and its supply chain)", while the Model Clause to Principle 22 refers to the "entire Project's supply chain". These provisions appear to describe the same due diligence exercise at different levels and should be expressed consistently. **2. The standard should be consistent with Principle 6.** Principle 6(2) provides that the parties "shall endeavour to pursue" the highest international standards, reflecting the difficulty of identifying and maintaining a definitive list of evolving sustainability standards. Principle 22 contains no equivalent qualification and instead requires best efforts to			

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		ensure compliance by subcontractors and suppliers, over whom the investor has less control. **3. The applicable standards should be identified.** Principle 22 refers to standards "applicable to it or to the project", without identifying which standards are intended. Elsewhere, the Instrument encourages parties to identify applicable sustainability standards in the IIC or an exhibit. Principle 22 should be tied expressly to standards so identified. The phrase "applicable to it" also raises a separate question. It may capture mandatory supply-chain due diligence requirements applicable to the investor under its home-State law. If non-compliance with such requirements is intended to constitute non-performance of the IIC owed to the host State, this should be stated expressly. If not, the formulation should be confined to standards applicable to the project. **4. Best efforts should be qualified and proportionate.** The commentary supplies qualifications which are absent from the black letter. Para 378 recognises that the extent of contractual cascading should vary according to the relationship with the business partner, while para 376 recognises that compliance may create additional costs and that their allocation should be negotiated having regard to the circumstances of the investment. We suggest the Principle provide that the obligation is to be discharged so far as appropriate and reasonable, having regard to the nature and duration of the relationship, the investor's leverage, the severity and likelihood of identified adverse impacts, and the costs allocated to the obligation under the IIC. A risk-based tiering approach would also be appropriate: more robust requirements for subcontractors and suppliers directly involved in the			

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		project, with escalation according to risk and the investor's degree of leverage. **5. The Principle should specify what constitutes discharge.** At present, the obligation is effectively discharged by inserting appropriate clauses in supply contracts. This is circular: it does not explain what the investor must actually do. The Principle should identify the measures capable of constituting compliance, including the process above and, where appropriate, sustainability policies, contractual cascading, audits, monitoring, training, capacity-building and the exercise of leverage. An investor that has taken the measures reasonably required by the Principle should not be treated as having failed merely because a subcontractor or supplier subsequently fails to comply. This is particularly important because Principle 22 is expressly an obligation of means. The investor should not become a guarantor of third-party compliance. **6. The Principle should address situations in which leverage is unavailable.** Para 375 suggests that an investor unable to increase its leverage should consider terminating the relevant relationship. This may not be realistic where there is a sole supplier, a thin local market or a supplier providing an essential service. We suggest a graduated approach under which the investor should first seek corrective action, capacity-building and mitigation. Where the required commitments remain unobtainable despite reasonable efforts, the investor should record the position and address the resulting risk so far as reasonably possible. Disengagement should be a last resort where continued reliance on the relationship presents material risks that cannot otherwise be mitigated.			

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		7. The interaction with local content obligations should be addressed. Para 356 recognises that IICs may require local sourcing, contracting local firms and developing local capacity. An investor may therefore face a conflict between a contractual local-content obligation and an expectation under Principle 22 to disengage from a local supplier that cannot meet the applicable standards. Disengagement may itself undermine the local economic or social objectives of the investment. We suggest the Instrument require the parties to address this interaction expressly. Corrective action, capacity-building and mitigation should precede disengagement where reasonably possible, and the contractual consequences of unavoidable disengagement should be addressed in the IIC. The State should also, where appropriate, assist by making available information concerning applicable requirements and local suppliers that may be capable of meeting them. This should be an information obligation, not a certification or warranty of supplier compliance, and should not displace the investor's own due diligence. **8. The remedial consequences require ascertainable limits.** Para 649 confirms that the State party may bring counterclaims for breach of investor sustainability obligations, including supply-chain obligations, while para 582 provides that liability for non-performance of sustainability obligations may not be limited or excluded. Given these consequences, Principle 22 must have sufficiently ascertainable content. As presently drafted, the investor could face non-limitable liability arising from the conduct of third parties notwithstanding that the investor's own obligation is stated to be one of means. We do not question the availability of counterclaims. Rather, their availability reinforces the need for the Principle to identify the applicable standards, due diligence process, proportionality, required measures and limits of the			

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		investor's responsibility. The investor should be liable for failure to discharge its own obligation of means, rather than for the independent non-compliance of a subcontractor or supplier. **9. The subcontractor Model Clauses should recognise reciprocal responsibility.** The Model Clauses impose extensive obligations on suppliers concerning compliance, documentation, reporting, audit and termination, but do not address the investor's own purchasing practices. Pricing, lead times, payment terms and other purchasing practices may themselves contribute to the labour and environmental harms the clauses seek to prevent. We suggest the Model Clauses include appropriate commitments concerning responsible purchasing practices, together with mechanisms for cost-sharing in remediation and capacity-building. Corrective action should generally precede termination, consistent with para 375's treatment of disengagement as a last resort. We would also welcome clarification as to whether workers within the supply chain are intended to have access to the grievance mechanism under Principle 21. If so, this should be stated expressly.			
284.	**Section D.4,** **Principle 22**	The obligation to ensure compliance by subcontractors and suppliers is a best-efforts obligation, while the investor's own sustainability obligations are expressed in mandatory terms. i3T suggests aligning the level of obligation in Principle 22 with that applying to the investor's own conduct.	i3T		Mexico
285.	**Section D.4,** **Principle 22,**	Assessment and remediation of supply-chain impacts. The Model Clause requires corrective action for Supplier/Subcontractor non-compliance but does not expressly address harm already caused. Correcting the breach may prevent recurrence without addressing the extent of the impact or the remediation required. Recommendation: Clarify that, where	Marian Portero	Member of CEIA	Spain / USA

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	Model Clauses for inclusion in subcontractor/supply chain contracts, clause 6	non-compliance has caused an actual adverse impact, corrective action should include, where appropriate, assessment of the impact, required remediation or restoration, associated costs and any material residual harm, supported by appropriate data, methodologies and, where necessary, evidence.			
	CHAPTER 6. CHANGE OF CIRCUMSTANCES				
286.	**General comments**	**COMMENT 1: Integration of Adaptive Performance Mechanics and Objective Financial Rebalancing Triggers in Hardship Clauses** • Analysis of Existing Deficiencies: Traditional hardship and stabilization clauses in international investment contracts frequently fail in practice because they treat economic shocks as binary events leading either to rigid renegotiation deadlocks or abrupt contract termination. In long-term, capital-intensive concession contracts and IICs, macroeconomic volatility–such as severe currency devaluations, hyperinflation, or sudden interest rate spikes–demands structured, pre-defined contractual adaptation rather than open-ended bargaining. • Actionable Proposal for Model Clauses: The UNIDROIT-ICC Model Clauses should explicitly incorporate "Adaptive Performance Mechanics" linked to objective, tiered financial equilibrium triggers. Rather than relying solely on a general duty-to-renegotiate in good	Mohamed Gomaa	President Judge, Court of Appeal, Egyptian Ministry of Justice	Egypt

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		faith, the Model Clauses should provide standardized formulas for automated, incremental risk-sharing adjustments. These adjustments should include: 1. Dynamic Tariff Indexation: Pre-agreed formulaic adjustments triggered automatically when macro-economic indicators breach specified variance thresholds (e.g., +/- 10% currency fluctuation). 2. Concession Period Extensions: Contractually pre-authorized temporal extensions designed to absorb capital recovery delays without altering the underlying debt-service coverage ratio (DSCR). 3. Tiered Financial Rebalancing: A structured sequence where minor economic shifts are handled via automatic mathematical adjustments, moderate shocks trigger mandatory technical adjustments by an independent financial expert, and severe, prolonged disruptions initiate formal renegotiation protocols. This tiered architecture prevents premature investor-state arbitrations, preserves project bankability, and maintains public service continuity without forcing either party into bad-faith renegotiations.			
287.	**General comments**	**General comment.** The Draft instrument's effort to protect regulatory freedom and avoid general freezing clauses was welcomed, as well as the explanations on using stabilisation clauses only "where appropriate" and "with full knowledge of the consequences"; it was considered positive to make States aware of the consequences of such clauses. It was noted that reasonable investor protection and contractual stability should coexist with legality, mandatory public-law constraints, sustainable development and sovereign regulatory responsibility. Support was expressed for the emphasis on preserving long-term contractual relationships, also in cases of hardship and force majeure.	Comment made during Latin American States' Representatives Roundtable		Ecuador

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		At the same time, it was stressed that continuity should not displace mandatory public-law prerogatives. Where domestic law grants public entities non-waivable powers to modify or terminate a contract in the general interest, the final Instrument should expressly preserve those powers, without prejudice to the consequences and procedural safeguards established by the applicable law.			
288.	**General comments on Chapter 6; and Commentary paras. 22, 400**	i3T supports the decision not to recommend freezing clauses, and the reasoning set out in the commentary on their constraining effect on regulatory freedom. Accordingly, contractual predictability should not be understood as a freezing of the applicable law or as an obstacle to the legitimate evolution of public policy.	i3T		Mexico
289.	**Section A,** **paras. 388-389**	Paragraphs 388 and 389 draw the distinction between hardship and stabilisation from the source of the change. In hardship the cause lies beyond the control of both parties and the loss is shared, whereas under a stabilisation clause the alteration of the economic equilibrium is treated as attributable exclusively to State conduct and the remedial logic is restitutionary rather than distributive. Paragraph 388 adds that a change of law which would be treated as force majeure or hardship between private parties cannot be so treated in an IIC because one party is the State. That reasoning is persuasive where the State legislates as a matter of policy choice. It does not hold where the State is implementing a measure that it is not free to refuse. A new aerodrome standard under Annex 14, a safety management requirement under Annex 19, or an amendment to Annex 17 following a security incident, is State conduct in form, but its content and its timing are determined externally. In substance such a change is closer to the hardship model, in that it lies beyond the control of both parties, than to	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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		the stabilisation model, even though it reaches the investor through a State instrument. The submission is not that the investor should bear such costs in full. It is that the binary in paragraphs 388 and 389 offers no intermediate category, and that Principle 23(3), being closed, does not presently supply one. It is suggested that the commentary acknowledge this third situation expressly, and indicate that where a measure is compelled by the State's international obligations an allocation between the parties may be more appropriate than either the sharing rule applicable to hardship or the full restitutionary rule applicable to stabilisation.			
290.	**Section A,** **para. 389**	The commentary indicates that, under a stabilization clause, the full cost of the alteration should in principle be borne by the State, and that the remedial logic is restitutionary, seeking to restore the investor to the position it would have occupied had the regulatory intervention not taken place. This allocation turns every regulatory modification into a measure individually capable of generating compensation, which is the mechanism through which anticipated liability displaces regulation even before it is drafted. A distinction should be drawn between a specific contractual breach by the State and general changes to the regulatory framework adopted legitimately and in good faith, for which full reparation should not be presumed.	i3T		Mexico
291.	**Section B**	**F. Limit Stabilisation Clauses** Stabilisation should not operate as a blanket freeze on future legislation or legitimate State regulation. Where fiscal or economic stabilisation is justified, it should be based on a demonstrable commercial need, clearly scoped, time-bound and open to review.	KNCCI		Kenya
292.	**Section B,**	**COMMENT 3: Harmonizing Public Interest Regulatory Carve-Outs with Proportional Adjustment Mechanics**	Mohamed Gomaa	President Judge, Court of Appeal,	Egypt

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	Principle 23	• Analysis of Existing Deficiencies: A persistent source of investor-state disputes arises from the friction between a host state's sovereign duty to enact public interest regulations (such as environmental protections, climate transition mandates, or emergency health measures) and an investor's reliance on contractual stability and fair treatment. Existing clauses often present a false dichotomy: either the state's measure is deemed a compensable breach/expropriation, or the investor absorbs all costs of regulatory compliance. • Actionable Proposal for Model Clauses: The Model Clauses should establish a balanced "Proportional Regulatory Adjustment" framework that explicitly reconciles public interest discretion with contractual equilibrium. The drafting committee should consider the following structure: 1. Explicit Public Interest Carve-Outs: Expressly state that non-discriminatory, good-faith regulatory measures adopted by the host state to protect public health, safety, the environment, or fundamental economic stability do not constitute a breach of contract or indirect expropriation per se. 2. Proportional Cost-Sharing Framework: Where a legitimate, non-discriminatory public interest regulation disproportionately alters the specific financial fundamentals of an investment project, the contract should mandate a shared financial adjustment. The cost of compliance should be allocated according to a pre-defined ratio (e.g., partial tariff adjustment, tax credits, or fee waivers) rather than full damages indemnification.		Egyptian Ministry of Justice	

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		3. Mitigation Obligations: Require foreign investors to demonstrate active steps taken to mitigate the financial impact of new regulatory requirements before claiming contractual rebalancing. This approach safeguards the host state's sovereign regulatory space while protecting foreign investors against unmitigated financial ruin, fostering an equitable and sustainable investment environment.			
293.	**Section B, Principle 23**	A controversial feature of stabilization clauses is the initiation of renegotiation. Typically, parties are required to enter into renegotiation when one of them invokes a stabilization clause—particularly regarding economic provisions. The problem with renegotiation is its inherent ambiguity and the resulting legal uncertainty; parties retain the freedom not to contract and are under no obligation to reach an agreement. Consequently, a renegotiation clause could prove futile or even serve as a pretext to undermine the stabilization clause—for instance, if a party is accused of failing to negotiate in good faith and, as a result, intentionally failing to reach an agreement. In light of this, it is worth considering Principle IV.6.7 – Duty to renegotiate of TransLex Principles as a reference; this Principle includes commentary outlining eighteen specific behaviors parties must adopt during renegotiation to demonstrate good faith. It represents a superior alternative; otherwise, a contractual duty to renegotiate risks becoming meaningless. Finally, Principle 23(3) is highly appropriate in including exceptions to the stabilization clause—a matter that has always been the subject of intense debate, particularly in international arbitration.	Sergio García Long	UNIDROIT Correspondent for Peru Pontifical Catholic University of Peru	Peru
294.	**Section B, Principle 23**	BFE+ welcomes the inclusion of Principle 23 and its recognition that stability of contractual relations is essential for IICs, as reflected in paragraph 394 of the commentary. The Instrument's decision to provide economic equilibrium, fiscal stabilisation, and hybrid alternatives, rather than impose a one-size-	Alfredo Bullard,	Bullard Falla Ezcurra +	Peru / Spain

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		fits-all solution, reflects a pragmatic understanding of the diverse needs of investment projects, sectors, and risk allocations. BFE+ also acknowledges the Instrument's departure from general freezing clauses. The commentary at paragraph 400 correctly observes that such clauses may "severely constrain[ing] the regulatory freedom of States". This position reflects a broader trend in contemporary contracting practice, including the OECD Guiding Principles for Durable Extractive Contracts and the OHCHR Principles for Responsible Contracts, which the commentary identifies at paragraph 382 as relevant benchmarks. BFE+ nevertheless considers that this policy of restraint should be accompanied by a fuller recognition of the circumstances in which stronger stabilisation may be justified. While BFE+ understands the policy rationale for excluding freezing clauses, their complete absence may limit the Instrument's utility for capital-intensive, long-term investments, particularly in the oil and gas sector. Upstream petroleum projects frequently require initial capital expenditure above USD 1 billion and may have payback periods of 15 to 25 years. Once such relationship-specific investments are sunk, the investor becomes vulnerable to opportunistic regulatory changes by the host State-a dynamic well recognised in economic literature as the *holdup problem*. Stabilisation clauses exist precisely to mitigate this risk and to align ex ante incentives for both the State (attracting investment) and the investor (committing capital). Project-finance lenders therefore seek certainty as to the fiscal and regulatory regime over the projected cash-flow horizon, and the absence of any freezing mechanism may impair the bankability of projects that the Instrument is designed to facilitate. BFE+ does not propose freezing clauses as the Instrument's default. The commentary should nevertheless acknowledge that, for extractive and other specific projects, they remain a legitimate and widely used contractual tool and are not inherently	Huascar Ezcurra, Bruno Doig, Inmaculada Posada, and Ignacio Enrique Tovar		

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		inconsistent with the Instrument's objectives. The freedom recognised in **Principle 23(1)** would be better served by commentary that informs, rather than discourages, their considered use. BFE+ expresses particular concern regarding the scope and potential impact of the carve-out in **Principle 23(3)**. It provides that stabilisation clauses "shall not apply to measures adopted in good faith, in a non-discriminatory manner, and in the public interest by the State, necessary to comply with the obligations to protect human rights, public health, the environment, climate change, or labour standards." While BFE+ recognises the carve-out's legitimate purpose, its formulation raises significant concerns for oil and gas investors, both as to the breadth of measures it may shelter and as to the remedies available to the investor when the carve-out is wrongly invoked. *First*, listing "climate change" separately from the already broad category of "the environment" may immunise a vast range of regulatory measures. Climate-related regulation is expanding rapidly, including carbon taxes, emissions caps, fossil-fuel phase-out policies, enhanced nationally determined contribution targets under the Paris Agreement, and mandated transitions to renewable energy. A measure framed as climate-related could therefore fall outside the stabilisation commitment regardless of its actual economic impact on the project. *Second*, the conditions of good faith, non-discrimination, and public interest may not prevent opportunistic use. Paragraph 414 states that "States enjoy discretion to decide the public interest they wish to protect, as long as the choice is made in good faith." That discretion, combined with the non-exhaustive list of protected objectives, creates a risk that the carve-out may			

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		shield measures nominally directed at climate change or the environment but substantively motivated by fiscal or political considerations. *Third*, if the requirements are met, the investor "does not have renegotiation or compensation rights" (paragraph 416). This all-or-nothing approach may produce disproportionate outcomes where a legitimate measure destroys a project's economic viability. BFE+ therefore recommends transitional compensation or, at minimum, a right to renegotiate within the carve-out. *Fourth*, the Instrument and its commentary are silent on the type of relief available to an investor who demonstrates that the State has invoked the carve-out without satisfying its conditions (i.e., in bad faith, on a discriminatory basis, or outside the public interest). In particular, neither the Principle nor the Model Clause addresses whether the investor may seek injunctive or specific-performance relief, such as an order requiring the State to suspend or rescind the offending measure, or whether the remedy is limited to pecuniary compensation. This distinction is critical in the extractive sector: where a regulatory measure threatens to shut down ongoing operations or strand infrastructure, damages alone may not adequately protect the investor's legitimate expectations, yet injunctive relief against sovereign regulatory action raises well-known enforceability and comity concerns. BFE+ recommends that the commentary clarify the intended scope of available remedies and, at minimum, acknowledge the circumstances in which non-pecuniary relief may be appropriate, drawing on the distinction recognised in arbitral practice between measures that are merely financially adverse and those that are confiscatory or operationally destructive.			

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		BFE+ recommends revising **Principle 23(3)**, or the accompanying **Model Clause**, so that where a carve-out measure substantially eliminates or renders the covered investment economically unviable, the investor has a right to renegotiate in order to distribute the economic burden proportionately. This transitional compensation mechanism would not nullify the carve-out or prevent the State from adopting the measure; it would recognise that the costs of legitimate regulatory transitions, including the global energy transition, should not fall exclusively on the investor where the State has made a long-term contractual commitment. The approach is consistent with proportionality, which the Instrument endorses in other contexts (see Principle 6, commentary at paragraph 143, and Principle 11, commentary at paragraph 215), and with the practice of the BTC Pipeline consortium. **Principle 23(2)(1)(d)** permits recourse to the agreed dispute-resolution procedure if renegotiation fails, but does not expressly empower the tribunal to adapt the contract. Paragraph 409 notes that the parties may grant such authority to an arbitral tribunal or expert. BFE+ submits that this option should receive greater prominence, ideally in the Model Clause, because it provides a necessary safety valve when renegotiation reaches an impasse. The UPICC already endorse this approach for hardship under Article 6.2.3(4), which empowers a court or tribunal to "adapt the contract with a view to restoring its equilibrium." Extending that principle to stabilisation would strengthen the economic-equilibrium clause and reduce the risk that failed renegotiation leads directly to termination and damages, an outcome that serves neither party's interest in a long-term IIC.			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		In summary, BFE+ supports Principle 23 as a valuable contribution to the modernisation of IIC practice, but recommends: (i) that the commentary acknowledge freezing clauses as a legitimate option for specific project categories; (ii) that the carve-out in Principle 23(3) include a transitional compensation or renegotiation mechanism for measures that substantially eliminate the economic viability of the investment; and (iii) that the Model Clause expressly provide for tribunal adaptation upon failed renegotiation.			
295.	**Sections B and C,** **Principle 23-24**	The interaction between stabilisation, hardship and force majeure should be explained through a factual illustration. The commentary should distinguish renegotiation, adaptation, compensation and termination, identifying the conditions for each. Public-interest exceptions should specify their relationship with contractual risk allocation.	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam
296.	**Section B,** **Principle 23; and** **Chapter 5.D,** **2.4 Model Clause on environmental and climate commitments paras. 3(5)-(6)**	The Instrument already uses dynamic language in one place. The climate Model Clause refers to the host State's nationally determined contributions under the Paris Agreement 'as may be adopted or amended from time to time', subject to any stabilisation obligations. That is the technique needed to settle whether a reference to host-State law is dynamic or fixed at the date of the contract, and it appears there without comment. Suggestion: the Instrument might use the same technique consistently, saying for each reference to host-State law which of the two is meant. It would cost no black-letter drafting and would remove a recurring source of dispute.	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
297.	**Section B,** **Principle 23(1)**	Principle 23(1): delete "if appropriate and with full knowledge of the consequences" . The qualification should be deleted and the Principle should read simply that the parties may agree to include a stabilisation and renegotiation clause. Every contractual term should be included only if appropriate and only with knowledge of its consequences. That is a general proposition about contracting, not a rule about stabilisation. Stated as a Principle, it adds no operative content: it creates no condition, imposes no burden, and produces no consequence if unmet. The drafting is also asymmetric. No comparable admonition precedes the hardship, force majeure, expropriation or sustainability provisions, each of which carries consequences at least as serious. Singling out stabilisation in this way conveys a normative posture adverse to it.	Santiago Montt	CIIAM / Montt Aguilar	Chile
298.	**Section B,** **Principle 23(1)**	**1. "If appropriate" should be given objective content.** Principle 23(1) provides that "if appropriate and with full knowledge of the consequences, the parties may agree to include a stabilisation and renegotiation clause in the IIC". It does not, however, indicate by reference to what factors appropriateness is to be assessed. The commentary contains material which could provide the basis for such an assessment. Para 397 identifies exposure to "the threat of non-commercial risks affecting the IIC, directly or indirectly", noting that such risks are aggravated by "the long-term nature and the time taken to receive the returns on the investment". Para 398 identifies the requirements of project lenders, observing that lenders may demand assurances of contractual stability to facilitate timely loan repayment. Para 394 similarly recognises that, given the peculiarities of IICs, stability of the contractual relationship	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		may be important, while acknowledging the need to preserve the regulatory freedom of States. We suggest that the Principle identify the matters to which the parties should have regard in assessing appropriateness. These could include: • the duration of the IIC and the period over which returns are expected to be realised; • the nature and degree of the non-commercial risks to which the investment is exposed; • the requirements of project lenders and other financing arrangements; and • the scale and nature of the investment relative to the resources and circumstances of the parties. We raise the last of these for the Working Group's particular consideration. If obligations assumed by the investor are to be calibrated to the size and nature of the investment (as the Commentary indicates elsewhere), the Working Group may wish to consider whether the appropriateness of additional contractual protection should likewise be assessed having regard to the scale and nature of the investment. **2. The Principle should direct the parties to consider the consequences of inclusion.** As drafted, Principle 23(1) addresses whether a stabilisation and renegotiation mechanism should be included, but does not direct the parties to consider the legal and commercial consequences of that decision. We suggest that the Principle require the parties to consider, and record their understanding of, the consequences of inclusion for the investment and for each party. This should include, as appropriate, the protection afforded by			

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		the stabilisation mechanism, the circumstances in which it may be engaged, the role and scope of the renegotiation mechanism, the remedies available in the event of breach or failed renegotiation, and the constraint placed on the State party. This is of practical importance because the consequences depend materially on the mechanism selected under Principle 23(2). An economic equilibrium clause may give rise to a right to request renegotiation and, if renegotiation fails, recourse to dispute resolution. A fiscal stabilisation clause may instead produce an entitlement to monetary compensation or comparable alternatives. Further, para 409 provides that, following a failure of renegotiation, the remedies in Chapter 7 would normally be available, including compensation. It also provides that the parties are free to specify the consequences of failed renegotiation in their contract, including by granting an arbitral tribunal authority to determine how the contract should be adapted and performed going forward. These are significant consequences. They are also matters in respect of which the parties retain contractual choice. Principle 23(1), which directs the parties' attention to the decision whether to include such a mechanism, should therefore also direct their attention to the consequences of that decision. **3. "Full knowledge of the consequences" should be replaced with an objective and evidential standard.** The requirement of "full knowledge of the consequences" describes a state of mind without identifying its content, the party bearing the burden of establishing it, or the consequence of its absence. Para 395 seeks to give the expression some content, stating that "full knowledge of consequences" is intended to cover knowledge of the competing considerations relating to the need for, and effects of,			

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		stabilisation and renegotiation clauses. The four considerations are then developed in paras 396 to 399. The use of "inter alia", however, leaves the content of the requirement open even on that reading. More fundamentally, the standard remains subjective. We do not consider "full knowledge" an appropriate standard for a contractual mechanism whose operation may extend over the life of a long-term investment and whose consequences may depend upon future regulatory, economic and factual circumstances. Parties cannot necessarily have complete knowledge at the time of contracting of the circumstances in which a stabilisation or renegotiation mechanism may subsequently be engaged, or of the precise consequences that may ultimately follow. We suggest instead an objective standard capable of being evidenced: that the parties have understood, and have recorded their understanding of, the matters identified in the Principle. The contract could contain a recital or acknowledgement recording that understanding. This would provide both a practical means of giving effect to the requirement and an evidential means of demonstrating compliance with it. **4. Suggested reformulation.** In light of the above, we suggest that Principle 23(1) be redrafted along the following lines: **"The parties to an IIC may agree to include a stabilisation and renegotiation mechanism where, having regard to the duration and nature of the investment, the risks to which it is exposed and other relevant circumstances, they consider such inclusion appropriate and have considered its consequences for the investment and for each party.** **In assessing whether inclusion is appropriate, the parties should have regard to the duration of the IIC and the period over which returns are expected to be realised; the nature and degree of the**			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		non-commercial risks to which the investment is exposed; the requirements of project lenders; and the scale and nature of the investment. **Where the State is a party to the IIC, the parties may agree to include a stabilisation commitment together with an appropriate renegotiation mechanism. Where a State entity is the contracting party on the State side, the parties may agree to include a renegotiation mechanism and, where that entity has authority to bind the State in respect of the relevant matter, a stabilisation commitment.** **Where such a mechanism is included, the parties should record their understanding of its operation and consequences, including the protection afforded to the investor, the circumstances in which renegotiation may be invoked, the remedies available in the event of breach or failed renegotiation, and the constraint placed on the State party or State entity."** We recognise that the precise drafting of the third paragraph will need to be aligned with the different forms of stabilisation mechanism addressed in Principle 23(2). Our principal suggestion is that Principle 23(1) should establish the distinction between the capacity to provide stabilisation protection and the capacity to undertake a contractual renegotiation obligation. **5. The capacity requirement should distinguish stabilisation from renegotiation.** The commentary appears to treat a "stabilisation and renegotiation clause" as a single mechanism for purposes of determining whether a State-side entity may include it. We consider that this risks conflating two distinct contractual functions.			

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		Para 393 states that a stabilisation and renegotiation clause may not be included where the State is not a party and the relevant State-side entity "is not a State or cannot bind the State", concluding that "only if one of the parties is a State or capable to bind the State can a stabilisation clause be included in the IIC". The first part of this proposition may be appropriate in relation to a **stabilisation commitment**, depending on the nature of the commitment contemplated. A State can ordinarily undertake such a commitment when it is itself a party, while a State-side entity can do so only to the extent that it possesses the requisite legal authority to bind the State. But this does not necessarily determine whether the same entity can undertake a **renegotiation obligation**. A renegotiation mechanism is capable of operating as a contractual process between the investor and the State-side entity. The entity may therefore be able to undertake an obligation to enter into negotiations, consider specified adjustments, or follow an agreed process in response to defined circumstances even where it has no authority to bind the State in respect of future legislative or regulatory measures. The capacity to undertake such an obligation should not be equated with the capacity to provide a stabilisation commitment. At the same time, we do not suggest that stabilisation and renegotiation should be treated as wholly independent mechanisms. The purpose of Principle 23 appears to be to address contractual arrangements through which the parties seek to preserve the investment's economic or legal equilibrium while retaining a mechanism for responding to circumstances that may make that equilibrium unsustainable. The Principle should therefore make clear that a renegotiation mechanism may accompany a			

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		stabilisation commitment, while recognising that the two components may have different capacity requirements. The distinction is particularly important because para 393 could otherwise be read as suggesting that **neither** a stabilisation mechanism nor a renegotiation mechanism may be included unless the State itself, or an entity capable of binding the State, is a party. That appears broader than necessary. **6. The in personam character of the protection merits greater prominence.** Para 399 makes an observation which we consider valuable and which is not sufficiently developed elsewhere: that, unlike investment treaties or national legislation protecting investors, which provide protection *in rem*, IICs and the stabilisation and renegotiation clauses contained in them operate *in personam*, with the State aware of the identity of the investor. We suggest that this distinction warrants greater prominence in the Principle and commentary. A contractual stabilisation commitment is given to an identified counterparty, in respect of an identified investment project, and on terms that the State has had an opportunity to assess, negotiate and price. It is therefore a considered and bilateral undertaking, rather than a general protection extended to an undefined class of investors. This distinction is relevant to the assessment of whether such protection is appropriate. The State is not being asked to surrender regulatory flexibility generally, but to assume a defined contractual commitment in the context of a particular investment and the allocation of risks between the parties. The project-specific and negotiated character of an *in personam* commitment therefore provides an important basis for assessing the appropriateness of the protection and the extent to which it should be included.			

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		We invite the Working Group to develop this point further, including by explaining how the *in personam* nature of the commitment, the particular characteristics of the investment, and the negotiated allocation of risk between the parties should inform the assessment contemplated by Principle 23(1).			
299.	**Section B, Principle 23(1)(2)(3)**	The stabilisation clause achieves an adequate equilibrium between the legitimate expectations of the investor and the right to regulate of the State, avoiding a regulatory chill. Particularly, the principle 23(3) enshrines an operationalised balance by providing a carve-out to certain regulations that were implemented in good faith, non-discriminatorily and are required to fulfil a public mandate. This is aligned with the broader purpose of fostering sustainability in IIC.	Maria Amparo Grau/Jose Ignacio Hernandez	AVEDA	Venezuela
300.	**Section B,** **Principle 23(2)**	**Principle 23.2 – Economic equilibrium.** The concept of economic equilibrium should be clarified. A reduction in expected economic return should not, by itself, amount to a disruption of the economic or financial equilibrium of the contract. Expected return may be an indicator of the original contractual equation, but that equation also reflects the allocation of risks, costs, revenues, obligations and remuneration. A fall in profitability resulting from the materialisation of a commercial risk expressly allocated to the investor should therefore not constitute contractual disequilibrium. Otherwise, the clause could operate as a contractual guarantee of projected profitability.	Comment made during Latin American States' Representatives Roundtable		Ecuador
301.	**Section B,** **Principle 23(2)(1)**	The economic equilibrium clause would benefit from further guidance regarding the threshold for triggering renegotiation. The expressions "substantially reduces" and "economic return expected" may generate significant uncertainty, particularly in long-term and capital-intensive projects where expected returns necessarily involve assumptions concerning	Gustavo Andrés Piedrahita	*Director, Centro de Arbitraje y Conciliación*	Colombia

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		market conditions, financing costs, demand, regulation and other variables. Consideration could therefore be given to providing non-exhaustive criteria for assessing substantial impairment, including causation, materiality, duration, foreseeability, the allocation of contractual risks and the investor's contribution to the alleged loss. Such guidance could enhance predictability while preserving the flexibility of the clause.			
302.	**Section B, Principle 23(2)(1)**	Principle 23(2)(1): there is no default rule on failure to agree. This is the most serious problem in this Principle. The model clause requires the investor to give notice without undue delay, obliges the parties to negotiate in good faith within a defined period, and requires the investor to continue performing throughout. Sub-paragraph (d) then provides that if a party "fails to fulfil the conditions contained in sub-paragraphs (a) through (c)," the other may resort to dispute resolution. That covers a party that breaches the procedure (including a failure to negotiate in good faith). It does not cover the ordinary case. Where both parties comply — the investor gives proper notice, both negotiate in good faith, and the period expires without agreement — no condition has been breached and there is nothing to take to dispute resolution. The investor has absorbed the loss, performed throughout, complied with every requirement of the clause, and has no remedy. The commentary does not solve this. Paragraph 409 observes that "the parties are free to specify the possible consequences of failed renegotiation in their contract," and suggests they "may agree to grant authority to an arbitral tribunal (or defer to an expert determination or dispute board procedure) to decide how the contract should be adapted."	Santiago Montt	CIIAM / Montt Aguilar	Chile

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		Freedom to provide for the outcome is not a rule, and the model clause, which is what will actually be used, provides no default. The gap is compounded by two settled propositions: that an obligation to negotiate is not an obligation to agree, so failure to agree is not itself a breach; and that, where negotiations fail in the absence of clear contractual criteria, it is doubtful that tribunals can revise the contract. The instrument's own treatment of hardship shows that a default rule is both possible and expected: Article 6.2.3(4) of the UPICC, which applies to IICs, empowers the adjudicator either to terminate the contract or to adapt it with a view to restoring its equilibrium. It is therefore proposed to add a new sub-paragraph (d) to Principle 23(2)(1), renumbering the present (d), as follows: "If the Parties fail to agree within the period specified, either Party may refer the matter to the dispute resolution procedure agreed in the IIC, and the tribunal may, as it considers appropriate: (i) adapt the contract with a view to restoring the economic equilibrium; (ii) award compensation for the reduction in economic return; or (iii) terminate the contract on terms to be fixed."			
303.	**Section B,** **Principle 23(2)(1)**	Principle 23(2)(1): delete "*either in the short term or in the long term*." The phrase should be deleted as surplusage. The operative threshold is that the measure "*substantially reduces… the economic return expected by the Investor*." A temporal qualifier that expressly embraces both the short term and the long term excludes nothing. The commentary confirms the redundancy: paragraph 404 explains that the timeframe "*is broad*" and that an investor may seek renegotiation whether the reduction is suffered "*in a shorter period of time or over a longer period of time*."	Santiago Montt	CIIAM / Montt Aguilar	Chile

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		The drafting is also internally inconsistent: the fiscal stabilisation clause in paragraph (2) contains no equivalent temporal language, and is none the worse for it.			
304.	**Section B, Principle 23(2)(1) and (2)**	The economic equilibrium clause should not be limited to trigger a renegotiation of the agreement and should provide for compensation as an alternative to restore such a balance if the state does not agree to renegotiation of the agreement. Some Common law jurisdictions, such as England in *The Amphitrite case* and Jamaica in *Revere Jamaica Alumina v Attorney General (1977) 26 WIR*, have adopted the fettering doctrine (or doctrine of executive necessity), where any clause that limits the discretion of the government would be null and void. In Revere Jamaica, a stabilization clause similar to the one provided for in Principle 23(2)(2) was disregarded by the Court. Principle 23(2)(2)(b) should remedy the mentioned weakness.	Jorge González Carvajal	AVA	Venezuela
305.	**Section B, Principle 23(2)**	**1. The provision should be expressed as a principle rather than as a model clause.** Principle 23(2) sets out detailed procedures which are then substantially reproduced in the Model Clauses. We suggest that the Principle identify the two mechanisms, their respective triggers and principal consequences, leaving the detailed contractual machinery to the Model Clauses. **2. The scope and operation of the two mechanisms should be clarified.** The Principle should provide clearer guidance on the circumstances in which the economic equilibrium and fiscal stabilisation mechanisms are intended to operate, including the relevant threshold for each. In particular, the treatment of measures adopted by different State authorities, the inclusion of judicial decisions, and the position where the counterparty is a State entity should be clarified.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		3. The fiscal stabilisation mechanism should be framed as a contractual undertaking. A contract cannot prevent the State from exercising its legislative powers, but it can provide for a contractual undertaking and the consequences of non-compliance. We suggest that the Principle reflect this distinction and clarify the basis on which compensation or other contractual consequences are to operate. **4. The hybrid mechanism requires clarification.** The relationship between the economic equilibrium and fiscal stabilisation mechanisms, and the intended effect of the hybrid option, is not sufficiently clear. We suggest that the Principle and Model Clause be aligned to make clear whether the two protections operate cumulatively or provide alternative forms of protection. **5. The Principle should provide greater guidance on drafting the trigger.** Given the importance of stabilisation provisions to long-term investments, the Instrument should assist parties in defining the relevant economic baseline, threshold and period of assessment, rather than leaving these matters to subsequent interpretation. **6. Position where the counterparty is a State entity.** The Principle should clarify how the economic equilibrium and fiscal stabilisation mechanisms operate where the contractual counterparty is a State entity rather than the State itself. In particular, it should distinguish commitments which the State entity can make in its own capacity from measures or obligations which require action by the State or another public authority, and clarify the contractual consequences where the relevant measure is outside the entity's control.			

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306.	**Section B,** **Principle 23(2)(1),** **Commentary paras. 389 and 404–409**	**Economic equilibrium** Principle 23 is likely to become a focal point in large-value disputes. As drafted, it comes close to treating causation as built into a stabilisation claim once there is a covered State measure and a material economic impact. I would not go that far. A regulatory measure may coincide with commodity-price movements, exchange-rate shifts, financing costs, management decisions, demand changes or technological disruption. The mere sequence of a State measure followed by economic harm does not establish causation. The phrase "economic return expected" also leaves too much open. At a minimum, the contract should identify: 1. the agreed financial base case or financial model; 2. the relevant return metric—IRR, NPV, EBITDA, tariff return, etc.; 3. a quantitative materiality threshold; 4. risks contractually assumed by the investor; 5. causation and mitigation requirements; and 6. the valuation date. The Draft already accepts that a "substantial reduction" has to be tested economically. It makes more sense to fix the relevant economic baseline in the contract than to ask a tribunal, years later, to reconstruct what the parties thought the project would yield. For the purely financial component of these disputes, expert determination before arbitration would often be useful.	ACCOLDI		Colombia

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307.	**Section B, Commentary para. 396**	Paragraph 396: the assertion that stabilisation clauses constrain sovereignty should be qualified. Paragraph 396 states that stabilisation and renegotiation clauses "may constrain the sovereign right of the State to regulate in the public interest, especially the protection of human rights, labour standards, environmental protection, climate change and other related measures." The proposition is inaccurate as a matter of law, inconsistent with the instrument's own architecture, and unnecessary to the point the paragraph makes. (a) It is inaccurate A stabilisation clause, as part of an IIC, operates in personam, not in rem. It binds the State only as against the identified investor. The State's legislative and regulatory competence as against everyone else is untouched. (b) It is inconsistent with the instrument The draft itself says the opposite twice. Paragraph 389 explains that under a stabilisation clause the consequence of State action is a compensatory obligation — the remedial logic is "restitutionary." And paragraph 400 excludes freezing, intangibility and allocation-of-burden clauses precisely because those are the forms said to constrain regulatory freedom. The clauses the instrument actually offers — economic equilibrium and fiscal stabilisation — do not purport to bar any measure. Paragraph 396 therefore describes a clause type that Principle 23 does not supply. (c) It omits the reason States use these clauses Stabilisation and renegotiation clauses allow States to give specific commitments directed at a particular investor, which the general regulatory framework — including investment treaties — cannot supply. Countries with	Santiago Montt	CIIAM / Montt Aguilar	Chile

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		a poor record of dealing with foreign investors may have a particular need for that instrument, and the Principles should not deprive them of it. The point is not that stabilisation raises no public-interest concerns; it plainly does. The objection is that the sovereignty framing is legally wrong and rhetorically loaded, and that the instrument does not need it. Paragraph 396 should be redrafted to say that, depending on their formulation, these clauses may attach a financial cost to subsequent regulatory change, and that this is the consideration the parties must weigh.			
308.	**Section B,** **Principle 23(2),** **Commentary para. 401**	**Paragraph 401** states: "*When the party to an IIC is not a State but rather a State entity, the parties should seek a contractual commitment by which the State entity shall endeavour to facilitate discussions and make efforts to persuade the State to ensure the stabilised fiscal treatment*". This may merit clarification. While the provision leaves room for the parties to agree a specific modality of the State entity's obligation, its current wording could imply taking informal steps, which could be non-transparent or even unlawful for the State entity to undertake. It may thus be preferable to suggest limiting such obligations by a qualifier "*only to the extent permitted by applicable national law*".	Nataliia Soldatenkova, Elizaveta Shegay, Anastasia Alexandrova	Russian Arbitration Association (EPAM law firm)	Russian Federation
309.	**Section B,** **Principle 23(2),** **A. Economic equilibrium clause**	Currently the Economic Equilibrium Model Clause is triggered where a State measure "*substantially reduce[s]*" the economic return "*expected*" when the IIC was concluded, or at another agreed time. It is suggested to clarify that such "*expectations*" should be objectively identifiable and shared by both parties to the IIC. If not, the clause should expressly address whether an investor's internal expectations or contractual financial model, whether or not shared with the counterparty, may constitute the relevant benchmark, even where previously unknown to the State party. This would avoid the State party being taken by surprise by a dispute based on previously	Nataliia Soldatenkova, Elizaveta Shegay, Anastasia Alexandrova	Russian Arbitration Association (EPAM law firm)	Russian Federation

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		undisclosed expectations. Otherwise, the Model Clause may effectively convert an investor's forecasts into protected contractual expectations. Including the relevant benchmark and/or methodology for determining it would therefore be in the interests of both parties, protecting the investor while providing the State party with greater certainty. The proposed mechanism could also clarify how mixed or subsequently changing regulatory effects are to be assessed. While such effects may ultimately be addressed through renegotiation, the Commentary could note that where a measure initially appears neutral or favourable but, upon implementation or subsequent application, proves adverse, the investor should not be precluded from seeking renegotiation merely because the adverse effect was not apparent when the measure was adopted. This would not require the clause to anticipate every possible regulatory development, but would provide guidance for cases where the adverse effect becomes apparent only in practice.			
310.	**Section B,** **Principle 23(2),** **Commentary para. 409**	**Paragraph 409** provides for recourse to dispute resolution where renegotiation fails: "*If one of the parties fails to fulfil the conditions contained in sub-paragraphs (a) to (c), the other party can resort to the dispute resolution procedure identified in the contract*." It also notes that "[t]*he parties are free to specify the possible consequences of failed renegotiation*". It may be useful to distinguish between failure to comply with the renegotiation procedure and a good-faith failure to reach an agreement. The latter is inherent in a negotiation process and does not necessarily indicate a failure by either party to fulfil the enlisted conditions. Moreover, if further recourse to dispute resolution is contemplated, this could be expressly addressed in the Model Clause.	Nataliia Soldatenkova, Elizaveta Shegay, Anastasia Alexandrova	Russian Arbitration Association (EPAM law firm)	Russian Federation

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		The Commentary and Model Clause could also give greater consideration to ADR, particularly where renegotiation involves complex economic or technical questions for which immediate arbitration may not be proportionate. A multi-tiered process could be considered, with a fixed period for negotiations (e.g. 120 days), extendable by mutual agreement, followed by mediation, expert determination or a dispute board, and arbitration as a final step. For long-term contracts, access to ADR with relevant specialists can significantly limit recourse to arbitration and avoid significant obstructions to performance. For such a mechanism to operate effectively, the pre-arbitration stages should define the applicable time limits, procedural triggers and steps, the third party's scope of authority, and the matters ultimately subject to arbitration. This would provide a structured path to resolution while reducing disputes over compliance with, or exhaustion of, the pre-arbitration steps.			
311.	**Section B,** **Principle 23(2)(1); and** **Commentary paras. 402-409**	The expression "substantially reduces the economic return" would benefit from additional guidance, particularly in long-term IICs. Define objective criteria for materiality. Depending on the project, such criteria may include a quantitative threshold and may refer to revenues, costs, cash flows, net present value, internal rate of return, debt-service capacity or other agreed financial parameters. Parties should be encouraged, where practicable, to establish objective criteria for determining whether a State measure substantially affects the economic equilibrium of the IIC. Any quantitative threshold should be calibrated to the financial structure and contractual risk allocation of the particular investment. In the absence of an agreed threshold, substantiality should be assessed taking into account the magnitude, duration and cumulative effect of the measure on the agreed economic assumptions of the investment. Equilibrium mechanism may identify: (i) the use of audited financial statements or other independently verifiable financial information; (ii) the relevant triggering events; (iii) the	Adolfo Pulgar Soarez	Member of CEIA	Peru

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		financial parameters against which the impact is measured; (iv) a counterfactual comparison between the actual financial position and the position that would have existed absent the relevant measure; (v) an agreed materiality threshold; and (vi) a symmetrical adjustment mechanism applicable to either party.The reference point for restoring economic equilibrium should be clarified. In a long-term IIC, the relevant baseline may evolve after execution as a result of financial close, starting operations, amendments, or a prior rebalancing. Restoration should therefore be linked to the latest contractually recognised equilibrium and remain consistent with the parties' allocation of risks.			
312.	**Section B, Principle 23(2)(1); and Commentary paras. 402-409**	The establishment of objective parameters for determining whether and to what extent the economic equilibrium should be restored has a positive effect on the renegotiation process, as it enables the parties to rely on verifiable criteria to assess the impact suffered and determine an appropriate solution that is consistent with the actual economic and financial structure, thereby preventing the renegotiation process from being subject exclusively to discretionary or subjective considerations.	Joyce Pamela Poves	Member of CEIA	Peru
313.	**Section B, Principle 23(2)(2) Commentary [paras. of Principle 23(2)]; and ALIC Guide (2021),**	Principle 23(2)(2) provides that the State cannot reduce or remove the tax, customs or other fiscal incentives given to the investor for the period of the IIC, and that changes to fiscal laws that substantially reduce the economic returns under the IIC shall not apply to the investor for that period. The Instrument does not say how that works in conflict-of-laws terms, and two readings are open. On the first, the clause fixes the applicable law at the date of the contract, so later changes in the host State's fiscal law never enter it. On the second, the clause incorporates identified provisions of host-State fiscal law as terms of the contract, while the governing law stays dynamic. This is the familiar line between a choice of law and incorporation by reference, and the difference is practical: on the second reading the	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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	[Chapter IV – Protection of investment and regulator autonomy, Section C], Paras. 4.137-4.140	frozen provisions yield to the mandatory rules and public policy of the governing law, so the protection is narrower than it looks. The Instrument draws that line with care, but only for its own Principles. Footnote 45 to paragraph 590 states it exactly. Where a rule of the Instrument 'has been incorporated as a term of the IIC', it 'can bind the parties only to the extent that it does not violate the mandatory provisions of the law governing the contract; in other words, those rules from which the parties to a contract may not derogate by way of agreement'. Paragraph 57 of the Introduction describes incorporation by reference in the same terms, as the route by which non-State rules apply 'as terms of the contract', and paragraph 597 makes the mandatory-rules point generally. The same analysis is not applied where the parties freeze host-State law, though the mechanism and the consequence are the same. Arbitral practice has gone both ways, and two awards rendered months apart show it. In Duke Energy International Peru Investments No. 1 Ltd v Republic of Peru (ICSID Case No. ARB/03/28, Award, 18 August 2008, para. 227) the tribunal held that a tax stabilisation guarantee protects, among other things, against alteration of 'a stable interpretation or application that is in place at the time the LSA is executed', and not only against amendment of the legislative text. It added, at paragraph 228, that stabilisation does not entitle the investor to the most favourable reading, and that an adverse interpretation is no breach unless it is so unreasonable that it defeats the stability guaranteed. The guarantee thus reaches past the text of the frozen provisions to their settled application. In Aguaytia Energy LLC v Republic of Peru (ICSID Case No. ARB/06/13, Award, 28 November 2008, despatched 11 December 2008, para. 89) a comparable guarantee was read the other way. The tribunal found that the legal framework in the fields listed in the agreement would not be modified for its duration, but that 'nowhere, however, are any individual, substantive rights created or guaranteed', and that 'what is guaranteed is the stability of the legislative framework as it existed on 17			

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		May 1996'. Aguaytia describes a dated snapshot of identified provisions, which is the language of incorporation by reference. Duke Energy extends the guarantee to the settled application of those provisions, which cannot be reduced to a closed set of texts and points towards a temporal restriction on the applicable law itself. Two tribunals, four months apart, on comparable Peruvian guarantees, reading them in opposite ways. The guarantees are not identical in subject matter. Duke Energy concerned tax stabilisation and Aguaytia the stability of a right to non-discrimination. But the divergence is not about what was stabilised. It is about what stabilising does, and that question is the same whichever provision is frozen. The ambiguity is real, and it is currently resolved at the enforcement stage rather than at the drafting stage. The divergence is older than these two awards, and the institutional record points both ways. The Institut de Droit International addressed the same technique, and did so for this very contractual relationship, in its Athens Resolution of 11 September 1979 on the proper law of the contract in agreements between a State and a foreign private person. Article 3 provides that 'the parties may agree that domestic law provisions referred to in the contract shall be considered as being those in force at the time of conclusion of the contract'. The device operates on provisions referred to in the contract, against the proper law designated under Articles 1 and 2, and the Resolution does not say which of the two operations it performs. Twelve years later the Institut did say, but for a different relationship. Article 8 of its Basel Resolution of 31 August 1991 on the autonomy of the parties in international contracts between private persons or entities provides that where the parties freeze the chosen law, 'the provisions of that law shall be applied as substantive provisions incorporated in the contract'. That is the second reading, stated expressly. The article then draws the consequence in the same sentence: if the chosen law has been amended or repealed by mandatory rules intended to govern existing contracts, 'effect shall be given to those rules'. Characterisation and			

