POSITION PAPER
in response to the public consultation on

THE UNIDROIT DRAFT PRINCIPLES AND MODEL CLAUSES FOR INTERNATIONAL INVESTMENT CONTRACTS

15 September 2026

The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has currently more than 700 members, mostly academics and practitioners, based in more than 70 countries.

For the purpose of taking part in the discussion launched by the UNIDROIT/ICC public consultation on its Draft Principles and Model Clauses on International Investment contracts, EAPIL established a Working Group in the summer of 2026. The Working Group prepared the following position paper focusing on the private international law aspects of the Draft Principles and Model Clauses.

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While the members of the Working Group have drawn on their respective expertise and experience, the positions and analysis presented are expressed in their personal capacities and do not represent the official positions of any institution or organization with which they are affiliated.

The Position Paper was approved by the EAPIL Scientific Council on 10 September 2026.

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A. EXECUTIVE SUMMARY

1 This Position Paper responds to the UNIDROIT/ICC Draft Principles and Model Clauses for International Investment Contracts ('PIICs'), focusing primarily on their private international law implications. The Working Group welcomes the initiative and, in particular, its attempt to provide a coherent framework for the drafting and implementation of international investment contracts (IICs), an area in which national contract law, public international law and transnational rules frequently interact. The Paper nevertheless identifies several areas in which greater precision would enhance legal certainty and the practical effectiveness of the Principles.

2 A central issue concerns the legal nature and application of the PIICs and their relationship with the UPICC. While the proposed *lex specialis-lex generalis* relationship between the two instruments is supported, parties choosing the PIICs may not immediately understand that this choice simultaneously entails the supplementary application of the entire UPICC. The Working Group therefore recommends making this consequence more explicit in the black-letter text and preserving the parties' ability to opt out. The Commentary should also provide greater guidance on application of the PIICs in the absence of a choice by the parties.

3 Particular attention should be paid to third-party and multi-contract situations. The Commentary should address conflict of laws issues arising from interdependent contracts governed by different laws, third-party beneficiary rights, assignments, and step-in rights. It should also treat the law governing the arbitration agreement as a distinct choice of law issue and encourage express consent by relevant non-signatories rather than reliance on uncertain doctrines extending arbitration agreements.

4 The Working Group supports the flexible multi-tier dispute-resolution framework, but recommends clearer guidance on whether pre-arbitration steps constitute conditions precedent, the law governing their operation, the use of the same neutral as mediator and arbitrator, and the cross-border enforceability of mediated settlements. The Commentary should in particular explain the limits of the Singapore Convention and encourage States to establish institutional mechanisms for early identification and coordinated management of investment disputes.

5 Further clarification is especially important regarding parallel proceedings, waivers and counterclaims. A contractual waiver of treaty remedies cannot be assessed under the contract law alone: its effectiveness also depends upon the applicable investment treaty and international law requirements for a valid renunciation of treaty rights. The PIICs should distinguish consolidation from coordination, strengthen the mechanisms preventing double recovery, and address affiliated claimants and State entities. With respect to counterclaims, the Principles should clarify applicable-law and admissibility questions and distinguish immunity from jurisdiction from immunity from execution, including through appropriately differentiated waiver language.

6 Finally, the PIICs should give greater prominence to mandatory rules, public policy and consistency in State investment policy. The Commentary should explain the relevance of the chosen law, the law of the forum and the law of the place of investment, while recognizing the

differences between arbitration and State-court proceedings. More broadly, States should be encouraged to coordinate investment contracts with their investment treaties, legislation and institutional practices. Such consistency is essential to reduce regulatory uncertainty, prevent parallel or conflicting claims, facilitate dispute prevention and ensure that the PIICs contribute effectively to sustainable and predictable investment relations.

B. INTRODUCTION

7 The purpose of this Position Paper is to comment on the private international law aspects of the UNIDROIT/ICC Draft Principles and Model Clauses for International Investment Contracts (hereinafter 'PIICs' and 'Draft Model Clauses' respectively).

C. A NEW SET OF PRINCIPLES BY UNIDROIT – PURPOSE, LEGAL NATURE, AND MODES OF APPLICATION

1. PURPOSE

8 The Principles and Model Clauses for International Investment Contracts are a new set of rules developed by UNIDROIT and the International Chamber of Commerce at the intersection of public international law and international commercial law. The project seeks to contribute to the development of more modern and consistent approaches to the drafting of international investment contracts (IICs). A particular focus is placed on the relationship between the UNIDROIT Principles of International Commercial Contracts (UPICC) and provisions typically used in IICs, as well as on recent developments in international investment law, including the increasing emphasis placed on corporate social responsibility and sustainability.

9 The current draft comprises eight Chapters and a total of 33 Principles. This statement by the European Association of Private International Law (EAPIL) is limited to those aspects of the PIICs that have a specific connection with private international law.

2. LEGAL NATURE

10 When the first edition of the UPICC was published in 1994, their legal nature was far from clear. By choosing the term 'Principles' as the legal form, UNIDROIT had, in a sense, created a new category of uniform law. Today, more than 30 years later, the strengths and weaknesses of the UPICC are much better understood.[1] At the same time, a number of other instruments have emerged that bear the name 'Principles' but have been developed by different organisations, based on different methodologies, addressing different legal issues, and achieving very different degrees of success in legal practice. Principles of law therefore constitute a much less homogeneous category of uniform law than treaties or model laws. The mere designation of an instrument as 'Principles' does not, in itself, permit conclusions to be drawn as to its legal function or

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

mode of operation. Rather, the particular characteristics of the respective instrument must be taken into account.[2]

11 This is also true of the PIICs. Despite the involvement of the same organisation and the terminological affinity with the UPICC, they differ from UNIDROIT's well-known flagship instrument in several respects. The UPICC cover the entire field of general contract law and therefore need to be sufficiently flexible to apply to sales and service contracts as well as to complex and rare contract types. The new instrument, by contrast, is tailored to a highly specialised area of law. It must therefore achieve a considerably higher degree of adaptation for investment contracts if it is to gain acceptance among those involved in drafting such instruments. In addition, the PIICs were developed in a considerably shorter period of time than the UPICC and are not conceived as a comprehensive restatement. It would therefore be misguided to derive the legal function and practical significance of the PIICs solely from experience with the UPICC.

12 Nevertheless, experience with the UPICC may be of considerable importance for the new PIICs. Even without specific provisions on IICs, the UPICC have already established a place for themselves in investment arbitration proceedings. The case law in this area has by now been analysed comprehensively on several occasions.[3] The experience gained from these cases can therefore serve as an important point of reference for the further development and practical application of the new PIICs.

3. MODES OF APPLICATION

13 The best starting point for assessing how the PIICs operate is the catalogue of their modes of application contained in the PIICs themselves. This closely follows the corresponding provision in the UPICC.

14 A formal difference is immediately apparent. In uniform law, it is customary to define the scope of an instrument in its first provision (see, for example, Art. 1 CISG). In the UPICC, however, the provision on scope was transformed, in a last-minute decision, from 'Article 1.1' into a 'Preamble'. The rationale was to emphasise the soft-law character of the UPICC.[4] A soft-law instrument cannot itself establish its scope in a binding manner. The UPICC therefore cannot prescribe their own application in certain cases or exclude it in others.

15 In the PIICs, this consideration does not appear to have played a comparable role. Their scope is instead described in Principles 1 and 2. In substance, this different formal structure is unlikely to

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

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

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

make a difference. Nevertheless, in the interests of coherence between the closely interconnected instruments, it may be worth considering transforming Principles 1 and 2 into a Preamble as well.

16 Principle 2 identifies a total of seven possible modes of application. The first six largely follow the Preamble to the UPICC; para. 7, by contrast, introduces an additional function of the new Principles.

a) Choice of the Principles by the Parties

17 According to Principle 2 para. 1, '[t]hese Principles apply to IICs where the parties have agreed that their contract shall be governed by them or where the parties have incorporated them in their contract.' Thus, as in the UPICC, the express choice of the PIICs by the contracting parties is mentioned first. Its position at the outset should not, however, be confused with its practical frequency. In the case of the UPICC, an express choice as the applicable law has so far gained acceptance only to a limited extent.[5] Although corresponding cases can be found in the relevant databases, their number hardly suffices to speak of an established practice. Other modes of application play a considerably greater role in practice. The prominent position of an express choice is therefore explained less by its practical frequency than by its fundamental legal effect: such an agreement constitutes the most direct form in which the parties can make the Principles the governing regulatory framework of their contract.

