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UNIDROIT Working Group on International Investment Contracts

Remote meeting
21 November 2025

UNIDROIT 2026
Study L-IIC – W.G. 7B – Doc. 3
English only
January 2026

SUMMARY REPORT

OF THE REMOTE MEETING AS A FOLLOW-UP TO THE

SEVENTH SESSION

(21 November 2025)

TABLE OF CONTENTS

1. A follow-up meeting to the seventh session of the Working Group on International Investment Contracts ("the Working Group") was held remotely via Zoom on 21 November 2025.

2. The meeting was attended by 20 participants, including individual experts, representatives of institutional observers, and representatives of the UNIDROIT Secretariat and the ICC Institute for World Business Law ("the ICC Institute"). The list of participants is available in the Annexe.

3. The meeting was chaired by former UNIDROIT President Ms Maria Chiara Malaguti ("the UNIDROIT Chair") and the Chair of the ICC Institute Council, Mr Eduardo Silva Romero ("the ICC Chair", together "the Chairs").

Item 1: Opening of the meeting and welcome

4. *The Chairs* welcomed all participants and expressed appreciation to the Drafting Committee, which had done an impressive amount of work since the seventh Working Group session.

5. *A member of the UNIDROIT Secretariat* explained that the Drafting Committee had already updated many parts of the draft Master Copy following the seventh session. A redline version of the draft Master Copy had been circulated, which made the changes carried out since the seventh session visible. She recalled that the objective of this remote meeting was to discuss sections of the draft Master Copy that had not been covered during the seventh Working Group session due to lack of time. In particular, it was proposed to focus on draft Chapter 7 on Remedies.

6. She recalled that an initial discussion on this chapter had taken place during the fifth Working Group session, primarily regarding the guidance on withholding performance (whereby it had been agreed that there should be limitations to the possibility of withholding performance since IICs often covered public service projects) and the draft principle on double recovery (which, the Working Group agreed, should aim at preventing duplicative damages for the same loss or injury). During the sixth session, the Working Group had discussed the chapter on remedies in detail. It agreed that many provisions in Chapter 7 of the UPICC were appropriate for IICs and did not require amendments or IIC-specific guidance. Following the sixth session, such subsections had therefore been deleted. Furthermore, the commentary and model clauses in the remaining subsections had been updated and new guidance and model clauses had been developed on limitation and exclusion of liability clauses and liquidated damages clauses. She expressed gratitude to the relevant member of the Drafting Committee for having scrupulously implemented the Working Group's guidance.

7. It was suggested that the Working Group discuss the subsections of draft Chapter 7 sequentially, also considering the comments made by the Consultative Committee and by the International Institute for Sustainable Development ("IISD").

Item 2: Consideration of work in progress: draft Chapter 7 (Remedies)

8. Upon invitation by the UNIDROIT Chair, *a member of the UNIDROIT Secretariat* explained that the introduction to Chapter 7 now explained that several UPICC provisions on non-performance applied to IICs "*telle quelle*" and were therefore not repeated. Where appropriate, IIC-specific commentary and model clauses were provided, while the chapter also contained some IIC-specific principles.

9. *A participant* suggested avoiding conceptual discussions on the intersection between public international law and private contract law in the introduction to Chapter 7, since explanations in this regard would be provided as a general matter in the introduction to the instrument. He also cautioned that references to public international law might be interpreted as allowing the application of such law even if that was not the law applicable to the contract. *It was agreed to delete such references.*

10. *The ICC Chair* noted that an important advantage of IICs, compared to treaties, was that liquidated damages clauses could be inserted into these contracts to provide legal certainty as to the consequences of non-performance. *It was agreed to mention this already in this introductory section.*

11. Following a discussion on the meaning of the principle of full reparation, it was agreed for the introduction to already mention the mechanism for full reparation under the UPICC rather than referring to the principle as understood "in international law" (paragraph 338).

12. As a general matter, *a participant* suggested reflecting on the order of the subsections; he proposed starting the subsection with performance of monetary obligation, followed by performance of non-monetary obligation, and then the subsection on withholding performance.

a) Types of remedies for non-performance

1. <u>Withholding performance</u>

13. *A member of the UNIDROIT Secretariat* introduced a comment from the Consultative Committee advocating for the inclusion of contract language stipulating that performance could only be withheld in exceptional circumstances or not at all, especially where an IIC involved the provision of public services. It was discussed that this comment was in line with the current text.

