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JOURNAL
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SOUTH TEXAS COLLEGE OF LAW HOUSTON
CURRENTS: JOURNAL OF INTERNATIONAL ECONOMIC LAW
1303 San Jacinto Street
Houston, Texas 77002-7006

2026

CURRENTS

Vol. XXVII No. 1

CURRENTS

JOURNAL OF INTERNATIONAL ECONOMIC LAW

2026

SOUTH TEXAS COLLEGE OF LAW HOUSTON

Vol. XXVII, No.1

LEGITIMATE EXPECTATIONS AT A TIME OF “CLIMATE COLLAPSE IN REAL TIME”: HOW THE PRINCIPLE OF PROGRESSION CAN REDEFINE INVESTOR-STATE ARBITRATION OF CLIMATE CHANGE-RELATED DISPUTES

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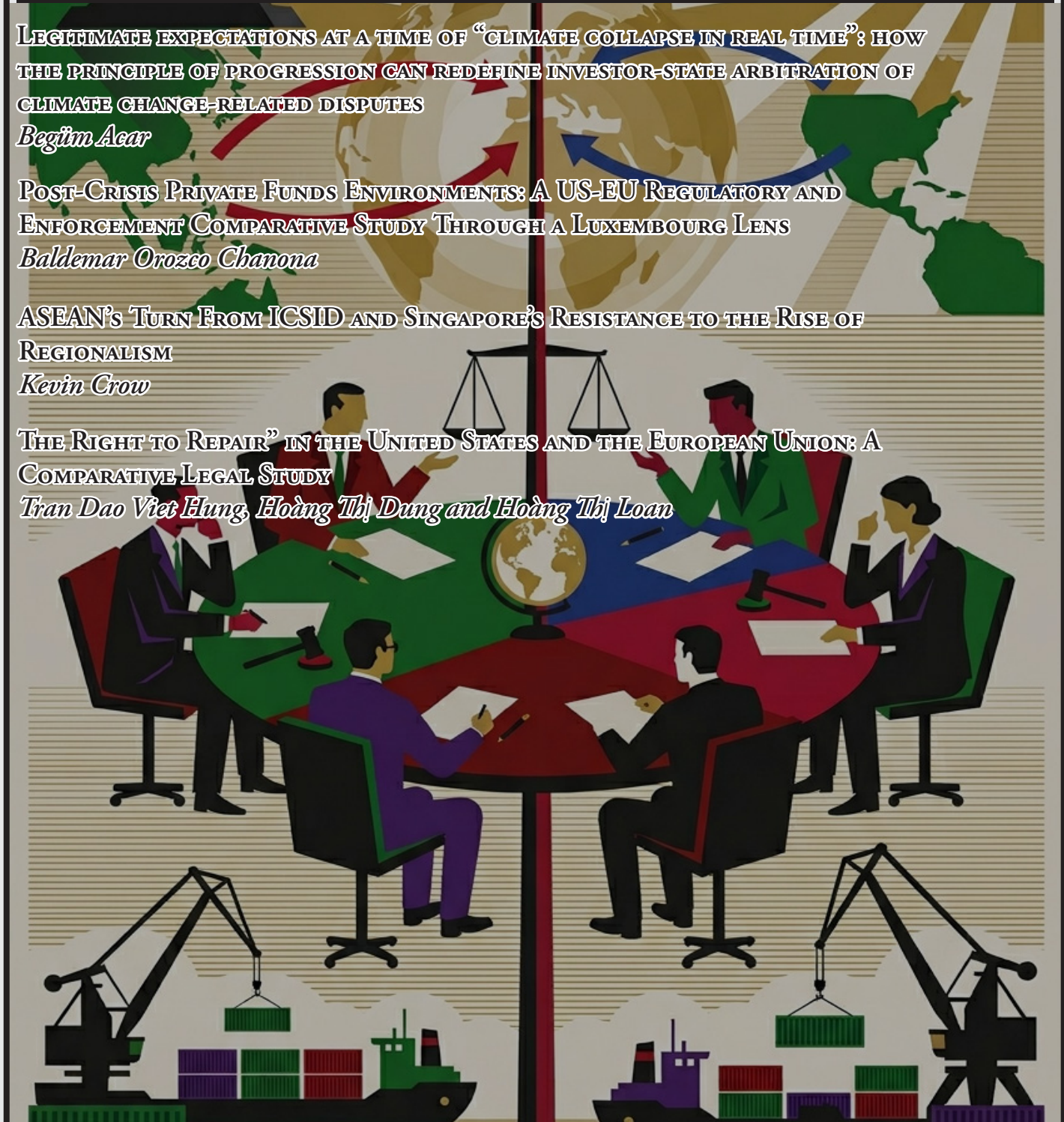
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LETTER FROM THE EDITOR

Dear Reader,

The Editorial Board of *CURRENTS: Journal of International Economic Law* (*CURRENTS: JIEL*) is proud to present Volume 27.1, an issue compiling diverse and critical perspectives on modern international economic law. This issue illustrates the dynamic legal frameworks governing global trade, climate change, financial regulation, and regionalism, offering valuable analysis for scholars and practitioners alike. As the articles make clear, evolving regulatory frameworks remain at the forefront of international dispute resolution and economic policy, providing structural flexibility, neutrality, and enforceability that are critical to today's interconnected global economies.

Volume 27.1 features five compelling articles that address pressing international law legal issues. Begüm Acar explores investor-state arbitration in the context of environmental crises, proposing how the principle of progression can redefine climate change-related disputes. Baldemar Orozco Chanona delivers a comparative regulatory and enforcement study of post-crisis private funds environments in the United States and European Union through a Luxembourg lens. Kevin Crow examines the shifting dynamics in Southeast Asia, focusing on ASEAN's departure from ICSID and Singapore's strategic resistance to rising regionalism and finally, Hoàng Thị Loan, Tran Dao Viet Hung and Hoàng Thị Dung present a comprehensive, comparative legal study analyzing the emerging "Right to Repair" frameworks within both the United States and the European Union. Together, these pieces underscore the evolving nature of international commerce and regulatory compliance.

In addition to these articles, this issue includes two insightful student notes. Caleb Ortega navigates the global expansion of athletics in "Global Playbook: Navigating the Internationalization of American Sports," while Max De Leon examines heritage protections in "Illicit Trade in Cultural Property and International Economic Law." Furthermore, our Current Events feature presents four collaborative group papers written entirely by the members of *CURRENTS: Journal of International Economic Law*. This feature dives deeply into pressing global matters, including "The Race for AI" and "The Race for Critical Minerals." Crucially, the final portion highlights domestic trade friction through two focused pieces: the tariff litigation paper, which predicts how the Supreme Court will rule on the high-profile tariff litigation against the Trump two administration, and a comprehensive analysis of *Learning Resources v. Trump*, which discusses the Supreme Court's ultimate decision on the case and explores its long-term effects on international trade.

On behalf of the Editorial Board, we would like to express our deepest gratitude to Professor Cherie Taylor for her unwavering commitment to *CURRENTS: JIEL* and its members. We also extend our sincere appreciation to Jacob Hubble, our Scholarly Publications Manager, for expertly guiding our journal through the publication process from inception to print. I would also like to thank the entire staff and Editorial Board; everyone worked tirelessly to bring this issue to life, and we overcame unique challenges along the way. A special thanks belongs to David Nixon, our Executive Editor, and Seema Shaheen, our Managing Editor, for their timeless energy, dedication, and vital support in reviewing these articles. Being a part of *CURRENTS: JIEL* has been one of the most influential experiences of law school, and we have all become better editors, writers, and leaders because of it.

On a deeply personal note, I want to give thanks to my wife, Ann Joseph, for her amazing support. Without her love, a second-career law student like me would never have been able to navigate this challenging journey, let alone graduate with honors from law school.

The Editorial Board always welcomes article submissions on any topic related to international economic law. Please visit our website at stcl.edu/academics/law-reviews-journals/currents for additional information on how to submit articles and our publication schedules. We hope you enjoy this issue!

Jeril Joseph
Editor-in-Chief

Jeril Joseph

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CURRENTS is published by
South Texas College of Law Houston.

Please cite *CURRENTS* as
CURRENTS: JIEL 27.1, 2026.

Please direct inquiries and correspondence to:
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CURRENTS

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Houston, Texas 77002-7006
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LEGITIMATE EXPECTATIONS AT A TIME OF “CLIMATE COLLAPSE IN REAL TIME”: HOW THE PRINCIPLE OF PROGRESSION CAN REDEFINE INVESTOR-STATE ARBITRATION OF CLIMATE CHANGE-RELATED DISPUTES

B E G Ü M A C A R

ABSTRACT

Article 3 of the Paris Climate Agreement stipulates that states' climate actions "will represent progress over time," underscoring the expectation that states will adjust their legal frameworks to implement more intense measures each year. Agreed by 195 ratifying states, this provision stands in stark contrast to how certain investment tribunals have interpreted the international investment agreements, especially the fair and equitable treatment (FET) standard provisions. Investment case law tends to prioritize investors' "legitimate expectations" over states' rights to regulate and international climate obligations, which may impede climate action and hinder states' efforts to achieve their Paris Climate Agreement goals. This paper argues that the "principle of progression" embraced in the Paris Climate Agreement must guide investment tribunals' construction of the legitimate expectations doctrine. It proposes several opportunities within international law and the existing investment law framework to integrate the principle of progression into tribunals' analysis of the legitimate expectations doctrine. This paper provides academics, arbitrators, and lawyers with a fresh perspective to align investment law with

PhD Candidate, UCLouvain. This paper was originally drafted as the final LL.M. paper at Harvard Law School. The author gratefully acknowledges the support of the Harvard Law School's Public Service Venture Fund (PSVF) Kaufman Fellowship, which supported the author's work at Doğa Derneği during the period in which subsequent revisions were made to the article. All views and errors remain the author's own.

climate imperatives, supporting the urgent need for climate action.

I. INTRODUCTION

"We are living through climate collapse in real time," says António Guterres.¹ This is a "climate collapse," which not only requires new technological and technical solutions but also a revised interpretation of our existing legal mechanisms. One place requiring more thinking is the emerging clash between the need for climate action and international investment law standards.

On the one hand, foreign investors affected by heightened climate measures may challenge these before investment tribunals, which may potentially lead these tribunals to award large amounts of compensation against states taking the measures.² On the other

hand, these measures might be necessary for states to comply with their obligations under international law, including the Paris Climate Agreement³ and to address the global climate crisis. The dilemma is clear: states must change their legal frameworks to comply with their international legal obligations to meet the global goal of keeping the temperature rise below 2°C and aiming for below 1.5°C. But making such legal changes could lead investment tribunals to rule that these states violated their international obligations under investment treaties.

This paper argues that the "legitimate expectations" analysis of investment tribunals must incorporate the discernible trend towards heightened climate action by states, which started in the 1990s. In the decades leading up to the Paris Agreement and especially after 2009, the ambition framework started to influence international climate law so much that states were motivated to join an ambitious future.⁴ The provisions and mechanisms of the Paris Climate Agreement took this a few steps further and established an even stronger ambition through the "principle of progression," which made clear that states' climate actions "will represent progress over time" under Article 3. As a result, the principle of progression under

the Paris Climate Agreement challenges the conventional understanding of legitimate expectations.

Foreign investment protection through international treaties dates back to 1959, with the number of international treaties booming in the 1990s.⁵ Currently, over 3,300 international investment agreements (IIAs) provide investors with various protections and recourse to arbitration against the host state through investor-state dispute settlement (ISDS).⁶ In ISDS, foreign investors arguing a violation of IIAs can take the states to arbitration. For the IIA to apply, no contract between the state and the foreign investor is required. Any foreign investor with the nationality of the contracting state can invest in the territory of the other contracting state and be protected under the IIA. In case of a dispute, usually, three arbitrators, two of them appointed by each party and one appointed by these two arbitrators decide whether a violation of the IIA occurred.⁷ States typically cannot take foreign investors to arbitration; even more, in most cases, they cannot file counterclaims, which creates an asymmetry.⁸

IIAs include many investment protection standards, including the fair and equitable treatment (FET) standard. This standard obliges states to treat foreign investors investing in their territory fairly and equitably. This brief provision's interpretation generally depends on the specific tribunal's approach. Some tribunals prefer interpreting the FET standard by using the legitimate expectations doctrine. Some even decide that, in the absence of any specific promise given to the investor, the domestic legal framework itself may create legitimate expectations and the changes in this framework can frustrate

these expectations,⁹ even when the changes in the legal framework are for the public interest.¹⁰

It is clear that this type of interpretation, in the case of a dispute brought by an investor challenging a climate measure, may create a contradiction between states' obligations under two different sources: the Paris Climate Agreement and the IIAs. With these considerations in mind, it becomes increasingly possible for investment arbitration to become an avenue for foreign investors to obstruct compliance with climate obligations under the Paris Agreement and customary international law, if tribunals decide not to give effect to climate obligations when dealing with investors' claims. In fact, investment tribunals have been increasingly dealing with these issues lately, while scholars warn of the asymmetrical structure of the IIAs and ISDS as well as unresolved norm conflict between international climate law and international investment law.¹¹ Accordingly, this paper suggests that these methods include the integration of the principle of progression in the tribunal's decision-making.

The risk of their climate measures being challenged before investment tribunals is an extra consideration of economic burden for states, while planning to revise their legal framework to comply with the Paris Climate Agreement obligations and raise their ambition levels. Dissuasion and hesitation due to the ISDS risk are not just mild risks, considering that compensation awarded by the tribunals can include not only direct economic costs but also future profits¹² and that the legal fees for the arbitral proceedings are very high.¹³ Arbitral awards can reach hundreds of millions and even billions of dollars against states.¹⁴

Considering this policy risk as well as the above-mentioned legal contradiction, the legitimate expectations doctrine as applied to date must be reevaluated to consider the climate crisis and to accommodate climate action, given the need for states to change their legal frameworks under the Paris Climate Agreement mechanism.

“The risk of their climate measures being challenged before investment tribunals is an extra consideration of economic burden for states, while planning to revise their legal framework to comply with the Paris Climate Agreement obligations and raise their ambition levels.”

At this moment in time, when these questions are more urgent than ever, arbitrators have an important role to play in addressing these questions.¹⁵ While investment cases create risks for compliance with international obligations to mitigate greenhouse gas (GHG) emissions, these are also instances where an opportunity for arbitrators to integrate international climate obligations in investment law arises.¹⁶ It is necessary for new studies to capture how international climate obligations can be integrated into international investment law in a way that does not support non-compliance with these obligations.

Accordingly, I propose a model for integration that operates by redefining the “legitimate expectations” doctrine, which stands as one of the biggest barriers created by the investment regime facing states that plan to take more ambitious climate measures under their domestic laws. As a consequence,

I reject the current narrow understanding of legitimate expectations in international investment law, which is isolated from the rest of international law. Instead, I propose incorporating the principle of progression into the legitimate expectations doctrine by using the customary treaty interpretation principles codified under the Vienna Convention on the Law of Treaties¹⁷ (VCLT) and rethinking the scope of investor expectations worthy of legal protection under the legitimate expectations doctrine, in light of expected climate measures. Moreover, I suggest that this approach is easily applicable as it situates itself within the investment law by relying on several previous tribunal decisions. Applying new legal thinking to the old and established ways presents challenges, yet adopting new legal thinking instead of strictly adhering to the conventional impractical approaches would benefit the legal system and the global community facing the climate crisis in “real-time”.¹⁸ This paper will provide a legal analysis within international investment law on how the FET standard, along with the legitimate expectations doctrine, has been construed and how else it could have been and should be construed.

In the second chapter, I will provide a broad overview of the investment case law relating to the tribunals’ understanding of legitimate expectations relating to changes in the domestic legal framework, capturing the varying opinions of the arbitral tribunals in this matter. I will close this chapter with an assessment of the potential impact of these opinions on pending and future cases, in which climate measures are involved. In the third chapter, this paper will start dealing with the proposed solution of using

the principle of progression to reshape the legitimate expectations doctrine. This chapter will analyze and discuss the history, contextual importance, and legal status of the principle of progression. In the fourth chapter, this paper will propose legal interpretative solutions on integrating the principle of progression into the review of the FET obligation, especially in the legitimate expectations analysis. This chapter will show that the principle of progression can reframe the scope of legitimate expectations, without needing a total deviation from the discipline of international investment law. I provide several arguments in support of this. First, the principle of progression can be considered a relevant rule of international law, under the VCLT Article 31(3)(c), helping the interpretation of the FET obligation. Second, regardless of whether the principle of progression is a binding legal obligation of any sort, it is a projection of a future reality, agreed by states to be expressed as a normative expectation¹⁹ in an international treaty. For this reason, it can narrow the scope of investors’ legitimate expectations to continue their high-emitting activities unaffected. In this chapter, I will discuss previous investment awards to showcase that solutions for making climate action possible exist even within the case law of the investment tribunals.

Working within the existing investment law system, this paper opens up a window to reconcile this system’s relationship with international climate law.²⁰ Finding new windows in the existing ISDS regime is essential, considering that a comprehensive reform or any decision of this regime’s abolition may not even be possible or, at least, will take time. Without underestimating that

institutional reforms are, in fact, necessary, this paper aims to bring an undiscovered legal solution into light within the existing frameworks.²¹

II. UNPACKING THE TENSION: HOW CLIMATE MEASURES ARE AT RISK TO BE CONTESTED WITH CLAIMS THAT INVESTOR EXPECTATIONS WERE FRUSTRATED

At the core of investment law and arbitration’s conflict with climate change law lies the question of whether climate action might infringe upon the investors’ legitimate expectations. Clearing the space around this question could encourage states to pursue the necessary climate action by relieving them of a substantial burden. This chapter is designed to set the scene by briefly illustrating the challenges that the “legitimate expectations” doctrine poses to climate policymaking.

A. TRIBUNALS GENERALLY INTERPRET FET AS PROTECTING FOREIGN INVESTORS’ “LEGITIMATE EXPECTATIONS”

IIAs include various treaty standards and protections for foreign investors.²² Even though every IIA is unique and includes a selection of different wordings and rights, some provisions find a place in most IIAs.²³ Becoming staple provisions of the IIAs, these shape the system’s architecture.

The FET standard is one of those provisions that shape international investment law, as the most commonly invoked provision and the one that majorly leads to the investors’ success in arbitral proceedings.²⁴ This standard requires that the state treat the

foreign investor fairly and equitably.²⁵ The wording of these is often short and vague,²⁶ providing the arbitral tribunal with a lot of flexibility.²⁷ With the different wordings of the provisions involving the FET standard in different treaties, one cannot talk about a single FET obligation.²⁸ Rather, each one of these provisions is unique, and any interpretation must start from the wording of the specific provision itself to understand the level of protection parties to the IIA intended to provide to foreign investors.²⁹ However, the wording itself does not, by itself, provide the answer to the question of whether an investor was treated fairly and equitably. The understanding of each arbitrator in an arbitral tribunal vastly influences the tribunal's answer. Some arbitrators may be more willing to protect the foreign investor and provide extra safety to the flow of foreign investments. Some may consider the state's regulatory space to be larger and may justify certain state actions, even when they negatively affect the investor. This choice of how much reverence must be given to state actions versus the impacts faced by the investor becomes crucial when it comes to state actions to protect public interest, such as public health and environment, which also happen to negatively impact the commercial interests of the investor.

Thousands of arbitral awards given by investment tribunals have a crucial role in shaping the relationships between states and investors,³⁰ moving beyond commercial relations to areas of public interest.³¹ However, since there is neither a uniform appeal mechanism³² that could systemize international investment law, nor the principle of *stare decisis*³³ that applies to investment tribunals; different interpretations

of the same clauses can and do exist.³⁴ Every tribunal is unique and consists of different arbitrators. Even though they seem to rely on previous decisions to strengthen their positions or foster uniformity, legal stability and predictability,³⁵ the flexibility provided to them can lead to legal instability when arbitral tribunals repeatedly use different standards of review or, even, use the same standards but reach different and even conflicting conclusions. The non-homogeneous character of investment law adjudication³⁶ makes it difficult to provide a single-handedly reached account of what certain obligations mean and what they prohibit states from doing under international investment law.

“[I]n interpreting the FET standard, tribunals might rely on a variety of factors, such as due process, transparency, freedom from discrimination, freedom from coercion and harassment and protection of legitimate expectations.”

For example, in interpreting the FET standard, tribunals might rely on a variety of factors, such as due process, transparency, freedom from discrimination, freedom from coercion and harassment and protection of legitimate expectations.³⁷ For the tribunals interpreting the FET standard by relying on legitimate expectations, if any state conduct creates “reasonable and justifiable expectations on the part of an investor (or investment),” which signals that the state will act according to that conduct, frustrating these expectations could lead to a violation of FET.³⁸ If the state frustrates the legitimate expectations it created earlier, it violates

the FET standard and is entitled to make reparation,³⁹ most probably in the form of compensation.⁴⁰

As a result, even though the IIA obligations do not specifically refer to investor expectations in their text, tribunals heavily rely on the doctrine of legitimate expectations in practice,⁴¹ showing that the doctrine is seen as a central element⁴² of the FET obligation.⁴³

Similarly, in a case challenging a host state's climate measures, there is a significant possibility of the tribunal interpreting the FET standard with reference to the investor's expectations. In such a case, how to construe legitimate expectations will be relevant. In particular, whether a change in the domestic legal framework can be considered to frustrate legitimate expectations will be relevant.

B. SOME TRIBUNALS VIEW CHANGES IN DOMESTIC LEGAL FRAMEWORK AS FRUSTRATING FOREIGN INVESTORS' “LEGITIMATE EXPECTATIONS”

It is often accepted that specific representations made by the state to the investor about their investments' continuity create legitimate expectations worthy of legal protection. However, whether a state's existing legal framework at the beginning of the investment can create such expectations that a change of law may frustrate those expectations is disputed.

To understand whether the framework of changes in the domestic legal framework can or cannot frustrate legitimate expectations, we can use the three-step analytical approach adopted by some tribunals to interpret the FET obligation through the legitimate expectations doctrine. To establish that the investor's legitimate expectations are

frustrated, there must be state action appropriate to create expectations (1), the investor must have acted reasonably relying on this action (2), and the state must have done something contrary to whatever expectation it set in the investor's mind in the first place (3).

First, is the legal framework appropriate to create expectations? The first discussion is whether a general legal framework is appropriate to form expectations. There are varying opinions by different investment tribunals. According to the *Philip Morris* tribunal, the law may change. The *Phillip Morris* tribunal stated that a general legal framework cannot be taken as a promise that the law will not change and decided that the tobacco restrictions in question did not violate the state's FET obligations.⁴⁴ There are also stronger opinions from some tribunals on this, stating that there must be "specific individualized promise[s]."⁴⁵

"Similarly, some tribunals state that certain contexts are inherently risky for investment, which makes their economic return even higher in case the risk does not materialize."

However, other tribunals have considered the legal framework conducive to creating legitimate expectations or ruled that specific representations are not strictly necessary. The *Cube Infrastructure* tribunal stated that legal regimes created to attract investors in highly regulated areas may create legitimate expectations.⁴⁶ In a similar vein, the *Saluka* tribunal decided that the expectation that the Czech authorities would be able to handle a financial problem did

not require specific representations.⁴⁷ The inconsistent case law suggests that whether general legal frameworks can create legitimate expectations is an unresolved question in investment law. This indeterminacy is a risk for states planning to change their legal frameworks for the public interest, including changes in the domestic legal framework to tackle climate change and comply with Paris Climate Agreement obligations.

Second, did the investor rely on the legal framework on a reasonable basis? Reasonableness requires an analysis of the investors' actions. Expectations are, by their very nature, subjective. However, the adjective "legitimate" before it conveys an objective meaning.⁴⁸ This means that the legitimate expectations doctrine does not protect every subjective consideration,⁴⁹ hope⁵⁰ and dream.

There is a line of reasoning favoring states' public interest regulations. According to these tribunals, investors must take into account states' "political, socioeconomic, cultural and historical conditions",⁵¹ its (constitutional or international) human rights obligations,⁵² and government authority to regulate with the aim of environmental protection, public health and ecological balance goals.⁵³ Similarly, some tribunals state that certain contexts are inherently risky for investment, which makes their economic return even higher in case the risk does not materialize. In this line, *Parkerings* tribunal states that the investor must have known in this context that the legislation they relied on could have changed, considering that Lithuania is a "country in transition" as it was previously a part of the Soviet Union.⁵⁴ Moreover, some tribunals openly stated that expectations must be objective.⁵⁵ In turn,

some tribunals and dissenting arbitrators argued that some subjective expectations might also be protected under the legitimate expectations doctrine.⁵⁶ This step also remains pretty inconsistent, making it challenging for states to evaluate the risks associated with taking climate action.

Third, did the changes in the legal framework frustrate the expectations? This step largely collides with the first step, as tribunals that decide that general legal frameworks can create legitimate expectations also decide that changes in the legal framework can frustrate expectations. However, most such tribunals also require extra requirements, such as the change to be profound⁵⁷, unreasonable⁵⁸ or "outside of the acceptable margin of change."⁵⁹ As an alternative, the *Saluka* tribunal suggested taking a balancing model where the investors' legitimate expectations and host states' legitimate interests in regulating domestic matters will be weighed to assess whether there is a FET violation.⁶⁰

It is obvious from the case-law that there is no consistent understanding of exactly which cases we consider legitimate expectations to be created and violated. In general, two theories are considered to be applied to the question of what generates legitimate expectations. According to the first, the so-called "voluntarist theory of promise," states must uphold the commitments they have made unless these were not legitimate, specific or clear.⁶¹ Unlike this theory, the theory of "detrimental reliance" gives weight to other circumstances, including whether these expectations were legitimate and reasonable, and what negative consequences these expectations might create.⁶² In summary, the second theory considers the objective landscape surrounding the

investment as well as whether the investors successfully complied with their share of duties, i.e. applying due diligence that would be applied by a prudent investor.⁶³

If the theories broadening the scope of legitimate expectations are applied to mitigation measures necessary to limit climate change, there is not a slim possibility that these measures will be shut down and large sums of compensation will be paid to investors. Considering that some of these investments, especially fossil fuel investments, are the reason for climate change in the first place, we should pay more attention to what investment arbitration encourages and what it deeply discourages.

C. THE QUESTION OF WHETHER CLIMATE MEASURES MAY ALSO FRUSTRATE “LEGITIMATE EXPECTATIONS” ACCORDING TO THE TRIBUNALS’ CASE-LAW

Unsurprisingly, effective climate action will include changes in the economic landscape and indispensably affect high-emitting industries. As early as the IPCC Report of 1992 analyzed the fossil fuel-related GHGs’ impacts, saying that energy consumption and largely fossil fuel consumption is a big portion of the GHG emissions leading to climate change.⁶⁴ The IPCC Report of 2023 highlights that existing fossil fuel infrastructure will consume the entire carbon budget for limiting warming to 1.5°C⁶⁵ if they continue as they have been, which indicates that the Paris Climate Agreement goals cannot be achieved unless the fossil fuel industry undergoes significant changes. Recently, in COP28 in Dubai, states reached a consensus on “transitioning away from fossil fuels in energy systems (...) accelerating action in this critical decade,”

which finally showed a clear and time-limited promise towards phasing out fossil fuels to reach net zero.⁶⁶ The expressions that follow this, “in a just, orderly and equitable manner,”⁶⁷ and the use of softer terms, such as “transition” instead of “phase out” or “phase down,”⁶⁸ show that the commitment could have been stronger. In fact, various governments and civil society representatives also strongly advocated for a decision to call on states to phase out fossil fuels at COP30 in Belem.⁶⁹ For the last few years, this has become an important struggle between states supporting strong climate action and fossil-fuel-producing states, and an agreement has yet to be concluded.⁷⁰ Still, the commitment to take measures that affect high-emitting industries, especially the fossil fuel industry,⁷¹ is clear.

“The risk of litigation against states that take ambitious, or even sufficient, climate action has already materialized.”

While there is already a lack of ambition in taking mitigation measures, with world nations unable to reach an agreement among themselves, it is important that there are sufficient incentives for those states which agree to take effective measures to tackle climate change. In the current circumstances, international investment law and investment arbitration could easily be instrumentalized by high-emitting corporations to punish states for ambitious climate action, unless international climate obligations are reconciled with international investment law.

The risk of litigation against states that take ambitious, or even sufficient, climate action has already materialized. In 2021, RWE, a German energy giant, initiated arbitration proceedings against the Netherlands for its adoption of the Coal Ban Act, which requires the country to phase out coal by 2030.⁷² It was not surprising that the RWE used the argument that the Netherlands did not provide regulatory stability by adopting the Coal Ban Act, and frustrated its legitimate expectations.⁷³ A year later, Uniper, another German company, also brought a claim against the Netherlands for the same act.⁷⁴ Along the same lines as RWE, Uniper argued that even though a complete freezing of the legal framework cannot be expected, the Netherlands’ act that pursues a phase-out of coal by 2030 is still considered an act that frustrates legitimate expectations,⁷⁵ as it is a “radical departure” from the previous framework.⁷⁶ The total damages asked by the two companies were 2.4 billion Euros, creating a powerful pressure on the Netherlands to turn back from its ambitious (or sufficient) mitigation measures. In the end, both proceedings were discontinued, but it left us with the fact that the discontinued proceedings already cost a total 5.4 million Euros to taxpayers.⁷⁷

RWE v Netherlands and *Uniper v Netherlands* also created questions over whether there will be new cases to be brought against climate measures. Unsurprisingly, Woodhouse’s claims against the UK in August 2025 answered these questions definitively, that these cases will not stop unless the law is clear.⁷⁸ The company argues that the UK violated its obligations under the UK-Singapore BIT by revoking an approval for the company’s coal extraction operations

because of its climate impacts.⁷⁹ This was followed by Shell and ExxonMobil's claims against the Netherlands in early 2026 after the Netherlands scaled down gas extraction in the Groningen region.⁸⁰

In fact, climate change has been a litigious issue even from the beginning.⁸¹ Commercial disputes are also a part of this broad category of climate change disputes.⁸² In relation to this, a specific reading of legitimate expectations, in investment arbitration, which has been explained in the previous subchapters, may prioritize subjective and unreasonable investor expectations over the urgent need for climate action. This imbalance can put the burden entirely on the states, whose political will is much-awaited and needed to tackle climate change.

