Vol. 10

University of Bologna Law Review

ISSUE 1. 2025

Articles & Essays

Obiter Dictum

• EISSN 2531-6133 Cover Copyrigth © 2021-2025, University of Bologna Law Review Doi https://doi.org/10.6092/issn.2531-6133/v10-n1-2025

University of Bologna Law Review

E-ISSN 2531-6133

GENERAL INFORMATION

The University of Bologna Law Review is a student-run, peer-reviewed, diamond open access journal published by Alma Diamond, Alma Mater Studiorum Università di Bologna and owned by the Department of Legal Studies, University of Bologna.
The Journal is hosted and mantained by AlmaDL University of Bologna Digital Library.
Refer to the "About the Journal" page on the website for details on the editorial process, section policies, ethics code, copyright and open access policy.
https://bolognalawreview.unibo.it/about

SUBMISSIONS

The University of Bologna Law Review accepts articles, essays, notes and conference papers. Authors can submit their manuscripts via email to bolognalawreview@unibo.it, via Scholastica, or via website.

SYSTEM OF CITATION

The University of Bologna Law Review follows The Bluebook: A Uniform System of Citation (21st Edition), copyright by The Columbia Law Review Association, The Harvard Law Review Association, the University of Pennsylvania Law Review, and the Yale Law Journal.

ADDRESS

University of Bologna, Department of Legal Studies, Via Zamboni 27, 40126, Bologna, Italy.

WEBSITE

www.bolognalawreview.unibo.it

University of Bologna Law Review

TABLE OF CONTENTS

Vol. 10 Issue 1

ARTICLES & ESSAYS

OBITER DICTUM

VOLUME 10 ISSUE 1 ARTICLES & ESSAYS

University of Bologna Law Review

https://doi.org/10.6092/issn.2531-6133/22335

Received: 08 Nov. 2024 | Reviewed: 30 Jan. 2025 | Accepted: 11 March 2025 | Published: 23 July 2025

Assessing the Role of International Judicial Advisory Opinions in the Evolution of International Environmental Law in Response to Climate Change

PHUONG DUNG NGUYEN* & THI HONG YEN NGUYEN**

*Phuong Dung Nguyen (corresponding author), Associate Lecturer in Law in the Department of Economics and Finance, RMIT University Vietnam (Vietnam), holds an LL.M. in International Business Law from Newcastle University (U.K.), and an LL.B. from Hanoi Law University (HLU)(Vietnam). Her research focuses on public international law and comparative law, with particular emphasis on international human rights, international environmental law, the law of the sea, climate change, the rights of migrant workers, and other related areas. She is a qualified solicitor licensed to practise law in Vietnam and also serves as a visiting lecturer at Hanoi Law University (HLU) (Vietnam) and the International School of Vietnam National University (VNU) (Vietnam). She has co-authored numerous publications that have appeared in prestigious national and international journals and have been published by renowned publishers.

**Thi Hong Yen Nguyen is an Associate Professor and Vice Director of the Undergraduate Training Department at Hanoi Law University (HLU) (Vietnam) and also serves as Head of the International Law Division at the Dak Lak Branch of Hanoi Law University (HLU) (Vietnam). She holds a Doctorate in Public International Law from Hanoi Law University (HLU) (Vietnam). Her research concentrates on public international law, with significant publications in international human rights law, international environmental law, climate change, and the law of the sea. She is a former recipient of several government scholarships and has held visiting appointments and fellowships at prestigious institutions including the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, at Lund University (Sweden), the Norwegian Centre for Human Rights, at University of Oslo (Norway), The Hague Academy of International Law (the Netherlands), and Yeosu Academy of the Law of the Sea (Korea). She is an active member of various international legal research networks and has received numerous recognitions for her academic contributions.

@ *dung.nguyen118@rmit.edu.vn **nguyenhongyen@hlu.edu.vn

*0000-0002-1882-2956 **0000-0003-2703-2363

ABSTRACT

Climate change has emerged as a global menace, threatening human existence and Earth's biodiversity. The urgency to address this crisis intensifies, yet the window for effective action is narrowing. Failure to act disproportionately impacts marginalised communities, highlighting the need for legal clarity. Judicial authorities, such as the International Court of Justice (I.C.J.), the International Tribunal for the Law of the Sea (I.T.L.O.S.), and the Inter-American Court of Human Rights (I.A.C.H.R.), have increasingly been requested to provide advisory opinions on addressing climate change. Although generally non-binding, these advisory opinions have become a vital source of international law, particularly in the evolving fields of environmental and human rights law, and can, in certain institutional and legal framework contexts, carry significant legal and practical influence. They offer the flexibility needed to develop new instruments or legal and policy reform in response to changing practices. This article explores the evolution of advisory opinions, their contributions to addressing climate change, and the benefits and challenges of utilizing them to mitigate climate change. It also attempts to delineate reflections and implications concerning the development of advisory opinions in the context of climate change.

KEYWORDS

Advisory Opinion, Climate Change, Judicial Authorities, International Environmental Law, International Law

TABLE OF CONTENTS

INTRODUCTION

Climate change has emerged as one of the paramount issues of our era, with this moment being critical. In his address at the opening of the 2024 Climate Ambition Summit, United Nations [hereinafter U.N.] Secretary-General António Guterres declared that humanity has "opened the gates to hell" by exacerbating the climate crisis.[1] According to recent findings by the Intergovernmental Panel on Climate Change [hereinafter I.P.C.C.], human activities such as power generation, manufacturing, industrial processes, and various other consumption practices that involve the exploitation and combustion of fossil fuels and alterations in land use – are the primary contributors to the rise in greenhouse gases [hereinafter GHGs]. The elevated atmospheric concentrations of GHGs result in the entrapment of heat within the atmosphere, thereby causing an increase in the Earth's average temperature.[2] The increase in average global temperatures has triggered a chain reaction, culminating in the melting of polar ice caps and subsequent sea level rise. Additionally, the rising global surface temperatures have altered atmospheric circulation patterns, resulting in a greater frequency and intensity of extreme weather events.[3]

Recent reports from the I.P.C.C. have highlighted the urgent necessity to limit the rise in the Earth's average temperature to no more than 1.5 °C.[4] While it is possible to limit the temperature increase to 1.5 °C, the window of opportunity is closing rapidly. The impacts of climate change on human societies and ecosystems are more extensive and severe than anticipated, with each additional fraction of the degree of warming exacerbating future risks. The climate crisis presents significant challenges, necessitating a concerted effort from the international community to address all aspects, including the development of an effective international legal framework. U.N. Secretary-General António Guterres has expressed deep concern over the severe impacts of climate change on specific countries, particularly small island states, which he

---

[1] *See* United Nations, *Humanity Has Opened the Gates to Hell' Warns Guterres as Climate Coalition Demands Action*, United Nations - UN News Global Perspective Human Stories (Sept. 20, 2023), https://news.un.org/en/story/2023/09/1141082 (last visited Feb. 28, 2025).

[2] *See* I.P.C.C., Climate Change: The I.P.C.C. Scientific Assessment 414 (J.T.Houghton et al. eds., 1990); *see also* I.P.C.C., Climate Change 1992: The Supplementary Report to the I.P.C.C. Impacts Assessment 130 (W.J.McG. Tegart and G.W. Sheldon eds., 1993); I.P.C.C., I.P.C.C. Second Assessment: Climate Change 1995 588 (1995); Clare Breidenich et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 Am. J. Int'l L. 315, 316-17 (1998).

[3] *See generally* I.P.C.C., *supra* note 2, at 3–4, 5, 7–8; Emily Richman, *Emissions Trading and the Development Critique: Exposing the Threat to Developing Countries*, 36 N.Y.U. J. Int'l L. & Pol. 133, 133-36 (2003); Breidenich et al., *supra* note 2, at 316–17.

[4] I.P.C.C., Global Warming of 1.5°C: An I.P.C.C. Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty 1 (Valérie Masson-Delmotte et al. eds., 2018).

described as "an existential threat" and called for actions from the rest of the world.[5] Although countries have made progress in enhancing their mitigation and adaptation targets, such progress is insufficient, and considerable efforts are still required to attain the long-term temperature goals and objectives outlined in the Paris Agreement.[6][7]

The role of courts and judicial bodies has received significant attention and recognition for addressing climate change challenges within the international legal framework. International courts and tribunals are considered avenues for addressing and clarifying states' responsibilities amidst the climate emergency. Nevertheless, no international judicial body has been tasked with determining states' duties under international law concerning climate change. This is an issue that is currently expected to be addressed.[8] In recent times, small island nations such as Palau[9] and Vanuatu[10] have actively pursued the likelihood of obtaining an advisory opinion from the International Court of Justice [hereinafter I.C.J.]. In October 2021, to facilitate the pursuit of seeking an advisory opinion from the International Tribunal for the Law of the Sea [hereinafter I.T.L.O.S.], the Commission of Small Island States on Climate Change and International Law [hereinafter C.O.S.I.S.] was formed based on an agreement between Antigua and Barbuda and Tuvalu [hereinafter C.O.S.I.S. Agreement].[11] In alignment with the United Nations Convention on the Law of the Sea [hereinafter U.N.C.L.O.S.], an advisory opinion on climate change and the law of the sea was sought by the C.O.S.I.S. from the I.T.L.O.S. in December 2022.[12] Another advisory opinion from the Inter-American Court of Human Rights [hereinafter Inter-Am.Ct.H.R.] was also requested by the governments of Chile

[5] *See* Press Release, U.N. Secretary-General, To Tackle Climate Change, Leaders Must Tax Pollution, Not People, End Coal Plant Construction by 2020, Secretary-General Urges, Concluding Pacific Region Visit (May 18, 2019), https://press.un.org/en/2019/sgsm19584.doc.htm (last visited Feb. 28, 2025).

[6] *See* U.N.F.C.C.C., Paris Agreement, (Nov. 2015), https://unfccc.int/documents/184656.

[7] *See generally* Maria A. Tigre, *It Is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives*, 17 Charleston L. Rev. 623, 625 (2024).

[8] *See id.* at 626.

[9] *See* United Nations, *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, United Nations - UN News Global perspective Human stories (Sept. 22, 2011), https://news.un.org/en/story/2011/09/388202 (last visited Feb. 28, 2025); *see also* Richard Barnes, *An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?*, 53 Ocean Dev. & Int'l L. 180, 180 (2022).

[10] *See* Radina Gigova, *Vanuatu Will Seek International Court of Justice Opinion on Climate Protection*, CNN (Sept. 26, 2021), https://edition.cnn.com/2021/09/26/asia/vanuatu-climate-change-protection-rights-intl/index.html (last visited Feb. 28, 2025); *see also* Barnes, *supra* note 9, at 181.

[11] *See* Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law, Ant. & Barb.-Tuvalu, Oct. 31, 2021 (hereinafter C.O.S.I.S. Agreement); *see also* Barnes, *supra* note 9, at 181.

[12] *See* Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) (2022), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request.for.Advisory.Opinion.COSIS.12.12.22.pdf (last visited Feb. 28, 2025); *see also* Manon Rouby, *The Role of International and Regional Courts in Future-Proofing Environmental Jurisprudence Through Advisory Opinions*, Centre for International Law - National University of Singapore (Aug. 1, 2023), https://cil.nus.edu.sg/blogs/the-role-of-international-and-regional-courts-in-future-proofing-environmental-jurisprudence-through-advisory-opinions/ (last visited Feb. 28, 2025).

and Colombia to elucidate the human rights obligations of states amidst the climate change crisis.[13] Vanuatu, in particular, has taken a leading role in proposing a resolution submitted to the I.C.J. regarding states' obligations to safeguard the rights of current and future generations from the adverse effects of climate change. This initiative succeeded, as the resolution was unanimously adopted by the United Nations General Assembly [hereinafter U.N.G.A.] on 29th of March 2023.[14]

Advisory opinions from the relevant judicial bodies hold significant importance and can have a profound impact on the international legal system. These opinions offer crucial insights into existing international legal obligations in the context of climate change emergencies, addressing the pressing need for clarification on states' responsibilities regarding climate change and promoting climate justice. Furthermore, advisory proceedings are effective mechanisms for vulnerable communities and nations, despite not being major contributors, yet experiencing severe consequences due to climate change, can actively pursue avenues for climate justice and pathways for undertaking climate actions and implementing climate adaptation measures for sustainable development. This tendency reflects an increasing recognition of the imperative for legal guidance, serving the dual purpose of holding states accountable for their actions or inactions and navigating the intricate landscape of responsibilities related to addressing challenges posed by climate change, thereby ensuring climate justice.

Although the Paris Agreement's commitments to reduce emissions represent a milestone in addressing climate change, they fall short of ensuring that global warming remains "well below" 2°C, the target established by the agreement. Achieving this objective requires countries to commit to progressively more stringent emission reductions over time. In this context, an advisory opinion of the judicial bodies, such as

[13] *See Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency,* Climate Change Litigation (2023), https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/ (last visited Feb. 28, 2025); *see also* Maria Antonia Tigre, Natalia Urzola & Juan Sebastián Castellanos, *A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions*, Climate Law - Sabin Center Blog (Feb. 17, 2023), https://blogs.law.columbia.edu/climatechange/2023/02/17/a-request-for-an-advisory-opinion-at-the-inter-american-court-of-human-rights-initial-reactions/ (last visited Feb. 28, 2025); Rouby, *supra* note 12.

[14] *See* United Nations General Assembly, Resolution Adopted by the General Assembly on 29 March 2023 on Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, A/RES/77/276 (Apr. 4, 2023), https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf (last visited Feb. 28, 2025); *see also* Sue Farran, *Vanuatu Leads Drive to Secure an Opinion from the International Court of Justice on State Responsibilities to Turn Words into Action on Climate Change*, 42 U. Queensl. L.J. 411, 414 (2023) (Austl.); United Nations, International Court's Advisory Opinions on Climate Change Obligations of States 'of Tremendous Importance', Secretary-General Tells General Assembly (Mar. 29, 2023), https://press.un.org/en/2023/sgsm21750.doc.htm (last visited Feb. 28, 2025).

the I.C.J., on climate change could provide valuable support. Such an opinion could stimulate further negotiations and help establish clear expectations for all stakeholders involved in climate initiatives. While it would not address all issues, it merits consideration as a component of a comprehensive strategy to tackle climate change.[15]

1. ADVISORY JURISDICTION OF JUDICIAL AUTHORITIES IN INTERNATIONAL LAW

1.1 ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

International tribunals and courts typically possess both contentious and advisory jurisdiction. Given that international obligations and dispute resolution are primarily based on state consent, treaty provisions serve as the foundation for the controversial and advisory jurisdiction of international courts and tribunals. Thereby, the provisions of such treaties should prescribe and limit the advisory jurisdiction of a court.[16] An advisory opinion aims to offer guidance to individuals or entities on a specific legal issue. In national legal systems, the judicial branch and the executive or legislative branches communicate to facilitate advisory proceedings. A nation's supreme court has the authority to issue advisory opinions within its domestic jurisdiction. However, these opinions are not legally binding unless a specific statute mandates their enforceability.[17]

The international judicial authorities, namely the I.C.J., operate on a similar principle. The I.C.J. was established to serve as the principal judicial organ and legal advisory body of the U.N. It is empowered to resolve disputes peacefully by international law and to issue advisory opinions on legal questions submitted to it. States cannot unilaterally request the I.C.J. to provide an advisory opinion; only the U.N.G.A., other U.N. organs, and specialised U.N. agencies have this authority.[18] The U.N. General Assembly, the Security Council, specific international organisations, and other authorised or specialised U.N. bodies can request an advisory opinion, which serves as legal advice, from the I.C.J. The U.N.G.A. and the Security Council enjoy seeking advisory

[15] *See generally* Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 Ariz. State L.J. 689, 692 (2017).

[16] *See* Tigre, *supra* note 7, at 626.

[17] *See id.* at 626–27; *see also* Myrto Stavridi, *The Advisory Function of the International Court of Justice: Are States Resorting to Advisory Proceedings as a "Soft" Litigation Strategy?*, J. Pub. & Int'l Affs. (Apr. 22, 2024), https://jpia.princeton.edu/news/advisory-function-international-court-justice-are-states-resorting-advisory-proceedings-%E2%80%9Csoft%E2%80%9D (last visited Feb. 28, 2025).

[18] *See* Anxhela (Angela) Mile, *Emerging Legal Doctrines in Climate Change Law-Seeking an Advisory Opinion from the International Court of Justice*, 56 Tex. Int'l L.J. 59, 62 (2021).

opinions from the I.C.J. on "any legal question". In contrast, the scope of advisory opinions requested by other U.N. bodies or specialised agencies is limited to legal questions related to their specific areas of activity.[19] Climate change has become a new security threat, endangering the existence of nations and all of humanity.[20] In response, the U.N.G.A. has issued numerous resolutions to ensure that states fulfil their responsibilities under international law. These resolutions aim to protect present and future generations, reaffirming the international community's goals from the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, and the United Nations Framework Convention on Climate Change [hereinafter U.N.F.C.C.C.].[21] Throughout its recent session, the U.N.G.A. acknowledged and continuously urged efforts to limit global warming to below 2 °C. [22]

In its opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996, the I.C.J. affirmed "its responsibilities as the principal judicial organ of the United Nations", and it is thus dedicated to providing advisory opinions upon request.[23] In alignment with this principle, the I.C.J. is prepared to issue an advisory opinion upon the U.N.G.A.'s adoption of a resolution requesting one.[24] The I.C.J. determined whether it had the jurisdiction to respond to the U.N.G.A.'s request for an advisory opinion. The I.C.J. is competent in providing advisory opinions, in light of Article 65(1) of its Statute, to the requesting body authorised by the U.N. Charter. Article 96(1) of the U.N. Charter bestows ample discretion on the U.N.G.A. and the Security Council to request an advisory opinion from the I.C.J. on "any legal question". Some states opposing the advisory opinion argued that the U.N.G.A. and Security Council should only request views on matters related to their work, similar to other U.N. organs and agencies under Article 96(2) of the U.N. Charter. However, the I.C.J. found that, regardless of this interpretation, the General Assembly has the competence to refer the question to the Court. The General Assembly is entitled to question or request the I.C.J. for an advisory opinion regarding any matters within the scope of the U.N. Charter. Article 11 of the U.N. Charter explicitly confers the

[19] *See* U.N. Charter, art. 96*; see also* U.N., Statute of the International Court of Justice, art. 65 (Oct. 24, 1945) https://treaties.un.org/doc/Publication/CTC/uncharter.pdf; Stavridi, *supra* note 17; Margaretha Wewerinke-Singh et al., *Bringing Climate Change Before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions*, *in* Climate Change Litigation: Global Perspectives 393, 403-04 (Ivano Alogna et al. eds., 2021) (Neth.).

[20] *See generally* Emyr Jones Parry, *The Greatest Threat to Global Security: Climate Change is not Merely an Environmental Problem*, UN Chron., June 2007, at 20.

[21] G.A. Res. 78/153, Protection of global climate for present and future generations of humankind (Dec. 21, 2023).

[22] *See* Mile, *supra* note 18, at 64–65.

[23] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J Rep. 14 (July 8), https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

[24] *See* Mile, *supra* note 18, at 66.

power on the U.N.G.A. to consider general principles related to maintaining international peace and security. Additionally, Article 13 of the U.N. Charter mandates the U.N.G.A. to initiate studies and make recommendations for the progressive development and codification of international law.[25] Therefore, the question presented to the I.C.J. is relevant to many of the U.N.G.A.'s activities and concerns regarding the maintenance of global peace and security, including addressing climate change emergencies, and the development of international law.

1.2 ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

At the time the United Nations Convention on the Law of the Sea was negotiated, climate change was not a recognised issue. Although the Convention does address the protection and preservation of the marine environment in Part XII, it does not specifically address climate change or its impacts on the oceans and marine life. Nevertheless, the U.N.C.L.O.S. is regarded as "a living instrument",[26] meaning it is intended to be dynamic rather than static. This allows for its provisions to be interpreted and applied in ways that reflect contemporary issues. Scholars have noted that, given this adaptability, the general obligations of states under the U.N.C.L.O.S. to manage marine pollution, as elaborated in cases such as the *Pulp Mills* case and the *Advisory Opinion on Seabed Activities*[27] – should also apply to GHGs emissions. Therefore, in line with the U.N.C.L.O.S.'s nature as "a living instrument" and the relevant jurisprudence from both I.T.L.O.S. and the I.C.J., it is appropriate for the I.T.L.O.S. to consider requests for advisory opinions on climate change issues under the U.N.C.L.O.S.[28] The U.N.C.L.O.S. established a system to maintain its consistency and ensure uniform interpretation and enforcement. This system includes the I.T.L.O.S., the I.C.J., arbitral tribunals, or special arbitral tribunals. States can choose their preferred forum for dispute resolution by the U.N.C.L.O.S.[29] The U.N.C.L.O.S., while establishing the I.T.L.O.S., does not expressly grant advisory jurisdiction to the I.T.L.O.S. The I.T.L.O.S. has developed its own rules for issuing advisory opinions. The advisory jurisdiction of the I.T.L.O.S. is established in Article 21 of

[25] *See* Legality of the Threat or Use of Nuclear Weapons, ¶¶ 10–12; *see also* Mile, *supra* note 18, at 64.
[26] *See* Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion of 21 May 2024, ¶ 130.
[27] Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion (Feb. 1, 2011), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf.
[28] *See* Monica Feria-Tinta, *On the Request for an Advisory Opinion on Climate Change Under UNCLOS Before the International Tribunal for the Law of the Sea*, 14 J. Int'l Disp. Settlement 391, 393-94 (2023) (U.K.).
[29]

its Statute[30] and Article 138(1) of its Rules.[31] However, this development has been a subject of controversy, as there are concerns that the U.N.C.L.O.S. may not have fully authorised the I.T.L.O.S. to undertake such a function.[32]

Additionally, under the U.N.C.L.O.S., the Seabed Disputes Chamber [hereinafter S.D.C.] – a specialised branch of the I.T.L.O.S. – was established with a narrowly focused jurisdiction specifically addressing issues related to the Area, which encompasses the seabed and ocean floor beyond national jurisdictions, as delineated in Part XI of the U.N.C.L.O.S. The S.D.C. has exclusive authority over matters regarding the exploration and exploitation of mineral resources in this region, as detailed in Article 187 of the U.N.C.L.O.S. While the S.D.C. is conferred with contentious and advisory authorities under Article 191 of the U.N.C.L.O.S., this Article comprises a provision referring to the advisory functions of other bodies. This suggests that the I.T.L.O.S. may not possess general advisory authority outside the specific remit of the S.D.C.[33]

The C.O.S.I.S. requested an advisory opinion from the I.T.L.O.S., rather than from the S.D.C. The advisory opinion pertains to the responsibilities of State Parties under the U.N.C.L.O.S. to address marine pollution resulting from climate change and to protect the marine environment from its effects. Since this request falls outside the scope of the S.D.C., it raises the issue of whether the I.T.L.O.S. has the authority to issue such an advisory opinion. The challenge against the I.T.L.O.S.'s competence in issuing advisory opinions was previously debated in the Advisory Opinion submitted by the Sub-Regional Fisheries Commission [hereinafter *S.R.F.C. Advisory Opinion*].[34] It was notably argued between states that the U.N.C.L.O.S. does not explicitly grant the I.T.L.O.S. the authority to issue advisory opinions, nor can the I.T.L.O.S. confer such power upon itself. It was also contended that if the U.N.C.L.O.S. had intended for the I.T.L.O.S. to have advisory authority, it would have explicitly stated so. In the absence of such a provision, these

---

See Armando Rocha, *The Advisory Jurisdiction of the ITLOS in the Request Submitted by the Commission of Small Island States*, Climate Law - Sabin Center Blog (Apr. 12, 2023), https://blogs.law.columbia.edu/climatechange/2023/04/12/the-advisory-jurisdiction-of-the-itlos-in-the-request-submitted-by-the-commission-of-small-island-states/ (last visited Feb. 28, 2025).

[30] U.N., United Nations Convention for the Law of the Sea, Annex VI, (Dec. 10, 1982) https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[31] International Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8 (Oct. 28, 1997), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.

[32] *See* Carlos A. Cruz Carrillo, *The Advisory Jurisdiction of the ITLOS: From Uncertainties to Opportunities for Ocean Governance*, *in* The Environmental Rule of Law for Oceans: Designing Legal Solutions 236, 240-42 (Froukje M. Platjouw & Alla Pozdnakova eds., 2023) (U.K.); *see also* Rocha, *supra* note 29.

[33] *See* Barnes, *supra* note 9, at 183-86; *see also* Rocha, *supra* note 29.

[34] I.T.L.O.S., Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal), Advisory Opinion (Apr. 2, 2015), https://www.itlos.org/itlos/documents/cases/21/-E.pdf.

states concluded that I.T.L.O.S. could not issue advisory opinions, except those given by the S.D.C. under Article 191 of the U.N.C.L.O.S.[35]

Nevertheless, by reference to Article 21 of the I.T.L.O.S.'s Statute, despite the absence of an express mention of advisory competence, the I.T.L.O.S. interpreted the term "all other matters" in Article 21 of its Statute as encompassing advisory jurisdiction. The phrase "all other matters" is interpreted to include more than just "disputes". Had it been intended to cover only disputes, Article 21 of the I.T.L.O.S.'s Statute would have used the term "disputes" alone.[36] Thus, the term must extend to other types of issues, such as advisory opinions, provided these are specifically mentioned in any agreement that grants jurisdiction to the Tribunal.[37]

The I.T.L.O.S., under Article 138 of its Rules adopted in 1997, formalised procedures for issuing advisory opinions, stipulating that such views must be based on an international agreement, a legal question, and a request from an authorised entity. The Tribunal possesses inherent authority to determine the scope of its jurisdiction, which includes interpreting its rules and mandates. Under the *S.R.F.C.* Advisory Opinion, the I.T.L.O.S. additionally confirmed that it is empowered to issue advisory opinions under international agreements, with the procedural framework outlined in Article 138 of its Rules.[38]

Under the auspices of the I.T.L.O.S., the establishment of the C.O.S.I.S. is aimed at providing a sturdy legal basis for seeking an advisory opinion from the I.T.L.O.S. under the U.N.C.L.O.S. The C.O.S.I.S. initially comprised Antigua and Barbuda and Tuvalu. Subsequently, the group has expanded to include other small island nations, with Palau participating in November 2021, Niue in September 2022, and both Vanuatu and Saint Lucia in December 2022. Further additions include Saint Vincent and the Grenadines and Saint Kitts and Nevis in June 2023. Any member of the Alliance of Small Island States [hereinafter A.O.S.I.S.] can join the C.O.S.I.S.[39] The C.O.S.I.S. is empowered to request advisory opinions from the I.T.L.O.S. on any legal question about the U.N.C.L.O.S.[40] This includes issues such as the impacts of climate change on small island states, considering the crucial role of oceans as carbon sinks and their direct relevance to the climate effects experienced by these states. The establishment of C.O.S.I.S. leverages a unique provision within the I.T.L.O.S. Rules, which permits the Tribunal to issue an advisory opinion on

[35] *See* Barnes, *supra* note 9, at 184 ; *see also* Rocha, *supra* note 29.
[36] *See* ITLOS, Advisory Opinion, *supra* note 34, ¶ 55.
[37] *See* Barnes, *supra* note 9, at 187; *see also* Feria-Tinta, *supra* note 28, at 400.
[38] *See* Carrillo, *supra* note 32, at 241–42; *see also* Feria-Tinta, *supra* note 28, at 400–01.
[39] *See* Commission of Small Island States on Climate Change and International Law - Organisation - Members, C.O.S.I.S. Members, https://www.cosis-ccil.org/members (last visited Feb. 28, 2025).
[40] *See id.* art. 2(2).

legal matters if an international agreement related to the U.N.C.L.O.S. specifically authorises such requests.[41] A request to the I.T.L.O.S. for an advisory opinion regarding the responsibilities of states under the U.N.C.L.O.S. for safeguarding the marine environment, with a particular focus on the impact of excessive GHGs. The C.O.S.I.S. submitted it in December 2022. The request seeks to resolve two key legal questions under the U.N.C.L.O.S.: one, related to the protection of the marine environment, and the other, requiring all nations to mitigate pollution that threatens the global oceans.[42]

1.3 ADVISORY JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-Am.Ct.H.R. is a specialised Tribunal dedicated to human rights, with jurisdiction over the American Convention on Human Rights [hereinafter A.C.H.R.] and other treaties within the Inter-American framework. Under the A.C.H.R., the Inter-Am.Ct.H.R. is empowered to interpret and apply the A.C.H.R.,[43] adjudicate legal disputes,[44] and issue advisory opinions.[45] Article 64 of the A.C.H.R. outlines the Court's advisory role, which is extensive and includes not only regional treaties but also "other treaties" about human rights protection in the Americas. This broad authority enables the Court to draw upon interpretations from various international bodies and human rights instruments, regardless of their primary objectives or the involvement of non-Member States of the Inter-American system.[46]

Unlike the I.C.J., the advisory opinions of the Inter-Am.Ct.H.R. have considerable legal impact on Member States. The Court has stated that its opinions carry "undeniable legal effects",[47] and all Member States are expected to adhere to these interpretations, even though the A.C.H.R. does not explicitly mandate their binding nature. Despite this, Canada and the United States, two major greenhouse gas emitters, have not ratified the A.C.H.R. and are therefore not bound by the Court's advisory opinions.

---

[41] *See* Tigre, *supra* note 7, at 634–35.
[42] *See id.* at 635.
[43] *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, No. 36, 1144 U.N.T.S. 123, art. 62 (1), https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf.
[44] *See id.* at 63.
[45] *See id.* at 64.
[46] *See* Monica Feria-Tinta, *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights*, Questions Int'l L., Nov. 2023, at 45, 47 (It.); *see also* Lena Riemer & Luca Scheid, *Leading the Way: The IACtHR's Advisory Opinion on Human Rights and Climate Change*, VERFASSUNGSBLOG (Jan. 18, 2024), https://verfassungsblog.de/leading-the-way/ (last visited Feb. 28, 2025).
[47] IACtHR, *Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, ¶ 48, available here; Feria-Tinta, *supra* note 46, at 60.

Advisory Opinion proceedings before the Court are intended to provide the Organisation of American States [hereinafter O.A.S.] members and organs with judicial interpretations of provisions in the Convention or other human rights treaties applicable in the Americas. As outlined in Article 64, Member States can consult the Court on the interpretation of both the A.C.H.R. and other relevant treaties. The Court's jurisdiction encompasses not only regional human rights treaties but also other international agreements concerning human rights.[48] Following this, on January 9, 2023, Chile and Colombia sought clarification from the Inter-Am.Ct.H.R. on the scope of state obligations in response to the climate emergency. The request outlines the climate emergency's impacts on human rights and contains numerous questions which are mainly related to due diligence and "common but differentiated responsibilities" and aims to clarify how mitigation, adaptation, and loss and damage intersect with human rights obligations.[49]

[48] *See* Feria-Tinta, *supra* note 46, at 47–48; *see also* Verena Kahl, *Warming Up: The Chilean and Colombian Request for an Inter-American Advisory Opinion on the Climate Emergency and Human Rights*, VERFASSUNGSBLOG (Mar. 10, 2023), https://verfassungsblog.de/warming-up/ (last visited Feb. 28, 2025).

[49] *See* The Center for Justice and International law (CE.J.I.L.), Chile and Colombia Join Forces to Ask a Regional Human Rights Court for Guidelines to Respond to the Climate Emergency, (Jan. 9, 2023), https://cejil.org/en/blog/chile-and-colombia-join-forces-to-ask-regional-human-rights-court-for-guidelines-to-respond-to-climate-emergency.

2. THE INFLUENCE OF ADVISORY OPINIONS ON CLIMATE CHANGE RESPONSES

Although the U.N.F.C.C.C. has recognised the detrimental impacts of climate change and aims to stabilise GHGs emissions, it does not define specific responsibilities for individual countries to achieve this goal. The Kyoto Protocol, which set emission reduction targets for many countries, excluding developing nations, was unable to reach a decrease in greenhouse gas emissions from 1990 levels. The Paris Agreement, building on the lessons from the Kyoto Protocol, mandates that all countries establish their emission reduction targets in their Nationally Determined Contributions [hereinafter N.D.Cs.], tailored to their national contexts. However, the Paris Agreement faces criticism for its aspirational targets and lack of binding obligations. This ongoing issue in climate governance has led many nations, particularly those most affected by climate change, to seek advisory opinions from judicial bodies to clarify the responsibilities of states in addressing climate change.[50]

When courts and tribunals issue advisory opinions, they are not tasked with resolving disputes between parties. Instead, they are requested to provide explanations on specific issues related to international law.[51] In advisory proceedings, the core activity is a dialogue between the states or entities involved and the court or tribunal. This exchange shapes the interpretation of the legal norms at hand, ideally resulting from a comprehensive deliberative process. Such a process enhances the acceptance and legitimacy of advisory opinions. Advisory opinions, due to their less restrictive nature compared to contentious judgments, provide courts or tribunals with greater potential to develop the law. This flexibility is particularly valuable when interpreting U.N.C.L.O.S. in the context of climate change.[52]

Although a commonly noted limitation of advisory opinions is their generally non-binding nature, they may carry binding implications in certain institutional or legal framework contexts. While advisory opinions differ from judgments in this respect, the practical impact of this distinction is often more theoretical than substantive.[53] Unlike the decisions rendered by judicial authorities in state-to-state disputes, advisory opinions do not carry binding legal force unless this is explicitly established beforehand. Despite their non-binding nature, these advisory opinions wield considerable legal impact and moral authority, "contributing to the clarification and development of

[50] *See* Jianping Guo et al., *The Climate Advisory Opinion: A Medicine with Side-Effects?*, Marine Pol'y, Oct. 2023, at 1, 2 (U.K.).
[51] *See* Tigre, *supra* note 7, at 627.
[52] *See* Feria-Tinta, *supra* note 28, at 394–95.
[53] *See id.* at 395.

international law".[54] While cases establish legal precedents, advisory opinions have the substantial possibility to reveal states' obligations under international law. In contrast to binding judgments, which are specifically linked to the particular facts of a dispute, advisory opinions provide a broad, authoritative interpretation of international law that is not directly tied to specific factual scenarios. Hence, except in the case of presenting cogent reasons to deviate from the interpretation provided, it is likely to influence future decisions by the court or tribunal.[55]

The rulings of regional and domestic courts can be influenced by advisory opinions, particularly in cases involving states or private entities related to climate change and loss and damage. Additionally, advisory opinions play a crucial role in raising awareness, contributing to the development of a global public consciousness about climate change as a pressing international concern. Advisory opinions can further shape and solidify normative expectations among the diverse range of public and private entities involved in climate-related initiatives.[56] Advisory opinions significantly contribute to elucidating the obligations of states outlined in treaties, such as the U.N.F.C.C.C.,[57] the Kyoto Protocol,[58] and the Paris Agreement. Furthermore, they can clarify the principles of international environmental law, including the prohibition against transboundary environmental damage, as well as environmental and human rights, such as the right to a healthy environment [hereinafter R.2.H.E.].[59]

2.1 UNDER THE AUSPICES OF THE INTERNATIONAL COURT OF JUSTICE

Unlike other international courts and tribunals, the I.C.J. benefits from its universal jurisdiction, enabling it to review diverse perspectives and an extensive body of case law when addressing legal questions. This unique position allows the I.C.J. to provide valuable guidance to the global community on state responsibilities and the corresponding legal implications under international law. By the Paris Agreement, the I.C.J. may highlight that enhancing the targets specified in the N.D.Cs. is not a matter of choice ("discretion") but rather a legal obligation ("diligence"). In other words, following

[54] International Court of Justice, Advisory Jurisdiction, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/advisory-jurisdiction (last visited Feb. 28, 2025); *see also* Wewerinke-Singh et al., *supra* note 19, at 404; Mile, *supra* note 18, at 66; Tigre, *supra* note 7, at 627; Feria-Tinta, *supra* note 28, at 395.

[55] *See* Tigre, *supra* note 7, at 627.

[56] *See* Wewerinke-Singh et al., *supra* note 19, at 404; *see also* Bodansky, *supra* note 15, at 692; Tigre, *supra* note 7, at 628.

[57] U.N. Framework Convention on Climate Change, May 9, 1992, https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[58] U.N., Kyoto Protocol to the United Nations Framework Convention on Climate Change, (Dec. 11, 1997), https://digitallibrary.un.org/record/250111.

[59] *See* Mile, *supra* note 18, at 66–67.

the I.C.J.'s interpretation, international law mandates that countries must treat their N.D.Cs. objectives with seriousness and actively undertake to improve them, as stipulated by the Paris Agreement and other relevant international regulations.[60]

While there is no direct engagement of the I.C.J. in addressing a case explicitly focused on climate change, there exist numerous environmental disputes adjudicated and issued with advisory opinions pertinent to the current proceedings by the I.C.J. Throughout its operation, the I.C.J. has significantly contributed to the development of international environmental law by providing advisory opinions in adjudicating contentious cases such as the *Corfu Channel*,[61] the *Gabcikovo-Nagymaros*,[62] the *Nuclear Weapons*,[63] and the *Pulp Mills*,[64] and the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.[65][66]

In the advisory opinion related to the *Corfu Channel* case, which addressed the dispute between Albania and the United Kingdom over Albania's failure to notify the United Kingdom of mines in its waters, although this case did not specifically focus on environmental issues, the I.C.J.'s assertion that "every [s]tate's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other [s]tates"[67] laid the groundwork for the formulation of Principle 21 of the Stockholm Declaration. This principle states that, by the U.N. Charter and established principles of international law, states have the right to exploit their resources through their environmental policies. However, they also bear the responsibility to ensure their activities do not cause environmental harm to other states or areas beyond national jurisdiction.[68][69]

[60] *See* Teresa F. Mayr & Jelka Mayr-Singer, *Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law*, 76 HEIDELBERG J. INT'L L. 425, 442 (2016) (Ger.); *see also* Margaretha Wewerinke-Singh et al., *The Advisory Proceedings on Climate Change Before the International Court of Justice*, QUESTIONS INT'L L., Nov. 2023, at 23, 38 (It.).

[61] Corfu Channel (U.K. and N. Ir. v. Alb.), Judgment, I.C.J. 1949 Rep. 4, (Apr. 9), https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf.

[62] GabCikovo-Nagymaros Project, Hungary/Slovakia, I.C.J. 1997 Rep. 7, (Sept. 25), https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf.

[63] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 14 (July 8), https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

[64] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, I.C.J. 2010 Rep. 14, (Apr. 20), https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-EN.pdf.

[65] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665, (Dec. 16), https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf.

[66] *See* Mile, *supra* note 18, at 67–68.

[67] Corfu Channel, (U.K. and N. Ir. v. Alb.), Judgment, I.C.J. 1949 Rep. 4, at 22 (Apr. 9), https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf.

[68] *See* United Nations Conference on the Human Environment, Declaration of the Human Environment, June 16, 1972.

[69] *See* Mile, *supra* note 18, at 68.

In the *Nuclear Weapons* Advisory Opinion, the I.C.J. emphasised the significance of the environment, stating that "it is not an abstraction but represents the living space, the quality of life, and the health of human beings, including generations unborn".[70] Moreover, the I.C.J. emphasised the necessity of incorporating environmental considerations, even in the context of military objectives. Based on the Rio Declaration[71] and the Additional Protocol I to the Geneva Conventions[72] (Articles 35 and 55), the I.C.J. imposes a general obligation on states to ensure that their actions, both within their territories and under their control, do not adversely impact the environment of other states or areas beyond their national jurisdiction. This general obligation is recognised and integrated into international environmental law.[73]

In the *Pulp Mills* case resolving the dispute between Argentina and Uruguay over Uruguay's alleged violation of the 1975 Statute of the River Uruguay regarding the planned construction and authorisation of two pulp mills on the river, the I.C.J. established the requirement for an environmental impact assessment [hereinafter E.I.A.], which is determined to identify potential risks that could cause adverse effects in a transboundary context, particularly on a shared resource.[74] The imposition of the obligation of due diligence aims to evaluate whether a nation has neglected its obligations to avert substantial environmental damages, including impacts on the climate system. The requirement for conducting an E.I.A. signifies a responsibility for states to anticipate and evaluate the climate-related effects of their activities.[75]

In light of the *Pulp Mills* case, when resolving the *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* case, the I.C.J. reaffirmed the duty of due diligence imposed on states to undertake an E.I.A. to predict and appraise any harm potentially caused to the environment. The I.C.J. viewed and linked environmental law standards with the general law of state responsibility, stating that "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a [s]tate must, before embarking on an activity having the potential adversely to affect the

[70] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J Rep. 14, (¶) 29 (July 8), https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

[71] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665, (Dec. 16), https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf.

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, artt. 35 and 55, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.34_AP-I-EN.pdf.

[73] *See generally* Legality of the Threat or Use of Nuclear Weapons, (¶) 29; *see also* Wewerinke-Singh et al., *supra* note 60, at 35–36; Mile, *supra* note 18, at 69.

[74] *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, I.C.J. 2010 Rep. 14, 204 (Apr. 20), https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-EN.pdf; *see also* Mile, *supra* note 18, at 68–69.

[75] *See* Wewerinke-Singh et al., *supra* note 60, at 37.

environment of another [s]tate, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry an environmental impact assessment".[76]

In the *Gabcikovo-Nagymaros Project* case, which addressed the dispute over the construction of dams and power plants on the border between Hungary and Slovakia,[77] the I.C.J. employed the concept of "sustainable development" to redress the balance between economic development and environmental protection. In particular, the I.C.J. recognised that safeguarding the environment requires careful consideration and preventive measures because once environmental damage occurs, it can be irreversible and lasting. Historically, economic development has led to significant interference with natural systems, often without adequate regard for environmental impacts. With the emergence of new environmental standards and norms, the I.C.J. advised nations to adhere to these regulations both when initiating new projects and when continuing existing ones. The I.C.J. highlighted the importance of "reconciling economic development with protection of the environment", an underlying principle embedded in the concept of sustainable development.[78]

2.2 UNDER THE AUSPICES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Seeking advisory opinions from the I.T.L.O.S. is more possible due to its procedural advantage. It permits extensive involvement from a diverse range of actors, encompassing states, intergovernmental organisations, and non-governmental organisations. This broad participation contrasts with the more restrictive process for seeking advisory opinions from the I.C.J., which does not engage non-governmental organisations in advisory opinions.[79]

With the rise in global average temperatures, marine ecosystems worldwide have also been adversely affected. According to the I.P.C.C.'s 2019 report, the oceans have been experiencing relentless warming since 1970, absorbing over 90% of the heat in the climate system. The salinity of marine waters was altered by the melting of glaciers,

[76] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665, (¶) 104 (Dec. 16), https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf; *see also* Wewerinke-Singh et al., *supra* note 60, at 37.

[77] GabCikovo-Nagymaros Project, Hungary/Slovakia, I.C.J. 1997 Rep. 7, (Sept. 25), https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf.

[78] *See id.* at 140; *see also* Mile, *supra* note 18, at 69; Wewerinke-Singh et al., *supra* note 60, at 36–37.

[79] *See* Feria-Tinta, *supra* note 28, at 394.

jeopardising marine habitats and detrimentally impacting aquatic life.[80] The ocean suffers from the effects of climate change through the absorption of GHGs emissions, which leads to ocean acidification and offers a potential remedy through its capacity for carbon storage.[81] Therefore, in addressing climate change, it is crucial to mitigate its effects on the oceans. This underscores the need for statutory frameworks that promote climate action and the role of the law of the sea mechanisms. Given the inextricable connection between climate change and the oceans, there is a possibility to apply the U.N.C.L.O.S. to explicitly delineate obligations for states to safeguard the marine environment.[82]

The oceans play a crucial role in emissions from human activities, serving as a "sink" to help reduce the amount of emissions in the atmosphere. However, it is arguable that the oceans cannot absorb unlimited emissions, meaning that the excess would still contribute to global warming. Despite this, the U.N.F.C.C.C. and the Paris Agreement mainly view the oceans as tools for climate regulation, rather than focusing on their protection as vital components of the environment. This limited perspective means that these agreements do not address or replace the comprehensive international laws dedicated to ocean protection, such as the U.N.C.L.O.S.[83]

The U.N.C.L.O.S. is considered the "constitution for the oceans",[84] acting as the core international legal framework for ocean governance and standing as one of the most universally recognised instruments.[85] The U.N.C.L.O.S. has its broad acceptance and is a comprehensive framework for safeguarding the marine environment, as well as its provision for unilateral access to international courts and tribunals for resolving marine environmental issues.[86] Despite the universal nature of the U.N.C.L.O.S., the treaty may not fully address emerging issues in maritime law. This raises questions

[80] *See* I.P.C.C., The Ocean and Cryosphere in a Changing Climate 9 (Hans-Otto Pörtner et al. eds., 2019); *see also* James Harrison, *Litigation Under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime*, *in* Climate Change Litigation: Global Perspectives 415, 415-16 (Ivano Alogna et al. eds., 2021) (Neth.).

[81] *See* Rocha, *supra* note 29; *see also* Harrison, *supra* note 80, at 416–17.

[82] *See generally* Rocha, *supra* note 29; *see also* Korey Silverman-Roati & Maxim Bönnemann, *The ITLOS Advisory Opinion on Climate Change*, VERFASSUNGSBLOG (May 22, 2024), https://verfassungsblog.de/the-itlos-advisory-opinion-on-climate-change/ (last visited Feb. 28, 2025); Feria-Tinta, *supra* note 28, at 393.

[83] *See generally* Margaretha Wewerinke-Singh & Jorge E. Viñuales, *More than a Sink: The ITLOS Advisory Opinion on Climate Change and State Responsibility*, COLUM. L. SCH.: CLIMATE CHANGE BLOG (June 7, 2024), https://blogs.law.columbia.edu/climatechange/2024/06/07/more-than-a-sink-the-itlos-advisory-opinion-on-climate-change-and-state-responsibility/#: :text=By%20shifting%20the%20focus%20on,the%20marine%20environment%20%E2%80%93%20is%2C%20in (last visited Feb. 28, 2025).

[84] Feria-Tinta, *supra* note 28, at 393.

[85] U.N.T.C., *Status of Ratification of the United Nations Convention on the Law of the Sea 1982*, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (last visited Feb. 28, 2025).

[86] *See* Harrison, *supra* note 80, at 417–18.

about whether the U.N.C.L.O.S. provides sufficient guidance or if new regulations are necessary. Rather than amending the treaty, advisory opinions can be employed to interpret and apply the U.N.C.L.O.S. to contemporary challenges, such as those related to climate change. Legal guidance on such topics as ocean acidification, decreasing oxygen levels, and rising sea levels due to climate change can be clarified through advisory opinions.[87] Furthermore, international climate change litigation can be informed and strengthened by the factual and legal insights offered by an advisory opinion. For instance, one of the environmental threats, marine litter and plastic pollution, encompasses complex legal considerations under international law. An advisory opinion addressing these issues could facilitate the negotiation of a new global framework.[88]

The distinction between treating the oceans merely as a "sink" and protecting them as an essential part of the environment has significant legal implications. The concern is that focusing on the oceans as sinks might undermine the role of the U.N.C.L.O.S. in dealing with climate change. This could occur if the U.N.F.C.C.C. or the Paris Agreement is wrongly interpreted as overriding the U.N.C.L.O.S. or leading to a "harmonious interpretation" that minimises the U.N.C.L.O.S.'s relevance.

In its recent Advisory Opinion on the 21st of May 2024, following the request from the C.O.S.I.S.,[89] the I.T.L.O.S. addressed this issue by clarifying that adherence to the Paris Agreement alone does not fulfil the requirements of the U.N.C.L.O.S. and affirmed that GHGs emissions are a form of marine pollution. The Tribunal's opinion underscores that the marine environment should be protected for its intrinsic value, not just as a tool for climate regulation. By aligning the goals of the U.N.C.L.O.S. with other international laws, the Tribunal has enhanced the U.N.C.L.O.S.'s role as an instrument for climate protection.[90]

This Advisory Opinion, rendered on the 21st of May 2024, marks a significant moment in the evolution of international law, as it is the first advisory opinion considering and addressing state responsibilities about climate change mitigation.[91] The I.T.L.O.S. opinion shifts the perspective from viewing the oceans merely as "sinks" for carbon dioxide to recognising them as crucial components of the environment that require protection and preservation. It suggests that causing significant harm to the climate system and the marine environment is inconsistent with international law. This implies that such harm triggers legal consequences for two groups: states directly

[87] *See* Carrillo, *supra* note 32, at 238.
[88] *See id.* at 239.
[89] *See* Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion (May 21, 2024).
[90] *See* Wewerinke-Singh & Viñuales, *supra* note 83.
[91] *See* Silverman-Roati & Bönnemann, *supra* note 82.

affected by climate change and its impacts, and people and individuals affected both now and in the future.[92]

In this Advisory Opinion issued in response to the C.O.S.I.S.'s request, a notable finding by the I.T.L.O.S. is that pollution of the marine environment is attributable to the release of GHGs emissions, according to Article 1(1)(4) of the U.N.C.L.O.S. This finding is based on the I.T.L.O.S.'s interpretation of marine pollution, encompassing three criteria: (i) the presence of a substance or energy; (ii) this substance or energy must be introduced by human activity, either directly or indirectly, into the marine environment; and (iii) this introduction must lead to or likely lead to harmful effects.[93] The I.T.L.O.S. determined that GHGs emissions satisfy these requirements since they contribute to ocean acidification and climate change, which are detrimental consequences outlined in the definition of marine pollution.[94][95]

The I.T.L.O.S. referred to Article 192 of the U.N.C.L.O.S., mandating that states must protect and preserve the marine environment to clarify what duty entails about climate change.[96] Relying on Article 194(1) of the U.N.C.L.O.S. and referencing the *Pulp Mills* case resolved by the I.C.J., the I.T.L.O.S. emphasised that states have a duty of due diligence to take all necessary measures to prevent, reduce, and control pollution from GHGs emissions by establishing and enforcing regulations to manage pollution effectively.[97] The I.T.L.O.S. raised the standard for due diligence, marking it as "stringent" due to the high risks associated with GHGs emissions. The standard for due diligence is influenced by factors such as scientific knowledge, relevant international standards, the risk of harm, and the urgency of the situation. While this standard may vary depending on a state's capabilities and resources, this obligation is mandatory for all states. Following the principle of "common but differentiated responsibilities", states with greater resources are expected to do more than those with fewer resources, although even less developed states must make efforts according to their capabilities.[98] The I.T.L.O.S. additionally affirmed a due diligence obligation under Article 194 for

[92] *See* Wewerinke-Singh & Viñuales, *supra* note 83.
[93] *See* Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶ 161.
[94] *See id.* at 178.
[95] *See generally* Silverman-Roati & Bönnemann, *supra* note 82; Constantinos Yiallourides & Surya Deva, *A Commentary on ITLOS' Advisory Opinion on Climate Change*, BRIT. INST. INT'L & COMPAR. L. BLOG (May 24, 2024), https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change?cookiesset=1&ts=1721470255 (last visited Feb. 28, 2025) (U.K.).
[96] *See* Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶¶ 184, 237, 299, and 321.
[97] *See* Yiallourides & Deva, *supra* note 95, at 235.
[98] *See* Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶¶ 239–43; *see also* Silverman-Roati & Bönnemann, *supra* note 82; Yiallourides & Deva, *supra* note 95.

States, encompassing specific obligations detailed in Sections 5 and 6 of Part XII (Articles 207 to 222), which address land-based sources of pollution and the adoption and enforcement of laws to prevent atmospheric pollution and mitigate land-based activities that impact the oceans.[99]

The Advisory Opinion rendered by the I.T.L.O.S. recently marks a significant advancement toward holding states accountable for their roles in climate change and its impacts. By defining the scope and requirements of states' climate obligations under the U.N.C.L.O.S., including a rigorous standard of due diligence, the opinion sets a framework for evaluating state behaviour over time. This framework facilitates international accountability for actions and omissions leading to climate change and environmental degradation.[100]

2.3 UNDER THE AUSPICES OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-Am.Ct.H.R.'s work has substantially contributed to the historical development of international law. Within the initial years of operation, following its establishment in 1979, the Inter-Am.Ct.H.R. issued eight advisory opinions without resolving any contentious cases.[101] While the use of advisory opinions diminished in the mid-1980s, their importance was revitalised in 2017 with the Advisory Opinion on the Environment and Human Rights [hereinafter *Advisory Opinion OC-23/17*],[102] which acknowledged extraterritorial jurisdiction for transboundary environmental damage and affirmed the R.2.H.E., and established state responsibility for environmental harm.[103]

The *Advisory Opinion 23/17*[104] issued by the Inter-Am.Ct.H.R. marks a pioneering and highly impactful contribution to environmental law, surpassing any previous rulings by international courts on environmental matters.[105] Before the advent of the *Advisory Opinion 23/17,* environmental rights were unknown as they were absent in the 1948 Universal Declaration of Human Rights.[106] Nevertheless, the Inter-Am.Ct.H.R. has

[99] *See* Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶ 190.
[100] *See* Wewerinke-Singh & Viñuales, *supra* note 83.
[101] *See* Riemer & Scheid, *supra* note 46.
[102] *See* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).
[103] *See* Riemer & Scheid, *supra* note 46.
[104] The Environment and Human Rights, Advisory Opinion OC-23/17.
[105] *See* Monica Feria-Tinta, *Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee*, *in* Climate Change Litigation: Global Perspectives 310, 319 (Ivano Alogna et al. eds., 2021) (Neth.).
[106]

integrated environmental law into the realm of human rights law in the American region through a progressive and systematic interpretation of the American Convention. This marks the first instance where an international tribunal has thoroughly explored the relationship between the environment and human rights, including both substantive and procedural aspects. The Inter-Am.Ct.H.R.'s analysis is meticulously reasoned and well-supported, offering a valuable foundation for future legal arguments and jurisprudential development.[107]

In the *Advisory Opinion 23/17*, the acknowledgement of R.2.H.E. as "a fundamental right for the existence of humanity" is intrinsically connected to the right to life.[108] The Court also asserted that "environmental degradation and the negative impacts of climate change undermine the effective enjoyment of human rights", with the right to life being particularly affected.[109] The Inter-Am.Ct.H.R. regards the "human right to a healthy environment" as having both collective and individual dimensions. This right is deemed universal by nature, owing to both current and future generations, and affects individuals directly or indirectly due to its ties with other personal rights, such as the right to health, personal integrity, and life.[110] The Court acknowledges the inherent interconnection and inseparability between human rights and environmental protection, which leads to obligations for states, and has been recognised in international legal instruments such as the International Covenant on Civil and Political Rights.[111]

Unlike the I.C.J., the advisory opinions of the Inter-Am.Ct.H.R. have considerable legal impact on Member States. The Court has stated that its opinions carry "undeniable legal effects" [112], and all Member States are expected to adhere to these interpretations. However, the A.C.H.R. does not explicitly mandate their binding nature. Despite this, Canada and the United States are two major emitters of GHGs. Emitters have not participated in the A.C.H.R. and thus, are not subject to the Court's advisory opinions.[113]

See generally John H. Knox, Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/22/43, at 1, 7 (Dec. 30, 2013); *see also* Feria-Tinta, *supra* note 105, at 319.

[107] *See* Feria-Tinta, *supra* note 105, at 319–20.

[108] *See* The Environment and Human Rights, Advisory Opinion OC-23/17, ¶ 59.

[109] *Id.* ¶ 47.

[110] *See id.* ¶ 59.

[111] *See* Feria-Tinta, *supra* note 105, at 322–23.

[112] IACtHR, *Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, ¶ 48, available here; Monica Feria-Tinta, *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights*, Questions of International Law, 60 (2023).

[113] *See* Riemer & Scheid, *supra* note 46.

In line with the principles of the 1972 Stockholm Declaration and the 1992 Rio Declaration, the *Advisory Opinion 23/17* incorporates key concepts from these early non-binding documents – such as preventing environmental harm, the precautionary principle, procedural safeguards, and the obligation to cooperate – as binding under the A.C.H.R. It also specifies several procedural rights, including the right to access information, the right to public participation, and the right to access justice which are enshrined in the 1998 Aarhus Convention.[114] The influence of A*dvisory Opinion 23/17* extends beyond the Americas, potentially shaping how other international courts, such as the European Court of Human Rights, address transboundary environmental challenges. Its treatment of the right to life is reflected in General Comment 36 by the Human Rights Committee [hereinafter H.R.C.].[115] The explanation of the *Advisory Opinion 23/17* could also impact debates on air pollution, chemical hazards, climate change, and the regulation of multinational corporations. Overall, this *Advisory Opinion 23/17* presents a significant development in both Inter-American jurisprudence and international human rights law, offering a more immediate legal tool compared to the often-lengthy resolution times typical in the Inter-American System of Human Rights.[116]

[114] U.N. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, U.N.T.C. vol. 2161.

[115] U.N., Int'l Covenant on Civil and Political Rights, H.R.C., General Comment No. 36 - Art. 6: Right to Life (Sept. 3, 2019).

[116] *See* Feria-Tinta, *supra* note 105, at 326–27.

3. REFLECTIONS AND IMPLICATIONS FOR THE DEVELOPMENT OF ADVISORY OPINIONS

Interpretation of various international laws, particularly climate treaties, may be necessary in advisory proceedings on climate change mitigation or reparations. These proceedings could address the legal status of N.D.Cs. and the expectation that each party's new N.D.C. reflects its highest possible ambition and represents a progression beyond previous N.D.Cs. Additionally, they might assess the legal significance of the mitigation objectives established by the Paris Agreement and the implications of the principle of "common but differentiated responsibilities". Thus, an advisory opinion could clarify vague obligations. However, courts would face considerable challenges in interpreting provisions like the principle of common but differentiated responsibilities, which often indicate that countries agree to disagree.[117]

The I.T.L.O.S. has limited case law on advisory proceedings. The only situation where the issue of whether the full Tribunal, rather than the S.D.C., can issue advisory opinions was addressed was in the *S.R.F.C.* Advisory Opinion. As a result, it remains to be seen whether it would be possible and sufficient for an agreement to solely identify the question for an advisory opinion without further details, if referencing the literal interpretation of Article 138 of the Rules. Additionally, the extent to which the Tribunal might limit its consideration to the jurisdictional scope of the requesting states and how it might address the obligations of states causing transboundary harm, such as emissions, is still vague.[118] The appropriateness of using advisory proceedings to interpret or develop the law of the sea about climate change is a topic of considerable debate. Some critics argue that such proceedings undermine the judicial functions of courts and tribunals, particularly when addressing politically sensitive issues. There are concerns that states might exploit the advisory process for strategic gains, potentially leading to biased or unfair outcomes, resulting in the potential misuse of advisory opinions.[119] In the *S.R.F.C.* Advisory Opinion, Article 21 of the I.T.L.O.S.'s Statute and Article 138(1) of its Rules are the legal bases for its jurisdiction. The I.T.L.O.S. clarified that when an agreement grants advisory jurisdiction, the Tribunal can address all matters specified in that agreement. This clarification, however, could be problematic as it might lead to an expansion of the I.T.L.O.S.'s advisory jurisdiction, enabling the

[117] *See* Benoit Mayer, *International Advisory Proceedings on Climate Change*, 44 Mich. J. Int'l L. 41, 53 (2023).
[118] *See* Feria-Tinta, *supra* note 28, at 403; *see also* Yoshifumi Tanaka, *The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility*, 32 Rev. Eur. Compar. & Int'l Env't L. 206, 209 (2023) (U.K.).
[119] *See* Guo et al., *supra* note 50, at 3.

