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HCCH Experts' Group on Carbon Markets:

Experts' Group consensus position on the current text of the applicable law provision in the draft UNIDROIT Principles on the Legal Nature of Verified Carbon Credits

1 The Experts' Group (EG) expresses its appreciation to UNIDROIT for its valuable work and engagement and for the transmission of the Comments and the iteration of draft Principle 4 prepared in response to the EG's October 2025 intermediate transmission.

2 In the spirit of engagement and having discussed the proposals from UNIDROIT, recalling that the EG's mandate covers private international law issues arising across the upstream, midstream, and downstream segments of the carbon markets, the EG considered a number of sensitive issues. The EG concluded, by consensus, that at this juncture, it is not in a position to support the current text of draft Principle 4, or its underlying policy approaches. The sensitive issues discussed, and also the underlying policy approaches considered, are set out in the Aide-Mémoire. Further, the EG considers that the issues raised, and the discussion set out in the Aide-Mémoire will require additional in-depth and inclusive multilateral consideration and consultation.

3 The EG considers that with this statement, it has fulfilled its mandate in respect of its initial focus on the possible inclusion of an applicable law provision in the draft UNIDROIT Principles on the Legal Nature of Verified Carbon Credits. The EG has thus asked the Permanent Bureau (PB) to convey this position in a formal and public manner, both in writing and through a brief statement at the next meeting of the UNIDROIT Working Group. Thereafter, the EG has suggested that the PB step back from its current role in the work with UNIDROIT on this issue.

4 The EG considers there is value in continuing its work on the holistic study of private international law issues arising in the carbon markets, including on jurisdiction, recognition and enforcement, international cooperation mechanisms, as well as applicable law rules. The EG will recommend to CGAP the continuation of its study, with the participation of relevant international organisations, including UNIDROIT.

[Extract from]
Aide-mémoire
of the third meeting of the Experts' Group on Carbon Markets prepared by the Chair

[…]

II. General Issues and Approaches Underpinning an Applicable Law Rule in draft Principle 4

A. Integration with the international climate regime

3 The EG raised concerns about UNIDROIT's decision not to expressly include text relating to international climate regimes in the black-letter text of the draft Principles (whether in Principle 4 or elsewhere), as the EG had suggested in its intermediate submission to UNIDROIT. The EG by consensus agreed on the need to acknowledge expressly in the draft Principles the role and underlying policy objectives of the public international law frameworks established in relation to climate change and other environmental law. One EG member raised the question of whether the starting point of any applicable law rule that is drafted should be based upon by the public international law treaties relating to climate change and environmental law. Other members underscored the value of a high-quality and inclusive multilateral exchange on this matter. The EG highlighted that sufficient time will be essential to enable an in-depth and comprehensive consideration of the issues, and that such deliberations should not be compressed into an unduly accelerated timeline.

B. Link between the carbon project and the carbon credits issued from that project, including any proprietary rights to those carbon credits

4 The EG proceeded to discuss the link between the upstream and downstream segments of carbon markets, including whether, and to what extent, there is or should be a link between the carbon project in question and the carbon credits issued from that project, including any proprietary rights to those carbon credits. While the EG acknowledged that such a link exists, some EG members queried whether private international law (PIL) would be the appropriate vehicle to address issues arising about this link. One participant questioned whether the applicable law rule could, as a matter of scope, govern this issue. Other participants, however, emphasised that PIL rules cannot be viewed in isolation from the international regimes and public policy frameworks within which carbon markets operate, recalling that carbon credits are not simply regular commodities or financial instruments, but instruments designed to advance the climate objectives reflected in the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, and related public international law instruments. As such, these participants noted that any carbon credits issued from a project, including the proprietary rights to those credits, would be inextricably linked to factors relating to the carbon project upstream. In light of the divergent views expressed and the complexity of the matters to be examined, the EG agreed by consensus that additional time would be required for further discussion.

1. Legality of a carbon project

5 The EG turned to examine the potential implications, if any, that a determination of illegality of a carbon project by a court or other competent authority, for example, a finding that the project infringes human rights, environmental rights, land rights, or the rights of indigenous peoples or local communities, or is otherwise inconsistent with the mandatory rules of the host State, may have for proprietary rights in a carbon credit. For the purposes of this discussion, the EG proceeded on the assumption that, depending on the law governing proprietary rights in a credit, the illegality of the underlying project could, in principle, constitute a basis for revoking, and thus cancelling, the credit.

6 From a private international law perspective, the EG identified several questions raised by this scenario, including:

a. **Jurisdiction:** which State or States have courts or other competent authorities empowered to determine the legality of a project;

b. **Applicable law:** which law governs the assessment of a project's legality, and how that law interacts with the law applicable to proprietary rights in credits derived from the project;

c. **Recognition and enforcement:** under what conditions a judgment or administrative determination on project illegality should be given effect in another State, including where a party were to rely on the judgment or determination to seek the cancellation of the credits concerned.