18 At the same time, a linguistic change is noticeable compared with the Preamble to the UPICC. Both instruments use the mandatory 'shall' for an express choice of law and thereby distinguish it from the less mandatory 'may' used for the subsequent modes of application. In the PIICs, however, 'shall' appears at a different point in the sentence. Whereas in the UPICC it forms part of their own claim to applicability, the new wording places greater emphasis on the fact that the application of the PIICs is based on an agreement between the parties. A practical difference is unlikely to result from this shift in grammatical focus. Indeed, the wording of the PIICs appears preferable. It is more closely aligned with the classic formulation of choice of law clauses ('the contract shall be governed by ...') and makes it clearer that a distinction must be drawn between the parties' agreement, on the one hand, and the resulting application of the PIICs, on the other.

19 A second particularity is that the new Principles expressly mention the possibility of a choice by incorporation ('*materiellrechtliche Verweisung*'). The problem addressed here is already familiar from the application of the UPICC.[6] Most legal systems do not permit parties, in proceedings before state courts, to choose a non-state set of rules as the applicable law. This does not necessarily mean, however, that such a choice is entirely without effect. Rather, it may be treated as

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

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

an agreement to make the PIICs part of the contract.[7] This changes their position within the hierarchy of legal sources. As contractual terms, the PIICs merely displace the non-mandatory provisions of the applicable national law; unlike a genuine choice of law, however, they remain subject to the mandatory rules of national contract law. In practice, an express incorporation of the UPICC does not play a significant role. Individual UPICC rules have occasionally been incorporated into contracts,[8] but this situation is already covered by Principle 2 para. 7 of the PIICs. Moreover, a choice of law in favour of the UPICC is frequently combined with an arbitration clause in order to benefit from the greater freedom of choice in arbitration proceedings. A comparable development can be expected for the PIICs.

b) Application as General Principles and lex mercatoria

20 Principle 2 para. 2 of the PIICs corresponds verbatim to the corresponding passage in the Preamble to the UPICC. In IICs, the parties sometimes choose general principles or the *lex mercatoria* as the governing law, often in combination with national law. In this way, they seek to create a greater scope for taking account of the particularities of cross-border contractual relationships. In investment law, such an approach appears even more plausible than in commercial law. National law, uniform law and public international law typically intersect here.

21 A mixture of such norms is therefore by no means unusual. As regards the UPICC, the prevailing view is that they cannot, as a whole, be equated with either the *lex mercatoria* or general principles of law. They can, however, be used as a possible source of such principles.[9] A comparable discussion will presumably arise with regard to the PIICs. In particular, it will have to be clarified whether and to what extent they may be relied upon as an expression of 'general principles of law recognized by civilized nations' within the meaning of Art. 38(1)(c) of the Statute of the International Court of Justice.[10]

c) Application in the Absence of a Choice of Law

22 Principle 2 para. 3 governs the application of the PIICs in the absence of a corresponding choice of law. Compared with the otherwise largely identical provision in the Preamble to the UPICC, it contains a noteworthy qualification through the insertion of the words 'where appropriate'. The UPICC generally allow recourse to them even in the absence of a choice of law. Whether such objective application is permissible depends on the applicable rules of private international law. Even where those rules permit a decision on the basis of non-state rules, the situation is less clear

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

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

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

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

than in the case of an express choice. The parties may, for example, have deliberately refrained from choosing a governing law because they shared the assumption that a particular national law would apply. Applying the Principles might therefore come as a surprise to them. For this reason, it has been recommended in relation to the UPICC that arbitrators discuss this issue with both parties and give them sufficient opportunity to comment.[11]

23 In the case of the PIICs, this issue is not sufficiently clarified by the mere insertion of 'where appropriate'. Nor does the Commentary on the provision elaborate on the point. It merely notes in general terms that contracts, and IICs in particular, today almost invariably contain a choice of law clause. The PIICs would benefit from a clarifying explanation of this issue in the Commentary.

d) Further Modes of Application According to Paras (4)-(6)

24 Paragraphs 4, 5 and 6 of the new Principles again correspond verbatim to the respective passages of the Preamble to the UPICC. They therefore raise no distinct private international law issues beyond those already known from the UPICC.

e) Model for Negotiators

25 Principle 2 para. 7 of the PIICs introduces the new function of serving 'as a model for negotiators of IICs'. The UPICC did not expressly provide for a corresponding use, although their practical significance in this respect has been emphasised in the literature on several occasions. It has been suggested, for example, that the UPICC be used as a checklist for drafting international contracts or that individual clauses be incorporated directly into contracts. They could also serve as a translation aid, given that the UPICC have been translated into numerous languages.

26 Furthermore, they could facilitate communication between lawyers from different legal systems by providing a common point of reference for explaining rules that appear unfamiliar to the other side.[12]

27 These functions can readily be transferred to the PIICs. Particularly in view of the different legal backgrounds of the actors involved in drafting IICs, this model function may be of considerable practical importance.

D. THE RELATIONSHIP BETWEEN THE UPICC AND THE PIICS

28 A separate and particularly important issue for practical application concerns the relationship between the new Principles and the UPICC. Principle 1 paras. 3 and 4 structures this relationship

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

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

as one between *lex specialis* and *lex generalis*. Thus, insofar as the Investment Contract Principles contain special rules for IICs, those rules prevail over the general rules of the UPICC. Where, by contrast, they do not consider a modification of the UPICC necessary (para. 3), or do not regulate a particular issue at all (para. 4), the general rules of the UPICC apply on a supplementary basis. UNIDROIT has adopted an approach here that it had already pursued in the Principles of Reinsurance Contract Law (PRICL). There, too, Art. 1.1.2 PRICL supplements the special rules by referring to the general rules of contract law contained in the UPICC.

29 While the UPICC originally refrained entirely from providing rules for specific types of contracts, the trend now appears to be towards combining them with rules for highly specialised types of contracts. Unlike, for example, sales law, both reinsurance law and the law of investment contracts are regarded as areas with relatively low regulatory density regarding general contract law, which can sometimes make them appear difficult to navigate.[13] This makes them particularly receptive to supplementation by general principles of contract law.

30 This structure, however, has an important consequence for the choice of law: A choice of the PIICs also entails a choice of the UPICC. The official Commentary confirms this interpretation, albeit somewhat unobtrusively at the end of para. 103 and in the comments on the Model Choice of Law Clauses (paras. 593 ff.).

31 This consequence, in particular, appears problematic. For the contracting parties, it may come as a surprise that choosing the PIICs encompasses not only the 33 Principles adapted for IICs, but also incorporates another soft-law instrument comprising a total of 211 articles on general contract law. This may be particularly relevant where the parties intended, by choosing the PIICs, merely to 'denationalise' the national law applicable to their contract (frequently the law of the host state), without intending to incorporate an additional general body of rules into their contract.

32 Nor can it simply be assumed that all persons involved in drafting IICs are familiar with the UPICC. Investment law is, in particular, a mixed field in which actors are often involved whose primary expertise lies in public international law rather than commercial law. Such an effect could also jeopardize or create disputes about the validity or interpretation of the IICs negotiated by reference to the PIICs, especially for government agencies or State-owned enterprises entering into such contracts with foreign investors.

33 Against this background, the incorporation of the UPICC deserves support, but also warrants greater transparency. In particular, the black-letter text itself should make it clearer that a choice of the Investment Contract Principles simultaneously entails the supplementary application of the UPICC, unless the contracting parties opt out of their application in the context of an IIC.

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

E. THIRD-PARTY ISSUES

34 In their various parts, the PIICs recognize that international investment contracts are frequently embedded in a network of interdependent contracts and relationships that extend beyond the original signatories, and emphasize the need for procedural coordination through multi-tier dispute-resolution mechanisms, waivers of parallel remedies, and consolidated counterclaims. This approach is commendable as a means of achieving legal certainty and avoiding fragmented or inconsistent outcomes.

35 However, there are several respects in which the PIICs do not sufficiently address the consequences of such choices under private international law, particularly where those choices interact with rules of a different nature (public international law, mandatory rules, sovereign immunity) or apply differently depending on whether the applicable law is chosen by the parties, determined by an arbitral tribunal, or determined by a domestic court. Third-party issues under the PIICs raise four main distinct private international law issues, discussed in turn in the following sections.

1. INTERDEPENDENT CONTRACTS

36 Principle 5 rightly encourages parties to regulate the interdependence of multiple contracts forming a single investment project, including by aligning their governing law and dispute resolution clauses.[14] However, the commentary does not address what should happen where such coordination is imperfect or absent — a situation that is common rather than exceptional.