Tribunal to issue opinions on a broad range of issues if the agreement provides for it and certain conditions are met.[120]

In addition, in the *S.R.F.C.* Advisory Opinion, Judge Cot has highlighted the possibility that states could form entities specifically to pose questions to the Tribunal, thereby seeking an advantage over others.[121] The I.T.L.O.S. has been scrutinised for its advisory jurisdiction, with concerns that the legitimacy of advisory requests might be questioned if the requesting body is not adequately representative or if the questions are perceived as strategically motivated. The validity and applicability of advisory opinions hinge on the legitimacy of the requesting body and the relevance of the issues raised.[122] This potential broadening of advisory jurisdiction raises concerns. According to Judge Cot, the I.T.L.O.S.'s interpretation is flawed and contrary to the Vienna Convention on the Law of Treaties.[123] The expansive application of the I.T.L.O.S.'s advisory jurisdiction could lead to significant consequences, potentially opening the door to misuse by states seeking to exploit the process and circumvent negotiations. The I.T.L.O.S. might also experience an overload of cases, straining its resources.[124]

Concerns about legitimacy primarily focus on the identity of the requesting entity and the appropriateness of its request. The S.R.F.C., a well-established regional organisation, sought legal advice to assist in fulfilling its mandate. This request was framed to fit within the Tribunal's jurisdiction. The I.T.L.O.S., following the precedent set by the I.C.J., interpreted Article 21 of its Statute broadly, accepting that a request merely needed a "sufficient connection" to the relevant agreements. In a similar vein, the C.O.S.I.S. is also entitled to seek advisory opinions, as this function is integral to its role in promoting and evolving international law concerning climate change and marine environmental protection. The C.O.S.I.S. is responsible for supporting small island states and advancing legal frameworks related to climate change, including through international judicial interpretations. The legitimacy of requesting an advisory opinion on climate change to assist the C.O.S.I.S.'s mission, as opposed to serving political objectives, remains a separate issue. The Tribunal's method for evaluating this legitimacy is not fully clear, as it is claimed that the validity of a request is based on the authority granted by the relevant agreement rather than the nature or institutional

[120] *See id.*

[121] *See* Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Declaration of Judge Cot (2015).

[122] *See* Barnes, *supra* note 9, at 200–02; Rozemarijn J. Roland Holst, *Taking the Current when It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change*, 32 Rev. Eur. Compar. & Int'l Env't L. 217, 218-19 (2023) (U.K.).

[123] *See* Request for an Advisory Opinion, Declaration of Judge Cot, ¶ 3.

[124] *See* Guo et al., *supra* note 50, at 3.

characteristics of the requesting body.[125] Furthermore, even though Article 138(2) of the I.T.L.O.S.'s Rules permits any international body authorised by the relevant agreement to request an advisory opinion, the simplicity of establishing such bodies raises concerns about their legitimacy and their representation of global interests. C.O.S.I.S. was explicitly established to request advisory opinions from the I.T.L.O.S. on climate change matters, yet it has not previously engaged in climate discussions. This situation casts doubt on whether C.O.S.I.S. is the most appropriate entity for this role.[126]

In addition, Article 138(2) of the I.T.L.O.S.'s Rules could be interpreted in two ways. First, a body explicitly authorised under the relevant agreement requests an advisory opinion. This condition applies when an international organisation's founding treaty designates a specific entity to seek an advisory opinion, as illustrated in the *S.R.F.C.* Advisory Opinion, where the requesting body needed prior identification and authorisation. Second, the request must align with the provisions of the agreement, meaning that any entity – whether a state or an organisation – expressly recognised in the agreement may submit a request. Furthermore, the agreement may establish procedural conditions, such as requiring prior consultations between States or within an organisation, before the advisory jurisdiction can be invoked.[127] Scholarly discussions continue whether states may directly initiate advisory proceedings. Some academics maintain that a request must be submitted through a properly authorised body, thereby preventing individual states or groups of states from initiating proceedings independently.

In contrast, others argue that neither Article 21 of the I.T.L.O.S. Statute nor Article 138 of the Rules explicitly forbids states from concluding an international agreement to request an advisory opinion. The issue of legal personality in I.T.L.O.S. advisory jurisdiction remains unresolved, leaving open the possibility for participation by states, regional organisations, and international organisations. This expanded range of actors could enhance judicial dialogue and contribute to the development of the U.N.C.L.O.S. legal framework. However, the question of legal personality must be examined in practice and carefully evaluated by the Tribunal to prevent potential misuse that could undermine the fundamental principle of consent to adjudication.[128]

The international legal system is founded on state consensus, grounded in principles of state sovereignty, equality, and independence. Without its express consent, a state is not obligated to assume any rights and obligations set out in a treaty or by an

[125] *See* Roland Holst, *supra* note 122, at 219.
[126] *See* Guo et al., *supra* note 50, at 3.
[127] *See* Carrillo, *supra* note 32, at 246.
[128] *See id.* at 247.

institution acting as an intermediary. In other words, the rights and duties of states cannot be dictated by others in the absence of the consent of those states.[129] The requirement for state consent could present a challenge to judicial authorities, such as the I.T.L.O.S. and regional courts like the Inter-Am.Ct.H.R.[130] Ensuring requests for advisory opinions genuinely reflect global interests rather than serving the agenda of a specific group. Climate change is a concern for the entire international community, not just small island countries. Since the obligation to protect the marine environment is owed universally (*erga omnes*), an important question arises whether the consent of other affected states is required when exercising the I.T.L.O.S.'s jurisdiction.[131] Historically, the I.T.L.O.S. has operated without requiring the consent of affected states, as observed in the *S.R.F.C.* Advisory Opinion, in which the I.T.L.O.S. has maintained that the consent of states not parties to the agreement authorizing S.R.F.C. to request the advisory opinion is irrelevant for advisory opinions since these opinions are not legally binding.

Nevertheless, the I.C.J. has observed that although the consent of interested states is not essential for establishing the court's jurisdiction, it becomes significant when evaluating whether issuing an opinion is appropriate. This is because, despite being non-binding, an advisory opinion can have legal implications by affecting how states conduct themselves.[132] To determine its competence to address a request, the court needs to ascertain whether it has jurisdiction over a sufficient number of relevant states and obtain express consent from those concerned states. Without such consent, the court cannot issue an advisory opinion. In particular, the Inter-Am.Ct.H.R. has assertively narrowed its interpretation of human rights standards to issues that directly pertain to the protection of human rights within Member States of the inter-American system. It has also refrained from exercising advisory jurisdiction on matters that primarily involve the international obligations of non-American states. Although Chile and Colombia requested an advisory opinion concerning the rights and obligations of American states, there is ambiguity regarding whether the Inter-Am.Ct.H.R. would consider climate change issues appropriate for its regional framework. The Court could experience difficulties if it were to issue an opinion that specifies climate action duties or contributions of American states to global climate efforts without the involvement or consent of non-American states.[133]

[129] *See* Mayer, *supra* note 117, at 81–82.
[130] *See id.* at 84–85.
[131] *See* Guo et al., *supra* note 50, at 3.
[132] *See* Barnes, *supra* note 9, at 198–200; Guo et al., *supra* note 50, at 3–4; Mayer, *supra* note 117, at 85–86.
[133] *See* Mayer, *supra* note 117, at 84–85.

Climate change is not only a legal issue but also a highly political one. Although the I.C.J. has dismissed the arguments suggesting that jurisdiction should be denied based on a state's "motives", emphasising that such factors are not legally relevant,[134] advisory opinions addressing climate change encompass both aspects of the absence of consent from affected states and the substantial political implications.[135] An advisory opinion on climate change is particularly complex due to the combination of the lack of consent and the political nature of the issue. Advisory opinions are not considered judgments in contentious cases, as they do not involve specific parties and are not legally binding on states. Although such opinions are not legally binding, they carry significant weight because of their authoritative status, and states and other stakeholders often use them in political and legal ways to support their positions.[136] States' responses to advisory opinions are determined on a case-by-case basis, usually reflecting their alignment with the opinion's conclusions. When an advisory opinion conflicts with its position, states are likely to emphasise its non-binding nature. For instance, the I.C.J.'s *Wall* Advisory Opinion[137] remains unimplemented nearly two decades after its issuance. Similarly, the U.K. has not relinquished control over the territory of the Chagos Archipelago despite the passage of almost five years since the issuance of the Chagos Archipelago Advisory Opinion.[138] Critics argue that the advisory opinion mechanism enables states to circumvent the requirement of consent in contentious legal disputes.[139] Past instances of state non-compliance suggest that nations tend not to effectively respond to advisory opinions on climate change, especially if these opinions contradict their interests. While climate change is a global issue, most governments do not acknowledge a duty to prevent environmental harm beyond their borders.[140]

For major GHGs emitters, the absence of consent could be crucial, as the opinion might influence the legality of their climate policies. Some countries could use the advisory opinion to gain an upper hand in negotiations or to pursue litigation over responsibilities. This raises key questions: Could such an opinion compel major emitters

[134] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

[135] *See* Guo et al., *supra* note 50, at 4.

[136] *See* Eran Sthoeger, *How Do States React to Advisory Opinions? Rejection, Implementation, and What Lies in Between*, 117 Am. J. Int'l L. Unbound 292, 292-293, 295 (2023).

[137] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

[138] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, (Feb. 25).

[139] *See* Sthoeger, *supra* note 136, at 296; Philippa Webb, *The United Kingdom and the Chagos Archipelago Advisory Opinion: Engagement and Resistance*, Melb. J. Int'l L., 2021, at 1, 20-21 (Austl.).

[140] *See* Christopher Campbell-Duruflé & Sumudu Anopama Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, 8 Climate L. 321, 326 (2018).

to reduce GHGs? Alternatively, can it provide meaningful solutions to the environmental damage caused by climate change?[141] Additionally, considering that major emitters, often developed countries, have a history of non-compliance with international rulings, the advisory opinion might fail to effectively address climate issues or enforce emission reductions.[142] For instance, if the I.T.L.O.S. issues an advisory opinion on climate change without the consent of affected states, it could set a precedent that encourages other countries to seek advisory opinions on politically charged issues they cannot resolve through diplomatic means. This could worsen problems related to jurisdictional overreach and the potential for judicial exploitation.[143] Furthermore, tribunals should exercise caution when issuing advisory opinions to avoid creating obligations for parties that have not been agreed upon. Consequently, the courts' examination should be confined to agreements with broad or inclusive state participation, such as multilateral or regional treaties. Although consent is critical in contentious cases, the I.C.J. has also shown similar caution in its advisory functions. Courts should refrain from issuing advisory opinions that could be treated as resolving issues related to ongoing disputes between states. Instead, advisory questions should be carefully designed to focus on the matters governed by the conventions under which the courts or tribunals operate, such as the U.N.C.L.O.S. in case of referring to the I.T.L.O.S., rather than issues that fall under other legal frameworks, like the U.N.F.C.C.C.[144]

[141] *See* Guo et al., *supra* note 50, at 4.
[142] *See id.*
[143] *See id.*
[144] *See* Barnes, *supra* note 9, at 209.

4. CONCLUSION

As emphasised by Phillippe Sands, the judicial authorities play an important role in raising global awareness,[145] particularly in the ongoing climate crisis. Requests for advisory opinions on climate change have been submitted to judicial bodies like I.T.O.S., the Inter-Am.Ct.H.R., and the I.C.J., highlighting the essential function these institutions serve in the development of international law and the clarification of state responsibilities, especially in areas where environmental and climate change regulations are often broadly defined and lack specificity.

These advisory opinions lay the groundwork for the relationship between environmental rights and human rights. Although no advisory opinion can fully resolve the climate crisis, and while such opinions are not legally binding, they create a foundational framework that can guide future decisions by other courts and tribunals. Additionally, they encourage ongoing academic and legal discourse at the global, regional, and national levels. Despite their non-binding nature, advisory opinions have an undeniable influence on the development of international law, particularly in relation to jurisdictional rules and the due diligence obligations of states to protect the environment in the context of climate change. However, judicial authorities face significant challenges in their role and jurisdiction, particularly in determining whether they should confine themselves to the interpretation and application of existing laws, or expand their role in developing legal norms and shaping global public consciousness in the context of climate change. They should specify and navigate the role they plan to assume in addressing climate change.[146] Moreover, as the international legal system is fundamentally based on state consensus, an advisory opinion issued by a judicial authority cannot define rights or impose any obligations on states without their express consent. This limitation is evident in the advisory proceedings of the I.T.L.O.S. and regional human rights courts like the Inter-Am.Ct.H.R.

Nevertheless, advisory opinions are considered valuable legal references. They establish a framework for evaluating state actions over time and for holding states accountable for actions or omissions that contribute to climate change and environmental degradation. As for climate action intensifies, these advisory opinions represent valuable contributions from judicial authorities in meeting the high expectations of the international community for establishing and reforming legal and

[145] Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. Env't L. 19, 26 (2016) (U.K.).
[146] *See id.* at 25–26; *see also* Guo et al., *supra* note 50, at 6.

policy frameworks in response to the climate crisis. Their advisory opinions will continue to inspire improvements in climate-related legal frameworks.

FUNDING STATEMENT

This research did not receive any specific grant from funding agencies in the public, commercial, or not- for-profit sectors.

DECLARATION OF INTEREST

The authors declare no conflict of interest.

VOLUME 10 ISSUE 1 ARTICLES & ESSAYS

University of Bologna Law Review

https://doi.org/10.6092/issn.2531-6133/21501

Received: 21 Nov. 2024 | Reviewed: 9 Feb. 2025 | Accepted: 29 Mar. 2025 | Published: 20 Aug. 2025

Soft International Economic Law: A New Sovereign?

COSMAS EMEZIEM

Cosmas Emeziem is an independent research scholar and he was a Drinan Fellow and Visiting Assistant Professor of Law at Boston College Law School (U.S.). He holds a J.S.D. and LL.M. from Cornell University Law School (U.S.), complemented by a B.L. from the Nigerian Law School Lagos (Nigeria), and an LL.B. from the University of Nigeria (Nigeria). His research specialises in international and comparative law, with particular focus on legal systems and jurisprudential analysis. A Barrister and Solicitor of the Supreme Court of Nigeria, Professor Emeziem is an alumnus of the Hague Academy of International Law (Netherlands) and recipient of the Rudolf B. Schlesinger Fellowship in International and Comparative Law from Cornell University Law School (U.S). He serves on the Editorial Board of the African Journal of Law and Justice System, contributing to scholarly discourse in comparative legal studies and international jurisprudence.

@ ccemeziem@gmail.com

0000-0003-0019-8996

ABSTRACT

This article examines the influence of soft law on formal international economic law structures and develops a theoretical framework for understanding its systemic significance within the discipline. The study addresses two intersecting objectives: first, demonstrating that soft laws substantially impact commercial treaties, global financial regulation policies, investment agreements, and dispute settlement institutions; second, establishing that despite this broad influence, international economic law lacks a cohesive theoretical understanding of soft law's systemic weight. The research employs comparative, normative, and analytical methodologies to examine how soft law functions as a contemporary mechanism through which seemingly benign taxonomies exert substantial influence in international economic law. The analysis reveals that soft law operates as a functional alternative when states and international law-makers cannot achieve consensus on treaties or hard law instruments. This study contributes to international economic law scholarship by providing a systematic theoretical framework for understanding soft law's role and demonstrating its significant impact on formal legal structures and regulatory processes.

KEYWORDS

Soft Law, Jurisprudence, Financial Regulation, Taxonomy, Comparative and International Law

JEL CODES

K33, F53, K20,F55, K40

TABLE OF CONTENTS

INTRODUCTION

Although soft laws in International Economic Law [hereinafter I.E.L.], such as agreements, guidelines, declarations, best practices, and draft articles, are not *legally binding*, they significantly impact many principles, doctrines, and concepts in the discipline. These soft laws could be categorized as "soft international economic law". This article analyses the underlying principles and far-reaching legal implications of "soft laws" in I.E.L.[1] The emergent regime of soft I.E.L. invites a thorough scholarly examination to situate its ramifications for the international economic governance system. Thus, the article, which elucidates methods of soft regulation and their alignment with existing structures, has two broad and intersecting goals. First, it argues that "soft laws" influence formal I.E.L. structures and have vital implications for commercial treaties, global financial regulation policies, investment agreements, and dispute settlement processes and institutions. Second—the more ambitious goal—it shows that despite the broad influence of "soft law" in I.E.L., there is a lack of a cohesive theory on "soft laws" and their systemic weight within the discipline. Often, scholars prefer to focus on hard law *rather than* the *so-called* "soft laws." Some others suggest "soft law" is just basic global governance rubrics. Other perspectives and structural difficulties exist, including the treatment of private sources of "soft laws" as limited in their systemic influence.

Equally, empirical ways of measuring the influence of particular soft laws in I.E.L. are scarcely sustainable. For instance, measuring the systemic impact of contractual clauses in private commercial arrangements is difficult. One reason for this difficulty is the issue of privacy and the large amount of data that would be considered in each situation. This is one area where large-scale data analysis or general investigation, relying on new technologies such as artificial intelligence [hereinafter A.I.], could provide basic evidence on any subject of interest. For example, we can examine how soft tax policies or basic pronouncements on tariffs affect capital flows in some market locations or for specific goods within a given market. Yet, the difficulty in engaging in such an empirical study is readily evident. Still, through a comparative, normative, and analytical review, this article addresses some of these issues, emphasising how "soft law"

[1] For general literature on soft law in international law, see Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 Am. J. Int'l L. 443 (1983); *see also* Ignaz Seidl-Hohenveldern, *International Economic "Soft Law"*, 163 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 165 (1979); Kern Alexander, *The Role of Soft Law in the Legalization of International Banking Supervision: A Conceptual Approach* (ESRC Ctr. for Bus. Rsch., Univ. of Cambridge, Working Paper No. 168, 2000). I make a case for a more tailored curation and systematic analysis of soft law standards touching on economic questions such as trade, intellectual property, investment, sovereign debts and enforcement of economic treaties.

is a contemporary iteration of the substantial influence that seemingly benign taxonomies exert in I.E.L. The article is divided into two broad parts. Part I shows the overarching potency of taxonomies such as "soft law," and broadly explores the literature on soft laws in international law. Part II tailors the discussion towards "soft laws" in I.E.L. (soft international economic law), scrutinizing their legal origins, sources, methods of (re)invention, and the politics of rulemaking within the system.[2] The article concludes that soft laws can be pragmatic in many circumstances, but they should be understood and studied in their broader systemic ramifications in I.E.L.

[2] I.E.L. covers broad areas of law. This view is shared by other publicists of I.E.L., in the post-World War II era. *See* Detlev F. Vagts, *International Economic Law and the American Journal of International Law,* 100 Am. J. Int'l L. 769 (2006) (U.K.) (while recognizing the controversial nature of the scope of I.E.L. defines it as *"the international law regulating transborder transaction in goods, services, currency, investment and intellectual property"*); *See id.* at 769. On his part, Georg Schwarzenberger observed "the challenge of an expanding field" while writing about I.E.L. *See* Georg Schwarzenberger, *The Province and Standards of International Economic Law*, 2 Int'l L.Q. 402 (1948) (U.K.); *see also* John H. Jackson, *International Economic Law: Jurisprudence and Contours*, 93 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 98 (1999) (noting that:

> *I.E.L. can have an extra-ordinarily broad scope of application. Virtually every type of government regulation on economic activity is attracted by the subject including anti-trust, or competition policy, securities regulations, labour law, immigration law, insurance, bankruptcy, trade and goods, trade and services, capital flows, monetary policy, labour adjustment policies for unemployment and exchange rate effects.*

See id. at 99.

1. THE POTENCY OF TAXONOMIES AND "SOFT" INTERNATIONAL LAW

The taxonomy "soft law" refers to various instruments, such as agreements, guidelines,[3] declarations, standards, best practices, and draft articles[4] that are not "legally" binding.[5] For Snyder, soft laws are "rules of conduct which in principle have *no legally binding force*,

[3] *See* Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L.J. 591, 591 (2016).

[4] *See* Elena Baylis, *The International Law Commission's Soft Law Influence*, 13 FIU L. REV. 1007, 1007 (2019) (a fascinating exploration of the role of the International Law Commission [hereinafter I.L.C.] in soft law formation and dissemination). *See also* Kristina Daugirdas, *The International Law Commission Reinvests Itself?*, 108 AM. J. INT'L L. UNBOUND 79, 79 (2014) (U.K.). Some examples of the soft law standards produced by the I.L.C. come in the form of guidelines, draft articles, and the reports of study groups. The institutional support of the U.N. is a factor to consider in the strategic position of the I.L.C. as a maker of soft laws in international law. Some of the soft laws produced by the I.L.C. in recent years include *Guide to Reservations to Treaties* (adopted by the I.L.C. at its Sixty-third Session) 2011. *See, e.g.*, Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 EUR. J. INT'L L. 1061 (2013) (U.K.); Marko Milanovic & Linos-Alexander Sicilianos, *Reservation to Treaties: An Introduction*, 24 EUR. J. INT'L L. 1055 (2013) (U.K.); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10 (2001); James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874 (2002); David Kaye, *International Law Commission: Draft Articles on State Responsibility*, 37 INT'L LEGAL MATERIAL 440 (1998); David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857 (2002); *see also* International Law Commission, Draft Articles on the Responsibility of International Organizations, U.N. Doc. A/66/10 (2011); Daphna Shraga, *The ILC Draft Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule*, 105 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 351 (2011); Noemi Gal-Or & Cedric Ryngaert, *From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) —The Responsibility of the WTO and the UN*, 13 GERMAN L.J. 511 (2012) (U.K.); International Law Commission, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with Commentaries, U.N. Doc. A/61/10 (2006). *See also* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16); Caroline E. Foster, *The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?*, 14 REV. EUR. CMTY & INT'L ENV'T L. 265 (2005) (U.K.); International Law Commission, Guiding Principles applicable to the unilateral declaration of States capable of creating legal obligations, U.N. Doc. A/61/10 (2006); Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018, 1; International Law Commission, Most Favoured Nation Clause: Final Report of the Study Group on the Most-Favoured-Nation Clause, U.N. Doc. A/CN.4/680 (2015); International Law Commission, Final Report of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (2006); International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, U.N. Doc. A/73/10 (2018); Dire Tladi, *Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?* EJIL TALK! (Aug. 30, 2018), https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/; Malgosia Fitzmaurice, *Subsequent Agreement and Subsequent Practice: Some Reflections on the International Law Commission's Draft Conclusions*, 22 INT'L CMTY L. REV. 14 (2020) (Neth.). So much of I.L.C.'s ongoing projects are exploring themes and topics that are both traditional and contemporary such as *jus cogens*, principles of international law, and customary law. Therefore, the I.L.C. is an active site of juris-genesis with a lot of the focus on soft laws beyond the commitment to the identification and codification of International Law.

[5] *See generally* Chris Inglese, *Soft Law?*, 20 POLISH Y.B. INT'L L. 75 (1993) (Pol.); Amos O. Enabulele & Eric Okojie, *Myths and Realities in 'Self-Executing Treaties'*, 10 MIZAN L. REV. 1 (2016) (Eth.); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 171 (2010) (exploring soft laws and some of the factors that necessitate their place in international law); Steven L. Schwarcz, *Soft Law as Governing Law*, 104 MINN. L. REV. 2471, 2471 (2020).

but which *nevertheless may have practical effects*".[6] The discipline and institutions of law are arguably a haven of taxonomies.[7] These taxonomies are often the vehicles of legal imagination.[8] Some scholars have suggested that legal writing relies on taxonomic "scaffolding".[9] The law is therefore an agglomeration of terms, concepts, and notions. Thus, taxonomies such as "soft law" come in several forms—sometimes associated with existing terms, such as collocations, qualifiers, maxims, clauses, or phrases.[10] Still, they are odyssean at different times—overcoming systemic exertions and mapping new standards, power relations, and legal development pathways.[11] For example, when Bentham adopted the term "international law" instead of "law of nations", "*jus gentium*", and "*droit des gens*" as used by his predecessors such as Vitoria and Grotius, he altered the

[6] Francis Snyder, *Soft Law and Institutional Practice in the European Community* (Eur. Univ. Inst. L. Working Paper, Working Paper No 93/5, 1993).

[7] The word *haven* is used here as a place that offers favourable conditions and refuge as distinguished from Rudolf Von Jhering's "Heaven of Legal Concepts" which is like an exclusive realm. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935) (exploring and critiquing Jhering's view of the world of legal concepts). *See also* Joachim Dietrich, *What is "Lawyering"? The Challenge of Taxonomy*, 65 Cambridge L.J. 549 (2006) (U.K.) (recognizing the role of taxonomy in law regarding classification, coherence, and order).

[8] For the role of taxonomy in jurisprudence and law see e.g., Tarunabh Khaitan & Sandy Steel, *Theorizing Areas of Law: A Taxonomy of Special Jurisprudence*, 28 Legal Theory 325 (2022) (U.K.); Emily Sherwin, *Legal Taxonomy*, 15 Legal Theory 25 (2009) (U.K.) [hereinafter Sherwin, *Legal Taxonomy*]; Emily Sherwin, *Legal Positivism and the Taxonomy of Private Law*, *in* Structure and Justification in Private Law: Essays for Peter Birks 103 (Charles E.F. Rickett & Ross Grantham eds., 2008); David Campbell, *Classification and the Crisis of the Common Law*, 26 J. L. & Soc'y 369 (1999) (U.K.); Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law*, *in* Structure and Justification in Private Law: Essays for Peter Birks 147 (Charles E.F. Rickett & Ross Grantham eds., 2008); Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate*, 24 Oxford J. Legal Stud. 335 (2004) (U.K.).

[9] *See* Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 Mercer L. Rev. 621 (2006).

[10] For instance, the taxonomy "fee simple" as a category of proprietary interest has strong implications for legal systems and property holding in the Common Law tradition. *See* William Blackstone, A Treatise on the Law of Descents in Fee-simple (Oxford, Clarendon Press 1759); Lee A. Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. Rev. 1457 (2016). It can make a difference regarding tenure and ownership in property transactions. The nightmare of any draftsman or conveyancer is often that a particularly dispositive taxonomy, such as "fee simple absolute", has been omitted in an instrument. *See* Katrina M. Wyman, *In Defense of the Fee Simple*, 93 Notre Dame L. Rev. 1 (2017); *see also* Thomas P. Gallanis, *The Future of Future Interests*, 60 Wash. & Lee L. Rev. 513 (2003) (showing some of the determinative impact of "fee simple" on future interests and alienability). The same is the case in legislative drafting, and treaty enforcement whereby the meaning of the law can turn on such an important taxonomy as "self-executing" or "non-self-executing"). *See* Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995) (exploring the treaty practice in the United States and the wobbly distinction between self-executing and non-self-executing treaties). *See also* Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 760 (1988); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 303, 368 (1992) (Neth.); Murdoch Watney, *Bewyslas by Die Toelaatbaarheid Van Bekentenisse* [*Burden of Proof in Admissibility of Confessions*], 1995 J. S. Afr. L. 365, 367 (1995) (S. Afr.); Industria Panificadora, S.A. v. U.S., 763 F. Supp. 1154 (D.D.C. 1991); Medellín v. Texas, 552 U.S. 491 (2008); Foster & Elam v. Neilson, 27 U.S. 253 (1829).

[11] *See* Sherwin, *Legal Taxonomy*, *supra* note 8 (explored the different ways in which taxonomy plays a role in law—normatively, functionally, and in the formulation of moral or legal principles that justifies legal rules and decisions).

paths and nature.[12] He, by that token, equally authored a fresh dimension of international law jurisprudence. The same can also be said of the taxonomic category "transnational law"[13] because it has ramifications for sources of laws or law-making rules, plurality, hierarchy, the applicability of these rules to issues in the field, legal interpretation, and dispute resolution.[14] Taxonomies may also signify systems of law, justify hierarchies, and preempt how we approach those systems in terms of law reform, conflict of laws/Private International Law [hereinafter P.I.L.] rules, interpretation, harmonization possibilities, legal/norm diffusion, and perceptions of (im)possibilities of transplants.[15]

[12] *See* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 10 (Batoche Books, 2000) (1781); *see also* Mark W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 Am. J. Int'l L. 405 (1984) (examining Bentham's 'new term' "International Law"); Hidemi Suganami, *A Note on the Origin of the Word 'International'*, 4 Brit. J. Int'l L. 226 (1978) (U.K.); Philip Marshall Brown, *Jus Inter Gentes*, 35 Am. J. Int'l L. 513 (1941) (critiquing Bentham's framing of "international law" as restrictive); Gordon E. Sherman, *Jus Gentium and International Law*, 12 Am. J. Int'l L. 56 (1918); Stanislaw Wielgus, *The Genesis and History of "Ius Gentium" in the Ancient World and the Middle Ages,* Roczniki Filozoficzne / Annales de Philosophie / Annals Phil., 1999, at 335 (Pol.); Emerich de Vattel, Le droit des gens. Ou Principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains [The Law of Nations. Or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns] (London, 1793), https://archive.org/details/bim_eighteenth-century_le-droit-des-gens-engl_vattel-emerich-de_1793/page/n1/mode/2; Jeremy Waldron, *Foreign Law and the Modern Ius Gentium,* 119 Harv. L. Rev. 129 (2005); Jacob Giltaij, *The Rediscovery of the Roman Jus Gentium and the Post 1945 International Order*, 35 Leiden J. Int'l L. 521 (2022) (Neth.); Martti Koskenniemi, *The Political Theology of Ius Gentium: The Expansion of Spain 1526–1559*, *in* To The Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870 117 (2021); Manuel Jiménez Fonseca, *Jus Gentium and the Transformation of Latin American Nature: One More Reading of Vitoria?*, *in* International Law and Empire: Historical Explorations 123 (Martti Koskenniemi et al. eds., 2017); Andreas Wagner, *Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth*, 31 Oxford J. Legal Stud. 565 (2011) (U.K.); Victor M. Salas, *Francesco De Vitoria on the Ius Gentium and the American Indios*, 10 Ave Maria L. Rev. 331 (2012); Janne E. Nijman, *Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword*, 30 Eur. J. Int'l L. 1105 (2019) (U.K.).

[13] Philip C. Jessup, Transnational Law 2 (1956) ("[m]y choice of terminology will no doubt be equally unsatisfactory to others. Nevertheless, I shall use the term 'transnational law' to include all law which regulates actions or events that transcend natural frontiers. Both public and private international law are included as are other rule which do not wholly fit into such standard categories."); *see also* Craig Scott, "*Transnational Law" As Proto-Concept: Three Conceptions*, 10 German L.J. 859 (2009) (U.K.).

[14] *See* Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. Int'l Disp. Settlement 241 (2011) (U.K.) (noting that "the utility of taxonomies is that they make it possible to immediately grasp the essential traits of the classified object by simply knowing in which category and with which other objects it has been grouped"). *See also Id.* at 244.

[15] *See* Ugo Mattei, *The Legal Metaverse and Comparative Taxonomy: A Reappraisal*, 71 Am. J. Compar. L. 900 (2023); *see also* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 Am. J. Compar. L. 5 (1997). Siems draws attention to the nature of taxonomies and makes an important methodological and philosophical argument about the place and value of taxonomies, that is, taxonomies of countries have both descriptive, analytical and normative functions. Yet taxonomies are never perfect representations of the complexities of the real world, and it is "*the task of subsequent researchers to critically scrutinize these conjectures and try to develop better ones*". *See* Mathias M. Siems, *Varieties of Legal Systems: Towards a New Global Taxonomy,* 12 J. Institutional Econ. 579 (2016) (U.K.). Taxonomies have their place in the law and its overarching function as an intermediator of human encounter(s) in societies. *See also*, Dominique Day, *Taxonomy and Restorative Justice: Can We Even See the Problem?*, 11 J. Race, Gender & Ethnicity 80, (2022) (highlighting how "taxonomy has been a powerful tool for maintaining supremacy, for delegitimizing struggle and resistance, and for narrowly defining injury and repair"); Toby S. Goldbach, *Why Legal Transplants?*, 15 Ann. Rev. L. & Soc. Sci. 583 (2019) (on taxonomies and typologies in legal transplant); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 Maastricht J. Eur. & Compar. L. 111 (1997) (U.K.).

As older taxonomies become vestigial, new ones emerge to continue the critical role that taxonomies play in the evolution and development of laws.[16] Thus, taxonomies impact the law and its institutions, shaping how we perceive and organize social, economic, political, and legal systems.[17] Consequently, the evolution of any aspect of law or legal institution can be studied by looking at its constitutive taxonomies and the mutations of these in the legal system over time.[18] For instance, we can examine the taxonomic classification/qualification "most favoured nation" to understand the evolution of investment treaties in international law and its core structures, such as institutions of arbitration throughout the nineteenth or twentieth century.[19] To further the discussion, the idea of soft law raises a question—why is it essential to name a category of laws as "soft laws"?[20] What, if any, ramifications might such a naming portend for the discipline?[21] To begin, naming—such as calling a law "soft law"—is a linguistic function

[16] *See* Anna Di Robilant, *Genealogies of Soft Law*, 54 Am. J. Compar. L. 499, 499 (2006) (exploring some of the roots of "soft law" and arguing that the genealogies of soft law "operate as powerful ideological devices serving competing professional and political agendas."). *See also id.* at 554.

[17] *See, e.g.*, Joseph Lavitt, *Leaving Contemporary Legal Taxonomy*, 90 Denv. U. L. Rev. 213 (2012) (exploring the role of legal taxonomies in contemporary legal scholarship in America); Felix Krysa, *Taxonomy and Characterisation of Crypto Assets in Private International Law*, *in* Blockchain and Private International Law 157 (Andrea Bonomi et al. eds., 2023) (Neth.); Frederick H. C. Mazando, *The Taxonomy of Global Securities: Is the US Definition of Security Too Broad?*, 33 Nw. J. Int'l L. & Bus. 121 (2012) (highlighting the disparate global concept of "security" and how its broad definition has ramifications for legal obligations and possibilities of norm and practice harmonization).

[18] In the private law sphere, some scholars have argued that so much of the debate has been about taxonomies. *See* Duncan Sheehan & TT Arvind, *Private Law Theory and Taxonomy: Reframing the Debate,* 35 Legal Stud. 480 (2015) (U.K.).

[19] *See* Olivier Accominotti & Marc Flandreau, *Bilateral Treaties and The Most-Favoured-Nation Clause: The Myth of Trade Liberalization in the Nineteenth Century*, 60 World Pol. 147 (2008); Stanley K. Hornbeck, *The Most-Favoured-Nation Clause*, 3 Am. J. Int'l L. 395 (1909) (tracing how the clause emerged and gradually became the "coner-stone of all modern commercial treaties"); *see also* Julian Arato et al., *The Once and Future Law of Non-Discrimination: Revisiting Most-Favoured-Nation and National Treatment,* 112 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 61 (2018).

[20] McNair made an original contribution regarding the nature of treaties—distinguishing contractual treaties and constitutional treaties—with implications for the obligations they create. "Soft law" seems to have developed from that idea of different categories of treaties in international law. The dynamics of international law and the globalisation trends have since complicated McNair's thesis. That is, beyond his categories we now have different categories of frameworks which are now lumped together as soft laws. *See* Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 Brit. Y.B. Int'l L. 100 (1930) (U.K.); *see also* Catherine Brölmann, *Typologies and the 'Essential Juridical Character' of Treaties, in* Conceptual and Contextual Perspectives on the Modern Law of Treaties 79 (Michael J. Bowman & Dino Kritsiotis eds., 2018).

[21] I have chosen the functional approach as a way of looking at the real effect of soft law in the international society—especially as it relates to I.E.L.: Because "*functionalist comparative law is factual; it focuses not on rules but on their effects...[it] combines factual approach with the theory that its objects must be understood in the light of their functional relation to society." See, e.g.*, Ralf Michaels, *The Functional Method of Comparative Law, in* The Oxford Handbook of Comparative Law 345, 347-48 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed. 2019) (U.K.); Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. Toronto L.J. 361 (2005); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 Am. J. Compar. L. 671 (2002); Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law 32-47 (Tony Weir trans., 3rd ed. 1998). Naming in law has the function in creating juridically cognizable rights. This in turn affects the politics of international law and the more significant formation of norms, pathways of norm dissemination, and ramifications for economic and distributive justice.

and an ontological instrument that introduces new entities into systems.[22] Sometimes, such taxonomies are essentially new metaphors.[23] In jurisprudence, naming carries significant importance and influences the five principal spheres.

First, naming confers legal corporeality to an object, rendering it (re)cognizable in juridical contexts. For example, the "right to be forgotten"—a relatively newly established right in the digital age—derives from pre-existing rights such as personal autonomy and privacy but has a broader legal scope through (re)naming, redefinition, and reclassification.[24] In like manner, the designation "alien" makes a difference regarding legal rights, obligations, and participation in the state.[25] Second, naming transforms existing entities. For instance, a tract of land or territory brand-named as "uninhabited", "for public use", or "non-self-governing" acquires a distinct legal character, influencing doctrines and practices such as adverse possession, self-governance, takings, and other aspects of rights of eminent domain.[26] These classifications implicate rights such as access, easements, alienability, sovereignty, and general economic exploration and exploitation.[27] Moreover, if the same land is renamed as a "graveyard", a place of worship, or a "common", it takes on a different historical,

[22] The naming not only creates a category but also establishes a relationship between what is named and the larger system of law and governance. This systems impact is therefore an important aspect of the deeper iterations of the role of taxonomies in law and society.

[23] As metaphors, taxonomies also carry their own challenges including what is not expressed. *See* László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 Int'l & Compar. L.Q. 605 (2010) (U.K.).

[24] *See* General Data Protection Regulation (EU) 2016/679, art. 17, 2016 O.J. (L 119) 1 (imposes an obligation on the controller of data to erase the data without undue delay when for instance the owner of the data has withdrawn his consent). *See also* Uta Kohl, *The Right to Be Forgotten in Data Protection Law and Two Western Cultures of Privacy*, 72 Int'l & Compar. L.Q. 737 (2023) (U.K.) (highlighting how this right though also hinged on data protection law is also a manifestation of privacy law—a privacy in public). Jeffrey Rosen, *The Right to Be Forgotten*, 64 Stan. L. Rev. Online, 88 (2012).

[25] Although there have been efforts to bridge the gap in the human rights experience of "aliens" the problem persists. *See* U.N. High Commissioner for Human Rights, The Rights of Non-Citizens, U.N. Doc. E/CN.4/2006/40 (2006).

[26] On the idea of non-self-governing territories in international law see generally, Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12; Makane Moïse Mbengue, *Non-Self-Governing Territories*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2013) (U.K.). By the provisions of Chapter XI of the Charter of the United Nations 1945, non-self-governing territories are "those territories whose people have not yet attained a full measure of self-government". *See also* G.A. Res. 66 (I), (Dec. 14, 1946). Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. Colo. L. Rev. 651 (2008) (exploring the element of public use in which is determinative of the extensions of the doctrine of eminent domain). Jesse Saginor & John McDonald, *Eminent Domain: A Review of the Issues*, 17 J. Real Est. Literature 1 (2000); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Env't L. 1 (1980); Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 Colum. L. Rev. 596 (1942) (tracing the history of the concept of eminent domain and its relationship to the "ends of public utility").

[27] *See, e.g.*, Mark A. Smith, *Sovereignty over Unoccupied Territories – The Western Sahara Decision*, 9 Case W. Rsrv. J Int'l L. 135 (1977); Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 Yale L.J. 2390 (2022) (exploring how the language and distinction regarding territories as "belonging to" the U.S. makes such territories "property"–something owned by the U.S. but not part of the United States. On the other hand, were such a territory to be designated as part of the United States, it would have implicated sovereign duties towards these territories). Downes v. Bidwell, 182 U.S. 244, 287 (1901) (belonging to and not part of the United States).

ontological, or sentimental significance—for example, Westminster Abbey, Cambridge Common, Allington Memorial, or Lincoln Memorial.[28] Third, naming helps define the inherent attributes of a subject, object, or concept, shaping its relationship within the broader socio-legal framework.[29] This contributes to legal hermeneutics and architecture, and extends beyond mere identification. For example, qualifying the term "purchaser" with "*bona fide* purchaser" or development with "sustainable development" affects the legal interpretation, obligations, and benefits accorded to that person. This is also reflected in temporal and spatial considerations, as evidenced by due diligence requirements for land transactions. Failure to perform reasonable inquiries could result in stiff penalties. "Sustainability" can also be a significant factor when exploring the environmental impact of a development project. Naming a law as "soft law" also implicates the distinction that is assumed between that which is so-called and *hard law,* with consequences for "obligation, precision, and delegation".[30] Fourth, naming plays a critical role in articulating rights and allocating obligations. Denoting an object as "property" establishes legal ties with the right of ownership and the entity with this right.[31] When ownership is established, the temporal tick "*T*" further nuances this relationship, affecting its standing within the broader juridical framework, often codified in doctrines such as "*the chain of title*".[32] Finally, this legal framework can be understood as a set of relational dynamics denoted by "*S*". The interplay between "*S*" and "*T*" produces complex temporal and spatial repercussions for property "*X*".[33] In summary, naming is a critical jurisprudential tool, and its application sometimes requires exactitude, given its far-reaching implications on the interpretation and operation of law. In the larger administrative state, understanding a taxonomy can be dispositive regarding questions of compliance and non-compliance. These may also have significant cost implications, as assessing a project as non-compliant with the law,

[28] *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009); *see also* Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 BYU L. Rev. 2203, 2203 (2010).

[29] As Cohen and Hutchinson have argued "*law is not only a symbol and act of power; it is also a major component of the social context in which those symbols and acts of power acquire meaning, significance and effect". See* David Cohen & Allan C. Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 13 Dalhousie L.J. 20 (1990) (Can.).

[30] Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 Mich. J. Int'l L. 433 (2019) (on "obligation, precision, and delegation").

[31] Naming someone as a beneficiary in a testament implicates a bundle of rights and responsibilities that the law will recognise.

[32] On the temporal aspects of law. *See generally,* Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 Neb. L. Rev. 349 (1985); Dotan Oliar & James Y. Stern, *Right on Time: First Possession in Property and Intellectual Property*, 99 B.U.L. Rev. 395 (2019); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667 (1986); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 Wash. U.L.Q. 739 (1986) (exploring the temporal dimensions of law as it affects issues such as adverse possession and alienation).

[33] This complexity is seen in varying tenures, such as a thirty-year leasehold for party *A*, a six-month tenancy for party "*B*" and then to "*C*" for life in being, and residual rights for party "*D*".

institutional directives, best practices, or regulatory standards—such as a directive by the Department of Housing on the quality of building materials in a specific zone—could alter land values in that zone or impede certain types of development, with potential ramifications for social class and other competing identities in the area. Indeed, the complex network of relationships and definitions formed through this semiotic exercise underscores the reliance of legal systems on meticulous terminological articulation. This explains the gap in literature and the need for I.E.L. to become more reflective regarding its taxonomic repertories and their systemic ramifications.

Therefore, when examining legal taxonomies, it is essential to consider the implications of naming beyond mere identification. The act of naming can effectively establish notions that permeate the law and occasionally lead to systemic changes within the law and its underlying operational mechanisms—for example, designating a country as a "most favoured nation" in an investment treaty. As such, weighing the implications of naming when constructing legal taxonomies is of utmost importance to ensure that the resulting legal doctrines are precise, accurate, and effective in bringing about the anticipated outcomes. Over time, the accumulation of norms, particularly concerning specific practices and methods, can give rise to various legal branches. The emergence of *equitable interests* as part of the common law and the development of customary international law [hereinafter C.I.L.] are examples of this phenomenon. Soft laws, which may appear unenforceable at present, can gradually become part of C.I.L. or general principles recognised by states as enforceable, or affect the judicial interpretation of agreements and treaties in many ways.[34] This change may occur despite the canonical articulation of formal and informal sources of international law, as well as the deference shown to this canon by legal scholars. For example, the I.L.C.'s *Draft Article on the Responsibility of States for their Internationally Wrongful Acts* has since permeated legal discourse and judicial deliberations in international law.[35] Other examples can be found in many areas of the global economy—including those arising from the Organisation for Economic Co-operation and Development [hereinafter O.E.C.D.]'s Base Erosion and Profit

[34] *See* Michèle Olivier, *The Relevance of 'Soft Law' as a Source of International Human Rights*, 35 Compar. & Int'l L.J. S. Afr. 289 (2002) (S. Afr.) (suggesting that subsequent behaviour and practice of states can harden soft laws into formal sources of international law).

[35] *See* Federica Paddeu & Christian J. Tams, *The ILC Articles at 20: Introduction to the Symposium* (GCILS Working Paper Series, Working Paper No. 11, 2021); *see generally* Fernando Lusa Bordin, *Still Going Strong: Twenty Years of the Articles on State Responsibility "Paradoxical" Relationship Between Form and Authority,* E.J.I.L.: TALK! August 3, 2021; Caron, *supra* note 4; GabCikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 ¶¶ 47-53; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62; *see also* International Law Commission, Model Rules on Arbitral Procedure (1958); International Law Commission, Draft Articles on Most-Favoured-Nation Clauses with Commentaries (1978).

Shifting [hereinafter B.E.P.S] initiative.[36]

In the civil law tradition, taxonomies often evolve or are associated with maxims, such as *uti possidetis juris* [as you possess under law], *jus in bellum* [justice in war], *ex aequo et bono* [according to what is equitable and sound], *jus ad bellum* [right to war], and *jus tertii* [a right of a third party].[37] These maxims have formed the springboard for many scholarly treatises on the role of law.[38] The maxims have formed the anchor of many foreign policy approaches in peace times and war situations.[39] They have also played a significant role in shaping communities and establishing the foundations of prevailing canons in domestic and transnational legal systems. In the common law tradition, equitable principles and remedies have since permeated the soil of common law following the unification of the respective courts in England. We see a lot of them in areas of law such as property, wills, and general conveyancing, as well as in the exercise of courts' discretionary powers. For example, today, the Roman law maxim of *uti possidetis juris* and its corollaries are indispensable in settling boundary disputes in international law.[40] This underscores the importance of precision and nuance in understanding legal structures and principles.

Thus, in many respects, the term "soft law" and its apparent qualification of law are vigorously debated in international law.[41] Currently, there is scarcely any aspect of international law that scholars do not perceive as having or requiring some species of

[36] *See* Frederik Heitmüller & Irma Mosquera, *Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future*, 24 J. Int'l Econ. L. 473 (2021) (U.K.) (highlighting the impact of the soft law standards).

[37] *See* Ditlev Tamm, Roman Law and European Legal History 85 (1997); Malcolm N. Shawt, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 Brit. Y.B. Int'l L. 75 (1996) (U.K.). On *jus tertii* see generally, Brian A. Blum, *The Use of Jus Tertii Defenses by an Obligor on a Negotiable Instrument*, 84 Com. L.J. 131 (1979); Patrick S. Atiyah, *A Re-Examination of the Jus Tertii in Conversion*, 18 Mod. L. Rev. 97 (1955) (U.K.); John Frederick Hurlbut, *Jus Tertii as a Defense to Conversion Suits in Indiana—Toward a More Rational Approach*, 18 Val. U. L. Rev. 415 (1984); Charles D. Baker, *The Jus Tertii: A Restatement*, 16 U. Queensl. L.J. 46 (1990) (Austl.). On *jus ad bello* see Alexander Orakhelashvili, *Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, 12 J. Conflict & Sec. L. 157 (2007) (U.K.); Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 Rev. Int'l Stud. 221 (1983) (U.K.).

[38] For example, *Jus ad bellum*. *See* Stuart Casey-Maslen, Jus ad Bellum: The Law on Inter-State Use of Force (2020) (U.K.).

[39] For some exploration of the way the maxims jus in bello, and jus ad bello have been used in international law to justify and delineate the ways and means of use of force in international law, *see* Greenwood, *supra* note 37; Orakhelashvili, *supra* note 37.

[40] *See* Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo,* Fletcher F. World Affs., Summer-Fall 2003, at 85; *see also* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 Am. J. Int'l L. 590 (1996); Arman Sarvarian, *"Uti Possidetis Iuris" in the Twenty-First Century: Consensual or Customary?*, 22 Int'l J. on Minority & Grp. Rts. 511 (2015) (Neth.); Monroe Leigh, *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) 1986 ICJ Rep. 554*, 81 Am. J. Int'l L. 411 (1987); Tomáš Bartoš, *Uti Possidetis. Quo Vadis?*, 18 Austl. Y.B. Int'l L 37 (1997) (Austl.).

[41] *See* Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law"*, 30 McGill L.J. 37 (1984) (Can.); *see also* Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements,* 71 Am. J. Int'l L. 296 (1977); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l & Compar. L.Q. 850 (1989) (U.K.); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int'l L. 413 (1983). Other scholars have also been exploring why states prefer soft laws as a means of cooperation, *see* Laurence R. Helfer & Ingrid Wuerth, *Custom in the Age of Soft Law* (working paper).

"soft law" or another.[42] For example, one area where soft law is powerful is international environmental law and international taxation.[43] Soft laws are often justified in environmental and commercial arrangements, based on the need for governance regimes that are readily acceptable to multi-stakeholders.[44] Arguably, when other aspects of the public sphere, such as A.I. and its governance, are situated in the universe of things, one can say that we are in a new age of soft laws.

Pergantis argues that "soft law is the response to the need for accommodating law's dynamism when the traditional sources of international law are unable to do so".[45] In other words, the changing realities of international law and order require a responsive approach to law-making in international law. Still, the responsiveness is often missing or tardy, hence the resort to soft law mechanisms to meet the felt needs of the time. Other scholars have suggested that these soft laws are perceived to be more "politically feasible".[46] That is to say, the politics of international law often gets in the way of norm formation and crystallization. Indeed, C.I.L. itself strongly relies on the behaviour of sovereigns and the emergence of obligations deemed binding on all. Therefore, the commitment to soft law based on political feasibility is a significant ramification for international law, politics, and diplomacy.[47]

---

[42] *See* Martino Reviglio, *The Shift to Soft Law at Europe Borders: Between Legal Efficiency and Legal Validity,* 23 Glob. Jurist 23 (2023) (Ger.); *see also* Seidl-Hohenveldern, *supra* note 1, at 194. Claire R. Kelly, *The Sociological Pull of Soft Law*, 106 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 327, 327 (2012). Felix Dasser, *"Soft Law" in International Commercial Arbitration*, 402 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 385 (2019) (Neth.). James Crawford, *Chance, Order, Change: The Course Of International Law*, 365 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 9, 27 (2013) (Neth.). Michael Bothe, *Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?,* 11 Neth. Y.B. Int'l L. 65, 68 (1980) (Neth.). Gruchalla-Wesierski, *supra* note 41, at 44; Antonio Cassese, International Law 196 (2nd ed. 2005) (U.K.) (articulating "soft law" as a body of standards, commitments, joint statements or declarations of policy or intention); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* Handbook of International Relations 538, 540, 551 (Walter Carlsnaes et al. eds., 2002) (noting that soft law has to do with "instruments or rule that have some indicia of international law but lack explicit and agreed legal bindingness"). On human rights see, Tracing the Roles of Soft Law in Human Rights (Stéphanie Lagoutte et al. eds., 2016) (U.K.).

[43] *See* Dinah L. Shelton, *Comments on the Normative Challenge of Environmental "Soft Law"*, *in* The Transformation of International Environmental Law 61 (Yann Kerbrat & Sandrine Malijean-Dubois eds., 2011); *see also* Jürgen Friedrich, International Environmental "Soft Law" (2013) (on environmental soft law); Marcel M. T. A. Brus, *Soft Law in Public International Law: A Pragmatic or a Principled Choice? Comparing the Sustainable Development Goals and the Paris Agreement*, *in* Legal Validity and Soft Law 243 (Pauline Westerman et al. eds., 2018); Non-State Actors, Soft Law and Protective Regimes: From the Margins (Cecilia M. Bailliet ed., 2012) (U.K.). Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 Wis. Int'l L.J. 325 (2007).

[44] *See* Henry Deeb Gabriel, *The Use of Soft Law in the Creation of Legal Norms in International Commercial Law: How Successful Has It Been?*, 40 Mich. J. Int'l L. 413 (2019) (highlighting the reasons and advantages that are often used to justify soft laws—especially in international commerce—such as UNIDROIT principles).

[45] Vassilis Pergantis, *Soft Law, Diplomatic Assurances and the Instrumentalisation of Normativity: Wither a Liberal Promise?*, 56 Neth. Int'l L. Rev. 137, 142 (2009) (Neth.).

[46] Cary Coglianese, *Environmental Soft Law As a Governance Strategy*, 61 Jurimetrics 19 (2020).

[47] See *infra* Part II (on the Politics of Soft law (re)making in international law); *see also* Abraham Newman & Elliot Posner, *Structuring Transnational Interests: The Second-order Effects of Soft Law in the Politics of Global Finance*, 23 Rev. Int'l Pol. Econ. 768 (2016) (U.K.).

Beyond environmental law and general contracts, other aspects of international law have increasingly become arenas for the development of soft law. For example, about outer space and mining in celestial bodies, soft laws have also been suggested as essential to some meaningful governance of the field.[48] Other subjects of international law (tax, trade, internet regulation) are also witnessing the resort to soft law or at least an invitation by scholars that one form of soft law standard or another is adopted.[49] So, soft laws abound, including in areas such as international relations,[50] artificial intelligence and nanotechnology,[51] intellectual property, trade, general business transactions,[52] marine life, navigation and safety at sea,[53] private military and security companies,[54] international security,[55] indigenous peoples, and human rights.[56]

[48] *See* Jack M. Beard, *Soft Law's Failure on the Horizon: The International Code of Conduct for Outer Space Activities*, 38 U. Pa. J. Int'l L. 335, 337 (2017); *see also* Jennifer A. Urban, *Soft Law: The Key to Security in a Globalized Outer Space*, 43 Transp. L.J. 33 (2016).

[49] On the prolific amount of literature on soft laws and also highlighting the advantages and disadvantages of soft law, see Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 Minn. L. Rev. 706 (2010).

[50] *See* Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 Cornell L. Rev. 735, 735 (2014).

[51] *See* Gary Marchant & Carlos Ignacio Gutierrez, *Soft Law 2.0: An Agile and Effective Governance Approach for Artificial Intelligence*, 24 Minn. J.L. Sci. & Tech. 375 (2023); *see also* Gary Marchant et al., *Governing Emerging Technologies Through Soft Law: Lessons from Artificial Intelligence*, 61 Jurimetrics 1 (2020); Carlos Ignacio Gutierrez et al., *Lessons for Artificial Intelligence from Historical Uses of Soft Law Governance*, 61 Jurimetrics 133 (2020); Kenneth W. Abbott et al., *Soft Law Oversight Mechanisms for Nanotechnology*, 52 Jurimetrics 279 (2012); Timothy F. Malloy, *Soft Law and Nanotechnology: A Functional Perspective*, 52 Jurimetrics 347 (2012).

[52] UNIDROIT Principles as soft law is one that comes to mind. *See* Lars Meyer, *Soft Law for Solid Contracts: A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization*, 34 Denv. J. Int'l L. Pol'y 119 (2006); *see also* Brooke Marshall, *The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law*, 66 Am. J. Compar. L. 175 (2018).

[53] *See* Unconventional Lawmaking in the Law of the Sea (Natalie Klein ed., 2022) (U.K.)*; see also* Birgit Feldtmann, *On-board Protection of Merchant Vessels from the Perspective of International Law*, 11 Erasmus L. Rev. 209 (2018) (Neth.).

[54] *See* International Committee of the Red Cross, The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (2009); *see also* James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. Conflict & Sec. L. 401 (2008) (U.K.); Joel C. Coito, *Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden*, 101 Calif. L. Rev. 173 (2013); David A. Wallace, *International Code of Conduct for Private Security Service Providers*, 50 Int'l Legal Materials 89 (2011).

[55] *See* Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. Rev. 1147 (2011).

[56] *See* Olivier, *supra* note 34 (highlighting how soft laws play crucial roles in advocacy and mobilization of the consent of states); *see also* Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples,* 58 Int'l & Compar. L. Q. 958 (2009) (U.K.).

In many respects, the scholarly debate about soft law in international law has followed three key pathways. First is the belief that soft law is an *effective way* of delivering on the mandate of international law and its institutions.[57] The set of scholars in this group argues for the pragmatic use of soft law because there is merit in getting things done as opposed to getting bogged down by the liberal limitations of international law.[58] Secondly, some scholars have *expressed reservations* about soft law, while others have given the taxonomy a *tepid endorsement*.[59] The reasons for this reticent approach to soft laws range from concerns about international institutions' functions and mission/mandate creep,[60] to worry about the "undesirability" of soft law.[61] The inability of international institutions to amend their charters and constitutive acts has led them to resort to soft law to remain relevant in the international sphere. At other times, soft laws have been suggested as a means of preventing some of the difficulties we see in cultivating the consent of states.[62] However, others have argued that soft laws sometimes overreach and extend international law beyond its intended boundaries—what is known as "mission creep." These extensions sometimes render them ineffectual and obfuscate their practical utility in international law.[63] Mission creep is a factor in the overarching complex machinery of international institutions such

[57] *See* Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 Eur. J. Int'l L. 733 (2014) (U.K.). International organisations have continued to inspire the development of international law through soft standards. *See also*, Sean Hagan, *International Organizations and the Development of International Law,* 52 Geo. J. Int'l L. 863 (2021).

[58] *See* Marie von Engelhardt, *Opportunities and Challenges of a Soft Law track to Economic and Social Rights: The Case of the Voluntary Guidelines on the Right to Food*, 42 L. & Pol. Afr. Asia & Latin Am. 502 (2009) (Ger.), highlighting some of the deemed merits of soft law to include "attracting compliance," serving as gap fillers in the law or helping to "resolve ambiguities in the text of hard law instruments".

[59] *See* Jan Klabbers, *The Redundancy of Soft Law,* 65 Nordic J. Int'l L. 167 (1996) (Neth).

[60] *See* Bert-Jaap Koops, *The Concept of Function Creep*, 13 L. Innovation & Tech. 29 (2021) (Swed.) for a conceptual discussion of functional or mission creep. See also Jessica Einhorn, *The World Bank's Mission Creep*, Foreign Affairs 22 (Sept. - Oct. 2001), https://www.foreignaffairs.com/world/world-banks-mission-creep discussing the concept of mission creep with a focus on the World Bank.

[61] *See* Jan Klabbers, *The Undesirability of Soft Law*, 67 Nordic J. Int'l L. 381, 381 (1998) (Neth.); *see also* Jan Klabbers, *Reflections on Soft International Law in a Privatized World*, 16 Finnish Y.B. Int'l L. 313, 315 (2005) (U.K.). Further frustrations have also been expressed regarding the redundancy of soft law standards. *See* Klabbers, *supra* note 59, at 167; Ramses A. Wessel, *Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreements*, 44 W. Eur. Pol. 72 (2021) (U.K.) (raising questions as to how the resort to soft law may be enabling international organisations such as the E.U. to "step-outside" the E.U. legal framework); *see* Peter Slominski & Florian Trauner,*Reforming Me Softly - How Soft Law Has Changed EU Return Policy Since the Migration Crisis*, 44 W. Eur. Pol. 93 (2021) (U.K.), endorsing soft law as more sift and with limited sovereignty cost for international institutions such as the EU as seen in it migration policies in recent years.

[62] *See* Andrew T. Guzman, *Against Consent*, 52 Va. J. Int'l L. 747 (2012), exploring soft laws as part of the strategies for working around the "consent problem" in international law. One has to be aware of a broader debate in the discipline regarding the potential exaggeration of the consent problem and the intricate nature of the sources of international law beyond the Westphalian paradigm. *See also* Anthony A. D'Amato, *Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law*, 10 Va. J. Int'l L. 1 (1969), arguing that international law based only on the consent of states is an "extreme form of the positivist tradition in international law".

[63] *See* Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 371 (1988).

as the United Nations [hereinafter U.N.] agencies and the Washington-based global institutions. Soft laws have also emerged due to the sluggish progression of international human rights law and the political maneuvering of states seeking to maximize the protections afforded by international law.

D'Aspremont considers the expansion of soft law as part of the politics of "deformalization" of sources of international law.[64] Goldman argues that "theoretically" soft law has remained a "conundrum".[65] There is also a sense in the field that the distinction between soft and hard international law is unnecessary: that is to say, what is essential is the role that soft laws play as part of the "methodologies of obtaining functional cooperation among states in reaching international goals".[66] Further scholarship, which has voiced a careful evaluation of soft laws and their ramifications in the international system, has suggested examining the intellectual history of soft law in international law. This is an essential way of situating soft law in the broader ontology of the evolution of international law first as an idea and second as part of the wider history of power and encounters between peoples and how the intellectual history of soft law is potentially revelatory of its potency to "endorse accepted political ideologies while obfuscating their distributive ramifications".[67]

The third approach is the approach of "*non-committal scholars*" who reckon with both the advantages and disadvantages of soft laws in the architecture of international law.[68] For example, there is a noted interest in the "network effect" possibilities that soft laws can generate in the international law system.[69]

[64] Jean d'Aspremont, *The Politics of Deformalization in International Law*, 3 Goettingen J. Int'l L. 503 (2011) (Ger.), critiquing deformalism. *See also* Jean d'Aspremont, Formalism and the Sources of International Law 29-30 (2011) (Austl.). Formalism, he argues, has its difficulties but "some elementary formal law-ascertainment in international law is a necessary condition to preserve the normative character of international law". *Id.* at 29-30. Jean D'Aspremont & Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks*, 25 Leiden J. Int'l L. 309 (2012) (U.K.), highlighting the "pitched" contest between scholars who are for and those against the idea of soft law.

