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SUMMARY REPORT

OF THE FIRST SESSION

(23 – 25 October 2023)

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1. The first session of the Working Group on International Investment Contracts (“the Working Group”) took place from 23 to 25 October 2023 at the seat of UNIDROIT. Online participation was possible for those who were unable to attend the session in person.
2. The session was attended by 18 members and 14 observers among representatives of international organizations and individual observers, as well as members of the UNIDROIT Secretariat and the ICC Institute of World Business Law (“ICC Institute”). The list of participants can be found in [Annexe I](#).
3. The session was chaired by the UNIDROIT President, Professor Maria Chiara Malaguti (“the UNIDROIT Chair”) and by the Chair of the ICC Institute of World Business Law, Mr Eduardo Silva Romero (“the ICC Chair”, together “the Chairs”).

Item 1 Opening of the session and welcome

4. *The UNIDROIT Chair* opened the session and welcomed all participants to the meeting. She recalled that the project on the UNIDROIT Principles of International Commercial Contracts (UPICC) and Investment Contracts (“the project on International Investment Contracts”) was part of UNIDROIT’s 2023-2025 Work Programme. It was envisaged that the future instrument would be developed and finalised within that period, i.e., by the end of 2025. There is as a consequence an intrinsic need for moving ahead in a fast and efficient manner to respect the deadlines.
5. *The UNIDROIT Chair* explained that the Working Group for this project was relatively large because of the significant amount of interest that the project had attracted. She explained that participants to the Working Group had been carefully selected, considering professional expertise, gender balance, and geographical diversity and that their heterogenous background could greatly contribute to the Project. She also added that it was part of the established practice of the Institute to involve interested stakeholders in the process. While participation of other categories of interests as observers had to be addressed under item 4 of the annotated draft agenda, she wished to anticipate that the Secretariat had established a Consultative Committee to convey the opinion of States. States had started to appoint national delegates, while Mr José Antonio Moreno Rodriguez had been designated by the Secretariat as *Chair of the Consultative Committee*.
6. The work would be started with a general discussion on the issues to be addressed in the project, as summarised in the Issues Paper previously sent to all members and observers to the Working Group (Study L-IIC - W.G. 1 - Doc. 2). In a context of repeated challenges to treaty protection of investments as well as investment arbitration, which were causing investment protection to gradually change, the main question was whether international rules on investment protection might be internalised in international investment contract (“IICs”). While internalisation of investment rules in contracts might lead to further fragmentation, the project sought to pave the way for looking at general principles applicable to the generality of investment contracts (such as the UPICC) and how they might provide a solid background for investment protection through contracts.
7. *The ICC Chair* also extended a warm welcome to the participants and referred to developments in investment arbitration, such as the criticism of investor-state dispute settlement (ISDS) (e.g., procedural burden and uncertainty in the outcome). He noted that contract-based arbitration was becoming increasingly important. The ICC Court of Arbitration statistics confirmed that almost 25% of new cases in investor-state arbitration arose out of investment contracts. It thus seemed that there was a strengthening of contractual arbitration against treaty arbitration. The entire ICC was convinced that there was a need to produce a new instrument to strike a balance between the various existing instruments regulating investment protection.

Item 2 Adoption of the agenda and organisation of the session

8. *The UNIDROIT Chair* introduced the annotated draft agenda and the organisation of the session. The Working Group adopted the draft agenda (UNIDROIT 2023 – Study L-IIC – W.G. 1 – Doc. 1, available in [Annexe II](#)) and agreed with the proposed organisation of the session.

Item 3 Consideration of matters identified in the Issues Paper

9. *The UNIDROIT Chair* drew the attention of the Working Group to the next item on the agenda. She proposed discussing the preliminary matters identified in Part I of the Issues Paper, such as the format of the future instrument, at a later stage. Similarly, she proposed to postpone the discussion on whether the future instrument should contain a definition of “international investment contract” (Part III of the Issues Paper). Instead, she invited the Working Group to discuss Part II of the Issues Paper.

(a) General issues relating to the project and the future instrument (Part II)

10. *The UNIDROIT Chair* referred to the Issues Paper and invited the participants to express their views on the possible “three layers of content” which might form the future instrument, i.e., i) the UPICC and their possible adaptations in the context of investment contracts, ii) IIC practice, and iii) principles addressing the needs covered by standards contained in International Investment Agreements (IIA) and policy commitments.

11. *The participants* agreed that the UPICC were a solid basis by which the work on a possible future instrument on IICs could start since they provided a background of legal notions that fully applied to IICs. Other UNIDROIT instruments should also be taken into consideration, with a view not to create inconsistencies. However, the final instrument should be self-standing and not a mere commentary or an adaptation of the UPICC. The UPICC should represent a point of reference for importing concepts such as offer and acceptance, free consent of the parties, non-performance, and the like, into the domain of IICs.

12. *Many participants* expressed the view that the second layer was necessary, as any possible future instrument could not reflect existing needs if it did not take into account what already existed in practice. However, the participants expressed the concern that it could be difficult to obtain significant access to sources and materials from contract practice. The ICC was invited to provide as much information as possible. *One participant* recalled that stabilisation and clauses on the restoration of the financial equilibrium of contract were a main area of work in this regard and, more in general, frustration of contract.

13. Furthermore, there was large consensus that the third layer was of paramount importance and should be expanded to include not only “newer” bilateral investment treaties (BITs) with sustainability and additional corporate social responsibility (CSR) commitments, but also climate change, human rights and the protection of affected populations (such as indigenous peoples). The instrument should not miss the opportunity to be specific on these points, including by providing model clauses on responsible business and human rights due diligence. Some perplexity was voiced over the possibility of importing or replicating BIT standards into contracts; however, single elements might be examined more in depth for future consideration.

14. The need to ensure consistency with existing instruments and ongoing work of other international organisations (e.g., UNCTAD, UNCITRAL, HCCH and OECD) was also pinpointed. *One participant* briefly expanded on the importance of the principle of mutuality in contracts and the need to not limit the instrument to an investor protection rationale, but rather to properly consider States’ interest in protection, including their own legitimate expectations. *The same participant* stressed the

need to ensure access to effective dispute resolution for affected third parties, particularly indigenous peoples, currently lacking within the international arena.

15. *One participant* pointed out that the second and third layers should be treated with great caution. While the UPICC might be referred to as a common basis for regulating international commercial contracts, there was no such common ground in international investment law (private and public). The interpretation of IIAs standards and contract practice were inherently dynamic and resisted any attempt to be systematically categorised. *Another participant* considered that the UPICC were a strong legal background for IICs as they were and should not be altered. He noted that traditional distinctions between public and private law were currently blurring; the notion of “good faith and fair dealing”, as considered in the 2016 edition of the UPICC, and the concept of “moralisation of contract law” implied that there were a lot of obligations allocated to both parties, and thus many standards might be built into IICs that took environmental concerns and social issues into consideration.

16. In this last regard, *one participant* observed that mutuality in contracts would lead to consideration of the issue of “counterclaims” and that the gradual erosion of protection standards (e.g., FET in the Investment Protocol to the ACFTA) might be tackled by the means of contract. *Another participant* added that the three layers of content should be examined with a view to considering their interaction. The UPICC could be adapted, but a crucial question would be which principles should be adapted and to what extent. The good faith principle stood out for its possible potential in the context of IICs, but any adaptation should take into account contract practice under the second layer. The inclusion of the third layer would be feasible only for those areas that could be addressed contractually, if the Group determined that the contract was the right instrument.

17. *The ICC Chair* referred to recent States’ practice in the bidding process and highlighted that, for the outcome of the project to be useful, regard needed to be had of what States offered to and required from investors. Usually, States offered a contractual provision on the economic equilibrium of contract, such as a renegotiation clause in case of hardship, or an automatic adjustment (in a long-term contract scenario), while the private investor (bidder) was required to accept a clause representing that it fully knew the law of the host state, and that there were many rules and principles in that law that might potentially apply to the investment.

18. *One participant* agreed that clauses typical of IICs, such as those addressing changes of law and/or economic conditions, should be addressed in the context of the first and second layers. *The same participant* agreed that the third layer was paramount, as sustainability, human rights, social commitments - and more generally “soft-law” on responsible business - were rapidly being turned into “hard law”.¹ *Another participant* added that it would be interesting to examine how the recently proposed Directive on Corporate Sustainability Due Diligence would interplay with IICs, while a big problem to address would be, once it came to arbitration, that in certain countries (such as France), public law contracts could not be subject to arbitration except under the application of national law.

19. The point was also made that extracting principles from recent treaties should be treated with caution, as they had been adopted under pressure and did not necessarily reflect real principles consistent across States. Consideration should be given to the fact that States, depending on size and capacity, are not necessarily able to negotiate contracts in their interests; a simple and clear

¹ He mentioned the [Proposal of the European Parliament and the Council for an EU Directive on Corporate Sustainability Due Diligence \(Brussels, 23.2.2022 COM\(2022\), 71, final\)](#) and the draft UN proposed binding instrument on business and human rights, whose latest version was elaborated on occasion of the 9th session of the “Open-Ended Intergovernmental Working Group” (OEIGWG) on “transnational corporations and other business enterprises with respect to human rights” (see <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>).

instrument should be created, not loaded with too many complex elements, that could be easily used by the States that needed more guidance.

20. *One participant* referred to the importance of a list of definitions to reflect practice. In this regard, *another participant* added that definitions needed to be textured with open language, so that they could embrace different families of law and also be applied across sectors. In certain jurisdictions, the mechanism for protection might be different depending on whether the contract concerned, for instance, public works or the energy sector; oil or gas contracts, indeed, might need to be approved by legislation.

