UNIDROIT Foundation
EA ICLR 8th Workshop
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Report for the 8th Meeting of the Economic Assessment of International Commercial Law Reform Project

1. The eighth session for the project on Economic Assessment of International Commercial Law Reform (EA project) took place in Cambridge and online on 15 September 2022. For the agenda and the list of participants, please see Annex 1 and Annex 2.

Item 1: Opening of the Session

2. The Directors of the Cape Town Convention Academic Project, *Professor Ignacio Tirado* (UNIDROIT Secretary-General), *Professor Louise Gullifer* (Cambridge University) and *Professor Jeffrey Wool* (President of the UNIDROIT Foundation and Secretary-General of the Aviation Working Group), opened the session and welcomed all the participants. They were delighted to see a good number of participants in person.

Item 2: Project Summary and Introduction to the Framework and Draft Guide

3. *The UNIDROIT Secretariat* gave a presentation (see Annex 3) on the background of the EA project and the work achieved so far. It recalled that the project had commenced in 2015 as a partnership between the UNIDROIT Foundation and Harris Manchester College's Commercial Law Centre at Oxford University. The Global Business Law Institute at the University of Washington had joined as a partner from 2017-2019. In 2019, the project had been brought within the ambit of the Cape Town Convention Academic Project (CTCAP), a joint initiative between the University of Cambridge and UNIDROIT, with the Aviation Working Group as its Founding Sponsor. The project had three main objectives: (i) researching, collecting and assessing information relating to the production of economic benefits of international commercial law reform; (ii) producing a framework for the assessment of the economic effects of commercial law reforms; (iii) developing guidance that would accompany the framework, in order to facilitate the process of conducting economic assessments.

4. *The Secretariat* explained that six workshops and a restricted session had previously been held and that a formula for the assessment of economic impacts of law reforms had been developed, consisting of five variables (the Framework). Moreover, a Preliminary Draft Guide to the Framework (the Guide) had been produced, setting out the purpose and scope of the Framework, explaining the Variables and other issues relevant to the application of the Framework, such as the timing for conducting economic assessments (*ex-ante* and *ex post*), the identification of the baseline scenario (the situation in the absence of the new rules) and the level of confidence to be allocated to the assessment.

Item 3: Conducting *ex-ante* impact assessments: Comparing approaches

(a) Presentation by the OECD and Q&A

5. *Richard Alcorn (OECD)* gave a presentation on '*Conducting ex-ante regulatory impact assessments'* (see Annex 4). He explained that the OECD views *ex-ante* regulatory impact assessments (RIA) as a formal and systemic policy tool to help policy teams in governments

and regulators to understand the likely costs and benefits of new regulation. RIA aimed at controlling the quality of regulation, ensuring evidence-based policy making and enhancing transparency on rule-making. Key steps of RIA were: (i) the definition of policy objectives and policy context; (ii) the identification of regulatory options; (iii) the assessment of costs and benefits; and (iv) the design of enforcement, compliance and monitoring mechanisms.

6. *Mr Alcorn* presented data from the Regulatory Policy Outlook 2021, showing that all OECD States had recognised the importance of RIA, albeit to varying degrees, and that the gap between RIA requirements and practice was slowly diminishing. The data also illustrated that there was an increasing use of threshold tests to determine the depth of RIA (i.e., whether a full RIA or a simplified RIA is undertaken) and that regulators were assessing regulatory impacts on an increasing number of factors, including international factors (e.g., impact on market openness, trade and foreign jurisdictions). Following a question by one of the participants, *Mr Alcorn* clarified that the Regulatory Policy Outlook analysed the extent to which OECD member countries had adopted and (systematically) implemented RIA processes – it did not analyse the quality of the assessments conducted by member States.

7. *Mr Alcorn* highlighted the importance of regulatory oversight and outlined the key challenges for implementing RIA (e.g., that assessments were often undertaken too late in the policy process and were still overly focused on direct costs). Finally, he presented two examples of jurisdictions with well-functioning RIA: the European Union and the UK, which both conducted a preliminary or inception impact assessment at an early stage, followed by a full impact assessment at a later stage.

8. In the ensuing discussion, *the participants* focused on comparing the OECD guidance with the Framework and accompanying Guide. *Mr Alcorn* praised the Framework both for going beyond direct costs, measuring systemic impact and indirect costs as well, and for recommending and linking *ex post* and *ex-ante* assessments. *Professor Gullifer* noted that, in line with OECD best practices, the Guide recommended that impact assessments be conducted early on (in the conceptual phase) and then be deepened later on as more information becomes available.

