



**UNIDROIT**  
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**EN**

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**SUMMARY REPORT**  
**OF THE SECOND SESSION**  
**(13–15 March 2024)**

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1. The second session of the Working Group on International Investment Contracts (“the Working Group”) took place from 13 to 15 March 2024 at the seat of the International Chamber of Commerce on the first day and hosted by White and Case Paris on the second and third days. Online participation was possible for those who were unable to attend the session in person.

2. The session was attended by 20 members and 18 observers among representatives of international organisations and individual observers, as well as members of the UNIDROIT Secretariat and the ICC Institute of World Business Law (“ICC Institute”). The full list of participants can be found in [Annexe I](#).

3. The session was chaired by 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 Chairs* opened the session and welcomed all participants. They expressed their gratitude to the participants for the progress made on occasion of the first session in Rome and for the intersessional work carried out since then, despite the tight deadlines. A *tour de table* was made to allow those who were not present in person at the former session in Rome to introduce themselves to the other participants.

#### **Item 2 Adoption of the agenda and organisation of the session**

5. *The UNIDROIT Chair* introduced the annotated draft agenda and the organisation of the session. The Working Group adopted the draft agenda (UNIDROIT 2024 – S-LIIC - W.G. 2 - Doc. 1, available in [Annexe II](#)) and agreed with the proposed organisation of the session.

#### **Item 3 Adoption of the Summary Report of the first session (Study L-IIC – W.G. 1 – Doc. 3)**

6. *The UNIDROIT Chair* introduced the draft Summary Report of the first session, which was circulated to the ICC and the participants after the meeting for consideration. The Working Group adopted the Summary Report.

#### **Item 4 Update on intersessional work and developments since the first Working Group session**

7. *The UNIDROIT Chair* illustrated to the Working Group the headway made so far on occasion of the first meeting in Rome and during the intersessional work. She referred to the Revised Issues Paper and the Summary Report to remind all that during the first session most of the topics addressed in the initial version of the Issues Paper had been thoroughly discussed at a high level, except dispute settlement clauses, due to lack of time. She added that since then, in accordance with the Institute’s established methodology, five Subgroups had been formed, namely: Subgroup 0 on general conceptual issues (applicable law, international investment law and contracts), Subgroup 1 on traditional contractual issues (pre-contract, formation, validity), Subgroup 2 on change of circumstances (stabilisation/renewal/adaptation, hardship, force majeure), Subgroup 3 on policy goals (sustainability, climate change, human rights), and Subgroup 4 on choice of law and dispute settlement clauses.

8. She noted that four out of the five subgroups (Subgroup 4 planned to start its work after the March 2024 session) had produced preliminary Discussion Reports as part of a general scoping

exercise, which sought to map the areas for work and would continue until the June 2024 session, when the Subgroups would be expected to finalise most of their findings and submit the final version of the Discussion Reports to the plenary Working Group for revision and final approval, as to produce a stable agenda of work for the time to come.

9. The UNIDROIT Chair also reminded the Working Group that a Revised Issues Paper had been produced by the Secretariat, available as [UNIDROIT 2024 - S-LIIC - W.G. 2 - Doc. 2](#), which aligned the initial Issues Paper to the outcome of the discussion held during the first meeting in Rome and the preliminary findings included in the Discussion Reports submitted by the Subgroups for the second session. She noted that the Revised Issues Paper would serve as a basis for discussion during the second meeting in Paris; in particular, the Subgroups would be required to present their preliminary Discussion Reports to the plenary and then the floor would be open for discussion in each area of work.

#### **Item 5            Consideration of matters identified in the Revised Issues Paper and the preliminary Discussion Reports**

10. *The UNIDROIT Chair* referred to the Revised Issues Paper and invited Subgroup 0 to present its preliminary findings, which were strictly related to the contents of the future instrument, its scope and structure, but which were in any case closely intertwined with the subject matter covered by the other Subgroups.

##### **(1)    Presentation and discussion of the Report of Subgroup 0: definitions, conceptualisations, and IICs relationships with domestic law and IIAs**

11. *One of the Co-Chairs of Subgroup 0* highlighted that the same idea underlying their proposal to form an additional Subgroup was to work on the conceptual underpinnings of the project, i.e. the very fundamental elements for discussion forming the basis for the whole endeavour. Three topics were selected in this regard: definitions, conceptualisations, and the relationships of International Investment Contracts (IICs) with domestic law and International Investment Agreements (IIAs). He noted that IICs were very specific because of the participation of the State or State entities and the constraints that this imposed on contracts, compared to business-to-business relationships. From this derived the necessity of identifying certain topics as main areas for work in the preliminary Discussion Report, in particular the role of domestic law and international law, party autonomy, public policy, the transnational nature of the instrument, commercial usages, and transnational practice as a benchmark for the elaboration of model clauses.

12. *The other Co-Chair of Subgroup 0* pointed out that the preliminary Discussion Report mainly provided a work programme for what this Subgroup wanted to do in the future. The main questions identified by the Subgroup were if (and what kind of) transnational principles would exist in the area of IICs and how they could be built; if they could be inferred from domestic law in a comparative perspective or should be found in international law; to which extent there might be diverging transnational principles, tensions with certain domestic law traditions or, on the contrary, principles integrating domestic law concerns and limitations. Another strand of issues would include how different legal orders related to each other and where we placed IICs, if they could stand in isolation or rather in a specific domestic legal order, the international or a transnational legal order. He stressed that a relevant area for work was the very definition of "international investment contract", if there should be any limitation as to the capacity to sign a contract, that is to allow parties to opt into an IIC. A long debate took place in the 1960s about the notion of investment, namely on whether it could be defined and on what terms. Another issue to discuss would be to what extent the parties should have room to define what an investment is.

13. *The UNIDROIT Chair* commented in this regard that the UPICC as a manifestation of transnational law were not a departure *per se* from domestic law, but rather the outcome of a process which elaborated what, throughout the legal systems or based on a performance assessment, was deemed to be fit for the needs of international economic relationships. In principle, it should not be opposed to domestic law.

14. *One participant* considered that the role of domestic law in IICs was important, but problematic and that it would be paramount to place any future instrument in a fair balance between universal principles and domestic law, hopefully through the UPICC. *Another participant* warned the Working Group that the project should not aspire to a full delocalisation of IICs since in real practice this would not function. The project should make the most of the UPICC but still be anchored into national systems, taking into consideration the constraints they imposed on contracts. The challenge was to acknowledge party autonomy as an integral element, but also the consequences of a State or a State agency being party to a contract, to ensure contract enforceability, while not leaving to States full leeway to change the equilibrium of the contract.

15. *One participant* highlighted the importance of international law and particularly of the fair and equitable treatment (FET) standard and legitimate expectations. While it was not an easy task to contractualise the FET, which evolved over time, any reference to FET implied submitting the contract to international law. FET is an indispensable part of the protection of IICs vis-à-vis the harmful use of sovereign powers and therefore the reference to international law was a necessary part of this exercise. The reference to international law would not exclude parallel references to national law and transnational principles, which could coexist. Any direction that would move away from international law would be at odds with the purposes of this project, cancelling out any advantages engendered. Some level of commitment on the part of the State not to modify the legal and regulatory framework should be part of the exercise and might be easily achieved through stabilisation clauses.

16. *Other participants* noted that to include FET-inspired standards in a contract was a difficult exercise, in the face of what was happening under new IIAs, which were including new sets of investors' obligations (e.g., the AcFTA Protocol on investment). FET and protection principles would belong to customary law and be later crystallised under the treaties, a very different and disparate category compared to contract law. The error of trying to include pre-existing standards with an ideological approach should be avoided, otherwise the final document might find itself facing the same criticism as investment treaties.

17. *One participant* noted that the international investment contract needed some degree of independence from domestic law to protect the private party against changes in law, discrimination, and arbitrary or otherwise unlawful treatment that would be deemed lawful under the State's domestic law. On the other hand, there was also the need to consider that a State was involved in the contract as the holder of public interests. The future transnational instrument should provide for some mechanism that ensured governments could agree to dispute settlement other than domestic courts and agree to applicable law other than domestic law, while at the same time ensuring that those mechanisms were not misused; all definitional issues interacted with this issue. A set of definitions in the future instrument should avoid different perspectives on this subject matter – that of the arbitral tribunals, which would privilege an international (or transnational) perspective, and that of national courts, which would give supremacy to a domestic law approach.

18. *One participant* stated that the issue could be viewed by the angle of whether the future instrument could opt out of the minimum standard of treatment in BIT, which was discussed in the first session of the Working Group. That might be difficult as what BIT looked for was indeed to establish an internationally accepted standard, e.g., on compensation, that departed from the domestic standard (e.g., providing internationally for the fair market value).

19. *One participant* drew attention to the fact that the usual situation in practice was rather that States required, e.g. as regards corruption, foreign investors to sign a commitment that they abide by mandatory domestic laws on the subject matter. So, there was no contracting out of domestic law but rather contracting into the laws of the host State. This would be reflected in investment treaty arbitration proceedings, where it was not even sure that corruption counterclaims were allowed since there could be no basis in the relevant treaty to hear them, while that jurisdiction might arise contractually because the investor agreed to comply with the domestic law of the host State. *Another participant* pointed out in this regard that universal transnational principles did include references to rules on legality: e.g., art. 5 of the UPICC deals with the application of mandatory rules. So, there was no incompatibility of transnational principles with domestic law on this subject matter.

20. *One participant* recalled the issue of FET and stated that the future instrument, in its model clauses, should contemplate that the State might offer the investor fair and equitable treatment. It would be reasonable to elaborate on what is the purpose of FET and look into how a possible future instrument might functionally address that very purpose, whether clauses might be negotiated in this regard, and how they could make sure there were no drastic changes in the regulatory framework.

21. *One participant* wished to consider that the issue of a possible tension between international (or transnational) and domestic law should be viewed through a possible complementarity between domestic and international law. More bodies of law might be called upon to regulate an investment relationship, including the home State law of the foreign investor, when relevant to the contract. The future instrument should not establish any exclusivity in this domain but rather propose draft clauses and commentaries to signal to the parties to the contract how they can reconcile both bodies of laws to be useful for the future interpretation, enforcement, and application of the contract. *Other participants* agreed that interactions between laws should be privileged, and not mutual exclusion.

