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Item No. 5 on the agenda: Update on certain high-priority projects on the 2023-2025 Work Programme

(c) 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 the progress of the project</i>
<i>Mandate</i>	<i>Work Programme 2023 - 2025</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<u>UNIDROIT 2022 - C.D. (101) 21</u> ; <u>UNIDROIT 2022 - A.G. (81) 9</u> ; <u>UNIDROIT 2023 - C.D. (102) 13</u> ; <u>UNIDROIT 2023 - C.D. (102) 25</u> ; <u>UNIDROIT 2023 - A.G. (82) 11</u>

I. INTRODUCTION

1. The purpose of this document is to update the Members of the Governing Council on the progress of the project on the UNIDROIT Principles of International Commercial Contracts (UPICC) and International Investment Contracts (IICs). After briefly recalling the background of the project (Section II), it provides information on the establishment of a Working Group and a Consultative Committee for this project (Section III), the first two Working Group sessions (Section IV), and envisaged next steps (Section V).

II. BACKGROUND

2. The project on the UPICC and IICs aims at developing guidance on how contracts between States (or their controlled entities) and private foreign investors could be modernised and standardised. It explores the interaction between the UPICC and common provisions in IICs, and seeks to address at the contractual level a series of developments which has occurred in the area of international investment law over the last few decades, in particular the decreasing level of protection

for foreign investors, the lack of consistency in arbitral decisions, the increasing role of corporate social responsibility and sustainability standards, and the call for greater transparency.

3. The project was proposed by, and is undertaken in cooperation with, the International Chamber of Commerce's Institute of World Business Law (ICC-IWBL). Upon recommendation of the Governing Council at its 101st session in June 2022 ([C.D. \(101\) 21](#)), the project was included in the 2023-2025 Work Programme with high priority ([A.G. \(81\) 9](#)).

4. In the first months of 2023, preparatory meetings took place between UNIDROIT and the ICC-IWBL to discuss the composition of the future Working Group on IICs, the relevance of contract and arbitral practice, and the possible scope and content of the future instrument, with a view to draft an Issues Paper to frame the areas for discussion. The Governing Council, at its 102nd session (May 2023), took note of the preparatory work that had been conducted by the Secretariat ([C.D. \(102\) 13](#)) and authorised the Secretariat to establish a Working Group. Furthermore, it granted the Secretariat flexibility to establish a Consultative Committee in addition to the Working Group, to allow for a wider participation of experts, ensuring that national and regional sensitivities and realities be considered throughout the project, and to increase transparency vis-à-vis UNIDROIT Member States ([C.D. \(102\) 25](#)).

III. THE WORKING GROUP AND THE CONSULTATIVE COMMITTEE

5. Following the mandate provided by the Governing Council at its 102nd session, a Working Group on IICs was established by the UNIDROIT Secretariat in cooperation with the ICC-IWBL. The Working Group is co-chaired by Ms Maria Chiara Malaguti (President of UNIDROIT) and Mr Eduardo Silva Romero (Chair of the ICC-IWBL Council) and consists of 24 individual experts in the fields of contract law and international investment law.¹ Individual experts participate in a personal capacity and represent different legal systems and geographical regions.

6. In addition, seven international and regional organisations participate in the Working Group as institutional observers.² Participation of these organisations will ensure that different regional perspectives are taken into account in the development and adoption of the future instrument. It is also anticipated that the observer organisations will assist in the promotion, dissemination and implementation of the instrument once it has been adopted.

7. Moreover, in light of the very broad interest generated by this project, a Consultative Committee was established, chaired by Governing Council Member Mr José Antonio Moreno Rodriguez. The Consultative Committee is composed of experts appointed by 27 Member States.³ Its main objective is to provide the Working Group with advice, comments and relevant information from a national and/or regional perspective. The Consultative Committee is expected to start its work following the third Working Group session.

¹ Please see [UNIDROIT's webpage on International Investment Contracts](#) for the list of individual Working Group experts.

