



UNIDROIT Foundation
EE ICLR 10th Workshop
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Report on the 10th Meeting of the Economic Evaluation of International Commercial Law Reform Project

1. The tenth session for the project on Economic Evaluation of International Commercial Law Reform (EE ICLR Project) took place in Rome and online on 17 September 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 Jordi Paniagua's contribution to the project.

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

4. *The UNIDROIT Secretariat (Ms Theodora Kostoula)* gave a presentation (see [Annex 3](#)) on the project, as well as on the updated Draft Guide to the Framework for the Economic Evaluation of International Commercial Law Reform, and two Case Studies, as prepared by the Secretariat in collaboration with *Professor Jordi Paniagua*, the consultant (economist) who was hired in 2024 for this project.

5. *The Secretariat* presented the intersessional work undertaken between the ninth and tenth Workshops and introduced the changes that had been made to the Framework and the Preliminary Draft Guide to the Framework, many of which had been discussed or approved during the two intersessional meetings in June and July 2024. A notable change regarded the title of the project where "Assessment" had been replaced by "Evaluation" to better reflect the purpose of the Guide. Other general aspects presented included the shifted focus of the Guide on ex-ante evaluations, the explanation of transaction costs and economic frictions in the Introduction ("Background section") and their impact on their Factors vs ex post), as well as terminological changes, (e.g., adopting the term "economic gains" instead of "economic benefits", "Factors" instead of "Variables", "degree of certainty" instead of "degree of confidence", and "economic frictions"). Other main changes included the introduction of the "Benchmark" to support economic evaluations, expanding Factors D and E, improving the Framework to allow for quantification and other "Uses", and introducing three Annexes (Annex 1 on Economic frictions & Transaction costs, Annex 2 on ex-post evaluation and its relationship with ex-ante, and Annex 3 on Third-party impacts).

6. *The Secretariat* also presented two Case Studies which were developed in collaboration with Professor Paniagua (see [Annex 5](#) and [Annex 6](#)). Case Study 1 regarded the UNIDROIT Legislative Guide on Bank Liquidation, which was at the consultation phase, while Case Study 2 on the UNIDROIT Digital Assets & Private Law Principles which had been

approved by UNIDROIT but not widely adopted by states yet. It was noted that the Case Studies were prepared with the aim of testing the application of the Framework and the Guide, receiving feedback and circling back to improve the Guide after the Workshop.

7. *Professor Paniagua* presented the main changes in relation to the Framework and Benchmark (see [Annex 4](#)). He explained that the Benchmark would help quantify the economic outcomes through comparison with ex-post analysis of best practices. He noted that the economic score indicated the expected relative economic variation from the Benchmark. He added that the revised scoring system included ranges and bands, which were intended to add clarity to the use of the Framework. He further elaborated on the notion of the “transaction costs” as a subset of “economic frictions”.

8. *The Secretariat* provided an indicative list of issues to consider and approve, in relation to (i) the quantification and scoring system of the Framework, (ii) relationship between the Introduction, Factors and economic frictions or transaction costs, (iii) the Benchmark and the ex-post evaluation. *The Secretariat* asked the participants whether further guidance was needed in relation to these matters.

Item 3: Introduction, Annex 1 and Annex 3

(a) Introduction: Economic frictions, Economic gains, Transaction costs, Relationship with the Factors

9. *The participants* debated the use of the terms “transaction costs” and “economic frictions” and considered which would be more suitable for the project.

10. *Professor Paniagua* observed that the analysis of transaction costs and economic frictions in the Introduction was largely theoretical and did not appear to be relevant in the Case Studies. He suggested, however, that the Framework could address these concepts by treating transaction costs as inefficiencies, akin to a tax. He provided examples from wage and rent markets, showing how economic reforms that reduced inefficiencies could create better market equilibrium by increasing supply or lowering prices.

11. *Professor Wool* expressed concerns about the Framework’s scope. He emphasised the need to differentiate between transaction costs and economic frictions, noting that the Framework was originally designed to address transaction costs in transnational commercial law, rather than broader economic issues. He referenced paragraph 138, questioning whether transaction costs or economic frictions were the real obstacles to profitable transactions. *Professor Wool* recommended clarifying this distinction to ensure that the Framework did not become overly broad by addressing issues like taxes and tariffs. He also called for clear definitions of “economic frictions” and “transaction costs” and suggested further testing the chart to ensure its relevance for transnational commercial law. He proposed simplifying the Framework by selecting a single term, which would reduce distractions and help focus the Guide.

12. *Professor Gullifer* supported these concerns, highlighting the need to keep the project within its scope and distinguishing between private law and regulation. She explained that organisations like UNIDROIT, UNCITRAL, and HCCH focused on private law, which dealt with rights and obligations between parties, rather than regulatory issues like taxes. She asked whether the Framework should remain confined to private law reforms or be expanded to cover regulatory reforms. As an example, she cited UNIDROIT’s project on Verified Carbon Credits (VCCs), where regulatory issues (like disclosures in securities regulation) could impact market practices, despite falling outside the project’s scope.

13. *Professor Tirado* pointed out that the project fell under the Foundation’s mandate, not UNIDROIT’S, suggesting that the discussion reflected it. He acknowledged that taxes and other regulatory issues could be relevant if they intersected with private law reform but

emphasised that the project's primary focus should remain on private law unless a regulatory issue was directly connected. *A participant* added that the boundary between private law and regulation was becoming increasingly blurred, particularly in technology-related areas. Transparency obligations in AI were mentioned as an example. *The participants* agreed that the focus should remain on non-regulatory law and the traditional understanding of transaction costs. It was suggested to adopt a traditional approach to private law, while considering regulatory elements where necessary.

14. *Professor Gullifer* identified two potential impacts of private law reform: either it could directly address broader economic frictions and regulatory matters, such as taxes or competition rules, or its effect could be indirect, such as fostering competition or incentivising taxation. She emphasised that if the Guide focused on the latter, references to free trade agreements and treaties reducing taxes would be misaligned. Instead, she proposed that the list of economic frictions, which were not typically the focus of private law reform (e.g., taxes), would be useful and should be placed elsewhere in the text. She stressed the importance of distinguishing between primary and secondary effects and ensuring that elements like human-generated economic frictions (e.g., information) were properly accounted for in the Framework.

