

**Economic Analysis of International Commercial Law Reform Project  
5<sup>th</sup> Workshop**

10-11 April 2019, Rome, Italy

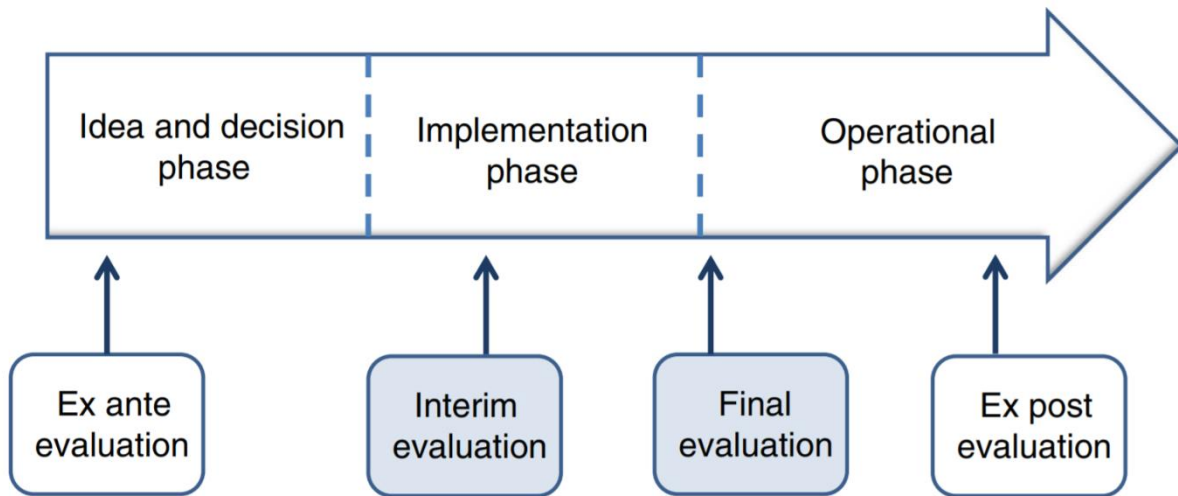
**Discussion Paper 2**

**The application of the framework during different phases of a commercial law reform project.**

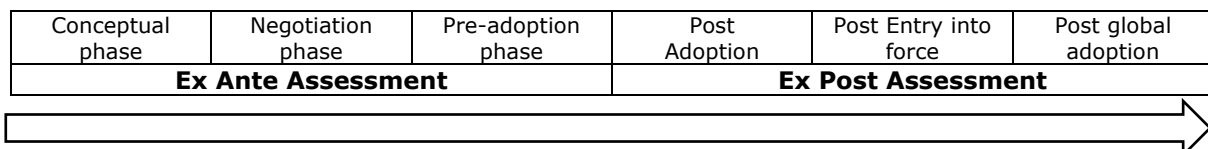
In principle, the EA framework should be able to be applied to all types of commercial law reform, whether domestic, regional, or international, and be applicable at all stages of the development of the solution, whether ex ante, or ex post. The value of the framework is in its adaptability and flexibility in applying to a broad range of legal reforms at any stage of their development.

However, designing a framework that can be applied at any stage of an instrument’s development raises a number of issues. This paper further examines the differences in the framework’s application for ex ante and ex post assessments and raises questions of the types of data that would be useful in different stages of the development of a legal instrument.

Samset and Christensen<sup>1</sup> divide up projects designed to bring economic benefits into the following phases:



Similarly, international commercial law reform projects could be divided up in the following way:



In economic theory, *ex ante* corresponds to the more traditional expression in law of *A priori*, and refers to the apprehension of a situation before it is constituted. Conversely, in economics, *ex post*

<sup>1</sup> Samset, K, and Christensen, T, 'Ex Ante Project Evaluation and the Complexity of Early Decision-Making' (2015) 17 Public Organization Review.

corresponds in law to *A posteriori*, referring to a reaction of an organism to a particular situation or development.

### **Ex ante assessment**

An ex ante assessment should be the natural first step of any international commercial law reform project. In the experience of the World Bank, an evaluation of more than 1000 investment cases revealed that 80% of projects that conducted a thorough feasibility study and secured 'Quality at Entry' were successful, whereas only 35% of those with poor preparation were successful.<sup>2</sup>

Large parts of an ex ante assessment, particularly prior to the adoption phase, are based on assumptions because of limitations in the availability of data. Data can be limited concerning history, facts and interpretations, leading to a selection of decision premises influenced by organisational structures and actors' roles.<sup>3</sup> Availability of limited amounts of data often leads to more reliance on experience, opinion or at worst, on guesswork. According to Samset and Christensen, this is a disadvantage but not a hindrance. The combination of facts and well-founded assumptions are usually the most important tool in an economic assessment at an early phase. Conducting an ex ante assessment tends to provide better results than developing an instrument without systematic ANALYSIS, even though the information base is weak.