37 Where connected contracts are ultimately governed by different laws or referred to different dispute resolution fora, a form of *dépeçage* ensues, which the PIICs do not currently discuss. The commentary could indicate a default interpretive rule/approach (presumption of consistency, the effect utile principle, or a hierarchy-of-contracts default: for instance, a presumption that ambiguous terms or absence of certain provisions in some of the contracts for the same project are to be interpreted consistently with the 'contract governing the overall investment) to reduce the risk that formal fragmentation defeats the parties' economic intentions, as Principle 5 itself recognizes may occur (paras. 134-136).[15]

2. THIRD-PARTY BENEFICIARY RIGHTS

38 A further, more fundamental issue concerns the enforceability of rights conferred on non- signatories, in particular local communities, through contractual mechanisms such as grievance mechanisms or community benefit agreements. Those mechanisms presuppose that the applicable law recognizes rights in favour of non-signatories. This is not universal: while many civil law

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

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

systems permit a stipulation *pour autrui* (cf. UPICC Arts. 5.2.1-5.2.6), a number of common law systems traditionally adhere to privity of contract, subject to statutory exceptions.[16]

39 The PIICs do not clarify (i) whether they intend the UPICC provisions on third-party rights to apply by default under Principle 1(4), or (ii) how a contractual third-party mechanism interacts with rules of the host State protecting the same interests (environmental, human rights, or community-protection legislation) that may qualify as overriding mandatory provisions, applicable irrespective of the law chosen to govern the IIC. The commentary to Principle 5 might consider expressly addressing both points, rather than leaving them to be inferred from Principle 1.

3. EXTENSION OF THE ARBITRATION AGREEMENT TO NON-SIGNATORIES

40 The PIICs rightly encourage the inclusion of identical arbitration clauses across a project's contractual network, to facilitate consolidation, but do not squarely address consent to arbitration by non-signatories (joinder or extension to parent companies, lenders, or affiliates).[17] This is not a marginal drafting question: the law governing the arbitration agreement — which may differ from the law governing the contract[18] — is itself contested as between the *lex contractus*, the law of the seat, and an autonomous conflicts analysis, and different jurisdictions apply divergent tests (e.g. the 'group of companies' doctrine[19]) to determine whether a non-signatory is bound.[20]

41 We submit that the PIICs should flag this as a distinct choice of law question in its own right, and recommend, as a matter of practice, express written consent by all relevant non-signatories (as the draft's own suggested clause already does) rather than reliance on doctrines whose cross-border recognition remains uncertain.

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

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

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

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

[20] E. Gaillard, *Legal Theory of International Arbitration* (Leiden 2010), *passim.*

42 The point can be put more sharply, because the draft already provides the drafting slot. Each of the model arbitration clauses in Chapter 8, Section C invites the parties to complete the line 'The law governing the arbitration agreement shall be […]'. The Commentary nowhere explains why that line matters, what follows if the parties leave it blank, or how the default answer differs from one seat to another. Of all the questions in Chapter 8, this is the one where silence is most costly, because it is resolved by national courts at the annulment and enforcement stage, rather than by the arbitral tribunal, as the contracting parties may have intended.

43 National solutions have recently diverged further rather than converged. Section 6A of the English Arbitration Act 1996, introduced through the Arbitration Act 2025, now provides that the law applicable to the arbitration agreement is the law expressly agreed upon by the parties, failing which the law of the seat of arbitration should apply. Section 6A further clarifies that the governing law chosen for the underlying contract of which the arbitration agreement forms a part does not constitute express agreement that the same law also applies to the arbitration agreement.[21] That rule departs from the approach of the UK Supreme Court in *Enka v Chubb*.[22] It is expressly disapplied to arbitration agreements arising from standing offers in treaties or in non-United Kingdom legislation, which means that it applies squarely to the contract-based arbitration the PIICs contemplate. Art. V(1)(a) of the New York Convention points to the law of the seat only in default of a choice by the parties.

44 A short Commentary paragraph explaining what is at stake and recommending that the parties complete the line rather than leave it blank would add real value at very little drafting cost.

4. ASSIGNMENT, STEP-IN RIGHTS, AND SUCCESSION

45 The commentary on assignment (paras. 501-503) should specify which law governs the effects of assignment on third parties[23] — a question that conflicts rules typically treat separately from the law governing the assigned claim itself as between assignor and assignee (compare Art. 14 of the Rome I Regulation[24] and the unresolved debate that preceded the 2022 EU proposal on third-party effects of assignments of claims[25]). It should equally clarify whether, and under what law, an assignee — in particular a syndicate of lenders exercising step-in rights across several jurisdictions — is bound by the dispute resolution clause of the original contract.

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

[22] *Enka Insaat ve Sanayi AS* v. OOO *Insurance Co Chubb* [2020] UKSC 38.

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

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

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

46 There is also an internal gap that may have gone unnoticed. Paragraph 503 of the draft states that situations in which the investor wishes to assign a claim against the State party to a third party 'will be addressed in Chapter 8 of this Instrument'. Chapter 8 does not address them. Neither Principle 28 nor the Commentary on choice of law mention the assignment of claims, and Section C touches the point only obliquely, through the anti-circumvention language in the Model Clause on waivers. We invite the Working Group either to complete the cross-reference or to remove it.

47 If it is completed, three questions deserve separate treatment, because rules of private international law treat them separately:

- First, the assignability of the claim and the relationship between assignor and assignee, normally governed by the law applicable to the assigned claim.
- Second, the effects of the assignment against third parties, for which no widely accepted rule currently exists.
- Third, whether the assignee may invoke, and is bound by, the dispute resolution clause contained in the IIC. The third question is of practical importance in project finance, where a syndicate of lenders may take security over receivables arising under contracts governed by several different laws.

48 A related caveat belongs to paragraph 502. The proposal that non-assignment clauses be given full effect in IICs, adjusting Art. 9.1.9 of the UPICC, holds as between the parties. It does not hold against an insolvency practitioner, whose power to dispose of the estate is not constrained by the debtor's contractual undertakings in the same way.

49 The Commentary should not leave parties to assume otherwise.[26]

F. MULTI-TIER DISPUTE RESOLUTION APPROACH[27]

50 The flexible, non-mandatory design of the multi-tiered dispute resolution approach appears appropriate, given the diversity of IICs, but its practical operation depends on the choices that the PIICs leave open, on at least the following main points.

1. CHARACTERISATION OF PRE-ARBITRATION STEPS

51 First, and most importantly, the PIICs do not indicate how the consequence of failing to comply with a mandatory pre-arbitration step (negotiation or mediation) should be characterized: as a matter of admissibility of the claim (for the tribunal itself to decide, generally not reviewable by

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

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

the courts of the seat) or as a matter of jurisdiction (reviewable at the seat and at the enforcement stage).[28]

52 National courts and tribunals have taken divergent positions on this question, and the choice has real consequences for the risk of annulment or refusal of enforcement of the eventual award.[29]

53 The commentary might expressly advise the parties to characterize non-compliance as a matter of jurisdiction or admissibility,[30] — rather than leaving the point to be resolved by the 'consequences of non-compliance' language alone, which does not by itself settle the characterization issue.

2. GOVERNING LAW OF THE MULTI-TIER OBLIGATIONS

54 Second, it should be clarified which law governs the obligation to negotiate or mediate in good faith: the law applicable to the contract, the law applicable to the arbitration agreement, or the lex arbitri. These may not coincide, and the consequences of breach (damages, cost sanctions, inadmissibility) may differ accordingly.[31]

55 Furthermore, as provided in most old-generation bilateral investment treaties (BITs), the multi-tiered dispute resolution clause also does not provide any substantive threshold for the exhaustion of good-faith attempts to settle the dispute amicably through negotiation and mediation. If the only determinative requirement is set in terms of the duration of the amicable settlement stage (i.e. 3 or 6 months typical for the 'cooling off' period in old-generation BITs), the opportunity for effective amicable settlement may be missed if one party simply allows the relevant time period to lapse in order to qualify for the arbitration stage.

56 Should the pre-arbitration stage of the multi-tiered procedure be treated as a condition precedent to arbitral proceedings, it may be useful to consider adding such a sub-paragraph to the relevant PIICs provision, to ensure that any potential questions about the fulfilment of this requirement can be assessed against a concrete and defined standard.

57 The PIICs contain no governing-law clause for the substance of the Board's or expert's determination (that is otherwise present in every arbitration-stage Model Clause), in line with the ICC Dispute Board Rules (2015) and the ICC Rules for the Administration of Expert Proceedings (2015), referenced by the Draft Principles.

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

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

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

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

58 This omission is not an oversight and accurately reflects the fact that these mechanisms are contractual creatures interpreting the underlying contract, not autonomous adjudicative regimes. The commentary might add a short explanatory note confirming this reasoning, since a reader who has just encountered the 'law governing the arbitration agreement' bullet in the preceding arbitration-stage clause may otherwise wonder why an equivalent bullet is absent here. However, where the expert's or board's determination is agreed to be contractually binding, the enforceability of that agreement to be bound may itself depend on the applicable law. This is material for investor-State contracts given questions that can arise concerning the delegation of binding decision-making authority away from a State's own courts or tribunals.

