

Aide-mémoire
of the second meeting of the Experts' Group on Carbon Markets
prepared by the Chair

I. Election of the Chair

- 1 The Permanent Bureau (PB) opened the meeting. The Experts' Group on Carbon Markets (EG), by consensus, appointed as its Chair Mr. Eduardo Silva Besa (Ministry of Foreign Affairs, Chile), a delegate representing Chile.
- 2 The EG adopted the draft Agenda.

II. Discussion of Working Document No 1: the Proposal of the delegations of Brazil, Chile and the European Union ("Proposal of Iteration of the Text of Draft Principle 4 of the UNIDROIT Principles on Verified Carbon Credits on Applicable Law as a basis for discussion")

- 3 The delegates of Brazil, Chile, and the European Union presented the rationale behind the Work Doc No 1 proposal, which was submitted ahead of the second meeting for the EG's consideration and to provide a basis for discussion. The delegates emphasised that the proposal was a contribution for an open discussion, with an informal and constructive spirit, to support the EG's coming to consensus on a possible text as part of their contribution to the work of the UNIDROIT Working Group (WG) on Verified Carbon Credits (VCCs). The delegates noted that, in this spirit, the text proposed was, as far as was feasible, either taken or adapted from language already used in the current UNIDROIT draft of Principle 4, including its Commentary.
- 4 The proponents of Work Doc No 1 indicated that the proposal focused on the few issues that were of particular importance to their designating States. Moreover, the proponents indicated that the approach they took was to facilitate the discussion at the HCCH EG with awareness of the limitations resulting from time constraints as a result of the UNIDROIT WG's timeline and intent to complete work by mid-2026. The proposal further aimed to including a consideration of the broad range of policy issues in relation to carbon credits, including relevant project level considerations, the recognition of overriding mandatory rules and the alignment with the obligations under the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement and other related instruments, with the intention to provide a refined scope and a clearer focus on the downstream issues.
- 5 Several EG members thanked the proponents for the proposal and expressed support for the rationale behind it. While acknowledging that the document was a work in progress, several EG members considered that the proposal served as a robust basis for finding common ground within the EG. Some EG members highlighted, on the other hand, that the private international law (PIL) issues being considered in the context of the carbon markets were complex, and that more time should be taken to properly consider these issues.

- 6 EG members agreed that the subject matter under discussion was solely the draft Principle 4. Nonetheless, it was recognised that any consensus arrived at in relation to a contribution to draft Principle 4 would be on the basis of the EG's understanding of certain concepts and definitions and that, were these definitions in the other draft UNIDROIT Principles be adapted or changed, such changes would necessarily impact on any contribution the EG makes on draft Principle 4. It was noted that it would be important, for the integrity of the process, to indicate that any proposal made by the EG to the UNIDROIT WG on draft Principle 4 be expressly premised on definitions that the EG understood at the time of any consensus arrived at on a proposed text.
- 7 The EG proceeded to consider, in a side-by-side comparison, the proposal contained in Work Doc. No 1 as an iteration to the text of draft Principle 4 that shared by UNIDROIT on 10 July 2024.

A. Paragraphs 1 and 2 of the proposal of iteration of the text

- 8 The EG discussed at length the use of the terms “recognised” in relation to the registry, “maintained”, and “secondary markets”, noting that these terms were not defined and could cause confusion by their use in proposed paragraphs 1 and 2. There was also debate on what the intended scope of the applicable law rule in draft Principle 4 would comprise, including what precisely the term “secondary markets” within the carbon markets means, and whether the delimitation of the scope of draft Principle 4 to “secondary markets” was an accurate reflection of what the EG intended that draft Principle 4 should apply to.
- 9 There was agreement within the EG that the draft Principle on applicable law should be confined to the matters pertaining to downstream, in order to avoid unintentionally touching on matters that go beyond these transactions, such as those at the project level. In this regard, the EG discussed the text in paragraph 4.4. of the Commentary of the draft UNIDROIT Principles, which noted the UNIDROIT WG's intention to carve out project level issues from the scope of its final set of Principles.
- 10 Some EG members noted the proponents' choice of the connecting factor (i.e., *lex registri*) and queried the reason for choosing this connecting factor instead of others. One EG member voiced their designating State's policy position in relation to party autonomy, expressing the view that it should be possible to include, as an option, a choice of law clause. Another EG member also raised concerns in relation to the use of the term proprietary “law”, noting that it was still within square brackets in the draft Principle 4 shared by UNIDROIT.