[65] Matthias Goldmann, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 Leiden J. Int'l L. 335 (2012) (U.K.) on the ramifications of soft law and how they usually work as the functional equivalence of binding treaties.

[66] Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 Int'l Law. 1433 (2001).

[67] Di Robilant, *supra* note 16.

[68] *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421 (2000) (U.K.), articulating such factors as less interference with sovereignty as part of the advantages inherent in the use of soft law in global governance.

[69] *See* Bryan H. Druzin, *Why Does Soft Law Have Any Power Anyway?*, 7 Asian J. Int'l L. 361 (2017) (U.K.).

Between these three foundations for exploring soft laws in international law, there are other theoretical justifications ranging from international relations theories to global governance and administrative law that have been applied in analyzing and articulating the place of soft laws in international law.[70] The fundamental flaw in soft law theory is its overextension, leading to the inclusion of inherently contradictory norms, and the near nonexistence of studies examining the distributive ramifications of soft laws within the international legal system. Thus, there are many analyses of soft law in the field, hinged on international relations theories of constructionism, functionalism,[71] realism, and normativism, highlighting the advantages and disadvantages of soft laws.[72] A significant aspect of this discourse is the acknowledgement that soft law standards constitute a part of international law.[73] Often overlooked is how the existing literature's concentration on state behaviour neglects the progressive evolution of international economic systems. These systems are guided by international law institutions that differ from traditional state constructs.

The International Relations [hereinafter I.R.] theory of international law holds allure for certain legal scholars. Nevertheless, caution is required, as this inclination towards international law could position it purely as another instrument in the toolbox of foreign relations. This reduces law to a tool for states to pursue power, wealth, and dominance. The difficulties in such approaches include the fact that conflict possibilities inherent in this approach to international law are self-evident. Approaches hinged on cooperative engagement and solidarity hold more hope for global peace, security, inclusive commerce, growth, and prosperity.[74] In other words, aligning I.R. with international law may lead to unilateral rather than multilateral efforts, the latter of which emphasises inclusivity, as opposed to the former, which is precariously open to abuse. Thus, the soft law puzzle has not been solved, and its systemic ramifications for

[70] Shaffer has also suggested that soft law is part of the realist approach to international law. *See* Shaffer & Pollack, *supra* note 49.

[71] *See* Blutman, *supra* note 23.

[72] *See* Galbraith & Zaring, *supra* note 50.

[73] *See* Anthony D'Amato, *A Few Steps Toward an Explanatory Theory of International Law*, Santa Clara J. Int'l L., Jan. 2010, at 1; *see also* Olufemi Elias & Chin Lim, *'General Principles of Law', 'Soft' Law and the Identification of International Law*, 28 Neth. Y.B. Int'l L. 3 (1997) (Neth.).

[74] *See* Ronald St. John MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 Pace Int'l L. Rev. 259 (1996); *see also* Chie Kojima & Kazimir Menzel, *Symposium on Solidarity As a Structural Principle of International Law, Max Planck Institute for Comparative Public Law and International Law, 29 October 2008*, 42 Verfassung und Recht in Übersee / L. & Pol. Afr. Asia & Latin Am. 585 (2009) (Ger.); *see also* Markus Tobias Kotzur & Kirsten Schmalenbach, *Solidarity Among Nations*, 52 Archiv des Völkerrechts 68 (2014) (Ger.) (on solidarity as an attempt to humanize international law); Jodie Boyd & Savitri Taylor, *Introduction. The Spirit of International Solidarity, the Right to Asylum, and the Response to Displacement*, 22 Hum. Rts. Rev. 383 (2021) (U.K.).

economic law and development remain under-explored.[75] In the next part, the article pivots to the discussion of this critical ramification of soft laws for I.E.L. [76]

[75] *See* Schwarcz, *supra* note 5 (looking at the increased recourse to soft law International financial and commercial transactions); *see also* Abraham L. Newman & Elliot Posner, Voluntary Disruptions: International Soft Law, Finance, and Power (2018) (U.K.)

> "*Voluntary Disruptions* argues that international soft law is deeply political, shaping the winners and losers of globalisation. Some observers focus on soft law's potential to solve problems and coordinate market participants. *Voluntary Disruptions* widens the discussion, shifting attention to the ways soft law provides new political resources to some groups while not to others and alters the sites of contestation and the actors who participate in them".

This work opens a very important discussion on the economic and distributive ramifications of soft law in international finance. I argue in my paper that the I.E.L. ramifications of soft law remain an open field yearning for deep scholarly cultivation.*See also* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 Brook. J. Int'l L. 884 (2009); Chris Brummer, *Why Soft Law Dominates International Finance—and not Trade*, 13 J. Int'l Econ. L. 623 (2010); For other debates on soft law, *see* Lorne Sossin & Chantelle van Wiltenburg, *The Puzzle of Soft Law*, 58 Osgoode Hall L.J. 623, 623 (2021) (Can.). The debate is ongoing as to the nature of soft law and its extensions. *See* Anthony D'Amato, *International Soft Law, Hard Law, and Coherence* (Nw. Pub. L., Research Paper No. 08-01, 2008); Weil, *supra* note 41. On the idea of formalism, *see* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949 (1988). For a rational choice and behavioural articulation of "why" soft law, see Tomer Broude & Yahli Shereshevsky, *Explaining the Practical Purchase of Soft Law*, *in* International Law as Behavior 98 (Harlan Grant Cohen & Timothy Meyer eds., 2021).

[76] See Vera Korzun, *Enforcing Soft Law in International Investment Arbitration*, 56 Vand. J. Transnat'l L. 1, 1 (2023) (on how investment treaties have incorporated soft laws thereby making them vastly applicable to arbitrations and investment disputes settlement).

2. 'SOFT' INTERNATIONAL ECONOMIC LAW

An archetypal textbook on I.E.L. looks at money, exchange rates, balance of payments, trade—especially now under the World Trade Organization [hereinafter: W.T.O.][77]—laws, regimes, and institutions of dispute resolutions, intellectual property, international investment treaties, and international institutions such as the World Bank [hereinafter: W.B.] and the International Monetary Fund [hereinafter I.M.F.] that provide the administrative backbone for I.E.L.[78] Taxation has also significantly evolved as an essential subject of I.E.L., although sovereign control and territorial questions associated with tax across transnational boundaries are often interlinked with conflict of laws.[79] Thus, sometimes, and depending on the region of the world, regional issues and institutions of economic law such as the European Union [hereinafter: E.U.],[80] African Union [hereinafter A.U.],[81] the Association of SouthEast Asian Nations [hereinafter A.S.E.A.N.], the Southern Common Market [hereinafter MER.CO.SUR.], Economic Community of West African States [hereinafter E.C.O.W.A.S.], Caribbean Community [hereinafter CARI.COM.] and North American Free Trade Zone under North American Free Trade Agreement [hereinafter N.A.F.T.A.] are also included to complicate the nature and extensions of I.E.L. There is equally the place of development/investment banks in the broader articulation of the aspirations of states whether as regional platforms or as lose association of states with common economic interests. Here we can generally include the African Development Bank [hereinafter A.D.B], Asian Development Bank [hereinafter A.D.B],[82] the European Investment Bank, Asian Infrastructure Investment

[77] The Oxford Handbook of International Trade Law (Daniel Bethlehem et al. eds., 1st ed. 2009).

[78] *See* Andreas F. Lowenfeld, International Economic Law (2nd ed. 2008). *See also*, John H. Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 Am. U. Int'l L. Rev. 595 (1995).

[79] *See* Sagi Peari & Nolan Sharkey, *Pairing International Taxation and Conflict of Laws: Common Challenges and Reciprocal Lessons*, 41 U. Queensl. L. J. 211 (2022) (Austl.) (on the intersection of conflicts of law with international taxation); *see also* Reuven S. Avi-Yonah, *International Tax Law as International Law*, 57 Tax L. Rev. 483 (2004). Julien Chaisse & Xueliang Ji, *'Soft Law' in International Law-Making — How Soft International Taxation Law Is Reshaping International Economic Governance*, 13 Asian J. WTO L. & Health Pol'y 463 (2018) (Taiwan) (exploring some of the espoused advantages of soft law including less contracting cost and lower sovereign cost).

[80] *See* Ernst B. Haas, The Uniting Of Europe: Political, Social, and Economic Forces, 1950-1957 (1st ed. 1958); *see also* Andreas Dür et al., *The Political Economy of the European Union*, 15 Rev. Int'l Org. 561 (2020); The EU and the Rule of Law in International Economic Relations (Andrea Biondi & Giorgia Sangiuolo eds. 2021); Jules Stuyck, Commercial and Economic Law in the European Union (3rd ed. 2022); Emilija Leinarte, Functional Responsibility of International Organisations: The European Union and International Economic Law (2021) (U.K.).

[81] *See* Frans Viljoen, Max Planck Encyclopedias of International Law: African Union (AU) (2011) (Ger.);*see also* James Thuo Gathii, *Agreement Establishing the African Continental Free Trade Area*, 58 Int'l Legal Materials 1028, 1028-38 (2019) [hereinafter Gathii, *Agreements*]; James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. Int'l L. 571 (2009).

[82] The New Development Bank is established by Brazil, Russia, India, China and.South Africa countries, [hereinafter B.R.I.C.S.]. Article 1 of the N.D.B. Agreement provides that "the Bank shall mobilize resources for infrastructure and sustainable development projects in B.R.I.C.S. and other emerging economies and

Bank promoted by China,[83] the New Development Bank (promoted by B.R.I.C.S. countries), and the Comprehensive Progressive Agreement for Transpacific Partnership (2018).[84] At other times, specialized agencies of the U.N., such as the United Nations Conference on Trade and Development [hereinafter U.N.C.T.A.D.], United Nations Industrial Development Organization [hereinafter U.N.I.D.O.],[85] and the United Nations Economic and Social Council [hereinafter ECO.SO.C.][86] and its regional commissions are also included to give a panoramic view of the field.

There is, therefore, a lack of committed systematic studies on soft I.E.Ls. and their broader ramifications in the legal system. This assertion of the limited review of soft laws concerning their systemic influence is not unaware of the substantial literature on soft law as a subject in international law and policy more broadly. The shifting forms of soft law and their varied arenas of operation may have contributed to the limited interest in centralizing their study in international law. Still, although soft laws are everywhere, they remain a blind spot in I.E.L. literature. The studies of the critical roles of taxonomies in law demand an examination and centralization of "soft laws" in I.E.L. To that effect, I.E.L. springs from the traditional foundations of international law. In a sense, the economic interests of states, businesses, and other interests are significant fulcrums for the evolution of diplomatic structures and commercial relations among nations, peoples, and societies. The transnational nature of trade, ocean navigation, and services has also necessitated global value chains, which, in turn, produced various prescriptive aspects of I.E.L.

As with legal foundations everywhere, once these incipient groundworks are established, they could easily fossilize and become centrifugal bases for further juridical development and transmission of rules. The role of trading interests, corporations, and colonialism in the development of I.E.L. is continually interrogated in the field. Hence, the discourses on the sources and implications of soft law within the realm of I.E.L.

developing countries, complementing the existing efforts of multilateral and regional financial institutions for financial growth and development". *See* Agreement on the New Development Bank, UNTS vol. 53647, no. 3126, EIF 3 July 2015.

[83] Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255 (2021).

[84] The Comprehensive and Progressive Agreement for Transpacific Partnership 2018 creates a free trade area between 11 countries in the Asia Pacific region including Australia, Brunei, Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. The United Kingdom has joined the group as of December 15, 2024. The gains of membership include national treatment and elimination/harmonization of custom duties and national treatment.

[85] *See* Franz Plasil-Wenger, *UNIDO: The United Nations Industrial Development Organization*, 5 J. WORLD TRADE 188 (1971) (Neth.).

[86] The Economic and Social Council of the U.N. has regional commissions in Europe, Africa, Latin America and the Caribbean, Asia and the Pacific Region, and Western Asia. *See* Volker Röben, *United Nations, Economic and Social Council (ECOSOC)*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds. 2018) (Ger.).

warrant deeper scholarly investigation. This is because the emergence of soft law within this domain intertwines with institutional frameworks, underscoring its significance despite its informal nature. Soft laws in I.E.L., distinct from broader soft law in international law, necessitate examination concerning their origins, re-making, and dissemination pathways. It is argued that their formalist underpinnings reinforce existing structures and engender path dependency, thereby impacting the distribution of benefits and burdens in I.E.L. While exploring the role of economically impactful soft laws in fostering development and inclusive growth, it is essential to acknowledge alternative perspectives on soft law in international law. Thus, the analysis presented here does not offer a rigid doctrine but instead aims to facilitate a nuanced examination of I.E.L.'s strategic relevance amid contemporary challenges in the international legal landscape. Equally, the article avoids the rigidities of disciplinary boundaries due to the policy and legal intersections on the subject of soft law, particularly in commerce and other related economic spheres.

The beginning of the twenty-first century has witnessed profound shifts in international law, driven by globalisation, pandemics, and the legacies of the Cold War, which have exacerbated global inequality and poverty. International law has expanded beyond traditional treaties to encompass a range of soft law instruments, including guidelines, best practices, and resolutions. Although lacking universal consensus, these mechanisms have a significant influence on businesses and government policies, particularly in emerging markets, shaping investment decisions and perceptions in the international financial market. In I.E.L., soft laws can impose significant obligations and consequences despite a unified theoretical framework. For instance, the implicit recognition of compliance expectations among stakeholders underscores the power dynamics inherent in financial stability standards and related best practices. Equally, organisations such as the Organization for Economic Co-operation and Development [hereinafter O.E.C.D.] expect their members to comply with their guidelines and prospective members to undertake to abide by the policies or model rules on many aspects of the global economy, such as taxation and human rights. Thus, the taxonomy of soft laws in I.E.L. holds substantial sway, defining private rights and influencing national destinies within the global economic legal system.

Moreover, the interplay between normative and taxonomic sources on the international stage yields distributive consequences that profoundly shape societal outcomes across various sectors. For example, in the area of taxation, the ability of multinational enterprises to shift profits across jurisdictions or avoid taxes in the place of business by taking advantage of regulatory arbitrage is a concern for scholars in the

field. Much of the effort to adjust these regulatory *lacunae* has been hinged on soft standards.[87] Soft laws in I.E.L. embody transformative potential while reinforcing formalist structures and privileging power dynamics among states and non-state actors. Mindful of these vast consequences of soft laws in I.E.L., one must ask whether the taxonomy "soft law" is an oxymoron. This article explores the legal origins and sources of I.E.L. in this Part. It notes the possibilities of embedding political preferences through soft law in I.E.L. This is critical because "soft laws" often reinforce existing hierarchies within I.E.L., hindering progress toward inclusive growth and global economic justice. By perpetuating specific formalist standards without considering equitable outcomes, soft laws hinder the transformations necessary for a more just and equitable I.E.L.

1) LEGAL ANCESTRIES AND SOURCES

In this Section, the article examines the issues of provenance and sources of I.E.L. and how they intersect with soft laws. Beyond the sources, it also highlights the methods and politics of rulemaking, regarding soft laws in I.E.L.

[87] *See* Hans Gribnau, *Soft Law and Taxation: EU and International Aspects*, 2 LEGISPRUDENCE 67 (2008) (U.K.) (exploring the use of soft laws for tax regulation). *See also* Guglielmo Ginevra, *The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at EU Level*, 45 INTERTAX 120 (2017) (Neth.).

A. ARTICLE 38 OF THE STATUTE OF THE ICJ

The source of law is an imprescriptible factor in the recognition, legitimacy, and enforcement of regulations.[88] In international law, the traditional literature focuses on Article 38 of the Statute of the International Court of Justice [hereinafter I.C.J].[89] This traditional source of international law is especially so in public international law, which is primarily shaped by the activities and behaviours of states.[90] Thus, the scholarship about the sources of I.E.L. often defaults to the discussion of Article 38(1) of the Statute of the I.C.J., which provides that:

> [T]he Court, whose function is to decide by international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom as evidence of general practice accepted as law; (c) the general principles of law recognised by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.[91]

It is crucial to note that recent developments in international law have complicated the orthodox view of states as the primary makers of international law. Beyond states, other actors such as international institutions, business organisations,

---

[88] François Rigaux, *Codification of Private International Law: Pros and Cons*, 60 La. L. Rev. 1321 (2000) (hinting at sources of law and their linkage with methods of study).

[89] For literature on the traditional discourse of the sources of international law see, Ian Brownlie, Principles of Public International Law 1 (4th ed. 1990); Joseph G. Starke, Introduction to International Law 32 (10th ed. 1989); David Kennedy, *The Sources of International Law*, 2 Am. U. Int'l L. Rev. 1 (1987); Humphrey Waldock, *General Course on Public International Law*, 106 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 1, 39-103 (1962) (Neth.); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 Yale Stud. World Pub. Ord. 249 (1980); Michel Virally, *The Sources of International Law*, *in* Manual of Public International Law 116 (Max Sørensen ed. 1968); Taslim O. Elias, *THE MODERN LAW OF TREATIES* (1974); Malcolm N. Shaw, International Law 58-109 (9th ed. 2021); Hugh Thirlway, The Sources of International Law (2nd ed. 2019); Alain Pellet & Daniel Müller, *Article 38*, *in* The Statute of the International Court of Justice: A Commentary 819 (Andreas Zimmermann et al. eds., 3rd ed. 2019). For more on treaties as sources of International Law *see*, Anthony D'Amato, *Treaties As a Source of General Rules of International Law*, 3 Harv. Int'l L.J. 1 (1962).

[90] Kennedy has argued that *"Article 38 is addressed to I.C.J. justices and enumerates the various sources they are to examine in finding the law necessary to resolve a case. It has been taken as a convenient catalog of international legal sources generally, and as such, has been the starting point for most discussion in this area."* Kennedy, *supra* note 89, *at 2.*

[91] *See Article 38 (1)* of the Statute of the I.C.J. reproduces the provisions of Article 38(1) of the League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920. This suggests the pre-World War II provenance of the Law governing sources of law in international Law. *See also* Valentina Vadi, Cultural Heritage in International Economic Law 90 (2023); Hazel Fox, International Economic Law and Developing States 1-23 (1992).

and "soft institutions" influence the evolution of I.E.L. For instance, in private international law which often has significant ramifications for commerce, the sources of law include many other factors, such as conflict of law rules, business practices, arbitration rules, and other non-state-based foundations for rule formation. This is because, in commerce and general transnational transactions, the sources of law may range from selected municipal laws in contractual arrangements to trade treaties, bilateral investment treaties, and rules of arbitration and dispute settlement adopted by the parties to the agreement. The doctrines and practices surrounding party autonomy in international business allow this state of affairs.

Nonetheless, by the extant provisions of Article 38(1) of the Statute of the I.C.J, the traditional sources of international law are, first, *treaties*—including conventions, agreements, protocols, and exchanges between states, and sometimes between states and international organisations such as the A.U., E.U., U.N., W.B. Group, and the I.M.F.[92] Second, *customs*.[93] Third *general principles*.[94] Fourth *judicial decisions*.[95] Fifth teachings of

[92] *See* Article 2 of the Vienna Convention on the Law of Treaties 1969, *"treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." See also* Vienna Convention on the Law of Treaties, U.N.T.S. vol. 1155, no. 18232, at 331, art. 2 (May 23, 1969).

[93] On customs as source of international law, see, Reexamining Customary International Law (Brian D. Lepard ed., 2017) (U.K.); *see also* Karol Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 Neth. Y.B. Int'l L. 1 (1993) (Neth.); *see* Lazare Kopelmanas, *Custom As a Means of the Creation of International Law*, 18 Brit. Y.B. Int'l L. 127 (1937) (U.K.); *see* Josef L. Kunz, *The Nature of Customary International Law*, 47 Am. J. Int'l L. 662 (1953); *see* Anthony D'Amato, The Concept of Custom in International Law (1971) (U.K.); *see* Michael Akehurst, *Custom As a Source of International Law*, 47 Brit. Y.B. Int'l L. 1 (1975) (U.K.); *see* Custom's Future International Law in a Changing World (Curtis A. Bradley ed., 2016) (U.K.); *see* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. Int'l L. 757 (2001); *see* Michael Byers, *Custom, Power and the Power of Rules*, 17 Mich. J. Int'l L. 109 (1995); *see* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 Eur. J. Int'l L. 523 (2004) (U.K.); *see* David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Y.B. Int'l L. 198 (1996) (Ger.); *see* Bhupinder S. Chimni, *Customary International Law: A Third World Perspective*, 112 Am. J. Int'l L. 1 (2018); Peter Tomka, *Custom and the International Court of Justice*, 12 L. & Prac. Int'l Cts. & Tribunals 195 (2013) (Neth.).

[94] *See* Xuan Shao, *What We Talk About When We Talk About General Principles of Law*, 20 Chinese J. Int'l L. 219 (2021) (U.K.); *see also* Marcelo Vázquez-Bermúdez (Special Rapporteur), Second Report on General Principles of Law, Int'l Law Comm'n, U.N. Doc. A/CN.4/741 (2020); *see* Mahmoud Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 Mich. J. Int'l L. 768 (1990); *see* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953); *see* Hersch Lauterpacht, Private Law Sources and Analogies of International Law (1927).

[95] Judicial decisions as sources of international law have become very relevant in our times. Yet the proliferation of international courts and tribunals besides the ICJ has led to some level of anxiety about the systemic significance of the decisions of these tribunals. Part of the anxieties include possibilities of "forum shopping", "norm fragmentation" and lack of certainty since there is no hierarchy of courts in international law. *See*, Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts*, 103 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 403 (2009); *see also* Mads Andenas & Johann R. Leiss, *The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute*, 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg J. Int'l L. 907 (2017) (Ger.).

the "*most highly qualified publicists*".[96] These are explored as they pertain to the discourse on the sources of I.E.L.

Treaties are multi-purpose instruments in international law.[97] They lend themselves to many interests, ranging from diplomatic relations to commercial arrangements.[98] Many theories have been co-opted to explain the motivation for treaties in international law. As public contracts, treaties can encompass a range of motivations, including development, political stability, and the maintenance of favoured nation treatment and friendly relations between contracting states. The Vienna Convention on the Law of Treaties (1969) is the governing regime for treaties as a source of international law. The law of treaties draws inspiration from such doctrines as *pacta sunt servanda*—agreements are meant to be obeyed.[99] Equally, treaties can codify existing norms or be innovative in articulating and enacting new norms of international law, depending on the emerging needs of the international system.[100] They are, therefore, important sources of I.E.L.s. Some of the significant examples of I.E.L. treaties are the U.N. Convention on the Limitation Period in the International Sale of Goods, New York

[96] D'Amato argues that "*the term "most highly qualified" selects from the class of scholars those whose writings have commended themselves through objective reporting and judgement to the international legal community.*" *See* Anthony D'Amato, *What Does It Mean to Be an Internationalist?*, 10 Mich. J. Int'l L. 102, 104 (1989); *see also* Sondre Torp Helmersen, *Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice*, 30 Eur. J. Int'l L. 509 (2019) (U.K.); *see also* Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 Int'l & Compar. L.Q. 1 (2017) (U.K.).

[97] Treaties can be used to identify, clarify and codify norms or customs. For example, the Vienna Convention on Diplomatic Relations recalls "*that peoples of all nations from ancient times have recognised the status of diplomatic agents.*" So, the convention is one sense seeks to put the practices arising from these "ancient times" into a treaty. *See* Vienna Convention on Diplomatic Relations 1961, UN *Treaty Series*, vol., 500, at 95, 1 of preamble; *see also* Vienna Convention on Consular Relations, 1963, U.N.T.S. 596, at 261 (Apr. 24, 1963). Treaties can also form the bases of international institutions. For instance, the U.N. Charter; *The Constitutive Act of the African Union*, 1963. They can simply serve as contractual foundations for relations between states and international organisations. *See* John B. Quigley, *Vienna Convention on Consular Relations: In Retrospect and into the Future*, 38 S. Ill. U. L.J. 1 (2013); *see also* Jan Wouters et al., *The Vienna Conventions on Diplomatic and Consular Relations*, *in* The Oxford Handbook of Modern Diplomacy 510 (Andrew Cooper et al. eds., 2013) (U.K.).

[98] For instance, the Treaty of Versailles is as much a foreign policy or diplomatic treaty as well as a treaty with strong ramifications for IEL. *See generally*, Barry Eichengreen, *Versailles: The Economic Legacy*, 95 Int'l Affs. 7 (2019); *see also* Nikolaus Wolf et al., *On the Economic Consequences of the Peace: Trade and Borders After Versailles*, 71 J. Econ. Hist. 915 (2011) (U.K.).

[99] *See Article 26 VCLT,* UN *Treaty Series, Vol. 1155*, at *331, May 23, 1969, in force 27 January 1980. See also* Jiang Zhifeng, *Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom*, 43 Mich. J. Int'l L. 745 (2022)*; see* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25);*see* I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 Am. J. Int'l L. 513 (1989); *see* Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 Va. J. Int'l L. 405 (1994); *see* Christina Binder, *Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited*, 25 Leiden J. Int'l L. 909 (2012) (U.K.); *see* Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 Am. J. Int'l L. 180 (1945).

[100] For instance, there is an ongoing discussion on the establishment of a treaty to govern plastic pollution. This is a specific type of treaty to deal with the particularly troubling problem of pollution especially with non-biodegradable materials. *See generally*, *Historic Day in the campaign to beat plastic pollution: Nations commit to develop a legally binding agreement*, UN Environment (Mar. 02, 2022), https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop (last visited May 12, 2025).

1974[101]; the U.N. Convention on Contracts for the International Sale of Goods, Vienna 1980[102]; the U.N. Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules);[103] the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention) 10 June 1958;[104] the Agreement Establishing the World Trade Organization 1995;[105] The Trade-Related Aspects of Intellectual Property Rights (T.R.I.P.S.),[106]and the African Continental Free Trade Agreement. [107]

Others include the North American Free Trade Agreement (N.A.F.T.A.) and the Mercosur Treaty of Asunción, 1991; CARI.COM. Treaty of Chaguaramas, 1973; E.U. Treaty of Lisbon, 2007; E.U. Treaty Establishing the European Economic Community, 1957; E.U. Treaty Establishing the European Coal and Steel Community, 1951. There are also over 3,000 bilateral and multilateral investment treaties (between states and among themselves as well as between states and regional and international organisations, such as the E.U.), which constitute sources of I.E.L., especially concerning the parties to the treaties. There are also several bilateral and multilateral free trade agreements, which are sometimes executed for specific economic interests and country settings. For example, the Chinese government maintains over 100 Bilateral Investment Treaties and about sixteen Free Trade Agreements with several countries globally.[108] It is also the case that the constitutive instruments of international organisations often incorporate existing agreements, sometimes by general reference and at other times as direct annexures to the charter of these institutions. For instance, the (W.T.O. Agreement 1995

[101] *See* U.N., Convention on the limitation period in the international sale of goods. Concluded at New York on 14 June 1974, UNTS 1511, No. 26119, at 3, (Aug. 1, 1988).

[102] *See* United Nations Convention on contracts for the international sale of goods, UNTS 1489, No. 25567, at 3, Jan. 1, 1988.

[103] *See* United Nations Convention on the carriage of goods by sea, 1978 (with Final Act), UNTS 1695, No. 29215, at 3 (Nov. 1, 1992).

[104] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNTS 330, No. 4739 vol. 330, at 3 (June 7, 1959).

[105] *See* Marrakesh Agreement establishing the World Trade Organization, UNTS 1867, No. 31874, p.1 (Apr. 15, 1994).

[106] *See* Alphonso B. Kassor, *The World Trade Organizations' Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement: The Compelling Challenges for Developing and Less Developed Member Countries-Implementation and Enforcement*, 9 Cybaris 107 (2018); *see also* Peter K. Yu, *TRIPS and Its Discontents*, 10 Marq. Intell. Prop. L. Rev. 369 (2006); *see* Ezinne M. Igbokwe & Andrea Tosato, *Access to Medicines and Pharmaceutical Patents: Fulfilling the Promise of TRIPS Article 31bis*, 91 Fordham L. Rev. 1791 (2023).

[107] *See* Gathii, *Agreement*, *supra* note 81; *see also* Rita M. Tsorme & Joseph Amoah, *African Continental Free Trade Agreement's Conditional Most Favoured Nation: A Necessary Compromise?*, 23 World Trade Rev. 93 (2024) (U.K.).

[108] *See* Protocol to Amend the ASEAN-China Framework Agreement on Comprehensive Economic Co-operation and Certain Agreements thereunder, Nov. 2015; China-Pakistan Free Trade Agreement, Nov. 2006; China-New Zealand, Free Trade Agreement, Apr. 7, 2008; China-Peru Free Trade Agreement, Apr. 28, 2009; China-Costa Rica Free Trade Agreement, 2010; China-Iceland Free Trade Agreement, Apr. 15, 2013; China-Switzerland Free Trade Agreement, July 6, 2013; China-Korea Free Trade Agreement, June 1, 2015; China-Australia Free Trade Agreement, June 17, 2015; Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, Jan. 15, 2020; *see* Michael Sampson, *The Evolution of China's Regional Trade Agreements: Power Dynamics and the Future of the Asia-Pacific*, 34 Pac. Rev. 259 (2021) (U.K.); *see* Min-Hua Chiang, *China–ASEAN Economic Relations After Establishment of Free Trade Area*, 32 Pac. Rev. 267 (2018) (U.K.); *see* Ka Zeng, China's Free Trade Agreement Diplomacy, 9 Chinese J. Int'l Pol. 277 (2016) (U.K.).

has several annexes that incorporate the existing trade agreements, such as General Agreements on Tariffs and Trade before the establishment of the W.T.O.[109] These also form the basis of economic law and cooperation among constituent states. At other times, sections or chapters of the establishment charters of international organisations, such as the U.N. bodies that pursue economic collaboration, thereby providing a platform for the emergence of economic law norms, obligations, and enforcement frameworks. The treaties can equally establish an economic community, thereby setting the foundation for further transnational economic laws and regimes.[110] Such economic communities forge common markets through the removal of trade barriers (including tariffs and non-tariff barriers), and they also provide regulatory frameworks for banking, payments systems, and other aspects of the economy. The E.U. is a prime example of this situation.

Further examples can be seen in the Charter of the United Nations [hereinafter referred to as the U.N. Charter], which establishes the bodies and special agencies charged with the broad responsibility to promote *"higher standards of living, full employment, and conditions of economic and social progress and development."* [111] By Article 57 of the U.N. Charter 1945, various specialized agencies of the U.N. are incorporated by reference to be brought into relationship with the U.N. to pursue the broad agenda of the organisation—many of which are economically oriented or hinged on allied issues of the economy such as development and higher standard of living.[112] These specialized agencies are often the nurseries of I.E.L. normativity through soft law standards. They also produce rules for dispute settlement, such as those established by the United Nations Commission on International Trade Law [hereinafter U.N.C.I.TRA.L.] Arbitration Rules that go on to become standard setters in the field.[113] Such rules have profound ramifications for significant dispute settlement and processes of enforcement of economic treaty obligations such as investor-state arbitrations. [114]

[109] *See supra* note 105.

[110] For instance, the Treaty of Rome Establishing the European Community (Mar. 25 1957) establishes the European Economic Community. The Treaty of Rome 1957 has since undergone amendments culminating in the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. Economic Community of West African States (E.C.O.W.A.S.), Treaty of the Economic Community of West African States (May 28, 1975) establishes the Economic Community of West African States. *See also* Articles of Association for the Establishment of An Economic Community of West Africa, U.N.T.S. 288, No. 8623 (May 4, 1967).

[111] *See* U.N. Charter art. 55.

[112] *See id.* ch. IX-X.

[113] *See* G.A. Res. 76/108, Expedited Arbitration Rules of the United Nations Commission on International Trade Law (Dec. 9, 2021).

[114] *See* Esmé Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31 ICSID Rev. - Foreign Inv. L.J. 622 (2016) (U.K).

Equally, these model rules of arbitration often have a substantive impact on municipal arbitration regimes. Sometimes, they inspire amendments in the local law, thereby changing the nature of the *lex arbitri* in that jurisdiction. At other times, they form the basis of institutionally designed legal development, such as restatements made by the legal institutes.[115] Often, these charter provisions invite economic cooperation among member states, which also leads to the establishment of subsidiary or affiliated institutions at the international, regional, or subregional levels. For example, Article 63 of the U.N. Charter recognises the specialized agencies of the U.N. as established in Article 57 of the U.N. Charter.[116]

Very interesting for the gamut of treaty-inspired expansion of the sources of I.E.L. is the establishment of regional development banks and other financial institutions to further obligations and aspirations first articulated in the founding charter of these international and regional institutions. Currently, we have the African Development Bank [hereinafter A.D.B.], the Asian Development Bank [hereinafter A.D.B.], the Inter-American Development Bank, and the European Central Bank [hereinafter E.C.B.] as exemplar institutions emerging from the *prior incipient* treaty grounds established in the founding charters of their respective regional parents.[117] These institutions are not only centres of norm formation for I.E.L. but also spaces for the transmission and assimilation of rules in I.E.L. In particular, they are spaces for easy consensus building on soft law standards on such issues as sovereign debt, letters of credit, risk exposure, management and bailout, prudential standards of financial markets, development policy formulation, and securities regulation and accountability.[118] It is safe to say that global

[115] Example is the United States Restatement of the Law of International Commercial and Investor-State Arbitration 2019. *See* George A. Bermann, *The UNCITRAL Model Law at the US State Level*, 39 Arb. Int'l 172 (2023).

[116] Indeed, the ECO.SO.C. is empowered to *"enter into agreement with any of the agencies referred to in article 57, defining the terms on which the agency concerned shall be brough into relationship with the United Nations."* U.N. Charter art. 63 (1).

[117] *See* Michael Ioannidis, *The European Central Bank*, *in* The EU Law of Economic and Monetary Union 352 (Fabian Amtenbrink et al. eds., 2020); *see also* René Smits, *The European Central Bank's Independence and Its Relations with Economic Policy Makers*, 31 Fordham Int'l L.J. 1614 (2007); *see* Paul Tucker, *How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment*, 22 German L.J. 999 (2021) (U.K); *see* Lucia Quaglia & Amy Verdun, *Weaponisation of Finance: The Role of European Central Banks and Financial Sanctions Against Russia*, 46 W. Eur. Pol. 872 (2023) (U.K.); *see* Philipp Hartmann & Frank Smets, *The European Central Bank's Monetary Policy during Its First 20 Years*, Brookings Papers on Econ. Activity, Fall 2018, at 1; *see* Arınç Onat Kılıç, *Secondary Objectives of the European Central Bank and Economic Growth: A Human Rights Perspective*, 35 Leiden J. Int'l L. 569 (2022) (U.K.); *see* Stefan Collignon, *Europe's Debt Crisis, Coordination Failure and International Effects* (Asian Dev. Bank Inst., ADBI Working Paper No. 370, 2012).

[118] *See* Agreement establishing the African Development Bank, U.N.T.S. 510 (Sept. 10, 1964); *see also* Susan Park, *The African Development Bank and the Accountability Policy Norm*, 29 Glob. Governance: Rev. Multilateralism & Int'l Orgs. 61 (2023); *see* Daniel Bradlow et al., *African Development Bank Independent Recourse Mechanism*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2023) (Germ.); *see* Stephen D. Krasner, *Power Structures and Regional Development Banks*, 35 Int'l Orgs. 303 (1981) (U.K.); *see* Roy Culpeper, *Regional Development Banks: Exploiting Their Specificity*, 15 Third World Q. 459 (1994); *see*

financial regulation cannot function effectively without the expertise, capacity, and supervision instruments that these institutions bring to the discipline.[119] Still, the treaty-based institutional and normative fermentation of the sources of I.E.L. will not be complete without some scholarly light cast on those organisations such as the W.B. and its associated institutions such as the International Finance Corporation, the International Bank for Reconstruction and Development, and the Multilateral Investment Guarantee Agency. Other comparably situated organisations include the I.M.F. as well as the O.E.C.D.; these bodies are not exclusively regional. They are not subsumed under global bodies, such as the U.N. However, they may establish relationships and sign memoranda of understanding with organisations such as the U.N. for specific purposes. The cooperative engagement of these bodies with regional and internationally affiliated institutions is a contributing factor in making I.E.L. frameworks and their governance.[120]

One such instance was the collaboration between the U.N. and World Bank-associated institutions in the design and implementation of the Highly Indebted Poor Countries initiative. Debt Relief Initiative in the 2000s. Through such collaborative activities and projects, these organisations develop soft law standards and create a taxonomy of instruments that often determine the trajectories and economic well-being of many communities globally. These organisations are platforms of turgid global economic domination and contestation. They have their internal logic, which shapes their policy preferences and determines what is deemed worthy of financing within the broader context. They have been the *fons et origo* [source and origin] of global economic liberalization and deregulation, which has ramifications for law and political economy. In particular, they impact economic sovereignty and its associated elements, such as ownership of natural resources, taxation possibilities, quality of life index, and general human well-being.

In summary, a comprehensive taxonomy of treaties in I.E.L. requires a whole book, considering the ever-expanding scope of the field and the proliferation of agreements in the post-1945 era. An examination of the genealogy of treaties reveals a deeper instrumentalisation of treaties for economic purposes. For instance, the Berlin

Eisuke Suzuki, *Regional Development Banks*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2011) (Ger.); *see* Judith Clifton et al., *Regional Development Banks in the World Economy*, *in* Regional Development Banks in the World Economy 1 (Judith Clifton et al. eds., 2021) (U.K); *see* Ruth Ben-Artzi, Regional Development Banks in Comparison: Banking Strategies Versus Development Goals (2016).

[119] *See* Rinke Bax, Andreas Witte, *The Taxonomy of ECB Instruments available for Banking Supervision* 6 E.C.B. Economic Bulletin (2019); *see also* David Quinn, *The Law and Norms of the European Central Bank as Sovereign Lender of Last Resort: Crystallising Endogenous Authority*, 17 Eur. Const. L. Rev. 78 (2021) (Neth.); *see* René Smits, *The European Central Bank: Institutional Aspects*, 45 Int'l & Compar. L.Q. 319 (1997) (U.K.).

[120] *See* Hagan, *supra* note 57, at 863.

West Africa Treaty of 1895 was to facilitate *free trade* in Africa.[121] The Treaty of Versailles 1919 had significant economic relations commitments for the parties, especially Germany. Many other treaties, including those signed amongst colonial powers and Indigenous communities, have financial consequences, as they often involve free trade, the acquisition of territory, access to minerals, ransom payments, taxation, and other economically significant issues, such as wages, labour, and ownership of private property. Indeed, Caesar's head is on the coin, and the coin of I.E.L. has treaties as its baseline.

It, therefore, suffices to state that regional and national issues may affect particular treaties and their interpretation when disputes arise between the parties. Thus, treaties could also be significant sources of *conflict of laws* principles and rules, especially when interpreting commercial and general contractual obligations arising from them. Hence, principles of interpretation such as *first-in-time rule* and *temporality* are essential facets in treaties' deeply embedded and nuanced role as sources of I.E.L. Equally, grasping the ways soft laws map into these treaties, especially those ratified in the post-1945 era, has ramifications for economic justice and the general distributive consequences of formal structures of international law. For instance, the International Centre for the Settlement of Investment Disputes [hereinafter I.C.S.I.D.] and its ramifications for investor-state arbitration are factors to consider when elucidating the implications of arbitration rules before the I.C.S.I.D. in international investment disputes.[122]The procedural provisions of I.C.S.I.D. and other simultaneously situated rules, such as the U.N.C.I.TRA.L. Arbitration Rules can be dispositive regarding the outcome of investment disputes, with significant consequences for the losing party's economy.

Custom is an aggregation of accepted behaviour within a legal system. Within the international community, custom has been justified based on historical legitimacy, natural law, and a general sense of duty between states themselves and states and other participants in the international system, such as tribal groups and indigenous peoples.[123] Often, customary law arises from and derives legitimacy from these behaviours, which are recognised as binding. Shaw argues that custom is *"an authentic expression of the needs*

[121] *See* Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 London Rev. Int'l L. 31 (2015) (U.K.); *see also* Ewout Frankema et al., *An Economic Rationale for the West African Scramble? The Commercial Transition and the Commodity Price Boom of 1835–1885*, 78 J. Econ. Hist. 231 (2018) (U.K.).

[122] *See* Yarik Kryvoi, International Centre for Settlement of Investment Disputes (ICSID) (2020); *see also* Stephen T. Lynch, *The International Centre for the Settlement of Investment Disputes: Selected Case Studies*, 7 Md. J. Int'l L. 306 (1982).

[123] B. S. Chimni has argued that custom in many ways maps on to capitalism and power relations especially of European states. *See* Chimni, *supra* note 93.

and values of the community at any given time".[124] Customary international law theory essentially adopts the view that law develops from people's behaviour, which is consistent and habituated over time. The dynamism of custom as a source of international law also means that the threshold of time, quality, and quantum of behaviour required for the emergence of a C.I.L. norm is often indeterminate. It aligns with Carl von Savigny's view that a deep methodical study of custom will yield the true law.[125] Therefore, customs as sources of law have significant ramifications for relations among nations, and they remain dynamic. Hence, there is an active debate about custom as an aspect of the various sources of international law.

In a recent International Law Commission study, customary international law is regarded as *"unwritten law deriving from practice accepted as law".*[126] Thus, a custom's existence is contingent upon states' practice and behaviour. The behaviour must be deemed obligatory, not merely a courtesy extended by one state to another. Thus, for a custom to be binding, it must fulfil the two elements that determine the existence of customary law—the existence of *"a general practice"* and the *"acceptance of this practice as law."* This signifies that the practice in question must be observed by states as a matter of legal obligation—arising from coherence between *state practice* and *opinio juris sive neccessitatis* [an opinion of law or necessity].[127] These broad categories of international law may remain what they are—broad categories devoid of significant ramifications for I.E.L. Indeed, the enormously shaped scope of I.E.L. makes it challenging to situate customs in I.E.L. Yet, a careful look at the evolution of international law reveals how customs such as the right of ownership of property derived from personal labour were used to justify the evolution of international law.

In many cases, customs have been resorted to answer recondite questions of international law, including the prohibition of piracy.[128] Custom, therefore, is not a place but a vibrant resource for the adjustment and development of international law in line with the felt necessities of the time, informed by history. Thus, reconciling I.E.L. with customs is a particularly fertile space for legal scholarship in I.E.L. For Lawrence Boisson de Chazournes, although one of the cornerstones of I.E.L. is founded on custom, very few

[124] *See* Shaw, *supra* note 89, at 61; *see also* Fidler, *supra* note 93; *see* Rein Müllerson, *On the Nature and Scope of Customary International Law*, 2 Austrian Rev. Int'l & Eur. L. 341 (1997) (Neth.); *see* Byers, *supra* note 93; *see* Kammerhofer, *supra* note 93; *see* Tomka, *supra* note 93; *see* Antony A. D'Amato, *The Concept of Special Custom in International Law*, 63 Am. J. Int'l L. 211 (1963).

[125] *See* Frederick C. Beiser, *Savigny and the Historical School of Law, in* The German Historicist Tradition 214 (2011) (U.K.).

[126] *See* I.L.C., Draft conclusions on identification of customary international law, with commentaries, U.N. Doc. (A/73/10) (2018).

[127] *See* Continental Shelf (*Libya v. Malta*) 1985 Rep. 13, ¶ 27 (June 3).

[128] *See* Lawrence Azubuike, *International Law Regime Against Piracy*, 15 Ann. Surv. Int'l & Compar. L. 43 (2009).

principles of customary law can be founded on custom, and a few principles of customary law can be found in I.E.L.[129] One of the important aspects of customary IEL is the right of sovereignty over national resources.[130]Another strand of customary sources of I.E.L. has been the gradual attenuation of the absolute immunity of sovereigns before foreign courts. Before this era, sovereigns were immune from proceedings in foreign courts based on the doctrine of *"par in parem non habet imperium"*.[131] It is a doctrine of equality of sovereigns, and no state can take hold of another sovereign, as that would mean putting an equal sovereign on trial before another sovereign.[132] This forms the basis of state immunity. Yet the evolution of commerce and the increased participation of states in the marketplace through activities such as commercial procurement, sovereign debt bond issues, bilateral investment treaties, accession to multilateral frameworks, and other market behaviours has led to the evolution of the custom regarding the jurisdictional immunity of states.

The law states that a state's immunity in I.E.L. is qualified immunity. This qualified immunity entails that states cannot claim immunity from actions or claims arising from transactions in which they act in the marketplace. Therefore, there are two limbs to the qualification. On one hand, conflicts arising from issues or actions construed as *acta jure imperii* (executive acts of the sovereign) are immune from actions. In contrast, disputes arising from business or commercial transactions are construed as acts of a juridical nature and fall outside the realm of sovereign jurisdictional immunity. States such as the United States and the United Kingdom have codified these customs.[133] Also, the United Nations has followed this trend in the evolution of customs by adopting the *United Nations Convention on the Jurisdictional Immunities of States and their Property in 2004*.[134] This Convention is not yet in force, as it has not yet reached the required thirty ratifications under its *Article 30*.[135] Furthermore, the jurisprudence on this custom of

[129] *See* Laurence Boisson de Chazournes, *International Economic Law and the Quest for Universality*, 32 Leiden J. In'tl L. 401(2019) (U.K.).

[130] *See* G.A. Res. 1803 (XVII), (Dec. 14, 1962).

[131] Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220 (1952) (U.K.).

[132] *See* Yoram Dinstein, *Par in Parem Non Habet Imperium*, 1 Isr. L. Rev. 407 (1966) (U.K.).

[133] *See United States Foreign Sovereign Immunities Act (FSIA)*, 28 U.S.C. §§ 1602-1611 (1976); Rosalyn Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 Am. J. Int'l L. 423 (1977) (U.K.); The *United Kingdom State Immunity Act* 1978, c. 33 (U.K.); Georges R. Delaume, *The State Immunity Act of the United Kingdom*, 73 Am. J. Int'l L. 185 (1979).

[134] David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194 (2005) (on restrictive immunity under which governments are not immune from actions arising from their commercial transactions. This Convention is not yet in force since).

[135] According to U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 30 (Dec. 2, 2004) *The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument*

attenuated sovereign immunity can be found in such cases as *Trendtex Trading Corporation v. Central Bank of Nigeria*[136] and *Jam v. International Finance Corporation*.[137] Similarly, the concept of collective ownership of global commons and collective ownership of property has been justified by international law, grounded in principles of natural law and customary international law. This common ownership has been reflected in areas of international law that have significant ramifications for I.E.L., such as the law of the sea, exploitation of common resources in the area, and the management and exploitation of fish and marine organisms in those areas outside the jurisdiction of the littoral states. It is, therefore, imperative that I.E.L. scholars pay attention to these newer yet critical frontiers of I.E.L. and relations as we seek humane and inclusive approaches in the latter part of the twenty-first century.

Regarding *general principles*, Article 38(1)(c) of the Statute of the I.C.J. also contemplates the existence of general principles of law acceptable to states as a source of international law.[138] These principles also demonstrate that every legal system has several principles upon which courts can rely to settle disputes, especially in situations where neither a clear customary norm nor an existing treaty exists on the subject matter at issue. Yet, there is no taxonomy of international law detailing all the principles now acceptable by states or the major legal traditions that are part of international law. In this circumstance, scholarship in the field has explored the nature, sources, and application of general principles from two major standpoints. First is the set of scholars and publicists who submit that general principles of international law are derivable from natural law principles, including principles of justice and equity. Yet, a second set of thinking in the discipline construes general principles of international law from the standpoint of treaty and customary international law. In other words, general principles of international law are derived from customary international law and treaties, treaties and customs are the primary sources of international law.

---

of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

[136] Trendtex Trading Corp. v. Central Bank of Nigeria [1977] 1QB 529 (sovereign immunity should not extend to commercial transactions); *see also Trendtex Trading Corporation v. Central Bank of Nigeria*, 64 Int'l L. Reps. 111 (1983) (U.K.); Robin C. A. White, *State Immunity and International Law in English Courts*, 26 Int'l & Compar. L.Q. 674 (1977) (U.K.).

[137] *Jam and Others v. International Finance Corporation*, 188 Int'l L. Reps. 672 (2020) (U.K.); *see also Jam v. International Corporation* 481 F. Supp. 3dI (D.D.C. 2020); Chimène I. Keitner & Scott Dodson, *Jam v. International Finance Corp.*, 113 Am. J. Int'l L. 805 (2019) (U.K.); Marco Simons & MacKennan Graziano, *Jam v International Finance Corporation: The US Supreme Court Decision and Its Aftermath*, 5 Bus. & Hum. Rts. J. 282 (2020) (U.K.).

[138] *See generally* Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations - A Study*, 10 UCLA L. Rev. 1041 (1963); Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 Am. J. Int'l L. 279 (1963) (U.K.); Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, 117 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 201 (1966); Mavrommatis Palestine Concessions Case (Greece v. U.K.) 1924 P.C.I.J. (Series B.) No. 3 (Aug. 30) (on jurisdiction to hear as a matter of general principles of law common to all jurisdictions).

Notwithstanding the scholarly aptitude concerning the source of *general principles* of international law, there is a near consensus that general principles are part of international law.[139] Thus, these principles have since become relevant sources of international law, including standards of justice, equity, and public policy.[140] In one sense, general principles of international law are significant gap fillers in international law. They are articulated to settle disputes either by courts, arbitration tribunals, or quasi-judicial bodies such as diplomatic committees and administrative panels of international institutions; they clarify norms and assist in dispute resolution on matters that are either based on economic disputes or have strong resonance with them. In a recent study, the I.L.C. articulated a two-part method so as to identify general principles of international law. The first limb of the approach is an ascertainment of the existence of a principle common to the world's principal legal systems. When such a principle is identified, it requires coherence with the second aspect, which is that the principle so identified "has been transposed into the international legal system".[141] This two-part move for the identification of the existence of a general principle of international law means that publicists have to be open to comparative studies of law from different jurisdictions and subject areas as a means of correctly identifying and applying general principles of law which have been transposed or in the process of transposition into international law. Thus, a deliberate study of comparative law is a necessary engagement for scholars of international law.[142]

Many times, the I.C.J. and other juridical bodies have applied general principles such as res judicata, *estoppel*, *restitutio in integrum*, *reparations,* and *ex aequo et bono* in the settlement of disputes—in international law generally and in I.E.L. Often, the ramifications of these disputes for I.E.L. and the well-being of states—especially emerging markets—are illustrated through the range of resources, whether as arbitration awards or otherwise required to meet their judgment debt obligations or arbitral awards arising from these disputes. One case exploring the principle of reparation and restitution in international law is the case of the *Chorzow Factory (Germany v. Poland),*[143] where the Permanent Court of International Justice [hereinafter P.C.I.J.][144]noted that "it is a principle of international law that the reparation of a wrong

[139] *See* Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 Am. J. Int'l L. 734 (1957); *see also* Friedmann, *supra* note 138.
[140] *See* Shaw, *supra* note 89, at 82-85.
[141] Marcelo Vazquez-Bermudez, Second Report on General Principles of Law, I.L.C., A/CN.4/741 (April 2020).
[142] *See genrally* Bassiouni, *supra* note 94, on the pragmatic value of general principles in international law; *see also* Cheng, *supra* note 94; Shao, *supra* note 94; Lauterpacht, *supra* note 94.
[143] Factory at Chorzow (*Germ. v. Pol.*), 1927 P.C.I.J. (ser. A) No. 9 (July 26), at 27-28.
[144] The Permanent Court of International Justice is the predecessor of the current I.C.J.. Yet, the P.C.I.J. and its establishment was a watershed in international law and some of the principles and practices which have

may consist of an indemnity that corresponds to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law".[145] Equally, since the *Chorzow Factory Case*, more courts and tribunals have integrated compensation and reparations into their corpus juris.[146] In the *Gabčíkovo-Nagymaros Project* case,[147] the I.C.J. explored the extent of applicability of general principles of international law in which the "existing structures" can fulfil the obligations assumed by the parties to a treaty.[148] Particularly on the existence of a general "principle of approximate application" as canvassed by Slovakia, the I.C.J. refused to address the point as to whether such a principle exists in international law. Nonetheless, the Court surmised that even if such a principle exists, it could only be considered within the walls of the treaty.[149] Although these examples are not exhaustive, they illustrate the prevailing outlook in the discipline and how *general principles* of international law have evolved to continue determining the incremental expansion of international law—especially its economic aspects.

Still, the discourse on general principles of law acceptable to civilized states as a source of international law will not be complete without an appropriate reflection about the place of equity, albeit a secondary source of principles of general international law. In a sense, equitable principles emerge at the confluence between civil and common law traditions. These two traditions have equally influenced many legal systems globally for reasons ranging from historical shifts, such as the fusion of common law and the Court of Chancery in England, to European colonial exploits in later centuries. There is, therefore, evident hybridity of systems of law globally, with Roman-Dutch in South Africa and

become common in all aspects of international law trace their provenance to the P.C.I.J. *See*, James D. Fry, *The Permanent Court of International Justice in Global History,* 33 Duke J. Comp & Int'l L. 151 (2023); William D. Coplin & J. Martin Rochester, *The Permanent Court of International Justice, the International Court of Justice, the League of Nations, and the United Nations: A Comparative Empirical Survey*, 66 Am. Pol. Sci. Rev. 529 (1972); Leland M. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 Am. J. Int'l L. 728 (1938); Manley O. Hudson, *The Permanent Court of International Justice*, 35 Harv. L. Rev. 245 (1922); Edwin M. Borchard, *The Permanent Court of International Justice*, 218 N. Am. Rev. 1 (1923); John Bassett Moore, *The Organization of the Permanent Court of International Justice*, 22 Colum. L. Rev. 497 (1922).

[145] The Factory at Chorzów (Merits) (*Ger. v. Pol.*), Judgment, 1928 P.C.I.J. (ser. A) No.17, ¶(47) (Sept. 13); *see also* Felix E. Torres, *Revisiting the Chorzów Factory Standard of Reparation – Its Relevance in Contemporary International Law and Practice*, 90 Nordic J. Int'l L. 190 (2021) (Neth.); Ronald E.M. Goodman & Yuri Parkhomenko, *Does the Chorzów Factory Standard Apply in Investment Arbitration? A Contextual Reappraisal*, 32 ICSID Rev. - Foreign Inv. L.J. 304, 322 (2017) (U.K.).

[146] *See* Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 Mod. L. Rev. 1246 (2020) (U.K.); *see also* Andrés Jana, *Reparation in Investment Treaty Arbitration*, 110 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 288 (2016).

[147] Gabčíkovo-Nagymaros Project (Hung./ Slovak.), Judgment, 1997 I.C.J. 7 (Sept. 25).

[148] *Id.* ¶ 134.

[149] *Id.* ¶(76). *See also* Mari Nakamichi, *The International Court of Justice Decision Regarding the Gabcikovo-Nagymaros Project*, 9 Fordham Env't L. Rev. 337 (1998); Stephen Stec & Gabriel E. Eckstein, *Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project*, 8 Y.B. Int'l Env't L. 41 (1997) (U.K.).

Indonesia, civil law in Latin America, Eastern Europe, Japan, Cameroon, and Algeria. Thus, equitable principles, often expressed in maxims, are perverse and readily apparent in the face of international law. By extension, these equitable principles have also permeated international law. Therefore, equitable principles are not expressly mentioned in Article 38(1) of the Statute of the International Court of Justice (hereinafter, the I.C.J. or P.C.I.J.), before it international courts and tribunals often apply equitable principles in settling disputes. Usually, this is done to assist a good-faith interpretation of treaties.

In the case of the *Diversion of Water from the Meuse, Netherlands v. Belgium*,[150] Manley Hudson, in his separate opinion, had argued that although the Court has not been expressly authorised by its statute to apply equity as distinguished from law.

> *Article 38 of the Statute expressly directs the application of 'general principles of law recognized by civilized nations' and in more than one nation, principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it 'to decide a case ex aequo et bono' if the parties agree thereto.*[151]

By these assertions, such maxims as "he who seeks equity must do equity" should be treated as general principles of international law. Many aspects of I.E.L.—especially dispute resolution—have incorporated these equitable tenets, and they are frequently employed. Equally, although the principle of *ex aequo et bono* articulated under Article 38(2) of the Statute of the I.C.J. has not been the fulcrum of contentions before the I.C.J., it has also recurred frequently in arbitrations and other juridical platforms where parties have expressly agreed to the principle. So, it is worth noting that the express agreement of parties to the application of the principle of *ex aequo et bono* is a dispositive factor for its application in dispute settlement.[152]

---

[150] Diversion of Water from Meuse (Neth. v. Belg.), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70, at 321 (June 28).

[151] *Id.* ¶¶ 12, 14 of the Separate Opinion of Manley O. Hudson.

[152] *See generally* Hersch Lauterpacht, The Function of Law in the International Community 379 (Oxford Univ. Press 1933) (U.K.) (regarding the place of equitable principles in international law and that of ex aequo et bono); *see also* Louis F. E. Goldie, *Equity and the International Management of Transboundary Resources*, 25 Nat. Res. J. 665 (1985); Francesco Francioni, *Equity in International Law, in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2020) (Ger.); Markus Kotzur, *Ex Aequo et Bono*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2009) (Ger.); Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 Chi. J. Int'l L. 621 (2008); S. K. Chattopadhyay, *Equity in International Law: Its Growth and Development*, 5 Ga. J. Int'l & Compar. L. 381 (1975); North Sea Continental Shelf (Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20); U.N. Vienna Convention on the Law of Treaties, art. 31 (1), May 22, 1969, 1155 U.N.T.S. 331. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object

Furthermore, *judicial decisions and teachings of the most highly qualified publicists* form part of the recognised sources of law in international law. Thus, in many law cases, we often ask similar questions: What is the jurisprudence on this subject? What have the courts said on the matter? The value of these questions lies in the fact that judicial deliberations are akin to seeking to understand what the expressed will of the parties to a contract or treaty may mean in the face of a dispute. This is law in action, and courts are indispensable in shaping the contours and general dimensions of actions anchored in the law. In other words, despite the differences across jurisdictions and legal traditions, judicial bodies are legitimate sources of law. At a minimum, courts clarify the law and confer legitimacy on emerging norms and policy interventions. Judicial imprimatur has a way of justifying or prohibiting other stakeholders within the international system.

In recent years, the proliferation of international law tribunals has added to the allure and complexity of studying the decisions of courts as sources of I.E.L. Many tribunals deal with economic questions. For example, the W.T.O. Appellate Body is a quasi-judicial tribunal charged with jurisdiction to hear and determine trade disputes within the framework of the W.T.O. There is also the I.C.S.I.D. This expansion and proliferation are factors in the general question of fragmentation and have since been studied by the I.L.C.[153] The lack of a hierarchy of courts within the international system makes it even more fragmentary, but no less intriguing for curious international legal scholars. The study of these courts can be approached from three perspectives: general jurisdictional decisions, advisory opinions, and other foundations such as *res judicata.* General decisions of the I.C.J. on a subject matter help to establish international law and its developmental trajectory. For instance, in maritime and land boundary disputes, the I.C.J. was very busy formulating international law on the subject even before the enactment of the United Nations Convention on the Law of the Sea. Even with those complex marine boundary questions, the Court has managed to distill pragmatic principles and approaches toward their dispute settlements and ensure that the exploitation of economic resources is neither hindered nor allowed to lead to a breach of international peace and security.[154] Equitable principles and the general doctrines of equidistant boundary delimitation have often been adopted to settle disputes between

and purpose." Larry A. DiMatteo, *Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration*, 1 Chinese J. Compar. L. 221 (2013) (U.K).

[153] *See* The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the Int'l Law Comm'n, 58th Sess. (18 July 2006); *see also* U.N. GAOR, 57th Sess., Supplement No.10, ¶¶ 492-94, U.N. Doc. A/57/10 (2002).