The first problem is that the law in this case is indeterminate. Criticizing this, Sands, in his dissenting opinion in *RENERGY* pointed out these inconsistencies by anticipating that "reasonable folk will question the wisdom of creating a system that allowed so many competing and contradictory awards to flower."⁸³ The unpredictability of the decisions, such as those on our planet's future, creates an unstable regime and undermines the rule of law.

Looking at the law and trying to find answers on what the costs of transition for states have failed us, because there were no definitive answers. We are left with risks and possibilities. Those risks and possibilities can present themselves through some statistics to assess the risk of investors' filing disputes against climate measures. According to Di Salvatore's report by the IISD in 2021, the energy sector is the most litigious sector

with 31% of the known investment cases,⁸⁴ and the fossil fuel industry has the biggest portion of the energy arbitrations with 60% of the total energy arbitrations being brought by the fossil fuel industry.⁸⁵ On top of the energy sector's litigious nature, they are very successful. According to the same report, among all fossil fuel arbitrations decided on the merits (60 arbitrations), 72% (43 arbitrations) are decided in favor of the investor investing in fossil fuels.⁸⁶ Both the litigious nature of the industry and their success rate before investment tribunals may suggest that these companies are likely to leverage their litigation experiences to challenge climate measures. Each fossil fuel arbitration, on average, entailed USD 14 billion of compensation awarded,⁸⁷ showing the magnitude of the financial stakes.

"ISDS poses a unique challenge and disproportionate impacts on the Global South states moving to a greener future in line with the Paris Climate Agreement goals, as arbitration risks their economic stability,⁹² and it is more likely for them to have drafted treaties with more investment protection due to the urgent need to develop by receiving foreign investment."

This is extremely important. A 2020 study put forward that 75% of the coal plant investments that must be closed to realize Paris Climate Agreement goals are protected under IIAs.⁸⁸ To achieve this, climate action should be easy, efficient and much less costly. In turn, investment protection standards, such as the legitimate expectations doctrine, make climate policymaking more fragile.

The fragility of climate policymaking manifests in several critical ways. First, the system creates a big financial risk for states planning legal changes to tackle climate change. Arbitration threat's impact on states was conceptualized under the term "regulatory chill,"⁸⁹ intended to mean states' "delaying, compromising, or abandoning the formulation or implementation of bona fide regulatory measures in the interest of the public good as a result of a real or perceived threat of investor-state arbitration."⁹⁰ Considering the holistic measures that need to be taken to minimize GHG emissions and these measures' impacts on the fossil fuel industry, cases are likely to arise, risking dissuading or slowing down state action.⁹¹ Second, ISDS poses a unique challenge and disproportionate impacts on the Global South states moving to a greener future in line with the Paris Climate Agreement goals, as arbitration risks their economic stability,⁹² and it is more likely for them to have drafted treaties with more investment protection due to the urgent need to develop by receiving foreign investment.⁹³ Third, the global calculations create the question of who should bear the burden of legal change. According to Tienhaara, Thrasher and Gallagher's estimates the states may have to pay as high as \$340 billion, which is more than the total climate finance level of \$321 billion as of 2020.⁹⁴ This is in complete contradiction with the Paris Climate Agreement's goal of "making the finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development" under Article 2(1)(c).

Apart from future arbitration proceedings potentially challenging climate

measures, current arbitration practices are already showing that the risks of taking climate action on states are much more than a trivial risk. The IISD Report mentioned seven climate cases before investment tribunals brought by investors from the fossil fuel industry,⁹⁵ two of which have presently been decided, while five have been settled or discontinued. *Rockhopper v Italy* did not include any analysis regarding the legitimate expectations because the majority accepted another claim and did not analyze the FET obligation. Rejecting the investor's claims, Prof. Dupuy wrote a dissenting opinion relying on the fact that the state did not provide any specific promises and stated that the investor did not have legitimate expectations.⁹⁶ His analysis included that the investor must not have ignored its investment's "immediate proximity to the coast" and "very serious concerns (...) with regard to its ecological harmlessness," which ultimately led to his finding of no legitimate expectations.⁹⁷ The second case, where the investor operating in the fossil fuel industry claimed that states' environmental regulations frustrated its legitimate expectations, the *Lone Pine* tribunal rejected the investor's claims shortly by stating that the facts did not support the investor.⁹⁸

The Climate Case Chart⁹⁹ also involves other climate cases, which include investment arbitration cases by both fossil fuel and renewable energy industries. Some tribunals adopted a critical approach to investors' subjective expectations,¹⁰⁰ which could be good news for effective climate policy. On the other hand, *Silver Ridge* tribunal stated that incentive regimes, even in the form of a general law can create expectations (while also deciding that no legitimate expectations were

frustrated in the case at their hands).¹⁰¹ *Blusun* tribunal rejected the investors' legitimate expectations claim but also highlighted that legal changes must be done "in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime."¹⁰² The tribunals that decided in favor of the investor highlighted that states needed to have predictable legal frameworks¹⁰³ and that general laws identifying the beneficiaries to induce investment can be seen as specific representations.¹⁰⁴

There are many gaps in the understanding of what a legitimate expectation is, how it is formed, what sources it bases itself on, to what extent concerns of reasonableness, due diligence, and good faith could be included in the analysis. Especially in the precarious situation that climate change leaves us in, with the pressing urgency of climate action, the answer to these questions should not be left to coincidences. Primarily governed by investment agreements that provide arbitration as the dispute settlement mechanism, and run by highly litigious directors who are well able to pay for strong legal defense, investors appear to have an upper hand in climate disputes in investment arbitration. Poorly defined standards, such as the FET standard as taken as non-frustration of legitimate expectations, are cherry on top for an unfair answer to the clash between investment law and climate law. This chapter points out the growing need for a more comprehensive FET analysis. The next chapters will discuss how to think about the scope of the FET standard and legitimate

expectations, by integrating the principle of progression under international climate law.

III. INTRODUCING THE PRINCIPLE OF PROGRESSION: HOW IT SHOWS THE DIRECTION TOWARDS INTENSIFIED CLIMATE ACTION

A. THE PRINCIPLE OF PROGRESSION POINTING TO STATES' DIRECTION IN CLIMATE ACTION: A BRIEF HISTORY AND THE CONTEXTUAL IMPORTANCE

The Paris Climate Agreement voices a "direction of travel."¹⁰⁵ Under the Paris Climate Agreement, state efforts "will represent a progression over time,"¹⁰⁶ states' nationally determined contributions (NDCs) "will represent a progression beyond [their] then current nationally determined contribution and reflect [their] highest possible ambition."¹⁰⁷ The principle of progression, reflected in these articles, shows that Paris Climate Agreement parties agreed to expect from one another to raise their levels of ambition over time.¹⁰⁸ That being said, the principle of progression is closely related to the principle of non-regression, prohibiting backsliding from a previously agreed level of environmental protection.¹⁰⁹

Climate negotiations leading to the Paris Climate Agreement witnessed many developing states pushing for a standard to limit developed states' discretion, especially through the notion of "no backsliding."¹¹⁰ Mentioned first in the Lima Call for Climate Action,¹¹¹ the principle of progression functionalized the ambition indicated in the agreement's long-term goals and purposes.¹¹² This principle aims to narrow the divide

between the national political zeitgeist and the urgent and necessary action.¹¹³ Thus, it is not surprising that this principle was integrated into the language of the Paris Climate Agreement, during the COP20 in Lima,¹¹⁴ after the parties realized that they had such big long-term goals, but they were not close to reaching them.

The history of climate treaties reveals that the element of ambition has always existed as an essential part of climate negotiations.¹¹⁵ The pre-Paris climate treaties, i.e., the UNFCCC¹¹⁶ and the Kyoto Protocol,¹¹⁷ were rendered flexible with clauses for future amendments. Article 15 of the UNFCCC concerns the amendments to the treaty, while Article 17 deals with adopting new protocols. The Kyoto Protocol also provides an opportunity to amend under Article 20. The possibility of changing these treaties and obligations therein shows that the nature of climate law has been flexible, and there has always been an envisioned space for new developments to make sure that climate science and timely necessities can further shape the legal obligations. This might hint that it was the states' intention, even in the beginning, that climate action was never planned to be frozen in time.

After the COP20, the principle of progression became a building block of the Paris Climate Agreement. One of the Paris Climate Agreement's goals, according to Article 2(1), is to keep the global temperature rise 2°C above pre-industrial levels and increase efforts to keep it below the 1.5°C pre-industrial levels. The Paris Climate Agreement provides a method to achieve these goals. Under Article 4(2), states are given the discretion to determine their measures through the NDCs. The

drafters limited this discretion with Article 4(3), stating that the NDCs will represent progression over time.¹¹⁸ Even though the NDCs are submitted every five years according to Article 4(9), upward changes are permitted at any time in accordance with Article 4(11).¹¹⁹ The NDCs are highly relevant in other mechanisms provided by the Paris Climate Agreement, such as the global stocktaking and the transparency system. First, all NDCs are submitted publicly under Article 4(12), which provides a sense of accountability. Second, according to Article 14, every five years, the COPs will serve as a mechanism where every state's NDCs will be cumulatively assessed, during the global stocktaking, which will show whether the NDCs are sufficient to achieve the Paris Climate Agreement's goal, i.e., to keep temperature rises under 2°C (and make efforts to keep it under 1.5°C). Even between the global stocktaking every five years, COPs serve as a medium to follow up on other states and contemporary climate science every year. Here, the principle of progression under Article 3, Article 4(3) and Article 4(11) will come into play. As long as the result of the global stocktaking indicates that the states' cumulative efforts are insufficient to reach the temperature goal, states will need to raise their levels of climate action. Otherwise, the discretion provided by the Paris Climate Agreement would lead the treaty to a dead end, where the global climate action is not high enough to realize the temperature goal, and no state is responsible for raising their levels of climate action. This is why the principle of progression is an integral part of the treaty system that clearly brings the element of ambition over time.

To further examine the articles reflecting a different aspect of the principle of progression, Article 3 outlines the principle without a specific reference to NDCs and affirms that ambitious efforts must be taken to achieve the treaty's goals under Article 2:

As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

A more concrete provision exists under Article 4(3): "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

Article 4(3) is more specific to the NDCs. The use of "will" similarly with Article 3, which is not as mandatory as "shall" and not as in an advising tone as "should,"¹²⁰ shows a complexity under the Paris Climate Agreement, which will be discussed in detail in establishing the status of the principle of progression in the next subchapter. Article 4(3) puts states in a position where they will consider their own capacities and responsibilities, but they have to maximize the level of their "game" by taking into

account the need for progression over time for the “highest possible ambition.”

Article 4(11) also provides that states may change their NDCs in an upward direction, showing that they are not bound by the five-year requirement if they are taking a more ambitious approach. In light of this flexibility tool and the previously mentioned articles, the treaty ensures that states periodically revise their NDCs with an upward direction. Whether the treaty allows a downward decision, minimizing the scope of climate measures, is quite disputed.¹²¹ The contextual interpretation may only allow this in limited circumstances, because, for the Paris Climate Agreement system to operate, states need to take heightened measures each time,¹²² because the permissiveness of the NDCs is balanced with the principle of progression.¹²³

All three provisions involving the principle of progression prepare the ground for the next step of this cycle. An upward decision must be made to fulfil the commitment under these articles, which contribute to the alignment with the goals during the global stocktaking. However, if the global stocktaking shows that the goals are far from being reached, the step of raising the commitments must be repeated until the goal is reached. Especially if the cumulative result of all parties’ NDCs shows that the carbon budget is about to run out, then even more ambitious efforts are expected.¹²⁴ This cycle aims to render the efforts more ambitious and, thus, the temperature goal more achievable each time. According to this design, the principle of progression, as a new principle introduced with the Paris Agreement, constitutes one of the

“conceptual pillars” of the Paris Climate Agreement.¹²⁵

B. THE LEGAL STATUS OF THE PRINCIPLE OF PROGRESSION

Commentators referred to the imperative that states are expected to progress in varying ways. Some referred to it solely as a “concept of progression.”¹²⁶ Some referred to it as the “principle of progression.”¹²⁷ Zaman explained that the principle of progression reflected an expectation, not an obligation.¹²⁸ This paper adopts the term “principle of progression,” as this is, at least, a treaty principle, as it has a normative character¹²⁹ and shapes the obligations in the treaty regime.

“Characterizing the principle of progression as a due diligence obligation signifies that states must implement all suitable and necessary measures within their capacity and responsibilities to progressively revise their NDCs and climate action.”

This term has been explained as an “expectation” or a “normative expectation”¹³⁰ to refer to the progression framework.¹³¹ Winkler observed that a moderate “will”, instead of a mandatory “shall” or recommendatory “should,”¹³² was used to express a strong and clear expectation.¹³³ These provisions have been negotiated with almost the full participation of states and agreed upon by 195 of them, as proved by their ratification. They provide a mechanism of constant progression and serve as the light at the end of the tunnel for further climate action. Therefore, progression under the Paris

Climate Agreement definitely shows strong expectations and commitments.

Rajamani argued that Article 3 involving progression “creates a substantive new obligation, perhaps the only one.”¹³⁴ But she also treated the issue more cautiously and pointed out that it signifies a strong expectation rather than a mandatory obligation.¹³⁵ A similar perspective was taken by Lawrence & Wong, who argued that this is a “non-binding obligation.”¹³⁶

In contrast to these comments, Viñuales treated the principle of progression as an “obligation of progression in the level of ambition.”¹³⁷ Maljean-Dubois referred to progress as an obligation:

Indeed, Parties have some flexibility to determine their contributions in the short term, and this should facilitate their adherence to the Agreement, but they must think through their actions in the longer term with a dynamic mindset, with the obligation to progress over time towards more ambition.¹³⁸

Other commentators analyzed the character of the obligation brought by the principle of progression. According to Zaman, Article 4(4) seeking progression in successive NDCs identifies a minimum level of ambition for each NDC by hinting at a standard of conduct.¹³⁹ Voigt refers to this as a standard of care similar to the international law standard of due diligence.¹⁴⁰ Characterizing the principle of progression as a due diligence obligation signifies that states must implement all suitable and necessary measures within their capacity and responsibilities to progressively revise their NDCs and climate action.¹⁴¹ If they

fail to reach the ambition in their NDCs, the mere fact that they failed at it will not be sufficient to conclude that they violated their obligations under the Paris Climate Agreement. There will be a case-by-case analysis on whether the state has taken all suitable and necessary measures available to it under various factors, and if it did not, it would violate its obligations.¹⁴² These factors include their availability to act, foreseeability of the harm in question and if their choice of action is proportionate compared to alternative actions.¹⁴³

Treaty interpretation also supports that the principle of progression must be understood as a due diligence obligation. Looking at the treaty's context, Article 2(2) of the Paris Climate Agreement establishes that the agreement's implementation must "reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different circumstances." When taken alone, this statement is quite static in time, only explaining that states may have different responses, but not openly entertaining the idea that there must be a progression over time in states' responses. In contrast, Articles 2, 4(3), and 4(11) provide a non-static framing that there are strong expectations for states to revise their responses in an upward direction. The treaty's object and purpose are mainly dealt with in Article 2, including a specific temperature goal, measurable by scientific methods. If each state announces its NDC but the total cumulative impact of all NDCs is insufficient to reach the goals, without the principle of progression, the mechanisms to push states to improve their NDCs would be weaker. The principle of progression, on the other hand, requires each

state to improve NDCs each time treaty goals are not met.

Having such big goals and objectives with not yet sufficiently ambitious efforts, the principle of progression fills an important gap. Considering the context of the treaty text as a whole and the place of the principle of progression in this treaty's design, the meaning of the words in Articles 3, 4(3) and 4(11) must be understood as providing a due diligence obligation. Articles 3 and 4(3) do not use "shall" or "must" when bringing forward the principle of progression, in contrast to Article 4(2) stipulating that states shall prepare, communicate, and maintain NDCs. This shows that, unlike the states' obligations relating to NDCs under Article 4(2), the principle of progression is not a strict result obligation, the mere non-performance of which violates a treaty obligation. However, the language in these provisions does not give the states unlimited discretion in deciding whether they show progression over time, which has also been confirmed through the history of negotiations.¹⁴⁴ To compare, Article 4(6) stipulates that "the least developed countries and small island developing States *may* prepare (...) strategies (...) for low greenhouse gas emissions development reflecting their special circumstances." This provision provides states with a larger discretion. In contrast, I also agree with the scholars who see the principle of progression as a due diligence obligation. States are to decide how to progress and how much, but they do not have an on/off button to choose to implement the principle or decide to pass.

There might be limitations to implementing this principle, relying on "the principle of common but differentiated

responsibilities and respective capabilities." But this does not provide states with full discretion or make the principle of progression less binding, as the discretion itself is dependent upon several conditions expressed as limitations to the principle. Instead, this perfectly aligns with the principle of progression's character as a due diligence obligation. States will take different measures, in light of different characteristics, such as historical responsibilities, technological and scientific capacities, and economic situations. Their progression might also depend on similar factors. In short, to comply with the principle of progression, states must take all suitable and necessary measures within their capacity and responsibilities to revise their NDC levels in an upward manner.

"The exercise of due diligence is an international obligation, which entails state responsibility."

The reading of the principle of progression as a due diligence obligation also ties well with Cook's analysis of the principle of progression as a factor strengthening the states' "right to regulate"¹⁴⁵ in the foreign investment context. Cook analyzed the principle of progression with reference to international investment law, suggesting that investors have been on notice that more climate action is on the way, with reference to the pre-Paris events, including the IPCC Reports and the UNEP Gap Reports, leading to them lowering their expectations.¹⁴⁶ As a result, the Paris Climate Agreement's entry into force is not an isolated event but it is the fruit of climate science and negotiations. Therefore, by choosing to include the principle of progression in the Paris Climate

Agreement, states chose to highlight a “framework for a state’s right to regulate” against investors’ legitimate expectations.¹⁴⁷

Moreover, the recent advisory opinion by the International Court of Justice confirms this analysis. When explaining the scope of international obligations relating to climate change, the Court names the UN Charter, treaties including but not limited to UNFCCC, Kyoto Protocol and the Paris Agreement, and customary international law.¹⁴⁸ This confirms that international obligations relating to climate change are not limited to what the Paris Agreement encapsulates. It also appears in line with the recent International Tribunal of the Law of the Sea (ITLOS) Advisory Opinion on climate change. When asked whether the UN Convention on the Law of the Sea adds any different obligations other than those stated in the Paris Agreement, ITLOS affirmed that states do not comply with all of their international obligations relating to climate change, “simply by complying with obligations and commitments under the Paris Agreement.”¹⁴⁹ This shows that the flexible language of the Paris Agreement could not be understood as giving states full discretion to choose and implement mitigation measures and that states must exercise due diligence.¹⁵⁰ The exercise of due diligence is an international obligation, which entails state responsibility.¹⁵¹ Similarly to other international obligations, violations of this obligation involve legal consequences.¹⁵²

ICJ’s conclusions were also confirmed by the Inter-American Court of Human Rights (IACtHR), in its recent advisory opinion on climate emergency and human rights. IACtHR rules that states must determine their mitigation targets according to the

principle of progression, which the Court called “principles of progressivity,” and these must be as ambitious as possible.¹⁵³ IACtHR also cautions states that their IIAs can cause regulatory chill,¹⁵⁴ suggests that they review these by including more climate-friendly language,¹⁵⁵ and states that companies have obligations and responsibilities in relation to climate change and human rights, which they must be aware of and avoid leading to violations of these.¹⁵⁶

As can be seen, the principle of progression, whether as a normative expectation or a due diligence obligation or a principle that reinforces the right to regulate, supports other international obligations obliging states to mitigate climate change. With these obligations, the clash is not between states’ right to regulate versus the investors’ rights under the IIAs, which would be a weaker framing of the issue in expense of the risk of softening climate actions.¹⁵⁷ Instead, there are two categories of international obligations that could be applied to climate measures impacting investor rights under the IIAs.¹⁵⁸ The question is whether there is a complete normative conflict, in other words, “two directly opposing norms”¹⁵⁹ or if one of these obligations informs the interpretation of the other. In the following chapter, I argue that international climate obligations can inform the interpretation of the IIA obligations, particularly the FET obligation and its interpretative tool, the legitimate expectations doctrine.

IV. INCORPORATING THE PRINCIPLE OF PROGRESSION IN THE FET ANALYSIS

A. THE PRINCIPLE OF PROGRESSION AS A RELEVANT RULE OF INTERNATIONAL LAW APPLICABLE IN THE RELATIONS BETWEEN THE PARTIES

In international legal methodology, normative conflicts are highly avoided, especially in cases where harmonization of different international obligations is possible.¹⁶⁰ Treaty interpretation principles can help us test whether harmonization is possible. In this case, we can use “systemic integration” for these two sets of obligations, one based on the IIAs and the other on international climate obligations under treaties and custom.

“Characterizing the principle of progression as a due diligence obligation does not change its character as an international legal obligation and does not mean that this obligation is any less binding.”

Interpretation of the FET standard must be made in accordance with international law, codified by the VCLT.¹⁶¹ Article 31(3)(c) suggests that, under the context, according to which ordinary meanings of the terms will be interpreted, the interpreters shall take into account “any relevant rules of international law applicable in the relations between the parties.” Considering that there is an obligation to mitigate climate change and ambitious climate action is a due diligence obligation, Article 31(3)(c)

of the VCLT will apply to the situation. In that case, while deciding whether a state violated its FET obligation or frustrated an investor's legitimate expectations, the investment tribunals may weigh investor expectations with the expectation from the state to take heightened action, i.e., the principle of progression.¹⁶² Characterizing the principle of progression as a due diligence obligation does not change its character as an international legal obligation and does not mean that this obligation is any less binding.

The logic behind this is simple.¹⁶³ The VCLT Article 31(3)(c) seems to demonstrate states' intention to pay due regard to the changing circumstances over time. The ILC worked through reconciling the intertemporal rule and the legal developments expected to occur after the treaty's conclusion.¹⁶⁴ Freezing treaties in time does not seem to be the intention of the VCLT contracting parties, nor has it been an understanding blocking the VCLT Article 31 to gain customary status. Instead, whether the terms used in a treaty can be interpreted in light of the changing legal landscape is dependent on the parties' intention.¹⁶⁵ This means that if the parties did not intend the term to be understood in the same way over the years, the interpretation of terms can change with the introduction of new international rules.

In light of this, the principle of progression's inclusion in the Paris Climate Agreement indicates that state parties intended international law applicable between them to be shaped by the ambition to tackle climate change. In turn, the investment treaty provisions, especially the FET provisions, are often short and vaguely termed, implying that states did not intend to define and freeze their interpretation at

the time of the IIA's conclusion. Accordingly, the interpretation of the IIAs between states, both also party to the Paris Climate Agreement, will be shaped by the principle of progression, which will lead to more regulatory space for climate measures and less protection for continuing high-emitting activities. Therefore, this allows the tribunals to take into account climate change considerations without leaving the doctrinal approach seemingly required by the discipline of investment law.

Even if we accept the principle of progression as an expectation¹⁶⁶ or a "non-binding obligation,"¹⁶⁷ there is a strong case for an international obligation of mitigation, the scope of which will depend on the CPDR principle, especially after the many international court decisions affirming this obligation.¹⁶⁸ Having said this, the "systemic integration" is a voluntary interpretative technique, which should be used for a consistent international legal system but is not obligatory. For this reason, the following subchapter will explain how the principle of progression, irrespective of whether we use Article 31(3)(c) of the VCLT or not, can be considered when the tribunal analyze the content and scope of the investor's legitimate expectations.

In that case, the principle of progression will be taken as a social reality and a strong normative expectation¹⁶⁹ showing that there is a global direction towards more climate action and that investors are aware of this trend. The proposed argument of the next subchapter can fill the gap in the understanding of what legitimate expectations might entail and can contribute to minimizing the fragmentation of law and promote a heightened rule of law.

B. THE PRINCIPLE OF PROGRESSION AS "DIRECTION OF TRAVEL" IN CONCEPTUALIZING LEGITIMATE EXPECTATIONS IN INVESTMENT CASES

"To expect" is defined as "to anticipate or look forward to the coming or occurrence of,"¹⁷⁰ which informs us that expectations are future-oriented and forward-looking. Expectations contain a probability analysis of the occurrence of an event. Something may be the same for decades or change very slowly, but the expectation might be that it will soon change completely. Because expectations are future visions, the direction of the legal landscape must matter in forming the scope of what could be expected, not the legal landscape's current situation. Unless the current situation of the legal framework also signals what direction the legal framework is going, the current situation alone should not be accepted to create any expectations. In assessing whether certain expectations are legitimate and worthy of legal protection against measures, arbitral tribunals need to differentiate the current situation of the legal framework from its direction.

The above explanations do not mean that the current position of a state's legal framework does not signify anything. In fact, the current weakness of climate policies can well be a part of an investor's decision to invest in a certain region or jurisdiction, solely because the legal framework's current situation is favorable for that investor. Nevertheless, the mere fact that the current situation of a legal framework is weak and protects the planned investments should not also become a reason to provide legal protections against future changes in the legal framework. Because in these scenarios, the investor is the one to decide whether the

short-term benefits of such an investment outweigh the risk. This free choice the investor enjoys is also why they should not benefit from the protection of legitimate expectations, because the state action in question is not unexpected. In this scenario, the possibility of the measures being taken into account by the investor, but the benefits outweighing the risk have led the investor to choose to invest.

If a legal framework's current situation seems to create expectations, what creates those expectations is not the current situation of the legal framework itself; it is the visual direction that the current situation signifies. As a result, irrespective of what the current situation of the legal framework looks like, if there are other factors indicating that the legal framework will highly possibly change, then the most probable expectation is that the legal framework will move beyond its current situation.

To explain it in the context of the principle of progression, despite the weakness of climate-aligned laws, future expectations of a legal framework can still be towards more climate action. The principle of progression is the missing link in understanding the scope of legitimate expectations. Not only because this is a normative or legal principle, but because this is a future visualization to which 195 states have agreed that it would come to life.

Less than ten years ago, the *Philip Morris* tribunal stated that “in light of widely accepted articulations of international concern for the harmful effect of tobacco,” there could be no expectations for the tobacco industry to continue in the same way they did for years.¹⁷¹ Even more, “the expectation could only have been of

progressively more stringent regulation of the sale and use of tobacco products.”¹⁷² The tribunal did not wait until there were binding and strictly phrased international legal obligations stipulating that states must take measures against tobacco. The mere fact that there is a transition to a tobacco-free culture because of its negative effects on human life and health was sufficient to rule that the investor did not have legitimate expectations. Similarly, in the case of climate change, there is a forward-looking direction of climate action, meaning that it is expected that there will be intensified climate action over time. Whether international law on climate change involves binding and strictly phrased international legal obligations is not relevant to this consideration.

“[L]egitimate expectations are not only shaped by the factors relating to the specific state (e.g., what specific promises were given) but also those relating to the industry in general.”

In the absence of broader treaty provisions,¹⁷³ the extent to which the FET standard will protect against legal changes must be understood by looking at multiple factors, concepts, and methods. This opens up space for considering the principle of progression to shape the scope of legitimate expectations. The question of how the principle of progression could be used to reframe legitimate expectations will be explained in the following parts, with reference to four conclusions found or inferred from past investment awards as well as dissenting opinions.

1. Industry-Specific Factors, Along with State-Specific Factors, Can Influence Legitimate Expectations

The legitimate expectations doctrine is related to the principle of good faith. *Tecmed* tribunal stated that the FET obligation requires states to “provide (...) treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”¹⁷⁴ These insights from the *Tecmed* tribunal may lead to the conclusion that investor expectations are protected because of the assumption that the investors make up their minds and plan their investment, according to the information available about the conditions of their then-potential investment. Having said this, the state's legal framework is not the only information that can be captured. Investors are expected to possess comprehensive and timely information on their field of operation compared to any other stakeholders. Having broader knowledge about the challenges within one's field of operation necessarily provides an understanding of what can feasibly be expected from a host state.

The *Philip Morris* tribunal acknowledged this in the case through which Uruguay's measures against tobacco have been challenged by the investor:

Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed (...)

On the contrary, in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been

of progressively more stringent regulation of the sale and use of tobacco products.¹⁷⁵

The *Philip Morris* tribunal concluded that the convenience of the legal framework at the time of the investment cannot prove that the investor had legitimate expectations to sustain the investment in the same conditions. This conclusion successfully separates the legal framework's "direction of travel"¹⁷⁶ and its permissive situation at the time of investment and picks the "direction of travel"¹⁷⁷ to use for determining the scope of legitimate expectations. According to the tribunal, the legal framework can change, especially with regard to a sector or industry with harmful effects, and the state has a legitimate ground to regulate this. This change does not lead to the frustration of legitimate expectations and a violation of the IIA in question.¹⁷⁸

The *Philip Morris* tribunal's focus on events and facts that are not only related to the state but the industry, in a broader sense, shows us an important avenue to discuss climate measures. It is not only the events and the facts about investing in a state but also the events and the facts outside of the state – especially those regarding an industry – that might shape and limit investors' expectations. In *Philip Morris*, it was the harmful nature of tobacco products and the newly gathered scientific information about tobacco products indicating that the investor had no legitimate expectation to challenge a measure against tobacco.

Parallels can be drawn between the measures against tobacco products and climate measures against investors operating in high-emitting industries, in particular the fossil fuel industry. First, the industry-

specific information about both issues, especially on their effects on health and the environment have already been well-known to the investors. For instance, leaked documents revealed that oil companies, such as Exxon and Shell, knew about the climate-changing risks of fossil fuels at least since the beginning of the 1980s, much earlier than the UN Intergovernmental Panel on Climate Change.¹⁷⁹ Moreover, they have been funding climate science at least since 1954, which expressed, as early as then, that the increasing concentration of CO₂ may lead to "considerable significance to civilization."¹⁸⁰ On top of that, climate measures are even more expected today than the tobacco measures at the time of the *Philip Morris* decision, in the sense that climate measures race against time, much more than tobacco control. Despite tobacco control's urgency to save lives and the health of millions, climate change's effects are irreversible to the future of the Earth and will potentially impact all members of future generations if timely measures are not taken.