21. *Many participants* agreed that contract practice might vary from one industry sector to another. They agreed that what should pragmatically be done was to (i) involve stakeholders from interested industries in order to understand their concerns and legal mindset; (ii) import the proper language and terminology as well as clauses and solutions from the industry sectors chosen as areas for work; and (iii) examine and compare models and contract practice from associations of the industries, as any future instrument would touch upon many industries that had achieved a significant level of standardisation of their practices. This should allow the future instrument to speak effectively to all the industries concerned.

22. *One participant* recalled that these were recurring issues both in administrative law and civil law, and particularly as regarded the relationship between general law and special principles in any area of law. A conceptual outline could be shaped around the idea of elaborating general principles which were flexible enough to embrace the fundamental rules of protection across sectors, but that also were connected to the special rules of each industry, i.e., to build on special rules from industry practice rather than interfere with them, and thus ensure their adherence to practice.

23. *The UNIDROIT Chair* summarised the discussion so far by stressing the consensus that appeared to be expressed around the three layers of content. She then invited the participants to express their opinions on the elaboration of model clauses. *The ICC Chair* reminded the Working Group that this had traditionally been a methodology followed by the ICC, that would offer its expertise to the Group.

24. There was widespread agreement among the participants that model clauses were essential to this exercise. *One participant* reminded the Group that model clauses - such as those of the FIDIC standard forms of contract - usually provided for a general and a special part.² The general clauses might be easier to elaborate, but when it came to special clauses, they could really vary from procurement to construction or energy. The question was whether the instrument should limit its reach to general clauses that encompassed as many aspects as possible across sectors, or rather cover special clauses, that might turn out to be an especially difficult exercise.

25. *One participant* expressed the opinion that model clauses were fundamental to the objective of providing the interested parties with a menu of varied options conducive to simplified negotiations and a reasonable balance of interests; in this regard, a guide with a set of model clauses might be more useful than a list of principles with comments, as the guidance text would expand on the options and describe how the options worked, while it would be up to the parties to make the final decision on how they wished to adapt the clauses to their needs.

26. *The Secretary-General* clarified that the objective of a legal guide was very specific, as it might include recommendations to the legislator or interested stakeholders in areas where consensus was registered within the Working Group. *One participant* pointed out that it was important to clarify how far the Group would go in drafting model clauses. While the FIDIC documents included a full

² See the [FIDIC Suite of Contracts, in particular the "Conditions of Contract for Construction for Building and Engineering works" \(First Edition 1999\)](#).

model contract, the Group could decide to work on key provisions (“golden rules”) that were crucial to protection and required senior management’s approval if not present in a contract under the usual rules of a corporation. The repeated use of model clauses in contract practice and in the interpretation by tribunals could provide consistency to the benefit of States and foreign investors.

27. *One participant* sought clarification concerning the types of IICs that would be under discussion, i.e., the background contract alone or the bundle of contracts interconnected with each other governing different areas of the investment.³ *The ICC Chair* clarified that the parties often concluded a “framework agreement”, but in substance there was a mixture of agreements, so that what was relevant were those provisions that regarded “investment protection”; from this angle, it would be better to refer the analysis to “model investment clauses”. *Another participant* agreed that what the project should address was the framework agreement; however, depending on the format, some regard might be given to sub-contracting rules.

28. At the end of the discussion, *representatives of the UNIDROIT Secretariat and the ICC* illustrated the results of their respective research. An informal research team supervised by the UNIDROIT Secretariat had collected investment contracts and contract-based awards from open sources and had classified the materials in accordance with the clauses they contained or that had been disputed, with a view to providing legal analysis. The ICC had also tasked a researcher with a view to examine ICC awards involving States or State entities rendered between 1997 and 2017, to ascertain which clauses were disputed and whether the UPICC were mentioned in the final decisions.⁴ Two brief notes were provisionally provided to the Group to highlight the early results of such on-going research.

29. *The Working Group agreed on the importance of work on the three layers of content envisaged in the Issues Paper, i.e. the UPICC as the main layer of work, along with the practice of investment contracts, and standards included in newer IIAs, especially with regard to CSR and sustainable development standards (policy goals). More caution should be used in considering work on protection standards in IIAs. The Working Group should consider extracting principles and model clauses that might work across sectors of industry, keeping flexibility as to definitions and language. It was considered of particular importance to ensure consistency with the work of international organisations and to strike a fair balance between the interests of States, investors and third parties.*

(b) Content of the instrument (Part IV)

1. Pre-contractual issues in IICs, issues of formation and validity of the contract (Section D)

30. *The UNIDROIT Chair* drew the attention of the participants to the second item for discussion, and particularly to “pre-contractual issues in IICs, issues of formation and validity of the contract”, as covered in the Issues Paper.

31. There was consensus that pre-contractual issues should be covered. *One participant* referred to the complexity of the nature of the “parties” in IIC practice. The State party, indeed, might consist of different entities, such as a Ministry or a State-owned company, and issues of legal representation might emerge. In those cases, it was to be ascertained which (public) rules applied to the legal representation of a State, of a State agency, or of State-owned enterprises when IICs were signed with foreign private companies.

³ Financial contracts, the construction contract, the licenses, and so forth.

⁴ Choice of law, confidentiality, dispute resolution, stabilisation, force majeure, termination and waiver to investment arbitration.

32. *One participant* referred to the importance of pre-contractual issues in the public interest, as this was where issues of third-party protection came into the picture, together with issues of protection of the investor in the context of pre-contractual conduct. *The same participant* pointed out that this issue, as many other issues, was intertwined with issues of applicable law, as the outcome of any dispute would depend on the forum (a national court or international arbitrators), and which law applied (administrative or private law). Domestic courts might have a very different understanding from arbitrators of the same issues, and they might deem invalid a choice of law that international arbitrators would place in a “transnational” context and deem perfectly valid. In this context, transnational law might override domestic law. Moreover, practice and model clauses from associations of industry might be relevant, as it concerned pre-contractual issues, naturally along with States’ rules on legal representation in the signature of contracts, to prevent “*ultra vires*” claims.

33. *One participant* expressed the opinion that, from a common law perspective, pre-contractual issues (and liability) were not part of the contract, i.e., the process that led the parties to sign the contract was not relevant to define the obligations the parties each undertook. Some perplexity was expressed on the existence of a transnational law principle in this area. *Another participant* clarified that, under certain legal cultures – and indeed not under common law – the information provided prior to the formalisation of contract was determinative of the object of contract; therefore, a stronger duty to inform was construed in those legal cultures. If certain information was not provided during the negotiations and turned out to have been relevant to the object of the contract, the party that did not disclose the information could be found to be in breach of contract.

34. *The same participant* argued that how to cover precontractual matters in the future instrument was an issue, given the very diverging views in this area: one option might be to suggest different treatment of the same issue depending on the governing law; another option would be to elaborate a transnational principle that might override governing law. This last option was, in any case, difficult to shape.

35. *Another participant* suggested that the final instrument might limit its scope to making users aware of the main pre-contractual risks: if pre-contractual documents had been expressly excluded from the scope of contract, the instrument should clarify what would happen if a breakdown of the negotiations occurred, how the governing law regulated the issue, and how the due diligence obligations which fell upon the foreign investors had an impact on the risk connected to the investment. *Another participant* drew attention to the fact that divergences in this area should not be overestimated: the final instrument should not provide guidance to legislators, but rather inspire negotiators to cover the issue by contractual provisions.

36. *The ICC Chair* recalled that in recent practice most pre-contractual issues were being contractualised by way of warranties and representation clauses, especially on the side of States. By way of example, a clause might require the investor to accept a statement that it reviewed all the papers of the bidding process, and all the relevant laws and regulations of the State in relation to the specific sector where it operated. This might prompt an area for work. *The UNIDROIT Deputy Secretary-General* recalled that, especially in long-term contracts, negotiations might occur during the entire lifespan of contract, and the same principles that would be applicable in the face of pre-contract liability might also be relevant for negotiations that took place at a later stage, and this might well be the object of a contractual provision, if the parties wanted to be very specific on how to conduct negotiations and depart from any domestic law or transnational principle that would apply.

37. *One participant* argued that transnational law principles existed in IIC practice that departed from domestic law, especially those that did not consider the legal relevance of pre-contractual conduct. In treaty arbitration, international responsibility based on pre-contractual behaviour was often adjudicated because of the standards existing in that area. In contract-based arbitration, the parallel issue, strictly connected to applicable law, was whether a transnational principle existed that overrode domestic law in the area. It was not clear whether the *OECD Guidelines for Multinational*

Corporations might provide these principles, nor whether they could be relied upon as a standard across industries and bind both States and investors; however, they could certainly be a point of reference for study and examination.

38. Drawing a parallel with States' practice in conflict prevention, where all along the pre-conflict relationship contacts are provided in order to pave the way for discussion and contain the possible development of a conflict, *another participant* expanded on the idea that how the investment relationship was managed in the pre-contractual negotiation phase heavily affected the entire investment relationship, and that the latter might be viewed as an ongoing, continuous negotiation, even after the conclusion of the contract.

39. *One participant* considered that many States were not well equipped with the expertise necessary to properly negotiate this type of contract, so that they simply accepted the version provided by the private counterpart. On the other hand, private investors were not always multinational corporations, but often SMEs with limited access to legal support. Thus, guidance on pre-contractual issues should also be provided to weaker subjects in the international investment arena. Gaps and loopholes might exist not only at the international level (e.g., in the application of the *UN Guiding Principles on Business and Human Rights*⁵), but also at the level of domestic law. It was therefore particularly relevant to directly identify what the parties needed to consider with respect to human rights and other policy goals, and only then provide concrete solutions.