22. *Another participant* recalled that the Working Group should focus on the contractual domain and on the principles that it would deem necessary to include in a contract, rather than focus on IIA standards or domestic law. He noted that a contract required that the will of the parties be expressed in clear words. All applicable rules, international law, investment treaty law and so forth, would remain in the background and come into the picture according to specific criteria. In the contractual domain, the future instrument should be precise about at which stage domestic law and international law came into play and what their roles were. When looking at the impact of domestic law on the contract, many factors should be considered, not only the concerned home State, but also where the transaction occurred and the seat of arbitration.

23. As to definitional issues, *one participant* considered that there should be no need to define an IIC. The future instrument should be flexible and globally accepted, accommodating the needs of States and investors for the forthcoming decades and suitable as a common standard for all legal cultures for generations to come. To avoid it becoming outdated too soon, the future instrument could limit itself to refer to the main characteristics of IICs and to the main targets they wished to address, as illustrated by the most relevant ICSID cases. *Another participant* noted that the future instrument should avoid providing a definition of IIC that was too narrow and consider that ICSID arbitral tribunals have been creative in establishing what an investment is (including commercial transactions when related to a larger investment project). Whatever definition the final instrument would include, it should be subject to the formula “except as parties otherwise agree”, as provided in the Subgroup Report.

24. *One participant* considered it wise not to define the notion of investment, which would require the examination of jurisprudence on art. 25 of the ICSID Convention. However, if the final instrument would attempt wider guidance, a reference might be made not only to ICSID art. 25, but also to the broader notion provided in the UNCITRAL Model Law on International Commercial Arbitration.

25. *Another participant* commented that when the subject matter of the contract was an investment, presumably the contract was to be enforced under a BIT, which defined the covered investments. In such a case, the parties to the contract usually did not define the investment to make sure that the subject matter fit within the scope of investment under the protection instrument. A wise option would be to not define an IIC, as an arbitrator might find herself or himself in the uncomfortable position of finding elements evidencing that the parties clearly wished to internationalise their contract, but when looking into the definition of IICs taken in the final instrument, she or he might be forced to conclude that the specific contract did not fall within that definition. *Many participants* agreed that the Working Group should focus on the principles that would apply to the contract and the model clauses that should be incorporated in it, rather than on a definition.

26. As to the characterisation of IICs as commercial contracts as opposed to administrative contracts, *one participant* put forward the issue of whether the UPICC would be applicable to IICs, where a State is party to the contract. He reminded the Working Group that the last revision of the UPICC had already had investment contracts within its mandate, but that Working Group at that time had decided not to tackle the issue (exactly for this reason) and this was why the current project was now re-addressing the issue, to look into how to deal with that conceptual difference, at least in civil law countries.

27. *One participant* replied that the future instrument should clearly distinguish an IIC from an administrative contract with exorbitant clauses making clear that it is not an administrative contract under any circumstances but rather a commercial contract, therefore eluding the traditional “commercial contract v. administrative contract” debate. He noted that much legislation, e.g. in France as well as in many Arab countries (see the Saudi Arbitration Act), included constraints on the conclusion of administrative contracts or the referral of disputes on administrative contracts to arbitration (such as requiring the consent of the relevant authority). At the same time, many countries had concluded “bilateral investment treaties” (BITs) with provisions enabling foreign investors to resort to arbitration. According to the Constitutions of many States, after ratification by the parliament international treaties became part of the domestic legal order at a higher level than ordinary legislation. In these cases, the transnational perspective should prevail since, when a foreign investor initiated an arbitration proceeding at the ICSID, the State could not object to the jurisdiction of the ICSID tribunal, arguing that the investor had not obtained permission from the government if a BIT was in place.

28. *One participant* mentioned that the main question would be if the future instrument or transnational principle or a mix of international and domestic law might apply to IICs and if, at some point, this might run against some mandatory norms of the law of the contracting host State. Under the French legal system, for instance, choosing foreign law or a transnational principle and providing for international arbitration in the contract would not be problematic provided that the investor had a foreign seat. The answer would be different if the IIC was characterised as an administrative contract since the contract, except for the case of public-private partnerships (PPP), would be subject to the legal regime applicable before French administrative courts (and there would be no possibility to agree on the characterisation of the contract). *One participant* replied that the final instrument should clearly state that the contract was not an administrative contract under any circumstances, but rather a commercial contract. He added that, when a dispute arose in arbitration, the arbitrator or the judge (when executing the award) were obliged to apply party autonomy and it was commonly accepted that contractual provisions superseded legislation as long as they did not contradict mandatory rules, as a matter of public policy.

29. *One officer from the Secretariat* conveyed a written observation from *one member of the Governing Council* that any attempt to define the type of instrument should be left for a later stage, when it would be clear what type of contractual issues were currently not regulated by the UPICC, so that the Governing Council could have a clear idea of whether the UPICC were a suitable basis for

the project, whether there were gaps, and whether there was a need to complement the existing guidance for IICs specifically – then and only then would there be elements to describe what type of instrument this guidance should present. A similar approach should be taken as regards the definition of IICs. The notion of IICs in the initial Issues Paper was presented to define the scope of the instrument but was not intended to be included as a definition in the contract. It would be a means of describing on which types of contracts the instrument would focus, and it could be done in various ways, by describing their “international character”, as the UPICC do in their Preamble, or by providing their characteristics or some examples.

## **(2) Presentation and discussion of the Report of Subgroup 1: Parties and pre-contractual issues**

30. *The UNIDROIT Chair* invited Subgroup 1 members to present their report and outline their methodology as a model for other Subgroups, in relation to the use of the UPICC as a starting point for addressing specific issues relevant to IICs. The UNIDROIT Chair reiterated that several principles were applicable to IICs, requiring no amendment, while others might necessitate redrafting or clarification, and some relevant topics for IICs might not be addressed within the UPICC framework. Indeed, while the final instrument should include contractual standards for investors’ protection, numerous investment standards were emerging in new-generation BITs and thus could not be found in the UPICC. Such standards reflected general interests underlying IICs and needed to be tailored to suit the specificities of the latter.

31. *One Co-Chair of Subgroup 1* noted that the areas assigned to the Subgroup encompassed a diverse array of topics within IICs, including: (i) pre-contractual issues, formation and validity; (ii) parties, non-signatory parties and affected stakeholders; (iii) transfer of rights and obligations; (iv) remedies; and (v) any other UPICC provision that may require adaptation. So far, the Subgroup had focused on the first two topics. The methodology adopted aimed to mirror the discussions held within the Working Group, outlining the main issues relevant to investment contracts, including considering how the UPICC could be applied within this context. The approach shifted following the first intersessional meeting, prompted by the suggestion to narrow down to specific, concrete questions.

32. *The Co-Chair* went on to present Subgroup 1’s report, which was divided into two parts: the first focusing on parties, non-signatory parties, and affected stakeholders, and the second addressing pre-contractual issues, formation and validity. The report sought to identify, with reference to each of these topics, potential areas of concern between the UPICC and the landscape of IICs. It then posed specific questions regarding how the UPICC could be applied, adjusted, or supplemented to address highlighted issues. The report highlighted the importance of considering the interaction between the UPICC and domestic law, identifying specific issues in this regard, without necessarily anticipating definitive provisions to resolve such matters. Furthermore, the report emphasised the need to discuss how certain UPICC provisions aligned with contract practices, particularly concerning pre-contractual liability, good faith, and disclosure obligations.

33. *The other Co-Chair* addressed the first part of the report relating to parties, non-signatory parties, and affected stakeholders. The topics discussed regarding parties leaned towards exploring how the identity of contracting parties affected their rights and obligations, and more generally contractual dynamics. The discussion delved into the implications of States’ or State entities’ involvement in contracts, particularly concerning their ability to contract and the implications for traditional clauses and mandatory provisions. Furthermore, *the co-Chair* emphasised that the State’s role as an investor had evolved significantly over the last two decades. Additionally, the collaboration State/private investors in joint ventures raised questions warranting further exploration. The *Co-Chair* continued, stating that complexity arose in understanding the diverse forms investors might take. Lastly, she considered whether there might be ways of ensuring that affected stakeholders’



rights be protected at the contractual level and whether the UPICC adequately addressed third-party rights.

34. In this last regard, *the Deputy Secretary-General* suggested turning to existing UNIDROIT instruments, such as the Legal Guide on Contract Farming (2015), for guidance on the topics of parties, non-signatory parties, and affected stakeholders. *One participant* referenced the topic of nationality in Subgroup 1's report and, drawing from ICSID case law, he emphasised the varying approaches of arbitral tribunals in determining jurisdiction based on investor nationality, holding that such diversity warranted further discussion within the Working Group.

35. *Another participant* provided five general observations in relation to Subgroup 1's report, particularly with reference to the topic of parties. The first focused on the involvement of States or State entities, distinguishing between sovereign and commercial capacities, suggesting that viewing these contracts as commercial rather than purely public could alleviate some identified problems, which the Working Group could do since it "operated" at the contractual rather than treaty or public law level. The second observation pertained to privity, both in contractual and arbitration contexts, with an emphasis on the need for further exploration on the interconnectedness between contracts and the concept of *alter ego* companies. He proposed a comparative analysis to potentially establish a link between companies ensuring access to contractual rights and dispute resolution provisions for investors and associated entities. Third, the participant suggested not delving into the character of investors as it would call for excessive details. Fourth, he suggested that extractive industries might be used as a paradigm for identifying which UPICC required adaptation, and which additional UPICC might need to be included. Finally, he supported the institutionalisation of due diligence in contractual relationships while highlighting the need for balance to protect commercial interests. *A subsequent participant* commended the inclusion of due diligence, combining it with the duty of disclosure. He suggested drawing guidance from the ICC model clauses, which historically included due diligence and disclosure processes.