Conceptual phase: Within UNIDROIT's working methodology, the conceptual phase is equivalent to the either a project being proposed for the UNIDROIT Work Programme or the Secretariat undertaking a feasibility study for a proposed project. During the conceptual phase, an EA can provide information about the possible impact of a potential instrument, before the decision to invest substantial resources into the project is made. During the conceptual phase, the ex ante economic assessment should attempt to be relatively simple, as it may be necessary to undertake several basic assessments of different potential solutions to a legal problem (for example, it may be necessary to prepare ex ante assessments for potential soft-law and a hard-law instruments responding to a particular legal problem). In terms of scope, ex ante assessments in the conceptual phase aim to identify which alternative solution to a particular problem will yield the greatest economic benefit and provide the most efficient model. At this phase, the EA may not need to go any further than identifying the different elements to be considered under each of the framework's variables. As no particular legal rules would have been drafted at the conceptual phase, the specifics will be necessarily vague and, in most cases, it will be impossible to make a quantitative assessment in terms of the potential dollar value impact of the proposed reform. Furthermore, EAs attempting to forecast material economic benefits at the conceptual stage risk being discredited and potentially damaging the project.

An important element at this stage is omitting details and less-relevant information which helps in avoiding analysis paralysis. This is also an argument for avoiding drowning the initial process with detailed, quantitative information. The lack of quantitative information ex ante can be challenging, and as such, the need for precise and detailed information increases with the advance of the process. In the latter stages, such information tends to be more readily available.<sup>4</sup>

Negotiation phase: Once a potential legal solution has been agreed, negotiations in relation to that instrument begin. Under UNIDROIT's working methodology, this would be through a Study Group or Working Group of international experts. As negotiations unfold and the instrument's provisions become more concrete, the ex ante economic assessment can be more specific in detailing the elements to be considered under each variable in the framework. Where there is sufficient certainty and data available, it may be possible for the EA to provide a quantitative estimate of the possible economic impact of the draft instrument.

Pre-adoption phase: Once negotiations for the draft instrument are complete, there will often be a period of time before the instrument is adopted, either by a Diplomatic Conference for a treaty or through a legislative body for a soft-law instrument. At this stage in the process, the rules in the draft instrument are usually well defined, which should allow for a relatively robust EA to be delivered, which includes an estimate of the possible economic impact. It may also be possible for EAs at this stage of the process to identify particular provisions or rules in the draft instrument that will have a particularly large effect on the economic impact of the instrument. This information could be vital to negotiating states as they finalise the instrument.

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<sup>2</sup> World Bank. (1997). Evaluation Results 1994, The International Bank for Reconstruction and Development, Washington D.C.

<sup>3</sup> Simon, H. A. (1957). Administrative Behaviour. New York: Macmillan

<sup>4</sup> Williams, T., & Sunnevaag, K. (2009). Making essential choices with scant information. Front-End decision making in major projects. UK: Palgrave Macmillan.

## Ex post assessment

Ex post evaluations undertaken after an instrument has been finalised or has entered into force provide learning information to improve design and decisions for similar projects in the future, as well as improve the implementation process and encourage greater adoption.<sup>5</sup>

Among the common issues faced in determining a methodology for conducting ex post economic assessments are the formulation of an appropriate counterfactual and the deterrent effect of enforcement.<sup>6</sup> In consideration of the uniform application of the framework, a counterfactual may be determined in the form of an absence of the developed law, or one of the alternatives considered in the pre-conceptual phase.

Evaluation ex post should in principle consider the objective and constraints that were faced by those developing the commercial law reform ex ante. As an example, from a report by the DG Competition for the European Commission, *an evaluation of whether a particular decision led to an increase in consumer welfare may be inappropriate if such objective was not meant to be pursued ex ante, or alternatively, if constraints were imposed which restricted the pursuit of this objective. In other words, the metric ex post should be consistent with the decision-making problem ex ante. An evaluation of outcomes which does not control for the parameters of the decision ex ante will thus necessarily be biased against the authority if observed decisions merely reflect deficiencies of the framework in which they were taken.*<sup>7</sup>

Post adoption: In conducting a post-adoption analysis, if there is limited implementation of the relevant instrument and the instrument did not change radically through the adoption process, the data available may not differ greatly from that available for an economic assessment undertaken at the ex ante pre-adoption phase.

