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Item No. 6 on the agenda: Ongoing legislative activities carried over from prior Work Programmes

(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 update on the progress of the joint UNIDROIT-ICC Institute project on the UPICC and International Investment Contracts</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> ; <u>UNIDROIT 2024 – C.D. (103) 10</u> ; <u>UNIDROIT 2024 – A.G. (84) 2</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 and the project's initial work (Section II), it provides information on the activity of the Working Group since the 103rd session of the Governing Council (Section III), and envisaged next steps (Section IV).

II. BACKGROUND AND INITIAL WORK

2. The project on the UPICC and IICs aims at developing guidance on the modernisation and standardisation of contracts between States (or their controlled entities) and private foreign investors. 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 have occurred in the area of international investment law over time, 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 the UPICC and IICs and the possible scope and content of the future instrument, with a view to drafting an Issues Paper framing 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, 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](#)).

5. Pursuant to the mandate provided by the Governing Council, the Working Group was established. Co-chaired by Ms Maria Chiara Malaguti (President of UNIDROIT's Governing Council) and Mr Eduardo Silva Romero (Chair of the ICC-IWBL Council), the Working Group consists of 24 individual experts in the fields of contract law and international investment law¹ that work together with representatives of seven international and regional organisations selected as institutional observers. Moreover, the Consultative Committee was established in March 2023, chaired by Governing Council Member Mr José Antonio Moreno Rodríguez and initially composed of experts and government representatives appointed by 27 Member States.

6. The first session of the Working Group took place between 23 and 25 October 2023 at the seat of UNIDROIT, and the second session, from 13 to 15 March 2024, was hosted by the ICC-IWBL in Paris. Between the two sessions, the Working Group experts were allocated in five thematic subgroups and conducted intersessional work, guided by a first version of the Issues Paper ([Study L-IIC – W.G.1 – Doc. 2](#)) in Rome, and a revised version prepared by the Secretariat ([Study L-IIC – W.G.2 – Doc. 2](#)) in Paris. Following the two sessions, the Working Group agreed to include three layers of content (namely, the UPICC as adapted to IICs, principles and rules from contract practice, and policy goals derived from new-generation IIAs), and carried on a progressively more specific scoping exercise, aimed at identifying selected content for the future instrument (in particular, the topics discussed included the definition of IICs, identity and nature of the parties, legal capacity, pre-contract and due diligence, contract formation and validity, rights and obligations, policy goals and sustainability, change of circumstances, remedies, choice of law and dispute settlement). The Working Group also discussed the format of the future instrument, expressing a preference for a self-standing set of principles with commentary, accompanied by model clauses where appropriate and feasible ([Study L-IIC – W.G.2 – Doc. 9](#)). The Governing Council, at its 103rd session (April 2024), recognised that the project had made significant progress since the Governing Council's 102nd session ([C.D. \(103\) Misc. 2](#)).

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

III. WORKING GROUP ACTIVITY SINCE THE 103RD SESSION OF THE GOVERNING COUNCIL

A. Second intersessional period (April-May 2024)

7. During the second intersessional period, the Subgroups translated the indications that had emerged during the second session into draft formulations, based on a tripartite format prepared by the Secretariat to facilitate text-based discussion (principles, commentary, model clauses). Subgroup 1 focused on pre-contractual issues and validity. Following written exchanges, the members of Subgroup 1 drafted a report which contained concrete drafting suggestions on a significant number of topics. Subgroup 2 discussed draft papers on hardship and *force majeure* that had been produced by members of the Subgroup and explored possible options for a draft stabilisation principle, based on existing models (freezing vs economic equilibrium clauses). The participants also discussed the “relational contracts” theory and its potential relevance for this project. The Secretariat shared an extract from the Note of the UNIDROIT Secretariat on the UPICC and the Covid-19 Health Crisis (2020)² for consideration by Subgroup 2. Subgroup 3 discussed a draft paper drawn up by the Co-Chairs concerning the scope of environmental, social and governance (ESG) obligations in IICs and the possible role of the home State in the context of policy goals, even when not a contracting party to an IIC. Subgroup 4 held its first virtual meeting at the end of April 2024 and started working on the development of model clauses. The participants agreed that the future instrument should provide different options to contracting parties, both concerning choice of law and dispute resolution clauses. Furthermore, statistical information was shared on contracts that had been the subject of contract-based arbitration at ICSID. Finally, given the interconnection between the subtopics allocated to Subgroup 0 and the subtopics allocated to other Subgroups, the Co-Chairs of Subgroup 0 decided to suspend the drafting until more specific choices on content were made; in the meantime, they provided elements on a conceptual definition of IICs, the interrelation of IICs with the UPICC, and the interaction of the future instrument with International Investment Agreements (IIAs).

