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Item No. 7 on the agenda: Update on certain high-priority projects on the 2023-2025 Work Programme

(a) UNIDROIT Principles of International Commercial Contracts and Investment Contracts

(prepared by the Secretariat)

<i>Summary</i>	<i>Update on the joint UNIDROIT-ICC Institute project on the UPICC and International Investment Contracts</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of progress</i>
<i>Mandate</i>	<i>Work Programme 2023 - 2025</i>
<i>Priority level</i>	<i>High</i>
<i>Related document</i>	<u>UNIDROIT 2022 - C.D. (101) 21</u> ; <u>UNIDROIT 2022 - A.G. (81) 9</u>

I. INTRODUCTION

1. In 2022, the Secretariat received a proposal for a joint project between the International Chamber of Commerce's Institute of World Business Law (ICC-IWBL) and UNIDROIT on investment contracts, for inclusion in the 2023-2025 Work Programme. The proposal aimed at exploring how international investment contracts (i.e., contracts between States, or their controlled entities, and private foreign investors) could be modernised, harmonised, and standardised, particularly in light of the UNIDROIT Principles of International Commercial Contracts (UPICC) and ICC standards, with a view to address—at the contractual level—a number of developments in the area of international investment law in the last decades, such as the increasing role of corporate social responsibility and sustainability standards in investment treaties, the lack of uniformity of arbitral decisions, and the call for greater transparency. The project would seek to strengthen the contractual framework for international investments by accounting for such developments at the contractual level in a uniform way (e.g., by means of a Legal Guide and/or a supplement to the UPICC, possibly combined with model clauses).

2. On 7 June 2022, the Secretariat, together with the ICC-IWBL, organised a Workshop on Transnational Law and Investment Contracts, during which the possible project was discussed with a group of experts in international arbitration and contract law. The Workshop considered developments in international investment law and confirmed the need for guidance at the contractual level.

3. At its 101st session (Rome, 8-10 June 2022), the Governing Council agreed on the importance of the topic and, considering the strong support expressed by Council Members, decided to recommend including the preparation of an instrument on International Investment Contracts in the 2023-2025 Work Programme as a high-priority project ([UNIDROIT 2022 - C.D. \(101\) 21](#)). The General Assembly, at its 81st session (Rome, December 2022), followed the Governing Council's recommendation and included the project in the new Work Programme of the Institute for the 2023-2025 triennium ([UNIDROIT 2022 – A.G. \(81\) 9](#)).

II. FIRST STEPS FOR THE IIC PROJECT

4. While considering the proposal for the 2023-2025 Work Programme at its 101st session, the Council agreed that, with its current resources, six constituted the maximum number of projects the Institute could manage simultaneously. In the first months of 2023, six projects were already ongoing. Nevertheless, the Secretariat—strengthened by a new Senior Legal Officer on secondment from the government of Italy—took first steps towards commencing the project on International Investment Contracts (IICs).

5. Consistent with the high level of priority, the Secretariat prepared a preliminary draft Issues Paper aimed at identifying topics that a future Working Group might wish to consider regarding the scope and content of the future instrument. This included aspects of “core” contract law in the investment context, such as pre-contractual issues, the role of legitimate expectations and investor due diligence, stabilisation and adaptation clauses, hardship and force majeure, compensation and damages, and dispute resolution, along with other key issues, such as the possible contribution of IICs to sustainable development and other emerging policy objectives, and the involvement of small and medium-sized enterprises in global investments. The paper also considered preliminary issues for discussion between the project partners, concerning (inter alia) methodology, the type of instrument, the relationship with the UPICC, and coordination with the UNIDROIT-IFAD Legal Guide on Agricultural Land Investment Contracts. The Secretariat shared the preliminary draft Issues Paper with the ICC-IWBL ahead of their first joint, preparatory meeting (see below).