15. *The participants* suggested eliminating the distinction between transaction costs and economic frictions, as it created confusion and distraction. They supported the idea of simplification by using a single term that could be accepted by both legal and economic communities.

16. *Ms Kostoula* pointed out that some economic frictions might still be relevant for specific legal reforms. These could be acknowledged as indirect impacts under Factor C, which extended beyond transaction costs. *Professor Wool* examined the potential outcomes of law reform, proposing that reforms increasing the number of transactions, generating taxes, boosting government revenues, or creating macroeconomic benefits should indeed be examined under Factor C. He added that if new market players emerged, competition would rise, not because of the reform itself, but due to its effect on market entry. He also suggested including geographic barriers and climate change in the Factors, provided they could be quantified.

17. *A participant* with an economic background argued that "transaction costs" might carry ambiguity and negative connotations and suggested using "frictions" instead. Non-economists often misused "transaction costs," which should refer to the gap between supply and demand. *Another participant* noted that economic frictions were becoming more policy-oriented, particularly in European regulations. *Professor Paniagua* referred to the Guide's intended audience, suggesting that "transaction costs" would be more appropriate for legal professionals, while "frictions" might resonate more with policy-focused readers.

18. *Professor Wool* raised concerns about how the term "transaction costs" would be perceived globally. *Professor Paniagua* ultimately recommended using "transaction costs" to avoid confusion, with *another participant* suggesting including a brief clarification in the text to explain the term's usage.

19. *The participants* discussed the role of natural economic frictions, particularly geographic barriers, in commercial law. *Many participants* emphasised their importance and impact on private law, citing several examples, such as the Suez Canal blockage's effect on global trade, the Panama Canal and China's Belt and Road Initiative and their impact on international commercial contracts, the Certificate of Financial Responsibility (COFR) and its impact on private contracts addressing environmental issues, and the UNIDROIT project on VCCs with indirect environmental impacts. It was argued that geographic barriers should not be excluded if relevant to a specific law reform but cautioned against allowing such examples to dominate the broader discussion.

20. *The participants agreed that the focus should remain on private commercial law reforms, not regulatory matters such as taxes. It was further agreed to (i) adopt "transaction costs" instead of "economic frictions" as central to private commercial law reforms; (ii) ensure consistent use of terminology throughout the text; (iii) acknowledge that other economic frictions could be addressed under specific factors like Factor C; (iv) eliminate the shaded box, revisit its content and integrate it under relevant Factors. Anything affecting the scoring should be considered as relevant and factored in, while distractions would be moved to an Annex.*

(b) Annex 1

21. Following the discussion regarding the transaction costs and economic frictions, the participants discussed how this would impact Annex 1, particularly Figure 2.

22. *It was agreed that Annex 1 should be either reformulated or potentially eliminated, as the primary emphasis was on transaction costs. Based on the revision of the section on transaction costs, certain elements of Annex 1 could be integrated (e.g., included in footnotes or linked to externalities), clarified, or removed to maintain focus and clarity.*

(c) Annex 3: Third-party impacts (Externalities)

23. A discussion ensued regarding Annex 3 on "Third-party impacts" (externalities) and its relevance to the economic evaluation of international commercial law reforms.

24. *Some participants observed that Annex 3 could be misleading and recommended a revision. A participant noted that externalities were not central to the evaluation of ICLR, as they dealt with distinct interactions: externalities involved effects between unrelated parties, whereas legal reforms addressed the economic impacts between connected parties. As an example, the participant indicated the Guide's reference to increased emissions as a result of facilitating credit for shipping. If emissions were adequately regulated and taxed, however, the market would adjust. The participant further critiqued the inclusion of income distribution effects in this context, arguing that such effects occurred independently of externalities.*

25. *Professor Jordi Paniagua acknowledged that income distribution may or may not be relevant to discussions of externalities. However, he emphasised that externalities were particularly significant for evaluations, especially for policymakers and in areas with high uncertainty, such as technological innovation. For instance, he noted that job losses due to AI could be an externality affecting sectors beyond technology. He suggested that externalities could be incorporated into the Framework, either by influencing the degree of certainty or being reflected in Factor E. If studies showed the presence of externalities, this should be reflected in the evaluation process. He recommended that the Guide offer flexibility for the evaluation team to assess the relevance of externalities in determining the final score.*

26. *Professor Wool agreed on the need for a clear reference to externalities in the Framework, noting that both positive and negative externalities were particularly relevant to policymakers. He recommended revising the Annex for clarity, including a clear definition of externalities and removing the shaded box under paragraph 187, which he deemed irrelevant to the discussion. Professor Wool also pointed out the relevance of distribution effects, referencing the Cape Town Convention, where policymakers were interested in the distribution of benefits among airlines, passengers, and banks. Another participant suggested an alternative framing of externalities, which involves identifying any negative effects of proposed laws and assessing whether they would outweigh the benefits.*

27. *Professor Gullifer observed that in private law reforms, it was common to recognise broader issues (e.g., capital requirements or disclosure obligations) and suggest addressing*

them through regulatory measures beyond the scope of the law itself. She queried whether such regulatory interventions could be considered externalities from a private law perspective, as they would fall outside the scope of the reform itself.

28. *The participants* discussed alternative ways of reflecting externalities in the Framework and Guide. *A participant* recommended a modest approach, suggesting that externalities be acknowledged in a footnote, rather than fully integrated into the analysis of private law, as implied in Annex 3. *Some participants* proposed incorporating externalities in a way that impacted the degree of certainty without directly affecting the score. It was also suggested that while the Guide should clarify that private law reforms do not address externalities which managed by other parties or through separate reforms, it should allow for externalities to be factored into the degree of certainty where relevant.

29. *A participant* highlighted a critical issue in the terminology used by economists and lawyers when discussing externalities. It was noted that lawyers tended to use "negative externality" in a normative sense, while economists typically used "negative" and "positive" to describe quantitative effects, related to increases or decreases in production. It was suggested adding a footnote to distinguish between those meanings, specifying whether externalities referred to increases or decreases in production.

