



# UNIDROIT

International Institute for the Unification of Private Law  
*Institut international pour l'unification du droit privé*

## **The UNIDROIT Principles and International Investment Contracts**

**Law and Development Program  
The International Institute  
for the Unification of Private Law  
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# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

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**(I) Background of the project**

**(II) Format of the future instrument**

**(III) Main project contents (the Issues Paper)**

**(IV) Discussion**

# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

## (I) Background of the project

### ► Proposal by the ICC/IWBL (2022)

“exploring how international investment contracts (IICs), i.e. “contracts between States, or their controlled entities, and private foreign investors could be modernised, harmonised, and standardised, particularly in light of the UPICC and ICC standards, with a view to address a number of developments in the area of international investment law”

### ► Preparatory meetings

- Workshop on ‘Transnational Law and Investment Contracts’ (June 2022)
- Governing Council (June 2022) and General Assembly (December 2022) approval with high priority
- 2 meetings in February and April 2023
- Establishment of a Working Group
- Drafting of an Issues Paper to delimit the scope and trigger discussion

# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

## (II) Format of the future instrument

### ► Legal Guide

- The UNIDROIT/FAO Agricultural Land and Investment Contracts (ALIC) Guide (2021)
- Pros: extensive guidance on how to draft a contract, including giving more context, handling the essentials of negotiation and tackling sensitive issues with more open-ended text
- Cons: lacking a uniform text which the parties may directly apply to or incorporate into the investment contract

### ► List of principles with comments

- Possible model: the Principles of Reinsurance Contract Law (PRICL) of 2019 (restatement)
- Pros: they may offer a direct, uniform and balanced normative solution (UPICC adaptation/combination with IIL)
- Cons: they may be more difficult to agree on/take more time
- Guidance on context and negotiation in more extensive comments or a separate document

### ► Both formats would consider the drafting of model clauses (mandate)

# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

## **(III) Main contents of the future instrument (Issues Paper)**

### ► Preliminary issues

- Objectives and purposes (response to crisis of IIL)
- Overall structure three-layered (UPICC, rules from investment contracts practice, principles of IIL and recent public policy trends)

### ► General Scope

- Do we need a definition of IICs?

### ► Examples of possible contents of the future instruments

- Legal framework and applicable law (choice of law clauses, IIL/public policy goals)
- Examples of possible IIL principles (FET/LE) or traditional investment contract clauses addressed by the instrument (standstill, stabilization, adaptation)
- Examples of UPICC addressed by the instrument (gross disparity/hardship)

# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

## (I) Preliminary issues

- Objectives and purposes (response to crisis of IIL)
  - Criticisms by the full spectrum of stakeholders (investors, States, civil society)
  - Lack of uniformity in interpretation by arbitral tribunal ('fragmented' legal basis, lack of 'institutionalisation' and 'centralised interpretation', 'conflicts of interests' and 'lack of transparency', 'high costs')
  - States exit from the BITs system (expiration/non-renewal) and reduction of safeguards
  - Treaty reform: lacking ISDS/arbitration, regulatory power (lessening of guarantees)
  - Investment operations leaning in favour of investors and elites not leaving any advantage on the ground/not having any impact in the field, or having a negative impact on local communities, workers and SMEs (including violations of human rights)
  - New public policy goals in IIAs/BITs (CSR, sustainability, labour standards, human rights, responsible investment, SMEs)
  - Expectations of increasing relevance of contracts: UNIDROIT/ICC project as a response (balancing the need for international uniformity with new public policy demands)

# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

## (I) Preliminary issues

- ▶ Complexity of legal sources applicable to IICs: IIL and transnational law (internationalised/transnationalised contracts)
  - IIL (IIAs/BITs): does IIL apply to IICs (background law/mandatory v. default rules)? Complexity of the issues (depending on IIAs language/contract language, scope and covered investment definition, umbrella clauses, choice of law and dispute settlement, use of public power)
  - Protection of IICs in pre-BITs arbitration ('contract-based' IIL system): from internationalised/transnationalised contracts (economic development contracts) to investment-importing countries objections and subsequent 'de-internationalisation' (generalised preference for national law)
  - A new balance: can a more articulated corpse of transnational law rules (UPICC/rules from contract practice/principles of IIL) be combined with national law to offer a uniform and balanced normative solution (incorporating both concerns by investors and new public policy demands) to govern IICs ?

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## (I) Preliminary issues

- ▶ Possible role of the UPICC as a 'transnational body of rules' for IICs
  - Assessing the UPICC against most common contractual terms in IICs and failures to perform to provide adaptation (how freedom of contract or hardship apply)
  - Application of the UPICC to IICs widely reported: form of contract, non-performance, choice of law, good faith and fair dealings, inconsistent behaviour, common intention of the parties, duty to achieve a specific result v. best effort, quantification of damage, set-off, applicable law, hardship, liability exemption clauses, force majeure
  - The need to take stock more widely of their application (due to limits imposed by confidentiality agreements)
  - Providing guidance and the adaptation of the UPICC found to be more relevant to investment contracts for each relevant topic



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## (I) Preliminary issues

► Adding special principles of IIL (combination with the UPICC like the PRICL) and emerging public policy standards in IIAs/BIT

- Can IICs address public international law standards (preliminary issue 'the legal relationship between IIL and IICs')? If so:
- IICs model clauses may help to give content and meaning to general clauses in IIAs/BITs

Examples: principles and clauses addressing FET and legitimate expectations (e.g., providing more formalised guarantees in written form that may interact with established FET/LE arbitral jurisprudence)