9. *The participants* discussed potential differences between the assessment of law reforms at domestic and international level (the latter being the focus of the EA project). *Mr Alcorn* explained that the OECD promotes the interoperability of legal and regulatory frameworks and encourages jurisdictions to consider the international environment in rulemaking.[1] It was noted that different challenges may arise in seeking international harmonisation as compared to introducing legislation at the national level. For instance, the effective implementation and application of the new rules in different countries may be of particular relevance in law reforms pursuing harmonisation.

10. *Professor Tirado* asked whether the OECD had established a methodology with specific aspects that need to be considered when assessing the economic impact of law reforms. *Mr Alcorn* referred to the OECD's Regulatory Compliance Cost Assessment Guidance, which contained a taxonomy of regulatory costs and guidance on how to perform a compliance cost assessment.

11. *Professor Gullifer* asked whether the OECD considered the quality of the law (i.e. the way in which a law was drafted) a relevant aspect of RIA, noting that the EA project aimed not only at assessing the impact of new legislation in the absence of rules, but also at reforms improving existing legislation. *Mr Alcorn* indicated that the OECD had indeed conducted work on legal quality in the past.

12. *Professor Gullifer* asked whether RIA should cover different types of impacts (e.g., economic, social and environmental impacts) in a single assessment or whether those could be assessed separately. *Mr Alcorn* replied that RIA should be as holistic as possible and

[1] Reference was made to the OECD's Best Practice Principles on International Regulatory Co-operation.

consider as many of these areas as possible within one process. It was recognised, however, that the quantification of social and environmental impacts may be challenging. It was also noted that it may not always possible to clearly distinguish between the assessment of economic impacts and other impacts. For instance, under the OECD framework, trade and market openness looked at the impact on domestic economic activity, whereas impact on foreign jurisdictions would encompass a wider range of factors, including social and environmental aspects.

13. *The participants* discussed how the work done by the OECD on regulatory enforcement and inspection related to the Framework's Variable D (effective application of the new rules). *Mr Alcorn* indicated that, ideally, RIA should consider in an *ex-ante* stage whether the preferred regulatory option would work in practice or whether there were indications against this, such as a history of non-compliance in the relevant sector. He further highlighted the importance of regulatory oversight and asked how this was addressed in the Guide. *Professor Tirado* replied that for one of UNIDROIT's instruments – the Cape Town Convention on International Interests in Mobile Equipment (CTC) – a Compliance Index had been developed with the assistance of the private sector. *Professor Wool* elaborated that the CTC Compliance Index was a sophisticated tool that monitors and assesses compliance by contracting States with their undertakings under the Convention, considering both their formal implementation and actual cases, which created a strong incentive to comply with the Convention. However, he also pointed out that such a global monitoring process was costly and complex, and that most commercial law instruments were self-effectuating and would not require such extensive monitoring.

14. *The key takeaways from the discussion were: (i) the importance of conducting impact assessments early on (conceptual phase); (ii) the need to ensure consistency with, and build, on the guidance of the OECD; (iii) the relevance of non-economic impacts, even if those were not at the core of the project.*

(b) Presentation by the European Commission and Q&A

15. *Ulrik Mogensen (European Commission)* gave a presentation on '*Impact Assessment in the European Commission*' (see Annex 5). He explained that impact assessments were required in the European Commission whenever a policy initiative was expected to have 'significant impacts' and there was a policy choice to be made (with an exemption for urgent policy files). The process included a call for evidence, evaluations, public consultations, studies, specific tests and interservice coordination. The assessment resulted in a report (usually about 60-70 pages plus annexes) which addressed all relevant economic, social, environmental and fundamental rights impacts. All impact assessment reports followed the same structure and addressed seven questions: (i) what is the problem; (ii) why should the EU act; (iii) what should be achieved; (iv) what are the available policy options; (v) what are the impacts; (vi) how do the options compare; (vii) how would actual impacts be monitored and evaluated? Impact assessments were subject to a quality control by the Independent Regulatory Scrutiny Board.