As a result, legitimate expectations are not only shaped by the factors relating to the specific state (e.g., what specific promises were given) but also those relating to the industry in general. The principle of progression under the Paris Climate Agreement made the high-emitting industries a less viable investment option in the long run. As a result, if the principle of progression is applied, the claims of investors in these industries regarding the frustration of their expectations, only in exceptional circumstances, lead to a violation of FET. In that case, these expectations will not be accepted as worthy of legal protection.

2. Legitimate Expectations Cannot Be Unreasonable and Abstract

Investment decided that investor expectations must be "reasonable"¹⁸¹ and "grounded in reality,"¹⁸² must not be "frivolous or unrealistic,"¹⁸³ and must take into account the "political, socioeconomic, cultural and historical conditions."¹⁸⁴

One example where an investor tribunal took into consideration the different conditions was *Methanex v US*. Even though the tribunal focused on an article concerning expropriation, another common IIA obligation, and the tribunal did not expressly talk about legitimate expectations, its explanations can still be translated into the case of legitimate expectations under the FET standard.¹⁸⁵ In this case, where the investor argued that a ban on a certain chemical violates the IIA in question, the *Methanex* tribunal implied that the context in which the investment was made was known to the investor:

Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, nongovernmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.¹⁸⁶

In this example, reasonableness requires taking an approach that considers the direction of the field of investment. In the case of *Methanex*, it was the “use and impact of chemical compounds” and their impact on the environment and health. Similarly, for climate measures, it is the GHG emissions and their impact on the environment and health. The *Methanex* tribunal’s approach globally understands the broader dynamic between what investors can reasonably expect and what states can reasonably impose.

“The urgency to act against climate change renders it difficult to defend that investors have legitimate expectations in the continuance of their high-emitting activities.”

In the case of climate change, the stakes are even higher. Only recently, a news article revealed we may reach the 1.5°C warming from pre-industrial times in a few months, a level we must have avoided, according to climate science.¹⁸⁷ For this reason, states are tied to act soon, if not now. The urgency to act against climate change renders it difficult to defend that investors have legitimate expectations in the continuance of their high-emitting activities. As a result, it is unreasonable to expect that states will not take climate action through changes in their legal framework, just as the US was not expected to avoid taking measures for the environmental and health impact of the chemicals in *Methanex*.

The principle of progression provided by the climate treaties and negotiations was already set to address the time limitation and resource allocation issues. The Paris Climate

Agreement drafters knew that states might not have taken their maximum measures right away.¹⁸⁸ The purpose of requiring the states to progress over time in their climate action was to address these temporal complexities and allow for the political will to arise in time. Considering this, the reasonableness criteria in *Methanex* include an analysis of the health and environmental effects of chemical compounds, an analysis easily translated into the climate change context. Climate change takes it a step further by the scope and permanency of its damage as well as the unprecedented temporal challenges it poses. This particularity makes the *Methanex* tribunal’s reasonableness analysis even more relevant and compelling.

Another pressing issue relating to reasonableness is the standard of proof required by the investor. The “due diligence” framework is a relevant part of the reasonableness of investor expectations, requiring investors to undertake an analysis of the host state’s regulatory framework and sociological, political and economic landscape,¹⁸⁹ even before investing. If constructed in a way that requires concrete proof of why the expectations are reasonable instead of accepting abstract assumptions, this framework can be helpful in assessing whether the expectations are legitimate.

On the contrary, the abstractness of claims is one of the main problems when both the state and the investor have certain valid claims, in the abstract, on how the case must be interpreted. Here, the questions of proof gain particular importance. What must the investor or the state put forward to finally establish their claim (i.e., the standard of proof question)? In case of an almost equal

force of proof, whose claim must stand out (i.e., the burden of proof question)?

The lack of intensity of the investor’s supportive proof of its legitimate expectations was criticized by Philippe Sands in his Dissenting Opinion in *RENERGY*. He posited that the due diligence conducted by *RENERGY*, as it is provided to the tribunal, “[appeared] to have been less extensive than that which may have been carried out by a farmer purchasing a modest plot of land in Devon,” and it created the suspicion that “either (a) a decision was taken not to obtain such legal, financial or economic due diligence, or (b) such legal, financial or economic diligence was obtained but not shared with the Tribunal.”¹⁹⁰ He pointed out the significance of conducting due diligence for the investor to establish proof of any alleged legitimate expectations.¹⁹¹ According to Sands, the tribunal must “therefore carry out an objective assessment of an investor’s expectations and not merely accept them as being protected under the treaty.”¹⁹²

In fact, the majority in *RENERGY* has already stated that there can be no investor expectation with regard to a legal framework’s “absolute stability.” However, the majority held that the investor can expect “relative stability.” Sands criticized this by stating that:

[T]he factors which led the Majority to reject the claim relating to an expectation of absolute stability ought to be equally relevant to the claim of an expectation of relative stability. The latter expectation should consequently be considered to be unreasonable for the same (or analogous) reasons. By proceeding as it has, the effect of the Majority’s approach is to eliminate the

reasonableness requirement; this approach falls foul of the principle that it is not the function of an arbitral tribunal to allow a claimant to make use of an investment treaty as a form of insurance policy, one which allows their hopes and expectations to be recompensed no matter how (a) unrealistic, or (b) unsupported by any evidence of an exercise in due diligence.¹⁹³

In fact, without analyzing whether due diligence has been conducted or not or whether conducted due diligence was shared with the tribunal or not, some tribunals focus on “relative stability” turning into a blanket protection for the investments of investors who knew or could have known the potential measures were on the way, but still decided to continue to invest.

“The principle of progression increases the business risks assumed by investors investing in high-emitting industries.”

Investor due diligence brings forward an objective method and helps us define what makes the investor’s expectations reasonable. Thus, the investor must conduct a comprehensive due diligence analysis and should not simply rely on the protection of IIAs as they are “a form of insurance policy.”¹⁹⁴ The tribunals must expect a comprehensive due diligence analysis to decide whether the investor’s expectations were legitimate. If there is no due diligence previously conducted, then the tribunal cannot conduct an objective analysis of the expectations because the content of such expectations will be undefined and abstract.

Conducting due diligence automatically requires a review of the state’s legal framework, including the ratification status of the Paris Climate Agreement. Thus, investor due diligence involves what the Paris Climate Agreement entails for states’ domestic actions. The principle of progression, as part of the Paris Climate Agreement, will inevitably be a part of the reasonableness analysis,¹⁹⁵ making the claim for legitimate expectations for investments in high-emitting industries highly difficult.

3. Legitimate Expectations Must Consider That Investors Might Have Taken Business Risks for Great Return Rates

In cases in which the investor took the business risk for a financially rewarding opportunity, tribunals held that the business decisions and commercial risks are not protected, as the IIAs are not insurance policies.¹⁹⁶ In *Generation Ukraine*, against the investor’s claim that its legitimate expectation has been frustrated, the tribunal held that the investor must have been aware of the context of its investment and the business risks associated with that context:

Finally, it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor’s legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties. The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies.

The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls. Its investment was speculative.¹⁹⁷

The *Generation Ukraine* tribunal’s holding provides us with a perspective to think about some investors’ insistence on investing in their respective industries, even though the future seems to hold a different direction for this industry. In fact, if an investment possibly has a high return rate, the investors can choose to invest in it, even though it might come with its associated risks.

The principle of progression makes it even harder to argue that investment decisions in high-emitting industries do not, themselves, entail a “business risk”. “If you start a project today, wherever you are, the first oil or gas will come to markets in five years, and will come at a time when you will see global oil and gas trends declining,” tells the International Energy Agency Executive Director Fatih Birol and continues “[t] herefore, one should be very careful about not only the climate risk but also the business risk on large-scale oil and gas projects.”¹⁹⁸ A 2014 Forbes article also dealt with the business risk for the fossil fuel industry and referred to a senior sustainability analyst’s report stating that “stranded-asset risk exists even under business-as-usual conditions.”¹⁹⁹ Another article also warned, as early as 2013, that investments in oil and gas search “could create a ‘carbon bubble’ of stranded assets.”²⁰⁰

The principle of progression increases the business risks assumed by investors investing in high-emitting industries. Consequently, the principle of progression can be invoked to argue that the investor knowingly assumed these risks by entering

such a dynamic and evolving regulatory landscape. This makes it highly challenging for the investor to substantiate a claim of legitimate expectations.

4. An Expected Legal Transition May Narrow Down the Scope of Legitimate Expectations

The *Parkerings* tribunal held that in investing in a “country in transition,” the investor was aware that the legal framework can change:

In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate. By deciding to invest notwithstanding this possible instability, the Claimant took the business risk to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate

expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.²⁰¹

The tribunal’s explanations as to the business risk between a high turnout rate and the possibility of legal changes are valuable, reflecting similarities with *Generation Ukraine*, discussed above. However, apart from the “business risk,” the concept of “country in transition” can also be influential in helping us understand how the principle of progression can integrate into the legitimate expectations analysis.

Referring to the principle of progression, Cook observed that the Paris Climate Agreement leads to the understanding that states are ambitious to take climate measures more than their current level of action.²⁰² As the post-Soviet states are expected to change their frameworks because they are countries in transition, she argued that the states parties to the Paris Climate Agreement are in a similar position as they have pledged to take action in the direction of limiting global warming to below 2°C and aiming for below 1.5°C.²⁰³ Especially considering that actions to limit global warming as framed in the Paris Climate Agreement require measures against high-emitting industries, it is increasingly more difficult to argue that states will maintain a stable legal framework without influencing investor interests.²⁰⁴ This may require us to observe states in a status of transition, meaning that the way legitimate expectations are construed will be different.

In fact, the conclusion made by the *Parkerings* tribunal also relies on a similar notion with the previous tribunals mentioned

in the other three conclusions. They all stress the point that the investors are aware of the context in which they are investing. The context is not only defined by how the legal framework currently looks like or what promises are given by the then-incumbent governments; but it is shaped by a broader list of social, economic, and scientific realities. Knowing the context and still investing in it requires assuming certain risks, which would make categorizing investor expectations regarding this investment not worthy of legal protection under “legitimate expectations.” Legitimate expectations should not be stretched to protect all expectations, even expectations from speculative investment, as in *Parkerings*, made in a particularly interesting era of legal change, in which the possibility of making a great turnout made the investor disregard the risks. Although similarities between this era of legal change, i.e., Post-Soviet era, and the post-climate crisis era are up to the tribunals to assess, the dynamic legal landscape and future projections seem to alert that investing in high-emitting industries entails risks.

5. The Case for Integration

Until this point, this article has explained step by step why integration of international climate obligations is possible by rethinking IIA obligations in light of the principle of progression. It is impossible to provide one strict framework that could apply to all climate disputes before investment tribunals, as the language of treaties differs as well as the specific facts at hand. However, this is not a full stop; it is more of a comma.

Considering that treaty interpretation is based on principles, but those principles themselves are not obligatory, and there is flexibility, and that arbitrators are not

bound by the previous cases, but they generally consider those as legal precedent for more legal certainty, one conclusion follows. Arbitrators enjoy a large degree of discretion.²⁰⁵ Integrating climate obligations in investment law is not contrary to international law, and there is ample evidence in this article that it is not even contrary to the very own principles and doctrines of investment law. There is already a trend to pay attention to the environmental aspects of the investment disputes among investment arbitrators, some of whom are vocal in challenging the status quo of the traditional views of the IIA obligations.²⁰⁶

The question is whether the arbitrators will enjoy their large discretion in favor of supporting necessary action against the “existential threat posed by climate change,”²⁰⁷ or continuing to fund the worst GHG emitters that largely contributed to climate change.²⁰⁸

There is absolutely nothing wrong with challenging old understandings of the IIA obligations when applying them in a very new and different context of climate change. This article aims to show that revising old understandings is possible while applying international law and without deviating from investment law’s own principles and doctrines.

V. CONCLUSION

In this paper, I argued that the principle of progression adopted by the Paris Climate Agreement must guide the interpretation of the FET obligation found in international investment treaties. Since climate change requires radical changes in legal frameworks, I analyzed investment awards to understand

how investment tribunals assess investor arguments claiming that the legal framework must stay stable under the doctrine of legitimate expectations. My analysis revealed that some investment tribunals broadly construe legitimate expectations, thereby protecting investors’ expectations against states’ legislative changes, even when such changes are necessary to protect public interests, including the environment. I discussed why this might create an economic burden for efficient climate change policymaking.

Throughout this paper, I foregrounded the principle of progression, as it openly provides that states are expected to take more and more climate measures over time, creating a stark contrast with investor interests to sustain their high-emitting activities. I explained how this principle and the circumstances leading to its adoption provided a normative expectation that more climate measures would be taken and lowered the expectations that these high-emitting activities would continue uninterrupted.

This paper proposed solutions on how to integrate the principle of progression into the interpretation of the FET obligation, especially within the legitimate expectations analysis. I provided investment arbitration case law examples that included similar considerations in their decision-making to argue that neither of the solutions proposed in this paper falls outside of the international investment law discipline. I concluded that if the principle of progression has a binding legal nature of an international obligation, Article 31(3)(c) of the VCLT applies, which requires the consideration of this principle in interpreting the FET principle and supports the interpretation that states cannot be

required to keep high-emitting investments uninterrupted. Moreover, if the principle of progression does not have the character of an international legal obligation, it is still a normative expectation agreed by states to show a future projection. In that case, we can still incorporate it into the analysis of whether the legitimate expectations of the investor have been frustrated.

On top of that, some investment tribunals have considered similar factors in their legitimate expectation analyses, suggesting that the proposals in this paper are not alien to the international investment law discipline. The main argument of this paper is inspired by the decisions of this discipline, in view of the fact that there is already a consciousness and a leaning toward involving environmental considerations among arbitrators.²⁰⁹

Examples from the investment case law showed that tribunals took into account the environmental and health risks of a tobacco investment to the point that they required the investors to form their expectations accordingly. Climate change is an unprecedented time-limited problem with an immense environmental and health risk, hinting that tribunals may easily decide analogously. Tribunals also made reasonableness analyses in detail, requiring that the investor expectations must be reasonable considering many factors, including the sociological realities and that the expectations must rely on previous due diligence. Similar considerations may be brought up in an investment case relating to climate measures. Some tribunals also discussed that the investor taking business risks expecting a return does not impose on states the obligation to honor these

expectations. High-emitting industries are definitely not risk-free; instead, they involve significant financial risks, given the scientifically proven need to take urgent action to address climate change's irreversible, time-limited challenges and the specific normative expectations of states to address these under the principle of progression. Lastly, tribunals dealing with investments in contexts where a high volume of legal changes is expected stated that the investor expectations to sustain their activities uninterrupted are narrowed down. Considering the need to revise the legal framework to allow taking climate measures is highly necessary for an efficient climate change policy, this caselaw may also apply to all those countries that are expected to shift their policies soon to meet their climate goals.

The primary purpose of this article was to investigate whether it is possible to find a solution in the realm of investment law for investment law's contradictions with global climate action. Throughout my analysis, limited to the integration of the principle of progression, it became evident that the interpretation of investment law standards, such as the FET obligation, can be informed by international law on climate change. The principle of progression found in the Paris Climate Agreement and formed throughout years of climate negotiations clearly brings a normative expectation that states will take heightened climate action over the years.

This research is critical in answering the bigger question of who will bear the burden of climate action. This paper targets the potential "non-climate-aligned"²¹⁰ investment cases by exploring the doctrine of legitimate expectations specifically in relation to climate action and concluding

that the principle of progression narrows down the scope of legitimate expectations. For this reason, the principle of progression is a helpful means for the host states to argue that the investor does not have legitimate expectations to sustain their high-emitting activities. This research provides a basis for further research aiming to integrate other international climate law obligations into international investment law, which could minimize the fragmentation of international law and improve legal certainty.

Investment tribunals must focus on the improvement of the field by addressing challenges raised by the doctrine of "legitimate expectations", especially the fact that the doctrine has been applied in a very narrow and isolated manner from the rest of international law. This application is particularly concerning given that the legitimate expectations doctrine is used to interpret many standards beyond the FET standard. Investment law must align with the broader framework of international law and the need for climate action. Including investment tribunal decisions that previously discussed similar notions in analogous issues, I aimed to open up a space for arbitrators to make the best use of their "responsibility of interpreting the IIAs"²¹¹ and implementing international climate obligations, by narrowing down legitimate expectations.

This paper is an arrow in the direction of making climate action easy and efficient so that necessary action is taken in due time to prevent further devastating impacts from occurring. This requires the revision of highly-criticized doctrines through the integration of new legal solutions and the revitalization of previous considerations.

END NOTES

1. Damian Carrington, 'Climate collapse in real time': UN head António Guterres urges Cop28 to act, *The Guardian* (Nov. 30, 2023), <https://www.theguardian.com/environment/2023/nov/30/climate-collapse-in-real-time-un-head-antonio-guterres-urges-cop28-to-act>
2. Lorenzo Cotula, *International Investment Law and Climate Change: Reframing the ISDS Reform Agenda*, 24 *The J. of World Investment & Trade* 766, 788 (2023).
3. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.
4. Leslie-Anne Duvic-Paoli, *International law: A Discipline of Ambition*, 36 *Leiden J. of Int'l Law* 233, 235-37 (2023).
5. U.N. Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999* U.N. Doc. UNCTAD/ITE/IIA/2, at 1-2 (December 2000), <https://unctad.org/system/files/official-document/poiteiad2.en.pdf>.
6. *Primer on International Investment Treaties and Investor-State Dispute Settlement*, Columbia CTR. on Sustainable Inv. (December 2021), <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> [https://perma.cc/DHW3-KBPF], (last visited May 10, 2024).
7. O F O E G O O B I O M A, *Appointment of Arbitrators*, Jus Mundi, (Mar. 18, 2024) <https://jusmundi-com.ezp-prod1.hul.harvard.edu/en/document/publication/en-appointment-of-arbitrators> [https://perma.cc/E6T5-7EQJ].
8. Alessandra Arcuri & Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties*, 59 *B. C. L. Rev.* 2791, 2798-99 (2018).
9. *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶388 (Feb. 19, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf> [https://perma.cc/4NES-3Y46].
10. Arcuri, *supra* note 8, at 2804.
11. Sheng Zhang & Ni Li, *The Application of International Climate Change Law in International Investment Arbitration: Addressing the Deficiencies*, 20 *Asian J. WTO & Int'l Health L. & Pol'y* 1, 12-19 (2025).
12. Lea Di Salvatore, *Inv.-State Disps. in the Fossil Fuel Indus.* 18 (*Int'l Inst. for Sustainable Dev.* 2021)..
13. *Id.*
14. *Id.* at 20.
15. Danielle Attwood, *Rocks and Hard Places: The Predicament of Arbitrators in Investor-State Dispute Settlement in Times of Climate Change*, 6 *ITA Rev.* 47, 79 (2024).
16. Ying Zhu, *A Quasi-Normative Conflict: Resolving the Tension between Investment Treaties and Climate Action*, 33 *Rev. of Eur., Compar. & Int'l Env't L.* 183, 193 (2024)
17. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969)
18. Carrington *supra* note 1.
19. Lavanya Rajamani & Emmanuel Guérin, *Central Concepts in the Paris Agreement and How They Evolved*, in *The Paris Agreement on Climate Change: Analysis and Commentary* 85 (Daniel Klein et al. eds., 2017).
20. Having said this, there is an ongoing effort to reform the international investment regime under the UNCITRAL Working Group III roof but it is focusing on procedural matters, leaving out substantial issues such as the fragmentation of international investment law and the related issue of inconsistency in tribunal decisions. For instance, fair and equitable treatment's broad and inconsistent interpretation that allows backlash against climate action with the use of the "legitimate expectations" doctrine could not be resolved, even though it is one of the major pitfalls facing legal developments of climate action.
21. There are risks accompanying working within the existing investment treaty arbitration system when we insist on a certain positive interpretation almost arguing that this regime is not problematic and that it is just the "wrong" practices that make it troublesome. This paper does not aim to legitimize the existing system; it only seeks to provide a more complex interpretation of a clause that would work better with other international law rules and the most pressing necessities of our time.
22. Rudolf Dolzer, Ursula Kriebaum & Christoph Schreuer, *Principles of International Investment Law* 16 (3rd ed. 2022), explaining that many bilateral investment treaties contain "a provision on admission of investments; a guarantee of fair and equitable treatment (FET); a guarantee of full protection and security; a guarantee against arbitrary and discriminatory treatment; a guarantee of national treatment and a guarantee of most-favoured-nation treatment (MFN clause); guarantees in case of expropriation; and guarantees concerning the free transfer of payments."
23. *Id.*
24. *Id.*, at 186.
25. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 *Int'l L.* 87,87 (2005).
26. See Agreement on Reciprocal Promotion and Protection of Investments, Turk.-Neth., art. 3, Mar. 27, 1986, which exemplifies how the FET clause often looks like in an IIA by stipulating: "Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, sale or liquidation thereof by those investors."
27. Dolzer, Kriebaum & Schreuer *supra* note 22 at 186-87.
28. Thomas Lehmann, *Investment Arbitration and International Climate Change Law: Revaluing Legitimate Expectations* 53 (2025); Mala Sharma, *Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players Special Issue: International Investment Law and Climate Change: International Investment Law and Climate Change*, 23 *J. World Investment & Trade* 746, 760 (2022).
29. Lehmann, *supra* note 28 at 50.
30. Valentina Vadi & Lukasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal*, 16 *J. Int'l Econ. L.* 613, 617 (2013).
31. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 *Eur. J. Int'l L.* 121, 127 (2006).
32. Niclas Landmann, *Appeal Mechanism and the Issue of Consistency in International Investment Arbitration, in Creation and Implementation of a Multilateral Investment Court*, 106-107 (Julian Scheu ed., 1st ed. 2022).
33. Dolzer, Kriebaum & Schreuer *supra* note 22 at 45-46.
34. *Id.* at 45-47; Landmann *supra* note 32 at 106-107.
35. Dolzer, Kriebaum & Schreuer *supra* note 22 at 45-46.
36. Vadi & Gruszczynski *supra* note 30 at 614, 632.
37. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: Standards of treatment* 278 (2009); *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case no ARB/05/15, Award, ¶450 (Jun. 1, 2009); *Micula v Romania I*, Award, ¶519 (Dec. 11, 2013); *Glencore v Colombia*, Award, ¶1310 (Aug. 27, 2019).
38. *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, ¶147, (Jan. 26, 2006).
39. Int'l Law Comm'n, on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, art. 31 (2001).
40. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10, at 99 (2001).
41. *Saluka Inv. B.V. v. The Czech Republic*, UNCITRAL, pca Case No. 2001-04, Partial Award, ¶302 (Mar. 17, 2006), reviewing it as "the dominant element of the FET standard"; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶7.75 (Nov. 30, 2012), seeing it as "the most important function" of the FET standard; *Novenergia II - Energy & Env' (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award, ¶648 (Feb. 15, 2018), describing it as the "primary element" of the FET standard.
42. Dolzer, Kriebaum & Schreuer *supra* note 22 at 208.
43. This paper does not discuss whether it is necessary or appropriate or useful to prefer using legitimate expectations to interpret the FET obligation. Instead, this paper's main argument is that, in the scenario where FET is interpreted

- by using legitimate expectations, there is a way to incorporate the Paris Climate Agreement's progression over time framework in the decision-making.
44. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶426, 434, (Jul. 8, 2016).
 45. *Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Republic of Poland*, PCA Case No. 2014-31, Final Award, ¶238 (Feb. 16, 2017).
 46. *Cube Infrastructure supra* note 9 at ¶388.
 47. See *Saluka supra* note 41 at ¶329.
 48. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶261 (Nov. 30, 2018), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3224/DS12012_En.pdf [https://perma.cc/V7ER-3G6Z].
 49. *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, ¶165 (Jun. 7, 2012), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C104/DC2552_En.pdf [https://perma.cc/AA7W-HT77]; Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, ¶984 (Jul. 26, 2018), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3985/DS11355_En.pdf [https://perma.cc/QG55-N3HQ].
 50. See *Cube Infrastructure supra* note 9 at ¶393.
 51. *South American Silver Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, ¶648 (Nov. 22, 2018).
 52. *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award, ¶622 (Dec. 8, 2016).
 53. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶157 (May 29, 2003).
 54. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶¶329, 333 (Sept. 11, 2007).
 55. *Toto Costruzioni Generali supra* note 49 at ¶165; Gavrilovic *supra* note 45 at ¶984.
 56. *Eastern Sugar Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, ¶255 (Jun. 26, 2009).
 57. *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, ¶¶266-269 (Jul. 17, 2003).
 58. *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, ¶¶580, 582, 583 (Feb. 28, 2020).
 59. *Philip Morris supra* note 44 at ¶433.
 60. *Saluka supra* note 41 at ¶305.
 61. *Lehmann, supra* note 28 at 84-85.
 62. *Id.*
 63. *Id.* at 84.
 64. Intergovernmental Panel on Climate Change [IPCC], *Policymaker Summary of Working Group III: Formulation of Response Strategies*, 115, 120 (1992), https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc_90_92_assessments_far_wg_III_spm.pdf [https://perma.cc/Y773-G78M].
 65. Intergovernmental Panel on Climate Change [IPCC], *Summary for Policymakers, in Climate Change 2023: Synthesis Report* 19-20 (H. Lee & J. Romero eds., 2023), <https://doi.org/10.59327/IPCC/AR6-9789291691647.001> [https://perma.cc/6BK3-E4DD].
 66. U.N. Framework Convention on Climate Change, *Outcome of the First Global Stocktake*, U.N. Doc. FCCC/PA/CMA/2023/L.17, at 5 (Dec. 13, 2023).
 67. *Id.*
 68. Ewan Thomson & Ian Shine, *Phasing Down, Phasing Out, or Transitioning Away: What Did COP28 Agree on Fossil Fuels?*, World Economic Forum (Nov. 21, 2023), <https://www.weforum.org/stories/2023/11/phase-down-out-fossil-fuel-arguments/#:~:text=COP28%20has%20produced%20a%20deal,use%20either%20of%20these%20terms> [https://perma.cc/6486-4HZB].
 69. *5 Outcomes from COP 30: What the Belém Political Package Really Delivered*, United Nations University, <https://unu.edu/ehs/article/5-outcomes-cop-30-what-belem-political-package-really-delivered> [https://perma.cc/4MPR-67RK], (last visited Mar. 12, 2026).
 70. *Id.*
 71. See Stephen Howard & Tim Smedley, *Business: Creating the Context, in Negotiating the Paris Agreement: The Insider Stories* 279 (Henrik Jepsen et al. eds., 2021) (“you can broadly divide business into four groups: (1) the “carbon dependants,” where carbon is a fundamental part of their core product and transition is impossible or extremely challenging, such as fossil fuel industries; (2) the “carbon intensives” with a critical reliance on carbon where transition cost and effort is high, such as power, steel, automotive and aviation; (3) the “unconstrained,” the large and diverse group of businesses that can more readily transition to low or carbon-free means and can thrive just as easily in a net-zero carbon world, such as finance and professional service industries; and (4) “climate-solutions” businesses that base their growth on a rapidly decarbonising world, such as the renewable energy industries and electric mobility companies.”)
 72. *Zhu, supra* note 16 at 184.
 73. *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Claimants’ Memorial ¶¶ 515, 529-530 (18 December 2021); *Zhu, supra* note 16 at 186-187.
 74. *Zhu, supra* note 16 at 184.
 75. *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Claimants’ Memorial ¶ 467 (20 May 2022); *Zhu, supra* note 16 at 187.
 76. *Id.* at ¶¶ 476, 480; *Zhu, supra* note 16 at 187.
 77. Bart-Jaap Verbeek, *RWE’s Arbitration Case against Dutch State Inadmissible under EU Law*, SOMO (Jul. 27, 2023), <https://www.somo.nl/rwes-arbitration-case-against-dutch-state-over-coal-ban-inadmissible-under-eu-law/> [https://perma.cc/6LXH-HLWJ].
 78. *The United Kingdom Faces Its First ISDS Arbitration – Investment Treaty News*, <https://www.iisd.org/itn/2026/01/19/the-united-kingdom-faces-its-first-ids-arbitration/> [https://perma.cc/ND9L-SVT5] (last visited Mar. 12, 2026); *Woodhouse Investment Pte Ltd and West Cumbria Mining (Holdings) Ltd. v. United Kingdom (ICSID Arbitration) - The Climate Litigation Database*, https://www.climatecasechart.com/document/woodhouse-investment-pteltd-and-west-cumbria-mining-holdings-ltd-v-united-kingdom-icsid-arbitration_2f6d [https://perma.cc/T2ZC-L72Z], (last visited Mar. 12, 2026).
 79. *Id.*
 80. Bart-Jaap Verbeek, *AfterShock in Groningen: Shell and ExxonMobil’s Arbitration Cases against the Netherlands – Investment Treaty News*, <https://www.iisd.org/itn/2026/01/19/afterShock-in-groningen-shell-exxonmobil-arbitration-cases-against-the-netherlands-bart-jaap-verbeek/> [https://perma.cc/ND9L-SVT5], (last visited Mar. 12, 2026); *Shell PLC v. Kingdom of the Netherlands - The Climate Litigation Database*, https://www.climatecasechart.com/document/shell-plc-v-kingdom-of-the-netherlands_c81b [https://perma.cc/NFG6-Z3JQ], (last visited Mar. 12, 2026).
 81. Ristead De Paor, *Climate Change and Arbitration: Annex Time before There Won’t Be a next Time Current Developments*, 8 J. Int’l Disp. Settlement 179, 183 (2017).
 82. *Id.* at 184.
 83. *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Dissent on Liability and Quantum of Professor Philippe Sands QC, ¶1 (Apr. 22, 2022).
 84. Di Salvatore, *supra* note 12 at 8-9.
 85. *Id.* at 10.
 86. *Id.* at 15 (also showing that the total rate of cases decided in favor of investors is 32% among all fossil fuel arbitrations (31% settled, 23% decided in favor of the state, 10% discontinued for unknown reasons and 7% unknown reasons)). This might show that once investors pass the threshold of the procedural necessities, their victory rate gets very high.
 87. *Id.* at 18.
 88. *Id.* at 40; Kyla Tienhaara & Lorenzo Cotula, International Institute for Environment and Development, *Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets*, 32 (2020).
 89. See Stephan W Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?* 27(5) J. of Int’l Arb. (2007); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. Int’l Econ. L. 1037, 1040 (2010); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science, in Evolution in Investment Treaty Law and Arbitration* 606 (Chester Brown & Kate Miles eds., 2011); Harald Laudal Berge & Axel Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 J. Int’l Disp. Settlement 1 (2021).

