



UNIDROIT Foundation
EA ICLR 9th Workshop
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Report on the 9th Meeting of the Economic Assessment of International Commercial Law Reform Project

1. The ninth session for the project on Economic Assessment of International Commercial Law Reform (EA Project) took place in Rome and online on 14 and 15 February 2024. 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 Louise Gullifer* (Cambridge University), *Professor Jeffrey Wool* (President of the UNIDROIT Foundation and Secretary-General of the Aviation Working Group) and *Professor Ignacio Tirado* (UNIDROIT Secretary-General), opened the session and welcomed all the participants.

3. The Directors expressed their appreciation for Professor Oren Sussman's contribution to the project.

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

4. *The UNIDROIT Secretariat* gave a presentation (see [Annex 3](#)) on the updated Draft Guide to the Framework for the Economic Assessment of International Commercial Law Reform, and a study of ex-post economic analysis. The *Secretariat* introduced the changes made to the Framework and the Preliminary Draft Guide to the Framework, as prepared by the Secretariat in collaboration with the consultant that was hired in 2023 for this project, Professor Oren Sussman. Aspects presented included the presentation of the Framework in a table as an alternative to a numeric Formula, the five Variables, additional factors including competition and externalities, distributional effect, the concept of transaction costs and economic benefits, the identification of the baseline scenario, and the level of confidence to be allocated to the assessment. It was explained that most of the changes reflected the discussions and addressed the outcomes of the 8th Workshop while others, such as the inclusion of definitions, aimed at bridging the gaps between lawyers and economists by using language familiar to both.

5. *The Secretariat* provided an overview and the main takeaways of a study of ex-post economic analysis (the "Study"), as prepared by Ms Theodora Kostoula (UNIDROIT). The Study (see [Annex 4](#)) focused on the analysis conducted by Bo Bian in relation to the Cape Town Convention and its Aircraft Protocol, as reflected in her article on "Globally Consistent Creditor Protection, Reallocation, and Productivity". Despite it being an ex-post analysis, the Study aimed at facilitating the comparison with the approach of the EA project and enabling lawyers to understand how economists would conduct an economic assessment. The key takeaways of the Study included, among others, the following: (i) the ex-post analysis did not distinguish between factors, i.e., it did not specifically address or distinguish between Variables A, B or C. Instead, it highlighted aspects such as productivity (i.e., increased transactions), competition, shifts in market dynamics due to the entry of new financiers under a harmonised framework, impact on consumers, and factors affecting the applicability

of the Convention; (ii) the analysis did not consider the transition costs of the reform (as per Variable E); (iii) the results of the analysis for each issue or factor were not aggregated but were rather presented and discussed individually.

6. The *Secretariat* provided an indicative list of questions to consider for future work on the project, in relation to (i) the content and number of the existing Variables, (ii) whether or not matters like competition should be considered either in the context of the existing Variables or as separate factors, (iii) whether specific concepts would require further guidance and explanation, (iv) what methodology should be adopted and what economic theories could support the Framework and the Guide, especially with regard to the confidence level, distributive effects, and assumptions.

7. *Professor Sussman* elaborated on the changes he proposed, with a particular focus on the proposal to merge Variables A-C, and on introducing competition and externalities as separate factors. He noted that the Guide was too descriptive and limiting and suggested elaborating a more flexible framework by merging some of the Variables. He referred to the example of the Study, which did not distinguish between different factors and did not consider harmonisation. He added that the Guide should be more accessible to audience with economic background and therefore suggested to use neutral terminology, avoiding terms with a specific meaning in economics.

Item 3: Open discussion on the Framework and draft Guide: Application, transaction costs and economic benefits

8. *The participants engaged in a discussion on the focus and purpose of the project, the target audience and their impact on the ex-ante or ex-post approaches and the Framework.*

(a) Focus and contexts of use

9. *Professor Wool* raised concerns regarding the project's shift from an ex-ante global approach to an ex-post country specific focus, as reflected in certain changes and in the exercise of undertaking the Study. He recalled that, originally, the purpose of the project was an ex-ante approach at a very early stage, where no information or data existed. The ex-post aspect was introduced later to help states in drawing comparisons on law reforms that had already occurred. He identified four main phases, (i) pure ex-ante international, (ii) ex-ante national, (iii) ex-post national, examining the market size, and (iv) ex-post general, when the instruments were adopted, and the countries considered ratification.

10. *Professor Gullifer* highlighted that the approach used in ex-ante assessment differed from ex-post analysis, necessitating a different exercise.

11. It was discussed that the ex-ante focus of the project was not only conceptual but also related to the Guide's target audience, which would eventually include decision-makers, policymakers, and government officials. *Professor Wool* emphasised that, despite the project's pedagogical approach, it focused on decision-making within a combination of law and economics context. In this sense, he noted that the project would change the past practices in the ex-ante assessments.