16. *Mr Mogensen* elaborated on typical features of the impact assessment report and general principles to be considered in the assessment, such as proportionality and subsidiarity. He then presented the Better Regulation Toolbox, a comprehensive document with guidance on 69 'tools' or different aspects of the impact assessment. He also explained that impact assessment reports were essentially qualitative reports given that they involved judgment, noting, however, that the extent to which the assessment may be underpinned with quantitative evidence varied across policy areas and that the reports had increasingly been quantified over the last years. Of all the European Commission's impact assessments, 50% contained a full quantification of costs and benefits, 90% were at least partially quantified and 10% addressed legal issues that were difficult to quantify. He clarified that the assessments without quantification generally concerned administrative or governance related issues where quantitative information was not available or not as relevant.

17. *The participants* discussed how the European Commission's approach compared to Variable D of the Framework. *Mr Mogensen* indicated that, generally, the European Commission assumed that member States would properly implement the rules. It was also clarified that the choice for a Regulation over a Directive was based on the desire to achieve a greater level of harmonisation, rather than to account for the risk of poor implementation by member States. Furthermore, *Mr Mogensen* explained that the risk of disparate implementation by member States was to some extent quantified in the assessment since the justification for regulatory intervention was typically the divergence of conditions across the EU; the assessment would therefore seek to assess and quantify the potential cost savings of harmonisation.

18. *A participant* asked how it was decided to conduct an impact assessment on a particular policy proposal. *Mr Mogensen* explained that the starting point was a call for evidence and that the responsible Unit decided whether an impact assessment was needed. He noted that impact assessments were announced on the European Commission's website.

19. *A participant* asked how the Commission identified different policy options, noting that such selection may have a significant impact on the outcome (e.g., if certain options were left out). He suggested starting with the economic analysis and subsequently designing the policy options, rather than starting with a baseline option that was already well-prepared and weighing it against possible alternatives. *Mr Mogensen* explained that the impact assessment report informed policymakers about whether a legislative initiative should be initiated and about the main content of the legislative proposal. The drafting of the legislative text was based on the outcome of a general assessment of different policy options.

20. *Another participant* asked whether the impact assessment included a comparative analysis of the legal solutions that existed across EU member States, suggesting that evidence from such jurisdictions may be useful for the quantification of the impact of a reform. *Mr Mogensen* indicated that, while experiences in member States were relevant, the impact assessment was an economic analysis and not an analysis of different legal options.

21. *Professor Gullifer* asked whether the expected economic value of the legislation continued to be assessed during the drafting process. *Mr Mogensen* answered in the negative but noted that, upon request, the European Commission may provide further analysis when a change to a legislative text was made or desired.

22. *Professor Tirado* referred to a list of questions in Chapter 3 of the Better Regulation Toolbox for assessing different types of impact, and enquired (i) whether this was a closed list; and (ii) whether the questions were expected to be answered merely from a qualitative standpoint or also quantitatively. *Mr Mogensen* explained that the Toolbox contained general guidance and that the Regulatory Scrutiny Board generally asked for quantification although it accepted that there are areas where quantification is not possible.

23. *The key takeaway from the discussion was that the European Commission's Better Regulation Toolbox provided comprehensive guidance that could usefully be considered in the next phase of the EA project.*

Item 4: Discussion on specific aspects of the Framework

24. *Professor Wool* raised two general questions for consideration by the participants: (i) whether the Framework as had been developed in previous workshops was fit for purpose; and (ii) to what extent any aspects of the Framework needed to be further developed.

(a) Introductory remarks

25. *Professor Oren Sussman (University of Oxford)* made introductory remarks regarding the EA project from an economist's perspective (see Annex 6). First, he presented the model generally used by economists for assessing economic impact, based on transaction costs. He explained that transaction costs (t) operated like a tax driving down the seller's price

and/or driving up the buyer's price, thus precluding profitable transactions and creating a deadweight loss. At the same time, transaction costs may generate income for intermediaries (e.g., lawyers). He noted that the political risk of non-implementation was expressed as a factor (a probability).

26. Second, *Professor Sussman* spoke about how to operationalise the Framework and quantify the transaction costs. Taking the example of the CTC, he pointed out that costs arose from the lack of legal certainty due to diverging rules across jurisdictions and that the Convention aimed at reducing transaction costs by strictly enforcing the contract while avoiding interference with its substance. He noted that the distinction between transaction costs and contractual substance was difficult in practice.