90. Ashley Schram et al., *Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill*, 9 Global Policy 193, 195 (2018).
91. This paper does not presume that “regulatory chill” is proven but it also does not presume that it can be definitively proven through quantitative studies. While metrics such as the rate of enacting and withdrawing laws could serve as an indicator, the reasons for not enacting laws in the first place are complex so it is difficult to pinpoint whether the exact reason is the fear of arbitration. However, this paper suggests that, because of its burdensome economic impact, investment arbitration could be a risk factor, while Paris Climate Agreement goals would support the elimination of risk factors preventing more intense climate measures. The subsequent chapters will introduce new legal solutions that both partly eliminates some of these risks and are consistent with international law as well as the notions of investment law.
92. Di Salvatore, *supra* note 12 at 20.
93. Cotula, *supra* note 2 at 787.
94. Kyla Tienhaara, Rachel Thrasher, B. Alexander Simmons & Kevin P. Gallagher, *Investor-state disputes threaten the Global Green Energy Transition*, 376 Science 701, 703 (2022).
95. Di Salvatore, *supra* note 12 at 40.
96. *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*, ICSID Case No. ARB/17/14, Opinion of Pierre-Marie Dupuy, ¶2 (Aug. 23, 2022). The Award in *Rockhopper v. Italy* was later annulled, as one of the arbitrators had not declared a conflict of interest. See, *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Annulment (Jun. 2, 2025).
97. *Id.*
98. *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, ¶614 (Nov. 21, 2022).
99. International Centre for Settlement of Investment Disputes, Climate Case Chart, <https://climatecasechart.com/non-us-jurisdiction/international-centre-for-settlement-of-investment-disputes/> [https://perma.cc/6UFF-8L6B].
100. *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, ¶452 (Sept. 4, 2020).
101. *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, ¶437 (Feb. 26, 2021).
102. *Iusun S.A., Jean-Pierre Lecorier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, ¶372 (Dec. 27, 2016). In *Blusun S.A., Jean-Pierre Lecorier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment (Apr. 13, 2020), the Annulment Committee rejected the annul the Award.
103. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶804, (Sept. 9, 2021).
104. *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, ¶¶266-269, (May 31, 2019).
105. Aslak Brun, *Conference Diplomacy: The Making of the Paris Agreement*, 4 Politics and Governance 115, 116 (2016); Lavanya Rajamani, *Guiding Principles and General Obligation (Article 2.2 and Article 3) in The Paris Agreement on Climate Change: Analysis and Commentary* 139 (Daniel Klein et al. eds., 2017).
106. Paris Agreement, to the United Nations Framework Convention on Climate Change, art. 3, Dec. 12, 2015, T.I.A.S. No.-1104.
107. *Id.* at Article 4(3).
108. Brun, *supra* note 105 at 117; Hao Zhang, *The Carbon Externality of Investments Financed by China's Development Banks: The Case of Energy Investments in Central Asia*, 20 The J. of World Investment & Trade, 335, 350 (2019).
109. Elif Naz Némec & Milan Damohorský, *Climate Litigation in Europe: A Discussion about Emerging Trends in the Context of Principle of Non-Regression*, 70 AUC IURIDICA 111, 116 (2024).
110. Rajamani & Guérin, *supra* note 19 at 78.
111. *Id.*
112. *Id.* at 74.
113. *Id.* at 78.
114. Duvic-Paoli *supra* note 4 at 236.
115. *Id.* at 236-237.
116. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.
117. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.
118. Rajamani & Guérin, *supra* note 19 at 78.
119. Ralph Bodle, Lena Donat and Matthias Duwe, *The Paris Agreement: Analysis, Assessment and Outlook*, 10 Carbon & Climate L. Rev. 5, 9 (2016).
120. Harald Winkler, *Mitigation (Article 4) in The Paris Agreement on Climate Change: Analysis and Commentary* 148 (Daniel Klein et al eds., 2017).
121. See Christopher Campbell-Durufflé, *A Legal Standard for State Mitigation Efforts: Is National Discretion Bound to Shrink Over Time?*, in RSCH. Handbook on the L. of the Paris Agreement 88 (Alexander Zahar ed., 1st ed. 2024) (“Interpreting the progression expectation acquired strong currency after the United States in 2017 indicated its intention to withdraw from the Paris Agreement and began to reverse some of its mitigation actions (...) Some commentators argued that, ‘while a downward revision is liable to draw criticism, it is a legally available option’. Another view was that the ‘terms of the Agreement do not permit downgrading of NDCs’, and that to do so ‘could have a corrosive effect on the carefully balanced architecture and normative foundations of the Paris Agreement’ Still another view was that non-arbitrary downward adjustments may be allowed in restricted situations that are consistent with the Agreement’s object and purpose – for instance, where a party is ‘unexpectedly faced with (...) rapid economic development or a large intake of population.’”) (footnotes omitted).
122. Brun, *supra* note 105 at 117; Zhang, *supra* note 108 at 350.
123. Campbell-Durufflé, *supra* note 121 at 87.
124. *Id.* at 94.
125. Leslie-Anne Duvic-Paoli & Mara Wendebourg, *The Legal Principles of the Paris Agreement: Familiarity in Novelty* in Research Handbook on the Law of the Paris Agreement 53-54, 58 (Alexander Zahar ed., 1st ed. 2024).
126. Julia Dehm, *Reflections on Paris: Thoughts Towards a Critical Approach to Climate Law*, 31 Revue Québécoise de Droit International [QUE.J. OF INT’L L.], 61, 71 (2020).
127. Bodle & Donat & Duwe, *supra* note 119; Sandrine Maljean-Dubois, *The Paris Agreement: A Starting Point towards Achieving Climate Neutrality?*, 10 Carbon & Climate L. Rev. 1, 3 (2016); Lavanya Rajamani & Jutta Brunnée, *The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons From the US Disengagement*, 29 J. of Env’t L., 537, 544 (2017); Sharaban Tahura Zaman, *Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under the International Law*, 26 Y.B of Int’l Env’t L. 98, 109 (2023); Zhang, *supra* note 108.
128. Zaman, *supra* note 127.
129. Rajamani & Guérin, *supra* note 19 at 85.
130. *Id.*
131. Brun, *supra* note 105 at 118.
132. Winkler, *supra* note 120 at 148.
133. *Id.* at 141.
134. Rajamani, *supra* note 105 at 139.
135. Rajamani & Brunnée, *supra* note 127 at 544.
136. Peter Lawrence & Daryl Wong, *Soft Law in the Paris Climate Agreement: Strength or Weakness?*, 26 Rev. of Eur., Compar. & Env’t L. 276, 280 (2017).
137. Jorge E. Viñuales, *The Paris Agreement on Climate Change*, 59 German Y.B. Int’l Law 11, 26 (2016).
138. Maljean-Dubois, *supra* note 127 at 2.
139. Zaman, *supra* note 127 at 115.
140. Christina Voigt, *State Responsibility for Damages Associated with Climate Change* in Research Handbook on Climate Change L. and Loss & Damage 166, 172-173 (Meinhard Doelle & Sara L. Seck, eds., 2021).
141. *Id.* at 173.
142. *Id.* at 175.
143. Zaman, *supra* note 127 at 115.
144. Rajamani & Guérin, *supra* note 19 at 78.
145. Kate Cook, *The Progressive Approach and the Paris Agreement in DISPUTE RESOLUTION AND CLIMATE CHANGE: THE PARIS AGREEMENT AND BEYOND* 96 (Wendy J. Miles ed., 2017).
146. *Id.*
147. *Id.*
148. ICJ, Obligations of states in respect of climate change, ¶¶113-173 <https://www.icj-cij.org/case/187> [https://perma.cc/H7QM-HT2H].
149. ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ¶223 <https://www.itlos.org/en/main/cases/list-of-cases/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/>.

150. ICJ Advisory Opinion, *supra* note 148 at ¶245
151. *Id.* at ¶¶444-445
152. ARSIWA, *supra* note 39 at Arts. 1 and 28.
153. IACtHR, Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, ¶¶324, 331-332, https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf.
154. *Id.* at ¶164
155. *Id.* at ¶352
156. *Id.* at ¶¶345-346.
157. Zhu, *supra* note 16 at 184.
158. *Id.*
159. *Id.*
160. Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskeniemi, U.N. Doc. A/CN.4/L.682 and Add.1, ¶ 37-41 (2006).
161. Richard Gardiner, *The Oxford Guide to Treaties* 460 (Duncan B. Hollis ed., 2d ed. 2020).
162. Zhang and Li, *supra* note 11 at 29
163. There has been a discussion of whether states' human rights obligations can be addressed in investment arbitration, relying on Article 31(3)(c) of the VCLT. Despite strong support in academic writings, most arbitral tribunals have still been disregarding Article 31(3)(c) in interpreting the IIA provisions. There are some exceptions, such as the *Urbaser* tribunal. See *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award, ¶1204 (Dec. 8, 2016).
164. Gardiner, *supra* note 127 at 469.
165. *Id.*
166. Brun, *supra* note 105 at 119; Winkler, *supra* note 120 at 141.
167. Lawrence & Wong, *supra* note 136 at 280.
168. See, for example, ICJ Advisory Opinion, *supra* note 148; ITLOS Advisory Opinion, *supra* note 149; IACtHR Advisory Opinion, *supra* note 153.
169. Rajamani & Guérin, *supra* note 19 at 85.
170. *Expecting*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/expecting> [<https://perma.cc/H9BS-8JQW>].
171. *Philip Morris supra* note 44 at ¶¶429-430.
172. *Id.*
173. There are other IIA provisions, such as stabilization clauses, which may provide broader protection against changes in the host state's legal framework.
174. *Tecmed supra* note 53 at ¶154.
175. *Philip Morris supra* note 44 at ¶¶429-430.
176. Brun, *supra* note 105 at 116; Rajamani, *supra* note 105 at 139.
177. *Id.*
178. The IIA clause, Article 3(2) of the Switzerland-Uruguay BIT stipulates: "Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable."
179. 1982 *Memo to Exxon Management about CO2 Greenhouse Effect*, Climate Files, <https://www.climatefiles.com/exxonmobil/1982-memo-to-exxon-management-about-co2-greenhouse-effect/> [<https://perma.cc/Q8WM-XYCX>].
180. Rebecca John, *New Evidence Reveals Fossil Fuel Industry Sponsored Climate Science in 1954*, DeSmog (Jan. 30, 2024), <https://www.desmog.com/2024/01/30/fossil-fuel-industry-sponsored-climate-science-1954-keeling-api-wspa/> [<https://perma.cc/S2RJ-TADV>].
181. *South American Silver supra* note 51 at ¶648.
182. *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, ¶ 571 (Aug. 6, 2019).
183. *Id.*
184. *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶340 (Aug. 18, 2008)
185. Howard Mann, *Methanex Corp. v. United States of America in Int'l Inv. L. & Sustainable Dev.* Key Cases from 2000-2010, 89 (Nathalie Bernasconi-Osterwalder & Lise Johnson eds., 2011).
186. *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits ¶9 (NAFTA Ch. 11 Trib. Aug. 3, 2005) [<https://perma.cc/Y9NV-BKW5>].
187. Mark Poynting, *This Year Set to Be First to Breach 1.5°C Global Warming Limit*, BBC (Nov. 7, 2024), <https://www.bbc.com/news/articles/c1dpxnvv2go> [<https://perma.cc/T2XH-826G>].
188. Rajamani & Guérin, *supra* note 19 at 78.
189. See Sek Lun Cheong, *Human Rights Due Diligence and the Climate Change Dimension: Implications for Investor Responsibility in International Investment Law*, 13 Climate Law, 188, 209 (2023).
190. *RENERGY*, Dissenting Opinion, *supra* note 63 at ¶11.
191. *Id.* at ¶11.
192. *Id.* at ¶10.
193. *Id.* at ¶¶10, 12.
194. *Id.*
195. Having said this, a due diligence analysis for investing in a state not party to the Paris Climate Agreement will not automatically create legitimate expectations that a high-emitting investment will continue uninterrupted. States have generally engaged or are highly expected to engage with the climate regime as climate change poses an existential threat that needs to be addressed in a specific time frame. The principle of progression is only a normative vision of this existential and time-limited problem. The party status to the Paris Agreement is all the more irrelevant, as the customary international rules regarding climate change have been dealt with by the recent advisory opinions of international courts.
196. *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, ¶114, (Apr. 30, 2004).
197. *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶20.37 (Sept. 16, 2003).
198. Fiona Harvey, *New Fossil Fuel Projects 'Very Unwise Economic Risk' Says Global Energy Chief*, The Guardian, (Sept. 14, 2023), <https://www.theguardian.com/environment/2023/sep/14/fossil-fuel-investment-very-unwise-economic-risk-energy-expert-fatih-birol> [<https://perma.cc/ZWL2-UF7Z>].
199. Mike Scott, *Fossil Fuel-Free Index Will Help Investors Manage Climate Risks*, Forbes (May 1, 2014), <https://www.forbes.com/sites/mikescott/2014/05/01/fossil-fuel-free-index-will-help-investors-manage-climate-risks/?sh=2ca249884410> [<https://perma.cc/Q9UC-Z5WH>].
200. John Parnell, *Warning \$674bn 'Carbon Bubble' Will Blow 2°C Climate Target*, Climate Home News (Apr. 19, 2013), <https://www.climatechangenews.com/2013/04/19/governments-warned-6tr-carbon-bubble-will-blow-2c-climate-target/> [<https://perma.cc/PCP8-BTAY>].
201. *Parkerings supra* note 54 at ¶¶335-336.
202. Cook, *supra* note 145 at 96.
203. *Id.*
204. *Id.*
205. Jenny Hall & Louis Koen, *Taking Stock of the Scholarship on the Relationship between International Investment Law and the Need for Raised Climate Ambition*, 14 Climate L. 95, 102 (2024).
206. Attwood, *supra* note 15 at 76.
207. ICJ Advisory Opinion, *supra* note 148 at ¶73.
208. Attwood, *supra* note 15 at 80.
209. *Id.* at 76.
210. Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2025* (2025).
211. Hall & Koen, *supra* note 205 at 105.

POST-CRISIS PRIVATE FUNDS ENVIRONMENTS: A US-EU REGULATORY AND ENFORCEMENT COMPARATIVE STUDY THROUGH A LUXEMBOURG LENS

BALDEMAR OROZCO CHANONA

Abstract: This article examines the evolution of regulatory frameworks for private funds in the aftermath of the 2008 Global Financial Crisis, comparing approaches in the United States and the European Union, with a particular focus on Luxembourg. The crisis revealed significant risks associated with the lightly regulated private funds sector, prompting substantial reforms aimed at enhancing transparency, investor protection, and systemic stability. In the United States, the Dodd-Frank Act and related SEC regulations imposed stringent reporting and compliance requirements on private fund managers, while the Volcker Rule limited proprietary trading by banks. In the European Union, the Alternative Investment Fund Managers Directive established a comprehensive framework for alternative funds, integrating oversight across member states and creating a passporting system for fund distribution along with other supporting regulatory measures. This article explores the impact of these regulatory regimes on the global private funds industry, analyzing how differing approaches in the US and EU

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have influenced fund structuring and cross-border investment. Through this comparative analysis, the article sheds light on the broader implications of regulatory divergence for the future of private fund management and financial stability. It then argues that the implementation of the Luxembourg model can afford a global competitive advantage to the US private funds sector while preserving core tenets of interest to regulators and industry players.

INTRODUCTION

It is true. If Pretty Woman had released post-Global Financial Crisis, Richard Gere may have played a private equity or hedge fund manager and not a Wall Street investment banker.¹ It is no surprise because once the shadow players of global finance, private funds have since moved to center stage in the post-crisis regulatory landscape. But as new rules seek to impose order, do they strike the right balance between curbing systemic risk and fostering investor confidence?

The Global Financial Crisis (GFC) changed the world's perspective on efficient markets.² As for private funds, who once held a low-profile behind-the-scenes persona, found themselves in the eye of the storm

and unable to escape regulatory scrutiny. Hedge funds, private equity, and other types of alternative investment vehicles became profiled as the potential sources of systemic risk, and this shift triggered the advent of new reforms aimed to tame the once unregulated or lightly regulated sector of the finance industry.³ Countries like the US and IGOs⁴ like the EU quickly began to investigate better ways to take on this new challenge through various means.⁵ From setting new rules, reporting requirements, and innovative compliance measures, these jurisdictions sought to provide the participants of this industry with an environment that mitigated systemic risk and promoted investor confidence, however this often came at the cost of the cornerstone traits in which this industry thrives: innovation, flexibility, and confidentiality. The industry expectedly pushed back in many instances in an effort to strike a balance of these opposites. What must have felt like an oxymoron mission, such as jumbo shrimp, did lead the industry to the regulatory and enforcement balance we have today. Whether this is the ideal balance is still a question discussed by industry professionals and academics, but what is certain is that private funds as they were known in the 90s are no longer the same product offering.⁶

As opposed to registered funds, those that the average retail investor can purchase shares from (for example, ETFs and Mutual Funds), private funds are often only accessible to institutional investors and high-net-worth individuals.⁷ By limiting their investor pool to a sophisticated profile, private funds can take a much more aggressive approach in high-risk investment strategies. Alternative investments have tended to be less liquid,

riskier, and less regulated compared to traditional forms of investment. Their higher risk profile affords the likelihood of competitive returns. These strategies and their systemic risk became very apparent during the GFC. Whether it is a hedge fund, venture capital, or private equity, these investment products are often referred to as private funds or alternative investment funds. Since their onset, there has been much change in regulation and enforcement, but private funds often flew under the radar of regulators. The GFC changed this status quo and from that point on, private funds across jurisdictions have come under closer oversight by their respective regulators.

But why was systemic risk so inherently present in the private fund industry and why was it catastrophic? Systemic risk implied a secondary and broader collapses as a reaction to an adjacent collapse of a segment or organization.⁸ Due to their high-risk profile, those that were highly leveraged such as private equity and hedge funds, were a ticking time bomb that would propagate to bordering sectors. In large part, it was the pre-GFC private funds environment that permitted this risk to be realized.

US PRIVATE FUND REGULATORY BACKGROUND PRE-GFC

On the US side, the SEC amongst other regulators and state agencies regulate private funds.⁹ To regulate funds the Investment Company Act of 1940 (Company Act) was passed by Congress and is enforced by the SEC.¹⁰ Pre-GFC, private funds and their managers were able to exempt themselves from registration with the SEC through the Company Act's Section 3(c)(1) or 3(c)(7) carveouts.¹¹ Those funds eligible for the exemption as "accredited investors" or

"qualified purchasers" were thus deemed private funds and those that did not became what we know as public or registered funds. During this period, compliance of the carved-out exceptions was the extent that private funds came close to oversight by regulators. However, as discussed, post-GFC saw a shift in regulation that affected already existing regulatory regimes and added new regulatory mechanisms.

"By limiting their investor pool to a sophisticated profile, private funds can take a much more aggressive approach in high-risk investment strategies."

As for private fund managers, the Investment Advisers Act of 1940 (Advisers Act) consists of the regulatory regime that grants the SEC the authority to regulate private funds advisers.¹² Under the Advisers Act, private fund manager could be exempt from registration with the SEC which afforded them reporting burdens and disclosure of confidential information. Essentially, depending on the Assets Under Management (AUM) and investment practices and whether the investment fund is considered a Venture Capital fund, a private fund adviser could be eligible for the exemption to register with the SEC as an Except Reporting Adviser (ERA).¹³

Even before the GFC, the SEC had attempted to close the opaque gap and sought greater leverage on transparency requirements through the 2004 Hedge Fund Rule.¹⁴ This regulation sought to require many hedge fund advisers to register under the Investment Advisers Act by determining each individual investor to a fund a separate

client of the adviser and counting towards limit of 15 to be exempt from registration.¹⁵ Lock-up periods beyond two years were the means to avoid registration.¹⁶ This rule was overturned in 2006 by the U.S. Court of Appeals in the *Goldstein v. SEC* case, which effectively maintained the less regulated status of hedge funds before the GFC.¹⁷

State rules aimed to regulate private funds are many and vary in approach. For these reasons, the scope of analysis of the evolution of US regulatory regimes and enforcement will remain at the Federal level. Although the minimally regulated environment pre-GFC afforded a space for innovation, flexibility, and confidentiality, it also created a gap for ample unregulated risk and investor exposure.

EU PRIVATE FUND REGULATORY BACKGROUND PRE-GFC: LUXEMBOURG LENS

Private funds in the EU and particularly those domiciled in Luxembourg were largely unregulated and were afforded great flexibility prior to the GFC. During this period, the regulation of funds was distributed amongst national competent authorities (NCAs).¹⁸ As for Luxembourg, the “Commission de Surveillance du Secteur Financier” (CSSF) was and continues to be the NCA over its jurisdiction.¹⁹ At the EU-level, the regulatory regime governing funds was established in 1985 as the “Undertaking of Collective Investment for Transferable Securities” (UCITS).²⁰ However, this directive left private funds outside its scope as it only pertained to those funds that catered to retail investors.²¹ As a directive this and those that followed was aimed to be implemented and transposed to local law in each relevant jurisdiction.²² At this time, private funds

regulation was largely then left to the NCAs, and this created a great lack of harmonization that prevented uniformity for cross-border market interactions. To provide better oversight of the markets, the Committee of European Securities Regulators (CESR) was introduced by the European Commission in 2001.²³ As the first attempt, this regulator lacked the oversight and reach that would be later restructured and reestablished as a response to the GFC in 2011.²⁴

OVERVIEW

This article presents a comparative examination of the evolution of regulatory and enforcement frameworks governing private funds in the US and the EU since the GFC and analyzes how each development continues to shape market dynamics, investor protections, and fund management practices in each jurisdiction.

In the following sections, a deeper contrast of the chronological evolution of private funds will be developed. To begin, Part I: US Regulatory and Enforcement Evolution will cover the analysis of the US perspective on regulation and enforcement since the GFC. This section will focus on the onset and implications the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. This will include insights into the impact of registration requirements under the Investment Advisers Act, the Form PF, and the Volcker Rule. The means by which the SEC began to lean into the private funds industry will be examined and Title IV of the Dodd-Frank Act will be explained at a high level. Afterwards, there will be a discussion of the implications on the sub-sector of commodities and derivatives within the private funds industry and the implications the change of administration in 2016 had

on the industry. This analysis will cover the proposed Financial CHOICE ACT, rollback on the Volcker Rule and other regulations, the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, and other implicated changes. After covering the regulatory landscape evolution in the US, we will discuss the various enforcement agents and methods by which this jurisdiction incentivized compliance and commitment to the changing regulatory landscape. To conclude this part, discussion on US industry’s reaction to these jolting changes in regulation and market practices including product trends will be elaborated from a regulatory compliance perspective.

Transitioning to Part II: EU Regulation and Enforcement Evolution, this following section will discuss the EU-side consideration and its evolution since the GFC with a focus on Luxembourg. This jurisdiction will be the lens through which the private funds regulatory and enforcement evolution will be analyzed as this the known entry point for investors into the European Union and is second in market size to the US.²⁵ These points alone pose Luxembourg as a rich private funds ecosystem that reacted in a comparative way as the US market did. Firstly, the analysis will cover the supranational regulators such as the AIFMD of 2011 that provided registration and reporting requirements. An emphasis on the revolutionizing impact of the Passport and its interaction with the CSSF will be discussed. Afterwards, the creation of the European Securities and Market Authority (ESMA) will be discussed as well as the implications of their Regulatory Technical Standards publications. From there, other restrictions and regulations focusing on investor protection will be

elaborated before turning to the European Market Infrastructure Regulation of 2012 (EMIR). EMIR's nuances in its effort to afford transparency and systemic risk mitigation within the derivatives ecosystem will be covered and this will lead to the following regulation, the Market in Financial Instruments Directive of 2018 (MiFID II). The regulatory ramifications of this stringent regulation will be discussed regarding transparency, governance, and investor protection. In transition to enforcement strategies and methods, the CSSF will become the focus as this is the relevant national competent authority (NCA) in Luxembourg. From there, the various methods of enforcement and compliance facilitation will be covered. AIFM Law will be highlighted as a primary example of AIFMD compliance facilitation and as an example of how member states adapt to new regulations within the EU. To conclude, upon covering the enforcement approach by the EU, the current trends in this market will be discussed from the perspective of how they reflect the evolving private fund regulatory landscape. Upcoming regulatory changes such as the AIFMD II will be presented as well as the predicted market reactions to promote and sustain compliance.

Then, in Part III: US Private Funds Beyond Trump 2025 & the Luxembourg Blueprint, this article argues that while a foreseen US regulatory rollback in private funds markets may encourage capital formation, the current and future administrations risk falling behind in overhauling private funds frameworks. This approach would lead to subpar efficiency and unreliable transparency, ultimately sacrificing global competitiveness. To prevent these

deregulation side effects, incorporating and assimilating with highly efficient models such as the Luxembourg model, the US can take advantage of a proven restructuring approach that will bolster tax incentives and further competitive market efficiency. Recognition of the weaknesses of the proposed model's imperfections spanning from conflicts of interest, to lack of on-site inspection frameworks for portfolio managers, unclear enforcement methods, and winding up framework harmonization will serve in part to show how the proposed and the current US frameworks could cross address the listed issues within each respective framework.

PART I: US REGULATORY AND ENFORCEMENT EVOLUTION

It was clear that the private fund ecosystem created systemic risk in the market and after the GFC, the SEC sought to establish regulatory reforms that could minimize this risk. To examine their approach in rulemaking, "[C]ongress directed the SEC to collect data from private funds advisers."²⁶ "Examinations...revealed risks that advisers to private funds [disclosed] inaccurate, incomplete or misleading information, [engaged] in disparate treatment of investors, and often inadequately [addressed] conflicts of interest."²⁷ These revelations reflected the many reasons the SEC and other state agencies tightened oversight of private funds advisers and the following legislations are the main developments that sought to achieve such heightened regulatory compliance.

THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010)

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) was the initial response by the SEC after the GFC. This legislation's preamble stated, "to end 'too big to fail' [and] to protect the American taxpayer..."²⁸ To achieve this goal within the private funds industry, Title IV of the Dodd-Frank Act introduced a registration requirement under the Advisers Act.²⁹ Accordingly, private fund managers with at least \$150 million in AuM were required to register with the SEC.³⁰ Although some private fund advisers remained exempt under the Dodd-Frank Act such as purely VC fund advisers, foreign fund advisers without a place of business in the US, and those that had held under \$150 million in AuM, were still be subject to reporting requirements.³¹

To comply with these reporting requirements, form PF (private fund) was introduced by the Dodd-Frank Act. This is the form that exempt and non-exempt private fund advisers need to use for reporting purposes. The form requires advisers to provide the following information to the Financial Stability Oversight Council (FSOC):

Basic organizational and operational information about each fund they manage, such as the type of private fund that it is (e.g., hedge fund, private equity fund, or liquidity fund), general information about the size and ownership of the fund, general fund data, and the adviser's services to the fund.

Identification of five categories of “gatekeepers” that perform critical roles for advisers and the private funds they manage (i.e., auditors, prime brokers, custodians, administrators and marketers)³²

Form PF was one of the ways in which regulators sought to monitor systemic risk as well as other inappropriate practices ranging from illegality, fraud, and self-dealing. However, while tightening reporting requirements can afford greater investor protection and risk mitigation, private funds managers were left without much room for confidentiality, flexibility and innovation. This regulatory approach saw further tightening in 2023 with a series of amendments and due to continued pushback from the SEC, form PF reporting requirements were recently amended with a new version to take effect in 2025.³³ While the 2023 amendments sought to establish parameters by when form PFs need be filed, the 2025 amendment will seek more granularity in reporting, particularly pertaining to large and small hedge funds and complex structure managers such as master feeders.³⁴

At the heart of the SEC and other regulators’ efforts in response to the GFC was to protect not only the investors but also all civilians and their assets. Prior to the GFC, banks and other financial institutions that served the greater population were free to acquire speculative positions through investments with hedge funds and other private funds products.³⁵ To prevent these leveraged positions from continuing, the Volcker Rule was established in section 619 of the Dodd-Frank Act. The rule states that,

[t]he final rules prohibit insured depository institutions and companies affiliated with insured depository institutions (“banking entities”) from engaging in short-term proprietary trading of certain securities, derivatives, commodity futures and options on these instruments, for their own account. The final rules also impose limits on banking entities’ investments in, and other relationships with, hedge funds or private equity funds.³⁶

Like the Dodd-Frank Act, there were parts of the Volcker Rule that afforded flexibility and called for banking institutions to determine the applicability of the rule under their current activities.³⁷ In particular, the original rule did not specify or define any parameters for what would constitute “material exposure to [‘]high-risk assets[’] or [‘]high-risk trading strategies[’].” For this reason, it was left up to the banks to determine what investments would fall under this definition and what were the mechanisms needed for compliance.³⁸

“With much reach from regulators to maintain close oversight where the alternative finance sector held a presence, legislative push back surged during the Trump administration.”

With much reach from regulators to maintain close oversight where the alternative finance sector held a presence, legislative push back surged during the Trump administration. Essentially, the Volcker rule was amended through the Economic Growth, Regulatory Relief, and

Consumer Protection Act (Growth Act).³⁹ This legislation, “significantly amended two aspects of the Volcker Rule: (1) creating an exemption for community banks, and (2) increasing opportunities to have funds and their investment advisers co-brand by sharing names.”⁴⁰ This aspect of legislative pushback on regulatory oversight signaled leniency and clarifications on what the Volcker Rule was initially aimed to address while relieving institutions and their activities that fell outside of the rule’s scope.