36. With reference to the first observation above, *another participant* suggested steering away from the distinction between commercial and public contracts. He noted that commercial relations did not fall within the definition of investment. He went on to observe that in investment relations the State was, by definition, acting differently from a purely commercial setting, otherwise the private investor would not need additional protections beyond those offered by any commercial contract. *A subsequent participant* added that the distinction between commercial contracts and investment contracts was merely technical and that one should examine decisions in which ICSID tribunals rejected jurisdiction due to the nature of the contract being commercial and should work on overcoming those same issues. For instance, one approach might be to argue that investment contracts aimed at fostering the host State's development should not be considered mere commercial contracts.

37. *One officer from the Secretariat* added that, when speaking of commercial contracts, as contrasted with public contracts, the investment treaty distinction between commercial claims and treaty claims should be left aside. The commercial nature of IICs would have more to do with the fact that the parties to an IIC, the State or State entity and the private foreign investor, had decided to conclude a contract on an equal footing, granting to each other guarantees and commitments that moved beyond traditional concessions contracts which recognised wide powers of revocation or amendment of the contract for the public party.

38. *A participant* suggested discussing pre-contractual issues. She proposed examining the principle of good faith and its interaction with due diligence, highlighting the lack of a fully general understanding of good faith across comparative law. She emphasised the importance of exploring how the duty of good faith aligned with due diligence and how article 1.4 of the UPICC derogated from the rules of the otherwise applicable law. *Another participant* emphasised the significance of

foreign investors' legitimate expectations and advocated for such inclusion in the instrument under development.

39. *A participant* made three remarks, one on methodology and two on substance. Firstly, she advocated for a pragmatic approach, urging the group to move beyond abstract concepts like good faith and their understanding in different legal systems and instead focus on implications for investors and States. Secondly, she advocated for the inclusion of the concept of cooperation, suggesting that it could yield more tangible outcomes than relying solely on the concept of good faith. Lastly, she highlighted the significance of due diligence and proposed providing concrete examples and clarifications to assist the different stakeholders involved in investment processes.

40. *Another participant* noted that there had been a significant change since the UPICC: the development of formal relational contracts. He noted a shift towards embedding values such as good faith, loyalty, and integrity into contractual frameworks, echoing principles already present in UPICC. He underscored the need for pre-contractual discussions to outline objectives and values, suggesting a departure from traditional fully specified contracts towards a more value-driven approach on contracting, that could be incorporated in the negotiation phase. The *subsequent participant* highlighted the relevance of other UPICC principles, such as article 5.1.2 on implied obligations, and article 5.1.3 on cooperation between parties, to the discussion. She noted that these principles might have an impact on the specific aims and obligations of the parties involved. Drawing from UNIDROIT's work on contract farming, she suggested exploring how the concept of cooperation could inform discussions on good faith in investment contracts, despite the distinct nature of the latter.

41. *One participant* discussed the applicability of relational contracts, emphasising the need for certainty in IICs, particularly in long-term investments in the oil and gas industry. She highlighted the importance in this sector of long and detailed contracts in order to enhance certainty, limit unforeseen consequences and manage contractual risks by way of broad coverage of all possible aspects related to contractual performance, in accordance with the common law contractual style. Incorporating mechanisms like hardship and stabilisation clauses was done precisely with the aim to limit the modification of written undertakings to unexpected events and changes in circumstances.

42. *A subsequent participant* raised a practical concern regarding the different interpretations of good faith, highlighting that article 1.7 of UPICC tried to capture the "comparative contract law" notion of good faith, while due to States' involvement in IICs, the Working Group might need to consider how good faith was understood in public international law. *Another participant* agreed with the need to discuss the different constructions of good faith and the duty of disclosure in private-to-private relations versus the public sphere. Good faith in the UPICC was construed with private-to-private relationships in mind. In a State-to-private relationship, the presence of a public entity would raise different concerns, e.g. as regards the duty of information in the oil and gas sector.

43. *Another participant* commented on how due diligence and the duty to disclose interacted and noted that this was really the realm of States since it was for the State entity to know whether it had or not the relevant information. He referred to a situation where a public enterprise re-organized and if there was a duty to disclose. Even if there was a due diligence in progress, the investor might not understand where the power was allocated. The public entity concerned would have a duty to disclose information as a matter of good faith and even warranties and representations might not suffice.

44. *One participant* discussed the issue of to what extent the investor carrying out the due diligence had an impact on the State's duty of disclosure towards the investor. Drawing from his experience, he suggested that information having an impact on an IIC would typically surface during the pre-contractual phase and be used for risk analysis in contract negotiation. He proposed a concrete example to illustrate the point, such as when an airport was to be built in a certain area and after the bidding process an issue with an indigenous community that objected to the project

came out, questioning whether certain information obtained during due diligence should be disclosed as part of a duty to disclose, considering its relevance and timing in the negotiation process.

45. *Another participant* raised a question regarding the distinction between transparency duties on States and transparency in contracts. She sought clarification on what transparency entailed in contractual agreements, considering factors such as understanding the country's legislation and functioning. *One participant* responded suggesting that contracts necessitated a higher level of disclosure. While transparency typically pertained to regulatory processes, commercial law lacked a specific requirement for State transparency in legislative procedures. *Another participant* continued by distinguishing between transparency regarding public access to laws and regulations and factual transparency (i.e., regarding specific project details, such as potential complications with land acquisition for infrastructure projects). However, he cautioned against inadvertently incentivising mistakes or misrepresentations by demanding excessive transparency. *One participant* highlighted the importance of regulatory transparency, citing examples from US and Canadian laws requiring the publication of regulations.

46. *One participant* reflected on the potential conflicts between protection established by international law and contract law. He expressed concern about expanding IICs provisions beyond the protections established by international law treaties. He acknowledged the possibility of introducing bilateral duties like good faith but questioned the practicability of imposing a duty on States to maintain a legal system easily understandable by investors. *Another participant* addressed the issue of whether the instrument being developed should recommend the use of warranties and representations. In public contracts or tenders, representations that the State had provided all relevant information to the bidders and that the bidder and the private contracting party had access to all relevant information were common practice. Then the question would be if it was proper to deal with due diligence through the contract.

47. *The next participant* emphasised the need for concrete elaboration on the bidding process in public procurement. He underscored the importance of aligning States' duties during bidding with principles recognised by international instruments like the OECD and the World Bank and to provide concrete guidance on legitimate expectations. *Another participant* agreed and proposed including a brief clause emphasising the State obligation to adhere to international standards during the bidding, as a main guarantee to achieve legitimate expectations of foreigners (transparency, equality before the law, equal opportunity, objectivity, integrity, and so forth). *One participant* provided a comment, redirecting the focus away from national procedural aspects and towards the impact of the public procurement process on the contractual relationship between the State and foreign investors.

48. *Another participant* discussed the relation between article 1.8 of the UPICC on inconsistent behaviour – which was linked to the good faith obligation and the creation of expectations – and contract practice. She highlighted real-world scenarios where both investors and States might alter their strategies or policies during negotiations and advocated for adjustment of the UPICC in this regard, tailored to the demands of IICs. *One further participant* illustrated this point with a practical example from a decade ago when Brazil launched a Public-Private Partnership project for building a high-speed train line, which received heavy criticism due to the country's economic crisis and led the government to cancel the project just days before finalising the contract. Under the UPICC, the parties might not escape the principle of good faith; a certain degree of adaptation might then be necessary. *One participant* questioned the same applicability of article 1.8 of the UPICC to IICs in the pre-contractual phase in the context of IICs in the face of States' sovereign powers and duties as well as investors' obligations.

49. *One participant* emphasised the need for coordination between parties regarding changes in strategies and policies, questioning how this coordination aligned with article 1.8 of the UPICC. She asked whether the instrument being developed by the Working Group should state that the obligation not to act inconsistently should not hinder States' ability to adopt their own policies or whether,

conversely, it should preclude States from deviating from certain policies. *Another participant* noted that while article 1.8 of the UPICC aimed to prevent detriment to the parties, there might be alternative solutions which better suited the investment context, beyond simply avoiding inconsistent behaviour, which might reach the same goal, such as providing reasonable notice or compensation for losses incurred. She acknowledged that these alternatives were recognised in the commentary of the UPICC and suggested evaluating whether they were sufficient or required further adaptation.

50. *One participant* noted that alternative and preventative dispute resolution mechanisms and preventing disputes might be viewed as an evolution of the State duty to monitor investments. Continuous monitoring might reveal unforeseen environmental issues or economic changes that affected the investment's success. Thus, the participant suggested the instrument being developed include guidelines on continuous monitoring, but acknowledged that States might not be open to receiving advice on the matter. *One participant* asked whether there should be a general duty to monitor the investment in certain industries, such as mining or oil and gas, because of the environmental implications of such operations, which should be reflected in the future instrument.

51. With reference to the management of relations in long-term contracts, *the next participant* advocated for the inclusion in the future instrument of a recommendation that the State designate a single entity responsible for the project throughout the contract's duration, which would be helpful in terms of dispute avoidance and negotiations following a change in circumstances. In this regard, *another participant* mentioned that some States had created new institutions to prevent investment disputes, such as a sort of "ombudsman" for investment controversies. He mentioned that Brazil had seemingly adopted this approach and it apparently worked well. The problem would be how to integrate such institutional function into an IIC.

52. *The next participant* warned that there seemed to be two strands of discussion going on, one touching upon contractual issues, the other upon investment treaties and how they were interpreted by arbitral tribunals. Some questions referred to how to qualify or restrict a duty of good faith in a contractual setting or how to formulate warranties and representations, while other questions referred to legitimate expectations and extended due diligence duties placed on foreign investors or covering affected third parties. He recalled, as it had been mentioned earlier in the session, that there were limitations on whether the forthcoming instrument might contractualise what was established in BITs and that the approach was then how to build "ground up" from the UPICC.

53. *The UNIDROIT Chair* invited Subgroup 1 to outline their expectations as to the content of the next report, and asked whether the Working Group could provide any guidance on how to advance the issues discussed so far. She sought consensus on the approach of using the UPICC as the benchmark for the exercise going forward and reminded the Working Group that, albeit not yet at this stage, the ultimate goal of the exercise was to draft model clauses.