Post entry into force: Once there is a sufficient level of implementation regarding the relevant reform, the data available following implementation can be utilised to determine whether the reform has had the anticipated impact determined in the ex ante assessment. Issues regarding causation can arise during this phase. Further, assuming there is only a limited number of States that had implemented the relevant reform, ex post assessments at this phase will likely need to be on a domestic level, focussing on the particular jurisdictions that have adopted the reform.

Post global adoption: Once there has been widespread implementation, a full global assessment as to whether the instrument has had the predicted economic impact can be undertaken. Given the long lapse between adoption of an instrument and its widespread adoption, this final phase might need to be undertaken over one decade after entry into force (or longer).

Annex I of this document was prepared by Professor Jeffrey Wool as another method of visualising how the framework could be applied throughout various stages of a commercial law project.

Annex II of this document are comments on the above discussion prepared by Dr. Juan S. Mora-Sanguinetti.

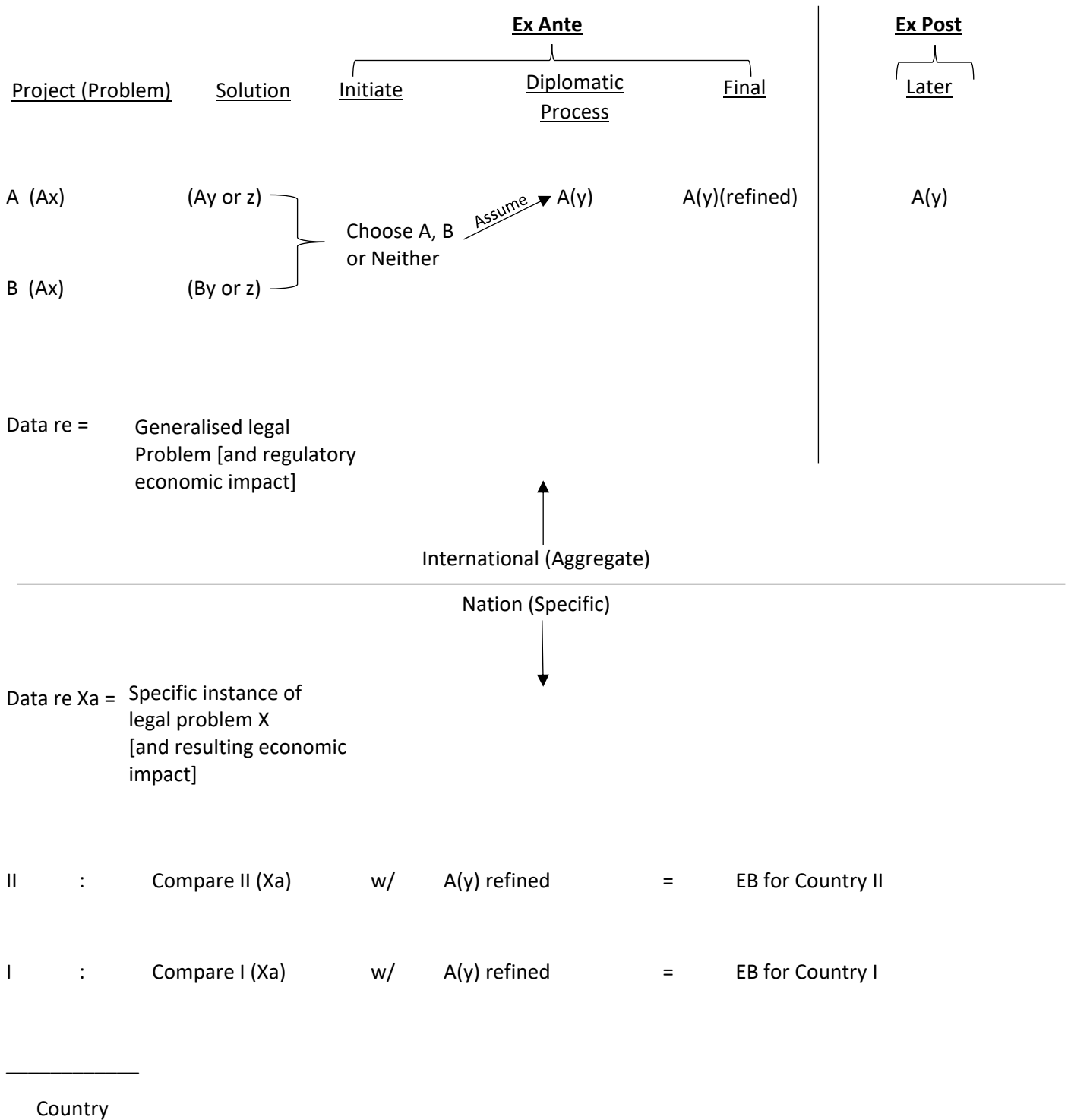
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<sup>5</sup> Andersen, B., et al. (2008). Effektvurdering av store statlige investeringsprosjekter (Impact Assessment of Major Public Investment Projects, Concept report no. 19, Norwegian University of Science and Technology.