12. *The participants* explored the relationship between ex-post and ex-ante analyses of international law reform initiatives. *A participant* underscored the difference between ex-post and ex-ante assessments, noting that ex-post analyses provided insights into the success and benefits of past reforms, such as the Cape Town Convention, which could inform future decisions (ex-ante) and be compared to them. *Another participant* noted that excluding ex-post analysis might not be effective as an ex-ante assessment might need to switch into ex post as the reform progressed and would be implemented.

13. *Professor Gullifer* queried whether the approach of this project would entail acknowledging the existence of different methodologies for different situations. She asked whether the Guide should cover all of them or should focus on those that had not been developed in detail. *Professor Wool* responded that while the project could change, if necessary, the original target was the ex-ante global approach for international organisations contemplating projects. He noted that this reflected the gap identified in ex-ante assessments. He suggested either eliminating the ex-post focus entirely or closely tailoring traditional models.

14. *Mr Brydie-Watson* observed that the Guide, particularly the table reflecting outcomes in an economic impact score, already reflected both ex-ante and ex-post assessments.

15. *The CTCAP Directors* pointed out that the core objective was to offer structured guidance to facilitate rational decision-making in the very early stage but acknowledged the need to provide a flexible tool. Besides, ex-post assessments could be useful, especially at the country level in promoting ratifications.

16. It was agreed that the project would primarily focus on early-stage ex-ante assessments, and in particular on two points in time: (i) conceptual stage, corresponding to a very early stage where the evaluation and the Framework would be applied to an early-stage idea, such as a proposal from an international organisation like UNIDROIT, UNCITRAL, or the World Bank. In that stage only an outline would exist without accompanying data; (ii) pre-adoption stage, corresponding to a later stage where states would seek to adopt or implement the law reform with more information available. That stage was evident with the Aircraft Protocol, where a final draft of the instrument existed, but had not yet been adopted.

17. *It was agreed to (i) adjust the Guide and change the "Contexts of use" section to reflect the shift back to the ex-ante approach; (ii) develop limited guidance on ex-post assessments without entirely excluding them from the scope. The Guide should focus on ex-ante assessments but should acknowledge the utility of ex-post assessments in drawing comparisons, possibly in an annex or a separate section.*

(b) Project's title

18. Following the discussion regarding the project's focus and purpose, the participants considered changing the project's title to better align it with the scope and objectives. A *participant* with an economic background raised concerns that the term "assessment" could be misleading, as it held a specific meaning in economics, potentially triggering expectations of an actual economic assessment.

19. *The participants* engaged in a detailed discussion and agreed that the project did not deal with a traditional economic assessment in the narrow sense. Consequently, they deliberated on alternative wording for the project's title, such as "evaluation," "analysis," or "scoring".

20. *It was agreed to (i) clarify that the project did not deal with an economic assessment in a narrow meaning; (ii) further contemplate the appropriate terminology for the title; (iii) change the project's title accordingly.*

(c) Framework and Scoring system

21. *The participants* examined the two Options presented in the updated Draft Guide for presenting the Framework. Option A, the Formula, presented the Framework in an equation form, illustrating the relationship between the Variables. Option B offered a simpler approach, listing factors in a table as an alternative to the Formula. *The UNIDROIT Secretariat*

invited the participants to decide whether to adopt a formula or a conceptual framework for evaluating reforms. It was noted that selecting Option B would necessitate further adjustments to the Guide, including removing the three “Steps” for calculating an economic impact score.

22. *Professor Tirado* observed that Option B appeared to reflect the discussions from the previous workshop about the challenges of incorporating different factors into a numeric formula. However, Option B would require further elaboration and alignment with the rest of the Guide. *Ms Thijssen* and *Ms Kostoula* confirmed that Option B was designed to align with earlier discussions. They recalled that several participants had criticised the use of an equation as overly simplistic and lacking accuracy and had suggested instead to present the Variables separately in the format of a table. That would allow for a simple score for each Variable without having a single numerical value. *Ms Thijssen* further elaborated on how this change in the Framework would affect Variable D. *Mr Brydie-Watson* recalled the concerns expressed in previous workshops in adding up Variables A and C.

23. *Professor Wool* expressed reservations regarding the removal of the Formula and its substitution with a mere listing of the Variables. He argued that presenting the Variables without any scoring system or guidance on how these would take force would offer little value to decision-makers. He identified two approaches: (i) providing some form of scoring to reflect the relevant impact and enable project comparisons, and (ii) employing numerical scoring and scaling, e.g., rating projects on a scale of 1-12 above or below an acceptability threshold.

24. *A participant* highlighted the utility of the Formula in (i) ranking different types of reforms, since it allowed different variables to be weighted and numerical results to be produced, and (ii) scaling to determine whether a subject met the threshold, creating a project scale. He further acknowledged that a formula might be less suitable for evaluating a specific project, where a conceptual framework would be more appropriate. *Professor Tirado* found the ranking exercise valuable for establishing a hierarchy or ranking for legal reform. However, he noted its limited utility for organisations like UNIDROIT in identifying comparable projects, particularly in innovative areas like digital assets. In such cases, scoring could be more useful.