27. Third, *Professor Sussman* made remarks on a possible Maritime Protocol to the CTC, noting that shipping and aviation were similar in many (operational) respects but the transaction costs differed. He noted that legal constraints undermined the competitiveness in aviation finance, while shipping finance was already highly competitive. Moreover, he argued that the transaction costs in the shipping industry were low and that market participants may lack interest in the CTC due to fear for substantial government interference.

28. Finally, *Professor Sussman* referred to a real case example of a shipping company that became insolvent, to underpin his argument that the legal system for the shipping industry already seemed to work well. This could be deducted from the relatively low amount of grounded capacity. Specifically, he argued that defaulting was a choice and that a low amount of grounded capacity showed that the parties were sufficiently disincentivised from defaulting, which would be evidence that the legal system was functioning well. *Professor Wool* questioned whether looking at the amount of grounded capacity would allow conclusions to be drawn on the functioning and costs of the legal system, noting that such factor may also mean that there were no defaults. Furthermore, *some participants* challenged the assertion that defaulting would be a choice based on fear for the legal consequences. It was further noted that the insolvency case that was used as an example may not be representative of shipping company insolvencies, which usually proceeded less smoothly. *Professor Sussman* maintained that the incidence of smooth insolvency cases was a relevant proxy for evaluating the quality of the legal framework, while fully recognising that there would be other proxies as well.

29. *The CTCAP Directors* thanked Professor Sussman for his valuable explanations.

(b) Domestic vs international level

30. *The participants* discussed whether the Variables of the Framework would be applicable in the same way in different situations. Two scenarios were referenced as example: (i) a government deciding to adhere to an international commercial law treaty; and (ii) an international organisation considering whether to develop a piece of transnational law. It was discussed that, while the Framework could well be applied in both situations, the relative weight of the Variables may differ. For instance, it was argued that Variable B (network effects) may be of greater importance to an international organisation seeking to harmonise legislation than to a government considering whether to ratify a treaty. It was pointed out, however, that Variable B would still be relevant for individual States since it aimed at assessing the advantage of harmonisation due to increased legal certainty.

(c) Scoring system

31. *The CTCAP Directors* asked whether the scoring system for the Variables as proposed in the Guide[2] was appropriate. They suggested that a simple scoring system was suitable for the conceptual phase, when deciding whether to pursue an international law reform, whereas the assessment results should be expressed in actual figures to the extent feasible at later

[2] The Preliminary Draft Guide to the Framework proposed the following scoring system: (i) Variable A: 1 to 4, (ii) Variable B: 1 to 4, (iii) Variable C: 1 to 4, (iv) Variable D: 0 to 1, (ii) Variable E: 1 to 2.

stages of the process. The acknowledged that the possibility to quantify assessment results likely depended both on the timing of the assessment and on the elements to be assessed (some factors would be harder to quantify than others irrespective of the timing).

32. *Several participants* agreed that the scoring system envisaged by the Guide was helpful when choosing between different possible interventions or making a decision on which project to prioritise. They also agreed that the need for quantification increased as the law-making process advances. *One participant* argued that, in principle, everything was quantifiable. He considered preferable to provide quantitative estimates on a best-efforts basis rather than not trying to provide an estimation at all. *Other participants* thought it may be misleading to provide estimates if data was lacking. To avoid this, it was suggested to provide the person conducting the economic assessment with flexibility to assess the results in different ways depending on the timing of the assessment. Specifically, it was suggested having a traffic-light scoring system in the conceptual phase while expressing the outcome of the assessment also in monetary values whenever feasible (likely at a later stage of the law-making process, when the amount and quality of data was expected to increase).

33. It was underlined that Variables A to C were net and that possible costs would thus be factored into the respective Variables (except for one-time transition costs, which would fall under Variable E). *The participants* considered that the assessment should contain a detailed commentary explaining the costs and benefits that resulted in the net outcome for Variables A to C. *Professor Tirado* suggested to continue working on differentiating between the Variables and developing guidance on elements that were relevant for each of them.

34. *Professor Tirado* asked whether the Variables should be assigned a relative weight. It was argued that, without such relative weight, the outcome of the assessment at the conceptual phase may lead to misleading results. *One participant* suggested expressing Variables A, B and C as percentages of 1 to account for the relative weight of the Variables. *Another participant* cautioned against assigning a relative weight to the Variables, arguing that the Variables were all necessary conditions and that an organisation would in any case maintain flexibility to decide whether to proceed with a project or not. He was in favour of keeping the scoring system as simple as possible. *Other participants* were of the view that the relative weight of the Variables should be clarified in the assessment. They suggested doing so in the explanatory text of the assessment.