7 The EG also noted that additional matters may arise in connection with the above, such as: how parallel proceedings in two or more States concerning the legality of the same project or the implications for the related credits should be managed so as to avoid conflicting outcomes; and whether, and in what form, cooperation, for instance through the exchange of information, may be facilitated between authorities in different States seised of proceedings concerning the same project and/or credits.

2. Reversals/revocations/cancellations

8 The EG then returned to the question of revocation in the context of the link between a carbon project and the credits it generates. Participants highlighted the importance of considering issues such as fraud, project illegality and invalidity claims, and their interaction with other elements of the draft UNIDROIT Principles. UNIDROIT provided clarifications on the processes of reversal and revocation as conceived in the draft UNIDROIT Principles, drawing particular attention to draft Principle 10, and noted that draft Principle 4 addresses only the proprietary aspects of the verified carbon credit (VCC) as defined and does not extend to the grounds for revocation, the application of which, in UNIDROIT's view, will likely be based on factual determinations.

9 The EG noted, from an applicable law perspective, that the discussion gives rise to two separate but interconnected issues: first, which law governs the grounds for revocation, and second, which law governs the effects of revocation on proprietary rights. It was observed that the former issue precedes the latter, and it would therefore be important to focus initially on the grounds for revocation. It was also noted that the resolution of these issues will depend on the domestic laws and regulatory frameworks of different States. The EG agreed that priority should be given to examining the PIL questions concerning grounds for revocation as a preliminary matter, although some members expressed reservations regarding this approach.

10 One participant referred to the potential revocation of an ITMO authorisation under Article 6.2 of the Paris Agreement and raised questions about the subsequent effects on the credit in light of draft Principle 4 of the UNIDROIT Principles. The EG's discussion focused on how such a revocation

would safeguard the sovereignty of the host State concerned. It was recalled that the overarching purpose of the draft UNIDROIT Principles is to support the mobilisation of climate finance, and the EG considered whether the proprietary rights recognised under the draft UNIDROIT Principles would reinforce international obligations arising under Article 6.2. A critical question was whether the withdrawal of an ITMO authorisation by a State would automatically affect the proprietary status of the associated carbon credit.

11 The EG also considered the challenges that may arise from the differing approaches to revocation and proprietary rights taken by host States, registries, and holders of carbon credits, particularly in situations where these actors do not share the same view. Participants noted that such divergences in approaches could generate tensions between State sovereignty and the expectations of buyers, registries, and other market participants, giving rise to classic PIL questions concerning conflicting applicable laws. After discussion, no solution was identified at this stage by the EG. The examples discussed by the EG illustrated that each actor may act under its own jurisdiction, resulting in a lack of global uniformity and, in turn, limiting the potential for decisions to be recognised and enforced across borders.

C. Policy values on the applicable law rule and the balance between actors

12 One EG member invited the EG to reflect on the type of legal infrastructure that would be necessary to support the responsible growth of carbon markets. Some EG members expressed caution about espousing a solely market-growth approach and questioned how such an approach could be reconciled with the broader objectives of the Paris Agreement, underscoring the need for a holistic approach. It was noted that failure to consider these concerns could create confusion, conflict, and undermine legal certainty, generate questions about the integrity of the credits on the carbon markets, and ultimately impede the growth of the carbon markets. Another EG member highlighted the need for clarity on the extent to which the concerns of project host States should be taken into account.

13 On one hand, some EG members emphasised the importance of features such as transferability and fungibility of credits in enabling the carbon markets to scale effectively. On the other hand, other EG members noted the need to balance these considerations with situations where an underlying project is found to be non-compliant, and to ensure appropriate regard be given to the role and interests of the States in which the projects are located. The EG agreed by consensus that these policy questions require careful and inclusive multilateral discussion. Members emphasised that achieving an appropriate balance among the various actors and stakeholders in carbon markets is essential not only for scaling the markets, but for ensuring that such scaling takes place with integrity and responsibility.

D. Party autonomy

14 One EG member suggested that greater emphasis could be placed on party autonomy, noting that many of the issues under discussion are likely to arise in a contractual rather than a proprietary context. Another EG member expressed a preference for the applicable law rule on proprietary matters to rely on a single connecting factor based on the place of the registry. A third EG member indicated reservations regarding this approach and indicated that additional time would be required to consider this matter in appropriate depth.

E. Consensus position of the EG (closed session)

15 The Chair *pro tempore* conveyed the request of several EG members, made pursuant to the HCCH Rules of Procedure, to move to a decision-making process in closed session (limited to members designated by HCCH Members). The EG, acknowledging that other members supported the request, and wishing to allow members to express their views and concerns, proceeded to a closed session.