40. *One participant* recalled that, in practice, many internal documents of multinational corporations contained affiliations to international soft law documents (e.g., the OECD Principles, the UN Global Compact): it was to be ascertained if these affiliations had only internal relevance, or if they might bear legal effects between the parties, the State and foreign investors, upon which also third parties might rely. All these issues might be properly approached by a set of recommendations that raised awareness about risks in the pre-contractual phase that might have an impact on the contract. *Another participant* referred to the difficulty of distinguishing between pre-contractual issues and investment facilitation and promotion, which formed a sizable percentage of ongoing international initiatives (including at the level of the WTO) and might shape, in part, legitimate expectations of investors from the pre-contractual phase.

41. *One participant* sought clarification on the legal capacity by which the State negotiated and concluded IICs, if in its sovereign or commercial capacity. States had traditionally concluded IICs without relinquishing their public law power, including the power to revise or terminate the contract. However, over time new types of IICs had taken the stage, such as "private-public partnerships" (PPP), that placed the parties on an equal footing. While the final equilibrium was left to parties to bargain, there was a clear trend to limit clauses providing exorbitant State powers, including as to termination of contract. For *some participants*, the Project covered contracts and not public international law; thus, the State acted in its contractual capacity, with some specificities depending on the public law nature of its acts.

42. According to *other participants*, the distinction as to "State capacity" was not clear, since public and private law profiles were tightly interwoven. An IIC might be a private contract to which any domestic law might apply depending on party choice, or an administrative contract that should be controlled against national public policy and domestic mandatory norms. The main issue to start with was always which law applied. States often promoted initiatives to facilitate investment, but at a later stage, there would be a commercial entity owned by the State to sign the contract. Practice was divergent in this area, so it was difficult to shape transnational principles vis-à-vis ephemeral local practice. In addition, the interaction between a treaty setting and a contractual setting should be considered in relation to the "State capacity" issue: a State might provide for the expropriation

⁵ See <https://www.undp.org/laopdr/publications/guiding-principles-business-and-human-rights>.

of the investment and thus surely act in its sovereign capacity, but then the question was whether it had a contractual right to do so.

43. It was argued that any future instrument coming out of the process would be a piece of soft law, with no intention or capacity to derogate from any domestic jurisdiction as far as basic principles were concerned. The final document would yet offer standards to fill existing gaps. For example, the need to perform an environmental or social impact assessment, which might be missing in specific domestic legislation, was progressively emerging as an international standard and therefore it might stand in the way of investors that tried to profit from gaps in local legislation, as they should have known of the existing standards on due diligence.

44. *The Secretary-General and the Deputy Secretary-General* clarified that, while a considerable consensus had emerged in the room that precontractual issues should be covered, this might be done irrespective of which form of instrument was later chosen, a list of principles with accompanying comments or a legal guide with specific recommendations and possibly a checklist of actions. In both cases, the participants were encouraged to consider which were the best practices that might be shared in the future instrument – not only to fill in the gaps, but also to identify the best substantive rules. *The ICC Chair* concluded that, while some opposition was emerging within the Group between domestic and transnational law, the modern, prevailing idea of transnational law was that it had to seriously consider domestic law and strive for regulation that conjugated the applicable law with the best available practices.

45. *Some participants* converged that, with regard to the balance between the parties, there could be a position of strength and dominance of the State vis-à-vis the company, but also the opposite situation, where the State was weak and the company was strong and therefore might impose inequitable conditions on the public party. There was enough consensus that a line should be drawn between cases where the State acted as a sovereign subject in its public law capacity and cases where it acted in its private law capacity, on an equal footing with the private foreign investor. Situations where the State and the foreign investors directly negotiated were surely different from the case of public tenders and public procurement, where the State provided for very strict regulations and clearly required the bidders to not depart from the provisions included in the call.

46. *One participant* made the argument that general principles as duress and other invalidity grounds might certainly apply to IICs, but the main question was whether and in what situations relevant to IICs they needed adaptation. If there was no specific situation to address, it would be better to refer to the UPICC as they were. Caution was suggested in equating corruption to grounds for invalidity of a contract: international practice had struggled for decades to elaborate some solution – without meaningful results. The risk was that the corruption-invalidity of contract connection left untouched both the corruptor and the corrupted, while being harmful to the State, the company, and the final beneficiaries. Reference was made to the memorandum by the ICC Institute concerning the application of the UPICC in the context of ICC arbitration proceedings, and it was mentioned that grounds such as gross disparity and even hardship would rarely be invoked in contract arbitration.

47. *The ICC Chair* summarised the different subtopics and clarified that freedom of contract seemed to be addressed in practice through warranties and representations, while form was usually addressed in final provisions prescribing that the contract be concluded in written form. He also confirmed that, in his experience, cases of duress or gross disparity were not usual, and he agreed with the participants maintaining that work on corruption was a difficult task. He recalled a case between a State and a foreign company on a contract which included an anti-corruption clause, establishing that, if the contract turned out to have been obtained through corruption, the State had a choice between asking for cancellation or damages. In this regard, contractual practice, likely more than the elaboration of general principles, might offer some creative solution to discuss.

48. *The Working Group agreed that pre-contractual issues, including issues concerning pre-contractual liability and international standards provided by soft law documents in the interest of third parties, should be covered by the future instrument. The Group should take into account contract practice in the field of warranties and representations and international organisations' standards, in combination with domestic law standards. The Working Group agreed that the UPICC on duress or gross disparity (in their current form) might apply to IICs if specific situations to tackle were not found in practice, while addressing corruption as a ground for invalidity might be problematic.*

2. Rights and obligations of the parties (Section E)

49. *The UNIDROIT Chair asked the participants to address issues of "rights and obligations", as covered in the Issues Paper. She pointed out how important the discussion was on whether the State could change its law during the lifespan of contract, as well as the reasonableness of changes of the domestic law. The point was, again, if (and how) rights and obligations of the parties to IICs could be contractualised, including by describing the limits of respective rights and obligations.*

(a) Protection standards in IIAs in contracts (E.1)

50. *Caution was expressed by some participants as to a possible contractualisation of IIA standards (such as FET or legitimate expectations) due to the uncertainties surrounding their content and interpretation. There was still discussion about what FET was and if its content should be built upon customary international law. Similar considerations might be in line for legitimate expectations, which in some ambits were often referred to as an element of FET, and in other contexts used as a criterion to differentiate between regulation and uncompensated expropriation.*

51. *While anchoring contractual protection to existing treaty standards might seem reasonable, the reality was that those standards were still a moving target and might not serve as a suitable anchor for protection. Many States were pulling out of FET in recent treaty negotiations. The question was, therefore, what this meant in the context of IICs and how the project could add value to existing protection standards, avoiding reproducing the limitations that affected treaty law. The main aim should be clarifying the reach of the investors' obligations that new treaties were constructing and turning best efforts into clearly defined obligations.*

52. *One participant argued that, in theory, the entire content of a BIT might be contractualised, but with no clear utility. There might be areas where this was feasible, i.e., free capital transfer, but there might be other areas, such as FET, where this was not worthwhile simply because contractual substitutes existed with the same function. Arbitrary application of domestic law could be handled by alternative legal means, while changes of law could be addressed through stabilisation clauses. Another participant added that States were not certain about what they had to abide by, based on the IIAs they had signed: if the final instrument was to replicate this imperfect mechanism in contracts, it would be bound to perpetuate its pathological elements in the future system.*

53. *Another participant suggested to identify contractual equivalents by focusing on remedies that were always triggered by a breach of contract. The same participant agreed that FET was vague and unclear, but he also argued that the same principle of good faith in the UPICC implied a great deal of interpretation. It was suggested that any future instrument should (i) if there was no IIA in place, include protection standards in the contract itself; (ii) if there was an IIA in place, envisage some sort of legal relationship between the IIA and the future instrument (such as including new standards into contracts, for those States that could not always revise existing agreements). Another participant supported the idea that contracts should directly address indeterminate provisions in treaties rather than only address gaps in treaty rules.*

54. *The ICC Chair* expressed consent to the methodology proposed by the participants, particularly with the opinion that some areas of treaty law might offer room for contractualisation, while others might be better covered by functional substitutes. While all knew the set and subset of obligations that had been created by arbitral jurisprudence under FET, it would not be reasonable to replicate the same level of uncertainty that was criticised today, but rather to generate at least equivalent contractual substitutes. *The UNIDROIT Chair* agreed on this point and stressed that the initial idea was exactly in line with the suggestions that had been made, i.e., not to reproduce treaty standards (such as FET itself), but rather address the same needs by functional equivalents.

55. The opinion was further expressed that the Group should not run the risk of being unidirectional, i.e., exclusively benefitting private investors. Taking the FIDIC model construction contract preamble as an inspiration, the future set of model investment clauses should find middle ground between States' and investors' interests, minimising the time needed to negotiate a contract. *Another participant* supported the idea of conducting work on the right to compensation vis-à-vis regulatory takings. The issue of regulatory takings was crucial because of the inherent State power to regulate and the "police power doctrine" that allowed the State to address health, security, moral and environmental concerns. It should be discussed whether addressing regulatory takings and the police power doctrine in a contractual setting would prove a feasible task.