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		consequence travel together. The Institut has thus characterised the device for contracts between private persons and left it uncharacterised for contracts with a State, which is where the technique is most used and where most turns on it. This Instrument is addressed to the second category. The instrument the draft itself relies on says something useful here. The Commentary draws on the UNIDROIT-IFAD Legal Guide on Agricultural Land Investment Contracts (2021) at paragraphs 4.137, 4.138 and 4.139, and stops there. Paragraph 4.137 of that Guide describes freezing clauses as clauses that 'purport to "freeze" applicable law to the norms in force at a specified time, excluding the application of subsequent legislation', which is the language of the first reading. Paragraph 4.140, the one paragraph in that sequence the draft does not cite, records that '[f]reezing clauses are particularly inflexible, and their enforceability may be doubtful in some domestic legal systems', which is why practice has moved towards economic equilibrium clauses. The Guide names the symptom without naming the mechanism. Doubtful enforceability is what one would expect if the frozen provisions operate as incorporated terms. Naming the mechanism would let the Commentary explain why, instead of leaving parties to find out. Two further points, one practical and one about the state of the literature. The Rome I Regulation already works with both operations, and on the face of its own text. Article 3(1) provides that a contract 'shall be governed by the law chosen by the parties', and a law is a living system, so a clause purporting to hold its content still cannot take effect as a restriction on that choice. Recital 13 records that the Regulation 'does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention', which is the other operation, and which leaves the mandatory rules of the governing law in place. Parties negotiating a freeze against a European forum may therefore be negotiating something that forum will not deliver in the form they expect. Suggestion: a short paragraph in the Commentary to Principle 23 saying which reading the Instrument			

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		intends, or, if the parties are meant to choose, inviting them to say so in the clause. The intertemporal default proposed in General Comment 2 would do most of this work on its own, since Principle 23 would then operate as an agreed departure from a stated baseline.			
314.	**Section B,** **Principle 23(3)**	To what extent should the exercise of sovereign or exorbitant State prerogatives automatically deprive the investor of its rights to renegotiation and compensation? Should this point be clarified?	Laura Pujols	Member of CEIA	Dominican Republic
315.	**Section B,** **Principle 23(3)**	**Principle 23(3**) excludes measures "*necessary* to *comply with the obligations*" to protect human rights, public health, the environment, climate change, or labour standards from the scope of the stabilization and renegotiation clause. However, the Model Clause omits the word "*necessary*" only keeping the latter wording "*to comply with obligations*". Given the potentially different scope of these terms, it may be beneficial to align the wording of Principle 23(3) with the Model Clause. In addition, a dispute may arise over the standard of "necessity" applicable to the Instrument. One option would be to interpret "necessity" autonomously under the Instrument. While this would provide flexibility, the absence of a clear benchmark could create uncertainty for a State relying on the provision. Alternatively, the customary international law standard reflected in Article 25 of ARSIWA could apply where State responsibility is invoked. However, Article 25 addresses responsibility for internationally wrongful acts of the States, whereas the IIC is a mixed instrument containing private and public law elements. It is therefore unclear whether that standard should automatically apply. Moreover, its high threshold may be unsuitable for the provision intended to operate as a balancing mechanism against stabilization clauses.	Nataliia Soldatenkova, Elizaveta Shegay, Anastasia Alexandrova	Russian Arbitration Association (EPAM law firm)	Russian Federation

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316.	**Section B, Principle 23(3)**	Principle 23(3): a single carve-out cannot serve both clauses, and as drafted it may empty the fiscal clause Principle 23(3) applies one carve-out to both stabilisation types. It should be split, and the fiscal carve-out should be enumerated. (a) The problem The carve-out excludes measures "necessary to comply with the obligations to protect human rights, public health, the environment, climate change, or labour standards." Applied to a regulatory clause, that formulation is workable: one can ask whether a given regulation serves one of those ends. Applied to a fiscal clause it collapses, because the State discharges every one of those obligations by spending, and it spends by taxing. A general increase in the corporate income tax rate to fund a public health system, a school-building programme or climate adaptation is, on a natural reading, a measure "necessary to comply with the obligations to protect" public health, human rights or the climate. On that reading the carve-out swallows the fiscal stabilisation clause entirely, and the investor has purchased nothing. The alternative reading is no better. If the carve-out is confined to measures that are human rights or environmental measures rather than measures that fund them, it does almost nothing for the fiscal clause — while leaving unresolved the one boundary that will certainly be litigated. A carbon tax, an emissions levy, a plastics tax or an environmental charge is simultaneously a fiscal measure and a climate measure. Whether it is stabilised or carved out is, as drafted, unanswerable. The two clauses operate on different objects. One responds to regulatory change, the other to fiscal change. A carve-out framed for the first cannot be lifted onto the second without either swallowing it or missing it.	Santiago Montt	CIIAM / Montt Aguilar	Chile

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		(b) The proposal Principle 23(3) should be split into two provisions: 1. A regulatory carve-out, applying to the economic equilibrium clause, in substantially the present terms. 2. A fiscal carve-out, exhaustively enumerated and expressed to be the only exclusion applicable to the fiscal stabilisation clause. The fiscal list should be short, specific and directed at measures whose exclusion no investor can reasonably resist. The list might comprise: - tax administration, assessment, collection, audit, reporting, filing and procedural requirements; - measures against tax evasion, avoidance and abuse; - measures adopted to implement internationally agreed tax standards. An enumerated exclusion is familiar, negotiable and — unlike an open-textured public-interest test — capable of being priced by both sides. Enumeration also does what paragraph 417 currently only encourages.			
317.	**Section B, Principle 23(3)**	**The idea of including exceptions to the Economic equilibrium clause should be reconsidered.** The idea of compensating the investor for general measures of the state that have an impact on the economic equilibrium of the contract is a way to guarantee the equality before public burden. This is a constitutional principle and basis of many domestic regimes of state responsibility. It would not be fair for the foreign investor, as it is not for any other contractor, to be daMaria Amparo Graued by a state measure and not be compensated because the measure is based on public purpose for determined topics. This is particularly evident in the case of jurisdictions where the administrative contract has been adopted. In these contracts, the state party	José Gregorio Torrealba	AVA	Venezuela

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		is empowered to use unilateral sovereign powers (exorbitant clauses): unilateral termination, unilateral modification, direction and control over the performance of the contractor and unilateral interpretation of the contract are some of them. When exercising these powers, public interest or public policy will always be invoked and the contractor will be entitled to compensation if the economic equilibrium of the contract has been affected. In general terms, there are no exceptions and the current text would impair the position of the investors unnecessarily. In common law jurisdictions where state contracts are subject to the wide version of the fettering doctrine or executive necessity (England and countries that have adopted England's public procurement system, i.e. Jamaica, and South Africa) and those where state contracts are subject to sovereign immunity (the USA and countries that have adopted the USA's public procurement system, i.e. Philippines), the rule, although for different reasons, is that the contractor is not entitled to compensation. The former has been nuanced contractually, where clauses granting the state the possibility of exercising unilateral powers similar to the exorbitant clauses and providing the payment of compensation have been included. However, if a state decides to remove these clauses from their contracts, the contractor would be stripped from the opportunity to obtain compensation. The Instrument should keep the principle about the economic equilibrium because it would be a safeguard for those cases where the Instrument is applicable. The same reasons explained above when commenting about the exercise of exorbitant clauses are reproduced here about the jurisdictions where the fettering doctrine or the sovereign immunity applies to state contracts. Measures with general effects also trigger contractual liability of the state. Doctrines such as *fait du prince* or Act of State have been developed in			

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		general terms, without exceptions, to guarantee that the economic equilibrium of the contract.			
318.	**Section B, Principle 23(3)**	**1. Source of the State's obligation.** The Principle should clarify whether the relevant obligation may arise under domestic as well as international law. This is important because measures concerning areas such as public health, environmental protection, labour and human rights may be required by domestic law rather than international law. **2. The threshold for the carve-out should be clear.** The use of "necessary to comply" may create uncertainty as to how the requirement is to be assessed. We suggest that the Principle provide clearer guidance on the connection required between the State's measure and the obligation with which it is intended to comply. **3. The effect of the carve-out should be considered.** We note that the current approach excludes both compensation and renegotiation where the carve-out applies. Given the potentially significant impact of regulatory measures on long-term investments, we suggest considering whether a limited mechanism for consultation or renegotiation, without necessarily giving rise to compensation, may be appropriate in some circumstances. **4. Relationship with other Principles.** The relationship between the regulatory qualification in Principle 23(3) and the similar qualifications elsewhere in the Instrument, particularly Principle 17, should be clarified to ensure that the different standards and their respective functions are understood. **5. Prudential carve-outs.** The Commentary should also address the concept of **prudential carve-outs**, which recur in contemporary investment treaty practice. Given their	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		relevance to the allocation of regulatory space, the Instrument should clarify how such carve-outs sit within the contractual framework of an IIC and whether parties should consider addressing them expressly.			
319.	**Section B,** **Principle 23(3)**	The carve-out covers measures necessary to comply with obligations to protect human rights, public health, the environment, climate change and labor standards. Fiscal reforms, reallocation of support across sectors, competition and market structure measures, and the introduction of performance requirements after entry into force fall outside it. The carve-out therefore protects the State when it regulates to prevent harm and leaves it exposed when it acts to promote industrial development. i3T recommends extending the carve-out to measures adopted in good faith, on a non-discriminatory basis and in the public interest for the purposes of industrial and productive development, including fiscal measures and performance requirements.	i3T		Mexico
320.	**Section B,** **Principle 23(3)**	**Principle 23.3 – Exclusions from stabilisation commitments.** It was questioned whether the formulation referring to measures "necessary to comply with obligations" might be too narrow, and whether the list of public-interest grounds should remain closed. It was noted that States may need to adopt forward-looking public-interest regulation in response to evolving scientific, social, environmental or fiscal priorities before a specific legal obligation requires them to act.	Comment made during Latin American States' Representatives Roundtable		Ecuador
321.	**Section B,** **Principle 23(2)(1); and**	The economic equilibrium clause is triggered by any State measure that substantially reduces the economic return expected at the time of entry into force, and the commentary confirms that the term covers legislation, constitutional changes and amendments, executive and administrative decisions, and judicial decisions.	i3T		Mexico

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	Commentary para. 403	Read with the limited carve-out in Principle 23(3), this places the ordinary output of the host State's legislature and courts within the reach of a renegotiation claim wherever it bears on returns.			
322.	**Section B,** **Principle 23(2)(2); and** **Commentary paras. 390, 411**	The fiscal stabilization clause is invoked on any alteration to the covered fiscal laws, without the threshold of substantiality that applies to economic equilibrium clauses, and the commentary states that the parties' negotiation is limited to the form of compensation and does not extend to its amount. i3T recommends that the Instrument decline to recommend fiscal stabilization clauses on the same reasoning applied to freezing clauses.	i3T		Mexico
323.	**Section B,** **Principles 23(1)-23(3)**	The economic equilibrium clause in Principle 23(2)(1) suffers prima facie from three significant drafting deficiencies: First, the threshold of 'substantially reduces the economic return' is undefined and the commentary offers no quantitative or qualitative benchmarks. It is unclear whether a 15% reduction qualifies, whether the assessment is prospective or retrospective, whether it should be made on a net present value basis, and whether the cumulative effect of multiple minor regulatory changes can collectively meet the threshold. Second, the renegotiation procedure lacks any time limit for completion. The clause requires the parties to negotiate 'in good faith' within a specified period (60 or 90 days in the Model Clause), but provides no consequence for failure to reach agreement other than access to the dispute resolution procedure. Third, the carve-out in Principle 23(3) (excluding measures adopted 'in good faith, in a non-discriminatory manner, and in the public interest') operates as an absolute bar to renegotiation and compensation, rather than as a	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		factor in the assessment. This is disproportionate: a bona fide environmental regulation that eliminates 80% of the investor's revenue should still trigger renegotiation rights, even if the measure satisfies the carve-out conditions. The Instrument's failure to distinguish between the legitimacy of the measure and the allocation of its economic consequences is a fundamental flaw. Recommendation: (a) defining 'substantially reduces' with reference to a minimum percentage threshold (e.g., 20% reduction in projected returns) and specifying the valuation methodology; (b) establishing a mandatory 180-day time limit for renegotiation, after which either party may refer the matter directly to arbitration with authority for the tribunal to adapt the contract; and (c) reformulating the carve-out as a presumption of legitimacy rather than an absolute bar, preserving the investor's right to compensation where the measure disproportionately impacts the investment.			
324.	**Section B,** **Principle 23(3); and** **Commentary paras. 413-415**	Principle 23(3) excludes from the operation of stabilisation and renegotiation clauses those measures adopted in good faith, in a non discriminatory manner and in the public interest which are necessary to comply with obligations to protect human rights, public health, the environment, climate change or labour standards. Paragraph 415 makes clear that the measure must rest on an obligation of the State arising under domestic or international law in one of those enumerated areas. The carve out is soundly conceived and its underlying logic is, with respect, correct. Where a State acts under the compulsion of a superior obligation, it should not bear the cost of a stabilisation commitment. The difficulty is that the enumerated list is closed, and it omits the two treaty regimes in which the compulsion on the State is at its strongest.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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		The first is civil aviation safety and security. Under Articles 37 and 38 of the Convention on International Civil Aviation (Chicago, 7 December 1944), a contracting State undertakes to collaborate in securing the highest practicable degree of uniformity with the Standards and Recommended Practices adopted by the ICAO Council under Article 54(l), and must give immediate notification of any difference between its own practice and an international standard. Annexes and amendments take effect under Article 90 unless a majority of contracting States register disapproval. Whether SARPs are formally binding remains a matter of scholarly debate, but the prevailing view is that the opt out structure of Article 38 leaves a State which has filed no difference under a good faith duty to comply. See M. Milde, International Air Law and ICAO (2008); P. S. Dempsey, Public International Air Law (2008). Non compliance also carries practical consequences through the ICAO Universal Safety Oversight Audit Programme and through safety provisions in bilateral air services agreements. The second is outer space. Article VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (27 January 1967) requires that the activities of non governmental entities be subject to authorisation and continuing supervision by the appropriate State party, and makes that State internationally responsible for them. Articles II and III of the Convention on International Liability for Damage Caused by Space Objects (29 March 1972) impose absolute liability for damage caused on the surface of the earth and to aircraft in flight, and fault based liability elsewhere. A State that licenses a satellite operator for a twenty year term therefore cannot freeze its licensing conditions. Its supervision duty is expressly continuing, and its own liability exposure obliges it to tighten conditions as debris mitigation and sustainability practice develops. See the Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, endorsed by General Assembly Resolution 62/217 (2007), and			

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		the Guidelines for the Long term Sustainability of Outer Space Activities adopted in 2019. It is respectfully suggested that Principle 23(3) either add aviation safety and security, and space authorisation, supervision and safety, to the enumerated list, or, preferably, be reformulated in open terms to cover any measure necessary to comply with an obligation of the State under international law, retaining the present list in the commentary as illustrative. The second solution is the more durable and is consistent with the future proofing objective stated in Introduction, Section K.			
325.	**Section B,** **Principle 23(3); and** **Commentary paras. 413-417**	The exception protects measures linked to human rights, public health, the environment, climate and labor, while the treatment of affirmative policies on productive development, innovation, competition, economic resilience and performance requirements is left less clear. i3T proposes extending Principle 23(3) to measures adopted in good faith, on a non-arbitrary and non-discriminatory basis, for legitimate public interest objectives, including productive and industrial development, innovation, technological development, competition, economic resilience, supply chain security and other legitimate development purposes. It should be specified that an impact on the profitability of the investment alone should not automatically trigger an obligation to restore the economic equilibrium.	i3T		Mexico
326.	**Section B,** **Principle 23(3); and** **Commentary paras. 413-417**	The carve-out in Principle 23(3) is drafted, and analysed in the Commentary, as a contractual carve-out. Measures falling within it may also qualify as overriding mandatory provisions or as public policy of the host State. Where they do, they apply whatever the parties chose and whether or not they agreed the carve-out, so the protection Principle 23(3) gives the State's regulatory freedom may in substance be wider than the clause. That cuts both ways: a State relying only on the contractual carve-out may be understating its position, and an investor negotiating it narrowly may be	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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		overstating what it bought. The categories listed make this more than a theoretical possibility. Article 9(1) of the Rome I Regulation defines overriding mandatory provisions as those 'the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract'. Measures protecting human rights, public health, the environment, climate change and labour standards, which are the categories the carve-out lists, are among the clearest candidates for that description. The carve-out and the mandatory-rules analysis will often be triggered by the same measure. Before a court in a Member State, Article 9(3) allows effect to be given to the overriding mandatory provisions of 'the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful'. The Grand Chamber ruled in Case C-135/15 Republik Griechenland v Nikiforidis (18 October 2016, ECLI:EU:C:2016:774) that Article 9(3) 'must be interpreted as precluding overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed from being applied, as legal rules, by the court of the forum, but as not precluding it from taking such other overriding mandatory provisions into account as matters of fact in so far as this is provided for by the national law that is applicable to the contract', reasoning at paragraph 49 that the list in Article 9 is exhaustive. So where the host State is neither the forum nor the State of performance, its measures cannot be applied as rules of law by a court in a Member State at all, however compelling the public interest behind them. They enter as facts, and only if the governing law makes room for them. Before an arbitral tribunal the analysis differs again. Suggestion: a sentence in the Commentary noting			

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		that the carve-out works alongside, and not instead of, the rules on mandatory provisions to which paragraph 597 already refers.			
327.	**Section B, Principle 23(3), Commentary para. 416**	Principle 23(3) provides an important safeguard by excluding qualifying measures adopted pursuant to human rights, including the rights of the child, environmental, public-health, climate and labour obligations from economic equilibrium and fiscal stabilisation mechanisms. Paragraph 416 nevertheless permits the parties to introduce exceptions to the carve-out or restore renegotiation rights. The commentary could clarify the limits of such contractual modification where the relevant State measure is required under applicable law. An IIC may regulate the contractual consequences of State action, subject to applicable law, but contractual arrangements should not deter, delay or materially impair compliance with independently applicable legal obligations. The commentary could therefore caution against modifications to the carve-out that would create contractual consequences of such nature or magnitude as to undermine its practical operation or materially discourage measures required for compliance. This is particularly important in relation to preventive regulation addressing serious or irreversible harm.	Ivana Savić	External PhD candidate, Leiden University	Serbia
328.	**Section B, Commentary para. 416**	This paragraph omits to incorporate an interpretative framework so the arbitral tribunals evaluate if the requirements are met.	Héctor Luis Pittman Villarreal	Peer Reviewer	Peru
329.	**Section B,** **Commentary para. 417; and** **Principle 23(2)(2)**	Paragraph 417 is, with respect, the most significant paragraph in this Section for present purposes. It warns that fiscal stabilisation clauses may constrain a State's ability to implement internationally recognised tax reform instruments such as the Pillar Two global minimum tax under the OECD and G20 Inclusive Framework, and it encourages parties to consider whether measures implementing such instruments should be expressly included within the carve out.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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		That is precisely the analysis this submission urges, and the drafters have already accepted it in the fiscal field. The reasoning does not depend on anything peculiar to taxation. It rests on the proposition that a State should not incur a contractual penalty for implementing an obligation it has assumed at the international level. If that is sound for Pillar Two, it is at least as strong for a safety standard whose non implementation may result in the grounding of an operator or in the downgrading of a State's safety oversight rating. One concrete illustration falls squarely within Principle 23(2), paragraph (2). The Carbon Offsetting and Reduction Scheme for International Aviation, adopted as Standards and Recommended Practices in Annex 16, Volume IV to the Chicago Convention, becomes mandatory for the great majority of States in its second phase from 2027. National measures implementing offsetting obligations may take the form of charges or levies falling within the words tax, customs or other fiscal laws in Principle 23(2), paragraph (2). A fiscal stabilisation clause in an airport or carrier contract concluded before implementation could therefore be read as insulating the investor from a cost the State is internationally obliged to impose. It is suggested that the guidance in paragraph 417 be generalised beyond fiscal reform instruments, and that a sentence be added to the commentary on Principle 23(2), paragraph (2), alerting parties to this interaction.			
330.	**Section C**	Could this difference in how national and arbitral tribunals assess the public interest affect the parties' choice of forum? Should this be addressed more specifically, with clear guidance, particularly for arbitral tribunals?	Laura Pujols	Member of CEIA	Dominican Republic
331.	**Section C,** **Principle 24; and related**	**Beyond Force Majeure: Contractual Resilience in Interdependent Investment Ecosystems** **Observation**	BAWEA Ikadri Michel	Director of Legal Affairs / Head of Legal, MIFA S.A. (Agricultural	Togo

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	Commentary	Complex investments may depend on an ecosystem extending beyond the immediate contractual parties, including financial institutions, local suppliers, off-takers, logistics providers and public authorities. A major external disruption can therefore affect several links in the chain simultaneously or sequentially. Experience during the COVID-19 period illustrates this interdependence. Increased risk perception by financial institutions could delay financing for productive activities, affecting production schedules, while purchasers could lose downstream markets and restrictions on movement or cross-border trade could reduce access to alternatives. The disruption could therefore propagate through an entire value chain rather than remain confined to one bilateral relationship. The Draft's hardship and force-majeure framework addresses the legal consequences of disruptive circumstances and already refers to possible risk-sharing mechanisms. This comment proposes a complementary operational perspective: where the underlying economic relationship remains viable, parties could consider mechanisms aimed at preventing a major disruption from becoming project failure. **Suggested approach** The Commentary could encourage parties, particularly where an investment materially depends on interconnected third parties, to consider appropriate business-continuity or contingency mechanisms alongside hardship and force-majeure provisions, such as: • early notification of material disruptions affecting essential project actors; • joint assessment of consequences for implementation; • identification of reasonable alternative financing, supply, implementation or market arrangements;		Financing Incentive Mechanism)	

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		• temporary operational adjustments and mitigation measures; and • where a State is a party, reasonable assistance within its lawful powers to facilitate viable continuity measures. This should neither transform the State into a guarantor of the investment's commercial success nor transfer ordinary commercial risks from the investor to the public party. Its purpose is to encourage reasonable cooperation aimed at preserving a viable investment relationship where continuation remains legally, technically and commercially feasible.			
332.	**Section C.1**	The hardship provisions reveal an unresolved overlap with the stabilisation framework that creates an ambiguity. The commentary states that 'if a measure imputable to the State causes a fundamental alteration of the economic equilibrium of the contract and a causality link is proved, this would be covered by a stabilisation clause, where provided, rather than by hardship' (para. 424). However, neither the Principles nor the Model Clauses provide a clear demarcation mechanism. Where a State measure contributes to (but does not solely cause) a hardship situation, or where the IIC contains a stabilisation clause that does not cover the specific type of measure at issue, the investor faces uncertainty about which regime applies. The remedial consequences differ substantially: under stabilisation, the full cost should in principle be borne by the State; under hardship, the loss is shared. This distinction might directly affects the quantum of any compensation, yet the Instrument provides no guidance for adjudicators confronted with overlapping claims. Furthermore, the Alternative Model Clause on Hardship imposes no obligation on the parties to continue performing during the 12-month renegotiation period under certain options, which contradicts the commentary's own insistence on the principle of continuity. Recommendation:	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		(a) inserting a conflict-resolution provision establishing that where a State measure triggers both the stabilisation framework and hardship, the stabilisation framework prevails; (b) requiring that all hardship Model Clause options expressly preserve the obligation to continue performance during renegotiation, consistent with the commentary's stated rationale; and (c) providing explicit guidance on whether arbitral tribunals may award compensation for hardship in the absence of an express contractual provision to that effect.			
333.	**Section C,** **Commentary paras. 422-447**	We question the statement at paragraph 385 that no separate Principle on hardship is required because Articles 6.2.1–6.2.3 of the UPICC apply to IICs. The commentary goes beyond explaining the UPICC and proposes several IIC-specific adaptations, including limiting termination rights, potentially limiting adaptation to renegotiation, restricting suspension of performance and introducing possible compensation mechanisms. These are substantive propositions which should either be stated at Principle level or, consistently with the proposed function of the Instrument, framed as matters which parties should address in their IIC. **1. Hardship arrangements should principally be addressed ex ante.** The parties should be encouraged to specify in the IIC the circumstances constituting hardship, the right to request renegotiation, the period for renegotiation, the consequences of failed renegotiation, and any agreed compensation or other adjustment mechanism. They should also identify precautions for managing hardship, including appropriate insurance and allocation of uninsured or uninsurable risks. **2. The role of an adjudicator in adapting the contract requires clearer guidance.** Article 6.2.3(4)(b) permits judicial or arbitral adaptation, while	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		paragraphs 431–433 recognise significant concerns about the ability of a third party to determine a new economic balance in a complex investment project. If adaptation is retained, the Instrument should clarify that the objective is to restore the contractual economic equilibrium, having regard to the risk allocation agreed by the parties, and should not permit an adjudicator to substitute its assessment of the public interest for that of the State party. The parties should also be encouraged to specify in advance the parameters for any adaptation, including relevant financial assumptions, variables capable of adjustment and, where appropriate, the use of experts, expert determination or dispute boards. **3. The relationship between hardship and the economic equilibrium provisions should be clarified.** The Instrument appears to adopt different approaches to adaptation following failed renegotiation: Article 6.2.3(4)(b) permits adjudicative adaptation in hardship, whereas paragraph 409 leaves adaptation following failed renegotiation under Principle 23 to express agreement. The distinction should be explained or the approaches aligned. **5. The Principle should address preservation of the investment during hardship.** Unlike force majeure, hardship does not ordinarily excuse performance. A prolonged period of performance on excessively onerous terms may nevertheless cause deterioration in the investment. The parties should therefore be encouraged to provide for reasonable measures to preserve the investment during renegotiation or subsequent proceedings, together with interim arrangements and allocation of the associated costs. **6. The distinction between hardship and force majeure should be maintained.** The Instrument should make clear that hardship concerns circumstances which fundamentally alter the contractual equilibrium while performance remains possible, whereas force majeure concerns an			

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		impediment to performance. The respective consequences for renegotiation, suspension, adaptation and termination should be kept distinct.			
334.	**Section C.1, Model Clauses, Option 2 – Alternative Model Clause on Hardship para. 1**	The clause is quite wide in respect of the extent of the changes of the foreseeable investments of the parties. It requires precision, e.g., that changes caused by reasonable levels of inflation should not lead to hardship (that could be added into comments to the clause instead of the clause itself).	Anastasiia Riabova, Stepan Sultanov	Russian Arbitration Association (KIAP law firm)	Russian Federation
335.	**Section C.1.C, Commentary paras. 431-433**	The power of a court or arbitral tribunal to adapt an IIC should be expressly framed as subsidiary to the adjustment mechanisms and parameters agreed by the parties. This is particularly important where adaptation may affect matters subject to mandatory regulatory or public-law competences. Where adaptation affects tariffs, public payments, concession duration, service levels or other regulatory matters, any mandatory competence, approval or procedural requirements under the applicable law should be taken into account.	Adolfo Pulgar Soarez	Member of CEIA	Peru
336.	**Section C.1.C, Commentary paras. 431-433**	Renegotiation or adaptation is an obligation incumbent exclusively upon the parties; therefore, the intervention of an Arbitral Tribunal should only be possible where both parties expressly consent to it. In addition, it would be advisable to expressly provide for the possibility of claiming compensation for any damages and losses arising from a breach of the duty to renegotiate.	Joyce Pamela Poves	Member of CEIA	Peru
337.	**Section C,**	**Mechanism for disputes arising from force majeure.** Principle 24 suggests using *Dispute Boards* to resolve disputes related to suspension of performance or termination of the contract due to force majeure. Although	Jorge González Carvajal	AVA	Venezuela

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	Commentary para. 446	this reference can be understood as an option within the catalogue of mechanisms available to the parties, the recommendation should not be oriented towards a specific mechanism. It would be preferable to formulate it in a neutral manner, leaving the parties free to choose the most appropriate procedure according to the circumstances of the contract and the nature of the dispute.			
338.	**Section C,** **Principle 24**	We question whether the Principle should itself create rights to renegotiate. Consistent with the function of the Instrument, it should instead guide parties on the matters which should be addressed in the IIC when allocating force majeure risk. **1. Renegotiation should be addressed as a matter of contractual risk allocation.** The Principle should instead encourage parties, when concluding an IIC, to determine whether and in what circumstances a force majeure event should trigger a right to request renegotiation, the period within which negotiations should take place, and the consequences if agreement cannot be reached. The parties should similarly be encouraged to agree in advance any compensation, agreed payments or other contractual consequences associated with prolonged force majeure. **2. The Principle should prompt parties to address precautions and risk allocation ex ante.** Force majeure provisions in IICs should address not only suspension and termination but also measures to mitigate and allocate the resulting risks. Depending on the project, these may include appropriate insurance, business interruption cover, political risk insurance, security arrangements, extension of the contractual term following prolonged suspension, and allocation of uninsured or uninsurable losses.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		The Principle should encourage parties to consider these matters at the time of contracting rather than leaving the consequences to be determined after the force majeure event has occurred. **3. A State or State entity should not invoke force majeure for its own acts.** Paragraph 455 appropriately recognises the particular difficulty where a State party relies on sovereign or governmental acts as force majeure. We suggest stating expressly that a party should not invoke force majeure in respect of an impediment attributable to its own conduct or within its sphere of control. For State entities, the Principle should distinguish between matters within the entity's control and measures of other State organs which it cannot reasonably control. **4. The duration of force majeure and preservation of the investment should be addressed.** Paragraphs 453 and 470 contemplate a prolonged period before termination becomes available, but the relevant period is not stated in the Principle. Parties should be encouraged to specify in the IIC the period after which termination may be considered and the consequences of its expiry. The parties should also address reasonable measures for preserving the investment and preventing avoidable deterioration during a prolonged force majeure event, including allocation of the associated costs. **5. The relationship between renegotiation, suspension and termination should be clear.** Where the parties have agreed a renegotiation mechanism, the IIC should specify whether the period spent renegotiating counts towards any period after which termination becomes available, whether performance continues during negotiations, and what happens if negotiations fail.			

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		Overall, Principle 24 would be more useful if it operated as a **checklist for contractual risk allocation** rather than as a source of additional rights arising independently of the parties' agreement.			
339.	**Section C.2, Principle 24**	The force majeure provisions contain a gap regarding the attribution of sovereign acts. The commentary acknowledges that 'a State should not ordinarily be entitled to invoke force majeure in relation to events or measures falling within its sphere of control' (para. 455), but neither the Principle nor the Model Clause operationalises this limitation. The presumptive force majeure events listed in paragraph 3 of the ICC Force Majeure Clause include 'act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation' (events that, by definition, fall within the State's sphere of control). The Instrument thus incorporates a standard commercial clause that is structurally unsuited to IICs without modifying its most problematic feature. In practice, this permits a State party to enact a regulation that renders the investor's performance impossible and then claim force majeure to excuse its own correlative obligations. The suggestion that parties 'consider' ex ante risk-sharing mechanisms (para. 456) is too tentative for a matter of this importance. Recommendation: (a) adding an express provision to the Model Clause stating that force majeure may not be invoked by the State party in respect of events or measures attributable to the State or its organs, agencies, or instrumentalities; (b) deleting 'act of authority' and 'compliance with any law or governmental order' from the list of presumptive force majeure events, or at minimum making them applicable only to acts of third States; and	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		(c) developing a dedicated Model Clause on risk-sharing mechanisms for force majeure events, rather than leaving this to a commentary suggestion.			
340.	**Section C.2,** **Principle 24,** **Commentary para. 455**	**Paragraph 455** provides that the force majeure clauses in IICs should be drafted so as to avoid situations in which the State could trigger or rely upon its own sovereign acts. However, the **Model Short-Form Clause** includes "*act of authority*", compliance with governmental orders, expropriation, seizure and nationalization, "*embargoes, sanctions*" among the presumed force majeure events. It is suggested to clarify that such events do not qualify as force majeure where they are attributable to or within the control of the State invoking the clause by itself, but may qualify as such and be applicable where a state party is involved subject to lack of its role in the implementation and subject to meeting the force majeure criteria (see in more detail below). It is further suggested that the distinction between the application of force majeure to States and State-related entities be clarified. The model IIC should more clearly preserve the possibility of force majeure where a governmental measure is genuinely external to the State-related entity and beyond its reasonable control, while excluding the defence where the entity was effectively acting as an instrument of the State or retained sufficient control over the event. **Paragraph 455** now distinguishes between commercial contracts, where sovereign acts may be beyond the control of both parties, and IICs involving a State or State-related entity. As currently worded, the statements that "*in the IIC context, however, one of the contracting parties is a State or State-related entity*" and then "*to limit the possibility of termination for force majeure events that fall within the control of the host State and/or exclude such events from the scope of force majeure*" could be read to suggest that the availability of force majeure to the State-side counterparty is presumed to be limited or even excluded in case of the controlling State's measures.	Nataliia Soldatenkova, Elizaveta Shegay, Anastasia Alexandrova	Russian Arbitration Association (EPAM law firm)	Russian Federation

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		However, the Draft Principles expressly define IICs as including contracts with "*State-related entities*", and not only States (*paras. 1, 455*). The force majeure commentary could therefore clarify whether, and in what circumstances, a State-related entity may invoke force majeure in respect of measures adopted by the controlling State, as addressed in respect of the States (*paras. 455, 467*). This would preserve the distinction between State acts and acts of a State-related entity while avoiding a categorical exclusion of force majeure for the latter. The basic principle that a party should not be entitled to invoke force majeure "*in relation to events or measures falling within its sphere of control*" (*para. 455*) seems equally applicable to State-related entities. However, determining whether an event falls within the entity's sphere of control requires a more nuanced assessment than in the case of the State itself. The valuable guideline is provided by the so-called Böckstiegel test, based on the study directed by Prof Böckstiegel under the auspices of the ICC (see *K.-H. Böckstiegel, The Legal Rules Applicable in Internal Commercial Arbitration Involving States or States-Controlled Enterprises, 60 Years on a Look at the Future, 1984*) and developed in other scholarly works as well as widely applied in arbitral practice. The Böckstiegel test fundamentally assumes that the State-related entity enjoys a separate legal personality and, as such, is entitled to invoke force majeure in relation to acts of its State, unless there are grounds to conclude that the State/State-related entity abused this principle of separation and – as most often was the case – the State used its sovereign powers to the commercial benefit of its own company. To this end, Prof Böckstiegel offers a non-exhaustive list of similar situations, when the State-related entity should be barred from invoking force majeure. The Böckstiegel test might be mentioned as a starting point because it accounts for the commercial core of any IIC, which implies that parties are – foremost – commercial entities having separate legal personalities and equal status under the law. As long as they exercise their rights in good faith			

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		and do not seek any undue benefits, there is no reason to depart from that equality and treat one party differently only because it is owned/controlled/otherwise related to the State. At the same time, the particularities of IICs may require a more fact-sensitive assessment of the State-side entity's independence. Unlike ordinary commercial contracts, IICs may involve substantial and largely irreversible investments in the host State, deferred returns over an extended period, and assets or infrastructure that cannot easily be dismantled or removed (*para. 451*). The model should therefore not exclude the State-side entity from invoking force majeure merely because the relevant event is attributable to the State. Instead, it should identify specific factors for determining when State action should be treated as external to the entity. First, the decision-maker should first assess the State-side entity's legal and operational relationship with the State, including the extent of State ownership and control, the State's authority to issue binding instructions concerning the contract or investment, and the entity's autonomy in commercial decision-making. Separate legal personality is not conclusive: as *Himpurna* case illustrates, an entity may be unable to rely on force majeure where it acts, in substance, as an instrument of the State. Conversely, State ownership or governmental influence should not, without more, preclude an otherwise independent State-side entity from invoking force majeure. Second, the decision-maker should consider the nature and effect of the governmental measure. A generally applicable measure will ordinarily be external to the State-side entity, whereas a measure specifically directed at the entity, its investment, or its contractual obligations may fall within its sphere of control, particularly where the entity could influence or avoid it. The purpose of the measure and the parties' contractual allocation of governmental risk, as illustrated by *Himpurna*, may provide further guidance.			

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		Finally, the characteristics of the investment – including sunk costs, the ability to withdraw or redeploy resources, and the immobility of infrastructure – may be relevant to whether the State-side entity could realistically have avoided or mitigated the consequences of the measure. These factors guide the application of the ordinary force majeure standard and ensure that an SOE is not denied the defence solely because of its relationship with the State.			
341.	**Section C.2,** **Principle 24(2); and** **Commentary para. 454**	Given that the principles advise establishing a dispute resolution mechanism for force majeure issues, it would be better to add an optional clause suggesting such a mechanism in this part (specific for force majeure). Absence of such suggestion makes it less likely that the provision will be used in practice.	Anastasiia Riabova, Stepan Sultanov	Russian Arbitration Association (KIAP law firm)	Russian Federation
342.	**Section C.2,** **Commentary paras. 448-456**	The Model Force Majeure Clause should expressly encourage parties to tailor the list of Force Majeure Events to the nature and sector of the investment. Among others, relevant events may include archaeological discoveries, hydrological events, third-party social disturbances, environmental events, occupation of the project site, or substantial destruction of project assets. The liquidation mechanism may distinguish between different stages of the investment, such as pre-construction, construction, post-financial close and operation, and may provide, as appropriate, for recognition of verified costs incurred, amounts corresponding to completed works, accrued or pending contractual payments, and the application of available insurance proceeds.	Adolfo Pulgar Soarez	Member of CEIA	Peru
343.	**Section C.2,** **Principle 24,** **Model Clause (ICC**	Sanctions currently appear in the draft only as a listed force majeure event excusing non-performance of substantive contractual obligations. The draft does not address sanctions as a distinct risk to the administration of the dispute resolution mechanism itself: whether the chosen institution, arbitrators, and counsel can lawfully accept a case, receive fees, or process payments once a party is designated (or suspected of being owned or	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden

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	Force Majeure Clause short and long)	controlled by a designated entity); the resulting risk of a "chilling effect" on a sanctioned party's practical access to justice; and the availability of access-to-justice licensing exemptions of the kind found, for example, in EU Regulation 2022/1269. Given the frequency with which IICs involve State parties, State-related entities, and jurisdictions subject to sanctions regimes, we suggest that the commentary to Chapter 8 addresses sanctions as a dispute-administration issue, distinct from its treatment as a force majeure trigger in Chapter 6. We recommend that Chapter 8, Section C includes a new, freestanding Principle addressing this issue. Positioned after Principle 32 (renumbering accordingly). We propose the following text and commentary points for consideration: Proposed Principle 33 (Sanctions and access to justice in dispute resolution): "*Parties, arbitral institutions, and adjudicators should take reasonable steps to ensure that sanctions do not unduly impair a party's access to the dispute resolution mechanism chosen under Principle 31.*" Proposed commentary points to accompany this Principle in the footnotes: (i) sanctions may affect the arbitration itself independently of their effect on the parties' substantive obligations, including the ability of arbitrators and counsel to accept appointments or instructions, the ability of institutions to receive and disburse fees and costs, and the ability of a designated party to obtain legal representation; (ii) States and arbitral institutions have in some cases developed licensing or exemption mechanisms specifically to preserve access to justice notwithstanding applicable sanctions (for example, exemptions for transactions strictly necessary to ensure access to arbitral or judicial proceedings and to the enforcement of resulting awards; (iii) parties			

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		negotiating an IIC may wish to consider, at the drafting stage, how their chosen dispute resolution mechanism would function if a party is or is later subject to sanctions, including by selecting an institution and seat with established practice in this area. *[Secretariat: it is proposed to consider this comment in the discussions on Chapter 8]*			
344.	**Section C.2,** **Principle 24,** **Model Clause para. 1**	The Faculty of Law at Universidad del Rosario (Colombia) recommends that the proposed regime on force majeure expressly address the situation in which the party invoking force majeure has itself caused, contributed to, or materially aggravated the circumstances giving rise to the alleged impediment. The proposed Model Clause is generally consistent with the contemporary understanding of force majeure. In particular, paragraph 1 requires the Affected Party to establish that the impediment is beyond its reasonable control, could not reasonably have been foreseen at the time of the conclusion of the contract, and could not reasonably have been avoided or overcome. Paragraph 7 further establishes a duty to mitigate. Nevertheless, the proposed text does not expressly address an important and conceptually distinct question: whether a party may invoke force majeure when its own acts or omissions caused or contributed to the occurrence of the impediment. Universidad del Rosario recommends that this issue be expressly regulated. **1. The principle in the law of State responsibility**	Faculty of Law, Universidad del Rosario		Colombia

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		The proposed clause would benefit from the approach reflected in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The ILC's treatment of force majeure recognizes that a State cannot invoke force majeure where it has itself caused or induced the situation giving rise to the alleged impossibility[71]. The commentary to the ILC Articles expressly states that "[a] State may not invoke force majeure if it has caused or induced the situation in question." The commentary further explains that this limitation reflects the basic requirement that force majeure must result from an external circumstance rather than from the conduct of the party invoking it. This principle is particularly important in the context of international investment contracts. The State may be both a contracting party and the holder of regulatory, administrative, legislative, and enforcement powers capable of materially affecting the performance of the contract. It would therefore be undesirable for the State to be able to rely on force majeure resulting from circumstances that it has itself created through the exercise of those powers. The principle should operate symmetrically. An investor should likewise be unable to invoke force majeure where its own acts or omissions caused or materially contributed to the impediment.			

[71] Arévalo-Ramírez, Walter. "State Responsibility." Public International Law. Routledge, 2024. 333-345.

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		The rule should therefore not be conceived as a State-specific limitation. It is a general principle concerning the causal relationship between the conduct of the Affected Party and the alleged Force Majeure Event. **2. Relationship with the UPICC and CISG approaches** The proposed addition suggested by the Faculty of Law, would also be consistent with the logic of the international commercial-law instruments that inform the draft regime. Article 7.1.7 UPICC provides that non-performance is excused only where it results from an impediment beyond the party's control and where the impediment could not reasonably have been taken into account, avoided, or overcome. Article 79 CISG similarly conditions exemption on the existence of an impediment beyond the party's control and on the absence of reasonable means of taking the impediment into account, avoiding it, or overcoming it. Although neither provision formulates the contribution rule in the same express terms as the ILC Articles, the requirement that the impediment be beyond the party's control is difficult to reconcile with a situation in which the party invoking the exemption has itself created or materially contributed to the impediment. An express provision would nevertheless be preferable in the IIC Model Clause. International investment contracts frequently involve long-term relationships, extensive regulatory intervention, and circumstances in which both parties may contribute, through different forms of conduct, to the			

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		conditions affecting contractual performance. An explicit rule would therefore provide greater certainty and reduce interpretative disputes. **3. Particular importance in State-investor contracts** The issue is especially significant in the investment-contract context because the State's conduct may itself be the source of the alleged impediment. For example, a State should not be permitted to invoke force majeure where the alleged impediment results from: • a governmental measure adopted by the State itself; • a regulatory or administrative decision attributable to the State; • a failure by the State to perform an obligation necessary for the investor's performance, where that failure contributed to the impediment; • a governmental restriction, prohibition, or suspension created by the State; • conduct of State organs or entities attributable to the State; or • circumstances that the State itself caused or materially aggravated. This does not mean that every State measure affecting contractual performance should automatically preclude force majeure. The relevant inquiry should remain causal: **The State should be prevented from relying on force majeure only to the extent that its own conduct caused or contributed to the impediment invoked.** The same principle should apply to investors. An investor should not be permitted to rely on force majeure where its own conduct, omissions,			

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		decisions, or failures materially caused or contributed to the circumstances preventing performance. **4. Proposed amendment** Universidad del Rosario recommends adding a new paragraph to paragraph 1 of the Model Clause, immediately after the existing requirements in subparagraphs (a)–(c), along the following lines: **d) that the Affected Party has not caused, contributed to, or materially aggravated the impediment or its consequences by its own act or omission.** For greater clarity in the particular context of international investment contracts, the following formulation could also be considered: **The Affected Party may not invoke Force Majeure to the extent that the impediment or its consequences were caused, contributed to, or materially aggravated by an act or omission attributable to the Affected Party. In the case of a State, this includes acts or omissions attributable to its organs, agencies, instrumentalities, or other entities whose conduct is attributable to the State under applicable international law.** The second formulation has the advantage of making explicit that the rule applies equally to investors and States while recognizing the particular attribution issues arising in State-investor contractual relationships.			

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		5. Partial contribution The Model Clause should also consider addressing situations in which the Affected Party's conduct did not exclusively cause the impediment but nevertheless contributed to it. A categorical rule under which any contribution automatically eliminates force majeure could produce disproportionate results where an external event independently constitutes the principal cause of the impediment. The preferable approach is therefore to provide that force majeure is unavailable "**to the extent"** that the Affected Party caused, contributed to, or materially aggravated the impediment or its consequences. Such an approach would also be consistent with the broader logic of the UPICC, under which the contribution of the aggrieved party to harm may affect the extent of an exemption. **6. Recommendation** The Faculty of Law, Universidad del Rosario (Colombia) therefore recommends that the proposed Model Clause expressly incorporate a non-contribution requirement as an additional condition for invoking force majeure. The principle should apply equally to both contracting parties. In particular: **(i)** an investor should not be permitted to invoke force majeure to the extent that its own conduct caused or contributed to the impediment; and			

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		(ii) a State should not be permitted to invoke force majeure to the extent that the alleged impediment resulted from, or was caused, contributed to, or materially aggravated by, conduct attributable to the State. This addition would improve the coherence of the proposed regime with the ILC's treatment of force majeure, reinforce the requirement that the impediment be genuinely external to the party invoking the clause, and provide an important safeguard against the use of force majeure as a defence to consequences arising from the invoking party's own conduct. In the particular context of international investment contracts, where the State may simultaneously act as contracting party and exercise sovereign and regulatory powers, expressly articulating this principle would significantly enhance the predictability, balance, and integrity of the proposed Model Clause.			
345.	**Section C.2,** **Principle 24,** **Commentary para. 455**	La question est de savoir si l'acte émanant de l'État peut être considéré comme extérieur à son émanation, de sorte qu'il constitue un cas de force majeure à son égard. L'une des affaires les plus connues à cet égard est Jordan Investments Limited d'Israël. Il s'agissait d'un litige opposant l'entreprise nationale soviétique d'exportation de pétrole, Sojutzneftexport, à la société Jordan Investments Limited d'Israël. En vertu d'un contrat de vente, l'entreprise soviétique s'était engagée à fournir à la société israélienne 650 000 tonnes de pétrole. Après la triple agression contre l'Égypte en octobre 1956, le ministre du Commerce extérieur soviétique a refusé de conférer à l'entreprise soviétique le permis d'exportation nécessaire. Ce refus a servi de prétexte à la société soviétique pour résilier le contrat, en invoquant la clause de force majeure figurant dans le contrat. En réponse, la société israélienne a saisi la Commission d'arbitrage à Moscou, accusant l'entreprise	Nasr Ashoush	Ph.D. holder from the University of Burgundy, France and Judge at the Egyptian Council of State	Egypt

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		soviétique d'avoir, unilatéralement, rompu le contrat et d'être responsable de cette rupture. La Commission s'est appuyée sur le droit soviétique pour statuer que l'entreprise était une personne morale distincte de l'État et ne pouvait être assimilée à un organe de celui-ci. Dans ce contexte, le refus d'accorder le permis d'exportation était considéré comme un évènement de force majeure pour la société soviétique. Cette position orthodoxe a depuis évolué. Dorénavant, les tribunaux arbitraux privilégient une approche nuancée pour apprécier les critères requis afin de caractériser un cas de force majeure dans ce type de situation. Ces critères sont l'extériorité (A), l'imprévisibilité (B) et l'irrésistibilité (C) de l'acte en cause par rapport à l'entité étatique. Voir la thèse p 290 et seq.[72]			
CHAPTER 7. REMEDIES, INCLUDING COMPENSATION AND DAMAGES					
346.	**General comments**	Chapter 7 should explicitly develop the interaction between the right to damages and the right to specific performance (UPICC Article 7.2.2). Although Section C of the preceding chapter (paras. 504-508) addresses	Karen Páez	Member of CEIA	Colombia

[72] Courtesy translation into English (Secretariat): The question is whether an act originating from the State can be considered external to the entity from which it emanates, such that it constitutes a case of *force majeure* for that entity. One of the best-known cases in this regard is *Jordan Investments Limited* (Israel). The dispute involved the Soviet state-owned oil export enterprise, Sojutzneftexport, and the Israeli company Jordan Investments Limited. Under a sales contract, the Soviet enterprise had committed to supplying the Israeli company with 650,000 tonnes of oil. Following the tripartite aggression against Egypt in October 1956, the Soviet Minister of Foreign Trade refused to grant the Soviet enterprise the necessary export permit. This refusal served as a pretext for the Soviet company to terminate the contract, invoking the *force majeure* clause contained therein. In response, the Israeli company brought the matter before the Arbitration Commission in Moscow, accusing the Soviet enterprise of unilaterally breaching the contract and holding it liable for that breach. Relying on Soviet law, the Commission ruled that the enterprise was a legal entity distinct from the State and could not be equated with an organ of the State. In this context, the refusal to grant the export permit was deemed an event of *force majeure* for the Soviet company. This orthodox position has since evolved. Arbitral tribunals now favor a nuanced approach when assessing the criteria required to establish a case of *force majeure* in such situations. These criteria are the externality (A), unpredictability (B), and irresistibility (C) of the act in question in relation to the state entity. See the thesis, p. 290 et seq.