[154] *See generally* Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18); North Sea Continental Shelf, Judgment, 1969 I.C.J. 3 (Feb. 20); Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1045 (Dec. 13); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgement, 2002 I.C.J. 303 (Oct. 10).*

the parties. Today, it is safe to argue that the guiding jurisprudence on land and maritime boundary disputes and the interpretation of treaties associated with them has significantly crystallised due to the decisions of the I.C.J. Increasingly, the work of the International Tribunal for the Law of the Sea also contributes to the development of international law in this area.[155]

Another way the I.C.J., as a Court, participates in creating international law and, therefore, serves as a source of international law is through the advisory opinion approach. This is particularly true in the non-contentious jurisdiction of the I.C.J. Here, the I.C.J. accommodates the peculiar position of international organisations such as the U.N. and its specialized agencies, who, not being states, cannot appear on their own before the Court but may do so in advisory opinion matters where particular questions are referred to the I.C.J. for clarification.[156] As with other sources of international law, Article 38(1) of the Statute of the I.C.J. equally recognises the teachings of the most highly qualified publicists as a source of law.[157] This is not surprising, considering the historical position of publicists, including institutes of law—especially in the civil law tradition, regarding the exposition and advancement of law. Thus, the history of international law bears testimony to the contributions of legal scholars to the development and expansion of international law. Some of these legal scholars were so influential in the field that scholars established awards in their honor. Yet the intriguing aspect of the provision "most highly qualified publicists" is that no standard or criteria are set out regarding how a publicist comes to become a "most highly qualified publicist".[158] This leaves the provision open to various interpretations. In that regard, some scholars have come to view it from the perspective that the teaching of the most highly qualified publicist may be considered within the broad divisions of state-empowered institutions, such as the I.L.C., which the U.N. authorized to study and assist in the progressive development of international law.

[155] *See* Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, 26 Penn State Int'l L. Rev. 289 (2007). *See, e.g.*, the "Monte Confurco" (Sey. v. Fr.), Prompt Release, Case No. 6, Judgment of Dec. 18, 2000, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/published/C6-J-18_dec_20.pdf (claims of breach of France's exclusive economic zone and bonds on the ship was resolved by the tribunal relying on general treaty interpretation and application of UNCLOS).

[156] *See generally* Buergenthal, *supra* note 95; H. C. Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*, 38 Transactions Grotius Soc'y 125 (1952) (U.K.).

[157] *See* Helmersen, *supra* note 96.

[158] Sivakumaran, *supra* note 96.

B. BEYOND ARTICLE 38—THE OTHER SOURCES

It is now considered in the discipline that Article 38(1) of the Statute of the I.C.J. is not exhaustive on the sources of international law.[159] Hence, despite the well-developed scholarship on the subject, the debate about the sources of international law has not been laid to rest.[160]In the same vein, soft law as a juridically essential set of standards, guides, guidelines, non-binding legal agreements, and policy prescriptions is ubiquitous and emerges from formal and informal sources.[161] In I.E.L., soft laws' readily noted sources and origins include international institutions such as the U.N. and its specialized agencies, the World Bank Group, the International Monetary Fund, and other global financial and governance institutions. At other times, they can emerge from sectional, ad hoc, and associated groups such as the G7, the Organization of Economic Cooperation and Development , the Basel Committee on Banking Supervision, the World Trade Organization, and other platforms with significant footprints in the making of I.E.L.[162] These platforms are, therefore, the primary sources of soft laws in I.E.L. Thus, from trade to mining, financial regulation, and corporate accountability for human rights violations to insurance and economic stability, a cadre of soft laws governs one aspect of I.E.L. or another. This has three ramifications for I.E.L. First, they map into the existing structures of I.E.L. in ways that are not transformative. Second, there is a commitment to certain normative positions. Third, it creates a closed system of norm creation. Regarding the mapping of existing structure within I.E.L., soft laws are typically an incremental extension of the approaches, laws, and institutions of I.E.L.

---

[159] *See* Aldo Zammit Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649 (2013) (U.K.) (highlighting the literature on sources of international law and the significance of *article 38(1)* of the statute of the ICJ although it has been criticized as belong underinclusive).

[160] There is currently an ongoing work by the ILC on other sources of International Law—especially "non-legally binding agreements." *See* Mathias Forteau, Non-Legally Binding International Agreements (Les Accords Internationaux Juridiquement Non-Contraignants), U.N. Doc. A/77/10. *See also* Fritz Münch, *Non-binding Agreements*, 29 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg J. Int'l L. 1 (1969) (Ger.); Schachter, *supra* note 41 (perhaps Schachter's title was too early because what we have seen since 1977 is not a sunset on non-binding international agreement, but its proliferation and recent years and this proliferation has been signification on subjects of commerce and environmental justice). Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 Int'l & Compar. L.Q. 901 (1999) (U.K.); *Non-Legally Binding Agreements in International Law*, Committee of Legal Advisers on Public International Law - Council Of Europe, https://www.coe.int/en/web/cahdi/non-legally-binding-agreements-in-international-law. (last visited May 12, 2025); Harsh Mahaseth & Karthik Subramaniam, *Binding or Non-Binding: Analysing the Nature of the Asean Agreements*, Int'l & Compar. L. Rev., June 2021, at 100 (U.K.); Wessel, *supra* note 61; Andreas Zimmermann & Nora Jauer, *Legal Shades of Grey? Indirect Legal Effects of 'Memoranda of Understanding'*, 59 Archiv des Völkerrechts 278 (2021) (Ger.).

[161] *See* Eibe Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 Eur. J. Int'l L. 58 (1991) (U.K.) (highlighting the complication of the sources of international law to include declarations, resolutions and other quasi juridical acts of international organisations such as the UN).

[162] *See* Karmel & Kelly, *supra* note 75.

They hinge on institutions such as the I.M.F., the World Bank, or other international financial institutions for their extensions. Sometimes, they penetrate through the boards of these institutions to emerge. Yet, the more significant majority of communities and countries on the receiving end of these policies often have limited access to the spaces where these approaches are brewed and sanctified for onward application. For instance, the report of the U.N.C.T.A.D. consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing notes the emergence of the principles; thus,

> [A]n expert group was established to contribute to the process of drafting these principles. The group comprises world-renowned experts in law and economics, private investors, N.G.O.s, and senior representatives from the I.M.F., the World Bank, and the Paris Club who participate as observers in this group. After several formal meetings and exchanges of ideas, these principles emerged. U.N.C.T.A.D. is now reaching out to get national and regional feedback on the design and possible and voluntary implementation process from U.N. Member States through consultative regional meetings.[163]

These world-renowned authority groups often comprise experts living and working in the global governance centres of Washington, New York, Geneva, London, and Paris. Equally, they also privilege private institutions and law firms in these centres whose perspective on the implications of critical economic law sometimes differ radically from those of farmers in Salt Lake City, Punjab, or Sokoto. Consequently, there is a high possibility of a diametrical disconnection between these commitments and the needs of the small farmer or business enterprise living on these peripheries. Equally, there is sometimes a disparity between the recommendations and the problems they seek to settle. It is also worth considering how subaltern experts are incorporated into these arrangements, which ultimately lead to the adoption of principles and standards that are subsequently codified into soft laws in the field. Secondly, the commitment to certain normative foundations is also evident in the framing, taxonomies, and conceptual arrangements. For instance, they give verve to market-driven ideals and market structures, such as commitment to deregulation.

The creation of the Washington Consensus has a folk aspect, with limited participation, yet it has become an integral part of I.E.L., influencing economic and social impact investments. Equally, the Washington Consensus has ramifications for distributing opportunities and wealth in ways that have made indelible marks on the

[163] *See* United Nations Conference on Trade and Development, Principles on Promoting Responsible Sovereign Lending and Borrowing, (Jan. 10, 2012), [hereinafter U.N.C.T.A.D.].

developmental outlook of states, especially in Latin America and Africa. The third point is that there is also a seemingly closed system of norm creation in the field, facilitated by the increased reliance on soft law standards. Arguably, reforms are difficult to achieve from a closed system for rulemaking in I.E.L. This is so because there is scarcely any significant opportunity for the cross-fertilization of ideas necessary to adjust the jural lenses of the institutions and centres of norm-making in I.E.L. Take, for example, the Basel Committee on Banking Supervision's Basel Standards. Each time a failure occurs in the system, a minor adjustment is made to add a new layer of prudential indicators to the set of indicators for measuring risks and other financial stability questions in the field. Thus, we have Basel I, Basel II, Basel III, and so on. The potential inertia and limited imagination that can arise from this commitment to weaving a little more iteration into the instruments is self-evident.

Furthermore, non-binding agreements are archetypal examples of soft law. There are many of them these days that one cannot effectively keep track of, some of them, and where they are in the broader schema of I.E.L. evolution. Non-binding agreements with profound ramifications for economic law and human well-being include the Paris Climate Accords 2016, the Rio Declaration 1995, and the Stockholm Declaration 1972.[164] Closely aligned with non-binding agreements are also a raft of policy prescriptions and model rules that govern many aspects of I.E.L. Many policy prescriptions in I.E.L. originate from model rules. In a sense, just like the discipline of economics, which has since evolved into a taxonomy of models and more modeling depending on the subject matter, I.E.L. has become a foundation of models. Examples include model arbitration clauses, model arbitration rules, model contractual clauses, model choice of law clauses, model most-favoured-nation clauses, model national treatment clauses, model dispute settlement mechanisms, and model judgment enforcement rules and agreements. Beyond these rules and models are also model bilateral investment treaties, model build-operate-transfer contracts, and model trade agreements. In sovereign debts, we have model common action clauses (C.A.C.). Beyond serving as guides, these models often become the operational tools of foreign missions, chambers of commerce, and other relevant organisations, institutions, and bodies involved in norm formation in I.E.L.

[164] *See* Philippe Gautier, *Non-Binding Agreements*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2022) (Ger.).

C. PERSISTENCE OF ESTABLISHED SOURCES OF NORMS

However, there is no doubt that these foundations persist because they already have leverage in the field and, therefore, can ensure the path dependence that privileges these leverages and maintains the structures of I.E.L. There is scarcely any path to reform in the global economy that can emerge from such walls of embedded liberalism. If anything, it is a continued march towards the co-optation and domination of other potential pathways to sustainable development and shared growth. Imagining a new path to sustainable development means reimagining these closed rules and soft law generation systems in I.E.L. Soft laws heavily rely on soft powers. Hence, they are scarcely dependable sources of reforms in I.E.L. For instance, many states opt out of soft law standards even when they are full members of the organisations that produce them. Whereas reservations are normal in treaties, wholesale avoidance by opting out is a significant factor to consider in the case of soft laws.[165]

The evolution of I.E.L. has often followed the steps of power relations. The power relations underpinning I.E.L. are evident in the structures arising from the histories of conquest, colonialism, and other forms of domination. Indeed, economic sanctions and other exclusionary measures have played a significant role in the opportunities and possibilities for development of states and communities around the world. In many situations, the impoverishment of populations around the world and the allocation of the undue burdens of I.E.L. have rested on these paths, which were charted by imperial orders. This also explains the central role of multinational corporations, mercantile associations, and guilds in shaping international law. In the post-World War II era, the Bretton Woods institutions have significantly influenced I.E.L.s and standards, for example, through the Washington Consensus. [166]

These standards and laws engender path dependency because these institutions are omnipresent in the development programmes and policies of states. For example, sovereign borrowing has become a primary source of development finance, a creed in international law. Despite the uncertainties and mixed correlations between the level of borrowing and the level of development, sovereign borrowing continues to grow. Some countries operate as if they are satellite stations of the World Bank and the I.M.F. Yet,

[165] *See* Memorandum on the Organization for Economic Co-operation and Development (OECD) Global Tax Deal (Global Tax Deal), 2025 Daily Comp. Pres. Doc. 150 (Jan. 28, 2025) (urging the Secretary of the Treasury and the Permanent Representative of the United States to the OECD to notify the OECD that "any commitments made by the prior administration on behalf of the United States with respect to the Global Tax Deal have no force or effect within the United States absent an act of Congress adopting relevant provisions of the global tax deal").

[166] *See* John Williamson, The Washington Consensus as Policy Prescription for Development (Jan. 13, 2004) (unpublished manuscript) (Peterson Institute for International Economics).

these institutions often do not change their constitutive instruments to create equal participatory opportunities. They are also not creating new hard laws; instead, they establish soft regulations and standards tailored to meet the new dynamics of the global economy, while retaining the levers of opportunity and control where they are. This takes us to the methods of (re)making soft laws in international law, including working groups, study groups, committees, and commissions.

2) METHODS, POLITICS, AND DIFFUSION

Law-making methods—either through legislative processes, judicial deliberations, or quasi-judicial administrative processes—often have ramifications for the politics and values embedded in the laws and their mode of transmission within the legal system. Soft laws also do not escape these primary considerations regarding methods of making, politics of (re)making, and the diffusion or general norm dispersal within the system. This article interrogates these ramifications in the following section.

A. METHODS OF (RE)MAKING SOFT LAW

The above factors draw us into the methods of (re)making soft I.E.L. The existing commitments and pathways in the field require that soft laws be (re)produced through mechanisms that do not disrupt these pathways. Soft laws in I.E.L emerge through four significant iterations, which, from the outset, do not commit to the goal of producing a treaty obligation to govern the subject matter in focus. These four observable iterations are (1) expert bodies such as the International Law Commission and (2) other bodies empaneled by plenary organs such as the Board of Governors of the World Bank; (3) soft consultations, symposia, and workshops (4) declarations, directives, and policy statements issued by Central Bank Governors of the G7 countries. Expert bodies, such as the I.L.C., have since gained global acceptance as juridical or quasi-juridical bodies capable of studying and setting out rules, pronouncements, or agendas for legal development in different aspects of international law. These rules or pronouncements are not self-executing, but they often gain salience, sometimes due to the quality of the work of these experts or the reliance of more formal institutions, such as the I.C.J., on the work of these expert bodies for dispute settlement. Soft consultation is often an entry point towards producing soft law in I.E.L. Sometimes, it is also depicted as a preliminary consultation, a call for opinions and thoughts.

The ideas generated from these preliminary foundations are then articulated into working papers, white papers, and other instruments that will form the groundwork of further consultation through conferences, symposia, and workshops on the subject of interest. The topic of interest can range from extractive industry policies to market deregulation. An early or preliminary consultation has two powerful effects on the crystallization process of soft laws. First, they sow seeds of ideas about subjects and topics of interest to institutions of global governance through the soft law-making process. If, for instance, the I.M.F. invites papers or opinions on modalities for facilitating market liberalization or business facilitation, it is readily perceptible that a keen observer will immediately recognise that these are subjects of interest to these institutions. This may affect scholarly commitment to research and work on topics that are of manifest interest to the institutions of global governance.

This can also be the case with the W.T.O. and any other institution with significant economic governance capacity. The second limb is to signal to the relevant public what is indispensable to the institutions. This signaling is also a way of driving conversations in both policy and epistemic spaces, thereby taking the initiative in the field rather than allowing for the organic development of the potentially multiple sets of ideas and normative frameworks possible within the plural foundations of the global economy. Thus, the seed sown in epistemic spaces and the signals given to the relevant public, such as government institutions, prime these institutions and spaces for the next level of engagement. In a sense, consultation tests the waters and prepares the soil for the effective implementation of laws on a particular subject. It also sets the tone for the subsequent activities, including workshops, symposia, and technical reviews. These workshops, symposia, and technical committees form more vital concentric spaces of norm cultivation and elucidation. They create an opportunity to enlarge the consultation space, articulate views, exchange opinions, debate issues, and produce a summary of the papers presented. These workshops can create far-reaching ripples in policy-making, whether as executive summaries or full-length reports. At times, the outcomes of these workshops are the final building blocks for policy declarations.

Another pathway in forming soft I.E.L. rules and norms is that of expert bodies such as the I.L.C.[167] Thus, there are occasions whereby the outcomes of these workshops are inconclusive and are, therefore, further referred to working groups, expert bodies, or technical committees to harmonize or review to produce a working document for the international institution in question. Sometimes, they may be referred to the heads of relevant units, such as the head of legal, the director of risk asset management, and the

[167] *See* Baylis, *supra* note 4.

authority responsible for financial stability, among others, to review and approve for the governing board's approval. Once this is approved accordingly, it becomes effective and may even produce more profound systemic shifts than hard laws of international economic governance. Even then, they are pliable in the hands of these powerful institutions, and they can be adjusted depending on the policy agenda of the successive heads of these systemically crucial economic governance institutions. A combination of these efforts, along with the contributions of working groups and expert bodies, also facilitates the development of these soft laws. Experts with global visibility often constitute these working groups. The difficulty is that those with the usual ability are usually experts in the global North and institutions where legacy public media can capture their activities, thus placing them at the forefront of norm articulation and soft law-making. Little wonder then, that these expert committees are often overcrowded with experts from European and North American backgrounds. These working groups submit reports at the end of their deliberations and work, which are then used to produce final records and documents that govern the subject matter or, at a minimum, serve as evidence of emerging soft law standards.

Another vital pathway of norm-making in soft I.E.L. is that of municipal institutions with the capacity to shape economic trajectories. In many cases, the emergence of or creation of soft laws does not follow all these detailed processes of normativization; they may simply be the articulated opinions of the plenary executive offices, such as the heads of federal reserve banks or central banks of the G7 countries. This is extended to incorporate G20 countries or countries under the O.E.C.D. in more generous situations. Suffice it to say that the pathways for making many soft law standards in I.E.L. do not usually extend to issues such as poverty, inequality, and distributive consequences of law. [168] The goal is to get businesses and other allied interests to thrive. Factors such as efficiency and incentives may influence norm formation, as driven by these entities. Still, these are limited in their overall impact on the developmental needs of many emerging markets. This section dovetails into the next, which explores the politics of norm-making and diffusion within the discipline.

B. THE POLITICS OF SOFT LAW MAKING

The emergence of international law norms is often considered dependent on the practices of states, which are regarded as the primary makers of international law. These

[168] It is worthy to recognise the effort made on general accountability of businesses for their violation of human rights. *See generally* Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, ASIL Insights (June 18, 2008),https://www.asil.org/insights/volume/12/issue/12/2008-ruggie-report-framework-business-and-human-rights.

plenary powers of rule-making granted to states as sovereigns have increasingly been mitigated, particularly in I.E.L. Thus, this has been reflected in the adjustment of sovereign prerogatives in regulatory control and the enforcement of obligations. Today, International Organizations [hereinafter I.Os.] have become quasi-sovereigns, influencing the making of international law. While this has been praised in some spaces as critical to the flexibilities needed for global governance, what is unmistakable is that the flexibilities have ramifications for all, including those living in emerging markets. Even before the significant disruption in the field by I.Os., international law had a dose of democratic deficit. International law facilitated the superimposition of the privileged customs and general principles of the "civilized" as the law of all humanity. In this Section, the article examines the democratic deficit from the perspective of uneven power relations, juridical commitments, ambiguities, and ambivalence in the field. Soft law rules are potential tools of obligation avoidance and perhaps soft power diplomacy. This has implications for the question: who gains from the expanding reliance on soft law standards in I.E.L?

One way of looking at the problem of democratic deficit is that participation is crucial to making I.E.L., whether soft or hard. Yet, I.E.L. relies so much on power relations that are historically entrenched and exclusive. G20 economies or other powerful states usually set the standards, which then become the template for any further evolution of the soft law. A review of the adjustments in the international economic system since the end of the Cold War, and the soft laws playing significant role in many spheres of the global economy such as taxation, environment and human rights shows the influence of robust economies and states such as those of the E.U., the O.E.C.D./G20. These powerful states and economies are also shapers of soft normativity through their state practices and substantial footprints in international institutions, such as the World Bank and the I.M.F. Even before then, the efforts of developing states, especially in Africa, Latin America, and South Asia to push for inclusive reforms have yielded minimal results, which is partly explained by their limited representation in influential institutions such as the O.E.C.D./G20 Base Erosion and Profit Shifting Project [hereinafter B.E.P.S.]. Arguably, the New International Economic Order, championed by developing states in the 1960s, failed because much of the economic interest was hinged on geopolitics and reforming the frameworks that existed before World War II, including readjusting economic access and opportunities for all. The goals entailed readjusting these political paradigms.[169] The profoundly entrenched I.E.L. and political power relations require

[169] *See generally* Victor McFarland, *The New International Economic Order, Interdependence, and globalisation*, 6 Human.: Int'l J. Hum. Rts. Humanitarianism & Dev. 217 (2015); *see also* Nils Gilman, *The New International Economic Order: A Reintroduction*, 6 Human. J. 1 (2015).

tailored reforms.[170] Although soft laws can inspire some reforms, it is argued that the democratic deficit stemming from the political power anchorages of I.E.L. is more acute when considering soft laws, because they often recline on global governance institutions such as the World Bank with carefully defined mandates, perspectives, and systems of participation in norm generation and soft law development.

Participation may be explored from two angles: procedural and substantive involvement. Regarding procedural participation, it is worth recognizing that the substantive issues to be deliberated or considered are often preempted by the terms of reference and available list of experts who can serve as consultants to these international institutions. Procedurally, meaningful participation in making soft law and its platforms requires access to information and epistemic spaces where the original ideas are conceived and debated.

Therefore, equal participation opportunity for all regions of the world requires education and access to relevant information as a first step. Similarly, there is limited gender representation in the platforms that produce these soft laws. Furthermore, there is the high cost of legal training and the development of expertise and competence to effectively engage at the reified levels of I.E.L., where these debates and discussions are held. For many developing countries, the post-1991 policies of defunding public education and other social policy alterations arising from the structural adjustment policies of the era have meant that there is even less expertise for them to engage effectively and in the best interest of their people at these levels. In many cases, they rely on outsourcing such representations to foreign law firms and experts in London, Geneva, Paris, and Washington for meaningful participation. Yet, such participations have their respective limitations, considering the nature of the politics of I.E.L. Often, this also gives rise to participation fatigue, and developing states have to accept whatever conditions make sense, regardless of the distributive impact this may have in their states. So, despite the air of deliberativeness and consensus-building highlighted in the activities of international institutions, a significant democratic deficit still exists in the system regarding how these soft law standards are generated and disseminated in the field.

In another sense, the politics of soft law-making can also be considered through the lens of judicial commitments and obligations arising from law. The law creates duties, rights, privileges, and responsibilities, and sometimes serves as the foundation

[170] *See* G.A. Res. 3201 (VI), Declaration on the Establishment of a New International Economic Order, at 3 (May 1, 1974); *see also* G.A. Res. 3202 (VI), Programme of Action on the Establishment of a New International Economic Order, at 5 (May 1, 1974).

for the juridification of many quasi-relations within the corpus juris.[171] Therefore, when a law is prefixed with the word "soft", it does not mean that the law in question is weak or ineffective, as we would say in phrases like "soft lettuce" or "soft tomato". The prefix is only a taxonomic exercise that in no way diminishes the potential capacity and ramifications of such a soft law within the corpus juris and the system of law in question. In I.E.L., soft law retains the capacity to create juridical commitments and jurally-recognised relationships—although in different ways than would have been the case with *hard* law. Hence, we see the relevance of soft law on numerous occasions, in various issues that impact the global economy.

There are *four* crucial pathways through which the legal landscape of I.E.L. is increasingly sculpted by soft law and its juridical extensions. First, soft law standards serve as instruments for ratings and, in some cases, as evidence of measurable standards within an economy. This is also evident in the design of other general measures, such as indicators of prudential banking policies. They could also be accepted as international best practices that govern the activities of institutions. Second, soft laws, once they are produced, also serve as instrumentalities of dominating epistemic spaces and consequently excluding what may be deemed *unorthodox*. This is because institutions of global economic governance often have the leverage to preempt developments in the field by publishing guidelines and approaches. This can be seen in the disposition of the O.E.C.D. policy and the Bretton Woods Institutions. For instance, the O.E.C.D./G.20 B.E.P.S. is shaping a significant part of the developments in the area of international taxation. The priorities of B.E.P.S. are to combat tax avoidance by multinational corporations. The fifteen-point Action Plan of the O.E.C.D. serves as a framework for achieving the organisation's objectives in international taxation. Indeed, B.E.P.S. tools and guidelines are being championed and advocated across jurisdictions, including in Non-Member States as standards for meaningful regulation and general governance of international tax.[172] The O.E.C.D. also has an OECD tax treaty.[173] When these guidelines and models are produced, they create a sense of completeness in the imagination and enunciation of what should be done regarding the subject matter. This makes other

[171] Wesley Hohfeld is acknowledged as having espoused the idea of jural relations in American Law. This has since become part of the general jurisprudence of understanding how the law operates especially as it relates to rights, duties, immunities, powers, and privileges within our institutions and social systems. It is broadly a functional articulation of how things work in an adversarial system. For more general understanding of the idea of jural relations, *see generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); *see also* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Luca Fiorito & Massimiliano Vatiero, *Beyond Legal Relations: Wesley Newcomb Hohfeld's Influence on American Institutionalism*, 45 J. ECON. ISSUES 199 (2011).

[172] *See* Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 2017 ERASMUS L. REV. 76.

[173] *See* John F. Avery Jones, *Understanding the OECD Model Tax Convention: The Lesson of History*, 10 FLA. TAX REV. 1 (2009).

efforts at reimagining the policy and legal foundations space redundant. The downside of this situation is that approaches from indigenous and subaltern spaces are continually marginalized and peripheralized. It eliminates or, at best, generally circumvents broader participation and curation of consensus, especially as between the big and smaller economies or developed and developing economies, in the formation, adoption, and dissemination of rules in I.E.L.

This leads us to the third point, which is eliminating the need for deeper democratic treaty commitments. As principal international lawmakers, states rely on treaty-making to articulate international law. The importance of this is the need to allow for democratic and broad participation of states. Broad participation helps articulate different concerns and viewpoints on the subject matter. In the post-independence period, the consensus-building that arises from this broad participation has seen smaller states and formerly colonized peoples increasingly seeking to reform the I.E.L. foundations, many of which were built in colonial times. For instance, the U.N. Declaration on the Sovereignty over natural resources.[174] Another way of eliminating broad democratic participation is through juridification. Here, current ideas are assimilated into the normative fabric of international law—often [175] through the plenary organs of international institutions. Thus, once these principles and political positions are accepted, they sediment and percolate into the deeper foundations of the systems of norm-making in international law.

Furthermore, there is also the idea of conditionalities for accessing the programmess and development activities of international institutions. In this regard, when soft laws are formulated and adopted, they are depicted as non-binding and, therefore, merely serve as guidelines, policy directions, and evidence of evolving standards in the field. For instance, the U.N. Guidelines on Corporate Accountability is a non-binding instrument for evaluating businesses' human rights commitments.[176] These guidelines may seem non-binding, but they establish minimal standards for assessing the activities of corporations. Another example is the Basel Standards for banking

[174] *See* G.A. Res. 1803 (XVII), Permanent sovereignty over natural resources, (Dec. 14, 1962); *see also* Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 Am. Bar Ass'n J. 463 (1963); Sangwani P. Ng'ambi, *Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, 12 Loy. U. Chi. Int'l L. Rev. 153 (2015); Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law*, Melb. J. Int'l L., Mar. 2014, at 1 (Austl.).

[175] On the general idea of juridification, see generally John Gardner, *The Twilight of Legality* (Oxford Legal Stud., Research Paper No. 4/2018) (on juridification as the "proliferation of legal norms or legally recognised norms") (U.K.).

[176] U.N., Guiding Principles on Business and Human Rights, (Jan. 1, 2012), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

regulations.[177] Although the Basel Committee on Banking Supervision primarily produces them, they are presented as best practices and required as minimum standards for central banking. These are offered as global prudential standards expressed as non-binding, but they have a significant juridical impact on the worldwide economy. They influence the perception of financial rating and stability in economies. To be listed as non-compliant based on the "non-binding" Basel Standards would naturally produce nightmares for any Central Bank Chief. Hence, enforcement is achieved by peer perception or reputation. Although reputation is essential in business and the global economy, it is often the case that in the real quest for economic advantage, states are very pragmatic.[178] These templates of standards are frequently adjusted by adding new layers of compliance indicators to respond to critiques and changing economic topography. Thus, we have seen Basel I, Basel II, Basel III, and Basel IV all providing global (prudential) financial standards.

Additionally, international law adheres to two fundamental principles—equality of states and the notion that no one can bind themselves over; they cannot be bound in law. This sovereign equality is also reflected in international law-making, primarily through international institutions, except in those exceptional circumstances where votes are weighted and membership and deliberative capacities depend on each sovereign's allotted weight. This approach is found in plenary organs, such as the Security Council of the U.N. and the Board of Governors of financial institutions, including the I.M.F. and the World Bank Group. The allotment of weight is often expressed in the constitutive document of the organisation, such as the U.N. Charter on the Security Council and the Constitution of the I.M.F. and the World Bank Group.[179] These plenary organs have a profound influence on the development of policy prescriptions and guidelines, which in turn affect global economic standards.

Consider, for instance, the creation of the Washington Consensus, which evolved into a standard of wise economic policy and minimum requirements for market policy liberalization and financial reform. Although these were policy guides recommended as non-binding, they had a positive impact on many economies because they reflected compelling public opinion, affecting the activities of economies, especially in developing

[177] *See generally* Emily Jones & Alexandra O. Zeitz, 2017. "The Limits of Globalizing Basel Banking Standards," Journal of Financial Regulation, Oxford University Press, vol. 3(1), pages 89-124 (U.K.); Emily Jones & Alexandra O. Zeitz, *The Limits of Globalizing Basel Banking Standards*, 3 J. Fin. Regul. 89 (2017).

[178] *See* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. Legal Stud. 95 (2002); *see also* Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 Brook. J. Int'l L. 68 (2004), available at SSRN: https://ssrn.com/abstract=970087.

[179] *See* William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 Fordham Int'l L.J. 910 (1990) (arguing that the current weighted voting system in these institutions is essential for the efficient operation of the institutions).

economies. Equally, they provided the minimum standards for participating in the development policy programmes of the Washington-based institutions. Today, there is scarcely any subject of international economic importance where the prevailing institutions of I.E.L. have no standard template articulated as guidelines, but are implemented almost as compulsory requirements for accessing the services and participating in the institutions' programmes. These, therefore, constrict the field of operations of states and minimize the need for thorough democratic deliberation. The non-binding nature of these codes, as produced by these global governance institutions with significant democratic deficits, does not diminish their capacities to reconfigure the landscape of I.E.L. in ways that have far-reaching consequences for communities, especially in developing economies.

For instance, the I.M.F. and the World Bank Group have developed "Standards and Codes" in twelve policy areas.[180] These standards and codes are not binding on states. Still, they are established as "benchmarks of good practices", and they define standards and regulations to mean "sets of provisions relating to the institutional environment—the 'rules of the game'—within which economic and financial policies are devised and implemented." Countries with well-regulated and transparent institutions tend to demonstrate better economic performance and greater financial stability. It is thus in the countries' interest to adopt and implement internationally recognised standards and codes[181]A cursory review of the quoted excerpt shows two critical points—the representation of these standards and codes as internationally recognised benchmarks, "the rules of the game", and the embedded threat that "it is in the countries' interest" to adopt and implement these standards and codes.

[180] For instance, there are policy benchmarks and standards on such subjects as: Association of Insurance Supervisors, Insurance Core Principles (2019); International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (May 2017) https://www.iosco.org/library/pubdocs/pdf/ioscopd561.pdf; International Association of Deposit Insurers, Core Principles of Effective Deposit Insurance Systems (Nov. 2014), https://www.iadi.org/uploads/cprevised2014nov.pdf; WBG, Committee on Payments and Market Infrastructures & Technical Committee of International Organization of Securities Commissions, Principles of Financial Market Structures; World Bank, Principles for Effective Creditor/Debtor Regimes (2016); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law, Sales No. E.05.V.10 (2004); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, Sales No. E.12.V.16 (2012); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law, Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups) (2020); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law for Micro- and Small Enterprises, Sales No. E.22.V.18 (2022); G.A. Res. 59/40, (Dec. 2, 2004), https://docs.un.org/en/A/RES/59/40; OECD, G20/OECD Principles of Corporate Governance (2023); IAASB, International Standards on Auditing; Financial Action Task Force, Revised Recommendations on Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) (Nov. 2023).

[181] IMF, *Fact Sheet: Standards and Codes: The Role of the IMF*, (Mar. 1, 2021).

No state can hope to do business with the I.M.F. and the World Bank unless it is ready to abide by these standards and codes. What is often ignored is the provenance and process of curation behind these standards and codes. Usually, the processes of articulating these standards and codes are exclusively controlled by these institutions, with debate regarding the potential externalities of these standards and codes, especially in emerging economies. It, therefore, goes without saying that the superimposition of these standards shrinks the needed space for thorough-going deliberations that would take into consideration the real concerns and interests of countries whose economic trajectories are often affected by these standards and codes developed in small policy spaces and dispersed accordingly without the input of the subaltern. Equally, it minimizes the need for a treaty or charter, as engaging in the laborious work of treaty-making and consensus-building is difficult; thus, if an institution can convene a policy dialogue or constitute a committee to produce a draft set of codes and standards based on carefully enacted terms of reference.

More to the issue of democratic deficit and the politics of rule formation in international economic soft law is the persistence of ambiguities and ambivalence. This is connected to the fact that a significant factor in international law is the absence of a general and globally recognised legislature. Thus, private and public entities participate in making rules for I.E.L. engagements. Consequently, although international law arises from treaties, customs, practices, and general principles that states recognise, I.E.L. depends a lot on private commercial activities of businesses and customs of trade such as *Lex Mercatoria*.[182] In the current era, there is an amalgam of international institutions constituted by states and sometimes a combination of states and other supranational entities such as the E.U. as a Member of the World Trade Organization.

In many cases involving financial and other economic regulations and standards, there is an overwhelming ambiguity regarding the provenance of these laws. Equally, a general ambivalence toward economic justice also persists. The ambiguity and ambivalence in these regulations towards questions of justice make it easy for the institutions to omit issues related to these questions. For example, there is a commitment to trade facilitation as a means of encouraging trade among states. This includes ensuring that barriers—both tariff and non-tariff barriers to trade are obviated. This aligns with the broader model of assisting businesses and investments globally.

[182] The provenance and general evolution of Mercatoria is a subject of intense scholarly deliberations. *See generally* Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State,* 14 Ind. J. Glob. Legal Stud. 447 (2007); *see also* Ralf Michaels, *Legal Medievalism in Lex Mercatoria Scholarship*, 90 Tex. L. Rev. 259 (2012); Emily Kadens, *The Myth of the Customary Law Merchant*, 90 Tex. L. Rev. 1153 (2012); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 Am. U. Int'l L. Rev. 685 (2006).

C. NORM DIFFUSION AND APPLICATION

Legal norms, rules, or standards can be juridically formative in many ways. However, if they germinate and remain in the same place, they will likely not be very systemically important. For instance, the idea of juridical equality of all human persons was not always a given. It had emerged from several norm-making traditions, including ethical, religious, and indigenous. Its movement has helped its evolution, and as it moves, there is a continued interrogation of its extensions and what it may yet accomplish. This can also be seen in the principle of judicial equality among states, which is a fundamental canon of international law today. It is essential to recognise that when laws or rules evolve and change, they can trigger other activities within a legal system. Together, these activities can lead to legal reform or expand existing frameworks within the systems. Norms are, therefore, nuggets of change, certainty, and stability within a legal system. However, how these laws move from their spaces of germination to other places of juridical importance or function is quite an exciting preoccupation of legal scholars in comparative and international law.[183]

One of the ways of legal movement has been legal transplants, which studies how laws and legal frameworks move from one place to another.[184] Sometimes, what is transplanted is a piece of legislation. At other times, it could be a constitution or practice. Yet, many times, as in colonial periods, entire legal systems or aspects of legal systems are transferred from one jurisdiction or legal tradition to another. This can be seen in the transplant of civil codes into places such as Japan and Louisiana. We can also observe the transplantation of common law into the former colonial territories of the United Kingdom of Great Britain and Northern Ireland, including the United States, Canada, Australia, Nigeria, Ghana, and Sierra Leone. These transplanted foundations have also since developed and evolved in their own ways to meet the functional needs of their different communities. It is remarkable how these evolutions are often not visible to the ordinary observer of the legal system. Still, they are ever-present in courts, classrooms, legislative institutions, and other juridically relevant epistemic spaces in the state. Soft laws in international law travel almost the same way—through courts, classrooms, and legislative institutions. However, since there is no obvious case of colonial structures of legal transplant, soft laws in I.E.L., in particular, proceed through specific, though seemingly irregular, pathways. Many of these pathways track the

[183] For a general review of the canon on legal movement, see generally John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 Ga. J. Int'l & Compar. L. 637 (2013); *see also* Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 Am. J. Compar. L. 583 (2010).

[184] *See* Alan Watson, Legal Transplants: An Approach to Comparative Law (1974).

frameworks of international institutions and their specialized agencies. My analysis of the movement and general dispersal of soft law norms in I.E.L. is explored through three pathways: through the organs and capillaries of international institutions, including courts and tribunals; through N.G.Os. and other associated organisations; through the media; and other instruments of public opinion curation.

It is often the case that, as primary generators of international economic soft law standards, international organisations such as the I.M.F. rely primarily on their organs and associated institutions as the capillaries for the dissemination and application of these standards once they are established. Thus, when, for instance, a financial stability standard or framework is developed and published by the I.M.F., it is widely disseminated to this group as governance standards, which they must comply with in the subject matter. One such standard is the Debt Sustainability Analysis framework of the I.M.F. While it is produced under the auspices of the I.M.F. and the World Bank, it cannot be considered a binding agreement. Still, it has an implicit recognition and a mediatory role in debt policies involving the I.M.F., its associated institutions, and even private organisations. Thus, although such a standard has been developed by a small group of experts and policy persons, it is given full institutional support. Because these institutions have significant footprints in I.E.L. and governance, they inspire associated organisations, such as regional development banks and the World Bank Group, to incorporate them in their meetings and briefings with their respective staff and organs.

Sometimes, this is done as a way of keeping up with economic policy trends, at other times as a hint of what adjustments are being made in the field, and at different times as non-committal standards that associates, affiliates, and other relevant institutions working with them should be aware of. The significance of peer pressure in the field is intense because many of these organisations and associated agencies collaborate in conceiving policies and adopting relevant pathways through which they are implemented. Beyond the dissemination of these policies through the established organs and associated agencies of international financial and global economic governance institutions, a relationship has also evolved between many of these institutions and non-governmental or not-for-profit organisations. Non-profit organisations working on I.M.F. and World Bank-associated projects are typically expected to demonstrate a thorough understanding of these guidelines and tailor their project proposals and implementations accordingly. Otherwise, these projects may not be approved or fail evaluations if they have been previously approved.

Non-governmental organisations also play critical roles in the dispersal of soft I.E.L.s. Increasingly, rulemaking institutions are compelled to rely upon N.G.Os. for two

crucial reasons—expertise and network. Outsourcing work to N.G.Os. with specific knowledge in areas of interest to international financial regulatory organisations has become a regular aspect of global development and economic policy. This is also critical in the more significant implications of overextending their limited staff. Thus, they tap into N.G.Os. with local networks and provide them with guidelines, standards, and soft laws that serve as the minimum rules of engagement. Therefore, these N.G.Os. must abide by the policy prescriptions of the institutions before they can be incorporated into the activities of these international institutions. For instance, World Bank-assisted projects must adhere to the rules established by the institution. This is not necessarily a bad thing because it can encourage transparency, accountability, and the quality of work done. They may also check for human rights abuses and ensure that resources are not misallocated or misapplied during the project execution process. However, it is also important to remember that difficulties may arise even with the best-intentioned soft law standards.

The limited deliberations and consultations that go into creating the law standards also affect the quality of these standards, as they may not have effectively anticipated many of the possible scenarios that could arise from these standards. For instance, there have been cases of clean water policies that hinge on privatizing water resources to encourage investment in water and sanitation. In some situations, these privatization policies have gone awry, thereby making drinking water and sanitation less affordable to the general community. In other cases, land titling projects have led to exclusionary approaches and complex outcomes, as the underpinning foundation is that individual ownership is the preferred title deed, and the consequent possibilities of credit leveraging arise from this title. There have been cases where such land titling projects disempowered women because such projects privileged the male gender, or the social and cultural milieu meant that women have to be represented by men in public affairs, hence the need for a woman or households to appoint a family head—usually a man—who will then go on to file information and have the land allotted in his name on behalf of the family. It is often the case that these titles become issues of conflict due to devolution, or the man may transfer interest without the appropriate consultation of the women, who should be equal interest holders in the property. The more significant economic and distributive (in)justice effect of this policy disposition is better imagined, especially in those communities where the seasonal allotment of portions of land for subsistence farming is still a significant source of income and livelihood. Although these "mistitling" or "improper allocations" may not have been intended or based on any hard law, the soft law policies do bring them about, and they can have as much transformative

effect as *hard* laws, which undergo more deliberations and consultations before being enacted.

Regional organisations and the media provide another vital pathway for the dissemination of soft law in I.E.L. In the era of high media coverage and speedy electronic access to information, soft laws are easily spread worldwide. In this regard, a simple tweet from the Twitter (*X*) handle of any globally significant regulator, such as the Federal Reserve Bank (F.E.D.) or the Bank for International Settlements (B.I.S.), regarding such factors as interest rates and stability indicators or market volatility, will immediately travel widely. In the E.U, the requi.rement that member states model their laws to meet E.U. standards on issues such as trade, market stability, environmental protection, and financial governance means that the E.U. has become a vital channel for soft law hardening. This has been seen in such efforts as Germany adopting a new supply chain due diligence law in 2021.[185] Equally, in 2017, France adopted the Corporate Duty of Vigilance Law.[186] These were in response to the E.U. requirement that states replicate the E.U. standard or enact equivalent laws to meet the E.U. compliance standards.[187]

Another significant way the E.U. impacts the emergence, dissemination, and hardening of soft laws is by requiring all companies operating in the zone to comply with the standards—for instance, the E.U. 's International Financial Reporting Standards 2002.[188] Sometimes, through carefully tailored and placed interviews and editorials, these organisations can also disseminate these policy prescriptions. This has a way of inspiring debates on important policy questions and also serving as a primary reference document on the subject matter. Such reference documents can reinforce the top-down policy frameworks in international financial regulation. Other ways of doing this are through carefully placed op-eds in legacy media.

---

[185] *See generally* Kellie R. Tomin, *Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn from International Supply Chain Regulations*, 18 Loy. U. Chi. Int'l L. Rev. 189 (2022) (highlighting how the nature of the commitments made in the law regarding the human rights aspects of business activities such as the use of slave labour); *see also* European Commission, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains (Feb. 23, 2022) (noting that the due diligence rule will apply to companies operating within the EU within a certain threshold of financial turnover and number of employees).

[186] Loi n° 2017-399 du 27 mars 2017, Loi de Vigilance, [Law No. 2017-399 of March 27, 2017, *Corporate Duty Vigilance Code*] (Fr.); *see generally* Elsa Savourey & Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption*, 6 Bus. & Hum. Rts. J. 141 (2021) (Fr.).

[187] Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, pmbl. ¶ 6, O.J. (L 243) notes that *"On June 13, 2000, the [EU] Commission published its communication on 'EU Financial Reporting Strategy: The Way Forward' in which it proposed that all publicly traded community companies prepare their consolidated financial statements in accordance with one single set of accounting standards, namely International Accounting Standards (IAS) at least by 2005."*; *see also* European Union, Regulation (EC) No. 1606/2002 of the European Parliament and the Council of 19 July 2002 on the Application of International Accounting Standards, 2002 O.J. (L 243) 1.

[188] *See* Alexander Schaub, *The Use of International Accounting Standards in the European Union*, 25 Nw. J. Int'l L. & Bus. 609 (2005).

CONCLUSION

Arguably, I.E.L. now has a "new" sovereign: "soft laws". Soft law in I.E.L. is undoubtedly an exciting taxonomy, considering the range of interests and issues now dependent on soft laws in the field.[189] The resonance in the name is rather remarkable, considering how far-reaching soft laws can be in shaping economic policies and the distributive effects of economic law. In many respects, soft laws reflect the consolidated foundations of I.E.L., many of which are traceable to colonial times and the early days of independence, when political decolonization was prioritised. Despite the promises of the U.N. through the Economic and Social Council, the needed post-independence global economic reforms are deferred. Instead, the international institutions with significant footprints in the system have maintained the current situation. When contests and cries arise, such as the riots in Seattle regarding the W.T.O., they weave small embroideries on the status quo. Tracking these consolidated foundations of I.E.L. helps to decentre the need for reform, which is sorely needed in the field. Recent efforts by the O.E.C.D. through the issuance of guidelines, have also not quietened the murmurs regarding reforms. Thus, a significant theoretical gap remains regarding the systemic implications of soft laws in I.E.L.

Soft laws, by providing minuscule and sometimes incremental remedies, hamper the possibilities for progress in ways that can unlock I.E.L. for the good of all. The limitations of soft laws in the I.E.L. sphere are also evident in the fact that they are easily exploited as tools of policy ambivalence and avoidance of obligations, especially in the hands of powerful states and institutions of global economic governance. When considered in light of the known difficulties in international law, such as unilateral use of economic sanctions, institutional inertia, and managing conflict of law rules across jurisdictions, the difficulty inherent in the taxonomy "soft law" becomes self-evident. It is, therefore, imperative for scholars and policymakers to recognise the nature of soft laws and thus be more deliberate when deciding to follow the path of soft laws rather than undertake the hard work of treaty-making.

[189] *See generally* Schwarcz, *supra* note 5; Newman & Posner, *supra* note 75.

FUNDING STATEMENT

This research did not receive any specific grant from funding agencies in the public, commercial, or not- for-profit sectors.

DECLARATION OF INTEREST

The author declares no conflict of interest.

ACKNOWLEDGEMENTS

The author is grateful to the Boston College Law School Junior Faculty Colloquium (Spring 2024 Cohort) attendees for their help in framing and properly conceptualising the work at its earliest stages. He also thanks the two anonymous reviewers for their insightful comments and graciousness. Indeed, many thanks to the Board of Editors of the University of Bologna Law Review for generous support, effective correspondence, and for doing an excellent job of getting the paper ready for publication.

VOLUME 10 ISSUE 1 ARTICLES & ESSAYS

University of Bologna Law Review

https://doi.org/10.6092/issn.2531-6133/20310

Received: 11 Sept. 2024 | Reviewed: 26 Apr. 2025 | Accepted: 27 Apr. 2025 | Published: 27 Aug. 2025

Mediation through Game Theory

ALEKSANDRE MATCHARASHVILI

Aleksandre Matcharashvili is an Invited Lecturer at Free University of Tbilisi (Georgia) and an accomplished international legal consultant and corporate law specialist, with a strong focus on international commercial arbitration, mergers and acquisitions (M&A), and cross-border corporate transactions. He has extensive experience in managing high-profile commercial negotiations and complex disputes for international investment firms, electronic money institutions, and payment service providers. He holds an Executive LL.M. from the London School of Economics (UK), a Master of Law and Business from Bucerius Law School (Germany), and an LL.B. from Free University of Tbilisi (Georgia). He is a member of the Georgian Bar Association and contributes regularly to scholarly and policy publications on mediation and dispute resolution.

@ a.matcharashvili@freeuni.edu.ge

0009-0008-0645-0287

ABSTRACT

This study examines the application of game theory principles within mediation frameworks to enhance dispute resolution effectiveness. The research analyses mediation fundamentals, including mediator functions and procedural methodologies, before establishing theoretical connections between game theory and mediation practice. Through systematic examination of commercial and non-commercial dispute scenarios, this article demonstrates how game-theoretic analysis enables mediators to evaluate strategic decision-making processes, anticipate behavioral outcomes, and facilitate optimal agreement structures. The findings reveal that game theory integration enhances mediation efficacy by promoting cooperative behaviors, strengthening inter-party trust mechanisms, and expanding solution possibilities. This research contributes to alternative dispute resolution scholarship by establishing a theoretical framework that demonstrates how strategic analysis tools can optimise mediation outcomes, resulting in more efficient and equitable dispute resolution processes.

KEYWORDS

Mediation; Game Theory; Alternative Dispute Resolution; Strategic Decision-Making; Negotiation Dynamics

JEL CODES

K41, K40, K12, K22

TABLE OF CONTENTS

INTRODUCTION

Complete control over the final decision, no fixed set of rules, less financial and time costs and transaction costs, less conflict, less stress, completely confidential, informal venue to focus not on "what happened" but "what will happen in the future", as well as mechanism that helps to maintain, repair or rebuild the trust - this is an incomplete list of the positive features of mediation.[1]

Mediation is often discussed and assessed in both academic and practical contexts as a functional, efficient, and simple dispute-resolution tool.[2] However, the question of what constitutes optimal mediation still requires further exploration.[3] In practice, one of the central values of mediation is its fair nature.[4] The strategies and actions taken by the parties during the mediation process are fair, and the responses to the negotiation strategies are often referred to as "organic" because of their spontaneous nature.[5] The outcome of the mediation process is determined by the parties alone. It is up to disputing parties to decide whether they want to cooperate; no third party will enforce the decision upon them and they can terminate the process whenever they decide. In addition, confidentiality is the principle that increases the effectiveness of mediation.[6]

Since the whole process and outcome depend on the parties themselves, it is noteworthy how and why the parties of the mediation process make decisions, what actions are expected to be taken during mediation, and what are the outcome alternatives. The decision-making process is very much related to the games and rational choice theories, where the counterparties try to analyse the payoffs of their decisions and predict their opponents' strategies. Thus, the negotiation or mediation process can be analysed from this angle as well. Under the prism of game theory, each party has distinct objectives that may not align completely. Coordination among the parties may or may not exist. The outcome for each player is influenced not only by their decisions but also the decisions of other players, alongside their characteristics and available information. All these factors, such as assumptions, variables, and parameters, significantly influence the players' decisions and, consequently, the outcome they achieve.[7]

---

[1] *See* Anna Shtefan & Yurii Prytyka, *Mediation in the EU: Common Characteristics and Advantages over Litigation*, J. for Int'l & Eur. L. Econ. & Mkt. Integrations, Dec. 2021, at 175, 184 (Croat.).

[2] *See id.* at 188.

[3] *See* Maria Goltsman et al., *Mediation, Arbitration and Negotiation*, 144 J. Econ. Theory 1397 (2009).

[4] *See* Peter Lovenheim & Lisa Guerin, Mediate, Don't Litigate: Strategies for Successful Mediation 2-3 (2004).

[5] *See* Neil H. Andrews, *Andrews on Civil Processes* 61 (2nd ed. 2019).

[6] *See e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. on Disp. Resol. 37, 38 (1986).

[7] *See* Reinaldo Diogo Luz, Elton Pupo Nogueira & Fabiano Teodoro Lara, *Game Theory and Conflict Resolution* (L. Sch. Fed. Univ. of Minas Gerais, Working Paper No. 2022/02/03,2022), http://dx.doi.org/10.2139/ssrn.4026952.

This paper explores the correlation between mediation and game theory and demonstrates how the mediator can add value to the mediation process between the disputing parties by using the tools of game theory.

The paper will first summarise the meaning of mediation, its procedure, the mediator's role, and different styles of mediation. All of these are vital to understand the functions and limits of mediator's actions as well as its role in general and the environment where the parties conduct mediation sessions. Then it will explain game theory, its models and the correlation between game theory and mediation. The following chapters will highlight the mediator's role in repairing trust and her actions regarding the filtering of the information; illustrative scenarios shall demonstrate an increase in efficiency through the effective engagement of the mediator. Finally, based on numerous scholarly sources, the paper will conclude by explaining how the mediator can add value to the overall mediation process by considering the basic principles and tools of game theory.

1. WHAT IS MEDIATION

Despite the widespread academic literature on mediation, its definition remains debatable.[8] Most scholars describe mediation as a voluntary, court-mandated, or contractually agreed-upon, confidential process[9] where a neutral, independent person (mediator) facilitates disputing parties in preventing, managing or resolving the dispute.[10]

Stulberg defines the mediation process as "a non-obligatory procedure in which an impartial, neutral mediator is invited or accepted by disputing parties to assist in identifying mutual concerns and finding an equally acceptable solution".[11] Studies have shown that mediation helps parties deal with disputed matters and evolves mutual understanding.[12] Mediation and negotiation are generally preferred by disputing parties

[8] *See* David Spencer & Michael Brogan, Mediation Law and Practice 4 (2007).

[9] Felix Steffek, *Mediation in the European Union: An Introduction*, European Commission, Directorate-General for Justice (2014), https://e-justice.europa.eu/sites/default/files/2015-03.

[10] *See e.g.*, German Foreign Federal Office, *Initiative Support Deutschland (IMSD),* Mediation Support Basics of mediation: Concepts and definitions, Berghof Foundation (Feb. 27, 2017), https://berghof-foundation.org/library/basics-of-mediation-concepts-and-definitions.

[11] Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, *in* Discussions in Dispute Resolution: The Foundational Articles 125 (Art Hinshaw et al. eds., 2021),https://doi.org/10.1093/oso/9780197513248.003.0026.

[12] *See* Robert A.B. Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1, 17 (1996).

due to their consensual nature and the opportunity for direct communication.[13] The process is informal (compared to arbitration or litigation), making it easier for the mediator to reduce the pressure, select an appropriate location for the sessions, and create a positive atmosphere. The less tension the parties feel, the more they are incentivized to speak openly. Additionally, since written communication is involved in the mediation process, it is easier to use plain language without being bound by formal written declarations.[14]

Spencer and Brogan assert that "the mediation process should begin with an intake procedure, during which the mediator reviews and assesses whether the dispute is suitable for mediation".[15] The rationale behind this assertion lies in the advantages of the intake procedure, which include trust-building, establishing institutional and procedural credibility, information gathering, and balancing various factors (such as determining the appropriate timing for mediation and assessing the parties' willingness to engage in the process).[16] As demonstrated below, the intake procedure can play a critical role since the mediator evaluates the disputing parties' strategies and the likelihood of a successful settlement before proceeding.

Although flexible and subject to variation, mediation generally consists of five main phases:

1. Opening of mediation.
2. Outline of specific issues and interests of the parties.
3. Information gathering and identification of specific legal issues (which may also occur in private meetings).
4. Discussion of issues requiring agreement and exploration of possible solutions.
5. Conclusion, including agreement drafting (in the case of successful mediation) and termination of the process.[17]

From this definition, it follows that the mediator does not have adjudicatory powers. However, scholarly discussions diverge regarding the mediator's role. Debates center on whether the mediator should assume an evaluative, transformative, or purely facilitative

[13] *See id.* at 23.
[14] *See* Aline Trindade do Nascimento & Karen Beltrame Becker Fritz, *Reflexões sobre a teoria dos jogos na mediação* [*Reflections on the Game Theory in Mediation*], 11 Revista Eletrônica do Curso de Direito da UFSM 654, 658 (2016).
[15] Spencer & Brogan, *supra* note 8, at 43; *see also* Josh Lewison, *Mediating Better*, P.C.B 2, 55 (2022).
[16] *See* Spencer & Brogan, *supra* note 8, at 44-48.
[17] *See id.* at 49.

function by generating proposals and facilitating communication to achieve an efficient settlement.[18]

Impartiality and neutrality are critical characteristics of a mediator. Trust is essential for a successful outcome in mediation. While a single mistake can easily undermine it, a mediator's substantive, objective, and facilitative approach can help build and reinforce the parties' trust and respect. The mediator's primary function is to establish effective communication between the parties.[19]

The mediator should create an environment where the parties experience "procedural justice". According to Welsh – drawing on Bush's analysis – such an environment encourages parties to share more information, thereby reducing transaction costs,[20] improving trust, and fostering meaningful discussions.[21] Fuller argues that "a mediator is most effective when, rather than merely maintaining procedural formalities, they help the parties develop mutual respect and build a relationship based on trust. This, in turn, encourages openness and facilitates the exchange of information necessary for reaching a mutual settlement".[22]

Studies indicate that when the level of conflict is high, parties cannot reach an agreement without a mediator. Conversely, when the level of conflict is lower, parties can exchange information more freely and achieve an optimal result. [23] Although there are multiple ways to gather information, process it, and formulate strategies, a mediator operates optimally by collecting comprehensive information from the parties, strategically filtering disputed details, and presenting only the necessary information to facilitate settlement. A mediator is successful when they provide only the information required to assist the parties in reaching an agreement. It is inappropriate for the mediator to disclose all the information received from one party to the other.[24]

Bush & Folger, Kressel, and Riskin categorize three primary styles of mediation: facilitative, transformative, and evaluative.[25] Recognizing the mediation style during the session is essential, as it informs the information-gathering process and guides the mediator's approach to achieving an optimal settlement. The mediation style plays a

[18] *See id.* at 5.
[19] *See* Stulberg, *supra* note 11, at 127.
[20] *See* Bush, *supra* note 12, at 8.
[21] *See* Nancy A. Welsh, *The Untethering of Mediation from Relationships*, *in* Discussions in Dispute Resolution: The Foundational Articles 111, 113 (Art Hinshaw et al. eds., 2021).
[22] Lon L. Fuller, *Mediation: Its Forms and Functions*, *in* Discussions in Dispute Resolution: The Foundational Articles 101, 103 (Art Hinshaw et al. eds., 2021).
[23] *See* Goltsman et al., *supra* note 3, at 3.
[24] *See id.* at 2.
[25] Kenneth Kressel et al., *Multidimensional Analysis of Conflict Mediator Style*, 30 Conflict Resol. Q. 135, 136 (2012).

pivotal role in managing uncertainties about the mediator's function and significantly influences their strategic and tactical approach to guiding decision-making.[26]

Riskin proposes the following grid that explains each type of mediation.

Facilitative Mediation: The mediator's role is to facilitate communication and guide the parties through the negotiation process. The mediator asks questions and educates the parties about the circumstances, helping them identify their interests, generate options, and reach a mutually acceptable agreement. The mediator remains neutral, refraining from offering opinions or evaluations. Instead, they focus on fostering open dialogue and collaboration while helping the parties assess counterproposals.[27]

Transformative Mediation: This approach emphasizes trust-building and repairing relationships, enabling parties to see the bigger picture and "expand the pie". Transformative mediation aims to empower the parties and alter their relationship dynamics. After thoroughly understanding the information, the mediator assists the parties in demonstrating each other's perspectives. The process encourages parties to consider their opponent's viewpoint when making decisions. If successful, transformative mediation fosters mutual respect and enhances communication between the parties.[28]

Evaluative Mediation: In this style, the mediator actively assesses the strengths and weaknesses of each party's case, offering opinions and evaluations regarding the legal merits and potential outcomes. The mediator may provide assessments based on their expertise or research to clarify the objective outcome for the parties. This mediation style is more direct than the other two.[29]

Mediation styles may be blended or adapted to suit the specific needs of a dispute and the parties involved. Mediators often incorporate elements from different styles to tailor a process that best serves the participants.

According to Bush, "mediators can add value by facilitating information exchange, posing questions, enhancing reliability, and fostering an environment that helps parties overcome cognitive biases and build trust".[30] Mediation, therefore, enables parties to improve the quality of their communication.[31]

[26] *See id.* at 136-38.
[27] *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 29 (1996).
[28] *See* Charlie Irvine, *Transformative Mediation: A Critique*, SSRN (Sept. 1, 2007), https://ssrn.com/abstract=1691847.
[29] *See* Riskin, *supra* note 27, at 27.
[30] Bush, *supra* note 12, at 13.
[31] *See id.* at 28.

Scholars identify two characteristics of an active mediator: first, that such a mediator nudges the parties toward settlement, [32] and second, that they actively engage in negotiations when they foresee a manifestly unfair outcome. [33]

As analysed by Riskin, facilitative or evaluative mediators can help reduce strategic barriers to settlement by transmitting, filtering, and structuring the flow of information.[34] The value that such a mediator adds lies in supporting decision-making, enhancing communication, and facilitating information exchange.[35]

Even if the mediator is not overtly evaluative, they should play a balancing role in managing the tension between the disputing parties and facilitating conflict resolution (active follow, facilitative style). By doing so, the mediator helps the parties engage in meaningful dialogue and reach a comprehensive understanding.[36] However, such dialogue may be hindered by the presence of attorneys during mediation sessions. [37] Lawyers significantly influence not only the mediation process but also its outcome. Scholars recommend minimizing the influence of lawyers, allowing clients to take the lead in discussions, as attorneys often adopt an argumentative and aggressive stance.[38]

Now that the mediation process and styles and mediator's role are summarised, the correlation between game theory and mediation will be explored.