56. *One participant* recalled that certain States were facing suits for billions of dollars in damages. This was unsustainable, and it would require discussion to define more reasonable criteria for the calculation of damages. A fairer balance would, indeed, add more value and legitimacy to the same system. *Another participant* considered that regulatory takings featured two opposing interests which deserved equal consideration: the interest of the State to not relinquish its power to legislate in the public interest and that of the private investor to not be deprived of the substantial value of its investment. These needs were addressed by FET and legitimate expectations in treaty law and by stabilisation clauses in a contractual setting.

57. *The Working Group agreed that it should further discuss investment protection standards with a view to identify areas suitable for contractualisation. As a general principle, the Working Group recognised contractualisation of treaty standards as problematic but considered that it might work in certain areas (calculation of damages and compensation). Future work should take inspiration from treaty standards and the needs for protection they covered, in the interest of both States and investors, with a view to find contractual substitutes, avoiding reproducing the same defects of treaty protection.*

(b) *Addressing investment contracts' practice (E.2)*

58. *The UNIDROIT Chair* introduced Section E.2 of the Issues Paper and invited the Working Group to express its views on the questions in paragraph 73. She proposed to discuss the possible solutions deriving from contract practice in case of changes in the host State's legal framework relevant to the contract, noting that developments in investment law had led to an increased use of "adaptation" or "renegotiation" clauses over traditional "stabilisation" clauses.

59. She suggested discussing (i) how stabilisation/renegotiation/adaptation clauses related to notions of general contract law such as hardship and force majeure (which were discussed in Section F.1 of the Issues Paper), and (ii) the possible role of transnational principles in the formulation and interpretation of these clauses.

Stabilisation/renegotiation/adaptation clauses

60. *The participants* echoed how "stabilisation" clauses were characteristic of international investment contracts (IICs) and had over time transformed into "renegotiation" and "adaptation" clauses. Such clauses were considered fundamental protection mechanisms for investors since

changes in the host State's legislation might affect the costs and envisaged timeline for investment projects. *The Working Group* agreed that the future instrument should provide guidance on stabilisation/renegotiation/adaptation clauses.

61. *One participant* noted that there might be different views on the historical origin and purpose of stabilisation clauses. He considered that, to the extent stabilisation clauses were introduced with the purpose of attracting foreign investors, there were other means available to pursue such goal.

62. Several suggestions were made with regard to specific issues that the Working Group might wish to consider in this context: (i) the concept of "legislation", e.g., whether changes in "legislation" would include changes in case law and/or industry standards; (ii) the geographical area of protection, e.g., whether the investor would benefit from protection only in case of changes in legislation in the country of investment or also in the country in which its headquarters or production facilities were located; (iii) the possible role of minimum thresholds, e.g., how to consider an explicit reference in the contract that the protective solution would only apply in case of a cost impact above a certain threshold; and (iv) the scope of stabilisation clauses, e.g., whether such clauses would cover changes in taxes on the part of the host State.

63. On the concept of "legislation", *one participant* suggested to distinguish between changes in case law and changes in legislation. She commended the forward-looking approach taken by courts in certain jurisdictions, which anticipated envisaged changes to the case law so that parties had time to adapt their practices. With regard to changes in the legislation, she noted that some States were actively monitoring foreign investments and the consequences of legislative reform for those investments. This could be a useful practice to consider in the future instrument. It was also suggested to consider that the interpretation of the host State's legislation might change over time, e.g., due to a change in government. *The Secretary-General* suggested to reflect on whether lessons could be drawn from the doctrine of "odious debt" in case of a change in government during the duration of the contract. Furthermore, a suggestion was made to categorise possible different types of legislative changes (e.g., changes in the legal framework concerning fundamental human rights and changes in legislation spurred by discretionary policy changes of States).

64. *The participants* generally agreed that the concept of "stabilisation clauses" would need to be clearly defined and that the future instrument should provide guidance on the exceptions and limitations to these clauses. The aim should be to clarify what would happen in complex situations, e.g., in case the host State made international climate commitments that would affect the regulatory environment of an IIC. It was also suggested to consider the treatment of foreign investors *versus* domestic investors that were affected by changes in the legislative framework of the host State. Reference was made to the principle of equality and the need to avoid "reverse discrimination".

65. *The UNIDROIT Chair* noted that aspects such as risk allocation and balancing the interests of the contracting parties might be addressed to some extent during the negotiation process of a contract. At the same time, it was discussed that the room for negotiation might be limited in certain cases, e.g., if there was an unequal bargaining position and the stronger party made use of a contract template. It was acknowledged that the weaker party could be either the investor or the State.⁶

66. *The participants* generally agreed that it would be useful to examine contract practice and arbitral awards to develop guidance and perhaps model stabilisation/renegotiation/adaptation clauses,⁷ although *one participant* expressed some doubts about the extent to which arbitral awards could provide useful insights in this area. *Another participant* raised the point that, during the 1990s, a solution to reconcile the need for flexibility for the host State, on the one hand, and the need for

⁶ Reference was made to the judgment of the UK High Court of Justice in the case between the *Federal Republic of Nigeria v Process & Industrial Developments Ltd*, [2023] EWHC 2638, paragraph 585.

⁷ See the question in the Issues Paper (paragraph 73, first bullet point).

predictability for the investor, on the other hand, had been to include elements in investment contracts that would guide their possible renegotiation (e.g., a formula to re-establish the economic equilibrium or an extension of the project duration in case of drawbacks for the investor). She wondered whether alternative solutions had been identified in recent contract practice. In the ensuing discussion, it was noted that the level of predictability that could be offered to investors had changed over time.

67. Regarding the possible limits of stabilisation/adaptation/renegotiation clauses,⁸ it was noted that the concept of “proportionality” had been interpreted differently by different courts and arbitral tribunals. Therefore, the Working Group might need to examine which understanding would be relevant in the investment context.

68. *One participant* indicated that, while transnational guidance could be developed about the interpretation of stabilisation/renegotiation/adaptation clauses, the future instrument should recognise the importance of domestic law for the use and interpretation of these clauses (e.g., the use of “stabilisation” clauses might be prohibited in certain jurisdictions). He considered that it would be useful to develop model clauses with different options for consideration by contracting parties from different industries.

69. *The Chairs and the Deputy Secretary-General* recalled that the UPICC provisions should be the starting point in this project. They suggested to carefully reflect on the possible role of the UPICC in interpreting investment contract clauses, and whether the UPICC might provide useful guidance on the negotiation process (e.g., the application of the principle of good faith) and on supervening circumstances. For instance, Articles 6.2.1 to 6.2.3 of the UPICC on hardship might be relevant. In addition, the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts (“ALIC Guide”) contained guidance on stabilisation clauses (paragraphs 4.137-4.140) and investor-government contracts (paragraphs 5.37-5.40) that might be considered to useful effect.

70. It was agreed, in this regard, that the Secretariat would prepare an overview of guidance, including illustrations, in existing UNIDROIT instruments on topics to be covered in the future instrument.

71. Furthermore, it was suggested to employ the terminology of the UPICC to prevent the use of terms that might have slightly different meanings in different legal systems. *A participant* added that the ICC Model Contracts followed the same, neutral approach.

72. *The Working Group agreed that the future instrument should cover stabilisation/adaptation/renegotiation clauses, which were typical for investment contracts. It was agreed to conduct research on the use of such clauses in contract practice, which had changed over time, and to consider the UPICC when developing guidance in this area, including concerning possible exceptions and limitations.*

Relationship with hardship and force majeure

73. *The UNIDROIT Chair* invited the Working Group to discuss the relationship between stabilisation/renegotiation/adaptation clauses, hardship, and force majeure, also considering the questions in paragraph 80 of the Issues Paper.

74. *One participant* noted that the issues behind stabilisation clauses were to some extent connected with the notion of hardship and that the approach to both concepts should be consistent.

⁸ See the question in the Issues Paper (paragraph 73, second bullet point).

75. This led to a discussion on the distinction between hardship and “stabilisation” clauses. It was suggested to clarify the boundaries of both concepts in the future instrument (although it was acknowledged that there might be grey areas). For instance, *one participant* noted that while a change in legislation was relevant for “stabilisation” clauses, a change in the price of raw materials would fall within the scope of hardship. *Another participant* suggested that hardship was caused by changes with generic application while stabilisation clauses would be triggered by events specific to the contract. In the ensuing discussion, *the participants* generally agreed that a main difference was that hardship was triggered by external events, i.e., events beyond the control of the contracting parties,⁹ while stabilisation clauses concerned changes that were within the control of one of the parties, namely the State. It was also discussed that, in case of hardship, performance became onerous for one of the parties while legislative changes that would trigger a stabilisation clause did not necessarily mean that performance of the contract had become challenging. *Several participants* noted that the consequences of hardship or stabilisation clauses were often the same, namely renegotiation of the contract.

76. *A member of the Secretariat* raised the question whether a change in legislation would be within or beyond the control of the parties if the contracting party was not the State but a regional body such as a municipality. It was discussed that in certain jurisdictions with a federal structure, the federal State remained responsible in case a local council entered into an investment agreement with a foreign investor. *The member of the Secretariat* recognised that the State would remain accountable at the level of treaty arbitration but wondered whether the same logic would apply at the contractual level. *The UNIDROIT Chair* suggested further discussing this at a later stage, possibly in the context of the parties to an IIC.

77. The discussion then turned to the question of whether hardship and “stabilisation” (or similar) clauses would both be needed in IICs. *One participant* wondered whether hardship clauses would be relevant for IICs. He sought clarification on the threshold for hardship in the UPICC. *The Deputy Secretary-General* elaborated on the hardship provisions in the UPICC. She explained that the threshold for hardship was high, given that the elements in Article 6.2.2 would need to be met cumulatively. She considered that the UPICC provisions on hardship might be relevant both for hardship clauses in IICs and to inform the formulation of typical IIC clauses.

