



**UNIDROIT Foundation**  
**EA ICLR 7<sup>th</sup> Workshop**  
**Restricted Session**  
**10 March 2022**

Foundation 03/2022

### **Report for the Seventh Meeting (Restricted Session) of the Economic Assessment of International Commercial Law Reform Project**

1. A restricted session of the Project Group for the project on Economic Assessment of International Commercial Law Reform (EA) took place in Rome and online on 10 March 2022 (for the agenda and the list of participants, please see [Annex 1](#) and [Annex 2](#) respectively).
2. *Professor Ignacio Tirado (Secretary General of UNIDROIT), 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 explained that work on the EA Project had been temporarily paused due to the COVID-19 pandemic, and that the aim of the Restricted Session was to resume this accordingly, discuss the general approach of the project, the scope and level of detail of the Guide to the Framework for the Economic Assessment of International Commercial Law Reform (hereinafter 'the Guide'), and next steps.
3. *Professor Wool* suggested developing a basic version of the Guide, while drawing up a separate list with issues for future work. He also suggested partnering with other global institutions for endorsing and disseminating the Guide. *Professor Gullifer* added that the EA project had two particular characteristics: (i) it focused on commercial law reform, while assessments generally tended to relate to regulatory law reforms; and (ii) it had an interdisciplinary character, examining issues from both a legal and economic perspective.
4. *The UNIDROIT Secretariat* recalled that the EA project was started 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 joined as a partner from 2017-2019. In 2019, the project was 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 (AWG) 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 (formula) 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.
5. *The Secretariat* explained that six workshops had previously been held and that a framework had been developed, consisting of five variables. For this meeting, the Secretariat had prepared a Preliminary Draft Guide to the Framework (draft Guide) based on the skeleton that had been approved during the sixth workshop. It was also noted that UNIDROIT continued to engage with international partners on this subject matter, including the OECD, by way of participating in the OECD International Organisation Partnership.
6. The Restricted Session had two main objectives: (i) collecting technical insights on how the formula could be applied in practice, from the perspective of economists; and (ii) discussing the Draft Guide and questions included therein.

## ***Discussion on Preliminary Draft Guide to the Framework***

### Scope

7. *The Participants* started with a discussion on the scope of application of the formula and the draft Guide, particularly: (i) whether it should be limited to private law in the strict sense or be broader; (ii) whether it should cover merely substantive commercial law reform or also reforms of a private international law nature; (iii) whether it should cover only 'reforms' of existing law or also the introduction of 'new' legislation; (iv) whether it should be limited to international reforms or should cover also reforms at domestic level; and (v) the application to hard law and soft law instruments.

8. *The Participants* generally expressed a preference for a wider scope. Acknowledging that the formula was designed for international commercial law reform, it was agreed that it could also be applied to domestic law reforms and to reforms initiated at an international level but implemented at a national level (e.g., Model Laws or soft law).<sup>1</sup> Moreover, the formula could be applied when existing legislation was changed but also when new laws were introduced in the absence of existing legislation, as well as to hard law and soft law.

9. Furthermore, *several participants* were in favour of including private international law reforms in the scope. It was discussed that changes in conflict of laws – similar to changes in substantive law – could have an economic impact. It was suggested that the formula could be applied to such reforms, with some adjustments of Variables A and B. It was also noted that there were areas of law where both approaches, i.e., choice of law rules and substantive rules, were considered (e.g., in the area of secured transactions) and that it would be useful to assess the economic impact of both options. However, *other participants* expressed caution and suggested that it would be preferable not to consider choice of law reforms as an alternative to the harmonisation of substantive law.

10. Regarding the type of substantive law reform, *the participants* discussed the pros and cons of applying the formula to different fields of law, such as tax law, corporate law, insolvency law, financial regulation (e.g., disclosure requirements), banking law, intellectual property law, competition law and labour law.

11. It was generally agreed that the formula could be applied to any type of law reform. *One participant* noted an example in the field of company law – a reform of shareholder protection – in order to substantiate the view that the formula could be applied to a broad range of law reforms.<sup>2</sup> It was also noted that, from an economist's perspective, the specific area of law was irrelevant since any reform could have an economic impact. However, it was suggested that there may be merit in focusing on particular areas of law, namely on 'core' private law matters, in the draft Guide (e.g., in the illustrations) and in case studies.

12. Some discussion took place as to how to apply the formula to broad-scale law reforms and how to address this in the draft Guide. It was suggested that, in such cases, the law reform could be subdivided into different components and the formula applied to each of those components (i.e., the formula would be applied separately to the various changes in specific laws).