2. GAME THEORY AND MEDIATION

2.1. GAME THEORY

Game theory studies human behaviours and decisions in specific situations through mathematical methods. The word "game" used by creators of the theory, Neuman and Morgenstern, means the specific behaviour and decision they make in a specific situation. For example, before making a game move in chess, in a car dealership – before she buys a car, in court – what she will build a lawsuit on, what evidence she will present, etc.[39] Game theory is based on the theory of rational choice, according to which the

[32] *See* david Mulcahy, *The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?*, 10 Soc. & Legal Stud. 505, 509 (2001).
[33] *See id.* at 510.
[34] *See* Bush, *supra* note 12, at 13.
[35] *See id.* at 26.
[36] *See* Nascimento & Fritz, *supra* note 14, at 659.
[37] *See* John Lande, *Ten Real Mediation Systems* (Univ. Mo. Sch. L., Legal Studies Research Paper No. 2022-11, 2022).
[38] *See* Lewison, *supra* note 15, at 57.
[39] *See* Martin J. Osborne, An Introduction To Game Theory 3 (2003) (U.K.).

decision maker chooses the decision that will bring them the best result from all the possible options.[40] Naturally, each player wants to finish the game as the winner – i.e., to get the biggest benefit based on his ability.[41] Each game may consist of many strategies. Strategic behaviour refers to an interactive decision-making process where a party's choices and possible outcomes depend on expectations of how the other party will behave.

The developers of the theory classified "zero and non-zero-sum games". In a zero-sum game, the players' fates depend on each other; the victory for one leads to a loss for the other, and vice versa. As for a non-zero game, one player doesn't need to lose for the other to win. Moreover, the players' interests in a non-zero game overlap often.[42] In a zero-sum game, cooperation is impossible, while in a non-zero-sum game, everything depends on players, their expectations are essentially equivalent, and cooperation is unnecessary.[43]

In 1994, John Nash received the Nobel Prize in Economics by introducing so-called – "Nash Equilibrium".[44] Today, it is the most practical and applicable tool to identify and predict human decision-making in a specific situation.[45] A Nash equilibrium is a set of strategies in which each strategy is appropriate for each player, so that no player is incentivized to change his chosen strategy. The Nash equilibrium is the only situation where everyone gets the payoff they are satisfied with, which could not be improved under different strategies and a set of actions. Therefore, the rational player does not change their chosen strategy under the conditions of the Nash equilibrium.

Two mandatory components need to be satisfied so that the parties keep playing the same strategy; first, the players to the game should make their choices based on the model of rational choice theory, and second such players should have a certain belief (trust) or assurances that the disputing party shall not deviate from their strategy.[46]

---

[40] *See id.*

[41] *See* Sudipta Sarangi, Exploring Payoffs and Beliefs in Game Theory 7 (Ph.D. dissertation, Va. Polytechnic Inst. State Univ., 2000). https://vtechworks.lib.vt.edu/items/720c1955-2b86-414c-954f-99786f349c35.

[42] *See* Bernhard von Stengel, Game Theory Basics 208 (2021) (U.K.)

[43] *See* A.W. Starr & Yu-Chi Ho, *Nonzero-sum Differential Games*, 3 J. Optimization Theory & Application 184, 185 (1969).

[44] *See* Osborne, *supra* note 39, at 3.

[45] *See* Patrick Bajari et al., *Game Theory and Econometrics: A Survey of Some Recent Research*, *in* Advances in Economics and Econometrics 3 (Daron Acemoglu et al. eds., 2013).

[46] *See* Osborne, *supra* note 39, at 22.

2.2. CORRELATION WITH MEDIATION

Game theory has transformed the understanding of disputes into a mathematical dimension,[47] particularly in mediation, where the procedure and the mediator's role can drastically improve the chances of applying the theory successfully to real-life cases. The mediator that leads and moderates the mediation session draws up a table showing the number of players, the strategy, other information, and, most importantly, the possible outcomes from each strategy. From this table, the mediator can determine whether a zone of possible agreement can be found and predict a specific behaviour and outcomes derived from other game theory methods.[48] Using the system of game theory, the mediator tries to identify the best possible strategies for the decision-makers while considering how the opponent will react and what the outcome will be, not only for the decision-maker but also for the counterparty.[49] It is the mediator's role to ensure smooth coordination so that one party does not take advantage of another (that will eventually lead to another conflict) and to assist the parties in viewing each decision from a bigger-picture point of view.

The mediator must obtain as much "perfect" information from each party as possible since "imperfect" data will be the key driver of the failed session. The common barrier to a successful negotiation is the strategic one, where the parties hide critical information due to the fear that the other party will gain an advantage. Such negotiation's inefficient result is due to "informational poverty and unreliability".[50] Another type of barriers also identified by scholars are cognitive biases, since the parties not trusting each other do not reflect on the information received adequately and are misled by their perceptions.[51]

Trust is another important element for playing the strategy that would lead to overall efficiency. According to Wright, one of the main obstacles of a non-zero-sum game is the possibility of cheating and lack of trust.[52] As explained, parties do not resolve the dispute without referring to the courts or Alternative Dispute Resolution [hereinafter A.D.R.] mechanisms due to damaging trust between them (as well as emotional and psychological factors) and the unwillingness to cooperate. Thus, naturally, they view the dispute as a zero-sum game. In such disputes, the mediator should focus on rebuilding trust and enhancing communication between the parties. In

[47] *See* THE HANDBOOK OF CONFLICT RRESOLUTION: THEORY AND PRACTICE 33 (Peter T. Coleman et al. eds., 3d ed. 2014).
[48] *See* Bajari et al., *supra* note 45, at 1.
[49] *See* Nascimento & Fritz, *supra* note 14, at 663.
[50] Bush, *supra* note 12, at 9.
[51] *See id.* at 12.
[52] *See* Luz, Nogueira & Lara, *supra* note 7, at 8.

the transformative style of mediation, the mediator focuses on the interests of the parties by using the technic of expanding the pie and brainstorming possible solutions. The mediator tries to demonstrate the fruits of the long-term relationship of the parties and highlights that a solution shall act as a victory for both due to the cooperation. Thus, the mediator's role is crucial in guiding parties toward this cooperative mindset and creating an environment that supports mutually beneficial outcomes.

The classic example of the game theory is the prisoner's dilemma, which also can be viewed from the mediation:

> The case involves two criminals who are interrogated separately. Each of the prisoners has a choice to inform on each other or to remain silent. If they both remain silent, they will serve one year in prison. If Prisoner 1 informs on the Prisoner 2 while the Prisoner 2 remains silent, the Prisoner 1 will go free, and the Prisoner 2 serves three years, and vice versa. If both prisoners inform each other, each of them will serve two years.
>
> After careful analysis, this well-known example demonstrates how both players are likely to inform on each other, as remaining silent carries the risk of receiving the maximum sentence. Such betrayal arises from mistrust and information asymmetry, as it is evident that successful cooperation between the parties would yield the most favourable outcome.

By analysing this example,[53] Josh Lewison transforms similar cases into real-life mediation cases. According to his categorization, the parties at the mediation table are either nasty or nice. If nice parties meet each other, the chances for an efficient settlement are high through a calm and effective negotiation session. If the nasty parties meet each other, the negotiation session will be challenging and probably will not result in a settlement. The dangerous part is when the nasty meets the nice party, where the probable outcome is that the nasty party will leverage its "character" and take more from the settlement it deserves. Therefore, the Author concludes that the normal incentive in mediation is to be nasty. Although the chances of not settling are high, the possible reward is much higher when the opponent is nicer than the nasty party to the negotiation.[54] The problem with the prisoner's dilemma is that it provides the circumstances only for the zero-sum game and does not provide different variables or grades for the other options.

In contrast, mediation, by its nature, provides more solutions than just choosing an alternative. Clients may behave more aggressively than usual, but typically not to an

[53] *See* Lewison, *supra* note 15, at 55.
[54] See *id.* at 56.

extreme degree. Moreover, as they become more familiar with one another, their attitudes can shift, leading to more cooperative behaviour. The examples provided in Chapter 4 of this paper will demonstrate how mediators, by using the mechanisms of game theory, may solve prisoners' dilemma problems.

A fundamental challenge in applying game theory to mediation is the feasibility of constructing decision matrices and payoff tables in real-time. Game theory suggests that rational players can map out possible outcomes and choose their best response based on expected payoffs. However, in practical mediation, parties often deal with time restraints, deficient or incomplete information, and emotional influences, which makes it more challenging to accurately formulate and interpret decision matrices on the spot.[55]

Additionally, while game theory assumes that payoffs are quantifiable and predictable, mediation often involves subjective interests, such as reputational concerns, future business relationships, or emotional satisfaction, which cannot be easily portrayed in a mathematical model.[56] As a result, traditional decision matrices might oversimplify complex negotiations, reducing their effectiveness in real-world mediation scenarios.

In response to this, mediators should consider pre-mediation analysis where possible. Instead of attempting to build full decision matrices during the session, mediators can prepare simplified negotiation models in advance, focusing on key interests, trade-offs, and possible areas of compromise.[57] This method allows mediators to guide discussions strategically without overcomplicating the process.

Additionally, mediators can use experimental decision-making models as an alternative to rigid game-theoretic payoff structures, such as anchoring effects, cognitive biases, and pattern recognition that will allow mediators to facilitate settlements without requiring complete quantitative analysis.[58] These methods are particularly expedient in commercial disputes, where rapid decision-making is often required, and parties are more responsive to qualitative insights rather than strict numerical models.

Thus, while game theory offers valuable frameworks for understanding strategic behaviour, its direct application in mediation should be adapted to realistic, flexible, and intuitive decision-making approaches rather than rigid mathematical formulations.[59]

[55] *See* Thomas C. Schelling, The Strategy of Conflict 143 (1960).
[56] *See* Bajari et al., *supra* note 45, at 76.
[57] *See* Lande, *supra* note 37, at 6.
[58] *See* Riskin, *supra* note 27, at 40-41.
[59] *See* Amos Tversky & Daniel Kahnemanm, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).

To summarise above, by applying various tools and concepts of game theory, mediators can guide the mediation process more effectively and constructively, which may lead to successful outcomes and mutually beneficial results for all parties. The game theory framework can give the mediator the full spectrum of different strategies, moves, and countermoves that disputing parties may take during mediation. In this way, a mediator can also identify their interests and objectives, enabling them to find common ground and identify possible areas for compromise. Furthermore, game theory allows the mediator to analyse the benefits of cooperation and encourage parties to cooperate to find win-win solutions and build trust. By analysing the conflict situation from game theory lenses, the mediator can identify possible solutions that meet the interests and preferences of all parties, which will lead to the successful completion of the mediation.

One of the key assumptions of game theory is the existence of faultless information, meaning that all parties are aware of all relevant details influencing the decision-making process. However, in mediation, information asymmetry is common, as disputing parties often withhold, distort, or selectively unveil the facts to gain a strategic advantage. This can limit the mediator's ability to apply game-theoretic models effectively.

To mitigate these risks, mediators employ various techniques such as indirect questioning, reality-testing, and controlled disclosures to extract and verify critical information. These techniques help parties evaluate their positions more accurately, reducing the risks of miscalculations and irrational decision-making. Additionally, mediators can facilitate trust-building exercises to create an environment where parties feel safer to share relevant details, thereby reducing strategic withholding of information.[60]

However, even with these methods, the effectiveness of mediation still hinges on the parties' willingness to engage in the process transparently and in good faith. If a party remains closed-off, refuses to disclose fundamental information, or approaches the negotiation with a purely adversarial mindset, then the value of game theory—and mediation itself—are significantly reduced. In such cases, the mediator must assess whether settlement is genuinely feasible or whether alternative dispute resolution mechanisms may be more appropriate.

[60] *See* Luz, Nogueira & Lara, *supra* note 7.

3. GAME THEORY MEDIATOR'S INTERVENTIONS

3.1. ROLE OF MEDIATOR IN COLLECTION AND ANALYSIS OF INFORMATION

Often, the primary cause of conflict is the asymmetry of information. One party in a dispute typically possesses an informational advantage.[61] Information plays a critical role in mediation as it influences the dynamics and outcomes of the entire process. Therefore, the mediator has a crucial role in building trust between the disputing parties, facilitating effective communication and cooperation, and ultimately assisting them in making informed decisions.

Access to information has various dimensions. First, informed decision-making is essential for the successful completion of the mediation process and the implementation of the agreement. Second, the more the parties are informed about each other's interests, preferences, and needs, the more realistic and creative solutions can be generated for dispute resolution. Furthermore, information sharing plays a key role in building trust, which is essential for conducting mediation in a transparent and honest manner. This, in turn, fosters cooperation and facilitates the achievement of compromise.

During negotiations, the mediator must carefully consider the significance of concealed information and its implications. As the mediator manages the flow of information, they are in a position to reduce the risks of adverse selection and moral hazard.[62] A high degree of adverse selection bias and moral hazard may arise when parties withhold information about themselves.[63] Complete information significantly reduces transaction costs,[64] while the structure of the mediation process can assist parties by indirectly revealing information so that at least the mediator attains near-complete knowledge.[65] The more information parties disclose to the mediator regarding their objectives, possible compromises, timeframes, and emotional aspects of the conflict, the more transparent the negotiation process becomes, thereby providing the mediator with a broader framework to develop a precise game theory matrix.[66]

---

[61] *See* Goltsman et al, *supra* note 3, at 3.
[62] *See* Jennifer G. Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994).
[63] *See id.*
[64] *See id.*
[65] *See id.* at 332.
[66] *See* JIM HORNICKEL, NEGOTIATING SUCCESS: TIPS AND TOOLS FOR BUILDING RAPPORT AND DISSOLVING CONFLICT WHILE STILL GETTING WHAT YOU WANT 142 (2013).

3.2. SPECIFIC TECHNIQUES OF GATHERING INFORMATION BY THE MEDIATOR

Riskin provides a categorization related to mediation challenges and a corresponding matrix for the mediator's role in addressing each issue. In this categorization, Riskin distinguishes: a. Litigation issues – which primarily involve resolving the dispute without court intervention; b. Business interests – which focus on a broader perspective and explore the parties' overarching interests beyond the specific dispute; c. Personal, professional, or relationship issues – which relate to the emotional aspects of the conflict; d. Community interests – which pertain to broader societal concerns rather than specific matters between the disputing parties.[67]

As outlined above, this categorization closely correlates with the mediator's role—whether to adopt a more evaluative or facilitative approach. Riskin proposes broad and narrow problem definitions and provides a continuum along which mediators can operate to achieve efficient settlements. This continuum ranges from a strictly evaluative approach, in which the mediator primarily listens to the parties' positions, to an extremely facilitative role, where the mediator suggests potential settlement options and helps the parties define their Best Alternative to a Negotiated Agreement [hereinafter B.A.T.N.A.] and Worst Alternative to a Negotiated Agreement [hereinafter W.A.T.N.A.].[68]

Roger Fisher and William Ury, authors of the well-known book *Getting to Yes*, introduced the concepts of B.A.T.N.A. and W.A.T.N.A. to help negotiation participants better understand their needs and strategies. B.A.T.N.A. represents the most favourable outcome if no agreement is reached, whereas W.A.T.N.A. denotes the least favourable scenario.[69] Each party in a negotiation has its own B.A.T.N.A. and W.A.T.N.A.

Under rational choice theory, a party will accept any offer superior to its B.A.T.N.A. and reject any offer inferior to its W.A.T.N.A. The mediator can assist the party in a private session by accurately assessing their B.A.T.N.A., thereby preventing them from rejecting offers that are more favourable than they initially perceive. To ensure accuracy, the mediator must prepare for the session in advance and gather as much information as possible. Due to informational asymmetry and psychological biases, parties often subjectively and overconfidently determine their B.A.T.N.A. The same approach applies to assessing W.A.T.N.A.

---

[67] *See* Riskin, *supra* note 27, at 22.

[68] See *id.* at 180.

[69] *See* Jessica Notini, *Effective Alternatives Analysis In Mediation: "BATNA/WATNA" Analysis Demystified*, Mediate.com (Jan. 10, 2005), https://mediate.com/effective-alternatives-analysis-in-mediation-batna-watna-analysis-demystified/.

Thus, once the mediator has identified each party's B.A.T.N.A. and W.A.T.N.A., they can construct a framework outlining acceptable and unacceptable offers. At this stage, the mediator may also develop an initial matrix to determine whether the parties are engaging in a zero-sum or non-zero-sum game. One of the mediator's primary roles is to analyse the parties' payoff structures and strive to achieve an outcome that is efficient for both. By controlling communication, the mediator can influence the parties to commit to an optimal resolution.[70]

If the game is identified as non-zero-sum, the mediator collects additional information to assess the potential for a Nash equilibrium. If the game is zero-sum, the mediator gathers data, objectives, and strategic interests to explore the possibility of "expanding the pie" and devising ways to achieve this. The concept of "expanding the pie" refers to increasing the available resources or improving the terms of negotiation to create additional value in integrative bargaining. Thompson's research on integrative agreements demonstrates that "in most negotiated settlements, parties enhance value by using creative problem-solving techniques."[71] This is where the mediation process and the mediator's expertise become crucial. Skilled mediators should employ innovative approaches to provide alternative perspectives and encourage the parties to broaden their negotiations. Studies on effective strategies for expanding the pie suggest that proper communication is essential, a principle that will be illustrated through a detailed case study in Chapter 4 of this paper.

3.3. W.N.S. MODEL OF PAYOFF CALCULATION

Jung and Matejek propose using the Weighted-Negotiation-Score [hereinafter W.N.S.] model to evaluate payoffs. This model consists of five core steps that mediators can apply to facilitate efficient decision-making. The first step involves assessing decision values, which vary depending on the negotiation context. For instance, in a commercial dispute, relevant variables may include price per unit, delivery timeframes, product quality, fees, contractual rights and obligations, and other parameters.

In the second step, the mediator engages with the parties to analyse these variables. Through individual interviews, the mediator assigns relative values to each core parameter. To simplify this exercise, the mediator allocates percentages to these parameters, ensuring that the total sums to 100% (i.e., identifying the most and least valued elements).

[70] *See* Schelling, *supra* note 55.
[71] Leigh Thompson, Mind and Heart of the Negotiator 111 (5th ed. 2011) (U.K.).

Once the values are defined, the third step entails analysing the range of acceptable values for each parameter. For instance, if Party *A* seeks $100 per unit and considers this its most critical variable, the mediator must determine the minimum price the party is willing to accept and the highest feasible amount—corresponding to the party's B.A.T.N.A. and W.A.T.N.A.

The next step involves calculating individual parameters using the formula: W.N.S. = Σ (pi × gi) where p represents the party's target for each parameter, and g denotes the assigned weight (value of the parameter).[72]

By performing this exercise for both parties, the mediator can determine whether an overlap exists between their intended outcomes. Through W.N.S. analysis, the mediator effectively identifies the parties' B.A.T.N.A. and W.A.T.N.A., assesses the Zone of Possible Agreement [hereinafter Z.O.P.A.], and, through strategic communication, guides the negotiation process toward a Nash equilibrium.

To summarise, B.A.T.N.A. and W.A.T.N.A. are critical concepts in mediation that enable parties to assess the negotiation process, with the mediator assisting by gathering and analysing information. The mediator plays a crucial role in fully utilizing mediation procedures, such as the intake process, during which they collect information from the parties. Additionally, the mediator conducts independent research on the subject matter to gain deeper insights and facilitates private sessions. Through these efforts, the mediator adds value not only to the cooperation process and overall negotiation but also helps the parties better understand their objectives.

Once these values are identified, it is essential to analyse the parties' strategies to determine the Z.O.P.A. The Zone of Possible Agreement represents the range within which the parties can identify mutually acceptable terms and potentially reach a Nash equilibrium. After evaluating the parties' B.A.T.N.A. and W.A.T.N.A., the mediator can develop a matrix to assess the likelihood of a settlement based on the parties' respective payoffs. By managing the parties' emotions and facilitating the exchange of offers and counteroffers, the mediator can guide them toward Z.O.P.A., where rejecting a rational proposal would be counterproductive. Consequently, the mediator helps narrow the range of possible agreements and facilitates a resolution that meets both parties' needs and interests.

One of the fundamental assumptions in game theory is that each player can accurately assess their best and worst alternatives before making a decision. However, uncertainty surrounding B.A.T.N.A. and W.A.T.N.A. presents a significant challenge in

[72] *See* Stefanie Jung & Michael Matejek, *Multidimensionalität von (Mediations-)Verhandlungen Teil 2* [*Multidimensionality of (Mediation) Negotiations Part 2*], 24 Zeitschrift für Konfliktmanagement 234 (2021).

mediation. Disputing parties frequently overestimate their bargaining power, miscalculate risks, or base their assessments on incomplete or biased information.

Mediators play a crucial role in helping parties assess their B.A.T.N.A. and W.A.T.N.A. more realistically. Techniques such as private caucusing, reality testing, and hypothetical reasoning enable mediators to guide parties in evaluating their alternatives objectively. Reality testing, for instance, involves critically examining the feasibility of a party's perceived alternative and assessing whether it is genuinely preferable to a negotiated settlement. Similarly, mediators can use hypothetical reasoning to explore different scenarios and illustrate the risks associated with rejecting a reasonable offer.

Another significant challenge is that even when parties disclose their B.A.T.N.A. and W.A.T.N.A., the accuracy of this information is not guaranteed. A party may exaggerate its B.A.T.N.A. to project a stronger position or understate its W.A.T.N.A. to resist concessions. To counter this, mediators should employ third-party verification techniques where feasible or use decision trees to visually illustrate potential outcomes. These tools help parties develop a more accurate understanding of their real bargaining power and mitigate the risk of strategic misrepresentation.[73]

This issue is particularly relevant in commercial disputes, where financial interests and long-term business relationships are often at stake. Unlike purely legal disputes, business conflicts require mediators who not only possess an understanding of the legal framework but also have expertise in commercial transactions, contract structures, and financial principles. A mediator with a business or financial background is better equipped to analyse complex deal structures, assess commercial risks, and propose settlements that align with the parties' broader business objectives.[74]

Mediation is not about "winning" or "losing" in the traditional sense. Unlike litigation, where a party may "win" by securing a larger monetary award, mediation focuses on identifying an optimal solution for all parties involved. The most effective mediated agreements not only resolve the immediate dispute but also lay the foundation for future cooperation. In business conflicts, maintaining a functional working relationship can be as valuable as the financial settlement itself, further reinforcing mediation as a superior alternative to adversarial litigation.[75]

---

[73] *See* Notini, *supra* note 69.

[74] Lande, John, "Business Lawyers and ADR: The Importance of Commercial Understanding in Mediation", (2022), p. 29, 53, University of Missouri School of Law Legal Studies Research Paper No. 2022-11; *see also* Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes (1992); Goldberg, Stephen B. & Sander, Frank E.A., *"Mediation in Commercial Disputes: Challenges and Opportunities"*, (2021), Harvard Negotiation Law Review, Vol. 8, p. 38, 41.

[75] *See* Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In 64, 66 (2011) (U.K.); *see also* Riskin, *supra* note 27, at 45.

3.4. IMPORTANCE OF TRUST

For parties to disclose information and, more importantly, cooperate in the future, trust and guarantees between the disputing parties and the neutral mediator are essential. Shapiro, Sheppard, and Cheraskin identify significant categories of trust, including Calculus-Based Trust [hereinafter C.B.T.], which is deterrence-based trust established through prior experience and consistency. This type of trust is purely empirical and results in retribution in the event of a breach or a corresponding reward for maintaining consistency. In this category, trustors are always aware of the potential consequences of deviation while focusing on the rewards associated with stability.[76]

Another category identified by the authors is Identification-Based Trust [hereinafter I.B.T.], which typically develops after C.B.T. has been sufficiently established. I.B.T. is associated with recognizing counterparties' positions, aspirations, and objectives.[77] Once such values are identified, the parties become invested in sustaining their relationship and mutually benefiting from it. Even when conflicts arise, parties with I.B.T. tend to consider their counterpart's intentions and prioritize preserving the relationship over escalating the dispute.[78]

Coleman outlines various strategies for managing and building C.B.T., including explicit agreements on obligations, timeframes, and penalties for non-compliance, upfront commitments, and clearly defined monitoring and verification procedures. If distrust is high, the mediator may consider limiting direct meetings between the parties and implementing mechanisms to reinforce trust when obligations are fulfilled. In cases where trust has been violated, C.B.T. can be repaired through apologies and by implementing measures to minimize future breaches, thereby rebuilding trust.

I.B.T., on the other hand, has a more psychological and emotional dimension. Levicky and Bunker suggest that repairing I.B.T. requires a three-step approach:

1. The parties must openly exchange information about the trust violation.
2. The injured party must be willing to forgive.
3. The violating party must commit to strengthening I.B.T. moving forward.[79]

If trust already exists between the parties and a conflict arises, mediation may not be necessary, as parties with strong C.B.T. or I.B.T. will likely resolve disputes amicably by

[76] *See* Coleman et al., *supra* note 47, at 106-08.
[77] *See id.* at 108.
[78] *See id.* at 109.
[79] *See id.* at 125.

prioritizing long-term interests. However, if trust is significantly damaged, emotional and psychological factors come into play, making a purely calculus-based approach insufficient. In such cases, a third party may be required to help rebuild or restore trust between the parties—potentially by reintroducing a structured C.B.T. mechanism, such as a clearly drafted agreement.

To summarise, the reasons why trust is an essential element for successful mediation are the following:

- Parties feel comfortable sharing their concerns and needs in an environment of honesty and transparency.
- A trustworthy environment encourages responsible and constructive information-sharing.
- Trust fosters empathy and enhances the parties' ability to understand each other's motivations and concerns.
- A mediation process built on trust promotes good-faith cooperation and facilitates the effective implementation of agreements.

Mediators play a crucial role in trust-building throughout the mediation process. They act independently and neutrally, creating a safe space for communication. Additionally, mediators encourage open dialogue, clarify misunderstandings, and facilitate trust-building by helping parties identify areas of agreement and work toward meaningful progress.

4. EXAMPLES OF APPLYING GAME THEORY IN MEDIATION

This chapter will summarise the above analysis and provide two examples of how the mediator can utilise game theory and analysed techniques in the mediation process.

4.1.EXAMPLE 1: HEIRS' DILEMMA

Two heirs are in a dispute over a property valued at $100,000. The disputing parties prefer to settle, but they have not agreed on the settlement terms. Each party can choose to hire an attorney to appear before the court and propose settlement terms. They can equally

Divide the inheritance if neither hires a lawyer. If one party hires a lawyer and the other does not, the party who does will end up in a more favourable position and benefit more than they would without legal representation. Assume that the party who hires a lawyer receives $85,000, while the other, who does not, receives $15,000. If both parties hire a lawyer, they will share the benefits equally but must pay legal representation costs. In this case, each party will receive $25,000. Similar to the prisoner's dilemma, the parties are most likely to hire a lawyer, yet they still fail to achieve an optimal outcome. If the parties had settled without lawyers, their expenses would have been significantly reduced.[80]

	brother 2	
brother 1	Hiring a lawyer	Not hiring a lawyer
Hiring a lawyer	25,000; 25,000	85,000; 15,000
Not hiring a lawyer	15,000; 85,000	50,000; 50,000

Table 1

In this case, the primary issue in the dispute is the lack of trust and cooperation. The parties could have achieved more effective outcomes if they had access to information about each other's choices and strategies. Nash equilibrium does not necessarily represent the optimal strategy that yields the best outcome for both parties. Instead, in a Nash equilibrium, each party chooses a strategy they are unwilling to deviate from to avoid a worse outcome. Their choice is based on rational choice theory, which can be problematic because both players make decisions their own payoff rather than considering the collective benefit—in this case, choosing not to hire a lawyer.

This is where the role of an evaluative mediator becomes crucial. The mediator can persuade the parties to deviate from their initial rational choice, ultimately leading to a more effective outcome. In such situations, the mediator facilitates interaction between the parties, identifies their strategies, and provides a comprehensive overview of available choices and alternatives. Consequently, the parties can make an informed decision about the most beneficial option for both.[81] In this specific case, the mediator, by effectively presenting the parties' options, can facilitate a shift from Nash equilibrium to a correlated equilibrium, where both parties sign a binding agreement (guarantee) ensuring that neither will deviate from the agreed-upon strategy.

The step-by-step analysis unfolds as follows: In the initial phase, the mediator listens to the parties' interests, with each heir stating their desire to receive $85,000. The mediator then gathers relevant information by inquiring about the heirs' legal costs and,

[80] *See* Jeff Hawkins & Neil Steiner, *The Nash Equilibrium Meets BATNA: Game Theory's Varied Uses in ADR Contexts*, 1 Harv. Negot. L. Rev. 249, 253 (1996).

[81] *See* Milan Bradonjic et al., *On the Price of Mediation*, 2009 EC '09: Proc. 10th ACM Conf. on Elec. Com. 315.

in an ideal scenario, conducting limited market research to obtain near-perfect information. After defining the players' strategic framework, available strategies, and the stakes involved, the mediator must assess whether a settlement is feasible.

For the parties to choose cooperation, two key elements are necessary: communication and trust. In the case of the prisoners' dilemma, communication is impossible since they are confined in separate cells. However, in the heirs' dilemma, both elements can be fulfilled. Trust is essential in encouraging parties to communicate, and it can be facilitated by the mediator, who helps the parties engage in dialogue and reach an agreement—one that would not be beneficial for either party to breach. A mediator can also initiate cognitive-behavioural trust-building even if trust has not yet been fully restored. For example, the mediator could propose that the heirs sign an agreement committing to appear at the court hearing without a lawyer. If either party breaches this agreement and hires a lawyer, they would incur a fine of $75,000. As a result, neither party has an incentive to breach the mediated agreement, ensuring that neither hires a lawyer. This way, both heirs achieve the most beneficial outcome through mediation without incurring unnecessary legal fees.

EXAMPLE 2: CONFLICT BETWEEN ENTREPRENEURS

Company *A* has been successfully producing apple jam for ten years. Company *B* supplied Company *A* with unique jars for the jam. Company *A* is well-known in the market not only for its delicious apple jam but also for its product durability—that is, consumers can store the apple jam in the jars for an extended period without special conditions. Once opened, the jar maintains the jam at a stable temperature and preserves its unique taste for three months.

In April 2023, Company *B* supplied Company *A* with 200,000 jars at a price of three euros each. However, within two weeks, 180,000 out of the 200,000 jars were found to be defective. According to an expert evaluation, the breakage of the jam jars was caused by defective glass material used by Company *B* in the manufacturing process. As a result, Company *A* incurred a total loss of €400,000 .

During the mediation process, Company *A* requested immediate full compensation for the damages. However, the representative of Company *B* stated that, at this stage, the company could only pay €100,000. He explained that the company did not

have the remaining €300,000 and that paying the full amount would result in Company *B*'s bankruptcy.

If the parties remain firmly entrenched in their positions, their negotiation will shift from a non-zero-sum game to a zero-sum game, preventing the achievement of total utility. The right to claim €400,000 significantly outweighs the €100,000 offered, making it highly likely that Company *A* will proceed to court if no alternative proposal is presented. However, if a mediator intervenes, they may propose alternative settlement terms that would not typically be considered in court or arbitration proceedings.

The mediator can strategically design options for the parties and, by identifying their B.A.T.N.A. and W.A.T.N.A., construct a game theory table. Additionally, the mediator can apply the W.N.S. calculation model to assess the parties' priorities—such as timely delivery, product quality, the acceptability of alternative jar types, and reputational concerns—and create a matrix to determine whether a Z.O.P.A. exists.

If the resulting matrix indicates a zero-sum game, the mediator can attempt to "expand the pie" by proposing settlement terms that increase payoffs for both parties. For example:

1. Company *B* compensates Company *A* with €100,000 immediately and pays the remaining damages over *X* years (if acceptable to Company *A*).

2. Alternatively, within two years, Company *B* supplies Company *A* with 500,000 high-quality jars at two euros each instead of three euros, offsetting the damages in a mutually beneficial manner.

Numerous such settlement options can be formulated through mediation. The mediator should also highlight the advantages of these proposals. For instance, if Company *A* terminates its relationship with Company *B*, it will need to find an alternative manufacturer, incurring additional time, costs, and responsibilities. Moreover, if Company *A* pursues legal action, it will face significant financial and time-related costs. Conversely, through a negotiated settlement, Company *B* avoids bankruptcy and continues to operate with greater financial stability.

CONCLUSION

This essay demonstrates how mediation can serve as an effective tool for dispute resolution by applying game theory principles and instruments. The analysis reveals

that both parties are more likely to be satisfied with the resolution if they adopt strategies that maximize mutual benefits. Game theory provides a structured and analytical framework for assessing the potential progression of negotiations and predicting the likelihood of settlement. However, its effectiveness depends heavily on the availability of accurate, unfiltered information and open communication between the parties. A lack of complete information or an inability to establish or restore trust—such as when parties refuse to sign any agreement—can render game theory-based mediation ineffective. By synthesizing key scholarship and applying it to various scenarios, this essay concludes that mediators play a crucial role in enhancing the mediation process and guiding the parties toward an efficient and mutually beneficial settlement.

The mediator can assist the parties in finding a solution where neither disputing party has an incentive to unilaterally deviate from the agreement. Depending on the mediation style, this can be achieved either through active facilitation or by guiding the process in a "fair" manner that enables the parties to reach such solutions independently. The mediator identifies the parties' needs and concerns, evaluates their priorities, and assesses the level of trust between them. By doing so, the mediator can construct an accurate strategy table, assigning the respective payoffs to different choices.

Once the game model is developed, the mediator analyses various competitive and cooperative strategies and evaluates their respective payoffs. If the mediator determines that one party's total gain is balanced by the other party's total loss, they can explore the underlying circumstances of the dispute, assess whether common interests exist, and analyse the parties' bargaining power. Through this process, the mediator may identify opportunities for integrative solutions and "expanding the pie," ultimately creating outcomes that benefit both parties.

If the mediator determines that a Nash equilibrium is possible, they can design appropriate incentives to encourage trust between the parties, ensure the enforcement of mutual commitments, and promote a win-win resolution of the conflict—one in which neither party feels unfairly treated.

These added-value functions should not compromise the mediator's neutrality, as a neutral mediator fosters trust in the process and creates an environment conducive to building mutual trust between the parties. Importantly, if the disputing parties base their decisions on rationality, the mediator can enhance the process by presenting the results of their analysis, thereby clarifying the structure of the game and its potential outcomes. This reality-testing approach helps the parties reach a rational and efficient resolution.

However, as discussed, the assumptions of game theory do not fully align with the complexities of real-world mediation dynamics. Unlike theoretical models, mediation takes place in an environment characterized by imperfect information, emotional influences, and evolving party interests. These factors make the direct application of rigid game-theoretic models impractical. Instead, game theory serves as a valuable heuristic tool—a conceptual framework that helps mediators and disputing parties structure their decision-making processes rather than dictating precise numerical outcomes.[82]

One key advantage of applying game theory in mediation is its emphasis on strategic decision-making. It provides mediators with structured models for analysing B.A.T.N.A. and W.A.T.N.A., assessing the dynamics of cooperation versus competition, and implementing trust-building mechanisms. Additionally, concepts such as Nash equilibrium and decision matrices help identify the conditions under which parties are more likely to reach a settlement or escalate their dispute.[83]

Additionally, game theory illustrates the critical role of trust in mediation. When parties perceive mediation as a zero-sum game, they are more likely to withhold information or engage in strategic deception. However, by reframing the process through non-zero-sum strategies and expanding the range of available options ("expanding the pie"), mediators can encourage cooperation and facilitate outcomes that maximize joint gains rather than merely redistributing losses.[84]

In commercial disputes, the application of game theory is particularly relevant because decision-making often involves long-term business relationships, contract structuring, and financial risk analysis. Mediators with a strong understanding of economic principles can use game theory to help businesses reach settlements that protect financial interests while maintaining future cooperation.[85]

Further research should examine the effectiveness of game theory in mediation from the perspective of mediators themselves, assess the optimal degree of mediator involvement in facilitative mediation, and explore how disputing parties perceive the application of game theory models in the mediation process. While strategic intervention in negotiation can be both beneficial and detrimental, future studies should also address the ethical considerations surrounding such interventions. These investigations would be instrumental in identifying the appropriate balance of mediator

[82] *See* Fisher et al., *supra* note 75, at 94.
[83] *See* Hawkins & Steiner, *supra* note 80, at 97.
[84] *See* Lande, *supra* note 37, at 102.
[85] *See* Goldberg et al., Stephen B., *"Mediation in Commercial Disputes: The Role of Economic Rationality"*, (2021), Harvard Negotiation Law Review, p. 108.

actions, contributing to the development of more effective mediation techniques, and refining the understanding of what constitutes optimal mediation.

FUNDING STATEMENT

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

DECLARATION OF INTEREST

The author declares no conflict of interest.

VOLUME 10 ISSUE 1 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/20653

Received: 10 Nov. 2024 | Reviewed: 26 May 2025 | Accepted: 29 May 2025 | Published: 08 Oct. 2025

Beyond the Bag: MetaBirkins, Hermès, and the Legal Frontier of NFTs in Trademark Law

THAYSSA BOHADANA MARTINS

Thayssa Bohadana Martins is a Ph.D. Candidate in Law, Science and Technology (LAST-JD) at Alma Mater Studiorum – University of Bologna (Italy), in joint doctorate with Autonomous University of Barcelona (Spain). She holds an LL.M. in Law and Technology from Tel Aviv University (Israel) and an LL.B. from the Rio de Janeiro State University (Brazil), and is a licensed attorney in Brazil. Her research examines the intersection of intellectual property law and emerging technologies, with a focus on non-fungible tokens (NFTs), copyright, and trademark enforcement. A member of the Legal Blockchain Lab at the University of Bologna (Italy), she has published and presented her work at international conferences addressing blockchain, digital regulation, and intellectual property.

@ thayssa.bohadana2@unibo.it

0000-0003-3792-1324

ABSTRACT

The MetaBirkins case, pitting Hermès against digital artist Mason Rothschild, underscores a groundbreaking challenge in trademark law within the rapidly evolving landscape of digital assets. Rothschild's fur-covered, Birkin-inspired Non-Fungible Tokens (NFTs) presented as digital art, not only defied Hermès' strict brand identity but also ignited a legal debate over the intersection of artistic freedom, consumer protection, and brand exclusivity. Hermès argues that the MetaBirkins infringe on its Birkin trademark, claiming they could dilute the brand's value and confuse consumers. At the same time, Rothschild asserts his N.F.Ts. are artistic expressions protected under the First Amendment. This paper delves into the legal complexities raised by this case, analyzing Rothschild's defenses against Hermès' claims of infringement, dilution, and cybersquatting in the United States (U.S.) and exploring how similar claims might fare under European Union (E.U.) trademark law. It highlights the limitations of traditional trademark frameworks in addressing digital assets, examining how both U.S. and E.U. laws might adapt to protect intellectual property rights without stifling creative expression. To provide a comprehensive analysis, this paper first offers an overview of the technologies involved, specifically N.F.Ts. and blockchain, establishing the foundation for Rothschild's and Hermès' respective claims. It then presents Hermès' arguments regarding U.S. trademark protections before assessing Rothschild's First Amendment defenses. Next, a comparative section examines how E.U. trademark law might apply, considering the potential defenses Rothschild could raise under the E.U.'s different legal framework. Finally, the study reflects on the implications of Rothschild's ongoing appeal, positioning this case as a pivotal reference point for the future of intellectual property in digital spaces and for balancing brand rights with creative freedoms.

KEYWORDS

Non-fungible Tokens; Trademark; Intellectual Property Law; Digital Art; Blockchain

JEL CODES

O34, G32

TABLE OF CONTENTS

INTRODUCTION

The year is 2021, and the *most wonderful time of the year* had just begun – i.e., it was early December. As the stores prepared for another busy shopping season, an unexpected challenger showed up at the doorstep of Hermès, one of the most famous fashion houses in the world. This challenger, however, was not a competing brand, rather a digital artist with a collection of Non-Fungible Tokens [hereinafter N.F.Ts] of virtual, fur-covered handbags called "MetaBirkins".[1] Coined by Mason Rothschild, these N.F.Ts. reimagined the iconic Birkin bag in a way that defied Hermès' traditional branding. As colourful, furry reinterpretations of one of the most desired handbags, the MetaBirkins were designed not from exotic leather, but from pixels, blockchain codes, and – as Rothschild argues- artistic vision.

As a result, the MetaBirkins quickly attracted attention—not only from N.F.Ts. collectors and digital art enthusiasts, but from Hermès' legal team. For the fashion house, Rothschild's N.F.Ts. were not just art; they were an infringement on Hermès' trademark, an unauthorized appropriation of the Birkin brand that could confuse consumers and dilute the exclusivity meticulously crafted around the Birkin name. In a world where a single Birkin bag can be worth hundreds of thousands of dollars, Hermès saw Rothschild's N.F.Ts. as a threat to its premium position in the luxury market.

Thus, Hermès did what any other brand owner would have done in its place: filed a lawsuit against Rothschild for trademark infringement, dilution, and cybersquatting.[2] For Hermès, the MetaBirkins directly impacted the Birkin brand identity, which had been carefully curated over decades to become a symbol of status and exclusivity. For reference, it is impossible to walk into a Hermès store and buy a Birkin bag. The bag is only available to the customer if Hermès offers them the opportunity to purchase it, and there is not much clarity about the steps that one needs to take to enter the Hermès "whitelist" and finally get the iconic bag.[3] In the eyes of Hermès, making the MetaBirkins available to anyone who wants to buy them has stripped away the exclusive character of the Birkin brand. There was a real fear that Birkins would become just another commodity openly sold in the N.F.Ts. digital market.

On the other hand, Rothschild took a stand and argued that the MetaBirkins were not just a commercial product, but digital art pieces that alerted consumers against animal

[1] *See* Alyssa Kelly, *Mason Rothschild's 'MetaBirkin' NFTs Sell for Record Prices*, L'Officiel USA (Apr. 14, 2022), https://www.lofficielusa.com/fashion/hermes-metabirkins-nfts-collection.

[2] *See* Hermès Int'l v. Rothschild, No. 22-CV-384-JSR, 2023 WL 1458126 (S.D.N.Y. Feb. 2, 2023), Doc. n. 1, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.573363.1.0_2.pdf.

[3] *See* Jasmine Li, *A Birkin insider shares her tips on buying the elusive bag: 'They want you to be a disciple of the brand'*, Fortune (Apr. 2, 2024), https://fortune.com/2024/04/02/birkin-insider-tips-buying-disciple-brand/.

cruelty. The Birkin design was specifically chosen because it is made with leather from exotic animals. Rothschild's main goal was to criticise the use of animal products in the luxury market. His MetaBirkins, consequently, carried out a form of speech that warrants protection under the First Amendment rights. Rothschild argued that he did not intend to become Hermès competitor or create digital imitations of the Birkin bag. Conversely, the MetaBirkins were, at their core, expressive works of art that were designed to inspire and provoke.

Besides highlighting the conflict between freedom of artistic expression and trademark protection, the *MetaBirkins* case brought to light a new legal question: how do traditional trademark protections apply to N.F.Ts., which operates in a digital, borderless, and decentralized environment? Trademark law is inherently territorial[4] and designed to protect the brands within a specific geographic region, yet the MetaBirkins existed on the Blockchain, accessible worldwide and unbound by jurisdictional constraints. This friction between tokenised digital art and Trademark law underscored the need for a cross-border approach to Intellectual Property Law.

In this scenario, the *MetaBirkins* case is more than a judicial precedent in the U.S. courts. It also serves as a critical case study in the evolution of Intellectual Property rights. As N.F.Ts. are growing in popularity in the digital art market, the judiciary is being called upon to balance two fundamental interests: artistic freedom and trademark protection. This balance is fascinating for N.F.Ts., which blur the lines between art and asset in ways that defy traditional legal categorization.

This paper aims to dissect the complex interplay between trademark rights and freedom of artistic expression within the context of N.F.Ts, deploying the *MetaBirkins* case as a lens. It will explore Hermès' claims and Rothschild's First Amendment defence. Further, this research will conduct a comparative analysis, examining how the European Union's approach to trademark law might yield different outcomes in similar cases. This comparison is particularly relevant as Hermès is a globally recognized French brand with trademarks registered in the E.U., subjecting it to E.U. trademark regulations. Moreover, the E.U.'s legal framework offers a contrasting perspective to the U.S. system, since it is rooted in civil law rather than common law, emphasising harmonized trademark protections across Member States and a distinct balance between consumer rights and brand ownership. By contrasting U.S. and E.U. frameworks, this study seeks to illustrate the legal and jurisdictional challenges that arise when national laws confront decentralized digital assets.

[4] *See generally* Annette Kur, *Trademark Functions in European Union Law*, *in* The Cambridge Handbook of International and Comparative Trademark Law 162 (Irene Calboli & Jane C. Ginsburg eds., 2020) (U.K.).

The paper is organized as follows. First, it provides a concise explanation of the technologies that surround the *MetaBirkins* case, specifically N.F.Ts. and Blockchain. Second, it outlines the trademark protection scenario in the U.S. to lay the groundwork for the third part, which starts with the legal analysis of the *MetaBirkins* case, from the U.S. perspective, detailing Hermès' claims of trademark infringement and dilution and examining Rothschild's defences. Next, a comparative analysis explores how E.U. trademark law would approach the Case, from the perspective of Hermès, i.e., the potential claims available for the fashion house in the E.U. This is followed by discussing the possible defences for Rothschild within the E.U. Member States. Finally, the paper concludes with an analysis of the broader implications of the findings.

1. BRIEF CONSIDERATIONS OF NON-FUNGIBLE TOKENS

Blockchain technology serves as the structure that allows N.F.Ts. to exist as unique digital assets. It functions as an unchangeable record that logs transactions across a network of computers.[5] Every "block" in the chain holds a transaction record, resulting in a tamper-proof and transparent system where data cannot be modified retroactively.[6] Blockchain, therefore, creates an environment that allows transactions and exchanges to happen in a secure and immutable way. This framework supports activities ranging from digital currency transfers to trading unique assets, such as N.F.Ts.

N.F.Ts. are generated, or "minted", by smart contracts on a blockchain, producing a token that represents metadata associated with certain goods or rights.[7] By establishing a link between metadata and ownership records to the blockchain, N.F.Ts. benefit from this transparent and secure infrastructure, which forms the foundation of digital asset transactions and ownership tracking.[8]

This characteristic allows this type of token to represent individual ownership and authenticity of an asset, which is now stored digitally and can be as tradeable as a physical object. [9] Therefore, N.F.Ts. functions as units of value representing various items, ranging from physical assets to voting power. And, by being recorded on the blockchain, the ownership of the N.F.Ts. can be transferred from one individual to another, much like the transfer of a real asset.[10] In other words, N.F.Ts. to provide creators and businesses a means to monetize digital assets while guaranteeing the origin and rarity of each item.[11] All of those factors made N.F.Ts. particularly attractive to the digital art market, as N.F.Ts. can be used by artists to confirm ownership and originality of their digital artworks, which had previously suffered from the lack of means for such verification.[12] And the use of this technology in this specific sector reached its apex in 2021, when Beeple's digital collage

[5] *See* Andrés Guadamuz & Christopher Marsden, *Blockchains and Bitcoin: Regulatory Responses to Cryptocurrencies*, First Monday, Vol. 10, N. 12, (Dec. 7, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704852.

[6] *See generally* Klint Finley, Gregory Barber & Nicole Kobie, *The WIRED Guide to the Blockchain*, Wired (Feb. 2, 2023), https://www.wired.com/story/guide-blockchain/.

[7] *See generally* Usman W. Chohan, *Non-Fungible Tokens (NFTs): Early Thoughts and a Research Agenda* (Critical Blockchain Rsch. Initiative (CBRI), Working Paper, 2021).

[8] *See generally* Pierluigi Cuccuru, *Beyond Bitcoin: An Early Overview on Smart Contracts*, 25 Int'l J.L. & Info. Tech. 179 (2017) (U.K.).

[9] *See generally* Andres Guadamuz, *The Treachery of Images: Non-Fungible Tokens and Copyright*, 16 J. Intell. Prop. L. & Prac. 1367 (2021) (U.K.).

[10] *See generally* Nikhil Malik et al., *Blockchain Technology for Creative Industries: Current State and Research Opportunities*, 40 Int'l J. Rsch. Mktg. 38 (2023).

[11] *See* Jessica Bookout et al., *A Brief Introduction to Digital Art & Blockchain*, 37 Cardozo Arts & Ent. L.J. 553, 556 (2019).

[12] *See* Steve Kaczynski & Scott Duke Kominers, *How NFTs Create Value*, Harvard Business Review (Nov. 10, 2021), https://hbr.org/2021/11/how-nfts-create-value.

sold for $69 million[13]. Even though recent data[14] suggests a decline in the global sales of art-related NFTs, the market for this specific type of token has been projected to grow at an annual rate of 34.5% through 2030, having reached the size of 26.9 billion just in 2023.[15]

However, the absence of existing legal frameworks prepared to deal with this new type of technology poses a significant difficulty, especially in the field of Intellectual Property, where the use of N.F.Ts. is a significant problem. Subsequently, whenever there is a lack of regulation, legal disputes are sure to arise.[16] This study analyses one of them, the *MetaBirkins* case.

2. THE METABIRKINS CASE: A U.S. APPROACH TO TRADEMARK PROTECTION AND N.F.TS.

In the next Section, this Article will discuss the history of Mason Rothschild's relationship with Hermès and how it led to a lawsuit. The fundamental legislative framework regulating trademark protection and intellectual property rights in the United States will then be outlined. This is necessary since the following part will examine Hermès' allegations and Rothschild's responses. This Section will conclude with the jury's verdict and repercussions.

2.1 BACKGROUND OF THE LAWSUIT BETWEEN HERMÈS AND ROTHSCHILD

The dispute arose in 2021 after a contemporary artist, under the pseudonym of Mason Rothschild [hereinafter Rothschild], decided to create virtual images of handbags with an almost identical design to the iconic Birkin bag from the luxury French fashion house Hermès International [hereinafter Hermès]. Rothschild's first digital work, "Baby Birkin", portrayed a human fetus inside of a transparent Birkin lookalike handbag. This image was linked to an N.F.T., which, in turn, sold for the modest sum of $23,500 and later

[13] *See* Jesse Damiani, *Beeple's 'The First 5000 Days' Sold To Metakovan, Founder Of Metapurse, For $69,346,250*, Forbes (Mar. 12, 2021), https://www.forbes.com/sites/jessedamiani/2021/03/12/beeples-the-first-5000-days-sold-to-metakovan-founder-of-metapurse-for-69346250/?sh=1f1354354de4.

[14] *See Sales Value of Art and Collectibles NFTs Worldwide 2019-2023*, Statista (Mar. 18, 2024), https://www.statista.com/statistics/1299636/sales-value-art-and-collectibles-nfts-worldwide/.

[15] *See* Grand View Research, Non-fungible Token Market Size, Share & Trends Analysis Report by Application (Art, Sports), by Type (Physical Assets, Digital Assets), by End-use (Commercial, Personal), by Region, and Segment Forecasts, 2024 - 2030 (2024).

[16] In fact, there are a few cases involving Intellectual Property Law and N.F.Ts. around the world. *See e.g.*, Alt Legal Team, *Top NFT Intellectual Property Disputes in 2022*, Alt Legal (Dec. 1, 2022), https://www.altlegal.com/blog/top-nft-intellectual-property-disputes-in-2022/.

resold for almost $50,000. By the end of 2021, Rothschild had created a collection of one hundred N.F.Ts. called MetaBirkins and each N.F.T. was linked to an image portraying virtual Birkin-like handbags covered in different varieties of fur.[17] The collection was an immediate success with an estimated sale of one million dollars. [18] With the launch and rapid success of Rothschild's MetaBirkin N.F.Ts., Hermès soon took legal action, claiming that this digital interpretation unlawfully infringed upon its renowned Birkin brand.

2.2 TRADEMARK PROTECTION IN THE U.S

The Lanham Act (15 U.S.C. §§ 1051 et seq.) is the primary source of regulation for trademark matters.[19] It establishes federal guidelines for registering and enforcing trademark rights. The Act's goal is to protect the public and the businesses, and to do so, it ensures that trademarks are not used in ways that might cause consumer confusion or damage the reputation that trademark owners have built around their brand.[20]

Trademark rights in the U.S. originate from two actions: actual use in trade and/or formal registration with the United States Patent and Trademark Office [hereinafter U.S.P.T.O.].[21] Whereas common law rights are derived from the use of the mark in commerce, the federal registration offers additional protections, such as the presumption of ownership and validity.[22]

2.2.1 CORE PROTECTIONS OF U.S TRADEMARK: INFRINGEMENT AND DILUTION

Among the protections available under the Lanham Act, the most relevant for the present discussion are those brought by Hermès in its claims against Rothschild: trademark infringement and dilution.

Trademark infringement occurs when a mark is used in a way that might confuse customers regarding its origins. According to the Lanham Act, to establish trademark infringement, the following must be verified: (1) the existence of a valid and protectable mark; (2) the complainant owns this mark; (3) the unauthorized use of the

[17] *See* Cassell Ferere, *Digital Artist Mason Rothschild Drops 100 'MetaBirkins' NFTs Through Basic.Space*, Forbes (Dec. 13, 2021), https://www.forbes.com/sites/cassellferere/2021/12/13/digital-artist-mason-rothschild-drops-100-metabirkins-nfts-through-basicspace/.

[18] *See* Hermes Int'l v. Rothschild, No. 22-CV-384-JSR, 2023 WL 1458126 (S.D.N.Y. Feb. 2, 2023), Doc. nn. 24-41, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.573363.24.41.pdf.

[19] *See* Lanham Act, 15 U.S.C. §§ 1051-1127 (1946), https://www.law.cornell.edu/wex/lanham_act.

[20] *See* Lanham Act, Legal Information Institute, https://www.law.cornell.edu/wex/lanham_act.

[21] *See Why register your trademark?*, USPTO, (Mar. 31, 2021), https://www.uspto.gov/trademarks/basics/why-register-your-trademark.

[22] *Id.*

mark to identify goods or services causes a likelihood of confusion.[23] Although the Lanham Act codified trademark protection in the U.S., it did not provide guidance on determining the likelihood of confusion.[24] This legal void has become an invitation for the American courts to deliberate. As a result, each of the thirteen circuits in the U.S. employs a fact-based analysis for the likelihood of confusion test, all of which have distinct details, but are comparable in general.[25] The Polaroid test is applied in the Second Circuit – which has jurisdiction over the *MetaBirkins* case. It examines the strength of the original user's mark, the similarity of the two marks, the proximity of the two products, the likelihood that the original user would enter the alleged infringer's market ("bridging the gap" between the two markets), evidence of actual confusion, the alleged infringer's intent, the relative quality of the products bearing the marks in question, and the sophistication of the product's consumers. This test will be further analysed when assessing Hermès' claims on the Section below.

The trademark dilution infringement (15 U.S.C. §1125) is a recent addition to the Lanham Act,[26] implemented by the Trademark Dilution Revision Act [hereinafter: T.D.R.A.] of 2006. It provides supplementary protection for famous trademarks, against uses that diminish their uniqueness.[27] Unlike infringement, which focuses on confusion, dilution applies regardless of it.[28] Dilution takes two forms: *blurring*—which weakens a mark's distinctiveness by linking it with unrelated products—and *tarnishment*, which associates a mark with inferior or undesirable goods.[29] Hermès argued that Rothschild's use of the Birkin name risked diluting its luxury image. This claim is discussed in greater depth in the section covering Hermès' dilution claims.

2.2.2 THE BALANCE BETWEEN FREEDOM OF ARTISTIC EXPRESSION AND TRADEMARK IN THE UNITED STATES

Whenever one talks about freedom in the U.S., they are often referring to the First Amendment of the U.S. Constitution, which prohibits Congress from passing laws

[23] *See* Lanham Act.
[24] *See* Daryl Lim, *Trademark Confusion Simplified: A New Framework for Multifactor Tests*, 37 Berkeley Tech. L.J. 867, 881 (2022).
[25] *See* Dan Hunter, *Trademark*, *in* The Oxford Introductions to U.S. Law: Intellectual Property 131, 166 (Dan Hunter & Dennis Patterson eds., 2012) (U.K.).
[26] *See id.* at 139.
[27] *See* Stacey L. Dogan & Mark A. Lemley, *The Trademark Use Requirement in Dilution Cases*, 24 Santa Clara High Tech. L.J. 541, 545 (2008).
[28] *See* Lim, *supra* note 24, at 891.
[29] *See* Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, H.R. 683, 109th Cong., https://www.congress.gov/bill/109th-congress/house-bill/683.

"abridging the freedom of speech"[30], making it one of the cornerstones of the protection of various forms of expression, including political speech, public discourse, and creative works. Although freedom of artistic expression is not explicitly mentioned, the U.S. Supreme Court has recognized that artistic expression is a form of free speech strongly protected by the First Amendment.[31] The Supreme Court went even further to affirm that the First Amendment protection extends even if the artistic or expressive materials are sold for profit.[32]

At times, trademark law protections under the Lanham Act will clash with the First Amendment protections,[33] as illustrated in the *MetaBirkins* Case. Therefore, when courts enforce trademark laws that restrict such expression, it is considered an act that warrants First Amendment assessment to determine whether the law unjustifiably limits creative freedom.[34] The absence of an explicit mention has not limited the protection of freedom of artistic expression; instead, its scope has been expanded by the courts, which include "whatever the human creative impulse produces" as artistic expression.[35] This judicial interpretation is critical, especially in the context of N.F.Ts., which challenges the conventional categories of expression.

Thus, whenever there is an artistic work that is alleged to infringe a trademark, it is necessary to weigh the public interest in freedom of speech against the public interest in preventing consumer confusion.[36] In an attempt to find a balance between those interests, the American courts have developed different tests to determine whether the use of another's mark in artistic expression violates that mark.[37] The Second Circuit, where the *MetaBirkins* case was tried, applies the *Rogers test*. According to this test, First Amendment rights should take precedence over trademark rights when the defendant uses the plaintiff's mark in the title of an artistic work, unless the title has no artistic significance to the underlying work at all or, if it does, unless it explicitly

[30] "*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*." U.S. Const. amend. I.

[31] *See* Stephanie Dotson Zimdahl, *A Celebrity Balancing Act: An Analysis of Trademark Protection Under the Lanham Act and the First Amendment Artistic Expression Defense*, 99 Nw. U. L. Rev. 1817, 1825-26 (2005).

[32] *See* Time, Inc. v. Hill, 385 U.S. 374, 397 (1967).

[33] *See* Dotson Zimdahl, *supra* note 31, at 1825.

[34] Lisa P. Ramsey, *First Amendment Limitations on Trademark Rights*, *in* 3 Intellectual Property and Information Wealth: Issues and Practices in the Digital Age 147, 148 (Peter K. Yu ed., 2007).

[35] *Freedom of Expression in the Arts and Entertainment*, American Civil Liberties Union (Feb. 27, 2002), https://www.aclu.org/documents/freedom-expression-arts-and-entertainment.

[36] *See* Alexander J. Kasparie, *Freedom of Trademark: Trademark Fair Use and the First Amendment*, 18 U. Pa. J. Const. L. 1547, 1573 (2016).

[37] *See* Dotson Zimdahl, *supra* note 31, at 1827.

misleads as to the work's source or content. [38] When assessing Rothschild's defences in the following sections.

With the *Rogers test* as a foundational tool for balancing the interests of artistic freedom and trademark protection, the *MetaBirkins* case provides a critical lens through which to explore the tension between expressive rights and brand integrity in digital contexts. The following Section will focus on Hermès' claims against Rothschild's MetaBirkins collection, delving into how trademark infringement and dilution concerns are addressed within the expanding field of N.F.T.-based art. This analysis will reveal the complexities of applying traditional IP frameworks to contemporary forms of digital expression.

2.3 HERMÈS CLAIMS AGAINST ROTHSCHILD'S METABIRKINS COLLECTION

To better understand Hermès' claims, examining the key legal arguments put forth by the fashion house in the U.S. court system is crucial. Hermès filed claims for trademark infringement, dilution, and cybersquatting.[39] For this paper, the focus will be on (1) trademark infringement and (2) dilution of the Birkin brand, both of which are protected under the Lanham Act.[40] The following sections break down Hermès' arguments, detailing how it contended that Rothschild's use of the Birkin mark likely led to consumer confusion and threatened the brand's iconic status.