30. *It was agreed to: (i) revise Annex 3 to reflect the discussion on externalities; (ii) factor externalities into the degree of certainty where relevant.*

(d) Drafting points

31. *The participants* discussed the following drafting issues:

"EE ICLR":

32. The current abbreviation was considered too heavy, so finding an alternative, such as "the reform", to refer to it throughout the text was recommended.

"Economic outcomes" or "economic gains":

33. It was agreed to primarily use the term "economic outcomes", with "economic gains" used where appropriate.

"Domestic" vs "national":

34. Several participants opted for the use of the term "domestic" instead of "national" to avoid oversimplification and better account for countries with multiple jurisdictions.

Harmonisation:

35. *A participant* raised concerns about the positive tone regarding harmonisation in the text, warning that harmonisation could have negative outcomes if applied to flawed mechanisms or rules. He advocated for a more cautious approach, noting that legal certainty based on a faulty mechanism or rule could lead to a net negative effect, an issue currently overlooked in the analysis.

36. *The CTCAP Directors* reminded the group that harmonisation was part of UNIDROIT's mandate. However, they noted that the Guide, and the project in general, is not designed to promote harmonisation indiscriminately, but rather to evaluate cases where harmonisation would not yield economic benefits and thus should not be pursued. *Professor Wool* added that even when suboptimal laws were harmonised, they could still increase legal certainty. For instance, even if choice-of-law rules led to imperfect outcomes, they could serve as a reference point, helping to mitigate complications in international transactions.

37. *Professor Paniagua* noted that the term "harmonisation" in the Guide referred specifically to legal harmonisation, as opposed to economic integration. He suggested clarifying this distinction in the text, explaining that legal harmonisation dealt with aligning legal frameworks, while economic integration focused on reducing trade barriers and economic frictions.

38. *Ms Kostoula* pointed out that the revised Guide already acknowledged that "the value of harmonisation might be negative, for example, due to regulatory competition" (Paragraph 60). She cautioned against contradicting the project's core objective, which focused on international law reforms rather than domestic laws.

39. *Professor Gullifer* further noted that some legislative projects aimed for full unification through hard law, while others were more suitable for soft law approaches. Economic evaluations were essential in guiding those choices, not merely based on costs, but also on what would be most effective in a given context.

40. *It was agreed that the text should be revised to reflect the points raised in this discussion.*

Item 4: Benchmark, Uses of the Framework and Scoring system

41. *Professor Paniagua* elaborated on the revised Framework and the use of Benchmark to allow for quantification. He emphasised that the current Framework was designed for ex-ante evaluation. In cases where Benchmarks were unavailable for the quantification process, the team would need to either hire experts or create Benchmarks.

(a) Benchmark

42. *The CTCAP Directors* noted the difficulty of setting Benchmarks in the ex-ante phase of projects, particularly when there was no prior literature. They further noted the challenges in creating Benchmarks and ex-post data analysis, where ex-post data did not exist.

43. *Professor Wool* expressed caution about over-reliance on Benchmarks, noting that Benchmarks often represented an ideal rather than a practical reality, thus potentially rendering results overly optimistic. He recommended adopting a clear methodology to rank and select Benchmarks based on their relevance, pointing out the risk of subjectivity in categorising Benchmarks, as demonstrated in the Case Studies.

44. *Professor Paniagua* responded that Benchmarks and ex-post studies often existed in practice, but when unavailable, academic literature could serve as a foundation, as demonstrated in the Case Studies. He noted that there was no alternative to the use of Benchmarks, even when they were imperfect.

45. *A participant* noted that, although lawyers often viewed each industry as a unique case, for economists, markets were the crucial element, as part of the general supply-demand picture. It was explained that a Benchmark could always be identified, albeit with varying degrees of creativity, such as by looking at similar areas. *The participant* cited environmental regulations as an example where Benchmarks from one industry could be applied to another, such as using maritime pollution standards for land-based regulations.

46. *Professor Tirado* agreed that Benchmarks were useful and suggested developing guidance on how to determine or establish them properly, particularly in contexts where no Benchmarks existed. He outlined three scenarios for Benchmarks in the conceptual phase of a legal instrument: (i) where multiple Benchmarks existed, and the goal of the law reform was to simplify and harmonise them with a global solution; (ii) where numerous but inefficient Benchmarks were available, and the reform would help identify best practices and optimal Benchmarks; (iii) where no Benchmarks existed and legal reforms were needed. In the first two cases, the exercise would not aim to adopt a specific national law but rather build on existing models, suggesting ways to improve Benchmarks. In the second case, a

new constructed Benchmark might be needed after identifying the best practice. However, even the best practice or specific model would not be adopted at face value, since it might have been designed for a particular country and may not suit others, thus making it necessary to develop a Benchmark. The third scenario posed more difficulties due to the lack of data.

47. *Ms Kostoula* highlighted that the Case Studies demonstrated that multiple and diverse Benchmarks might exist, including both ex-post studies and academic literature. She added that Benchmarks could cover some or all of the specific aspects which would be addressed by the law reform under evaluation.

48. *Professor Wool* added that Benchmarks could be tailored to specific projects, using constructed frameworks where none existed. He added that the optimistic notion of an existing perfect Benchmark deemed highly unlikely and proposed that a constructed Benchmark should be developed starting from an ideal perspective or identified best practices, as happened in the case of the Cape Town Convention which was built upon existing principles.

49. *Professor Gullifer* emphasised the importance of considering the phase of the ex-ante stage when discussing Benchmarks. She stressed that at the conceptual phase, before deciding on whether to proceed with a project, the content of the law would still be unclear. Previous projects with similar uncertainty could serve as useful Benchmarks if they demonstrated economic benefits. She further suggested that a more abstract and conceptual approach was necessary in that phase and cautioned against making assumptions about what the law would entail, as this could dictate the working group's decisions. She further queried whether the perceived benefit of increased legal certainty as a result of the law reform could be subject to evaluation, where the specific content of the law was not yet determined.