59 We suggest the following wording for the commentary to the expert proceedings and dispute board Model Clauses:

'This Model Clause does not include a separate stipulation of the law governing the expert proceeding or dispute board, because such proceedings are contractual in character: the substantive standard applied is that of the IIC's general applicable law (see Chapter 8, Section B), absent contrary agreement. Where the parties agree that the expert's or board's findings shall be contractually binding, they should confirm, under the law applicable to the IIC, that such a delegation of binding decision-making authority to a non-arbitral third party is valid and enforceable, since the enforceability of binding-effect agreements of this kind may vary across legal systems.'

3. SAME PERSON SERVING AS BOTH MEDIATOR AND ARBITRATOR

60 Third, the PIICs do not use or define anywhere in their text the terms 'med-arb' or 'arb-med' (hybrid dispute-resolution techniques combining mediation and arbitration, most commonly where the same neutral acts successively as mediator and then as arbitrator in the same dispute, or where an arbitration is deliberately paused for a mediation attempt before resuming[32]). They address only two partial equivalents: sequential mediation-then-arbitration clauses (Principle 30's multi-tiered Model Clauses), and 'mediation windows' — pre-agreed pauses within an ongoing arbitration to attempt mediation (paragraph 616). The legally sensitive feature of the 'same neutral' variant of med-arb is the risk that a mediator's exposure to confidential settlement communications — including a party's private assessment of case weaknesses shared in a mediation caucus — could compromise that same person's later impartiality as arbitrator. This is why institutional mediation rules commonly restrict a mediator from later acting as arbitrator in the same dispute absent both parties' informed agreement. However, at no stage do the PIICs address the role-continuity question (i.e. the same person serving as both mediator and arbitrator) or the associated confidentiality and due-process safeguards, nor do they name hybrid protocols such as SIAC-SIMC's Arb-Med-Arb.

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

61 We suggest that the commentary to the 'mediation windows' discussion (paragraph 616) be supplemented to flag the role-continuity issue explicitly, along the following lines:

'Where the parties contemplate that mediation during a "mediation window" may be conducted by a member of the arbitral tribunal itself, rather than by a separate mediator, they should be aware that this raises distinct confidentiality and due-process considerations, since a mediator's exposure to confidential settlement communications may affect that person's later impartiality as arbitrator if the mediation is unsuccessful and the arbitration resumes. Institutional mediation rules commonly restrict, or require express party consent to, a mediator's subsequent appointment as arbitrator in the same dispute. Parties wishing to combine mediation and arbitration more closely may also wish to consider institutionalised hybrid protocols developed for this purpose, such as the Arb-Med-Arb Protocol jointly administered by the Singapore International Arbitration Centre and the Singapore International Mediation Centre.'

4. CROSS-BORDER ENFORCEMENT OF MEDIATED SETTLEMENTS

62 Fourth, the reference to the Singapore Convention is useful but incomplete: The commentary should clarify the law applicable to the validity of the settlement agreement itself and should note the Convention's limited scope (it does not cover settlement agreements already enforceable as a judgment or an arbitral award), to avoid parties over-relying on it as a universal enforcement solution.[33] While the parties can agree in the contract to pursue the form and procedure of settlement viable for enforcement under the Singapore Convention, the Commentary should also note the ability of ratifying States to exercise the reservation to exclude contracts involving State parties from the scope of the Convention's application.[34]

63 Therefore, where the law of such a State applies, the enforcement of the mediated settlement arising from the IIC may not be possible.

64 Finally, the PIICs do not provide any mechanism for intra-governmental coordination, while they might encourage governments to establish internal protocols for early identification and management of potential grievances, and suggest appointing a central coordinating authority or inter-agency task force to review contract performance and address emerging issues.

65 This can be accomplished through, for example:

- Documenting the policy and intent behind the conclusion of specific contractual language in each IIC (interpretive and evidentiary negotiation history)

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

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

- Internal government coordination and communication channels to ensure an equal understanding of State commitments in international treaties and IICs aligned with national legislation on foreign investment protection
- Reimagining the dispute resolution framework to extend to the pre-dispute and amicable settlement phases, and negotiating bespoke, multi-tiered 'dispute management protocols' (building on the PIICs multi-tiered dispute resolution framework) which could clearly outline:
- government focal points for early grievance resolution (e.g. Foreign Investment Protection Agencies (FIPAs) or similar bodies), including the relevant contact information
- an inter-ministerial coordination body for the development of settlement proposals in negotiation and mediation proceedings (for issues that could not be resolved at the early grievance stage), ensuring that the competent institutions have the proper settlement authority
- an escalation mechanism for dispute resolution in investment arbitration and the preliminary information exchange framework
- a protocol outlining the concrete sequence, timing, notices, requirements and procedure (express or by reference to existing rules) for the dispute resolution stage.

G. AVOIDING PARALLEL PROCEEDINGS AND WAIVERS[35]

66 This is the area of the PIICs where the interaction between contract law and public international law is most acute, and where further guidance would add the most value.

67 The PIICs seem to treat the waiver of treaty-based investment arbitration primarily as a contractual mechanism, subject to the law chosen under Principle 28. However, this approach understates the analytical complexity of the issue. The validity of such a waiver is also governed by the relevant investment treaty itself and by the standard under international law — as reflected in arbitral case law — requiring a 'clear and unambiguous' renunciation of treaty rights.[36]

68 It is submitted that the commentary should make explicit that the validity of a waiver clause depends on a cumulative test: validity under the law governing the contract, and compliance with whatever conditions the relevant treaty itself imposes on waiver or renunciation of the investor's treaty rights.

69 Presenting the waiver as a single-layer contractual device, as the current Model Clause options arguably do, risks giving parties a false sense of certainty. This is particularly relevant where the

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

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

underlying treaty provides an umbrella clause enabling covered investors to elevate breaches of contractual rights through State measures as a breach of international legal obligations of the State. The interplay of these consequential legal standards and the possibility of their waiver should be considered and addressed in the PIICs.

70 As regards waivers of access to domestic courts,[37] the commentary's general caveat (referring to 'mandatory jurisdiction of local courts in some States') appears insufficiently developed. Such waivers may conflict with constitutional or public-policy guarantees of access to justice that exist in a number of jurisdictions, independently of any express local court mandatory jurisdiction rule. The commentary might consider indicating that the enforceability of such a waiver should be assessed cumulatively against: (i) the law governing the contract; (ii) the law governing the arbitration agreement; (iii) the *lex arbitri*; and (iv) the law of the State(s) where enforcement will eventually be sought. A short practical checklist along these lines — which the drafters of PIICs have already used elsewhere for other issues — could be more useful than a general disclaimer.

71 Finally, the commentary correctly observes that a waiver does not bind non-signatory shareholders or affiliates, and that consolidation may be sought where the applicable arbitration rules permit it.

72 We suggest that this point be more explicitly cross-referenced to Principle 5 (interdependent contracts, discussed above), and that PIICs recommend, as standard practice, that all contracts forming part of a single project cluster carry identical dispute resolution clauses specifically in order to preserve the possibility of consolidation under the chosen institutional rules — bearing in mind that the availability of consolidation itself depends on the lex arbitri and on the rules selected, which the PIICs could usefully identify by cross-reference.

73 For example, the 2022 ICSID Arbitration Rules distinguish consolidation (merging proceedings into a single award, Rule 46(2)) from coordination (aligning procedural steps, such as submissions and hearings, while keeping separate proceedings and separate awards, Rule 46(3)). Coordination is notably more flexible because it can bridge different procedural regimes or even different arbitral institutions entirely. The Draft's Principle 32 commentary should introduce this consolidation/coordination distinction as an additional tool for managing the problem of parallel contract-based and treaty-based proceedings.

74 Principle 27 states the correct substantive rule (no double compensation for the same damage across mechanisms or fora) but relies for its operation entirely on a promissory undertaking between 'the Parties'. There are at least three specific gaps, each with a corresponding drafting suggestion. First, a party's own undertaking not to seek double recovery does not survive the fact that an arbitral award, once rendered, is a freestanding enforcement title that can be assigned to, and independently enforced by, a third party not bound by the original undertaking, and that the tribunal that rendered the award becomes functus officio and cannot supervise compliance.

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

75 The Model Clause should be supplemented with an express instruction that any tribunal seized of a later or parallel claim shall deduct sums already recovered for the same damage in an earlier or parallel proceeding and shall condition enforcement of its own award on evidence that no double recovery has occurred, rather than relying solely on the parties' compliance.

76 Second, the clause does not extend to affiliated claimants — parent companies, shareholders, or related corporate vehicles in the same vertical chain — who might bring a duplicative claim for the same economic harm under a different treaty or a different corporate capacity.

77 We recommend extending both the no-double-recovery clause and the Principle 32 waiver clauses to bind such affiliated entities, to the extent the drafting parties can procure their agreement.

78 Third, a no-double-recovery clause binding only the signatories to a given IIC cannot, by ordinary principles of consent-based jurisdiction, bind a separate State-owned or State-controlled entity that is not a party to that same arbitration agreement, even where that entity is closely connected to the same investment.