CONTINUED SEC REGULATION OF PRIVATE FUND ADVISERS

The Dodd-Frank provided a heightened level of oversight of fund advisers by the SEC. New compliance mechanisms, reporting rules, record-keeping, and disclosure requirements added with these regulations brought an adjustment to industry standards. Relying on innovation, flexibility, and confidentiality, the private funds industry may have expected at this point that regulatory burdens had reached their ceiling. However, after the Dodd-Frank Act, regulators continued to find ways to narrow the gap between oversight and the lack thereof over private funds and their advisers. With these goal in mind, the SEC adopted the Private Fund Adviser Rules on August 23, 2023.⁴¹ This was yet the furthest reach by regulators into the private funds space. “Engagement from Carta, Congress, and others in the ecosystem helped shape—and soften—some of the most problematic aspects of the proposal for venture to make the rules more workable.”⁴² In summary, the original rules regarded the following:

For all private fund advisers...
Limits on side letters: Certain preferential terms would be

prohibited unless offered to all investors, while others would need to be disclosed. Preferential treatment would not be permitted with respect to redemption rights and certain information rights if the adviser reasonably expects such terms would have a material, negative effect on other investors—unless the same terms are offered to all investors. Other forms of preferential treatment for material economic terms would be prohibited unless the terms are disclosed in advance of the investment. All side letter terms are required to be disclosed post-investment with annual updates.

Restricted activities: Fund managers would be limited from engaging in a number of activities without investor disclosure, or in some cases, investor consent. Fund managers would not be able to charge regulatory, examination, or compliance fees to the fund without investor disclosure. Fees and expenses associated with investigations would require disclosure and investor consent, and if the fund manager is sanctioned for an Advisers Act violation, no associated expense could be charged to the fund. Fund managers would be prohibited from charging fees or expenses related to a portfolio investment on a non-pro rata basis unless the allocation is “fair and equitable” and disclosed to investors.

For SEC-registered private fund advisers...

Quarterly statements: Private fund RIAs **would be required to provide quarterly statements to investors around fund performance, fees, and expenses in a standardized format.**

Audit requirements: Private fund RIAs⁴³ would be required to obtain annual audits for each private fund **from an independent PCAOB-registered auditor.**⁴⁴

GP-led secondaries: Private fund RIAs would have to obtain a fairness opinion or valuation opinion from an independent opinion provider for adviser-led secondary transactions.

Recordkeeping and compliance: Private fund RIAs would be subject to new recordkeeping obligations related to new rules and amendments, and all RIAs would be required to document annual compliance reviews.⁴⁵

“Derivatives were, at their core, the product originating the systemic risk that led to the GFC.”

Although the proposed final rules were deemed by regulators as the appropriate approach to achieve the desired control over these investment funds and their managers, these were softened in several ways. This leniency was shown by grandfathering prohibited activities, less stringent side letter requirements, a shift from prohibition

of activities to regulation via disclosures, and more flexible adviser liability.⁴⁶ These amendments may have achieved a balance between regulation and the desired freedom in the industry, but recently, these rules were vacated by the Fifth Circuit and thus, will not have the regulators’ desired effect on the industry.⁴⁷ Although the SEC will likely appeal this decision, the fact that these rules were vacated means that they will not come into effect at all, making this a resolution that applies to the industry as a whole.⁴⁸

DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE ACT AMENDMENTS (CFTC)

Derivatives were, at their core, the product originating the systemic risk that led to the GFC.⁴⁹ With the staggering regulation brought by the Dodd-Frank Act, the CFTC was granted the duty of overseeing the derivatives markets, a category that often falls under the AuM of private funds of several kinds.⁵⁰ Prior to the GFC, regulation of swaps was nonexistent and as stated, this led to the crisis itself.⁵¹ Rulemaking in this area evolved over time, and as of 2023, the CFTC completely overhauled Rule 4.7.⁵² These changes regarded:

[A]n increase in the “Portfolio Requirement” threshold contained in the definition of “qualified eligible person” (QEP) and other less controversial changes. The CFTC did not approve the sweeping changes to Rule 4.7 it had proposed that would have dramatically increased regulatory burdens and cut back on the prior regulatory exemptions available to Rule 4.7 exempt CPOs [Commodity Pool

Operators] and CTAs [Commodity Trading Advisers].⁵³

This is another instance where regulations connected to private funds underwent a progressive back-and-forth swing until settling, for the time being, on an implementable and hopefully efficient set of rules.

PRESIDENT TRUMP'S ADMINISTRATION

During President Trump's 2017 Administration, there was a major attempt to rollback various rules set forth by the Dodd-Frank Act. Although it died after the Senate did not push it further, the Financial CHOICE Act of 2017 is another example of the effort to reach a regulatory balance between industry privacy and regulatory oversight. The Financial CHOICE Act received criticism from both sides of the spectrum.⁵⁴ "The bill aimed to relax financial industry regulations, including stress tests as well as capital and liquidity requirements. Critics argued that the bill created unregulated incentives that led to the financial crisis, setting up the economy for another."⁵⁵

With the upcoming second term of a Trump administration and with Fifth Circuit's decision in *National Association of Private Fund Managers et al. v. SEC*,⁵⁶ it is likely that there will be a continuing movement of relaxation in rulemaking.⁵⁷

ENFORCEMENT APPROACHES

Enforcement of the above-mentioned rules and regulations took many forms after the GFC with many supporting mechanisms that enabled their efficient implementation and facilitated compliance. The following section will explore the several means by

which the US government and their agencies sought to achieve their goals.

As discussed, the SEC and the CFTC play a center role in oversight of markets and in rule making. They have delegated authority to implement and enforce legislation passed by Congress. We know that the SEC primarily enforces the Dodd-Frank Act, and the CFTC is involved whenever there is a fund that trades in commodities or derivatives. But how is this enforcement carried out and made effective? These regulating agencies achieve enforcement by several enforcement methods depending on the legislation or specific rule. Dodd-Frank Act regulatory enforcement involves several methods included below.

Examination and Audits is one method where the SEC regularly examines registered investment advisers to private funds to ensure compliance with regulatory requirements. An approach by the Federal Reserve involves implementing stress tests to determine financial positions of firms under simulated crises.⁵⁸

Fines and Penalties is another method the SEC can impose for non-compliance such as a failure to register, inadequate disclosures, or misleading statements to investors. These penalties can range from monetary fines to secondary liability.⁵⁹

Cease-and-Desist Orders are another method the SEC can issue to halt illegal activities, such as violations of anti-fraud provisions or trading regulations. "Additionally, for cease-and-desist proceedings instituted under the Securities Act, the Dodd-Frank Act adopts the three-tiered penalty grid already contained in

the Securities Exchange Act, but raises the penalty amounts by 50%."⁶⁰

Civil Litigation can be a route in cases of serious violations. Regulators may file civil suits in federal courts to seek injunctions, asset freezes, or further financial penalties. However, the private sector often alleges that what is perceived as strict liability for Dodd-Frank regulatory requirements, which have often shifted and changed since the Act's inception, places an undue burden on the industry players who seek to comply in good faith.⁶¹

Whistleblower Program was established by the Dodd-Frank Act and, "awards to eligible whistleblowers who voluntarily provide the CFTC with original information about violations of the Commodity Exchange Act (CEA) that leads the CFTC to bring a successful enforcement action resulting in monetary sanctions exceeding \$1,000,000."⁶²

The enforcement of the Investment Advisers Act Amendments under Dodd-Frank is achieved by the following methods:

Enforcement Actions allow for the SEC to facilitate the registration process in cases of non-compliance. The deadlines to bring the actions were made more flexible in favor of the SEC due to amendments brought by the Dodd-Frank Act.⁶³

Disciplinary Actions by the SEC are imposed for misrepresented or incomplete reports and other kinds of violations that often result in significant fines, stop orders, and trading suspensions.⁶⁴

The enforcement of the Volcker Rule is approached similarly in the following ways:

Agency collaboration between the SEC and the Federal Reserve serves to oversee effective enforcement of this rule.⁶⁵ Other

regulators involved include the CFTC, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC).⁶⁶

Interim Examination Procedures set forth by the OCC, “help examiners... [assess] plans that banks have developed and are implementing to comply with the regulations. During the conformance period, the OCC will augment these interim procedures with in-depth procedures that examiners should use to assess banks’ ongoing adherence to the regulations.”⁶⁷

CFTC’s Regulation of Derivatives is enforced in similar approaches as the SEC’s enforcement of the Dodd-Frank Act.

CURRENT TRENDS

There are several factors that will influence market trends today in the private funds industry. With arduous inflation and the continuous rise in interest rates, markets are seeing a rising trend in private credit.⁶⁸ Private fund advisers are turning to investment strategies focused on swaps and continuation funds while investors seeking maturing returns are finding exits through secondaries.⁶⁹ The market’s response to the current regulatory and enforcement environment remains uncertain.⁷⁰ While the new Trump administration may foster a positive market atmosphere with a rollback in regulatory scrutiny, any stringency to come will likely look like the SEC’s final rules that faced vacatur.⁷¹

PART II: EU REGULATORY AND ENFORCEMENT EVOLUTION

In the European Union, prior to the GFC, the regulating bodies overseeing private

funds were largely distributed across member states. In Luxembourg, the NCA is the CSSF and in conjunction with the European Commission and ESMA, these regulatory agencies developed, communicated, and implemented the directives and regulations in response to the GFC.

“Similarly, to the Dodd-Frank Act, the AIFMD established parameters and thresholds that trigger registration requirements.”

ESMA was indeed a part of the EU’s response to the GFC. As the replacing regulating body to the CESR, ESMA was founded after the recommendation of the 2009 de Larosi re report.⁷² With these regulatory bodies in place, there were a series of directives that went into effect in response to the GFC.

ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE OF 2011 (AIFMD)

To increase investor protection and widen Alternative Investment Fund (AIF) regulation, the AIFMD was put in place to create a comprehensive regulatory framework to be adapted by the NCAs.⁷³ A key difference in the regulatory approach was that this directive does not regulate the AIFs themselves but their managers (AIFMs) instead. This regulation was largely revolutionary not for its registration and reporting requirements but via the initiated “passport” network established by this directive.⁷⁴ Similarly, to the Dodd-Frank Act, the AIFMD established parameters and thresholds that trigger registration requirements. Given the supranational

regulatory environment that an IGO like the EU enables, the AIFMD sought to streamline cross-border marketing of AIFs without sacrificing investor protection because of varying regulatory frameworks and standards among member states. To acquire such passport rights, the AIFM need make sure it complies with several requirements set forth by this directive. In part, investor protection was increased by,

...requiring alternative investment fund managers (AIFMs) to ensure an independent depositary is appointed by the alternative investment funds they manage, particularly when those funds are managed from Europe or marketed to European investors. Under the provisions, a depositary must verify that financial instruments are being properly safekept in custody and in some circumstances subjects them to strict liability provisions should those assets go missing or be stolen anywhere in the custody chain. Other depositary responsibilities include performing cash flow monitoring, verifying a funds ownership of its assets and overseeing compliance with the fund prospectus.⁷⁵

Through this separation of control, the AIFMD enabled oversight on AIFMs by limiting the confidentiality of the action taken by the AIFM upon the fund.

Beyond the depositary requirements, leverage restrictions were also implemented by the directive. Primarily focused to mitigate and prevent the uncontrolled propagation of systemic risk, the AIFMD imposes leverage limits.⁷⁶ “It defines leverage as [‘]

any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash securities, or leverage embedded in derivative positions or by any other means[.]”⁷⁷ Besides these limits, another requirement that shows the extent and reach by the regulatory regimes in the EU is the requirement to report to the NCA of the leverage positions of any derivatives through a common approach.⁷⁸ In an effort to promote investor confidence, this regime requires AIFMs to make disclosures of liquidity positions before committing capital and at a defined frequency thereafter.⁷⁹

Aside from disclosing their overall leverage positions, the AIFMs are required to disclose further details regarding borrowing of cash and securities, the embedded financial leverage in derivatives, leveraging arrangements, top five lenders and amounts, and any other information that provides insights to systemic risk harboring.⁸⁰

In Luxembourg, the CSSF transposed the AIFMD into local law known as the Law of July 12 of 2013 or “AIFM Law.”⁸¹ This legislation was accepted by the industry in a positive light because although it establishes the regulatory framework locally, it grants clarity and insight of how the already existing AIF products within Luxembourg would be regulated under this regime. Given that the AIFMD is a quite long and complex directive, member states can benefit from these transpositions and from local experts in defining the implications within the relevant regimes.⁸²

There are some clear similarities between Dodd-Frank and the AIFMD. Firstly, reporting requirements and registration had aligning purposes, but aspects such as the depositary and the ability to delegate

regulation enforcement to NCAs likely afford the EU closer oversight of private fund industries in varying markets. Beyond the various nuances the AIFMD brought into effect, there were other directives and guidelines that continue to shape the regulatory landscape of private funds today.

REGULATORY TECHNICAL STANDARDS (RTS)

“EMIR is yet another regulation that was aimed to reduce systemic risk by providing greater transparency in the over the counter (OTC) derivatives market.”

The RTS is a regulatory instrument utilized by ESMA and the European Commission to enable uniformity across member states in the EU.⁸³ As priorly mentioned, directives or EU level products such as European Long Term Investment Funds (ELTIFs)⁸⁴ can be long and filled with nuances left to be implemented by member states. The RTS serves to hedge gross, incomplete, or incorrect interpretation and implementation of directives and other legislations that affect markets. While there are regulations and procedures that serve as belts-and-suspenders for a given purpose, the RTS is rather the instruction manual that indicates where the belt should lay at the waist and how the suspenders should align at the shoulders.⁸⁵

EUROPEAN MARKET INFRASTRUCTURE REGULATION OF 2012 (EMIR)

EMIR is yet another regulation that was aimed to reduce systemic risk by providing greater transparency in the over the counter (OTC) derivatives market.⁸⁶ Similarly to the CFTC, EMIR set out to regulate a set of

products that had little to no oversight from regulators before the GFC. This regulation is broken down into three levels: (i) EMIR along with its following amendments since its inception: EMIR Refit and EMIR 2.2, (ii) the European Commission’s Implementing and Delegated Acts and the respective EMIR RTS, and (iii) provided ESMA Q&A in EMIR implementation.⁸⁷ Beyond the disclosure requirements provided by the regulation, EMIR “introduces rules to reduce the counterparty credit risk of derivatives contracts . . . all standardized OTC derivatives contracts must be centrally cleared through Central Counter Parties (CCPs) . . . if a contract is not cleared by a CCP, risk mitigation techniques must be applied . . . CCPs must comply with stringent prudential, organizational and conduct of business requirements[.]”⁸⁸

MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE II OF 2014 (MiFID II)

In 2014, MiFID II “...established a comprehensive set of rules regulating firms who provide investment services and activities linked to financial instruments, and the trading venues where financial instruments are traded. The aim of the MiFID framework is to promote financial markets that are fair, transparent, efficient and integrated.”⁸⁹ As opposed to its preceding version, MiFID II set out more stringent transparency and reporting requirements.⁹⁰ While the previous version only applied to equity markets, MiFID II covered all securities and derivatives.⁹¹ In particular, MiFID II’s “unbundling” requirement is likely one of its most pervasive oversight rules.

“[U]nbundling” requires that fund managers budget separately

for research and trading costs rather than funding research from commissions retained. This has strained some individual relationships between analysts and fund managers, forcing both sides to track meetings, calls, and emails. Having to add research costs as a separate charge can also lead to difficult questions from clients, both about why they should be funding research and what has happened in the past. This is compounded by the very broad definition of research under MiFID II, which may even encompass what would have previously been seen solely as informed market commentary.⁹²

This regulation could be compared to the vacated final rules of the SEC which, although developed later, were aimed at similar purposes of casting a wide net to regulate all financial instruments that expose their respective economies to the kinds of systemic risk that private funds often generate.

ENFORCEMENT APPROACHES

Enforcement of the above-mentioned rules and regulations, similar to the US, took many forms after the GFC, with many supporting mechanisms that enable their efficient implementation and facilitate compliance. The following section will explore the several means by which the EU and, particularly, the Luxembourg government and its agencies sought to achieve their goals.

As previously mentioned, regulation implementation and thus enforcement is carried out by the NCAs in each member

state. Using RTSs, ESMA and the European Commission coordinate with Luxembourg's CSSF, the implementation of the intended regulations and their consistent enforcement. Some of these enforcement methods are like those practiced in the US, but there are others that are different and purposed for jurisdiction-specific noncompliance and cross-border transactions.

Enforcement methods of the AIFMD are supervised by NCAs like the CSSF, who in turn authorize AIFMs and monitor their compliance through the methods described below.⁹³ Besides conducting periodic reviews of fund managers, NCAs have the authority to impose sanctions on AIFMs for failing to meet the directive's obligations.⁹⁴

Inspections and Audits: The CSSF may conduct on-site inspections and audits of AIFMs to verify compliance with capital requirements, risk management policies, and investor protection provisions.⁹⁵ On-site inspections are of great value to ensure that the respective activities and management(s) are carried out in the provided domicile.⁹⁶

Penalties are another means, like in the US, that are used as a non-compliance consequence, which may include fines due to registration failures,⁹⁷ AML violations,⁹⁸ and unauthorized leverage positions.

Passporting Rights Revocation would be an available consequence for those AIFMs who do not comply with AIFMD. This is a costly consequence, as NCAs can revoke the AIFM's ability to market AIFs across EU countries via passporting, effectively curtailing their operations. Being that NCAs like the CSSF hold the ability to market the requested AIFs, it is the AIFM's burden to ensure compliance with the respective AIFM

Law to be authorized and sustain Passporting rights.⁹⁹

EMIR is another regulation that is delegated to the respective NCAs, while ESMA is responsible for its uniform application across the EU. EMIR's enforcement methods are specified below.

Administrative Sanctions: Private funds trading in OTC derivatives are required to report transactions to trade repositories.¹⁰⁰ Failure to comply with EMIR's reporting, clearing, or margin requirements can lead to penalties.¹⁰¹ In the highlighted case, the CSSF sanctioned a public statement and a reprimand with a follow-up inspection because, "the oversight arrangements of the manager did not enable it to assess the quality of the reporting in accordance with the EMIR Regulation as performed by its delegated portfolio manager."¹⁰²

Mandatory Central Clearing: Regulators can enforce clearing obligations by requiring that certain derivatives be cleared through a central counterparty (CCP) or impose sanctions for non-compliance.¹⁰³

Similarly to the prior directives and regulations, the NCAs and ESMA play a key role in the uniform enforcement of MiFID II. Some of the methods of enforcement are the following:

Pre- and Post-Trade Transparency: An interrelated legislation to MiFID II is the Markets in Financial Instruments Regulation (MiFIR).¹⁰⁴ "MiFIR focuses on the technical aspects of reporting and transparency, while MiFID II addresses broader investor protection and business conduct."¹⁰⁵ ESMA monitors compliance with transparency requirements for private funds engaged in market trading,

MiFIR provides for pre-trade and post-trade transparency requirements across equity, equity-like and non-equity financial instruments. Those obligations can be waived (pre-trade requirements) or deferred (post-trade requirements) in certain circumstances. To determine the transparency obligations, which are calibrated for each financial instrument, a number of parameters have to be calculated on the basis of the trading activity of the instrument. To perform such calculations ESMA developed the Financial Instruments Transparency System (FITRS) which collects and processes the data and publish the results of those calculations.¹⁰⁶

Product Governance Requirements:

Private fund managers must comply with rules regarding the suitability of financial products for investors. Non-compliance can lead to restrictions on the distribution of investment products.

Take, for example, MiFID II's requirement to provide an annual suitability review for every client; including updating a client's circumstances, reassessing attitude to risk and capacity for loss, and providing a report to each client demonstrating their products are still suitable for meeting their objectives. It would be easy to treat the provision of this information as a "tick box" exercise, but it is essential that firms keep sight of the importance of changing client circumstances and ensuring that

products remain appropriate.¹⁰⁷

"If found to be non-compliant with MiFID II, a firm could face strict liability in some cases, such as transaction reporting – meaning it could be liable regardless of the reason for its non-compliance. This could result in considerable fines, as well as reputational damage and possible knock-on third-party claims."¹⁰⁸

"With the rise of decentralized finance and increased volatility in alternative investments, investor protection should be kept as a high priority."

Investor Protection Sanctions: MiFID II enforcement includes measures to protect investors, such as imposing penalties for misleading marketing materials or failing to disclose risks. For firms, enforcement will mean not just an algorithmic solution but efficient controls and competent managers which grants NCAs the power to enforce over not just the firm but specifically over individuals and their senior managers.¹⁰⁹

CURRENT TRENDS

Similarly to the US market, current conditions in the EU are seeing a rise in private credit as an alternative lending sources.¹¹⁰ Currently, member states are undergoing a critical shift in response to the recently released AIFMD II. From its release on April 16, 2024, member states have 24 months to prepare and legislate local laws that will adapt the relevant local regulations to the new amended directive.¹¹¹ Targeted changes under the AIFMDII that NCAs and the industry should bear in mind include: (i) delegation, authorization, disclosure to investors, and reporting; (ii) a

new loan origination regime; (iii) liquidity management tools; (iv) depositaries; (v) non-EU AIFM marketing under a national private placement regime (NPPR); and (vi) other miscellaneous amendments.¹¹² While the revamping will raise significant considerations to both AIFMs and the adjacent professionals involved, from a legal perspective, it will be interesting to see how current Luxembourg products such as SICARs,¹¹³ SIFs,¹¹⁴ RAIFs,¹¹⁵ and European AIFs like ELTIFs¹¹⁶ will adapt to the AIFMD II implications.

PART III: US PRIVATE FUNDS MARKETS BEYOND TRUMP 2025 & THE LUXEMBOURG BLUEPRINT

Regulatory oversight is expected to ease under the new Trump administration. Prioritized private funds transparency and risk mitigation present in the Biden-era, should see a shift towards a laissez-faire enforcement approach. Along with these changes, a rollback of ESG mandates and overall relaxation of reporting requirements for private funds would take place under what will likely become principle-based enforcement. Although these changes may pose an enticing horizon to private fund managers in the US, there are masked risks that should not be disregarded. Regulation step-downs may cause compliance unpredictability, and this could push investors to consider alternative jurisdictions. With the rise of decentralized finance and increased volatility in alternative investments, investor protection should be kept as a high priority.

However, the answer should not be continued increase of oversight by regulators, but an overhaul of private fund frameworks.

I argue that instead of reinventing the wheel, we should turn to our neighbors who have succeeded in developing a private funds regulatory and enforcement system that aligns with the administration's goals of a flourishing pro-business ecosystem. Luxembourg would be a proper blueprint to consider. Outstanding qualities of this jurisdiction consist of strong, yet flexible regulatory structures as seen through the AIFMD-compliant funds that meet NCA demands while leveraging the RAIF as an operationally efficient product. Predictable and tax-friendly vehicles such as the SCSp alleviate investors from regulatory friction. Through extensive analysis of market responses to rolling regulations, Luxembourg can tailor regulatory regimes to specific investor profiles. As a result, the abovementioned initiatives have allowed this jurisdiction to align compliance with market demand, bolstering efficiency without sacrificing stability.

The US could adapt and implement similar initiatives in the overhaul. For instance, implementing a US version of the RAIF could increase the use of domestic vehicles while promoting operational flexibility. Through a tiered oversight approach such as Luxembourg's, regulators would no longer need to engage in regulatory overreach and rollback cycles that widen inefficiencies. Modernizing and rethinking tax treatment of private funds is another avenue that should be explored. By introducing tax clarity and incentives, capital growth will inevitably result, existing without excessive loopholes and with greater regulatory certainty. The US could seek to adopt a similar passporting system for foreign funds and their managers to truly enhance the cross-border capital-

raising processes without overly burdensome market-entry requirements.

"A Luxembourg-inspired private funds framework rehaul would not only reduce regulatory burdens and maintain market trust and transparency."

However, the grass is not all green within the ecosystem of the Luxembourg model. There are several shortcomings that Luxembourg is currently trying to address. Conflicts of interests often arise between depositaries and fund managers due to the closeness of the private fund community, which calls for NCA supervision.¹¹⁷ Lack of on-site inspection frameworks for portfolio managers can be impracticable when these are found overseas.¹¹⁸ Unclear enforcement methods and winding-up framework harmonization require constant updates due to continuous legislation, and this leads to a widening gap of interpretation between local and EU regulation that can lead to deteriorated investor protections.¹¹⁹ Under these considerations, there is ample opportunity to recognize how the current US framework's strengths optimally address the proposed framework's shortcomings. For once, the model would be implemented in a significantly larger market that saw a high of 15,396 SEC-registered investment advisers by the end of 2023,¹²⁰ compared to a total of 234 in Luxembourg as of 2022,¹²¹ making it less probable for the referenced conflicts of interest to arise. Further, the depositary requirement is pertinent to the AIFMD which would not be necessarily implemented unless it was logical to do so. Secondly, with domestic portfolio managers, these

issues should be minimal, if not completely deterred. Lastly, it would be interesting to see how this model would react and adapt under the common law system. With likely existing common law precedent addressing the issues regarding investor class actions, US regimes adjacent to the private funds industry should synchronize in a flexible manner to the Luxembourg model.

With this fresh view, I argue that the current and future administrations could achieve their goals without sacrificing high-regarded investor protection. A Luxembourg-inspired private funds framework rehaul would not only reduce regulatory burdens and maintain market trust and transparency. In fact, this position would enable the US to maintain its competitive edge as a premier jurisdiction for private funds while reducing and possibly eliminating the need for offshore alternatives. As opposed to easing regulatory scrutiny, the opportunity should be seized to align the right incentives, refine frameworks, and boast market efficiency to ensure global long-term competitiveness.

CLOSING REMARKS

The evolution of private fund regulation since the GFC reflects a profound shift from a largely opaque and minimally supervised sector to one that is under intense scrutiny and regulatory oversight. Both the US and the EU have introduced frameworks aimed at balancing the systemic risk mitigation with the need to foster investor confidence and market stability. The US, through the Dodd-Frank Act and various regulator mandates, moved to impose extensive registration, reporting requirements, and restrictions on private fund activities. This shift marked a

significant departure from the previously hands-off approach. It also imposed a new level of accountability on private fund managers, particularly through measures like the Volcker Rule and Form PF that pushed them towards increased transparency.

In parallel, the EU, with a distinct approach through supranational regulations such as the AIFMD, EMIR, and MiFID II, also aimed to standardize and harmonize oversight across member states, and we explored their effect with Luxembourg as a focal jurisdiction. The creation of ESMA and the implementation of RTSs underscored the EU's commitment to systemic risk reduction, investor protection, and market efficiency. Through measures like the AIFMD's Passporting system and the CSSF's enforcement role, the EU has crafted a regulatory environment that fosters cross-border investment while prioritizing regulatory compliance and investor safeguards.

The Luxembourg model offers a blueprint that the US private fund regulatory and enforcement landscape may avail from to overcome current shortcomings. Keeping a wide and fresh view of not only the successes but also the inefficiencies experienced by our neighbors could afford valuable insights on how a complete private funds overhaul could be achieved. Relying on the Luxembourg model and leaning on the current strengths of the US would afford a global competitive edge without sacrificing valued tenets of regulators and of industry players.

Today's private funds industry operates in a landscape defined by regulatory complexity and heightened scrutiny, reflecting both jurisdictions' attempts to strike a balance between innovation and prudence. As the

private funds sector continues to evolve, especially with forthcoming changes like locally implementing the AIFMD II in the EU, the challenge will be to ensure that regulatory measures keep pace with new investment strategies, technological advances, and market dynamics. While some argue that these regulations may stifle the flexibility historically associated with private funds, they have undoubtedly contributed to greater market resilience and enhanced protections for sophisticated investors. The regulatory journeys of the US and the EU offer valuable lessons on balancing market stability with the need for innovation and confidentiality in financial markets, a balance that will continue to shape the private funds landscape globally.