² International Centre for Settlement of Investment Disputes (ICSID); International Institute for Sustainable Development (IISD); International Law Association (ILA); International Law Institute (ILI); United Nations Commission on International Trade Law (UNCITRAL); United States Council for International Business (USCIB) Trade and Investment Committee; United Nations Conference on Trade and Development (UNCTAD).

³ By Note Verbale of 18 September 2023, all UNIDROIT Member States were invited to consider appointing maximum two experts to the Consultative Committee.

IV. THE FIRST TWO WORKING GROUP SESSIONS: A SCOPING EXERCISE

8. The first session of the Working Group on IICs took place between 23 and 25 October 2023 at the seat of UNIDROIT and was attended by 30 Working Group members and observers. The discussions during this session were guided by an Issues Paper prepared by the Secretariat ([Study L-IIC – W.G. 1 – Doc. 2](#)).

9. During its first session, the Working Group discussed some preliminary issues, such as the possible scope and structure of the future instrument, and agreed to include three layers of content, namely (i) the UPICC as adapted to IICs, (ii) principles and rules from States' contract practice, and (iii) policy goals derived from new generation international investment agreements (IIAs) and bilateral investment treaties (BITs), such as sustainability and corporate social responsibility. The Working Group expressed some perplexity as to the inclusion in the future instrument of investor protection standards derived from IIAs/BITs when contractual equivalents existed that might fulfil the same function without running the risk of replicating the flaws of the existing IIA system. The discussion then turned to the possible specific content of the future instrument, including aspects such as the complexity generated by the nature of the parties to IICs (States or State entities and sub-State level entities; foreign companies, locally incorporated companies or shareholders of foreign or locally incorporated companies); the private law capacity or sovereign -public law- capacity in which the State concludes IICs and the legal consequences thereof; pre-contractual issues having regard to issues of accountability *vis-à-vis* either the negotiating and contractual counterparty or affected third parties and non-signatories; the emerging set of obligations that investors are required to abide by under recent IIAs in the area of sustainable development, climate change, human rights and so forth, with a view to clarifying the terms of their possible "contractualisation" (policy goals clauses addressing "changes of circumstances", e.g., stabilisation commitments, hardship and force majeure; and issues of applicable law, with special regard to the relationship between domestic and international law in IICs. For more information, reference is made to the Summary Report of the Working Group's first session ([Study L-IIC – W.G. 1 – Doc. 3](#)).

10. At the end of the first session, the Working Group decided to establish five thematic subgroups to advance the work on the project during the intersessional periods:

- Subgroup 0 on Definitions and conceptualisation of IICs; relationship of IICs with IIAs and domestic law; interactions with the UPICC. Co-Chairs: Mr Stephan Schill (University of Amsterdam) and Mr Diego Fernández Arroyo (Paris Institute of Political Studies, Sciences Po).
- Subgroup 1 on Pre-contractual issues, formation and validity; parties, non-signatories and affected stakeholders; remedies, including compensation and damages; transfer of rights and obligations; other UPICC that might need adaptation. Co-Chairs: Ms Giuditta Cordero-Moss (University of Oslo) and Ms Ndanga Kamau (Ndanga Kamau Law).
- Subgroup 2 on changes of circumstances (stabilisation/renegotiation/adaptation, hardship, force majeure); other clauses typical of IICs. Co-Chairs: Ms Margie-Lys Jaime (University of Panama) and Mr Pierrick Le Goff (De Gaulle Fleurance & Associés).
- Subgroup 3 on addressing policy goals in IICs (sustainability, Corporate Social Responsibility); other treaty standards to be functionally addressed at the contractual level. Co-Chairs: Ms Catherine Kessedjian (ILA) and Ms Céline Lévesque (University of Ottawa).
- Subgroup 4 on choice of law clauses; dispute settlement clauses. Co-Chairs: Mr Michele Potestà (Lévy Kaufmann-Kohler) and Mr Jeremy Sharpe (International Arbitrator).