78. *Another participant* considered that both hardship and stabilisation clauses were important for IICs. He explained that their compensation mechanisms tended to be different; in case of hardship, the court or arbitral tribunal tended to be involved, while direct negotiations could be held if a stabilisation clause had been breached. He also noted that the concept of hardship or *imprévision* could not be ignored since it was applicable to State contracts, including IICs, in various jurisdictions.

79. *Another participant* considered that it was for the contracting parties to decide which clauses would be needed in a specific IIC. He noted that the risk that one of the contracting parties – the State – would unilaterally change its legislative framework was typical for IICs, which explained why stabilisation/renegotiation/adaptation clauses might be needed in addition to a hardship clause.

80. *The Working Group* generally agreed that the future instrument could provide distinct guidance, and, if possible, model clauses, on hardship and “stabilisation” clauses (or similar), allowing the contracting parties to select the clauses they wished to include in their contract. It was suggested to provide guidance that would help in standardising different options for risk allocation between contracting parties (e.g., stabilisation clauses that would be triggered in case of “a change” or “a fundamental change” in the legislative environment pertinent to the investment). Furthermore, it was discussed that open-ended formulations in hardship clauses (e.g., “any change” in circumstances) might lead to an impasse in contract negotiations. *One participant* advocated a

⁹ Reference was made to Article 6.2.2 of the UPICC (definition of hardship), point (c) which referred to events “beyond the control” of the disadvantaged party.

surgical application of the notion of hardship, e.g., using index clauses to address the impact of inflation. It was also suggested to consider integrating concepts and/or principles from arbitration practice if model clauses were to be developed. Furthermore, it was agreed that the research on ICC arbitral awards would be expanded to cover hardship.

81. The discussion then turned to force majeure clauses. It was discussed that force majeure was a widely recognised concept across jurisdictions and that a force majeure clause was needed in addition to hardship and/or “stabilisation” clauses for cases in which performance had become impossible. The COVID-19 pandemic had further underlined the need for such clause.

82. *Several participants* referred to the link between force majeure and investment treaty arbitration, especially the necessity defence (which had been invoked, e.g., in the context of the financial crisis in Argentina). They considered that clear guidance on force majeure in IICs could play an important role for lawyers and arbitrators in arbitration cases. This led to some discussion on the role of customary international law and the extent to which it would be possible to contract out of customary international law rules. The point was raised that if a State was entering into a contract as a commercial legal entity based on domestic law, some of the issues arising from customary international law would not apply.

83. With regard to the guidance to be provided in the future instrument on force majeure, it was suggested to cover prolonged force majeure events, which could affect the economic equilibrium of the contract, and the timing for triggering termination rights. It was also suggested to consider the notion of “*fait du prince*”.

84. *A member of the Secretariat* suggested to consider for future work the possible role of insurance for investors, as well. *A participant* suggested that the Working Group reflect on possible guidance in case an “uninsurable risk” materialised. As an example, he made reference to a situation in which a facility built by an investor was destroyed following an act of war, before the date on which it would be handed over to the State. In such case, it might be unclear who should bear the costs of rebuilding the facility, which could be very high and would not be covered by insurance. *Another participant* noted that some lessons might be drawn from case law.¹⁰

85. *The Working Group generally agreed that stabilisation/renegotiation/adaptation clauses, hardship, and force majeure were three different concepts that applied to different scenarios. The future instrument could therefore provide distinct guidance, and if possible, model clauses, on these clauses, allowing the contracting parties to select the clauses they wished to include in their contract.*

Consequences of stabilisation/renegotiation/adaptation clauses, hardship and force majeure

86. *The UNIDROIT Chair* asked the Working Group to discuss the consequences of hardship, force majeure, and the breach of “stabilisation” clauses, and the relationship with mitigation of damages.

87. *The Deputy Secretary-General* noted that there was a tendency under general contract law, especially for long-term contracts, to keep the contract alive in case of supervening events (e.g., by introducing renegotiation as an option even in case of force majeure). She suggested reflecting on whether this tendency would apply to IICs. *A member of the Secretariat* added that States would likely have an interest in preserving IICs to ensure investment projects were finalised.

88. *The participants* generally agreed to build on the UPICC, which already contained useful guidance on the consequences of hardship and force majeure.

¹⁰ Reference was made, e.g., to the arbitration concerning the Channel Tunnel between England and France.

89. *The ICC Chair* recalled the relevance of the UPICC and suggested to reflect on (i) the notion of “economic equilibrium” of the contract, and (ii) solutions in case renegotiations failed, e.g., recommending that an arbitral tribunal would have jurisdiction to adapt the contract with a view to restoring its equilibrium. This led to some discussion on the type of “equilibrium” to be sought in the investment context. It was noted that the hardship provisions in the UPICC required a fundamental change of the “equilibrium of the contract”, while a more economic approach might be warranted for IICs.

90. *One participant* stressed that investment contracts were long-term contracts and that the “economic equilibrium” of the contract could be affected by various types of changes. He suggested recommending in the future instrument that any factor that might change the economic equilibrium of the contract should give rise to renegotiations.

91. *Another participant* referred to investment contracts as “relational contracts” that were necessarily incomplete given that it was impossible to predict all the possible developments that might occur during the duration of the contract. He therefore considered it important to include mechanisms that allowed contract renegotiation, adaptation and, as possible ultimate consequence, contract termination. He suggested considering the commentary to Principle IV.6.7 of the TransLex-Principles, which referred to the concept of “commercial equivalence” rather than “economic equilibrium”, and which contained a number of guidelines to be observed by contracting parties in a renegotiation process.

92. *The participants* discussed that a distinction should be made between the occurrence of events that had an economic consequence, on the one hand, and compensation and damages following a breach of obligations, on the other.

93. *One participant* noted that time extension, cost protection, contract renegotiation and adaptation were common remedies for hardship and similar clauses. At the same time, there was a link with mitigation of damages. For instance, in case of unusual adverse meteorological conditions that would affect an investment site, the investor might have a duty to protect and preserve the equipment on site, to limit the damages that would be caused by the force majeure event. Furthermore, there was a link with the principle of good faith, since renegotiations would need to be conducted in compliance with the good faith principle.

94. *Another participant* suggested to consider the consequences of hardship, force majeure, and “stabilisation” clauses (and similar) separately. With regard to stabilisation, she noted that compensation would be a natural consequence. She raised the point that it might be useful to examine the possible link between the breach of a stabilisation clause and force majeure in case the State exercised its right to regulate in the public interest (e.g., for environmental or public health reasons). With regard to hardship, she noted that renegotiation or other means such as mediation were relevant since the purpose was to rebalance the contract. For force majeure, the consequence would be exoneration of performance of the contract by the party that was breaching the contract.

95. *One participant* raised the point that, in some jurisdictions, constitutional provisions might require certain types of IICs (e.g., concerning natural resources) to be promulgated through legislation. This meant that amendments to the contract would need to follow the same legislative route. To avoid delays, he suggested to recommend in the future instrument that the host State should endeavour to process any adaptations to the contract in a swift manner.

96. *The participants* discussed how alternative mechanisms such as mediation, third-party facilitation and contract renegotiation were increasingly relevant to solve disputes while seeking to preserve the contract. *The Deputy Secretary-General* noted that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming discussed options for parties to include specific alternative dispute resolution mechanisms (e.g., special institutions or mediation boards) in their contracts. She suggested

considering whether such guidance might also be useful for investment contracts. *A participant* added that there were examples of jurisdictions in which public bodies – rather than third-party facilitators – had been established with a view to achieve consensual solutions to disputes between the State and a private party. *Other participants* agreed that alternative mechanisms, whether private or public in nature, might be useful to solve investment disputes. It was discussed that it would also be useful to consider potential obstacles to mediation and to see whether the mediation process could be organised in a manner that would address such obstacles. *One participant* indicated that alternative dispute mechanisms to solve disputes concerning hardship, force majeure, and stabilisation clauses should be discussed separately from general dispute settlement clauses.

97. *The Working Group agreed to discuss the consequences of stabilisation clauses, hardship and force majeure separately and recognised that the UPICC would provide a useful starting point on contractual remedies. The Working Group agreed on the importance of cooperative remedies such as renegotiation, contract adaptation and alternative dispute settlement mechanisms, including mediation/third-party facilitation, to preserve the continuity of the investment relationship. It was agreed to further reflect on the consequences and dispute settlement mechanisms in existing UNIDROIT instruments.*

(c) *Addressing public policy standards (E.3)*

98. *The UNIDROIT Chair* invited the Working Group to discuss how the future instrument should address policy trends, such as sustainable development and environmental protection.

99. *One participant* considered that it would be important to address policy goals in the future instrument. She noted that investors should contribute to the development of the host State and that IIAs increasingly made reference to sustainable development. She suggested providing guidance on what this would mean in practice and linking this to existing standards such as the UN SDGs. *Another participant* cautioned against being very prescriptive on human rights obligations, noting that developing countries might face difficulties with the implementation of such standards due to a lack of resources or structures (e.g., specialised courts). The point was also raised that a challenge to the formulation of concrete guidance in this area was that policy goals were often vague and the interpretation of human rights concepts and similar (e.g., freedom of speech) evolved over time. It was also noted that the current UN SDGs were part of the 2030 agenda for sustainable development, while thinking had started about the next generation of goals.