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		specific performance, Chapter 7 does not explain the relationship between the two remedies. Recommendation: add a paragraph addressing (i) the burden of proof for each remedy; (ii) whether they are cumulative or alternative (election of remedies); (iii) differences between common law and civil law; and (iv) the fact that termination of the contract extinguishes the right to specific performance.			
347.	**General comments**	While the Chapter fulfills its purpose of offering a guiding framework for the parties, a detailed review of its provisions — particularly the model clauses proposed on compensation and interest — reveals certain tensions between the stated principles and the specific calculation and implementation mechanisms that the Instrument itself suggests. These tensions do not call into question the Chapter's general approach, but they do reveal points where greater precision would help reduce interpretive uncertainty and strengthen the predictability that the Instrument seeks to provide the parties. The two comments below identify and develop two of these tensions: (i) the relationship between the full compensation standard and the fair market value clause proposed as a calculation mechanism; and (ii) the treatment of interest, both with respect to the distinction between pre-award and post-award interest and the lack of references to specific interest rates. For each one, a recommendation is offered aimed at improving the Chapter's internal coherence.	Nicolás E. Bianchi	CIIAM / PBX International Law	Argentina
348.	**Section A, para. 475**	The reference that monetary compensation should be considered a last resort ("a fallback remedy") as regards other remedies does not appear to be current investment arbitration practice. Compensation is less invasive than orders to do or abstain directed to States. The need for damages	Herfried Wöss (Wöss & Partners)	LAI Regional Chapter	Austria / Mexico / USA

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		protocols in order to avoid lengthy litigation and uncertainty in damages determination has been proposed already in the past.[73] The problem is that investment arbitral tribunals ignore the underlying investment contract due to formalistic reasons (see forthcoming publication in the ICC Dossier).			
349.	**Section B**	The Instrument's treatment of withholding performance creates an unjustified asymmetry to the detriment of the investor. Option 2 of the Model Clause ('Continuing Performance') requires both parties to waive the right to withhold performance and to continue performing in the event of non-performance by the other party. While this is framed as reciprocal, its practical effect is disproportionate: it is the investor (not the State) that typically bears the ongoing cost of performance (construction, operation, or service delivery). A State's non-performance (failure to issue permits, pay tariff adjustments, or approve regulatory changes) typically involves non-compliance with minimal marginal cost. The Instrument fails to recognise this asymmetry and provides no compensatory mechanism. Furthermore, the guidance on cure periods is generic and fails to account for the sector-specific nature of IIC obligations. A reasonable cure period for a payment default (30 days) is entirely different from a reasonable period to remedy a construction defect (potentially years). Recommendation: (a) conditioning the waiver of withholding rights under Option 2 on the availability of expedited interim relief (e.g., through dispute boards or emergency arbitrators) to address ongoing non-performance; (b) providing that an investor who continues performing in reliance on Option 2 is entitled to recover the incremental costs of continued performance as a separate head of damages; and	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

[73] Wöss et al., *Damages in International Arbitration*, Chapter 5; Herfried Wöss, 'Contract as Investment – Damages in International Arbitration', Dossier of the ICC Institute of World Business Law, forthcoming

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		(c) replacing the generic cure period framework with sector-specific guidance or, at minimum, a matrix of indicative cure periods by obligation type.			
350.	**Section B.480-Section C.508**	Sections B and C address withholding performance, cure, additional time for performance and the right to require performance. The Commentary recognises that non-performance in an IIC may require a different approach from that applicable to ordinary commercial contracts, particularly because IICs are often long-term arrangements and may involve the provision of essential public services. It also recognises the importance of cooperation, continuity and preservation of the contractual relationship. We suggest that this distinctive remedial approach should be stated more clearly in the Principles. In particular, the framework should recognise, where appropriate: • **continuity and preservation of the contractual relationship**, particularly where termination could disrupt a long-term investment or essential services; • **an effective opportunity to cure**, with the period adapted to the nature and circumstances of the investment rather than treated as an inflexible period of promptness; • **cooperation between the parties in effecting cure**, where remedying non-performance reasonably depends upon assistance or action from the other party; and • the possibility of **agreed non-monetary or injunctive relief**, where monetary compensation would not adequately address the consequences of non-performance. These considerations should not create a rigid hierarchy of remedies applicable to every IIC. Rather, they should provide a general framework for parties to consider the nature of the investment, the consequences of non-	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		performance and the availability of less disruptive means of preserving performance before resorting to termination or monetary compensation.			
351.	**Section C.1,** **Commentary paras. 497-498**	Paragraphs 497 and 498 address the situation in which the investor assigns its right to payment from the State and refer helpfully to Chapter 9, Section 1 of the UPICC. That guidance captures receivables financing. It does not capture the principal financing technique used in the sectors under discussion. In capital intensive sectors, project finance does not rest primarily on the assignment of payment streams. It rests on security taken over the equipment itself. The Instrument contains no treatment of security interests or asset based collateral. This is a gap of practical consequence, because a uniform international regime designed for exactly this purpose already exists within the UNIDROIT family: the Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001), together with the Protocol on Matters Specific to Aircraft Equipment, in force since 1 March 2006, and the Luxembourg Rail Protocol, in force since 8 March 2024. In aviation the connection is not incidental but direct. Eligibility for the reduced export credit pricing available under the 2011 Aircraft Sector Understanding depends upon the debtor's State having made the qualifying declarations and having implemented the Convention effectively, so that the availability of registered international interests is an input into the cost of financing the project itself. It is suggested that the commentary to this Section acknowledge that IICs in mobile equipment intensive sectors are commonly layered over registered international interests, and that it cross refer to the Cape Town system in the same way that the Instrument already cross refers to the FIDIC forms and to the ICC model clauses.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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352.	**Section C.1,** **Commentary para. 502**	Paragraphs 501 and 502 propose that non-assignment clauses be given full effect in IICs, adjusting Article 9.1.9(1) of the UPICC and submitting the effectiveness of an assignment to a reasonableness test, so as to protect the State party's interest in controlling who its counterparty is. The policy is understandable. Its limits deserve to be stated. A contractual prohibition on assignment binds the parties. It does not constrain an insolvency practitioner appointed over the investor, whose powers to realise the estate come from the lex concursus and not from the contract. Nor does it settle whether an assignment made in breach of the clause is effective against third parties, a question no widely accepted conflicts rule presently governs. Suggestion: a sentence in the Commentary recording that the effect of a non-assignment clause on an insolvency practitioner, and its effect on third parties, fall to other laws.	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain
353.	**Section C.1; and** **The two Model Clauses under Section C.1**	The distinction between assigning monetary rights and transferring the IIC as a whole could be reflected more consistently in the Model Clauses. The first clause permits assignment of monetary rights and requires prompt notice, whereas the subsequent clause requires prior consent to assignment of the Agreement "or any part hereof". If used together, these provisions may leave the parties and their financiers uncertain whether an assignment of receivables also requires consent. The proposed addition to the assignment-of-contract clause is: "The restriction on assignment of this Contract does not apply to an assignment of monetary rights expressly permitted by [clause]. An assignment of monetary rights does not transfer the Investor's performance obligations or release it from liability under this Contract. The obligor retains the defences and rights of set-off available against the assignee under the applicable rules."	Sergey Alekhin	Russian Arbitration Association (ELWI law firm)	Russian Federation

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		The Commentary could clarify that the effect of an assignment restriction against an assignee remains subject to applicable law. This would preserve the State's interest in the identity of the project operator while allowing the parties to make a clear allocation of financing rights.			
354.	**Section C.3, Principle 25**	The commentary acknowledges that specific performance is 'rarely sought' in IIC disputes and that States may resist enforcement on sovereignty grounds (para. 506), yet it offers no mechanism to overcome this structural limitation. The result is that the available remedy of specific performance is, for practical purposes, illusory when claimed against the State. This is particularly problematic given that the Instrument simultaneously restricts the investor's right to withhold performance (Chapter 7, Section B) and encourages the preservation of the contractual relationship over termination. If the investor can neither compel the State to perform nor withhold its own performance, it is left with damages as the sole effective remedy. Principle 25 on judicial penalties ignores the practical reality that penalties imposed against a State by an arbitral tribunal are rarely enforceable and may be subject to sovereign immunity defences at the enforcement stage. The Instrument also fails to address interim or provisional measures, which are critical where delay in performance risks causing irreversible harm. Recommendation: (a) including a Model Clause whereby the State party expressly waives sovereign immunity from enforcement of specific performance and judicial penalty orders rendered by arbitral tribunals constituted under the IIC; (b) addressing the availability and enforceability of interim measures, including emergency arbitrator provisions, as part of the dispute resolution framework in Chapter 8; and (c) providing that where specific performance against the State is not practically obtainable, the tribunal may order alternative measures (such as	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		extension of the concession term or adjustment of financial terms) that achieve an equivalent economic result.			
355.	**Section B,** **Commentary paras. 480-508**	Sections B and C address withholding performance, cure, additional time for performance and the right to require performance. The Commentary recognises that non-performance in an IIC may require a different approach from that applicable to ordinary commercial contracts, particularly because IICs are often long-term arrangements and may involve the provision of essential public services. It also recognises the importance of cooperation, continuity and preservation of the contractual relationship. We suggest that this distinctive remedial approach should be stated more clearly in the Principles. In particular, the framework should recognise, where appropriate: • **continuity and preservation of the contractual relationship**, particularly where termination could disrupt a long-term investment or essential services; • **an effective opportunity to cure**, with the period adapted to the nature and circumstances of the investment rather than treated as an inflexible period of promptness; • **cooperation between the parties in effecting cure**, where remedying non-performance reasonably depends upon assistance or action from the other party; and • the possibility of **agreed non-monetary or injunctive relief**, where monetary compensation would not adequately address the consequences of non-performance. These considerations should not create a rigid hierarchy of remedies applicable to every IIC. Rather, they should provide a general framework for parties to consider the nature of the investment, the consequences of non-	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		performance and the availability of less disruptive means of preserving performance before resorting to termination or monetary compensation.			
356.	**Section C.3, Principle 25**	We support addressing this matter expressly. The Commentary recognises that coercive monetary measures are uncommon in the context of IICs. Given their unusual nature, however, the Principle should provide sufficient clarity for parties to understand what they are agreeing to and what the resulting provision can achieve. **1. The parties' agreement should be clearly situated in the IIC.** The Principle should clarify that the parties' agreement as to whether a coercive monetary measure may be sought is to be made in the IIC. This is important because an agreement made at the time of contracting allows the parties to consider the remedy when allocating risk and determining the appropriate remedies for non-performance. The Principle should also make clear whether and how that agreement may subsequently be modified. **2. The nature of the coercive monetary measure should be clear.** The Principle should briefly explain what is meant by a "coercive monetary measure". In particular, it should distinguish a payment ordered by a court or arbitral tribunal to secure compliance with an order for performance from a contractual penalty, liquidated damages or other payment agreed by the parties for non-performance. This distinction is important because these remedies serve different purposes and are treated separately elsewhere in the Instrument. **3. The relationship with orders for performance should be clarified.** The measure should be understood as operating in connection with an order for performance. The Principle should therefore clarify that it can arise only	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		where such an order is available and capable of being enforced against the relevant party. This is particularly important in IICs involving a State or State entity, where the availability or enforceability of specific performance may raise particular issues. **4. The parties' agreement should be distinguished from the forum's legal power.** The Principle should distinguish between the parties agreeing that such a measure may be sought and the independent legal power of a court or arbitral tribunal to order it. The parties cannot, by agreement, confer a power on a forum which it does not possess under applicable law or procedural rules. This distinction should be reflected clearly in the Model Clauses so that parties understand the effect of the option they are selecting. **5. The Model Clauses should use consistent terminology.** The terminology used in the Model Clauses should be aligned with the Principle. In particular, referring simply to "penalties" may create confusion with contractual penalties, liquidated damages and other agreed payments for non-performance addressed elsewhere in the Instrument. The Model Clauses should make clear that the provision concerns the coercive monetary measure described in the Principle.			
357.	**Section C.3**	**Liquidated Damages** The preparation of damages protocols in investment contracts and other project agreements, provided both of them are recognized as investment ('contract as investment') would allow for compensation according to the progress of a project and financial and economic ratios achieved. This would lead to predictability of damages for breach of investment contracts and also of project agreements.	Herfried Wöss (Wöss & Partners)	LAI Regional Chapter	Austria / Mexico / USA

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358.	**Section D**	The termination framework contains prima facie three deficiencies. First, the qualifier 'solely' in the exclusion of investor defaults attributable to State non-performance sets an unreasonably high causation threshold. In complex, multi-year IICs, non-performance is virtually never attributable to a single cause. An investor whose construction delay results from both its own project management failures and the State's failure to deliver the required site access will not benefit from this exclusion, even if the State's failure was the predominant cause. This effectively allows the State to trigger termination while itself being in default. Second, the Model Clause provides no mechanism for termination for convenience by either party (a standard feature of major infrastructure and concession contracts). Third, the restitution provisions for long-term contracts (referencing Article 7.3.7 of the UPICC) are inadequate for the IIC context, where the investor may have made substantial upfront capital expenditures that will not be recovered through ex nunc restitution alone. Recommendation: (a) replacing 'solely' with 'predominantly' or, alternatively, adopting a proportionate contribution standard; (b) including a termination-for-convenience clause with an express compensation mechanism based on the investor's sunk costs plus a reasonable rate of return; and (c) providing detailed guidance on asset valuation upon termination, including book value, replacement cost, and fair market value methodologies appropriate to different stages of the investment lifecycle.	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain
359.	**Section D.1,** **Model Clause**	The exclusions from Investor Default and State Default appear to use different causation standards. Clause 1.1 excludes an Investor Default where the failure results "solely" from the State's non-performance, whereas clause 2.1 contains no equivalent limitation for a State Default. In a project affected	Sergey Alekhin	Russian Arbitration Association (ELWI law firm)	Russian Federation

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		by concurrent causes, the difference may produce materially different outcomes which are not explained in the Commentary. It is suggested to replace these formulations with a common provision, consistently with Article 7.1.2 UPICC: "Neither Party may rely on the other Party's failure to perform to the extent that the failure was caused by its own act or omission, or by an event for which it bears the risk under this Contract. Any remaining failure shall be assessed against the applicable conditions for termination." Further, termination under clause 1.2 takes effect from the date of the Termination Letter. To align the mechanism with Principle 9(2), both clauses could provide: "Termination takes effect when the Termination Letter reaches the other Party, or on a later date specified in it, after the applicable cure, representation and agreed lender-protection periods have expired."			
360.	**Section D, Commentary paras. 516-538**	We agree with the overall approach of the Section, particularly its recognition that termination of an IIC may require greater consideration of continuity and preservation of the contractual relationship than termination of an ordinary commercial contract. We suggest that some of the IIC-specific adaptations currently expressed in the Commentary be reflected more clearly in the Principles and Model Clauses. **1. IIC-specific modifications to the UPICC should be stated clearly.** Section D.2 proposes modifications to the UPICC approach to termination, including in relation to notice and the circumstances in which a termination right may be lost. Where the Instrument intends to depart from the UPICC for the specific characteristics of IICs, those departures should be stated in the Principles rather than left to the Commentary.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		2. The termination procedure should provide a meaningful opportunity to cure. The Model Clause appropriately provides for notice, representations and an opportunity to remedy the default. We suggest that the procedure make clearer that representations and proposals for cure should be considered before termination is exercised. This would support the Chapter's broader objective of preserving the contractual relationship where appropriate. **3. Termination periods should be based on the nature of the default.** The Model Clause provides different periods for State and Investor Defaults. We question whether a general difference is justified. The appropriate period should instead depend on the nature of the obligation, the circumstances of the investment and the time reasonably required to remedy the particular default. Where a longer period is genuinely required, the parties should be able to provide for this in the IIC. **4. The consequences of termination require greater guidance.** The treatment of restitution is particularly important in long-term investments where substantial expenditure may have been incurred before termination. The Instrument should provide greater guidance on matters such as non-removable assets, transfer of infrastructure to the State, unrecovered investment and the relationship between restitution and damages. **5. Termination by a State entity should be addressed.** Where the counterparty is a State entity, the Instrument should clarify how the termination provisions operate, particularly where the relevant decision or action is outside the entity's control or requires action by the State or another public authority.			

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361.	**Section D.1,** **Commentary para. 526**	Paragraph 526 records that the investor's right to terminate may be made subject to the provisions of a Substitution Agreement, reflecting the practice in project finance of allowing lenders to step in and cure defaults before termination takes effect. This is a welcome recognition of financing reality, and it raises a question that the Instrument might usefully address. Where the project assets are subject to a registered international interest, the creditor's remedies arise under the Convention rather than under the contract, and contractual restrictions on assignment, or a State step in right, may sit uneasily beside them. The tension is genuine. The State's concern is continuity of a public service, while the creditor's concern is the enforceability of its security. The Cape Town system has already worked out a reconciliation that the drafters may find directly useful. Article XXVII of the Protocol on Matters Specific to Space Assets (Berlin, 9 March 2012) permits a Contracting State to register a public service notice, the effect of which is to postpone the exercise of the creditor's default remedies to the extent that their exercise would interrupt the public service, for a limited period. The Luxembourg Rail Protocol contains a comparable public service mechanism. Whatever view is taken of the Space Protocol's prospects, and it has not entered into force, Article XXVII remains a fully worked model of how a private law instrument can protect continuity of public service without extinguishing security. See R. Goode, Official Commentary on the Protocol on Matters Specific to Space Assets; M. J. Sundahl, The Cape Town Convention: Its Application to Space Assets and Relation to the Law of Outer Space (2013). It is suggested that a short commentary paragraph note the interaction between substitution and step in arrangements and registered international interests, and refer to this model.	Dr. Mohammad Owais Farooqui	Associate Professor of Air and Space Law, College of Law, University of Sharjah	United Arab Emirates

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362.	**Section E**	**Section E – Contractual nature of compensation and damages.** The contractual character of compensation and damages should be reflected more consistently throughout Chapter 7. Although the Draft indicates that adjudicators should not automatically import public international law standards, some concepts used in the commentary and Model Clauses, including fair market value and commercially reasonable rates of interest, are closely associated with treaty-based investment arbitration and have generated substantial interpretative difficulties. He suggested further distancing the contractual damages framework from those treaty-based concepts or providing additional contractual guidance on their use.	Comment made during Latin American States' Representatives Roundtable		Brazil
363.	**Sections E and F**	**Sections E and F – Normative status of key protections.** It was argued that certain protections currently addressed only in Model Clauses or commentary should receive greater normative prominence. In particular, it was suggested elevating the exclusion of punitive and speculative damages and the non-derogable liability carve-outs from optional Model Clauses to Principles. The limitation of compensation for pre-operational investments should, at a minimum, be addressed in a Model Clause rather than only in the commentary. He also identified the sovereign-debt-rate interest benchmark among the protections currently left to optional clauses or commentary.	Comment made during Latin American States' Representatives Roundtable		Brazil
364.	**Section E,** **Principle 26**	**Nature of the obligation and claimant.** Principle 26 provides an important framework for remedies concerning breaches of sustainability obligations, including breaches that harm third parties. The final commentary should distinguish obligations to achieve a result, due-diligence obligations and reasonable-efforts obligations. It should also identify who may invoke the contractual remedy: a contracting party, an expressly designated third-party beneficiary, or another person granted standing by applicable law. The	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		Instrument should not imply an independent cause of action unless that consequence is intended and legally supportable. **Effectiveness and accessibility.** A remedy is meaningful only if the claimant can use it. Contractual mechanisms should be publicised, understandable, reasonably affordable and procedurally predictable, especially where they are intended for affected communities. Safeguards should address language, representation, confidentiality, non-retaliation and the ability to obtain timely interim or protective measures. **Forms of reparation.** Depending on the obligation and the applicable law, remedies may include cessation, restitution, rehabilitation, compensation, satisfaction, guarantees of non-repetition and corrective action. The commentary should avoid assuming that monetary compensation is adequate for every form of environmental, social or human-rights harm. **Relationship with public remedies.** Contractual remedies should complement rather than displace the State's independent regulatory, judicial and human-rights duties. The Model Clauses should not create waivers, exhaustion requirements or procedural barriers that prevent affected persons from using remedies available under domestic or international law unless such consequences are expressly permitted by the applicable law. ***Key References.*** *Basic Principles and Guidelines on the Right to a Remedy and Reparation, UN General Assembly Resolution 60/147, A/RES/60/147 (16 December 2005).*			
365.	**Section E, Principle 26**	We support the inclusion of a specific remedial framework for non-compliance with sustainability obligations. The approach contemplated in paragraph 542 — prioritising early identification, remediation and preservation of the contractual relationship before resorting to termination — is appropriate.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		1. The rationale for a distinct remedial approach should be clearer. Sustainability-related non-compliance may cause environmental, social or community harm which is not necessarily remedied by termination of the IIC. We therefore support a framework which prioritises containment, corrective action and cure before termination, while recognising that termination may ultimately be appropriate where serious non-compliance remains unresolved. **2. The Principle should distinguish contractual and regulatory obligations.** The Principle refers to sustainability obligations arising under both law and the IIC. These should not be treated as interchangeable. A regulatory breach may give rise to public-law consequences, while a contractual breach gives rise to contractual remedies. Where the parties intend a requirement arising under domestic law to have contractual effect, this should be clear from the IIC. **3. The remedial process should be more clearly structured.** The Principle should set out the basic sequence of notification, appropriate immediate measures where necessary, cure and remediation, and escalation where the breach remains unresolved. The parties should be encouraged to establish appropriate periods and procedures in the IIC, having regard to the nature of the investment and the time reasonably required for remediation. **4. Responsibility and cooperation in remediation should be addressed.** The Principle should clarify responsibility for proposing and implementing corrective measures. This is particularly important where sustainability obligations are performed through contractors, suppliers or other members of the investment project's supply chain. The Investor may remain responsible under the IIC while the immediate cause of the non-compliance			

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		lies with a third party, and the remedial framework should recognise the Investor's ability and responsibility to take reasonable steps to address it. **5. The economic consequences of remediation should be considered.** Remediation may take considerable time and may itself create significant costs and risks for both parties. The IIC should therefore, where appropriate, address the allocation of costs and the treatment of payments, incentives and other economic consequences during the remedial period. The cure period is itself an element of the parties' risk allocation. **6. The thresholds for escalation should be clear.** The Principle should distinguish between a sustainability breach which triggers a remedial process, a failure to remedy within the applicable period, and circumstances sufficiently serious to justify termination. Sustainability non-compliance should not automatically result in termination; termination should generally remain a final remedy where the breach is sufficiently serious or remains unresolved. **7. Continuing or irreversible harm requires particular treatment.** A cure period should not prevent immediate action where non-compliance is causing or threatens serious or irreversible harm. The Principle should therefore allow for appropriate protective or interim measures while the broader remedial process continues. **8. Sustainability obligations may survive termination.** The Principle should recognise that certain obligations, particularly environmental rehabilitation, remediation, decommissioning or community-related obligations, may need to continue after termination. The parties should therefore be encouraged to identify which sustainability obligations survive termination and how the associated responsibilities and costs are to be addressed.			

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		9. Relationship with treaty protections. The Commentary should also clarify the relationship between contractual sustainability remedies and applicable treaty protections. The same conduct may constitute a regulatory breach, contractual non-performance and conduct relevant to a treaty claim, but the legal consequences under each regime should remain distinct. **Overall observation.** The central distinction should be between **remediation and termination**. Principle 26 is strongest where it treats sustainability non-compliance as a problem to be identified, contained and remedied before resorting to final remedies, while still providing a clear path to escalation where remediation fails. The framework should enable parties to determine in advance **what has been breached, who is responsible for remedying it, how long remediation should take, and when failure to remedy becomes sufficiently serious to justify termination.**			
366.	**Section E, Principle 26**	It would be beneficial that the commentary clarify expressly that contractual notice, cure and consultation periods do not suspend or postpone regulatory, judicial or other protective measures available or required under applicable law where immediate action is necessary to prevent, stop or remedy serious or irreversible harm. Such measures should be capable of being taken without awaiting completion of the contractual cure process. Any contractual consequences of those measures may be addressed separately in accordance with the IIC and applicable law. This clarification is particularly important where environmental, health or human rights impacts affecting children or other affected rights-holders are imminent or ongoing.	Ivana Savić	External PhD candidate, Leiden University	Serbia
367.	**Section E,** **Principle 26(7)**	The Instrument makes an important and welcome step by recognising the interests of affected third parties and, in particular, by contemplating the possibility of direct claims and compensation actions arising from non-performance of sustainability obligations. However, the Principles could provide greater procedural guidance on the interaction between such third-	Gustavo Andrés Piedrahita	*Director, Centro de Arbitraje y Conciliación*	Colombia

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		party claims and the dispute resolution mechanism agreed by the State and the investor. In particular, it would be useful to clarify questions of standing, applicable law, forum, consolidation or coordination of proceedings, and the avoidance of inconsistent decisions. Otherwise, the recognition of third-party rights may generate a new layer of procedural uncertainty in already complex investment disputes.			
368.	**Section E,** **Principle 26; and** **Commentary paras. 317, 539-546**	Breach by the State of Principles 16 to 19 entails immediate access to the remedies in Chapter 7. Non-performance by the investor of its sustainability obligations passes through a structured process comprising written notice, a cure period of sixty or ninety days, direct negotiations, referral to a joint sustainability committee where established, and expert proceedings or mediation, with termination available only as a last resort and only where the non-compliance amounts to fundamental non-performance. Both sets of obligations are contractual, and the route to a remedy differs according to which party has failed to perform. i3T suggests either extending the graduated process to both parties or making the ordinary remedies available on the same terms for both.	i3T		Mexico
369.	**Section E,** **Principle 26,** **Model Clause para. 1**	Timely measures for serious or irreversible harm. Model Clause para. 1 provides a [60/90]-day Cure Period, but some sustainability impacts may worsen rapidly or become irreversible within that period. From an impact-assessment perspective, the time to initiate preventive or mitigation measures and the time required to complete remediation should be distinguished. The timing of initial action should reflect the severity, rate of progression and reversibility of the impact. Recommendation: Clarify that, where monitoring or impact assessment indicates a risk of serious or irreversible harm, preventive or mitigation measures should be initiated promptly and should not await expiry of the Cure Period. Where complete remediation requires more time, it may follow	Marian Portero	Member of CEIA	Spain / USA

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		an agreed timeframe appropriate to the nature and complexity of the measures required.			
370.	**Section E,** **Principle 26,** **Model Clause para. 1**	Impact evidence relevant to material sustainability non-compliance. Principle 26 uses material non-compliance as the threshold for the remedial process but does not indicate what impact evidence may inform that assessment. Relevant evidence may include the severity, scale or extent, duration, recurrence and cumulative effects of actual or potential adverse impacts, supported where available by due diligence findings, monitoring data, targets or indicators and baseline conditions. For example, relevant evidence could include the extent and duration of an exceedance of an agreed emissions or other performance threshold, the geographic area or population affected, or the time required to restore affected conditions. Recommendation: Clarify that material non-compliance may be informed by evidence on the severity, scale or extent, duration, recurrence and cumulative effects of adverse impacts, including, where relevant, the magnitude of deviations from agreed targets or thresholds, together with relevant due diligence findings, baseline conditions, targets or indicators, and monitoring data.	Marian Portero	Member of CEIA	Spain / USA
371.	**Section E,** **Principle 26,** **Model Clause para. 2**	Participation of affected third parties in remedial measures. Principle 26(1) expressly refers to cooperation with relevant third parties for the purpose of providing early remedy, but their role is not developed in the subsequent remedial process. Where non-performance affects communities or other stakeholders, their input may be important to define appropriate corrective measures and the outcomes those measures are intended to achieve. This would also be consistent with Chapter 5, under which the principles on consultation of local communities and populations apply to continuous sustainability monitoring and grievance mechanisms may be established for affected individuals and communities. Recommendation:	Marian Portero	Member of CEIA	Spain / USA

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		Provide in Model Clause para. 2 that, where appropriate, affected third parties identified through the due diligence, consultation and monitoring processes should be meaningfully consulted in defining remedial measures that directly affect them and, where relevant, the outcomes those measures are intended to achieve.			
372.	**Section E,** **Principle 26,** **Model Clause para. 2**	Effectiveness of remediation and residual harm. Model Clause para. 2 contemplates disagreement as to whether a failure has been adequately remedied, but does not indicate how that determination should be made. After corrective measures have been implemented, the Parties should verify whether those measures have effectively addressed the non-performance and, where the non-performance has caused an adverse impact, identify any residual harm relevant to determining whether further remedial measures are appropriate. Implementation of a corrective measure should therefore be distinguished from achievement of its intended outcome. For example, installation of a treatment system demonstrates implementation, while achievement of the applicable water-quality target or threshold provides evidence of its effectiveness. This assessment should be linked to the continuous sustainability monitoring process in Chapter 5 and, where established, to relevant baseline conditions, agreed targets or indicators and monitoring data. Recommendation: Specify that the assessment of whether a failure has been adequately remedied should include verification of the effectiveness of corrective measures against their intended outcomes through the continuous sustainability monitoring framework and, where the non-performance has caused an adverse impact, identification of any residual harm relevant to whether further remedial measures are appropriate, using, where established, the relevant baseline conditions, agreed targets or indicators and monitoring data.	Marian Portero	Member of CEIA	Spain / USA

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373.	**Section F.1**	Chapter 7, Section F.1, presents the "full compensation" standard (Art. 7.4.2 UPICC) as the guiding principle for damages in IICs, stating in paragraph 536 that its essence consists of: "*return the aggrieved party as closely as monetarily possible to the position in which it would have been had the wrong or expropriatory act not been done.*" While this standard is the one usually cited under international law, we note that in investment arbitration practice, debate continues as to whether it is the correct standard under BITs. Given this state of affairs, we consider it would be valuable to include the option for the contracting parties to decide whether this is indeed the standard they wish to apply to the regime of their investment contract. In any event, the tension arises upon noting that, by definition, the "*full compensation*" standard is broader than the value of the company or the asset. Indeed, full compensation includes both the loss suffered and the loss of profit, and additionally allows for compensation for non-pecuniary damage (paragraph 537). Despite that technical difference, Model Clause - Option 2 of that same section combines both standards in a way that creates a normative tension: 1. [...] the compensation shall follow the principle of full reparation. [...] 2. Compensation shall be equivalent to the reduction in the fair market value of the Investment resulting from the breach [...]. The tension arises because fair market value (FMV) is, by its methodological nature, a measure of the value of the investment as a going concern. In other words, FMV is not designed to capture the value of other potential damages, such as: moral or non-pecuniary damage;	Nicolás E. Bianchi	CIIAM / PBX International Law	Argentina

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		excess cash or other non-operating assets not included in the business valuation; certain consequential costs that do not affect the market value of the asset but do constitute a real loss for the investor. As a result, stating that compensation "*follows the principle of full reparation*" while simultaneously setting it as equivalent to FMV creates a normative expectation that the chosen metric cannot satisfy. This may give rise to interpretive disputes as to whether FMV is a ceiling, a floor, or simply one preference among several ways of quantifying full reparation. <u>Recommendation</u> I recommend removing the reference to "full compensation" in the model clause and retaining fair market value as the sole calculation standard, thereby avoiding the promise of a broader standard that the calculation methodology cannot actually deliver. In our opinion, this option provides greater predictability and internal coherence to the clause, by aligning the stated standard with the quantification method actually applied			
374.	**Commentary para. 547 et ss.** **Model Clause. Option 1.4**	The interest rate should be defined. Referring to a "commercially reasonable rate" creates a burden to the adjudicator that should be left to the agreement of the parties or to the applicable law. If the Instrument can be agreed by the parties as the governing law of the contract, it should include a provision to determine the applicable interest rate. In some legal regimes, compounded interest are against public policy and this would prevail even if the parties agree for the Instrument to be the governing law of the contract. **Recommendation**:	José Gregorio Torrealba	AVA	Venezuela

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		The arbitral tribunal may award pre-award and post award interest at the rate applicable under the law governing the contract or, where no such rate is prescribed or where permitted by the applicable law, at a commercially reasonable rate, considering the currency of the obligation, prevailing market conditions, and any other relevant circumstances. Interest may be simple or compounded only to the extent permitted by the applicable law. Where compound interest is permitted and awarded, the arbitral tribunal shall determine the appropriate compounding period, taking into account the circumstances of the case and applicable commercial practice.			
375.	**Section F.1**	**H. Adopt Proportionate Compensation and Valuation Principles** Compensation should reflect actual and demonstrable loss. Speculative future profits should be treated cautiously, particularly for early-stage or non-operational projects. Discounted cash-flow valuation should be reserved for established projects with a credible earnings history and should account for mitigation, contributory conduct and insurance recoveries.	KNCCI		Kenya
376.	**Section F, Commentary paras. 547-582**	Section F contains no Principle and addresses compensation and damages principally through commentary on the UPICC and two alternative Model Clauses. We consider that this understates the extent to which the Section develops an IIC-specific approach. Paragraph 547, in particular, establishes that compensation under the Instrument is contractual in character and should not automatically import standards developed in investment-treaty arbitration. The Instrument also creates contractual causes of action, including non-discrimination, for which the appropriate remedial consequences are not addressed. We therefore suggest that a short Principle be added setting out the basic contractual framework for compensation and damages, while leaving	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		detailed valuation methodologies to the parties and, where appropriate, the Model Clauses. **1. The contractual character of compensation should be stated as a Principle** We agree with the distinction in paragraph 547 between contractual compensation under an IIC and compensation arising under an investment treaty. Compensation and damages arising from an IIC should be assessed by reference to the IIC, the Instrument and the UPICC, unless the parties expressly agree otherwise. This distinction is particularly important where an IIC coexists with an applicable investment treaty. The same conduct may give rise to both contractual and treaty claims, but the contractual claim should not automatically attract treaty-based standards of compensation merely because treaty protection is available. **2. The framework should recognise the different forms of loss which may arise** We do not consider it necessary for the Instrument to prescribe detailed valuation methodologies for every category of loss. It should, however, recognise that the appropriate measure of compensation may depend upon the nature of the obligation breached. This is particularly relevant because an IIC may create contractual obligations whose breach does not involve deprivation of a physical or financial asset. Loss may arise, for example, from discriminatory treatment, failure to provide agreed cooperation or facilitation, or other non-performance which leaves the investment intact but places the Investor in a less favourable economic position.			

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		The Instrument should therefore provide sufficient guidance on the assessment of such losses without attempting to establish a separate valuation methodology for every contractual obligation. **3. Non-discrimination and intangible assets merit specific recognition** The Instrument expressly creates contractual non-discrimination obligations. It should therefore provide some indication of the remedial consequences of their breach. A breach may leave the investment intact while causing loss through additional charges, benefits withheld, discriminatory delay or costs imposed on the Investor but not on a similarly placed operator. The assessment could appropriately consider the difference between the treatment actually received and the treatment which should have been received, consistently with the comparator approach contemplated elsewhere in the Instrument. The compensation framework should also recognise that the economic value of an investment may lie substantially in **intellectual property and other intangible assets**, including licences, proprietary technology, know-how, software and technical information. Their loss, impairment or restricted use may cause significant economic loss even where the physical investment remains intact. The Instrument need not prescribe a separate methodology, but should make clear that such loss may be taken into account where relevant. **4. Agreed payments and security mechanisms should be distinguished from damages** The discussion of compensation should be distinguished from **agreed contractual payment mechanisms**, including liquidated damages, performance undertakings, guarantees and other forms of security. These mechanisms may serve different functions: allocating risk in advance,			

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		securing performance or payment, or providing immediate financial protection before the ultimate loss is established. The Instrument should therefore encourage parties to specify how such mechanisms interact with subsequent claims for damages. In particular, the IIC should make clear whether an agreed payment or security is intended to be an exclusive remedy, additional to damages, credited against damages, or otherwise subject to the prohibition on double recovery. This is particularly relevant in investment and project-finance structures, where guarantees or other security may provide only partial or interim protection. A payment under a guarantee should not automatically extinguish an underlying claim, but the same loss should not ultimately be recovered twice. **5. This should be coordinated with Principle 27** The treatment of liquidated damages, agreed payments, undertakings and guarantees should be expressly coordinated with Principle 27. The relevant question should be whether different recoveries relate to the **same injury**, rather than simply how the payment or claim is labelled. The framework should prevent double recovery while allowing recovery of a genuine uncompensated balance where an earlier payment or security mechanism did not cover the full loss. **6. The Model Clause should reflect the distinction between contractual and treaty compensation** The Model Clause should remain consistent with the contractual character of compensation identified in paragraph 547. The relationship between the different valuation dates proposed for ordinary damages and expropriation should be clarified.			

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		We also suggest reviewing paragraph 2 of Model Clause Option 1, which provides that the tribunal shall consider "only the submissions of the disputing Parties". If the intention is to prevent a tribunal from awarding compensation on a basis which neither party has advanced, this should be stated more clearly and should not inadvertently restrict consideration of expert evidence or other evidence admissible under the applicable procedural framework. **7. Interest** We suggest the Instrument provide fuller guidance on interest (what to agree, how and why, which could even be deciding between simple and compound interest), which in long-term investment contracts may form a substantial component of any eventual recovery. More generally, interest performs a function beyond compensation for the loss itself. Where an IIC provides for negotiation, mediation or other pre-adjudicative steps, and those steps extend over a considerable period, the time value of the sums in issue may itself become significant. **Interest may therefore operate as a discipline on delay, and its absence may create an incentive for a party to prolong a process without resolving it.** We suggest the Instrument address the relationship between interest and the multi-tiered dispute resolution processes it contemplates, including the point from which interest runs and whether time spent in amicable settlement procedures is taken into account. We recognise that the treatment of interest varies considerably between legal systems and may be subject to mandatory rules. That is a reason for the Instrument to draw the matter to the parties' attention at the contracting stage rather than leaving it to be determined after a dispute has arisen. **More generally, we suggest the Instrument give greater attention to delay as a risk to be allocated between the parties.**			

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		Overall observation We support the development of a contractual compensation framework for IICs, but consider that its principal propositions should be stated in a **Principle**, rather than left principally to commentary and Model Clauses. At a minimum, the Instrument should establish that compensation and damages under an IIC are **contractual in character**, distinguish them from treaty-based compensation, and recognise that loss may arise not only from expropriation or loss of physical assets but also from **non-discrimination, impairment of intellectual property and other intangible assets, and non-performance of contractual obligations**. The Instrument should also clarify the relationship between damages and **liquidated damages, agreed payments, guarantees and other security mechanisms**, particularly in light of the prohibition on double recovery in Principle 27. The key distinction should be between **the legal basis of the claim, the function of the payment mechanism, and the injury or loss to which it relates**.			
377.	**Section F.1,** **Model Clauses**	Option 1 is described as self-contained but does not expressly retain the foreseeability requirement in Article 7.4.4 UPICC. Clause 2(a) refers to intentional or negligent contribution, while Article 7.4.7 also addresses events for which the aggrieved party bears the risk. An express reference to these provisions would reduce uncertainty when the clause is used independently. The exclusion of "hypothetical" harm in clause 1(d) could also be clarified. Valuation necessarily involves a counterfactual, and Article 7.4.3 permits sufficiently certain future harm and, where appropriate, loss of a chance. The Commentary could distinguish unsupported speculation from a reasoned assessment supported by reliable evidence. The existing case-by-case	Sergey Alekhin	Russian Arbitration Association (ELWI law firm)	Russian Federation

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		approach in clause 3 should be retained, with clarification that a historical record of profitability is relevant evidence rather than an absolute eligibility condition.			
378.	**Section F.1,** **Commentary paras. 548-550**	**i) La relación entre el estándar de compensación plena y la cláusula de justo valor de mercado (FMV)** El Capítulo 7, Sección F.1, presenta el estándar de "compensación plena" (Art. 7.4.2 UPICC) como principio rector de los daños en los CII, señalando en el párrafo [548] que su esencia consiste en: "return the aggrieved party as closely as monetarily possible to the position in which it would have been had the wrong or expropriatory act not been done"[74] Si bien este estándar es el habitualmente reseñado bajo derecho internacional, debemos señalar que en la práctica del arbitraje de inversiones sigue vigente la discusión respecto de si es el estándar correcto bajo los TBIs o no. Debido a este estado de la materia, consideramos que sería valioso incorporar la opción de que los contratantes decidan si efectivamente es este el estándar que desean aplicar al régimen de su contrato de inversión. En todo caso, la tensión visualizada se da al advertir que, por definición, el estándar de "compensación plena" es más amplio que el valor de la empresa o del activo. En efecto, la compensación plena incluye, tanto la pérdida sufrida como el lucro cesante y, además, permite la compensación por daño no pecuniario (párrafo [550]).	Pablo Parrilla, Nicolás E. Bianchi	Partners, PBX International Law	Argentina

[74] UNIDROIT / ICC Principles and Model Clauses for International Investment Contracts, ¶ [548].

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		A pesar de esa diferencia técnica, la Cláusula Modelo - Opción 2 de esa misma sección combina ambos estándares de forma que generan una tensión normativa: > 1. [...] the compensation shall follow the principle of full reparation. [...] > 2. Compensation shall be equivalent to the reduction in the fair market value of the Investment resulting from the breach [...].[75] La tensión se da en que el justo valor de mercado (FMV) es, por su naturaleza metodológica, una medida de valor de la inversión como *going concern*. Es decir, el FMV no está diseñado para capturar el valor de otros eventuales daños, tales como: - daño moral o no pecuniario; - exceso de caja u otros activos no operativos no incorporados en la valoración del negocio; - ciertos costos consecuenciales que no afectan el valor de mercado del activo pero sí constituyen un perjuicio real para el inversor. En consecuencia, anunciar que la compensación "sigue el principio de reparación plena" y simultáneamente fijarla como equivalente al FMV genera una expectativa normativa que la métrica elegida no puede satisfacer. Esto puede dar lugar a disputas interpretativas sobre si el FMV es un techo, un			

[75] Ver, UNIDROIT / ICC Principles and Model Clauses for International Investment Contracts, [page 157, Model Clause Option 2, paragraph 1]

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		piso, o simplemente una preferencia entre varias formas de cuantificación de la reparación plena. <u>Recomendación</u> Se recomienda eliminar la referencia a la "compensación plena" en la cláusula modelo y dejar como único estándar de cálculo el del justo valor de mercado, evitando así la un estándar más amplio contradictorio con la cláusula. En nuestra opinión, esta opción otorga mayor previsibilidad y coherencia interna a la cláusula, al alinear el estándar declarado con el método de cuantificación realmente aplicado.[76]			
379.	**Section F.1,** **Commentary para. 549**	The reference to "proportionality" in paragraph 549 is not a term arising from comparative law but confusing. The result of a proper causality analysis is determinative for the extent and amount of damages. There is nothing	Herfried Wöss (Wöss & Partners)	LAI Regional Chapter	Austria / Mexico / USA

[76] Courtesy translation into English (Secretariat): i) The relationship between the full compensation standard and the fair market value (FMV) clause. Chapter 7, Section F.1, presents the "full compensation" standard (Art. 7.4.2 UPICC) as the guiding principle for damages in IICs, noting in paragraph 548 that its essence is to: "return the aggrieved party as closely as monetarily possible to the position in which it would have been had the wrong or expropriatory act not been done". While this standard is the one usually referenced under international law, we must point out that in investment arbitration practice, the debate over whether it is the correct standard under BITs remains ongoing. Given this state of affairs, we consider that it would be valuable to incorporate the option for the contracting parties to decide whether this is indeed the standard they wish to apply to the regime of their investment contract. In any case, the observed tension arises from noting that, by definition, the "full compensation" standard is broader than the value of the enterprise or the asset. Indeed, full compensation includes both the loss suffered and the loss of profit, and furthermore, it allows for compensation for non-pecuniary damage (paragraph 550). Despite this technical difference, the Model Clause - Option 2 of that same section combines both standards in a way that generates a normative tension: "1. [...] the compensation shall follow the principle of full reparation. [...] 2. Compensation shall be equivalent to the reduction in the fair market value of the Investment resulting from the breach [...]". The tension stems from the fact that fair market value (FMV) is, by its methodological nature, a measure of the value of the investment as a going concern. That is, FMV is not designed to capture the value of other potential damages, such as: moral or non-pecuniary damage; excess cash or other non-operating assets not incorporated in the business valuation; and certain consequential costs that do not affect the market value of the asset but do constitute a real loss for the investor. Consequently, announcing that the compensation "follows the principle of full reparation" and simultaneously fixing it as equivalent to the FMV generates a normative expectation that the chosen metric cannot satisfy. This can give rise to interpretive disputes over whether the FMV is a ceiling, a floor, or simply a preference among various ways of quantifying full reparation. Recommendation: It is recommended to eliminate the reference to "full compensation" in the model clause and leave fair market value as the sole calculation standard, thus avoiding a broader standard that contradicts the clause. In our opinion, this option provides greater predictability and internal coherence to the clause, by aligning the declared standard with the quantification method actually applied.