14. *A participant* expressed support for the current text, noting that it created a sensible balance between the interests of States and investors. He recalled that Article 7.1.3 of the UPICC was not a mandatory provision, so that parties could adapt it to their particular circumstances. *The Deputy-Secretary General* confirmed this, noting that this instrument could suggest model clauses for specific circumstances relevant to IICs.

15. *A participant* noted that Article 7.1.3(1) of the UPICC only applied where parties were to perform simultaneously. Considering that IICs were long-term contracts involving different obligations to be performed at different times, he suggested explaining that the right to withhold performance only applied if there was a sequence of timing that justified compelling the non-performing party to perform at a specific time. *Another participant* preferred the text to be general and leave it to the contracting parties to tailor the model clause to their specific situation.

16. *A participant* suggested providing examples in the commentary of situations in which it would be desirable for performance *not* to be withheld. *Another participant* preferred not to provide examples so that contracting parties would retain flexibility to decide this on a case-by-case basis. If examples were to be provided, he suggested clarifying that it was a non-exhaustive list. *The ICC Chair* noted that, in some jurisdictions, withholding performance was not allowed for contracts relating to public services, as mentioned in paragraph 347. It was discussed that, in many Arab countries, the exception "*non adimpleti contractus*" was not applicable in administrative contracts relating to public services, given the fundamental principle of continuity of public services and utilities, while suspending performance to exert pressure on a non-performing party was possible in commercial contracts in these jurisdictions. It was noted that the current text appropriately dealt with the issue and provided contracting parties with flexibility to select the desired approach. *A member of the UNIDROIT Secretariat* suggested that further examples might be distilled from the research of the Task Force constituted under the Roma Tre-UNIDROIT Centre for Transnational Commercial Law and International Arbitration ("Task Force"), which was completing a memorandum on remedies.

17. *The ICC Chair* wondered whether there would be merit in developing a draft Principle on the application of the right to withhold performance in the context of IICs. *A participant* expressed support for the development of such principle and further reflecting on the relationship with the right

to cure (Article 7.1.4 of the UPICC), which had also been mentioned in the discussion. However, *others* preferred not to mention the right to cure under withholding performance, to avoid confusion.

18. *The Working Group provided a mandate to the Drafting Committee to update the commentary in line with the discussion.*

2. Cure by non-performing party

19. *No comments were raised on this subsection.*

3. Additional period for performance

20. Upon invitation by the UNIDROIT Chair, *a participant* expressed concern that, if left open-ended, the cure mechanism might enable prolonged non-compliance. He suggested that there should be clear limits on any cure periods, requiring security – such as bonds or escrows – and allowing the State to step in where public or environmental risks arose. He also considered that there should be no right to cure in cases of repeated or wilful breach.

21. *A member of the UNIDROIT Secretariat* indicated that the provision of additional time for performance in the UPICC (Article 7.1.5) was discretionary, *i.e.*, a party could decide itself whether to provide an extension in case the other party did not yet perform. It was discussed that this might address some of the concerns. *A participant* agreed that it was important to avoid prolonged non-compliance, suggesting that this could be further emphasised in the commentary – for instance, by referring to "a reasonable period" within which the other party had to perform. He expressed reservations about the other suggestions made by the first speaker. He noted that it might be challenging for a State to provide financial guarantees, whereas explicitly providing for step-in rights might not be necessary, and mentioning this could increase complexity. *A further participant* recalled that, pursuant to the UPICC, a party could decide whether to grant an additional period of time and also what the consequences would be in case the other party still did not perform within that period (*e.g.*, termination of the contract). He doubted whether there was anything to add. *A member of the Secretariat* indicated that, if the commentary were to be expanded, regard could be had to the research conducted by the Task Force, which had found IICs that provided a deadline (*e.g.*, within 30 or 90 days, depending on the type of breach) and specified the consequences in case of non-performance within such period. It was proposed to recognise in the commentary that IICs' contract practice showed that different timeframes were provided, and to recommend that parties establish a reasonable period of time depending on the nature of the contract and the type of non-performance to be cured. *The Deputy Secretary-General* noted that Article 7.1.5(3) of the UPICC referred to "an additional period of time of reasonable length" and the possibility to provide an extension if the additional period was not reasonable, which might be usefully considered.