16 In closed session, the experts designated by HCCH Members discussed the consensus position on the current text of the applicable law provision in the draft UNIDROIT Principles on the Legal Nature of Verified Carbon Credits. The EG concluded by consensus that, at this juncture, it is not in a position to support the current text of draft Principle 4, or its underlying policy approaches. After a line-by-line reading, the EG agreed by consensus on a text for transmission to UNIDROIT. The transmission will include this *Aide-Mémoire*, that discusses the sensitive issues and the underlying policy approaches that informed the decision of the EG.

F. Discussion on the way forward

17 The EG discussed its next steps with respect to the two principal deliverables at this stage; first, the preparation of input to be transmitted to UNIDROIT; and second, formulating a recommendation to CGAP on the future work of the EG.

18 At the request of the Secretary General of the HCCH, the PB provided an update on recent oral discussions between the Secretaries General of the HCCH and UNIDROIT. The Secretary General of UNIDROIT indicated that, although UNIDROIT currently envisages adopting its draft Principles on VCCs in May 2026, additional time could be considered, if necessary, to enable the EG to provide further input on draft Principle 4. In that event, the adoption date could be postponed to December 2026, in the interests of continuing cooperation between the two Organisations and working toward a solution acceptable to both.

19 The EG agreed by consensus to respond to UNIDROIT at this stage and also to invite UNIDROIT to consider replacing the current text of draft Principle 4, or any applicable law rule, with a placeholder provision in its draft Principles on VCCs, and to invite UNIDROIT to continue participating in the EG as an Observer. The EG further agreed by consensus to pursue its holistic study of PIL issues arising in the carbon markets, without being bound either by UNIDROIT's internal timeline or by any decision UNIDROIT may take in relation to the content, text or approach to its draft Principles on VCCs. The EG also agreed by consensus that any decision taken by UNIDROIT would not affect the EG's continued ability to advance its work.

G. Reopening of the session to Observers

20 At the instructions of the Chair, the PB read the paragraph reflecting the conclusion of the closed session (para. 16 above), as agreed by the EG, for the benefit of all the Observers who had rejoined the meeting.

21 Following the reading, UNIDROIT sought clarification on whether the EG intended to provide further feedback to the UNIDROIT Working Group on VCCs or whether cooperation was coming to an end. The Chair clarified that, by consensus, the EG suggested that the PB should step back from its current role in UNIDROIT's work on the applicable law provision. The Chair noted that the EG's text that will be transmitted to UNIDROIT leaves open the possibility of future engagement. The Chair further explained that this *Aide-Mémoire* would reflect the substantive and policy considerations underpinning the EG's conclusion that it is not, at this stage, able to support the current text of draft Principle 4.

H. EG members' input and comments to UNIDROIT in relation to the current text of draft Principle 4

22 The EG agreed by consensus that it could be helpful to share comments with UNIDROIT which, at that point, had not been included in the Aide-Mémoire by discussing them in the room and, where appropriate, reflecting them in this *Aide-Mémoire*, without prejudice to the EG's earlier consensus that it is not able to support the current text of draft Principle 4 or its underlying policy approaches.

23 In this context, one EG Member noted the following four points relating to the current text of draft Principle 4:

a. Concerning VCCs held by custodians, this EG Member had reservations about the law of the custody agreement applying to all questions of proprietary rights in a VCC held by a custodian. For proprietary issues affecting third parties, this EG Member's view was that the *lex registri*-based rule seemed more appropriate.

b. Concerning security rights, this EG Member expressed a preference for the approach proposed by the EG and transmitted to UNIDROIT in the EG's intermediate transmission of October 2025. This approach would subject the proposed *lex registri*-based rule to applicable international and supranational frameworks in relation to the law applicable to security rights. It was further noted that where the VCCs are held by a custodian and security interest is taken over such VCCs, it is not clear whether the applicable law in paragraph (8) of UNIDROIT's current draft Principle 4 would prevail over paragraph (7) of the same.

c. Concerning insolvency-related proceedings, it was noted that issues of priority and the extinction of security rights in insolvency-related proceedings should be governed by the *lex fori concursus* and not paragraph (7) of UNIDROIT's current draft Principle 4. This EG member's understanding was that this outcome is achieved by the scope exclusion in paragraph (2)(d) of the current draft Principle 4.

d. On the scope of proprietary issues governed by draft Principle 4, in lieu of the catch-all approach in paragraph (1) of the current text of draft Principle 4, this EG member suggested that a 'white-list' approach would avoid inadvertently capturing proprietary issues that should be governed by a different applicable law rule. Equitable interests under common-law legal systems were cited as one example.