- Re-balancing 'transnationalisation with public policy concerns': clauses addressing public policy standards and making commitments more clear and specific vis-à-vis mostly vague IIAs/BITs standards (best efforts or more peremptory language in IIAs)

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## (II) Scope of the instrument

- ▶ Do we need a definition of investment contracts?
  - Alternatives: (i) definition (ii) description/list of examples (iii) no description/definition
  - “contracts or a bundle of related contracts (i) negotiated, concluded and executed between a State (or a State-owned entity, agency or subdivision) and a private foreign investor (or a local subsidiary of a foreign investor) that (ii) tend to relate to the establishment and operation of a lasting economic activity in the host State with a high exposure to risk, not merely speculative but implying a substantial commitment to the economic development of the host State by the foreign investor”
  - Definition in the Code for Arbitrators (ICSID/UNCITRAL) to be taken into account

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## **(III) Contents of the instrument**

- ▶ Table of contents/structure and sub-topics
  - List of definitions of legal concepts familiar to IICs
  - Structure of the UPICC-PRICL/ALIC Guide
  - UPICC-PRICL: list of adapted principles plus restated principles and rules of the relevant sector
  - ALIC: aggregated areas (parties, legal framework, precontractual issues, formation of contract, validity, rights and obligations, non-performance and remedies)

# UNIDROIT/ICC JOINT PROJECT ON THE UPICC AND INTERNATIONAL INVESTMENT CONTRACTS

## **(III) Contents of the instrument**

- ▶ Legal framework and applicable law (guidance or principle)
  - 'choice of law' of paramount importance to apply the UPICC as a uniform 'transnational' body of rules along with special principles of IICs and IIL principles to IICs
  - Combination of the UPICC (or the adapted version) and national law as a balanced solution (i) by designation (ii) by incorporation
  - Are there other approaches?
  - Formulating a model clause on 'choice of law' pointing at the UPICC (the adapted version) and other legal materials?
  - Should the final instrument also valorize other uses of the UPICC (interpreting or supplementing the application of transnational and national law)? The PRICL example

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## (III) Contents of the instrument

- ▶ Pre-contractual issues: freedom of contract (guidance or principle)
  - parties are free to choose with whom to stipulate and what to stipulate (article 1.1 UPICC)
  - the principle ensures 'nothing is agreed until everything is agreed', but unfair behavior in the pre-contractual phase may be assessed against 'good faith and fair dealing' principles (UPICC art. 1.7)
  - freedom of contract might be limited because of peremptory rules on procurement, rules on State aid, special rules applying to State-owned enterprises (SOEs) or investors financed by third States, and intersections with the expanding golden power discipline
- ▶ Pre-contractual issues: fraud or threat, gross disparity (guidance or principle)
  - duress and improper influence against the UPICC principles in art. 3.2.5 and 3.2.6 respectively on 'fraud' and 'threat')
  - unbalance between the agreed obligations (unjustifiably excessive advantage for one of the parties) against the UPICC principle in art. 3.2.7 on gross disparity

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## (III) Contents of the instrument

- ▶ Hardship and force majeure/restoring the financial equilibrium (guidance or principle)
- IICs are long-term contracts regulating a complex network of long-lasting activities with a higher risk of unforeseeable events that may affect the performance, or alter the economic equilibrium (change of circumstances)
- Increasing language in IIAs aimed at preserving States' regulatory space in case of change of circumstances
- Typically, private investors require States to stipulate stabilization/standstill clauses, that freeze the legal treatment of the investment at the date of conclusion of the contract, but more and more include adaptation/renegotiation clauses
- Hardship' clauses come into play when a performance under a contract is not impossible, but the commercial equilibrium of the contract has been significantly altered/force majeure when the unforeseeable event make the performance impossible (uneasy distinction)
- Examination of the relevance of the UPICC principle on hardship in arts. 6.2.1-6.2.3 to IICs is relevant, or may determine overlap with established principles? Are there substantive concept we may use?
- UPICC principle on hardship provides for renegotiation to restore equilibrium and, lacking an agreement, resort to court (adaptation to IICs: arbitration and wider room for renegotiation)
- Relevance of the 'fait du prince' (exercise of public power)

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## **(III) Contents of the instrument (to conclude)**

- ▶ Principles special to IICs practice and IIL (guidance or principle)
  - Standstill/stabilization clauses in IICs
  - Principles and clauses affecting FET/LE
  - Qualifying disputed principles and rules of IIAs/BITs (cooling off periods)
  - Principles and clauses affecting public policy standards in recent IIAs/BITs
  - Compensation and damages (standard clauses on calculation of compensation, liquidated damages, set-off in case of counterclaims)
  - Dispute resolution [model clause on arbitration, adhesion to codes on conflicts of interests, transparency rules allowing for (partial?) awards circulation/as a functional mechanism for 'harmonisation']

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## **(IV) Hints for discussion**

- ▶ Theory and practise of transnationalisation of contracts/public policy goals (acceptability)
- ▶ UPICC as 'applicable law' to IICs (compatibility with national laws and special principles and rules of IICs and IIL)
- ▶ Freedom of contract and intersection with national laws on exploitation of natural resources, golden power disciplines, public procurement
- ▶ Expanding 'room for manoeuvre' for renegotiation/adaptation as a mean to restore equilibrium in case of change of circumstances (compatibility with national laws and international practice)



# Thanks!

Any question or comment  
please write to

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