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		proportional about that. Adding terms without functionality leads to confusion.			
380.	**Section F.1,** **Commentary para. 551**	Here is worth noting that the perception that loss of profits claims are "speculative" often arises from the observation that experts valuing the same project or asset arrive at substantially divergent conclusions. It is important to recognise that such divergences are not indicative of any deficiency in the exercise itself. They are, in fact, precisely what one would expect. Even assuming that both experts proceed from the same legal premise and are skillful and unbiased valuers, differences in their conclusions are the norm rather than the exception. Corporate finance literature highlights that determining the value of an asset is not an exact science and cannot be reduced to a prescribed formula, as the exercise necessarily relies on the professional judgement of the valuator at every stage. That is, a DCF valuation can be arithmetically flawless yet lead to a materially different result depending on the assumptions adopted, because even small differences in judgemental inputs can produce wide variations in outcome. Reasonable and competent professionals will naturally reach different conclusions because they will inevitably form different assessments of the economic and other exogenous factors affecting the subject asset. In short, asset valuation, and ultimately the quantification of damages, is much more than a matter of arithmetic; it is an exercise in informed professional judgement, and a range of defensible outcomes is the natural and expected result.	Piero Fortino	Member of CEIA	Spain / Italy
381.	**Section F.1,** **Commentary para. 552**	Here is worth noting that while liquidated damages clauses can provide more certainty and predictability for the contracting parties regarding quantum, they may be incompatible with the principle of full reparation endorsed elsewhere in this Instrument. IICs are typically long-term arrangements, often extending over decades, during which both project-specific and	Piero Fortino	Member of CEIA	Spain / Italy

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		broader economic circumstances may evolve substantially. As a result, a fixed amount or formula agreed at the inception of the contract is unlikely to capture the actual loss suffered at the time a breach occurs. Even where the agreed amount represented a reasonable forecast of loss when the contract was signed, subsequent changes in market conditions (e.g. commodity prices, regulatory frameworks, interest/exchange rates) or the commercial prospects of the investment may significantly alter the value of the project. Thus, liquidated damages clauses will likely be incompatible with the objective of restoring the injured party to the position it would have occupied absent the breach.			
382.	**Section F.1,** **Commentary para. 553**	Perhaps is worth noting that liquidated damages clauses may also incentivise opportunistic behaviour from the contracting parties. By fixing in advance the financial consequences of non-performance, liquidated damages clauses effectively grant the potentially breaching party an option to choose between continued performance and termination upon payment of the agreed amount. In long-term investment projects, the relative attractiveness of these alternatives may change substantially over time. If adverse business conditions (e.g. project-specific factors, regulatory changes, or broader macroeconomic factors) materialize, reducing the value of the project, the breaching party may find it economically optimal to terminate the contract and pay the liquidated damages rather than continue performing. In this sense, the liquidated damages clause functions as a "cap" on the cost of non-performance. From an economic perspective, this flexibility is equivalent to an embedded option, and therefore has value. Unless that option value is explicitly reflected in the contractual allocation of risks and benefits, the agreed liquidated damages amount will likely fail to reflect the economic position	Piero Fortino	Member of CEIA	Spain / Italy

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		that would have existed absent the breach (on average, will overcompensate), and therefore diverge from the objective of full compensation.			
383.	**Section F.1,** **Commentary para. 554**	Eighth line in paragraph 554: "... the price that a hypothetical willing buyer would pay for the investment" is the typical definition of fair market value, not that of the DCF method.	Piero Fortino	Member of CEIA	Spain / Italy
384.	**Section F.1,** **Commentary para. 554**	Sixth line in commentary paragraph 554: It is worth noting that international valuation standards recognise several distinct "bases of value", each resting on different assumptions regarding the parties to a transaction and the factors to be considered in arriving at a valuation conclusion. "Fair Market Value" is premised on a hypothetical exchange between a willing buyer and a willing seller (neither being under any compulsion to transact, and acting with reasonable knowledge of relevant facts). This definition excludes from the valuation any element of value that is available only to a specific owner or purchaser. Entity-specific factors (such as unique synergies between the asset and other assets owned by the entity, tax benefits or burdens particular to that party, or an ability to exploit the asset that is unique to that entity) should be disregarded. Accordingly, where part of the claimant's loss relates to benefits or advantages that accrued specifically to it (rather than to market participants generally), reliance on Fair Market Value may produce a measure of value that falls short of full reparation, precisely because it is designed to strip out such idiosyncratic elements. Having said so, international valuation standards provide other bases of value that capture entity-specific benefits. "Investment Value", for instance, reflects the value of an asset to a particular owner for its individual	Piero Fortino	Member of CEIA	Spain / Italy

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		investment, and incorporates entity-specific factors that a market-based measure would exclude. Similarly, "Synergistic Value" measures the additional value arising from the combination of two or more assets or interests where the combined value exceeds the sum of the separate values. Where those synergies are available only to one specific buyer, Synergistic Value will differ from Market Value because it reflects particular attributes of the asset that are of value solely to that purchaser.			
385.	**Section F.1,** **Commentary para. 554**	Eleventh line in commentary paragraph 554: Instead of "...macroeconomic conditions and political risks..." I would instead say including "project or asset-specific and systematic or market risks", to make broader and consistent with valuation terminology	Piero Fortino	Member of CEIA	Spain / Italy
386.	**Section F.1,** **Commentary para. 554**	Twelfth line in commentary paragraph 554: Instead of making a distinction between "market comparables method" and the "stock market-based valuation method" I would say that "methods alternative to DCF include the "market approach", which derives an indication of value from observable market transactions, such as transactions involving the same asset at a different point in time, transactions involving comparable assets, or valuation multiples implied by publicly traded companies" – this makes it more consistent with valuation terminology	Piero Fortino	Member of CEIA	Spain / Italy
387.	**Section F.1,** **Commentary para. 554**	The last sentence of paragraph 554: I would rephrase the last sentence, and say "such as the cost approach, under which value is derived from the resources committed to the investment rather than its expected future cash flows. Relevant methodologies within the cost approach include net asset value, replacement	Piero Fortino	Member of CEIA	Spain / Italy

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		cost, book value, sunk costs, and invested capital. These methodologies are inherently backward-looking, as they focus on the value of the assets employed or expenditures incurred rather than the future earning capacity of the investment. These methodologies may provide an indication of value for an early-stage project, where major risks haven´t been resolved, since a rational buyer would generally not be willing to pay more for such an investment than the cost of acquiring or constructing an equivalent asset with similar economic potential. As the project progresses and key technical, regulatory, financing, and commercial risks are progressively resolved, the investment acquires value beyond the resources committed to it, reflecting the increasing certainty of its future cash flows. At that stage, cost-based methodologies become progressively less representative of fair market value, as they fail to capture the value created by the successful resolution of uncertainty.”			
388.	**Section F.1,** **Commentary paras. 555-556**	Socioeconomic, environmental and climate-related harm. The Draft develops sustainability obligations and remedies across Chapters 3, 5 and 7.E, but Section 7.F does not expressly address the assessment of socioeconomic, environmental or climate-related harm that may arise from non-performance of those obligations. From a damages-assessment perspective, these categories of harm may require evidence and methodologies different from conventional financial loss, particularly in relation to causation, relevant contributing factors and uncertainty. Depending on the nature of the harm, relevant approaches may include remediation costs or recognised monetary valuation methods for environmental impacts; socioeconomic indicators or impact frameworks for effects on employment, income, health, livelihoods or accessibility; and IVS/IVSC where material environmental or social factors affect the value of	Marian Portero	Member of CEIA	Spain / USA

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		a business or asset. These approaches serve different purposes and should not be treated as interchangeable or, by themselves, as arbitral standards of quantum. Recommendation: Where such harm is recoverable, the assessment and, where appropriate, quantification of such harm should use methodologies appropriate to the nature of the harm and available evidence, distinguish relevant contributing factors, and address uncertainty consistently with the applicable reasonable-certainty standard. Consistently with Commentary paras. 229 and 370, where established methodologies do not adequately capture material social, socioeconomic or interrelated social-environmental impacts, the assessment framework should remain open to methodological innovation through the use, testing and further development of fit-for-purpose qualitative and quantitative indicators, metrics and methodologies, with their basis, assumptions and limitations transparently documented.			
389.	**Section F.1,** **Model Clauses,** **Option 1 para. 1(b);** **Option 2 para. 2**	Instead of saying "fair market value may be determined […]", I would instead say that "value should be determined by applying the valuation method or methods most appropriate in the circumstances. No prescribed formula should apply: the valuation exercise requires judgment, having regard to the nature of the asset, the applicable basis and premise of value, the availability and reliability of information, the strengths and weaknesses of each method, and the extent to which observable market inputs are available. More than one method may be considered where appropriate, but materially divergent indications of value should not be mechanically averaged or weighted without a reasoned basis."	Piero Fortino	Member of CEIA	Spain / Italy
390.	**Section F.1,** **Model Clauses,**	Valuation approaches and investment stage. Model Clause para. 1(b) refers to going concern value and asset-based valuation as examples of valuation methods. From a valuation perspective, this mixes concepts that are normally distinguished: going concern is a	Marian Portero	Member of CEIA	Spain / USA

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	Option 1 para. 1(b)	premise or condition of the business being valued, while current International Valuation Standards identify market, income and cost as the principal valuation approaches, with specific methods selected within those approaches. Commentary paras. 554-556 themselves recognise that method selection depends on the investment stage, available evidence and project characteristics. Recommendation: Review the valuation terminology in para. 1(b) for consistency with recognised valuation practice, ensuring that the valuation approach and method are selected according to the characteristics and stage of the investment, the relevant basis and premise of value, and the quality and availability of evidence.			
391.	**Section F.1,** **Model Clauses,** **Option 1 paras. 1(c) and 2**	Causation and contributing factors. Option 1 requires harm to be caused by the non-performance and addresses contribution by the aggrieved Party and mitigation, but does not expressly address other factors that may contribute to the observed harm. In complex socioeconomic, environmental and climate-related settings, pre-existing conditions, third-party conduct, market or regulatory developments and other external factors may materially affect the outcome. For example, if soil contamination is identified following the non-performance, the full remediation cost should not automatically be attributed to it. The assessment should first distinguish contamination that already existed, contamination caused by third parties and any additional contamination attributable to the non-performance, using evidence such as baseline and subsequent testing, the location and timing of the contamination, affected quantities and unit remediation costs. From a quantification perspective, these effects should be distinguished from the incremental harm caused by the non-performance. Recommendation: The assessment of damages should consider relevant pre-existing conditions, third-party conduct and other external factors, and distinguish their contribution from the harm caused by the non-performance.	Marian Portero	Member of CEIA	Spain / USA

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		Where appropriate, the quantification should identify, to the extent supported by the available evidence, the extent of harm attributable to the non-performance rather than assuming that the entire observed change is attributable to it.			
392.	**Section F.1, Model Clauses, Option 1 para. 1(d)**	I would remove the reference to "hypothetical". The assessment of damages necessarily requires the construction of a counterfactual scenario (i.e. an estimate of what would have occurred absent the wrongful act) which is hypothetical by definition. However, hypothetical does not mean speculative. The relevant distinction is between losses that can be established with a reasonable degree of certainty based on evidence and reliable assumptions, and losses that are merely speculative.	Piero Fortino	Member of CEIA	Spain / Italy
393.	**Section F.1, Model Clauses, Option 1 para. 1(d)**	Reasonable certainty and quantification of harm. Option 1(d) appropriately requires harm to be established with reasonable certainty, but it could better distinguish certainty that harm occurred from uncertainty as to its precise amount. Proven harm may still require estimation where its precise amount cannot be established, consistent with UPICC Article 7.4.3, which separately addresses certainty of harm and uncertainty in the amount of damages. This distinction is particularly relevant for socioeconomic, environmental and climate-related harm, where the existence of an impact may be supported by technical or other reliable evidence even though its monetary amount requires estimation. Depending on the nature of the harm, quantification may rely, for example, on remediation or restoration costs, recognised environmental valuation methods, socioeconomic indicators, benchmarks or appropriately supported proxies. Recommendation: Reflect the distinction between certainty of harm and uncertainty as to amount, so that uncertainty as to the precise amount does not preclude compensation where the harm is established with reasonable certainty and the amount can be reasonably assessed on the	Marian Portero	Member of CEIA	Spain / USA

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		available evidence. Where estimation is required, the methodology should identify the relevant assumptions and data sources, address material uncertainty through appropriate ranges, sensitivity analysis or, where relevant, probability-weighted scenarios, and avoid double counting.			
394.	**Section F.1,** **Model Clause** **Option 1 para. 2; and** **Chapter 8.C,** **Commentary para. 619**	**Tribunal-appointed experts** There is a fairly concrete inconsistency between Chapters 7 and 8. Chapter 7 says that, in assessing monetary damages, the tribunal shall consider "only the submissions of the disputing Parties." Chapter 8, however, contemplates independent experts appointed by the dispute-resolution forum to assist with quantification. I would delete "only." In a complex investment dispute, a tribunal-appointed expert may be especially useful when the parties put forward materially different DCF models, discount rates or counterfactual scenarios. Any such expert evidence should remain fully open to adversarial testing and party comment.	ACCOLDI		Colombia
395.	**Section F.1,** **Model Clauses,** **Option 1 para. 3**	I would remove or revise the text after "inter alia" on the a sentence, as it could be interpreted as suggesting that loss profits cannot be awarded unless the investment has operated for a sufficient period of time to establish a record of profitability. In reality, the relevant consideration is not the existence of a historical operating record, but the degree of certainty with which future performance can be forecast. While an established record of profitability may provide useful evidence in emerging industries, it is neither a necessary nor a sufficient condition for the valuating an investment using forward-looking methodologies. In mature industries with proven technologies and reasonably observable inputs, future performance may often be forecast	Piero Fortino	Member of CEIA	Spain /Italy

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		with a high degree of reliability even where the particular investment has only recently commenced operations or has not yet reached commercial operation.			
396.	**Section F.1,** **Model Clauses,** **Option 1 para. 3**	Performance record and evidence of future profitability. Model Clause para. 3 appropriately identifies operating history and a profitability record as relevant factors, but an established profitability record is not the only evidence that may support an assessment of future economic performance. Depending on the stage of the project, reliable contemporaneous forecasts, contracts, demand evidence, financing assumptions, comparable projects and other market evidence may also be relevant. Where material to the investment, contemporaneous evidence of sustainability-related risks, opportunities and performance may also be relevant because these factors may affect projected revenues, operating costs, access to finance, financing costs, risk or other valuation inputs. In impact investments, achievement of defined and measurable social or environmental outcomes may also affect value where a demonstrable financial link exists. For example, verified achievement of an energy-efficiency target may reduce operating costs, while achievement of a sustainability-linked performance target may reduce financing costs. Such positive impact performance should not be assumed to increase value automatically; its financial effect should be supported by contemporaneous evidence. Recommendation: The assessment of future profits should consider all reliable evidence appropriate to the investment's stage and circumstances, and the absence of an established profitability record should not, by itself, determine the outcome. Where relevant and supported by the available evidence, the assessment should also reflect material sustainability-related risks, opportunities and impact performance through the valuation inputs they affect, without double counting.	Marian Portero	Member of CEIA	Spain / USA

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397.	**Section F.1,** **Model Clauses,** **Option 2**	Option 2 of the damages model clauses is equally confusing and lacks structure. It starts with the reduction of the fair market value of the investment, which is the consequence of lost cashflows caused by the breach of contract. Loss of income stream and loss of value are two sides of the same coin. The order that "compensation shall include simple interest accruing from the valuation date until the payment date" and that "the interest rate shall correspond to the rate of sovereign debt of the host State", is difficult to understand. As a general rule post award interest should normally be higher than the compensatory interest rate established in the award, in order to provoke early payment, not the other way round. An interest rate below market rates provokes non-payment. Again, the model clause refers to the date-of-breach rule, when even English law makes exceptions to that rule in case of long-term supply contracts (see The Golden Victory).	Herfried Wöss (Wöss & Partners)	LAI Regional Chapter	Austria / Mexico / USA
398.	**Section F.1,** **Model Clauses,** **Option 2 paras. 1-2; and** **Commentary para. 558**	Scope of fair market value as a measure of compensation. Option 2 applies the principle of full compensation but states that compensation shall equal the reduction in the Investment's fair market value, while Commentary para. 558 describes FMV as the primary measure. FMV may not always be the most appropriate or reliable measure of proven harm, particularly for early-stage investments or cost-based losses where other evidence may provide a better basis for quantification. Depending on the nature of the non-performance, proven harm may instead be reflected in discrete lost cash flows, additional costs, wasted expenditure, delay-related effects or other measurable economic consequences that may not translate directly into an equivalent reduction in the Investment's fair market value. An exclusive FMV measure could therefore create a mismatch between the nature of the proven harm and the measure used to quantify it. The availability of different valuation methods to determine FMV does not, by itself, resolve that issue. Recommendation: Clarify whether FMV is intended	Marian Portero	Member of CEIA	Spain / USA

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		to be the exclusive or primary measure under Option 2. If it is a primary measure, permit other appropriate measures of loss and corresponding quantification methods where better suited to the nature of the proven harm, project stage and available evidence, while avoiding double counting. Para. 2 should also distinguish the valuation approaches or methods used to determine FMV from the evidence and inputs used in their application, such as comparable transaction data and management information.			
399.	**Section F.1,** **Model Clauses,** **Option 2 para. 4**	Note that commercially reasonable rates are defined on a compound basis. Also, from an economic perspective, pre-award interest at the risk-free rate could also be a coherent rate if the Tribunal considers that the breach is established only at the award date (and therefore the only risk the harmed party bore from breach to award date is the passage of time)	Piero Fortino	Member of CEIA	Spain / Italy
400.	**Section F.2**	Section F.2 (interest) merely notes, in general terms, that the interest rate and whether it is simple or compound "may lead to a claim for interest being almost the same amount as, or even more than, the damages award" (para. 544). However, this section: 1. Does not reflect the technical difference between pre-award interest and post-award interest, even though both serve different functions: pre-award interest compensates for the time value of money during the period in which the damage remained unredressed, while post-award interest seeks to compensate for the time value of money applied to the award, which grants a fixed sum, with no possibility of variability and no associated commercial or industrial risks — which justifies differentiated treatment (including, in certain cases, different rates or capitalization methods).	Nicolás E. Bianchi	CIIAM / PBX International Law	Argentina

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		2. Does not propose specific risk-free interest rate alternatives that the parties could adopt as an objective reference, in line with a significant part of arbitral trends over recent decades. 3. The Model Clauses in Section F.1 (Option 1, para. 4) and F.2 (Option 1) repeatedly resort to the formula of a "*commercially reasonable rate*": *"The arbitral tribunal may award pre-award and post-award interest at a commercially reasonable rate, compounded annually"* As to the rate, the proposed formula, although flexible, shifts to the arbitral tribunal the determination of an indeterminate standard, which reduces the predictability sought by the Instrument and may generate additional disputes over the applicable rate — exactly the type of uncertainty that paragraph 544 itself identifies as risky. It should be noted that Option 2 of the same section does adopt a more concrete reference (the sovereign debt rate of the State receiving the investment), but that choice has the drawback of incorporating the sovereign risk of the respondent State itself into the calculation of the interest owed to the injured investor, which is conceptually inconsistent if the aim is to compensate for the time value of money in a neutral manner, or to avoid shifting the role of the arbitral tribunal into that of an enforcement tribunal. Additionally, it should be clarified that reference is made to a rate and not to a yield, as these are two different concepts. Indeed, the rate does not reflect the sovereign risk it is intended to refer to. As to the method of capitalization, the Model Clause in Section F.2 adopts a specific position on the capitalization method, establishing that interest will be calculated with annual compounding (compounded annually).			

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		However, we consider that this choice deserves to be reconsidered, at least with respect to post-award interest. The period elapsing between the date of the award and the date of its payment is a single, continuous time interval: there are no reinvestment sub-periods or returns that accumulate progressively, as would occur in the context of an active financial investment. In that context, segmenting the period annually with the sole effect of compounding interest does not reflect a recognizable economic logic and may produce results that are difficult to justify under the principle of full compensation, whose purpose is to restore, not to enrich. For this reason, we suggest that the Instrument — or, failing that, the commentary — clarify that, at least with respect to post-award interest, simple capitalization is the most appropriate method: applying the reference rate chosen by the parties to the principal amount of the award over the entire period, without periodic subdivisions. This clarification would give the Instrument greater internal coherence and would reduce the risk of the capitalization method becoming an additional source of controversy. <u>Recommendation</u> I suggest: - Including in the commentary a technical explanation of the distinction between pre-award and post-award interest, including their different economic functions and the possibility for the parties to agree on differentiated rates or capitalization methodologies for each period. - Replacing the reference to a "*commercially reasonable rate*" with a specific and publicly available reference rate, preferably one widely used in international financial markets — for example, the 3-month USD SOFR rate — rather than an open-ended standard subject to interpretation. This would			

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		provide the parties with greater certainty ex ante and reduce the scope for controversy over the applicable rate before the arbitral tribunal. - Including alternatives providing that, for post-award interest, the simple method is the appropriate one, removing the reference to compounded annually from the Model Clause, or limiting it exclusively to pre-award interest, where it could have greater theoretical justification.			
401.	**Section F,** **Commentary para. 560**	The model clauses about payment of interest look redundant since the provision in the Model Clause, Option 1.4 already addresses this topic.	Jorge González Carvajal	AVA	Venezuela
402.	**Section F.2,** **Commentary para. 560; and** **Model Clauses**	**(ii) El tratamiento de los intereses, tanto en lo referido a la distinción entre intereses pre-laudo y post-laudo** La sección F.2 (intereses) se limita a señalar, en términos generales, que la tasa de interés y su carácter simple o compuesto *"may lead to a claim for interest being almost the same amount as, or even more than, the damages award"*[77] (párr. [560]). Sin embargo, esta sección: 1. No refleja la diferencia técnica entre intereses pre-laudo (pre-award) y post-laudo (post-award), pese a que ambos cumplen funciones distintas: el interés pre-laudo compensa el valor temporal del dinero durante el período en que el daño no fue resarcido, mientras que el interés post-laudo busca compensar por el valor tiempo del dinero aplicado al laudo, que otorga una suma fija, sin posibilidad de variabilidad y que no contiene riesgos comerciales o industriales asociados, lo que justifica un tratamiento	Pablo Parrilla, Nicolás E. Bianchi	Partners, PBX International Law	Argentina

[77] UNIDROIT / ICC Principles and Model Clauses for International Investment Contracts, ¶ [560].

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		diferenciado (incluyendo, en ciertos casos, tasas o capitalización distintas). 2. No propone alternativas concretas de tasas de interés libres de riesgo, que las partes puedan adoptar como referencia objetiva, siguiendo una parte importante de las tendencias arbitrales de las últimas décadas. 3. Las Cláusulas Modelo de la Sección F.1 (Opción 1, párr. 4) y F.2 (Opción 1) recurren reiteradamente a la fórmula de una "tasa comercialmente razonable": "The arbitral tribunal may award pre-award and post-award interest at a commercially reasonable rate, compounded annually"[78] Respecto a la tasa, la fórmula propuesta, aunque flexible, traslada al tribunal arbitral la determinación de un estándar indeterminado, lo que reduce la previsibilidad buscada por el Instrumento y puede generar disputas adicionales sobre la tasa aplicable —exactamente el tipo de incertidumbre que el propio párrafo 544 identifica como riesgoso. Cabe notar que la Opción 2 de la misma sección sí adopta una referencia más concreta (la tasa de deuda soberana del Estado receptor de la inversión), pero esa elección tiene la desventaja de incorporar el riesgo soberano del propio Estado demandado en el cálculo de los intereses debidos al inversor perjudicado, lo cual es conceptualmente inconsistente con el objetivo es resarcir el valor temporal del dinero de forma y de no mutar el			

[78] Ver, UNIDROIT / ICC Principles and Model Clauses for International Investment Contracts, [page 157, Model Clause Option 1, paragraph 4].

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		rol del tribunal arbitral al rol de un tribunal de ejecución (respecto del potencial incumplimiento del Estado del laudo). Adicionalmente, cabe aclarar que se hace referencia a una tasa y no al rendimiento, siendo ambos conceptos diferentes. En efecto, la tasa no refleja el riesgo soberano al que se pretende referir. Respecto al método de capitalización, la Cláusula Modelo de la Sección F.2 adopta una posición concreta respecto del método de capitalización, al establecer que los intereses se calcularán con capitalización anual (*compounded annually*). Sin embargo, consideramos que esta elección merece ser revisada, al menos en lo que respecta a los intereses post-laudo. El período que transcurre entre la fecha del laudo y la fecha de su pago es un intervalo temporal único y continuo: no existen subperíodos de reinversión ni rendimientos que se acumulen progresivamente, como ocurriría en el contexto de una inversión financiera activa. En ese contexto, la segmentación anual del período con el único efecto de capitalizar intereses no refleja una lógica económica reconocible y puede producir resultados difícilmente justificables bajo el principio de compensación plena, cuyo propósito es restituir, no enriquecer. Por ello, se sugiere que el Instrumento —o en su defecto el comentario— aclare que, al menos en materia de intereses post-laudo, el cálculo sin capitalización (interés simple) constituye el método más adecuado. Esta precisión dotaría de mayor coherencia interna al Instrumento y reduciría el riesgo de que el método de capitalización se convierta en una fuente adicional de controversia. <u>Recomendación</u>			

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		Se sugiere: - Incorporar en el comentario una explicación técnica sobre la distinción entre intereses pre-laudo y post-laudo, incluyendo su distinta función económica y la posibilidad de que las partes pacten tasas o metodologías de capitalización diferenciadas para cada período. - Sustituir la referencia a una "tasa comercialmente razonable" por una tasa de referencia específica y pública, preferentemente una tasa ampliamente utilizada en los mercados financieros internacionales —por ejemplo, la tasa SOFR a 3 meses en USD— en lugar de un estándar abierto a interpretación. Esto otorgaría mayor certeza *ex ante* a las partes y reduciría el espacio de controversia sobre la tasa aplicable ante el tribunal arbitral. - Incluir alternativas respecto de que, en los intereses post-laudo, el tipo simple es el método adecuado, eliminando la referencia a *compounded annually* de la Cláusula Modelo o limitándola exclusivamente a los intereses pre-laudo, donde podría tener mayor justificación teórica.[79]			

[79] Courtesy translation into English (Secretariat): (ii) The treatment of interest, specifically regarding the distinction between pre-award and post-award interest. Section F.2 (interest) limits itself to pointing out, in general terms, that the interest rate and its simple or compound nature "may lead to a claim for interest being almost the same amount as, or even more than, the damages award" (para. 560). However, this section: 1. Does not reflect the technical difference between pre-award and post-award interest, despite the fact that both serve distinct functions: pre-award interest compensates for the time value of money during the period in which the damage was not remedied, whereas post-award interest seeks to compensate for the time value of money applied to the award, which grants a fixed sum without the possibility of variability and contains no associated commercial or industrial risks, which justifies a differentiated treatment (including, in certain cases, different rates or capitalization); 2. Does not propose concrete alternatives for risk-free interest rates that the parties could adopt as an objective reference, following a significant portion of arbitral trends in recent decades; and 3. The Model Clauses in Sections F.1 (Option 1, para. 4) and F.2 (Option 1) repeatedly resort to the formula of a "commercially reasonable rate": "The arbitral tribunal may award pre-award and post-award interest at a commercially reasonable rate, compounded annually". Regarding the rate, the proposed formula, although flexible, shifts the determination of an indeterminate standard to the arbitral tribunal, which reduces the predictability sought by the Instrument and may generate additional disputes over the applicable rate—exactly the type of uncertainty that paragraph 560 itself identifies as risky. It should be noted that Option 2 of the same section

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403.	**Section F.2,** **Model Clauses**	See comments above on model clauses for Full Reparation (on interest)	Piero Fortino	Member of CEIA	Spain / Italy
404.	**Section F.2,** **Model Clauses,** **Options 1 and 2; and** **Commentary Paras. 560-562**	Interest on monetary obligations and damages. Section 7.F.2 addresses both interest on overdue monetary obligations and interest on damages. It identifies UPICC Article 7.4.9 as the relevant provision, while Article 7.4.10 separately addresses interest on damages arising from non-performance of non-monetary obligations. These should be distinguished, as different starting points and accrual periods may apply and could otherwise create double counting. From a quantum perspective, the starting point for interest on damages should be consistent with the valuation date and damages calculation. Recommendation: Clarify the applicable accrual period for each category of interest and coordinate	Marian Portero	Member of CEIA	Spain / USA

does adopt a more concrete reference (the sovereign debt rate of the investment's host State), but this choice has the disadvantage of incorporating the sovereign risk of the respondent State itself into the calculation of the interest owed to the injured investor, which is conceptually inconsistent with the objective of compensating for the time value of money and not mutating the role of the arbitral tribunal into the role of an enforcement court (regarding the State's potential non-compliance with the award). Additionally, it should be clarified that reference is made to a rate and not to a yield, both being different concepts; indeed, the rate does not reflect the sovereign risk to which it intends to refer. Regarding the capitalization method, the Model Clause in Section F.2 adopts a concrete position by establishing that interest will be calculated with annual capitalization (compounded annually). However, we consider that this choice deserves to be reviewed, at least with respect to post-award interest. The period that elapses between the date of the award and the date of its payment is a single and continuous time interval: there are no reinvestment sub-periods or progressively accumulating yields, as would occur in the context of an active financial investment. In this context, the annual segmentation of the period with the sole effect of capitalizing interest does not reflect a recognizable economic logic and can produce results that are difficult to justify under the principle of full compensation, whose purpose is to restore, not enrich. Therefore, it is suggested that the Instrument—or failing that, the commentary—clarify that, at least regarding post-award interest, calculation without capitalization (simple interest) constitutes the most appropriate method; this precision would provide greater internal coherence to the Instrument and reduce the risk of the capitalization method becoming an additional source of controversy. Recommendation: It is suggested to: (i) incorporate into the commentary a technical explanation regarding the distinction between pre-award and post-award interest, including their different economic functions and the possibility for the parties to agree on differentiated rates or capitalization methodologies for each period; (ii) replace the reference to a "commercially reasonable rate" with a specific and public reference rate, preferably a rate widely used in international financial markets—for example, the 3-month USD SOFR rate—instead of a standard open to interpretation, which would provide greater ex ante certainty to the parties and reduce the room for controversy regarding the applicable rate before the arbitral tribunal; and (iii) include alternatives indicating that, for post-award interest, the simple rate is the appropriate method, eliminating the reference to compounded annually from the Model Clause or limiting it exclusively to pre-award interest, where it could have greater theoretical justification.

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		interest on damages with the damages valuation to avoid double counting. Include UPICC Article 7.4.10 as a relevant provision and clarify the applicable starting point for interest on damages.			
405.	**Section F.4,** **Commentary para. 570**	"In some jurisdictions, a contractual clause that imposes an agreed payment for non-performance that is unreasonably high may qualify as a penalty because such pre-estimated damages may represent a punishment for breach, rather than a reasonable forecast of damages for the harm caused by the breach..." "U.S. jurisprudence makes clear that a provision in a contract fixing a sum or a procedure for determining a payment in lieu of ordinary breach of contract damages is enforceable if it is reasonable in light of the anticipated or actual loss and proof of actual loss would be difficult at the time the contract was agreed. According to comment b to American Law Institute's Restatement (Second) of Contracts § 356 (1981), "the amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches." The time for assessing the reasonableness of the fixed sum is the time of the making of the contract; "Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss." […] "The traditional English test for determining whether a particular "liquidated damages" clause was in fact an unenforceable penalty clause was whether the fixed sum was a genuine pre-estimate (when judged as at the time of contracting) of the loss that could be caused by breach of the relevant primary obligation.	Piero Fortino	Member of CEIA	Spain / Italy

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		However, in 2015 the U.K. Supreme Court readdressed the approach towards liquidated damages provisions and penalty clauses in Cavendish Square Holding BV v. Makdessi and ParkingEye Ltd v. Beavis (Consumers' Association intervening). In the Cavendish case, the Supreme Court rejected the traditional distinction between a clause aimed at compensating the innocent party, which is enforceable, and one aimed at deterring a breach, which is penal and unenforceable. Instead, the Court's test for a penalty clause focused on whether the contractual remedy for breach would be out of proportion to the innocent party's legitimate interest in enforcing the counterparty's obligations under the contract. The general test can be described as "whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract." If the innocent party was able to "dominate" the breaching party at the time of contracting with respect to the choice of terms, the courts may take that relationship into account in determining the primary objective(s) of the clause at issue. The Supreme Court acknowledged that, where a contract is negotiated between "properly advised parties" of "comparable bargaining power," a strong presumption exists that the parties are the best judges of their terms. The English courts should therefore not generally interfere in such business arrangements. The Court further noted that, for an ordinary damages clause, the injured party's interest will rarely extend beyond compensation for breach. Consequently, the traditional test will usually be adequate to determine the validity of the clause unless a "wider interest" comes into play." Source: https://icca-asil-damages.com/articles/liquidated-damages			

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406.	**Section F.4,** **Model Clause on liquidated damages for failure to meet performance standards**	Agreed payments linked to measurable performance standards. The Model Clause provides an amount for each occurrence of failure to meet a performance standard. This may work for discrete events but is less suited to standards measured over time or by degree of compliance, including sustainability performance commitments. Without a clear measurement framework, parties may disagree about what constitutes an occurrence, when non-compliance occurred, its duration or magnitude, and how the agreed amount should apply. Recommendation: For performance standards subject to agreed payment, including sustainability performance standards where applicable, define, as appropriate, the relevant baseline or starting condition, target or threshold, indicators, measurement period and verification method, and the basis on which an occurrence of non-compliance is determined. Where performance varies by degree or duration, consider graduated amounts or a formula that reflects those dimensions. This would improve consistency with the monitoring framework in Chapter 5 and enhance the clarity and traceability of the mechanism.	Marian Portero	Member of CEIA	Spain / USA
407.	**Section G**	**I. Liability Caps Should Not Shield Serious Misconduct** Contractual liability caps may be appropriate for commercial predictability, but they should not shield fraud, corruption, wilful misconduct, gross negligence, serious environmental or climate-related harm, death or personal injury, material sustainability breaches, or failure to remediate, decommission or safely hand back assets.	KNCCI		Kenyar
408.	**Section G**	The Model Clause on State enterprise liability (whereby the government is expressly excluded from liability, and the investor waives all claims against the government) raises fundamental concerns where the enterprise exercises delegated sovereign authority. The Instrument provides no guidance on whether such waivers may be rendered ineffective under	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

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		piercing-the-veil doctrines or principles of State attribution, creating a gap that will be exploited in disputes. The commentary also fails to address the interaction between contractual limitation of liability and investment treaty standards: where an investor's contractual remedies are limited by an exemption clause, a treaty-based tribunal might treat the inadequacy of contractual remedies as relevant to an expropriation or fair and equitable treatment claim, effectively circumventing the contractual allocation of risk. Recommendation: (a) requiring that any waiver of claims against the government in State enterprise IICs be accompanied by a guarantee or indemnity from the State for obligations that the enterprise cannot independently fulfil; and (b) including commentary guidance on the interaction between contractual exemption clauses and investment treaty standards, particularly regarding the relevance of contractual remedy limitations to treaty-based claims.			
409.	**Section G,** **Model Clauses**	The expression "indirect, incidental, or consequential loss or damage … including loss of profits" may create uncertainty as to whether all lost profits are excluded or only those which fall within the preceding categories. Loss of profits may be the direct consequence of non-performance, particularly where an IIC concerns the operation of an income-generating asset. Paragraph 549's description of lost profits as "sometimes called consequential loss" may reinforce that uncertainty. The Commentary could distinguish the type of loss from its remoteness and invite the parties to state their intended allocation expressly. If only indirect lost profits are to be excluded, the clause could clarify:	Sergey Alekhin	Russian Arbitration Association (ELWI law firm)	Russian Federation

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		"For the purposes of this clause, loss of profits is excluded only to the extent that it constitutes indirect or consequential loss. Direct loss of profits is not excluded by this clause." If all lost profits are to be excluded, this should instead be stated expressly, with an explanation of the interaction with the compensation and termination provisions.			
410.	**Section H**	This approach is consistent with the direction of the UNCITRAL Working Group III discussions on ISDS reform, under which parallel proceedings arising from the same underlying facts may, in appropriate circumstances, give rise to an admissibility objection based on abuse of process. The provision should nevertheless be clarified in two respects. First, the prohibition should be confined to duplicative compensatory recovery for the same loss. It should not inadvertently extend to remedies pursuing a distinct punitive, exemplary, penal or coercive function, such as punitive damages.	Rodrigo Hesse	Member of CEIA	Peru
411.	**Section H**	Second, the provision should define its subjective reach. Abuse may arise not only where the same claimant pursues multiple proceedings based on the same underlying facts, but also where nationality, ownership, control or corporate structures are manipulated to multiply claims or circumvent the agreed allocation of dispute-resolution rights. The clause should therefore address attempts to circumvent the rule through corporate restructuring, assignment, or proceedings brought by shareholders, affiliates or other related entities. This should not affect genuinely distinct claims, independent legal rights or separate losses.	Rodrigo Hesse	Member of CEIA	Peru
412.	**Section H,**	The prohibition of double recovery is appropriate, but the deduction mechanism could distinguish compensation which has actually satisfied the same loss from the existence of an award or an insurance payment.	Sergey Alekhin	Russian Arbitration Association	Russian Federation

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Model Clause	Paragraph 583 refers to compensation "awarded", while the Model Clause also refers to amounts obtained or received. An award which has not been satisfied does not necessarily eliminate the underlying loss. Insurance and guarantee payments may give rise to subrogation or an obligation to repay the insurer from a subsequent recovery. An automatic deduction could therefore reduce the responsible party's liability without producing the intended prevention of double recovery, or prejudice the recovery rights of a subrogated insurer or guarantor. The proposed clarification is: "In preventing double recovery, the adjudicator shall determine whether, and to what extent, the same loss has already been satisfied. The existence of an unsatisfied award does not of itself constitute payment. Insurance and guarantee payments shall be considered together with the applicable rules on collateral benefits, subrogation and repayment, and this clause shall not prejudice the rights of a subrogated insurer or guarantor. The adjudicator may require appropriate disclosure and undertakings concerning subsequent recoveries to prevent satisfaction of the same loss more than once." The Commentary could explain that disclosure of related proceedings remains required, even where no deduction is appropriate at that stage. The corresponding provisions in Section F.1 could use the same test. This would maintain the prohibition on double recovery while avoiding an automatic equation of an award, an insurance indemnity and final satisfaction of the claim.		(ELWI law firm)	
413.	**Section H,** **Principle 27**	We support Principle 27 and consider the disclosure obligation in paragraph 3 of the Model Clause particularly useful, since an adjudicator can apply a	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		no-double-recovery rule effectively only if informed of relevant claims and recoveries in other proceedings. Our principal concern is that the black letter appears narrower than the commentary and Model Clause. The Principle refers to compensation for injury resulting from **"non-performance of the IIC"**, whereas the Model Clause applies to injury arising **"out of or in connection with this Contract"**, irrespective of the legal basis or forum. We consider the latter formulation preferable and more consistent with the purpose of the Principle. **1. The relevant test should be the same injury, not the legal characterisation of the claim** A single measure or event may give rise to contractual, domestic-law and treaty claims. The causes of action may differ, but the economic injury may be the same. The no-double-recovery rule should therefore focus on whether the party has already obtained recovery **for the same injury**, rather than whether the claims have the same legal basis. We suggest that the Principle be framed along the following lines: **A party shall not recover more than once for the same injury arising out of or in connection with the IIC, irrespective of the legal basis or forum of the proceedings in which recovery is sought.** This would also bring the black letter into alignment with the Model Clause. **2. The Principle should address double redress, not only double compensation** The current reference to "compensation" is also potentially too narrow. An IIC may provide, or an adjudicator may order, other forms of relief, including **specific performance, restitution, injunctive relief, liquidated damages and other agreed payments or security arrangements**.		Platform Collective	

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		The Principle should therefore operate as a broader **no-double-recovery/no-double-redress principle**. This does not mean that different remedies should automatically be mutually exclusive. Specific performance, for example, may address an ongoing breach while compensation addresses loss already suffered. The relevant question should remain whether the remedies provide recovery or redress for the **same injury**. **3. The rule should not prevent recovery of distinct or uncompensated loss** The prohibition should not be confused with a prohibition on bringing more than one claim. A party may have legitimate claims arising from the same factual circumstances where they concern **different injuries**, or where an earlier recovery compensated only part of the loss. The Principle should therefore prevent double recovery while allowing recovery of a genuine uncompensated balance. This is particularly important where contractual and treaty remedies coexist. **4. Insurance, guarantees and other prior payments require clarification** We support the requirement that adjudicators be informed of relevant insurance recoveries and other payments. However, a payment under insurance, a guarantee or another security arrangement should not automatically be treated as extinguishing or reducing the underlying claim. The nature and purpose of the payment may differ, and the insurer or security provider may have separate rights of recourse or subrogation. The relevant question should therefore be whether the **same injury has already been finally and effectively recovered**. The Instrument should also make clear that partial recovery does not prevent a party from pursuing the remaining uncompensated loss.			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		5. The relationship with Principle 32 and disclosure should be clear Principle 27 and Principle 32 address different but complementary problems. Principle 32 concerns **whether overlapping claims or proceedings should be permitted or excluded**; Principle 27 addresses the consequences where overlapping claims nevertheless exist. The commentary should make this relationship clear. We support retaining the disclosure requirement in Model Clause paragraph 3 and suggest that it extend, where relevant, to remedies and relief **sought or obtained**, rather than only compensation actually received. This would allow the adjudicator to assess potential duplication of recovery or redress. **Overall observation** The central proposition of Principle 27 should be simple: **One injury should not produce double recovery or double redress, but a party should not be deprived of recovery merely because the same factual circumstances give rise to different legal claims or because an earlier remedy compensated only part of the loss.** We consider that this formulation would better reflect the reality of IICs, where contractual, domestic-law and treaty-based rights may coexist and where multiple forms of contractual and financial protection may operate simultaneously.			
414.	**Section H,** **Principle 27,**	**Insurance and double recovery** The rule against double recovery is sensible. The difficulty lies in treating insurance payments automatically as compensation that must be deducted from damages.	ACCOLDI		Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Model Clause para. 2	Insurance proceeds may carry subrogation, reimbursement or recourse rights. If the tribunal deducts an insurance payment without asking whether the claimant must later repay the insurer, the result can be under-compensation and, in effect, an unintended benefit to the party in breach. A narrower formulation would be: "insurance proceeds constituting a net benefit retained by the claimant, after taking account of any subrogation, reimbursement or recourse rights."			
415.	**Section H,** **Model Clause;** **Commentary para. 584; and** **Principle 15**	Add an explicit cross-reference to the good faith clause in Chapter 2, Section B, and explain that disclosure is a concrete manifestation of that general duty.	Karen Páez	Member of CEIA	Colombia
416.	**Section H,** **Model Clause paras. 2-3; and** **Principle 27**	Amend Principle 27 and paragraph 2 of the Model Clause to include an express reference to "any form of compensation, regardless of its source or form", and clarify that this includes compensation from third parties (partners, contractors), subsidies, or other forms of redress.	Karen Páez	Member of CEIA	Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
CHAPTER 8. CHOICE OF LAW AND DISPUTE SETTLEMENT					
417.	**General comments**	Chapter 8 is moving in the right direction, but it needs to be more sensitive to jurisdictional differences and to what happens at the enforcement stage. Its strongest feature is that it sees investment disputes as an ecosystem: negotiation, mediation, expert determination, dispute boards, arbitration, treaty interaction, transparency and counterclaims all appear in the same architecture. The difficulty is that several Model Clauses appear to assume that consent, jurisdiction, applicable law and waiver can be solved by drafting the contract alone. They cannot. An investment contract operates alongside mandatory domestic public law, the applicable arbitral framework, the lex arbitri in non-ICSID cases, investment treaties, jurisdictional conventions and enforcement law. Before adoption, I would put six changes at the top of the list: 1.**Recast Model Clause A** to include a residual domestic governing law. 2.**Create separate arbitration clauses for ICSID Convention, ICC/other institutional arbitration and UNCITRAL ad hoc arbitration.** 3.**Substantially rewrite Principle 32 and the treaty-waiver Model Clauses**, particularly Options 1 – 3. 4.**Qualify Principle 33 and its Model Clause** so counterclaim jurisdiction remains subject to the selected arbitral framework. 5.**Replace the current transparency/confidentiality treatment with a public-interest default plus protected-information exceptions.**	ACCOLDI		Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		6.**Add an entirely new section on recognition, enforcement and sovereign immunity.** Those changes would make the Draft more reliable where it ultimately matters: not simply when the contract is signed, but ten or fifteen years later, when a regulatory measure, termination, expropriation, sustainability breach or financial crisis tests the dispute-resolution architecture before a tribunal. [*Secretariat: these suggestions are further developed in specific comments below*]			
418.	**General comments**	**B. Domestic Law Should Remain Central** The host State's domestic law should remain the primary legal framework governing the investment contract, unless the parties lawfully agree otherwise. International contractual principles should complement rather than displace constitutional and statutory requirements.	KNCCI		Kenya
419.	**General comments**	The draft does not appear to expressly provide and specify the legal status and interpretative weight of the Commentary -specially whether the text is legally binding, if it creates contractual obligations, or as an interpretative authority regarding the principles, or if the incorporation of the Principles automatically incorporate the Commentary- when the Principles are chosen as the applicable law. In fact, the structure of the draft suggests the opposite: it distinguishes between the Principles, which contain the normative rules, and the Commentary, which explains and guides their application. This can be problematic for the actual application of the principles in a dispute scenario, given that without the commentary several aspects of the principles can become confusing and ambiguous.	Ian Signori Gorriti	Member of CEIA	Peru

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
420.	**General comments**	As a general comment on this section, could there be a form of mitigation of the high costs of investment arbitration? The guide proposes a great multi-level mechanism to deescalate conflicts before resorting to arbitration, but it is still a very expensive proceeding, especially for the developing/least developed States. Moreover, these costs are one of the reasons many countries have denounced ISDS.	Mariana Names Bettiol	Academic, Federal University of Rio Grande do Sul	Brazil
421.	**General Comments**	**Third-party funding.** The Instrument should clarify whether third-party funding is contemplated in proceedings arising from an IIC and, if so, whether the parties should address disclosure of funding arrangements, the identity of funders and conflicts of interest. The issue is particularly relevant to arbitrator independence and potential security-for-costs applications. The dispute-resolution framework could also consider whether mechanisms for the early dismissal of manifestly unfounded or frivolous claims are appropriate. If included, the threshold should be sufficiently clear to prevent legitimate claims from being prematurely excluded while enabling tribunals to address claims which plainly lack a sustainable basis. **Costs.** The Instrument should also address the allocation of costs arising from contractual dispute resolution. Parties should be encouraged to consider in advance whether costs are to follow the event, be allocated according to the parties' respective conduct or be determined by the tribunal having regard to specified factors. Clear treatment of costs may itself influence the manner in which claims and settlement discussions are pursued. **Procedural architecture and tribunal constitution.** Where arbitration is selected, the Model Clause should encourage parties to address the procedural framework governing the arbitration, including the applicable institutional or ad hoc rules, transparency of proceedings where appropriate, appointment and selection of arbitrators, disclosure and management of conflicts of interest, and applicable standards of independence and	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		impartiality. These matters can materially affect the legitimacy, cost and efficiency of contractual dispute resolution and should not be left entirely to implication. Where third-party funding is permitted, the parties should also consider appropriate disclosure requirements and their interaction with arbitrator independence and conflicts of interest. **Severability and non-arbitrability.** The Instrument should also recognise the principle of severability of arbitration agreements, such that the validity of an arbitration agreement is not necessarily affected by the invalidity or termination of the underlying contract. Parties should also be encouraged to consider, at the drafting stage, any categories of disputes that may be non-arbitrable under applicable law and to address their treatment within the dispute-resolution framework. **Consolidation of disputes.** Given that a single investment may give rise to multiple related contractual disputes involving the same or different parties, the Instrument should also encourage parties to consider whether their dispute-resolution arrangements should permit consolidation of related proceedings, where appropriate. Clear provisions addressing consent, tribunal constitution and the circumstances in which consolidation may occur could reduce duplication, inconsistent determinations and unnecessary cost. **Interim and final determinations.** The parties may also wish to consider whether the dispute-resolution framework should permit interim or preliminary reports where an adjudicative body identifies non-compliance or requires further action before issuing a final determination. Where appropriate, the framework could provide for temporary remedial measures or a period for compliance before final relief is determined. Such mechanisms may assist in preserving the investment and reducing the need for			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		immediate final remedies where the underlying problem remains capable of being corrected. **Preliminary determinations.** The Instrument could also identify preliminary rulings or determinations as an optional procedural mechanism where an early determination of a discrete question may assist in narrowing the issues in dispute or avoiding unnecessary proceedings. The Commentary could indicate the circumstances in which such a mechanism may be particularly useful, while leaving its adoption to the parties. **Conduct of adjudicators and mediators.** Where the parties provide for arbitration or mediation, the Instrument should encourage them to identify the applicable standards of independence, impartiality, disclosure and professional conduct. Consideration could also be given to incorporating, through an annex or by reference, a code of conduct applicable to arbitrators and mediators. This would provide greater predictability concerning conflicts of interest and procedural integrity without requiring the substantive Principles themselves to contain a detailed procedural code. **Dialogue and cooperation.** The EU Model Clauses also reinforce the importance of dialogue and cooperation in implementing sustainable investment commitments. We suggest that the Instrument adopt a similar approach. Sustainability obligations should not be conceived solely as unilateral obligations imposed upon the investor, but as commitments whose effective implementation may require continuing cooperation, information-sharing and engagement between the parties and, where appropriate, relevant stakeholders.			
422.	**General comments; and**	Throughout Chapter 8 (mediation, expert proceedings, dispute boards, and the arbitration forum, including Principle 31 and the accompanying footnotes and Model Clauses), the worked examples and footnoted references consistently name ICC-administered mechanisms and ICC model	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Chapter 8	instruments in detail (e.g., the ICC International Centre for ADR for mediation and experts, the 2015 ICC Dispute Board Rules, and the ICC's own recommended arbitration clause), while other major arbitral institutions with experience administering IICs and investor-State disputes are referred to only generically ("several institutions", "various international and regional arbitration institutions") without comparable elaboration or citation. Given that this Instrument is presented as neutral, internationally harmonised guidance jointly developed by UNIDROIT and the ICC's Institute of World Business Law, we respectfully suggest that the Working Group review the dispute settlement chapter as a whole to ensure a more balanced and representative treatment of the range of institutions parties may choose from, including by adding illustrative references to other institutions' comparable rules and model clauses alongside the ICC's.			
423.	**Section B,** **Principle 28;** **Model clauses A and B;** **Chapter 8.A; and** **Commentary paras. 589-603**	The Instrument makes no reference to digital assets, tokenisation or distributed ledger technology, and none to the UNIDROIT Principles on Digital Assets and Private Law (2023). That is understandable, since the Instrument is not about digital assets. I raise it because paragraph 83 of the Introduction sets out the aim of keeping the Instrument future-proof, noting that the landscape is not static and that new sectors, new technologies and new regulatory frameworks continue to emerge. This is one of the places where that aim can be served at almost no cost. The gap is structural rather than a matter of coverage. Principle 28 confers party autonomy over the law applicable to the contract, and paragraph 589 describes the reach of that law in contractual terms. A choice-of-law clause binds the parties to the contract that contains it. Proprietary questions are not like that. They are addressed to the world, and above all to the third party who acquires, lends against or attaches an asset without ever having seen the contract. Party autonomy has never been the natural answer to a proprietary question, and Principle 28 cannot reach one. Principle 5(1) of the 2023 Principles is built for that difficulty. Proprietary issues in respect of a digital asset are governed	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		by 'the domestic law of the State expressly specified in the digital asset'; failing that, by the law 'expressly specified in the system on which the digital asset is recorded'; failing that, where there is an issuer whose statutory seat is 'readily ascertainable by the public', by the law of that seat. Principle 5(2)(c) adds that 'by transferring, acquiring, or otherwise dealing with a digital asset a person consents to the law applicable' under those sub-paragraphs. The designation is carried in the asset and in the system, so it reaches the third party in a way a contractual clause cannot. It is an asset-facing rule, and it works independently of the parties' choice under Principle 28. Two features are worth flagging. The residual step in Principle 5(1)(d) was adopted in two versions, Option A and Option B, and in both the last reference is to the private international law rules of the forum, so divergence survives at the point where a cross-border project is most exposed. That is a reason to secure the designation under sub-paragraphs (a) and (b). And Commentary 5.4 gives the reason with welcome directness: the usual connecting factors 'usually have no useful role to play' here, and adopting them 'would be incoherent and futile' because digital assets 'are intangibles that have no physical situs'. There is a further consequence for Chapter 8 as a whole. The chapter assumes that the forum the parties choose will be able to give effect to the rights the contract creates. That holds where a proprietary right is perfected by registration, possession or the involvement of an intermediary, each of which puts the right somewhere. It weakens where a right is perfected by control, because control can be exercised from anywhere, while realisation needs a forum, an order, and a person able to comply with it. Perfection travels with the asset; enforcement does not. The risk for this Instrument is narrow and real. Parties reading Model Clause B will assume that a choice of the law of the host State, interpreted and supplemented by this Instrument, settles everything their project throws up. Where any part of the investment or its security package is held, transferred or pledged in tokenised form, it does not settle the proprietary questions,			

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		and no amount of contractual drafting will make it do so. Suggestion: one sentence in the Commentary to Principle 28 cross-referring to the 2023 Principles, and, in the introduction to Chapter 8, a sentence recording that the usefulness of the chosen forum depends on where the assets are and what law governs them. Both cost nothing and make visible a coherence between two UNIDROIT instruments that the reader currently has to discover unaided. On the private international law of digital assets and the limits of party autonomy here I may refer to C. Santaolalla Montoya, 'The challenges of blockchain arbitration from a private international law perspective' (2025) 30(3) Uniform Law Review 398, doi:10.1093/ulr/unaf035.			
424.	**Section B**	Model Clause A designates this Instrument as the governing law of the contract, but then refers matters falling outside its scope to the applicable conflict-of-laws rules. I would question whether that is the most appropriate technique for investment arbitration. Rather than referring the tribunal to a predetermined conflicts methodology, the clause should give the arbitral tribunal discretion to determine the rules of law applicable to the dispute, subject to overriding mandatory rules and the parties' reasonable expectations. This approach would provide a more flexible framework for investment arbitration. It could also be viewed in light of considerations associated with the economic analysis of law, particularly the possible relevance of efficiency, predictability, transaction costs and the parties' incentives in selecting the applicable legal framework. The point may also be connected, cautiously, with discussions in some Hague Academy courses concerning the possible influence of economic analysis of law on flexible choice-of-law methodologies. Model Clause A should not, however, be presented as suitable for commercial arbitrations arising out of the investment contract. Treating a soft-law model	Rodrigo Hesse	Member of CEIA	Peru