### *The Framework's limitations (para. 23 to 25 of the draft Guide)*

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<sup>1</sup> One participant noted that the difference between hard law and soft law would mainly have an impact on Variable B.

<sup>2</sup> This participant explained that the direct impact (Variable A) could refer to the impact of increased shareholder protection on the level of investments; Variable B could refer to the benefits of harmonisation across various jurisdictions (e.g., legal certainty); Variable C to the spill-over effects to other areas of company law; Variable D to the rule of law in the relevant jurisdiction, but also broader factors such as self-regulation and non-judiciary enforcement; Variable E to the costs of transitioning to the new rules.

13. *The Participants* suggested elaborating on each of the three limitations of the Framework and conducting further work on distributional effects. It was also suggested to move the section on limitations to the beginning of the Guide.

14. Some discussion took place on how to best address possible non-economic objectives and effects of law reform (e.g., social, distributional, or environmental objectives). It was discussed that factors such as legal predictability and dispute resolution costs could be captured under Variable A. Social effects (e.g., gender equality) may also be relevant and have an impact on the efficiency of the law reform. Such effects could be considered under Variable C on spill-over effects. It was noted that social objectives and relevant factors to measure such effects with quantitative data would need to be clearly outlined out in advance.

15. *The Participants* had divergent views on whether there would be merit in transforming non-economic effects into prices. On the one hand, that would be useful in order to place social effects in the broader framework. On the other hand, it may be challenging to quantify non-economic effects, especially in cases where hard data was not readily available. It was suggested to follow a two-step approach, in which qualitative and quantitative factors would be combined and would lead to a score in line with the proposed ranking of the Variables.

#### Assumptions (para. 26 of the draft Guide)

16. It was agreed that assumptions should be identified on a case-by-case basis, since they varied depending on the law reform and jurisdictions involved. Furthermore, assumptions should be made transparent in the assessment. Economists generally relied on some basic assumptions, for instance that consumers were rational, but these would not need to be specified in the Guide.

#### Format (para. 27 to 29 of the draft Guide)

17. On the proposed format of the economic assessment, it was agreed that guidance on the structure of the assessment may be helpful, although its utility depended on the use for which the assessment was undertaken.

18. It was agreed to move this part and other parts concerning general matters to the end of the Guide, and to start the Guide with the part on the Variables.

#### Counterfactuals

19. *One participant* queried whether the Framework provided guidance on how to identify counterfactuals. *The Secretariat* indicated that this was addressed in paras. 44 and 63 of the draft Guide, referring to the existing law (if applicable) or hypothetical scenarios as possible counterfactuals.

20. Drawing from the discussion on the application of the Framework in practice (see below), it was suggested to clarify that, depending on the case, several counterfactuals may be used. In addition, alternatives or different options for the law reform may be used as counterfactual.

#### (Un)certainty (para. 71 of the draft Guide)

21. On probability and confidence, it was noted that a confidence level from 1-5 was suggested in the Framework, but had not yet been discussed in detail in the past. It was noted that it would be preferable to avoid reflecting uncertainties in wide ranges as was done in various economic assessments. *One participant* suggested not only focusing on possible large scale effects, such as impacts on GDP, but looking at closer causal relationships (e.g., number of companies listed on the stock market following the reform). It was also noted that short-term and long-term effects may differ – in terms of certainty as well – and that this may be further considered in the draft Guide.

22. From an economic perspective, it was explained that standard statistical techniques could be used to express the level of confidence and transform it into a confidence interval. Moreover, it was discussed that it was important to be transparent about the type of data sources and evidence used for an assessment (e.g., interviews are generally less reliable than hard data). *One participant* referenced the health sector, where data sources could be ranked depending on their certainty (e.g., direct evidence, observational evidence, etc.). It was agreed to add the topic of uncertainties and confidence to the list of further work.

### The Variables

23. As a general point, *the Secretariat* explained that the outcome of the economic assessment would lead to a rating for each Variable, rather than a monetary number, and that the proposed scoring for Variables A to C would be 1-4. *The Participants* agreed with this scoring and noted that there was no need for negative numbers, given that the ranking should be seen as an index.