50. *The participants* highlighted the challenges of identifying and selecting a Benchmark during the conceptual phase. *Professor Gullifer* suggested considering a law reform from a neighbouring area. For instance, in the UNIDROIT Digital Assets project, a suitable Benchmark could have been a law reform addressing a completely new form of asset, where economic activity was present but no legal framework yet existed.

51. *Professor Paniagua* clarified that an ideal Benchmark, rated at 10, would be preferable although not always attainable. A suboptimal Benchmark could still serve as a practical reference. He noted that the scoring system allowed for imperfect Benchmarks by rating them at a lower level (e.g., at 5). He suggested that Benchmarks should be selected based on available evidence and their relevance should be reflected in the economic scoring.

52. *Professor Wool* queried whether Benchmarks should be chosen by analogy based on their subject matter or broader functional similarities. He pointed to the Bank Liquidation Case Study, where the Benchmark was not on the nearest liquidation law, but on bank restructuring.

53. *Professor Paniagua* and *Ms Kostoula* emphasised that combining multiple Benchmarks could be an effective strategy, allowing for greater flexibility. *Ms Kostoula* added that the selection of a Benchmark would be reflected in the degree of certainty, which would adjust to account for the fact that the Benchmark was in a different legal area. That approach was adopted in the Case Studies. An ideal Benchmark, closely aligned with the subject matter of the law reform, should yield a higher degree of certainty. Conversely, a suboptimal Benchmark from less related legal areas, should be reflected in a lower degree of certainty.

54. *Professor Wool* pointed out that Benchmarks should evolve as more information becomes available, allowing for refinement during the different stages of the project. He advocated for a balanced approach that integrated both subject-specific and broader economic Benchmarks, stressing the need for flexibility and adaptability in the evaluation

process. *Several participants* agreed that both approaches could be valid and should be used flexibly.

55. *Professor Wool* suggested that, in reviewing options for Benchmarks, the starting point should be identifying the general problems they addressed and seeking functional analogies. If an analogy proved too distant or uncertain, a constructed approach could be used. He added that if the legal problem targeted by a project could not be defined or translated into economic terms, it should fall outside the scope of the Guide.

56. *Professor Tirado* clarified that interest in pursuing a legislative project at UNIDROIT was never assessed in an abstract context; it always addressed a specific legal issue that required transnational law. He emphasised that a reference text would always be available, even for early stages of projects. He highlighted that the Guide's current methodology was particularly useful in later stages, such as the consultation phase or when states were considering adoption, as it involved comparing draft projects with established best practices. However, he proposed adapting the methodology for situations where only an abstract proposal existed, underlying the importance of having a clear reference point when evaluating legislative initiatives to ground them in practical realities.

57. *Professor Wool* emphasised that the nature of the proposal would guide their approach. *Professor Gullifer* pointed out that many legislative instruments addressed multiple legal problems. She queried whether the economic evaluation should focus on the instrument as a whole or on specific issues within it. *A participant* stressed that this should be the starting point of the evaluation and added that the Benchmark should be viewed as a multifactorial ecosystem with various elements. Comparing different scenarios could help identify potential Benchmarks and would likely reveal different economic scores, which should be reflected in the evaluation.

58. *Professor Wool* asked whether the current methodology would work when no predefined text or draft law existed. He referred to a hypothetical project aiming to create a legal framework for dispute resolution in cross-border transactions among small entities. *Professor Paniagua* suggested creating scenarios with three alternatives—for example, mediation, conciliation, and arbitration—and assessing them separately against established Benchmarks for each dispute resolution mechanism.

59. *Professor Wool* noted that two key aspects should be considered when determining the Benchmark: whether a Benchmark existed or had to be constructed, and the assumptions to be made in comparing to the Benchmark. He advocated for a comprehensive approach that considered multiple factors and various areas of law to create a constructed Benchmark.

60. *The participants* further noted that the quality of the Benchmark depended on the available studies and literature and therefore it was suggested prioritising Benchmarks with strong economic studies, robust economic data or datasets, even if they were not a perfect match for the reform. The more detailed and robust the Benchmark, the better it would serve in evaluating the reform's impact.

61. *Professor Paniagua* highlighted the need to create different alternatives at the conceptual stage, which could then be fed into the Framework. He stressed the importance of selecting appropriate Benchmarks based on the specifics of the project, even if they were not directly linked to industry legislation. For instance, in the case of AI, Benchmarks could be drawn from related technology regulations. He suggested that even suboptimal Benchmarks could provide valuable insights, as long as alternatives faced similar biases or included similar individual components, allowing meaningful comparisons. He emphasised that the Framework should offer clarity on the economic impact, even if UNIDROIT or another organisation opted for a lower-scoring alternative for other reasons. He noted that the process of determining a Benchmark should be economically driven and the Framework should be flexible enough to accommodate inputs from various proposals and legislations. A

clear workflow should be established: (i) receiving the text-proposal; (ii) creating alternative scenarios; and (iii) delivering an economic score.

62. *Professor Gullifer* inquired whether the alternative scenarios would consider the “no action” option. *Professor Paniagua* suggested that this alternative would constitute the baseline scenario, while law reform would be evaluated as a deviation from it. He highlighted the Framework’s flexibility in accommodating both positive and negative economic impacts.

63. *A participant* asked about the extent to which Benchmarks could incorporate qualitative factors in addition to quantitative ones. *Professor Wool* clarified that qualitative evidence, such as expert opinions, should be considered when quantitative data was unavailable. However, non-quantitative benefits should fall outside the Guide’s focus and should be assessed separately by relevant stakeholders.

(b) Uses and Scoring system

64. *Professor Wool* observed that the current methodology proved effective when dealing with relative scores. Benchmarks could either be selective or constructed, followed by comparisons and assumptions. He stressed the importance of quantification, ensuring that evaluations resulted in tangible, numerical data, based on the facts of the market.

65. *The participants* discussed the methodology behind how scores were assigned in the Case Studies, specifically the transition from qualitative assessments to numerical values like 8 or 9.