100. *The UNIDROIT Chair* suggested providing guidance on how international soft law principles could be transformed into contractual language. She noted that, if such soft law principles had not been incorporated into the domestic law of the State in which the investment took place, but were transformed into contractual obligations or otherwise applicable to the investor, this might raise competition issues since foreign investors might be subject to more stringent norms than domestic investors.

101. *One participant* raised the point that the development of model clauses would be helpful to explain what kind of contractual clauses could be used to fulfil specific sustainable development goals. He noted that a challenge might be that the relevant policy goals might depend on the industry sector.

102. It was discussed that a broad, general model clause could be developed, or that specific clauses could be formulated to address specific SDGs, while leaving it to the contracting parties to determine which ones would be relevant to their contract. *The participants* generally agreed that the guidance should be as concrete as possible. It was also discussed that it might not be possible to provide equally detailed guidance on the inclusion of environmental, social and governance obligations in IICs; while the level of specificity had increased over the years with regard to environmental provisions, that might be less the case with social and governance obligations.

103. *The ICC Chair* suggested building on Article 1.4 of the UPICC, explaining that mandatory rules included principles of public policy (e.g., human rights, environmental protection). *A participant* noted that, in addition to the mandatory rules in the law of the jurisdiction in which the investment took place, regard should be had to other mandatory rules with which the investor would need to comply, e.g., stemming from the jurisdiction in which the (parent) company is located.¹¹ *The UNIDROIT Chair* added that, in addition to guidance on mandatory rules, guidance could be developed on due diligence obligations, e.g., to involve local communities or conduct environmental due diligence.

104. *The Secretary-General* indicated that regard could be had to the ALIC Guide, which already provided guidance on these aspects. He explained that, if investors were bound by their own legislative framework also for investments in other jurisdictions, this could incentivise responsible investments even if the host State was less advanced in prescribing sustainable development norms in its domestic laws. Also, investors could condition their investment on certain minimum standards that the host State should guarantee.

105. *A participant* warned that investors might act through local companies, or even in the form of a joint venture with the host State. In such case, she argued, it might be challenging to make them subject to the laws of the home jurisdiction. *The Secretary-General* responded that this had been considered in the ALIC Guide, since land investments were often structured through local subsidiaries. *Another participant* suggested that research could be done on best practices to address such issues, e.g., by imposing (via contract or a code of conduct) liability on the parent company for breaches of environmental, social and governance (“ESG”) obligations by a local company. It was also noted that the Annex to the Proposal for a Directive on EU Corporate Sustainability Due Diligence contained a comprehensive list of rights and prohibitions enshrined in international human rights agreements that could be imposed on companies.¹²

106. *The UNIDROIT Chair* raised the question whether it would be possible to contractualise an obligation for the State to guarantee certain rights or standards. *Several participants* responded that this was possible, with *one participant* noting that contractualisation was possible as long as it was not against the public policy of the host State. *The Secretary-General* noted that an aspect for discussion might be whether States were fully free to define their public policy or whether there were any limits – for instance, a minimum standard regarding the respect for internationally recognised human rights that should be upheld by States.

107. Furthermore, it was discussed that it might be difficult to address situations in which the State would not comply with such obligations. *Another participant* explained that the contract could specify consequences in case the State did not comply with such obligations and it affected the contract (e.g., the investor being relieved of certain obligations or the timing thereof).

108. *The Secretary-General* raised the question whether, in case a State breached a contractualised ESG obligation, this would mean that the investor should pull out of the investment. *The Deputy Secretary-General* responded that in case of a contractual breach, the remedies for non-performance would be applicable, which included withholding of performance and, as last resort, termination of the contract. She noted that the Working Group might wish to consider the enforceability of the remedies, e.g., by examining dispute resolution mechanisms that would facilitate enforcement.

109. *Another participant* noted that, if the host State did not comply with fundamental contractual obligations (e.g., payment), the investor should be able to suspend performance – which currently

¹¹ Reference was made to the proposal for an EU Directive on Corporate Sustainability Due Diligence (EU Corporate Sustainability Due Diligence Proposal).

¹² See the [Annex to the Proposal of the European Parliament and the Council for an EU Directive on Corporate Sustainability Due Diligence \(Brussels, 23.2.2022 COM\(2022\), 71, final\)](#).

was not possible in all jurisdictions depending on the sector (e.g., public utilities) – and, ultimately, resort to arbitration. *The Secretary-General* responded that an analysis of different types of IICs might be useful since not all of them related to the provision of essential public services.

110. *One participant* suggested to identify key issues and conduct research on how those issues were dealt with under different domestic laws to see to what extent the development of contractual remedies was possible (noting that, e.g., modern slavery was a crime in certain jurisdictions). *The UNIDROIT Chair* indicated that thought should also be given to the applicable mechanism in case of a breach of a due diligence obligation (e.g., whether this would be the domestic judicial system).

111. *One participant* suggested examining the output of the non-judicial mechanisms that had been established under the *OECD Guidelines for Multinational Enterprises*. He explained that examining the OECD statistics on claims brought to National Contact Points (NCPs) might help to better understand the needs in different industries and define the aspects to be covered in model clauses. *The UNIDROIT Chair* noted that in the cases brought to NCPs, the solution was often an active change in behaviour rather than compensation. She asked whether such consequence (i.e., a positive behavioural change) should be considered as a contractual solution.

112. *One participant* suggested looking at industry practices, which might already provide indications as to how policy goals would apply in specific sectors. *Another participant* suggested examining how recent BIT models covered policy goals. For instance, Article 16 of the most recent Canadian model BIT on responsible business conduct referred, *inter alia*, to the need for investors to comply with domestic law and regulations (e.g., concerning human rights) and to reaffirm the importance of internally recognised standards (e.g., the *OECD Guidelines for Multinational Enterprises* and the *UN Guiding Principles on Business and Human Rights*), encouraging investors to voluntarily incorporate such principles into their business practices and internal policies.

113. *The UNIDROIT Chair* recognised the relevance of codes of conduct and similar, and raised the question of how these would relate to contractual obligations. *One participant* agreed that guidance should be provided on how general principles on sustainable development would relate to contractual provisions. One option could be to provide guidance on how public policy interests could be protected in case of disputes (e.g., by interpreting substantive provisions by reference to the general policy of the need to protect the environment). Another option, perhaps preferably, could be to make general provisions concrete as rights and obligations of the parties to the contract.

114. *One participant* noted that there were two aspects to be considered: (i) ESG risk allocation between a State and a private investor, and (ii) breach of contractual ESG obligations. Regarding the first aspect, an example would be the situation in which the investment project site was occupied by third parties as a protest because of the alleged impact of the project on climate change. In such case, the question was who would bear the risk: the State or the investor. Regarding the second aspect, the questions would be how to define ESG obligations in a contract and what the remedy would be in case of a breach (e.g., termination, a financial sanction, etc.). It was discussed that ESG obligations could be applicable, e.g., based on a general obligation to comply with the laws and regulations of the host State or based on a contractual commitment of the investor to comply with its own code or standard (e.g., the company's corporate social responsibility standard).

115. *The UNIDROIT Chair* suggested to postpone the discussion on other policy trends (e.g., digitalisation, SME involvement in investments) and forms of cooperation (e.g., multilateral contracts, joint ventures) to the next Working Group session.

116. *The UNIDROIT Chair* asked whether the participants had any views on possible topics that should be covered in the future instrument, in addition to those in the Issues Paper.

117. *One participant* proposed addressing issues of confidentiality *versus* transparency in the future instrument, in particular regarding the investment contract itself. In the ensuing discussion, it was noted that, in some jurisdictions (e.g., Brazil), investment contracts as “public contracts” were to be made public. It was also discussed that listed companies might be obliged to publish certain information. *One participant* emphasised the benefits of transparency and proposed encouraging transparency of IICs in the future instrument. Alternatively, she suggested that copies of IICs could be made available to UNIDROIT in the future to allow it to monitor practices and determine whether a review of the instrument might be needed. *Other participants* noted that investors might be reluctant to publish the complete IIC since it might contain commercially sensitive information, while there might also be reluctance on the side of the State to publish IICs. *The UNIDROIT Chair* suggested to consider the existing guidance provided in the ALIC Guide (beginning from paragraph 4.178) on how to define the concept of confidential information and how such information could be redacted from documents that were made available to the public.

118. *The Working Group* agreed that policy goals should be covered in the future instrument. Different views were expressed on how that should be done and how specific the guidance could be (e.g., a general obligation to comply with relevant rules and regulations and/or contractualisation of policy goals). It was generally considered useful to identify relevant existing standards and to consider the guidance provided in the ALIC Guide. The future instrument could also cover mechanisms for non-compliance. In case non-compliance would result in a breach of contract, the remedies under the UPICC should be the starting point. It was commonly agreed that granularity would be needed to operationalise sustainability goals, which might require consideration of different circumstances and scenarios.

3. Compensation and damages (F.2)

119. *The UNIDROIT Chair* asked the Working Group whether the future instrument should provide specific guidance on remedies, including compensation and damages.

120. *One participant* suggested focusing on exactly how IICs differed from purely international commercial contracts (i.e., one of the parties was a State or State entity) to determine what specific guidance to provide in this area. For instance, it might be considered to develop a general principle on the prohibition of punitive damages. It was discussed that future guidance in this area should be complementary to the work undertaken by other international organisations.