<sup>6</sup> [http://ec.europa.eu/dgs/competition/economist/ex\\_post\\_evaluation.pdf](http://ec.europa.eu/dgs/competition/economist/ex_post_evaluation.pdf)

<sup>7</sup> Neven, D., and Zenger, H., 'Ex post evaluation of enforcement: a principal-agent perspective', see [http://ec.europa.eu/dgs/competition/economist/ex\\_post\\_evaluation.pdf](http://ec.europa.eu/dgs/competition/economist/ex_post_evaluation.pdf)

**Economic assessments at different stages**



## Some comments to the "Discussion Paper 2"

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### I

From a pure economic analysis point of view, the *ex ante* and *ex post* problematic that the paper exhibits is very similar to the one faced by research in standard economics. The "evaluation" of a problem can be done from a theoretical point of view (when confronting a lack of data, which is what happens in our case in the "ex ante" stage) or from an empirical point of view, when there is an adequate amount of data available for the analysis (usually *ex post*). The "theoretical" analysis is constructed using "models" that simplify reality. In general, for this debate, there are many references, but we can consult an old/"classic" reference like Friedman (1966).

For the "ex ante" analysis, the researcher could construct a "theoretical model", based on pure mathematical reasoning. For example, "DSGE" models, which are so popular today, are theoretical models and are used for several subjects (such as monetary policy ... But they are also used to "reason" about the effects of a possible simplification of the regulation of a country) (by way of example for Spain: López et al., 2008 and Andrés et al., 2006).

In any case, the ultimate objective, from my point of view, should always be to collect the data that allow us to make the analysis from an empirical point of view (and to correct, if necessary, the *ex ante* or theoretical analysis, following a scientific method).

Obtaining data should therefore always be present throughout the analysis. In that sense I would propose the following:

- The "ex ante" analysis should foresee, at least from a very general point of view, what kind of data would be necessary to make an *ex post* evaluation. The framework could provide a general indication of how similar projects have been evaluated with data on other occasions or by other institutions.
- The framework should include the "obligation" that the implementer ("user") generate statistical information, indicators and information on effective implementation. This information will be used in a complementary manner to some other information that may be generated by third parties not directly involved in the implementation process (such as the national judicial systems, which would report on litigation, or national statistical services).

### II

More generally, I think it would be useful for "Discussion Paper 2" to mention the efforts made at the European level to improve the evaluation of the new regulations. We can also learn from those experiences. There are "guidelines" and initiatives in this sense both from the OECD and the European Union (and specific country level).

- On the side of the European Union: "*Better regulation: guidelines and toolbox*". [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).
- On the side of the OECD (for the specific case of Spain): OECD (2014) (see reference below).

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<sup>8</sup> Email: [juans.mora@bde.es](mailto:juans.mora@bde.es) My opinions regarding my participation in this project of UNIDROIT are always personal and not on behalf of the Banco de España (such disclaimer must appear next to my name).

- At the national level, for example for Spain (although similar regulations can be found in other countries): Royal Decree 931/2017 on "Regulatory impact reports". In Spain it is requested that each new norm justify why the norm is necessary (as opposed to the alternative of not adopting any regulation at all) (article 1. a) 3 of RD 931/2017) and an explanation about its coherence with the principles of necessity, efficiency and proportionality (article 1. a) 2).

These texts refer, for example, to the methodology on how to conduct an ex ante evaluation. The "ex ante" situation is understood as the moment in which a new regulation has been passed (or is going to be passed by a national parliament) but has not yet been enforced.

### III

Finally, I mention a point of minor importance but that connects us with some discussions related to the literature on "big data". A new regulation (or regulatory proposal) (at a stage prior to the ex post evaluation), could provide indications based on "structural metrics" and "linguistic metrics" [many references can be cited, but by way of example: Waltl and Matthes (2014) or Mora-Sanguinetti (2019)].

## REFERENCES

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