79 The commentary should flag that, where the State's contracting structure involves both the State and a separate State entity, the parties should consider either making the State entity a co-signatory to the same no-double-recovery and consolidation provisions or establishing an inter-entity indemnity or contribution mechanism outside the IIC itself.

80 Suggested wording (additional paragraph 4 to the Model Clause under Principle 27):

'Where a tribunal or court is seized of a claim for damage that has already been, or may also be, the subject of a claim in another proceeding, the party bringing that claim shall disclose the existence and status of the other proceeding, and the tribunal or court shall deduct from any award or judgment any sum already recovered, or awarded and enforceable, for the same damage in that other proceeding. This Principle extends to claims brought by, or against, any Affiliate of a Party, including any parent company or shareholder of the investor, and, on the State side, to claims against any State entity connected with the same investment; the Parties shall use reasonable endeavours to procure the agreement of any such Affiliate or State entity to be bound by this Principle.'

H. COUNTERCLAIMS[38]

81 It is commendable that the PIICs aim at combining procedural symmetry (conferring to both the investor and the state equal standing to initiate claims and submit counterclaims), comprehensive scope (by not artificially limiting counterclaims to the subject matter of the original claim, but extending them to all contractual obligations in connection with the IIC, including those related to sustainability, e.g., environmental, labour, human rights[39]) and single forum resolution

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

[39] X. Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law' [2021] 24 Journal of International Economic Law 157-179; S. Faccio,

(i.e. reducing the risk of fragmented or inconsistent outcomes by consolidating all related disputes in one forum).

82 The symmetrical, contract-based architecture of Principle 33 — allowing the State to raise counterclaims, including for breach of sustainability obligations, on an equal footing with the investor's claims — is a genuine improvement on the position generally prevailing in treaty-based investment arbitration. It may, however, be useful to clarify the extent to which, and effects of, the pre-arbitration obligations apply to both the investor and the State, since the capacities and ability to initiate such amicable procedures may be more difficult for States (especially those used to being respondents and appearing from a defensive standpoint, but also in complex, decentralized governments where the relevant approvals for direct negotiation and mediation with private parties may be difficult to obtain within the framework provided under the PIICs). It may be worth including clarifications and additional express guidance for the reciprocal effects of the active standing of both parties to the PIICs.

83 Three main private international law issues warrant further attention in relation to counterclaims.

84 The first concerns the jurisdictional basis for counterclaims grounded in obligations that may themselves be governed, in whole or in part, by rules other than the law chosen under Principle 28[40] — for instance, sustainability obligations (Chapter 5) that may be subject to overriding mandatory provisions or public policy of the host State, or of a third State. The PIICs should clarify whether the tribunal's jurisdiction over such counterclaims depends on those obligations being governed by the same law chosen for the contract, or whether the contractual connection ('in connection with the IIC') is sufficient on its own, independently of the law applicable to the specific obligation invoked.

85 The second concerns the (law governing the) procedural requirements for admissibility of counterclaims (e.g., to be raised within a certain timeframe; what does precisely mean 'in connection with the IIC'? etc.),[41] which might affect the enforceability of model clauses providing for broad counterclaim rights.

86 The third concerns sovereign immunity. The enforceability of awards against States may be limited by sovereign immunity, especially in domestic courts, as States may invoke public policy or

'Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability' [2023] 38 ICSID Review - Foreign Investment Law Journal 625-643; D. Cheng, J. Abhijit Unde and J. Casey Ryan, *Investor Obligations in International Investment Law - South Centre as part of the Geneva Graduate Institute's LL.M. Legal Clinic Programme*, 2024.

[40] A.K. Hoffmann, 'Counterclaims in Investment Arbitration' [2013] 28 ICSID Review 438 ff.; P. Lalive and L. Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' [2011] 2 Czech Yearbook of International Law 141 ff.; A.K. Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' [2013] 17 Lewis & Clark Law Review 461 ff.; *Saluka Investments BV v. Czech Republic,* UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 2007; *Burlington Resources Inc v. Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017); *Urbaser SA v. Argentina*, ICSID Case No ARB/07/26, Award (8 December 2016).

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

constitutional principles to limit or resist enforcement of certain claims or counterclaims.[42] The PIICs would benefit from expressly distinguishing immunity from jurisdiction from immunity from execution or enforcement, which is frequently unaffected by a general waiver or requires identification of specific non-immune assets under that law. Indeed, consent to arbitration will generally preclude a State from invoking jurisdictional immunity in respect of the agreed arbitral proceedings, subject to the applicable law; this does not, however, entail a corresponding waiver of immunity from execution.

87 We recommend that the Model Clause on counterclaims (or the Model Clause on waivers, Principle 32) includes layered waiver language addressing both limbs of immunity separately, together with a note that advance waivers of execution immunity may not be effective in all jurisdictions regardless of the contractual wording used.

88 Furthermore, Art. 55 of the ICSID Convention makes clear that becoming a party to the Convention does not itself waive a State's immunity from execution of an award under its own national law. A separate, carefully tailored waiver of execution immunity is required if the parties wish to address this issue.

89 Therefore, the PIICs could add a short provision on this point, distinct from the forum-waiver provisions in Principle 32.

90 A short point on Model Clauses A and B. Both are drafted as 'This Contract shall be governed by…', and paragraph 589 describes the reach of the applicable law in contractual terms: formation, rights, obligations, remedies and interpretation. Disputes under investment contracts are rarely purely contractual. Claims in tort, in unjust enrichment and for *culpa in contrahendo* are commonly pleaded alongside the contractual claims arising from the same facts.

91 Where a court in a Member State of the European Union is seized, a choice of law for non-contractual obligations made before the event giving rise to the damage is possible only under Art. 14(1)(b) of the Rome II Regulation, which requires that all the parties be pursuing a commercial activity and that the agreement be freely negotiated. Whether a State party contracting in the exercise of public functions satisfies the first condition is not obvious, and Art. 14 does not in any event extend to every non-contractual obligation.

92 We suggest that the Commentary note the point and that Model Clauses A and B offer an optional bracket along the following lines: '[… and any non-contractual obligation arising out of or in connection with this Contract, to the extent permitted by the applicable rules of private international law]'. Parties who want a single governing law for their whole relationship should be

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

prompted to make such express references, and warned that they may not always obtain such effects.[43]

I. MANDATORY RULES AND PUBLIC POLICY

93 As a general rule, the applicable law determines the mandatory rules governing the contractual relationship. However, the PIICs could clarify which legal system determines the application of mandatory rules, including the respective relevance of the law chosen by the parties, the law of the forum, and the law of the place where the investment is carried out. In this respect, the position may differ significantly between arbitration and proceedings before State courts.

94 One observation supports the approach the PIICs take to sustainability issues. The sustainability provisions rest on making obligations contractually enforceable rather than in reliance of public law. Recent developments in European Union law have strengthened that choice. Art. 29(7) of Directive (EU) 2024/1760 originally made the national rules transposing the civil liability provision of overriding mandatory application where the law applicable to the claim was not the law of a Member State.[44] That paragraph, together with the harmonised liability rule in Art. 29(1), was deleted by Directive (EU) 2026/470 of 24 February 2026, and civil liability has been referred back to national law.[45] The conflict of laws route to enforcing sustainability standards across borders has therefore narrowed. That makes the contractual route the PIICs propose more important, and not less.

95 A good example relates to Chapter 5, Model Clause 4.1 (‘Labour standards’) and its commentary (paragraph 358); Introduction, Section I (the corroborative-function discussion, paragraphs 68-70).

96 An international treaty, e.g. a chapter in a free trade agreement on labour relations, may impose binding obligations on a State as a matter of international law, while lacking direct effect in that State's domestic legal order, such that it can typically be enforced only through the treaty's own inter-State dispute settlement mechanism, not by domestic courts, a commercial arbitration tribunal, or by private parties.

97 Model Clause 4.1 requires the investor to follow ‘internationally recognised labour standards enshrined in the International Labour Organization agreements or any other international agreement to which the Government of the Host State is or becomes a party.’ This wording is broad enough to capture the hypothetical FTA labour chapter and effectively sidesteps the direct-effect problem through an ordinary incorporation-by-reference contractual technique. This is an effective tool, but the Draft does not explain why it works, nor does it flag two related risks. First, the clause’s forward-looking language (‘or becomes a party’) automatically incorporates future agreements the investor may not have anticipated at signing. Second, the clause gives no

[43] Regulation (EC) No 864/2007 (Rome II), Arts 14(1)(b) and 12.
[44] Directive (EU) 2024/1760 of 13 June 2024, OJ L, 2024/1760, 5.7.2024, Art. 29(7) as originally adopted.
[45] Directive (EU) 2026/470 of 24 February 2026, in force 18 March 2026; consolidated text CELEX 02024L1760-20260318.

guidance on how an adjudicator should interpret 'standards enshrined in' a treaty whose authoritative interpretation may be separately and differently addressed by the treaty's own State parties (for example through a Joint Committee interpretation) in a parallel inter-State process.