B. Paragraph 3 of the proposal of iteration of the text

- 11 Concerning the term “creation” in the original text of draft Principle 4 as circulated by UNIDROIT, and the suggestion in Work Doc No 1 to remove the “creation and extinction of proprietary rights in VCCs” from the scope of applicable of draft Principle 4, the EG agreed that it was a broad concept that could unintentionally cover issues that are established from the beginning of the project.
- 12 EG members agreed that the examination of PIL issues encompassed a consideration and analysis of both public and private issues, including, for example, regulatory matters and matters relating to forum shopping. Some EG members also expressed the need to have PIL rules that are easy for courts and legal practitioners to apply.
- 13 The EG agreed on a preference for concentrating the applicable law rule in a single objective connecting factor, without prejudice to an option for party autonomy.
- 14 Some EG members expressed concerns about including the “content and effects” of proprietary rights in the scope of the draft Principle 4. One EG member gave an example concerning the circumstance in which a carbon project needed to be halted and the consequences of this circumstance on existing VCCs. A number of issues were raised in relation to the revocation of VCCs, and the EG agreed that there was a link between what happened in the project phase and its impact on the credit in such cases.

- 15 The EG also discussed the matter of cancellations, The EG questioned whether, particularly in the case of revocations, there was the possibility to compel a registry to conduct certain activities concerning VCCs. The EG noted that, at PIL, the issue could be addressed by using different techniques, either via the harmonisation of applicable law rules, or via rules relating to jurisdiction and enforcement. Draft Principle 23 on enforcement, which had been circulated for consideration by the UNIDROIT WG, was brought to the attention of the EG.
- 16 The participants from UNIDROIT indicated that several preliminary matters were excluded from draft Principle 4, including all project level considerations, and that matters such as revocations were being dealt with in separate draft Principles. The participants from UNIDROIT stated that the issue for discussion was solely in relation to private law and private parties, and that the discussion should be confined to that perspective.
- 17 The EG examined the definitions under draft Principle 2 of the UNIDROIT Principle and noted that those definitions were still subject to change. EG members expressed concerns about having different laws applicable to *ex ante* credits (which are excluded from the scope of the work of UNIDROIT) and as opposed to the law applicable to VCCs.

C. Paragraph 4 of the proposal of iteration of the text

- 18 The EG discussed the proposed addition of a new provision to draft Principle 4 to expressly caveat any applicable law rule in draft Principle 4 to the overriding international obligations under the UNFCCC, the Paris Agreement and its related instruments and outcomes. Several EG members expressed their agreement with the importance of the inclusion of this provision and the EG agreed to do so.
- 19 The participants from UNIDROIT indicated that their work was premised on the distinction and separation between the compliance and voluntary carbon markets, and indicated that the draft UNIDROIT Principles only applied to credits in the voluntary markets. EG Members, however, highlighted the convergence between such markets, including within the mechanisms under the Article 6 of the Paris Agreement, as well as the use of credits from the voluntary markets in fulfilment of the international obligations arising from the UNFCCC and the Paris Agreement.
- 20 One EG member, speaking on behalf of their designating State, further noted that this provision constituted a non-negotiable safeguard to host States in the application of the draft Principles and emphasised States' obligations under international law. Other EG members, speaking on behalf of their designating States, expressed full support for this view. The participants from UNIDROIT reiterated that they consider that this was outside the scope of the project, which was agnostic to Article 6 of the Paris Agreement. The participants from UNIDROIT stated that it would not be coherent to include reference to the UNFCCC and the Paris Agreement mechanisms in the UNIDROIT Principles, given UNIDROIT's focus on the private schemes.
- 21 The Chair clarified that the private sector also contributes to the achievement of Paris Agreement goals. He brought the attention of the EG to the recent work of the UNFCCC Secretariat in which a taskforce was set up to study and review how voluntary markets are considered in the standards of environmental accountability. He stressed that the private sector is a key player in climate mitigation strategies to advance Paris Agreement goals.
- 22 An Observer asked the EG which part of the Paris Agreement would have implications in relation to the scope of draft Principle 4, which was limited to proprietary law issues. In response to the question, the EG agreed that private law cannot be insulated from other areas of law. In that regard, another Observer noted that it was usual practice for HCCH work to include compatibility clauses and that such clauses were considered very helpful to ensure non-fragmentation with other applicable international law frameworks. An EG member raised the matter of authorisations for Article 6 of Paris Agreement purposes as an example for the necessity of considering the provisions