54. *The UNIDROIT Deputy Secretary-General* stated that the pre-contractual phase was usually reflected in the contract through warranties. Pre-contractual obligations would become contractual obligations and normally through the "entire agreement clause" any statements made before signature that were not included in the warranties would have no effect. *Another participant* agreed: this highlighted the need for clarity on which aspects of the pre-contractual phase would survive and become relevant during contract negotiations. *Many participants* pointed in this regard to the divide between common law and civil law approaches.

55. *The next participant* discussed the importance of contractual behaviour, duties, and disclosures during the contractual phase, drawing a parallel with franchise agreements. He suggested that the Working Group could draw inspiration from the ICC Model International Franchising Contract, which addressed obligations of disclosure and consequences for lack of disclosure.

56. *Another participant* commented on the second part of the provisional Report on the question of to what extent the pre-contractual phase shaped the content of the contract. He mentioned that this went to the heart of the divide between civil and common law in commercial contract practice. In civil law practice, good faith played an important role and prescribed no inconsistency in parties' conduct and implied obligations as well. In common law practice, there were several attempts to constrain the consequences of this approach by way of representations and warranties, "entire agreement" clauses, no waiver, and so forth. Since the UPICC would be deemed to lean more towards the civil law approach, the question was whether the future instrument would favour one or the other approach, taking into account that, under the UPICC, the principle of good faith could not be overridden, even by party autonomy.

57. *Another participant* commented regarding pre-contractual engagements that warranties and representations did create obligations but that those engagements might not necessarily always create obligations, but rather impinge on the interpretation of the terms of the contract. He added that the common and the civil law approaches really differed in this area and thus a further look at existing literature on this point from a comparative perspective as to the treatment of pre-contractual engagements, either binding or with an interpretative function, might prove useful to guide future work.

58. *One officer of the Secretariat* added in this regard that there is no common principle on the pre-contractual phase shared by the families of common law and civil law as regards international contracts. Some principles of general contract law might be relevant under civil law, but the "sanctity of contract" prevailed in a common law setting and thus pre-contractual arrangements might be useful to govern negotiations and specific contractual arrangements to rule the effects of the pre-contractual documents on contractual obligation. However, when looking at IICs where a State was party to the contract, the contract was relevant to the public interest and had a significant impact on the Host State (also because of its duration and effects on third parties), a general principle might be found that parties had a stronger duty to inform and cooperate, and that this information and conduct might have a wider influence on contractual obligations and their interpretation.

59. *One participant agreed* that the logic of pre-contractual obligations in commercial contracts in general was integrated into the logic of the public policy on due diligence, as envisaged in investment treaty law (i.e., not typical commercial due diligence, but rather the logic of taking into account the needs of affected third parties). He added that more clarity would come from continuing work on investors' obligations as they would stem from the elaboration on policy goals. It would be not just a matter of protection of the investment, but rather of social responsibility of private companies, which changed the angle by which pre-contractual issues were normally considered.

60. *Another participant* referred to his experience as a practicing judge and considered that oil and gas contracts and procurement contracts, whether a tender with a rigorous bidding process was provided or not, all sorts of pre-contractual documents (MoUs, letters of intent), would be relevant for making a decision, as elements that determine the scope of the existing obligations, or when the parties excluded their relevance by virtue of an "entire agreement clause", as guidance to understand parties' intent. Some guidance on pre-contractual conduct and on the interpretation of contract should then be included in the future document, tailored depending on the type industry as a one-size-fits-all approach would not work.

61. *The UNIDROIT Chair* proposed using the UPICC as a benchmark and suggested collecting a wide sample of contract clauses to approximate real-world practice and refine the guidelines accordingly, reminding the Working Group that due to the specificities of IICs in different industry sectors, differentiated solutions might be required. *The Co-Chair* welcomed the suggestion and added that mapping both contract practices and arbitration practices in investment disputes would be useful. This would help identify emerging principles and inform the development of guidelines.

### (3) Presentation and discussion of the Report of Subgroup 3: policy goals

62. *One Co-Chair of Sub-group 3* referred to paragraphs 3, 4 and 5 of the Report and pointed out that a crucial point consisted of how to identify the standards that would be suggested to apply in the final instrument. The expression “standards” would be opportune, as it would cover not only international or national “soft law”, but also States’ obligations under international treaties and CSR. It would include biodiversity conservation, human rights and labour rights preservation, and the fight against climate change; it should be the highest attainable standard, and not a minimum standard; and a future-oriented one, which would provide lasting advice and not be soon out-of-date. Another issue would be whether and how much the final instrument could deviate from or build on national public policy, which usually needed to be respected by the parties to the contract as a limit to party autonomy.

63. *The other Co-Chair of the Subgroup* illustrated the roadmap of future work included in annex 4 to the Report, in particular the mapping exercise of standards addressing policy goals in domestic and international (soft and hard) law, instruments that were still being negotiated, and secondary sources (such as “due diligence” laws) so to identify areas and trends to be covered. A similar exercise should cover model treaties and IIAs/BITs (the EU model BIT 2023, the AfCFTA Protocol on Investment) with a view to identify new demands and understand how they should be reflected in contract practice. She also described how the work should first touch upon the pre-contractual stage (initial due diligence, environmental impact assessments, consultation with local communities, and so forth) and then the preamble of the future instrument, its main text and model clauses. She finally illustrated the part of the annex which considered the possible relevance of the UPICC concerning mandatory rules and all those rules that could operationalise treaty standards (transfers of funds, performance requirements, full protection and security, expropriation). Any outcome should strike a balance, particularly in more controversial areas (e.g., labour standards), compared to areas where consensus existed (e.g., climate change) and build on the respect of international commitments, rather than imposing policies on countries.<sup>1</sup> *One participant* noted that how the final instrument would cover public policy and mandatory rules would be a difficult task. He recalled cases before the Cairo Court of Appeal where administrative decrees issued along the life of a long-term investment contract were considered to prevail over international public order and to be non-arbitrable, also based on the 1958 New York Convention. Regarding the contradiction between domestic public policy and international public policy, he posed the question of which prevailed. He pointed to a case where an arbitral award was rejected recognition and execution because of public policy before the Cairo Court of Appeal. Similar decisions refusing recognition and enforcement of international awards had been issued by courts in the United Kingdom on the same grounds. *Another participant* recalled the case when the contract incorporated higher standards compared to the domestic standards and whether a company from a home State imposing higher standards (e.g. prohibition on dumping waste) would be permitted to carry out conduct in the host State that was prohibited in its home State. *Other participants* pointed out that the type of instrument that was discussed should not go too deeply into public policy, but that there would be value in signalling policy commitments in the final instrument, because of their interpretative value.<sup>2</sup>

64. *One participant* warned that by introducing higher standards, a double standard might be created whereby foreign investors would be subjected to higher standards than local investors. He concluded it would be reasonable to promote a level playing field, a minimum common standard that

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<sup>1</sup> Operation policy standards coming from operational policies adopted by international financial institutions, global or regional, could provide useful indications not just for purposes of financial contracts, but also since they would dictate the conditions for the realisation of long-duration infrastructural contracts. The findings of the memo on policy goals, as elaborated by the Roma Tre-UNIDROIT Task Force on IICs, should be integrated into the work.

<sup>2</sup> E.g. in the “Costa Rica” case, where the tribunal interpreted FET in light of the State expressing policy interest to protect the environment.

would recognise the current increasing standards and enhance the protection of the environment and social values. *Another participant* added that it might be difficult to render obligatory standards that deviated from the applicable law or exclude binding legal rules by the same contract, both on the side of the company and the State. Standards might be misused and if the standards had to be imposed on States or investors, then that should be clarified. CSR standards might be imposed on investors, but only to a certain extent, since the State was expected to have laws on CSR. Another issue would be whether these standards would be enforceable and which principles the arbitral tribunals would apply, as the principle of proportionality - adopted by European Court of Human Rights - was taken up by arbitral tribunals but applied inconsistently. How the standards would be interpreted by tribunals should be taken into account with a view to identify a global public policy. The Indian Model BIT contained many provisions on CSR, labour standards, and human rights, and it would be worth exploring how they were interpreted and applied in a comparative perspective under commercial arbitration, which was more specific compared to public international law. *A further participant* noted that a crucial issue was if the Working Group would like to develop binding obligations or focus on the preamble, developing principles and guidelines to which the investors would adhere. He mentioned that the OECD approach was discussing a carve-out of protected investments if they did not align with the standards and the Working Group should take the OECD's work into consideration.

65. *One participant* commented that to develop practical guidance for investors would be useful since financial contracts usually required companies to establish ESG and specific clauses in the contract itself as a condition for loans, but companies did not have knowledge of the practical content of ESG principles and did not find consistent principles in the existing context. Therefore, the future instrument might provide clarification on this point, developing a clearly stated principle, standard clauses or obligations to help investors understand the scope of their ESG commitments. *An officer from the Secretariat* clarified in this regard that an aim of the project was indeed to provide more precise information and integrate ESG or other commitments from recent BITs, sometimes targeting investors or targeting States, either through CSR commitments or specific obligations. It would not touch upon the right to regulate, but rather on investors' obligations and, depending on the applicable law, domestic and/or international, and by the interpretation of the arbitral tribunals, might provide a counterclaim to States.

66. *One participant* noted that the project should not second any carve-outs that would have been decided within the OECD discussion. Since the project was considering reintegrating investment protection into the investment, the standard of protection should be applied to investments even though the OECD considered them as being non-sustainable and non-protected investments. *Another participant* considered that to look into the OECD's work was important to keep track of what was occurring as it was also important to gather information from governments. She recalled the importance of States' declarations in the interpretation of contractual commitments. She mentioned that many interpretative documents from State reaffirmed the parties' right to regulate to achieve public policy objectives, measures to mitigate and combat climate change and future consequences. The same documents invite arbitrators, when interpreting the provision of investment chapters, to give due consideration to parties' commitments under multilateral environmental agreements including the Paris Agreement. These statements reflected contracting parties' commitments under an international treaty that had a bearing on contracts.