25. *Mr Brydie-Watson* noted that the economic impact score table constituted a middle ground between scoring and benchmarking methodologies. He suggested that the project’s primary utility laid in benchmarking exercises.

26. *Professor Wool* proposed offering flexible options: (i) quantifying with a range and assigning numbers to projects, (ii) employing numerical scoring and scaling, (iii) comparison, or (iv) net positive evaluation. The Guide could present these options and emphasise that quantification, i.e., assigning numbers, was preferred as it facilitated comparisons and produced absolute numbers.

27. *One of the participants* discussed the use of a formula and scale for measuring the impact of different projects or reforms, from an economics perspective. The participant distinguished between an ordinal scale, which ordered values without an absolute reference, and a cardinal scale, which provided an absolute reference point. The approach chosen would depend on policymakers’ needs. An approach involving both ex-post and ex-ante analysis was identified, in using a law reform, such as the Cape Town Convention, as a baseline for comparison to assess the expected benefits of different law reforms. In this context, the formula could apply to both ex-ante and ex-post assessments, depending on the desired outcome.

28. *Professor Wool* pointed out that a formula would increase transparency and uniformity. *Mr Brydie-Watson* agreed, emphasising the value of the project in including all the factors that should be taken into account, especially Variable D, which was innovative.

29. *Professor Sussman* suggested presenting a less descriptive Framework, avoiding terms with specific economic meaning. *Professor Wool* clarified that while descriptive language aimed to provide guidance, it did not limit the Framework. He stressed the importance of scaling and quantifying for aiding decision-making by illustrating costs and benefits.

30. *Mr Brydie-Watson* highlighted that the target audience was UNIDROIT and other international organisations or states in prioritising law reforms or the allocation of funds for legal and technical assistance. He pointed out the role of the Framework in facilitating the process. *Professor Gullifer* added that the Guide's purpose and focus were crucial issues that would impact decisions on substance, the Framework, and the Variables.

31. *Professor Wool* noted that while quantifying benefits required economic assessment, oversimplifying or disregarding complex legal and contextual factors risked misleading policymakers. Policymakers would benefit from comparing proposed reforms based on past experiences using the Formula. This approach would guide decision-making by positioning reforms within a hierarchy of past successes and failures, offering insights into potential impacts.

32. *The participants* discussed the use of notional numbers and methods for measuring the impact of law reforms. Consistent notional figures and scoring would aid decision-makers in comparing projects, especially in the early stages.

33. *The participants* explored whether the Framework could produce actual monetary values, i.e., money figures, for ex-ante evaluations. *Professor Gullifer* asked the participants if this was feasible and how it could be accomplished. *Professor Wool* referred to the economic assessment of the Mining, Agricultural and Construction Protocol (MAC Protocol) as an example, explaining how monetary figures demonstrated to governments the benefits of ratification. He noted that it was important to provide various tools within the Framework to meet decision-makers' expectations.

34. *The participants* agreed that a formula could be more effective and opted for Option A with modifications. It was agreed to use the term "Framework" but employ a formula. The formula was deemed easier to interpret and could yield results indicating how a law reform differed from a benchmark or another low-ranking reform.

35. *One of the participants* questioned the use of plus signs among Variables A, B and C, noting that their combined effect, the net figure, could often be negative. *The participants* discussed alternatives, including the "&" sign, dash, or a flow chart to reflect the relationship. It was suggested to keep the formula simple and maintain the plus signs to avoid confusion and misinterpretations.

36. *The participants* focused on how Variables A-C should be presented and framed. *A few participants* noted their overlapping nature and questioned the necessity of presenting them separately. *Professor Wool* acknowledged the overlap in certain situations but noted that their effect would still be combined and then multiplied by D.

37. It was agreed to consider the combined effect of the Variables while assigning individual scores to each, as one could be positive or negative. For instance, individual scores for A, B and C, could range from 0 to 12, with the combined score not exceeding 12. This approach would allow decision-makers to assess the individual weighing and benefits; for example, where the combined effect was 12 because A was 12 while B and C were zero.

38. *The participants* also discussed how to present Variable E and considered options such as a percentage cost, simple scoring, separate scoring, or a threshold by dividing the entire amount by E. It was pointed out that Variable E was the only Variable that could be easily quantified. *The participants* favoured a suggestion to create a separate system for E to reflect the relative cost of the law reform compared to its benefit.