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		contract as a floating governing law is not workable in that context and may create uncertainty concerning matters not addressed by the Instrument. Commercial arbitration should instead remain subject to a conventional determination of the governing law, with this Instrument, if relevant, serving only a supplementary or interpretive function.			
425.	**Sections B and C**	**Sections B and C – Host-State governing law and seat of arbitration.** It was suggested to make the law of the host State and a seat of arbitration in the host State the default solutions in the Model Clauses rather than presenting them as alternatives of equal weight with other options. Reference was made to Brazilian practice, where the large majority of contract-based arbitrations involving public entities apply Brazilian law and are seated in Brazil.	Comment made during Latin American States' Representatives Roundtable		Brazil
426.	**Section B,** **Principle 28**	**Scope of party autonomy** Principle 28 currently reads: "An IIC is governed by the rules of law chosen by the parties." The commentary recognises mandatory rules, public policy and limits on the choice of non-State rules. Some of that qualification belongs in the black-letter text itself. That is particularly true in investment contracts. A State entity's authority to select foreign law or non-State rules may itself be constrained by mandatory domestic public law. Party autonomy here is not quite the same as party autonomy in an ordinary commercial contract. A possible formulation is:	ACCOLDI		Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		"An IIC is governed by the rules of law validly chosen by the parties, subject to applicable mandatory rules and to any limitations governing the authority or capacity of the State party to make such choice."			
427.	**Section B,** **Principle 28**	Principle 28 fails to address the central practical problem of choosing this Instrument as the governing law: in judicial proceedings before domestic courts (which remain the dispute resolution forum in a significant number of IICs) most jurisdictions do not recognise the choice of non-State rules of law as governing law. The commentary acknowledges this limitation (para. 590) but offers only the suggestion that parties may 'incorporate' the Instrument 'by reference as contractual terms'. This mechanism is inadequately developed: incorporation by reference of an entire 185-page instrument raises serious questions about the hierarchy between incorporated provisions and the otherwise applicable domestic law, the treatment of provisions that are internally characterised as 'Principles' versus 'Model Clauses', and the enforceability of incorporated provisions that conflict with mandatory rules. The Instrument assumes an arbitral setting and provides insufficient guidance for the substantial number of IICs that will be subject to domestic court jurisdiction. Furthermore, the commentary's treatment of supervening mandatory legislation is evasive. It acknowledges that mandatory rules will override the Instrument's provisions but does not address whether such override triggers the renegotiation mechanism under Chapter 6 (a question that will arise in virtually every IIC where the host State enacts new legislation affecting the investment). Recommendation: (a) developing a dedicated Model Clause for judicial-forum IICs that specifies the incorporation mechanism, the hierarchy between incorporated provisions and domestic law, and the consequences of conflict; (b) expressly providing that the enactment of supervening mandatory legislation that materially alters the rights or obligations under the	Marco Alejandro Plaza Huélamo	Member of CEIA	Spain

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Instrument constitutes a relevant 'measure' for purposes of the economic equilibrium clause in Principle 23(2); and (c) including a practical guidance note on the evidentiary and procedural steps for invoking the Instrument's corroborative function before domestic courts, including model submissions or expert opinion frameworks.			
428.	**Section B,** **Principle 28**	Principle 28 should expressly clarify that the parties' choice of "rules of law" or law applicable to the contract, may include the IIC Principles that contain as integral and (in some cases) inseparable part the UNIDROIT Principles of International Commercial Contracts 2016, as part of the chosen or supplementary legal framework. The whole text of the commentary of principle 28 mentions that the IIC Principles "include", "refers" and "incorporates" the UPICCs and even a few of the explanations (E.g., paragraph 597) jump to the UPICCs as justification of said commentary, as it was an integral part and indivisible of the IIC Principles. These phrasing gives the impression that the UPICC automatically or mandatorily apply whenever the UNIDROIT–IIC Principles are chosen. Such an approach could be inconsistent with the principle of party autonomy and could create uncertainty regarding the intended hierarchy between the selected rules, any applicable national law, and supplementary principles. Having in mind that the whole text of the IIC principles´ commentary, gives the firm impression (and signals it textually in some parts) that the use and application of the UPICC is mandatory when the IIC Principles are used; a point to be considered here is how to preserve the party autonomy and party consent, regarding the choose of law. In this regard, if the intent is to preserve party autonomy over the need for the UPICC to be applied, a preferable approach might be to include optional wording clarifying that the UPICC may apply as supplementary rules where the parties so provide, or	Ian Signori Gorriti	Member of CEIA	Peru

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		where appropriate under the interpretive framework of the contract, without making their application mandatory in all cases. If by the contrary the intent of the IIC Principles is that the UPICC must be applicable as an integral and indivisible part of them, given the integral part that the UPICC (or at least some of those principles) play into the IIC Principles scheme, those necessary principles (of the UPICC) should be included in the IIC Principles text literally if their relevance is such that their exclusion would render helpless, ineffective or inapplicable an IIC Principles by itself, or make the goal for the creation of these principles irrelevant. This clarification would better inform parties of the legal consequences of their choice, reduce uncertainty in future disputes, and preserve party autonomy by allowing the parties to exclude or limit the application of the UPICC if that reflects their intention. The wording proposed unifies and harmonizes the requirements of the IIC principles, the principles of party intent and party autonomy, the need for clarified regulation, and the text and intention stablished in the IIC Principles draft commentary, including the exclusion or modification provisions in Principle 2, as stated in paragraph 113. Proposed wording: "An IIC is governed by the rules of law chosen by the parties; including national law, the IIC Principles of International Investment Contracts [year], or other rules of law agreed by the parties. Where the parties choose the IIC Principles, such choice shall include and entails the mandatory application the UNIDROIT Principles of International Commercial Contracts 2016 as an integral part of the applicable or supplementary legal framework, unless this Instrument expressly provides otherwise or where the parties expressly exclude or modify their application." The proposed wording clarifies and stablishes the mandatory nature of the UPICC but expressly allows the parties to exclude or modify this or parts of			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		the UPICC according to their will, allowing to preserve party autonomy and consent, while maintaining the UPICC vital contributions to the IIC Principles.			
429.	**Section B,** **Principle 28**	B. Choice of law Principle 28 Scope of party autonomy "An IIC is governed by the rules of law chosen by the parties." While Principle 28 is self-explanatory in relying on "party autonomy", beyond the brief notes (par. 597/599) of the Commentary, Principle 28 should make clear the existing limits to choice. A suggested new draft Principle 28: "An IIC is governed by the rules of law chosen by the parties, including the UPIIC where the relevant rules of private international law allow a choice of non-State rules. The choice of rules of law does not exclude applicable mandatory and overriding rules (whether of national, international or supranational origin)." While Principle 28 concerns only cases where the parties reached an agreement upon such rules of law. An additional Principle 29 should be added and define how the governing law or rules is/are to be determined "by default" in cases where the parties failed to agree. A suggested new draft Principle 29: "In the absence of such agreement, an IIC is governed by the law of the Contracting State party to the dispute and such rules of international law as may be applicable". This suggested Principle 29: i) retains the well-known ICSID Convention Art. 42; ii) adapts and simplifies it by excluding the "renvoi" mechanism ("including its rules on the conflict of laws").	Guido Carducci	Member of CEIA	Italy

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
430.	**Section B,** **Principle 28**	**Choice of non-State rules.** Principle 28 appropriately recognises party autonomy in the choice of law for an IIC, including the possible use of non-State rules. The effectiveness of such a choice depends on the procedural setting and the law of the forum. Some legal systems permit arbitrators to apply 'rules of law' chosen by the parties, while domestic courts may require selection of a national law and treat non-State rules only as incorporated contractual terms. **Existing treatment in the draft.** The June 2026 draft already addresses important limits. Its commentary explains restrictions on choosing non-State rules and the incorporation alternative (p. 168, para. 586), while the commentary to Model Clause A addresses mandatory rules and differences between arbitration and domestic courts (pp. 170-171, paras 597-599). The recommendation should therefore be framed as a request for consolidation and additional practical guidance, not as an assertion that enforcement-stage limitations are omitted. **Recommended clarification.** The final commentary should provide a compact decision path: (i) determine whether the chosen forum recognises a direct choice of non-State rules; (ii) if not, select a national law and incorporate the Instrument contractually; (iii) identify mandatory and overriding mandatory rules that remain applicable; and (iv) address public policy and enforcement risks. A Model Clause should state whether the Instrument governs directly as rules of law, is incorporated as contractual terms, or supplements a designated national law. ***Key References.*** *Official June 2026 UNIDROIT-ICC consultation draft, p. 168, para. 586, and pp. 170-171, paras 597-599; HCCH Principles on Choice of Law in International Commercial Contracts (2015), Article 3 and commentary.*	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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431.	**Section B,** **Principle 28**	We acknowledge that Principle 28 recognises the parties' choice of governing rules, while paragraph 590 acknowledges differences between litigation and arbitration concerning non-State law. From that, *lex voluntatis* fully operates within a framework recognising its legal effects. Model Clause A remains appropriate where parties deliberately select transnational governing rules and the applicable framework permits that choice. Model Clause B is therefore potentially favoured across more settings because it clearly identifies domestic governing law. However, a court or tribunal shall determine whether the parties have authorised interpretation, contractual incorporation or permissible displacement of non-mandatory provisions. These functions should not be treated as equivalent. (Paragraphs 139–142 of the first session report emphasise clarity when domestic and international sources are combined and distinguishes the different uses of the UPICC. In a similar fashion, paragraphs 203–204 and 214 of sixth session report address the relationship between sources of law and the need for practical guidance.) These discussions suggest a development in the understanding of choice-of-law clauses: beyond selecting a legal system, they can organise the functions of diverse recognised sources. Further, Model Clause B provides a politically acceptable compromise for States that mandate domestic governing law.	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam
432.	**Section B,** **Principle 28**	We support the statement of party autonomy in Principle 28 and the use of the expression "rules of law". Our principal concern, however, is that the Principle presently adds little to the well-established proposition that parties may choose the rules of law governing their contract. The more important question for this Instrument is **what role the Instrument itself should play within the legal framework of an IIC**.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		In our view, the Instrument should not be presented primarily as a substitute for the body of law otherwise applicable to an IIC. Its principal function should be to **supplement and assist the application of a chosen governing law**, particularly by providing guidance on matters specific to international investment contracts. This is consistent with the Instrument's treatment elsewhere, including Principle 2(5) and Model Clause B. **1. Principle 28 should explain the role of the Instrument.** Principle 28 presently provides that an IIC is governed by the rules of law chosen by the parties, but does not explain what the parties should choose or how the Instrument relates to that choice. Paragraph 591 advises parties to agree on the applicable law in advance and records that IICs "typically designate the law of the host State as the applicable rules of law, either exclusively or in conjunction with other rules". We suggest that the Principle should expressly recognise that the governing law of an IIC should ordinarily be a **complete and sufficiently developed body of law**, such as the domestic law of the host State, while the Instrument should operate in aid of that law rather than in substitution for it. This is important because the Instrument itself recognises several limitations on its suitability as a standalone governing law. First, **the Instrument is not a complete body of law**. Paragraph 595 acknowledges that the Principles apply only to matters within their scope and that matters outside both the Instrument and the UPICC will need to be governed by other legal sources. Second, **the Instrument is not entirely normative in character**. Introduction paragraph 84 records that the Principles may be normative or descriptive. Some provisions are also expressed in advisory terms. For			

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		example, Principle 5 provides that parties "may wish to consider" the interdependence of connected contracts; Principle 12 that they "may wish to include wording" concerning legal capacity; and Principle 13 that they "may wish to insert a clause" concerning the contractual record. It is not clear what legal effect an adjudicator applying the Instrument as governing law is expected to give to provisions framed in this manner. Third, **the Instrument is new and its application will initially be relatively untested**. Paragraph 594 refers to the predictability and balance of Model Clause A. Predictability in the application of a body of contractual law ordinarily develops through interpretation and accumulated practice. The UPICC has an established body of commentary and decisions; this Instrument does not yet have that experience. This is not a criticism of the Instrument, but it is relevant when considering whether it should be encouraged as the sole governing law of long-term IICs. For these reasons, we suggest that Principle 28 should identify the **supplementary function of the Instrument** as part of its guidance on applicable law. **2. The Instrument should operate in aid of the chosen governing law.** The corollary is that the Instrument is particularly well suited to the function contemplated by Principle 2(5) and given effect by Model Clause B: the interpretation and supplementation of a chosen domestic law. In that role, the chosen law remains the principal governing framework, while the Instrument provides additional guidance on matters within its scope and specific to international investment contracts. Matters outside the scope of the Instrument remain governed by the chosen law, avoiding the gap identified in paragraph 595.			

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		This approach also reduces the difficulties identified in paragraph 590 concerning the recognition of non-State rules of law before domestic courts. We therefore suggest that the **supplementary role of the Instrument be stated expressly in Principle 28**, rather than left to be inferred from the Model Clauses. **4. Model Clause A should be reconsidered; Model Clause B better reflects the Instrument's supplementary function.** Model Clause A provides simply: "This Contract shall be governed by the UNIDROIT–ICC Principles of International Investment Contracts." In our view, a clause in those terms should not be presented without qualification. It leaves unresolved the law applicable to matters outside the scope of the Instrument, raises the recognition issues identified in paragraph 590, and gives insufficient prominence to the fact that some provisions of the Instrument are advisory or descriptive rather than prescriptive. Model Clause B, by contrast, gives effect to the function for which the Instrument appears particularly well suited: **interpretation and supplementation of a specified governing law**. It preserves a complete governing legal framework while allowing the Instrument to address matters specific to international investment contracts. We therefore suggest that **Model Clause A be deleted and Model Clause B retained**. **5. Principle 28 should also be reconciled with Principle 2(3).**			

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		Paragraph 592 provides that, in the absence of a choice, the applicable law will be determined pursuant to the applicable conflict-of-laws rules. That is consistent with the approach described above. It sits less comfortably, however, with Principle 2(3), under which the Principles "may be applied where appropriate when the parties have not chosen any law to govern their contract". Chapter 1 therefore contemplates application of the Instrument in the absence of a choice, while Chapter 8 provides that the applicable law is determined through conflict-of-laws rules without explaining how those rules would lead to application of the Instrument. We have addressed this issue in our comments on Principle 2 and suggest that the two provisions be expressly reconciled. **Overall, Principle 28 should do more than restate party autonomy. Its distinctive contribution should be to guide parties on the place of the Instrument within the legal architecture of an IIC. In our view, that place should ordinarily be supplementary: the chosen governing law provides the underlying legal framework, while the Instrument supplies investment-specific guidance, interpretation and supplementation within its scope.**			
433.	**Section B,** **Principle 28; and** **Section C**	3. EXTENSION OF THE ARBITRATION AGREEMENT TO NON-SIGNATORIES The PIICs rightly encourage the inclusion of identical arbitration clauses across a project's contractual network, to facilitate consolidation, but do not squarely address consent to arbitration by non-signatories (joinder or extension to parent companies, lenders, or affiliates).[80] This is not a marginal drafting question: the law governing the arbitration agreement —	EAPIL		

[80] G. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021); *ICCA's Guide to the Inter- pretation of the 1958 New York Convention*, 2011.

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		which may differ from the law governing the contract[81] — is itself contested as between the *lex contractus*, the law of the seat, and an autonomous conflicts analysis, and different jurisdictions apply divergent tests (e.g. the 'group of companies' doctrine[82]) to determine whether a non-signatory is bound.[83] We submit that the PIICs should flag this as a distinct choice of law question in its own right, and recommend, as a matter of practice, express written consent by all relevant non-signatories (as the draft's own suggested clause already does) rather than reliance on doctrines whose cross-border recognition remains uncertain. The point can be put more sharply, because the draft already provides the drafting slot. Each of the model arbitration clauses in Chapter 8, Section C invites the parties to complete the line 'The law governing the arbitration agreement shall be [···]' . The Commentary nowhere explains why that line matters, what follows if the parties leave it blank, or how the default answer differs from one seat to another. Of all the questions in Chapter 8, this is the one where silence is most costly, because it is resolved by national courts at			

[81] R. Nazzini, 'The law applicable to the arbitration agreement: towards transnational principles', [2016] Interna- tional and Comparative Law Quarterly 681 ff.; K.P. Berger, 'Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?' in A.J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* ICCA Congress Series No 13 (Montreal 2006), 2007, 301, 303-306; P. Bernardini, 'Arbitration Clause: Achieving Effectiveness in the Law Applicable to the Arbitration Clause' in A.J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No 9 (Paris 1998), 1999, 197 ff.; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, paras 357-358; *Sumitomo Heavy Industries v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45; *Sonatrach Petroleum Corp v Ferrell International Ltd* [2002] 1 All ER (Comm) 627; A. Trukhtanov, 'The Proper Law of Arbitration Agreement – a Farewell to Implied Choice?' [2012] 15 International Arbitration Law Review 140 ff.; M. Blessing, 'Choice of Substantive Law in International Arbitration' [1997] 14 Journal of International Arbitration 39 ff.; *Sulamérica Cia. Nacional De Seguros and others v. Enesa Engenharia and others*, [2012] EWHC 42; *Enka Insaat Ve Sanayi AS v. OOO Insurance Co Chubb* [2020] UKSC 38, parr. 128-170.

[82] P. Ferrario, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?' [2009] 26 Journal of International Arbitration 647 ff.; *Dow Chemical France v. Isover Saint Gobain*, ICC Case No. 4131, Interim Award, 23 September 1982, in Yearbook of Commercial Arbitration, Vol. IX (1984) 131 ff.; also in Journal du droit international (Clunet), 1983, 899 ff., with note Y. Derains, 905 ff.

[83] E. Gaillard, L*egal Theory of International Arbitration* (Leiden 2010), passim.

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		the annulment and enforcement stage, rather than by the arbitral tribunal, as the contracting parties may have intended. National solutions have recently diverged further rather than converged. Section 6A of the English Arbitration Act 1996, introduced through the Arbitration Act 2025, now provides that the law applicable to the arbitration agreement is the law expressly agreed upon by the parties, failing which the law of the seat of arbitration should apply. Section 6A further clarifies that the governing law chosen for the underlying contract of which the arbitration agreement forms a part does not constitute express agreement that the same law also applies to the arbitration agreement.[84] That rule departs from the approach of the UK Supreme Court in *Enka v Chubb*.[85] It is expressly disapplied to arbitration agreements arising from standing offers in treaties or in non-United Kingdom legislation, which means that it applies squarely to the contract-based arbitration the PIICs contemplate. Art. V(1)(a) of the New York Convention points to the law of the seat only in default of a choice by the parties. A short Commentary paragraph explaining what is at stake and recommending that the parties complete the line rather than leave it blank would add real value at very little drafting cost. **Recommendation 5: Extension of arbitration agreement to non-signatories** *The PIICs should flag the extension of arbitration agreement to non-signatories as a distinct choice of law question in its own right, and recommend, as a matter of practice, express written consent by all relevant*			

84 Arbitration Act 2025 (c. 4), s. 1, inserting s. 6A into the Arbitration Act 1996; Royal Assent 24 February 2025, in force 1 August 2025.

85 *Enka Insaat ve SanayiAS v. OOO Insurance Co Chubb* [2020] UKSC 38.

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		non-signatories (as the draft's own suggested clause already does) rather than reliance on unevenly recognized doctrines. 4. ASSIGNMENT, STEP-IN RIGHTS, AND SUCCESSION The commentary on assignment (paras. 501-503) should specify which law governs the effects of assignment on third parties[86] — a question that conflicts rules typically treat separately from the law governing the assigned claim itself as between assignor and assignee (compare Art. 14 of the Rome I Regulation[87] and the unresolved debate that preceded the 2022 EU proposal on third-party effects of assignments of claims[88]). It should equally clarify whether, and under what law, an assignee — in particular a syndicate of lenders exercising step-in rights across several jurisdictions — is bound by the dispute resolution clause of the original contract. There is also an internal gap that may have gone unnoticed. Paragraph 503 of the draft states that situations in which the investor wishes to assign a claim against the State party to a third party 'will be addressed in Chapter 8 of this Instrument'. Chapter 8 does not address them. Neither Principle 28 nor the Commentary on choice of law mention the assignment of claims, and Section C touches the point only obliquely, through the anti-circumvention language in the Model Clause on waivers. We invite the Working Group either to complete the cross-reference or to remove it. If it is completed, three questions deserve separate treatment, because rules of private international law treat them separately:			

[86] CJEU, C-548/18, *BGL BNP Paribas SA v. Team Bank AG Nürnberg*, 2019.

[87] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[88] Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM/2018/096 final – 2018/044 (COD); European Parliament, Legislative Resolution of 13 February 2019 on the Commission proposal COM(2018) 96; S. V. Bazinas, 'The law applicable to third-party effects of assignments of claims: the UN Convention and the EU Commission Proposal compared' [2019] 24 Unif. L. Rev. 609 ff.

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		• First, the assignability of the claim and the relationship between assignor and assignee, normally governed by the law applicable to the assigned claim. • Second, the effects of the assignment against third parties, for which no widely accepted rule currently exists. • Third, whether the assignee may invoke, and is bound by, the dispute resolution clause contained in the IIC. The third question is of practical importance in project finance, where a syndicate of lenders may take security over receivables arising under contracts governed by several different laws. A related caveat belongs to paragraph 502. The proposal that non-assignment clauses be given full effect in IICs, adjusting Art. 9.1.9 of the UPICC, holds as between the parties. It does not hold against an insolvency practitioner, whose power to dispose of the estate is not constrained by the debtor's contractual undertakings in the same way. The Commentary should not leave parties to assume otherwise.[89] **Recommendation 6: Assignment, step-in rights and succession** *a) The Commentary on assignment (paras. 501-503) should specify which law governs the effects of assignment on third parties separately from the law governing the assigned claim itself, as well as whether, and under what law, an assignee is bound by the dispute resolution clause of the original contract.* *b) The cross references in Paragraph 503 of the draft to the assignment of investor claims against the State in Chapter 8 should either be added, or the reference should be removed. If maintained, the provisions should cover*			

[89] Section on Case C-548/18 BGL BNP Paribas and COM (2018) 96 final (cf.).

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		separately, the relationship between the assignor and assignee governed by the law of the assignment the effects of the assignment on third parties, and the ability of the assignee to invoke the IIC's dispute resolution clause. The commentary should expressly distinguish between the full effects of the assignment to its parties and to the insolvency practitioner, who is not bound by such limitations.			
434.	**Section B,** **Principle 28;** **Commentary paras. 50, 52, 590, 591, 597; and** **Chapter 2, Principle 8**	The document touches on the internationalisation of contracts (paras 50-51) between States and foreign investors, noting that the Principles do not subject contractual relationship to public international law. The Principles preserve party autonomy in choosing the governing law of the contract (e.g. host State law, non-State rules, etc.). Where parties adopt the IICs principles, per article 1.4 UPICC, this choice does not override mandatory rules. Para 590 highlights that such mandatory rules can also be international in nature, a point directly relevant to host State's international obligations arising from international investment law treaties. To strengthen the Principle's effectiveness in the investment contract context, the implications of internationalisation of contracts should not be circumvented. There seems to be a tension between on the one hand rejecting the internationalisation of the IIC (para 51), and on the other hand accepting that certain mandatory provisions of international law origin have to be applied (Article 1.4.). Examples of these mandatory rules of international law would be very useful to understand the concrete implications and limitations of choosing investment contracts instead of investment treaties to regulate the behaviour of host States and foreign investors. We recommend the commentary be expanded to: **On party autonomy and freedom of contract:**	Felipe de Andrade PhD Fellow of the Research Foundation Flanders (FWO), PhD researcher at the University of Antwerp and KU Leuven Nathan Willems PhD researcher, Institute of Private International Law, KU Leuven		Belgium

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		1. Provide concrete examples of investment law/contract drafting interaction, specifying whether particular rules function as default rules, sticky defaults, or mandatory terms (see Arato 2016). Such examples can also be mentioned as a commentary to Principle 8. 2. Build up para 590's existing discussion on party autonomy – the scope of matters governed by chosen law, formality requirements choice of law and public policy limitations – with examples specific to investment contracts. **On overriding mandatory rules:** 3. Clarify how art. 1.4 UPICC identifies overriding mandatory nature of rules, and whether it adopts, due to its transnational character, a more restrained approach on the determination of mandatory rules, which may construe mandatory rules more broadly. 4. Para 52 explains different standards of applicability of mandatory rules in arbitration and judicial settings. According to the text, the choice of IIC as the governing law does not restrict the application of mandatory rules under applicable rules of private international law. In arbitration contexts, this application is restricted to mandatory rules of overriding nature. The paragraphs explaining Principle 28 are less systematic in the application of these two concepts, often just referring to "mandatory rules". To improve clarity, it would be better if they consistently refer to overriding mandatory rules, to emphasise that only a specific category of mandatory rules can override the law chosen by the parties **On choice of law**:			

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		5. Footnote 46 of paragraph mentions the possibility of dépeçage in the IIC. For clarification purposes, this term should be put in the body of the main text. 6. In arbitration, it is generally considered possible that the arbitrator settles the dispute *ex aequo et bono* (see e.g., Article 28(3) Model Law). This possibility is excluded by Principle 28 UPICC since it refers to "rules of law". Is this a conscious rejection? 7. As for the possibility of having non-state law applied: now the principles are rather descriptive ("it depends on the circumstances"). A more positive approach "parties can refer to non-state law unless excluded by the applicable conflict of law rules" would be useful. This would emphasise that e.g., in arbitration parties can have solely non-state law applied. **On applicable law in the absence of choice:** 8. In case of litigation, the principles are right in leaving the applicable law in the absence of choice to the applicable conflict of law rules. In case of arbitration, the big hurdle is determining what, if any, is "the applicable conflict of law rule". It might be appropriate for the principles to provide a rule here. The popular choices for this are "the law the arbitrators deem to be appropriate" and "the law most closely connected to the dispute". It might be good for the IIC working group to reflect on the need to include a conflict rule in case of arbitration.			
435.	**Section B,** **Model Clause A**	The model clause should expressly state that the choice of the UNIDROIT–ICC Principles also entails mandatory application of the UNIDROIT Principles of International Commercial Contracts of 2016 (and/or its subsequent modifications). This would better inform parties of the legal consequences of	Ian Signori Gorriti	Member of CEIA	Peru

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	under Principle 28	their choice and reduce uncertainty in future disputes. Parties should also be allowed to exclude or limit the supplementary application of the UPICC if that reflects their intention. Given (i) what has been expressed in the commentary relating to Model Clause A (specially in para. 593) regarding the necessary inclusion and incorporation of the UPICC as part of the IICs and the repetition of it, (ii) that most private parties would not read the commentary of the principles before deciding if they should apply supplementary or be the "law governing the contract", (iii) attending to the fact that the manifestation of will and the parties´ autonomy could be to just apply the IICs without the UPICC and fill the vacuums in other ways (such as arbitrators discretion, or the law of the seat, or supplementary application of national law), and (iv) to the fact that a lack of mention of the direct and mandatory application of the UPICC could cast doubt in a possible dispute scenario, regarding the application of these principles as integral part of the IICs; it's our believe that the clause should read as follows looking to better inform the parties what their selection entails, and to avoid any and all doubt, allowing the parties to limit or exclude the application of the UPICC. Proposed wording: "This Contract shall be governed by the UNIDROIT–ICC Principles of International Investment Contracts of (year) which include the UNIDROIT Principles of International Commercial Contracts (2016) as an integral part, unless the parties expressly exclude or modify their application."			
436.	**Section B,** **Model Clause A**	**On Model Clause A, mn 599:** While I concur with the general assessment that the choice of rules of law should generally be admitted in the context of international investment arbitration, we know that, within the international legal community, there is	Prof. Dr. Eckart Brödermann	Professor, University of Hamburg	Germany

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	and B under Principle 28	still some objection to applying non-state rules of law (*soft law*). Not all countries, not even all national arbitration laws, admit the choice of rules of law. For example, in Hungary and Israel, even the arbitration law does not explicitly permit the application of non-state rules of law.[90] (Arbitrators or counsels might come from jurisdictions with a certain suspicion to apply soft law instruments. A partial dispute might be brought to the attention of a domestic judge who is only familiar with the application of state law. If and to the extent the Art. VII (1) of the European Convention on International Commercial Arbitration of 21 April 1961 gains relevance, not everybody might apply it in a liberal way permitting the application of non-state rules of law with regard to Article 28 UNCITRAL Model Law so that the word "law" would include the choice of "rules of law". In view of these circumstances, it might be worth considering either add an additional sentence in the clause or in the comments to remind about the possibility that, *if the applicable private international or dispute resolution regime permits only the application of a state law the [this] choice of the UNIDROIT–ICC Principles of International Investment Contracts shall be interpreted as an incorporation of the UNIDROIT–ICC Principles of International Investment Contracts into the contract (quasi like general terms and conditions taking priority over the otherwise applicable state law to the extent that (i) the contract does not provide specifically otherwise on a specific issue, and (ii) the applicable state law does not require priority as a matter of mandatory law, Art. 1.4 UPICC).* In this context, it may be worth a cross-reference to mn. 113. Especially for colleagues with a status-quo bias (i.e. hostile to working with new			

[90] Reference: Art. 37 of the International Commercial Arbitration Law of Israel, adopted in 2024, which explicitly departed from Art. 28 of the UNCITRAL Model Law in this respect (In all other respects, Art. 37 mirrors Art. 28); (ii) Section 41 (1) Hungarian Act on Arbitration (Act LX. of 2017).

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		international instruments), it may be helpful to be reminded in this context that any specific, individually negotiated clause in the contract takes priority. It may even be an additional thought to explicitly lay out the hierarchy of rules: (i) applicable mandatory rules of law; (ii) the specific clauses in the contract; (iii) the UNIDROIT–ICC Principles of International Investment Contracts; (iv) the UNIDROIT Principles of International Commercial Contracts ("UPICC") to the extent that the UNIDROIT–ICC Principles of International Investment Contracts refer to them. **Model Clause B** is convincing as it stands. It requires no such adaptation because it is rooted on a state law.			
437.	**Section B,** **Model Clause B under Principle 28**	Plain reading of the clause means that the national law should be interpreted based on the UNIDROIT–ICC Principles of International Investment Contracts and not only the Contract itself. This suggestion is potentially problematic: national law is designed to be interpreted by the local laws of interpretation, and specifically state courts (majority of jurisdictions) are not likely to apply interpretation under the IIC to the national law. Issues could also be faced in arbitration, which is a more common case for investment disputes: it is not clear how to interpret the unique mechanisms of national law existing only in a certain state and what would be the consequences when a party tries to enforce an award in that state, as the pro-arbitration levels vary between courts of different states. Our suggestion would be to only leave the supplementing role of the principles and precise that interpretation of the Contract (not national law) could be done in accordance with the IIC.	Anastasiia Riabova, Stepan Sultanov	Russian Arbitration Association (KIAP law firm)	Russian Federation

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		We would also consider the possibility of a separate Model Clause on incorporation of the IIC as a part of the Contract, where the parties do not wish to agree on the IIC as a source of law.			
438.	**Section B,** **Principle 28,** **Commentary para. 591**	I suggest clarifying in paragraph 591 that the parties' choice of applicable law may also be exercised at a later stage, including after the conclusion of the international investment contract and, where appropriate, after a dispute has arisen. The current wording of paragraph 591 emphasises the desirability of agreeing on the applicable law in advance and stipulating it in the contract. It does not, however, address the situation where the parties make, modify or withdraw their choice of applicable law subsequently. The Principles could clarify that a subsequent choice of law constitutes an exercise of party autonomy concerning the applicable law and should be distinguished from an amendment of the substantive terms of the investment contract. Accordingly, the mere fact that the choice is made after the conclusion of the contract should not, by itself, require compliance with contractual procedures applicable to amendments of the IIC. This clarification would be particularly relevant in arbitration, where the parties may agree on the rules of law applicable to their dispute after the dispute has arisen, subject to the applicable arbitration framework and mandatory rules. Suggested wording: "*The parties may also exercise their autonomy with respect to the choice of applicable law at a later stage, including after the conclusion of the IIC or after a dispute has arisen. A subsequent choice, modification or withdrawal of the choice of applicable law should be distinguished from an amendment*	Natalia Alenkina	Associate Professor, American University of Central Asia	Kyrgyzstan

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		of the substantive terms of the IIC and should not, solely by reason of its timing, be subject to contractual procedures applicable to amendments of the IIC. In arbitration, such a choice may be made in the context of the arbitral proceedings, subject to the applicable arbitration framework, mandatory rules and public policy."			
439.	**Section B,** **Model Clause A,** **Commentary paras. 593 – 597**	**Critical need for a residual governing law** **Model Clause A is the place where I would make the clearest change.** Model Clause A presently provides: "This Contract shall be governed by the UNIDROIT – ICC Principles of International Investment Contracts." The Draft immediately acknowledges that issues outside the Instrument and the incorporated UPICC will have to be resolved by reference to another legal source identified through conflict-of-laws rules. That leaves a gap at precisely the point where a governing-law clause is supposed to provide ex ante certainty. The gap is not marginal. Questions of title, corporate status, insolvency, security interests, administrative permissions, taxation, public procurement, regulatory licences and the exercise of State authority may all sit outside the Instrument. In that form, I would not advise a client to use Model Clause A. **One way to close the gap is:** **"This Contract shall be governed by the UNIDROIT – ICC Principles of International Investment Contracts and, in respect of matters not**	ACCOLDI		Colombia

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		governed by those Principles or the UPICC incorporated therein, by the substantive law of [Host State], excluding its conflict-of-laws rules, subject in all cases to applicable mandatory rules." If neutrality requires it, the residual law could instead be the law of a third State.			
440.	**Section B,** **Commentary para. 599**	**"Overriding mandatory rules" and the difference between ICSID and seated arbitration** Paragraph 599 should draw sharper distinctions among arbitral regimes. "International arbitration" is not a single procedural category for these purposes. The ICSID Convention provides in Article 42(1) that the tribunal decides in accordance with the rules of law agreed by the parties. By contrast, a seated ICC or UNCITRAL arbitration interacts with a lex arbitri, mandatory procedural rules and enforcement law. Under the current 2026 ICC Rules, Article 22 addresses the rules of law applicable to the merits, while other mandatory rules may remain relevant to the procedure and award. The formulation that the Principles apply "subject only" to overriding mandatory rules is therefore too general. **Recommendation**. Paragraph 599 should distinguish: • ICSID Convention arbitration; • non-ICSID institutional arbitration; • ad hoc arbitration; and • domestic judicial proceedings.	ACCOLDI		Colombia

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		That distinction should run through Chapter 8, not appear only as a qualification in one paragraph.			
441.	**Section B,** **Principle 28; and** **Model Clauses A and B**	If the Working Group is willing to go a step beyond a cross-reference, an optional element in Model Clauses A and B would help parties structuring tokenised project finance. It might read: '[Proprietary questions concerning any digital asset issued, transferred or pledged in connection with this Contract are governed by the law designated in the asset and in the system in which it is recorded, in accordance with the applicable rules of private international law.]' The drafting is modest by design. It creates no conflicts rule. It prompts the parties to make the designation while they still can, at the moment of issue rather than at the moment of enforcement.	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain
442.	**Section B,** **Model Clause B under Principle 28**	The model clause should expressly state whether, when the parties choose the law of a State as the governing law and provide that it is to be interpreted and supplemented by the IIC Principles, such supplementation also entails application of the UNIDROIT Principles of International Commercial Contracts 2016. This clarification would better inform parties of the legal consequences of their choice and reduce uncertainty in future disputes. Parties should also be allowed to exclude or limit the supplementary application of the UPICC if that reflects their intention. Given that Model Clause B contemplates the application of a national law interpreted and supplemented by the IIC Principles, the clause should make clear whether the UPICC form integral part of that supplementary framework. In the absence of such clarification, parties may reasonably believe that only the IIC Principles apply as supplementary guidance, while a tribunal should consider that the UPICC are incorporated through those Principles. To avoid uncertainty and preserve party autonomy, consent and literality of the parties´ agreement (pacta sunt servanda), the clause should	Ian Signori Gorriti	Member of CEIA	Peru

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		expressly identify the scope of supplementation and allow parties to exclude or modify the application of the UPICC. Proposed wording: "This Contract shall be governed by the law of [State X], interpreted and supplemented by the UNIDROIT–ICC Principles of International Investment Contracts [year], including the UNIDROIT Principles of International Commercial Contracts 2016 as part of the supplementary framework, unless the parties expressly exclude or modify their application."			
443.	**Section B,** **Model Clause B,** **Commentary paras. 600 – 604**	**Hierarchy between domestic law and the Principles** Model Clause B provides: "This Contract shall be governed by the law of [State X], interpreted and supplemented by the UNIDROIT – ICC Principles…" This is conceptually attractive but potentially difficult in public-law contracts. The word **"supplemented" needs a hierarchy rule**. Otherwise, a tribunal could be asked to use a UNIDROIT – ICC Principle to produce a result inconsistent with a domestic rule that is not merely supplementary but integral to the public-law regime governing concessions or administrative contracts. I would make the hierarchy express: "This Contract shall be governed by the substantive law of [State X]. To the extent consistent with mandatory provisions of that law, the UNIDROIT – ICC Principles shall be used to interpret the Contract and to supplement matters not expressly resolved by the applicable law or this Contract."	ACCOLDI		Colombia

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		The current language risks turning "supplementation" into de facto displacement.			
444.	**Section C**	**COMMENT 2: Operationalization of Early-Warning Systems (EWS) and Dispute Avoidance Governance** • Analysis of Existing Deficiencies: Conventional international investment contracts rely almost exclusively on ex-post remedies—such as notice of breach, cure periods, and formal arbitration under ICSID, UNCITRAL, or ICC rules. This reactive framework exacerbates adversarial dynamics, consumes substantial state and corporate resources, and frequently leads to project abandonment before underlying operational friction can be resolved. • Actionable Proposal for Model Clauses: The Model Clauses should incorporate an ex-ante "Dispute Avoidance Framework" centered on Early Warning Systems (EWS) and Joint Project Monitoring Committees (JPMC). Specifically, the drafting committee should include clauses that: 1. Mandate Early-Warning Notifications: Require both the contracting state entity and the investor to formally notify the JPMC within 14 days of identifying any emerging regulatory, environmental, financial, or administrative bottleneck capable of impacting performance or project costs. 2. Establish Joint Standing Committees: Mandate equal representation from host state authorities and investor executives to meet periodically and resolve operational friction before it ripens into a legal claim of breach or indirect expropriation.	Mohamed Gomaa	President Judge, Court of Appeal, Egyptian Ministry of Justice	Egypt

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		3. Institute Non-Binding Expert Determination: Provide an expedited 30-day independent expert determination process for technical and financial disagreements. The findings should be provisionally binding to ensure project execution continues uninterrupted while formal legal reservations are preserved. Embedding proactive dispute prevention mechanisms transforms the legal relationship from a confrontational, breach-oriented contract into a resilient, long-term governance partnership.			
445.	**Section C, General comment**	**J. Balanced Dispute Resolution** The proposed Instrument should not present international arbitration as the presumptive forum in every case. Parties should be encouraged to consider good-faith negotiation, mediation, expert determination, domestic courts and arbitration depending on the nature, value, complexity and public-interest implications of the investment.	KNCCI		Kenya
446.	**Section K,** **Commentary para. 80;** **Chapter 6.B,** **Principle 23(1),** **Commentary para. 393; and**	Paragraph 80 of the Introduction records that the party on the State side 'may be the State itself, an organ or ministry of the State, a State enterprise, or any other entity that is competent to enter into IICs on behalf of the State'. A State enterprise can fail. The Instrument says nothing about what happens if it does. The Instrument already draws a consequence from the identity of the State-side entity in one place. Paragraph 393 explains that a stabilisation clause may have no effect where the contract is with an entity 'that is not a State or cannot bind the State', and that 'only if one of the parties is a State or capable to bind the State can a stabilisation clause be included in the IIC'. The same question of identity has consequences in insolvency, and those are not drawn. Three follow, and none is governed by the law chosen under Principle 28. The insolvency of a State enterprise will ordinarily be governed by the law of the host State and administered in its courts, since its centre of main interests will normally be there, so the	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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	Chapter 8.C	investor's contractual rights become claims in a proceeding conducted under the legal system whose future conduct the contract was drafted to make predictable. Whether the State stands behind the obligations of the enterprise is a question for the host State's law and for the terms of any separate undertaking, not for the IIC. And the protections the Instrument gives the investor against State conduct, including the stabilisation regime of Chapter 6 and the compensation rules of Chapter 7, are worth what the counterparty can pay. The asymmetry is worth stating plainly, because it runs the other way from the point made about the investor's insolvency. There, the State's counterclaims become unsecured claims. Here, the investor's contractual protections may be enforceable only against an entity without the means to honour them. One further reference may assist. Where the State enterprise sits inside a group, as a project company ordinarily does, the UNCITRAL Model Law on Enterprise Group Insolvency (2019) provides a framework for coordinating proceedings across the group and for a planning proceeding in the State where one company of the group has its centre of main interests. It coordinates. It does not say which law governs the contract. Suggestion: a sentence in the Commentary recording that where the State party is a separate legal entity, the consequences of its insolvency, and whether the State is answerable for its obligations, fall to laws other than that chosen under Principle 28, and inviting parties to consider a direct undertaking or guarantee from the State where the counterparty cannot bind it.			
447.	**Section C,** **Principles 29-31**	**Dispute Settlement – Principles 29 to 31.** I appreciate the multi-tier dispute resolution mechanism, which provides parties with a range of options, from amicable discussions and negotiations to more structured non-judicial processes such as mediation or conciliation before resorting to an adjudicative proceeding (arbitration or national court).	Carol Khouzami	Former Lebanon BITs Chief Negotiator, Legal and Policy	Lebanon

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		My main concern relates to the treatment of timelines. This is a recurring issue in international investment agreements, where uncertainty regarding pre-arbitration procedures has often generated jurisdictional disputes and extensive arbitral jurisprudence. While a mediator may eventually conclude that one party is not engaging in good faith or that the process is unlikely to produce a settlement, allowing the other party to proceed to arbitration, the situation is less clear when the pre-arbitration step consists of negotiations or informal consultations. Is there a defined period during which the parties must pursue these discussions before either may initiate arbitration? In the absence of such clarity, there is a risk of disagreement as to whether the pre-arbitration requirements have been satisfied. Moreover, it would be also advisable to clearly specify whether pre-arbitration procedures, including consultations, negotiations, mediation, or conciliation, are mandatory or optional before either party may resort to arbitration/national court.		Advisory Consultant	
448.	**Section C.1,** **Principle 29**	The wording of the principle, as well as the first paragraphs of the commentary signal that this principle states an optional and advisable way to attempt to resolve the dispute. Yet, paragraph 609 states that "It is advisable to specify in the contract that negotiations commence upon written request by one of the parties. The obligation to try to resolve disputes through direct negotiations implies an obligation to provide sufficient information about the dispute to enable meaningful dialogue.". The use of this terminology refers as to once the parties have decided to opt in for this mechanism, therefore becomes and obligation; but in a dispute scenario, if a party fails to solicited negotiations to the other and skips ahead to a third party binding dispute resolution mechanism, the party that was	Ian Signori Gorriti	Member of CEIA	Peru

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		not ask to negotiate, may use or believe that this sentence under comment, creates an actual obligation to negotiations as a mandatory first step before any other dispute resolution mechanism. It might be a better option to state that "It is advisable to specify in the contract that negotiations commence upon written request by one of the parties. When parties agree to try to resolve disputes through direct negotiations as part of their dispute resolution mechanism, this implies an obligation to provide sufficient information about the dispute to enable meaningful dialogue." As to the principle itself, in the search for clarity and preservation of parties´ consent and intent the principle should state that the option to start negotiations does not transform it into a mandatory sequential precondition to look for another dispute resolution mechanism including binding third parties mechanisms. Propose wording: "Parties should make their best endeavours to resolve disputes arising out of or in connection with the IIC amicably through direct negotiations. Either Party may propose negotiations at any time by written request. Such request must include sufficient information about the dispute to facilitate good-faith discussions and promote settlement. Unless the parties expressly agree to it, these negotiations do not impose a mandatory, sequential process, and shall not be considered a precondition to move to another dispute resolution mechanism; therefore, either party may pursue any binding dispute resolution at any time, to resolve the dispute."			
449.	**Section C.1,** **Principle 29**	While the draft Instrument commendably emphasizes amicable negotiations as an initial mechanism to preserve long-term investment relationships (see Introduction, paras 2, 55), the current drafting of this Principle and its accompanying Model Clause has three ambiguities:	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam

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		- Enforceability: Principle 29 utilizes the precatory term "should endeavour", and the Model Clause adopts the permissive auxiliary "may". Meanwhile, it is referred as an "obligation" in the Commentary (see para. 609). In order to create a condition precedent to the commencement of arbitration, clear words are necessary (see CZQ v CZS [2024] 3 SLR 111, paras. 13-29; Ho, D., & Boo, L. (2023). Arbitration. Singapore Academy of Law Annual Review of Singapore Cases, 24, 57, paras. 4.34-4.38)). - Standard of "sufficient information" of the notice: Principle 29 requires a notice initiating negotiations to contain "sufficient information," but leaves the standard undefined. This risks tactical objections concerning the adequacy of a notice, while reflecting judicial scrutiny of the sufficiency of notices in contractual dispute-resolution mechanisms (see Mitchell Acoustics and Drywall Inc v GSC Construction Inc et al., No. 5:2015cv00293 (W.D. Okla. 2015)). Thus, it is advisable to further discuss such standard in the Commentary, clarifying that "sufficient information" is assessed objectively by a reasonable notice standard. - Temporal commencement and validity of electronic communications: Principle 29 states that negotiations commence upon "written request by one of the parties". We wonder whether "written request" automatically encompass electronic communications (e.g., e-mail), and what standard applies to the designated address? The provision should clarify that negotiations commence upon receipt of a written request by the other party. It should also expressly recognize, in the Commentary, electronic communications, including email, as valid written requests, provided that the communication is accessible and capable of subsequent reference (see Article 6 of the UNCITRAL Model Law on Electronic			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		Commerce (1996) and Bernuth Lines Ltd v High Seas Shipping Ltd (The "Eastern Navigator") [2005] EWHC 3020 (Comm)).			
450.	**Section C.1, Principle 29**	We support the priority given to direct negotiations and the requirement that a request identify the dispute sufficiently. Principle 29 would, however, benefit from greater procedural specificity. As drafted, it establishes negotiation as the first step in a multi-tiered dispute resolution process without specifying when negotiations must commence, how long they may continue, what is required for the obligation to negotiate to be discharged, or how the negotiation period interacts with limitation periods. The objective should be to ensure that direct negotiation provides a genuine and meaningful opportunity for settlement **without allowing it to become an indefinite procedural barrier to the next stage of dispute resolution**. **1. The Principle should address the timing and duration of negotiations.** Neither the Principle, the commentary at paragraphs 607–610, nor the Model Clause specifies when negotiations should commence following a request or when either party may proceed to the next stage. In practice, multi-tier dispute resolution provisions ordinarily address both matters: the parties are required to commence discussions within a defined period, and either party may proceed to the next stage if the dispute remains unresolved after a further period. Without such periods, a party with little interest in settlement may comply formally with an obligation to negotiate while allowing the process to continue indefinitely. This is particularly problematic where the underlying conduct is continuing or delay may itself cause loss.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		We suggest that the Principle provide that negotiations should commence within a period agreed by the parties following receipt of the request, be conducted expeditiously, and permit either party to proceed to the next agreed stage if the dispute is not resolved within the agreed period. The Model Clause should include express placeholders for both periods. **2. The Principle should address the effect of negotiations on limitation periods.** This is a more significant consequence of the present silence as to timing. Where the Instrument governs the IIC, Chapter 10 of the UPICC applies by virtue of Principle 1(4). Articles 10.5–10.7 provide for suspension of limitation periods in specified circumstances, including proceedings in which a third person assists the parties in reaching an amicable settlement. Direct negotiations between the parties do not appear to fall within that provision, whereas mediation and conciliation under Principle 30 do. The result is that the Instrument places direct negotiation first in the dispute resolution process without expressly suspending the running of the limitation period, while a subsequent third-party process may suspend it. A party which complies with an obligation to negotiate in good faith for an extended period could therefore risk allowing its claim to become time-barred. The position may differ under the domestic law governing the IIC. Given the Instrument's intended international application, however, the Principle should draw attention to the issue and encourage parties to address expressly the effect of negotiations on applicable limitation periods. The commentary should also explain the distinction between direct negotiations and third-party mechanisms under Articles 10.5–10.7 of the UPICC. **3. The Principle should clarify when the obligation to negotiate arises and what constitutes a sufficient request.**			

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		The reference to a party's "written request for negotiations" leaves unclear whether the obligation arises from the contract or from the request itself. The Principle should make clear that the parties may provide for direct negotiations in the IIC and that either party may initiate the process by written notice. The Principle should also give greater content to the requirement that the request contain "sufficient information". This may be important in determining whether the negotiation obligation has been triggered and whether a party may proceed to the next stage. A request should identify, at a minimum, the nature of the dispute and matters in issue, the relevant contractual provisions or conduct relied upon, and the relief or outcome sought. **4. The standard governing the conduct of negotiations should be more clearly defined.** The Principle presently requires discussions to be conducted in good faith. While this is important, good faith alone provides limited positive guidance as to how the parties are expected to conduct the process. We suggest that the Principle require the parties to negotiate **in good faith, cooperatively and with a genuine effort to identify a mutually acceptable solution**. This would give greater content to the obligation and align it with the Instrument's stated objective of resolving disputes through cooperation and dialogue, as well as with the duty of cooperation under Article 5.1.3 of the UPICC and Principle 15. The obligation should not, however, require a party to accept a proposal or compromise its legal or commercial position merely because negotiations are underway.			