67. *The UNIDROIT Chair* manifested appreciation for the positions expressed and clarified that there was enough time before the end of the project to clearly understand what the OECD would stand for at the end of the process. She also recalled that the OECD had been invited to participate in the Working Group as well as in the exploratory work on the project on Corporate Sustainability Due Diligence, and they could provide their contribution. She then asked the participants to address the techniques to implement these goals with regard to the distinction between pre-contractual documents, the preamble of the contract, and the contract itself, and what this tripartite approach implied as to the difference between what was compulsory and what was used to interpret the rules

of the contract. She also added that the Report of Subgroup 1 examined how the interests of third parties and stakeholders which were not parties to the contract were considered in the pre-contractual phase, taking into account the wider interests of the community affected. This included the manner in which the OECD Guidelines might be applied and if there were obligations on the investors to start a dialogue with the stakeholders.

68. *One participant* noted that a preamble was an integral part of the contract and that it determined many issues, such as the relevance of pre-contractual documents to the contract and whether they were part of the contract, the scope of application of the contract, including in certain cases parties' capacity. *Another participant* added that the parties might undertake obligations under the contract that included unilateral obligations *vis-à-vis* third parties and external stakeholders' interests and that this should be addressed by the final instrument, taking into account the necessity to prevent people and competing business interests from abusing these obligations and disrupting the effective functioning of a contract. It was also added by *another participant* that some multinational companies had established specific departments and adopted guides for relations with external stakeholders to ensure that when a project was launched there was a methodology in place to liaise and consult with them (who qualified as a stakeholder, how to engage with stakeholders).

69. *The Co-Chairs of Subgroup 3* recalled that consultation with local communities, including vulnerable groups and indigenous communities, was a constitutional duty in some countries (e.g., Canada). To address these issues in the pre-contractual phase would be the right approach to prevent conflicts with the local population at a later phase. The due diligence obligation and the involvement of affected third parties in the early phase of contact between the State and the investor through consultations would help to understand the impact of the investment on the local community and lead to opportune adaptations to minimise impact. This would amount to the co-creation of the investment project, rather than mere consultation.

70. *One participant* raised the issue that this type of commitment should not necessarily sit within the contract itself, as it might derive from other instruments. The Working Group should not run the risk of including in the contract too many aspects which would complicate the management of the contract. It was also mentioned that the mapping of performance requirements was a relevant exercise, but there could be an issue of prohibition of those requirements in treaty law and possible friction between treaty rules and contract rules in this area. *Another participant* referred to the concept of Social License to Operate (SLO) and recalled a publication of the Inter-American Development Bank (IDB) on SLO in the Latin American Extractive Sector that compared different countries and how the issue was handled in that region.

71. *The UNIDROIT Deputy Secretary-General* summarised the discussion, pointing to two relevant issues: how to involve affected third parties and external stakeholders in due diligence during the formation of the agreement itself, and what the impact on the duties, obligations, or rights of the parties at that stage would be. A crucial issue would be whether third parties might enjoy benefits from the choice made in the pre-contractual phase and in the contract. *The UNIDROIT Chair* noted that the theory of the international minimum standard could offer a way forward in this area, i.e. while international law provided for a basic standard, the parties could always build on it by the contract and go beyond. She made the example of the UN Guiding Principles on Business and Human Rights that established some level of commitments but did not go into detail, while a contract might establish a duty of cooperation and expand on the details (procedures, substantive steps).

72. *Some participants* noted that domestic laws more and more frequently included guidance on consultation with the local community, provided for companies' obligations to submit a report and a plan on how to deal with the issues, including an environmental and social assessment that governments had the discretion to consider when taking the decision to start the project. *Another participant* added that the Indian law on land acquisition included detailed provisions on this topic. The obligation to liaise with the local community and put in place planning to minimise impact would



sometimes be on the State, other times on the investor, based on the stage of the contract (before land acquisition, on the State, and after, on the investor). This implied ensuring careful and flexible drafting to accommodate both situations. *A further participant* considered, as to the consultation of local populations, that there was the issue of distribution of risks, as the obligation to undertake a consultation was often placed on the investors' shoulders. On one hand, the consultation was not an easy venture; on the other hand, the State had the obligation to ensure full safety and security to the investors. In many litigation cases, the issue discussed was the delay in carrying out the project and it was not clear if this delay was attributable to the investor or the State. The contract might more properly allocate the duty between the parties.

73. *The ICC Chair* agreed on this point and commented that consultations might be difficult to conduct as the selection of the stakeholders that qualified for participation was not in and of itself an easy task and might lead to a large number of subjects claiming their legitimacy to participate.<sup>3</sup> The final instrument may provide guidance on how to clearly allocate roles and responsibilities between the State and the private investor, also considering the need not to leave all responsibilities on the side of the investor. *One participant* added that often investors did not know with whom to interact, when a local community or indigenous people were to be consulted. In most cases there was no formal obligation to take into account the local community opinions and the State could still approve the project, but in case of protests, the company could not operate and a delay in performance occur. A clear standard on protection and security should be in place, that was usually included in the BIT, but could also be considered in the contract. *Another participant* mentioned in this regard the "Channel Tunnel" case, where there was a contractualisation of the protection and security standard and a dispute was raised about the allocation of risk as to who should protect that particular construction site. These situations should not be left indefinite in the realm of "business risk": a clear allocation of responsibility in this regard should be provided in contractual provisions.

74. With regard to delay in performance *one further participant* noted that, in general, there was no discussion to date on principles regarding "performance" in the future instrument. This was a relevant point as, in the relationship between States and foreign investors, it might often happen that there might be controversies concerning a delay in performance depending on the conduct of the other party (e.g., a delay in delivering the infrastructure because of a previous delay by the authority in issuing authorisations or delivering the construction site). As to delay in payments, he mentioned there was a principle in many jurisdictions that in commercial contracts a private company might suspend the obligation until it is paid by the State. However, in some jurisdictions, a contractor cannot suspend performance nor terminate the contract when the contract is of an administrative nature and deals with public utilities and services to the public. He concluded this point should be addressed in the final instrument. *One participant* added that other issues might include when an investing or financing process needed environmental approval by an independent authority and the approval was not issued. There were cases where the public party was sentenced to return the money initially paid for the concession. *Other participants* pointed to the relevance of precontractual documents in this regard, such as memoranda of understanding and letters of intent, that might regulate negotiations.

75. *The UNIDROIT Chair* pointed to other issues that might need consideration, such as when there was an issue of responsibility of entities that were not party to the IIC but of the group directed by the entity that signed the contract, and implemented some aspect of the contract in the host State. Often subcontractors were called upon to build part of a construction project or provide electric installations. The question arose when there was an arbitration and they were not party to the contract and the arbitration clause. Along the same lines, another manner to consider the position of affected third parties and stakeholders which were not party to the contract would be to involve them, and representative bodies, in the arbitration or at least in mediation, as it was considered by

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<sup>3</sup> E.g., Federal States, Regions, Municipalities, local communities and groups.

the UNCITRAL Guidelines on Investment Mediation. This would be for Subgroup 4 to consider in relation to the findings of Subgroup 3.

76. *One participant* stated that the point was how to make subcontractors and third parties responsible, even if they were not signatories, when they were affected by the measures taken in the case. *Another participant* referred to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which cover the motions of affected parties in treaty-based arbitration and their participation in the arbitration process, including as regards the involvement of third-party affected communities in the dispute resolution and mitigation phases, even though it was not sure whether the Commission would finally approve this.

77. *The UNIDROIT Chair* clarified that third parties' involvement in mediation would still fall under the logic of contract, the mediation resulting not in an award, but in possible agreement, which would develop along the lines of a continuing renegotiation and amendment of the existing contract, without having to deal with the formalities qualifying as a disputing party in the context of investment arbitration.

78. *One participant* recalled the process by which, from early NAFTA cases, where the arbitration rules did not provide any opportunity for third parties' involvement, based on pleadings from the United States and other NAFTA parties, the Tribunal interpreted the arbitration rules so as to allow "*amici curiae*" briefs. Ultimately, the ICSID Arbitration Rules and the UNCITRAL Rules of Transparency caught up with this development. He argued that in cases such "Glamis Gold", it was very important for the legitimacy of the process to have the affected indigenous tribes not excluded and any contract-based arbitration should consider this option to ensure the legitimacy of the procedure. *Another participant* considered that one should be very wary of allowing any intervention in arbitration proceedings, since there could already be judicial proceedings in the home or the host State to enforce the same obligations.

79. *One participant* noted further that, in the absence of privity of contract between the subcontractor and the host State, the future instrument could include an obligation upon the main contractor to make sure that the subcontractor be obliged towards the main contractor parallel to the main contractor's obligations towards the host State, so that the obligation be transferred from the main contractor to the State. The arbitration clause would not extend to non-signatories as a general principle, but might require the main contractor to oblige the subcontractor in a consolidation of procedures, if necessary, in multiparty arbitration. This might allow the State, e.g. in case of delay in performance and delivery, to initiate arbitration against the main contractor for compensation and involve the subcontractor for its part. In this regard, *another participant* warned that arbitration rules might not provide principles on consolidation of proceedings, and thus this should be considered when formulating an arbitration clause in the final instrument by the relevant Subgroup.

80. *One participant* considered that mediation was very different from arbitration. He mentioned that mediation was a process and not a procedure: the first issue for the mediator was who had the right to be in the mediation room, and there was no relevance of the distinction between disputing/non-disputing parties and, as a consequence, of the *amici curiae* being incorporated in the process. It should also be considered that a non-signatory party accepting to be part of a mediation might be viewed as implicitly agreeing on the arbitration clause. *Another participant* distinguished between the right to participate by non-signatories and the conclusion of the settlement agreement and noted that third parties would not sign the settlement agreement that was an investment agreement itself.

81. *An officer of the Secretariat* noticed that, while the discussed topic involved the areas covered by Subgroups 1 and 3 in their provisional Reports, there would merit in shifting some of the topics to Subgroup 4, especially when they touched upon dispute settlements, and invited the relevant

Subgroups to coordinate to define the respective boundaries of their work. Subgroup 1 agreed that this part might be dealt with by Subgroups 3 and 4.

#### **(4) First discussion of the topics covered by Subgroup 4: dispute settlement clauses**

82. *The UNIDROIT Chair* initiated discussion on dispute settlement clauses, clarifying that the topic had not been covered in the first session due to time constraints. She emphasised that the project's mandate did not cover dispute settlement, but rather contractual clauses on dispute settlement. However, while the former fell within the competence of other IOs like UNCITRAL and ICSID, the final instrument should make use of their work. The scope of the exercise was defined as drafting a model clause for dispute resolution and exploring the potential inclusion of provisions addressing criticism against ISDS, such as conflicts of interest, transparency, and meeting the present demand for ADR.