END NOTES

1. LSE, *One Step Ahead: Private Equity and Hedge Funds After the Global Financial Crisis*, YouTube (Jan. 17, 2014), <https://www.youtube.com/watch?v=OqpkvBCZvI> [https://perma.cc/E9WR-QG9Q].
2. Ray Ball, *The Global Financial Crisis and the Efficient Market Hypothesis: What Have We Learned?* 21 J. Applied Corp. Fin. 8 (Fall 2009), https://static1.squarespace.com/tic/5e6033a4ea02d801f37e15bb/r/5f6159ad94f47c7b8a413117/1600215469638/all_2009+EMH+and+the+GFC.pdf [https://perma.cc/YG7K-55BU].
3. *Id.* at 16.
4. Intergovernmental Organizations.
5. Int'l Monetary Fund, *Regulatory Reform 10 Years After the Global Financial Crisis: Looking Back, Looking Forward*, ch. 2, at 59 (October 2018).
6. Laura Kreutzer & Russ Garland, *Twenty-five Years of Change in Private Equity*, Accordion (Sep. 1, 2016), <https://www.accordion.com/our-insights/knowledge/wall-street-journal-twenty-five-years-of-change-in-private-equity/> [https://perma.cc/NFC4-MVPY] (last accessed Nov. 29, 2024).
7. U.S. Securities and Exchange Commission, *Private Funds* (Sep. 19, 2024), <https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/private-funds> [https://perma.cc/7LPB-EN3P] (last visited Nov. 29, 2024).
8. C.J. Axon & R.C. Darton, *Sustainable Production and Consumption*, ScienceDirect (2021), <https://www.sciencedirect.com/topics/engineering/systemic-risk> [https://perma.cc/ABH2-CNWD] (last accessed Nov. 29, 2024).
9. The Carta Team, *Private Funds*, Carta (Jun. 6, 2024), <https://carta.com/learn/private-funds/> [https://perma.cc/8JUL-8DZJ] (last accessed Nov. 29, 2024).
10. *Id.*
11. *Id.*
12. Holli Heiles Pandol, *Private Fund Adviser Rules*, Carta (Apr. 3, 2024), <https://perma.cc/4VNB-HDJH>.
13. *Id.*
14. *Registration Under the Advisers Act of Certain Hedge Fund Advisers*, 69 Fed. Reg. 45172, 45174, 45177 (proposed Jul. 28, 2004) (to be codified at 17 C.F.R. pts. 275, 279).
15. Laurel Fitzpatrick, *SEC Approves New Rule Requiring the Registration of Investment Advisers to Hedge Funds*, Ropes & Gray (Dec. 8, 2004), <https://perma.cc/V9AY-DMV6>.
16. *Id.*
17. *See generally Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).
18. European Patients' Academy on Therapeutic Innovation [EUPATI], *National Competent Authority [NCA]*, <https://perma.cc/B989-NDZQ>.
19. Commission de Surveillance du Secteur Financier [CSSF], *About the CSSF* (Sep. 4, 2023), <https://perma.cc/K6DU-RR46>.
20. Ass'n of the Lux. Fund Indus. [ALFI], *UCITS*, (2025), <https://perma.cc/6VZG-S4ZY>.
21. *Id.*
22. Consolidated version of the Treaty on the Functioning of the European Union No. 59/2016 of 7 June 2016, art. 153, 2016 O.J. (C 202) 115.
23. *Committee of European Securities Regulators (CESR)*, Thomson Reuters Practical Law Glossary, [https://uk.practicallaw.thomsonreuters.com/5-107-7543?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#:text=CESR%20was%20an%20independent%20body,2001%20F527%20FEC](https://uk.practicallaw.thomsonreuters.com/5-107-7543?transitionType=Default&contextData=(sc.Default)&firstPage=true#:text=CESR%20was%20an%20independent%20body,2001%20F527%20FEC) [https://perma.cc/A4HL-MCBT] (last accessed Nov. 29, 2024).
24. *Id.*
25. Jeroen van Zanten, *What Makes Luxembourg Funds Attractive to US Fund Managers*, BOLDER GROUP (Nov. 2, 2023), <https://boldergroup.com/insights/us-fund-managers-in-luxembourg/> [https://perma.cc/48Z5-Y7JS].
26. Comm'r Jaime Lizarraga, *Empowering and Protecting Private Fund Investors*, SEC Statement (Aug. 23, 2023), <https://www.sec.gov/newsroom/speeches-statements/lizarraga-statement-private-fund-advisers-082323> [https://perma.cc/QJX3-A24C].
27. *Id.*
28. Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 954 (2011).
29. DAY PITNEY, LLP, *Dodd-Frank Act Impact on Investment Advisers and Private Investment Funds*, Insights Thought Leadership (July 23, 2010), https://www.daypitney.com/insights/publications/2010/07/doddfrank-act-impact-on-investment-advisers-and-___/ [https://perma.cc/PU6X-QF3M].
30. *Id.*
31. *SEC Adopts Dodd-Frank Act Amendments to Investment Advisers Act*, SEC (June 22, 2011), <https://www.sec.gov/news/press/2011/2011-133.htm> [https://perma.cc/R9MK-JFZ6].
32. *Id.*
33. *What is Form PF?*, UMB (May 20, 2024), [https://blog.umb.com/institutional-banking-guide-what-is-form-pf/#:text=Form%20PF%20\(private%20fund\)%20is,risk%20within%20the%20financial%20sector](https://blog.umb.com/institutional-banking-guide-what-is-form-pf/#:text=Form%20PF%20(private%20fund)%20is,risk%20within%20the%20financial%20sector) [https://perma.cc/4YWT-9SWZ].
34. *Id.*
35. James Chen et al., *Volcker Rule: Definition, Purpose, How It Works, and Criticism*, Investopedia (Jun. 22, 2022), <https://www.investopedia.com/terms/v/volcker-rule.asp> [https://perma.cc/EGA6-8DCG] (last accessed Nov. 30, 2024).
36. Bd. of Governors of the Fed. Rsrv. Sys. et al., *Agencies Issue Final Rules Implementing the Volcker Rule* (Dec. 10, 2010), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20131210a.htm> [https://perma.cc/P5CH-KS6Y] (last accessed Nov. 30, 2024).
37. Koby Kastiel, *The Volcker Rule: A First Look at Key Changes*, Harv. L. Sch. F. Corp. Governance (Dec. 18, 2013), <https://corpgov.law.harvard.edu/2013/12/18/the-volcker-rule-a-first-look-at-key-changes/> [https://perma.cc/3BJF-MR3P] (last accessed Nov. 30, 2024).
38. *Id.*
39. V. Gerard Comizio & Nathan S. Brownback, *Finalized Volcker Rule Amendments*, Harv. L. Sch. F. Corp. Governance (Aug. 10, 2019), <https://corpgov.law.harvard.edu/2019/08/10/finalized-volcker-rule-amendments/> [https://perma.cc/2AFH-PGAC] (last visited Nov. 30, 2024).
40. *Id.*
41. The Carta Policy Team, *What the SEC's Rule Changes Mean for Private Funds*, Carta (Aug. 29, 2023), <https://carta.com/blog/sec-proposed-rules-private-funds/> (last visited Nov. 30, 2024).
42. *Id.*
43. Registered Investment Adviser (RIA), *Registered Investment Advisor (RIA): Definition, Duties, and Responsibilities*, <https://www.investopedia.com/terms/r/ria.asp#:text=Investopedia%20%2F%20Julie%20Bang,Definition,may%20manage%20their%20investment%20portfolios> [https://perma.cc/29Q9-EVPV] (last accessed Nov. 30, 2024).
44. Public Company Accounting Oversight Board (PCAOB), *Public Company Accounting Oversight Board (PCAOB)*, <https://www.investor.gov/introduction-investing/investing-basics/glossary/public-company-accounting-oversight-board-pcaob#:text=The%20Public%20Company%20Accounting%20Oversight,reports%20for%20publicly%20traded%20companies> [https://perma.cc/446F-495Z] (last accessed Nov. 30, 2024).
45. The Carta Policy Team, *supra* note 41.
46. *See id.*
47. *See Nat'l Ass'n of Priv. Fund Managers et al. v. SEC*, No. 23-60471, slip op. at 25 (5th Cir. filed June 5, 2024), (vacating agency rule as exceeding statutory authority).
48. *See generally* John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, YALE J. ON REGUL. BULL. (2023), <https://www.yalejreg.com/bulletin/vacatur-of-rules-under-the-administrative-procedure-act/> [https://perma.cc/BU4T-SAZR].
49. Will Kenton, *Derivatives Time Bomb: Definition and Warren Buffett's Warnings*, INVESTOPEDIA (Sept. 23, 2024), <https://www.investopedia.com/terms/d/derivativestimebomb.asp> [https://perma.cc/83YZ-L3ZK].
50. *Dodd-Frank Act*, COMMODITY FUTURES TRADING COMMISSION, <https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm> [https://perma.cc/X7CT-VGW5] (last visited Nov. 30, 2024).

- 30, 2024).
51. *Id.*
 52. Stacie Hartman & Stephen C. Tirrell, *New CFTC Rule 4.7 Changes Have Private Funds Industry Breathing a Sigh of Relief*, MORGAN LEWIS (Sept. 24, 2024), <https://www.morganlewis.com/pubs/2024/09/new-cftc-rule-4-7-changes-have-private-funds-industry-breathing-a-sigh-of-relief> [https://perma.cc/ND57-2BHG].
 53. *Id.*
 54. Adam Hayes, *Financial CHOICE Act: What It Is and How It Works*, INVESTOPEDIA (Feb. 4, 2025), <https://www.investopedia.com/terms/f/financial-choice-act.asp> [https://perma.cc/4L9M-PZNK].
 55. *Id.*
 56. *Nat'l Ass'n of Priv. Fund Managers et al. v. SEC*, 103 F4th 1097 (5th Cir 2024).
 57. Ropes & Gray, *A Second Trump Administration: Implications for Asset Managers* (Nov. 6, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/11/a-second-trump-administration-implications-for-asset-managers> [https://perma.cc/XNV2-VX6B] (last accessed Nov. 30, 2024).
 58. Bd. of Governors of the Fed. Rsr. Sys., *Comprehensive Capital and Analysis Review and Dodd-Frank Act Stress Tests: Questions and Answers*, <https://www.federalreserve.gov/publications/comprehensive-capital-analysis-and-review-questions-and-answers.htm> [https://perma.cc/A8BN-ZVDU] (last accessed Nov. 30, 2024).
 59. Mark K. Schonfeld et al., *The Expansion of SEC Enforcement Under the Dodd-Frank Act*, 27 Rev. Banking & Fin. Servs. 21 (March 2011), <https://www.gibsondunn.com/wp-content/uploads/documents/publications/pansionofSECEnforcement0311.pdf> [https://perma.cc/4G4G-K94K] (last accessed Nov. 30, 2024).
 60. *Id.* at 26.
 61. David Meister, *An Illusory Promise or Real Change? Transition at CFTC Brings Hope for Dodd-Frank Act Revisions*, Skadden's 2020 Insights (Jan. 21, 2020), <https://www.skadden.com/insights/publications/2020/01/2020-insights/an-illusory-promise-or-real-change> [https://perma.cc/Z3GC-Y347] (last accessed Nov. 30, 2024).
 62. Commodity Futures Trading Commission, *Whistleblower Program*, <https://www.whistleblower.gov/overview> [https://perma.cc/X8RN-R2XT] (last accessed Nov. 30, 2024).
 63. *Supra* note 59 at 28.
 64. U.S. Securities and Exchange Commission, *Enforcement and Litigation*, <https://www.sec.gov/enforcement-litigation> [https://perma.cc/8T83-WSQP] (last accessed Nov. 30, 2024).
 65. Bd. of Governors of the Fed. Rsr. Sys., *Volcker Rule*, <https://www.federalreserve.gov/supervisionreg/volcker-rule.htm> [https://perma.cc/Z5N7-HCZU] (last visited Nov. 30, 2024).
 66. *Id.*
 67. Office of the Comptroller of the Currency, *Volcker Rule Interim Examination Procedures*, at 1 (2014), <https://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-27a.pdf> [https://perma.cc/VSS5-EWPL] (last accessed Nov. 30, 2024).
 68. Dechert LLP, *Private Credit Highlights and 2024 Outlook*, <https://www.dechert.com/about/dechert-year-in-review/private-credit-highlights-and-outlook.html> [https://perma.cc/P7W6-3W2L] (last accessed Nov. 30, 2024).
 69. Tim Toska, *5 trends Shaping Private Markets Secondaries in 2024*, Alter Domus (Mar. 6, 2024), <https://alterdomus.com/insight/5-trends-shaping-private-markets-secondaries-in-2024/> [https://perma.cc/4SKU-FV6W] (last accessed Nov. 30, 2024).
 70. Claire Coe Smith, *Legal Advisers on the Future of Funds Regulation*, Private Funds CFO (Aug. 24, 2024), <https://www.privatefundscfo.com/legal-advisers-on-the-future-of-funds-regulation/> [https://perma.cc/EP6V-LB74] (last accessed Nov. 30, 2024).
 71. *Id.*
 72. ESMA, *About ESMA*, <https://www.esma.europa.eu/about-esma> [https://perma.cc/D59R-HU3U] (last accessed Nov. 30, 2024).
 73. PWC, *Alternative Investment Fund Managers Directive (AIFMD)*, <https://www.pwc.lu/en/alternative-investments/aifmd.html#:~:text=It%20is%20designed%20to%20protect,a%20a%20condition%20of%20operation> [https://perma.cc/C2AE-B24B] (last accessed Nov. 30, 2024).
 74. BNP Paribas, *Alternative Investment Fund Managers Directive (AIFMD) – Regulation Memo*, <https://securities.cib.bnpparibas/alternative-investment-fund-managers-directive-aifmd-regulation-memo/> [https://perma.cc/NKA3-42YZ] (last accessed Nov. 30, 2024).
 75. Jon Masters, *A Decade of AIFMD: The Story So Far*, JTC (Dec. 6, 2023), <https://www.jtcgroup.com/insights/a-decade-of-aifmd-the-story-so-far/> [https://perma.cc/SH7X-HRST] (last accessed Nov. 30, 2024).
 76. Linklaters, *Leverage* (Jun. 3, 2021), <https://www.linklaters.com/en/insights/publications/aifm/leverage> [https://perma.cc/XES9-G48N] (last accessed Nov. 30, 2024).
 77. *Id.*
 78. ESMA, *Assessing Risks Posed by Leveraged AIFs in the EU* (Jan. 30, 2024), at 3, https://www.esma.europa.eu/sites/default/files/2024-01/ESMA60-1389274163-2572_TRV_article_-_Assessing_risks_posed_by_leveraged_AIFs_in_the_EU.pdf [https://perma.cc/7GUL-BH79] (last accessed Dec. 1, 2024).
 79. *Id.* at 9.
 80. *Supra* note 76.
 81. Arendt, *AIFM Law*, <https://www.arendt.com/news-insights/hot-topics-and-products/aifm-law/> [https://perma.cc/87S2-JRKS] (last accessed Dec. 1, 2024).
 82. Elvinger Hoss Prussen, *AIFM Law* (Jul. 2023), https://elvingerhoss.lu/sites/default/files/documents/legal_topics/investment/EHP-AIFM-Law-FR-ENG.pdf [https://perma.cc/A8GX-Z4ZW] (last accessed Dec. 1, 2024).
 83. European Banking Authority, *Regulatory Technical Standards, Open Banking*, <https://www.openbanking.org.uk/glossary/european-banking-authority-regulatory-technical-standards/> [https://perma.cc/QZF3-2C32] (last accessed Dec. 1, 2024).
 84. ALFI, *ELTIF 2.0 – the European long-term investment fund (ELTIF)* (Nov. 2023), https://www.alfi.lu/getattachment/fc1d6379-cf85-404a-9695-adb24c137ed4/app_data-import-alfi-eltif-2-0-the-european-long-term-investment-fund-eltif.pdf (last accessed Dec. 1, 2024).
 85. Practical Law Financial Services, *EU Financial Services Technical Standards and Guidance*, [https://uk.practicallaw.thomsonreuters.com/5-557-0605?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-557-0605?transitionType=Default&contextData=(sc.Default)&firstPage=true) [https://perma.cc/ZRA4-D792] (last accessed Dec. 1, 2014).
 86. EMIR, Europex, <https://www.europex.org/eulegislation/emir/#:~:text=The%20European%20Market%20Infrastructure%20Regulation,in%20Pittsburgh%20in%20September%202009> [https://perma.cc/C4C4-TSKV] (last accessed Dec. 1, 2024).
 87. *Id.*
 88. European Commission, *Derivatives / EMIR*, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/financial-markets/post-trade-services/derivatives-emir_en [https://perma.cc/GJ83-39FP] (last accessed Dec. 1, 2024).
 89. CSSF, *Markets in Financial Instruments (MiFID II/MiFIR)* (Apr. 5, 2023), <https://www.cssf.lu/en/markets-financial-instruments-mifid-ii-mifir/> [https://perma.cc/6QTB-RQ6T] (last accessed Dec. 1, 2024).
 90. Will Kenton et al., *Markets in Financial Instruments Directive (MiFID) Definition*, Investopedia (Sep. 17, 2023), <https://www.investopedia.com/terms/m/mifid.asp#:~:text=What%20Is%20the%20Difference%20Between,type%20of%20securities%20and%20derivatives> [https://perma.cc/8NN2-LQGE] (last accessed Dec. 1, 2024).
 91. *Id.*
 92. Marsh, *MiFID II: Why Compliance Should be an Ongoing Exercise for Firms* (Feb. 2019), at 2, <https://www.marsh.com/content/dam/marsh/Documents/PDF/UK-en/MiFID%20II.pdf> [https://perma.cc/L9V7-SWLY] (last accessed Dec. 1, 2024).
 93. CSSF, *Alternative Investment Fund Managers (AIFM)* (Nov. 19, 2021), <https://www.cssf.lu/en/aifm/> [https://perma.cc/LGL7-YZPX] (last accessed Dec. 1, 2024).
 94. CSSF, *Periodic and Non-Periodic Transmission of Information by AIFMs* (Dec. 15, 2023), <https://www.cssf.lu/en/periodic-and-non-periodic-transmission-of-information-aifms/> (last accessed Dec. 1, 2024).
 95. ALFI, *Considerations for Investment Fund Managers with Regard to On-Site Inspections in Luxembourg by the CSSF*, at 5, <https://www.alfi.lu/alfi/media/statements/2020/on-site-inspections-2020-28-01.pdf> (last accessed Dec. 1, 2024).
 96. *Id.*
 97. CSSF, *Administrative Sanction Imposed on the Investment Fund*

- Manager Cement GP* (Sep. 27, 2024), https://www.cssf.lu/wp-content/uploads/S_75_GFI_Cement_GP_2024.05.22_en.pdf (last accessed Dec. 1, 2024).
98. CSSF *Fines and Reprimands Managers for AML Failures*, Investment Officer (Jun. 14, 2024), <https://www.investmentofficer.lu/en/news/cssf-fines-and-reprimands-managers-aml-failures> [https://perma.cc/S5QZ-J3CQ] (last accessed Dec. 1, 2024).
 99. CSSF, *National Provisions Governing the Marketing Requirements for Alternative Investment Funds* (Jul. 5, 2022), <https://www.cssf.lu/en/marketing-alternative-investment-funds/> [https://perma.cc/8YBW-5HWW] (last accessed Dec. 1, 2024).
 100. *Supra* note 88.
 101. Lydia Linna, *CSSF imposes sanction on DNB Asset Management S.A.*, Delano (Sep. 10, 2024), <https://delano.lu/article/cssf-imposes-sanction-dnb-asse> [https://perma.cc/2K23-A29A] (last accessed Dec. 1, 2024).
 102. *Id.*
 103. ESMA, *Clearing obligation and risk mitigation techniques under EMIR*, <https://www.esma.europa.eu/post-trading/clearing-obligation-and-risk-mitigation-techniques-under-emir#:~:text=EMIR%20includes%20the%20obligation%20to,EMIR%20establishes%20risk%20mitigation%20techniques> [https://perma.cc/T43P-R4EW] (last accessed Dec. 1, 2024) (detailed information on central counterparty mechanism).
 104. Jennie Clarke, *MiFID II and MiFIR: Key Differences and Similarities*, Global Relay (Aug. 30, 2024), <https://www.globalrelay.com/resources/the-compliance-hub/rules-and-regulations/mifid-ii-and-mifir-key-differences-and-similarities/#:~:text=In%20brief%3A,investor%20protection%20and%20business%20conduct> [https://perma.cc/8XQY-VMHP] (last accessed Dec. 1, 2024).
 105. *Id.*
 106. ESMA, *Manual On post-trade transparency under MiFID II/ MiFIR* (Oct. 16, 2024), at 16, https://www.esma.europa.eu/sites/default/files/2023-07/ESMA74-2134169708-6870_Manual_on_post-trade_transparency.pdf [https://perma.cc/M27V-T4WW] (last accessed Dec. 1, 2024).
 107. *Supra* note 92.
 108. *Id.* at 1.
 109. *Id.* at 2.
 110. *Supra* note 68.
 111. Dechert LLP, *AIFMD 2.0: What's New? Analysis of Key Changes* (Mar. 27, 2024), <https://www.dechert.com/knowledge/onpoint/2024/3/aifmd-2-0--what-s-new--analysis-of-key-changes.html> [https://perma.cc/BD6L-YH7G] (last accessed Dec. 1, 2024).
 112. *Id.*
 113. SICARs (Sociétés d'Investissement en Capital à Risque), *SICAR (Investment Company in Risk Capital)*, [https://www.alfi.lu/en-gb/pages/setting-up-in-luxembourg/alternative-investment-funds-legal-vehicles/sicar-\(investment-company-in-risk-capital\)](https://www.alfi.lu/en-gb/pages/setting-up-in-luxembourg/alternative-investment-funds-legal-vehicles/sicar-(investment-company-in-risk-capital)) [https://perma.cc/VW8C-KKVU] (last accessed Dec. 1, 2024).
 114. SIFs (Specialized Investment Funds), *SIF (Specialised Investment Funds)*, [https://www.alfi.lu/en-gb/pages/setting-up-in-luxembourg/alternative-investment-funds-legal-vehicles/sif-\(specialised-investment-funds\)](https://www.alfi.lu/en-gb/pages/setting-up-in-luxembourg/alternative-investment-funds-legal-vehicles/sif-(specialised-investment-funds)) [https://perma.cc/NEF9-38CG] (last accessed Dec. 1, 2024).
 115. RAIFs (Reserved Alternative Investment Fund), *RAIF (Luxembourg Reserved Alternative Investment Fund)*, [https://www.alfi.lu/en-gb/pages/setting-up-in-luxembourg/alternative-investment-funds-legal-vehicles/raif-\(luxembourg-reserved-alternative-investment-fund\)](https://www.alfi.lu/en-gb/pages/setting-up-in-luxembourg/alternative-investment-funds-legal-vehicles/raif-(luxembourg-reserved-alternative-investment-fund)) [https://perma.cc/H4CP-JZ5Z] (last accessed Dec. 1, 2024).
 116. ELTIFs (European Long-Term Investment Fund), *ELTIF 2.0 – the European Long-Term Investment Fund (ELTIF)* (Nov. 2023), https://www.alfi.lu/getattachment/fc1d6379-cf85-404a-9695-adb24c137ed4/app_data-import-alfi-eltif-2-0-the-european-long-term-investment-fund-eltif-.pdf [https://perma.cc/26Q5-775X] (last accessed Dec. 1, 2024).
 117. International Monetary Fund, *Luxembourg: Financial Sector Assessment Program — Technical Note on Investment Funds: Regulation and Supervision*, IMF Country Report No. 24/181 (2024) <https://www.elibrary.imf.org/view/journals/002/2024/181/article-A001-en.xml> [https://perma.cc/X4MM-BT78] (last accessed Feb. 22, 2025).
 118. *Id.*
 119. *Id.*
 120. IAA, *Investment Adviser Industry Snapshot 2024*, <https://www.investmentadviser.org/industry-snapshots/> [https://perma.cc/5Z5M-F53S] (last accessed May 1, 2025).
 121. Statista, *Number of Asset Management Companies in Belgium Luxembourg, and Netherlands (Benelux) from 2009 to 2022*, <https://www.statista.com/statistics/954430/number-of-asset-managers-in-benelux/#:~:text=Since%202009%2C%20most%20of%20the,of%20234%20as%20of%202022> [https://perma.cc/9TTY-5EA8] (last accessed May 1, 2025).

ASEAN'S TURN FROM ICSID AND SINGAPORE'S RESISTANCE TO THE RISE OF REGIONALISM

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Abstract: This Article critically examines the evolving engagement of the Association of Southeast Asian Nations (ASEAN) with the international investment law regime, focusing on its shift away from traditional investor-state dispute settlement (ISDS) under ICSID and UNCITRAL. Challenging the purported neutrality of ISDS, the study argues that ASEAN's recalibration is not technocratic refinement but a normative intervention grounded in postcolonial resistance, developmental pluralism, and legal sovereignty. Drawing on doctrinal analysis, arbitral jurisprudence, and political economy scholarship, the Article traces how ASEAN's treaty innovations, regional frameworks like the ASEAN Comprehensive Investment Agreement (ACIA), and domestic reforms collectively articulate a model of "defensive pluralism." Through case studies of Indonesia, Malaysia, Vietnam, the Philippines, and—pivotal—Singapore, the Article shows that ASEAN's regional turn is being made against the friction of one member state's unbroken fidelity to the Washington Consensus paradigm. The Article concludes that the ASEAN debate is not

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merely about whether ISDS should be reformed at the margins, but about whether investment risk should continue to be allocated through adjudication at all. Building on Robert Howse's observation that the architecture of investor protection is overdetermined by ISDS, the Article argues that political risk insurance (PRI)—properly designed, transparently priced, and coordinated through MIGA, regional vehicles, and modernized national export-credit agencies—should complement and, in important domains, replace ISDS as ASEAN's preferred mechanism for managing political risk. Singapore's resistance to this regional turn is, on this account, not pragmatism but a costly nostalgia.

I. INTRODUCTION

The international investment law regime, historically scaffolded by institutions like the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), has functioned as a juridical mechanism for the governance

of transnational capital flows. Framed as "depoliticized," investor-state dispute settlement (ISDS) procedures were embedded within an emerging *lex mercatoria* that purported to neutralize politics in favor of juridical coherence.¹ Yet that "neutrality" has long masked the asymmetrical political economy within which ISDS was conceived and operates. For states across the Global South—many of whom acceded to these regimes under structural adjustment or investment-promotion pressures—the supposed apoliticism of ISDS has frequently materialized as a juridical discipline on sovereignty itself.² That this has occurred through treaties drafted in the idiom of liberal universalism only sharpens the dissonance. Investment law's claim to universality is not merely contested but increasingly untenable in light of shifting geopolitical alignments, regional legal pluralism, and post-colonial resistance to asymmetrical adjudication.

Within this evolving landscape, the Association of Southeast Asian Nations (ASEAN) presents a particularly salient case. The bloc, comprising ten states spanning disparate legal traditions, developmental trajectories, and governance models, has moved—deliberately and unevenly—toward a reconfiguration of its engagement with global investment law.³ This reconfiguration cannot be understood as a technocratic adjustment to procedural inefficiencies. Rather, it reflects a deeper critique of the liberal legal ordering that investment treaties

encode: a refusal of the premise that law should be structurally biased toward capital mobility at the expense of democratic regulation. ASEAN's evolving treaty practice, preference for local remedies, and calibrated participation in multilateral reform platforms like UNCITRAL Working Group III signal a jurisprudential pragmatism grounded in political economy.

The story is not, however, one of bloc-wide consensus. Singapore—ASEAN's wealthiest state and its largest outbound capital exporter—has repeatedly held the line for the orthodoxy that the rest of the region has begun to leave behind. In its treaty practice with the European Union, in the CPTPP, and in its bilateral programs with Australia, China, India, and the United States, Singapore has insisted on broad, ICSID- and UNCITRAL-anchored ISDS clauses, pre-dispute consent, and minimal procedural filters.⁴ In RCEP, Singapore was on record as preferring the inclusion of ISDS, only to be overruled by a coalition led, conspicuously, by Malaysia.⁵ This Article reads Singapore's resistance not as cosmopolitan sophistication but as a continuation of Washington Consensus orthodoxy—the disciplinary package of trade and investment liberalization, deregulation, and the depoliticization of dispute resolution that the Bretton Woods institutions exported in the 1980s and 1990s, and that has since lost much of its empirical and normative footing.⁶

This Article advances three claims. First, ASEAN's divergence from ICSID/UNCITRAL is best read not as fragmentation but as norm-production: an attempt to rebalance legal authority in ways that acknowledge the embeddedness

of investment law in broader systems of inequality. Second, Singapore's continued fidelity to the Washington Consensus constitutes a measurable drag on this regional project—and, as the case study below shows, an awkward fit even with Singapore's own strategic profile as an outbound investor whose firms are now defendants as well as claimants in the global system. Third, the more interesting question for ASEAN is not which courtroom adjudicates investor claims but whether courtrooms are the right institution at all. Building on Robert Howse's argument that political risk insurance (PRI) is the institution actually most analogous to what ISDS purports to do—price political risk—and on the recent intervention of Wolfgang Alschner along the same lines,⁷ the Article proposes that ASEAN's regionalism would be substantially advanced by elevating PRI, mediation, and other *ex ante* or non-adjudicatory instruments above ISDS, and by treating the latter as a residual mechanism, not the default.

The argument proceeds in ten Parts. **Part II** describes the Washington-Consensus inheritance of the ICSID/UNCITRAL regime. **Part III** situates ASEAN's historical engagement. **Part IV** examines ASEAN's regionalism. **Part V** offers case studies of Indonesia, Malaysia, Vietnam, the Philippines, and Singapore. **Part VI** surveys the international legal scholarship on ASEAN's divergence. **Part VII** looks beyond doctrine to the structural politics of investment law. **Part VIII** considers alternative dispute settlement models. **Part IX** develops the PRI argument. **Part X** concludes.

II. THE TRADITIONAL INTERNATIONAL INVESTMENT LAW FRAMEWORK AS WASHINGTON CONSENSUS

The edifice of international investment law, as constructed in the postwar era and consolidated through the late twentieth century, rests upon a matrix of juridical and ideological commitments: the sanctity of private capital, the depoliticization of dispute resolution, and the formal equality of treaty contracting parties.⁸ These commitments do not float free of political-economic context. They cohere as the legal-institutional limb of what came to be known—following John Williamson—as the Washington Consensus: the policy package of trade liberalization, deregulation, privatization, fiscal discipline, and openness to FDI exported by the IMF, World Bank, and U.S. Treasury through structural adjustment programs and treaty practice from the 1980s onward.⁹ Institutionalized through ICSID and UNCITRAL, and expanded through a proliferating network of bilateral investment treaties (BITs), this regime promised to insulate investment governance from geopolitical contingency. Yet beneath the veneer of neutrality lies a more conflicted terrain—one in which legal form serves to entrench economic asymmetries, normalize investor privileges, and restrict the regulatory space of host states, particularly in the Global South.¹⁰

A. ICSID AND THE DEPOLITICIZATION OF DISPUTE RESOLUTION

The ICSID Convention, adopted in 1965, is emblematic of the broader ideological project: to translate disputes

into apolitical legal claims, adjudicated by technocratic tribunals ostensibly insulated from political contestation.¹¹ This structure elevated arbitral logic above domestic constitutionalism, constructing an international dispute resolution mechanism in which private capital could challenge sovereign regulatory acts with minimal accountability. ICSID's exclusion of domestic courts and the enforceability of awards under Article 54 created a system in which public-interest regulation could be judicially subordinated to the expectations of foreign investors.

"ICSID's jurisprudence—especially in landmark cases such as Tecmed v. Mexico and Occidental v. Ecuador—has often privileged expansive interpretations of "fair and equitable treatment" (FET) and indirect expropriation, effectively chilling regulatory interventions."

This architecture was not merely juridical but profoundly political. It evolved in tandem with the economic and geopolitical reordering of the decolonization period, embedding asymmetrical legal obligations into ostensibly reciprocal treaty forms.¹² ICSID's jurisprudence—especially in landmark cases such as *Tecmed v. Mexico* and *Occidental v. Ecuador*—has often privileged expansive interpretations of "fair and equitable treatment" (FET) and indirect expropriation, effectively chilling regulatory interventions.¹³ The point is not that arbitrators are uniformly captured but that the institutional logic—party-appointment, confidentiality, no appellate correction, no horizontal stare decisis—produces

a jurisprudence whose normative tilt is structural rather than incidental.

B. UNCITRAL AND THE PROCEDURAL ILLUSION OF FLEXIBILITY

While the UNCITRAL Arbitration Rules provide a more decentralized procedural alternative to ICSID, their operation remains entrenched within the same conceptual architecture. The rules' promise of procedural flexibility has often functioned as a thin veil for the same asymmetries: confidential tribunals, uneven access to legal expertise, and the absence of appellate oversight.¹⁴ As a result, the promise of party autonomy is often illusory; investors enjoy a repeat-player advantage while states, particularly those without robust legal infrastructure, remain structurally disadvantaged.