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		5. The parties should ensure that representatives have appropriate authority. The effectiveness of direct negotiations depends not merely on seniority but on the representatives' ability to engage meaningfully and, where appropriate, reach a binding settlement. The Principle should therefore encourage the parties to designate representatives with appropriate knowledge and authority to negotiate and settle the dispute. For State parties in particular, the commentary could encourage identification in advance of the person or body competent to authorise a settlement, recognising that internal approval requirements may otherwise prolong the process. This would also be consistent with the Instrument's recognition that institutional and financial constraints may affect the availability of specialised dispute-resolution resources. **6. The Principle should recognise partial settlement and narrowing of issues.** Negotiations may produce useful outcomes even where they do not resolve the entire dispute. The Principle should therefore recognise settlement **in whole or in part**, as well as the narrowing or clarification of issues that remain for subsequent determination. This would better reflect the commentary at paragraph 608 and provide a clearer basis for determining whether the negotiation process has served its purpose. **7. Direct negotiation should not be an inflexible precondition to a facilitated process.** Direct negotiation will not always be appropriate. Where the relationship between the parties has materially broken down, where the dispute concerns alleged unlawful conduct, or where previous direct discussions have failed,			

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		requiring the parties to repeat that process may serve principally to delay resolution. Principle 30 already recognises the availability of mediation, conciliation and other third-party mechanisms at any time, and paragraph 610 confirms the desirability of retaining flexibility to pursue amicable resolution throughout the dispute. We suggest Principle 29 make clear that, where the circumstances indicate that direct negotiations are unlikely to be productive, the parties may proceed directly to a third-party amicable dispute resolution mechanism under Principle 30. This would also provide a useful safeguard against the limitation-period concern identified above. **8. The Model Clause should reflect the substantive guidance in the Principle.** The Model Clause should incorporate the above elements rather than merely requiring the parties to use "best efforts" to negotiate. In particular, it should provide for: • commencement within an agreed period following a request; • a defined negotiation period, subject to mutual extension; • the minimum content of a negotiation request; • good-faith, cooperative and solution-oriented engagement; • the possibility of resolving the dispute in whole or in part; and • the ability to proceed to the next stage, including a facilitated process under Principle 30, once the agreed negotiation period has expired or where direct negotiation is unlikely to be productive.			

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		A possible formulation would be: "The Parties shall use best efforts to resolve through direct negotiations any dispute or controversy arising out of or in connection with this Contract. Either Party may initiate negotiations by written notice identifying the nature of the dispute, the matters in issue, the relevant provisions of this Contract or conduct relied upon, and the outcome sought. The Parties shall commence negotiations within [X] days of receipt of such notice and shall conduct them in good faith, cooperatively and with a genuine effort to identify a mutually acceptable solution. Negotiations shall continue for [X] days, unless extended by mutual agreement. The Parties may resolve the dispute in whole or in part or agree to narrow the issues in dispute. If the dispute has not been resolved within that period, either Party may proceed to the next stage of the agreed dispute resolution process. Where, having regard to the nature and circumstances of the dispute, the Parties consider that direct negotiations are unlikely to be productive, either Party may proceed directly to a facilitated process under Principle 30." **Overall**, Principle 29 should establish direct negotiation as a meaningful opportunity for consensual resolution, while ensuring that it does not become an indefinite procedural requirement. The Principle should therefore address **when negotiation starts, what constitutes a proper request, how the parties are expected to conduct themselves, when the obligation is discharged, and when a party may proceed to the next stage**. It should also expressly address the interaction with limitation periods.			
451.	**Section C,** **Model clauses of**	The Model Clauses should include a clear procedure for negotiations and ADR. With the current drafting, the clause can be easily breached by a party and disregarded by an arbitral tribunal. The clause should clearly mention the representatives of the parties that will participate in the negotiations or the ADR mechanism, the ones that should receive the notice of dispute to	José Gregorio Torrealba	AVA	Venezuela

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	Principles 29 and 30	trigger negotiations or ADR, a timeframe for the negotiations or ADR to take place. Also, since negotiation and ADR mechanisms depend on the agreement of the parties, a provision should be included for the interested party to be able to submit the dispute to the next level of dispute resolution when the other party does not participate in the negotiations or ADR.			
452.	**Section C,** **Model clauses of Principles 29 and 30**	The instrument adopts a multi-tiered approach that is not rigid, favouring the implementation and design of dispute resolution mechanisms under the mutual consent of the parties. Under the multi-tiered approach, amicable dispute resolution can be more easily reached due to the direct negotiation and non-adjudicative means enshrined in the model clauses, without forcing the parties to abide by the suggested procedures, which allows them to pursue other formulas for dispute resolution. While the instrument acknowledges that, on one hand, States might prefer to resort to domestic proceedings and require the exhaustion of these proceedings before allowing the investor to resort to international proceedings, and on the other, that the preferred dispute resolution mechanism is international arbitration, the instrument provides a party autonomy approach that construes in a sufficient manner the freedom of the parties involved to design the dispute resolution mechanism. Accordingly, the instrument highlights the virtues of contractual arbitration as it allows the parties to choose the applicable rules, in which the IIC Principles could be included with the prior agreement of the parties.	Maria Amparo Grau/Jose Ignacio Hernande	AVEDA	Venezuela
453.	**Section C.1,** **Model Clause of**	In accordance with the commentary to the main article, the proposed wording to the model clause would be the following: "The Parties shall use best efforts to settle through direct negotiations any dispute or controversy arising out of or in connection with this Contract.	Ian Signori Gorriti	Member of CEIA	Peru

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	Principle 29	Either Party may propose negotiations at any time by written notice. Such notice must include sufficient information about the dispute or controversy to facilitate good-faith discussions and promote settlement. These negotiations do not impose a mandatory, sequential process, and shall not be considered a precondition to move to another -binding or not binding- dispute resolution mechanism; therefore, either party may pursue binding dispute resolution at any time, to resolve the dispute."			
454.	**Section C.1,** **Principle 29;** **Commentary para. 610; and** **Model Clause**	To determine clearly when the negotiation process has ended, the clause should identify an objective milestone, such as a specified number of days or weeks from the date on which the notice of dispute is sent to consider that the negotiation process is over. Parties should avoid engaging on debates on subjective milestones to consider the process over, such as attending the negotiation process in good faith.	Leandro Caputo	Member of CEIA	Argentina
455.	**Section C.2,** **Principle 30**	F. MULTI-TIER DISPUTE RESOLUTION APPROACH[91] The flexible, non-mandatory design of the multi-tiered dispute resolution approach appears appropriate, given the diversity of IICs, but its practical operation depends on the choices that the PIICs leave open, on at least the following main points. 1. CHARACTERISATION OF PRE-ARBITRATION STEPS First, and most importantly, the PIICs do not indicate how the consequence of failing to comply with a mandatory pre-arbitration step (negotiation or mediation) should be characterized: as a matter of admissibility of the claim	EAPIL		

[91] J.C.Y. Long, 'A Comparative Analysis of the Enforcement of Multi-tier Dispute Resolution Clauses' *American Review of International Arbitration*, 13 October 2025.

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		(for the tribunal itself to decide, generally not reviewable by the courts of the seat) or as a matter of jurisdiction (reviewable at the seat and at the enforcement stage).[92] National courts and tribunals have taken divergent positions on this question, and the choice has real consequences for the risk of annulment or refusal of enforcement of the eventual award.[93] The commentary might expressly advise the parties to characterize non-compliance as a matter of jurisdiction or admissibility,[94] — rather than leaving the point to be resolved by the 'consequences of non-compliance' language alone, which does not by itself settle the characterization issue. 2. GOVERNING LAW OF THE MULTI-TIER OBLIGATIONS Second, it should be clarified which law governs the obligation to negotiate or mediate in good faith: the law applicable to the contract, the law applicable to the arbitration agreement, or the lex arbitri. These may not coincide, and the consequences of breach (damages, cost sanctions, inadmissibility) may differ accordingly.[95] Furthermore, as provided in most old-generation bilateral investment treaties (BITs), the multi-tiered dispute resolution clause also does not provide any substantive threshold for the exhaustion of good-faith attempts to settle the dispute amicably through negotiation and mediation. If the only			

[92] D. Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' [2010] 27 Journal of International Arbitration 551 ff.; L. Flannery and R. Merkin, 'Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?' [2015] *Arbitration International 63 ff.; Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286, parr. 14-21; BBA v. BAZ [2020] Singapore Court of Appeal, 53, parr. 69-77; *BG Group plc v. Republic of Argentina,* 572 U.S. 25 (2014).

[93] Swiss Federal Supreme Court, *X Ltd v. Y SpA*, 4A_628/2015, 16 March 2016.

[94] L. Gouiffès and M. Ordonez, 'Jurisdiction and admissibility: are we any closer to a line in the sand?' [2015] 31 *Arbitration International* 107 ff.

[95] R. Nazzini, 'The law applicable to the arbitration agreement: towards transnational principles' [2016] *International and Comparative Law Quarterly* 681 ff.; *Enka Insaat Ve Sanayi AS v. OOO Insurance Co Chubb* [2020] UKSC 38, parr. 166-170; Dicey, Morris and Collins, *The Conflict of Laws* (16th edn, London 2022), passim.

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		determinative requirement is set in terms of the duration of the amicable settlement stage (i.e. 3 or 6 months typical for the 'cooling off' period in old-generation BITs), the opportunity for effective amicable settlement may be missed if one party simply allows the relevant time period to lapse in order to qualify for the arbitration stage. Should the pre-arbitration stage of the multi-tiered procedure be treated as a condition precedent to arbitral proceedings, it may be useful to consider adding such a sub-paragraph to the relevant PIICs provision, to ensure that any potential questions about the fulfilment of this requirement can be assessed against a concrete and defined standard. The PIICs contain no governing-law clause for the substance of the Board's or expert's determination (that is otherwise present in every arbitration-stage Model Clause), in line with the ICC Dispute Board Rules (2015) and the ICC Rules for the Administration of Expert Proceedings (2015), referenced by the Draft Principles. This omission is not an oversight and accurately reflects the fact that these mechanisms are contractual creatures interpreting the underlying contract, not autonomous adjudicative regimes. The commentary might add a short explanatory note confirming this reasoning, since a reader who has just encountered the 'law governing the arbitration agreement' bullet in the preceding arbitration-stage clause may otherwise wonder why an equivalent bullet is absent here. However, where the expert's or board's determination is agreed to be contractually binding, the enforceability of that agreement to be bound may itself depend on the applicable law. This is material for investor-State contracts given questions that can arise concerning the delegation of binding decision-making authority away from a State's own courts or tribunals.			

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		We suggest the following wording for the commentary to the expert proceedings and dispute board Model Clauses: 'This Model Clause does not include a separate stipulation of the law governing the expert proceeding or dispute board, because such proceedings are contractual in character: the substantive standard applied is that of the IIC's general applicable law (see Chapter 8, Section B), absent contrary agreement. Where the parties agree that the expert's or board's findings shall be contractually binding, they should confirm, under the law applicable to the IIC, that such a delegation of binding decision-making authority to a non-arbitral third party is valid and enforceable, since the enforceability of binding-effect agreements of this kind may vary across legal systems.' 3. SAME PERSON SERVING AS BOTH MEDIATOR AND ARBITRATOR Third, the PIICs do not use or define anywhere in their text the terms 'med-arb' or 'arb-med' (hybrid dispute-resolution techniques combining mediation and arbitration, most commonly where the same neutral acts successively as mediator and then as arbitrator in the same dispute, or where an arbitration is deliberately paused for a mediation attempt before resuming [96]). They address only two partial equivalents: sequential mediation-then-arbitration clauses (Principle 30's multi-tiered Model Clauses), and 'mediation windows' — pre-agreed pauses within an ongoing arbitration to attempt mediation (paragraph 616). The legally sensitive feature of the 'same neutral' variant of med-arb is the risk that a mediator's exposure to confidential settlement communications — including a party's private assessment of case weaknesses shared in a mediation caucus —			

[96] A well-known institutionalised example is the SIAC-SIMC Arb-Med-Arb Protocol operated jointly by the Singapore International Arbitration Centre and the Singapore International Mediation Centre, under which an arbitration is commenced first (to secure the enforceability advantages of a subsequent consent award under the New York Convention), immediately stayed for mediation, and resumed only if mediation fails.

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		could compromise that same person's later impartiality as arbitrator. This is why institutional mediation rules commonly restrict a mediator from later acting as arbitrator in the same dispute absent both parties' informed agreement. However, at no stage do the PIICs address the role-continuity question (i.e. the same person serving as both mediator and arbitrator) or the associated confidentiality and due-process safeguards, nor do they name hybrid protocols such as SIAC-SIMC's Arb-Med-Arb. We suggest that the commentary to the 'mediation windows' discussion (paragraph 616) be supplemented to flag the role-continuity issue explicitly, along the following lines: 'Where the parties contemplate that mediation during a "mediation window" may be conducted by a member of the arbitral tribunal itself, rather than by a separate mediator, they should be aware that this raises distinct confidentiality and due-process considerations, since a mediator's exposure to confidential settlement communications may affect that person's later impartiality as arbitrator if the mediation is unsuccessful and the arbitration resumes. Institutional mediation rules commonly restrict, or require express party consent to, a mediator's subsequent appointment as arbitrator in the same dispute. Parties wishing to combine mediation and arbitration more closely may also wish to consider institutionalised hybrid protocols developed for this purpose, such as the Arb-Med-Arb Protocol jointly administered by the Singapore International Arbitration Centre and the Singapore International Mediation Centre.' **Recommendation 7: Multi-tiered Dispute Resolution Approach (Principle 27)** *a) The Commentary should expressly advise the parties to characterize non-compliance with the pre-arbitration negotiation and mediation steps as a*			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		matter of jurisdiction or admissibility, rather than referring broadly to the 'consequences of non-compliance.' *b) The law governing the obligation to negotiate or mediate in good faith should be clarified to refer to either the law of the contract, the arbitration agreement, or the lex arbitri, to avoid inconsistent remedies for breach.* *c) If the pre-arbitration stage of the multi-tiered procedure should be a condition precedent to arbitral proceedings, it would be useful to add such a sub-paragraph to the relevant PIICs provision, to provide a defined standard of its assessment.* *d) The omission of the law applicable to the Board or Expert determination should be clarified in the Commentary, as a consequence of its dependence on the contractual arrangement between the parties to the relevant IIC.* *e) The Commentary on the expert proceedings and dispute board Model Clauses should be adjusted as follows:* *'This Model Clause does not include a separate stipulation of the law governing the expert proceeding or dispute board, because such proceedings are contractual in character: the substantive standard applied is that of the IIC's general applicable law (see Chapter 8, Section B), absent contrary agreement. Where the parties agree that the expert's or board's findings shall be contractually binding, they should confirm, under the law applicable to the IIC, that such a delegation of binding decision-making authority to a non-arbitral third party is valid and enforceable, since the enforceability of binding-effect agreements of this kind may vary across legal systems.'*			

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		f) The contours of the med-arb and arb-med procedures should be defined to avoid independence and impartiality of the arbitrators, given the sensitivity, confidentiality, due process and risks of bias, should the same person serve as arbitrator and mediator in such hybrid proceedings. *g) The Commentary on the 'mediation windows' discussion (paragraph 616) should be supplemented as follows to expressly flag the role-continuity issue:* *'Where the parties contemplate that mediation during a "mediation window" may be conducted by a member of the arbitral tribunal itself, rather than by a separate mediator, they should be aware that this raises distinct confidentiality and due-process considerations, since a mediator's exposure to confidential settlement communications may affect that person's later impartiality as arbitrator if the mediation is unsuccessful and the arbitration resumes. Institutional mediation rules commonly restrict, or require express party consent to, a mediator's subsequent appointment as arbitrator in the same dispute. Parties wishing to combine mediation and arbitration more closely may also wish to consider institutionalised hybrid protocols developed for this purpose, such as the Arb-Med-Arb Protocol jointly administered by the Singapore International Arbitration Centre and the Singapore International Mediation Centre.'* 4. CROSS-BORDER ENFORCEMENT OF MEDIATED SETTLEMENTS Fourth, the reference to the Singapore Convention is useful but incomplete: The commentary should clarify the law applicable to the validity of the settlement agreement itself and should note the Convention's limited scope (it does not cover settlement agreements already enforceable as a judgment or an arbitral award), to avoid parties over-relying on it as a universal			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		enforcement solution.[97] While the parties can agree in the contract to pursue the form and procedure of settlement viable for enforcement under the Singapore Convention, the Commentary should also note the ability of ratifying States to exercise the reservation to exclude contracts involving State parties from the scope of the Convention's application.[98] Therefore, where the law of such a State applies, the enforcement of the mediated settlement arising from the IIC may not be possible. Finally, the PIICs do not provide any mechanism for intra-governmental coordination, while they might encourage governments to establish internal protocols for early identification and management of potential grievances, and suggest appointing a central coordinating authority or inter-agency task force to review contract performance and address emerging issues. This can be accomplished through, for example: • Documenting the policy and intent behind the conclusion of specific contractual language in each IIC (interpretive and evidentiary negotiation history) • Internal government coordination and communication channels to ensure an equal understanding of State commitments in international treaties and IICs aligned with national legislation on foreign investment protection • Reimagining the dispute resolution framework to extend to the pre-dispute and amicable settlement phases, and negotiating bespoke,			

[97] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Singapore Convention) with Guide to Enactment and Use, 2018.

[98] Singapore Convention (supra), Art. 8. The Singapore Convention only allows two types of reservations which the member States can adopt: 1. The exclusion of settlement agreements involving States, their agencies or any person acting on behalf of a government agency, and 2. The application of the Singapore Convention only to settlement agreements whose parties have expressly agreed to its application.

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		multi-tiered 'dispute management protocols' (building on the PIICs multi-tiered dispute resolution framework) which could clearly outline: • government focal points for early grievance resolution (e.g. Foreign Investment Protection Agencies (FIPAs) or similar bodies), including the relevant contact information • an inter-ministerial coordination body for the development of settlement proposals in negotiation and mediation proceedings (for issues that could not be resolved at the early grievance stage), ensuring that the competent institutions have the proper settlement authority • an escalation mechanism for dispute resolution in investment arbitration and the preliminary information exchange framework • a protocol outlining the concrete sequence, timing, notices, requirements and procedure (express or by reference to existing rules) for the dispute resolution stage. **Recommendation 8: Cross-border Enforcement of Mediated Settlements** *a) The Commentary should clarify the limitations of the application of the Singapore Convention (excluded in case of settlement enforceable as court decisions, or arbitral awards under the New York Convention), and the possible State reservations excluding investor-State mediation from the scope of the Singapore Convention.* *b) The Commentary to the PIICs should highlight the need to expand the dispute resolution spectrum to include the early grievance stage and other mechanisms through, e.g.:*			

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		o Documenting the policy and intent behind the conclusion of specific contractual language in each IIC (interpretive and evidentiary negotiation history) *o Internal government coordination and communication channels to ensure an equal understanding of State commitments in international treaties and IICs aligned with national legislation on foreign investment protection* *o Reimagining the dispute resolution framework to extend to the pre-dispute and amicable settlement phases, and negotiating bespoke, multi-tiered 'dispute management protocols' (building on the PIICs multi-tiered dispute resolution framework) which could clearly outline:* *• government focal points for early grievance resolution (e.g. Foreign Investment Protection Agencies (FIPAs) or similar bodies), including the relevant contact information* *• an inter-ministerial coordination body for the development of settlement proposals in negotiation and mediation proceedings (for issues that could not be resolved at the early grievance stage), ensuring that the competent institutions have the proper settlement authority* *• an escalation mechanism for dispute resolution in investment arbitration and the preliminary information exchange framework* *• a protocol outlining the concrete sequence, timing, notices, requirements and procedure (express or by reference to existing rules) for the dispute resolution stage.*			
456.	**Section C.2,**	We support the inclusion of mediation and other consensual dispute-resolution mechanisms in the Instrument. Given the potentially long-term and complex nature of investment contracts, parties should have access to	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
	Principle 30	mechanisms that can address disputes without immediately resorting to adjudication. The Principle would, however, benefit from greater procedural clarity on how these mechanisms interact with each other, with adjudicative proceedings and with limitation periods. **1. Relationship between mediation/conciliation and adjudicative proceedings** The Principle should clarify the relationship between mediation or conciliation and any pending court or arbitral proceedings. In particular, the parties should determine whether the commencement of mediation or conciliation suspends an existing adjudicative proceeding, whether the two processes may proceed in parallel, and whether any consent of the relevant court or tribunal is required. The Model Clause could provide for an agreed mediation or conciliation period during which adjudicative proceedings are suspended, while allowing the parties to agree otherwise where parallel proceedings are appropriate. **2. Appointment and authority of mediators/conciliators** The Principle should encourage parties to establish clear appointment procedures, including the qualifications or experience expected of the mediator or conciliator, the appointing authority where the parties cannot agree, and the consequences of a failure to make an appointment within the prescribed period. This is particularly important in investor-State contexts, where the relevant State authority may need to have sufficient authority to negotiate and, where appropriate, settle the dispute. The parties should therefore also identify the authority of their respective representatives to participate in the process and to conclude a settlement.		Platform Collective	

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		3. Applicable rules The parties should be encouraged to identify the procedural rules applicable to the mediation or conciliation, whether institutional or ad hoc. Where institutional rules are selected, the relevant institution should be identified. Where the process is ad hoc, the IIC should specify sufficient procedural matters to avoid disputes concerning the conduct of the process. **4. Settlement and legal effect** The Principle should address the legal effect and enforceability of any settlement reached through mediation or conciliation. This is particularly relevant where the parties are subject to different legal systems or where a State entity may require additional governmental approval before a settlement can become binding. The parties should therefore consider, at the outset, the authority required to conclude a settlement and the manner in which the settlement is to be documented, approved and enforced. **5. Limitation periods** The interaction between amicable dispute-resolution processes and limitation or prescription periods should be addressed expressly. The commencement of mediation or conciliation should not inadvertently cause a claim to become time-barred while the parties are attempting to resolve it. The parties should therefore specify whether, and from what point, the relevant limitation period is suspended or otherwise affected by the commencement of the process, and when the period resumes if no settlement is reached. This should be addressed in the Model Clause rather than left entirely to applicable procedural law.			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		6. Expert proceedings and dispute boards We recognise that expert proceedings and dispute boards can have an important role in the dispute-resolution architecture of an investment project, particularly where the parties wish to refer specific, technical or relatively straightforward issues to a specialised determination rather than subject the entire dispute to arbitration or court proceedings. The parties may, for example, wish to distinguish between disputes concerning valuation, technical specifications, measurement or other matters capable of expert determination and disputes raising broader questions of contractual interpretation or liability. These mechanisms are, however, materially different from mediation and conciliation because an expert or dispute board may make a determination that has legal consequences for the parties. The Principle should therefore provide greater guidance on the procedural architecture required where such mechanisms are used. In particular, the parties should clearly define: • the categories of disputes or issues that may be referred to expert determination or a dispute board; • the appointment procedure, including qualifications, appointing authority and the procedure to be followed if a party or the parties fail to make an appointment within the prescribed period; • the applicable procedural rules and time limits; • whether the determination is binding, provisionally binding or merely advisory; • the circumstances in which a determination may be challenged, reviewed or referred to arbitration or another adjudicative process;			

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		• the time period within which any such challenge or subsequent proceeding must be commenced; and • the relationship between those periods and any applicable limitation or prescription period. The last point is particularly important. As with mediation and conciliation, the commencement of an expert determination or dispute board process should not inadvertently prejudice a party's ability to bring a subsequent claim because the applicable limitation period expires while the determination is pending. Where the parties contemplate that disagreement with an expert determination or dispute board decision may subsequently be referred to arbitration, the contract should specify whether the limitation period is suspended during the process and, where appropriate, when the period for commencing the subsequent arbitration begins. The Instrument should also recognise that the parties may deliberately establish different consequences for different categories of determination. Some issues may be intended to be finally determined by an expert or dispute board, while others may be subject to review or subsequent arbitration. The Model Clause should therefore encourage parties to specify the scope of the mechanism, the legal effect of the determination and the applicable review or appeal mechanism, rather than assuming that every disagreement will automatically proceed to arbitration. Overall, Principle 30 would be more useful if it provided parties with a framework for designing an integrated dispute-resolution architecture, while leaving sufficient flexibility for them to determine which mechanisms are appropriate for the particular investment project and the nature of the disputes that may arise.			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
457.	**Section C.2,** **Principle 30; and** **Model Clause**	In accordance with the statement in the comment to the previous principle, the same modifications should be made regarding this principle. Proposed wording: "Parties may at any time submit to mediation, conciliation, or other third-party amicable (non-binding) dispute settlement mechanism any dispute arising out of or in connection with the IIC, without prejudice to the legal position or rights of any party. The use of these third-party amicable (non-binding) dispute settlement mechanism do not impose a mandatory, sequential process, and shall not be considered a precondition to move to another -binding or not binding- dispute resolution mechanism; therefore, either party may pursue binding dispute resolution at any time, to resolve the dispute." As to the model clauses, the proposed wording would be as follows (the same modifications should be implemented into the model clauses on expert proceedings): "Option 1: The Parties may at any time, without prejudice to any other proceedings, submit to mediation [or conciliation] any dispute or controversy arising out of or in connection with this Contract in accordance with [include reference to agreed rules]. The language of the mediation shall be [include language] and the mediation shall take place in [include location] The use of these proceedings do not impose a mandatory, sequential process, and shall not be considered a precondition to move to another -	Ian Signori Gorriti	Member of CEIA	Peru

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		binding or not binding- dispute resolution mechanism; therefore, either party may pursue binding dispute resolution at any time, to resolve the dispute.". "Option 2: The Parties agree to seek to resolve any dispute or controversy arising out of or in connection with this Contract amicably through discussions or negotiations, which may include the use of non-binding, third-party procedures such as mediation or conciliation. Either Party may propose negotiations, mediation, or conciliation at any time by written notice. Such notice must include sufficient information about the dispute or controversy to facilitate good-faith discussions and promote settlement. The language of the mediation [or conciliation] shall be [include language] and the mediation [or conciliation] shall take place in [include location]. These negotiations, mediation, or conciliation do not impose a mandatory, sequential process, and shall not be considered a precondition to move to another -binding or not binding- dispute resolution mechanism; therefore, either party may pursue binding dispute resolution at any time, to resolve the dispute:" Model Clause on mediation in a multi-tiered setting "In the event of a dispute or controversy arising out of or in connection with this Contract, the Parties shall refer to mediation [/or conciliation] in accordance with [include reference to agreed rules] as a necessary mandatory first step. The language of the mediation [or conciliation] shall be [include language] and the mediation shall take place in [include location].(…)"			

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
458.	**Section C,** **Commentary paras. 605 – 606**	**Mandatory or non-mandatory pre-arbitral steps** Paragraphs 605 and 606 do not quite sit together. Paragraph 605 says the parties must try to settle amicably; paragraph 606 then explains that the model clauses do not create a mandatory sequence unless the parties choose one. The Draft should say which proposition controls. In practice, disputes frequently arise over whether compliance with negotiation or mediation clauses is: • a jurisdictional requirement; • a matter of admissibility; • merely procedural; or • non-binding. The Principles should encourage parties to specify the intended consequence. Where the parties do choose mandatory pre-arbitral steps, I would add: "Non-compliance with a pre-arbitral step shall concern admissibility rather than the existence of consent to arbitration, unless the Parties expressly provide otherwise." The clause should then deal expressly with: • futility; • refusal by the other party to participate; • urgent interim relief;	ACCOLDI		Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
		• approaching limitation periods; and • tolling or suspension of contractual limitation periods during mandatory negotiations or mediation.			
459.	**Section C,** **Commentary para. 606**	**Proposed wording amendment:** "606. The dispute resolution clause in an IIC may thus refer to multiple means of settlement. The model clauses provided in this Instrument are intentionally flexible. They do not impose a mandatory, sequential process, whereby failure of one step is a legal precondition to move to the next. If the parties prefer a mandatory step-by-step approach, however, they should clearly define the sequence of steps, the rules and the timeframes applicable to each stage. In the latter case, it is suggested that the parties also clarify whether failing to effectively engage in amicable settlement would give rise to issues of admissibility if arbitration is initiated. **When the parties intend to provide for subsequent stages in the dispute resolution process, they are encouraged to explicitly specify whether a particular stage is mandatory and the specific sequence of those stages. Additionally, any identification of a stage as mandatory should be accompanied by an indication of the moment such stage is considered to be completed (whether a time period or a specific result) However, a party's impediment to the completion of a mandatory stage (such as its failure to participate or its lack of involvement) should not preclude the other party's right to proceed with the dispute resolution in accordance with the provisions of the agreement**." **Comment:** The current wording of Paragraph 606 does not expressly advise the parties to specify whether each particular stage of the dispute resolution process is	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		intended to be mandatory. In the absence of clear contractual language to that effect, an arbitral tribunal or a state court may consider the relevant stage to be non-mandatory. In addition, Paragraph 606 does not provide guidance on how the parties should define the point at which a mandatory stage is deemed to be completed, particularly where the other party fails or refuses to participate or otherwise delays the process. The proposed addition therefore seeks to encourage the parties to address these matters expressly when drafting a multi-tier dispute resolution clause and to prevent a party's non-participation or obstructive conduct from impeding the other party's ability to proceed to the next stage of dispute resolution.			
460.	**Section C.1,** **Principle 29; and** **Model Clause**	**Direct negotiations** The Model Clause requires the parties to use "best efforts" but contains **no definite negotiation period**. From a dispute lawyer's perspective, this invites an unnecessary satellite dispute over whether adequate efforts were made. A workable clause needs more than a "best efforts" standard. It should specify, for example: • 30, 45 or 60 days from receipt of the notice; • identification of senior representatives authorised to negotiate; • precise commencement date; • express ability to proceed earlier if the other party refuses to participate; and • a qualification that the information provided in the notice need not disclose privileged or protected material.	ACCOLDI		Colombia

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
461.	**Section C.1,** **Model Clause under Principle 29**	**Proposed wording amendment:** "The Parties shall attempt in good faith to settle through direct negotiations any dispute or controversy arising out of or in connection with this Contract. Either Party may initiate negotiations by written notice. Such notice shall include sufficient information about the dispute or controversy to facilitate meaningful discussions and promote settlement. **Unless otherwise agreed, the negotiation period shall commence upon receipt of such notice and shall expire [XX] days thereafter. The failure or refusal of a receiving Party to participate in negotiations shall not prevent the proposing Party from proceeding to any subsequent dispute resolution mechanism available under this Contract upon expiry of that period.**" **Comment:** The proposed wording would ensure enhanced transparency in the negotiation process by establishing (1) a clear timeframe for such process; and (2) the consequences of the receiving party's refusal to participate in the negotiations, in particular, the proposing party's right to commence dispute resolution proceedings in accordance with the provisions of the contract.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
462.	**Section C.2,** **Commentary para. 617; and** **Model Clause**	Multi-tiered clauses may be the source of problems of interpretation, chiefly on determining when one stage is over and the next one is available and could be launch. Taking this into consideration, the model clause should benefit from reading like this -or something in this in line- in order to authorize the commencement of the arbitration process: "In case the parties do not reach a full agreement, the dispute or the partial aspects thereto not solved by the mediation above mentioned, will be settled by arbitration pursuant to…".	Leandro Caputo	Member of CEIA	Argentina

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
463.	**Section C.2,** **Principle 30,** **Commentary paras. 611 – 617**	**Mediation and the Singapore Convention** The Draft appropriately refers to the Singapore Convention as a mechanism potentially facilitating enforcement of mediated settlements. The commentary should add an important State-specific qualification. Article 8 of the Singapore Convention permits a Contracting State to reserve that the Convention will not apply to settlement agreements to which that State, its governmental agencies or persons acting on behalf of governmental agencies are parties. This is particularly relevant to IICs. The practical drafting point is to require the parties to check: 1. whether the relevant States are parties to the Convention; 2. whether reservations have been made; 3. whether the official negotiating for the State has authority to settle; and 4. whether domestic budgetary, fiscal or administrative approvals are required for settlement. Without that qualification, the practical enforceability of mediation settlements may be overstated.	ACCOLDI		Colombia
464.	**Section C.2,** **Principle 30,** **Commentary para. 614**	**Proposed wording amendment:** "614. Contracting parties to an IIC are encouraged to include mediation and/or conciliation in their dispute resolution clause. The choice between institutional and ad hoc mediation depends on the parties' needs for structure, support, cost-efficiency, and flexibility. The parties should specify the chosen type of process, with explicit reference to the applicable rules. Furthermore, they are encouraged to stipulate the language. **Nevertheless, the parties are encouraged to ensure, at the very least, consistency**	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		of the procedure for appointing the mediator who will responsible for managing the mediation process and the timeframe within which the mediation process is to be completed." **Comment:** Even if the parties do not provide for specific mediation rules, they should at least specify the procedure for appointing the mediator. Otherwise, uncertainty as to the commencement and conduct of the mediation may affect the enforceability of the relevant clause. The parties should also define the timeframe for completing the mediation where such timeframe is not determined by the applicable rules or where the parties do not wish to leave the duration of the process to the mediator's discretion, in order to prevent undue delay and preserve the other party's right to proceed to the next stage of dispute resolution.			
465.	**Section C.2,** **Principle 30,** **Commentary paras. 618**	**Proposed wording amendment:** "618. The parties to an IIC may also consider expert proceedings and dispute boards as means of third- party amicable dispute settlement. While mediation and conciliation aim to facilitate agreement between the parties, expert proceedings typically focus on providing a decision or assessment about a specific technical, financial, or other specialised issue, based on expertise in a particular field. Referring one or more issues in dispute to experts allows the parties to obtain either a non-binding expert evaluation, which may serve as a basis for settlement negotiations, or a binding expert determination, where the parties agree to be contractually bound by the expert's findings. The parties are advised to agree in advance on the types of issues that may or should be submitted to expert proceedings, and to make this explicit in their IIC (e.g., by referring to specific contract clauses). Furthermore, it is advisable to clarify whether the findings of the expert will be binding for the parties **(for example, having the same binding force**	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		as the contract between the parties) under the provisions of the applicable law and whether they will be final or may be subject to further review**, including the procedure for such review where applicable**. **Comment:** The parties may also, when providing for the binding effect of the expert's findings, specify their legal effect under the applicable law, for example by providing that such findings have binding force equivalent to a contractual obligation between the parties. In addition, where the parties provide for the possibility of reviewing the expert's findings, they should expressly determine the procedure for such review.			
466.	**Section C.2,** **Principle 30,** **Commentary paras. 618.1**	**Proposed new paragraph:** "**It should also be noted that the expert proceedings provided herein are different from – and do not replace – the applicable arbitration rules or the procedural laws of state courts providing for the presentation of expert evidence, including the appointment of experts by the arbitral tribunal or court, as well as the engagement of experts by the parties in the relevant proceedings.**" **Comment:** The parties should take into account that agreeing on a separate contractual procedure for expert proceedings does not replace or modify the mechanisms for the presentation and examination of expert evidence provided for under the applicable law or arbitration rules, including the appointment of experts by the arbitral tribunal or state court and the engagement of experts by the parties, except where the parties have expressly excluded such appointment by the tribunal or court, to the extent permitted by applicable law.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
467.	**Section C.2,** **Commentary paras. 618 – 623; and** **Model Clauses**	**Expert determination and Dispute Boards** The treatment of experts and dispute boards is useful but should be more precise regarding the **legal effect of their determinations**. The contract should specify whether a determination is: • advisory; • immediately binding but subject to later review; • final and contractually binding; or • final except in cases of fraud, manifest error or excess of mandate. The contract should also say: • whether performance must continue pending challenge; • whether limitation periods are suspended; • whether failure to comply constitutes an independent contractual breach; and • whether arbitral review is de novo or limited. Those details matter most in tariff, valuation, technical-completion and economic-equilibrium disputes, where the effect of an expert or board determination can shape the rest of the case.	ACCOLDI		Colombia
468.	**Section C.3**	Although Option 2 is presented as an alternative to Option 1, I question whether a multi-tier dispute resolution clause should be included as a recommended model at all. The parties can negotiate, mediate or pursue other amicable solutions at any time without having to stipulate them as contractual preconditions to arbitration. If the parties genuinely wish to negotiate, they can do so without	Rodrigo Hesse	Member of CEIA	Peru

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		such a clause. Conversely, if one party is unwilling to engage meaningfully, the contractual obligation to negotiate is unlikely to generate a genuine settlement process. In practice, making negotiations or other amicable procedures a contractual precondition may simply create procedural friction and delay access to arbitration, particularly for the claimant. It may provide the respondent with an additional opportunity to raise objections concerning compliance with the agreed escalation mechanism, without materially increasing the prospects of settlement. I would therefore retain Option 1 as the only recommended model clause. The text may acknowledge that parties remain free to agree on negotiations, mediation or other preliminary mechanisms when the circumstances of the particular IIC justify doing so, but it should avoid presenting multi-tier clauses as a generally desirable solution.			
469.	**Section C.3**	I would not recommend ad hoc arbitration as a general option for commercial arbitrations arising out of an IIC. The absence of institutional safeguards may create concerns regarding the constitution of the tribunal, appointment procedures, administrative control and the risk of abusive or sham arbitrations. Those risks are not necessarily eliminated by institutional arbitration, but institutional administration provides additional safeguards that are particularly important in commercial disputes. The position may be different in investment arbitration or in disputes between States. Ad hoc proceedings may function more effectively in those contexts where they operate within an established international framework and benefit from the involvement of a reputable appointing authority or professional secretariat. The use of UNCITRAL arbitration in investor-State disputes illustrates this distinction.	Rodrigo Hesse	Member of CEIA	Peru

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		Accordingly, the model clauses should recommend institutional arbitration for commercial disputes arising out of an IIC. Ad hoc arbitration could be retained for investment or inter-State disputes, or allowed only where a consolidated arbitral institution participates as appointing authority or provides secretarial and administrative support.			
470.	**Section C.3,** **Principle 5**	**Dispute resolution across interdependent contracts.** Principle 5 has important procedural consequences where a project is documented through several agreements. The Model Clauses should not assume that one dispute-resolution clause automatically governs every related contract. Within a single agreement, Fiona Trust & Holding Corporation v. Privalov supports a broad, commercially coherent reading of an arbitration clause. In a multi-contract setting, however, Trust Risk Group SPA v. AmTrust Europe Ltd. illustrates the need to identify the agreement and clause most closely connected with the dispute. In Latam Hydro v. Peru fairness, consistency and procedural efficiency in international arbitration were considered as important factors while assuming jurisdiction in having an ICSID arbitration based on different claims. In Contour Global Kosovo LLC v. Republic of Kosovo and others the tribunal consolidated arbitrations where the subject matter of the Disputes arising out of different project agreements related to essentially the same facts or transactions. These authorities should be used as drafting guidance rather than as universal rules. **Coordinated clauses.** Where the parties want a single forum, the relevant agreements should contain compatible provisions on governing law, seat, institutional rules, appointment of the tribunal, joinder, consolidation, confidentiality and interim relief. The clauses should also specify whether disputes under one agreement may be heard with disputes under another and how conflicts between clauses are resolved. Coordination cannot bind a person that has not consented.	Dr. Shashikala Gurpur	Symbiosis Law School, Pune	India

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		Umbrella-clause analogy. Treaty umbrella-clause jurisprudence may be mentioned only as an analogy for the risk of parallel contractual and treaty proceedings. The principal early contrast is between SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, and SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6. It is inaccurate to refer to the latter as the 'Asian Gas case'. The commentary should not claim that most tribunals now favour a particular construction without a current systematic source. **Recommendation.** The Instrument should focus on the contractual problem within its mandate. The Model Clauses should offer: (i) an express master-forum option; (ii) a coordinated-but-separate option; and (iii) a clause preserving separate fora while establishing notice and case-management duties. Each option should state its effect on related agreements, non-parties and mandatory procedural law. ***Key References.*** *Fiona Trust & Holding Corporation v. Privalov [2007] UKHL 40; Trust Risk Group SpA v. AmTrust Europe Ltd. [2015] EWCA Civ 437; Latam Hydro v. Peru, Award, (December 20, 2023); Contour Global Kosovo LLC v. Republic of Kosovo and others (ICSID Case No. ARB/20/50); SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003); SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004).*			
471.	**Section C.3**	**Section C.3 – Domestic and regional arbitral institutions.** The Instrument could give greater consideration to domestic and regional arbitral institutions. The development of contract-based arbitration in Brazil was linked to the existence of a strong local arbitral community and	Comment made during Latin American States' Representatives Roundtable		Brazil

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		institutions familiar with the domestic legal framework and the environment in which public entities operate.			
472.	**Section C.3**	**Section C.3 – Exhaustion of local remedies.** The possibility of requiring exhaustion of local remedies before arbitration should be explored more fully in the commentary and potentially as an option in the Model Clauses. Guidance could address the advantages and disadvantages of such a mechanism and, where adopted, the period during which an investor should be required to pursue local remedies before initiating arbitration.	Comment made during Latin American States' Representatives Roundtable		Brazil
473.	**Section C.3,** **Principle 31**	We consider that Principle 31 would be better positioned closer to Principle 28 on applicable law. The two Principles address complementary aspects of the parties' design of the legal framework governing an IIC: the law applicable to the contractual relationship and the forum or mechanism through which particular disputes will be resolved. Although applicable law and forum are conceptually distinct, they should be considered together when structuring an investment contract. This is particularly important in the context of an investment project comprising a suite of contracts and potentially involving disputes of very different character. The parties should not necessarily be expected to subject every dispute arising from an IIC to the same forum or dispute-resolution mechanism. The Principle should instead recognise the possibility of allocating different categories of disputes to forums or procedures that are appropriate to their nature. **1. Carve-outs and differentiated dispute-resolution mechanisms** The commentary should provide greater guidance on the circumstances in which parties may wish to carve particular disputes out of the general dispute-resolution mechanism. Examples may include tariff disputes,	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		contractual price reviews, valuation questions, technical determinations, questions of measurement, contractual interpretation and specified categories of contractual breach. For example, a long-term infrastructure investment may provide for an expert determination or dispute board in respect of technical or valuation questions, a specialised regulatory or contractual mechanism for tariff or price reviews, and arbitration for questions concerning contractual interpretation, liability or specified breaches. Such arrangements may improve efficiency and preserve the suitability of the dispute-resolution mechanism to the subject matter of the dispute. The Instrument should therefore make clear that a general arbitration or court jurisdiction clause need not preclude parties from establishing appropriately defined carve-outs, provided that the scope and consequences of those carve-outs are clearly specified. **2. Guidance on selection of an appropriate forum** The commentary should provide guidance on the factors parties should consider when selecting the appropriate forum or mechanism for a particular category of dispute. These may include: • the legal or technical nature of the dispute; • whether the dispute requires specialist technical, financial, valuation or regulatory expertise; • whether the dispute concerns a question of contractual interpretation or legal liability; • whether the parties require a binding determination or an opportunity for negotiated resolution;			

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		• the urgency of the dispute and the consequences of delay for continued performance of the investment project; • the availability of interim or protective measures; • the relationship between the chosen forum and any applicable domestic administrative or regulatory process; • the enforceability of the resulting decision or determination; and • the relationship between the selected forum and the applicable law. The commentary should also caution against creating overlapping or insufficiently defined jurisdictional arrangements. Where multiple mechanisms are contemplated, the contract should identify clearly which disputes fall within each mechanism and which mechanism takes precedence where the characterisation of a dispute is contested. **3. Relationship between applicable law and forum** The discussion should distinguish the parties' choice of applicable law from their choice of forum. A particular forum does not necessarily imply a particular governing law, and the selection of a domestic court, arbitral tribunal, expert, dispute board or other mechanism should not by itself determine the substantive law applicable to the dispute. At the same time, the parties should consider whether the selected forum is legally and practically capable of applying the chosen substantive law and of granting the remedies contemplated by the IIC. This is particularly relevant where the parties select different mechanisms for different categories of dispute.			