98 Therefore, the commentary to Model Clause 4.1 could be supplemented as follows:

'The reference in this Model Clause to standards "enshrined in" an international agreement operates as an incorporation by reference into the contract. This has the effect that the investor's obligation derives from the IIC itself, and is enforceable through the IIC's own dispute-resolution mechanism, independently of whether the referenced international agreement has direct effect in the domestic legal order of the Host State or is otherwise enforceable only through an inter-State dispute settlement mechanism under that agreement's own terms. Parties should nonetheless be aware that (i) referencing agreements the Host State "becomes" a party to in the future may bind the investor to standards not reasonably foreseeable at the time of contracting, and parties may wish to consider whether such future incorporation should instead be addressed through the stabilisation and renegotiation framework in Chapter 6; and (ii) where the content or meaning of the referenced international agreement is contested, the adjudicator resolving a claim [under this Model Clause] will need to interpret that content independently for contractual purposes, and is not bound by any interpretation the Host State may advance in a separate, inter-State proceeding under the referenced agreement.'

J. INVESTMENT CONTRACT NEGOTIATION AND IMPLEMENTATION: STATE CONSIDERATIONS BEYOND THE FOUR CORNERS OF THE CONTRACT (CLARIFICATIONS AND FURTHER NUANCES IN THE PIICS)

1. GENERAL COMMENTS: THE VALUE OF, AND MEASURES FOR, CONSISTENCY IN INVESTMENT POLICY-MAKING AND INTERPRETATIONS

99 States as contracting parties to investment contracts are in the unique position of placing themselves in negotiations with private investors, concerned only with private economic interest, while balancing a variety of public interests (financial, economic, political, social, as well as climate change and energy transition policies and international obligations).[46] While the PIICs meaningfully contribute to the systemic integration of sustainability standards as contractual obligations,[47] it is important to ensure that they do not become another layer of obligations which cannot be enforced against either party (as explained in the sections below).

100 At the same time, the competent institutions negotiating specific investment contracts are often not aware of other international treaty commitments or investment treaty standards concluded

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

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

by their government, or the broader investment protection framework of the relevant country. This significantly elevates the risks of investment claims filed against the state for acts, omissions, and measures of sectoral or local institutions with direct jurisdiction over the relevant investment project.

101 This is even more challenging in decentralized States with several levels of government operating semi-autonomously, which can mean that the institutions negotiating international treaties, those negotiating investment contracts and those representing the State in international investment disputes are not mutually coordinated, nor do they apply consistent policies and standards to their foreign investment contracts.[48]

Since many developing States are working on expanding their rate of energy production through renewable energy sources, and seeing more sustainable investments, it is of crucial importance to ensure a transparent, balanced and predictable contractual and legal framework to lower regulatory risks and avoid costly ISDS disputes, such as the dozens of RE claims against Spain (in the so-called Spanish Renewables Saga).[49] As case reports from leading international arbitration institutions (such as ICSID) are highlighting the growing rate and significance of contract-based investment claims against States, it is more important than ever to provide viable and predictable models for States to effectively conclude sustainable IICs, and to avoid inconsistencies that could lead to investment disputes.[50]

102 These circumstances highlight the need for certain specific State measures, policy and institutional arrangements to be made in governments seeking to enhance the consistency and coherence of investment protection policies, in order to effectively operationalize and capitalize on much-needed foreign investment in the sectors of key importance for sustainable economic development.[51] When properly designed and implemented, IICs can be leveraged to accomplish a rich mosaic of public and private benefits, while contributing to the strategic direction of the Host State under the applicable domestic and international legal frameworks. The legal and

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

[49] The World Bank and the International Energy Charter, 'Enabling Foreign Direct Investment in the Renewable Energy Sector: Reducing Regulatory Risks and Preventing Investor-State Conflicts' (2023) 13-33 <https://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Renewable_Energy_FDI_Final__032923.pdf> accessed 17 August 2026.

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

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

institutional structures enabling such outcomes are created before the pen hits the paper during contract negotiations. Some of these considerations are outlined below.[52]

103 In order to ensure compliance with investment contracts and to avoid investment disputes (along with their inherent costs, and potential damage awards worth hundreds of million or even billions of USD),[53] it is important that each State maintains consistent investment protection standards across all of its international instruments of consent, from its international investment treaties, foreign investment legislation to its investment contracts.[54] This will ensure the significant modernization of any of these instruments (including those inspired by the proposed PIICs), and prevent potential claimant investors from circumventing the policy restrictions introduced in e.g. modernized investment contracts, through umbrella clauses under unreformed investment treaties with lower standards, which are more favourable to the claimant investor.[55]

104 This would not only perpetuate legal uncertainty and increase the risks of investment disputes, but it would also cancel out the progress governments make through policy and institutional reforms, aligned with their agendas for sustainable economic development.[56] Inconsistent standards can also lead to inconsistent interpretations by the parties and arbitral tribunals, thus endangering the viability of the contractual equilibrium and escalating investment disputes.[57]

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

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

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

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

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

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

2. EXPANDING CONSISTENCY THROUGH THE INSTITUTIONAL AND PROCEDURAL SPECTRUM OF DISPUTE PREVENTION AND MANAGEMENT IN INVESTMENT CONTRACTS

105 The consistency and coherence of treaty/contract interpretation and the resulting outcomes in investment arbitration were also noted as concerns of States which were universal enough to become a staple of the investor-State dispute settlement (ISDS) reform at the UNCITRAL Working Group III (ISDS Reform).[58] However, in light of the procedural focus of this multilateral reform process, the proposed solutions are primarily reserved for the post-award appeals and review of arbitral awards, rather than any pre-emptive policy tools or institutional mechanisms. Thus, each State should invest in developing its internal response systems and safeguards to ensure that its IIC negotiations, implementation and remedies are interpreted correctly by both contracting parties and any potential adjudicator deciding a dispute.

106 The Commentary to the PIICs and particularly the multi-tiered dispute resolution mechanism should highlight the need to expand the dispute resolution spectrum to include the early grievance stage, and include communication roadmaps, focal points and coordination bodies as express contractual remedies for potential disputes.

107 Such a preliminary policy and institutional framework, coupled with clear, balanced and well-defined contractual clauses, can help maximize the benefits of the application of the PIICs.[59] In this sense, it may be useful to expressly mention in the PIICs the need for consistent policymaking across all instruments of consent, as well as the commentary to specific provisions of the PIICs Model Clauses.[60] This would also be aligned with the most recent UNCTAD[61] recommendation for modern investment treaties geared towards sustainable economic development, as well as

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

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

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

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

treaties which are already concluded, including the CETA[62] and the modernized Energy Charter Treaty.[63]

108 Therefore, the PIICs could effectively create a negotiating tool to reaffirm consistency in international investment protection instruments, as channelled through contractual arrangements.[64]

109 Otherwise, and to the extent that the international investment treaty network of a specific jurisdiction remains dominated by unreformed, old-generation treaties which are set in vaguely defined terms, it would be a rare situation where a well-crafted umbrella clause could serve to leverage the PIICs provisions adopted in the contract between the parties, until the investment treaties are modernized as well. Importantly, where the contracting parties have documented their negotiation history, it can serve as a valuable interpretive tool for the parties and the arbitrators in the context of contractual investment disputes, but also as a signal of evolving policy directions of the respondent State.

3. SUBSTANTIVE PRINCIPLES AND MODEL CLAUSES

110 In addition to the framework and procedures for dispute resolution, there is also a number of substantive principles and measures that can be expanded further in the PIIC Model Clauses or in the commentary, to ensure the effectiveness of the substantive provisions of IICs, and to lower the dispute risks. This is particularly important for States in the context of investment claims under the fair and equitable treatment provisions of the old-generation investment treaties, and the legitimate expectation standards.[65]

111 For example, while States are increasingly averse to including stabilization clauses in their more recent investment treaties and contracts, investment arbitration awards have shown that arbitral tribunals have nevertheless interpreted broad treaty language and circumstances surrounding the specific investment project (including representations and assurances by the government) to create the effects of a stabilization clause.

112 Therefore, it is important to ensure that IICs that are aligned with the PIICs and Model Clauses preclude any such interpretations, unless the contracting State intended to expressly agree

[62] The Comprehensive and Economic Trade Agreement between Canada and the European Union (2018) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjMpMr3ta-qWAxXIMVkFHXNwLaAQFnoECBkQAQ&url=https%3A%2F%2Finvestmentpolicy.unctad.org%2Finternational-investment-agreements%2Ftreaty-files%2F5380%2Fdownload&usg=AOv-Vaw1hx9y2AoCvWHKhyF6hv8Tz&opi=89978449> accessed 17 August 2026.