39. *It was agreed to: (i) keep Variables A, B and C separate to provide more complete and accurate results; (ii) use a modified Option A, where Variables A-C are assigned individual scores, their combined effect is multiplied by D, and Variable E is presented separately; (iii) further develop the Framework and the scoring system, (iv) reflect on whether the Framework could be used to produce actual monetary values for ex-ante assessments.*

(d) Transaction costs

40. *The participants* reflected on the concept of transaction costs and their implications for market dynamics, initiated by Professor Sussman's proposal. *The participants* explored the role transaction costs in evaluating economic impact and their relationship with Variables A-C.

41. A discussion ensued among the participants on the meaning of "transaction costs", which seemed to vary across contexts. *Professor Wool* noted that the term "transaction costs" was used in two different ways in the Guide, one as a "lawyers" definition, encompassing legal fees and monitoring, and one as an economic definition referring to "imputed costs".

42. Recognising transaction costs as part of a cost-benefit analysis, *a participant* proposed a broader definition to encompass all relevant costs. *Professor Gullifer* noted that transaction costs in the new text of the Guide aimed to cover all costs, including lawyers' fees and unrealised transactions. It was agreed to clarify this in the Guide and broaden the definition to encompass all costs and factors that could move the market equilibrium of the graph. *Professor Sussman* advocated for a unified concept of transaction costs accessible to both economists and lawyers.

43. *One of the participants* noted the role of transactions costs in producing and reducing economic benefits and proposed to use the equilibrium analysis and the graph presented in the Guide, to explain the relationship and the concepts. *The participants* discussed the relationship between transaction costs, economic benefits, and the Framework, and pointed out the need for linkage between the Introduction and the Framework by stressing the problem, the purpose and scope of the Guide. For that purpose, *a participant* suggested adding a problem description, the Guide's resolution approach and its impact on reducing transaction costs and producing economic benefits. To bridge the terminology gap between lawyers and economists, this should be accompanied by an explanation of the terminology used. *Another participant* suggested adding the explanatory text after the Framework had been laid down, to demonstrate that the analysis of transaction costs was one method of applying the Framework.

44. *A participant* suggested framing the analysis and linking a basic economic model to the Framework through the graph that was contained in the transaction costs analysis. It was noted that the questions in Variable A followed from this model. Therefore, the graph and its analysis should not be perceived as a mere illustration but rather as the economic model adopted by the Guide. Integrating a micro model into the formula would help frame the Variables and operationalise the questions under the Variables, addressing issues related to market description and size, or to the parties affected by market failure.

45. It was further noted that, from an economics perspective, translating the Framework to monetary terms would involve reducing transaction costs. Economic benefits would be generated as increased transactions would grow the market, increasing competition and thus reducing transaction costs. *Professor Wool* noted that reducing transaction costs could occur through lower transaction risk without necessarily increasing transaction volume or competition.

46. *It was agreed to (i) elaborate on the role and concept of transactions costs in producing economic benefits, elucidating their connection with the Variables and with concepts such as competition; (ii) avoid the use of the term 'transaction costs' in the Guide due to its different interpretation by lawyers and economists; (iii) develop the introductory section by bridging it to the Framework and the Variables, utilising the transaction costs analysis as an economic model.*

Item 4: Assessment of Variables A-C and their relationship with transaction costs

47. *The participants explored the interplay of Variables A-C, and how they related to transaction costs.*

48. *Professor Gullifer emphasised that Variables A, B and C represented different sources of benefits. She reminded the participants that these Variables constituted "net" values to provide benefits, meaning that each could move the graph to the right to produce benefits.*

49. *A participant explained that the Variables served as factors, which could then be quantified to offer a sense of how the law reform would interact with other laws. It was argued that particularly Variable B, which involved assessing the benefits of harmonisation, was difficult to quantify because of the challenges in tracking it or where its value was negative due to regulatory competition. Mr Brydie-Watson noted that, despite the intricacies in precise quantification, the inherent value of uniform laws for cross-border trade was highly recognised, as demonstrated in the Cape Town Convention and the aviation industry. Professor Wool stressed the significance of Variable B, both mathematically and conceptually.*

50. *A discussion ensued regarding the relationship between transaction costs and Variables A-C. Professor Sussman explained that the expansion of transactions as a result of reducing the transaction costs, should be categorised under Variables B and C. He further pointed out that economists would not make a distinction between them as everything was interrelated and not considered as separate factors.*

51. *Professor Gullifer explained that changing the law resulted in a reduction of transaction costs, widely defined, which led to an increase in the number of transactions, falling under Variable A. Instead, B represented the impact of the law changes across many places in lowering the transaction costs. In the context of transaction costs, it was explained that B corresponded to the narrower "lawyer" definition presented in the Guide.*

52. *Professor Wool further noted that Variable C connected to broader economic consequences, emphasising the impact of harmonisation and legal changes on transaction costs: lower transaction costs could lead to more transactions, for example acquisition of more equipment such as aircraft, which could have an effect in another industry such as tourism or employment. Instead, B meant that because of harmonisation and changes to the law in more countries, transaction costs dropped as a consequence of a reduction of the investigation costs and legal costs related to the operative rule across different jurisdictions. He explained that, consequently, transaction costs matched to Variables A and B. Professor Sussman noted an overlap between the Variables and proposed expanding the text to clarify their meanings.*