2.3.1 THE TRADEMARK INFRINGEMENT CLAIM (15 U.S.C. § 1114)

Hermès' central claim is based on Section 32 of the Lanham Act[41]. This Section states that any person who uses a registered mark in commerce, without the consent of the trademark owner, is liable for trademark infringement.[42] Hermès' complaint revolved around the fact that Rothschild was using the Birkin mark,[43] without permission, in

[38] *See* Ramsey, *supra* note 34, at 158.
[39] *See* Hermes Int'l v. Rothschild, No. 22-CV-384-JSR, 2023 WL 1458126 (S.D.N.Y. Feb. 2, 2023), Doc. n. 1, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.573363.1.
[40] *See* Lanham Act, 15 U.S.C. §§ 1051-1127 (1946). The Lanham Act is the main federal trademark statute in the United States. It governs trademark law, including registration, maintenance and protection of trademark. Full Act available at: https://www.bitlaw.com/source/15usc/index.html.
[41] *See* 15 U.S.C. § 1114 (1946) (Section 32 of the Lanham Act): Remedies; infringement; innocent infringement by printers and publishers, Nov. 2015 (BitLaw), n.d., https://www.bitlaw.com/source/15usc/1114.html.
[42] *See Id.*
[43] Hermès owns the registered trademark for both the Birkin name and the Birkin handbag design within U.S. territory. *See* Birkin handbag design, Registration No. 3936105, USPTO, Search; BIRKIN, Registration No. 2991927, USPTO, Search.

connection with the sale, distribution, and advertising of the MetaBirkins N.F.Ts.[44] Moreover, the fashion house claimed that the N.F.Ts. had no discernible artistic intent and, therefore, should be treated as commercial speech under the *Gruner + Jahr v. Meredith Corp test*.[45] The Gruner + Jahr test functions as a preliminary consideration for whether the trademark use should even qualify for artistic protection in the first place. It essentially asks whether the trademark is being used as part of the content (eligible for artistic protection) or as a label for branding purposes (more likely to be viewed as a commercial source indicator).[46]

One fact that supported the application of this test is the slogan used by Rothschild, "NOT YOUR MOTHER'S BIRKIN" when marketing his N.F.Ts., which made a clear indication of commercial intent on the Birkin brand.

Rothschild, in turn, defended himself in a Motion to Dismiss[47] by arguing that his N.F.Ts. did not infringe the trademark because they were used in the context of art. By attaching his tokens to the digital images of the reimagined Birkin bags, they should be considered as an artistic expression, protected by the First Amendment. To analyse cases that require the balance between artistic expression and trademark protection, the courts generally begin with applying the *Rogers test*. This test acts as a gatekeeper for First Amendment rights in creative works, by posing two questions: first, if the use of the trademark has artistic relevance; second, if this use is explicitly misleading to consumers.[48]

However, the First Amendment does not extend its protection to unauthorized use of another's mark as a source identifier.[49] This is precisely what Hermès counterargued. It claimed that the use of the Birkin trademark was a mere indicator of source and that Rothschild's addition of the generic term "Meta" (referring to metaverse) to the mark "Birkin" created an explicitly misleading impression that Hermès – the only source of the Birkin handbags – was offering the Birkin bags in the metaverse.[50] Furthermore, Hermès challenged the application of the *Rogers test*, not only for the lack of artistic relevance of the N.F.Ts, but also because it could be explicitly misleading. However, the Second Circuit – where the case was tried – has already stated that explicit misleadingness is not necessary;

[44] *See* Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 1, at 34, ¶¶ 115-28, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.573363.1.0.
[45] *See id.*, Doc. n. 31, at 8, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourt.
[46] *See* Muzamil Abdul Huq, Ani Oganesian & Alyssa Mahatme, *Hermès Successfully Defends its Trademark in the Metaverse*, Lexology (Feb. 9, 2023), https://www.lexology.com/library/detail.aspx?g=6dba3b12-030d-41ff-98c6-1c2aad6468ce.
[47] Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 17, https://storage.courtlistener.com/recap/gov.uscourts.
[48] *See* Sven Schonhofen, *Trade Mark Law and the First Amendment: California District Court Clarifies the Rogers Test*, 11 J. Intell. Prop. L. & Prac. 482, 483 (2016) (U.K).
[49] *See* Yankee Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 276 (S.D.N.Y. 1992).
[50] *See* Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 31, at 11.

instead, a "particularly compelling" case of likelihood of confusion is required to overcome the First Amendment interests involved.[51]

The Court denied Rothschild's Motion to Dismiss based on the *Rogers* doctrine, finding that, despite the MetaBirkins showing artistic relevance, Hermès presented a compelling case for likelihood of confusion.[52] The Court noted that customers commenting on the MetaBirkins Instagram page were unsure if Hermès was linked with the N.F.Ts., and that various media sources had incorrectly asserted that Hermès was affiliated with the N.F.Ts.[53] The Court also cited the strength of the Birkin mark and apparent bad faith on the part of Rothschild as other elements that might create a convincing case of likelihood of confusion.[54]

Courts across the U.S. apply several key factors to assess this likelihood, through specific tests. The one used in the Second Circuit is the *Polaroid test*. It consists of an eight-factor test to evaluate the potential for consumer confusion in trademark disputes. [55] Under the *Polaroid* analysis, the following factors should be taken into consideration: (1) the strength of Hermès' trademark; (2) the similarity between Hermès' Birkin mark and MetaBirkins; (3) evidence of actual consumer confusion; (4) the likelihood that Hermès might expand to the N.F.Ts. market, "bridging the gap"; (5) the proximity of the products in the marketplace; (6) the existence of bad faith when Rothschild used the Birkin sign; (7) the quality of the marks; and (8) the sophistication of the relevant consumers.[56]

By incorporating these factors, Hermès presented a compelling argument for the likelihood of consumer confusion. Initially, Hermès emphasised the Birkin mark's significance as a global symbol of exclusivity and luxury. This strength increases the probability that consumers will associate any use of the mark with Hermès. Secondly, Hermès was significantly favoured by the similarity of the marks. The fashion house contended that the name MetaBirkins combines the entire "Birkin" mark and the prefix "Meta", which does not significantly distinguish it. This is because "Meta" can imply a virtual or digital interaction, which further reinforces the association with the original Birkin purses.[57] The N.F.Ts. displayed a striking resemblance to the renowned Birkin handbags, accentuating their similarity.

[51] *See* Andrew C. Michaels, *Confusion in Trademarked NFTs*, 7 Stan. J. Blockchain L. & Pol'y 1, 15 (2024).
[52] Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 50, at 20, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.573363.50.0.pdf.
[53] *See id.* at 5.
[54] *See id.* at 14.
[55] *See* Lim, *supra* note 24, at 884.
[56] *See* Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 50, at 17.
[57] *See id.*, Doc. n. 1, at 34, ¶ 1.

Moreover, regarding the third factor, Hermès provided substantial evidence of consumer uncertainty, such as a commissioned survey that indicated an 18.7% net confusion rate among potential N.F.Ts. consumers.[58] The fashion house also brought examples of press articles and social media posts in which consumers and commentators appeared to believe that Hermès was associated with or endorsed the MetaBirkins N.F.Ts.[59]

Following the remaining factors, the plaintiff sustained that it was feasible that Hermès might expand into the N.F.T. space, given the trend of high-end luxury brands exploiting this market,[60] supporting the fourth factor of the *Polaroid test*. Hermès further argued that

> . . . [C]onsumers are sophisticated enough to be well aware that brands have been expanding from physical into digital goods; they nonetheless are likely to be (and in fact have been) confused by Defendant's use of the BIRKIN trademark and apparent affiliation with Hermès and actual BIRKIN handbags.[61]

Therefore, the luxury brand made clear that, despite sophistication, consumers can be confused due to unfamiliarity with N.F.Ts. technology and digital marketplaces.

2.3.2 THE DILUTION CLAIM (15 U.S.C. § 1125(C))

In addition to the consumer confusion claim, the fashion house contended that the MetaBirkins also diluted the distinctiveness of the Birkin brand. The dilution claim in the U.S. is based on the T.D.R.A., which adds a new Section 43(c) to the Lanham Act.[62] This statue is intended to protect famous trademarks from uses that erode their uniqueness or tarnish their image, even when consumers are not likely to be confused about the origin of the goods.[63] The dilution claim is a key aspect in the strategy of trademark protection in the luxury sector, because it is a protection limited to famous marks and also does not require proof of consumer confusion.[64]

[58] *See id.*, Doc. n. 67-1, at 15, ¶ 21, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.
[59] *See id.*, Doc. n. 72, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.
[60] *See* Noah Johnson, *15+ Luxury Fashion Brands into NFTs in 2023*, NFT Evening (Apr. 10, 2024), https://nftevening.com/luxury-fashion-brands-nft/.
[61] Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 31, supra note 45, at 14.
[62] *See generally* David S. Welkowitz, *Oh Deere, What's to Become of Dilution? (A Commentary on the New Federal Trademark Dilution Act)*, 4 UCLA Ent. L. Rev. 1, 4 (1996).
[63] *See* Ilanah Simon, *Dilution in the US, Europe, and Beyond: International Obligations and Basic Definitions,* 1 J. Intell. Prop. L. & Prac. 406, 409 (2006) (U.K).
[64] *See id.* at 410.

Section 43(c) of the Lanham Act[65] requires Hermès to demonstrate four aspects to win a trademark dilution claim: (1) the Birkin trademark is well-known; (2) the defendant is using the MetaBirkins trademark in commerce; (3) Rothschild's use started after the Birkin trademark gained notoriety; and (4) Rothschild's use of MetaBirkin lowers the quality of the Birkin mark by reducing its ability to identify and differentiate goods and services.

Thus, in contrast to conventional trademark infringement, which relies on the "confusion" test centred on source or sponsorship, dilution is predicated on more nebulous notions of "*blurring*" and "*tarnishment*" that do not inherently rely on consumer perceptions regarding the origin of a defendant's product.[66] *Blurring* occurs when the association with a famous mark is weakened through repeated use on unrelated products, causing it to lose its distinctiveness over time. *Tarnishment*, by contrast, involves associations that could harm the brand's reputation, such as linking it with unsavoury or lower-quality products. Although the MetaBirkins may not "blur" Hermès' reputation, Rothschild's use of the Birkin mark could be seen as exploiting its recognizability and prestige without authorization. Though diluting the Hermès brand is a genuine issue, the concern is specific to N.F.Ts. is that Rothschild may unintentionally "take" Hermès's place in this digital tokenised market.[67] Moreover, owing to the fact that the Birkin handbag serves not just as a utilitarian item but as an emblem of luxury and exclusivity, any connection to Rothschild's fur-adorned, creative reinterpretations of the bags could jeopardize Hermès' authority over the Birkin's image.

2.4 ROTHSCHILD DEFENCES AGAINST HERMÈS CLAIMS

In response to Hermès' accusations, Rothschild asserted that his MetaBirkins N.F.Ts. were not an infringement but rather a legitimate exercise in artistic expression. Consequently, he employed several defences, centred around the First Amendment, to argue that the MetaBirkins represented a commentary on luxury culture rather than an unauthorized use of Hermès' trademarks. In addition, against the dilution claim, Rothschild made a strategic use of non-commercial and referential arguments.

The following Sections outline these defences, examining how Rothschild's claim to artistic freedom was positioned against Hermès' assertion of consumer confusion and dilution.

---

[65] 15 U.S.C. § 1125 (Section 43 of the Lanham Act): False designations of origin, false descriptions, and dilution forbidden, Nov. 2015 (BitLaw), n.d. https://www.bitlaw.com/source/15usc/1125.html.

[66] *See* Dogan & Lemley, *supra* note 27, at 543-44.

[67] *See* Michelle Gery, *Understanding the MetaBirkin: Trademark Law and an Appropriate Legal Standard for NFTs,* 47 Colum. J.L. & Arts 619, 636 (2024).

2.4.1 FREEDOM OF ARTISTIC EXPRESSION DEFENCE UNDER THE FIRST AMENDMENT

For Rothschild, the MetaBirkins were more than just N.F.Ts.; they were a result of his expression as an artist, designed to instigate the consumers into questioning the use of animal products in the luxury market. Not surprisingly, in the U.S., one of the primary defences against a trademark infringement lawsuit is the assertion of freedom of artistic expression, which is protected under the First Amendment.[68] Therefore, after Hermès filed the complaint, Rothschild presented a Motion to Dismiss, invoking his First Amendment rights. He claimed that his creations constituted a form of artistic expression condemning animal cruelty, and consequently, were subject to being protected by the said Amendment.[69] This defence is typically evaluated using the *Rogers test*, which determines whether the right to protect a registered trademark should be restricted in specific circumstances to safeguard freedom of expression in artistic works.[70]

Hermès, however, counterargued that the *Rogers test* did not apply because Rothschild was using the MetaBirkins not as art, but rather as a mark to identify source on social media, to promote and advertise the sale of N.F.Ts., as a U.R.L., and neither of those uses is protected by the First Amendment.[71] In other words, the referred Amendment does not protect the unauthorized use of another's mark when it functions as a source identifier.[72]

When analysing the Rothschild motion to dismiss, Judge Rakoff made relevant remarks considering the artistic relevance of the MetaBirkins. First, he stated that using the artwork's title for social media and relevant accounts dedicated to its sale is consistent within *Rogers'* marketing and advertising guidelines. Furthermore, regarding the specifics of N.F.Ts, the Judge concluded:

> Neither does Rothschild's use of [N.F.Ts.] to authenticate the images change the application of Rogers: because [N.F.Ts.] are simply code pointing to where a digital image is located and authenticating the image, using [N.F.Ts.] to authenticate an image and allow for

[68] *See* Michaels, *supra* note 51.

[69] *See* Christian Tenkhoff, Philipp Grotkamp & Sylvia Burgess-Tate, *Brands in the Metaverse: The Concept of 'Interdimensional Confusion' Between the Physical and the Virtual Space under EU Trade Mark Law*, 72 GRUR Int'l 643, (2023) (Ger.).

[70] *See* Paolo Maria Gangi, *The NFT Hermés Case: Mainly Relevant for Large Collection of NFTs*, The IPKat: Guest Post (Mar. 2, 2023), https://ipkitten.blogspot.com/2023/03/guest-post-nft-hermes-case-mainly.html.

[71] *See* Felicia Boyd, *Trademarks and NFTs: The battle over "MetaBirkin" NFTs continues*, The Brand Protection Blog (June 10, 2024), https://www.thebrandprotectionblog.com/2024/06/trademarks-and-nfts-the-battle-over-metabirkin-nfts-continues/.

[72] *See* Jack Daniel's Properties, Inc. v. VIP Products L.L.C., 599 U.S., slip op. at 3 (2023), https://supreme.justia.com/cases/federal/us/599/22-148/case.pdf.

> traceable subsequent resale and transfer does not make the image a commodity without First Amendment protection any more than selling numbered copies of physical paintings would make the paintings commodities for Rogers.[73]

Concerning the applicability of the *Rogers test*, Judge Rakoff noted that the test required a very low threshold for artistic expression. It could be satisfied unless the use had "*no artistic relevance to the underlying work at all*".[74] And since the MetaBirkins represented a commentary on consumerism and luxury fashion, there was, therefore, a direct link to creative expression. Nonetheless, the Judge noted that Hermès provided enough evidence of Rothschild's intention of having his N.F.Ts. associated with the fashion house, instead of with an artistic association, especially when Rothschild made statements saying the MetaBirkins were a tribute to Hermès.[75] Still, Judge Rakoff concluded that the *Rogers test* was applicable in this Case, given that Rothschild's use had a modicum of artistic relevance. However, Judge Rakoff left open the issue of whether Rothschild's use was explicitly misleading, indicating that this prong required further examination to determine if the use implied Hermès' endorsement or sponsorship.[76]

Before delving into the application of the *Rogers test*, it is necessary to understand its origins. It emerged from a ruling in *Rogers v. Grimaldi* in 1989, which involved the use of actress Ginger Rogers' name in the film *Ginger and Fred.*[77] The question was whether the movie title constituted commercial speech or artistic expression, and if the Lanham Act would ban the use of her name in the title.[78] The Second Circuit determined that the Lanham Act should only apply to artistic works where the public interest in avoiding consumer confusion outweighs the public interest in free expression.[79] Since then, the *Rogers test* has evolved into a fundamental legal test in the United States for assessing the applicability of First Amendment rights in instances of trademark utilization within creative creations.[80]

In summary, the *Rogers test* determined that an artistic use of a trademark was protected by the First Amendment as long as (1) the use of the trademark has artistic

[73] Hermès Int'l v. Rothschild, No. 22-CV-384-JSR, 2023 WL 1458126 (S.D.N.Y. Feb. 2, 2023), Doc. n. 50, at 12.
[74] *Id.* at 13.
[75] *See id.* at 14.
[76] *Id.* at 19.
[77] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).
[78] *See* John Villasenor & Sam Albright, *NFTs and Birkin Bags: A Hermès Lawsuit Tests the Limits of Trademark Rights*, The Brookings Institution (Apr. 21, 2022), https://www.brookings.edu/articles/nfts-and-birkin-bags-a-hermes-lawsuit-tests-the-limits-of-trademark-rights/.
[79] *See* Rogers v. Grimaldi, 875 F.2d 994, 996 (2d Cir. 1989).
[80] *See* Michael D. Murray, *Deepfakes and Dog Toys: First Amendment Defenses under the Rogers Test after Jack Daniel's v. VIP Products*, SSRN (May 1, 2024), https://ssrn.com/abstract=4811359 http://dx.doi.org/10.2139/ssrn.4811359].

relevance to the underlying work; (2) the use is not explicitly misleading as the source or content of the work.[81] The initial factor—artistic relevance—establishes a modest threshold, indicating that the mark's usage must possess some connection to the work's creative expression. The second factor—explicitly misleading—determines that the work does not imply the trademark owner's sponsorship or involvement in a deceptive manner.[82]

Regarding the first prong, Hermès argued that the N.F.Ts. failed to meet the artistic relevance standard. As continuously reiterated by Hermès, the N.F.Ts. were mere digital reproductions of the Birkin bag with no genuine artistic purpose besides capitalizing on Hermès' reputation. On the other hand, Rothschild argued that his MetaBirkins were expressive works because they reimaged the Birkin bag in a digital form that critiques the values the Birkin symbolizes (i.e. exclusivity, and luxury).

Moving on to the second prong, Hermès contended that the MetaBirkins were explicitly misleading to consumers, since they mirrored the name and design of the Birkin bag. To support this claim, Hermès presented evidence of actual confusion to the court, such as surveys, magazine reports, and social media publications.[83] Adversely, Rothschild argued that his use was not explicitly misleading, since it did not imply Hermès endorsement or sponsorship. Quite the contrary, Rothschild added a disclaimer in the MetaBirkins website that read "*We are not affiliated, associated, authorized, endorsed by, or in any way officially connected with the HERMES, or any of its subsidiaries or its affiliates*" and included a link to the Hermès website.[84] The defence even went as far as to compare his works with Andy Warhol's Campbell Soup paintings, which recontextualized a well-known brand into the realm of fine art.[85]

Whereas the works of Andy Warhol were singular pieces, the MetaBirkins collection consisted of one hundred NFTs. One could have argued that there is no risk of a consumer intending to purchase a can of Campbell Soup in a supermarket and inadvertently acquiring the Warhol artwork representing the Campbell's Soup. These are both distinctly different products and aimed at disparate consumer demographics in the market.[86]

---

[81] *See* Ramsey, *supra* note 34, at 158.

[82] *See* Taylor E. Green, *The Rogers Test Dances Between Trademark Protection under the Lanham Act and Freedom of Speech under the First Amendment*, 112 Trademark Rep. 844, 848 (2022).

[83] *See* Hermès Int'l v. Rothschild, No. 22-CV-384-JSR, 2023 WL 1458126 (S.D.N.Y. Feb. 2, 2023), Doc. n. 72.

[84] Taylor Dafoe, *Hermès Is Suing a Digital Artist for Selling Unauthorized Birkin Bag NFTs in the Metaverse for as Much as Six Figures,* Artnet News (Jan. 26, 2022), https://news.artnet.com/art-world/hermes-metabirkins-2063954.

[85] *See* Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 65-1, https://storage.courtlistener.com/recap/gov.uscourts.nysd.573363/gov.uscourts.nysd.573363.65.1_1.pdf.

[86] *See* Gangi, *supra* note 70.

Notwithstanding Hermès's efforts to disqualify the application of the *Rogers test* to the Case, the Court thought otherwise due to its allegations about the lack of artistic expressions in an N.F.T.. When denying both parties' Motion for Summary Judgment, Judge Rakoff reaffirmed that the *Rogers test* was the appropriate framework for evaluating the Case, noting specifically that N.F.Ts. qualified as an expressive work. By doing so, the Judge inherently clarified that N.F.Ts. possess a dual character. Namely, N.F.Ts. are digital assets (tokens on the blockchain that certify ownership) and artistic or creative works (the digital content associated with those tokens). The decision also clarified that N.F.Ts. are fundamentally digital assets that provide unique ownership rights over an associated image or file, but that Rothschild was not merely selling virtual assets devoid of content.[87] Instead, the N.F.Ts. represented digital handbags with distinct visual features (fur-covered Birkin bags) that consumers might view as a form of artistic expression or even virtual luxury goods.[88] As for the "explicitly misleading" factor, Judge Rakoff found sufficient evidence to suggest a likelihood of consumer confusion, pointing to Hermès' evidence of consumer misunderstanding regarding MetaBirkins' association with Hermès. The Judge noted that there was substantial factual disagreement concerning multiple factors of the *Polaroid test*, including the strength of the Birkin mark, the similarity of the marks, and evidence of actual consumer confusion. These unresolved issues on key *Polaroid* factors indicated that the "explicitly misleading" prong could not be conclusively resolved at this stage.

Consequently, while Judge Rakoff applied the *Rogers test* to Rothschild's work, he ultimately denied summary judgment, concluding that a jury trial was necessary to determine whether Rothschild's MetaBirkins N.F.Ts. explicitly misled consumers into believing there was an endorsement or association with Hermès.[89]

2.4.2 NON-COMMERCIAL USE AND REFERENTIAL USE DEFENCE AGAINST DILUTION

Several defences are available against dilution claims, especially when the defendant's use can be argued as non-commercial or artistically expressive.[90] The Lanham Act's dilution provision outlines these potential defences,[91] exempting uses that are descriptive, non-

[87] *See* Hermes Int'l v. Rothschild, 2023 WL 1458126, Doc. n. 140, at 14, https://www.courtlistener.com/docket/62602398/hermes-international-v-rothschild/.
[88] *See id.*
[89] *See id.*, Doc. n. 50, at 19.
[90] *See* Hunter, *supra* note 25, at 179.
[91] *See* 15 U.S.C. § 1125 - False designations of origin, false descriptions, and dilution forbidden, https://www.law.cornell.edu/uscode/text/15/1125.

commercial, or otherwise protected under the First Amendment as forms of expressive speech.[92]

In the *MetaBirkins* case, Rothschild strategically selected a defence grounded in non-commercial artistic expression and referential use. His approach emphasised that MetaBirkins N.F.Ts. should be considered protected art, positioning his work as a commentary on luxury culture and animal cruelty, rather than a commercial enterprise attempting to leverage the Birkin brand for profit.[93] Moreover, Rothschild contended that MetaBirkins were merely referring to Hermès' trademark, only describing the good, with no intent to tarnish the brand's reputation.[94]

By leveraging artistic expression, non-commercial use, and referential use defences, Rothschild sought to distinguish MetaBirkins as protected speech, maintaining that his reinterpretation of the Birkin bag was designed to reflect its cultural status rather than dilute or harm the brand.

2.5 THE JURY VERDICT AND IMPLICATIONS

Despite Rothschild's efforts to defend the MetaBirkins as artistic expression, the jury ultimately sided with Hermès, concluding that Rothschild was liable for trademark infringement, dilution and cybersquatting.

However, it remains uncertain which of the two prongs was pivotal: whether the MetaBirkins N.F.Ts. were deemed to lack artistic relevance or if the usage was regarded as explicitly misleading to consumers. [95] Since a jury verdict does not provide detailed reasoning or legal analysis, the decision only indicated liability without clarifying its rationale. This lack of explanation left it unclear whether the jury found the MetaBirkins N.F.Ts. lacking in artistic relevance, explicitly misleading, or both. This uncertainty generated criticism[96], of the verdict, highlighting the need for further clarity on brand use within N.F.Ts. and digital assets, where the boundaries between artistic expression and commercial endorsement are still evolving.

[92] *See* Welkowitz, *supra* note 62, at 5.
[93] *See id.*
[94] *See id.* at 22.
[95] *See* Inès Tribouillet, Magdalena Borucka & Christian Tenkhoff, *MetaBirkin: Hermès Successful in First NFT Trade Mark Trial,* Marques (Feb. 11, 2023), https://www.marques.org/blogs/class46/?XID=BHA5158.
[96] *See* Brian L. Frye, *Tokenized Brands*, 9 St. Thomas J. Complex Litig. (Special Issue) 32, 40 (2023).

In response, Rothschild has recently filed an appeal,[97] seeking a reassessment of the legal principles applied to N.F.Ts. as artistic expression in the context of trademark law. This appeal will reexamine the intersection of trademark rights and First Amendment protections, offering an opportunity to clarify how courts might address similar cases. With the appeal now in motion, the legal community is closely watching for potential refinements or adjustments to brand use standards in digital art.

To clarify these unanswered questions, examining the possible legal ramifications of such situations in other jurisdictions is essential. This is significant not only for Hermès, a French fashion brand, but also for legal practitioners, academics, and magistrates. Analysing jurisdictions' approaches like the E.U. to analogous trademark and intellectual property matters enables interested parties to obtain insights into developing legal principles, foresee potential challenges, and engage in the broader discourse on reconciling intellectual property rights with emerging technological advancements. This is especially valuable for Hermès, given its Birkin trademark is also registered in the E.U. jurisdiction. [98]

Therefore, exploring the *MetaBirkins* case under the E.U. 's trademark framework could shed light on whether European courts would reach similar conclusions, given the E.U. 's distinct requirements and protections against unlawful trademark usage. With disputes in digital spaces still in early stages, the U.S. decision may influence European perspectives; however, a comparative analysis is essential to understand how E.U. trademark law might respond to similar challenges.

In the following section, the *MetaBirkins* case will be assessed from an E.U. perspective. This will offer insight into the global landscape of digital trademark enforcement and highlight the diverse protections brands must navigate in a cross-border digital marketplace.

[97] *See* Blake Brittain, *MetaBirkins NFT Creator, Hermes Square off in US Trademark Appeal,* Reuters (Oct. 23, 2024), https://www.reuters.com/legal/litigation/metabirkins-nft-creator-hermes-square-off-us-trademark-appeal-2024-10-23/.

[98] *See* BIRKIN, Registration No. 0686529, EUIPO, https://euipo.europa.eu/eSearch/#details/trademarks/W10686529; Birkin 3D form, Registration No. 004467247, EUIPO, https://euipo.europa.eu/eSearch/#details/trademarks.

3. THE METABIRKINS CASE: AN ANALYSIS FROM THE E.U. LEGAL FRAMEWORK PERSPECTIVE

This section will analyse the *MetaBirkins* case through the E.U. legal framework and provide a structured examination of how European trademark law would address Hermès' claims and Rothschild's defences. With the expansion of digital assets like NFTs, which blur the lines between commercial products and expressive art, understanding E.U. trademark protection in this context offers insights into how Europe might respond to similar cases.

First, Section 3.1 will outline trademark protections in the E.U., starting with an overview of the legislative framework and examining the balance between trademark rights and artistic freedom under European law. This will assist in contextualizing Rothschild's potential defences under E.U. legal principles, particularly in light of Europe's nuanced approach to balancing freedom of expression against brand protections.

Section 3.2 will explore the specific claims Hermès might assert under E.U. trademark law. The analysis will begin with the double-identity protection outlined in art. 9(2)(a) European Union Trademark Regulation 2017/1001 [hereinafter E.U.T.M.R.] and art. 10(2)(a) Trademark Directive [hereinafter T.M.D.], where Hermès could argue that the MetaBirkins infringe directly on its Birkin trademark. This Section will continue by assessing the likelihood of confusion protections in art. 9(2)(b) E.U.T.M.R. and art. 10(2)(b) T.M.D., including a closer look at the likelihood of confusion test in E.U. law and key distinctions between E.U. and U.S. approaches. Finally, it will be evaluated how these principles might apply to Hermès' arguments that MetaBirkins create consumer confusion in a European setting.

Moving further, Section 3.2.3 will address the protections against dilution and unfair advantage (or "*free-riding*") in Article 9(2)(c) E.U.T.M.R. and Article 10(2)(c) T.M.D. Examining the concepts of dilution by "*blurring*" and "*tarnishment*" as well as unfair advantage. It will be considered how Hermès could argue that MetaBirkins dilutes the exclusivity of the Birkin brand or unfairly benefits from its reputation. This part will also analyse how successful Hermès' claims might be under E.U. law, shedding light on the standards Rothschild would face when asserting European artistic and referential defences.

3.1 TRADEMARK PROTECTION IN THE EUROPEAN UNION

The European trademark framework is founded on two significant legal instruments. The Harmonization Directive [hereinafter First Council Directive 89/104][99] served as the foundation for unifying trademark legislation among the Member States of the E.U. This directive has been replaced by a new Directive [100] EU 2015/2436 [hereinafter T.M.D.], which eradicates inconsistencies among national regulations that may obstruct the free flow of goods and services and distort competition.[101] National trademark regulations are now nearly equivalent across the E.U. due to the implementation of the First Directive into national law. Almost all Member States already possess such provisions in their legislation, and where this is not presently the case, they will be required to amend their laws in compliance with Directive 2015/2436, which mandates such protection.[102]

The second legal instrument is the Trademark Regulation 2017/1001 [103] and its provisions are almost identical to those of the Directive.[104] The E.U.T.M.R., besides being valid throughout the E.U. without needing national implementation, also provides a unified trademark registration system in the E.U., whereby one registration provides protection in all Member States,[105] much like the registration at the U.S.P.T.O.

[99] First Council Directive 89/104/ECC of 21 Dec. 1988, To Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1.
[100] Directive (EU) 2015/2436, of the European Parliament and of the Council of 16 Dec. 2015, To Approximate the Laws of the Member States Relating to Trade Marks, 2015 O.J. (L 336) 1.
[101] *See* Charles Gielen, *Trademark Dilution in the European Union*, *in* Trademark Dilution and Free Riding 188, 223 (Daniel R. Bereskin ed., 2023) (U.K.).
[102] *See id.* at 223.
[103] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017, European Union Trade Mark, 2017 O.J. (L 154) 1 [hereinafter E.U.T.M.R.].
[104] *See* Gielen, *supra* note 101, at 224.
[105] *See Trade Marks*, European Union Intellectual Property Office [hereinafter E.U.I.P.O.], https://www.euipo.europa.eu/en/trade-marks.

3.2 HERMÈS POSSIBLE CLAIMS UNDER EU TRADEMARK LEGISLATION (ART. 9 (2) E.U.T.M.R. AND ART. 10 (2)

Both the E.U.T.M.R. and the T.M.D. The provides protections highly relevant to Hermès' claims in this study. Those protections are outlined in Article 9(2) E.U.T.M.R. and Article 10(2) T.M.D., which establish three types of protection: under sub (a) protection against double identity; sub (b) protection against confusion; and sub (c) protection against dilution:

> Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the E.U. trade mark, the proprietor of that E.U. trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:
>
> 1. the sign is identical with E.U. trade mark and is used in relation to goods or services which are identical with those for which the E.U. trade mark is registered;
> 2. the sign is identical with, or similar to, the E.U. trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the E.U. trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;
> 3. the sign is identical with, or similar to, the E.U. trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the E.U. trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the E.U. trade mark.[106]

From the assessment of the law, it is clear to observe that to successfully assert trademark rights under E.U. trademark law, under those protections, it must first be demonstrated that the use of a conflicting sign occurred "*in the course of trade*" and "*in connection with goods or services*". These two conditions, therefore, delimit the scope of the

[106] Art. 9(2)(a)(b)(c) EUTMR (Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) (Text with EEA relevance).

exclusivity granted to the owner of a registered trademark.[107] While there is no hierarchy of protection between those three categories, each of them has its own peculiarity.[108] For instance, in sub (a), there is an unwritten requirement, established by the Court of Justice of the European Union[109] [hereinafter C.J.E.U.], which determines that the use must impact the origin function[110] of the trademark.[111] Each of these protections will be analysed in detail in the following sections.

With Hermès' registrations of both the "Birkin" word mark and the Birkin 3D form mark established as the foundation of their rights, examining the specific legal protections provided under E.U. trademark law is essential. These protections, as outlined in Article 9(2) of the E.U.T.M.R. and Article 10(2) of the T.M.D., delineate the various forms of infringement that Hermès could claim in this case. In particular, they offer recourse in instances of double identity, confusion, and dilution, each of which prevents unauthorized uses of registered marks within the E.U.

3.2.1 THE DOUBLE-IDENTITY PROTECTION UNDER ARTICLE 9(2)(A) E.U.T.M.R. AND ARTICLE 10(2)(A) T.M.D

The first type of protection is outlined in art. 9(2)(a) E.U.T.M.R. and art. 10(2)(a) of the Directive. Known as the "double identity rule", this protection grants the trademark proprietor the exclusive right to prohibit the use of a sign that is identical to the registered mark, in relation to goods or services that are identical to those for which the trademark was registered. [112] In simple terms, the double identity protection grants trademark owners the exclusive right to prevent others from using an identical mark for identical goods or services.

Moreover, the double identity rule provides absolute protection, meaning that if someone uses an identical mark on identical goods, the trademark owner can prevent

[107] *See* Michal Bohaczewski, *Conflicts Between Trade Mark Rights and Freedom of Expression Under EU Trade Mark Law: Reality or Illusion?*, 51 IIC - Int'l Rev. Intell. Prop. & Competition L. 856, 858 (2020) (Ger.).

[108] *See* Ilanah Fhima & Dev S. Gangjee, *Introduction: The Likelihood of Confusion*, *in* The Confusion Test in European Trade Mark Law 1, 2 (2019) (U.K.).

[109] *See* Case C-487/07, L'Oréal SA v. Bellure NV, 2009 E.C.R I-05185.

[110] Originally, trademarks primarily served the origin function, helping consumers identify the source of goods or services. However, as trademark law has evolved, the C.J.E.U.'s function theory has expanded to protect additional functions, such as investment, advertising and quality function. *See* Annette Kur, *Trademark Functions in European Union Law - Also Containing a Comment on C.J.E.U. Case C-129/17, Mitsubishi v. Duma* 11 (Max Planck Institute for Innovation & Competition, Research Paper No. 19-06, 2019), https://doi.org/10.2139/ssrn.3425839.

[111] *See* Annette Kur & Martin Senftleben, *Rights Conferred*, *in* European Trade Mark Law 276, 276 (2017).

[112] *See* EU, European Union Intellectual Property Office (EUIPO), EUIPO Guidelines https://guidelines.euipo.europa.eu/binary/2214311/2000180000 P. 883.

that usage without needing to demonstrate consumer confusion.[113] Unlike the other two protections (against confusion and dilution), no additional conditions are required by the provision itself. [114] The Recital 16 of the T.M.D. confirms that the protection should be absolute, if the two identity criteria are met : (1) same sign or mark and (2) same category or class of registration.[115]

In addition to the letter of the law, there is an unwritten condition set by the C.J.E.U. that there must be some negative impact on at least one of the trademark's functions.[116] Therefore, an infringement claim under double identity must prove that the infringing use harms the traditional origin function or the accessory ones.[117] As a result, the double identity claim cannot prevail unless the trademark owner proves all the cumulative conditions of use, including proof of a detrimental effect on at least one of the functions of the trademark.

When assessing whether this rule would apply to the *MetaBirkins* case, one needs to consider the statutory requirements and the C.J.E.U. 's interpretation. Firstly, the mark and goods or services must be identical to the trademark owner's. In this context, Hermès could argue that the MetaBirkins N.F.Ts. Replicate the Birkin name and visual design, which could be perceived as an identical use of Hermès' Birkin trademark. Secondly, it must be proven that the infringing sign causes harm to the function of the

[113] *See* César Ramírez-Montes, *EU Trademarks in the Metaverse*, 63 IDEA: L. Rev. Franklin Pierce Ctr. for Intell. Prop. 555, 673-74 (2023).

[114] *See* Kur & Senftleben, *supra* note 111, at 294.

[115] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, recital 16, 2015 O.J. (L 336) 1:

> The protection afforded by the registered trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin, should be absolute in the event of there being identity between the mark and the corresponding sign and the goods or services. The protection should apply also in the case of similarity between the mark and the sign and the goods or services. It is indispensable to give an interpretation of the concept of similarity in relation to the likelihood of confusion. The likelihood of confusion, the appreciation of which depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified, should constitute the specific condition for such protection. The ways in which a likelihood of confusion can be established, and in particular the onus of proof in that regard, should be a matter for national procedural rules which should not be prejudiced by this Directive.

[116] Specifically in the case of double identity, the C.J.E.U. already positioned itself by stating that this right:

> was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is to say, to ensure that the trade mark can fulfill its functions. The exercise of that right must therefore be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods...

in Case C-206/01, Arsenal Football Club plc v. Matthew Reed, 2002 E.C.R. I-10317, ¶ 51.

[117] *See* Kur & Senftleben, *supra* note 111, at 298.

existing trademark. On this matter, Hermès could contend that the consumers might interpret the MetaBirkins as affiliated with or endorsed by Hermès, thus impacting the Birkin Brand's origin function. Moreover, since Hermès has heavily invested in the Birkin mark as a symbol of exclusivity and luxury, using an identical mark could diminish the return on this investment by confusing the brand image.

However reasonable it may be, Hermès' claim under the double-identity protection may fall short on fulfilling the first requirement. This is because, when applying the double identity test on a case-by-case basis, the C.J.E.U. Takes a rigorous interpretation of the first criteria (i.e., identity of signs and goods), emphasising that the sign and the mark must appear identical in all essential respects.[118]

Even though the signs are similar, the term "MetaBirkins" includes the addition "Meta" to the original "Birkin" mark, suggesting that the term is not identical, and it also does not meet the threshold of "minor differences in the consumer perception". Moreover, there is no consensus regarding the identity of goods: the MetaBirkins are N.F.T.s linked to a digital image of a handbag, meanwhile Hermès Birkin handbags are, in fact, physical bags. Hermès's only possibility would be to persuade the courts to consider N.F.T.s as conceptually identical to the physical handbags in terms of market positioning and consumer perception in the luxury market. Nonetheless, one cannot ignore the clear physical-versus-digital divide, making Hermès's approach challenging, especially compared to more straightforward cases of identical goods or services in traditional trademark disputes.

Therefore, the fashion house would certainly face a challenge proving the identity of goods, making the double identity claim one of the weakest protections under E.U. law in the *MetaBirkins* case.

[118] According to the C.J.E.U. in Case C-291/00, LTJ Diffusion SA v. Sadas Vertbaudet SA, 2003 E.C.R. I-2833, ¶50-51, "*The criterion of identity of the sign and the trade mark must be interpreted strictly. The very definition of identity implies that the two elements compared should be the same in all respects. . . . There is therefore identity between the sign and the trade mark where the former reproduces, without any modification or addition, all the elements constituting the latter.*". Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0291.

3.2.2 PROTECTION AGAINST CONFUSION UNDER ARTICLE 9 (2) B E.U.T.M.R. AND ARTICLE 10(2)(B) T.M.D

The protection specified in Article 9(2)(b) of the E.U.T.M.R. and Article 10(2)(b) of the Trademark Directive, enables registered trademark owners to take action against a third party's use of a similar mark on related goods or services when it creates a likelihood of confusion among consumers.[119] To succeed in this claim, therefore, the trademark owner must prove (1) identity (or similarity) of the marks; (2) identity (or similarity) of the goods and services (both of those requirements also present in case of double identity); and (3) likelihood of confusion.[120]

3.2.2.1 LIKELIHOOD OF CONFUSION TEST IN EU

The assessment of the likelihood of confusion is used in trademark disputes, especially in infringement cases. However, neither the E.U.T.M.R. nor the T.M.D. defines when it happens or even what "confusion" means.[121] The C.J.E.U., consequently, took it upon itself to provide more clarity.

Regarding the meaning of "confusion", the C.J.E.U. already stated in the *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* case that it occurs when "*the public can be mistaken as to the origin of the goods or services in question*".[122] This can include situations where consumers may believe that the goods come "*from the same undertaking or, as the case may be, from economically-linked undertakings*".[123] In simple terms, the risk of confusion can arise either through direct confusion (where consumers mistakenly perceive the sign as the trademark itself), or through indirect confusion (where consumers associate the owner of the sign with the trademark owner, leading to uncertainty about origin).[124]

In *SABEL BV v. Puma AG*, the European Court identified the relevant factors for assessing the likelihood of confusion:

> [I]t is clear from the tenth recital in the preamble to the Directive that the appreciation of the likelihood of confusion 'depends on numerous

[119] *See* Martin Senftleben, *Adapting EU Trademark Law to New Technologies: Back to Basics?*, *in* Constructing European Intellectual Property 137 (Christophe Geiger ed., 2013) (U.K.).
[120] *See* Ilanah Fhima & Dev S. Gangjee, *Assessing Likelihood of Confusion*, *in* The Confusion Test in European Trade Mark Law 160 (2019) (U.K.).
[121] *See* EU, European Union Intellectual Property Office (EUIPO), EUIPO Guidelines, p.885, https://guidelines.euipo.europa.eu/binary/2214311/2000180000.
[122] Case C-39/97, Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc., 1998 E.C.R. I-5534, ¶ 26.
[123] *Id.* ¶ 29.
[124] *See* Fhima & Gangjee, *supra* note 120, at 164 (U.K.).

> elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign and between the goods or services identified. The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case.[125]

This ruling establishes that to verify the likelihood of confusion, the courts require (1) a degree of similarity of the signs and (2) a degree of similarity between the goods and services; (3) recognition of the trademark in the market; and (4) the association between the sign and the registered mark. Besides, all those requirements must be assessed "globally", meaning an "*appreciation of the visual, aural or conceptual similarity of the marks in question…based on the overall impression given by the marks*".[126] Furthermore, the C.J.E.U. also stated that *"the more distinctive the earlier mark, the greater will be the likelihood of confusion"*.[127] In other words, the uniqueness of the mark also plays an important role when assessing the likelihood of confusion.[128]

3.2.2.2 KEY DIFFERENCES BETWEEN U.S. AND E.U. LIKELIHOOD OF CONFUSION

From this analysis, it is possible to observe that the E.U. approach to examining likelihood of confusion is quite similar to the U.S. approach. Particularly concerning the application of the *Polaroid test*, both the E.U. and the U.S. consider factors such as similarity of the marks, proximity of goods, strength of the marks, and consumer confusion. However some key differences could be crucial when analysing the *MetaBirkins* case from the E.U. perspective.

For instance, in the context of the U.S. *Polaroid test*, the American courts also consider the intent of the (1) alleged infringer, (2) evidence of actual confusion, and (3) the sophistication of the relevant consumers.[129] In contrast, in the E.U., the intention or knowledge of the infringer is not taken into consideration, meaning that the intent is irrelevant when it comes to determining liability.[130] In other words, this lack of intent does not excuse the infringement even if someone unknowingly or unintentionally uses a trademarked sign. Subsequently, whether Rothschild had bad faith when creating the

[125] Case C-251/95, SABEL BV v. Puma AG, Rudolf Dassler Sport, 1997 E.C.R. I-6214, ¶¶ 22-25.
[126] *Id.* ¶ 25.
[127] *Id.* ¶ 24.
[128] *See* EU, European Union Intellectual Property Office (EUIPO), EUIPO Guidelines, p. 888, https://guidelines.euipo.europa.eu/binary/2214311/2000180000.
[129] *See* Gery, *supra* note 67, at 624.
[130] *See* Fhima & Gangjee, *supra* note 108, at 4.

MetaBirkins collection would not be as pertinent if the *MetaBirkins* case were judged in the E.U.

Secondly, the evidence of actual confusion (i.e., concrete proof) plays a significant role in the assessment of likelihood of confusion in the U.S., while the C.J.E.U. had already determined that actual confusion is not a requirement under the likelihood of confusion test, although desirable.[131] While acknowledging that this is one element to be weighed against others as part of a global appreciation, it is sometimes stated that proof of actual confusion is the best evidence of likely confusion. Consequently, the same way Hermès presented evidence – through surveys, social media posts and news reports – this would also be a relevant factor to consider before the European courts.

Finally, while both the E.U. and U.S. systems consider consumer attention levels, the U.S. *Polaroid test* evaluates explicitly the sophistication of the target audience, recognizing that consumers of certain goods may be more discerning and less prone to confusion. In the E.U., consumer sophistication is more generalised, with the assumption that the "average consumer" is reasonably observant and circumspect but still subject to "imperfect recollection".[132] As a result, slight differences between marks may go unnoticed by consumers in the E.U., especially if a strong impression remains that links the goods to a particular origin.[133]

3.2.2.3 HOW SUCCESSFUL WOULD HERMÈS'S LIKELIHOOD OF CONFUSION CLAIM BE IN THE E.U.?

If the *MetaBirkins* case were judged in the E.U. based solely on the likelihood of confusion, it would follow the E.U.T.M. and the T.M.D. according to the interpretation set by the C.J.E.U.

Applying these E.U. factors to the Case, the first area of consideration would be the similarity of the signs. It is enough that the relevant audience perceives the sign through any form that consumer senses can perceive. In this light, there is no doubt that MetaBirkins used the Hermès sign (i.e., the Birkin bag).

---

[131] *See* Fhima & Gangjee, *supra* note 120, at 184.

[132] *For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect,* Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt, 1998 E.C.R. I-4690, 31*). However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question* in Case C-342/97, Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV, 1997 E.C.R. I-3841, ¶ 26.

[133] *See* Fihma & Gangjee, *supra* note 120, at 162.

The second requirement is that it must be used about goods and services that are identical or similar to those for which the trademark is registered. The greater the similarity, the higher the potential for confusion. In this regard, the claim may face a challenge arising from the classification of goods in which Hermès has the registration for its trademarks. Although it could be argued that they are both focused on "fashion items", N.F.T. digital handbags would be classified as "downloadable image files" or "downloadable digital image files authenticated by non-fungible tokens"[134] under Class 9 of the Nice Classification.[135] Physical Birkin bags are classified as "handbags and leather goods", falling under Class 18. Notably, at the time of the lawsuit, Hermès did not extend its company to include digital items for use in the virtual world, nor had it filed trademark registrations for the Birkin mark for such goods.

Nevertheless, one requirement remains to be satisfied. The third and final requirement is the likelihood of confusion. The key question is whether consumers will likely view MetaBirkins N.F.T.s as originating from Hermès or as an endorsed digital line of Birkin bags. Hermès may argue that the high distinctiveness of the Birkin mark, combined with its reputation in the luxury market, heightens this risk. For an average consumer, particularly one navigating digital and physical luxury markets, even subtle associations may suffice to create a perception of endorsement.

Therefore, the same problem encountered in the analysis of the second requirement is also found in the third assessment. There is a clear distinction between a digital image of an asset, specifically, a digital handbag, and another type of digital media file, such as a virtual handbag intended for use by an avatar in a virtual environment like the Metaverse. And it was undisputed that Rothschild sold images, rather than virtually

[134] The European Intellectual Property Office ("EUIPO") asserts that the terms "downloadable goods" and "virtual goods" are ambiguous and require further specification, such as identifying the specific goods involved, for instance, downloadable multimedia files in class 9 or retail of virtual clothing in class 35. The term "NFT" is deemed unacceptable by EUIPO and must further describe the category it denotes. *See* Iza R. Mešević, *Intellectual Property Rights in the Metaverse*, 2023 Reg'l L. Rev. 345, 355 (Serb.).

[135] The Nice Classification is an international system used to categorize goods and services for trademark registration. Established by the Nice Agreement of 1957, it is maintained by the World Intellectual Property Organization (W.I.P.O.) and is widely adopted by countries worldwide. The system organizes goods and services into 45 distinct classes (34 for goods and 11 for services) to standardize trademark applications, making it easier to identify and protect trademarks across different jurisdictions. This classification system ensures uniformity in trademark filings, helping applicants and trademark offices determine the scope and potential conflicts of trademarks within specific classes. This classification provides a universal reference that allows trademark offices worldwide to uniformly assess applications, reducing inconsistencies in trademark registration processes. By clearly defining the scope of protection in specific classes, the Nice Classification helps prevent confusion and conflicts between trademarks in similar sectors, supporting effective enforcement and legal clarity. This system is particularly valuable for international trademark registration, where applicants seek protection in multiple countries under the same classification framework. *See* World International Property Office – WIPO, Nice Classification, https://www.wipo.int/classifications/nice/en/.

wearable goods. This is what is called "interdimensional confusion"[136] and it has also been seen in other cases around the world.[137] Consumers might not directly believe that Hermès created the Metabirkins, but rather sponsored them.

Nonetheless, as previously highlighted, the role of the "average consumer" is fundamental under the E.U.'s likelihood of confusion standard. The C.J.E.U. assumes that an average consumer may not remember minor distinctions between marks.[138] With a distinctive mark like Birkin, even minor similarities can reinforce an association. This imperfect recollection may lead consumers to overlook the "Meta" prefix and focus on the dominant "Birkin" element, especially in an era where digital and physical luxury goods frequently intersect. While MetaBirkins consists of digital assets, consumers might believe Hermès is involved in or has endorsed the MetaBirkins project, particularly given the trend of luxury brands expanding into virtual fashion.

The E.U. 's consumer-oriented, origin-based approach could favour Hermès more strongly than a U.S. court, where the *Polaroid test* places greater emphasis on intent and explicit confusion in expressive works. As a result, if the consumers believe the mark or sign merely as an embellishment, it will not be considered a trademark.[139] On the other hand, one must also consider that some brands have established themselves in virtual works and/or collaborated with developers to produce digital goods, which increases the likelihood of confusion between a physical asset and a digital on.

3.2.3 PROTECTION AGAINST DILUTION AND UNFAIR ADVANTAGE IN ARTICLE 9(2)(C) E.U.T.M.R. AND ARTICLE 10(2)(C) T.M.D

Up to this point, two of the three types of protection provided by E.U. trademark law have been assessed: protection against double identity and confusion. Those two provisions focus on preventing consumer confusion regarding the origin of the goods and services. Both protections also focus on satisfying the similarity requirements of the sign and the goods and services. However, in the protection against double identity, when an identical mark is used for similar goods and services, the Articles 9(2)(a) E.U.T.M.R. and 10(2)(a) T.M.D. do not require proof of confusion. Which is not the case in the protection against confusion. The safeguard under Article 9(2)(a) E.U.T.M.R. and Article 10(2)(a) T.M.D. applies when similar marks or goods/services might lead to

[136] Tenkhoff, Grotkamp & Burgess-Tate, *supra* note 69.
[137] *See, e.g.*, AM Gen. LLC v. Activision Blizzard, Inc., 450 F.Supp.3d 467 (S.D. N.Y. 2020); Court of Rome, Preliminary Injunction, July 20, 2022, *Juventus Football Club S.p.A. v. Blockeras S.r.l.,* (It.).
[138] *See* Case C-342/97, Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV, 1999 E.C.R I-3841,¶ 26.
[139] *See* Case C-102/07, Adidas AG v. Marca Mode CV, 2008 E.C.R I-2437, ¶ 33.

consumer confusion about the origin of the products. This requires a "global assessment" of factors, such as visual and conceptual similarities between the signs, the relatedness of the goods or services, and the average consumer's perception.

As can be observed, so far, trademark protection has been limited to signs used to differentiate one trader's goods from another to avoid trade confusion. For this purpose, trademarks must be capable of indicating a commercial origin. This has restricted the scope of protection to the use in the course of trade of identical or similar signs about identical or similar goods or services for which the trademark has been registered, where such use creates a likelihood of confusion (except in the case of double identity, where confusion is presumed).[140] However, the third type of safeguard provided in the E.U.T.M.R. and T.M.D. brings distinct forms of protection that step beyond consumer confusion.[141] Article 9(2)(c) E.U.T.M.R. and 10(2)(c) T.M.D. provide three distinct protections for well-known trademarks: against dilution by *blurring*, dilution by *tarnishment*, and *free-riding*. Each protects the mark's reputation and distinctiveness from different forms of misuse, recognizing that the harm to a well-known brand can take various forms beyond the traditional framework of confusion.

3.2.3.1 PROTECTION AGAINST DILUTION BY "BLURRING" AND "TARNISHMENT"

Dilution is a form of protection designed specifically for trademarks with a reputation.[142] This safeguard is outlined in Article 9(2)(c) of the E.U.T.M.R. and Article 10(2)(c) of the T.M.D., which states that the protection applies regardless of whether the goods and services are identical, similar, or entirely unrelated.[143] Rather than concentrating on protecting the consumers from confusion or ensuring fair market practices, this provision ensures that the uniqueness and appeal of the trademark remain intact. In other words, the purpose of this provision is to safeguard the investment made by the trademark owner in establishing a trademark with a specific brand image.[144]

In the context of dilution, trademark law lists specific requirements that differentiate this protection from the other two types. First, to invoke this protection,

[140] *See* Anselm Kamperman Sanders, *Dilution and Damage beyond Confusion in the European Union*, *in* THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW 499, 500 (Irene Calboli & Jane C. Ginsburg eds., 2020) (U.K.).
[141] *See id.* at 505.
[142] *See* Kur & Senftleben, *supra* note 111, at 338.
[143] *See* Gielen, *supra* note 101, at 251-52.
[144] *See* Martin Senftleben, *The Trademark Tower of Babel – Dilution Concepts in International, US and EC Trademark Law*, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 45, 56 (2009) (Ger.).

the registered trademark must have a significant market reputation. Secondly, if the reputation threshold is reached, the protection is applied to all kinds of goods and services. Notably, the mere likelihood of association is enough to bring the claim instead of demonstrating consumer confusion. The last criterion for infringement is taking unfair advantage of, or being damaging to, the unique character of the mark with a reputation. In addressing the last requirement, the C.J.E.U. differentiates between two types of dilution: by *blurring* and by *tarnishment*. In the *Intel Corporation Inc. v. CPM United Kingdom Ltd.*, the C.J.E.U. established that dilution by *blurring* occurs when

> . . . that mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor of that mark is weakened, since use of the later mark leads to dispersion of the identity and hold upon the public mind of the earlier mark.[145]

The C.J.E.U. even went further to determine that this type of dilution requires establishing a "link" in the mind of the average consumer between the reputed trademark and the third-party use.[146] Concerning dilution by *tarnishment*, the damage occurs when the trademark is associated with goods or services that could degrade its image. In this sense, the C.J.E.U. asserted that "*such detriment may arise in particular from the fact that the goods or services offered by the third party possess a characteristic or a quality which is liable to hurt the image of the mark*".[147] In the United States, dilution is also protected but demands a higher threshold for harm, specifically requiring evidence of actual damage to the famous mark's distinctiveness or reputation. The T.D.R.A. mandates that brand owners prove that the association between the marks is demonstrable rather than merely potential, contrasting with the E.U.'s standard of a possible mental "link" in the mind of consumers.

However, the European Court has already asserted that, in both cases of dilution, the trademark owners need to provide evidence of potential alteration in consumer economic behaviour or significant imminent risk that must not be speculative.[148]

---

[145] Case C-252/07, Intel Corporation Inc. v. CPM United Kingdom Ltd., 2008 E.C.R. I-8857, ¶ 29.
[146] *See id.* ¶ 30.
[147] Case C-487/07, L'Oréal SA v. Bellure NV, 2009 E.C.R. I-5246, ¶ 40.
[148] Case C-252/07, Intel Corporation Inc. v. CPM United Kingdom Ltd., 2008 E.C.R. I-8876, ¶77. *See also* Ramírez-Montes, *supra* note 113, at 672. However, there is a minority opinion that believes that this interpretation is wrong. In this regard, "*If the distinctiveness of a mark is diluted, the result will be that consumers, when faced with the mark, will no longer make a direct association with the earlier mark, thus influencing their economic behavior by causing them to turn away from the original mark. This is all the trade mark owner must prove.*" *See* Gielen, *supra* note 101, at 254.

3.2.3.2 PROTECTION AGAINST UNFAIR ADVANTAGE (OR "FREE-RIDING")

Finally, the last type of protection provisioned in Article 9(2)(c) of the E.U.T.M.R. and Article 10(2)(c) of the T.M.D. is *"free-riding"*. This type of protection can be regarded as a form of unjust enrichment, as it emphasises the advantages that an authorized party unfairly gains from the trademark.[149] In other words, brand proprietors must provide proof of the infringer's purpose to establish a connection between marks to promote the marketing of their products.[150]

Adversely, from the protections against dilution, *free-riding* does not require evidence of harm. For claims involving damage to a mark's distinctive character or reputation, the key issue is whether the mark itself has suffered harm. This focuses on how the infringing act has affected the trademark and its owner. In contrast, when dealing with unfair advantage (*free-riding*), the main question is whether the infringer has gained, rather than causing harm to the trademark owner. While claims of *blurring* and *tarnishment* involve a decrease in the value of the trademark, *free-riding* focuses on an increase in the value of the infringer's goods or services. Therefore, demonstrating harm is only required for claims involving detriment to the mark, not for those based on unfair advantage. [151] In the *L'Oréal v. Bellure*, the C.J.E.U. emphasised that *free-riding*

> . . . relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.[152]

Moreover, the precedent also established that the trademark owners must offer evidence of the defendant's intention to create an association between the marks "to facilitate the marketing".[153] Unfair advantage, therefore, claims focus on protecting the trademark owner's marketing efforts and investment in building a favourable image or positive associations linked to the E.U. trademark.[154] While there is no exact U.S. equivalent to E.U. free-riding protection, a comparison may be drawn with the T.D.R.A., which

[149] *See* Kur & Senftleben, *supra* note 111, at 338.
[150] *See* Ramírez-Montes, *supra* note 113.
[151] *See* Kur & Senftleben, *supra* note 111, at 351.
[152] Case C-487/07, L'Oréal SA v. Bellure NV, 2009 E.C.R. I-5246, ¶ 41.
[153] *Id.* ¶ 47.
[154] *See* Ramírez-Montes, *supra* note 113, at 673.

considers the intention to create an association with the earlier mark as a relevant factor for establishing *blurring*.[155]

In summary, while *free-riding* and dilution (*blurring* and *tarnishment*) are protected under the same provision (Article 9(2)(c) E.U.T.M.R. and Article 10(2)(c) T.M.D.), free-riding is not a type of dilution. Instead, it is a separate form of infringement that focuses on preventing unjust enrichment without requiring harm to the brand's distinctiveness or reputation. Both forms of protection exist to comprehensively guard famous trademarks' value and prestige in the E.U.

However, there is also a negative condition in the above-mentioned provision, which the trademark owners need to observe: protection is only granted when there is no "due cause" to justify the alleged infringing use. Article 9(2)(c) E.U.T.M.R. and Article 10(2)(c) T.M.D. clearly states:

> [T]he sign is identical with, or similar to, the [E.U.] trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the [E.U.] trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the [E.U.] trade mark.

Thus, this provision effectively incorporates a defence mechanism, allowing the use of a reputed trademark without constituting infringement if the defendant can present a sufficiently compelling reason for the unauthorized use. This flexible and broad defence has become an important safeguard, helping to balance trademark rights against prior rights and competing fundamental freedoms, particularly in the realms of artistic and commercial expression.[156] In the next sections, this negative condition will be further analysed when assessing the possible defences available for Rothschild.

3.2.3.3 HOW SUCCESSFUL WOULD HERMÈS DILUTION AND "FREE-RIDING" CLAIMS BE IN THE E.U.?

Hermès' dilution claim against Rothschild could argue both dilution by *blurring* and *tarnishment*. Regarding the first requirement – repute - it is undisputed that the Birkin mark has acquired a reputation, especially in the luxury market. Secondly,

[155] *See* Simon, *supra* note 63, at 412.
[156] *See* Kur & Senftleben, *supra* note 111, at 338.

even though the Birkin mark identifies physical leather handbags, MetaBirkins are N.F.Ts. linked to digital images, in the case of reputed marks, as seen in Section 3.2.3.1, the protection applies even when the goods and services are dissimilar. This condition, therefore, would also be met. Thirdly, it is undeniable that there is a likelihood of association in this case. In this regard, the mere fact that social media posts and news werereports mentioning Hermès' Birkin bag together with MetaBirkins would suffice to demonstrate that the "link" between the signs in the mind of the consumers was already formed. Finally, when assessing the final criterion of being detrimental to the distinctiveness or reputation of the mark, Hermès also has good chances.