22. *A participant* suggested to remove the subheading "considerations in contract drafting" above paragraph 358. *Another participant* considered that it would be useful to still make visible that this paragraph provided suggestions for drafting a contract clause.

23. *The UNIDROIT Chair* asked whether there would be merit in developing a model clause. *A participant* advised against the development of such clause since the consequences of providing additional time for performance might vary (*e.g.*, the length of the additional period, what happened in case the other party did not perform within such period, etc.). It was suggested to add in paragraph 358 that contracting parties may wish to consider what the consequences would be in case of non-performance within the additional period.

24. *The Working Group agreed to update the commentary in line with the discussion.*

4. Exemption clauses

25. *A member of the UNIDROIT Secretariat* introduced a comment of the Consultative Committee, suggesting that excusing sustainability commitments should only be possible where performance had become objectively impossible in the context of hardship or force majeure.

26. It was discussed that the meaning of the concept "exemption clause" might not be sufficiently clear. *A participant* considered paragraph 363 and the reference therein to "grossly unfair" to be confusing; he suggested clarifying that a party could not make an express promise, on the one hand, and exempt itself from liability for such promise, on the other hand.

27. *The Working Group agreed to (i) clarify the meaning and purpose of exemption clauses, (ii) revise paragraph 363, and (iii) ensure consistency in the way existing model clauses were referenced.*

b) Right to performance

1. <u>Performance of monetary obligation</u>

28. It was agreed to delete the black-letter rule since it repeated Article 7.2.1 of the UPICC.

29. *A participant* considered that the commentary rightly addressed assignment of payment claims and third-party funding. The draft model clause allowed investors to transfer receivables but required State consent for assignments linked to third-party funding, the consent to which must not be unreasonably withheld. He welcomed the consent requirement but suggested that, for State parties, it should not be confined to a "reasonableness" test but rather be at the State's discretion. He also suggested that any request for consent include full transparency of the assignee – including its ultimate beneficial owner, incorporation, and funding structure.

30. *A participant* noted that the suggestion to identify the ultimate beneficial owner in the context of third-party funding was in line with recent discussions at UNCITRAL Working Group III. *Another participant* recognised the objective at the treaty level but wondered what the consequences would be from a contractual perspective in case such owner was not identified (*e.g.*, whether this would make the assignment null and void or would only be a breach of an ancillary duty that might lead to a claim for damages). He suggested either not including this issue or clarifying the consequences.

31. It was subsequently discussed that the topic of third-party funding was generally understood as referring to funding in the context of dispute resolution, which was to be distinguished from external financing an investor might obtain to perform its obligations under an IIC. It was suggested to delete the reference to third-party funding here to avoid confusion, while third-party funding in the context of dispute settlement (including the possible involvement of third-party funders prior to the commencement of dispute settlement proceedings) could be addressed in Chapter 8. In this context, reference could also be made to rules of the ICC and ICSID on third-party funding in the context of dispute settlement.

32. *The Working Group agreed to delete the reference to third-party funding and to add a placeholder on that topic in Chapter 8.*

2. <u>Performance of non-monetary obligation</u>

33. *The UNIDROIT Chair* noted the importance of developing a consistent approach to illustrations in the instrument.

34. *Several participants* suggested deleting the draft model clause since it resembled a stabilisation/renegotiation clause, which was covered in Chapter 6.

35. *A participant* expressed doubts about the draft commentary, particularly paragraphs 374-375, which referred to the State's power to regulate and stabilisation commitments. *A member of the UNIDROIT Secretariat* explained that these paragraphs had been developed in response to discussions during the sixth Working Group session on how Article 7.2.2(a) of the UPICC related to clauses on stabilisation and physical protection and security.[1] *The previous speaker* suggested amending the commentary so that it would recognise that there could be non-monetary obligations in IICs that parties should comply with, linking this to the obligation to perform obligations under the contract in good faith, and cross-referring to Chapter 6 for questions on how the performance of non-monetary obligations on the part of the State related to the exercise of its regulatory powers.