of the Paris Agreements in the context of proprietary law issues. The EG, therefore, agreed that it was necessary to keep the proposal of text mentioning overriding international obligations under the UNFCCC and the Paris Agreement.

D. Paragraph 5 of the proposal of iteration of the text

- 23 The EG expressed support for an express reference to the host State in relation to the text relating to a competent forum considering the public policy and overriding mandatory rules in making its decisions. One EG Member further indicated that stronger language in reference to the rules of the host State may be necessary, and proposed the replacement of the clause “may give effect” with “shall give effect”.
- 24 In the context of relevant overriding mandatory rules of the host State of the underlying carbon project, the proponents of the Work Doc No 1 also raised a number of domestic and international obligations, including regional Conventions and the ILO 169 Convention and obligations concerning Free, Prior and Informed Consent (FPIC).

E. Paragraph 6 of the proposal of iteration of the text

- 25 After discussion, the EG agreed that, if connecting factors change, the applicable law would not change, but that this draft rule was not intended to have prospective effects.
- 26 In the context of this provision, EG members discussed the issue of party autonomy, which could, depending on how the drafting was structured, solve the matter of changes and allow the parties to choose whether to allow a change in the applicable law or not.

F. Paragraph 7 of the proposal of iteration of the text

- 27 While agreeing that the scope of draft Principle 4 should be limited to downstream activities, one EG member expressed concerns about the exclusion under “c” (underlying project activities), noting that it could bring unintended consequences and possible fragmentation of the applicable law rules. This EG member also expressed concerns of conflicting provisions with the HCCH 2006 Securities Convention.
- 28 In relation to the exclusion of “insolvency”, the EG acknowledged the work of UNCITRAL in this area and the need to ensure no fragmentation of Principle 4 from other frameworks, either existing or currently under consideration.
- 29 The participants from UNIDROIT indicated that keeping security rights and insolvency within the scope of application of draft Principle 4 was crucial to the UNIDROIT Principles, in order to ensure that it would address all the proprietary issues arising from VCCs. The participants from UNIDROIT stated that, otherwise, the UNIDROIT Principles would have little value.
- 30 Another EG member raised the issue of custodians, and queried whether custody arrangements should be included in the scope of draft Principle 4. The EG member also asked whether both the common law and equitable doctrines of property would fall within the scope of “proprietary law” issues in the draft UNIDROIT Principles. This EG member further raised the issue of transactions in which VCCs are sold as a bundle, the consequences of such transfers, and whether a single law should apply. Another EG member noted that custody arrangements were complex and would raise many questions of PIL, noting that much more time would be necessary to discuss the matter.
- 31 One EG Member expressed that items “b. (entitlement to generate or claim VCCs)” and “c. (the law governing the underlying project activities, including land-use, community rights, indigenous rights, or human rights)” listed under the draft paragraph 7 of the proposal could be enhanced further in terms of drafting.

- 32 The EG agreed that, given the many and complex issues that must be discussed in relation to the principle on applicable law, including considerations relating to jurisdiction and recognition and enforcement, any submission made by the EG to the UNIDROIT WG should include in its text an express provision listing what it specifically does apply to, and what it does not. The principle on applicable law should take into account the fact that there are other international legal frameworks, including binding international and regional instruments in force, already established, for example, international contracts, secured transactions, collateralisation, securities, insolvency, agency etc.