B. Third session of the Working Group (June 2024)

8. The Reports of the Subgroups of the second intersessional period were the main object of discussion by the Working Group at its third session, which took place from 3 to 5 June 2024 at the seat of UNIDROIT in Rome. A number of questions were put to the attention of the plenary, together with a first draft structure of the future instrument, attached as Annexe II to a Revised Issues Paper prepared by the Secretariat ([Study L-IIC – W.G.3 – Doc. 2](#)).

9. The Working Group first discussed the Report of Subgroup 2 on stabilisation, hardship and *force majeure*. The discussion mainly revolved around the practicability of alternative choices to a stabilisation principle, together with a stabilisation clause, using as material the research conducted on different types of stabilisation clauses in practice contained in a memorandum provided by the Roma Tre-UNIDROIT Task Force (freezing vs equilibrium clauses). Due to the diverging opinions on the matter within the Subgroup, consideration was given to providing different options in line with transnational practice and other documents of international organisations on the subject matter (e.g., UNIDROIT’s Legal Guide on Agricultural Investment Contracts – ALIC Guide – and the UN Principles for Responsible Contracts).

10. A discussion took place on choice of law and dispute settlement, based on Subgroup 4’s Report. The Working Group discussed the relevance of host State law as the law governing IICs and how the UPICC and the future instrument might apply in combination with domestic law. Reference was made to possible interaction with other sources such as transnational or international law,

² The Note is available at <https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf>.

highlighting a possible risk of vagueness, but also the evolution of international standards now prone to consider sustainability and the protection of public concerns and related policy goals. The Working Group further discussed the inclusion of alternative dispute resolution (ADR), including mediation, dispute boards and expert determination, in model dispute settlement clauses, waivers of commercial or treaty arbitration to prevent sequential or parallel proceedings, and State immunity clauses.

11. Based on Subgroup 3's Report, the Working Group underlined the importance of including ESG principles in the preamble and as a basis for due diligence and specific obligations in the body of the contract. The discussion revolved around the relevance of referring to the highest international standard and the feasibility of a reference to the law of the home State of the investor, while touching upon the need to extend accountability to the entire supply chain that depended on the investor.

12. Finally, based on Subgroup 1's Report, the Working Group had a thorough text-based discussion on the applicability of the UPICC in topics ranging from the pre-contractual phase to parties and the formation and validity of IICs. The discussion mainly focused on disclosure obligations in the pre-contractual phase, the freedom to change commercial strategy or State policy decisions, the relevance of negotiations as to the scope of future contract obligations, entire agreement clauses, differentiated rules for energy contracts and public procurement contracts in the formation phase, and the practicability of invalidity grounds, including corruption and contrariety to mandatory rules, in the IIC context.

C. Third intersessional period (June-November 2024)

13. As agreed at the third Working Group session, Subgroup 1 discussed updated draft texts concerning the subtopics it had been allocated. Subgroup 2 discussed a first draft paper on stabilisation and updated drafts on hardship and *force majeure*. In the third meeting, Subgroup 2 focused exclusively on stabilisation and the material that had been produced by individual participants in this regard. Subgroup 3 discussed a draft Preamble a draft anti-corruption provision. In the second meeting, Subgroup 3 focused on discussing pending matters connected to the scope of ESG obligations in IICs. In the third meeting, Subgroup 3 reviewed and commented on a draft sustainability due diligence clause and a draft text on policy goals to be included in the introduction of the future instrument. The Subgroup 4 Co-Chairs prepared a draft Report on choice of law and dispute settlement with draft text submissions in accordance with the findings of the previous Working Group session. The draft Report was circulated to the members of the Subgroup and subsequently updated according to the comments received.

14. The foregoing discussions resulted in the production of Reports of each Subgroup for the fourth Working Group session.