83. *Some participants* agreed with the methodology and recalled the IBA Guidelines on Conflicts of Interest in International Arbitration, the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration as good starting points. Furthermore, *the ICC Chair* recalled that the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration laid out different measures regarding transparency and conflicts of interest. He recalled that the potential instrument should provide different options to States and private entities.

84. *Another participant* questioned the extent to which arbitration clauses in investment contracts would need to consider issues of transparency and arbitrator qualifications. Additionally, he pondered whether arbitrators should possess specific powers differing from those in commercial arbitration, and whether the procedure itself should differ from commercial arbitration.

85. *One participant* emphasised the importance of including ADR mechanisms in the model clause to prevent disputes from reaching arbitral tribunals, thus saving time and efforts in the interest of both States and investors. Other participants agreed on this point and recalled that many new ADR mechanisms had emerged in practice. The discussion also touched upon whether the use of ADR mechanisms in contracts should be obligatory or voluntary, the relevance of the "cooling off" period for questions of jurisdiction,<sup>4</sup> and whether the development of new mechanisms based on best practices, offering a range of options to prospective users, might be considered. *Another participant* expressed his views in relation to the sequencing of dispute resolution mechanisms, advocating for the inclusion of mediation in the instrument being developed by the Working Group as a voluntary and flexible DRM, to preserve the spontaneity of the process.

86. Responding to a participant's suggestion to address double hatting concerns at the contractual level, *the UNIDROIT Chair* suggested that double hatting might have a lesser impact in certain sectors where ADR mechanisms, such as dispute boards, were more common and where adjudicators were experts in the specific sector.

87. *One Co-Chair of Subgroup 4* noted the practice of parallel proceedings between contract and treaty cases and questioned whether the final instrument should include guidance on this point or an exclusion of treaty remedies in the model clause, albeit acknowledging the concerns about the validity of waiving treaty rights. *The other Co-Chair* referred to instances where the IIC included a choice of law clause, a choice of forum clause or a waiver of treaty-based arbitration and nevertheless the investor was able to bring a treaty claim under the umbrella clause<sup>5</sup>, since at the international law level the waiver might not apply. Nevertheless, he suggested exploring solutions to these "pathologies" of investment treaty arbitration (such as "fork-in-the-road" provisions, parallel

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<sup>4</sup> See contrasting approaches in "Biwater v. Tanzania" and "Enron v. Argentina".

<sup>5</sup> E.g., "Crystallex v. Venezuela".

proceedings, umbrella clauses) at the contractual level and suggested that perhaps a waiver of treaty arbitration might be considered differently by an arbitral tribunal if a case only involved contractual breaches and no allegations of unlawful sovereign acts.

88. *The ICC Chair* noted that States were already using waiver clauses in public contracts, but to his knowledge those clauses had not yet been tested in arbitral jurisprudence. *Another participant* added that such clauses were used by Germany in its contracts for exiting coal power-based energy production. *The UNIDROIT Chair* suggested exploring whether the “Achmea” Judgment of the Court of Justice of the European Union affected the drafting of arbitration clauses in contracts.

89. *One participant* cautioned against delving into the relationship between contracts and treaties, noting the complexity and variability in interpretations.<sup>6</sup> He advocated against settling on one interpretation over the other and stressed the importance of focusing solely on contractual matters, expressing scepticism about broader treaty discussions. *Another participant* noted that parallel proceedings were currently being discussed, at the treaty level, in UNCITRAL Working Group III. Different tools might be used in addressing this issue, such as waivers, sequencing, coordination, cooperation, limitations of claims and denial of benefits. However, implementing these solutions at the contractual level may be challenging, due to cross-institution, cross-treaty and cross-treaty-contract coordination concerns. He expressed uncertainty as to how the Working Group would be able to address the issue of parallel proceedings through a contractual clause.

90. *The ICC Chair* raised an issue regarding who was authorised to waive rights in the context of corporate groups: could a subsidiary company waive rights for the whole group? He stressed the importance of precise wording in the drafting of the clause and noted the use of side letters signed by the holding company to ensure comprehensive waivers.

91. *One participant* raised a concern regarding the operation of waivers, since, she pointed out, in the context of an investor concluding a contract with a host State, the home State of the investor was the holder of treaty rights, rather than the latter. *Another participant* highlighted the distinction between procedural and substantive rights under treaties. Procedural rights, she explained, could potentially be waived by investors, while the substantive rights which belonged to the State could not be waived. *One participant* echoed the concerns relating to the investor’s ability, at the contractual level, to effectively waive all other fora, including treaty-based dispute settlement, to the benefit of the exclusive jurisdiction of one selected forum. *A further participant* agreed and suggested that the question of to which extent contractual parties might dispose of rights, whether these might be substantive or not, was a question that should be addressed by Subgroup 0 since it went to the relationship between the contract and the international legal order. *The UNIDROIT Chair* welcomed either Subgroup to take the lead.

92. *Another participant* inquired as to the potential difference between a waiver of treaty-based arbitration in a contractual clause and a waiver expressed after the dispute had arisen, akin to a waiver of other remedies expressed after the dispute had arisen once the party brought its claim in treaty-based arbitration (the lack of which might give rise to issues of jurisdiction or admissibility in the arbitration<sup>7</sup>). *A co-Chair of Subgroup 4* responded by questioning the efficacy of a requirement to express a waiver once a dispute had arisen, since at that point the investor would want to invoke the additional protections afforded by the treaty in a treaty-based arbitration. He stated that unlike in the treaty scenario, in the contract there would be no incentive to waive the treaty rights after the dispute had arisen. *The participant* agreed that as things stood today that would most certainly be the case, but that the Working Group should strive to develop model clauses that efficiently protected investors, rendering recourse to treaty arbitration less necessary or attractive. *One participant* noted that a contractual fork-in-the-road or election provision would be hardly conceivable as States were

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<sup>6</sup> See “SGS v. Pakistan” and “SGS v. Philippines”.

<sup>7</sup> See “Renco v. Peru”.

more and more often negotiating treaties that provided for increasing investors' obligations and there would be no reason for them to allow investors to opt out of the arbitration system.

93. *The UNIDROIT Chair* concluded the discussion, inviting Subgroup 4 to consider ADR mechanisms and address concerns about conflicts of interest. She recalled that the UPICC included a provision on dispute settlement which could be considered by the Subgroup and reiterated that it was the prerogative of Subgroups 0 and 4 to coordinate their work as they saw fit.

#### **(5) Presentation and discussion of the Report of Subgroup 2: change of circumstances**

94. *The UNIDROIT Chair* gave the floor to the Co-Chairs of Subgroup 2 for the presentation of the Discussion Report on change of circumstances.

95. *One Co-Chair of Subgroup 2* illustrated the provisional Report and the methodology the participants had applied. The Subgroup looked into the different types of change of circumstances, their consequences and if the change was due to one party, i.e. the State's exercise of public power, and if the State act was lawful or unlawful. It divided the work into three parts, investigating stabilisation clauses (including adaptation or renegotiation), hardship and force majeure clauses. The Subgroup had found that the common rationale to stabilisation and adaptation/renegotiation clauses was to mitigate the risk of arbitrary unilateral actions by governments. It examined different instruments including the ALIC Guide, the OECD Guiding Principles of Corporate Governance, the UN Guiding Principles, and the OECD Guidelines on Multinational Enterprises, and it realised that there were some divergent views on this topic. Some of the participants held that the stabilisation model might not be adequate, particularly for developing countries that might suffer constraints on their social, environmental, or economic policies. Four areas of divergence were: (i) if the final instrument should propose the presence of a stabilisation clause in every contract or a "case by case" approach; (ii) if any elaboration in this regard should build on the current practice in developing countries, limited to fiscal issues, or rather on international instruments; (iii) if the "economic equilibrium" model, which did not constrain legislation but provided remedies to the benefit of the investor, should be upheld in the final instrument; and (iv) if the stabilisation process should be independent or not from renegotiation or adaptation clauses.

96. *One participant* commented in this regard that an essentially commercial law approach recognised that whatever the parties agreed concerning stabilisation, as long as it was in a contract, was a binding and enforceable commitment, thus encompassing a wide permissibility of stabilisation. On the other hand, a public law approach based on national constitutional frameworks would consider that limitations existed to what States could promise when agreeing on stabilisation clauses. As a consequence, he agreed that different models on stabilisation should be developed that might meet different needs and constitutional constraints by the States. *Another participant* pointed out that many developing countries did wish to attract investments by providing stabilisation in their laws, however they did not opt for the pure freezing of the contracts which constrained their sovereignty. As to issues of compensation and damages, he added that the distinction lay not between breaching the contract or not, but rather between engaging in internationally wrongful conduct or not. Compensation might be due even for internationally legitimate conduct, and damages if it were not legitimate. These cases were dealt with under specific regimes that prescribed specific States' defences to deal with that (e.g., the doctrine of necessity). States would be free to decide under the UN resolution on permanent sovereignty over national resources if they acted as a commercial party or not, but in either case they would still be sovereign. Therefore, the future instrument should clarify what would happen when circumstances changed and provide remedies with the instruments of private law, including adaptation, renegotiation and compensation or damages, based on a clear understanding between the State and the investor when they concluded an agreement.

97. *One participant* vouched in favour of the stabilisation regime as it was necessary to ensure certainty in the medium and long run, while being shaped in a manner that would not encroach upon

States' sovereignty in any circumstance. He argued that, because of the variability of the political situation along the duration of the IIC, of the domestic legal regimes and of IICs in different sectors (construction, oil and gas), a "one-size-fits-all" approach would not work. He further referred to two issues: first, the stabilisation clause should not be independent from renegotiation clauses, but rather connected as part of the "stabilisation process" to allow the parties to sit and re-adapt the financial equilibrium of the contract when it was altered; second, a line should be drawn between stabilisation and hardship, as stabilisation should also be intended to cover legislative and administrative acts of the State that had an impact on the dynamics of the market and costs (e.g., decrees establishing rates or prices), usually covered by hardship at certain conditions, but with a higher threshold.