III. Proposal from the UK

- 33 Following the discussion on Work Doc. No 1, the delegation of the UK presented a proposal for further drafting iterations to the text initially proposed by the delegations of Brazil, Chile, and the European Union in Work Doc No 1.
- 34 The delegation of the UK presented the rationale for the drafting iterations being suggested, in particular regarding the option to allow the parties to a transaction the choice of law first and the reference to a “registry agreement for the account on which the VCC is held” in relation to that choice of law. The UK also presented the reasons for restructuring the order of the text in the draft under discussion.
- 35 One EG Member raised a question about using the term “domestic law” against the background of PIL drafting techniques and matters pertaining to *renvoi*. The UK delegation acknowledged the point being made and agreed to the deletion of the word “domestic”.
- 36 The EG then engaged in a discussion about revocations. The EG agreed that this issue was crucial to understanding of the role of host States, the link between what happens on the ground and the impact of such events on the ground with the relevant credits, and that there should be a balance between the interests of private parties and the need for States to be reassured in relation to their public policies and applicable domestic legal frameworks.
- 37 The participants from UNIDROIT reiterated that their UNIDROIT Principles concerned purely private matters, and in respect to cancellations, only the proprietary effects of it. Therefore, to UNIDROIT, no considerations in relation to the UNFCCC or the Paris Agreement, or any public international law obligation on States, should be included in the text of the UNIDROIT Principles on VCCs.
- 38 The EG engaged on a discussion about whether the matter of revocations would be a substantive law issue (as opposed to a matter for PIL) and whether the link to the VCC would be direct or indirect. The EG noted that there were different techniques to address this issue. Some EG members suggested that the market would provide a solution for the issues raised by revocations (and so the issue of revocations may not need an applicable law rule to resolve it). According to these EG members, if industry stakeholders do not put in place a viable model to deal with such revocations, their business model would not be viable (the “market approach”). Other EG members however indicated that any solution addressing revocations must also reflect the policy positions of States, and should go beyond the “market approach”.
- 39 The EG also discussed practical issues as to how judgments rendered in a host State may travel across borders, including how these judgments could be recognised and enforced in another jurisdiction with frameworks to safeguard rights that the legislation of the host States had originally intended to protect. The EG agreed on the importance of this matter, and further agreed that any applicable law rule should not create a situation in which the regulatory or other aspects of national law could be circumvented.

IV. Intermediate transmission from the HCCH Experts' Group on Carbon Markets to the UNIDROIT WG on VCCs

- 40 With a view to addressing several concerns discussed during the meeting, and with the aim of coming to a text that could be accepted by consensus, the delegations of Brazil, Chile, the EU, Malaysia and the UK proposed a proposed consolidated text. The proposed consolidated text was circulated to the EG as Discussion Doc No 2 of 9 October (p.m.).
- 41 The delegation of the EU (in their personal capacities) submitted text proposed as iterations to the text in Discussion Doc No 2 of 9 October (p.m.) and Work Doc No 2 (see Section V below). This text was circulated to the EG as Work Doc No 3. These proposals were discussed (and in some cases adopted) in a line-by-line reading of both documents by the EG.
- 42 The EG engaged in a line-by-line reading of the proposed consolidated text. Basing their discussions on the proposed consolidated text, the EG agreed by consensus on a text to be submitted as an intermediate transmission to the UNIDROIT WG in relation to the applicable law provision to be contained in draft Principle 4, in fulfilment of the initial focus of the EG's mandate.
- 43 The text that the EG agreed to by consensus reads as follows:

SECTION II: PRIVATE INTERNATIONAL LAW

Principle 4

Applicable law

- (1) This Principle applies to relevant proprietary [law] matters relating [directly] to—
- a) the issuance (including its first creation or entry on the registry on which it is held) onto and the removal (through retirement or transfer) of that VCC from the registry on which it is held, including the content of proprietary rights in that VCC;
 - b) the circumstances in which a person may hold or use proprietary rights in [such a] VCC, including the circumstances in which [those] proprietary rights in [such a] VCC may be validly transferred to another person; and
 - c) the third-party effects of a transfer of such a proprietary right in a VCC.
- (2) The relevant proprietary [law] matters are governed by—
- a) [the law of the State expressly chosen in the registry agreement for the account on which the VCC is held; the registry operator and the holder of the VCC may at any time agree to choose a law other than that which previously governed the above proprietary [law] matters, whether as a result of an earlier choice made under this subparagraph or in accordance with subparagraph (b);
 - b) absent a choice in accordance with subparagraph (a),] [the law of the State where the registry operator for the registry on which the VCC held had its statutory seat or, in the absence of such a seat, its central place of administration, at the time of the issuance (*lex registri*).]
- (3) This Principle is without prejudice to, and shall be applied in conformity with, the United Nations Framework Convention on Climate Change, the Paris Agreement, and their related instruments and outcomes.
- (4) Courts [may][shall][must] refuse the application of a foreign law designated under this Principle where it violates their public policy (*ordre public*). Courts may also give effect to overriding mandatory rules of the forum, and [may][shall][must] give effect to overriding mandatory rules of other States, including, notably, the host State of the underlying carbon project, which apply independently of the otherwise governing law.