The post-2010 revisions to UNCITRAL's rules and the establishment of transparency standards (e.g., the Mauritius Convention) have addressed some legitimacy concerns but do not displace the fundamental critique: arbitration remains ill-equipped to adjudicate complex public-law disputes that turn on competing social, environmental, and economic interests.¹⁵ This critique has gained traction in reform debates under UNCITRAL Working Group III, where calls for institutional redesign—a standing investment court, an appellate body, mediation, dispute prevention, and a multilateral advisory center—reflect broader disillusionment with the privatized dispute paradigm.¹⁶

C. THE EXPANSION AND FRAGMENTATION OF TREATY ARBITRATION

The proliferation of investment treaties—rising from fewer than 500 in 1990 to over 2,800 by 2010—engendered what

Schill has termed the "multilateralization" of international investment law.¹⁷ Yet this expansion has simultaneously produced fragmentation, inconsistent jurisprudence, and growing contestation. Treaty arbitration, though presented as neutral and apolitical, has repeatedly delivered outcomes that constrain host-state discretion in highly sensitive sectors such as public utilities, extractives, and health policy.¹⁸

Recent scholarship has emphasized how the regime reflects deeper dynamics of global governance, where legal formalism operates to insulate capital from democratic contestation and transposes the prerogatives of multinational corporations into enforceable treaty claims.¹⁹ The resulting regime privileges juridical coherence over distributive justice and reinforces the core-periphery dynamics that many Global South states sought to escape through post-colonial economic sovereignty.²⁰ ICSID, UNCITRAL, and treaty-based arbitration thus represent not merely legal tools, but mechanisms of discipline—structures that shape the boundaries of permissible state conduct in the name of investment protection. ASEAN's turn away from this architecture, then, should be read not only as regional legal pluralism, but as a refusal of the depoliticized fiction at the heart of the Washington-Consensus model.

III. ASEAN PAST AND THE ICSID/UNCITRAL REGIME

ASEAN's relationship with the dominant mechanisms of international investment law—particularly ICSID and UNCITRAL—has been marked by strategic ambivalence. While several ASEAN states

acceded to ICSID in the early decades of its existence and incorporated UNCITRAL-based arbitration clauses into a proliferation of BITs, this participation cannot be read as unequivocal endorsement. It reflects a complex interplay of legal emulation, development imperatives, and geopolitical maneuvering in a post-colonial context.²¹ For many ASEAN states, early engagement with ISDS was less a commitment to juridical liberalism than a pragmatic maneuver aimed at attracting foreign capital amid structural adjustment pressures and liberal economic orthodoxy.²²

A. ICSID RATIFICATION AND UNEVEN TREATY PRACTICE

As of 2024, six of the ten ASEAN member states—Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam—remain parties to the ICSID Convention.²³ This pattern of participation, however, obscures deep divergences in legal practice, institutional uptake, and political disposition toward ISDS. Brunei, Cambodia, Laos, and Myanmar have refrained from ratifying ICSID or have largely abstained from ICSID-based arbitration, opting instead for ad hoc approaches or regional forums.²⁴ The diversity reflects the heterogeneity of ASEAN's political economies and legal cultures, but it also marks a skepticism about ceding legal authority to external tribunals with questionable democratic accountability.

ASEAN's early BITs—heavily influenced by Global North treaty models—tended to reproduce boilerplate provisions favoring expansive investor protections with little consideration for host-state policy autonomy or development asymmetries.²⁵ This juridical borrowing, often mediated by donor conditionalities and technocratic advisory

bodies, inscribed an asymmetrical legal order into ASEAN's treaty practice. The widespread adoption of such treaties should not be mistaken for consent to their ideological foundations; it was, at best, a concession to necessity, and at worst, a legal manifestation of post-colonial economic subordination.

B. JURISPRUDENTIAL ENCOUNTERS AND STRATEGIC RECALIBRATION

By the early 2000s, several ASEAN states had been drawn into contentious ISDS proceedings, often involving resource governance, environmental regulation, and commercial licensing. Indonesia's experience in *Churchill Mining v. Indonesia* and *Planet Mining v. Indonesia*—both involving allegations of expropriation following the cancellation of coal mining licenses—illustrates the high financial and reputational costs of arbitration even when investor claims are ultimately dismissed.²⁶ These cases, despite their outcomes, exposed the vulnerability of domestic regulatory decisions to external juridical scrutiny and spurred growing calls for treaty reform and institutional reconsideration.

“The ACIA’s layered dispute resolution framework—allowing parties to choose between ICSID, UNCITRAL, or ASEAN’s Enhanced Dispute Settlement Mechanism (EDSM)—foregrounds procedural pluralism and recalibrates investor-state relations toward dialogic resolution.”

Malaysia's legal entanglements in *Malaysian Historical Salvors v. Malaysia* further illuminated the blurred line between commercial and sovereign acts under ICSID's

jurisdictional thresholds.²⁷ Vietnam, likewise, has been subject to claims under both ICSID and UNCITRAL rules, raising concerns over policy constraints in sectors critical to national development.²⁸ These episodes revealed the material risks of arbitration, particularly for states lacking extensive legal infrastructure or negotiating leverage.

Crucially, such disputes catalyzed a strategic reassessment. Indonesia's sweeping review of its investment treaties in 2014, leading to the termination or non-renewal of more than twenty BITs, was not an isolated policy reversal but part of a broader recalibration.²⁹ Vietnam and other ASEAN members began embedding safeguards into newer treaties—narrowing substantive obligations, curbing most-favored-nation (MFN) clause expansion, and conditioning investor access to ISDS on domestic remedies or mediation.³⁰

C. REGIONALISM AND LEGAL PLURALISM AS RESPONSE

Rather than retreating from international investment law, ASEAN has increasingly turned inward, privileging regional frameworks that reflect its normative preferences and legal pluralism. The ASEAN Comprehensive Investment Agreement (ACIA), which entered into force in 2012, embodies this shift. While it retains ISDS provisions, the ACIA imposes procedural filters such as a six-month consultation period, optional exhaustion of local remedies, and institutional mediation.³¹ The ACIA's layered dispute resolution framework—allowing parties to choose between ICSID, UNCITRAL, or ASEAN's Enhanced Dispute Settlement Mechanism (EDSM)—foregrounds procedural pluralism and

recalibrates investor-state relations toward dialogic resolution.

This regional turn is not simply a legal preference but a political one. It reflects ASEAN's broader diplomatic ethos—commonly characterized as the “ASEAN Way”—emphasizing consensus, sovereignty, and non-interference.³² In resisting the centralization of legal authority in ICSID-style arbitration, ASEAN reasserts the primacy of national and regional institutions, reclaiming space for regulatory experimentation and political deliberation. ASEAN's historical engagement with ICSID and UNCITRAL, once shaped by economic vulnerability and juridical emulation, has thus evolved into a more critical and self-determined legal posture.

IV. REGIONALISM IN ASEAN INVESTMENT DISPUTE SETTLEMENT

The regionalism that undergirds ASEAN's investment dispute settlement approach is not merely geographical; it is ideological. It reflects a deliberate reconfiguration of legal authority, motivated by a desire to recalibrate the terms of engagement between capital and sovereignty.³³ In contrast to legal-integrationist models such as the European Union—which pursue uniformity and supranational authority—ASEAN's regionalism embraces heterogeneity, legal pluralism, and procedural restraint. This is not a failure of institutional development but a conscious strategy: a refusal to surrender regulatory discretion to the presumptive neutrality of international arbitration and a preference for consensus-based deliberation embedded within shared political histories.

A. ACIA AS A NORMATIVE INTERVENTION

The ACIA, signed in 2009 and entering into force in 2012, marks a critical turning point in the bloc's engagement with investment law.³⁴ While retaining core features of international investment treaties—protections against expropriation, national treatment, and access to ISDS—the ACIA also introduces procedural filters and interpretive flexibilities that significantly qualify investor access. These include a six-month consultation period, an optional requirement to exhaust local remedies, and the availability of alternative forums, including the EDSM.³⁵

“ASEAN's reluctance to judicialize intra-regional investment disputes should thus be understood not as institutional failure but as institutional choice—a decision to protect regulatory plurality and shield states from juridical hierarchies that may not reflect shared developmental priorities.”

More importantly, ACIA does not merely transplant ISDS into a regional setting; it seeks to re-embed investment protection within a broader developmental and institutional logic. Unlike traditional BITs, ACIA's preambular and operational clauses foreground objectives like equitable development, transparency, and policy space—suggesting that investment is a means to a political-economic end, not an end in itself.³⁶ This instrumentalization contrasts sharply with the axiomatic privileging of investor rights that characterizes much of ICSID and UNCITRAL jurisprudence.

B. DISPUTE SETTLEMENT BEYOND ADJUDICATION

ASEAN's broader dispute resolution architecture reinforces this orientation. The 2004 Protocol on the Enhanced Dispute Settlement Mechanism (EDSM), while formally modeled on the WTO's Dispute Settlement Understanding, functions primarily as a political, not juridical, institution.³⁷ With emphasis on good offices, mediation, and consultation, the EDSM embodies ASEAN's “soft institutionalism”—a modality of governance that prioritizes flexibility, diplomatic engagement, and informal mechanisms over binding adjudication.³⁸ This approach is often criticized by Western observers as underdeveloped or ineffective, yet it remains consistent with the bloc's normative commitment to sovereignty, non-interference, and regional consensus.

Scholars have described this modality as “institutional under-definition”—a strategy of legal ambiguity that enables cooperation without coercion.³⁹ ASEAN's reluctance to judicialize intra-regional investment disputes should thus be understood not as institutional failure but as institutional choice—a decision to protect regulatory plurality and shield states from juridical hierarchies that may not reflect shared developmental priorities.

C. SOFT LAW, LEGAL CULTURE, AND NORM DIFFUSION

ASEAN's legal regime is also notable for its reliance on soft-law instruments—declarations, guidelines, and communiqués that articulate normative aspirations without binding obligation. Although such instruments lack enforceability in the formal sense, they play a crucial role in

norm diffusion, especially across jurisdictions with vastly different legal cultures and capacities.⁴⁰ Soft law allows ASEAN to coordinate investment promotion, legal harmonization, and institutional reform without the disciplining force of hard treaty obligations. This pragmatism is both a concession to heterogeneity and a form of resistance to global investment law's normative monoculture.

Initiatives like the ASEAN Investment Report, the Guidelines for FDI Promotion, and the Blueprint for the ASEAN Economic Community demonstrate an ongoing effort to define investment facilitation in ways responsive to domestic policy goals and regional equity.⁴¹ These texts, though non-binding, perform a jurisprudential function: they articulate ASEAN's vision for investment governance as fundamentally political rather than technocratic.

D. THE POLITICS OF PROCEDURAL INNOVATION

Finally, ASEAN's regional dispute frameworks present an opportunity to reimagine procedural justice in international investment law. While the bloc has not established a permanent regional tribunal akin to the EU's Investment Court System, its legal infrastructure supports the gradual institutionalization of hybrid mechanisms—ad hoc panels, ombuds offices, and advisory centers—that can balance accessibility, legitimacy, and state control.⁴² The continued development of domestic arbitral centers such as AIAC in Malaysia and VIAC in Vietnam further indicates the region's commitment to reterritorializing legal authority over foreign investment.⁴³ These institutional innovations are not merely administrative but ideological: a conscious departure from

the investor-centric proceduralism of ICSID and UNCITRAL toward a model of dispute resolution that is pluralist, development-oriented, and sovereignty-affirming.

V. CASE STUDIES FROM ASEAN

The five case studies that follow are not representative of ASEAN as a statistical sample. They are instead a curated tableau, chosen because each illustrates a distinct posture toward the Washington-Consensus inheritance and a distinct institutional response to it. Indonesia is the paradigm of strategic retrenchment: a state that, after a chastening encounter with ISDS, terminated the bulk of its BIT portfolio and rewrote its model treaty around regulatory sovereignty. Malaysia is the case of quiet recalibration through multilateral instruments—the CPTPP and RCEP—and through the construction of a regional arbitral hub at AIAC. Vietnam is the transitional case: a still-deepening integration into the global economy paired with treaty practice that has begun to defend domestic policy space, most visibly through the EU–Vietnam Investment Protection Agreement's standing tribunal. The Philippines is the paradoxical case, an early ICSID adopter whose constitutional and political architecture has nonetheless complicated full juridical incorporation, and whose recent treaty practice tracks closely with ASEAN's regional turn. Singapore is the holdout case—and the case that the title of this Article foregrounds—because its treaty practice, its WTO/CPTPP/EUSIPA orthodoxy, and its diplomatic posture in RCEP reveal a fidelity to the Washington Consensus that increasingly puts it at odds with the rest of the bloc. Read together,

the five cases trace a regional project that is plural rather than uniform: an ASEAN that is moving, but not as one, away from ICSID and toward something else.

A. INDONESIA

Indonesia's relationship with the international investment law regime illustrates a paradigmatic shift from juridical acquiescence to regulatory reassertion—a trajectory shaped as much by structural critique as by sovereign recalibration. For much of the late twentieth century, Indonesia subscribed to the prevailing orthodoxy, adopting a panoply of BITs and ratifying the ICSID Convention in 1968.⁴⁴ Yet this engagement was grounded in strategic necessity: a postcolonial state navigating the ideological currents of Cold War development finance and liberal economic conditionality.⁴⁵ Indonesia's BITs—most negotiated under asymmetrical terms—reflected legal transplantation more than legal transformation, embedding investor-centric norms within a polity still grappling with uneven institutional capacity and developmental volatility.⁴⁶

1. Treaty Proliferation and Early Juridical Encounters

By the mid-2000s, Indonesia had entered into over sixty BITs, many of which provided expansive protections—including vague FET clauses, unqualified MFN guarantees, and virtually automatic recourse to ISDS under ICSID or UNCITRAL.⁴⁷ These treaties often went unchallenged domestically, insulated from public scrutiny and removed from legislative oversight—a pattern that legal-political-economy scholarship has identified across the post-colonial world as one of executive treaty-making operating at

a depth incommensurate with democratic deliberation.⁴⁸ The state's early arbitration experiences exposed the latent power imbalance coded into these texts.

The *Churchill Mining* and *Planet Mining* cases—conjoined ICSID arbitrations brought against Indonesia following the cancellation of coal mining concessions—exemplify this dynamic.⁴⁹ Although the tribunal ultimately dismissed the claims due to fraudulent documentation by the investors, the protracted nature of the proceedings and the financial burden incurred highlighted the structural asymmetries of ISDS. The dispute laid bare a core contradiction: a state's regulatory acts, especially in resource governance, could be reframed as juridical infractions under investment law—subject not to public-law review but to private adjudication by arbitrators unmoored from the domestic legal order.⁵⁰

2. Strategic Treaty Retrenchment and Model BIT Innovation

Indonesia's response to these disputes was not merely defensive—it was paradigmatic. In 2014, the government initiated an unprecedented review of its BIT portfolio, announcing the termination or non-renewal of at least twenty-six treaties.⁵¹ This move was not framed as rejection of foreign investment but as a rearticulation of sovereignty: a refusal to continue privileging investor rights over regulatory discretion. In the years that followed, Indonesia drafted a new model BIT, which restructured substantive obligations, reintroduced domestic courts as dispute forums, and integrated investor responsibilities relating to environmental protection and anti-corruption.⁵²

Notably, the model excludes MFN clauses to prevent treaty shopping, narrows the scope of FET to customarily accepted principles, and explicitly affirms the state's right to regulate in the public interest.⁵³ This legal architecture reflects a turn toward what Humphreys might term “defensive pluralism”—a form of legal engineering that inscribes sovereign discretion into international instruments as both shield and symbol.⁵⁴ It is law not merely as tool, but as terrain for contestation and reimagining.⁵⁵

“Indonesia’s trajectory, then, is emblematic of a broader critique: that the global investment regime, as structured, offers protection without accountability, access without reciprocity.”

3. Domestic Legal Reform and Legal Re-embedding

Alongside treaty reform, Indonesia has engaged in significant domestic legal and institutional restructuring. The 2007 Investment Law (Law No. 25/2007) attempted to consolidate protections for investors while reaffirming state authority in areas such as land use, environmental licensing, and nationalization.⁵⁶ More controversially, the 2020 Omnibus Law on Job Creation sought to streamline investment procedures, though critics argue it diluted environmental and labor protections in pursuit of “regulatory efficiency.”⁵⁷ These reforms reflect a dual logic: attracting capital while reclaiming legal sovereignty from foreign tribunals.

Institutionally, Indonesia has also sought to reterritorialize dispute resolution. The

revitalization of the Indonesian National Board of Arbitration (BANI) and efforts to promote its use as an alternative to ICSID signal a broader attempt to embed investment governance within domestic legal structures.⁵⁸ Indonesia's trajectory, then, is emblematic of a broader critique: that the global investment regime, as structured, offers protection without accountability, access without reciprocity. Its disengagement from the ICSID-centered order is not a rejection of law, but a demand for its repoliticization—one grounded in postcolonial development, juridical pluralism, and democratic legitimacy.

B. MALAYSIA

Malaysia's investment law posture reflects a mode of calibrated pragmatism: outwardly liberal, institutionally cautious, and increasingly attuned to the risks of juridical overreach. For decades, Malaysia adopted the conventional logic of ISDS, signing a wide array of BITs and positioning itself as a rules-based jurisdiction for capital inflows.⁵⁹ Yet this legal architecture, though ostensibly depoliticized, has produced a series of frictions—between juridical formalism and domestic sovereignty, between economic openness and regulatory discretion—that have led to a strategic softening of Malaysia's engagement with the traditional ISDS regime.

1. Early Treaty Practice and Institutional Alignment

As an early adopter of the ICSID Convention (ratified in 1966), Malaysia rapidly developed a dense network of BITs—over seventy by the early 2000s.⁶⁰ These treaties, largely modeled on Global North templates, offered expansive protections and

minimal conditionality. With broad FET clauses, unqualified MFN provisions, and automatic access to ISDS, Malaysia appeared to affirm the orthodox model of investment liberalization.⁶¹

Yet this doctrinal alignment belied domestic ambivalence. Malaysia's early embrace of arbitration mechanisms coexisted uneasily with a political economy premised on state-led development, preferential policies (such as the Bumiputera program), and strategic state-owned enterprises.⁶² The coexistence of formal openness and substantive state control rendered Malaysia's legal commitments prone to contestation—especially when international tribunals interpreted treaty provisions without regard to their socio-political context.

2. Disputes and Doctrinal Reassessment

The case of *Malaysian Historical Salvors v. Malaysia* illustrates the tensions inherent in ISDS for a middle-income, developmental state.⁶³ In this ICSID arbitration, the tribunal initially upheld jurisdiction over a maritime salvage contract, only for the award to be annulled on grounds that the activity did not meet the objective criteria of “investment” under Article 25 of the ICSID Convention.⁶⁴ Although Malaysia ultimately prevailed, the case exemplified the indeterminacy of key legal thresholds and the potential for jurisdictional overreach in arbitrator interpretation. It also highlighted the asymmetry in arbitral tribunals' capacity to impose financial and reputational burdens irrespective of merit.

Although Malaysia has avoided the volume of ISDS cases faced by other ASEAN members, confidential UNCITRAL arbitrations—such as *Matai Ventures LLC v. Malaysia*—reportedly concerning regulatory

measures in the real-estate and energy sectors, have raised additional concerns about transparency and the legitimacy of treaty arbitration.⁶⁵ These disputes catalyzed a quiet shift in Malaysia's treaty-making practice: a movement toward legal specificity, interpretive restraint, and greater policy-space preservation.

“In both CPTPP and RCEP, Malaysia has embraced legal ambiguity as a defensive strategy—holding open the possibility of investor recourse while constructing procedural bottlenecks that insulate domestic regulation.”

3. Treaty Modernization Through Multilateralism

Rather than initiating a wholesale termination of existing BITs, Malaysia has pursued reform through multilateral agreements—most notably the CPTPP and RCEP. These instruments reflect a subtler form of sovereignty reclamation: narrowing FET clauses, excluding MFN-based expansion of procedural rights, and including state interpretation clauses to constrain arbitral discretion.⁶⁶

The CPTPP, for example, allows state parties to issue binding joint interpretations of treaty provisions—an innovation designed to reinsert state agency into the interpretive process.⁶⁷ More dramatically, Malaysia's late-stage opposition to ISDS during the RCEP negotiations is now widely credited with the agreement's omission of investor-state arbitration: as Marie Wilke and others have shown, Malaysia's shift gave political cover to other parties—Australia, Indonesia, India (during its participation), New Zealand, Thailand—and effectively

converted RCEP into an investment chapter without ISDS, displacing the matter into a future work program and into state-to-state mechanisms.⁶⁸ In both CPTPP and RCEP, Malaysia has embraced legal ambiguity as a defensive strategy—holding open the possibility of investor recourse while constructing procedural bottlenecks that insulate domestic regulation. This embrace of “bounded flexibility” reflects the insight that sovereignty in international law is no longer exercised through legal closure, but through interpretive friction⁶⁹—strategic ambiguity deployed to defend political discretion.

4. Domestic Legal Infrastructure and Regional Forums

Malaysia has also invested in domestic and regional arbitration infrastructure. The reconstitution of the Kuala Lumpur Regional Centre for Arbitration as the Asian International Arbitration Centre (AIAC) signaled an effort to localize expertise and recenter investment dispute resolution in the region.⁷⁰ The AIAC's alignment with UNCITRAL rules and the growing use of its facilities for commercial and investor-related disputes suggest a reterritorialization of legal authority.

Domestically, specialized commercial courts, judicial training programs, and reform of arbitration laws have strengthened Malaysia's legal credibility.⁷¹ These reforms form part of a broader strategy of legal embeddedness: rather than rejecting investment law, Malaysia is seeking to domesticate it—to bring transnational disputes into the orbit of national oversight. Malaysia's engagement thus exemplifies a quiet politics of recalibration: not through rupture, but through reinterpretation.

C. VIETNAM

Vietnam's engagement with international investment law exemplifies a kind of structural ambivalence—a posture shaped by its historical transition from centralized planning to market socialism, its economic reliance on FDI, and its ideological commitment to regulatory sovereignty.

1. Treaty Proliferation and Strategic Accession

Vietnam ratified the ICSID Convention in 1994 during a period of accelerated economic reform (Đổi Mới), seeking to bolster investor confidence while repositioning itself within the global economic order.⁷² In the following decade, it signed over sixty BITs, often modeled on Western treaty templates, granting broad protections such as FET, MFN, and full ISDS access.⁷³ These agreements reflected a legal mimeticism common among post-socialist states—an attempt to signal openness and adherence to global norms without the institutional infrastructure to manage their juridical implications.⁷⁴

Yet the substantive asymmetry of these treaties soon became apparent. Provisions were often drafted with little domestic input or review, leading to the externalization of public-law decisions to foreign tribunals. Investment arbitration thus emerged not as a neutral adjudicatory mechanism, but as a potential veto point on sovereign regulation.

2. Arbitration Experience and Regulatory Repositioning

Vietnam's experience in *Trinh Vinh Binh v. Vietnam*, a high-profile UNCITRAL arbitration involving claims of expropriation and due process violations by a Dutch-Vietnamese investor, served as a critical

inflection point.⁷⁵ Although the case concluded in a confidential settlement reportedly exceeding USD 45 million, it triggered widespread concern about the state's exposure to financial liability and reputational risk.⁷⁶

Subsequent disputes—such as *DialAsia SAS v. Vietnam*, a UNCITRAL arbitration administered by the Permanent Court of Arbitration concerning a French investor's dialysis clinic—further highlighted the risks of treaty overreach into sensitive regulatory domains.⁷⁷ These cases revealed the vulnerability of domestic governance structures to investor pressure and catalyzed an internal policy shift: away from deference and toward doctrinal recalibration.

3. Treaty Modernization and Normative Realignment

Vietnam's new generation of investment treaties reflects a more cautious and calibrated approach. The EU–Vietnam Investment Protection Agreement (EVIPA), signed in 2019 and pending ratification as of 2025, introduces a standing investment tribunal, an appellate mechanism, and strict transparency provisions.⁷⁸ Similarly, Vietnam's commitments under the CPTPP and RCEP introduce procedural safeguards, interpretive limitations, and development-oriented preambular language.⁷⁹

These agreements restrict MFN clause expansion, narrow the scope of FET, and reaffirm the state's right to regulate for public interest. Vietnam's treaty language has thus evolved from juridical deference to legal defensiveness—from universalism to contextualism. This is not a rejection of investment law, but a reappropriation of its terms: a juridical refusal to subordinate

development to abstraction.

4. Domestic Arbitration and Legal Institutionalization

Parallel to treaty reform, Vietnam has invested in building domestic dispute resolution capacity. The Vietnam International Arbitration Centre (VIAC) has become a leading regional arbitral body, adopting UNCITRAL-aligned rules and expanding its docket to include investor-related claims.⁸⁰ The 2015 Law on Commercial Arbitration and its subsequent refinements have strengthened the procedural credibility of arbitration within the national legal system. Vietnamese courts have also expanded their role in commercial adjudication, with judges receiving training in international economic law.⁸¹ These developments reflect a turn toward what Humphreys might call “legal re-embedding”: an effort to reclaim the authority of domestic institutions over transnational capital disputes.

D. PHILIPPINES

The Philippines occupies a paradoxical position within the architecture of international investment law. As one of the earliest ASEAN adopters of the ICSID Convention (1978),⁸² and an active negotiator of BITs, it projected an image of juridical modernity and openness to capital flows. Yet its engagement with ISDS has repeatedly exposed the fragility of that posture—revealing how the legal formalism of investment arbitration can collide with institutional weakness, developmental policy, and the politicized character of regulatory authority.

1. Treaty Formation and Developmental Tensions

Through the 1980s and 1990s, the Philippines signed over thirty BITs, many drafted in the familiar idiom of liberal investment protection: expansive FET clauses, unqualified MFN provisions, and investor access to ICSID or UNCITRAL arbitration.⁸³ These instruments were rarely subject to democratic debate or inter-agency scrutiny, and often ran parallel to constitutional restrictions on foreign ownership and the archipelagic logic of decentralization.⁸⁴ As such, they introduced a set of legal commitments whose institutional and developmental implications were neither fully internalized nor strategically harnessed.

This disjunction was compounded by reliance on public-private partnerships in critical infrastructure and utilities, sectors where disputes over regulatory change or contract enforcement frequently triggered ISDS claims. The state's dual role—as economic manager and legal subject—was rendered precarious in the face of investor claims framed in ostensibly apolitical legal terms.

2. Jurisprudential Exposure and Doctrinal Vulnerability

The *Fraport AG v. Philippines* arbitrations serve as defining episodes in the country's ISDS history.⁸⁵ At issue was Fraport's investment in a terminal at Manila's Ninoy Aquino International Airport, allegedly made in contravention of Philippine laws limiting foreign equity. The first ICSID tribunal dismissed the claim for lack of jurisdiction;

the case was annulled and re-filed, with a second tribunal ultimately rejecting Fraport's claims on the merits.⁸⁶ Although the Philippines eventually prevailed, the dispute was protracted, costly, and politically charged. It highlighted the structural bias of ISDS mechanisms that allow foreign investors to test sovereign regulation against ambiguous standards while denying host states reciprocal leverage or institutional parity.

“By embedding safeguards into treaty text and participating in multilateral reform, the Philippines is attempting to reconcile capital mobility with democratic regulation—not by rejecting investment law, but by reshaping its normative foundations.”

Subsequent disputes—including the reportedly confidential *Chevron v. Philippines* arbitration concerning energy-sector regulation—have reinforced these concerns.⁸⁷ The opacity of proceedings, coupled with fiscal risks and policy chill, has prompted renewed debate about the legitimacy and utility of investor-state arbitration.

3. Treaty Reform and Regional Realignment

In response, the Philippines has undertaken a quiet transformation of its investment treaty practice. Recent instruments—negotiated through regional platforms such as the ACIA, the CPTPP, and the RCEP—reflect more nuanced treaty language: narrowing FET, conditioning MFN, and explicitly preserving the state's right to regulate.⁸⁸ The Philippines has also supported procedural innovations under UNCITRAL Working Group III, including appellate review mechanisms and code-of-

conduct provisions for arbitrators.⁸⁹

This reformist turn signals a shift from juridical submission to strategic recalibration. By embedding safeguards into treaty text and participating in multilateral reform, the Philippines is attempting to reconcile capital mobility with democratic regulation—not by rejecting investment law, but by reshaping its normative foundations.

4. Domestic Infrastructure and Legal Modernization

Institutionally, the Philippines has invested in strengthening its commercial judiciary, revamping rules on foreign arbitral award enforcement, and expanding the capacity of the Philippine Dispute Resolution Center (PDRCI).⁹⁰ The creation of commercial courts, coupled with judicial training in international economic law, reflects a broader agenda of legal modernization aimed at reasserting domestic competence over transnational disputes.

Yet challenges remain. The constitutional framework—particularly its nationalist economic provisions—and the fragmentation of regulatory authority across local government units complicate uniform application of investment law. Public skepticism toward foreign corporate influence, rooted in colonial and authoritarian legacies, complicates any uncritical embrace of ISDS. The Philippines' approach must be read not merely as technocratic adjustment, but as a layered struggle over legal sovereignty, policy space, and the postcolonial state's place in global economic ordering.

E. SINGAPORE: THE HOLDOUT

Singapore is the case ASEAN cannot quite assimilate. Its treaty practice, its public diplomacy, and its strategic self-conception

remain anchored in the Washington-Consensus logic the rest of the region has been backing away from. Where Indonesia has rebuilt its model BIT, where Malaysia has helped neutralize ISDS in RCEP, where Vietnam has accepted a standing investment tribunal in EVIPA, and where the Philippines has folded its treaty reform into ACIA and CPTPP, Singapore has continued to negotiate and ratify some of the deepest, most investor-protective instruments in Asia.⁹¹ This posture is neither neutral nor inevitable. It is a substantive normative position. And it is increasingly difficult to reconcile with the regional institutional project this Article has described.