15. A virtual intersessional workshop was organised by the Secretariat on 3 October 2024 to allow the Task Force on IICs under the Roma Tre-UNIDROIT Centre to present three memoranda with relevant clauses extracted from open source IICs (mainly related to energy and mining). The three memoranda provided legal analysis on: (i) policy goals and sustainability clauses (due diligence, human rights, local community protection and development); (ii) change of circumstances (stabilisation clauses, both freezing and economic equilibrium, hardship and *force majeure*); and (iii) choice of law and dispute settlement (including different types of choices, ADR and waivers of treaty arbitration). In addition, a representative of the ICC Institute presented relevant ICC Model Clauses. A fourth memorandum is expected to be presented in 2025 based on the Working Group's new requests.

16. In addition, during the third intersessional period, Mr José Antonio Moreno Rodríguez organised the event "*Taller sobre arbitraje y el Estado*", which took place in Paraguay (and remotely, via Zoom) on 14-15 October 2024, where the following topics were discussed: (i) "investments and change of circumstances: the role of the contractual 'stabilisation' clause", (ii) "international

investment contracts and policy goals”, (iii) “applicable law and dispute settlement clauses” and (iv) “remedies, with a focus on compensation and damages”. The event was attended by several Latin American members of the Consultative Committee and other renowned experts in the field, as well as by the UNIDROIT Secretary-General, in person, and the UNIDROIT President, Deputy Secretary-General and Senior Legal Officers Rocco Palma and Myrte Thijssen, remotely.

D. Involvement of the Consultative Committee

17. Between August and October 2024, following the third Working Group session, the Secretariat developed a first Request for Input from the Consultative Committee in the form of a questionnaire on a list of substantive topics relevant to the discussion on the content of the future instrument. In parallel, the Secretariat invited a number of non-Member States with significant investment relations to appoint experts to the Consultative Committee as Observers. This resulted in the appointment of 13 additional experts from eight non-Member States, which were equally requested to provide information and advice. In total, 35 States are now represented in the Committee. The responses to this request were collected and compiled in a confidential document which was circulated for consideration and feedback by the Working Group at its fourth session, together with a summary of responses to guide and facilitate the consultation (Study L-IIC – W.G. 4 – Doc. 3).

18. The responses highlighted substantial consent as to the scope and content of the project and provided some further insights. In particular, attention was drawn to (i) recognising States’ regulatory powers in the context of stabilisation clause practice, while clarifying what constitutes indirect expropriation and under what conditions compensation is warranted; (ii) creating investors’ policy commitments, drawing from IIC practice in the mining sector and international investment awards; (iii) adding local content and employment requirements as well as IP and technology transfer commitments; (iv) including provisions on political risk insurance (*i.e.*, MIGA); (v) clarifying to what extent international soft law and commercial usages apply to IICs; (vi) clarifying interactions between host State law and international law in choice of law issues (so to avoid the application of the unintended traditional investment standard); (vii) dealing with parties’ capacity to conclude an IIC as an issue of mandatory law; (viii) developing the good faith principle in relation to the duty to act transparently and responsibly when engaging with public entities; and (ix) considering special principles for State-owned enterprises (SOEs) as separate from States. Further, and more generally, it was suggested to avoid complexities and to keep the instrument simple.

E. Fourth session of the Working Group (November 2024)

19. The Reports of the five Subgroups as revised at the end of the third intersessional period were the main object of discussion by the Working Group at its fourth session, which took place from 25 to 27 November 2024 at the seat of UNIDROIT in Rome. The discussion was complemented by a further iteration of the Revised Issues Paper and an updated draft structure prepared by the Secretariat ([Study L-IIC – W.G.4 – Doc. 2](#)).

20. Subgroup 2 presented a draft stabilisation principle accompanied by commentary and a model clause. Consent was expressed as to offering a plurality of options, including an economic equilibrium and renegotiation clause, respecting States’ regulatory powers and, if appropriate, a limited fiscal freezing clause in line with current international practice, with sufficient safeguards and carve-outs to exempt changes in laws implementing international obligations, sustainability obligations and public policy concerns. The point was made to examine, based on text proposals, how a stabilisation process would interplay with an expropriation standard and particularly with regulatory takings. Hardship and *force majeure* principles were equally discussed to clearly delimit respective borders and consider the needs of long-term contracts while providing mechanisms to allow the preservation of the investment relationship.