35. *The participants* then discussed how the Variables should be framed. *One of the participants* noted that including the Variables in an equation that resulted in a single score risked being overly simplistic. He suggested presenting the Variables separately, by listing them in a table. *Other participants* saw merit in such approach, which would allow to present both simple scores and actual values in the table depending on the phase of development of the law reform. It was acknowledged that the transformation of the formula into a table would not solve the issue of the relative weight of the Variables in the conceptual phase. In that phase, the descriptive part of the assessment would thus be key.

36. *It was agreed to: (i) present the Variables in a table rather than in a formula; (ii) further develop guidance for each of the Variables; (iii) clarify in the Guide that in the conceptual phase, the outcome of the economic assessment would likely need to be limited to a simple scoring, whereas the assessment should seek to provide actual values whenever this was feasible at later phases of the law-making process; (iv) clarify in the Guide that the economic assessment should contain a comprehensive commentary, which would include explanations regarding the relative importance of the Variables.*

(d) Variable D

37. *Professor Wool* noted that Variable D was the most innovative part of the Framework. It represented political risk and was meant to qualify the outcome of the assessments of Variables A, B and C. Therefore, it had been included as a multiplying factor in the formula. He raised the question how Variable D could be considered if the formula was replaced by a

table. *Some participants* suggested that it may be possible to qualify each score individually, but it was generally considered preferable to present the outcome of the assessment under Variable D separately.

38. It was discussed whether Variable D had the same meaning in international and domestic law reforms. *Professor Gullifer* noted that, for international organisations, Variable D was an aggregate of the likelihood or extent to which States would effectively adopt the instrument, whereas Variable D would have a different meaning at the domestic level. *Mr Hameed* pointed out that several of the factors listed under Variable D in the Guide could be considered both at international and domestic level.

39. *One of the participants* asked why Variable D was not referred to as a 'probability' (or 'conditional probability' as it was based on a specific set of circumstances). To enable the application of the Framework by lawyers and economists, he suggested using terms that were used by economists whenever possible.

40. A discussion ensued whether D was indeed a probability. *Professor Wool* underlined the importance of distinguishing between Variable D, which referred to political and institutional risk, and the confidence level - which related to the quality of the data. *Professor Gullifer* noted that Variable D meant to express the extent to which the implementation of the law reform would be effective, it did not refer to the probability of ratification by individual States. *Professor Tirado* drew a comparison between Variable D and the assessment of credit risk by banks, where the default risk of a loan did not merely reflect the probability of default but also the cost and time implications in case of default. *The participants* generally considered Variable D to be a discount factor rather than a probability.

41. *It was generally agreed that, in the absence of a formula, the Guide should clarify that Variable D affected the outcome of the assessment of Variables A, B and C (similar to a 'discount factor').*

(e) Transaction costs

42. *A participant* asked why the term 'transaction costs' had not been used in the Guide. A discussion ensued among participants on the meaning of the term transaction costs, which appeared to be understood differently in different contexts.

43. *It was agreed not to use the term 'transaction costs' in the Guide due to its different interpretation by lawyers, economists, and financiers.*

(f) Distributional effects

44. *Professor Wool* asked the participants to what extent the Guide should provide guidance on distributional effects. He noted that distributional effects can encompass different facets and suggested that at least distribution among stakeholders, and possibly geographical distribution, ought to be considered when conducting an economic assessment.

45. *Several participants* agreed that distributional effects were important and needed to be considered. It was suggested assessing such effects qualitatively.

46. *It was agreed that the next version of the Guide should include guidance on how to consider distributional effects in the economic assessment report.*

(g) Social and environmental impacts

47. *Professor Wool* asked whether societal impacts (besides distribution) should also be taken into account, noting that the Framework and Guide had been in principle developed to assess the economic impacts of law reforms.

48. *Professor Gullifer* recalled that the guidance of the European Commission distinguished between economic, social and environmental impacts. She suggested that non-economic effects could be subject to separate assessments.

49. *Several participants* considered that environmental impacts could and should be considered to some extent in the assessment, given their relevance in certain reforms and their increasing relevance in general. *A participant* referred to the shipping industry as an example, where compliance with emission standards created substantial costs.