- (5) The relevant proprietary [law] matters relating to a VCC subject to this Principle do not include—
- a) those related to the carrying on of any underlying carbon mitigation project, including land-use, community rights, indigenous rights, or human rights, [related directly to that VCC];
 - b) the recognition of VCCs for compliance or regulatory purposes;
 - c) [applicable law in insolvency proceedings];
 - d) contractual rights and obligations arising from agreements relating to VCCs [, including sales or account agreements]; and
 - e) other matters not directly relevant to proprietary matters.
- (6) This Principle is subject to other applicable international and supranational frameworks, for example, in relation to the law applicable to security rights.
- (7) For the purposes of this Principle, “law” means the law of a State or the law of a territorial unit of a State. The application of such a law means the application of the rules of that law other than its rules of private international law.

44 The EG also agreed that, at the bottom of this text, an express statement should be made to specify that the terms as used in the iterated text presented above is based on the definitions contained in the 10 July 2025 text of the draft UNIDROIT Principles on the Legal Nature of Verified Carbon Credits, as listed.

V. Chapeau on the iterated text to be submitted to the UNIDROIT WG

- 45 The delegation of Singapore (in their personal capacities) proposed a suggested text for a chapeau to cover the iterated text of draft Principle 4 to be submitted to the UNIDROIT WG, which was circulated to the EG as Work Doc No 2. The delegation of Singapore (in their personal capacities) presented their proposal as contained in Work Doc No 2.
- 46 The delegation of Singapore (in their personal capacities) highlighted that several topics needed more time for multilateral consultation and in-depth discussion, including matters relating to party autonomy, the preference for one or more objective connecting factors, and any and which objective factors should be included in the applicable law rule. Some delegations supported this view, indicating that the topic of party autonomy included policy issues and was connected to the concern about asset fragmentation. The EG agreed on the need to consider limitations to party autonomy, particularly in light of potential issues that may arise from the underlying carbon project. There was consensus in the EG that these topics needed to be carefully explored before the applicable law rule is adopted.
- 47 The EG agreed by consensus to the proposal to add the text suggested by the delegation of Singapore, with some language adjustments and the insertion of a non-exhaustive list of caveats (as outlined in the Section below). The text, which would be headed “Comments from the HCCH Experts’ Group on Carbon Markets on Draft Principle 4”, would serve as a reminder that the transmission to UNIDROIT was an intermediate work-in-progress at this stage, and expressly note that, for certain issues that require discussion and consultation at the multilateral level, more time is necessary for proper consideration before a final applicable law rule is arrived at.

VI. Position of HCCH Members

- 48 EG Members agreed by consensus to submit the intermediate transmission to the UNIDROIT Secretariat, with the following non-exhaustive list of issues that will require more time for multilateral discussion and consultation:

- a) whether the connecting factor(s) should be anchored on the registry, or on a different and broader conception of party autonomy. In that regard, paragraph (2)(a) of the Annex, which is square bracketed, prioritises party autonomy as a connecting factor, and reflects concerns including that, in a market where holders of VCCs are free to choose where their credits are held, the former may risk concentrating registry use within a limited number of jurisdictions, which could risk wider development and distribution of registry infrastructure and services. It is intended to be a place-holder for questions on (i) whether a choice of law should be given effect as the relevant applicable law, (ii) what limits, if any, should be placed on such a choice, (iii) the safeguards required to protect the interests of third parties, (iv) the effect of a supervening choice of law; and (v) the law to govern issues relating to the existence, validity and interpretation of a relevant choice of law;
- b) if anchored on the registry, whether there should be only one connecting factor, or options for different connecting factors;
- c) what connecting factor(s) should apply to proprietary rights in VCCs held by a custodian;
- d) whether different applicable law rules are needed for the matters excluded under paragraph (5) of the proposed iterated text, and if so, what those should be; and
- e) whether to address in draft Principle 4 the situation where the impossibility of the project to achieve its intended carbon mitigation benefits for reasons related to the host State law may result in the cancellation of the relevant VCCs, and/or whether it should be addressed through other private international law techniques or whether it should/can be addressed through other methods. This includes whether the following text should be included as a specific provision:
 “The proprietary rights in a VCC are deemed to exist subject to the condition that the underlying carbon mitigation project remains in compliance with the overriding mandatory rules of the host State concerning land tenure and indigenous rights, as applied under Principle 4(4).”.