66. *Professor Paniagua* explained that the scoring of each Factor in the Case Studies, was based on qualitative assessments drawn from existing literature, expert judgment and structured questions which allowed to compare the law reform to the Benchmark. For instance, in the Bank Liquidation Case Study, a score of 10 was not given due to the greater variability in global banking systems compared to those in the EU. This highlighted the importance of considering the diversity across different legal and economic systems.

67. *A participant* proposed displaying scores as ranges rather than single numbers, which would better reflect the degree of certainty. For example, instead of a score of 7.2 with 80% certainty, showing it as a range between 6.8 and 7.8 would acknowledge inherent uncertainties.

68. *The participants recognised the value of Benchmarks—whether ideal or suboptimal—and suggested offering additional guidance in selecting and prioritising Benchmarks to inform discussions effectively, particularly where an ideal Benchmark was unavailable. It was agreed that the degree of certainty would play a crucial role in reflecting Benchmarks deriving from different legal contexts. Additional guidance should be developed for the assignment of scores.*

69. *It was suggested developing a Case Study to reflect the conceptual phase where no information and data were available. The Case Study could focus on border transactions and dispute resolution for small businesses and rural communities.*

Item 5: The Factors

General points

70. *The participants* agreed that transaction costs should be reflected in the shaded boxes of the Factors.

71. *A participant* suggested removing Factor A, as it represented transaction costs, and defining Factor B as reflecting partial equilibrium effects, and Factor C as dealing with general

equilibrium effects. Several participants noted that similar distinctions between partial and general equilibrium had caused confusion in previous discussions, particularly to non-economists.

72. *A participant* proposed adding definitions for “network” and “system” to be understood by economists. *Ms Kostoula* clarified that a definition for “network” had been added after the last Workshop but suggested further elaborating it.

Factor A

73. *The participants* agreed with the content of Factor A. It was further suggested to eliminate the last paragraph of the shaded box as its content was reflected in the previous one and, in addition, the term “monopolistic” could create confusion.

Factor B

74. *Professor Wool* referred to footnote number 9, which was initially drafted for academic purposes, and inquired how the group would suggest handling indirect network effects. *Professor Paniagua* explained that indirect network effects could be relevant as a law reform could affect other (indirect) segments of the market.

75. *It was suggested* treating indirect network effects similarly to externalities by factoring them into the degree of certainty only where relevant.

Factor C

76. *Professor Wool* referred to the indicative question regarding the expected impact on prices and queried how this differed from the discussion on transaction costs under Factor A and how the general methodology with the Benchmark would apply.

77. *Professor Paniagua* explained that, while transaction costs may influence prices, Factor C focused on broader market dynamics and price shifts in other areas. The Benchmark used for comparison would help gauge whether a reform would have a similar or different effect on prices, with any deviations needing clear justification. The repetition of “relative to the Benchmark” at each indicative question might be redundant, although it would help detect deviations from the Benchmark.

78. *The participants* discussed the scope of multiplier effects (e.g., indirect economic impacts like increased consumption following employment growth) and how far these should be analysed. Practical limits should be set around those cascading effects, particularly when they were not documented and data was lacking, thus allowing for comparison rather than real quantification. *A participant* noted the importance of aligning Benchmarks with the specific policy goals of the reform and reflect rather than broad economic effects. It was argued that the specific market frictions or economic deficiencies the reform sought to address, not the overall economic outlook.

79. *Professor Paniagua* noted that Benchmarks tied to well-documented multiplier effects can be adjusted based on the context of the reform. If a reform did not have the same broad application as the Benchmark, the effects and, consequently, the scoring could be adjusted accordingly and scaled down. However, limitations in data may require new studies or the creation of Benchmarks from scratch, often relying on forecasting or modelling techniques.

80. *It was agreed* to adjust Factor C to reflect the discussion and set limits to its scope.

Factor D

81. *Professor Wool* raised concerns about an example used to illustrate Factor D (in the shaded box under paragraph 74), noting that it was more relevant for Factors A or C. He argued that Factor D should focus on compliance and applicability rather than on varying outcomes due to differences in financial market structures, such as reliance on the bond market versus banking systems.

82. *The participants* debated how to account for country-specific political risks and differences in implementation and outcomes across countries, suggesting the use of existing indices (e.g., World Bank indices) or other tools (e.g., the pricing or risk assessment by the World Bank's Multilateral Investment Guarantee Agency (MIGA) for measuring compliance and political risks. A similar approach was followed for the Cape Town Convention Compliance Index which factored in political risk by averaging data from sources like the World Justice Project and property rights sub-indexes. However, it was pointed out that those indices did not promptly adjust to new political realities.

83. A discussion ensued on whether global evaluations should assume full compliance or account for country-level risks. *The CTCAP Directors* noted that compliance would be more relevant at the country level and noted the difficulties in predicting compliance at an ex-ante stage.

84. *Professor Paniagua* recommended that economic scoring for global or regional legal reforms should assume implementation by an "average" country, similar to the OECD approach. Specific tailoring could be done later for individual countries or groups, but the baseline should be an "average" scenario. *Professor Wool* highlighted the sensitivity of making assumptions about compliance before a country had ratified a treaty, especially when the pre- and post-ratification legal systems differ significantly. He explained that countries with legal systems closer to international standards (e.g., the Cape Town Convention) tended to comply more easily with reforms, while countries making a "qualitative leap" struggled with compliance. This highlighted the importance of considering pre-existing legal systems in Factor D. *Some participants* also noted that countries facing more compliance difficulties might benefit more from transaction cost reductions (Factor A), as reforms could significantly improve their systems.

85. *Several participants* agreed that assumptions about full compliance or weighted averages might be appropriate for global assessments but could vary depending on the nature (soft law vs hard law) and complexity of the instrument, as well as on the classification of jurisdictions as common and civil law (for example, soft law often lacked immediate enforceability in civil law jurisdictions). *Many participants* highlighted that assumptions for country-specific evaluations should also consider varying compliance levels based on different (pre-existing) legal systems.