In case of dilution by *blurring* (detriment to distinctive character), Hermès could argue that the widespread use of the "Birkin" name in the digital space could erode the exclusivity of the Birkin mark, gradually blurring its association with physical luxury handbags. Furthermore, Rothschild's use of digital replicas of Birkin handbags, replicating their shape and design, could negatively impact Hermès' plans to digitize and tokenise its trademarked Birkin products for future use in the metaverse. This may result in the 'Birkin' brands losing their ability to evoke an immediate association with the genuine goods in the digital market.[157] However, a shift in consumers' economic behaviour resulting in *blurring* cannot be presumed solely because the E.U. trademark is distinctive or simply due to the presence of a new, similar sign that consumers may notice.[158] Hermès would have to present evidence of a change in the economic behaviour of the consumers, which could be more difficult in the digital space.

In the dilution by *tarnishment*, although MetaBirkins N.F.Ts. Hermès could not claim that associating its high-end brand with an unauthorized digital product is inherently low-quality; Hermès could claim that associating its high-end brand with an unauthorized digital product harms the mark's luxurious reputation. In *L'Oréal v. Bellure*, the C.J.E.U. recognized that unauthorized associations can degrade a brand's image, especially luxury brands known for exclusivity and prestige.[159] Hermès could argue that *MetaBirkins* N.F.T.s cheapen the Birkin name by making it widely accessible in a digital format, which runs against Hermès' carefully carved image of exclusivity. This

[157] *See* Ioanna Lapatoura, *From Hermes v Rothschild to Vegap v Mango: An EU Analysis on Fair Metaverse Uses of Digitised IP*, 2024 Procs. Int'l. Cong. Towards Responsible Dev. Metaverse 1, 4 (Spain).

[158] *See* Ramírez-Montes, *supra* note 113, at 672.

[159] In this case, Bellure sold budget perfumes that mimicked the scents of L'Oréal's high-end fragrances and used comparative advertising to inform customers of the similarities to L'Oréal's products. Although Bellure's products were neither counterfeit nor intended to deceive consumers into thinking they were from L'Oréal, they leveraged L'Oréal's well-established brand reputation to gain market traction. The Court held that Bellure's use of L'Oréal's reputation to promote lower-cost products degraded L'Oréal's luxury image by associating it with budget offerings, thereby reducing its exclusivity and prestige. *See* Case C-487/07, L'Oréal SA v. Bellure NV, 2009 E.C.R. I-5248, ¶ 46.

perceived cheapening could tarnish the Birkin mark in the eyes of consumers, particularly if they begin to associate it with the broader, less exclusive digital N.F.T. market.

Finally, the last possible path for Hermès is the claim of *free-riding*. Different from dilution by *blurring* or *tarnishment*, if Hermès failed to prove harm to its trademark, it is enough to argue that an unfair advantage has been obtained from it. When arguing unfair advantage, the trademark owner does not need to provide evidence of harm (Section 3.2.3.2). In this argument, the key point for Hermès would be to demonstrate that Rothschild's MetaBirkins N.F.T.s likely benefited from the Birkin brand's prestige, drawing upon its image as a symbol of luxury and exclusivity.

Therefore, Hermès could argue that the intense demand and high sale price of the MetaBirkins were mainly due to the Birkin handbag's rare and highly selective nature, which Rothschild exploited. Unlike the physical Birkin handbag, the MetaBirkins N.F.Ts. were available to anyone willing to pay, undermining Hermès' curated exclusivity and creating broad public access to the Birkin name in a way that Hermès carefully restricts. This line of argumentation would bolster Hermès' *free-riding* claim, emphasising that Rothschild tapped into the allure of exclusivity and luxury surrounding the Birkin name to drive demand for MetaBirkins, a factor central to proving unfair advantage.

However, even as Hermès asserts that Rothschild has improperly capitalized on the Birkin handbag's renowned status, the E.U. trademark framework provides artists and creators with specific legal defences against claims of infringement that will be the focus of this analysis in the next section.

3.3 DEFENCES AVAILABLE FOR ROTHSCHILD UNDER THE EU TRADEMARK FRAMEWORK

To evaluate the defences available to Rothschild under the E.U. Trademark framework, this Section will analyse the specific legal provisions that could support his arguments against Hermès' claims.

First, Section 3.3.1 will cover the defences against trademark infringement claim, provided under Article 14(1) of the E.U.T.M.R. and T.M.D., where it will be assessed whether Rothschild's use of the Birkin design serves as a descriptive (Section 3.3.1.1), or referential (Section 3.3.1.2). Furthermore, Section 3.3.1.3 will explore the critical concept of "honest practices" in E.U. trademark law, which could influence how courts interpret the legitimacy of Rothschild's use.

In Section 3.3.2, the "due cause use" in Article 9(2)(c) E.U.T.M.R. and Article 10(2)(c) T.M.D. will be analysed. This use could be particularly relevant if Rothschild can demonstrate that his use of the Birkin trademark serves a legitimate social or artistic purpose that justifies the otherwise unauthorized use.

3.3.1 DEFENCES AGAINST TRADEMARK INFRINGEMENT (ART. 14 (1) E.U.T.M.R. AND T.M.D.)

Art. 14 (1) E.U.T.M.R. and T.M.D. explicitly limit the exclusive rights granted to trademark holders. These provisions are crucial in delineating the scope of trademark protection, ensuring that it does not unreasonably encroach upon other legitimate trademark uses. By balancing exclusivity with broader public interests, they acknowledge the necessity of trademarks coexisting with principles such as fair competition, freedom of expression, and trade facilitation.

In essence, the provisions specify three categories of uses deemed "fair" under the law: (1) use of one's name and address, (2) descriptive use, and (3) referential use. While the first category is not relevant to this discussion, the focus will be on the latter two. Nevertheless, Article 14(2) introduces a critical safeguard, stipulating that these permissible uses must align with 'honest practices in industrial and commercial matters', thereby setting a standard of ethical conduct in applying these limitations.

3.3.1.1 DESCRIPTIVE USE (ART. 14 (1) B E.U.T.M.R. AND T.M.D.)

The descriptive use defence under Article 14(1)(b) E.U.T.M.R. allows a trademark to describe characteristics of goods or services, such as kind, quality, or intended purpose. This defence is particularly relevant when a term has come to represent the nature or features of a product or service or where work titles or other culturally significant signs have been registered as trademarks, as it permits third-party references that enhance consumer understanding without infringing on trademark rights. However, not all uses will qualify as descriptive, and this defence applies only when the sign genuinely communicates a characteristic of the product rather than serving as a brand identifier.[160]

The C.J.E.U. has provided some guidance on the scope of descriptive use, in cases such as *Adidas AG v. Marca Mode CV* and *Adam Opel AG v. Autec AG*. The first Case dealt with

[160] *See* Martin Senftleben, *Safeguarding Freedom of Artistic Expression in the European Union: Toward a Legal Presumption of Fair Use*, *in* Charting Limitations on Trademark Rights 121, 125 (Haochen Sun & Barton Beebe eds., 2023) (U.K.).

the use of decorative stripes on clothing that bore a resemblance to Adidas's famous three-stripe trademark. In this Case, the C.J.E.U. found that the purely decorative use of a two-stripe motif on sports clothing was "*not intended to give an indication concerning one of the characteristics of those goods*".[161] The Court clarified that these stripes, used as design features, did not indicate any characteristic of the products as sportswear or leisurewear, thereby denying that the use was descriptive.[162]

In the *Adam Opel AG v. Autec AG*, the C.J.E.U. analysed the Opel logo on scale model cars produced by a third party, Autec AG. The C.J.E.U. held that the reproduction of the Opel logo on toy cars was not necessarily intended to indicate the origin of those goods but rather to achieve an accurate likeness to the original Opel cars. However, since Opel had registered its trademark specifically for toy cars, the Court ruled that the use could still be deemed relevant for infringement purposes if it fell outside "honest practices".[163]

3.3.1.2 REFERENTIAL USE (ART. 14 (1) C E.U.T.M.R. AND T.M.D.)

Referential use is one of the core defences available to Rothschild under Article 14(1)(c) of the European Union Trademark Regulation. This provision permits the use of a trademark to "identify or refer to" the goods or services associated with the mark owner, particularly when the use is necessary for conveying information, such as compatibility or association.[164] Initially focused on product and service identification, the 2015 E.U. trademark reforms expanded this limitation,[165] allowing third-party uses *"which concern the kind, quality, quantity, intended purpose, value, geographic origin, the time of production of goods or rendering of the service or other characteristics of goods or services".*

The present version of the provisions allows users to express opinions, criticism, or refer to goods and services marked by that trademark, including indicating participation in an undertaking. It also allows lawful recognition of statements often debated, such as satirical or political expressions.[166]

---

[161] Case C-102/07, Adidas v. Marca Mode, 2008 E.C.R. I-2481, ¶ 48.

[162] *See* Martin Senftleben, *The Unproductive "Overconstitutionalization" of EU Copyright and Trademark Law – Fundamental Rights Rhetoric and Reality in CJEU Jurisprudence*, 55 IIC - Int'l Rev. Intell. Prop. & Competition L. 1471 (2024) (Ger.).

[163] Case C-48/05, Adam Opel AG v. Autec AG., 2007 E.C.R. I-1050, ¶ 43.

[164] *See* Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (hereinafter E.U.T.M.R.), art. 14 (1), 2017 O.J. (L 154) 1: *"A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade: . . . (c) the trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of the trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.*".

[165] *See* Ramírez-Montes, *supra* note 113, at 693.

[166] *See Krystyna Szczepanowska-Kozłowska, Referential Use – A Limitation or Expansion of the Right to a Trademark,* 56 IIC - INT'L REV. INTELL. PROP. & COMPETITION L. 771 (2025) (Ger.)

However, the wider referential use defence's ability to encompass artistic usage has seldom been tested.[167]

3.3.1.3 HONEST PRACTICES IN INDUSTRIAL AND COMMERCIAL MATTERS

Referential and descriptive use defences have to be interpreted "*in accordance with honest practices in industrial or commercial matters*". [168] This is a provision outlined in Article 14(2) E.U.T.M.R. and T.M.D, and it aligns with Article 17 of the Agreement on Trade-Related Aspects of Intellectual Property,[169] making emphasis on the importance of allowing a fair use of descriptive terms.[170]

The "honest practices" standard requires third-party trademark use, even when intended for commentary, critique, or other expressive purposes, to respect established norms of fairness and avoid misleading implications about origin or endorsement. Although Recital 21 E.U.T.M.R. and Recital 27 T.M.D. both affirm that artistic expression should be "considered fair" as long as it complies with "honest practices", this language offers limited concrete guidance on what constitutes fair behaviour.[171]

The "honest practices" condition introduces complexities for artists who may lack familiarity with industry-specific norms that typically apply to commercial actors. This requirement can constrain artists who wish to utilise trademarks in their expressive works. [172]

In *BMW v. Deenik*, the C.J.E.U. interprets "honest practices" to mean that third-party use "[...] *must be regarded as constituting in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner.*" [173] In addition, the C.J.E.U. held in *Gillette v. LA-Laboratories* that the use will not comply with the "honest practices" if

> . . . use of the trade mark will not comply with honest practices in industrial or commercial matters where, first, it is done in such a manner that it may give the impression that there is a commercial

[167] *See id.* at 771-74.
[168] E.U.T.M.R., art.14(3).
[169] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 17, Apr. 15, 1994, 1889 U.N.T.S.: "*Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties*".
[170] *See* Martin Senftleben, *Robustness Check: Evaluating and Strengthening Artistic Use Defences in EU Trademark Law*, 53 IIC - Int'l Rev. Intell. Prop. & Competition L. 567, 583 (2022) (Ger.).
[171] *See* Senftleben, *supra* note 160, at 132.
[172] *See* Senftleben, *supra* note 170, at 570.
[173] Case C-63/97, Bayerische Motorenwerke AG (BMW) & BMW Nederland BV v. Ronald Karel Deenik, 1999 E.C.R. I-947, ¶ 61.

> connection between the reseller and the trade mark proprietor[...] Nor may such use affect the value of the trade mark by taking unfair advantage of its distinctive character or repute . . .[174]

As the C.J.E.U's interpretations in *BMW v. Deenik* and *Gillette v. LA-Laboratories* show, "honest practices" demand that any referential or descriptive mark use must avoid implying a false connection or profiting from the brand's reputation. However, a use that could be confusing – such as in the *MetaBirkin* case – will inherently create a connection.[175] The C.J.E.U. has not yet assessed this question, but in *Céline SARL v Céline SA*, it has been concluded that

> . . . [W]hether the condition of honest practice is satisfied, account must be taken first of the extent to which the use of the third party's name is understood by the relevant public, or at least a significant section of that public, as indicating a link between the third party's goods or services and the trade- mark proprietor or a person authorised to use the trade-mark, and secondly of the extent to which the third party ought to have been aware of that.[176]

As a result, there is little clarity about what "honest practices" will be considered in European courts.

3.3.1.4. FREEDOM OF EXPRESSION

In the European Union, the relationship between freedom of expression and trademark is approached differently than in the U.S. Whereas the American system has the freedom of expression explicitly codified under the First Amendment, the E.U. relies on the Article 10 of the European Convention on Human Rights [hereinafter E.C.H.R.][177] and Article 11 of the Charter of Fundamental Rights of the European Union [hereinafter

[174] Case C-228/03, Gillette v. LA-Laboratories, ECLI:EU:C:2005:177, ¶¶ 41–42.
[175] *See* Fhima & Gangjee, *supra* note 108, at 10.
[176] Case C-17/06, Céline SARL v. Céline SA, 2007 E.C.R. I-7072, ¶ 34.
[177] Article 10 Freedom of expression 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

C.F.R.E.U.].[178] When considering the direct applicability of this freedom, the E.U.'s framework becomes even more distinct from that of the U.S. In the latter, the courts have developed the *Rogers test*, which is based on case law that favours artistic expression by requiring that trademark protection apply only if a creative work is explicitly misleading or lacks artistic relevance. As for the E.U., since the protection of intellectual property rights is also recognized in art. 17(2) C.F.R., a horizontal relationship between fundamental rights is established and, in those cases, the application of those rights is limited.[179] The C.J.E.U. already had the opportunity to clarify this on two cases regarding copyright law, where a balance between copyright protection and fundamental rights must be achieved strictly within the framework established by E.U. law. [180] This means that the Directive exhaustively defines the exceptions and limitations to copyright and cannot be expanded by Member States or justified by invoking fundamental rights alone. This interpretation underscores the E.U. 's commitment to harmonizing copyright laws to ensure legal certainty and the proper functioning of the internal market, while still safeguarding fundamental rights within the limits explicitly set by the legislation. This interpretation could also be applied to E.U. Trademark Law, when one must consider the limitations provided by the E.U.T.M.R. and T.M.D. to balance those fundamental rights.

[178] Article 11 - Freedom of thought, conscience and religion 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right. *See* Charter of Fundamental Rights of the European Union art. 11, June 7, 2016, 2016 O.J. (C 202).

[179] *See* Til Todorski, *The Concept of 'Due Cause' and Its Role in Safeguarding Fundamental Rights Under EU Trade Mark Law: How Should the CJEU Rule in IKEA, C-298/23?*, 19 J. Intell. Prop. L. & Prac. 809, 810 (2024) (U.K.).

[180] *See* Case C-469/17, Funke Medien NRW GmbH v. Federal Republic of Germany, ECLI:EU:C:2019:623, ¶¶ 55-64 (July 29, 2019); Case C-516/17, Spiegel Online GmbH v. Volker Beck, ECLI:EU:C:2019:625, ¶¶ 40-49 (July 29, 2019).

3.3.1.4.1 FREEDOM OF ARTISTIC EXPRESSION

Even though freedom of artistic expression is recognized as a fundamental right under Article 13 of the C.F.R.E.U., the C.J.E.U. has strictly interpreted this freedom. For instance, freedom of artistic expression is not an autonomous defence against trademark infringement. Instead, the C.J.E.U's approach, often described as "internal balancing", requires that any reconciliation between artistic freedom and trademark rights must occur within the harmonized framework of E.U. trademark law.[181] This means that artists seeking to invoke freedom of expression must fit their use within statutory limitations like descriptive or referential use and comply with the additional constraint of "honest practices in industrial and commercial matters".[182]

The E.U.T.M.R. and T.M.D. provide unique guidelines for balancing trademark protection and freedom of artistic expression. The Recital 21 E.U.T.M.R. and Recital 27 T.M.D. state that "*[T]he use of a trade mark by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters*".

At first glance, these provisions give the impression of a more explicit safeguarding of freedom of artistic expression against trademark protection in the E.U. However, there are a few concerns regarding the recitals. First, a Recital does not constitute a legally enforceable standard. Therefore, it cannot be used to justify a deviation from the real terms of the relevant statute. Instead, recitals are interpretive instruments in the E.U. legal system that the C.J.E.U. might use to shed light on the meaning of operational laws.[183]

Secondly, instead of requiring trademark owners to demonstrate noncompliance with standards of fairness and honesty in the field of art and culture, the "honest

[181] *See* C-661/11, Martin y Paz Diffusion SA v. David Depuydt and Fabriek van Maroquinerie Gauquie NV, ECLI:EU:C:2013:577, (Sep. 19, 2013). This precedent establishes the principle of complete harmonization in E.U. trademark law, under which tensions between competing rights and interests must be resolved internally. Under this internal balancing approach, conflicts must be addressed exclusively within the system of trademark rights, limitations, and exceptions provided by the E.U.T.M.R. and T.M.D., without recourse to external constitutional doctrines or supplementary national rules. This model of internal reconciliation mirrors the methodology later confirmed by the C.J.E.U. in the copyright context in *Pelham* (C-476/17), where the Court reaffirmed that the reconciliation of fundamental rights must occur entirely within the harmonized framework, thereby excluding broader constitutional balancing outside the legislative structure. Thus, *Martin Y Paz* serves as a foundational case for the C.J.E.U.'s doctrine of internal balancing in intellectual property law. Even in subsequent rulings, such as *Constantin Film Produktion v. EUIPO* (C-240/18 P), where the Court stressed that E.U. trademark law must be applied with "full respect for fundamental rights and freedoms, in particular freedom of expression," the commitment to internal reconciliation remains unchanged: fundamental rights must be accommodated within the legislative framework, without altering the rule. i.e. exception architecture established by harmonized E.U. I.P. law; *see also* Senftleben, *supra* note 162, at 1493-94.

[182] *See* Senftleben, *supra* note 162, at 1501.

[183] *See* Ramírez-Montes, *supra* note 113, at 705.

practices" guideline provided in Recital 21 E.U.T.M.R. and Recital 27 T.M.D. takes the opposite approach: the artist is forced into a defensive position and must prove compliance with standards of honesty in industrial and commercial matters. Using industrial and commercial norms as a benchmark for determining the legitimacy of unlawful artistic usage promotes an information imbalance, giving the trademark owner an advantage. Unlike artists, trademark owners may remain within their industry and "play a home game".[184]

When compared to the U.S., the balance between trademark protection and freedom of artistic expression is less clear.[185] The E.U. protects artistic expression under the larger umbrella of freedom of expression and approaches this freedom through the prism of "honest practices", offering less specific protection.[186]

3.3.1.4.2 PARODY

The parody defence in the E.U. would also present unique challenges. The legal foundation for parody in the E.U. is grounded in the broader constitutional principle of freedom of expression, as protected under Article 10 E.C.H.R., which explicitly encompasses satirical and critical forms of expression. This principle also informs the parody exception in E.U. copyright law. Article 5(3)(k) of Directive 2001/29/EC (the InfoSoc Directive) allows Member States to introduce exceptions or limitations to exclusive rights in cases of caricature, parody, or pastiche. However, the Directive does not define these terms or provide criteria for their application.

In *Deckmyn v. Vandersteen*, the C.J.E.U. clarified that the notion of parody must evoke humour or mockery and be distinct from the original work, ensuring it does not serve as a replacement or compete with the original in its commercial exploitation.[187] Although this interpretation offers guidance within the copyright framework, E.U. trademark law does not provide a statutory definition of parody, and the concept remains undefined in both the E.U.T.M.R. and national trademark statutes across Member States.[188]

Therefore, successful delivery of a parody in connection with a trademark hinges on the nuanced balance between recognition and satire: it must evoke the original

[184] *See* Senftleben, *supra* note 162, at 1501.
[185] *See* Senftleben, *supra* note 170, at 569.
[186] Some scholars are going as far as to say that the balancing between freedom of artistic expression and Trademark is undeveloped in the E.U. *See* Ramírez-Montes, *supra* note 113, at 705; *see also* Lapatoura, *supra* note 157, at 9.
[187] *See* Case C-201/13, Deckmyn v. Vandersteen, ECLI:EU:C:2014:2132, ¶ 33 (Sep. 3, 2014).
[188] *See* Diana D. Chiampi Ohly, *Trademark Protection Versus Parodic Use in Commerce: A Comparative Analysis of the US Approach Post Jack Daniel's Properties v. VIP Products and the German Likelihood of Confusion Analysis*, 73 GRUR Int'l 198, 206 (2024) (Ger.).

reference while distinctly conveying that the intent is humorous rather than authentic or commercially linked. Should the parodist neglect to achieve this equilibrium, their creation may be deemed as infringement.[189] The legal complexity is exacerbated by the limited European case law on trademark parody, particularly in contrast to the more established jurisprudence in the United States,[190] and by the lack of a comprehensive creative fair use theory under E.U. trademark law.[191]

National courts across the E.U. have approached this tension with varying degrees of flexibility. For instance, the Italian Supreme Court settled a case in 2022 involving a television and radio ad for "Brio Blu" water bottles depicting an actor costumed as Zorro.[192] Although the Zorro figure was not directly displayed on the product and the actor was shown holding the bottle rather than consuming it, the Court of Appeal initially found no infringement because the image was not affixed to the product and the use did not function as a trademark.[193] However, the Italian Supreme Court ruled otherwise. It criticised the Appeal Court's interpretation as shallow, emphasising that the key question is whether the symbol is utilised as a trademark, not just in trade.[194] The Court stressed that trademark functions, especially for well-known marks, go beyond origin to include communicative, reputational, and association aspects.[195] The Court decided that the advertisement's humorous Zorro reference risked creating a closeness between the marks, which might affect consumer perceptions and the protected sign's communicating power.[196] The Court also cautioned of "parasitic free-riding" when a parody might exploit a well-known mark's reputation, diluting its distinctiveness or allowing unfair advantage in commerce, in which such parody should be considered trademark violation.[197]

In the same year, a more flexible approach was taken by the Benelux Court of Justice in the *Moët Hennessy Champagne Services v. Cedric Art*.[198] In this Case, the Benelux

[189] *See* Ines Duhanic, *The Artistic Use Defence in Trademark Dilution Cases – Hermès' Legal Setback in Its Attempt to Prevent Others from Using Its Iconic Birkin Handbag*, 73 GRUR Int'l 421, 421 (2024) (Ger.).

[190] *See* Leonardo M. Pontes, Trademark and Freedom of Speech: A Comparison Between the U.S. and the EU System in the Awakening of Johan Deckmyn v Helena Vandersteen, Address Before the 2015 Ninth Wipo Advanced Intellectual Property Research Forum: Towards a Flexible Application of Intellectual Property Law - a Closer Look at Internal and External Balancing Tools.

[191] *See* Duhanic, *supra* note 189.

[192] Cass. Civ., Sez. I [Court of Cassation], 30 December 2022, N. 38165/2022 (It.).

[193] *See* Eleonora Rosati, *Parody under copyright and trade mark law: key guidance from Zorro .. and the Italian Supreme Court*, The IPKat (Jan. 5, 2023), https://ipkitten.blogspot.com/2023/01/parody-under-copyright-and-trade-mark.html.

[194] *See id.*

[195] *See id.*

[196] *See id.*

[197] *See* Federico Manstretta, *Italian Supreme Court Provides Guidance on Parody Exception Under Copyright and Trade Mark Law*, 18 J. Intell. Prop. L. & Prac. 177, 179 (2023) (U.K.).

[198] [Benelux Court of Justice], Oct. 14, 2019, Case No. A2018/ 1/ 8, Moët Hennessy/ Cedric Art.

Court ruled that parody in a commercial context should not infringe upon the rights of a trademark owner, provided it is not done with the primary intent to harm the brand's reputation or goodwill.[199] In addition, the Court clarified that artistic expression should not attempt to damage the trademark or its proprietor.[200] The ruling shifted towards a more contextual evaluation, in which parody is safeguarded, provided it is identifiable as a critique. It does not unjustly exploit or create misunderstanding about the original trademark's source.

The trend promoting a more proportional reasoning was further reflected in Germany, where the Frankfurt Regional Court ruled in 2023 in favour of a non-commercial fashion performance that referenced the design of Hermès.[201] The Berlin fashion label *Namilia* made a fashion show, titled "In loving memory of my sugar daddy", featuring designs referencing Hermès' Birkin bag. The performance used provocative slogans and Birkin-inspired garments to critique gender stereotypes and the association of women with luxury goods provided by affluent men.[202] The Court emphasised that the absence of product sales, combined with the purely artistic nature of the performance, meant that neither an unfair advantage was taken nor reputational harm was caused to the trademark owner.[203] Applying a balancing test grounded in fundamental rights under Article 13 of the C.F.R.E.U., the Court concluded that the parodic use was a legitimate exercise of artistic freedom.[204] This judgment reflects an increasing recognition that expressive uses of trademarks, particularly where there is no commercial intent, deserve protection against infringement claims. This reasoning resonates with the U.S. Supreme Court's most recent decision in *Jack Daniel's v. VIP Products*.[205] In both cases, courts acknowledge that trademark law must be carefully calibrated to avoid unduly restricting freedom of artistic expression, particularly when the use does not involve commercial exploitation or source-identifying purposes.

However, this more permissive approach was limited by the *Tribunal Judiciaire de Paris* (Paris Judicial Court) in its decision of 25 April 2024 in the *Louis Vuitton v. Pooey*

[199] *See* Senftleben, *supra* note 160, at 147.
[200] *See id*.
[201] *See Striking a Balance Between Trade Mark Rights and Artistic Freedom*, 73 GRUR Int'l 450 (David Wright-Policepayeh trans., 2024) (Ger.).
[202] *See* Duhanic, *supra* note 189, at 423.
[203] *See Striking a Balance Between Trade Mark Rights and Artistic Freedom*, *supra* note 201, at 451.
[204] *See id.*
[205] In the 2023 Jack Daniel's v. VIP Products decision, the U.S. Supreme Court reaffirmed that trademark infringement applies only when a mark is used in commerce in a manner that implicates the core functions of a trademark, i.e. identifying a product's source and distinguishing it from others in the marketplace. The decision further suggests that if a defendant uses a trademark as a designation of source for its own goods, even if the product has expressive content, the use falls under the traditional "use in commerce" standard, making it subject to the "likelihood of confusion" analysis. *See* Stacey Dogan & Jessica Silbey, *Jack Daniel's and the Unfulfilled Promise of Trademark Use*, 42 Cardozo Arts & Ent. L.J. 705 (2024).

Puitton case.[206] The dispute concerned a children's toy designed to resemble a luxury purse, marketed as a slime-making kit under the name "Pooey Puitton", with floral motifs mimicking Louis Vuitton's signature monogram.[207] The defendants argued that the product was a playful and humorous reference unlikely to cause consumer confusion.[208] Nevertheless, the Court rejected this defence, reaffirming the absence of a statutory parody exception in French trademark law.[209] It concluded that such use within the commercial sphere constituted an unjustified appropriation of Louis Vuitton's reputation.[210] The Court further emphasised that humorous intent does not override the rights of trademark proprietors when the use occurs "*dans la vie des affaires*", particularly when it risks capitalising on the prestige associated with a renowned brand.[211]

These cases illustrate both convergence and divergence in national approaches to trademark parody within the E.U. The Italian and French courts tend to rigorously protect trademark reputation in commercial contexts, regardless of humorous or satirical intent. By contrast, the Benelux and German courts exhibit a more nuanced recognition of parody as a legitimate form of artistic expression, particularly where the use does not result in consumer confusion or reputational harm. These differences highlight the fragmented legal landscape governing trademark parody across Member States.

The pending C.J.E.U. ruling in the *IKEA (C-298/23)* case may offer much-needed doctrinal consolidation. The case concerns whether the unauthorised use of IKEA's brand by a political party constitutes "due cause" under Article 9(2)(c) E.U.T.M.R, thereby justifying the parodic use on freedom of expression grounds.[212] The Court of Justice is now called upon to determine whether and how fundamental rights can operate as legitimate justifications for expressive trademark uses.[213] Its decision has the potential to harmonise these divergent national practices, offering more explicit guidance on the balance between trademark exclusivity and freedom of expression in the absence of an explicit parody exception in E.U. trademark law.

In addition, the pending C.J.E.U. case is seen by many as a pivotal moment: some commentators argue that the concept of "due cause" under Article 9(2)(c) E.U.T.M.R. offers the most appropriate doctrinal framework to accommodate expressive uses such

[206] Tribunal Judiciaire de Paris, [Paris Judicial Court], RG No. 19/01735, 25 April 2024., https://www.courdecassation.fr/decision/662a9fd6c8a1343b8cd62599 (Fr.).
[207] *See* Anne-Sophie Cantreau, *Marques: La Renommée Vainc La Parodie*, Lexing Avocats (June 26, 2024), https://www.lexing.law/avocats/marque-de-renommee-vainc-la-parodie/2024/06/26/.
[208] *See id.*
[209] *See id.*
[210] *See id.*
[211] *See* Tribunal Judiciaire de Paris, [Paris Judicial Court], RG No. 19/01735, p. 19 (Fr.).
[212] Case C-298/23, Inter IKEA Systems, (May 8, 2023) (lodged).
[213] *See* Sabine Jacques, *The EU trade mark system's lost sense of humour*, 1 Intell. Prop. Q.J. (forthcoming 2024).

as parody,[214] while others defend that, after the 2015 European Union Trademark Law reform, the scope of art. 14(1) b – referential use – was enlarged and could entail satirical discourses, such as parody.[215]

Moreover, Recital 21 E.U.T.M.R. and Recital 27 T.M.D. provide limited guidance,[216] merely suggesting that artistic use may be considered fair if it complies with "*honest practices in industrial and commercial matters*".[217] Due to the lack of guidance and clarity of the existing principles, it becomes unhelpful to artists to defend themselves in infringement proceedings.[218]

3.3.1.5 HOW SUCCESSFUL WOULD ROTHSCHILD'S DEFENCES AGAINST TRADEMARK INFRINGEMENT BE IN THE E.U.?

If Rothschild's *MetaBirkins* case were judged under E.U. trademark law, the artist would have potential defences against the trademark infringement claim, though each comes with its challenges. His arguments could rely on descriptive and referential use, but all would hinge on whether his actions align with the "honest practices" requirement in Article 14(2) of the E.U.T.M.R. and the T.M.D.

Concerning the referential use, Rothschild might first argue that his MetaBirkins serve as a form of referential commentary on the cultural status of Hermès' Birkin bag. This is only possible due to the expanded scope of referential use under the 2015 E.U. trademark reforms. As previously stated, this reform allowed trademarks to critique or symbolize a brand's social implications, which could theoretically support Rothschild's position. The artist has claimed that the fur-covered digital Birkin bags were intended to critique Hermès' non-compliance with the fur-free movement gaining traction in the fashion industry. By "diverting" the meaning of the Birkin mark, Rothschild might argue that MetaBirkins represent a broader critique of the luxury sector's reliance on animal products, which aligns with a growing ethical stance in the fashion world. This line of argument could indeed be strong if his digital works were perceived as engaging meaningfully with this ethical discourse.[219]

---

[214] *See* Todorski, *supra* note 179.
[215] *See* Szczepanowska-Kozłowska, *supra* note 166.
[216] *See* Rosati, *supra* note 193.
[217] Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, art.10 (2), 2015 O.J. (L 336) 1.
[218] *"[...] the guideline given in Recital 21 EUTMR and Recital 27 TMD seems to reflect the opposite approach: the artist is forced into a defensive position and obliged to prove compliance with standards of honesty in industrial and commercial matters."* *See* Senftleben, *supra* note 170, at 570.
[219] *See* Lapatoura, *supra* note 157, at 7.

However, one could interpret Rothschild's presentation of MetaBirkins as lacking explicit indicators of this message. Unlike other cases where artists issue explicit statements to reinforce the critical or artistic nature of their work, Rothschild's marketing did not visibly communicate an anti-fur or animal rights message.

Rothschild might try to argue descriptive use, as allowed under Article 14(1)(b) E.U.T.M.R. and T.M.D. permits using trademarks to describe characteristics of goods or services. Rothschild could claim that the term "Birkin" descriptively conveys luxury and exclusivity in his digital products. However, past C.J.E.U. cases like *Adidas AG v. Marca Mode* and *Opel AG v. Autec AG* demonstrate a high bar for descriptive use. Therefore, the courts have generally found that mere decoration or branding does not qualify. This defence would likely fall short in Rothschild's case, as the term "Birkin" is more indicative of Hermès' brand than any specific characteristic of his N.F.Ts.

Another possible defence would be parody, as Rothschild used the phrase "Not your mother's Birkin" in MetaBirkins promotions. This tagline could suggest a humorous take, positioning MetaBirkins as a modern, digital reinterpretation of the classic Birkin. However, parody in E.U. trademark law remains complex, without a clear protection like the First Amendment in the U.S. If a similar standard were applied here, Rothschild's phrase might struggle to meet the parody threshold, as it does not critique Hermès. The court may view it as a marketing strategy rather than genuine humour or critique, further weakening his case.

3.3.2 "DUE CAUSE" IN DILUTION CLAIMS

Under the art. 9(2) (c) E.U.T.M.R., the "due cause" defence can be invoked if a legitimate reason justifies a third-party usage of a reputed trademark. This defence is applicable where the utilization of the mark fulfils a broader purpose. The statute, however, did not include an illustrative list of considerations that might assist in evaluating the validity of unauthorized use of a mark. [220] From one angle, the lack of due cause factors complicates the uniform use of the defence in practice. On the other hand, this flexibility allows due cause to be invoked to accommodate freedom of speech.[221]

The C.J.E.U. has not yet had the opportunity to decide on cases concerning the use of the due case defence about political or artistic expression. [222] On a national level,

[220] *See* Kur & Senftleben, *supra* note 111, at 363.
[221] *See* Senftleben, *supra* note 119, at 167–68.
[222] *See* Bohaczewski, *supra* note 107, at 874.

however, rulings[223] illustrate the capacity of the due cause defence to function as a protection for political and artistic freedom.[224]

The 'due cause' is exciting from the Rothschild perspective. One of his central claims was that the MetaBirkins should be regarded as art, designed to draw attention to the cruelty of using animal leather in the production of Birkin handbags. By reimagining the iconic design with fur-covered digital versions, Rothschild sought to critique the luxury fashion industry's reliance on animal products. This line of reasoning aligns closely with the due cause defence under E.U.T.M.R., as using the Birkin design is essential to the message he aims to convey. By incorporating the recognizable Birkin silhouette, Rothschild's artwork directly engages with the cultural significance of the handbag, making it an integral element of his artistic and ethical commentary, rather than merely commercial exploitation.

However, a significant challenge for Rothschild is the "honest practices" requirement in Article 14(2) E.U.T.M.R. and T.M.D., applied to referential and descriptive use and due cause. This requirement demands that any defence meets commercial integrity standards. Those standards, however, are unclear and could backfire. This is because, according to the C.J.E.U. understanding, the use is only in line with "honest practices" if it does not imply a false connection or profiting from the brand's reputation. This could be extremely difficult for Rothschild to prove, since his N.F.Ts. did sell for astronomical values and also gained extensive popularity – two facts that could be considered as acts of taking unfair advantage of the Hermès Birkin bag's reputation.

In conclusion, while Rothschild has several defences available, each is constrained by the "honest practices" requirement and the ambiguity of his artistic intent. His lack of a clear statement about the social or ethical critique behind MetaBirkins limits his reliance on referential use and parody. The high prices and commercial nature of MetaBirkins further complicate these defences, which would likely tip the scales in favour of Hermès if Rothschild's use were seen as leveraging Hermès' reputation rather than a form of social critique.

[223] *See* Senftleben, *supra* note 160, at 123.
[224] *See* Kur & Senftleben, *supra* note 111, at 366.

CONCLUSION

The *MetaBirkins* case is a milestone in trademark law because it overlaps with the emerging realm of non-fungible tokens and digital assets, which is new primarily territory in legal practice. The disagreement between Hermès and Rothschild highlights the complexities of applying existing legal frameworks to modern technologies, mainly when they function as creative expressions and commercial objects. The MetaBirkins lawsuit exemplifies the issues that luxury businesses confront in retaining exclusivity and safeguarding their trademarks in internet markets, as Hermès alleges trademark infringement, dilution, and customer confusion.

One of the key issues raised by the *MetaBirkins* case is the difficulty of differentiating between digital assets generated for artistic purposes and those meant for commercial use. N.F.Ts., as shown in Rothschild's collection, do more than simply copy physical items; they frequently endow them with fresh interpretative or aesthetic aspects that call into question traditional notions of ownership and originality. By tying images of virtual fur-adorned Birkin bags to N.F.Ts, Rothschild developed a product that serves as a digital collection and, potentially, an artistic statement. This uncertainty poses fundamental concerns in intellectual property law, such as when an N.F.T. becomes a commercial product infringing on established trademarks and qualifies for protection as an artwork.

While Hermès viewed Rothschild's creations as unauthorized replicas that jeopardized the Birkin's brand identity, Rothschild presented the MetaBirkins as transformative, critiquing luxury fashion's reliance on animal-derived materials. In finding for Hermès, the court determined that this critique did not supersede the risk of consumer confusion and the commercial exploitation of the Birkin brand's exclusivity.

This Case also highlights the limitations of traditional trademark laws, such as the Lanham Act, in addressing the novel issues posed by digital assets like NFTs. Hermès' concerns over trademark dilution and blurring are magnified in the digital realm, where rapid dissemination and limited regulatory oversight can easily erode a brand's carefully curated image.

The judgment reinforces the brand's exclusive control over its reputation and resistance to unauthorized associations, even those made under claims of artistic expression. However, the defence Rothschild raised, arguing his N.F.Ts. were comparable to artistic works like Andy Warhol's Campbell Soup series, illustrates the potential for future cases to question whether the commercial value of an N.F.T. always nullifies its artistic claim. The court's reluctance to accept Rothschild's First Amendment defence

may set a precedent. Still, it also raises questions about how digital art is defined legally and where the line between art and commerce should be drawn.

Further analysis from an E.U. perspective, as undertaken in this study, reveals that Rothschild's defences might have gained stronger consideration under E.U. law. The European legal framework prioritizes consumer confusion and dilution differently, notably without the explicit protection for artistic expression in U.S. law. Rothschild's potential to argue under "due cause" or to invoke the "freedom of artistic expression" defence offers a distinct perspective, underscoring how cultural and legal differences can shape outcomes in trademark disputes involving digital assets. Unlike in the U.S., where the *Rogers test* governs the balance between trademark rights and free speech, the E.U.'s reliance on likelihood of confusion, distinctiveness, and association may open nuanced defences to those claiming artistic reinterpretation. The examination of both frameworks in this paper highlights a critical need for convergence or consideration of a harmonized approach to digital assets, given the global and decentralized nature of N.F.Ts.

The *MetaBirkins* case has given us a glimpse of how U.S. courts might interpret trademark rights concerning digital assets. It underscores the necessity for brand owners to remain vigilant in protecting their intellectual property within digital spaces. It reinforces the potential need for legislative advancements that specifically address digital assets and their multifaceted nature. As N.F.Ts. continue to proliferate and artists increasingly experiment with digital reinterpretations of luxury brands, the MetaBirkins ruling may serve as a foundational case study, guiding the development of a more nuanced legal framework for digital assets. Simultaneously, the case invites ongoing discourse on the boundaries of artistic expression in an era where digital art and commerce are becoming inextricably linked. The contrasting approaches of the U.S. and E.U. legal systems provide an invaluable lens to consider future cases, advocating for more precise definitions and even new legal categories that recognize and protect the unique intersections of art, commerce, and technology in the digital age.

Rothschild's recent appeal promises further developments in this debate, marking this case as a milestone with far-reaching implications. It's not just a legal battle; it's a litmus test for how courts worldwide might adjust trademark doctrines to accommodate—or constrain—creative digital expressions. In this case, each new ruling will likely shape the future for artists, brands, and platforms within the metaverse, setting precedents that may redefine what's permissible when reimagining iconic brands in a digital form.

As the outcome of this appeal is yet to come, the legal community, brands, and artists alike are left to ponder: will the courts expand protections to shield brand

identity in the virtual space, or will they permit broader freedoms in artistic expression? The *MetaBirkins* case reminds us that, in the digital age, the boundaries of intellectual property are no longer set in stone but are being continuously redrawn. This ongoing litigation is not just about Hermès and Rothschild; it's about setting the stage for the digital economy's legal framework, where art, commerce, and intellectual property intersect in unprecedented ways.

FUNDING STATEMENT

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

DECLARATION OF INTEREST

The author declares no conflict of interest.

ACKNOWLEDGEMENTS

The author would like to thank the anonymous reviewers for their insightful comments and the Board of Editors of the University of Bologna Law Review for their meticulous editorial work. The author also wishes to express gratitude to Professor Dr. Carles Górriz López for his valuable supervision and guidance.

VOLUME 10 ISSUE 1 ARTICLES & ESSAYS

University of Bologna Law Review

https://doi.org/10.6092/issn.2531-6133/22377

Received: 10 Nov. 2024 | Reviewed: 25 Jun. 2025 | Accepted: 26 Jun. 2025 | Published: 21 Oct. 2025

Data Privacy Across Borders: A Comparative Analysis of European Union and Indian Protection Laws

ANITA YADAV* & RABIKANT PANDEY**

*Anita Yadav (corresponding author) is an Assistant Professor of Law (Senior Scale) at the Campus Law Centre, Faculty of Law, University of Delhi (India). She has completed her LL.M. and Ph.D. from the National Law School of India University (NLSIU) (India). During her Ph.D. programme she was an Erasmus Mundus Scholar at University of Göttingen (Germany). Her research focuses on Human Rights, International Humanitarian Law, Environment Conservation and Artificial Intelligence & Law.

**Rabikant Pandey is an independent research scholar, holding an LL.B. and an LL.M. from the University of Delhi (India). His research focuses on Constitutional Law, Information Technology Law, and Criminal Law, with specific interest in the intersection of privacy, digital governance, and rights-based legal frameworks.

@ *ayadav@clc.du.ac.in **rabikant1209@law.du.ac.in

*0009-0005-4070-9748 **0009-0000-5603-0071

ABSTRACT

Cross-border data protection frameworks increasingly shape global digital governance as privacy rights intersect with economic imperatives. This article examines the European Union's General Data Protection Regulation (GDPR) and India's Digital Personal Data Protection Act (DPDP Act) through comparative legal analysis, evaluating their distinct approaches to international data transfers and privacy safeguards. The GDPR establishes privacy as a fundamental right through extraterritorial application and stringent adequacy mechanisms, while India's DPDP Act balances individual data protection with economic development objectives in one of the world's fastest-growing digital markets. This study employs doctrinal methodology and comparative legal analysis to explore privacy within the international human rights framework, emphasising personal data sovereignty as essential to human dignity. Drawing on surveillance theory and analysing the GDPR's adequacy mechanism against India's data localisation and cross-border transfer provisions, the research reveals significant divergences in regulatory philosophy and enforcement mechanisms. The analysis demonstrates that India's evolving engagement with global data protection standards positions it as a critical actor in developing harmonised international frameworks. The findings indicate that reconciling the EU's rights-based approach with India's development-oriented model requires adaptive governance structures that accommodate diverse regulatory contexts. This research contributes to understanding how divergent legal traditions can converge toward cooperative data governance, highlighting implications for international trade negotiations, digital sovereignty debates, and the architecture of future cross-border data transfer mechanisms that balance privacy protection with economic integration.

KEYWORDS

Cross-border, Right to Privacy, Data Protection, European Union, India

TABLE OF CONTENTS

INTRODUCTION

The transnational data movement has become crucial for enterprises, governments, and individuals in the contemporary globalised digital economy. Data, frequently referred to as the "new oil",[1] powers critical sectors ranging from finance and healthcare to e-commerce and social media.[2] Nonetheless, as data traverses borders effortlessly, apprehensions over privacy, security, and national sovereignty have converged. This has led to the institutionalisation of regulatory frameworks safeguarding personal data across several countries. In other words, it means safeguarding personal information from unofficial, unsanctioned, unapproved, and unauthorised use of data. At the same time, it ensures that individuals have control over their data. This concept is closely linked to informational autonomy, which states that individuals should be the sole deciding authority regarding the use of their data. Protecting this right is crucial for maintaining personal identity, dignity, and autonomy, especially in an era in which data has become a significant asset for corporations and governments.

Cross-border data protection pertains to the Regulation of personal data transfer across international boundaries. The proliferation of multinational enterprises, worldwide trade, and cloud-based services results in personal data often traversing jurisdictions with varying legal frameworks, posing substantial hurdles to ensuring uniform protection. These transfers provoke apprehensions regarding the sufficiency of privacy safeguards in the recipient nations and the possibility of data misuse, encompassing monitoring and economic exploitation.[3]

It must be stated that numerous international human rights documents have acknowledged Privacy as a fundamental human right. For instance, Article 12 of the Universal Declaration of Human Rights affirms the right to privacy, stating, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence".[4] Similarly, the International Covenant on Civil and Political Rights affirms the right to Privacy under Article 17, which prohibits unlawful interference with an individual's privacy, family, or correspondence.[5] Further in Europe, Article 8 of the European Convention on Human Rights [hereinafter E.C.H.R.] provides the foundation

[1] "Data is the new oil". It's valuable, but if unrefined it cannot really be used. It has to be changed into gas, plastic, chemicals, etc. To create a valuable entity that drives profitable activity, so data must be broken down and analyzed for it to have value" – Clive Humby, *see e.g.*, Nisha Talagala, *Data as The New Oil Is not Enough: Four Principles for Avoiding Data Fires*, Forbes (Mar. 4, 2022), https://www.forbes.com/sites/nishatalagala.

[2] *See id.*

[3] *See* U.N. Conference on Trade and Development, Data protection regulations and international data flows: Implications for trade and development (Apr. 19, 2016).

[4] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948).

[5] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 17 (Dec. 16, 1966).

for safeguarding the privacy of the individual while at the same time ensuring the reverence and dignity for private and family life, along with home and correspondence.[6] Additionally, the General Data Protection Regulation [hereinafter G.D.P.R.] establishes data protection as a fundamental right in the European Union [hereinafter E.U.], safeguarding personal data within and beyond E.U. borders. It also provides the international benchmark for privacy regulation, influencing data security/protection legislation internationally.[7]

India has been recognised as one of the world's rapidly growing digital economies and occupies a vital role in these discussions. Balancing economic growth with innovation and digital sovereignty, while at the same time institutionalising the framework for safeguarding and respecting individual privacy and national security, presents a significant challenge, especially amid the rapid expansion of its technology sector and increasing volumes of cross-border data exchanges. In this scenario, the D.P.D.P. Act of 2023 highlights an essential step towards securing personal data domestically, while also raising critical questions about the country's approach to regulating international data flow.[8]

The article begins by exploring the concept and development of privacy legislation in India and Europe, highlighting the significance of safeguarding personal information and its connection to human dignity. It offers a comparative and critical insight into the analysis of data security/protection laws in India and Europe, followed by an examination of the current trans- border or cross-border data security/protection rules. The article reviews data transfer regulations and the steps India has taken to protect individuals' private information during international exchanges. By analysing India's approach to cross-border data protection within the context of global data governance frameworks, such as the E.U.'s G.D.P.R., the article seeks to evaluate India's position on data flows, the challenges it faces, and its ambitions to emerge as a digital leader while ensuring the protection of its citizens' data.

[6]European Convention of Human Rights and Fundamental Freedoms [hereinafter E.C.H.R.], art. 8, opened for signature Nov. 11, 1950, C.E.T.S. No. 005.

[7]*See* Shravishtha Ajaykumar, Amoha Basrur & Vaishnavi Sharma,*The Digital Personal Data Protection Act 2023: Recommendations for Inclusion in the Digital India Act*, Observer Research Foundation (Oct. 30, 2023) https://www.orfonline.org/research/the-digital-personal-data-protection-act-2023-recommendations-for-inclusion-in-the-digital-india-act.

[8]*See* Charru Malhotra & Udbhav Malhotra, *Putting Interests of Digital Nagriks First: Digital Personal Data Protection (DPDP) Act 2023 of India*, 70 Indian J. Pub. Admin. 516, 516-20 (2024) (India).

1. CONCEPT OF PRIVACY AND DATA PROTECTION LAWS

1.1 UNDERSTANDING PRIVACY THROUGH INDIVIDUALISM

This article primarily addresses the individual's right to privacy and the need for data security/protection laws. It must be stated that the understanding of "individualism" plays a seminal role in shaping their concept of privacy. Individualism, as a social and political theory or ideology, is centred on affirming "the moral value of the individual".[9] According to the principle of individuality, each person, as a gift of life from God, is entitled to fully exercise all associated freedoms, including the right to privacy.[10]

The principles of human dignity and autonomy form the basis of fundamental individual rights, often described as natural rights. These rights are viewed as intrinsic, and existed before any governmental or legal systems. Philosophers like John Locke and Jean-Jacques Rousseau asserted that individuals possess an inherent right to freedom from oppression, encompassing personal freedom, property rights, and liberty. Locke listed life, liberty, and property as core natural rights. Privacy is integral to freedom, even if not stated. The protection of one's personal space, thoughts, and choices underlies the concept of individual liberty and aligns closely with the natural rights framework.[11]

1.2 EARLY LEGAL CONCEPTION OF PRIVACY

In the legal realm, Samuel Warren and Louis Brandeis are credited with providing the first explicit definition of privacy in American legal history, famously advocating for "the right to be let alone". They argued that the law should offer criminal and civil protections to safeguard individuals' "inviolate personality" from state interference. In light of the rise of intrusive technologies and sensationalist journalism, scholars like Warren and Brandeis think that individuals should be the sole authority over their personal information and private lives.[12]

The concept of privacy traces its origins to biblical times and carries multiple interpretations. Privacy can be understood in various ways: as a right to private property, as ownership over one's name and image, as control over one's personal and financial matters, as the confidential operations of an organisation, or as the protection

[9] Steven Lukes, *The Meanings of "Individualism"*, 32 J. Hist. Ideas 45 (1971).
[10] *Id.* at 46.
[11] *See* John Locke, Two Treatises of Government 45-66 (Peter Laslett ed. Cambridge Univ. Press 1988) (1690) (U.K.).
[12] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193-202 (1890).

of intimate and family life. Privacy thus encompasses a broad range of meanings, each significant. Individuals use it daily in various circumstances to criticise others, society, and the state. In his seminal paper "Privacy and the Law: A Philosophical Prelude", Milton Konvitz articulates these concepts as follows:

> Once a civilization has made a distinction between the "outer " and the "inner" man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between the realm of God and the realm of Caesar, between Church and State, between rights inherent and inalienable and rights that are in the power of government to give and take away between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called the idea of a private space in which man may become and remain himself.[13]

Alan Westin states privacy has four characteristics: seclusion, closeness, anonymity, and restraint. According to Westin, being alone is to be physically apart from other people. An intimate relationship develops when two or more people are alone, characterized by closeness, comfort, and candor. In cases of public privacy, people want to remain anonymous. At its core, reserve is about protecting one's mental space from prying eyes; it's about asking people to respect one's wishes regarding the degree to which they divulge private information.[14]

1.3 THE SHIFT FROM PHYSICAL TO DIGITAL SPACES

In our digital era, privacy has taken on new dimensions. As we go from physical to digital platforms, personal data, including chat histories, online behaviour, financial details, and biometric information, is continually being gathered, analysed, and occasionally used—without people's awareness or agreement. Nowadays, the right to privacy goes beyond only controlling one's own destiny and living space. The authority over the personal data and information in the digital realm has become increasingly essential, especially with the advent of "big data" and the "Internet of Things", which have greatly amplified the value of such data. The lack of robust data protection regulations has led to the unauthorised access and misuse of personal information, frequently resulting in

[13] Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 L. & Contemp. Probs. 272, 273 (1966).
[14] *See* Leon A. Pastalan, *Privacy as a Behavioral Concept*, 45 Soc. Sci. 93, 94 (1970).

privacy violations, and at the same time, has become the basis of trust erosion between individuals and businesses.[15]

Since the beginning of the internet and social media, there has been an unprecedented accumulation, exchange, and examination of personal data, and governments throughout the globe are enacting Data Protection Laws to protect individuals' privacy and forestall exploitation. Websites started keeping tabs on users' movements throughout the internet using tracking technology like cookies, collecting information about their preferences and how they browse. Initially, this data was used to enhance user experiences. However, it soon became clear that personal information might be used for commercial purposes.[16]

1.4 RISE OF DATA MONETISATION AND SURVEILLANCE

A turning point in privacy discussions came with personal data monetisation. The development of business models by multinational firms based on collecting, analysing, and selling user data raised serious concerns about the exploitation of personal information for profit. There have been calls for more transparency and control over personal data because many people were unaware of how companies collected and used their data.[17] Social media has significantly reshaped perceptions of privacy. Platforms like "Facebook", "Instagram", and "Twitter" allow individuals to effortlessly share personal experiences, photos, and opinions with a vast audience. Unlike the traditional view of privacy as the safeguarding of one's personal space, more people today are voluntarily sharing information that was once considered private.[18] However, social media companies often collect and store far more data than users realise, including location data, browsing habits, and conversation patterns, even if users may wish to disclose personal information. Problems arise when individuals do not always have complete control over how their data is used after sharing, especially when data breaches and algorithmic manipulation are prevalent in the social media world.[19]

---

[15] *See generally* Adam Henschke, *Privacy, the Internet of Things and State Surveillance: Handling Personal Information Within an Inhuman System*, 7 Moral Phil. & Pol. 123, 123-35 (2020).

[16] *See* Timothy Morey, Theodore "Theo" Forbath & Allison Schoop, *Customer Data: Designing for Transparency and Trust*, Harvard Business Review (May, 2015), https://hbr.org/2015/05/customer-data-designing-for-transparency-and-trust.

[17] *See id.*

[18] *See generally* Stefan Stieglitz et al., *Social Media Analytics – Challenges in Topic Discovery, Data Collection, and Data Preparation*, 39 Int'l J. Info. Mgmt. 156, 157 (2018) (U.K.).

[19] *See id.* at 159.

If data alterations are made and observed repeatedly, the human mind will respond accordingly; individuals may accept false data as truth and act in a specific manner. The 2018 Cambridge Analytica scandal highlighted the dangers of data misuse on social media, as the personal information of millions of users of Facebook was collected without their consent and utilised for targeted political maneuvering and advertising. The incident prompted enquiries over the ethics of data acquisition and manipulation in a context where privacy and personal information are seen as commodities.[20] Privacy is becoming recognised as an essential freedom in the digital age due to this case's direct attack on voters' liberty and damaging democracy. As digital technologies become increasingly pervasive, personal data control is essential to human dignity, autonomy, and freedom. Philosophers like Immanuel Kant have long argued "that individual autonomy and the ability to make choices free from external influence are central to upholding human dignity".[21] Lastly, in the digital era, the capacity to manage one's data is essential for preserving autonomy. Individuals relinquish authority over their information without privacy, leading to manipulation, surveillance, and potential harm.

2. INFORMATIONAL PRIVACY

2.1 DEFINING INFORMATIONAL PRIVACY

The concept of information privacy, or informational privacy, is relatively new. It is evolving as digital tools and networks have reshaped traditional understandings of privacy to encompass personal data rights. Informational privacy emphasises the individuals' authority and control over their private information and how others may use it. This underscores the need to protect diverse forms of data, including financial details, health records, communications, and identification information. At its core, informational privacy rests on the right to privacy, which prohibits unauthorised disclosure of personal data. Alan Westin defines informational privacy as the capacity of individuals to control the dissemination of their personal information to others.[22] Later studies conducted by Westin laid the groundwork for modern privacy notions,

[20] *See* Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, The New York Times (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html.

[21] *Kant's Social and Political Philosophy*, Stanford Encyclopedia of Philosophy (Apr. 11, 2022), https://plato.stanford.edu/entries/kant-social-political/.

[22] *See* Alan Westin, Privacy and Freedom 6 (1967).

demonstrating that people should possess control over their informational timing, manner, and the extent to which their data is shared with others.[23] There are presently two predominant conceptualisations of information privacy: the first perceives privacy as the capacity to "limit or restrict others from accessing information about" oneself, while the second defines privacy as the "control of personal information".[24] Both approaches are predicated on the assumption that information is a commodity that can be regulated or to which access can be limited. Data or information are generally considered objective entities that exist, a notion often accepted but rarely stated.[25] In the modern age, personal information has transformed into a commodity that is exchanged in the information marketplace and among data brokers. Personal information possesses monetary worth and can be regarded as a sort of property that individuals can own and negotiate within the economic and commercial realm.[26] Upon closer examination, if we associate personal information with property rights, others possess no entitlement to utilise our personal information without consent. This perspective is attractive, although it presents a problematic concept. To associate personal information with property rights, the owner must hold it; nevertheless, the essential question is how one can have an ethereal substance like information, which escapes physical control.[27] Consequently, personal data privacy cannot be equated with property, as, unlike tangible assets, data can be replicated and utilised by several individuals without diminishing its worth or utility. For instance, if an individual uses your data, it does not exclude others from accessing that same data. This differs from a tangible thing, such as a car, where simultaneous usage by multiple individuals is not feasible. Thus, considering personal data as property fails to fully reflect the inherent nature of data functionality.[28]

2.2 ESSENTIAL ATTRIBUTES AND DEMOCRATIC NECESSITIES

Informational Privacy possesses three characteristics: it's "nonrivalrous", "imperceptible", and "recombinant". Firstly, information is nonrivalrous, meaning that multiple individuals can utilise the same information concurrently without diminishing its availability to others. Secondly, data privacy breaches are challenging to identify due

[23] *See id.* at 35.
[24] Jens-Erik Mai, *Three Models of Privacy: New Perspectives on Informational Privacy*, 37 Nordicom Rev. 171, 171-72, (2016) (Swed.).
[25] *See id.*
[26] *See id.* at 173.
[27] *See* Julia M. Fromholz, *The European Union Data Privacy Directive*, 15 Berkeley Tech. L.J. 461, 464 (2000).
[28] *See id.*

to their often imperceptible nature. Information may be accessed, stored, and disseminated without prior notification. The capacity to traverse at light speed amplifies the obscurity of data access; "information acquisition can constitute the most rapid form of theft". Thirdly, since information is recombinant, data processing outcomes can be used again as input to create new data outputs. This cyclical process enhances the potential for ongoing analysis and the creation of new information.[29] Moreover, creating a robust data protection regime is essential; however, it is a complex undertaking that governments must pursue. It emphasises the necessity for the state to diligently strike a balance between protecting individual privacy and fulfilling other critical objectives served by data protection, while simultaneously taking into account the state's legitimate interests.[30]

In democratic countries, ensuring informational privacy is crucial for protecting individual liberties and rights. Privacy enables individuals to articulate their thoughts freely, make independent choices, and participate in democratic activities without excessive influence or monitoring. Privacy rules curtail the authority of both governmental and private organisations over personal data, thereby preventing the misuse of information that could manipulate public opinion or suppress opposition.[31]

3. EVOLUTION OF DATA PROTECTION LAW

3.1 INDIA

Although the Indian Constitution does not explicitly enshrine the right to privacy, the Indian Judiciary, notably the Supreme Court, has acknowledged privacy as both a fundamental constitutional right and a common law right since the 1960s. Despite consistently affirming this right, the Judiciary has not articulated a precise definition, instead opting for a case-by-case approach to delineate its contours. This Section examines key Supreme Court decisions that have progressively shaped the recognition and scope of the right to privacy, illustrating its evolution as a fundamental right within India's legal framework.