11. Between January and March 2024, Subgroups 0 to 3 carried out intense intersessional work.⁴ Seven virtual Subgroup meetings were organised to discuss the organisation of work and the subtopics assigned to each Subgroup, mainly to suggest more precise parameters for each subtopic and trigger a more detailed scoping exercise. Written input was provided by the Subgroup participants to advance the work. The intersessional work conducted by the Subgroups resulted in four discussion reports, one for each Subgroup.

12. The second session of the Working Group took place from 13 to 15 March 2024 at the seat of the ICC-IWBL and at White and Case (Paris). The deliberations focused on the reports prepared by the Subgroups, accompanied by a Revised Issues Paper prepared by the Secretariat based on the outcomes of the first session ([Study L-IIC – W.G. 2 – Doc. 2](#)) and a document on the contents of existing UNIDROIT instruments relevant to the project (the UPICC, the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC Guide), and the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming).

13. The co-Chairs of the Subgroups illustrated the contents of their intersessional work and particularly the provisional discussion reports with a view to obtain feedback from the greater Working Group on their first scoping exercise. The discussion mainly focused on: (a) definitions of an IIC and conceptualisations, the relationship between IICs and domestic law or IIAs (respectively), with particular regard to the principle of party autonomy, its extension and limitations, and IICs' interactions with the UPICC (Subgroup 0); (b) complexities raised by the nature of the parties (identity, nationality, multifaceted subjects), principles applicable to the pre-contractual issues having regard to differences between common and civil law, formation and validity (Subgroup 1); (c) views on "change of circumstances" clauses, having regard to the feasibility, possible reach and content of one or more "model stabilisation clauses", the relevance of hardship and force majeure to IICs, and the similarities and differences between these types of clauses, as well as the role of adaptation/renegotiation clauses along the whole life of the contract (Subgroup 2); and (d) the mapping and examination of the policy commitments stemming from new IIAs/BITs, international documents, and new legislation in domestic law with a view to identify common ground (the highest attainable standard) and discuss how new policy goals could be contractualised. The Working Group also discussed for the first time the elaboration and content of a possible dispute settlement clause, having regard to issues of arbitrators' conflicts of interest and transparency, and to the possible resort to conciliation, mediation, and other alternative means of dispute resolution (Subgroup 4). Finally, the Working Group discussed the format of the future instrument, which could be a self-standing set of principles with commentary, accompanied by Model Clauses where appropriate and feasible. The Secretariat provided supplementary methodological guidance on the way forward.

14. Furthermore, a research team constituted under the Roma Tre-UNIDROIT Institute on Transnational Commercial Law and Investment Arbitration illustrated the findings of its provisional work (conducted under the supervision of the Secretariat) on analysing clauses concerning policy goals and change of circumstances clauses in publicly-available IICs.

V. NEXT STEPS

15. The third session of the Working Group on IICs will take place between 3 and 5 June 2024 at the premises of UNIDROIT. In the meantime, the Subgroups are expected to update and further develop their discussion reports in line with the outcome of the second Working Group session. Intersessional work will include virtual meetings on methodology and substance and mapping activities (including IICs, IIAs/BITs, and arbitral awards). The Secretariat will ensure that

⁴ At the first Working Group session, it was agreed that Subgroup 4 would start its work after the second Working Group session.

coordination takes place with the observers and between the Subgroups, given that several of the subtopics are directly interconnected.

16. The fourth session of the Working Group on IICs has been scheduled for 25 to 27 November 2024 at the seat of UNIDROIT in Rome, while the fifth session (in spring 2025) will be hosted by the ICC-IWBL in Paris.

VI. ACTION TO BE TAKEN

17. *The Governing Council is invited to take note of this update on the progress of the joint UNIDROIT-ICC Institute project on the UPICC and International Investment Contracts.*