53. *The participants engaged in a discussion on the content of the Variables, their differences, and the feasibility of merging some, as proposed by Professor Sussman. The participants expressed different views on the interpretation of the Variables, particularly for Variable B. It was noted that Variable A pertained to the direct benefits and risk reduction associated with facilitating transactions, crucial for assessing the viability of a law reform project. Variable B focused on the international applicability of the instrument and its potential for creating network effects, while Variable C addressed broader development objectives, such as poverty alleviation or environmental sustainability. It was noted that*

increasing transactions in the wider area should fall under Variable C, as it looked at other affected areas, beyond the area at stake. It was discussed that Variable A could spill over to Variable C. However, it was clarified that Variable A referred to the market size and cost, as well as the number of transactions within it. Increased transactions or reduced costs would be categorised under Variable A.

54. Professor Wool added that it was important to underscore the value of Variable B to the decision makers, to show the benefit of a harmonised rule on an international basis, especially for non-localised things, such as mobile equipment or intangibles, as is shown by mobile assets falling under the Cape Town Convention. *Mr Brydie-Watson* pointed out the need to separate Variables A and B, recognising their potential as distinct tools to promote law reform. Variable B, in particular, was deemed highly significant. For instance, it would lead to increased transactions within a country as neighbouring and regional countries adopted the same rules.

55. *Professor Gullifer* explained that Variables A and B were not necessarily going to be the same considering that Variable A could represent a low figure where the law had not been optimal. *Professor Veneziano* added that in certain areas, such as contracts related to the production of food, the benefit could be sought beyond the increase of the number of transactions, for example in that transactions could be more effective and more efficient, after resolving transnational problems and issues between the two parties.

56. *Ms Kostoula* queried whether B would cover the situation where new players entered the market by virtue of harmonisation. She noted that, as Variable A focused on the number of transactions, it did not necessarily mean that new players would enter the market but that transactions would increase for the existing players. Instead, Variable B could be interpreted as allowing new international players to enter the market by virtue of harmonisation. *Professor Gullifer* agreed that this was a core issue and would affect the commentary of Variable B. She noted that Variable B referred to the benefits that would result from more states adopting the law reform, without necessarily implying or indicating that these benefits would solely arise from cheaper transactions. The benefits could also entail the involvement of additional players. *The participants* discussed that Variable B could be interpreted as both the increase in transaction volume and the decrease in transaction costs. *Professor Wool* noted that it was important to capture this without double counting, irrespective of the method chosen, as long as it was clearly outlined in the Guide.

57. While acknowledging the blurred boundaries among the three Variables, *several participants* recognised the importance of preserving their distinctiveness and their respective impacts on market dynamics, as each captured different elements and addressed different time horizons. *A participant* noted that while this approach might not appear entirely 'clean' since some of the transaction cost reduction would result from harmonisation, it would still simplify the analysis when examining different elements. To enhance clarity, *the participants* suggested separating the analysis of the market size from the benefits of harmonisation which would be addressed later. It was further suggested that, in using the Variables, they should first be considered individually, avoiding double-counting, and then their effect and net value should be combined.

58. *It was agreed to: (i) clarify the correlation between Variables A-C and transaction costs; (ii) further develop the definition of Variable B to encompass its different perspectives.*

Item 5: Assessment of Variables D and E

(a) Variable D

59. *The participants* discussed the main changes under Variable D, which mirrored Professor Sussman's suggestion to expand the Variable and include reasons beyond a county's compliance. This could include situations where the infrastructure or the people involved in the transactions did not apply the instrument.

60. *Professor Wool* remind the participants that Variable D was originally conceived as narrow in scope, designed to capture political risk arising from rules being adopted but not effectively implemented or complied with. It did not account for other factors that could hinder the application of the rule, particularly in an ex-ante, global evaluation with limited data. He noted that the example of contrasting markets' development levels within different countries, as presented in the Guide, required a country-specific analysis.

61. *The participants* explored additional reasons beyond non-compliance by a country where a legal instrument did not apply, particularly emphasising the relevance in soft law contexts. This led to a consideration of broadening the interpretation of Variable D.

62. *Professor Wool* pointed out the prominent role of Variable D, which could nullify benefits entirely through multiplication if a country failed to meet its obligations. He suggested expanding Variable D to encompass any instance where the new rules did not apply or were not applied effectively, citing reasons such as the market structure or factors beyond political risk for a country's failure to ratify. He noted that the current structure of D did not include those factors.