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		This consideration also reinforces the point made under Principle 28 that the Instrument should not itself be treated as a substitute for a complete body of applicable law. **4. Expert determination and dispute boards** We suggest that the references to expert proceedings and dispute boards currently associated with Principle 30 be moved to Principle 31. These mechanisms are materially different from mediation and conciliation. Mediation and conciliation are primarily facilitative processes directed towards assisting the parties to reach their own settlement, whereas expert determination and dispute boards may produce a determination that has defined legal or contractual consequences. Principle 31 is therefore the more appropriate location for guidance on the selection and operation of these mechanisms as part of the parties' overall allocation of disputes between different forums. **5. Limitation periods and subsequent proceedings** The relationship between these mechanisms and limitation or prescription periods should also be addressed expressly. Where parties provide that a determination by an expert or dispute board may subsequently be challenged or referred to arbitration, the commencement of the determination process should not inadvertently cause the underlying claim or subsequent challenge to become time-barred. **6. Appointment and failure of appointment** Appointment procedures should be sufficiently complete to ensure that the dispute-resolution mechanism remains operational if the parties cannot agree or one party fails to cooperate. The parties should identify the			

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		appointing authority, the applicable time periods and the consequences of non-appointment. The same principle should apply to mediation and conciliation under Principle 30. **7. Relationship with Principle 30** We recommend that Principle 30 be confined to mediation and conciliation. Expert determination and dispute boards should instead be addressed under Principle 31 as part of the broader framework governing the allocation of disputes between appropriate forums and mechanisms. This maintains a difference between interest-based conflict resolution forums and rights-based conflict resolution forums. This would also avoid treating fundamentally different mechanisms as though they were interchangeable, while preserving the flexibility that parties require when designing dispute-resolution arrangements for complex and long-term investment projects.			
474.	**Section C.3,** **Principle 31**	The model clauses do not provide an agreement on number of arbitrators, language, seat, or law governing the arbitral proceedings; matters of vital importance that should be agreed upon, before any dispute arises. Propose wording for accomplishing this is as follows: Model Clauses on arbitration "Option 1: All disputes arising out of or in connection with this Contract shall be finally settled by arbitration [in accordance with the rules of [include reference to the agreed arbitration rules] or pursuant to [include legal basis for the arbitration]]. The number of arbitrators shall be …[include number of arbitrators] appointed [include the form of appointment]". The seat of the	Ian Signori Gorriti	Member of CEIA	Peru

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		arbitration will be [include place of arbitration chosen by the parties], the language of the arbitration shall be [include language of the arbitration], and the proceedings will be governed by the law of [include chosen law to govern the arbitral proceedings]. The tribunal shall have jurisdiction to hear and determine all claims and counterclaims of the Parties arising out of or in connection with this Contract including all subjects related to its existence, validity, interpretation, breach, termination, enforceability, formation, performance and execution, and including obligations relating to investment protection, sustainability, payments and transfers, cooperation and assistance, and any other matter governed by this Contract, in a single proceeding, with the objective that the entirety of the dispute be resolved in one forum to avoid parallel proceedings and inconsistent decision. The award shall be final, binding and unappealable, becoming enforceable upon notification to the parties." "Option 2: If any dispute, controversy, or claim arising out of or in connection with this Contract, or the breach, termination or invalidity thereof, does not settle within [XX days] of the [notice of dispute/default notice], either Party may submit such dispute, controversy, or claim to arbitration [in accordance with the rules of [include reference to the applicable arbitration rules] or pursuant to [include legal basis for the arbitration]]. The tribunal shall have jurisdiction to hear and determine all claims and counterclaims of the Parties arising out of or in connection with this Contract including all subjects related to its existence, validity, interpretation, breach, termination, enforceability, formation, performance and execution, and including obligations relating to investment protection, sustainability, payments and transfers, cooperation and assistance, and any other matter governed by this Contract, in a single proceeding, with the objective that the entirety of the dispute be resolved in one forum to avoid parallel proceedings and inconsistent decision. The award			

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		shall be final, binding and unappealable, becoming enforceable upon notification to the parties Unless the Parties agree otherwise: i. [The place of arbitration shall be […]] ii. The number of arbitrators shall be […]. iii. The language of the arbitration shall be […]. iv. The law governing the arbitration agreement shall be […].”			
475.	**Section C.3,** **Principle 31**	The draft does not reference emergency arbitrator procedures or interim/urgent relief mechanisms in Chapter 8, notwithstanding that IICs are, by the Instrument's own description, long-term, high-value contracts in sectors (resource extraction, construction, telecommunications, water, and power) where urgent interim relief is frequently commercially critical. We respectfully suggest that the commentary to Principle 31 note the general availability of emergency arbitrator or equivalent interim relief mechanisms among arbitral institutions (available in for example arbitration at the SCC Arbitration Institute), and flag that institutional practice varies as to whether such relief is available in treaty-based as opposed to contract-based investor-State proceedings.	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden
476.	**Section C.3,** **Principle 31**	**Principle 31 / Section C.3 – Arbitration and judicial proceedings.** The Instrument should provide a more balanced and developed treatment of arbitration and domestic judicial proceedings as alternative adjudicatory mechanisms. The commentary could explain the respective advantages and disadvantages of each option. It was noted that contract-based arbitration may reproduce some difficulties associated with treaty arbitration, including inconsistency between decisions and the absence of an appellate or	Comment made during Latin American States’ Representatives Roundtable		Brazil

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		comparable mechanism capable of promoting coherence across awards.			
477.	**Section C.3, Principle 31,** **Model Clauses**	A provision similar to the fork-in-the-road, common in BITs, should be included to avoid parallel proceedings.	José Gregorio Torrealba	AVA	Venezuela
478.	**Section C;** **Principle 31; and** **Chapter 7,** **Section C.1**	The Instrument mentions insolvency in one provision only. Principle 18(4)(b), and the corresponding Model Clause, list 'bankruptcy, insolvency, or the protection of the rights of a creditor' among the grounds on which the host State may prevent or delay a payment or transfer through the equitable, non-discriminatory and good faith application of its law. Insolvency therefore enters the Instrument as a permitted restriction on the investor's right to move money, and nowhere else. Nothing is said about what happens when the investor, or the project company through which the investment is held, enters insolvency proceedings. This is not a marginal case. IICs are long-term, often performed through a special purpose vehicle whose only asset is the project, and the Instrument's own Illustrations contemplate terms of twenty-five years. Two consequences fall to other laws, and not to the same one. I take the European Union rules as the clearest worked example of the allocation, not as a universal rule: they bind Member States only, and a forum elsewhere will reach these questions through its own conflicts rules and may allocate them differently. The effects of the opening of proceedings on the contract, and the practitioner's power to continue or disclaim it, are for the law of the State of the opening of proceedings; within the Union this follows from Article 7(2)(e) of Regulation (EU) 2015/848. The effects on the arbitration agreement and on a pending arbitration go elsewhere: Article 18 of the same Regulation refers the effects	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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		on a pending lawsuit or pending arbitral proceedings concerning an asset or right forming part of the estate solely to the law of the Member State in which the lawsuit is pending or in which the arbitral tribunal has its seat. How much rides on that allocation is clear from the leading decision on the point, decided under the predecessor Regulation (EC) 1346/2000, whose Articles 4 and 15 are now Articles 7 and 18. In Syska and Elektrim SA (in administration) v Vivendi Universal SA [2009] EWCA Civ 677 the Polish provision in issue was article 142 of the Bankruptcy and Reorganisation Law, set out by Longmore LJ at paragraph [4]: 'Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued.' Patten LJ observed at paragraph [31] that, 'Unusually (and perhaps uniquely) this has the effect of invalidating the arbitration agreement itself and not merely of staying the pending reference.' The case turned on one allocation. As Longmore LJ put it at paragraph [18], '[o]ne still has to decide whether the question of discontinuance or no is to be decided by reference to art 4 or art 15'. He concluded that it was article 15, so that 'the question whether that lawsuit should continue or be discontinued by reason of the insolvency is to be determined 'solely' by English law as 'the law of the Member State in which that lawsuit is pending''. Patten LJ added at paragraph [33] that, once an existing reference to arbitration is accepted to be a pending lawsuit within article 15, the choice of national law to determine the effects of insolvency proceedings on a lawsuit pending 'would appear to comprehend any issues about the validity of the arbitration agreement which would affect the continuation of the arbitration itself'. The arbitration agreement survived. Allocated to article 4 instead, Polish law would have applied and article 142 would have destroyed it. The rule that produced that result binds Member States only. A tribunal seated outside the Union, or a court in a third State, comes to the same question through its own conflicts rules, which may characterise it differently, for instance as capacity to be a			

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		party to arbitration rather than as the effects of insolvency on pending proceedings. The characterisation, not the substance, decides the case. An Instrument offered for seats inside and outside the Union cannot assume that any one characterisation will prevail. Nor was the rule in issue in Syska peculiar to Poland; comparable national rules avoiding the arbitration agreement on the opening of insolvency proceedings have existed in Spain. And the consequence reaches past the tribunal: where a party becomes insolvent, whether the arbitration should be stayed is itself contested, and an award rendered without a stay may be refused recognition under the public policy exception in Article V(2)(b) of the New York Convention. There is a narrower point in the same area. The multi-tiered structure the Instrument recommends assumes the parties keep the capacity to negotiate, mediate and settle. Once proceedings open, who may take those steps, and what approvals a settlement needs before it binds the estate, are for the lex concursus, and an outcome negotiated with the former management may not bind anyone. A model lies close to hand. Principle 19(1) of the 2023 Principles provides that a proprietary right made effective against third parties 'is effective against the insolvency representative, creditors, and any other third party in an insolvency-related proceeding', and 19(2) preserves the rules on ranking, avoidance and enforcement. Principle 5(6) does the conflicts half by fixing the applicable law for events before the opening of proceedings. The technique transfers even though the subject matter does not: state the pre-insolvency position, then expressly preserve the insolvency rules that override it. Suggestion: a short Commentary paragraph in Chapter 8 recording that the effects of insolvency on the IIC, on the arbitration agreement and on pending proceedings fall to other laws, that insolvency may also affect the parties' standing to take part in the amicable phases and to settle, and inviting parties to address the consequences when drafting. The UNCITRAL Model Law on Cross-Border Insolvency (1997) and the Model Law on Recognition and Enforcement of Insolvency-Related			

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		Judgments (2018) would be useful references, with one caveat that bears on Chapter 8. Those instruments work by recognition, stay and cooperation, and not by allocating the question to a law. The stay does reach arbitration: the Guide to Enactment and Interpretation of the 1997 Model Law records, at paragraph 180, that the automatic stay on recognition of a foreign main proceeding covers actions brought before an arbitral tribunal, and that the provision therefore imposes a mandatory limitation on the eventual effectiveness of any arbitration agreement. In the same passage the Guide concedes that, because international arbitration is relatively independent of the legal order of the State in which it is held, it may not always be possible in practice to stay arbitral proceedings, and that staying them may be difficult where the arbitration is seated neither in the enacting State nor in the State of the main proceeding. A stay that may not reach the tribunal is not a substitute for an allocation rule, which is why the point belongs in the Commentary to Chapter 8.			
479.	**Section C.3,** **Principle 31; and** **Commentary paras. 624 – 630**	**ICSID-specific jurisdiction** The ICSID portion needs more work than the current text gives it. The generic reference to arbitration "pursuant to the ICSID Convention" is not enough. ICSID Convention jurisdiction depends on the requirements of Article 25, including a legal dispute arising directly out of an investment and the required relationship between a Contracting State (or properly designated constituent subdivision or agency) and a qualifying national of another Contracting State. The issue becomes acute in investment contracts where: • the contract is signed by an SOE rather than the State; • the investor operates through a locally incorporated project company;	ACCOLDI		Colombia

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		• foreign control must be established; • the relevant State entity requires designation or approval; or • nationality changes during the project. I would add a separate ICSID Model Clause, with drafting notes tied specifically to Article 25. It should also contain a fallback. If ICSID Convention jurisdiction is unavailable, the dispute shall be resolved under the ICSID Additional Facility Rules, ICC Rules or UNCITRAL Rules, as selected by the parties. Otherwise, a defective ICSID clause can leave a very large investment without the forum the parties thought they had chosen.			
480.	**Section C.3,** **Principle 31,** **Commentary para. 625**	**Proposed wording amendment:** "The parties may choose between institutional and ad hoc arbitration, depending on their needs for structure, administrative support, cost-efficiency, and procedural flexibility. The UNCITRAL Arbitration Rules are widely used in ad hoc investor-State arbitration, both in treaty-based and contract-based disputes. Various international and regional arbitration institutions are experienced in administering disputes between States and investors concerning IICs, and the choice of parties may vary according to the specific features of an institution, its history, and its regional scope. **Where the parties choose ad hoc arbitration, they should also ensure that the arbitration agreement provides for, or incorporates through the applicable rules, an effective mechanism for the constitution of the arbitral tribunal, including an appointing authority in the event that the agreed appointment procedure fails.**"	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		Comment: In the absence of such provisions in an ad hoc arbitration, the arbitration agreement may face enforceability difficulties if the tribunal cannot be constituted in accordance with the parties' agreement.			
481.	**Section C.3,** **Principle 31,** **Commentary para. 625; and footnote 66**	Principle 31 and its commentary appropriately leave the choice of dispute resolution forum to the parties and note (fn. 66) that the choice between institutional and ad hoc arbitration depends on the parties' needs for structure, administrative support, cost-efficiency, and procedural flexibility. We suggest strengthening this comparative framework in the main commentary itself (rather than only in a footnote) with reference to a broader set of criteria relevant to selecting an arbitral institution for IICs. For example, prior experience administering State-investor and contract-based investment disputes, regional expertise, availability of expedited or streamlined procedures, scrutiny of awards, and administrative fee structures, without naming specific institutions in the main text. This would better equip drafters, especially those less familiar with institutional arbitration, to make an informed choice suited to their transaction.	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden
482.	**Section C.3,** **Principle 31,** **Commentary paras 626-627; and footnote 69**	Paragraphs 626-627 give details of only two institutions (the ICC and ICSID) in the main commentary text, while other institutions experienced in administering State-investor and contract-based investment disputes are mentioned only collectively. We suggest that if illustrative examples of specific institutions are retained in the main text, a representative range of institutions with relevant experience be named with comparable detail, so that drafter is not steered toward the institutions mentioned in the current draft. For example, the SCC Arbitration Institute has registered more than 130 investor-State arbitrations since 1993.	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden

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		The Draft already provides its own generic model clauses in paragraph 629 ("Option 1" and "Option 2") that are meant to be institution-neutral, in which a drafter is meant to fill in "[include reference to the agreed arbitration rules]" themselves. We agree with this approach and to remain consistently institution neutral, we respectfully suggest removing the institution-specific wording in footnote 69.			
483.	**Section C.3,** **Principle 31,** **Commentary para. 627**	(Introducing the ICSID Convention, its enforcement mechanism under Article 54, and its post-award remedies, including annulment, interpretation, and revision). Paragraph 627 of the Commentary to Principle 31 highlights the finality and distinctive enforcement regime of ICSID awards as a reason for recommending ICSID as a forum, noting that an "*ICSID arbitration award is final and binding and can be enforced in any ICSID Contracting State as if it were a final judgment from that State's courts.*" The paragraph, however, does not clarify that this enforcement regime, established under Articles 53 and 54 of the ICSID Convention, applies only to awards rendered pursuant to the ICSID Convention. Article 54(1) requires each Contracting State to recognize an award "*rendered pursuant to this Convention*" as binding and to enforce the pecuniary obligations imposed by it as if the award were a final judgment of its own courts. This enforcement regime is not a feature of every arbitration administered by ICSID. In particular, it does not extend to awards rendered under the ICSID Additional Facility Rules, these proceedings are expressly outside the scope of the ICSID Convention according to Article 3. Awards rendered under the Additional Facility Rules are instead subject to the legal framework applicable at the seat of arbitration and to any applicable treaties on the recognition and enforcement of arbitral awards, most notably the New York Convention. Their recognition and enforcement may therefore	Gerardo Lozano Alarcón (GLA Arbitraje)	LAI Regional Chapter	Mexico

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		be subject to proceedings before domestic courts and to the grounds for refusal established under the applicable legal regime. This distinction is important because an arbitration administered by ICSID is not necessarily an arbitration under the ICSID Convention. I therefore suggest that the Commentary clarify that the enforcement benefit described in paragraph 627 is contingent upon the arbitration proceeding under the ICSID Convention itselfREL. It does not automatically extend to all arbitrations administered by ICSID.			
484.	**Section C.3,** **Principle 31,** **Commentary para. 628**	**Proposed wording amendment:** "628. Any arbitration clause in an IIC should clearly reflect the parties' consent to arbitration and designate the applicable arbitration rules or legal basis for the arbitration. Furthermore, the clause should specify the number of arbitrators (typically one or three), the language of the proceedings, and the governing law **of IIC**. The **place** of arbitration **and governing law of the arbitration clause** may also need to be designated." **Comment:** The current wording of Paragraph 628 does not make clear which legal relationship the reference to "governing law" concerns, namely whether it refers to the law governing the IIC itself or to the law governing the arbitration agreement. The proposed amendment is intended to distinguish these two matters expressly and avoid ambiguity as to the applicable law.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
485.	**Section C.3,** **Principle 31,**	**Proposed new paragraph:** **"When entering into an IIC containing an arbitration agreement, the parties should take into account the potential impact of applicable sanctions and other restrictive measures in order to preserve the effectiveness and enforceability of the arbitration agreement and**	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA	Russian Federation / United Arab Emirates

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	Commentary para. 628.1	**minimise the risk of any resulting award being set aside or rendered unenforceable."** **Comment:** Given the long-term nature of IICs, sanctions or other restrictive measures may arise or change after the contract is concluded and may affect the conduct of the arbitration, access to relevant services, payment arrangements or enforcement of the resulting award. The parties should therefore take such risks into account when drafting the arbitration agreement in order to preserve its practical effectiveness and reduce potential procedural and enforcement risks.		IAWG; BGP Litigation)	
486.	**Section C.3,** **Principle 31,** **Commentary para. 630; and footnote 74**	Paragraph 630 states that expedited arbitration "is offered by several institutions" but footnote 74 illustrates the USD 4 million automatic-application threshold. We suggest, for clarity, to add in a short note that other institutions' expedited procedures differ in mechanics and thresholds.	Caroline Falconer, Jake Lowther	SCC Arbitration Institute	Sweden
487.	**Section C.3,** **Model Clauses on arbitration**	**Seat, law of arbitration agreement and interim relief** In non-ICSID arbitration, the seat is not a secondary drafting detail. The clause should identify: • arbitral institution/rules; • seat; • number of arbitrators; • language;	ACCOLDI		Colombia

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		• law governing the arbitration agreement; • appointing authority for ad hoc proceedings; and • availability of emergency and interim relief. This also matters for interim relief. An application to a court for protective measures does not necessarily breach an arbitration agreement, and the 2026 ICC framework recognises both tribunal-ordered measures and, in appropriate cases, recourse to competent courts. Any exclusivity or waiver language in Chapter 8 should therefore preserve interim, conservatory and emergency relief.			
488.	**Section C.3, Model Clauses on arbitration**	It would be useful to add a commentary that it is recommended to use, or at least take note of, recommended model clauses (if any) of chosen arbitral institutions, thus avoiding issues with determining the chosen arbitral institution.	Anastasiia Riabova, Stepan Sultanov	Russian Arbitration Association (KIAP law firm)	Russian Federation
489.	**Section C.3, Model Clauses on arbitration**	It could be useful to add into the model clause the order of exchange of lists of candidates for the presiding arbitrator. Alternatively, a comment could contain an advice of considering a protocol of the presiding arbitrator nomination.	Anastasiia Riabova, Stepan Sultanov	Russian Arbitration Association (KIAP law firm)	Russian Federation
490.	**Section C.3, Model Clauses on arbitration**	It could be useful to add an optional clause on finality of arbitral awards.	Anastasiia Riabova, Stepan Sultanov	Russian Arbitration Association (KIAP law firm)	Russian Federation
491.	**Section C.3,**	**Proposed wording amendment:**	Sergey Morozov	Russian Arbitration	Russian Federation /

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	Model Clauses on arbitration	Option 1: All disputes arising out of or in connection with this Contract shall be finally settled by arbitration [in accordance with the rules of [include reference to the agreed arbitration rules] or pursuant to [include legal basis for the arbitration]]. **Unless the Parties agree otherwise:** **i. [The place of arbitration shall be […] If, following the conclusion of this Contract, there is a material change of circumstances affecting the suitability of the agreed place of arbitration, the Parties shall negotiate in good faith for a period of [XX] days with a view to agreeing on whether the place of arbitration should be changed and, if so, on an alternative place of arbitration. If the Parties fail to reach agreement within that period, the arbitral tribunal shall determine, having regard to the relevant circumstances, whether the place should be changed and, if so, shall designate an alternative place.]** **ii. The number of arbitrators shall be […].** **iii. The language of the arbitration shall be […].** **iv. The law governing the arbitration agreement shall be […].** **Comment:** There is no reason why parties of an IIC should not be encouraged to specify these basic procedural elements directly in the arbitration agreement, rather than leave them to be determined subsequently by the arbitral tribunal. Given the long-term nature of IICs, the circumstances existing at the time the place is chosen may change materially, for example as a result of sanctions or other restrictive measures. The parties may therefore consider including in advance a mechanism for reconsidering the place, allowing them		Association (Deputy Chairman RAA IAWG; BGP Litigation)	United Arab Emirates

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		first to seek agreement on an alternative place and, failing such agreement, to refer the issue to the arbitral tribunal for determination.			
492.	**Section C.3,** **Model Clauses on arbitration**	**Proposed wording amendment:** "Option 2: If any dispute, controversy, or claim arising out of or in connection with this Contract, or the breach, termination or invalidity thereof, does not settle within [XX days] of the [notice of dispute/default notice], either Party may submit such dispute, controversy, or claim to arbitration [in accordance with the rules of [include reference to the applicable arbitration rules] or pursuant to [include legal basis for the arbitration]]. **A Party's failure or refusal to participate in the agreed preliminary dispute resolution procedure shall not prevent the other Party from proceeding to arbitration upon the expiry or other agreed completion of that procedure.** Unless the Parties agree otherwise: i. [The place of arbitration shall be […]] ii. The number of arbitrators shall be […]. iii. The language of the arbitration shall be […]. iv. The law governing the arbitration agreement shall be […]." **Comment:** The parties may expressly provide that a party's failure or refusal to participate in the preliminary dispute resolution procedure shall not prevent the other party from commencing arbitration in accordance with the agreement.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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493.	**Section C.3,** **Model Clauses on arbitration**	**Proposed wording amendment:** "Option 1: All disputes arising out of or in connection with this Contract shall be **subject to the exclusive/ non-exclusive jurisdiction** of the courts of [State]. Option 2: Any dispute, controversy, or claim arising out of or in connection with this Contract, or the breach, termination or invalidity thereof, not settled within [XX days] of the [notice of dispute/default notice], shall be **subject to the exclusive/ non-exclusive jurisdiction of** the courts of [State]. **A Party's failure or refusal to participate in the agreed preliminary dispute resolution procedure shall not prevent the other Party from commencing judicial proceedings upon the expiry or other agreed completion of that procedure.**" **Comment:** The parties may expressly specify whether the jurisdiction of the designated state courts is exclusive or non-exclusive, thereby clarifying whether the dispute may also be resolved in another forum, including arbitration. In addition, as noted above, a party's failure or refusal to participate in a prior preliminary dispute resolution procedure should not prevent the other party from commencing judicial proceedings in accordance with the agreement.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
494.	**Section C.3,** **Model Clauses on arbitration**	**Proposed addition to the Model clause on arbitration. Option 2:** "Should the place of arbitration and/or applicable *lex arbitri* render the arbitration agreement null and void, inoperative or incapable of being performed or otherwise adversely affect a party's ability to present its case, or enforce any resulting award by reason of material change of circumstances, the tribunal, at the request of a party, after giving the parties	Roman Zykov	Russian Arbitration Association (Mansors law firm)	Russian Federation

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		a reasonable opportunity to state their views, may change the place of arbitration and /or applicable *lex arbitri."* **Comment:** Economic and geopolitical events in recent years have demonstrated the need for flexibility of long-term contracts, including a possibility to modify a dispute resolution mechanism.			
495.	**Section C.3, Model Clauses on arbitration**	The draft does not address potential arguments by investors that they did not provide express prior consent to specific claims and counterclaims brought against them. Therefore, it is recommended that the model clauses on arbitration be improved to prevent arbitral tribunals from declaring themselves incompetent to hear claims and counterclaims by the State.	Héctor Luis Pittman Villarreal	Peer Reviewer	Peru
496.	**Section C.3,** **Commentary para. 630**	**Proposed wording amendment:** "630. For smaller or less complex cases, the parties to an IIC may wish to consider expedited arbitration, designed to resolve disputes quickly and efficiently with simplified procedures, typically involving a sole arbitrator and shorter timelines. Expedited arbitration options and rules are offered by several institutions. **Where the applicable arbitration rules provide for the automatic application of expedited procedures based on the amount in dispute or other criteria, the parties should consider whether such automatic application is appropriate in the context of the particular IIC and, where appropriate, consider expressly excluding the application of the expedited procedure. In doing so, they should take into account not only the amount in dispute, but also the complexity of the issues and the significance of the potential dispute for the investment project.** "	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		Comment: The parties should take into account that the amount in dispute may not be the only relevant indicator of the complexity of an investment dispute. Other factors may include issues of expropriation, causation, damages quantification, valuation and complex expert evidence.			
497.	**Section C.3,** **Commentary para. 631,** **Model Clauses on judicial proceedings**	The suggested clauses— "All disputes ⋯ shall be submitted to the courts of [State]" That is too thin for an international investment contract. At a minimum, the clause needs to deal with: • exclusive versus non-exclusive jurisdiction; • ordinary civil courts versus administrative courts; • territorial and subject-matter competence; • service requirements; • interim relief; • language; • recognition and enforcement; and • any applicable State-immunity rules. This is especially important in civil-law systems, where the parties may not be free to choose an ordinary commercial court if administrative jurisdiction is mandatory.	ACCOLDI		Colombia
498.	**Section C.4**	I am not persuaded that Principle 32 should be retained in its current form. The existence of parallel proceedings is not, in itself, the central problem. Principle 27 already addresses the principal remedial concern by prohibiting	Rodrigo Hesse	Member of CEIA	Peru

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		double recovery and requiring amounts obtained in other proceedings to be taken into account. The more precise concern is the illegitimate or abusive initiation of proceedings, particularly where a party commences proceedings in breach of an exclusive forum clause, an agreed waiver, or the limits of the parties' consent to arbitration. These issues should not be conflated with the broader concerns relating to costs, forum shopping, inconsistent decisions and double recovery. The provisions on double recovery, deduction and disclosure should remain under Principle 27. By contrast, provisions concerning the coordination of dispute resolution mechanisms, consolidation, exclusive forums, waivers and fork-in-the-road arrangements should be addressed in the section on interdependent contracts, particularly where several contracts or legal instruments form part of the same investment project and the parties intend disputes to be resolved by the same tribunal. Principle 32 should therefore either be deleted or narrowly reformulated as a prohibition against initiating proceedings in violation of an agreed exclusive dispute resolution mechanism or waiver, subject to applicable law and the relevant investment treaties. A rule directed at illegitimate initiation would be more precise than the current statement that parties should merely "endeavour to avoid" parallel proceedings. Even in this scenario, its existence is not convincing as, following *pact sunt servanda*, a provision stating that one should uphold its word is redundant.			
499.	**Section C.4**	The progressive structure of the waiver options is a commendable feature that provides parties with flexibility to calibrate their approach. The issue that arises, however, is that the enforceability of waivers may be uncertain when the relevant investment treaty contains an umbrella clause, which can elevate contractual breaches to treaty violations and allow investors to	Yaqi Ma	Member of CEIA	China

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		reframe their claims. The commentary acknowledges this difficulty by citing the *Compañía de Aguas del Aconquija v. Argentina* annulment decision and the "fundamental basis" test, but it does not provide sufficient practical guidance on how to address this in drafting practice. The principle should be that parties who have agreed on an exclusive dispute resolution mechanism should be able to rely on that agreement without the risk of parallel treaty proceedings. Therefore, it is respectfully suggested that the commentary explicitly advise drafters to broaden waiver language to encompass claims "whether framed as breach of contract, breach of treaty, or otherwise," thereby reducing the risk of circumvention. It would also be helpful to recommend that the investor acknowledge in the contract that it makes the waiver with full knowledge of its treaty rights, strengthening the evidentiary basis for enforcement before arbitral tribunals. The commentary could also be enhanced by noting the link between avoiding parallel proceedings and the broader objective of ensuring effective access to remedy, a principle that underpins the UN Guiding Principles on Business and Human Rights. The UNGPs emphasize that States have a duty to protect against business-related human rights abuses and to ensure that affected individuals and communities have access to effective remedies, and parallel proceedings that fragment disputes can undermine timely access to remedy for affected stakeholders. On the question of third parties, the commentary correctly observes that waivers do not bind shareholders or affiliates, and it is suggested that the drafters add practical guidance recommending that all contracts governing a single investment project contain identical arbitration clauses to facilitate consolidation and prevent related parties from circumventing the chosen forum.			
500.	**Section C.4;**	The rationale underlying Principle 32 addresses a legitimate concern: parallel proceedings increase costs, decrease predictability, and may lead to multiple and potentially conflicting awards or decisions. That notwithstanding, the	José Ángel Rueda	CIIAM / Cuatrecasas	Spain

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	Model Clause (pp. 181- 182); Commentary to Principle 32 (paras. 632-638)	Model Clause appears to disregard that, in certain circumstances, the investor (and its shareholders) may be legitimately compelled to initiate proceedings in a different forum without this constituting an exercise of forum shopping. In this regard, the Model Clause may give rise to significant tensions when the subjective scope of the arbitral tribunal's jurisdiction under the IIC does not coincide with the universe of entities whose conduct materially affects the IIC. Indeed, arbitral practice shows instances in which the investor has sought to bring into the arbitration under the IIC autonomous entities endowed with separate legal personality and statutory powers, which are not party to the IIC or the arbitration agreement, but whose conduct has a direct and material impact on the IIC and lies at the origin of the injury suffered by the investor. Where the host State objects and the tribunal determines that it lacks jurisdiction ratione personae over such entity under the IIC, treaty-based investment arbitration may constitute the only effective means of access to justice for the investor (if the treaty provides ius standi to the investor) and/or its shareholders. In such circumstances, precisely because the parallel claim would "arise out of or in connection with" the IIC, but with respect to an additional party over which the *'contractual tribunal'* lacks jurisdiction (by comparison with a BIT tribunal that has jurisdiction over all entities of the host State), an advance waiver of that avenue (such as the ones contained in the Model Clause) may amount, in practice, to a denial of access to justice. In light of the foregoing, the Instrument should incorporate several corrective mechanisms. (a) On the one hand, the Model Clause should be deleted;			

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		(b) On the other hand, if the Model Clause is kept, the Instrument should include the following: Correlative waiver by the host State of objections to the participation of all of its state entities involved in the ICC in the arbitration. Any waiver by the investor of the right to initiate parallel or sequential adjudicative dispute resolution proceedings should be contingent upon a correlative waiver by the host State of the right to object to the participation in the arbitration of its autonomous entities, agencies, and regulators provided that their actions or omissions affect the IIC. In this way, the principle of State unity would operate effectively as a basis for attributing to the State party the acts of the entity, agency or regulator (as in a BIT arbitration), preventing the host State from simultaneously benefiting from the investor's waiver and from the jurisdictional exclusion of the entity, agency or regulator whose conduct gives rise to the injury under the IIC. Jurisdictional exception on grounds of subject matter and persons. Any waiver by the investor of the right to initiate parallel or sequential proceedings should include a carve-out providing that the waiver shall not apply to proceedings concerning matters or persons that fall outside the jurisdiction of the arbitral tribunal designated under the IIC. In this respect, Option 3 of the Model Clause already establishes an exception for matters that fall outside the jurisdiction of the tribunal, but omits any reference to persons. This exception should be expanded to encompass also persons whose participation in an arbitration under the IIC would be precluded on grounds of jurisdiction ratione personae, so as to avoid situations amounting to a practical denial of justice to the investor and/or its shareholders. Likewise, both exceptions - on grounds of subject-matter and on grounds of persons - should be incorporated into Options 1 and 2, ensuring that, regardless of the form of waiver chosen, the investor retains			

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		access to an effective remedy for those claims that the contractual forum is unable to hear.			
501.	**Section C.4,** **Principle 32**	Principle 32 should not merely ask parties to "endeavour" to avoid parallel proceedings; it should impose a clearer obligation and should be embedded in the dispute resolution clauses under Principle 31. Regarding this important principle (especially attending to the interest of investors who may not have enough funding to have several dispute procedures open regarding the same contract), we believe that the principle is a bit soft and the wording can create more issues in a dispute scenario. First, the principle should have a mandate wording ("Parties shall…", more than a suggestion ("Parties should…") that leaves no doubt that the intent is to prevent duplication of procedures as well as forum or tribunal shopping, and not just a non-binding recommendation that can take Courts and Tribunals to have to value (in a dispute scenario case), if set party had an obligation to abstain to look for another forum or procedure or if they acted withing their rights. Also, regarding wording, the word "endeavour" (define as to "try", "attempt", "strive", "seek") opens the door to review (and therefore be a matter of dispute) a somewhat fluid concept with undefined parameters; how to measure the attempts made to avoid a parallel procedure? How to determine how hard one should try or seek to prevent this duplication? Is the open negotiation taken under article 30, enough to justify that the party has fulfilled the endeavour to avoid the duplicated process? This open concepts open the door to a collateral dispute directed to determine as to whether the obligation was breached or if it's the proper use of a right under the IIC principles, and no matter what argument wins, the mere creation of this "new dispute" over this principle, makes this principle not efficient enough to fulfil its goal to avoid new procedures and forum or tribunal shopping.	Ian Signori Gorriti	Member of CEIA	Peru

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		In this respect, we propose a new wording that better preserves this principle´s core goals as well as maintaining party autonomy, as follows: "Parties shall refrain to commence or maintain parallel or duplicative adjudicative dispute resolution proceedings over the same IIC, unless required to preserve rights, comply with mandatory law, or as otherwise agreed by the parties." Second, in order to maximize the effectiveness of the principle under commentary, this should be integrated into principle 31, especially into the model clauses as has been proposed on the commentary to that principle. Their inclusion in principle 31 dealing with the venue choice and dispute resolution clause in the ICC, assures that this intricate and relevant subject matter doesn't get lost in the drafting, and is expressly reflected in the parties' dispute resolution agreement.			
502.	**Section C.4,** **Principle 32**	**Proposed wording amendment:** "Parties should endeavour to avoid **or appropriately coordinate** parallel or duplicative adjudicative dispute resolution proceedings." **Comment:** Parties should endeavour to avoid parallel or duplicative adjudicative dispute resolution proceedings. In the case such parallel or duplicative proceedings appear, Parties shall appropriately coordinate them, including but not limited to through suspension, discontinuance or other procedural mechanisms, in order to reduce the risk of conflicting awards	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
503.	**Section C.4,** **Principle 32**	Principle 32 pursues a legitimate objective: minimizing unnecessary costs, inconsistent decisions, and duplicative recovery. Nevertheless, the commentary places excessive emphasis on exclusive forum mechanisms and	Dr. Le Xuan Tung, Nguyen Vu Ngoc Mai	Institute for Legal Strategy and Science, Vietnam	Vietnam

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		waivers, while offering insufficiently to provide adequate guidance on handling cases that actually arise in practice. The HCCH Draft Text on Parralel Proceedings should be considered point of reference. First, distinguish parallel proceedings from related actions. Paragraph 632 groups together claims under different instruments and claims by investors and shareholders. These are not necessarily duplicative. Article 3 of the HCCH Draft Text on Parallel Proceedings distinguish proceedings involving the same parties and subject matter from related actions involving connected parties and overlapping issues. This distinction could improve Principle 32's conceptual precision. Second, provide proportionate procedural responses. Avoidance should be supplemented by disclosure, consultation, stays and coordination. Under Article 5, The HCCH draft's treatment of suspension, dismissal and resumption illustrates how duplication can be managed while preserving access to adjudication. Third, broaden paragraph 637 beyond consolidation. Consolidation may be unavailable where proceedings involve different parties or procedural regimes. Coordinated timetables, agreed sequencing and identification of common issues should also be considered, subject to applicable rules. Fourthly, preserve effective remedies. Concurrent proceedings should not automatically be treated as abusive. The commentary should clarify unnecessary duplication from proceedings protecting distinct rights, while explicitly addressing double recovery.			

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504.	**Section C.4,** **Principle 32**	G. AVOIDING PARALLEL PROCEEDINGS AND WAIVERS[99] This is the area of the PIICs where the interaction between contract law and public international law is most acute, and where further guidance would add the most value. The PIICs seem to treat the waiver of treaty-based investment arbitration primarily as a contractual mechanism, subject to the law chosen under Principle 28. However, this approach understates the analytical complexity of the issue. The validity of such a waiver is also governed by the relevant investment treaty itself and by the standard under international law — as reflected in arbitral case law — requiring a 'clear and unambiguous' renunciation of treaty rights.[100] It is submitted that the commentary should make explicit that the validity of a waiver clause depends on a cumulative test: validity under the law governing the contract, and compliance with whatever conditions the relevant treaty itself imposes on waiver or renunciation of the investor's treaty rights. Presenting the waiver as a single-layer contractual device, as the current Model Clause options arguably do, risks giving parties a false sense of certainty. This is particularly relevant where the underlying treaty provides an umbrella clause enabling covered investors to elevate breaches of contractual rights through State measures as a breach of international legal obligations of the State. The interplay of these consequential legal standards	EAPIL		

[99] G. Zarra, *Parallel Proceedings in Investment Arbitration* (Kluwer Law International 2017); H. Wehland, *Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford 2013); W. Shen and Y. Zhang, 'Domestic Proceedings in Investment Arbitration and Possible Strategies to Mitigate Potential Clashes' [2021] *American Review of International Arbitration 32*, 41 ff.; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford 2017).

[100] A. K. Hoffmann, 'The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty' [2007] 22 *ICSID Review 69 ff.; SGS Société Générale de Surveillance SA v. Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction (12 February 2010), parr. 180-181; *Waste Management Inc v. United Mexican States* (No 2), ICSID Case No ARB(AF)/00/3, Decision on Jurisdiction (26 June 2002).

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		and the possibility of their waiver should be considered and addressed in the PIICs. As regards waivers of access to domestic courts,[101] the commentary's general caveat (referring to 'mandatory jurisdiction of local courts in some States') appears insufficiently developed. Such waivers may conflict with constitutional or public-policy guarantees of access to justice that exist in a number of jurisdictions, independently of any express local court mandatory jurisdiction rule. The commentary might consider indicating that the enforceability of such a waiver should be assessed cumulatively against: (i) the law governing the contract; (ii) the law governing the arbitration agreement; (iii) the *lex arbitri*; and (iv) the law of the State(s) where enforcement will eventually be sought. A short practical checklist along these lines — which the drafters of PIICs have already used elsewhere for other issues — could be more useful than a general disclaimer. Finally, the commentary correctly observes that a waiver does not bind non-signatory shareholders or affiliates, and that consolidation may be sought where the applicable arbitration rules permit it. We suggest that this point be more explicitly cross-referenced to Principle 5 (interdependent contracts, discussed above), and that PIICs recommend, as standard practice, that all contracts forming part of a single project cluster carry identical dispute resolution clauses specifically in order to preserve the possibility of consolidation under the chosen institutional rules — bearing in mind that the availability of consolidation itself depends on the lex arbitri and on the rules selected, which the PIICs could usefully identify by cross-reference.			

101 *Commerce Group Corp v. Republic of El Salvador*, ICSID Case No ARB/09/17, Award (14 March 2011).

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		For example, the 2022 ICSID Arbitration Rules distinguish consolidation (merging proceedings into a single award, Rule 46(2)) from coordination (aligning procedural steps, such as submissions and hearings, while keeping separate proceedings and separate awards, Rule 46(3)). Coordination is notably more flexible because it can bridge different procedural regimes or even different arbitral institutions entirely. The Draft's Principle 32 commentary should introduce this consolidation/coordination distinction as an additional tool for managing the problem of parallel contract-based and treaty-based proceedings. **Recommendation 9: Avoidance of Parallel Proceedings** *a) The PIIC and the Commentary should make explicit that the validity of a waiver clause for investment treaty arbitration depends cumulatively on the law of the contract and the treaty conditions for waiver of treaty rights.* *b) The enforceability of the waiver of national court proceedings should be subject to the law of the contract, the law of the arbitration agreement, or the lex arbitri, in addition to the independent constitutional safeguards for access to justice and due process.* *c) The PIICs could recommend as standard practice, that all contracts forming part of a single project cluster carry identical dispute resolution clauses specifically in order to preserve the possibility of consolidation under the chosen institutional rules — bearing in mind that the availability of consolidation itself depends on the lex arbitri and on the rules selected, which the PIICs could usefully identify by cross-reference to Principle 5 (interdependent contracts, discussed above).*			

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		Principle 27 states the correct substantive rule (no double compensation for the same damage across mechanisms or fora) but relies for its operation entirely on a promissory undertaking between 'the Parties'. There are at least three specific gaps, each with a corresponding drafting suggestion. First, a party's own undertaking not to seek double recovery does not survive the fact that an arbitral award, once rendered, is a freestanding enforcement title that can be assigned to, and independently enforced by, a third party not bound by the original undertaking, and that the tribunal that rendered the award becomes functus officio and cannot supervise compliance. The Model Clause should be supplemented with an express instruction that any tribunal seized of a later or parallel claim shall deduct sums already recovered for the same damage in an earlier or parallel proceeding and shall condition enforcement of its own award on evidence that no double recovery has occurred, rather than relying solely on the parties' compliance. Second, the clause does not extend to affiliated claimants — parent companies, shareholders, or related corporate vehicles in the same vertical chain — who might bring a duplicative claim for the same economic harm under a different treaty or a different corporate capacity. We recommend extending both the no-double-recovery clause and the Principle 32 waiver clauses to bind such affiliated entities, to the extent the drafting parties can procure their agreement. Third, a no-double-recovery clause binding only the signatories to a given IIC cannot, by ordinary principles of consent-based jurisdiction, bind a separate State-owned or State-controlled entity that is not a party to that same arbitration agreement, even where that entity is closely connected to the same investment. The commentary should flag that, where the State's contracting structure involves both the State and a separate State entity, the parties should			

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		consider either making the State entity a co-signatory to the same no-double-recovery and consolidation provisions or establishing an inter-entity indemnity or contribution mechanism outside the IIC itself. Suggested wording (additional paragraph 4 to the Model Clause under Principle 27): 'Where a tribunal or court is seized of a claim for damage that has already been, or may also be, the subject of a claim in another proceeding, the party bringing that claim shall disclose the existence and status of the other proceeding, and the tribunal or court shall deduct from any award or judgment any sum already recovered, or awarded and enforceable, for the same damage in that other proceeding. This Principle extends to claims brought by, or against, any Affiliate of a Party, including any parent company or shareholder of the investor, and, on the State side, to claims against any State entity connected with the same investment; the Parties shall use reasonable endeavours to procure the agreement of any such Affiliate or State entity to be bound by this Principle.' **Recommendation 10: Parallel Proceedings and Preventing Double Recovery** *a) The distinction between the consolidation and coordination proceedings should be clearly noted in the Commentary as a means to prevent double recovery, complemented by an express PIIC provision to that effect. This amendment should ensure that:* *o any tribunal seized of a later or parallel claim is expressly required to deduct any sums already recovered in respect of the same damage in an earlier or parallel proceeding, and to condition enforcement of its own award on evidence that no double recovery has occurred, rather than relying solely on the parties' compliance;*			

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		o the provisions on double recovery, as well as Principle 32, extend to entities and companies affiliated with the parties, to the extent that the drafting parties are able to procure their agreement; and *o non-signatory State-owned or State-controlled entities are either made subject to the no-double-recovery provisions as if they were signatories to the IIC, or are covered by a separate indemnity or cost-allocation mechanism applicable between the relevant government agencies and entities.* *b) A new paragraph 4 should be added to the Model Clause under Principle 27:* *'Where a tribunal or court is seized of a claim for damage that has already been, or may also be, the subject of a claim in another proceeding, the party bringing that claim shall disclose the existence and status of the other proceeding, and the tribunal or court shall deduct from any award or judgment any sum already recovered, or awarded and enforceable, for the same damage in that other proceeding. This Principle extends to claims brought by, or against, any Affiliate of a Party, including any parent company or shareholder of the investor, and, on the State side, to claims against any State entity connected with the same investment; the Parties shall use reasonable endeavours to procure the agreement of any such Affiliate or State entity to be bound by this Principle.'*			
505.	**Section C.4,** **Principle 32**	We consider that Principle 32 is presently too softly structured. Where an IIC provides for contractual dispute-resolution mechanisms alongside potentially applicable treaty protections, the Instrument should take a clearer position on the avoidance of forum shopping and the need for parties to define the relationship between different avenues of recourse.	Saniya Sharma	Founder & Executive Director, Alt Platform Collective	United Kingdom

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		The appropriate approach is reflected more closely in paragraph 6.34, which recognises that forum shopping can be addressed by clearly defining the contractual claims available to the parties, establishing the applicable dispute-resolution process and, where appropriate, including waiver provisions. We suggest that this should be elevated from commentary into a more substantive prescription within the Principle itself. **1. Clear allocation of contractual claims and forums** The Principle should encourage parties to identify clearly the claims that may be brought under the IIC and the forum or dispute-resolution mechanism applicable to each category of claim. This is particularly important where the investment project involves different types of disputes or multiple contractual instruments. The parties should seek to avoid overlapping avenues of contractual recourse that permit the same underlying dispute to be characterised differently for the purpose of accessing a more favourable forum. Where different forums are deliberately provided for different categories of disputes, the contract should clearly define the relevant carve-outs and the circumstances in which each mechanism applies. **2. Forum shopping and waiver** The Principle should recognise that, where contractual and treaty-based avenues of recourse may coexist, appropriate waiver or exclusivity provisions may be necessary to prevent a party from pursuing duplicative or inconsistent proceedings in different forums in respect of the same underlying dispute. Such provisions should, however, be drafted with particular care in the investment-contract context. The parties should not assume that a contractual waiver is neutral merely because it is expressed in reciprocal			

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		terms. The relative bargaining positions of an investor and a State, the availability of treaty protections and the circumstances in which the investment contract was negotiated may mean that a contractual waiver has substantially greater consequences for one party than the other. **3. Relationship with treaty protections** Before agreeing to any waiver or exclusivity provision, the parties should identify the relevant treaty protections that may otherwise be available in relation to the investment. This should include consideration of the scope of any applicable treaty, the definition of protected investment and investor, applicable substantive standards, available remedies and the treaty's dispute-resolution provisions. The objective should not be to preserve every possible avenue of recourse irrespective of the parties' contractual allocation of risk. Rather, the parties should make an informed decision as to which protections and remedies are being allocated contractually, which are being preserved under applicable treaty law, and which are being waived. In particular, a party should not inadvertently be left without a remedy, or with materially less favourable remedies, as a result of a contractual waiver that was agreed without proper consideration of protections that would otherwise have been available under an applicable treaty. This is particularly important where the contractual allocation of risk reflects materially unequal bargaining positions. **4. Risk allocation and bargaining position** The commentary should therefore make clear that the use of waiver or exclusivity clauses should be considered together with the substantive allocation of risk under the IIC. The relevant question is not simply whether a contractual waiver is legally effective, but whether the resulting allocation			

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		of protection and risk is appropriate in light of the nature of the investment, the parties' respective positions and the protections otherwise available under applicable treaty law. The parties should undertake this assessment before finalising the dispute-resolution and waiver provisions. Where a contractual provision removes or materially limits a protection that would otherwise be available under a treaty, the corresponding contractual allocation of risk and remedies should be sufficiently clear and deliberate. **5. Duplication and inconsistent proceedings** The Principle should also distinguish between legitimate preservation of separate contractual and treaty rights and inappropriate duplication of proceedings. Where the same conduct may potentially give rise to contractual and treaty claims, the parties should consider mechanisms addressing parallel proceedings, double recovery and inconsistent findings. This should be coordinated with Principle 27. The objective should be **not simply to discourage forum shopping, but to structure the IIC so that the scope of each avenue of recourse is sufficiently clear that forum shopping is unnecessary, while ensuring that an investor or State does not inadvertently surrender substantive protection or an effective remedy through an inadequately considered contractual waiver.**			
506.	**Section C.4,** **Principle 32;** **Model Clause:**	One of the more recurrent and complex practical issues in ISDS and IIC is that the interaction, complementarity, and differing approaches and legal bases of each create inefficiency and double dipping, not to mention contradictions that affect the coherence of the system and its general acceptance.	José Miguel Júdice	CIIAM / José Miguel Judice International Arbitration	Portugal

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	Option 2 and Option 3; **Commentary to the Model Clause (paras. 634-638)**	The Draft did not forget the relevance of the issue and clearly stated its intention: "To maximise legal clarity and avoid forum shopping, the parties to an IIC should ideally have recourse only to the dispute settlement mechanism specifically designated in the contract" (para. 634). This goal may be attained if the frontier between ISDS and IIC is drafted in a way that clearly avoids two different, and in a way opposite, risks: double dipping and the lack of protection available in specific situations. I agree that it is important to avoid the possibility of re-litigating the same issue through the mere attempt to enter using a different door. At the same time, it is important to avoid the risk that the two legitimate doors end up closed to the exercise of the right of protection, with each tribunal finding, in turn, that the other door was actually the one available. These pathological situations may not always be avoided, and in any event, it is reasonable to anticipate that a sophisticated and experienced tribunal will not be caught by this kind of trap. But to decrease the possibility of these anomalies materialising, it is paramount that the wording of BITs and IICs be carefully drafted to limit the overlap of the situations, and the drafters have clearly made a very positive and helpful effort. However, as the issue has been addressed from the viewpoint of future signatories of IIC contracts, with the common, subliminal intention that IIC, and not BIT, should be the route to settle disputes (as clearly stated in para. 634), I understand that the draft tries to attain a certain expansion of the system to situations that might be seen as existing in a grey zone, which makes sense for both the IIC investor and the State. There is nothing to worry about if, through this kind of wording as proposed by the drafters, future tribunals are equipped to adjudicate without facing			

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		artificial borders created by very restrictive clauses and may therefore bring a conflict to a fairer end without the temptation (or need) to restart afresh under ISDS, which also remains available as a general recourse. The problem lies elsewhere. Investors resorting to BITs – if for no other reason than that they are not signatories to an IIC – may be faced with new interpretations of old BITs, based on a theory that certain issues may no longer be adjudicated because they are now considered contractual by nature, with the evidence for this coming from this draft once it is used to create a binding legal interpretation applied to IICs on a general and internationally extensive level. Now, after this high-level approach, the detailed and consequential analysis: (a) I do not see any relevant global issues in relation to the waiver analysed in paras. 635-637; (b) The point to take into account is in Option 2 of the subsequent "Model Clause" after para. 637: the inclusion of "matters arising out of or in connection with" appears to be a better approach than not referring to it explicitly, and from a contractual viewpoint this may make sense. However, the risk is that it may be construed as an argument to deny access to a BIT's protection, on the basis that whenever a "matter" arises "out of or in connection with" a contract, it falls short of ISDS … even where the relevant contract does not have the State or any entity related to it as a signatory or a party. I would suggest clarifying that this waiver may not, in any way, be considered the basis for refuse recourse to ISDS where the contract is not with a public entity; (c) I do not consider the issue as significant for Option 3, since in that case it is clearly highlighted that the provision relates only to the Contract at			

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		stake. However, ex abundanti cautela, it may perhaps be adequate to apply guidance similar to that suggested for Option 2 above; (d) My previous comments may be even more relevant for another reason: since Option 3 draws a distinction between "claims that are contractual in nature or that allege a breach of the contract" and "matters arising out of or in connection with the contract", this may in itself open a larger avenue for restrictions on BIT protection where the latter expression is accepted as capable of being included.			
507.	**Section C.4,** **Principle 32,** **Model Clause Option 3**	i3T supports the adoption of Option 3 in so far as it forecloses treaty arbitration, including the investor's irrevocable waiver of any right to initiate proceedings under a bilateral or multilateral investment treaty and the undertaking not to circumvent that waiver through corporate restructuring, assignment, or proceedings brought by shareholders, affiliates or third parties on substantially the same facts. Nevertheless, i3T does not support the remainder of the clause, which forecloses recourse to the courts of the host State and designates arbitration outside the host State's legal order as the exclusive forum. i3T suggests that binding determination of disputes arising out of an international investment contract should rest exclusively within the legal order of the host State, either before its competent courts or in arbitration seated in the host State, governed by its arbitration law and subject to the supervisory and annulment jurisdiction of its courts, with the law of the host State applying to the merits in both cases. The waiver given by the investor should accordingly cover treaty-based investment arbitration, arbitration seated outside the host State, and any mechanism that removes the award from the supervisory jurisdiction of the host State's courts, including arbitration under the ICSID Convention.	i3T		Mexico

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		i3T therefore proposes a further option in the Model Clause, drafted as the recommended default, under which the parties designate the competent courts of the host State or arbitration seated in the host State as the exclusive fora for binding determination, provide for non-binding third-party procedures under Principles 29 and 30 as a prior step, and record the investor's waiver of every binding forum outside the host State's legal order. Where the parties depart from that option, the Instrument should treat the departure as an exception and invite the parties to record their reasons. In light of this proposal, it is recommended to remove options 1 and 2 from the draft Model Clauses.			
508.	**Section C.4,** **Principle 32; and** **Commentary paras. 632 – 634**	**Do not presume one exclusive forum is always preferable** Principle 32 is another provision I would recast rather than merely qualify. The Draft states that parties should "ideally" have recourse only to the dispute mechanism designated in the contract. As a general proposition, that goes too far. A contractual claim and a treaty claim may involve: • different causes of action; • different respondents; • different applicable law; • different substantive obligations; and • different forms of sovereign conduct.	ACCOLDI		Colombia

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		The better policy objective is to prevent abusive duplication, inconsistent outcomes and double recovery without pretending that every parallel legal avenue can or should disappear. I would put the principle this way: "Parties should structure the dispute resolution architecture of the IIC so as to minimise unnecessary parallel or duplicative proceedings, inconsistent decisions and double recovery, while preserving claims arising from independent legal obligations where appropriate." That formulation is more neutral and avoids taking a position on questions that treaty texts and tribunals resolve differently.			
509.	**Section C.4,** **Commentary para. 635**	Il s'agit de déterminer si la clause parapluie peut également s'appliquer aux contrats signés par des entités étatiques. La plupart des clauses parapluie n'apportent pas de précision à ce sujet. Cependant, la réponse est affirmative si l'entité en cause est un organe de l'État, puisque l'ensemble de ses actes lui sont directement imputables. En revanche, pour les émanations de l'État dotées d'une personnalité juridique distincte, leurs comportements ne sont pas attribués à l'État à moins qu'ils ne relèvent de prérogatives de puissance publique. Deux courants jurisprudentiels se dégagent sur cette question : une première approche restrictive considère que les engagements contractuels des entités étatiques doivent être exclus du champ d'application de la clause parapluie (a). Au contraire, la seconde approche est plus large, estimant que ces engagements doivent y être inclus (b). Voire p. 152 et seq de la thèse. Les États devraient éclairer leurs intentions en précisant le champ d'application de cette clause parapluie: vise-t-elle la protection des	Nasr Ashoush	Ph.D. holder from the University of Burgundy, France and Judge at the Egyptian Council of State	Egypt

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		obligations contractuelles ou internationales de l'État ? S'étend-elle également aux engagements contractuels des entités étatiques ? Il convient également de préciser l'étendue du consentement à l'arbitrage, afin d'éviter que les tribunaux ne procèdent eux-mêmes à une interprétation extensive de leur compétence. Les États devraient donc définir avec précision si les litiges contractuels impliquant des entités étatiques relèvent ou non du mécanisme de règlement des différends prévu par l'accord d'investissement. Une telle précision permettrait non pas d'élargir automatiquement la compétence du tribunal, mais d'en fixer clairement les limites. Parallèlement, tous les contrats conclus avec les entités étatiques pourraient prévoir un renvoi explicite au mécanisme de règlement des différend prévu par le TBI applicable, lorsque les parties souhaitent soumettre l'ensemble du litige à un forum unique. Une telle coordination permettrait de limiter les procédures parallèles et d'assurer que les litiges impliquant l'État et ses entités soient résolus sur la base d'un cadre procédural uniforme.[102]			

[102] Courtesy translation into English (Secretariat): The issue is whether the umbrella clause can also apply to contracts signed by state entities. Most umbrella clauses do not specify this point. However, the answer is affirmative if the entity in question is an organ of the State, since all its acts are directly attributable to the State. Conversely, regarding state emanations possessing distinct legal personality, their conduct is not attributed to the State unless it involves the exercise of governmental authority. Two lines of case law have emerged on this issue: a first, restrictive approach holds that the contractual commitments of state entities should be excluded from the scope of the umbrella clause (a). In contrast, the second approach is broader, taking the view that such commitments should be included (b). See pp. 152 et seq. of the thesis. States should clarify their intentions by specifying the scope of the umbrella clause: does it aim to protect the State's contractual obligations or its international obligations? Does it also extend to the contractual commitments of state entities? It is also advisable to specify the extent of consent to arbitration to prevent tribunals from adopting an overly broad interpretation of their own jurisdiction. States should therefore precisely define whether or not contractual disputes involving state entities fall within the scope of the dispute settlement mechanism provided for in the investment agreement. Such precision would not automatically expand the tribunal's jurisdiction but would clearly establish its limits. At the same time, all contracts concluded with state entities could include an explicit reference to the dispute settlement mechanism provided for in the applicable BIT, where the parties wish to submit the entire dispute to a single forum. Such coordination would make it possible to limit parallel proceedings and ensure that disputes involving the State and its entities are resolved based on a uniform procedural framework.