36. *A member of the UNIDROIT Secretariat* supported the proposal to refine the commentary, noting that, in practice, parties to IICs seemed to prefer requesting damages rather than specific performance, although the concept of performance of non-monetary obligations was key for sustainability obligations. He also noted that the Task Force had found examples of clauses that granted the State step-in rights in case of non-performance of specific obligations. He suggested considering such examples for the revision of the commentary.

37. *The Working Group agreed to delete the draft model clause and to redraft the commentary in a more concise way with a cross-reference to Chapter 6, Section A, on stabilisation and renegotiation clauses.*

3. Penalty imposed by a court or arbitral tribunal

38. *Some participants* expressed doubts about the suitability of Article 7.2.4 of the UPICC in the context of IICs since States performed public functions and were already struggling with damages claims. They suggested merely encouraging parties to perform their obligations under the IIC and warning that the contractual consequences of non-performance would otherwise apply.

39. *The Deputy Secretary-General* explained that Article 7.2.4 of the UPICC did not concern a contractual penalty for non-performance, but rather a fine for non-compliance with an order to perform issued by a court or arbitral tribunal. She suggested clarifying this in the commentary. Following comments by a participant, *a member of the UNIDROIT Secretariat* added that Article 7.2.4(2) of the UPICC identified the aggrieved party as the beneficiary of the penalty, as a rule, and the commentary referred to the exceptional nature of the penalty depending on the kind of obligation to be performed. Since these aspects followed from the UPICC, they were not mentioned in the draft commentary here, but they could be repeated if this was deemed useful.

40. *A participant* added that this subsection did not concern the more controversial issue of contractual clauses of a punitive nature – referring to the different treatment in civil and common law jurisdictions of liquidated damages clauses. He was in favour of keeping this provision as an option for parties. *Another participant* concurred and noted that arbitral tribunals either had the power to impose a penalty or they did not; this provision could not change this. In his opinion, this provision rather had the purpose of clarifying (i) to whom the penalty should be paid, and (ii) the contractual consequences for not paying the penalty. He suggested indicating that any non-payment of a judicial penalty would not be tantamount to non-performance of the contract.

41. Following these discussions and clarifications, *a participant* reiterated his concerns about the application of this provision in the context of IICs, warning that it might provide too much discretion to the tribunal and might be non-justiciable. He strongly suggested indicating that this UPICC provision did not apply in the investment context. *Another participant* supported this position, noting that the imposition of a judicial penalty on a State might be prohibited in some jurisdictions.

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[1] See UNIDROIT 2025 – Study L-IIC – W.G. 6 – Doc. 3, paras 124-128.

42. *A member of the UNIDROIT Secretariat* recalled the discussions on this point during the sixth Working Group session. It had been argued then that *ad hoc* arbitral tribunals might have the authority to impose a penalty depending on the *lex arbitri* and that the imposition of a penalty provision would be subject to mandatory rules. Therefore, if domestic law prohibited such penalty by means of a mandatory rule, it would not apply. *The UNIDROIT Chair* and *the Deputy Secretary-General* added that, if the Working Group considered that Article 7.2.4 of the UPICC should not apply or should be adjusted in the context of IICs, a new principle with explanations in the commentary should be developed. *The Deputy Secretary-General* also suggested reflecting on the situation in which not a State, but an investor was the party that did not comply with a court's order – noting that it seemed unlikely that mandatory rules of the forum State would prohibit a judicial penalty in such case.

43. *Some participants* were in favour of retaining the UPICC provision in the investment context. They reiterated that this provision was optional and merely allowed a court or arbitral tribunal to exercise its power to impose a penalty, if it had such authority under the applicable procedural rules and subject to any mandatory rules. It was also mentioned that it was common in some jurisdictions *(e.g.*, Brazil) for courts to issue a penalty – both to State and non-State parties – to incentivise compliance with a court order to perform. While less common in arbitration, they saw no harm in providing for such option if the procedural rules allowed the tribunal to impose a penalty and parties agreed to it.