63. *The participants* agreed to provide a broader definition of Variable D to cover a wide array of issues. Suggestions were made to change the text to link it with the analysis of transactions. Instead of defining Variable D solely as rules not applied as intended, it could reflect the extent to which transactions within scope were not subject to those rules or that those rules were not effectively applied. *The participants* also considered having Variable D focus on the application of rules, potentially supplemented by an additional variable or factor to account for other reasons why reform benefits would not materialise.

64. *The participants* discussed the interplay between Variables A and D. *Professor Wool* queried whether a decrease in transactions subject to the new rule, stemming from parties choosing to opt out, would pose a Variable issue. He asked whether the lower volume result implied less direct benefit, requiring consideration under Variable A, or if the focus should be on the fact that transactions were not subject to the rule, thus falling under Variable D. *The participants* debated whether Variable D might offer a simpler solution, albeit possibly sacrificing accuracy.

65. *It was agreed to: (i) broaden the scope of Variable D to include any reason why the rules were not implemented or applied; (ii) further discuss and develop the issues related to the soft law and hard law considerations.*

(b) Variable E

66. *The participants* discussed Variable E and observed that E would typically be higher if the problem targeted by the law reform was harder. They also considered the impact of hard law and soft law reforms on the costs, recognising treaties as more resource-intensive but potentially yielding broader impacts beyond negotiation costs.

67. *It was agreed to further develop Variable E in light of the hard law and soft law considerations.*

Item 6: Additional factors: Competition, externalities and distributional effect

68. A discussion ensued regarding "competition", "externalities" and "distributive effect" within the new section titled "Additional factors". *The UNIDROIT Secretariat* clarified that the section was added tentatively and invited the participants to provide their views on whether and how these factors and elements should be presented in Guide, especially considering that competition and externalities could fall under the existing Variables.

69. *Professor Wool* noted that the additional factors were included in Variables A, B and C and covered by the concept of “net”, which was introduced as a tool to account for externalities and market power.

70. *Several participants* acknowledged the necessity of referring to those issues but proposed to include them in an annex or a separate section in the Introduction.

(a) Competition

71. *Professor Wool* expressed the view that competition was already addressed by Variables A and C. He explained that a wider definition of transaction costs would fit in competition.

72. *The participants* discussed the relationship between competition and economic benefits in light of transaction costs. It was explained that a reduction in transaction costs, attributable to lower transaction risk, could result in either an increased volume of transactions or increased competition. However, it was acknowledged that increased competition did not necessarily correlate with more transactions but could simply signify lower prices.

73. *Professor Wool* suggested to use neutral terminology when referring to competition, avoiding terms like market power which might carry a negative connotation. *Ms Kostoula* clarified that the term “market power” was used to examine the competitive effects rather than taking a stance on whether competition was beneficial or on the abuse of market power. *A participant* noted that including such terms would be useful if they reflected reality, suggesting their inclusion in an annex alongside other pertinent issues for decision-makers to consider. *Another participant* argued for measuring competition by referring to ‘industry concentration’ rather than to ‘market power’.

74. *It was agreed to incorporate competition into: (i) the Introduction of the Guide, explaining its relationship with economic benefits and transaction costs, and (ii) Variables A-C.*

(b) Externalities

75. *Ms Kostoula* asked the participants with economic backgrounds whether and how the economic effects of social and environmental impacts could be measured and quantified without consuming excessive resources and time, considering the scale of the task.

76. *The participants* discussed on how to address non-economic considerations such as social and environmental impacts. *Mr Brydie-Watson* referred to the MAC Protocol, which included an environmental dimension, noting that non-economic issues like the environmental impact, were mentioned descriptively but were not part of the economic assessment. *The participants* agreed that while non-economic factors could not be completely disregarded, quantifying them would be time-consuming, complex, and often controversial or less relevant.

77. *Professor Wool*, drawing from the aviation industry and the complex debates on emissions, explained the challenges of quantifying such impacts and the potential risk of impeding the entire economic assessment. These challenges included the practical difficulties of translating assessment results into figures or determining the appropriate time horizon, particularly in ex-ante evaluations. He also stressed the importance of setting limits on Variable C, as it was associated with externalities. *A participant* suggested establishing a reasonable timeframe to delineate its relevance.

78. *A participant* recommended quantifying social and environmental impacts only if they were central to the subject matter, such as in climate change law reform, or if the impact was positive and necessitated showcasing. It was suggested that this approach could apply

to projects like the UNIDROIT project on the Legal Nature of Voluntary Carbon Credits, which aimed to expand the market and fund projects to reduce carbon emissions. *Mr. Brydie-Watson* proposed clarifying the roles and limitations of economic analysts, acknowledging that specific projects might necessitate a different methodology.

79. *Several participants* agreed that while externalities should be acknowledged, they should not be factored into the economic assessment. *Professor Veneziano* and *Ms. Thijssen* recommended highlighting that the Guide primarily focused on economic impacts in a traditional and narrow sense, while acknowledging that other factors could affect decision-making for national legislators or international organisations, depending on the project's objectives.