121. *Another participant* raised the point that, at the level of IIAs, the focus was on arbitration and monetary damages, with a lack of guidance as to how such monetary sum should be calculated. He noted that, at the level of IICs, there was significant flexibility and an important opportunity to provide guidance for contracting parties to consider alternative remedies and methods of dispute resolution, including with a view to salvage the contractual relationship. *Other participants* agreed that guidance on means to preserving the contract would be useful. *One participant* suggested to establish a clear hierarchy of steps or a default option, e.g., favouring renegotiation before turning to compensation and damages. As to the latter, she suggested that it would be important to involve valuation experts in order to develop possible guidance on the calculation of damages. *Another participant* noted that salvaging the contractual relationship before considering compensation would also be in line with principles of international law on State responsibility, where restitution was considered before financial compensation.

122. *The Secretary-General* asked whether there would be merit in covering the possible assignment of claims against the State to third parties (e.g., litigation funds) in the future instrument. *The UNIDROIT Chair* indicated that it might be covered to some extent by UNCITRAL, which was undertaking work on third-party funding. *A participant* added that this question also related to the issue of immunity of State property, which was highly sensitive and outside the scope of this project. *Another participant* added that the disclosure of the involvement of third-party funders might be

another aspect to consider. She suggested to further reflect on whether there were aspects relating to third-party funding that would merit being regulated in the contract. *The UNIDROIT Chair* agreed and proposed to consider this topic in the future in the context of the transfer of rights and obligations.

123. *The ICC Chair* suggested to explore (i) limitation of liability clauses, and (ii) liquidation of damages clauses, as means to set boundaries in this area and enhance legal certainty. *A participant* added that the guidance in the ALIC Guide should also be taken into account, as well as the principle of proportionality, contractual caps, and the duty to mitigate harm. *Another participant* suggested to consider exploring linking the amount of damages that could be claimed to the timing of the investment to avoid the risk of extraordinary awards of damages.

124. *The Deputy Secretary-General* suggested to consider the guidance in the UPICC, especially Article 7.4.8 (mitigation of harm), Article 7.4.13 (agreed payment for non-performance) and Article 5.2.3 (exclusion and limitation clauses). *Other participants* agreed that the UPICC should be taken as a basis, as well as the guidance provided in the ALIC Guide.

125. With regard to exclusion and limitation of liability clauses, *one participant* suggested to look into clauses that excluded liability for “consequential loss”, which were often used in IICs concerning construction and infrastructure projects. He noted that the meaning of “consequential loss” might not be clear or subject to different interpretations across jurisdictions, and that such clauses were an important protection mechanism for investors given that they would be unable to secure insurance for such types of losses. *Another participant* supported the idea of addressing consequential loss in the future instrument.

126. *One participant* noted that the issue of compensation was closely related to the applicable law and suggested to consider these two aspects together. He referred to a case in which a breach of an IIC had amounted to a breach of a BIT, and the arbitral tribunal had resorted to general principles of international law to determine the compensation. The award had subsequently been annulled because the contract was governed by domestic law and contained a numerical cap on compensation.

127. *Another participant* considered that the determination of compensation and damages depended on the legal nature of the contract (e.g., a State contract or commercial contract) and the approach in a specific jurisdiction. He explained that liquidated damages might be limited to actual loss in certain jurisdictions, while in other jurisdictions the amount of liquidated damages was established regardless of the actual loss or whether it had a punitive nature.

128. *The UNIDROIT Chair* raised the question whether the future instrument should provide guidance on aspects such as interest and currency, even if these were not covered in the Issues Paper. *The participants* considered that the future instrument should cover these aspects since they might have an impact on the calculation of damages and guidance could enhance predictability.

129. *It was generally agreed that compensation and damages be considered within the wider topic of remedies. Guidance could be provided on issues such as consequential loss and indirect damages, criteria to calculate damages, including possible caps and common contractual clauses to that end, limitation of liability and liquidated damages clauses. It was agreed that the UPICC already contained useful guidance on this topic (e.g., regarding mitigation of harm, agreed payment for non-performance, treatment of exclusion of liability, etc.).*

4. Transfer of rights and obligations under the contracts and return of rights (Section G)

130. *The UNIDROIT Chair* drew the attention of the Working Group to paragraph 84 of the Issues Paper and invited the participants to provide their views on the questions raised by the Secretariat in that section.

131. *One participant* suggested not to develop guidance on the transfer of rights and obligations under the contract and the return of rights, since it would be contract-specific. *Another participant* agreed that this should be left to the contracting parties. He noted that a specialty of IICs might be that the assignment of rights might be subject to the consent of the State party. It was suggested to consider the existing guidance in the ALIC Guide and to further reflect on the possible development of model clauses on this topic.

5. Legal framework and applicable law (Section H)

132. *The UNIDROIT Chair* invited the Working Group to discuss Section H on law applicable to IICs.

133. *One participant* noted that it would be preferable for parties to first decide on the law applicable to the contract and subsequently negotiate the remaining terms of the contract with the applicable law in mind. However, she recognised that, in practice, the governing law was often discussed at the end of the negotiation process.

134. It was discussed that investors might focus on limitation or exclusion of liability clauses and a neutral place of dispute settlement rather than the applicable law, which was consequentially often the law of the State where the project was located. This was considered logical since the law of the host State was most closely connected to the investment. It was also noted that the law of the host State might be imposed as governing law as part of public tender processes or might be mandatorily applicable in certain sectors (e.g., oil and gas) given their importance for the State's economy. Nevertheless, it was underlined that transnational principles might play an important role as neutral applicable law in lieu of, or in combination with, the law of the host State, thereby "transnationalising" the contract.

135. *One participant* expressed doubts about the potential of transnational principles in this area. *Another participant* noted, to the contrary, that he saw growing support for transnational law, for instance in South America. *The UNIDROIT Chair* emphasised that transnational and international law had the potential of detaching the relationship between the contracting parties from the domestic law of the host State to some extent. *A participant* agreed that inserting international elements in the governing law would likely be welcomed especially by investors, since it would add neutrality to the contract. *Other participants* noted that dispute settlement through arbitration was a means of detaching the contractual relationship from the domestic arena, and that arbitral tribunals often resorted to international law, sometimes even in cases in which parties had made an express choice for domestic law.¹³

136. *The Secretary-General* argued that the choice for a "neutral" applicable law might also help to avoid the use or breach of stabilisation clauses. *A participant* responded that, if the applicable law was not the law of the host State, changes in the host State's legislation could still affect the investment project since such laws and regulations needed to be complied with for the execution of the project in that country.

¹³ Reference was made, e.g., to the award in the case *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* (January 1977).

137. *Some participants* noted that the starting point was freedom of contract: that parties were free to choose the law applicable to their contract. The problem was rather what would happen in the absence of a choice of law or an ineffective choice of law. It would then be for the arbitral tribunal to determine the applicable law based on factors such as the centre of gravity (e.g., the place of performance) and principles of transnational law. *One participant* raised the point that, if parties had made an express choice of law for domestic law, it should be clear which substantive rules applied (e.g., administrative law or commercial contract law).

138. *Another participant* argued that the conceptual framework for commercial contracts and IICs was different; the principle of freedom of contract was universally recognised as the starting point for commercial contracts, while for IICs it might instead be the principle of legality since the State was subject to the boundaries of its own domestic law, i.e., the State could only agree to a certain governing law if it was allowed to do so by its domestic law.

139. It was discussed that the applicable law clause should be precise; for instance, if the applicable law was domestic law in combination with international law, the relationship between those two should be clearly set out. It was also noted that domestic law and international law might be closely related since aspects of international law might be incorporated in the domestic law of the host State.

140. *One participant* suggested to take existing approaches into account, such as in Article 42 of the ICSID Convention, and to consider whether any of those would be appropriate for IICs. He noted that a difficulty might be if the parties had made a choice of law that was contrary to the law of the host State. He wondered whether it could then be argued that this was irrelevant from an international perspective. He suggested to address the relationship between parties' choice and the role of the host State's domestic law in the future instrument.

141. *Other participants* agreed that Article 42 of the ICSID Convention would be a good starting point since it reflected a balanced approach towards the role of domestic and international law. It was noted that ICSID had conducted a study on the application of ICSID rules to contract-based arbitration, which would be published in the near future. It was also suggested to consider Article 11 of the *HCCH Principles on Choice of Law in International Commercial Contracts*.

142. *The UNIDROIT Chair and the Deputy Secretary-General* recalled that the UPICC could be (i) chosen as applicable law by the parties, (ii) incorporated as terms of the contract, and (iii) used to interpret and supplement the applicable domestic law. It was noted that the *UPICC Model Clauses for the use of the UPICC in international commercial contracts* might be useful for the development of model clauses.

143. *The Deputy Secretary-General* indicated that the future instrument, as a soft law instrument, could provide different options regarding the choice of the applicable law. *A participant* agreed and underlined the need for flexibility, also noting that there was a difference between the law applicable to the procedure and the law applicable to the substantive provisions of the contract. He considered that model clauses that would allow contracting parties to choose from among different approaches would be most useful.

144. *The Secretary-General* added that the choice of law might also depend on the type of investment (whether it concerned, e.g., land or financial instruments), which might be something on which to further reflect.

6. Dispute resolution clauses (Part I)

145. Due to time constraints, it was decided to postpone a detailed discussion on dispute resolution clauses to the next Working Group session. However, several aspects mentioned in Part I

of the Issues Paper were indirectly touched upon during the discussion of other topics, such as the potential of alternative dispute settlement mechanisms, especially mediation (see para. 95 above), award transparency (see para. 118 above) and applicable law (see point 5 above).