24. *One participant* suggested creating a list of standard questions per Variable (a 'checklist') that would assist in evaluating the law reform.<sup>3</sup> Such a list could consist of general questions (e.g., how many countries have ratified a treaty) and questions specific to the law reform. It was discussed that the 'factors to consider' in the draft Guide could be reformulated into questions and that the checklist could be developed over time, taking into account the use of the formula in practice. *The Secretariat* added that a next step would be to determine how the answers to the questions, once formulated, would translate into a score.

25. *One participant* suggested to focus mainly on aspects that were deductible from the law or the legal environment surrounding it. *Others* explained that the law itself may not always provide for relevant factors and that a broader view would need to be adopted. It was also discussed that relevant factors and data sources used in *ex post* assessments could feed into *ex ante* assessments.

26. Regarding Variable A (direct impact), *the participants* did not provide any specific observations or suggestions on data sources or factors to be included in the Guide.

27. Regarding Variable B (network impact), it was suggested to take into account the broader impact a treaty may have, beyond its signatories, i.e., in third countries.<sup>4</sup> It was also suggested to incorporate past experiences into the Guide, for instance by examining past reforms and the network effects those generated.

28. Regarding Variable C (systemic impact), it was explained that partial and global equilibrium effects as mentioned in the draft Guide were methodological elements taken into account by economists. Some suggestions were made as to potential questions that could be relevant for the assessment of systemic impact, such as: Which type of companies would be affected? How many sectors would be affected? How would the law reform affect the labour market? How many different regions or countries would be affected?

29. One participant cautioned against taking too broad an approach for Variable C, e.g., with regard to possible long-term effects that may be uncertain. It was suggested to narrow the scope to elements that could be measured with a certain degree of certainty. Others agreed that a detailed, quantified assessment of uncertain long-term effects should be postponed to a later moment in time. However, the assessment could already describe the relevant factors and considerations. *Participants* agreed that it may be challenging, but not impossible, to translate such qualitative considerations into a score.

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<sup>3</sup> As an example, reference was made to the approach taken by the World Bank with respect to deep trade agreements.

<sup>4</sup> As an example, it was noted that regional initiatives such as the European principles on contract law may have inspired legislators in other jurisdictions.

30. *The Participants* discussed the importance of Variable D and its novelty, compared to how assessments were generally carried out.<sup>5</sup> It was agreed that there would be merit in taking into account practical impediments to effective application in this Variable (e.g., closure of courts), although it may be challenging to find data sources that would cover such aspects. It was suggested to include this in the list of future work.

31. Furthermore, it was discussed that Variable D was mostly relevant for *ex-ante* assessments, at domestic level, that is, for national law reforms and for international reforms that would be implemented at national level, such as Model Laws.

32. *One participant* noted that Variable D could be seen as a framework for assessing the institutional set-up of countries. It was observed that this Variable may be impacted by the clarity of the rules of the reform, noting that vague rules were more challenging to apply effectively. *Another participant* suggested to take into account the specific content of the law reform. For instance, it could be verified whether the law provided for specific dispute resolution or other enforcement mechanisms. *The participants* agreed that the proposed ranking of Variable D, from 0-1, subdivided into a five-tier structure, was appropriate.

33. As a last point on Variable D, it was noted that different views may exist as to whether the nature of the legal instrument (hard law or soft law) had an impact on the effectiveness of its application, and that views evolved over time (e.g., it was no longer considered that hard law instruments were, *per se*, more effective than soft law). Views in academic literature could also differ as to whether a fundamental change, as compared to a relatively small change, would generally be more or less likely to be institutionally enforced. It was suggested to conduct further work on these aspects.

#### Relationship between the Variables (para. 97 of the draft Guide)

34. *One participant* posed general questions regarding the Framework and the relationship between Variables B and C, on the one hand, and between Variables D and E, on the other. For instance, it was queried why Variable E would not affect the other variables.

35. In response, it was explained that Variable E had a narrow scope, relating merely to (administrative) costs for creating and implementing the law reform. Variables A to C were net and, therefore, already took into account other types of costs or disbenefits. *The Secretariat* added that the relationship between the Variables had been discussed in the past and that this had been reflected, e.g., in paragraph 97 of the draft Guide. Overall, it was explained that the formula aimed at identifying relevant types of effects and factors that economists could use as a starting point when applying their economic methods.

36. *One participant* noted that it was challenging to distinguish between Variables A and C. It was agreed that double counting should be avoided. In order to do so, it was suggested to consider under Variable A only the effects on direct beneficiaries (e.g., in the case of the Cape Town Convention, the airline companies) whereas broader economic impacts (indirect beneficiaries) would be covered under Variable C. The difference between Variables A and C could also be clarified through the questions that would be formulated under each of them.