86. *The participants* noted the challenges in evaluating compliance with soft law instruments and scoring Factor D. It was noted that soft law often lacked the binding force of treaties, and their application and enforcement were not as straightforward as model laws or treaties designed for legislative adoption. *Professor Gullifer* added to the difficulties that many countries might already have similar legal norms, even if these were not formally codified.

87. *It was agreed that Factor D should capture those distinctions and varying components that could affect implementation and compliance.*

Factor E

88. The discussion on Factor E focused on transition costs and how they should be weighted in evaluating legal reforms.

89. *The participants* agreed that Factor E should encompass not only public sector transition costs but also private sector costs, as reforms often impacted both sectors.
90. *Professor Paniagua* pointed out the significant impact that transition costs had on the final score of an economic evaluation, highlighting the sensitivity of the formula to how Factor E was defined and measured. In one of the Case Studies, adjusting Factor E from 1 to 5 drastically changed the final score from 7.7 to 3.7. That meant that even small changes in transitional costs could lead to large shifts in the final evaluation of the reform.
91. *Many participants* expressed concern that transition costs might be overemphasised, potentially undervaluing reforms. It was highlighted that transitional costs (e.g., training, education) should not disproportionately affect the final score of a reform, as they were typically short-term (one-off expenses) and minor, as in the case of the Cape Town Convention, compared to long-term economic benefits. *Professor Wool* advocated for carefully balancing the weight of Factor E against Factors like direct economic gains (Factor A) or compliance (Factor D).
92. Suggestions were made to overcome the problem by scaling down the weight of Factor E and preventing transitional costs from disproportionately lowering the score. *The participants* explored various methods, including:
- (a) Factoring transition costs into Factor A: However, it was pointed out that A reflected net economic effects and transition costs were intended to be treated separately. In fact, it was noted that in most economic assessments, transition costs were identified as independent variables.
 - (b) Multiplying Factor E by Factor D: *Many participants* found this option problematic as transition costs would be weighted by compliance. *The participants* agreed on keeping Factor E separate to ensure clear comparison between economic benefits and transitional costs.
 - (c) Separating Factor E similarly to the degree of certainty, thus not affecting the final economic score itself. *Some participants* pointed out the practical difficulties in dealing with three separate figures (gains, transitions, certainty) instead of one.
 - (d) Scaling down Factor E: One suggestion was to apply a multiplicative factor to scale E down to a maximum of 1%. Another suggestion was to limit Factor E to 10% of the total weight, which would allow E to influence the final score by a certain capped amount at 10%. Alternatively, transitional costs could be viewed as a percentage of Factor A or B. For instance, if transition costs were expected to be around 10% of the direct effects (Factor A), then Factor E could be 0.1.
 - (e) Adjusting the score range: Factor E could be scaled down to 0 to 1 instead of a range from 0 to 10, which could lead to disproportionate results.
93. *Many participants* expressed a preference for a combination of the last two options. *One participant* raised concerns that setting an ex-ante limit on Factor E would restrict the formula and might bias the assessment towards harmonisation, as it would assume that transitional costs were always minor compared to the benefits. *Another participant* explained that the economic gains (A), costs (B), and compliance (D) Factors would already account for many of the costs associated with implementing a reform, instead Factor E would be specifically designed to account for the one-off transitional costs (such as training or education) that could occur during the implementation phase, and which would not be covered by the other Factors. *Professor Paniagua* explained that restricting the formula would allow modelling the reality. Since Factor E was perceived to have a lower effect, a lower value should be given in its formulation.

94. *A participant* raised the question of how to account for infrastructure costs, such as the international registry in the Cape Town Convention, which should be seen as a net economic benefit rather than a cost. Professor Wool added that real transition costs reforms were relatively minor and often absorbed by legal professionals in the course of their duties. *Professor Gullifer*, however, cautioned that the magnitude of transitional costs could vary depending on the size of the project and the country involved. *Professor Wool* noted that when discussing transitional costs, it was essential to distinguish between developmental costs (like long meetings and conferences) and actual per-country implementation costs.

95. *Some participants* proposed including non-economic costs that blocked the overall economic benefit for a specific country, such as political costs or costs related to the cultural shift required to adopt a law reform. However, *many participants* argued that those costs were not translated to an economic impact and were distinct from the direct transitional costs the formula aimed to capture.

96. *A participant* noted that the idea of evaluating reforms across different legislative scenarios would highlight how varying levels of reform impacted transitional costs.

97. *Ms Kostoula* noted the challenge of quantifying the costs and assigning score to Factor E, particularly in soft law contexts, where concrete figures for transitional costs were harder to obtain. This was observed in the Case Studies, which pointed the need for more detailed data and theoretical assessments to improve the accuracy of Factor E scoring.

98. It was suggested that the analysis and formula should account not only for costs within the country but also for the costs incurred by the institution producing the legal instrument, which would vary depending on the nature of the reform (hard law versus soft law).

99. *Professor Veneziano* added that transition costs could differ based on the type of soft law instrument. For instance, with the UNIDROIT Principles for International Commercial Contracts, transition costs would primarily involve educating judges and arbitrators and updating contract forms, as these principles would be applied in contracts and interpreted by judges. On the other hand, instruments like the UNIDROIT Digital Asset Principles could entail higher transition costs, as they would require the involvement of multiple stakeholders and potential legal adjustments in different jurisdictions to accommodate the instrument's detailed provisions.

100. *It was agreed to: (i) reduce the weight of Factor E; (ii) determine the best approach, by revisiting the Case Studies and examining how different formulations of Factor E would affect the outcomes, ensuring that the results remained credible and consistent; (iii) developing Factor E in light of hard law and soft law considerations.*

Item 6: Contexts of use

(a) Timing

101. *The participants* discussed the different phases and noted a transitional period between the adoption and implementation of an instrument (e.g., after adoption by UNIDROIT but before widespread application by states) where quantitative data may be scarce.

102. *Ms Kostoula* suggested including this period into the pre-adoption phase. She proposed that this phase could include two distinct stages: one where the instrument can still change, thus before being formally adopted by the relevant body, and another where it has been adopted the body (e.g., of the international organisation) but has not yet been applied by states.