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

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

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

otherwise in the specific IIC, as expressly defined in the contract itself. In the PIICs themselves, for example, the language to this effect can be provided in the preamble, or as a model provision in and of itself.[66]

4. COMMENTS ON THE SUSTAINABLE INVESTMENT PRINCIPLES AND MODEL CLAUSES

113 In relation to the provisions governing sustainability obligations for both the investors and States, it is important to ensure that contractual commitments in this respect should not remain purely aspirational and ultimately non-enforceable for potential breaches by either party. Considering the fact that the existing international instruments are primarily binding on the member States (as confirmed in the landmark ICJ advisory opinion, granting the right to climate change protection as a human right), any desired extension of these duties to the investors will have to be expressly defined and enforced through binding national legislation and contractual remedies.[67]

114 In this sense, the PIICs should ensure that the specific investor obligations that they negotiate for specific IICs are reinforced by regulations, standards and procedures against which the general international sustainability framework (still largely soft law), binding on States, can be properly enforced as a contractual obligation.[68]

115 Otherwise, general references to the applicable international conventions entered into by the State will lead to the circular application of vague and non-enforceable standards which remain binding only among States. In such a scenario, the desired effects of contractual sustainability obligations of the investors would remain out of reach, and ineffective beyond the pages of the contract itself.

116 To the extent the specific jurisdiction has not adopted national legislation or sectoral regulation providing specific sustainable development and public interest obligations of foreign investors, or established Nationally Determined Contributions (‘NDCs’) under the Paris Agreement, which requires the member States to outline and communicate their post-2020 measures and regulations to combat climate change,[69] actionable obligations and remedies for investors can be specified in bespoke mechanisms of the relevant IIC.

117 In such provisions, the contracting parties can incorporate, expressly or by reference, the specific provisions of the international legal instruments, which would otherwise only provide obligations

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

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

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

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

for States, as contractual obligations of both parties. Thus, rather than aspirational and best-effort commitments on either side, the concrete sustainability rules could be enforced and remedied as contractual breaches. The Commentary to the PIICs could clarify and encourage such express contractual language to give effect to the relevant IIC sustainability obligations.

118 An additional benefit would be the avoidance of circular references to non-binding State obligations or soft law, which can create difficulties in dispute resolution proceedings, for determining the applicable law under rules of private international law. In jurisdictions where governments have adopted NDCs with accompanying rules and enforcement mechanisms, these can also serve as a reference point for becoming mutually binding on the State and private investors under the relevant IIC.

119 It is important to bear in mind that, although it is the instinct of State parties, even in contract negotiations with private entities, to approach the balance of interests and powers from their sovereign perspective, the contract should remain a bargain of balanced and mutual rights and obligations of both parties (although it is clear that the State maintains a superior sovereign position and leverage throughout).

120 Considering the fact that the ambitious goals of sustainable development and energy transition require immense contributions of private capital, the normative and contractual burden and transaction risks should not be fully shifted to the investors, to the effect of alienating or dissuading potentially beneficial sustainable investment projects. Therefore, the rights and obligations of both parties should be balanced and enforced with a view towards maintaining long-term benefits from foreign investments in public interest. Such a reference should be expressly stated in the PIICs commentary on negotiating principles.

121 In addition to the benefits during the implementation phase of the investment project, clear and balanced protection standards and robust dispute resolution mechanisms can protect the State against forum shopping in the event of investment claims. Namely, if the investor considers the contractual framework too restrictive and less favourable than the framework of the applicable (old generation) investment treaty, they may initiate investment arbitration based on qualifying their claims as breaches of treaty standards. This is even more likely where the relevant treaty includes an 'umbrella clause' which allows investors to elevate a contractual claim to a breach of the investment treaty. This would not only circumvent the improved substantive standard, but also miss the opportunity to benefit from the multi-tiered dispute resolution mechanism provided in the Model Clauses.

122 Although it is commendable that the PIICs and Model Clauses are constructed in light of the lessons learned from the existing concerns with treaty-based investment arbitration[70] (e.g.

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

expressly protecting the States' right to regulate, the calibration and express carve outs from the most sensitive investment protection standards, such as indirect expropriation and full protection and security, the omission of the broad 'fair and equitable treatment' provision otherwise found in old generation investment protection agreements, etc.),[71] the determinative factor for the effectiveness of future IICs will be their adaptations to the specific parties and project in question. States should take advantage of the benefits of direct negotiations with foreign investors and design the substantive and procedural framework which will carry forward their policy goals as well as the viability of sustainable investment projects. Importantly, by creating a stable and internationally recognized legal framework, the parties will avoid challenging battles under private international law rules in cases of disagreements or disputes arising from the contract.

123 In addition, although the qualifications and limitations to the substantive provisions are meant to reduce the risk of investment claims against the contracting State, the additional language can also cause interpretive issues. The alternative language, replacing vague and broad standards with equally undefined terms, can be counterproductive when applied to concrete matters in dispute. To prevent such an outcome, it may be useful to provide a glossary or definitions of the main terminology in the PIICs and/or Model Clauses, which is intended to carry legal force and effects beyond declarative or aspirational notions (particularly for the provisions and standards matching those in old-generation investment treaties).

124 Should the official commentary to the PIICs serve as the instrument for clarification and policy background for interpretive purposes, binding on the parties and the arbitral tribunals, this should be expressly stated in the PIICs text itself.

125 For these and other considerations outlined above, on both substance and procedure, it may be useful to modify the existing provisions or add 'for the avoidance of doubt' or 'for greater certainty' provisions, which would expressly define the intended scope of the specific provisions, to the exclusion of any discretionary interpretations.

K. LIST OF RECOMMENDATIONS

126 **Recommendation 1: Application in the Absence of a Choice of Law Clause**

The Commentary could clarify the applicability of the PIICs in case the underlying IIC does not provide an express choice of law clause.

127 **Recommendation 2: The Relationship between the UPICC and the PIICs**

The black-letter text itself should make it clearer that a choice of the Investment Contract Principles simultaneously entails the supplementary application of the UPICC, unless the contracting parties opt out of their application in the context of an IIC.

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

128 **Recommendation 3: Interdependent Contracts**

The Commentary should indicate a default interpretive rule/approach (presumption of consistency, the effect utile principle, or a hierarchy-of-contracts default to reduce the risk that formal fragmentation defeats the parties' economic intentions, as Principle 5 itself recognizes may occur (paras. 134-136).

129 **Recommendation 4: Third-party Beneficiary Rights**

The Commentary to Principle 5 should expressly address: (i) whether they intend the UPICC provisions on third-party rights to apply by default under Principle 1(4), or (ii) how a contractual third-party mechanism interacts with rules of the host State protecting the same interests (environmental, human rights, or community-protection legislation) that may qualify as overriding mandatory provisions, applicable irrespective of the law of the IIC.

130 **Recommendation 5: Extension of arbitration agreement to non-signatories**

The PIICs should flag the extension of arbitration agreement to non-signatories as a distinct choice of law question in its own right, and recommend, as a matter of practice, express written consent by all relevant non-signatories (as the draft's own suggested clause already does) rather than reliance on unevenly recognized doctrines.

131 **Recommendation 6: Assignment, step-in rights and succession**

a) The Commentary on assignment (paras. 501-503) should specify which law governs the effects of assignment on third parties separately from the law governing the assigned claim itself, as well as whether, and under what law, an assignee is bound by the dispute resolution clause of the original contract.

b) The cross references in Paragraph 503 of the draft to the assignment of investor claims against the State in Chapter 8 should either be added, or the reference should be removed. If maintained, the provisions should cover separately, the relationship between the assignor and assignee governed by the law of the assignment the effects of the assignment on third parties, and the ability of the assignee to invoke the IIC's dispute resolution clause. The commentary should expressly distinguish between the full effects of the assignment to its parties and to the insolvency practitioner, who is not bound by such limitations.