#### Other

37. One participant underlined the relevance of considering financial effects of law reforms, such as the impact on the financial markets (e.g., in the area of public debt). It was discussed that the financial perspective was generally overlooked when considering law reforms and this could lead, on an *ex post* basis, to less positive results than expected. It was noted that it seemed feasible to take into account financial effects, especially on an *ex post* basis, due to the existence of relevant data. It was agreed to continue involving persons with an expertise in banking and finance in the project.

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<sup>5</sup> *One participant* noted that, in their methodology, the effect of the factors under Variable D would not be considered *ex ante* but rather be reflected in the prices *ex post* (see under 'Discussion on the application of the Framework in practice').

**Discussion on the application of the Framework in practice**

38. Mr Paniagua gave a presentation on 'Welfare Analysis in Trade Models' ([Annex 3](#)). He explained that the analysis was limited to an assessment of impacts on trade only. He focused on five examples: (i) arbitration<sup>6</sup> (*ex post*); (ii) the introduction of the euro (*ex post*); (iii) a constitutional reform leading to the transformation of a region into an independent country (*ex-ante*); (iv) Brexit (*ex-ante*); (v) import policies.

39. He explained that, in economics, welfare referred to changes in real consumption, which were driven by two factors: effects on prices (which may be subdivided into direct and indirect effects) and the share of expenditure on domestic goods.

40. On the methodology used, he explained that economists generally assessed partial effects (i.e., on trade flows) first and then translated these into general equilibrium effects. While distributional effects were currently not accounted for in the Framework, they were usually considered by economists. It was also noted that economists were constrained by the identification of a realistic counterfactual and that a legal perspective may be particularly helpful in identifying such counterfactuals.

41. Upon request of one of the participants, Mr Paniagua explained that, to establish causation, economists used the theory of gravity equation and the accompanying toolkit. A range of confidence was then provided to determine trustworthiness.

42. Regarding the example on arbitration, he explained that an increase in GDP was visible for countries that joined the New York Convention, while the GDP decreased in countries that did not join. Consumer prices were generally lower in countries that joined the New York Convention. On the methodology used, he explained that the results were first considered at a domestic level and subsequently expressed at a global level by using a weighted average.

43. In the ensuing discussion, it was observed that different counterfactuals may be used depending on the case, in particular in *ex-ante* assessments where uncertainties existed and in large-scale reforms for which different scenarios could be envisaged. For instance, in the example of a constitutional reform leading to the transformation of a region into an independent country, such newly created jurisdiction may or may not join the European Union or the World Trade Organization, which in turn may affect the economic impacts of the reform. This would speak in favour of developing and using different counterfactual scenarios.

44. On data sources, it was noted that, for this analysis, use was made of data of the United States International Trade Commission (USITC).<sup>7</sup> Data was used from different time periods in order to increase reliability.

45. Regarding the relationship between the conducted analysis and the Framework, it was noted that, qualitatively, the Framework was helpful to formulate research questions in a more structured and efficient manner.

46. Quantitatively, Mr Paniagua suggested that Variables A and B would relate to effects on prices, Variable C to trade creation, and Variable D could be used to distinguish between *ex-ante* and *ex post* assessments. On Variable D, he explained that he generally did not assess enforcement and compliance separately. Instead, this would be captured in the effects on prices (i.e., a lower level of enforcement may lead to outlier results). On request of a participant, he explained that no discount rates were applied. Instead, use was made of a range of confidence.

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<sup>6</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); the UNCITRAL Model Law on International Commercial Arbitration; the UNCITRAL Model Law on International Commercial Conciliation.

<sup>7</sup> See <https://www.usitc.gov/data/index.htm>.

47. Some discussion took place on Variable E. *Mr Paniagua* suggested that Variable E could be understood to cover opportunity costs, i.e., costs of not applying the reform. Variable E could also capture trade diversion (as opposed to trade creation, which would be seen as spill-over effects and therefore covered under Variable C). It was discussed and clarified that the intention had been to cover the costs of transitioning into the new rules under Variable E. One of the participants suggested explaining in the draft Guide that Variables A to C would relate to private sector costs and benefits, while Variable E would refer to public costs.