21. Based on Subgroup 3's Report, the Working Group discussed text submissions, namely, a draft Preamble on respecting ESG principles, a due diligence clause, and an anti-corruption clause. The discussion focused on the need to assess the possible environmental and social or human rights impact of the IIC in consultation with affected third parties and local communities before and after the establishment of an investment, to consider a proper set of rules to govern the legal consequences of corruption on an IIC and possible remedies, and on a methodology regarding how to build policy goals specific to investors' obligations in the body of contract, endowed with an array of proper remedies in case of non-performance.

22. The Working Group made further progress on the examination of text submissions by Subgroup 1 with regard to the pre-contractual phase, parties, formation of contract and validity issues, particularly focusing the discussion on issues of legal capacity as a ground for invalidity. A first discussion also took place on Subgroup 1's first draft text on remedies, including compensation and damages, which was deemed to need further analysis, also by providing draft text on issues of double recovery and liquidated damages for the next session.

23. The Working Group discussed a first text submission by Subgroup 4 on choice of law and dispute settlement, focusing on the need to add clarity to the relationship between host State law and any possible reference to international or transnational law, as it surfaced from the memorandum of the Roma Tre-UNIDROIT Task Force, but also to different law sources that might apply to an IIC beyond the law governing the contract. In this regard, direct reference was made to the UPICC as an impartial source that might be adequate and clear in its contents and reciprocally acceptable to the parties. In the context of dispute settlement clauses, the Working Group discussed more specific issues, such as whether to include negotiation, mediation and dispute boards/expert determination, how to draw on ICC Model Clauses in this area, whether to include a domestic forum selection choice, issues of notice of arbitration, the specific reach of waivers to courts and treaty arbitration.

24. The Working Group also took note of the input received from the Consultative Committee, to be considered during the next intersessional period, and requested the Roma Tre- UNIDROIT Task Force to conduct further research on a number of aspects.

F. Fourth intersessional period (November 2024-January 2025) and establishment of the Drafting Committee

25. Following the fourth session of the Working Group, the intersessional work in the period December 2024 to March 2025 consisted of updating and finalising the Reports of the Subgroups and establishing a Drafting Committee, with the aim of developing a preliminary draft of the future instrument based on the Working Group discussions and the input by the Subgroups.

26. All Subgroups were asked to revise their Reports in line with the outcome of the fourth Working Group session and finalise draft text. As to the Report of Subgroup 0, given that the aspects allocated to that Subgroup depended to some extent on the outcome of the work allocated to the other Subgroups, the Co-Chairs informed the Secretariat that the Report of Subgroup 0 remained unchanged. The Subgroups were dissolved and their final draft texts were compiled into a single draft "Master Copy" of the future instrument, meant as an initial basis for further refinement by a Drafting Committee to be established. The draft texts developed by the Subgroups were provisionally allocated to the various Chapters of the future instrument.

27. After the conclusion of the work of the Subgroups, a Drafting Committee was established. Members of the Committee are Ms Giuditta Cordero-Moss, Mr Lauro Gama, Mr Pierrick Le Goff, Mr Minn Naing Oo, Mr Aniruddha Rajput, and Mr Jeremy Sharpe. During the initial virtual meetings of the Drafting Committee, the experts discussed (i) the style to be used in the future instrument for the draft Principles, commentary, model clauses and illustrations; (ii) the placement of Subgroup input in the draft structure of the instrument; and (iii) gaps or elements that were missing. The

Drafting Committee agreed to update and refine the draft text of the Subgroups focusing on selected IIC-specific issues rather than reproducing and commenting on the UPICC provisions one by one. It was suggested to provide, for each topic: (i) comments explaining what was specific to IICs, (ii) explanations regarding which UPICC provisions were relevant (if any) and how they might be affected, (iii) suggested adjustments of specific UPICC articles (if needed), and (iv) draft model clauses (if appropriate). The Drafting Committee also signalled questions for discussion at the fifth Working Group session.

28. In addition, on 3 March 2025, UNIDROIT and the ICC-IWLBL, in cooperation with the International Federation of Consulting Engineers (FIDIC), organised a virtual workshop on international investment construction contracts (IICCs). During the workshop, high-level FIDIC experts participated in a roundtable discussion focused on (i) the specificities of international construction contracts, (ii) ESG clauses and due diligence obligations, (iii) the pre-contractual phase and the conclusion of IICs, (iv) change of circumstances, and (v) applicable law and dispute settlement clauses. The Working Group received a report of the intersessional workshop.