103. *Professor Tirado* outlined four distinct phases in the legislative process: (i) the phase before the existence of a legislative project, where initial discussions would take place on the necessity of the instrument; (ii) the consultation phase which involved the approval or a first draft; (iii) the phase from adoption to implementation, where the instrument had been adopted but hard data was not yet available; (iv) post-adoption phase where sufficient data would exist for quantitative analysis.

104. *The participants* highlighted the importance of distinguishing those phases to aid in data collection and analysis. *Some participants* suggested merging the conceptual and negotiation phases of the Guide, while *others* expressed concerns about merging due to the differences in data availability.

105. *It was agreed to treat the transitional phase as a distinct period for qualitative assessment and include in the ex-ante stage.*

(b) Nature of law reform

106. *Professor Wool* raised concerns about the assumption of the Guide that soft law was equivalent to hard law (Paragraph 115), considering that soft law lacked the binding force of treaties.

107. *Professor Paniagua* clarified that the assumption referred to enforceability rather than direct comparison, suggesting the text should instead focus on assuming enforceability of and compliance with soft law instruments during an economic evaluation.

108. *Professor Gullifer* and *Professor Wool* discussed the multiple roles of soft law. *Professor Wool* used international contract law principles as an example, suggesting soft law should be seen as applied within specific contexts rather than enforced or implemented. *Professor Gullifer* added that soft law instruments like the UNIDROIT Principles on Digital Assets and Private Law, often provided a foundation for future legislation, even if not fully implemented.

109. *A participant* highlighted that soft law, though non-binding, shaped domestic law reforms and set international standards. Examples like the UNIDROIT Principles of International Commercial Contracts served as interpretive tools for contracts and in arbitration, while influencing legislative processes without being binding.

110. *Professor Wool* emphasised the need to recognise soft law's legal impact and effects to assess its economic implications accurately. He also called for more precise language to reflect soft law's potential to inspire hard law or fill gaps but noted its varying impact depending on context. He argued that Factor D, which assessed legal certainty, might be less relevant for soft law due to its non-binding nature, a point supported by *Professor Tirado*, who noted the increased risks during implementation.

111. *The CTCAP Directors* noted the diversity within soft law, such as principles versus model laws, which complicated the evaluation due to different degrees of implementation. *Professor Veneziano* pointed out the difficulty in linking model laws directly to legislative changes when multiple reforms occurred simultaneously. She further cautioned that focusing on soft law's legislative impact, as implied in paragraph 116, could narrow the scope of the analysis, neglecting the broader impacts of soft law on other addresses, such parties involved in mediation or arbitration, judges, lawyers. She stressed that the analysis should clarify whether it focused on soft law aimed at legislators or if it considered other addresses of law reforms. *The participants* agreed the evaluation framework should adopt a broader approach to fully capture soft law's impact.

112. *Some participants* suggested replacing the term "promotional law" with "facilitating law" to avoid misinterpretation. It was noted that, while "promotional" was a technical legal term, it could indeed confuse readers unfamiliar with it.

113. *It was agreed to revise the "contexts of use" by: (i) including the "transitional period" in ex-ante evaluations; (ii) expanding on the types, degrees of implementation, and impact of soft law, (iii) revising key sections (particularly paragraphs 114-116) to reflect those discussions; and (iv) replacing "promotional law" with "facilitating law" and adding an accompanying explanation.*

Item 7: Evaluation Actors and Workflow

(a) Evaluations Actors

114. *The participants approved the content of that section.*

(b) Baseline scenario

115. *Several participants observed that the terms "baseline scenario" and "counterfactual" were introduced in the Workflow section without sufficient explanation, leading to confusion about whether both were necessary.*

116. *Professor Paniagua clarified that the *baseline scenario* represented the status quo, or the "business as usual" case—what would happen if no legal changes were implemented. In contrast, the *Benchmark* served as a reference point for measuring the impact of legal changes or economic effects. He also explained that *counterfactuals* were used in economics to assess welfare by modelling outcomes in the absence of a particular component, allowing for an estimation of welfare gains or losses. He suggested that this type of analysis for counterfactuals was particularly useful when ex-post studies are unavailable for quantification purposes.*

117. *Professor Gullifer underlined the need to refine how Benchmarks and data were handled, noting that Benchmarks from other sectors may still be valuable. Ensuring clarity and practicality in Benchmark selection would be critical for a robust economic impact analysis. It was suggested that, if no Benchmark existed, assumptions or a constructed alternative should be used. If none was feasible, the economic evaluation should be considered to be premature.*

118. *The participants agreed to: (i) focus on defining the baseline scenario (current situation) and Benchmark (comparison point), while counterfactual analysis could be addressed in Annex 2 for clarity; (ii) expand the baseline scenario section and explain it more consistently. In particular, it was agreed to clarify why a baseline scenario is required, both in the factor analysis and in its own dedicated section; (iv) provide additional guidance for selecting a Benchmark (paragraph 138).*

(c) Assumptions

119. *The participants discussed different assumptions based on the Case Studies.*

120. *Professor Wool questioned whether the assumption that all states would adopt a legal instrument was realistic. Professor Tirado expressed the view that every state had the potential to adopt such instruments, and making *a priori* assumptions could hinder the aspiration for widespread adoption.*

121. *Professor Paniagua identified this as primarily a wording issue and noted the importance of such a question. He suggested revising the phrasing of the question used in the Case Studies and, instead, reflecting the maximum number of states realistically expected to adopt a given reform. For example, a maritime protocol might be relevant only to coastal states, whereas landlocked countries like Switzerland may not adopt it. Similarly, Ms Kostoula referred to the UNIDROIT Principles on Digital Assets and Private Law, noting that*

countries already advanced in digital technology were more likely to adopt such principles, while those banning certain digital assets, like crypto-assets, may not pursue legal reform in this area. She added that assigning a reference number to estimate likely adoption levels would help generate a more accurate economic score. *Professor Paniagua* also suggested using the verb “reform” instead of “adopt” to capture the likelihood of legislative change, acknowledging that some states might reform their legal frameworks without fully adopting the international instruments in question.