[29] *See* Justice K.S. Puttaswamy (Retd.) & Anr, v. Union of India & Ors., (2017) 10 SCC 1 (India).
[30] *See id.* at 179.
[31] *See id.*

3.1.1 EARLY JUDICIAL RELUCTANCE

The development of privacy jurisprudence in India commenced with the *M.P. Sharma* case,[32] in which the Supreme Court addressed privacy issues for the first time. A search and seizure carried out by police as part of a criminal investigation gave rise to this case. The Court decided that no constitutional requirements were violated by the authority to conduct searches and seizures. Furthermore, the Court stated the following to avoid acknowledging the right to privacy as a fundamental constitutional right:

> 17. In any system of jurisprudence, a power of search and seizure is an overriding power of the State for the protection of social security. That power is necessarily regulated by law. When the constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it into a different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches.[33]

The following significant case on the subject was the *Kharak Singh* case,[34] which raised concerns about whether the Uttar Pradesh Police Regulations permitted police surveillance. The petitioner claimed that this surveillance went against his constitutional rights as guaranteed by Articles 19(1)(d) and 21. The Supreme Court concluded that there was no fundamental right to privacy in a split ruling. Nonetheless, Justice Subba Rao acknowledged in his opinion that privacy is an essential part of individual liberty, adding that "the right to personal liberty takes in not only a right to be free from restrictions placed on his movements but also free from encroachments on his private life".[35] Justice Subba Rao's dissent laid the foundation for recognizing privacy as an essential element of the right to personal liberty under Article 21 of the Indian Constitution.[36]

---

[32] M.P. Sharma & Ors. v. Satish Chandra, District Magistrate, Delhi & Ors. (1954), SCR 1077 (India).
[33] *Id.* at 17.
[34] Kharak Singh v. State of Uttar Pradesh & Ors., (1964]),1 SCR 334 (India).
[35] *Id.* at 28.
[36] India Const. art. 21: **"Protection of life and personal liberty.**- No person shall be deprived of his life or personal liberty except according to the procedure established by law**".**

3.1.2 PROGRESSIVE EXPANSION THROUGH CASE-BY-CASE RECOGNITION

Subsequently, the *Govind* case[37] represented a significant advancement in Indian privacy legislation. The petitioner contested specific police regulations permitting the surveillance of repeat offenders. The Supreme Court determined that specific police regulations conflicted with the concept of personal liberty and recognized the right to privacy as a fundamental right within the Indian Constitution. However, it upheld that the right to privacy should develop progressively through individual cases, rejecting an absolute interpretation. The Court further noted the following points:

> 28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India, and the freedom of speech create an independent right of privacy as an emanation from them, which one can characterize as a fundamental right, we do not think that the right is absolute.[38]

A similar assertion was affirmed by the Supreme Court in *R. Rajagopal* case,[39] where the Court examined whether a magazine's publication of a convicted prisoner's memoirs violated his right to privacy. The Supreme Court acknowledged the right to privacy in the context of the press and public figures. The Court further observed the following points:

> The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing, and education, among other matters.[40]

This ruling marked a significant step in explicitly recognising privacy as a component of Article 21, asserting that the press is restricted from publishing unauthorised information about an individual's private life, except when the individual is a public figure or has willingly disclosed the information. Subsequently, in the *People's Union of Civil Liberties* case [hereinafter PUCL case],[41] the case addressed the matter of "telephone tapping". PUCL challenged the government's interception of telephone conversations,

[37] Govind v. State of Madhya Pradesh, & Ors., (1975) 2 SCC 148 (India).
[38] *Id.* at 28.
[39] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632 (India).
[40] *Id.* at 26.
[41] People's Union of Civil Liberties v. Union of India, (1997) 1 SCC 301 (India).

arguing it violated the right to privacy. The Supreme Court responded with the following explicit statement:

> We have, therefore, no hesitation in holding that right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed except according to procedure established by law.[42]

3.1.3 PRIVACY AND PERSONAL IDENTITY

Furthermore, in the *Naz Foundation v. Government of NCT of Delhi*,[43] although the primary focus was L.G.B.T.Q.+ rights, the case also addressed the right to privacy. By decriminalising homosexuality under Section 377 of the Indian Penal Code, the Delhi High Court asserted that an individual's sexual orientation is fundamentally linked to personal privacy. The Court emphasised that "the right to privacy is intrinsic to the right to life and liberty guaranteed to the citizens of this nation by Article 21", underscoring that sexual orientation is a deeply personal aspect of privacy.[44] This case acknowledged privacy concerning individual sexual orientation, establishing a foundation for subsequent advancements in privacy legislation.

3.1.4 LANDMARK RECOGNITION: JUSTICE K.S. PUTTASWAMY

Finally, in the landmark case of *Justice K.S. Puttaswamy case*,[45] popularly called "Privacy Judgement", the Supreme Court interpreted privacy as a penumbral right under Article 21 of the Indian Constitution. The decision overturned the earlier rulings in the *M.P. Sharma* case[46] and the *Kharak Singh* case.[47] The unanimous verdict on privacy is a restatement of core constitutional principles. Justice D.Y. Chandrachud held that as follows:

> (A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. (C) Privacy is a constitutionally protected right that emerges primarily from guaranteeing life and personal liberty in Article 21 of the

[42] *Id.* at 17.
[43] Naz Foundation v. Gov't of NCT of Delhi, (2009) 111 DRJ 1 (India).
[44] *Id.*
[45] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., (2017) 10 SCC 1 (India).
[46] M.P. Sharma & Ors. v. Satish Chandra, District Magistrate, Delhi & Ors., (1954) SCR 1077 (India).
[47] Kharak Singh v. State of Uttar Pradesh & Ors., (1964]) 1 SCR 334 (India).

> Constitution. (F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Privacy also connotes a right to be left alone. (H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law that encroaches upon privacy must withstand the touchstone of permissible restrictions on fundamental rights. (I) Privacy has both positive and negative content. The negative content restrains the state from intruding on a citizen's life and personal liberty. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.[48]

This Judgement made the right to privacy more essential and precious than any other right. Article 21 of the Constitution requires fair, reasonable, and just legislation that sanctions privacy violations. The Supreme Court's three-part test applies to any law that infringes on privacy. First, legality requires the law to be legal and statutory. Second, the measure must serve the legitimate government goal. The third requirement is proportionality; measures must align with the intended objective.[49] Therefore, every legislation that infringes upon individual privacy rights must be evaluated against the specified standards. The circumstances would have varied had privacy remained solely a statute or common law safeguard.

In his discussion on the right to informational privacy in the contemporary context, Justice D.Y. Chandrachud held that as follows:

> Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and implement a robust regime for data protection. Creating such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but

[48] *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India*, (2017) 10 SCC 1, at 459.
[49] *See id.* at 179.

> also some disadvantages. Access to information that an individual may not want to give needs the protection of privacy.[50]

The aforementioned cases demonstrate that privacy rights have taken time and effort to develop. The judiciary has progressively expanded its scope through constitutional interpretation. Initially, in instances like *M.P. Sharma* and *Kharak Singh*, the Supreme Court denied privacy as a fundamental right, but in K.S. Puttaswamy, it recognised and strengthened it.[51] Today, privacy is firmly identified as a fundamental right, protecting individuals against encroachments by state and non-state actors across various facets of life.

3.2 EUROPE

Europe possesses the world's oldest, most extensive, and severe data privacy legislation, implemented at national and regional levels. The E.U., through its supranational institutions, has been a pivotal entity in establishing the global paradigm for data protection. Significant E.U. instruments with substantial global ramifications comprise, among others, (a) the European Convention on Human Rights and Fundamental Freedoms (E.C.H.R.), 1950 (b) the Convention of the Council of Europe (Convention 108), 1981 (c) the Modernisation of Convention of the Council of Europe (Convention 108+), 2018 (d) Directive 95/46/EC, 1995 and (e) the General Data Protection Regulation, 2018. Firstly, the E.C.H.R., 1950, stands as the foundational convention and a pivotal instrument in the Council of Europe's data protection efforts.[52] The Convention protects various rights, including privacy in personal and family matters. Article 8 affirms explicitly that "every individual has the right to respect for their private and family life, home, and correspondence".[53]

Furthermore, before the 1960s, most international and regional human rights treaties about privacy primarily focused on physical and spatial privacy. Nonetheless, technological advancements during the 1960s and 1970s, especially the enhancement of computer capabilities and their widespread implementation, facilitated the collecting, documenting, organising, and indexing of substantial amounts of personal data. To mitigate such approaches, certain nations have enacted data protection legislation

[50] *Id.* at 457.
[51] *Id.*
[52] E.C.H.R., *supra* note 6.
[53] *Id.* art. 8.

designed to limit information practices. A multitude of interventions differed in scope and execution, resulting in restricted information flows.[54]

3.2.1 DEVELOPMENT OF PRIVACY RIGHTS IN EUROPE

The development of privacy rights in Europe has been shaped by judicial rulings and regulatory frameworks, with the European Union playing a pivotal role in governing personal data usage. This commitment to stringent data control across its fifteen Member States is encapsulated in the Directive 95/46/EC on the Protection of Personal Data, which came into force on October 25, 1998.[55] The Directive encapsulates the concept that privacy is a fundamental human right.[56] The Directive also aims to harmonize data privacy protection standards across E.U. Member States, thereby reducing transaction costs for organisations conducting cross-border operations. It establishes robust personal data protection measures and extends these safeguards internationally by restricting data transfers to third nations,[57] which are classified as nations external to the E.U., unless those countries exhibit a nebulously defined "adequate" standard of data protection.[58]

The European Union regards privacy as a fundamental human right and, accordingly, advocates for stringent protections against the unauthorised commercial exploitation of personal data.[59] European governments have long prioritised identifying the most effective approaches to protect citizens' personal information from misuse; the Directive represents the latest development in this ongoing discourse, which has also unfolded beyond the E.U.'s jurisdiction.

3.2.2 O.C.E.D. PRIVACY GUIDELINES, 1980

In 1980, the Organisation for Economic Cooperation and Development [hereinafter O.E.C.D.] established an international agreement about data privacy.[60] The O.E.C.D.'s rules were designed to address the risk that variations in national laws could obstruct

[54] *See* Mai, *supra* note 24.
[55] Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 50.
[56] *See id.* art. 1.
[57] Third Countries refers to Countries outside E.U.
[58] *See* Directive 95/46, art. 25.
[59] *See id.* art 1 (1).
[60] Org. for Econ. Co-operation & Dev. [OECD], Guidelines on the Protection of Privacy and Transborder Flows of Personal Data [hereinafter O.E.C.D. Guidelines] (Sept. 23, 1980).

the unrestricted movement of personal data across borders.[61] The Guidelines outline core principles for safeguarding data privacy, with the O.E.C.D. aiming for these principles to be incorporated into existing national laws or to serve as a foundation for legislation in countries without established data protection frameworks.[62] The principles of the Directive generally adhere to the O.E.C.D. guidelines.

While the O.E.C.D. Guidelines may be endorsed by most countries, the O.E.C.D. lacks the authority to enforce its recommendations and appears either uninterested or unable to address how nations should collaborate to reconcile their varying standards of protection. The O.E.C.D. asserts its commitment to assist member countries in sharing information regarding privacy on global networks and to report on progress towards attaining the objectives of this Declaration. However, it significantly deviates from a definitive commitment to establish a singular international norm.[63]

3.2.3 COUNCIL OF EUROPE CONVENTION 108 (1981)

To strengthen data protection standards, the Council of Europe, which is committed to promoting democracy, human rights, and the rule of law among its Member States, established the Convention for the Protection of Individuals regarding the Automatic Processing of Personal Data.[64] The Convention 108 established essential concepts including data minimisation, purpose limitation, and openness, which were subsequently integrated into the directives and regulations on data privacy.[65] Nevertheless, the Council has predominantly failed to establish standard protection for personal data due to its inability to compel countries to enact legislation under its Convention. Both the O.E.C.D. and the Council of Europe Convention failed to achieve their aims; however, they established the groundwork for the broad and profound protection provided by the directives.[66]

Although the E.U. Data Privacy Directivehas been ratified by the E.U. itself,[67] it is not self-executing. Before adoption in individual Member States, each must establish its legislation. Consequently, it was imperative to harmonize regional data protection

[61] *See id.*
[62] *See id.*
[63] *See* Fromholz, *supra* note 27, at 467.
[64] Council of Eur., Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, C.E.T.S. No. 108 (Jan. 21, 1981).
[65] *Id.*
[66] *See* O.E.C.D. Guidelines, *supra* note 60.
[67] Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 50.

mechanisms and policies with national standards. Following years of rigorous efforts and negotiations, the Directives were successfully enacted; nevertheless, the efficacy of this instrument was subsequently undermined by the enactment of the General Data Protection Regulation [hereinafter G.D.P.R.] in 2018.[68]

3.2.4 THE GENERAL DATA PROTECTION REGULATION, 2018

The G.D.P.R.[69] has significantly influenced global data protection rules. The G.D.P.R. serves as a worldwide baseline for data protection regulation, owing to its extensive legal framework, broad extraterritorial applicability, and considerable market impact of the E.U.[70] Consequently, there is a global trend of establishing or updating existing data privacy regulations to align with G.D.P.R. The legal framework, textual nuances, and contextual prominence of G.D.P.R. have attained a pivotal status, making at least a basic understanding of the abbreviation essential for anyone engaged with contemporary discourse.[71]

The G.D.P.R. has supplanted the prior Directive 95/46/EC, introducing significant alterations across various sectors, including technology, advertising, medicine, and finance.[72] It is considered one of the most comprehensive and influential rules, tackling all possible challenges individuals may face about their personal data in the digital age. Post-G.D.P.R., it is claimed that E.U. residents would be informed about the utilisation of personal data by firms and how the E.U. may leverage the advantages of a data-driven economy. Companies often seek clarity to expand their activities securely within the region, and recent data scandals necessitate more precise and rigorous data protection regulations; thus, the E.U. has effectively met its commitments.[73]

[68] *See* Fromholz, *supra* note 27, at 469.

[69] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [hereinafter G.D.P.R.], 2016 O.J. (L 119) 1.

[70] *See* Marc Langheinrich, *The Golden Age of Privacy?*, IEEE Pervasive Computing, Oct.-Dec. 2018, at 4, 4-8.

[71] *See id.*

[72] *See* Alex Hern, *What is GDPR and How will it affect you?,* The Guardian (May 21, 2018), https://www.theguardian.com/technology/2018/may/21/what-is-gdpr-and-how-will-it-affect-you.

[73] *See* European Commission Statement /18/3889, Statement by Vice-President Ansip and Commissioner Jourová ahead of the entry into application of the General Data Protection Regulation (May 24, 2018), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_3889.

3.2.5 ROLE OF EUROPEAN COURTS

The European Court of Justice [hereinafter E.C.J.] and the European Court of Human Rights [hereinafter E.Ct.H.R.] have been instrumental in shaping and broadening the scope of privacy and data protection laws across Europe. The initial lawsuit addressing this topic was *Klass and Others v. Germany*,[74] the Case included covert monitoring tactics employed by the German government for national security purposes. The petitioners contended that these measures infringed upon their privacy rights as stipulated in Article 8 of the E.C.H.R. The Court ruled that covert surveillance is permissible only when it is necessary to safeguard democratic institutions, setting a precedent for balancing state surveillance powers with individual privacy rights.[75]

Subsequently, in the *Google Spain SL* case,[76] the E.C.J. delivered a landmark ruling establishing the "right to be forgotten". In this Case, an individual requested that Google remove outdated and irrelevant information from search engine results. The E.C.J. ruled that individuals have the right to request the deletion of personal data that is no longer relevant. The Court further emphasised the following points: "the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results".[77]

The instances above highlight the growing importance of data protection and privacy rights within the legal framework of the European Union. The E.C.J. and the E.Ct.H.R. have consistently expanded the scope of privacy rights, often due to technological advancements and global issues. This continuous development strengthens the E.U.'s position as a preeminent international data privacy Regulation authority.

4. CROSS-BORDER DATA PROTECTION LAW

In today's increasingly digital world, personal data moves across borders at an unprecedented pace and scale. Global corporations and digital platforms routinely collect, store, and manage data across various countries, making cross-border data flows

[74] Klass and Others v. Ger., App. No. 5029/71, (Sept. 6, 1978), https://hudoc.echr.coe.int/eng?i=001-57510.
[75] *See id.*
[76] Case C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317 (May 13, 2014).
[77] *Id.* ¶ 97.

a crucial component of the modern economy. Personal data has emerged as a valuable raw material, with international data transfer as a key resource for multinational businesses. At the same time, data protection has become a fundamental aspect of the rule of law in the digital age. The disparities in data protection regulations between different jurisdictions now pose a significant challenge to the seamless flow of global data. Balancing the need for unrestricted information exchange with the imperative of robust data protection, irrespective of geographic boundaries, is becoming increasingly essential.[78]

Moreover, cross-border data protection regulation underscores the necessity of ensuring data security following the standards of the originating country when personal data is transferred across national boundaries. The E.U. has consistently led the way in data protection, exemplified by its stringent legislation. However, there remains a lack of consensus among third countries on adopting robust data protection laws. Recently, India has aligned itself with the G.D.P.R. by enacting the Digital Personal Data Protection Act [hereinafter D.P.D.P. Act], which incorporates provisions of the G.D.P.R. that safeguard cross-border data flows. Additionally, the global community must work toward establishing a comprehensive legal framework for cross-border data transfers, ensuring that personal data can move across borders effectively while protecting individuals' rights.[79]

4.1 EUROPEAN LAW ON CROSS-BORDER DATA TRANSFER

The European Union created the G.D.P.R. as a crucial regulatory framework to protect its citizens' privacy and personal information. It has shaped the way many countries and organisations manage personal data and established a global standard for data protection regulations. One of the main characteristics of the G.D.P.R. is its emphasis on transnational data transfers, particularly the transmission of personal data between jurisdictions, including those outside the E.U. Controlling cross-border data transfers is crucial to protecting the security and privacy of personal data in a globalised world where companies and services operate internationally.

Further, regardless of the organisation's location, the G.D.P.R. applies to all organisations that handle personal data belonging to individuals in the E.U. With an emphasis on safeguarding people's privacy and personal information, it provides precise

[78] *See* Lingjie Kong, *Data Protection and Transborder Data Flow in the European and Global Context*, 21 Eur. J. Int'l L. 441, 441-43 (2010) (U.K.).
[79] *See id.*

protocols for businesses for the gathering, storing, processing, and sharing of personal data.[80]

Key Principles of G.D.P.R. include:

- **Lawfulness, fairness, and transparency:** The Individual shall be kept informed, and data must be processed transparently and lawfully.[81]
- **Purpose limitation**: Personal data must be gathered solely for particular, clearly stated, and lawful purposes.[82]
- **Data minimization**: Only the data necessary for the specific purpose should be processed.[83]
- **Accuracy**: Individual data must be maintained accurately and currently.[84]
- **Storage limitation**: Personal data must not be retained longer than required.[85]
- **Integrity and confidentiality**: Individual data shall be handled in a way that guarantees its security and confidentiality.[86]

4.1.1 CROSS-BORDER DATA TRANSFERS UNDER G.D.P.R.

If specific requirements are fulfilled, including subsequent transfers, the G.D.P.R. permits the transfer of personal data to third nations or international organisations. The G.D.P.R. allows data transfers to nations whose legal systems the European Commission deems to provide an "adequate" degree of personal data protection under the framework of the Directive set forth. Transfers to non-E.U. Nations may take place without such an adequacy judgement under certain conditions, such as the application of binding corporate rules [hereinafter B.C.Rs.] or standard contractual clauses [hereinafter S.C.Cs.]. Under some circumstances, derogations are also permitted. The regulations for cross-border data transfers are outlined in Chapter V (Articles 44–49) of the G.D.P.R., which introduces notable enhancements over earlier Data Protection Directives.[87]

[80] *See* G.D.P.R., *supra* note 69.
[81] *Id.* art. 5 (1) (a).
[82] *Id.* art. 5 (1) (b).
[83] *Id.* art. 5 (1) (c).
[84] *Id.* art. 5 (1) (d).
[85] *Id.* art. 5 (1) (e).
[86] *Id.* art. 5(1) (f).
[87] *See* Shakila Bu-Pasha, *Cross-border Issues Under EU Data Protection Law with Regards to Personal Data Protection*, 26 Info. & Commc'n Tech. L. 213, 222 (2017) (U.K.).

- **Adequacy Decisions: The Gold Standard for Data Transfers**

Article 45 of the G.D.P.R. authorises the European Commission to evaluate whether a foreign country provides an "adequate" level of protection for personal data.[88] This adequacy level requires that the data protection framework of the third country implement measures equivalent to those outlined in the G.D.P.R. The European Commission has thus far issued adequacy conclusions for a select group of nations, namely Japan, Switzerland, Israel, and Canada (on business entities). These judgements enable the effortless movement of personal data without requiring further authorisation, demonstrating the E.U.'s inclination to develop reliable, compatible international partners for data sharing.[89]

Nonetheless, adequacy determinations provide some obstacles. Uncertainty accompanied the post-Brexit adequacy verdict awarded to the United Kingdom. The European Commission's adequacy evaluation of the United Kingdom [hereinafter U.K.] highlighted apprehensions regarding possible divergence in data protection standards following Brexit, especially in light of the U.K.'s intention to promote data flows with nations such as the United States, which lack an adequacy determination under G.D.P.R. criteria. The adequacy mechanism, both as a legal instrument and a diplomatic weapon, reconciles privacy protection with international trade and collaboration.[90]

- **Standard Contractual Clauses and Binding Corporate Rules: Alternatives to Adequacy**

In the absence of an adequacy judgment, the G.D.P.R. provides mechanisms such as S.C.C.s and B.C.R.s, as outlined in Article 46, to legitimise international data transfers. S.C.C.s are legally binding frameworks that organisations can adopt to ensure that third-party data recipients uphold protections comparable to those required by the G.D.P.R. These provisions are essential for businesses transferring data to countries lacking sufficient assessments.[91]

Nonetheless, the *Schrems II*[92] ruling by the Court of Justice of the European Union [hereinafter C.J.E.U.] highlights that applying S.C.C.s alone is insufficient if the recipient country's legal system does not adequately protect personal data. In this landmark ruling, the C.J.E.U. invalidated the E.U.-U.S. Privacy Shield, citing concerns over United

[88] G.D.P.R., *supra* note 69, art. 45.
[89] *See* Kong, *supra* note 78, at 444.
[90] *See id.*
[91] *See id.* at 454.
[92] Case C-311/18, Data Protection Comm'r v. Facebook Ireland Ltd. & Schrems, ECLI:EU:C2020:559, (July 16, 2020).

States [hereinafter U.S.] government surveillance programs that lacked proportionality and judicial redress for E.U. citizens. The Court emphasised that companies using S.C.C.s must evaluate the data protection standards in the receiving country and adopt supplementary measures as necessary, significantly increasing business compliance obligations. The ruling introduced a new standard for implementing S.C.C.s, mandating that companies conduct "case-by-case assessments" to ensure the protection of personal data transferred outside the E.U.[93]

B.C.R.s are intended for multinational organisations that move data internally across international borders. These internal rules require approval from the pertinent Data Protection Authorities and must comply with G.D.P.R. regulations. Although B.C.R.s offer a more adaptable framework for multinational corporations, the protracted and intricate approval process renders them less feasible for small and medium-sized organisations.

- **Derogations for Specific Situations: Last Resort Mechanisms**

Article 49 of the G.D.P.R. outlines specific exceptions that can be used under certain conditions to justify cross-border data transfers in the absence of an adequacy decision or appropriate safeguards, such as S.C.C.s or B.C.R.s. These exceptions include cases where the data subject has explicitly consented, where the transfer is essential for fulfilling a contract, or when it serves substantial public interest considerations. These derogations are carefully defined and intended for limited use, underscoring the G.D.P.R.'s preference for more regulated data transfer mechanisms. This controlled approach to derogations further emphasises the G.D.P.R.'s rigorous framework for protecting personal data internationally.[94]

- **Monetary Fines**

Additionally, Noncompliance with the G.D.P.R.'s regulations governing the transfer of personal data to countries outside the E.U. can lead to substantial fines, marking a significant departure from the penalties under the previous Data Protection Directive. The G.D.P.R. imposes its most severe administrative penalties for breaches of data transfer provisions outlined in Articles 44-49. Organisations found in violation may be subject to fines of up to "4% of their global annual turnover from the preceding financial year or €20 million, whichever amount is greater".[95] The following factors are

[93] *Id.* ¶ 96.
[94] *See* Anna Myers, *Top 10 operational impacts of the GDPR: Part 4- Cross Border data transfers*, IAPP (Jan. 19, 2016), https://iapp.org/news/a/top-10-operational-impacts-of-the-gdpr-part-4-cross-border-data-transfers/.
[95] G.D.P.R., *supra* note 69, art. 83 (5).

considered when deciding on a fine: the infringement's kind, severity, and length of time; the act's intentionality; efforts made to lessen the harm it caused; the offender's level of responsibility or relevant history of infractions; the way the infraction was reported to the supervisory authority; adherence to any instructions given to the processor or controller; compliance with a code of conduct; and any other factors that might be considered aggravating or mitigating.[96]

- **The *Schrems I* Case**

Maximillian Schrems, an Austrian, complained to the Irish Data Protection Commissioner in 2013 about Facebook Ireland's transfer of personal data to Facebook's servers in the United States. Schrems contended that his data was not adequately protected by U.S. law, especially given disclosures about surveillance programs such as the Planning Tool for Resource Integration, Synchronization, and Management that gave U.S. intelligence agencies unrestricted access to the personal information of non-U.S. individuals. At the time, the main structure controlling data transmission between the U.S. and the E.U. was the "Safe Harbour" framework.[97] Further, U.S. businesses might self-certify their compliance with European data protection rules under the "Safe Harbour" framework, allowing data transfers from the E.U. without the need for further security measures.[98]

In *Schrems I*, the C.J.E.U. ruled that the "Safe Harbour" agreement was illegal because it was insufficient to protect the personal information of E.U. individuals from arbitrary accessibility by U.S. authorities. The Court emphasised that when transferring data to a non-E.U. countries, E.U. data protection regulations must not be compromised.[99] The Court additionally determined that U.S. monitoring methods infringed against E.U. residents' fundamental right to privacy as stipulated in Article 8 of the Charter of Fundamental Rights and Article 7 of the European Convention on Human Rights.[100] Due to the "Safe Harbour" framework's invalidation, it is currently uncertain whether businesses can legally transfer consumers' personal information from the European Union to the United States.[101]

---

[96] *See id.*

[97] *See* Samuel Gibbs, *What Is 'Safe Harbour' and Why Did the EUCJ Just Declare It Invalid?*, The Guardian (Oct. 6, 2015), https://www.theguardian.com/technology/2015/oct/06/safe-harbour-european-court-declare-invalid-data-protection.

[98] *See* Bu-Pasha, *supra* note 87, at 220.

[99] *See* Case C-362/14, Maximillian Schrems v. Data Protection Comm'r, ECLI:EU:C:2015:650, (Oct. 6, 2015).

[100] *See id* ¶ 39.

[101] *See id.* ¶ 98.

The *Schrems I* ruling abruptly nullified Safe Harbour, compelling numerous corporations dependent on the framework to urgently seek other data transfer arrangements, including S.C.C.s and B.C.R.s. The European Commission and the United States developed a new framework, known as the E.U.-U.S. Privacy Shield, which was enacted in 2016. Schrems' legal challenges continued, resulting in *Schrems II* and the eventual dissolution of Privacy Shield.

- **The *Schrems II* Case**

Schrems submitted a second complaint with the Irish Data Protection Commissioner after the Privacy Shield framework was implemented, alleging that it was still insufficient to shield E.U. people from American surveillance methods. After that, the matter was heard by the C.J.E.U., which resulted in the landmark *Schrems II* ruling in July 2020.[102]

Further, the Privacy Shield agreement was declared void by the C.J.E.U. in the *Schrems II* case because it did not offer an "adequate" level of protection for the personal information of E.U. persons. The Court concluded that U.S. surveillance statutes, including "Executive Order 12333 and Section 702 of the Foreign Intelligence Surveillance Act", permitted U.S. intelligence services to have extensive access to personal data. Furthermore, E.U. citizens lacked adequate legal recourse to contest such surveillance tactics under the U.S. legal system.[103] The Privacy Shield framework was declared invalid by the Court, but S.C.C.s were upheld as long as businesses took further precautions to secure data that was moved outside of the E.U. The C.J.E.U. stressed that if data exporters are unable to provide a sufficient level of security, they must evaluate the recipient nation's legal system and, if necessary, halt data transfers.[104] The development of cross-border data protection has been significantly influenced by the *Schrems* cases, which highlight the need to provide personal data transmitted outside the E.U. with the same degree of protection as it would inside the E.U. Companies must implement strong data protection procedures when transferring data internationally due to the strict standards set by the C.J.E.U.'s emphasis on the fundamental right to privacy.[105]

[102] Case C-311/18, Data Protection Comm'r v. Facebook Ireland Limited and Maximillian Schrems, ECLI:EU:C:2020:559, (July 16, 2020).
[103] *See id.* ¶ 165.
[104] *See id.* ¶ 26.
[105] *See* Bu-Pasha, *supra* note 87, at 221.

4.2 THE INDIAN LEGAL FRAMEWORK ON CROSS-BORDER DATA PROTECTION

India's regulatory landscape for data protection is evolving, especially regarding cross-border data transfer. As one of the world's largest digital markets, India faces unique challenges balancing the need for stringent data protection with its ambition to establish itself as a global digital leader. The introduction of the Digital Personal Data Protection Act (D.P.D.P. Act), 2023, marks a significant step towards formalising data protection standards, including guidelines on cross-border data transfers.[106] This Section will explore India's current legal framework for data protection, offering a critical analysis of the D.P.D.P. Act, considering the implications of data localization debates, and examining the influence of international law and jurisprudence on India's approach.

India's progress in data protection was initiated with the Information Technology Act, 2000, which laid the foundational legal structure for cybersecurity, data protection, and privacy within the country. An amendment in 2008 introduced Section 43A, imposing liability on corporate entities for inadequate implementation of "reasonable security practices" when managing sensitive personal data.[107] This Regulation, together with the Information Technology Rules, 2011, laid the foundation for privacy protection in India.[108] This method was seen to be limited in its use and lacked the robustness required to address the complexities of modern digital data processing and cross-border data transfers.

With the Supreme Court's landmark decision in *Justice K.S. Puttaswamy,* where the right to privacy was upheld as a fundamental right under Article 21 of the Indian Constitution, the status quo saw a dramatic change.[109] The Court's ruling underscored the critical need for comprehensive data protection laws, leading to the formation of the Justice B.N. Srikrishna Committee. The Committee's report, titled "*A Free and Fair Digital*

---

[106] *See* Anirudh Burman, *Understanding India's New Data Protection Law*, Carnegie India (Oct. 3, 2023), https://carnegieendowment.org/research/2023/10/understanding-indias-new-data-protection-law?lang=en (India).

[107] *See* the Information Technology Act, § 43A , No. 21, Acts of Parliament, (2000), (India).

> **43A. Compensation for failure to protect data:** Where a body corporate, possessing, dealing or handing any sensitive personal data or information in a computer resource which it owns, controls or operates, its negligent in implementing and maintaining reasonable security practices and procedure and therby cause wrongful loss or wrongful gain to any person, such body corporate shall liable to pay damages by way of compensation to the person so affected.

[108] *See* the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, (20110, (India).

[109] *See* Justice K.S. Puttaswamy (Retd.) & Anr, v. Union of India & Ors., (2017) 10 SCC 1 (India).

Economy: Protecting Privacy, Empowering Indians",[110] laid the groundwork for India's inaugural comprehensive data protection legislation, ultimately shaping the D.P.D.P. Act of 2023. The D.P.D.P. Act covers essential facets of data protection, including permission, data localisation, and cross-border data transfers. The Act is less strict than the G.D.P.R.'s comprehensive and rigorous requirements for cross-border data protection, even if it represents significant progress.

4.2.1 CROSS-BORDER DATA TRANSFERS UNDER THE D.P.D.P. ACT

The D.P.D.P. Act, 2023, authorises the transfer of personal data from India to countries specified by the central government, except to jurisdictions which are notified as being restricted, ensuring that the data is protected in a manner comparable to India's domestic standards. This Section mirrors the G.D.P.R.'s adequacy process but is less exhaustive, heavily reliant on governmental discretion. Section 16 of the Act authorises the government to assess foreign jurisdictions for adequacy; however, the criteria for this assessment remain ambiguous.[111] The centralised control of data transfers has raised concerns about the potential influence of political or strategic interests on classifying countries as secure for data transfers.

Additionally, the current version of the D.P.D.P. Act does not provide clear criteria for evaluating the permissibility of data transfers or the process for selecting countries for such transfers. This highlights the need for supplementary frameworks alongside the existing legislation. India could benefit from adopting elements of the European Union's G.D.P.R., which outlines three distinct mechanisms for transferring data outside the E.U. Specifically, Articles 45, 46, and 47 of the G.D.P.R. address "Adequacy Decisions (for pre-approved countries), S.C.C.s, and B.C.R.s, all of which establish frameworks for assessing the legality of cross-border data transfers".[112] The D.P.D.P. Act does not impose a special responsibility on the central government to establish norms of adequacy or other processes for S.C.C.s and B.C.R.s for the regulation or permission of data transfers.[113] As a result, additional compliance measures, reciprocal agreements,

[110] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians (2018).

[111] *See* the Digital Personal Data Protection Act, § 16 No. 22, Act of Parliament, (2023) (India). Section **16(1): Processing of Personal Data outside India:** The Central Government may by notification, restrict the transfer of personal data by a Data Fiduciary for processing to such country or territory outside India as may be so notified.

[112] G.D.P.R., *supra* note 69, arts. 45, 46, 47.

[113] *See* Anas Baig, *Data Privacy Legislation in focus: A Deep Dive into India's DPDP Act & EU's GDPR*, Securiti (Jan. 24, 2024), https://securiti.ai/india-digital-personal-data-protection-act-vs-gdpr/.

and conditions, along with contractual provisions, must be put in place to protect the integrity of the crucial data ecosystem.

Moreover, as any critical examination will show, the authority to choose a destination country for data transfer will rest with the Union government. This gives the central government a lot of power in these areas, which could lead to it favouring its own political agendas.[114] In addition, sector-specific regulations might be given priority under the D.P.D.P. Act, as stated in Section 16(2). The D.P.D.P. Act will be superseded by sectors that provide a higher degree of security and set more stringent rules on data flow. Therefore, it's critical to understand that specific industries' expectations make it impossible for certain data types to remain private. However, there is still an unsolved issue with the Act's enforcement and the following penalties, which could make the Act ineffective. As a result, lawmakers must now prioritise the creation of a robust legislative framework to ease the flow of data across borders.[115]

1. **Vague Criteria for Restricting Transfers**: Section 16(1), which talks about processing personal data outside India permits Central Government "by notification" to restrict transfer of personal data to any country or territory outside India, but the Act does not specify what criteria it will use to access whether a destination affords an "adequate" level of protection.[116] This "negative list" methodology assumes permissibility unless explicitly prohibited, reversing the burden seen in G.D.P.R.'s adequacy regime under Article 45, where the European Commission must evaluate objective factors (e.g., rule of law, respect for human rights, data protection rules, onward transfer safeguards) before deeming a country adequate.[117] In the absence of comparable statutory standards, entities encounter ambiguity and possible legal action regarding the circumstances and rationale for restricting transfer.[118]

2. **Centralised Discretion and Risk of Political Influence**: By granting the Union Government sole jurisdiction to enforce limits, the D.P.D.P. Act consolidates significant power at the executive level.[119] Conversely, G.D.P.R. adequacy determinations are made by the autonomous European Commission in conjunction with the E.U. Data Protection

[114] *See* Mahek Sangwan & Sayed Kirdar Husain, *Guarding The Data Frontier: Navigating Cross-Border Data Transfer Under Digital Personal Data Protection Act,* NLR Blog (Oct. 23, 2024), https://nliulawreview.nliu.ac.in/blog/guarding-the-data-frontier-navigating-cross-border-data-transfer-under-digital-personal-data-protection-act/.

[115] *See id.*

[116] *See* Digital Personal Data Protection Act, 2023, § 16.

[117] *See* G.D.P.R., *supra* note 69, art. 45.

[118] *See* Raktima Roy & Gabriela Zanfir-Fortuna, *The Digital Personal Data Protection Act of India, Explained*, Future of Privacy Forum (Aug. 15, 2023), https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/.

[119] *See id.*

Board, protecting results from narrow political interests. According to Section 16, the Indian government may block jurisdictions for non-technical or geopolitical reasons without explicit criteria, undermining predictability and hindering legitimate data flows essential for trade, research, and innovation.[120]

3. Sector-Specific Overrides Create Fragmentation: Section 16(2) of the D.P.D.P. Act stipulates that nothing in the Act precludes sector-specific laws (e.g., banking, insurance, telecommunications) from enforcing more stringent cross-border restrictions.[121] This approach honours traditional localisation requirements but also risks creating a fragmented regulatory environment, with financial data governed by Reserve Bank of India regulations, health data regulated by clinical trial protocols, and Aadhaar-linked information according to Unique Identification Authority of India standards. This fragmentation hinders the establishment of a cohesive "one-stop" compliance system and imposes diverse, potentially contradictory obligations on fiduciaries.[122]

4. Absence of an Independent Data Protection Authority: The D.P.D.P. Act establishes the Data Protection Board of India [hereinafter D.P.B.I.] under Section 18 of the Act,[123] and the board has a legislative mandate to function "as an independent body" under Section 28(1) of the Act.[124] Further, the board is the principal entity responsible for enforcing and upholding the legislation. It will function as the principal adjudicative authority, addressing complaints at the beginning. Independence is paramount for the board to administer the law equitably. But the method for appointing the Board members can facilitate its autonomy from the state, draft Rules 16(1), (2), and (3) of the D.P.D.P. Rules, 2025, providing a framework for the Central Government to oversee the Board's nomination process.[125] The Board, as an adjudicatory entity, must consist of individuals nominated by a transparent and dependable independent process, as compared to the G.D.P.R.'s supervisory authority outlined in Article 51.[126] In the absence of a genuinely autonomous regulator empowered to evaluate or veto the Central Government's notifications under Section 16, there exists no internal mechanism to

[120] *See* Baig, *supra* note 113.

[121] Digital Personal Data Protection Act, 2023, § 16. **/longcitation §16(2). Processing of Personal Data outside India: Nothing contained in this section shall restrict the applicability of any law for the time being in force in India that provides for a higher degree of protection for or restriction on transfer of personal data by a Data Fiduciary outside India in relation to any personal data or Data Fiduciary outside India in relation to any personal Data or Data Fiduciary or class thereof.**

[122] *See* Roy & Zanfir-Fortuna, *supra* note 118.

[123] *See* Digital Personal Data Protection Act, 2023, § 18.

[124] *Id.* § 28.

[125] *See* Draft Rules of the Digital Personal Data Protection Act, MEITY, (Jan. 3, 2023), (India).

[126] G.D.P.R., *supra* note 69, art. 51.

monitor discretionary restrictions, nor a platform for fiduciaries to contest politically motivated blocklists.[127]

5. Multinational Corporation Adaptation to D.P.D.P. Act: Multinational corporations operating in India are required to adhere to the D.P.D.P. Act, which mandates obtaining free, informed, and revocable consent for the processing of "sensitive" personal data, safeguarding data subjects' rights to access, correction, and erasure, designating a Data Protection Officer for extensive processing, instituting "appropriate" security measures, and limiting cross-border data transfers.[128] To satisfy these objectives, multinational corporations have undertaken comprehensive data mapping and inventory initiatives to classify Indian personal data by sensitivity and document data flows across global networks, facilitating targeted risk assessments and accurate compliance protocols.[129] They have restructured consent management by substituting bundled or implicit consents with detailed, purpose-specific opt-in processes and streamlined revocation workflows, in alignment with D.P.D.P.'s focus on specificity and purpose limitation.[130] To fulfil the D.P.D.P.'s "reasonable" security requirement as given under Section 8(5) of the Act, Privacy by Design mandates the implementation of Data Protection Impact Assessment, role-based access controls, encryption both at rest and in transit, as well as stringent data minimisation and retention policies.[131] Without an Indian "adequacy" list, Multinational corporations [hereinafter M.N.Cs.] must formulate India-specific Standard Contractual Clauses, solicit preliminary Data Protection Impact Assessment comments, and start a trial Binding Corporate Rules. They also construct "India-edged cloud" architectures to localise data storage and reduce cross-border transfers.[132] Current governance frameworks encompass India-based Data Protection Officers who report directly to senior management, specialised Data Protection and Data Privacy (D.P.D.P.) helpdesks, grievance resolution committees, and the incorporation of D.P.D.P. metrics, such as response times to data subject requests, into global privacy dashboards. MN.Cs. confront practical challenges, including ambiguity regarding "large-scale" processing, postponed

[127] *See* Karthika Rajmohan, *First Read on the Digital Personal Data Protection Rules 2025: Here's what you need to know,* Internet Freedom Foundation (Jan 9, 2025), https://internetfreedom.in/first-read-on-the-dpdp-rules-2025/.

[128] *See* The Digital Personal Data Protection Act,, § 2(l) No. 22, Act of Parliament, (2023), (India). Section 2(l). Definitions: "Data Protection Officer" means an individual appointed by the significant Data Fiduciary under clause (a) of sub-section (2) of section 10.

[129] *See* Deepshikha Sharma, *India's Data Boom and New Thinking About Data Governance,* SCIKIQ (Oct 4, 2024) https://scikiq.com/blog/indias-data-boom-and-new-thinking-about-data-governance/.

[130] *See* Bharvi Shahi & Anand Raj Dev, *Navigating India's Digital Personal Data Protection Act: Critical Implications And Emerging Challenges*, Int'l J. Legal Stud. & Soc. Scis., 2025, at 412, 417 (India).

[131] *See* Ankit Kapoor, *Operationalizing Privacy by Design: An Indian Illustration*, 20 Scripted 5, 11 (2023) (Scot.).

[132] *See* Data Secure, *Impact of the Digital Personal Data Protection (DPDP) Act on Cross - Border Data Transfer,* DPO India, (Mar 5, 2025), https://www.dpo-india.com/Blogs/impact-dpdpa-cross-border/#comparison.

Data Protection Impact Assessment guidelines, and incompatible vendor contracts, by implementing conservative thresholds utilising interim best practices from consulting firms, and renegotiating vendor contracts to incorporate India-specific breach notification timelines and audit rights.[133] To reconcile innovation in Artificial Intelligence/Machine Learning efforts with sensitive data, they generate de-identified datasets and assemble A.I. Ethics Boards to ensure proportionality and necessity. The D.P.D.P. mandates that multinational corporations incorporate an "India Annexe" into their current global privacy frameworks to accommodate India's distinct environment, while the G.D.P.R. offers many lawful bases for processing and a delineated adequacy regime.[134] MN.Cs. should regularly engage with the D.P.B.I. through public comments and meetings, invest in local privacy expertise, automate Data Protection Impact Assessment and consent workflows via Privacy Management Platforms. By understanding the nuances of D.P.D.P., MN.Cs. may mitigate regulatory risks, uphold individual freedoms, and foster innovation within India's rapidly evolving data protection landscape.

5. DATA LOCALISATION AND ITS IMPLICATIONS

Data localisation, or the need that companies store and handle data within the nation's boundaries, has been a contentious issue in India's data protection debates. The Personal Data Protection Bill, 2019, had strict data localisation requirements in previous versions. According to these regulations, sensitive data may only be exported under specific circumstances, while essential personal information must be kept within India. The central government still has the power to restrict some data categories based on national security or strategic interests, even though the final version of the D.P.D.P. Act, 2023, lessens these localisation requirements.[135] The debate about data localisation is fuelled by worries about data sovereignty, safeguarding citizens' privacy from foreign surveillance, and the need for local law enforcement to have quicker access to data. Some people believe that localisation is beneficial to national security. In contrast, others are concerned that it could lead to an increase in operational expenses for multinational

[133] *See* Vinod Mahanta, *Big four firms now grapple with data protection challenges under DPDP Act,* The Economic Times (Oct 6, 2023), https://economictimes.indiatimes.com/news/india/big-four-firms-now-grapple-with-data-protection-challenges-under-dpdp-act/articleshow/104195585.cms?from=mdr.

[134] *See supra* note 130.

[135] *See* Anirudh Burman and Upasana Sharma, *How Would Data Localization Benefit India?*, Carnegie Endowment For International Peace, (Apr 14, 2021), https://carnegieendowment.org/research/2021/04/how-would-data-localization-benefit-india?lang=en.

corporations, a decrease in foreign investment, and the creation of data silos, which would make it more challenging to engage in digital trade across international borders. There are broader worldwide worries about data sovereignty, particularly in rising economies that are attempting to establish greater control over their digital economies, and the debate that is taking place in India is a reflection of these concerns.[136]

6. COMPARATIVE ANALYSIS OF NON-EU ADEQUACY DECISIONS ACROSS KEY JURISDICTIONS.

An analysis of non-E.U. adequacy frameworks uncovers unique approaches by which jurisdictions have conformed to or diverged from the G.D.P.R.'s cross-border transfer regulations, providing useful models for India's developing D.P.D.P. Act.

6.1 JAPAN'S A.P.P.I. AND SUPPLEMENTARY RULES

The Act on the Protection of Personal Information [hereinafter A.P.P.I.] in Japan was initially deemed adequate in 2011 and reaffirmed in 2019, when the Personal Information Protection Commission promulgated binding "Supplementary Rules"[137] that closely align with G.D.P.R. principles, including purpose limitation, data minimisation, and enforceable individual rights, while maintaining flexibility for domestic legal customs (Commission Implementing Decision 2019/419/EU).[138] Japan employs a flexible yet reliable adequacy strategy that harmonises regulatory clarity and procedural agility by integrating statutory amendments and administrative directives.

6.2 UNITED KINGDOM'S POST-BREXIT DATA PROTECTION ACT

Subsequent to Brexit, the U.K. enacted the Data Protection Act 2018, which incorporated the G.D.P.R. into domestic legislation and established the Information Commissioner's Office as an autonomous regulatory body. This mirror-imaging technique supports the

[136] *Id.*

[137] Supplementary Rules means the Personal Information Protection Commission issues binding, detailed guidance (e.g., on cross-border transfer safeguards) that can be updated without fresh legislation.

[138] Commission Implementing Decision (EU) 2019/419 of 23 January 2019, pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information, 2019 O.J. L (76) 1.

E.U.'s 2016 adequacy decision (Decision 2021/1772/EU), which guarantees seamless data transfers.[139] The U.K. model emphasises the efficacy of statutory isomorphism in maintaining business continuity and illustrates how sufficiency can be enhanced through "sunset clauses" and review mechanisms to accommodate evolving political contexts.

6.3 SOUTH KOREA'S HARMONIZED P.I.P.A.

In 2021, South Korea achieved adequacy by revising its Personal Information Protection Act [hereinafter P.I.P.A.] to include G.D.P.R.-like consent requirements and sanctions while also enhancing the autonomy of its Personal Information Protection Commission (Commission Implementing Decision 2022/254/EU).[140] In contrast to the E.U.'s centralised adequacy reviews, South Korea's framework depends on regular mutual assessments and enforceable guidelines, enabling the nation to adjust standards in response to technological advancements while maintaining treaty-level equivalence.

6.4 ARGENTINA DATA PROTECTION LAW

The Argentine Constitution provides a specific judicial remedy for safeguarding personal data termed "habeas data". This represents a component of the Constitution's framework for protecting constitutional rights, thereby establishing personal data protection as a fundamental right. Argentina received adequacy status (Decision 2003/490/EC) for conforming its legislation to E.U. criteria for data quality, purpose limitation, and legal recourse. It established the Agency for Access to Public Information in 2016 as an autonomous regulatory entity. In contrast to G.D.P.R., which prioritises corporate accountability, Argentina prioritises administrative enforcement and public-sector transparency—an approach that underscores the need for robust institutional design in sustaining adequacy over time.[141]

[139]Commission Implementing Decision (EU) 2021/1772 of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, 2021 O.J. L (360) 1.

[140]Commission Implementing Decision (EU) 2022/254 of 17 December 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the Republic of Korea under the Personal Information Protection Act, 2021 O.J. L (44).

[141]Commission Decision of 30 June 2003 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Argentina, 2003 O.J. L (168).

6.5 COMPARATIVE INSIGHTS FOR INDIA

These jurisdictions exhibit three primary strategies: First, Legal Convergence—alignment of statutes with G.D.P.R. principles; Second, Regulatory Layering—enhancing domestic legislation with obligatory agency regulations; and Third, Institutional Independence—empowering independent supervisory bodies to provide adaptive guidance and perform regular assessments. India's adoption of a G.D.P.R.-inspired adequacy framework, rooted in explicit legislative criteria coupled with Standard Contractual Clauses and Binding Corporate Rules issued by the D.P.B.I., and bolstered by an independent, adequately resourced regulator, would afford multinational corporations both certainty and adaptability in navigating emerging technological and geopolitical challenges.

CONCLUSION

To summarise, a nuanced appraisal of India's D.P.D.P. Act, 2023—when measured against the E.U.'s G.D.P.R.—reveals both promise and peril in India's pursuit of global data integration. The G.D.P.R.'s adequacy regime (art. 45), Standard Contractual Clauses (art. 46), and Binding Corporate Rules (art. 47) embody a transparent, rights-based framework under the stewardship of independent supervisory authorities. By contrast, the D.P.D.P. Act vests undisclosed discretion in the Union Government (sec. 16) to permit or restrict transfers, without publishing objective criteria or timelines. This opacity risks politicization of data flows, especially amid intensifying geopolitical rivalries—for example, India's efforts to balance strategic autonomy vis-à-vis both Western alliances and regional partnerships in the Global South.

Furthermore, India's reticence to embrace G.D.P.R.-style adequacy assessments reflects a trade-off between preserving data sovereignty and unlocking foreign investment, cloud services, and cross-border research collaborations. Sectoral overrides (sec.. 16(2))—from financial data localisation under the R.B.I. to health-data mandates in clinical-trial regulations—compound this fragmentation, burdening organisations with conflicting mandates and leaving enforcement agencies without clear jurisdictional boundaries. In practice, the absence of a genuinely independent Data Protection Board and statutory procedural safeguards (e.g., public consultation, appeal rights) undermines accountability and allows enforcement gaps to persist.

To navigate these challenges, India must pursue a calibrated convergence strategy. This entails articulating statutory adequacy criteria—drawing on G.D.P.R.'s evidence-based assessments—while tailoring them to India's legal traditions and development priorities; promulgating model S.C.Cs. and context-sensitive B.C.Rs. to bridge interim compliance needs; and fortifying the D.P.D.P. Board with clear mandates for impartial oversight, binding timelines, and stakeholder redress. Crucially, such reforms must occur in tandem with diplomatic engagement—for instance, ensuring that any E.U.–India Trade and Technology Council framework factors in India's industrial policy concerns and security imperatives.

In an era where data diplomacy increasingly intersects with national security, economic competitiveness, and human rights, India's regulatory evolution cannot be reduced to mere legislative mimicry. Instead, by embedding transparency, accountability, and principled interoperability into its cross-border transfer regime, India can safeguard citizens' privacy and secure its position as a trusted partner in the global data economy. This balanced approach—grounded in realistic assessments of geopolitical tensions and enforcement capacities—offers the best prospect for reconciling digital innovation, sovereign interests, and fundamental rights on the world stage.

FUNDING STATEMENT

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

DECLARATION OF INTEREST

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

ACKNOWLEDGEMENTS

The authors are grateful to the Faculty of Law, University of Delhi, for facilitating access to library resources that were indispensable to this research. We also thank the two anonymous reviewers for their insightful comments and constructive suggestions, which materially improved the manuscript. Our appreciation goes to the Editorial Board of the University of Bologna Law Review for their professional support and timely correspondence throughout the review process.

VOLUME 10 ISSUE 1 OBITER DICTUM

University of Bologna Law Review

https://doi.org/10.6092/issn.2531-6133/23215

Between Sovereignty and Commerce: Reflections on the Rise of State-Owned Entities

INTRODUCTION

In most industrialized economies, private enterprises are the predominant economic actors. However, in recent decades, the prevalence of enterprises associated with sovereign states — such as State-Owned Entities (SOEs) and related institutions like Sovereign Wealth Funds (SWFs) — has skyrocketed. This quiet revolution has shifted the balance between public interests and private initiative, blurring lines between market competition and statecraft. While the surge in commercial enterprises associated with the state is not without important historical precedent, much of the international legal architecture that was built over the twentieth century has not sufficiently engaged with these economic realities.

The rise of SOEs is not merely a matter of economics. It reflects deeper shifts in governance, law and diplomacy. In international law, these entities can present a puzzle: they behave like private corporations in commercial arenas, yet they may enjoy the privileges — and carry the burdens — of sovereign authority. Their growing prominence in sectors from energy to infrastructure raises fundamental questions: How should international law recognize and adapt to their dual nature? Moreover, what lessons can history offer us in understanding this evolving phenomenon?

In reflecting on this, I am reminded of the recent fate of the Hudson's Bay Company in Canada. Founded in 1670 under a royal charter from the English crown, it functioned for centuries as both a commercial trading house and a quasi-sovereign administrator of vast territories. Its powers — to govern, to tax, to negotiate with Indigenous nations — blurred the line between public interest and private enterprise. Yet by the late twentieth century, it had shed its political functions, becoming simply another retail brand. In 2025, the Hudson Bay Company shut its doors forever: it filed for bankruptcy and subsequently liquidated its assets, including its physical stores and intellectual property. This transformation offers a striking counterpoint to today's SOEs,

which are moving in the opposite direction: expanding their reach not only in commerce, but in shaping state policy and international law. *Come cambiano i tempi.*

1. HISTORICAL AND CONCEPTUAL BACKGROUND

State entities are not unique to the modern state. History offers a long lineage of enterprises that fused public authority with commercial ambition — from chartered companies to nineteenth-century state railways. While today's SOEs are common in emerging economies, their presence is by no means confined to them. What they hold in common is their *publicness* — a defining characteristic rooted in their connection, whether by ownership, control, or policy, to broader social outcomes, or the provision of public service.

This *publicness* is not simply a matter of formal ownership structures; it is embedded in the purposes these entities serve. Whether financing infrastructure, managing natural resources, or delivering essential goods, they operate at the junction of market and state, where market efficiency and social policy intersect. This dual mandate can be both a source of strength and a site of tension, especially in the realm of international economic law.

The rise of what has been called *state capitalism* — countries in which governments hold an ownership stake or exert significant influence over more than one-third of the 500 largest companies — is particularly significant. The causes of this phenomenon are varied. They include: increasing privatization in liberal democracies, where governments retain a "golden share" or strategic control; the delegation of state functions in formerly socialist states; the ascendance of China, with its distinctive combination of a state-driven economy; and competitiveness in global markets; and a reversion to authoritarianism in some states with prior histories of centralized control.

Moreover, *entità statali economiche* (SAEs) now fulfill remarkable roles in diverse and dynamic ways — from being champions of national industrial policy, to serving as diplomatic tools in soft power strategies, to acting as global investors through sovereign wealth funds. Their reach is no longer restricted by geography, nor is their influence confined to [traditional sectors]?. They are as likely to own a critical port in the Mediterranean as to be majority shareholders in a South American mining conglomerate.

2. RATIONALES AND CONTRASTS

The rationale for SOEs is mixed, reflecting a blend of social, economic, and strategic interests that vary from state to state. Their purposes range from advancing industrial policy and fostering regional development, to ensuring the supply of public goods, and managing so-called natural monopolies where competition is deemed politicaly infeasible. These justifications are often framed in the language of national interest, appealing to the legitimacy of state intervention in strategic sectors.

SAEs can be contrasted with what Jacob Levy has described as "intermediate groups" — associations, clubs, churches, and other organizations that exist midway between the individual and the state, and provide social and institutional resistance to state dominance. The difference lies partly in their origin: while intermediate groups arise from the ground up, SAEs are created from the top down as instruments of state policy.

Moreover, while both intermediate groups and the state itself can act as agents for individuals, states have a historical tendency to overreach, seeking to control, co-opt, or regulate these intermediary bodies. This overreach, Levy notes, often forces associations into a defensive posture: raising barriers to entry, becoming more opaque to external scrutiny, and demanding greater loyalty and ideological conformity from their members.

SAEs are also to be contrasted with political parties, which Samuel Issacharoff has argued require a thick right of autonomy to protect them from adverse state regulation. He situates this as part of the broader problem of intermediary institutions within civil society: "These institutions fall between the realms where rights of autonomy truly take hold and those where the claim to fidelity to the full range of social mores may be imposed." He further warns that political parties cannot retain their organizational identity if they devolve into mere instruments of the median voter.

Despite these distinctions, there remains one notable similarity between intermediate groups and SAEs: both are often prone to secrecy and criticized for their lack of transparency. As Levy observes, states are, by their nature, information-gathering and surveilling entities, and the relative opaqueness of intermediate groups can provoke state antagonism. For grassroots associations, opacity may be a survival strategy; for SAEs, it may be a function of national security, commercial confidentiality, or political sensitivity. In both cases, the result is a shield against scrutiny — and a lightning rod for criticism.

3. LEGAL AND GOVERNANCE CHALLENGES IN INTERNATIONAL LAW

The dual nature of SAEs— simultaneously market participants and instruments of sovereign policy — generates complex legal and governance challenges. Chief among these is the question of sovereign immunity. In many jurisdictions, the doctrine of *immunità sovrana* protects states from being sued without their consent. Yet, when SAEs engage in *atti commerciali*, they may fall within exceptions to immunity, especially under restrictive immunity regimes. Determining whether an SAE's conduct is "sovereign" or "commercial" is often contentious, particularly when the same act may have both policy and profit motives.

In the realm of international investment law, SAEs present further difficulties. Under many bilateral investment treaties (BITs) and free trade agreements, they can appear on either side of the dispute: as "private" investors themselves or as respondents accused of breaching investment protections. The ICSID Convention and UNCITRAL rules have grappled with questions of attribution: when does an SAE's conduct engage the responsibility of the state under *diritto internazionale pubblico*? Cases such as *BUCG v. Yemen and CSOB v. Slovakia* illustrate the tensions in defining the threshold for state control and governmental function.

SAEs also pose challenges in the field of competition law and trade regulation. In the European Union, for example, state aid rules under Articles 107–109 TFEU constrain the ability of Member States to grant preferential treatment to their own enterprises. The WTO's Agreement on Subsidies and Countervailing Measures similarly seeks to discipline distortive state support, yet its application to SAEs remains politically sensitive, particularly when such entities operate as *campioni nazionali* in strategic industries.

Transparency norms present another point of contention. Multilateral frameworks, such as the OECD Guidelines on Corporate Governance of State-Owned Enterprises, promote disclosure, accountability, and competitive neutrality. However, compliance varies widely, and many SAEs resist full transparency on grounds of national security or commercial sensitivity. This resistance mirrors the dynamics described by Levy with respect to intermediate groups — opacity as a strategic choice — but in the case of SAEs, the stakes are amplified by their potential to influence global markets, shape industrial policy, and act as vectors of diplomatic leverage.

CONCLUSION - SOVEREIGNTY AND COMMERCE IN DIALOGUE

In tracing the rise of state affiliated or owned enterprises in the modern global economy, it becomes clear that these hybrid actors are neither an aberration nor a novelty. They are part of a longer story — one that runs from the chartered companies of early modern Europe to today. Today's SOEs, by contrast, are moving in the opposite direction — expanding their reach from commerce into realms once reserved for the sovereign itself.

This evolution reflects recurring tensions in the relationship between *Stato*and *mercato*: the desire to harness market mechanisms for public ends, the temptation to conflate strategic policy with competitive advantage, and the challenge of governing actors that answer to both boardrooms and ministries. The legal complexities — from sovereign immunity to competition law — are symptoms of a deeper truth: that the boundary between public and private is never fixed, but continually negotiated.

In Bologna, under the arches of the*portici*, one walks through a city that has witnessed centuries of such negotiation. Here, jurists of the *studium* once wrestled with the reception of Roman law, adapting it to the realities of medieval commerce and governance. That same spirit of comparative law is needed today to navigate the legal space occupied by SAEs — a space that demands both respect for sovereignty and insistence on transparency, accountability, and the rule of law.

Ultimately, *il diritto è un dialogo senza fine* — the law is an endless dialogue. The challenge for our time is to ensure that, in this dialogue, the voices of both state and market are heard, balanced, and held to account, so that the hybridity of SAEs serves not merely the interests of power, but the broader public interest.

Kristen Boon
Full Professor of Law
University of Ottawa, Canada

With gratitude to the University of Bologna Law Review for the invitation to join its Advisory Board. It is an honour to contribute to this dialogue.


UBLR

University of Bologna Law Review
Department of Legal Studies
Via Zamboni, 27
40126 Bologna
(Italy)

Email: dsg.bolognalawreview@unibo.it
Website: bolognalawreview.unibo.it