7. Summary of key points of discussion

146. At the end of the discussion, *the UNIDROIT Chair* opened the discussion on a draft interim document prepared by the Secretariat that summarised the key points made during the three-day session's discussion on the Issues Paper, that would constitute the guidelines of future work.

147. *One participant* noted that the draft document should consider the discussion on methodology, and particularly how professionals that shaped "transnational practice" could be involved in the process, so to create a product adherent to practice. *One participant from the ICC* stressed how important the voice of the industry was for ICC processes, but also that industry lawyers were usually reluctant to share information on contracts. The same participant also stressed that ICC task forces usually established a special group of in-house lawyers from companies to have an open channel with practice, while being careful to keep an independent standing from industry. The ICC Model Contracts and Clauses might be of inspiration for the Working Group, together with the UPICC. States' and investors' negotiators, including independent lawyers, should also be heard.

148. *Some participants* pointed out that the draft summary document should address the nature of the parties to IICs, especially when a dispute with a non-signatory party arose, such as in the case of a new company being established in the host State to execute the contract.

149. There was widespread agreement that the informal intersessional work, and particularly the work of the Drafting Committee, should be carried on under the rule of confidentiality, also with a view to access information and ensure efficiency, independence, and impartiality.

150. *One participant* suggested to consider that the contemporary discussion on stabilisation clauses covered these issues under adaptation clauses. *The UNIDROIT Deputy Secretary-General* added that stabilisation clauses were more and more often re-characterised as renegotiation clauses, meant to adapt the contract to medium- and long-term developments in the investment relationship. *The participants* finally converged that stabilisation, hardship and force majeure should be collated under the heading of "change of circumstances" because of the similar consequences they entailed.

151. *One participant* suggested that the summary document might consider, under issues of compensation and damages, "consequential loss" and "indirect damages" in relation to the usual attempt of contract parties to obtain a limitation of damages or avoid liability based on the loss of alternative business opportunities. *Another participant* argued that interest issues should also be included, recalling the utility of the UPICC as regards the calculation of pre- and post-award interest. *The same participant* drew the attention on that, even though it was decided to use the same heading of "change of circumstances", the Group should maintain a differentiation between stabilisation clauses as clauses that covered events within the control of one of the contracting parties, on one side, and force majeure and hardship, on the other. In particular, the Working Group should consider examining the meaning of the expression "events within the control of one party" since often some situation might be under the sphere of influence of one party but not technically within its control.¹⁴

¹⁴ E.g., when a ministry concluded a contract within its field of competence (e.g., water management) and another ministry introduced new obligations which affected the financial equilibrium of the contract (e.g., a new tax or levy by the ministry of finance); or when the investor and the State created a company to implement the project and the question arose in the course of the dispute whether the arbitration clause extended to the conduct of the project company and to the rights of its shareholders, particularly when a defective execution of the project leads to a lack of revenues that impairs the possibility for the project company to distribute dividends to its shareholders.

152. *Some participants* observed that umbrella clauses, though belonging to treaty law, presented links with contractual waivers and put forward the issue whether an investor could waive its rights under a treaty. The nature of the rights of investors under umbrella clauses in IIAs should be discussed at a certain point in time. *The UNIDROIT Chair* noted that these issues were discussed in an original version of the Issues Paper, but they were left aside for later discussion in case they would be found relevant by the participants.

153. *Another participant* referred to the legal relationship between contracts and BITs and suggested that caution be exercised when examining possible input from arbitral practice since litigation only dealt with a minimum array of pathological investment relationships, while not reflecting all the cases where the rules worked well.

154. *The UNIDROIT Chair and the Secretariat* took note of the additional points made by the participants and clarified that issues of relationship between contracts and BITs, having regard to umbrella clauses, would be taken into consideration later in the process. *The UNIDROIT Chair* also encouraged the participants to pay additional attention to the issue of contractualisation of treaty standards, asking whether the draft summary document fully reflected the discussion.

155. *Many participants* confirmed that the opinion had generally been expressed that treaty standards were problematic, but specific standards such as free capital transfer or remedies and calculation of damages could be mirrored into contractual provisions, while issues addressed under FET might flow, in a contractual context, into the discussion on stabilisation clauses. The Working Group might rather take inspiration from those standards and materials from international organisations, particularly when it came to issues of sustainable development, labour, and human rights.

156. *Other participants* recalled that certain principles that stemmed from the interplay between treaty and customary law could not be contracted out of (e.g., denial of justice). *One participant* noted that the Working Group should functionally examine treaty clauses such as FET and see how they worked in practice, possibly trying to reproduce the functions of those clauses and meet their needs, while not maintaining their entire normative baggage and being careful not to reproduce the problems they entailed. The evolution of arbitration practice concerning treaty standards over the last two or three decades should be examined.

157. *The Working Group agreed to include in the final document elements on the nature of the parties, calculation of compensation and damages (especially as regards indirect damages and consequential loss) and to consider issues concerning stabilisation clauses under the heading of adaptation/renegotiation of contracts. Contractualisation of treaty standards confirmed problematic, but it could cover specific aspects (capital transfers, remedies), also based on a functional analysis of those standards and policy goals in new IAAs. The discussion should also cover umbrella clauses at a certain point in time, and that there was the need to have clearer insights on transnational practice.*

Item 4 Organisation of future work

158. *The UNIDROIT Chair* drew the attention of the Working Group to the organisation of future work and announced that the Working Group would meet in plenary in 2024 in Paris at the premises of the ICC. *The UNIDROIT Chair* noted that the Working Group appeared to be well balanced as to expertise, geographical provenance and legal families, and remitted the discussion on whether to enrich the membership to further “observers” to the next meeting in Paris (e.g., to include in-house lawyers).

159. *The UNIDROIT Chair* further added that it was the established practice of the Institute to invite to participate as observers a selection of entities that represented third-party interests, such as non-

governmental organisations committed to sustainable development, human rights and other public interests, in the same manner that NGOs had participated throughout the process which led to the adoption of the ALIC Guide, or that States had been involved through the Consultative Committee. *Several participants* stressed the importance of having represented NGOs, including those whose nature lay in between NGOs and corporations, supporting multinational enterprises in ESG and human rights due diligence.

160. *One participant* expressed the opinion that another type of expertise to be included in the process could be that of insurers (private insurers and overseas development insurance agencies). They could, indeed, provide direct insights on the risk and financial consequences of including (or not being able to include) certain provisions in contracts, such as choice of law, choice of forum, and certain substantive standards of protection. *The UNIDROIT Chair* replied that, in addition to observers, the Institute's methodology provided for public consultations at a certain stage, that might be addressed to industry. The UNIDROIT Secretary-General clarified that, in the context of other projects (e.g., Digital Assets and Private Law), during intersessional work several *ad hoc* workshops had been held on specific items, mostly online. Experts could be invited to give presentations without the need to involve them on a regular basis. On the other hand, stakeholders representing certain public interests should be involved regularly.

161. *Several participants* invited the Working Group to consider wider participation to the process, such as international arbitration centres (e.g., the Permanent Court of Arbitration), that might contribute not only to provide content, but also to promote the process's outcome, officers from the World Bank or from the UN Commission on Business and Sustainable Development and the UN Commission on Human Rights.

162. *The UNIDROIT Chair* illustrated the structure of future intersessional work. She stated that, to efficiently allocate areas of work, subgroups were to be established. Each subgroup would be coordinated by one or two focal points, i.e., participants who took responsibility for organising meetings, keeping track of the outcomes, stimulating studies and advancements, and drafting papers. *A member of the Secretariat* explained that the work of each subgroup was to be reflected in a discussion report that would keep records of the progress on each single topic. Written contributions were to be later consolidated, shared across subgroups, and discussed in plenary. The Secretariat would support the work.

163. *The UNIDROIT Chair* asked the participants if they agreed with the division into thematic subgroups suggested in the relevant draft document prepared by the Secretariat.

164. The participants thoroughly discussed the document and agreed that some issues should be considered transversal rather than specific to a single subgroup and therefore allocated to a thematic general subgroup called "subgroup 0"; other general or theoretical issues should be allocated to the same subgroup, such as applicable law, legal relationship between contract and IIAs/BITs, possible contractualisation of treaty standards; policy goals issues would be such a vast topic that could stand alone in a single subgroup; the subgroup on dispute settlement clauses should discuss how contracts might deal with States' counterclaims.

165. *The UNIDROIT Chair summarised the positions and clarified that subgroup 0 would cover more general issues of definition and conceptualisation of international investment contracts, the issue of UPICC interaction with IICs and between the three layers of content envisaged in the Issues Paper, including between contracts and IIAs/BITs, theoretical issues of applicable law and the possible contractualisation of treaty standards; subgroup 1 would deal with pre-contractual issues, parties and non-signatory parties, as well as affected stakeholders, formation and validity of contract, remedies including compensation and damages, and transfer of rights and obligations, while also tackling other UPICC provisions that might need adaptation; subgroup 2 would deal with "change of circumstances" covering stabilisation, hardship, and force majeure clauses; subgroup 3 would cover*

policy goals in IIAs, such as sustainable development; subgroup 4 would cover choice of law and dispute settlement clauses.

Items 5 & 6 Any other business. Closing of the session

166. In the absence of any other business, *the UNIDROIT Chair* thanked all the participants for their participation and invaluable contributions, and declared the session closed.

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

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ANNEXE II**AGENDA**

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Consideration of matters identified in the Issues Paper
 - (a) Preliminary matters
 - (b) Scope of the future instrument
 - (c) Content of the future instrument
4. Organisation of future work
5. Any other business
6. Closing of the session