24 Another EG member requested clarification from UNIDROIT on whether, under draft Principle 4, the priority of claims would be determined in a situation where a project developer becomes insolvent before a credit is formally registered, or whether proprietary rights arise only after the credit had been issued and registered. Another EG member noted that, under the current formulation of the draft UNIDROIT Principles, proprietary rights could not arise in the situation described since for the purposes of the Principles the VCC only exists upon its issuance on a registry. UNIDROIT provided comments on both the questions and the feedback described in paras 23 and 23d.

25 At the request of the UNCITRAL Secretariat, the PB conveyed a message noting that UNCITRAL Working Group V's current project on applicable law in insolvency-related proceedings will also cover issues relating to VCCs. UNCITRAL then took the floor to confirm that the colleagues servicing UNCITRAL Working Group V remained ready to discuss any insolvency-related questions with the EG delegates.

III. UNIDROIT's statement on day 3 of the meeting (4 December 2025), and the EG's discussion

This part of the Aide-Mémoire reflects statements and discussions that took place chronologically after the conclusion of the Technical Roundtable.

26 The Chair gave the floor to the representative of UNIDROIT, who made the following statement (in full transcript below):

> [...] I wanted to greet all of you for the discussion and also in agreement with our Secretariat, to reiterate that we fully understand the importance of the Paris Agreement and the other international agreement frameworks. At the same time, I must acknowledge that we may have underestimated their importance for this group, perhaps because within

the UNIDROIT we are working on a soft law instrument, not even a model law or guidelines, and therefore, assuming that binding state obligations would remain intact and unaffected by our project. Our draft clearly states that the principles are intended to provide guidance for states wishing to align their private laws with best practice and international standards on verified carbon credits, of course. Consequently cannot, even conceptually, affect the framework or binding obligation for enacted state. We ensure that drafting committee at the Working Group of the project are deeply sensitive to this matter. We fully recognise that the international climate framework is the indispensable context for understanding the precise meaning of mitigation, adaptation and cooperation as they relate to state obligation. We share the concern raised, raised by some states here and elsewhere that the private law framework must be coherent with the public international law framework, therefore I'm here to reiterate that the Working Group of UNIDROIT will address this matter explicitly by incorporating the references to these instruments in the principles in a manner suggested by you, by this expert group, namely I quote "These principles are without prejudice to, and shall be applied in conformity with United Nation Framework Convention on Climate Change, the Paris Agreement and their related instruments and outcomes." I am quoting the iterated principle furnished by you at the end of the last session. This allows an actual state to have a general guideline, strike a balance between the public and private interest in carbon market financing and transaction. Regarding the specifically the drafting of Principle 4, we originally felt it necessary to preserve coherence and balance across the entire set of principles. Once it was understood that the compliance and subordination close to the Paris Agreement and so forth would be emphasised at the outset of the principle, principle one or the introduction, we considered slightly redundant to repeat. But, nevertheless, this approach remains open to reconsideration by the Working Group, even when it comes to Principle 4. This, ultimately, is the approach we intend to pursue as our works move on. As regards the grounds for revocation, for instance, and I suppose that we will touch upon those issues and why, and the potential illegality associated with them, we consider that these issues are already implied to the reference of mandatory provisions, mandatory rules, consistent with the doctrine of illegality of performance. But again, still, we are prepared to say something more, in this respect, to make issues clearer, in this respect. I cannot repeat what you heard yesterday. Hearing of your withdrawal was bad news for us, of course, but we sincerely hope you may reconsider your position in the cooperative spirit, reflected in my, this, qualification, the qualification coming from the Secretariat. In any event, UNIDROIT project will move on and with a sort of this revision approach that I have just explained. Thank you so much." [...]

27 The EG broadly welcomed the update and the shift in UNIDROIT's position as stated in para 26 above. EG members noted that the update usefully recognises the need to align PIL concerns with the evolving international climate and environmental law framework. Several EG members underlined the importance of reflecting this need in the Aide-Mémoire and in any future iterations of the text of the draft UNIDROIT Principles on VCCs.

28 The EG also reaffirmed that the consensus decision taken in relation to the current text of draft Principle 4, and its underlying approaches, remains unchanged. The EG appreciated the flexibility shown by UNIDROIT and noted that this flexibility provided space for continued dialogue once UNIDROIT is able to make a revised text available.

29 The EG underscored a number of critical issues, such as the potential implications of project illegality on proprietary interests in carbon credits, require deeper examination across the full range of PIL considerations. The EG agreed to keep channels of communication with UNIDROIT open by reiterating its invitation to UNIDROIT to continue participating in the EG's work. The EG concluded that it would continue to advance its outstanding agenda items in accordance with its prior conclusions.

30 [...]