50. *Professor Gullifer* suggested assessing on a case-by-case basis whether a specific law reform led to costs for stakeholders related to environmental impacts. For instance, while a possible Maritime Protocol to the CTC may lead to an increase in the total number of ships, it was not expected to increase the emissions – and therefore the costs for complying with emission regulations – per ship. *Mr Hameed* added that, in relation to the Protocol to the CTC on matters specific to Mining, Agricultural and Construction equipment (MAC Protocol), a study had shown that the MAC Protocol could contribute to reducing the environmental impacts of mining since it would allow market participants to acquire better equipment. A deep understanding of the relevant sector and environmental matters would thus be required to assess the expected environmental impacts.

51. *The participants* concluded that an economic assessment should not consider non-economic impacts as such. However, it should take into account costs relating to social and environmental impacts, which could generally be considered under Variables A and C.

52. *It was agreed that the Guide should recommend economic assessments to recognise the relevance of possible social and environmental effects. To the extent such effects have an economic impact, they should be taken into account under Variables A and/or C. A detailed assessment of social and environmental effects could be conducted separately.*

(h) Uncertainties and confidence level

53. The *CTCAP Directors* noted that the confidence level as envisaged in the Guide related to the quality and reliability of the data used for the economic assessment. While the confidence level was generally expected to be low at the conceptual phase, it was expected to increase with the stages of development of the law reform as more accurate data would become available over time (especially in the *ex-post* phase).

54. *Professor Wool* noted that the European Commission's Better Regulation Toolbox contained a tool on uncertainty and sensitivity analysis which described a six-step process for performing such type of analysis. He suggested taking this into account, to the extent appropriate, for the Guide's section on confidence level.

55. It was recalled that the current version of the Guide envisaged a score from 1 to 5 to express the confidence level. *The participants* discussed whether such scoring system should be replaced by a range or confidence interval. *Several participants* cautioned against wide ranges in economic assessments, noting that they risked to lower the perceived importance and credibility of the assessment. It was also noted that ranges may be subject to different interpretations and may unduly draw the attention of readers to the extreme figures. In addition, wide ranges could be challenging for policymakers to consider during the decision-making process on a law reform.

56. At the same time, *several participants* acknowledged that a scoring system also had drawbacks, including the risk of divergent interpretations. For instance, a confidence level expressed in a score from 1 to 5 could be interpreted (i) as an indication of the certainty that the result would be at least the value expressed in the assessment (i.e., with a confidence score of 3 it would be more likely than not that the outcome would be at least € 10,0000); or (ii) as an indication of the likelihood that the value provided an exact outcome (i.e., with a confidence score of 3, the value of € 10,000 provided a relatively reliable indication, although the actual outcome could be lower of higher). *Some participants*

considered the first interpretation to be more meaningful for readers of the economic assessment. *Other participants* preferred interpreting the confidence score in the second manner, expressing how closely – in both directions – a certain value was expected to reflect the 'real' value. *One participant* suggested drawing inspiration from business costs analyses, where the confidence level may be expressed in a range reflecting the certainty of a specific number in percentages (e.g., the outcome could be expected to be at least 90% of a certain figure and at most 180% of that figure). Another option mentioned by a participant was to provide a ballpark figure and a simple confidence score in the main text of the economic assessment, with a more detailed analysis (possibly including ranges) in an annex.

57. *While the participants were generally not in favour of expressing the confidence level in ranges, it was concluded that the Guide could describe different ways of granting a confidence level to an economic assessment, thereby leaving flexibility to the person conducting the assessment to decide on the preferred approach.*

Item 5: Case Study - A possible Maritime Protocol to the Cape Town Convention

58. *The UNIDROIT Secretariat* presented the '*Case Study on a possible Maritime Protocol to the Cape Town Convention*' which had been prepared with the purpose of testing the Framework and the Guide. The Case Study consisted of four main parts: (i) Executive summary; (ii) Introduction to the envisaged law reform; (iii) Background of the economic assessment; (iv) Assessment of the five Variables.

59. *The Secretariat* underlined that the Case Study identified questions to be answered in a hypothetical *ex-ante* economic assessment concerning a possible Maritime Protocol. Although the Secretariat had provided background information on such possible Protocol and had sought to answer some of the questions on a preliminary basis, the Case Study was not to be understood as an economic assessment, nor was the objective of the Case Study to discuss the merits of a Maritime Protocol.