98. *The UNIDROIT Chair* commented that there was some concern whether stabilisation clauses would *per se* achieve the goal of shielding investors from all regulatory or legal risks they might be facing. They should be included in the future instrument, but they might not be sufficient to achieve a full modernisation of IICs and meet investors' demands.

99. *One participant* agreed that stabilisation was more perceived than effective. He pointed out that contractual practice seemed to be drifting away from stabilisation, as it might be inferred by the study of the Secretariat where stabilisation clauses were included in contract around 2002-2007, but not in later contracts. As the literature also suggested, stabilisation clauses included more and more renegotiation and adaptation clauses. The three should not be separated. He mentioned an adaptation/renegotiation clause in Article 21 of an IIC reported in the Memo on Change of Circumstances elaborated by the Roma Tre-UNIDROIT Task Force on IICs, which was a hybrid stabilisation, adaptation, and renegotiation clause. He added that, when speaking of alteration of the economic equilibrium of contract, this would cover a wider range of situations than pure hardship and adaptation/renegotiation. The Working Group should then discuss whether it was willing to go down that path.

100. *One of the Co-Chairs* agreed that this was the reason why stabilisation and adaptation/renegotiation were categorised together, with hardship and force majeure in separate boxes. Some linkage was found between the two in the dynamic of change of circumstances, with the only difference being whether the action was taken by the State voluntarily or if it was something that was outside of the control of the State (i.e., a voluntary act with an impact on the context which could cause a consequence in terms of prices, and an act that directly fixed prices).

101. *One participant* invited the Working Group not to think only to import the existing way of thinking to stabilisation, giving labels and aligning to a "codification" style of the existing practice, but rather focus on risk analysis and adaptation of the contract. The main point was that during the negotiation of the contract between the investor and the State a certain balance was achieved and readaptation techniques should try to keep that balance over time as much as possible. *The UNIDROIT Deputy Secretary-General* agreed with the opinion expressed and added that changes in circumstances might also be addressed by provisions in the applicable law (including the UPICC if applicable) by way of general principles, while specific mechanisms in the contracts might be included to address different types of supervening circumstances which were specific to IIC practice. A study was made on the application of the UPICC in changes of circumstances during COVID where more guidance was given on how to renegotiate in extraordinary situations in a manner that did not come as completely unpredictable or unexpected. Providing specific notices might be a way, which was not directly provided for in the UPICC provisions on hardship or force majeure.

102. *Another participant* warned that the EU model BIT 2023 referred to the right to regulate where a statement clarified that the provision of the agreement should not be interpreted as a commitment from a party that it would not change the legal and regulatory framework, including in a manner that negatively affected the operation. The commentary called it "the non-stabilisation clause" and further specified that there was no general duty on the parties to compensate for changes

in the regulatory framework. This should be considered so as to give a special role to adaptation and renegotiation and, perhaps, avoid references to stabilisation.

103. *The ICC Chair* confirmed that today, as regarded sovereign powers, there was a prevalent trend toward renegotiation and economic equilibrium clauses in contract practice. In terms of approach, he mentioned the decision might be providing suggested choices or options, with a scaled degree of intensity (from limited to full 'modern' stabilisation). He noted that to define the scope was important: particularly, identifying the form of the public measure (laws, but also decrees). The effects of the measure could be easy to identify if it were a fiscal one, but it could be much more difficult if it were a normative or administrative measure affecting generally or specifically the economic value of the investment, of which evidence should be given. It was also crucial to identify the remedies, and more precisely, the entity of compensation, where again for fiscal measures it was easy to calculate the amount, while for other measures it could be difficult to envisage the entity, and if automatic mechanisms of rebalancing might be put in place. The main point was how to replace existing standards and give more certainty to the parties in the contracts preventing disputes and if the option was for monetary compensation or continuous renegotiation, or both, and which role for arbitrators in renegotiation (e.g., giving them powers to substitute the parties) in order to unblock the controversy and allow the contract to continue its life.

104. *One participant* mentioned that guidance for renegotiation existed that considered not the financial equilibrium of contract but rather commercial equivalence, and that it was conceptually close to the formal relational contract theory which built on a values-based system, mainly integrity and transparency. The legitimate exercise of regulatory powers would make any act and consequence by the State lawful, and there was the issue of whether in this case compensation still applied. *Another participant* commented on the necessity to delve into the distinction between fiscal and non-fiscal measures since especially in the era of ecologic transition there were fiscal-related measures or measures that might be conflated with fiscal measures pursuing environmental objectives (e.g., feed-in tariffs).

105. *One Co-Chair of Subgroup 2* illustrated the second part of the provisional Report on hardship. The point of departure was the UPICC. An area for work was found in whether the UPICC definition of hardship and its legal effects were sufficient or needed adaptation in the realm of IICs. The report went further, discussing compensation and damages as effects of hardship, the role of third parties and experts or arbitrators, applicable law and finally possible model clauses. *The other Co-Chair* illustrated the interaction between the governing law and hardship. He pointed out that, based on his experience and the golden rules that companies usually adopted, it would likely be unrealistic that an IIC had no hardship clause. Since many domestic laws did not provide for hardship, a clause should be included in the contract (except France, where from 2016 there was the need to opt out). Therefore, a comparative law analysis could not be set aside to assess the practicability of model clauses in this area.

106. *One participant* commented that there were many different sorts of instruments and methods of dealing with risk. While it was true that general changes affecting the market or external events were respectively dealt with through hardship and force majeure - and stabilisation with deliberate acts of the State - the common element was that every issue of risk management could be equally contractualised (financial, operational, and legal issues, including political risk). The point was also that not all sources of risk may be eliminated. In some cases, there was a deliberate assumption of risk to which parties were tied by the contract (e.g., gaming contracts, or the fixing of an exchange rate). He mentioned the most famous common law case on the doctrine of frustration, "Davis Contractors", where there was a fixed price with a valid assumption of risk, that had not fully taken into account the shortage of building materials in the post-Second World War period. Stabilisation should not be considered the only means to deal with risk. Risk might be dealt with in a multitude of ways and viewed from different angles, such as the forum, the choice of law and so forth, while also looking at financial instruments to diversify or share the risk.

107. *One participant* mentioned that, for a hardship clause to come into play, the trigger event should “fundamentally alter the equilibrium”, setting a high threshold with cost and value of the performance as relevant benchmarks. It should be seen whether this was sufficient for IICs in the context of long-term contracts. He added that the procedure in UPICC article 6.2.3, para. 1, only considered the onus of the party suffering the hardship to invoke it, while it did not elaborate on the responsibility of the other part. While this would be understandable in the context of commercial contracts, when a State was involved and thus incentives were not only economic, it could be helpful to craft a procedure that also provided some responsibility on the other side to react. As to the involvement of third decision-makers, he added that there would likely be agreement that a court procedure might not be appropriate in the context of IICs; while concerning the vast array of instruments that could deal with political risk, he asked, once hardship was adapted and broadened, whether stabilisation would really be necessary.

108. *Another participant* expressed the view that stabilisation and hardship were different clauses and there would be no overlapping. Stabilisation clauses dealt with States’ interventions that affected the financial or economic equilibrium of contracts through changes in legislation or regulations. Hardship clauses dealt with severe changes in contract prices. *One participant* noted that the UPICC article on hardship needed adaptation as to the very notion of economic equilibrium since in commercial contracts it had to do with the costs of parties’ performance, while in IICs – as long-term contracts – it had more to do with the project cash flow.

109. *The UNIDROIT Chair* noted that the UPICC provision on hardship provided for a default rule. Any provision in IICs providing for additional indications of what the threshold should be, e.g. if lower or implying a wider scope, would be perfectly compatible. She also added with reference to a previous comment by one participant that, while it was true that the aggrieved party should invoke and prove the hardship, the counterparty had an obligation to re-negotiate in good faith. Things being as they were, the existing framework for renegotiations could still be better refined to meet the needs of IICs, as had been done for the Legal Guide on Contract Farming, with a view to add certainty on how the negotiations should be executed. A framework for adaptation should also be provided, taking into account the ICC clause, but integrating a role for arbitrators.

110. *One participant* referred to contradictory investor-State case law on the Argentine financial crisis and to how the arbitral tribunals provided different interpretations on States’ necessity in the same or similar circumstances. While supporting the principle that “less is more”, he argued that contract law should be used to limit the uncertainties of public international law and therefore richer language should be used to define the role of UPICC article 1.4 on mandatory laws as well as of UPICC article 6.2 on hardship. *The UNIDROIT Deputy Secretary-General* confirmed that many different legal systems and even the UPICC admitted that contracts might add more specific provisions to the integration of the general principle, including a mechanism whereby a third party, a board or a trusted expert which is not one of the parties renegotiating, might help to reach a solution or decide on the contested issue for the parties themselves. The contract might even provide for the parameters the third party should apply.

111. It was then reiterated by *one participant* that it was paramount from the very beginning of the formulation of the contract to define the notion of economic equilibrium and when this equilibrium was altered. *Another participant* agreed that stabilisation and hardship were two different doctrines, since with stabilisation clauses there was the possibility of invoking the rules on state responsibility. There was in any case an asymmetry when the State sought to reject responsibility as a result of the violation of a stabilisation clause based on the defence of necessity since it should meet its extremely rigorous requirements under customary international law. At the same time, the defence of necessity could not be excluded contractually. A stabilisation clause could provide for a carve-out, excluding measures in pursuit of a legitimate public welfare objective, but it would again be doubtful whether it would operate in the same manner as in a treaty. *A further participant* added in this last regard



that it would not be necessary to include such a carve-out in the model clause as that was provided in the general doctrine about State contracts and sovereignty in public international law.

112. *One participant* commented that, in addition to the fact that the characterisation of the State action was not relevant, the main issue to tackle was if there had been a severe violation of the financial and economic equilibrium of the contract as a consequence of the State's intervention, by legislation, regulations, decrees, directly or indirectly, or in any other form, i.e. the mere fact was that its equilibrium was affected and there was a causality link between the State act the alteration, irrespective of whether there was a state of necessity or emergency.