132 **Recommendation 7: Multi-tiered Dispute Resolution Approach (Principle 27)**

a) The Commentary should expressly advise the parties to characterize non-compliance with the pre-arbitration negotiation and mediation steps as a matter of jurisdiction or admissibility, rather than referring broadly to the 'consequences of non-compliance.'

b) The law governing the obligation to negotiate or mediate in good faith should be clarified to refer to either the law of the contract, the arbitration agreement, or the *lex arbitri*, to avoid inconsistent remedies for breach.

c) If the pre-arbitration stage of the multi-tiered procedure should be a condition precedent to arbitral proceedings, it would be useful to add such a sub-paragraph to the relevant PIICs provision, to provide a defined standard of its assessment.

d) The omission of the law applicable to the Board or Expert determination should be clarified in the Commentary, as a consequence of its dependence on the contractual arrangement between the parties to the relevant IIC.

e) The Commentary on the expert proceedings and dispute board Model Clauses should be adjusted as follows:

'This Model Clause does not include a separate stipulation of the law governing the expert proceeding or dispute board, because such proceedings are contractual in character: the substantive standard applied is that of the IIC's general applicable law (see Chapter 8, Section B), absent contrary agreement. Where the parties agree that the expert's or board's findings shall be contractually binding, they should confirm, under the law applicable to the IIC, that such a delegation of binding decision-making authority to a non-arbitral third party is valid and enforceable, since the enforceability of binding-effect agreements of this kind may vary across legal systems.'

f) The contours of the med-arb and arb-med procedures should be defined to avoid independence and impartiality of the arbitrators, given the sensitivity, confidentiality, due process and risks of bias, should the same person serve as arbitrator and mediator in such hybrid proceedings.

g) The Commentary on the 'mediation windows' discussion (paragraph 616) should be supplemented as follows to expressly flag the role-continuity issue:

'Where the parties contemplate that mediation during a "mediation window" may be conducted by a member of the arbitral tribunal itself, rather than by a separate mediator, they should be aware that this raises distinct confidentiality and due-process considerations, since a mediator's exposure to confidential settlement communications may affect that person's later impartiality as arbitrator if the mediation is unsuccessful and the arbitration resumes. Institutional mediation rules commonly restrict, or require express party consent to, a mediator's subsequent appointment as arbitrator in the same dispute. Parties wishing to combine mediation and arbitration more closely may also wish to consider institutionalised hybrid protocols developed for this purpose, such as the Arb-Med-Arb Protocol jointly administered by the Singapore International Arbitration Centre and the Singapore International Mediation Centre.'

133 **Recommendation 8: Cross-border Enforcement of Mediated Settlements**

a) The Commentary should clarify the limitations of the application of the Singapore Convention (excluded in case of settlement enforceable as court decisions, or arbitral awards under the

New York Convention), and the possible State reservations excluding investor-State mediation from the scope of the Singapore Convention.

b) The Commentary to the PIICs should highlight the need to expand the dispute resolution spectrum to include the early grievance stage and other mechanisms through, e.g.:

   - Documenting the policy and intent behind the conclusion of specific contractual language in each IIC (interpretive and evidentiary negotiation history)
   - Internal government coordination and communication channels to ensure an equal understanding of State commitments in international treaties and IICs aligned with national legislation on foreign investment protection
   - Reimagining the dispute resolution framework to extend to the pre-dispute and amicable settlement phases, and negotiating bespoke, multi-tiered 'dispute management protocols' (building on the PIICs multi-tiered dispute resolution framework) which could clearly outline:
     - government focal points for early grievance resolution (e.g. Foreign Investment Protection Agencies (FIPAs) or similar bodies), including the relevant contact information
     - an inter-ministerial coordination body for the development of settlement proposals in negotiation and mediation proceedings (for issues that could not be resolved at the early grievance stage), ensuring that the competent institutions have the proper settlement authority
     - an escalation mechanism for dispute resolution in investment arbitration and the preliminary information exchange framework
     - a protocol outlining the concrete sequence, timing, notices, requirements and procedure (express or by reference to existing rules) for the dispute resolution stage.

134 **Recommendation 9: Avoidance of Parallel Proceedings**

a) The PIIC and the Commentary should make explicit that the validity of a waiver clause for investment treaty arbitration depends cumulatively on the law of the contract and the treaty conditions for waiver of treaty rights.

b) The enforceability of the waiver of national court proceedings should be subject to the law of the contract, the law of the arbitration agreement, or the *lex arbitri*, in addition to the independent constitutional safeguards for access to justice and due process.

c) The PIICs could recommend as standard practice, that all contracts forming part of a single project cluster carry identical dispute resolution clauses specifically in order to preserve the possibility of consolidation under the chosen institutional rules — bearing in mind that the availability of consolidation itself depends on the lex arbitri and on the rules selected, which the PIICs could usefully identify by cross-reference to Principle 5 (interdependent contracts, discussed above).

135 **Recommendation 10: Parallel Proceedings and Preventing Double Recovery**

a) The distinction between the consolidation and coordination proceedings should be clearly noted in the Commentary as a means to prevent double recovery, complemented by an express PIIC provision to that effect. This amendment should ensure that:

   - any tribunal seized of a later or parallel claim is expressly required to deduct any sums already recovered in respect of the same damage in an earlier or parallel proceeding, and to condition enforcement of its own award on evidence that no double recovery has occurred, rather than relying solely on the parties' compliance;
   - the provisions on double recovery, as well as Principle 32, extend to entities and companies affiliated with the parties, to the extent that the drafting parties are able to procure their agreement; and
   - non-signatory State-owned or State-controlled entities are either made subject to the no-double-recovery provisions as if they were signatories to the IIC, or are covered by a separate indemnity or cost-allocation mechanism applicable between the relevant government agencies and entities.

b) A new paragraph 4 should be added to the Model Clause under Principle 27:

   'Where a tribunal or court is seized of a claim for damage that has already been, or may also be, the subject of a claim in another proceeding, the party bringing that claim shall disclose the existence and status of the other proceeding, and the tribunal or court shall deduct from any award or judgment any sum already recovered, or awarded and enforceable, for the same damage in that other proceeding. This Principle extends to claims brought by, or against, any Affiliate of a Party, including any parent company or shareholder of the investor, and, on the State side, to claims against any State entity connected with the same investment; the Parties shall use reasonable endeavours to procure the agreement of any such Affiliate or State entity to be bound by this Principle.'

136 **Recommendation 11: Counterclaims (Principle 32)**

a) The applicability and nature of the pre-arbitration amicable settlement phase should be clarified, along with guidance on the effects of the mutual right of both parties to initiate claims and counterclaims under principle 33.

b) Three issues of private international law should be clarified: First, jurisdiction over counterclaims subject to applicable mandatory law outside of the IIC framework (i.e. sustainability obligations) as raised 'in connection with the IIC'. Second, the admissibility requirements for the initiation of counterclaims. Third, their subsequent enforceability

c) The distinction between the waiver of sovereign immunity from jurisdiction and the sovereign immunity from execution (which remains subject to domestic law, and as aligned with Article 55 of the ICSID Convention) should be made in the PIICs, distinct from the forum-waiver provisions in Principle 32.

d) The PIICs should expressly preclude the interpretation of any IIC provision as a stabilization clause freezing the contractual and regulatory framework applicable to the relevant IIC.

e) The Commentary to Model Clause 4.1 should be supplemented as follows:

'The reference in this Model Clause to standards "enshrined in" an international agreement operates as an incorporation by reference into the contract. This has the effect that the investor's obligation derives from the IIC itself, and is enforceable through the IIC's own dispute-resolution mechanism, independently of whether the referenced international agreement has direct effect in the domestic legal order of the Host State or is otherwise enforceable only through an inter-State dispute settlement mechanism under that agreement's own terms. Parties should nonetheless be aware that (i) referencing agreements the Host State "becomes" a party to in the future may bind the investor to standards not reasonably foreseeable at the time of contracting, and parties may wish to consider whether such future incorporation should instead be addressed through the stabilisation and renegotiation framework in Chapter 6; and (ii) where the content or meaning of the referenced international agreement is contested, the adjudicator resolving a claim [under this Model Clause] will need to interpret that content independently for contractual purposes, and is not bound by any interpretation the Host State may advance in a separate, inter-State proceeding under the referenced agreement.'

f) Parties wishing to have a single governing law for their entire relationship should be prompted to make such express references and warned that they may not always achieve the desired effect.

g) The Commentary should suggest that the Model Clauses A and B include an optional bracket along the following lines:

'[… and any non-contractual obligation arising out of or in connection with this Contract, to the extent permitted by the applicable rules of private international law].'

137 **Recommendation 12: Cross-cutting policy issues**

a) The modernized and improved substantive and procedural standards in the IICs should be systemically integrated in all instruments of consent (treaties, national legislation) for consistency in policy and procedure.

b) The desired sustainability obligations of the investor and State should be matched with national law rules and procedures for their enforcement, to ensure their effective compliance.

c) To give effect to the parties' international sustainability obligations, the IIC should expressly acknowledge their binding nature and specify the remedies available in the event of non-compliance. This should also be made explicit in the PIICs and reflected in a separate Model Clause.

d) The PIICs commentary on negotiating principles should note that the rights and obligations of both parties should be balanced and enforced with a view towards obtaining the public interest benefits from foreign investments.

e) The PIICs could effectively create a negotiation tool to reaffirm consistency in international investment protection instruments, as channelled through contractual arrangements.

f) If the PIICs are intended to serve as a negotiation and interpretation instrument binding on both the parties and arbitral tribunals, this should be expressly stated in the PIICs text.

g) The relevant clarifications on both substance and procedure can be provided as 'for the avoidance of doubt' or 'for greater certainty' provisions, to limit discretionary space for in-consistent interpretations.