60. *The Secretariat* explained how each of the Variables had been considered in the Case Study. Under Variable A, a preliminary stakeholder mapping had been suggested. To assess Variable B, the Case Study examined relevant existing international instruments with which a hypothetical Maritime Protocol would be expected to interact (legal mapping). To measure the systemic impact (Variable C), the Case Study had sought to identify stakeholders that may be indirectly affected by the reform (e.g., supply chains, governments and, potentially, consumers of ship goods). Under Variable D, factors such as the complexity of the envisaged rules and the expected effective application by courts in relevant jurisdictions would need to be assessed. For Variable E, the costs of negotiating and adopting the Protocol would need to be measured, as well as the costs of setting up an international registry and the costs of advocacy and assistance activities.

(a) Scope and assumptions

61. The Case Study provided several possible approaches regarding the scope of the economic assessment (e.g., all States bordering the sea, the top 10 ship-owning economies in terms of cargo carrying capacity, etc.). It was raised that, at the *ex-ante* stage, it would be challenging to make an appropriate assumption of how many States would ratify the Protocol. *The participants* discussed that it may not be necessary nor feasible to assess this in a detailed manner; it may be more efficient to analyse which States would need to ratify the Protocol for it to successfully lower transaction costs. It was suggested to examine various hypothetical scenarios in the *ex-ante* assessment.

62. It was noted that another important aspect to consider was the declaration system. *Professor Wool* explained that the Aircraft Protocol to the CTC allowed jurisdictions to deposit declarations concerning some of its provisions (e.g., regarding insolvency). The extent to which States made such declarations – and the content thereof – would impact the reduction of transaction costs and would therefore need to be considered in the assessment.

63. Furthermore, *the participants* noted that the exact scope of the law reform may impact the economic effects and the geographical distribution thereof (e.g., impacts may be different depending on whether the Maritime Protocol would only apply to ships or also to maritime equipment such as mobile offshore platforms for the oil and gas industry).

64. *It was concluded that the Guide should advise that reasonable assumptions be made and that, especially in the early stages of the law reform, several legal assumptions may need to made (e.g., regarding the scope and content of the reform). The assumptions may also concern different options provided in a law reform (e.g., assuming that States would adopt the most favourable option).*

(b) Assessment of the Variables

65. *The participants* discussed whether and, if so, how the costs or benefits to lawyers should be accounted for in the assessment, noting that they had not been identified as stakeholders in the Case Study. It was concluded that legal costs could be considered under Variable A or C, and that it was rather a matter of distributional effects given the relationship with the costs for businesses (which would benefit from a decrease in legal costs).

66. Furthermore, *the participants* discussed whether shipping registries should be identified as stakeholders. It was noted that national registries (and service industries relating to the registries) may think that they would be affected by the introduction of a Maritime Protocol, while the international registry that would be introduced by the Protocol would run in parallel to the national registries. It was suggested to consider the role of national registries in the economic assessment, under Variable A or C.

67. Moreover, *the participants* discussed whether ship manufacturers would more appropriately fall under Variable A or Variable C. *Several participants* considered manufacturers to be direct stakeholders (Variable A), noting that this would be in line with the approach taken in the economic assessment of the MAC Protocol.

68. *One of the participants* suggested including a 'theory of change' under Variable A, i.e., a theory of how the project was going to benefit stakeholders, to give context for understanding the impact and the key drivers for the initiative.

69. Regarding Variable B, it was discussed that the assessment should also consider the possible revocation of existing laws. Furthermore, in case of possibly conflicting legislation, the law reform itself could provide solutions (e.g., indicating that the instrument would prevail in such case).

70. With respect to Variable D, it was noted that it may be challenging to assess the complexity of the new rules at the conceptual phase of a law reform, since the exact content would still be unknown.

71. *It was concluded that the Case Study had provided an excellent opportunity to test the Framework and accompanying Guide. It was agreed to further develop the Case Study ahead of the next meeting, with the input from economists.*

Item 6: Next steps and closing remarks

72. *The CTCAP Directors* summarised the next deliverables for the EA project:

1) Updating the Framework (presenting the Variables in a table instead of in a formula).
2) Updating the Preliminary Draft Guide:
    - Building on the guidance of the OECD and the European Commission.
    - Further developing the guidance on the Variables (especially Variable C).