49 EG members agreed to include several terms in square brackets in the iterated text. These square-bracketed terms represent terms and issues that would require further discussion within the EG, and are so indicated to expressly show that EG members did not have a position on the use of these terms as yet. The EG expressly noted that the inclusion of the various terms in square brackets does not indicate that the EG accepts their use in the text that will comprise any Principle adopted in the UNIDROIT Principles. The term “proprietary law” was therefore left in square brackets, as well as the terms “may”, “shall” and “must”.

50 The EG agreed that, (a) in order to ensure non-fragmentation from other frameworks already established or ongoing work at other Organisations, and (b) in light of the close coordination and cooperation between the HCCH and UNCITRAL in particular, that the text it puts forward to UNIDROIT should exclude “applicable law in insolvency proceedings”, as that work is currently being considered by UNCITRAL’s Working Group V. Moreover, the EG also agreed to exclude from the text being put forward to UNIDROIT any asset-specific rules for VCCs where there is an established private international law framework in place, for example, where the HCCH 2006 Securities Convention, or UNCITRAL’s Model Law of Secured Transactions, would apply.

51 The EG agreed that it would only submit a draft iterated text of Principle 4 as a basis for ongoing discussions, with the Comments as described in para 48 above, but without accompanying text by way of commentary on the draft iterated text.

52 The EG further agreed that it puts forward a possible alternative to the draft text of Principle 4 of the UNIDROIT Principles in an attempt to clarify as well as simplify, while noting that the EG will continue to discuss and work on the applicable law rule or rules for proprietary issues in respect of carbon credits. The EG moreover agreed that these are important issues to not only get right, but

also to get buy-in for from HCCH Members and their stakeholders. This proposed iterated text is conveyed to UNIDROIT at this juncture so that UNIDROIT can take the preliminary suggestions into account in determining the way forward for its work on draft Principle 4.

VII. Technical roundtable

- 53 The EG heard a presentation by Dr Wei-nee Chen, Head, Carbon Markets, Bursa Malaysia Bhd, on an “Introduction to Bursa Malaysia – Exchange”. Together with Dr Chen, the following colleagues from Bursa Malaysia Bhd then took questions from the EG on the presentation: Karen Ong Su Wern (Corporate Legal), Ali Imran (Group Corporate Strategy), and Muhammad Sahel Nordin (Shariah & Governance).

VIII. Next Steps

- 54 The EG agreed that text would be transmitted by the PB to the UNIDROIT WG on VCCs via the UNIDROIT Secretariat in mid-October. The UNIDROIT WG will be requested to provide any comments and / or questions that they may have to the HCCH EG’s suggested text by mid-November.
- 55 If the UNIDROIT WG has comments and / or questions on the EG’s suggested text, the HCCH EG will discuss these at its third meeting, scheduled to take place on Tuesday 2 to Thursday 4 December 2025. The EG will aim to come by consensus to a final suggested text for the draft UNIDROIT Principles at the end of its third meeting, which the PB will transmit to the UNIDROIT WG on VCCs for consideration ahead of its seventh session to take place from Wednesday 17 to Friday 19 December 2025. This final suggested text will constitute the HCCH’s contribution to the possible inclusion of an applicable law provision in the draft UNIDROIT Principles, in line with the mandate of the HCCH EG.
- 56 The EG expressly noted that the extent to which the EG will be able to support the applicable law provision in the final version of the UNIDROIT Principles will depend on the reaction of the UNIDROIT WG to the text and concerns raised by the EG.