44. *Other participants* reiterated their concern in imposing a penalty on a State party, noting that the burden of paying such penalty would ultimately rest on taxpayers and that there might be issues of State immunity and non-justiciability. It was also argued this issue should not be considered from a merely domestic perspective but also for situations in which non-performance was considered by an international arbitral tribunal. *The ICC Chair* added that he was not aware of any investment arbitration decision in which a penalty had been imposed on a sovereign State, and that it had been debated whether arbitral tribunals had the authority to issue these types of penalties. He therefore suggested mentioning that parties were free to cover this in their contract, but expressing caution about it. *Another participant* concurred that, for the reasons expressed earlier about these penalties not being applied often in the investment context, possible issues of enforcement, and the relationship with procedural rules, it would be preferable to state that Article 7.2.4 of the UPICC should not apply by default in the investment context.

45. *The Working Group agreed to stipulate that Article 7.2.4 of the UPICC should not apply by default in the investment context, recalling parties' freedom to contract in the commentary but cautioning that issues that might arise in the context of IICs*.

c) Termination

1. Right to terminate the contract

46. Upon invitation by the UNIDROIT Chair, *a participant* expressed support for paragraph 387, which explained that stricter rules on termination should apply to IICs as compared to commercial contracts, as IICs were often long-term agreements that served public interests. *A member of the UNIDROIT Secretariat* added that it followed from research of the Task Force that some IICs only established grounds for termination for the State, without prejudice to the remedies available to the parties under the applicable law. Furthermore, several contracts contained qualifications for termination (*e.g.*, providing longer timelines or limiting termination to material breaches or specific types of non-performance). It was noted that the draft model clause reflected this procedural practice, but perhaps additional explanations could be added in the commentary based on the forthcoming memorandum of the Task Force.

47. *The ICC Chair* suggested that there might be merit in mentioning in the commentary that parties could agree on termination as one of the possible remedies for a breach of representations

and warranties (*e.g.*, situations in which an investor did not comply with a representation to comply with all applicable laws when concluding the contract or as part of the bidding process). *A member of the UNIDROIT Secretariat* suggested also referring to corruption as a ground for termination.

48. *The Drafting Committee was provided with a mandate to update the commentary in line with the discussions.*

2. Notice of termination

49. *A participant* underlined the importance of notice as part of the procedural framework to protect substantive rights. He suggested taking a consistent approach to notice throughout the instrument and specifying whether notice by electronic means would be legally binding. *A member of the UNIDROIT Secretariat* suggested reflecting on notice generally, recalling that draft Chapter 2 still contained a placeholder on this topic. She indicated that notice was covered in a general manner in Article 1.10 of the UPICC, which stipulated that notice may be given by any means appropriate to the circumstances – not excluding electronic communications.

3. Restitution concerning long-term contracts

50. *A member of the UNIDROIT Secretariat* indicated that it followed from the research of the Task Force that restitution upon termination was often articulated in a detailed manner in IICs. In the ensuing discussion, it was suggested to (i) clarify in the commentary that reference was made here to restitution in the context of termination (not restitution generally); and (ii) clarify the second and third sentence of paragraph 394, which referred to the content of the relevant UPICC provisions. *The Working Group agreed with these suggestions.*

d) Remedies for non-compliance with sustainability obligations

51. *The UNIDROIT Chair and a member of the UNIDROIT Secretariat* recalled that it had been agreed to streamline and reorganise the guidance on sustainability in Chapters 2, 3, and 5. It was confirmed that the remedies for non-compliance with sustainability obligations would remain in Chapter 7. It was agreed to postpone the discussion on the latter until the other parts of the instrument on sustainability had been updated.

e) Criteria for calculation of compensation and damages

52. It was agreed to change the heading of Section E to "Compensation and damages", *i.e.*, without referring to calculation criteria since those were not covered in detail.

1. Full compensation

53. *A participant* noted that the draft moved beyond Article 7.4.2 of the UPICC on full compensation and incorporated treaty-style approaches based on fair market value, including lost profits and discounted cash flow (DCF). While welcoming that the draft recognised concepts such as certainty of harm, causation, foreseeability, and mitigation, he considered that linking compensation to fair market value – especially for early-stage or long-term projects – risked producing disproportionate awards and might have a chilling effect on legitimate regulation. To address this, he suggested that, for early-stage or pre-production projects, compensation should be limited to proven net unrecovered investments – reliance costs – excluding speculative future profits, while DCF valuations should be reserved for established operating assets with a demonstrated earnings history – and even then, this valuation method should be subject to deductions for contributory fault, failure to mitigate, prior insurance recoveries, and public-interest considerations such as fiscal sustainability and social impact.