122. *The participants* agreed with the analysis and noted that while assuming full participation could be useful in theory, expectations should be more realistic in order to properly reflect likely adoption scenarios.

(d) Causal links

123. *The participants* discussed the concept and content of “Causal Links” in the context of the workflow, and of “Causal Inference” as described in Annex 2.

124. *Professor Paniagua* explained that “causal inference” referred to statistical techniques commonly used in economics and medicine, such as randomised control trials (RCTs), instrumental variables, and difference-in-differences approaches, which aimed to identify whether a specific treatment (e.g., a legal reform) had a measurable effect (e.g., economic improvement). Causal inference focused on determining statistical relationships and outcomes, rather than logical or legal causality. “Causal links” referred more to logical relationships in legal terms, while “causal inference” related to economic outcomes demonstrated through rigorous statistical methods.

125. *The participants underlined the need to clarify these distinctions in the methodology and offer additional guidance.*

(e) Degree of certainty

126. *The participants* discussed how the degree of certainty should be reflected in the evaluations. *Professor Paniagua* and *Ms Kostoula* explained how they applied the degree of certainty in their Case Studies. For instance, a 10% uncertainty in the Bank Liquidation Case Study accounted for deviations in focus (legal areas), geography (e.g., different target countries), or sectors between the reform and the Benchmark. It was noted that the degree of certainty represented how confidently the effects documented in the Benchmark could be expected to apply to the reform under evaluation. As demonstrated in the Case Studies, the degree of certainty would be adjusted downward to reflect the uncertainty in applying the Benchmark data to a potentially different context.

127. A participant suggested distinguishing the degree of certainty between the different effects in the Framework, as direct effects may be more certain than indirect ones. *The participant* emphasised the importance of tailoring the degree of certainty to individual case studies rather than using a single value for the entire Framework. It was further noted that displaying scores as ranges, as discussed under the scoring system, would better reflect the degree of certainty.

128. *It was agreed to: (i) further elaborate the degree of certainty with concrete examples and methods; (ii) factor in externalities and indirect network effects, where relevant.*

Item 8: Ex-post analysis (Annex 2)

129. *The participants suggested reviewing Annex 2 to ensure consistency with the Framework and alignment with previous steps and discussion points. In particular, it was agreed to (i) better explain the role of ex-post analysis as a guide for selecting Benchmarks and (ii) elaborate on the “Causal Inference” and its difference to “Causal links”.*

Item 9: Next steps and closing remarks

130. *The CTCAP Directors summarised the next deliverables for the EE ICLR project:*

- 1) Updating the Framework
 - Reflecting on how to present Factor E.
- 2) Updating the Preliminary Draft Guide:
 - Adopting the term "transaction costs" and revisiting the section, while acknowledging that other economic frictions could be addressed under specific Factors.
 - Reformulating or eliminating Annex 1.
 - Addressing drafting points, such as "economic outcomes", "domestic", "facilitating law", and "EE ICLR".
 - Adapting the text to reflect the discussion on harmonisation.
 - Developing guidance on selecting and prioritising Benchmarks.
 - Providing additional guidance on the assignment of scores.
 - Adapting Factors A-B, limiting Factor C and expanding Factor D.
 - Developing Factor E and reducing its weight.
 - Including the "transitional phase" to the ex-ante stage.
 - Developing the "Timing" section in light of the hard law and soft law considerations.
 - Expanding the "Baseline scenario" section.
 - Clarifying the distinction between "Causal links" and "Causal inference".
 - Developing the "degree of certainty" and incorporating externalities and indirect network effects, where relevant.
- 3) Developing a new Case Study to capture the conceptual phase where no text and data would exist.

131. It was reiterated that the goal was to finalise the Guide in 2025, and the next meeting would take place in early 2025.

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

ANNEX 1

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

An initiative under the auspices of the Town Convention Academic Project

Project Leads:



Supported by:



**10th Workshop on
Economic Evaluation of International Commercial Law Reform
Draft Agenda
17 September 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)

09:00 - 09:10	Opening of the Session <i>CTCAP Directors</i>
09:10 - 09:20	Project background, summary of intersessional work and introduction to the revised Framework and Draft Guide <i>UNIDROIT Secretariat</i>
09:20 - 09:35	Presentation on the revised Framework and Draft Guide <i>Prof. Jordi Paniagua</i>
09:35 - 10:30	Agenda Item No. 1: Discussion on the Introduction, Annex 1 and Annex 3: <i>Scope, Economic frictions, Economic gains, Transaction costs, Relationship with the Factors, Third-party impacts</i>
10:30 - 11:00	Agenda Item No. 2: Discussion on the Framework: Uses and scoring system
11:00 - 11:10	Coffee break
11:10 - 12:10	Agenda Item No. 3: Discussion on the Factors
12:10 - 13:30	Agenda Item No. 4: Discussion on the Case Studies and the application of the Framework and the draft Guide <i>Introduction by UNIDROIT Secretariat and Prof. Jordi Paniagua</i>
13:30 - 14:15	Lunch break
14:15 - 15:15	Agenda Item No. 5: Discussion on the contexts of use and ex-post analysis (Annex 2)

15:15 – 16:00	Agenda Item No. 6: Discussion on the Evaluation Actors and Workflow
16:00 – 16:10	Coffee break
16:10 – 16:50	Open discussion, summary and next steps
16:50 – 17:00	Closing Remarks <i>CTCAP Directors</i>

ANNEX 2**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. Teresa Rodriguez de las Heras Ballell (University Carlos III of Madrid)
7. Mathias Siems (European University Institute)
8. Oren Sussman (University of Oxford)
9. Anna Veneziano (UNIDROIT)
10. William Brydie-Watson (UNIDROIT)
11. Myrte Thijssen (UNIDROIT)
12. Theodora Kostoula (UNIDROIT)
13. Benedetta Mauro (UNIDROIT)
14. Kateryna Bovsunovska (UNIDROIT)
15. Ekaterina Chistiakova (UNIDROIT, intern)
16. Sihui Zhang (UNIDROIT, intern)