#	Section / Principle / Model Clause / Paragraph	Comment	Respondent Name	Respondent Title / Organisation	Respondent Country
510.	**Section C.4,** **Principle 32,** **Commentary para. 635**	**"Fundamental basis" test** Paragraph 635 relies heavily on the contractual/treaty distinction and the "fundamental basis" of the claim. I would also be careful with the "fundamental basis" discussion. It should not be presented as a settled rule governing contractual waivers. Forum-selection clauses, umbrella clauses, waiver provisions, fork-in-the-road clauses and independent treaty claims are treated differently across treaties and tribunals. The commentary does not need to settle that jurisprudential debate. A more cautious formulation would be: "The effect of a contractual waiver upon claims arising independently under an investment treaty depends on the wording of the treaty, the scope and validity of the waiver, the identity and authority of the contracting parties, and the applicable jurisdictional framework." That better reflects how the issue is actually argued in practice.	ACCOLDI		Colombia
511.	**Section C.4,** **Principle 32; and** **Commentary paras. 635-650**	The commentary acknowledges that the enforceability of a treaty waiver depends on the circumstances and that arbitral tribunals disagree on the effect of a contractual waiver where an umbrella clause is present. No drafting is offered to address that uncertainty beyond the undertaking against circumvention. A waiver whose enforceability depends on the disposition of a subsequent tribunal offers the host State limited protection, and the Working Group may wish to consider whether further drafting can be provided. i3T therefore proposes extending paragraph 2 of the Model Clause to refer expressly to obligations of technology transfer, local content development,	i3T		Mexico

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		training and skills development, research, development and innovation, and other productive development commitments agreed in the IIC. It further proposes allowing the IIC to provide for the publication of non-confidential information on indicators and results relating to sustainability commitments, technology transfer, supplier development and the creation of public value, as well as decisions or awards, with adequate safeguards for protected commercial, technological and personal information.			
512.	**Section C.4,** **Principle 32,** **Model Clause Option 1**	**Proposed wording amendment:** "The investor shall submit with its request for or notice of arbitration a written and non-conditional waiver of any right **for itself**~~[for itself or its shareholders]~~ to initiate other adjudicatory dispute resolution proceedings, with respect to: (a) Any breach alleged under this Contract, or (b) Any claim the fundamental basis of which is contractual. **Comment:** The commencement of proceedings or submission of claims by the investor should not automatically result in a waiver of independent claims belonging to its shareholders, where such shareholders have separate causes of action that do not overlap with the investor's claims. The waiver should therefore be limited to rights and claims held by the investor itself.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
513.	**Section C.4,** **Principle 32,** **Model Clause**	**Waivers of treaty proceedings** The treaty-waiver options need a fairly substantial rewrite. **(a) Option 1 — Shareholders** An investor generally cannot contractually waive an independent legal right belonging to a **shareholder that is not a party to the contract**.	ACCOLDI		Colombia

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	Options 1 – 3	The words "for itself or its shareholders" should come out unless every relevant shareholder is itself a party to the waiver. A parent company may undertake not to procure or finance claims by entities under its control, but that is conceptually different from extinguishing those entities' independent rights. **(b) Option 2 — "Mutual waiver of Treaty Proceedings"** This option is conceptually problematic. Paragraph 635 itself states that treaty-based investor-State arbitration is ordinarily initiated by the investor. Yet Option 2 states that "the Parties" mutually waive treaty proceedings. A private investor cannot waive treaty rights belonging to a sovereign State; likewise, a State-owned contractual entity may lack authority to affect the host State's treaty rights or obligations. Option 2 should either be deleted or confined to rights that each contracting party actually holds and has legal authority to waive. **(c) Option 3 — Anti-circumvention** The undertaking not to circumvent through shareholders, affiliates or third parties can bind the investor **as a contractual covenant**, but it cannot itself eliminate jurisdiction based on an independent right held by a non-signatory. The clause should say this expressly. **(d) Necessary carve-outs** The waiver also needs carve-outs for: • interim and conservatory measures;			

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		• enforcement and recognition; • award challenges; • insolvency; • criminal or regulatory proceedings; • mandatory local procedures; • proceedings involving third parties; and • matters outside the tribunal's jurisdiction.			
514.	**Section C.4;** **Principle 32;** **Model Clause: Option 3** **Commentary to the Model Clause (para. 638)**	Regarding the Anti-Circumvention Undertaking in Model Clause Option 3, there is an issue of potential ineffectiveness and ambiguity of the investor's undertaking not to circumvent the waiver through shareholders or affiliates. Model Clause Option 3 includes an undertaking by the investor "*not to circumvent this waiver, directly or indirectly, through… proceedings through shareholders, affiliates, or third parties*" [[The Investor undertakes not to circumvent this waiver … through … shareholders, affiliates, or third parties…]]. This anti-circumvention commitment is crucial for the effectiveness of the exclusive forum clause. However, as the comment recognizes it, its legal effect is questionable. As a general rule, an investor, as a distinct legal entity, cannot unilaterally waive or extinguish the legal rights belonging to its shareholders or affiliates, who are separate legal persons and may have their own rights under different investment treaties. The current wording creates a best-efforts obligation for the investor but fails to define what actions are required to fulfil it. This leaves a significant loophole and creates uncertainty regarding compliance and enforcement.	Ana María Ordóñez	CIIAM / Martínez Quintero Mendoza González Laguado & De La Rosa	Colombia

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		To address this issue, it is recommended that the drafters add a commentary to guide the interpretation and implementation of this undertaking. The commentary could clarify that while the investor cannot extinguish third-party rights, its commitment implies an active and verifiable obligation to take all reasonable measures within its power to prevent such parallel proceedings. The proposed commentary could suggest that this undertaking could be operationalized through the following or some actions by the investor: 1. Procurement of Formal Waivers: The investor is obligated to use its best efforts to procure a written waiver from its controlling shareholders and relevant affiliates who could potentially bring a claim under an applicable investment treaty. This waiver would confirm their adherence to the IIC's exclusive forum clause. 2. Use of Corporate Governance: The investor commits to employing its corporate governance mechanisms (e.g., board directives, shareholder resolutions) to ensure that its related entities do not initiate parallel proceedings. 3. Indemnification Obligation: The investor undertakes to indemnify the Host State for all costs, expenses, and any potential awards arising from a parallel proceeding initiated by a shareholder, affiliate, or third party in contravention of the spirit of the waiver. This creates a strong financial disincentive. 4. Duty of Transparency: The investor must disclose its corporate structure during the IIC negotiations, identifying shareholders and affiliates that could potentially invoke an investment treaty, thereby allowing the State to assess the risk of parallel proceedings.			

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		The commentary should also clarify that if a parallel proceeding is initiated by a related entity, and the investor cannot demonstrate that it took the reasonable steps, this failure will be considered a breach of the IIC by the investor. This would entitle the Host State to pursue contractual remedies, such as a claim for damages or, if the breach is deemed fundamental, termination of the contract. This guidance would transform a general promise into a set of concrete, verifiable obligations. It would provide greater legal certainty, manage the parties' expectations, and give arbitral tribunals a clear standard for assessing compliance. Ultimately, it would significantly strengthen the waiver clause and the overarching goal of preventing duplicative proceedings.			
515.	**Section C.4,** **Principle 32,** **Commentary para. 637**	**Consolidation** The Draft suggests that including the same arbitration clause in all contracts governing an investment project facilitates consolidation. Using the same arbitration clause helps, but it is not enough to make consolidation work. In practice, consolidation also depends on compatibility among: • parties; • arbitration agreements; • institutional rules; • seats; • governing procedural arrangements; and • consent to joinder/consolidation.	ACCOLDI		Colombia

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		For interdependent contracts, I would add an express cross-contract consolidation agreement rather than rely on identical arbitration clauses alone. Treaty and contract arbitrations raise additional consent problems and should be dealt with separately.			
516.	**Section C.5**	Option 3 is a useful provision and should be retained. However, the model clause should go further than merely referring to transparency. It should also incorporate the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and the IBA Guidelines on Conflict of Interest in International Arbitration (2024) as applicable standards of conduct. The clause should expressly address double hatting and role confusion. These issues are particularly relevant to the legitimacy of investment arbitration, where the perceived concentration of appointments among a relatively limited group of individuals may lead the same person to act, in different proceedings, as arbitrator, counsel or expert. The concern is not limited to actual conflicts of interest. It also concerns the appearance that a person is performing incompatible functions or approaching similar legal or factual issues from different institutional roles. The model clause should therefore require each arbitrator to disclose whether, in any pending or recent proceeding, the arbitrator has acted as arbitrator, counsel or expert in a matter involving the same State, investor, affiliated entity, investment, measure, transaction or substantially related facts or legal issues. It should also provide that an arbitrator may not concurrently act as counsel or expert in a related investment proceeding. The restriction should, however, be tailored to the relevant arbitration market. A stricter rule may be justified for investment arbitration because of the legitimacy concerns associated with concentration and recurring	Rodrigo Hesse	Member of CEIA	Peru

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		appointments. It should not be transposed automatically to commercial arbitration, where the market is broader and a general prohibition on acting in different capacities in unrelated proceedings would be disproportionate. In commercial arbitration, the restriction should apply only where the proceedings involve the same parties or affiliates, the same transaction or materially related facts or legal issues.			
517.	**Section C.5**	The balanced approach of offering three distinct transparency options is a pragmatic recognition that different investment projects have different public interest and commercial sensitivity profiles. The issue is that the commentary does not provide sufficient guidance on how these options interact with the broader principle of access to information, which is increasingly recognized as important in investment governance involving public interests, particularly in light of the UN Guiding Principles' emphasis on access to information as a component of effective remedy. The principle should be that transparency provisions should be proportionate to the nature and impact of the investment while preserving the integrity and efficiency of the arbitral process, and should align with the growing body of investment treaty practice that reflects this approach. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), referenced in the draft, represent a significant step toward greater public accountability and have been incorporated into a number of recent investment treaties, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and various Model BITs adopted by States. Therefore, it is suggested that the commentary explicitly encourage parties to consider the interests of affected stakeholders when selecting their transparency option, particularly for projects with significant environmental, social, or human rights implications. On conflicts of interest, the commentary mentions both the UNCITRAL Code of Conduct and the IBA Guidelines but does not explain their relationship. It	Yaqi Ma	Member of CEIA	China

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		is suggested that the drafters add a brief note that these instruments serve complementary functions and that parties may wish to incorporate both by reference into their arbitration clause, consistent with approaches increasingly adopted by arbitral institutions and States in recent BITs. It may also be helpful to suggest that the contract explicitly empower the arbitral tribunal to apply these standards when determining challenges to arbitrators, providing procedural clarity. Furthermore, given the increasing role of artificial intelligence in legal practice, it is proposed that the commentary address the emerging issue of technology use in proceedings. The principle should be that technology should enhance, not undermine, the integrity of the arbitral process and should not create new conflicts of interest or compromise confidentiality. Parties may benefit from guidance on protocols for AI use, including disclosure obligations, restrictions on inputting confidential information into third-party platforms, and confirmation that counsel remain responsible for their submissions.			
518.	**Section C.5**	Given the public-interest dimension of international investment contracts, the Instrument could consider establishing a clearer baseline regarding transparency and conflicts of interest in arbitral proceedings. While flexibility and party autonomy are important, IIC disputes frequently concern public resources, public services and regulatory decisions affecting third parties. Rather than leaving transparency entirely to the applicable institutional or procedural rules, the Instrument could identify minimum standards concerning disclosure of the existence of proceedings, publication of awards, disclosure of arbitrators' potential conflicts of interest and, where appropriate, access to relevant procedural documents. Such standards could remain subject to legitimate exceptions based on confidentiality, sensitive commercial information and other overriding public interests.	Gustavo Andrés Piedrahita	*Director, Centro de Arbitraje y Conciliación*	Colombia

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519.	**Section C.5**	**Section C.5 – Transparency and confidentiality.** Transparency of proceedings and awards should be the default in contract-based investment arbitration involving States or State entities, particularly where public funds are concerned. Confidentiality should operate only as a narrow and justified exception rather than as the default inherited from commercial arbitration practice. Such approach was already taken in Brazil, where awards are publicly available.	Comment made during Latin American States' Representatives Roundtable		Brazil
520.	**Section C.5**	**Section C.5 – Conflicts of interest.** The treatment of conflicts of interest should be developed further. It was suggested to address the issue through a Principle and a dedicated Model Clause rather than through a limited reference in the commentary. It was also suggested to refer to the 2023 UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution.	Comment made during Latin American States' Representatives Roundtable		Brazil
521.	**Section C.5,** **Commentary paras. 639 – 641; and** **Model Clause**	**Transparency** The Draft offers three options, including complete non-publication of awards. For contracts involving public assets, natural resources, public utilities or significant fiscal commitments, **absolute confidentiality may conflict with mandatory transparency, access-to-information, audit or parliamentary oversight requirements.** The 2026 ICC Rules themselves do not impose blanket confidentiality on the parties; ICC expressly recognises that disputes involving States and matters of public interest may require a tailored approach. For contracts with a substantial public-interest dimension, publication subject to protection of confidential information is the better default, always subject to mandatory law.	ACCOLDI		Colombia

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		There is another technical point. The UNCITRAL Transparency Rules were drafted for treaty-based investor-State arbitration. If parties import them into an IIC arbitration by contract, the clause should say that they apply mutatis mutandis and explain how treaty-specific references, the repository and the relevant authorities are to function. A clause of that kind should cover, among other things: • publication of notices and awards; • pleadings and evidence; • hearings; • confidential business information; • national-security information; • personal data; • amicus curiae submissions; and • responsibility for publication			
522.	**Section C.5,** **Model Clause,** **Option 1 and 2**	**Proposed wording amendment:** "… **The foregoing shall be without prejudice to any disclosure strictly required by applicable law or regulation, including applicable governmental, regulatory, stock exchange or audit requirements, or necessary for the recognition, enforcement or challenge of an award.**" The obligation to maintain the confidentiality of an award may conflict with a party's legal or regulatory duty to disclose it. The proposed exception is therefore intended to ensure that confidentiality obligations do not prevent	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		disclosures required by applicable law or necessary for recognition, enforcement or challenge of the award.			
523.	**Section C.5,** **Model Clause,** **Option 3**	**Proposed wording amendment:** "The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) shall apply **mutatis mutandis** to arbitrations conducted under this Contract." **Comment:** The UNCITRAL Rules on Transparency were developed for treaty-based investor-State arbitration and therefore may not apply directly to disputes arising solely under an IIC. The proposed amendment is intended to clarify that, where the parties wish to use those Rules in contract-based arbitration, they should apply only with the adaptations and exclusions necessary to reflect the contractual nature of the dispute.	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
524.	**Section C.5,** **Commentary para. 642**	Proposed wording amendment: "States and other stakeholders have undertaken steps in recent years to address conflicts of interest in international investment arbitration. Arbitration institutions may have specific rules or practices to ensure the independence and impartiality of arbitrators and address potential conflicts of interest that would apply or that the parties may be willing to refer to." The parties may also consider specifying the standards governing arbitrator independence, impartiality and disclosure, including whether any applicable codes of conduct, institutional standards or other relevant soft-law instruments are intended to apply in addition to, or be taken into account alongside, the applicable arbitration rules."	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates
525.	**Section C.5,**	**Conflicts of interest**	ACCOLDI		Colombia

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	Commentary paras. 642 – 644	The Draft discusses conflicts of interest but stops short of a black-letter Principle or Model Clause. Given the weight the Instrument places on legitimacy in investment dispute resolution, leaving the issue at commentary level feels incomplete. I would add a short, separate Principle covering: • independence and impartiality; • continuing disclosure duties; • repeat appointments; • relationships with counsel, experts and parties; • third-party funding disclosure; • issue conflicts where relevant; and • multiple roles or "double-hatting". The Draft already points to the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution. It should say whether the parties are expected to incorporate that Code contractually or simply use it as guidance.			
526.	**Section C.5,** **Commentary para. 644**	**Proposed new paragraph:** "**Where third-party funding is used, the parties should also take into account any disclosure requirements necessary to identify potential conflicts of interest, including, where appropriate, disclosure of the existence and identity of a third-party funder. The parties may also agree on specific disclosure requirements in relation to third-party funding, for example by reference to relevant guidance such as the**	Sergey Morozov	Russian Arbitration Association (Deputy Chairman RAA IAWG; BGP Litigation)	Russian Federation / United Arab Emirates

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		ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration." **Comment:** Given the complexity and significant value of investment disputes, investors may frequently rely on third-party funding. The parties should therefore take into account that disclosure of such funding may be required under the applicable arbitration rules, including for the purpose of identifying potential conflicts of interest. They may also agree in advance on appropriate disclosure requirements and documentation concerning third-party funding.			
527.	**Section C.6**	Section C-6 is a valuable addition. It addresses an important legitimacy concern arising from the perception that investment tribunals may be structurally more receptive to investor claims and that the State may lack an effective procedural response. The recognition of a reciprocal right to bring counterclaims helps correct that asymmetry by ensuring that the State can obtain relief for the investor's non-performance of obligations connected with the IIC. The provision could, however, make clearer that this mechanism is based on the contractual jurisdiction created by the IIC. It should not be understood as automatically subjecting the investor to obligations under an investment treaty or to international obligations that do not otherwise bind the investor. Rather, the tribunal should be empowered to hear claims arising from different legal sources, provided that those claims fall within the parties' consent and the tribunal's jurisdiction. This could allow the same tribunal to address, within a single proceeding, the investor's contractual breaches under applicable domestic commercial law, the State's contractual breaches, and the State's alleged breaches of public international law where those claims are properly within the tribunal's jurisdiction. This would resemble the approach taken in complex commercial	Rodrigo Hesse	Member of CEIA	Peru

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		arbitration, where different claims or issues may be governed by different legal rules within the same proceeding. The model clause should therefore clarify that the tribunal may determine claims and counterclaims under the legal regime applicable to each claim, while preserving a single procedural forum. The investor's liability would arise from the obligations undertaken in the IIC, including any expressly incorporated sustainability obligations, whereas the State's liability could also be assessed under the applicable rules of public international law, where jurisdiction exists. This structure would preserve the distinction between treaty-based and contract-based arbitration while offering a more balanced and coherent framework for resolving the whole dispute.			
528.	**Section C.6**	The explicit recognition that States may bring counterclaims for breaches of sustainability obligations is a significant innovation and one of the most valuable contributions of this instrument, as it transforms environmental protection, labour standards, and human rights due diligence from aspirational principles into enforceable contractual commitments. This approach aligns with recent developments in investment treaty practice, which acknowledge that investors may have human rights and environmental obligations. For example, the Dutch draft Model BIT explicitly permits investment tribunals to consider an investor's non-compliance with its commitments under the UN Guiding Principles on Business and Human Rights when determining compensation, reflecting a growing trend toward symmetrical obligations in investment law. The issue is that the commentary does not flag potential procedural limitations that may arise depending on the choice of arbitral institution. Parties may select ICSID arbitration without realizing that Article 46 of the ICSID Convention limits counterclaims to those arising directly out of the	Yaqi Ma	Member of CEIA	China

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		subject matter of the dispute, which could restrict the broad counterclaim jurisdiction intended by the model clause. The principle should be that the full scope of counterclaims available under the contract should not be inadvertently constrained by institutional rules. It is therefore suggested that the commentary advise parties to consider institutional frameworks such as the ICC or SCC, where counterclaims are not similarly restricted, or to explicitly state in the contract that they waive any objection to jurisdiction based on a narrow reading of the applicable procedural rules. Additionally, the drafters might consider referencing internationally recognized frameworks that inform the content of sustainability obligations. The principle should be that sustainability obligations should be defined with reference to widely accepted standards, including the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the ILO core labour standards, to facilitate clarity and enforceability. A brief reference to these instruments in the commentary would assist drafters in defining the substantive content of the obligations that may give rise to counterclaims and would align with the increasing trend in recent State practice, including in Model BITs and investment treaties, to reference these standards explicitly. Finally, given the increasing role of technology in investment operations, it is suggested that the commentary note that technological developments, including artificial intelligence, may create new dimensions of sustainability risk, and parties may wish to consider whether their sustainability obligations should explicitly address technology-related compliance.			
529.	**Section C.6**	**Chapter 8, Section C.6 – Counterclaims involving public-law and non-arbitrable obligations.** An audience participant asked how the Draft should deal with contractual obligations concerning matters such as sustainability, human rights and other public-law rules where the underlying matter may not be arbitrable	Comment made during Latin American States' Representatives Roundtable		

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		under the law of the host State. The question was whether contractualising such obligations was intended to make their breach arbitrable and, if so, what effect this might have on the State's ability to pursue the underlying matter before domestic courts.			
530.	**Section C.6,** **Principle 33**	In order to avoid confusion regarding the ability to bring up counterclaims in the same procedure in cases when a contract uses the principles, has a disputes clause but is silent regarding counterclaims (especially those that can come from a contract that relies on the principles as its rule of law, but has not been agreed in the contract that parties may bring counterclaims in the same procedure) and to maximize the effectiveness of the principle under commentary; this should be integrated in principle 31, especially into the model clauses as has been proposed on the commentary to that principle. Their inclusion in principle 31 dealing with the venue choice and dispute resolution clause in the ICC, assures that this intricate and relevant subject matter doesn't get lost in the drafting and is expressly reflected in the parties' dispute resolution agreement.	Ian Signori Gorriti	Member of CEIA	Peru
531.	**Section C.6,** **Principle 33**	H. COUNTERCLAIMS[103] It is commendable that the PIICs aim at combining procedural symmetry (conferring to both the investor and the state equal standing to initiate claims and submit counterclaims), comprehensive scope (by not artificially limiting counterclaims to the subject matter of the original claim, but extending them to all contractual obligations in connection with the IIC, including those related to sustainability, e.g., environmental, labour, human	EAPIL		

[103] T. Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' [2019] *AJIL Unbound* 33–37.

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		rights[104]) and single forum resolution (i.e., reducing the risk of fragmented or inconsistent outcomes by consolidating all related disputes in one forum). The symmetrical, contract-based architecture of Principle 33 — allowing the State to raise counterclaims, including for breach of sustainability obligations, on an equal footing with the investor's claims — is a genuine improvement on the position generally prevailing in treaty-based investment arbitration. It may, however, be useful to clarify the extent to which, and effects of, the pre-arbitration obligations apply to both the investor and the State, since the capacities and ability to initiate such amicable procedures may be more difficult for States (especially those used to being respondents and appearing from a defensive standpoint, but also in complex, decentralized governments where the relevant approvals for direct negotiation and mediation with private parties may be difficult to obtain within the framework provided under the PIICs). It may be worth including clarifications and additional express guidance for the reciprocal effects of the active standing of both parties to the PIICs. Three main private international law issues warrant further attention in relation to counterclaims. The first concerns the jurisdictional basis for counterclaims grounded in obligations that may themselves be governed, in whole or in part, by rules other than the law chosen under Principle 28[105] — for instance, sustainability			

[104] X. Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law' [2021] 24 *Journal of International Economic Law* 157–179; S. Faccio, 'Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability' [2023] 38 *ICSID Review - Foreign Investment Law Journal* 625–643; D. Cheng, J. Abhijit Unde and J. Casey Ryan, *Investor Obligations in International Investment Law* - South Centre as part of the Geneva Graduate Institute's LL.M. Legal Clinic Programme, 2024.

[105] A. K. Hoffmann, 'Counterclaims in Investment Arbitration' [2013] 28 ICSID Review 438 ff.; P. Lalive and L. Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' [2011] 2 Czech Yearbook of International Law 141 ff.; A. K. Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' [2013] 17 *Lewis & Clark Law Review* 461 ff.; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 2007; Burlington

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		obligations (Chapter 5) that may be subject to overriding mandatory provisions or public policy of the host State, or of a third State. The PIICs should clarify whether the tribunal's jurisdiction over such counterclaims depends on those obligations being governed by the same law chosen for the contract, or whether the contractual connection ('in connection with the IIC') is sufficient on its own, independently of the law applicable to the specific obligation invoked. The second concerns the (law governing the) procedural requirements for admissibility of counterclaims (e.g., to be raised within a certain timeframe; what does precisely mean 'in connection with the IIC'? etc.),[106] which might affect the enforceability of model clauses providing for broad counterclaim rights. The third concerns sovereign immunity. The enforceability of awards against States may be limited by sovereign immunity, especially in domestic courts, as States may invoke public policy or constitutional principles to limit or resist enforcement of certain claims or counterclaims.[107] The PIICs would benefit from expressly distinguishing immunity from jurisdiction from immunity from execution or enforcement, which is frequently unaffected by a general waiver or requires identification of specific non-immune assets under that law. Indeed, consent to arbitration will generally preclude a State from invoking jurisdictional immunity in respect of the agreed arbitral			

Resources Inc v. Ecuador, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017); *Urbaser SA v. Argentina*, ICSID Case No ARB/07/26, Award (8 December 2016).

[106] *David Aven v. Costa Rica*, ICSID Case No UNCT/15/3, Final Award (18 September 2018); *Perenco Ecuador Ltd v. Ecuador,* ICSID Case No ARB/08/6, Award (2019/2021).

[107] P. D. Winch, 'State Immunity and the Execution of Investment Arbitration Awards' in C. Titi (ed.), *Public Actors in International Investment Law* (2021), 59 ff.; A. K. Bjorklund, 'Sovereign Immunity and the Enforcement of Investor-State Arbitral Awards' in C. Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford 2009), 302 ff.; A. K. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' [2010] *21 American Review of International Arbitration* 211–241.

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		proceedings, subject to the applicable law; this does not, however, entail a corresponding waiver of immunity from execution. We recommend that the Model Clause on counterclaims (or the Model Clause on waivers, Principle 32) includes layered waiver language addressing both limbs of immunity separately, together with a note that advance waivers of execution immunity may not be effective in all jurisdictions regardless of the contractual wording used. Furthermore, Art. 55 of the ICSID Convention makes clear that becoming a party to the Convention does not itself waive a State's immunity from execution of an award under its own national law. A separate, carefully tailored waiver of execution immunity is required if the parties wish to address this issue. Therefore, the PIICs could add a short provision on this point, distinct from the forum-waiver provisions in Principle 32. A short point on Model Clauses A and B. Both are drafted as 'This Contract shall be governed by …', and paragraph 589 describes the reach of the applicable law in contractual terms: formation, rights, obligations, remedies and interpretation. Disputes under investment contracts are rarely purely contractual. Claims in tort, in unjust enrichment and for *culpa in contrahendo* are commonly pleaded alongside the contractual claims arising from the same facts. Where a court in a Member State of the European Union is seized, a choice of law for non-contractual obligations made before the event giving rise to the damage is possible only under Art. 14(1)(b) of the Rome II Regulation, which requires that all the parties be pursuing a commercial activity and that the agreement be freely negotiated. Whether a State party contracting in			

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		the exercise of public functions satisfies the first condition is not obvious, and Art. 14 does not in any event extend to every non-contractual obligation. We suggest that the Commentary note the point and that Model Clauses A and B offer an optional bracket along the following lines: '[… and any non-contractual obligation arising out of or in connection with this Contract, to the extent permitted by the applicable rules of private international law]'. Parties who want a single governing law for their whole relationship should be prompted to make such express references, and warned that they may not always obtain such effects. **Recommendation 11: Counterclaims (Principle 32)** *a) The applicability and nature of the pre-arbitration amicable settlement phase should be clarified, along with guidance on the effects of the mutual right of both parties to initiate claims and counterclaims under principle 33.* *b) Three issues of private international law should be clarified: First, jurisdiction over counterclaims subject to applicable mandatory law outside of the IIC framework (i.e. sustainability obligations) as raised 'in connection with the IIC'. Second, the admissibility requirements for the initiation of counterclaims. Third, their subsequent enforceability* *c) The distinction between the waiver of sovereign immunity from jurisdiction and the sovereign immunity from execution (which remains subject to domestic law, and as aligned with Article 55 of the ICSID Convention) should be made in the PIICs, distinct from the forum-waiver provisions in Principle 32.* *d) The PIICs should expressly preclude the interpretation of any IIC provision as a stabilization clause freezing the contractual and regulatory framework applicable to the relevant IIC.*			

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		e) The Commentary to Model Clause 4.1 should be supplemented as follows: *'The reference in this Model Clause to standards "enshrined in" an international agreement operates as an incorporation by reference into the contract. This has the effect that the investor's obligation derives from the IIC itself, and is enforceable through the IIC's own dispute-* *resolution mechanism, independently of whether the referenced international agreement has direct effect in the domestic legal order of the Host State or is otherwise enforceable only through an inter-State dispute settlement mechanism under that agreement's own terms. Parties should nonetheless be aware that (i) referencing agreements the Host State "becomes" a party to in the future may bind the investor to standards not reasonably foreseeable at the time of contracting, and parties may wish to consider whether such future incorporation should instead be addressed through the stabilisation and renegotiation framework in Chapter 6; and (ii) where the content or meaning of the referenced international agreement is contested, the adjudicator resolving a claim [under this Model Clause] will need to interpret that content independently for contractual purposes, and is not bound by any interpretation the Host State may advance in a separate, inter-State proceeding under the referenced agreement.'* *f) Parties wishing to have a single governing law for their entire relationship should be prompted to make such express references and warned that they may not always achieve the desired effect.* *g) The Commentary should suggest that the Model Clauses A and B include an optional bracket along the following lines:* *'[… and any non-contractual obligation arising out of or in connection with this Contract, to the extent permitted by the applicable rules of private international law].'*			

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532.	**Section C.6,** **Principle 33**	BFE+ welcomes Principle 33 as a sound recognition of the contractual logic underpinning international investment contracts (IICs). The symmetrical right to bring counterclaims is a natural consequence of the bilateral nature of the contractual relationship: where both parties assume enforceable obligations, each should be able to invoke the other's non-performance in the same contractual forum. Unlike treaty-based investment arbitration, where the scope for State counterclaims has been contested and tribunals have reached divergent conclusions, a contract-based framework logically supports full reciprocity. This symmetry also promotes procedural economy by enabling the tribunal to address the parties' interdependent rights and obligations in one proceeding, rather than fragmenting related issues across multiple proceedings. However, BFE+ notes that paragraph 2 of the Model Clause specifically highlights—within square brackets—the State's right to bring counterclaims for "non-performance of the Investor's sustainability obligations under [Chapter 5, Section D], including obligations relating to environmental protection, labour standards, human rights due diligence, local content, and community development." Although this language is presented as illustrative and non-limiting, its express inclusion in the Model Clause, absent any corresponding illustration of investor-initiated counterclaims, creates a textual asymmetry that may influence how tribunals interpret the provision. The commentary at paragraph 649 reinforces this imbalance by emphasising that "the State [...] may bring counterclaims for breach of the investor's sustainability obligations." BFE+ submits that the Model Clause and commentary should either omit this illustrative paragraph or include a corresponding illustration of counterclaims available to the investor, such as counterclaims for non-performance of the State's cooperation obligations under Principle 19 or its stabilisation commitments under Principle 23.	Alfredo Bullard, Huascar Ezcurra, Bruno Doig, Inmaculada Posada, and Ignacio Enrique Tovar	Bullard Falla Ezcurra +	Peru / Spain

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		BFE+ further observes that many of the sustainability obligations the Model Clause envisions as the basis for State counterclaims—environmental protection, labour standards, local content, community development—are typically also regulated under the host State's domestic administrative law. In most jurisdictions, the State already possesses administrative enforcement powers, including the authority to impose fines, suspend permits, or order corrective measures, and the investor has access to domestic administrative or judicial review proceedings to challenge such sanctions. Permitting the State to re-litigate the same underlying conduct as a counterclaim before a contractual arbitral tribunal, in parallel with or subsequent to domestic administrative proceedings, creates a serious risk of duplicative proceedings. The tribunal may in practice be called upon to review the legality or proportionality of administrative decisions already adjudicated or pending before domestic courts, effectively assuming the role of an appellate body for host-State administrative law. To mitigate this risk, BFE+ recommends that the commentary to Principle 33 or the Model Clause address the interaction between contractual counterclaims and domestic administrative enforcement. At minimum, the Instrument should: (i) require the State to identify whether the conduct underlying a counterclaim has been or is being the subject of domestic administrative or judicial proceedings; (ii) establish that a final and binding domestic determination on the same facts and legal basis should be given *res judicata* or preclusive effect by the arbitral tribunal, to avoid inconsistent outcomes; and (iii) where both proceedings remain pending, provide for coordination mechanisms such as stay, consolidation, or set-off of amounts already paid or collected through administrative sanctions. The possibility of set-off is particularly relevant: where the investor has already paid fines or borne the cost of remedial measures imposed by the host State's administrative authorities, those amounts should be credited against any damages awarded on a counterclaim arising from the same facts. Such an			

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		approach would preserve the State's legitimate right to counterclaim while preventing the unjust enrichment that would result from double recovery through parallel enforcement channels. BFE+ recommends that the Instrument clarify that counterclaims based on sustainability obligations under Chapter 5 should be subject to the graduated dispute resolution process established in Principle 26 as a precondition to their admissibility in arbitral proceedings. Principle 26 establishes a structured, multi-step framework for remedying non-performance of sustainability obligations: written notice under paragraph 2, direct negotiations under paragraph 3, optional facilitation by a Joint Sustainability Committee under paragraph 4, and dispute resolution mechanisms under paragraph 5, with regular contractual remedies available only after these steps have been exhausted under paragraph 6. This graduated approach reflects the Instrument's own policy choice that sustainability disputes should prioritise early cure and cooperation over adversarial proceedings, as confirmed by the commentary at paragraphs 539–542. It would be inconsistent with this design to permit a State to bypass these pre-escalation requirements simply by repackaging a sustainability claim as a counterclaim within existing arbitral proceedings initiated by the investor. BFE+ therefore suggests that the commentary to Principle 33, or a new paragraph in the Model Clause, expressly state that sustainability-related counterclaims are admissible only where the procedural requirements of Principle 26 have been complied with, unless the tribunal determines that compliance would be impracticable in the circumstances. BFE+ further recommends that the Instrument introduce a materiality threshold for counterclaims, particularly those based on sustainability obligations. In the extractive sector, minor or incidental environmental non-compliance is not uncommon given the inherent risks of operations. Permitting counterclaims for any alleged non-compliance, however			

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		immaterial, would create a disproportionate litigation risk that could fundamentally alter the risk–reward calculus of international investment in the sector. A materiality requirement would be consistent with the approach taken in Principle 26(2), which requires "material" non-compliance before triggering the remedial process, and with the general principles of proportionality recognised throughout the Instrument, including Principle 6 and its commentary at paragraph 143, Principle 11 and its commentary at paragraph 215, and Principle 20 and its commentary at paragraph 347. The threshold should be sufficiently clear to distinguish actionable breaches from technical, immaterial, or promptly curable deviations that do not justify the costs and strategic consequences of a counterclaim. In sum, BFE+ supports Principle 33 in its fundamental orientation but recommends: (i) that paragraph 2 of the Model Clause be revised to ensure textual neutrality; (ii) that the Instrument address the risk of duplicative proceedings between contractual counterclaims and domestic administrative enforcement, including through res judicata recognition and set-off mechanisms; (iii) that sustainability-related counterclaims be subject to the pre-escalation requirements of Principle 26; (iv) that a materiality threshold be introduced for sustainability-based counterclaims; and (v) that the commentary acknowledge the cumulative effect of Principles 32 and 33 on the investor's procedural position. These adjustments would preserve the Instrument's central commitment to reciprocal contractual remedies while ensuring that counterclaim jurisdiction operates in a predictable, proportionate, and genuinely balanced manner.			
533.	**Section C.6,** **Principle 33**	Our principal concern is that the Principle should make clearer the scope and basis of permissible counterclaims, particularly where they concern sustainability obligations.	Saniya Sharma	Founder & Executive Director, Alt	United Kingdom

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		1. Counterclaims should be anchored in obligations arising under the IIC. The Principle should clarify that a counterclaim under an IIC is a claim arising from the contractual rights and obligations assumed by the parties under the IIC, rather than a general mechanism for asserting any alleged non-compliance by the investor with standards referred to elsewhere in the Instrument. This distinction is particularly important in the sustainability context. The Instrument uses "sustainability" in a broad sense, encompassing environmental, social, human rights, climate change, labour, governance and anti-corruption considerations. Many of the standards contemplated by the Principles are also capable of being expressed at different levels of normativity: some may derive from applicable domestic law, some from international standards expressly incorporated into the IIC, and others may operate primarily as guidance. It should not follow that an alleged departure from any such standard automatically gives rise to a contractual counterclaim. There is a particular risk that a broadly framed counterclaim provision could allow a State party to rely retrospectively on loosely defined international standards which were not incorporated into the IIC as contractual obligations. That would risk converting the counterclaim mechanism from a means of enforcing the parties' agreed allocation of contractual obligations into a broader mechanism for pursuing claims based on standards which the investor may never have undertaken contractually to satisfy. We therefore suggest that the Principle expressly state that counterclaims should ordinarily arise from, or be directly connected with, the rights and obligations established by the IIC. Where the parties intend particular domestic or international sustainability standards to constitute contractual		Platform Collective	

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		obligations giving rise to remedies, those standards should be clearly identified or incorporated into the IIC, together with the relevant obligations and contractual consequences of non-compliance. This is particularly important in light of Principle 6 and the Instrument's broader treatment of sustainability. The fact that an international standard is identified in the Instrument as relevant to responsible investment should not, without more, transform that standard into a contractual obligation enforceable through a counterclaim. The Instrument should distinguish between standards which guide the parties' conduct and standards which the parties have expressly undertaken to comply with as contractual obligations. We would also welcome clarification as to whether the reference in paragraph 2 of the Model Clause to "non-performance of the Investor's sustainability obligations" is intended to refer only to obligations expressly assumed under the IIC, or also to alleged non-compliance with sustainability standards which are not incorporated into the contract. We strongly favour the former. Such clarification would preserve the principal advantage identified in para 649 — contractual symmetry — without creating an open-ended right to bring counterclaims based on standards external to the parties' contractual bargain. **2. The Principle should address limitation periods applicable to counterclaims.** Neither the Principle nor the Commentary addresses limitation, although Chapter 10 of the UPICC applies where the Instrument governs the IIC by virtue of Principle 1(4). The Principle should clarify how applicable limitation rules operate in relation to counterclaims, particularly where obligations may give rise to claims only after a significant period has elapsed. This is relevant to long-term IICs and, in particular, sustainability obligations where adverse			

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		impacts may manifest only after the relevant conduct has occurred (para 487; Principle 11). Parties should be encouraged to consider expressly the applicable limitation regime when structuring such obligations, subject to any mandatory law. **3. The Principle should require counterclaims to be raised at the earliest opportunity.** The Principle confers a right to bring counterclaims but does not address when that right should be exercised. Paragraph 3 of the Model Clause provides that the tribunal "shall have jurisdiction to hear and determine all claims and counterclaims of the Parties arising out of or in connection with this Contract in a single proceeding, with the objective that the entirety of the dispute be resolved in one forum". This states the desired outcome without requiring a party to bring an available counterclaim within that proceeding. Three considerations support an express requirement. *The applicable procedural rules already impose requirements, but those requirements differ.* Institutional and ad hoc arbitration rules generally require counterclaims to be submitted with the answer or statement of defence, while permitting later amendment only with the tribunal's leave. A party that does not raise its counterclaim at that stage may therefore be refused permission to advance it subsequently. Since the Instrument contemplates a range of procedural regimes — para 625 refers to institutional and ad hoc arbitration and the UNCITRAL Arbitration Rules, while paras 626 and 627 refer to the ICC and ICSID regimes — and para 647 recognises that the rules "may vary in how they address the scope and admissibility of counterclaims", the parties should be expressly alerted to this issue.			

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		The objective of the Principle requires it. Paragraph 648 states that "the objective is that all aspects of the dispute shall be resolved at one forum and avoid parallel/sequential proceedings". That objective is not achieved by a right which may be exercised at a party's discretion at a later stage. A party that withholds an available counterclaim and pursues it separately after the first proceeding has concluded creates precisely the sequential proceedings which Principle 32 and para 648 seek to avoid. *The interaction with Principles 27 and 32 requires clarification.* Principle 32 obliges the parties to endeavour to avoid parallel or duplicative adjudicative proceedings, while Principle 27 addresses double recovery for the same injury. Neither addresses whether a party that fails to raise an available counterclaim in the first proceeding may pursue it subsequently. That question is material, and the answer is not necessarily obvious: the counterclaim has not been adjudicated, so the ordinary bars applicable to matters already determined may not apply, yet permitting subsequent proceedings may defeat the objective stated in para 648. We suggest that the Principle provide that a party wishing to bring a counterclaim should do so at the earliest opportunity in the proceedings and, in any event, within the time permitted by the applicable procedural rules. We suggest that the Model Clause be amended accordingly and that the commentary address the consequences where a counterclaim available at the commencement of the first proceeding is not raised — in particular, whether it may subsequently be pursued and whether such failure engages the obligation under Principle 32. **4. Indemnification and other compensation.** The Instrument should also consider whether the contractual framework should address the effect of insurance, guarantees or other forms of indemnification received or available to a party in respect of loss arising under the IIC. Contemporary investment instruments may expressly provide that such indemnification or			

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		compensation does not, of itself, constitute a defence, counterclaim or basis for set-off against the claimant's contractual or treaty claim. Given the importance of insurance and guarantees in allocating investment risk, the parties should be encouraged to address expressly how such recoveries are to be treated in determining the remedies available under the IIC, including their relationship with any applicable rules against double recovery and subrogation.			
534.	**Section C.6, Principle 33**	i3T supports the reciprocal right to bring counterclaims and the Model Clause provision extending the State's counterclaims to non-performance of the investor's sustainability obligations, including local content and community development. The value of this right depends on the underlying obligations being drafted in binding and measurable terms, which is the subject of the comments on Chapter 5 above	i3T		Mexico
535.	**Section C.6, Principle 33; and Commentary paras. 645-649**	Principle 33 and its Commentary present counterclaims as an important part of the symmetry of the Instrument, and as the route by which a State can hold an investor to its sustainability obligations. As a matter of jurisdiction that is right. What the Commentary does not mention is what the right is worth. A counterclaim for breach of sustainability obligations yields, if it succeeds, a money judgment or award. Where the investor is insolvent, that award is an unsecured claim ranking behind the project's secured lenders. Obligations such as site rehabilitation and environmental remediation are among the most exposed, since they fall due at the end of a project's life and are the least likely to be funded by an investor in difficulty. The symmetry is then formal rather than economic, unless the parties provide for it when they draft. Suggestion: a sentence in the Commentary to Principle 33 recording this, and inviting parties to consider security for the investor's sustainability obligations, whether by parent company guarantee, performance bond, or a ring-fenced rehabilitation fund. That would give the sustainability provisions of Chapter 5 effect at the moment they matter most.	Cayetana Santaolalla Montoya	Associate Professor of Private International Law, Universidad Pública de Navarra	Spain

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536.	**Section C.6,** **Principle 33**	**Counterclaims are not an unconditional "right"** Principle 33 currently states: "The parties ··· have a right to bring counterclaims···" That proposition needs a qualification. In ICSID Convention proceedings, Article 46 provides for counterclaims subject to specified conditions, including that they arise directly out of the subject matter of the dispute, remain within the scope of consent and fall within the Centre's jurisdiction. Consent can be broadened by contract; the external jurisdictional limits of the chosen arbitral framework cannot. I would therefore use: "**Subject to the jurisdictional requirements of the applicable arbitral framework, each party may bring counterclaims falling within the scope of the parties' consent to dispute resolution."** The distinction matters because the commentary itself recognises the Article 46 limitation while the black-letter Principle reads as unconditional.	ACCOLDI		Colombia
537.	**Section C.6,** **Model Clause para. 3**	**"The tribunal shall have jurisdiction"** The Model Clause states: "The tribunal shall have jurisdiction to hear and determine all claims and counterclaims···" The sentence should be recast.	ACCOLDI		Colombia

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		Parties can give consent. They cannot, by contract alone, establish the jurisdiction of an international tribunal where jurisdiction also depends on an external convention or mandatory rule. For example: " The Parties hereby consent, to the fullest extent permitted by the applicable arbitral framework, to the tribunal's determination of all claims and counterclaims arising out of or in connection with this Contract." For ICSID: " Nothing in this clause shall be construed as dispensing with the jurisdictional requirements of Article 25 or Article 46 of the ICSID Convention."			
538.	**Section C.6,** **Commentary para. 648; and** **Model Clause**	The intention is that all aspects related to the IIC be resolved at one forum. The model clause does not grant preference to the institutional regulations if they restrict counterclaims to those arising out of the subject-matter of the dispute. The model clause prioritizes with efficacy the autonomy of the parties.	Héctor Luis Pittman Villarreal	Peer Reviewer	Peru
539.	**Section C.6,** **Commentary paras. 648 – 650**	**Sustainability counterclaims and standing** The effort to make investor sustainability obligations enforceable through counterclaims is worth preserving. It is one of the more useful features of the Instrument. The commentary, however, needs to separate: 1. breach of an obligation owed contractually to the State party;	ACCOLDI		Colombia

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		2. damage suffered directly by the State; 3. environmental or social remediation costs borne by the State; 4. harm suffered by local communities; and 5. rights belonging directly to affected third parties. Chapter 7 expressly preserves direct third-party claims. A contractual State party should not automatically be treated as having stood to recover every loss suffered by third parties. Standing, causation, beneficiary status and the available remedies will depend on the contract and applicable law. In sustainability cases, the Principles should also recognize that restitution, remediation or specific performance may be more appropriate than an award of damages.			
540.	**Proposed new Section C.7 — Recognition, enforcement and State immunity**	**The most consequential omission in Chapter 8 may be the treatment of recognition, enforcement and State immunity.** The Draft speaks of arbitration as a globally enforceable regime, but it does not sufficiently separate recognition of an award from execution against sovereign assets. Even under the ICSID Convention, Article 55 preserves domestic rules concerning State immunity from execution. ICSID itself confirms that recognition and enforcement do not eliminate national sovereign-immunity rules applicable to execution. For an investment contract, that distinction is central rather than peripheral. It affects bankability and the real economic value of the dispute-resolution clause.	ACCOLDI		Colombia

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		I would add a dedicated subsection dealing with: • immunity from jurisdiction; • immunity from execution; • the distinction between the two; • whether and to what extent waivers are valid under applicable law; • identification of assets used for commercial purposes; • assets protected by mandatory immunity rules; • service of process; • award recognition and enforcement; and • the effect of selecting ICSID versus New York Convention arbitration. A model clause could contemplate a carefully drafted waiver "to the fullest extent permitted by applicable law," while making clear that some categories of sovereign assets may remain immune in any event.			