54. *The UNIDROIT Chair* noted that these issues were also being discussed at UNCITRAL Working Group III and that coordination was necessary. *The ICC Chair* remarked that this was an important topic since both States and investors were unsatisfied with the approach to damages in investment arbitration.

55. In the ensuing discussion, support was expressed for the approach in the commentary, which first discussed the contractual approach to damages. The reference to proportionality in the first paragraph was also appreciated, whereby *a participant* underlined that the proportionality test was widely applied in both common and civil law jurisdictions.

56. *The ICC Chair* suggested indicating, as a second point, the possibility of including liquidated damages clauses in the contract. *A participant* agreed and suggested clarifying the approach, pointing to the distinction between relative and absolute relative liquidated damages (*i.e.*, whether evidence of the damages should be considered or not). *A member of the UNIDROIT Secretariat* noted that the model clause and commentary on liquidated damages could be moved up, so that it would directly follow this part.

57. *The Working Group* generally advised against seeking to resolve issues of valuation in the instrument. It was noted that valuation methods were complex, that the DCF method was applied inconsistently by arbitral tribunals, and that this area was evolving. It was suggested to mention different methodologies as examples, recognising that DCF was used in arbitration but subject to complicated discussions – without expressing views in favour of or against this method.

58. Different views were expressed about whether to make reference to contributory fault in this subsection. On insurance, *a participant* considered that insurance coverage should not exclude the right to receive damages. However, he suggested not to cover these issues in the instrument. *Another participant* pointed to situations in which risks were shared between the parties and in which liability was therefore shared. She suggested considering addressing this in the instrument.

59. *A participant* suggested addressing the time at which damages should be assessed and specifying whether any increase in loss that occurred after the non-performance should be taken into account.

60. *A participant* expressed support for the approach in draft Model Clause 1, in particular the statement in paragraph 5 that the arbitral tribunal shall not award punitive damages. Different views were expressed about moral damages. *One participant* considered that these should be excluded. However, *another participant* was in favour of confirming that moral damages could be awarded, mentioning inconsistent findings among courts in the MENA region. *A further participant* saw no reason to exclude moral damages, although he saw no reason to mention them in a model clause.

61. *The first speaker* took note of the approach suggested by the Working Group, *i.e.*, not to engage closely with the ongoing debate surrounding damages. However, he cautioned that, in framing this topic in the instrument, it should be ensured that it would be aligned (or at least could leave room for an interpretation that would be consistent) with the outcome of UNCITRAL's project.

62. *The UNIDROIT Chair concluded that it had been agreed to (i) first explain the contractual approach to damages in the commentary; (ii) insert a part on liquidated damages; and (iii) encourage parties to discuss the issue of damages when negotiating their IIC, explaining the aspects to be considered (e.g., different valuation methodologies, whether to exclude punitive damages, etc.).*

Item 3: Organisation of future work and closing of the meeting

63. *A member of the UNIDROIT Secretariat* explained that the valuable input provided by the participants would be used by the Drafting Committee to update draft Chapter 7 – recalling that most

other parts of the draft Master Copy had already been updated following the seventh session, as shown in the version that had been circulated for this meeting. As a next step, the Consultative Committee would again be consulted. The Working Group would meet for its eighth session between 19-21 January 2026 in Rome. In the meantime, the Secretariat would keep the Working Group informed of developments with regard to draft Chapter 8, section B (dispute settlement) and the reorganisation of the sections relating to sustainability – both of which were expected to be finalised soon.

64. *The Chairs* thanked the experts for their participation in the meeting, noting the remarkable devotion shown towards this project. They also thanked the Drafting Committee and looked forward to discussing a close-to-final version of the instrument at the next Working Group session.

ANNEXE I

LIST OF PARTICIPANTS

MEMBERS

Ms Maria Chiara MALAGUTI *Chair*	President UNIDROIT
Mr Eduardo SILVA ROMERO *Chair*	Chair ICC Institute Council
Mr José Antonio MORENO RODRIGUEZ *Chair of the Consultative Committee*	Professor Founding Partner, Altra Legal
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