113. *The ICC Chair* summarised the discussion and recalled that renegotiation/adaptation seemed the trend for both hardship and stabilisation and the trigger points for both would be an alteration of the economic equilibrium of contract, so that it might make sense to create new (coordinated) clauses. The scope of the stabilisation clause should be discussed as it were a "FET of IICs". If the scope would include the freezing of the financial agreement enshrined in the contract, then any act of the State that impinged on that would undoubtedly fall within the scope. A doubt remained as to whether any act of the State that changed or influenced, for instance the rate of the guarantees, elevating the costs of the contract, as something conditioning the market dynamic, would fall under stabilisation or hardship. In this regard, *one participant* argued that UPICC article 6.2.2 was very broad and a single event might fall under both, and that this should be clarified to add certainty. He also added that if a State imposed a higher tax on the use of coal to reduce its use of coal based on the Paris agreement commitments, in the context of investment treaty arbitration it would invoke its regulatory freedom in the public interest and the usual test of *bona fide* and non-discrimination or proportionality, but it could still be responsible under the contract. As a consequence, a carve out might be necessary, mirroring new-generation BITs.

114. *One Co-Chair* of Subgroup 4 moved to the discussion on force majeure. She explained that the Subgroup took UPICC article 7.1.7 as the starting point, but that it should still be discussed whether that broad definition would meet the needs of IICs, and if a list of events, exhaustive or open-ended, may add clarity, as occurred in contract practice. The provisional Report also analysed the requirements for invoking force majeure and its effects and the difference between a temporary and permanent force majeure, the latter leading to termination. Another issue was also what should be proven in order to avoid non-performance and thus liability and the payment of damages. *The other Co-Chair* expressed the view that force majeure appeared to be well known, but it entailed many criticalities, both substantial and procedural: how to clearly define a force majeure event, whether of short duration or long duration; how to consider the consequences when the duration of the force majeure event was so long that it would result a lack of financial equilibrium (e.g., suspension of the cash flow, rising prices in the medium run, and so forth); what occurred if there was a failure to give notice on time; and what the consequence of not complying with the notice would be. A critical issue was whether termination would be a proper remedy in the context of IICs because of the magnitude of investment projects: again, there could be an interest in preserving either public service or business continuity and in providing renegotiation or adaptation.

115. It was considered that force majeure should regard situations when performance was impossible, either for a while or forever. However, it was noted that it would be not easy to draw a line between hardship and force majeure in practice, i.e. when a performance was more onerous or merely impossible, and indeed the language of impossibility was left aside in many legislative projects. Even COVID-19 was characterised as an event of force majeure in Europe and the United States, while in the Middle East it was viewed as entailing mere hardship.

116. *The UNIDROIT Chair* concluded on this point reminding that the ICC had a force majeure clause, the first draft of which was adopted in 2003 and then revised in 2020. She mentioned that it could be perfectly combined with the UPICC and that comparing the ICC force majeure model clause in the 2003 and 2020 versions with the comments, the UPICC on force majeure and the clauses in modern

contracts, as compiled in the Roma Tre-UNIDROIT Memo, would provide useful insights for the benefit of the Working Group, with a view to elaborating a proper model clause for IICs.

117. At the end of the session, *an officer of the Secretariat* and two coordinators illustrated the memos of the Roma Tre-UNIDROIT Task Force on IICs on policy goals and change of circumstances clauses in IICs. It was explained that the sample of contracts examined with an initial legal analysis had yet to be completed, in terms of geographical distribution (regions of the globe), date and time of contracts (2000-2024) and sectoral allocation (industries), but already provided some hints for reflection. It was discussed and considered that it would be important to have a description of what was present, but also what was absent in the contracts. At the end of the process, a map with the overall picture would help to visualise the overall picture of current practice.

## **Item 6 Organisation of future work**

118. *The UNIDROIT Chair* proposed, after consultation with the ICC Chair, as a way forward leading up to the June 2024 session, that the Working Group make a very first attempt to look into whether, between the two possible formats envisaged in the Issues Paper, it might be feasible to formulate a list of principles with commentaries, accompanied by model clauses. To this end, the Subgroups should translate the contents of the provisional Reports into a tripartite structure that would resemble the structure of the UPICC, i.e. one or more principles, a commentary to the principle(s) and one or more model clauses for every principle. Compared to a contractual guide, that appeared to be too much diluted, a list of principles would help States and investors to modernise their contracts, providing a soft-law instrument ready for immediate application, without losing the chance to provide specific guidance. Explanatory notes or commentaries might serve the purpose of convincing prospective users about the reasons why the principles themselves were necessary, which concerns they addressed, what conflicts of interests they wished to tackle and why IICs needed different solutions from commercial contracts. The works of other IOs should be used to the fullest, especially when they addressed areas that were outside the scope of the Institute's mission. Contractual guidance might be transfused into the commentaries and short comments to the model clauses. The UPICC would serve as a model as to form and purpose and, when the UPICC could not provide a starting point, other materials should be taken into account with a view to formulate a new principle. The ICC model clauses might provide a track to follow when it came to formulating model clauses. This would provide a map by the beginning of June of what was left on the agenda.

119. *The participants generally* agreed with the proposal. *One participant* expressed a preference to start from the formulation of model clauses rather than principles or explanatory notes. *Certain participants* were on the same line, while *other participants* opined that it would be up to the Subgroup to consider how to start. *One participant*, joined by *other participants*, asked whether the envisaged "principles of international investment contracts" would work as the UPICC, i.e. would pursue similar functions to those established in the UPICC's preamble as regards their possible application as the governing law of commercial contracts and their other functions. *A further participant* considered whether all topics might be covered with the same specificity, since some areas would seem to be less suitable for providing details if a list of principles was chosen.

120. *The UNIDROIT Deputy Secretary-General* replied that the mandate foresaw a self-standing instrument and not a new edition of the UPICC, unless the Working Group had a strong feeling that it was necessary to return to the Governing Council with a different proposal. She added that the self-standing instrument might apply, if so decided, according to the same concepts provided in the UPICC's preamble and mentioned the PRICL as an example. Following the logic of the PRICL, the future instrument might refer to the UPICC "*telle quelle*" as general contract law applicable to IICs when there was no need for adaptation, while it would mainly contain adaptations of the UPICC to the special needs of IICs, together with other special rules and principles that the Working Group might deem it proper to include. Model clauses similar to those providing for the UPICC's application

might be drafted for the self-standing instrument. It would be in any case a soft law instrument, open to States and investors.

121. *An officer from the Secretariat* clarified that at this stage the Subgroups would not be expected to formulate the whole principle; they might simply describe how they would envisage this principle and how they would formulate explanatory notes trying to visualise how the final instrument would appear. *A participant* joined this view and referred to the practice of the International Law Commission. He also considered that explanatory notes should predate model clauses, giving reasons for the latter to be adopted. *Another officer from the Secretariat* clarified that for those Subgroups that did not find available resources in the UPICC, i.e. Subgroup 3, then the ALIC Guide and the IISD Model Clauses would be the materials to consider.

122. *One participant* recalled on behalf of his organisation of the ongoing process of holistic reform of international investment law in the face of the current climate crisis which require States to maintain their policy space and investors to respect new emerging obligations. He thus recommended that the outcome of the project be supportive of the achievements of the Sustainable Development Goals, facilitate a meaningful climate policy and contribute to host State development with broad socioeconomic benefits. Any meaningful guidance on IICs should be developed through an inclusive process involving government representatives.

123. *The UNIDROIT Deputy Secretary-General* replied in this regard that it was the established practice of the Institute to involve all the relevant stakeholders in the project process and that a consultative committee had already been established, involving States' representatives that were appointed by the respective governments. As soon as the Working Group would be able to make available the first drafts of the future instruments, these would be submitted to the consultative committee to receive the input of States' representatives. At least two consultations should be held in a relatively short timeframe.

124. *The UNIDROIT Chair* took the floor and concluded the discussion on this point. She then moved on to illustrate the role of the Roma Tre-UNIDROIT Task Force on IICs as part of the UNIDROIT Academy and asked the participants to provide their feedback on the memos they had received, particularly on the underlying methodology and conceptualisation. She also reiterated the view that was expressed in the first session that hearings with in-house counsel and operators from the market should be held as a form of a reality check, with a view to consider whether there were some elements the project had failed to consider.

125. *One participant* mentioned that the memos should examine the applicable law clauses in the available sample of contracts. *Other participants* agreed on the importance of a reality check with in-house counsel and the audience of investors. Meetings should be organised quite early in the process to receive their input, a questionnaire should be drafted in advance, and minutes should be taken to share with the participants that might not join. *One participant* finally recalled the importance of adding principles on performance and possible procedural guarantees against unilateral termination of IICs, which would be quite usual in many jurisdictions.

126. *The ICC representatives* reminded the Working Group that the official documents of the Working Group would be submitted to the Council of the IWBL, to the Commercial Law and Practice Commission (the one in charge of developing model clauses and model contracts) and to the Arbitration and ADR Commission, so that there would definitively be feedback from the business world. *The UNIDROIT Deputy Secretary-General* finally noted that is part of the established practice of the Institute to hold targeted consultations in order to receive input from market players which might add to the network of contacts already available to the ICC.

**Items 7 & 8      Any other business. Closing of the session**

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

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

Ms Maria Chiara MALAGUTI <i>Chair</i>	President UNIDROIT
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\* \* \* \*

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Ms Anna VENEZIANO	Deputy Secretary-General
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\* \* \* \*

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Ms Prakitree YONZON	Visiting Scholar PhD Candidate, University of Hong Kong
Ms Chen WANG	Intern



**ANNEXE II****AGENDA**

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Adoption of the Summary Report of the first session (Study L-IIC -W.G. 1 – Doc. 3)
4. Update on intersessional work and developments since the first Working Group session
5. Consideration of work in progress
  - a) Report of Subgroup 0
  - b) Report of Subgroup 1
  - c) Report of Subgroup 2
  - d) Report of Subgroup 3
  - e) Other matters identified in the intersessional period
6. Organisation of future work
7. Any other business
8. Closing of the session