29. Furthermore, during this intersessional period, dissemination of the project took place at several events. UNIDROIT President Prof. Maria Chiara Malaguti and Senior Legal Officer Mr Rocco Palma participated in the Lillehammer Workshop on International Investment Contracts on 5 and 6 December 2024 at the Inland Norway University, organised by a member of the Task Force, which provided useful insights for further work.³ Senior Legal Officer Ms Myrte Thijssen participated in the event “Leading the sustainable transition”, which took place on 13 and 14 March 2025 at the European Investment Bank and examined the critical role of Multilateral Financial Institutions (MFIs) in advancing sustainability standards across global value chains.

G. Fifth session of the Working Group (March 2025)

30. The final Reports by the Subgroups, presented at the conclusion of their work, and the refined draft of the “Master Copy” were the main object of discussion by the Working Group at its fifth session, which was hosted from 1 to 3 March 2025 by the ICC-IWBL in Paris. For the sake of a complete and thorough analysis, the discussion was limited to Chapters 3 (Pre-contractual phase), 4 (Formation, Parties and Authority), 5 (Validity), and 7 (Change of Circumstances), while the other Chapters were left for the next session. A high-level discussion on Chapters 6 (Rights and Obligations) and 8 (Remedies) ensued to provide general direction to the Drafting Committee on expropriation and full protection and security, as well as on ESG obligations and compensation and damages.

31. The discussion on Chapter 3 (Pre-contractual phase) focused on the need to consider developing general principles on States’ regulatory powers, good faith and exceptions in the pre-contractual phase, mandatory rules, the legal nature of pre-establishment due diligence, and whether the Chapter was sufficiently independent from the UPICC. As to Chapter 4 (Formation, Parties and Authority), the Working Group discussed the possibility to elaborate a principle on “parties’ capacity” and IICs’ “authorities’ approval”, coordination between form and formation, and the relevance of specific UPICC provisions (e.g., notice, terms deliberately left open) in this area. On Chapter 5 (Validity), the Working Group discussed issues of legal capacity, attribution and responsibility, mistake, fraud and gross disparity, and illegality (including infringement of mandatory norms and corruption), in relation to host State compliance clauses and the existing ICC Model Clauses. For Chapter 7 (Change of Circumstances), the Working Group clarified some uncertainties on the proposed stabilisation model clause as discussed at the last session, while confirming the approach on hardship and force majeure. A more general discussion followed on Chapter 6 (Rights and

³ A second edition of the Workshop is expected to take place in June 2025 dealing with “plain language” and “clear formulation of legal concepts” in IICs.

Obligations), particularly as regarded a first draft expropriation clause, a draft full protection and security clause, and on the approach to be taken on ESG obligations. The discussion ended with consideration of Chapter 8 (Remedies), including on the legal nature of a double recovery provision, which needed direction for further work, to be examined at the next session.

IV. NEXT STEPS

32. The sixth session of the Working Group on IICs is scheduled to take place between 10 and 12 June 2025 at the seat of the ICC-IWBL (Paris). In the meantime, the Drafting Committee is expected to update the draft Master Copy of the future instrument in line with the outcome of the fifth Working Group session and further develop Chapter 6 (Rights and Obligations) and Chapter 8 (Remedies). Intersessional work will include virtual meetings on methodology, the structure and allocation of contents and substance, as well as possible further workshops to examine practice in the areas that remain to be developed (ESG and remedies). It is envisaged that the sixth session will focus on Chapter 1 (General Provisions of the Instrument), Chapter 2 (General Principles of an IIC), Chapter 6 (Rights and Obligations), Chapter 8 (Remedies) and Chapter 9 (Choice of Law and Dispute Settlement), as well as on the general Introduction to the instrument.

33. Following the updating of the draft Master Copy in accordance with the discussion to be held at the Working Group's sixth session, a new submission will be made to the Consultative Committee between July and September. The seventh session of the Working Group, which has been scheduled between 27 and 29 October 2025 at the seat of UNIDROIT in Rome, is then expected to examine the final Master Copy and the feedback by the Consultative Committee. An eighth session is expected to take place at the beginning of 2026 to finalise the instrument, which would then be subject to a public consultation addressed to all interested stakeholders, should the Governing Council so authorise.

V. ACTION TO BE TAKEN

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