80. *It was agreed that the Guide (i) should delineate its scope and clarify its focus on economic, quantifiable, impacts while acknowledging its non-exhaustive nature; (ii) should not address non-economic impacts, such as social and environmental effects; (iii) should recognise, either within the scope or in an annex, that other benefits and impacts on third parties may be considered and evaluated through other means or instruments. A detailed assessment of social and environmental effects should be conducted separately.*

(c) Distributional effects

81. *Professor Wool* noted that the project was not intended to address distributional effects.

82. *Several participants* acknowledged that distributional effects held significance, but they noted that the Guide should recognise their relevance in other contexts. It was agreed to acknowledge that a law reform could create winners and losers, or only winners. *Professor Wool* noted that the Guide should refrain from suggesting undertaking a specific ex-ante analysis of the distributional effects in an instrument.

83. *Professor Sussman* suggested incorporating distributional effects into a separate section or acknowledging them within an expanded version of Variable D, where implementation and compliance might hinge on the political power of the losers. *Ms Thijssen* reminded the participants that distributional effects were already acknowledged under Variable A, where a positive impact for one party could entail a negative impact for another party.

84. *It was agreed that the Guide should not feature a separate section for distributional effects but should simply recognise them under the existing Variables.*

Item 7: Baseline scenario, assumptions, level of confidence

(a) Baseline scenario

85. *The participants* agreed that the section on baseline scenario should be revised to reflect the focus of the project on ex-ante assessment, while offering limited insights for ex-post assessment.

86. *Professor Gullifer* highlighted the applicability of theories such as difference-in-difference, structural estimation, and descriptive statistics in ex-post assessment, questioning their utility in ex-ante assessment. *Professor Sussman* explained that there would be no difference in the use of those theories between ex-ante or ex-post analyses, noting that effective ex-ante assessments often draw insights from comparable ex-post cases.

87. *The participants* discussed that the best approach to conduct an ex-ante assessment involved comparing it to an ex-post analysis of a similar subject or with reference to a specific type of impact. For instance, the Cape Town Convention Compliance Index could offer valuable insights in relation to Variable D. It was pointed out that examining other law reform studies could provide insights into unintended consequences.

88. *Professor Gullifer* identified two difficulties in this exercise: (i) the difficulty in determining the similarity or comparability of a law reform, particularly in innovative areas with no precedents, and (ii) challenge of determining the methodology for comparing the results of an ex-post analysis to an ex-ante assessment within the Framework, especially where the comparable study was conducted differently. This was demonstrated by the Study of the ex-post analysis, which diverged from the Framework and instead focused on other types of impact.

89. *Some participants* explained that economists would typically analyse the different effects and categorise them as Variables A-E, as observed in the MAC Protocol. *A participant* suggested ranking other studies based on their use of the ABCDE factors or rating the quality of the evidence.

90. *The participants* discussed how to construct an ex-ante assessment based on ex-post analysis, considering alternative approaches such as comparing current law with future law. However, *Professor Wool* noted that the most effective approach would involve accurately describing the current situation, outlining assumptions, summarising the potential changes, gathering input from market players on how the change would affect their behaviour, and then quantifying the result.

91. *It was concluded that the section on baseline scenario should be changed to reflect the focus of the project on ex-ante assessments while offering limited insights into ex-post analyses to capture their value and utility when conducting ex-ante assessments.*

(b) Assumptions

92. *Professor Wool* distinguished between the assumptions made in ex-ante and ex-post evaluations. He noted that, in ex-ante evaluations, assumptions should be formulated for all Variables, addressing both the current state and the anticipated changes in the law. Conversely, in ex-post evaluations, the emphasis should be on testing the effects and assumptions made previously.

93. *The participants* discussed the various aspects of assumptions. *Professor Wool* suggested structuring them by setting the different levels of assumptions and subsequently providing additional information on data sets and their usage. It was noted that assumptions should cover the current legal framework and the impact of law reform, considering the level of adoption and the nature of the reform as either soft law or hard law. The assumptions concerning legal rules should be identified and articulated by legal experts to guide economists. *Professor Gullifer* highlighted several challenges in this endeavour, including a lack of knowledge regarding the content of the new legal rule.

94. *Some of the participants* observed a correlation between assumptions, data and the level of certainty, where assumptions were crafted based on insufficient data. It was underlined that the level of certainty depended on the accuracy of assumptions and the quality of data and data sources. *Ms Thijssen* remarked that the quantity and type of assumptions could vary, depending on the assessment stage and data availability, and could change over time. She added that during the conceptual phase, assumptions would primarily focus on the scope or content of the law reform, whereas at the pre-adoption phase, assumptions could be expanded to encompass the expected number of states to adopt the law reform.