6. A first preparatory meeting between UNIDROIT and the ICC-IWBL took place at the seat of UNIDROIT on 17 February 2023. The project partners discussed in detail the composition of the future Working Group, considering that it should be duly balanced in terms of (i) experience and expertise (in international investment law and contract law, with experts from the academic world and from the public and private sectors); (ii) geographical origin; (iii) legal systems (common and civil law); and (iv) gender. The joint project had attracted great interest in the international investment law community and would therefore be sure to count on the participation of leading experts from all over the world. Furthermore, it was agreed to invite a number of relevant international organisations to participate in the Working Group as observers. As to the costs for the project, the ICC-IWBL clarified that while it would gladly host sessions of the Working Group, experts proposed by the ICC-IWBL would need to cover their own expenses. The project partners also discussed the relevance of arbitral awards for this project and the terms on which the ICC-IWBL could make relevant awards available on an anonymised basis. Moreover, an initial discussion on the scope of the project and the possible content of the future instrument took place, based on the preliminary draft Issues Paper.

7. A second preparatory meeting between UNIDROIT and the ICC-IWBL was held on 12 April 2023 at the ICC-IWBL headquarters in Paris. On that occasion, the project partners finalised the list of Working Group members and observers. The discussion then turned to the scope of the project, and the possible form and contents of the future instrument, based on a revised version of the draft Issues Paper. The draft Issues Paper recalled the recent developments in international investment law - with a specific focus on the trend to incorporate public policy goals (e.g., relating to climate change and corporate social responsibility) in international investment agreements - and highlighted the increasing potential relevance of international investment contracts, also given the need to

specify vague treaty norms and address legal uncertainty deriving from the lack of uniformity in arbitral decisions.

8. Among the preliminary issues for discussion were the interplay between international investment law and investment treaties, on the one hand, and international investment contracts, on the other; the type of instrument to be developed (taking into consideration that the Governing Council at its 101st session had expressed a preference for a self-standing instrument rather than a revision of the UPICC); and the target audience (while the primary addressees of the future instrument would be expected to be States and investors, other stakeholders may include e.g., local communities, subcontractors, employees, and the society at large). Regarding the scope of the project, one of the issues for discussion concerned whether to develop a definition of 'international investment contract' or whether to define the scope in an alternative manner (e.g., providing examples of types of investment contracts and their specific features). Concerning the contents of the future instrument, issues for discussion concerned how to address matters of applicable law (e.g., by developing a model choice-of-law clause); pre-contractual issues; rights and obligations of the parties; non-performance and remedies (with a focus on the UPICC provisions on hardship and force majeure in the investment context); options for reflecting public policy concerns at the contractual level (e.g., by developing guidance and model clauses on possible due diligence, reporting and/or monitoring obligations of private investors); and dispute resolution (e.g., developing guidance on how to improve dispute resolution clauses taking into account the recent criticisms to investment arbitration and Investor-State Dispute Settlement mechanisms).

9. During the second preparatory meeting, the project partners also discussed the methodology for empirical research on arbitral awards by a person designated by the ICC-IWBL, and the organisation of the work during the project. Given the very broad interest generated by this project, it was discussed that it may be useful to establish informal, thematic Subgroups to conduct work in-between sessions of the future Working Group. Furthermore, setting up a Steering Committee would allow the Working Group to obtain guidance and input from national and regional stakeholders (see Part III below).

10. Both meetings between the UNIDROIT Secretariat and the ICC-IWBL described in this section were part of the preparatory work for this project, ahead of the actual start of the project with the establishment of a Working Group on International Investment Contracts, if authorised by the Governing Council.

III. NEXT STEPS

11. The first session of the Working Group on International Investment Contracts is planned to be held at the seat of UNIDROIT between 23 and 25 October 2023. It is anticipated that the future instrument would be developed over at least five in-person sessions of the Working Group between 2023 and 2025.

12. In light of the significant amount of interest this project attracted, the Secretariat in cooperation with the ICC-IWBL is considering enhancing the structure for this project by setting up a Steering Committee, in addition to the establishment of a Working Group on International Investment Contracts. Such Committee would allow for wider participation of experts, ensuring that national and regional sensitivities and realities are considered throughout the project. Similar to the Steering Committee on Digital Assets and Private Law, this Steering Committee would have a consultative capacity.

IV. ACTION TO BE TAKEN

13. *The Governing Council is invited to take note of this update on the progress made towards the joint UNIDROIT-ICC Institute project on the UPICC and International Investment Contracts. In particular, the Governing Council is invited to: (i) authorise the Secretariat to establish a Working Group on International Investment Contracts; and (ii) grant the Secretariat flexibility to establish a Steering Committee (or similar) if deemed convenient.*