- Clarifying that economic assessments should seek to provide values whenever feasible. At the initial phase of a law reform process, the outcome of the assessment would be expressed according to a simple scoring system.
- Clarifying that the economic assessment should contain a comprehensive commentary, which would include explanations regarding the relative importance of the Variables.
- Clarifying that Variable D affected the outcome of the assessment of Variables A, B and C.
- Developing guidance on how to consider distributional effects.
- Acknowledging the relevance of social and environmental effects, and recommending to take the costs relating to such effects into account under Variables A and C.
- Developing the parts of the Guide on the confidence level and assumptions.
- Developing an accompanying document explaining how economic theory was taken into consideration, in order to ensure that the Framework and Guide could be usefully applied by both lawyers and economists.

3) Further developing the Case Study on a possible Maritime Protocol to the Cape Town Convention.

73. Two participating economists kindly offered their assistance to the Secretariat for these steps. It was agreed that a next meeting would be organised once the abovementioned documents were further developed.

74. *The CTCAP Directors* thanked all the participants for their time and for the fruitful discussions.

ANNEX I

Economic Assessment of International Commercial Law Reform project

An initiative under the auspices of the Town Convention Academic Project

Project Leads: UNIDROIT; UNIVERSITY OF CAMBRIDGE Faculty of Law

Founding Sponsor: A·W·G Aviation Working Group

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Draft Agenda
Thursday, 15 September 2022

University of Cambridge, Cavonius Centre, Gonville & Caius College, West Road site, Cambridge CB3 9DS and online via Zoom

*** all times are in British Summer Time (BST), UTC +1) ****

Chairs: Professor Louise Gullifer, Professor Jeffrey Wool, Professor Ignacio Tirado (CTCAP Directors)

09:30 – 10:00	Registration and tea/coffee Opportunity for virtual participants to check connection
10:00 - 10:10	Opening of the Session *CTCAP Directors*
10:10 – 10:30	Project summary and introduction to the Framework and Draft Guide *UNIDROIT Secretariat*
10:30 – 11:10	Conducting *ex-ante* impact assessments: Comparing approaches *Presentation OECD and Q&A*
11:10 – 11:40	Coffee break
11:40 – 12:15	Conducting *ex-ante* impact assessments: Comparing approaches *Presentation European Commission and Q&A*
12:15 – 13:00	Open discussion on different approaches and discussion on specific aspects: Counterfactuals, distributional effects, uncertainties, Variable D
13:00 – 14:15	Lunch
14:15 – 15:45	Open discussion on the case study: A possible Maritime Protocol to the Cape Town Convention *Introduction by UNIDROIT Secretariat and Andrew Myburgh*
15:45 – 16:00	Coffee break
16:00 – 17:15	Continued discussion and next steps
17:15 – 17:30	Closing Remarks *CTCAP Directors*

ANNEX 2

List of participants

1. Jeffrey Wool (UNIDROIT Foundation, Aviation Working Group)
2. Louise Gullifer (Cambridge University)
3. Ignacio Tirado (UNIDROIT)
4. Richard Alcorn (OECD)
5. Ole Böger (Judge, Hanseatic Court of Appeal Bremen)
6. José Manuel Canelas Schüt (LegalBolivia / University of Oxford)
7. Mohamed Gomaa (Hamburg University)
8. Ulrik Mogensen (European Commission)
9. Andrew Myburgh (IFC)
10. David Osborne (Watson Farley & Williams)
11. Jordi Paniagua (University of Valencia, University of Notre Dame)
12. Laura Pierallini (Studio Legal Pierallini)
13. Hessam Rahimi (Independent researcher)
14. Isabelle Rueda (University of Exeter)
15. Teresa Rodriguez de las Heras Ballell (University Carlos III of Madrid)
16. Mathias Siems (European University Institute)
17. Daniel da Silva (Boeing Capital Corporation)
18. Oren Sussman (University of Oxford)
19. Jennifer Varzaly (Durham University)
20. Alison Weal (Watson Farley & Williams)
21. Anna Veneziano (UNIDROIT)
22. William Brydie-Watson (UNIDROIT)
23. Myrte Thijssen (UNIDROIT)
24. Hamza Hameed (UNIDROIT)
25. Amelia Lo (UNIDROIT)
26. Rebekka Forster (UNIDROIT, intern)