95. *A participant* underscored the importance of subjecting proposed law reforms to tests, using various scenarios to evaluate assumptions. It was suggested that case studies could facilitate testing in this regard.

96. *It was agreed to (i) shift the focus of the assumptions section to ex-ante evaluations (ii) introduce a section for ex-post evaluations; (iii) provide further guidance on assumptions, particularly regarding their formulation, credibility based on data sources, and their evolution over time; (iv) highlight the interrelation between assumptions, data and the degree of certainty.*

(c) Uncertainties and confidence level

97. *The participants* recognised the importance of establishing a degree of certainty in the assessment to specify the validity of assumptions, the level of confidence in previous studies or the uncertainty surrounding the data and findings. *Mr Brydie-Watson* noted that the degree of certainty depended highly on the nature of the law reform and the entity proposing it.

98. *A participant* pointed out that the term “confidence level” held a specific meaning in economics, and specifically in statistics, and proposed substituting it with “degree of certainty” or a related concept.

99. *It was agreed to replace the term “confidence level” with the “degree of certainty” and provide further guidance.*

Item 8: Next steps and closing remarks

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

- 1) Updating the Framework
 - Reflecting on how to present the relationship between the Variables in a Formula.
 - Separating Variable E.
- 2) Updating the Preliminary Draft Guide:
 - Shifting the focus on ex ante assessments while recognising the utility of ex-post assessments in drawing comparisons.
 - Developing Option A for the Framework and the scoring system.
 - Clarifying the role and concept of transactions costs and their relationship with the Framework and the Variables.
 - Developing the definition of Variable B.
 - Expanding Variable D and providing a wide definition.
 - Developing Variable E in light of the hard law and soft law considerations.
 - Clarifying that the scope of the Guide is limited to economic, quantifiable, impacts in the narrow sense.
 - Acknowledging the importance of social and environmental effects and recommending evaluating them separately, through other means, if relevant.
 - Incorporating competition into the existing analysis.
 - Recognising the distributional effects under the existing Variables.
 - Developing the sections on the baseline scenario, assumptions, and degree of certainty and clarifying their interconnectedness.
 - Adopting neutral terminology with no specific meaning in economics: (i) changing the project’s title and replacing “assessment”; (ii) replacing the term “confidence level” with “degree of certainty”.

101. It was agreed that the next meeting will take place on 16 or 17 September 2024. It was recommended to undertake intersessional work and organise intersessional meetings to discuss core issues.

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

ANNEX 1

An initiative under the auspices of the Town Convention Academic Project

Project Leads:



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**9th Workshop on
Economic Assessment of International Commercial Law Reform
Draft Agenda
14-15 February 2024**

*UNIDROIT, Via Panisperna 28, 00184, Rome,
and online via Zoom*

** all times are in Central European Time (CET), UTC +1) **

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

**DAY 1
14 February 2024**

14:00 – 14:30	Registration and tea/coffee Opportunity for virtual participants to check connection
14:30 - 14:40	Opening of the Session <i>CTCAP Directors</i>
14:40 – 14:50	Project summary and introduction to the Framework and revised Draft Guide <i>UNIDROIT Secretariat</i>
14:50 – 15:15	Presentation on the revised Draft Guide <i>Oren Sussman</i>
15:15 – 16:00	Open discussion on the Framework and draft Guide: <i>Application, Transaction costs and Economic benefits</i>
16:00 – 16:30	Open discussion on <i>Variable A</i>
16:30 – 16:40	Coffee break
16:40– 17:30	Open discussion on <i>Variable B</i>
17:30 – 18:30	Open discussion on <i>Variable C</i>

**Economic Assessment of
International Commercial
Law Reform project**

An initiative under the auspices of the Town Convention Academic Project

Project Leads:



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**DAY 2
15 February 2024**

09:00 – 10:00	Open discussion on <i>Variable D</i>
10:00 – 10:30	Open discussion on <i>Variable E</i>
10:30 – 11:00	Open discussion on distributional effects, level of confidence, data
11:00 – 11:15	Coffee break
11:15 – 13:00	Continued discussion on distributional effects, level of confidence, data
13:00 – 13:20	Open discussion and next steps
13:20 – 13:30	Closing Remarks <i>CTCAP Directors</i>
13:30 – 14:15	Lunch

List of participants

1. Jeffrey Wool (UNIDROIT Foundation, Aviation Working Group)
2. Louise Gullifer (Cambridge University)
3. Ignacio Tirado (UNIDROIT)
4. Andrew Myburgh (IFC)
5. Jordi Paniagua (University of Valencia, University of Notre Dame)
6. Mathias Siems (European University Institute)
7. Oren Sussman (University of Oxford)
8. Anna Veneziano (UNIDROIT)
9. William Brydie-Watson (UNIDROIT)
10. Myrte Thijssen (UNIDROIT)
11. Theodora Kostoula (UNIDROIT)
12. Benedetta Mauro (UNIDROIT)