48. *Mr Myburgh* provided additional input on the application of the Framework in practice from an economist's perspective. As an example, he elaborated on how the formula could have been used, hypothetically, when the New York Convention was first considered. In such a scenario, Variable A could consist mainly of a mapping of direct stakeholders (e.g., importers and organisations that provided loans) which could be invited to be involved in the reform process.<sup>8</sup> Variable B could consist of a legal analysis of the envisaged rules in the broader legal system. Variable C could consist of estimated price effects, effects on GDP, etc. On Variable D, he noted that application and enforcement was generally not considered in detail. Instead, the focus tends to be merely on whether the jurisdiction joined the New York Convention and whether the contractual terms were clear.

49. The Co-Directors thanked the economists for their valuable input.

### **Next steps**

50. It was agreed that the next meeting on the EA Project would take place on 15 September 2022, in Cambridge, alongside the 11<sup>th</sup> Annual Cape Town Convention Academic Conference. The key deliverables for the next session would be: (i) a further developed version of the draft Guide; and (ii) a case study on a possible Maritime Protocol to the Cape Town Convention (i.e., formulating relevant questions to be considered in an *ex-ante* assessment). *The Secretariat* underlined that, for both deliverables, input from economists would be required. The experts present at the meeting agreed to provide assistance where needed.

51. To summarise, the items included in the list for future work would be the following:

- The Framework's limitations and, in particular, distributional effects
- (Un)certainities/confidence level
- Counterfactuals
- Practical impediments to effective application of the new rules (Variable D)
- The impacts of the legal nature of the instrument and the extent of change introduced by the law reform on Variable D.

52. The Co-Directors thanked all participants for their time and the fruitful discussions.

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<sup>8</sup> It was noted that a challenge may be that not all direct beneficiaries may acknowledge that there was an issue to be addressed by the law reform, since private stakeholders may have found their own solutions of working around it.

**ANNEX 1****Economic Assessment of  
International Commercial Law Reform project****Restricted Session  
Thursday 10 March 2022 (UNIDROIT and via Zoom)****ANNOTATED DRAFT AGENDA**

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|--------|---------------|--|
| Intr.  | 09:45 – 10:00 | Welcome and tea/coffee<br>Opportunity for virtual participants to check connection |
| Item 1 | 10:00 – 10:10 | Opening of the Session<br><i>Jeffrey Wool, Louise Gullifer, Ignacio Tirado</i>     |
| Item 2 | 10:10 – 10:20 | Project Summary<br><i>UNIDROIT Secretariat</i>                                     |
| Item 3 | 10:20 – 10:40 | Views on current status of the Project   |
| Item 4 | 10:40 – 12:10 | Discussion on the application of the Framework in practice                         |
| Item 5 | 12:10 – 13:00 | Discussion on Preliminary Draft Guide to the Framework                             |
|        | 13:00 – 14:30 | Lunch  |
| Item 5 | 14:30 – 16:45 | Discussion on Preliminary Draft Guide to the Framework and next steps              |
| Item 6 | 16:45 – 17:00 | Closing Remarks<br><i>Jeffrey Wool, Louise Gullifer, Ignacio Tirado</i>            |

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## **ANNOTATIONS TO THE DRAFT AGENDA**

### **Intr. Welcome and coffee/tea**

To join the restricted session online, participants received a link with connection details.

### **Item 3 Views on current status of the Project**

Each participant is invited to express his/her views on the current status of the Project and raise any major questions.

### **Item 4 Discussion on the application of the Framework in practice**

It is proposed that each economist explains, in a basic manner, how they would apply the Framework to a specific commercial law reform of their choice.

Indicative timing: 20 min. per speaker, followed by 10 minutes of discussion.

### **Item 5 Discussion on Preliminary Draft Guide to the Framework**

It is proposed to discuss the Preliminary Draft Guide in a chronological manner, taking into account also the discussions under Items 3 and 4.

It is proposed that the next meeting for the project be held in the form of a one-day Workshop in September 2022.

**ANNEX 2****List of participants**

1. Jeffrey Wool (UNIDROIT Foundation, Aviation Working Group)
2. Louise Gullifer (Cambridge University)
3. Ignacio Tirado (UNIDROIT)
4. Aitor Erce (Independent research and policy advisor)
5. Andrew Myburgh (IFC)
6. Jordi Paniagua (University of Valencia, University of Notre Dame)
7. Mathias Siems (European University Institute)
8. Anna Veneziano (UNIDROIT)
9. Myrte Thijssen (UNIDROIT)
10. Hamza Hameed (UNIDROIT)
11. Daphne Farmaki (UNIDROIT, intern)
12. Joshany Michelle Reséndiz Alvarez (UNIDROIT, intern)