1. The Treaty Architecture: Depth, Breadth, and Orthodoxy

Singapore is party to the ICSID Convention and to a dense network of BITs and FTA investment chapters that, almost without exception, contain ICSID- and UNCITRAL-anchored ISDS clauses, expansive FET and indirect expropriation language, and minimal procedural filters.⁹² Its FTAs with the United States, Australia, China, India, Japan, Korea, and the EFTA states, and its participation in the CPTPP, reproduce the orthodox template: pre-dispute consent to arbitration, MFN provisions, and full enforcement of awards. The 2018 EU–Singapore Investment Protection Agreement (EUSIPA) is the partial exception, having migrated to the EU’s standing-tribunal Investment Court System, but Singapore accepted that design only as the price of EU access; in agreements where Singapore has had drafting leverage, the model has been ICSID-style ad hoc arbitration without an appellate layer.⁹³

Singapore’s domestic infrastructure reinforces the orthodoxy. The Singapore International Arbitration Centre (SIAC) markets itself as a neutral seat for investor-state cases; the Singapore International Mediation Centre (SIMC) and the Singapore Convention on Mediation seek to extend Singapore’s institutional position from commercial to investor-state dispute resolution. These are valuable contributions. But it is precisely because Singapore’s institutional capacity in this area is so well developed that its substantive positions on treaty design—broad ISDS, ICSID-anchored, lightly filtered—carry weight, and weigh against the pluralism the rest of the region has begun to assert.

2. RCEP, ACIA, and the Politics of Resistance

Singapore’s posture is most visible at the regional level. In the RCEP negotiations, Singapore consistently supported the inclusion of ISDS, only to be overruled by a coalition led, conspicuously, by Malaysia. The eventual omission of investor-state arbitration from RCEP—displacing the issue into a future “work program”—was a defeat for Singapore’s preferred design and a victory for the regional pluralism embodied in ACIA.⁹⁴ In ACIA itself, Singapore was among the negotiating parties least enthusiastic about the procedural filters—six-month consultation, optional exhaustion of local remedies, and ASEAN’s EDSM as an alternative forum—that the broader bloc insisted upon.⁹⁵

Singapore’s resistance is often defended in pragmatic terms. As ASEAN’s largest outbound capital exporter, Singapore’s firms benefit—so the argument goes—from robust treaty protection abroad. Its sovereign wealth

funds, its banks, and its trading companies invest heavily across Asia and beyond, and they expect that, if expropriation or denial of justice occurs, ICSID-style arbitration will be available. There is some force to this. But the argument proves less than its proponents need it to prove.

3. The Holdout Posture’s Tensions

Three problems undermine the pragmatic case for Singapore’s continued fidelity to ICSID/UNCITRAL orthodoxy. First, the empirical premise has eroded. The leading econometric work on the relationship between BITs and FDI finds, at best, modest and conditional effects, and recent studies indicate that BITs are far less salient to corporate boardroom decisions than political risk insurance, multilateral development bank financing, and project-specific guarantees.⁹⁶ If Singaporean firms are choosing where to invest, treaty protection is one factor among many—and not, on the available evidence, a decisive one.

Second, Singapore’s own firms are increasingly defendants, not just potential claimants, in disputes shaped by the global investment regime. The *Sanum Investments v. Lao PDR* arbitrations, seated in Singapore and administered by the PCA under the China–Laos BIT, illustrate the awkwardness: a Macao-incorporated, Dutch-controlled investor used the global ISDS architecture to sue a Singapore neighbor, and Singapore’s courts ended up adjudicating the jurisdictional shape of the China–Laos BIT under the customary international law of state succession.⁹⁷ In a world of multi-layered corporate vehicles and treaty-shopping incentives, Singaporean public funds and SOEs may find themselves on the wrong end of awards built on the very doctrines—

broad nationality, expansive FET, indirect expropriation—that Singaporean treaty practice has helped to entrench.

Third, the normative cost of Singapore's posture is high and rising. Within ASEAN, Singapore's resistance complicates the bloc's collective bargaining position in UNCITRAL Working Group III and in negotiations with extra-regional partners. It signals to outside negotiating partners that ASEAN is not, in fact, of a single mind, and licenses extraregional pressure on Indonesia, Malaysia, Vietnam, and the Philippines to soften their reformist instincts. Singapore's fidelity to the Washington Consensus is therefore not merely a domestic preference; it is a region-wide externality.

4. Reading Singapore's Resistance

It is tempting to characterize Singapore's posture as cosmopolitan sophistication—an embrace of the rule-of-law cosmopolitan order against parochial nationalism. The characterization fits poorly. The Washington Consensus to which Singapore remains tethered is a particular ideological package, and one whose intellectual confidence has been eroded by, among other things, the 1997 Asian Financial Crisis, the legitimacy crisis of ISDS, and the very Global South pluralism that ASEAN's regional turn embodies.⁹⁸ To remain loyal to that package while the regional architecture moves elsewhere is not pragmatism; it is nostalgia, and an expensive one.

The remainder of this Article takes Singapore's resistance seriously, but not as a settled feature of the regional landscape. **Part VIII** surveys the alternative dispute settlement models that ASEAN is already, in its various ways, deploying—and that Singapore itself has substantial expertise in. **Part IX** argues

that the most productive alternative to ICSID-style ISDS is not another courtroom but political risk insurance, and that the case for PRI is in some ways strongest where, as in Singapore's case, the state in question is a large outbound investor.

VI. INTERNATIONAL LEGAL SCHOLARSHIP ON ASEAN'S DIVERGENCE

ASEAN's recalibration of its engagement with ISDS has not gone unnoticed by scholars of international law, political economy, and global governance. Once interpreted through the narrow lens of treaty practice or regional integration, ASEAN's legal trajectory is increasingly situated within a broader constellation of structural critique: as a deliberate juridical dissensus from the dominant investment law regime, and as a site for norm innovation grounded in sovereignty, development, and postcolonial legal pluralism.⁹⁹

A. FROM FORMALISM TO RESISTANCE: REFRAMING THE LEGAL TURN

Where early international legal literature often treated BIT proliferation as a measure of state commitment to the rule of law or investor confidence, recent scholarship has interrogated this assumption. Critical theorists such as Sornarajah, Van Harten, and Pahuja argue that ISDS embeds a regime of legal subordination—translating investor expectations into enforceable norms while displacing the political character of economic regulation.¹⁰⁰ ASEAN's divergence is thus not merely a reaction to procedural inconvenience, but a juridical assertion of normative autonomy.

In this vein, ASEAN's post-2010 treaty revisions—narrower FET clauses, reduced MFN scope, interpretive authority for states—are read not as institutional lag or underdevelopment, but as strategic moves to reconfigure the locus of legal authority.¹⁰¹ The reframing of ASEAN as a normative actor, rather than a passive recipient of legal transplants, reflects a deeper shift in international legal method: from diffusion to contestation, from isomorphism to pluralism.

“More recent interventions from comparative international law have interpreted ASEAN's trajectory as a site of legal pluralism—where shared principles emerge through negotiation rather than prescription.”

B. LEGAL PLURALISM AND REGIONAL SOVEREIGNTY

Scholars like Diane Desierto and Julien Chaisse have emphasized ASEAN's unique form of “development-sensitive regionalism”: one that aligns investment law with economic planning, social equity, and institutional capacity.¹⁰² This view challenges the unilinear narrative that legal harmonization must entail convergence with Global North standards. ASEAN's model—characterized by soft law, procedural flexibility, and consultative mechanisms—foregrounds sovereignty as institutional resilience rather than nationalistic closure.

More recent interventions from comparative international law have interpreted ASEAN's trajectory as a site of legal pluralism—where shared principles emerge through negotiation rather than prescription.¹⁰³ This pluralism, far from

diluting legal coherence, injects interpretive friction that unsettles the epistemic authority of ICSID/UNCITRAL jurisprudence and opens space for alternative normative imaginaries.

C. JURIDICAL POLITICS AND STRUCTURAL HETERODOXY

More recent scholarship has deepened this critique by situating ASEAN's approach within global structural asymmetries. Ntina Tzouvala, Surabhi Ranganathan, and David Schneiderman argue that the legal ordering of foreign investment is embedded in global capitalist hierarchies, where formal equality between states conceals profound inequalities in bargaining power, legal expertise, and enforcement capacity.¹⁰⁴ In such readings, ASEAN's recalibration of treaty commitments and dispute forums is a form of legal resistance—a refusal to perform compliance within a regime architected for transnational capital.

Notably, ASEAN's divergence is not framed in isolation but in alignment with a growing Global South consensus. UNCTAD, UNCITRAL Working Group III, and the rise of regional courts and codes of conduct all reflect a global jurisprudential moment in which formerly peripheral legal models are repositioned as normative templates.¹⁰⁵

D. TOWARD NORMATIVE INNOVATION: LAW AS POSSIBILITY

More constructively, ASEAN is also viewed as a space of norm entrepreneurship. Its engagement with sustainable development, corporate social responsibility, and procedural innovation is cited as evidence that legal pluralism need not entail normative relativism.¹⁰⁶ ASEAN's recalibration is thus not a retreat, but a proposition—a

pluralist legal order in which treaty law can be developmentally embedded, regionally rooted, and globally relevant.¹⁰⁷ Read collectively, this literature reframes ASEAN not as lagging, but leading: a regional formation that confronts the structural exclusions of investment law and reclaims legal agency through institutional pluralism, juridical strategy, and normative resistance.¹⁰⁸

VII. BEYOND DOCTRINE

The evolving posture of ASEAN toward international investment law cannot be fully understood through doctrinal analysis alone. It must be situated within the broader landscape of global legal ordering—where interpretation, institutional practice, and political economy intersect to produce what Ingo Venzke has termed the “authority of law without force.”¹⁰⁹ ASEAN's divergence from traditional ISDS frameworks is not simply a matter of institutional design or developmental preference. It is a jurisprudential intervention—an act of meaning-making within a contested normative field—whose significance lies as much in its discursive posture as in its treaty clauses.

A. INVESTMENT LAW AS A REGIME OF INTERPRETATION

Traditional international investment law presents itself as neutral, technical, and rule-bound. But, as Venzke argues, the meaning of legal texts is not fixed *ex ante*; it is continuously constituted through interpretive practices that reflect institutional position, historical contingency, and discursive authority.¹¹⁰ ICSID tribunals have long interpreted standards such as “fair

and equitable treatment” or “legitimate expectations” in ways that crystallize the priorities of capital and constrain the discretion of regulatory authorities. These interpretations do not simply reflect law—they constitute it.

ASEAN's divergence from these regimes, and its embrace of more calibrated treaty language, represents a refusal of this interpretive hegemony. By narrowing the scope of FET, excluding expansive MFN interpretations, and embedding joint interpretive statements into treaties, ASEAN is not merely “clarifying” law—it is contesting the institutional monopoly over legal meaning.

“Legal instruments such as BITs and ISDS clauses have functioned not merely as risk mitigation tools, but as juridical scaffolding for a global economy that privileges capital mobility over democratic regulation.”

B. LEGAL FORM AS POLITICAL PROJECT

From Humphreys' perspective, this move must be read in structural terms: ASEAN states are not only interpreting law differently—they are resisting the global economic order that investment law has helped construct.¹¹¹ Legal instruments such as BITs and ISDS clauses have functioned not merely as risk mitigation tools, but as juridical scaffolding for a global economy that privileges capital mobility over democratic regulation. ASEAN's reconfiguration becomes, in this light, a political project: an effort to re-embed law in the institutions, economies, and priorities of the state.

Anthony Anghie's postcolonial reading of international law reinforces this structural critique. For Anghie, the universality of investment law replicates colonial-era logics of control under the guise of legal formalism.¹¹² ASEAN's retreat from blanket ISDS commitments functions as a resistance to the epistemic violence of legal mimicry, challenging the idea that legitimacy is found only in institutional convergence with Global North norms. Lee Jones, in turn, frames ASEAN's approach as an extension of its long-standing commitment to "non-interference sovereignty," an ideological orientation that, while often criticized, also serves as a protective principle against external legal imposition.¹¹³

C. THE AUTHORITY TO SPEAK NORMS

Both Venzke and Humphreys are concerned with the question of who speaks law, and with what authority.¹¹⁴ In global investment law, the authority to interpret has long resided with arbitral tribunals composed largely of actors socialized into investor-friendly epistemic communities. This interpretive monopoly has produced a body of jurisprudence whose normative tilt is not incidental but systemic.

ASEAN's turn toward interpretive sovereignty—expressed in clauses granting states the power to issue binding interpretations, the use of regional tribunals, and efforts to limit investor claims procedurally—reflects a reallocation of discursive power. Diane Desierto, writing from within the region, argues that ASEAN's legal regime must be understood as public law in form and in function—a legal order that foregrounds social objectives, economic rights, and institutional accountability.¹¹⁵

D. CONTESTING THE UNIVERSALITY OF LAW

What emerges from this interdisciplinary vantage is a different conception of law—not as a neutral arbiter, but as a site of contestation, production, and authority. ASEAN's divergence shows that law's universality is neither natural nor inevitable; it is constructed through processes of interpretation, institutional practice, and resistance.¹¹⁶ By refusing juridical mimicry and insisting on regional legal pluralism, ASEAN introduces a normative dissonance into the international legal order.

This dissonance is productive. Julien Chaisse notes that ASEAN's heterodox treaty practices—combined with its domestic institutional innovations—are creating new templates for "sustainable investment protection," where ethics, sovereignty, and procedural flexibility co-exist.¹¹⁷ Simon Chesterman's work on institutional design reminds us that regional legal orders are not derivative but generative.¹¹⁸ ASEAN's path—layered, pluralist, ambivalent—offers not only critique, but construction. Its resistance is also proposition: an insistence that legal meaning can be shaped from below.

VIII. ALTERNATIVE DISPUTE SETTLEMENT MODELS

The conventional debate has framed ISDS reform as a binary: keep the present system, or replace it with the EU's Investment Court System. The reality is that the bench of available alternatives is much wider, and ASEAN—as the case studies above show—is already deploying several of them in combination. This Part canvasses the principal alternatives, briefly assesses

each, and shows how ASEAN's regional architecture already operates as a layered, multi-instrument response. Part IX then argues that the most promising alternative is one that has been comparatively neglected: political risk insurance.

A. A MULTILATERAL INVESTMENT COURT (UNCITRAL WORKING GROUP III)

The most institutionally ambitious alternative is a permanent, treaty-based multilateral investment court (MIC), which has been the focus of UNCITRAL Working Group III's work since 2017. The MIC would replace ad hoc tribunals with tenured judges, introduce horizontal stare decisis, and add an appellate mechanism. The European Union has been the most consistent proponent, and the EU's bilateral Investment Court System—now in EUSIPA, EVIPA, CETA, and elsewhere—is an explicit precursor.¹¹⁹ The MIC addresses several of ISDS's structural pathologies—party-appointment incentives, jurisprudential incoherence, lack of error-correction—but it does so without revisiting the underlying allocation of risk between investors and states. As Howse has argued, the MIC's design choices, however well-intentioned, leave investor-state arbitration's defining feature in place: the privatization of public-law disputes.¹²⁰

B. STATE-TO-STATE DISPUTE SETTLEMENT

A second alternative is to return to the state-to-state model that prevailed before the rise of investor-state arbitration. RCEP's investment chapter is the leading recent example: it omits ISDS and channels disputes into state-to-state mechanisms, with a "work program" left for future negotiation.¹²¹ State-to-state dispute settlement has the

virtues of restoring diplomatic filtering, ensuring that only meritorious or politically significant disputes are pursued, and aligning enforcement with reciprocal interests. Its principal limitation is the espousal problem: investors have no direct claim and depend on home-state political will, which can be uneven and politicized. ASEAN's experience—particularly the EDSM's reliance on consultation and good offices—suggests that state-to-state mechanisms are most effective when paired with mediation infrastructure rather than treated as a stand-alone substitute.

C. MEDIATION, CONCILIATION, AND DISPUTE PREVENTION

The third alternative is the cluster of non-adjudicatory mechanisms: mediation under the Singapore Convention on Mediation (2019); ICSID's revised Mediation Rules (2022); the IBA Rules on Investor-State Mediation; investor-state ombuds offices and dispute-prevention mechanisms; and structured early-warning systems.¹²² ASEAN is unusually well-positioned in this domain. ACIA's six-month consultation period, the EDSM's emphasis on good offices, and Singapore's institutional infrastructure (SIAC, SIMC) together compose a mediation-first architecture that, in principle, can resolve a substantial majority of disputes without ever reaching arbitration. The challenge is uptake: investors retain a structural preference for binding adjudication, and mediation works best when paired with credible default mechanisms—whether arbitration, state-to-state dispute settlement, or, as **Part IX** argues, insurance.

D. DOMESTIC COURTS AND EXHAUSTION OF LOCAL REMEDIES

The fourth alternative is the most jurisprudentially venerable: requiring investors to exhaust local remedies, with international recourse available only if the domestic courts fail. This is the customary international law default in the law of diplomatic protection, and was abandoned in the bulk of modern BITs. Reintroducing it—through optional or mandatory exhaustion clauses, fork-in-the-road provisions, or “no U-turn” clauses—relocates first-order adjudication to the host state, where it arguably belongs.¹²³ Indonesia's model BIT moves in this direction. The principal limitation is well known: in states with weak or politically captured judiciaries, the exhaustion requirement converts to a bar on recovery. The doctrinal answer—an “obvious futility” exception—is workable but reintroduces the indeterminacy the requirement was meant to dispel.

E. JOINT INTERPRETIVE COMMITTEES AND TREATY-BASED CONSTRAINT

A fifth alternative is to leave ISDS in place but constrain it through treaty-based interpretive mechanisms: joint commissions empowered to issue binding interpretations, narrowed FET and indirect expropriation language, MFN exclusions, security exceptions, and legitimate-expectation carve-outs. The CPTPP and the U.S. 2012 Model BIT illustrate the technique.¹²⁴ This is the path of least disruption and perhaps the most politically realistic, but it leaves the underlying allocation of risk between investors and states unchanged.

F. HOME-STATE ESPOUSAL AND DIPLOMATIC PROTECTION

A sixth alternative is the pre-Washington Consensus default: home-state espousal under the customary law of diplomatic protection. This option has obvious limitations—it is discretionary, politicized, and asymmetric in favor of powerful home states—but it has the often-overlooked advantage of internalizing the political cost of pursuing claims to the home state, which can act as a filter against speculative or merits-poor litigation.

G. CONTRACT-BASED ARBITRATION AND STABILIZATION CLAUSES

A seventh alternative is to remove the dispute from the treaty layer entirely and embed arbitration commitments in concession or investment contracts, with stabilization clauses, governing-law provisions, and choice of forum negotiated bilaterally. This approach—long the default in extractive industries—allocates risk through pricing rather than through treaty commitments, and is consistent with PRI logic to which **Part IX** turns.

H. SYNTHESIZING THE MENU: TOWARD A LAYERED ASEAN ARCHITECTURE

These alternatives are not mutually exclusive. ASEAN's most distinctive contribution is in fact the layered combination of several—mediation as default, exhaustion of local remedies as filter, state-to-state dispute settlement as backstop, joint interpretive committees as ongoing constraint, and limited residual ISDS as last resort. The remaining question is whether that layered architecture can be improved by adding a further institutional layer that prices political risk *ex ante* rather than litigating

it *ex post*. That is the case for political risk insurance.

IX. FROM ADJUDICATION TO INSURANCE: THE CASE FOR PRI

Robert Howse has made the most arresting observation in the recent literature on ISDS reform: the institution that actually does what ISDS purports to do—price political risk and allocate it between states and investors—is not a courtroom at all, but an insurance market.¹²⁵ Wolfgang Alschner has recently elaborated the same intuition: in 2023, public and private political-risk underwriters issued more than USD 41 billion in new investment cover; in the same year, investor-state awards collected, on a present-value basis, a small fraction of that. Boards and credit committees rely on PRI when they decide whether and where to invest; treaties, by contrast, are largely invisible at the point of decision.¹²⁶ If the question is how to allocate political risk associated with foreign investment, the architecture is already there. ISDS is a comparatively expensive, comparatively slow, comparatively incoherent latecomer.

This Part develops the case that political risk insurance—properly designed, transparently priced, and coordinated through the World Bank’s Multilateral Investment Guarantee Agency (MIGA), through national export-credit and development-finance institutions, and through the private Lloyd’s market—should complement and, in important domains, replace ISDS as ASEAN’s preferred mechanism for managing political risk. The argument is not that ISDS should be wholly abolished. It is that the relationship between ISDS and PRI should

be inverted: PRI should be the default risk-allocation mechanism, with ISDS retained as a residual, last-resort option for a narrowly specified set of cases.

A. WHAT PRI DOES

PRI is a familiar, if under-theorized, instrument. It indemnifies investors against a defined list of political risks—expropriation, transfer restrictions, war and civil disturbance, breach of contract, and, in newer policies, regulatory and licensing risks—in exchange for a premium reflecting the underwriter’s assessment of country and project risk.¹²⁷ It is provided by MIGA at the multilateral level, by national agencies (the U.S. Development Finance Corporation, the U.K.’s UK Export Finance, Germany’s Euler Hermes, Japan’s NEXI, China’s Sinosure, and Singapore’s own export-credit instruments at Enterprise Singapore), and by private underwriters. It has existed alongside ISDS for decades; what is new is the willingness of scholars to see it not as a complement but as a substitute.

“PRI should be the default risk-allocation mechanism, with ISDS retained as a residual, last-resort option for a narrowly specified set of cases.”

B. WHY PRI OUTPERFORMS ISDS ON SEVERAL MARGINS

PRI has at least five advantages over ISDS, which together make a strong case for inverting their relationship. First, PRI prices risk; ISDS does not. Insurance premiums force underwriters to assess country risk, project risk, and the probability of regulatory action with discipline; investors who face higher premiums internalize the cost of

operating in higher-risk environments. ISDS, by contrast, externalizes risk to host-state taxpayers: investors gain access to enforceable compensation without paying a premium, and the cost of that protection is paid by the public at the moment of award.¹²⁸

Second, PRI does not chill regulation. The PRI underwriter pays the investor; the host state’s regulatory autonomy is not directly constrained. There is no equivalent of the *Tecmed / Occidental* line of cases, no doctrine of “indirect expropriation” deployed to invalidate or compensate for ordinary regulatory measures. PRI is therefore more compatible with the developmental and environmental regulation that ASEAN states (Indonesia’s Omnibus Law debates being a prominent example) are increasingly being asked to undertake.

Third, PRI rests on contract, not on adjudication; its disputes, when they arise, are between investor and underwriter rather than between investor and host state. The host state may be a participant in subrogation, but the underwriter is the principal counterparty. This is a more appropriate alignment of parties, and it eliminates many of the transparency and legitimacy critiques that have dogged ISDS.

Fourth, PRI is administratively faster, comparatively cheaper, and structurally less prone to outlier outcomes. Investor-state arbitrations frequently run for five to ten years and consume tens of millions of dollars in legal and arbitral costs; PRI claims are resolved in months and at a small fraction of the cost.

Fifth, PRI sidesteps the corporate-nationality and treaty-shopping pathologies that have come to dominate the ISDS literature. Under PRI, eligibility is governed

by the policy contract, not by the rules of treaty-shopping under multi-tiered corporate structures. This addresses a problem that ICSID has not been able to solve.¹²⁹

C. PRI AND ASEAN: A STRATEGIC FIT

PRI is also a particularly good fit for the ASEAN regional project. Three reasons stand out. First, ASEAN already has the institutional bones. MIGA underwrites in every ASEAN economy; ASEAN-based national institutions (Sinosure where Chinese investment is involved; NEXI where Japanese investment is involved; Enterprise Singapore for Singaporean investors abroad) are already active; and SIAC, SIMC, and the AIAC are well-positioned to administer the small number of PRI-related disputes that escalate to formal proceedings.

Second, PRI complements rather than displaces the layered ASEAN architecture described in Part VIII. Mediation remains the default; exhaustion of local remedies channels disputes to domestic courts; joint interpretive committees discipline arbitrators; PRI internalizes the residual risk that survives those filters. ISDS is retained only as a last-resort residual mechanism for cases of denial of justice or systemic regulatory failure—the cases in which the PRI policy has paid out and the underwriter is pursuing subrogation against the host state.

Third, PRI is responsive to a feature of the ASEAN regional economy that the ISDS-centric model handles poorly: ASEAN states are simultaneously capital importers and exporters. Singapore is an outbound investor; so, increasingly, are Malaysia, Thailand, Indonesia, and Vietnam. The PRI architecture treats this symmetry naturally, by underwriting outbound investment, while

ISDS, with its presumption that the host state is the regulator and the investor the foreigner, handles the symmetry awkwardly at best.

D. WHAT PRI CANNOT DO, AND THE RESIDUAL ROLE OF ISDS

PRI is not a panacea. There are at least three categories of disputes for which PRI is a poor fit and for which a residual ISDS-like mechanism may remain necessary. First, PRI typically does not cover all forms of regulatory risk; novel or unanticipated regulatory measures may fall outside the policy. Second, PRI works best when the investor is willing to pay a premium reflecting the true country and project risk, and weakest when investors believe (rightly or wrongly) that ISDS gives them the same protection for free. Third, PRI does not directly address denial-of-justice or systemic-corruption claims, which arguably belong in an adjudicatory forum.

The right response is not to retain ISDS in its present form but to retain a narrowly specified residual mechanism—either a multilateral investment court of the kind UNCITRAL Working Group III is designing, or a state-to-state dispute settlement procedure modeled on RCEP—and to confine it to the cases for which PRI is genuinely unsuited.

E. SINGAPORE'S STAKE IN THE PRI ARGUMENT

The Article's central provocation, in light of the case study in Part V.E, is that Singapore's own strategic interests are better served by the PRI-led architecture than by the ICSID-led architecture it has continued to defend. Singapore is a large outbound investor; its firms benefit, on the margin, from the deep PRI markets that would

emerge under a regional architecture that treated PRI as the default. Singapore is also a sophisticated mediation hub; the layered ASEAN model is, in many ways, an extension of Singapore's own institutional comparative advantage. The continuation of Washington-Consensus orthodoxy in Singapore's treaty practice is therefore not just out of step with the regional project; it is out of step with Singapore's own institutional strengths and economic profile.

To say this is not to dismiss Singapore's concerns. Outbound investors do have legitimate interests in predictable, enforceable protection. The point is that those interests are better served by a layered system in which PRI does most of the work and ISDS is a residual mechanism, than by a system in which ISDS is the front line and PRI an afterthought.

X. OUTLOOK AND CONCLUSIONS

ASEAN's recalibration of its relationship with international investment law is not merely a regional inflection of a global phenomenon—it is a forward-facing proposition about the future shape of legal authority, economic regulation, and institutional legitimacy. In its pluralist posture, interpretive caution, and sovereignty-sensitive treaty practice, ASEAN offers a living critique of the ISDS regime and, more importantly, a glimpse of its possible successors.

A. FRAGMENTATION AS FERTILITY: THE END OF A SINGULAR MODEL

The global investment regime is increasingly defined not by coherence, but by contestation. The proliferation

of competing treaty models—ASEAN’s embedded regionalism, Brazil’s Cooperation and Facilitation Investment Agreements, India’s state-regulatory BITs, the EU’s investment court proposal—marks a moment of disaggregation in which no singular model dominates.¹³⁰ Far from signaling disorder, this pluralism opens the discursive space for differentiated legal orders that reflect diverse developmental, historical, and institutional contexts.

ASEAN’s contribution to this legal plurality lies not in offering a new orthodoxy, but in demonstrating that pluralism can be coordinated without being assimilative. Its treaty innovations, domestic reforms, and institutional preferences—layered mediation, interpretive joint bodies, development-sensitive clauses—show that fragmentation need not paralyze lawmaking, but may actually democratize it.¹³¹

B. REPOSITIONING THE ROLE OF THE STATE

ASEAN’s approach suggests that states—particularly in the Global South—are likely to reclaim a more active role in shaping not only treaty terms but interpretive outcomes. From procedural thresholds and time-bound mediation to binding interpretive guidance, ASEAN’s recent instruments shift the balance of authority away from arbitral tribunals and back toward political institutions. This represents not a regression to statism, but a recalibration of legal legitimacy—anchoring law’s authority not in abstraction, but in deliberative sovereignty.¹³²

C. THE ETHICS OF REFORM: LAW BEYOND LEGALITY

Reform of investment law must be more than a technocratic endeavor. It must be a political project—one that reconnects legal

institutions to questions of social justice, economic redistribution, and historical accountability.¹³³ Tzouvala’s warning against reform that simply repackages imperial logics in progressive language reminds us that reform itself must be reflexive.¹³⁴ ASEAN’s challenge is thus not only to design better treaties, but to embed law in political commitments capable of confronting asymmetries of wealth, expertise, and influence.

D. SINGAPORE, THE WASHINGTON CONSENSUS, AND ASEAN’S OPEN FUTURE

The future of ASEAN’s role in international investment law remains open—contingent on geopolitical shifts, regional solidarity, and internal heterogeneity. Some members may move toward greater liberalization under trade-plus treaties; others may fortify domestic courts, arbitral centers, and PRI infrastructure as counterweights to international tribunals. Singapore’s posture will be decisive. If Singapore continues to anchor itself to ICSID-style ISDS, the regional project will advance more slowly and less cleanly. If, by contrast, Singapore comes to see that its institutional strengths—mediation, arbitration administration, sophisticated underwriting markets—are better deployed in the service of a layered, PRI-led architecture, the regional turn this Article has described could mature into a genuinely new model of investment governance.

In this open future, ASEAN does not offer a blueprint but a provocation: that international investment law need not speak in a singular voice; that sovereignty can be exercised through legal form; that reform must begin not with institutional design, but with a critical interrogation of what law

is for, who it serves, and how its authority is sustained. ASEAN’s divergence is neither conservative nor radical. It is generative. It opens a space for reimagining what international law can be when it is authored by those it binds, and when it is accountable not only to investors, but to communities, histories, and futures.

END NOTES

1. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159; Jeswald W. Salacuse, *The Law of Investment Treaties* 6–12 (2d ed. 2015); Stephan W. Schill, *The Multilateralization of International Investment Law* 3–5 (2009).
2. Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 4–12 (2015); Gus Van Harten, *Investment Treaty Arbitration and Public Law* 8–10 (2007); Surabhi Ranganathan, *Remnants of Empire: Memory and Legal Method in Postcolonial International Investment Law*, 114 *AJIL Unbound* 199, 202 (2020).
3. Diane A. Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* 56–60 (2015); Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* 31–37 (Inst. of Southeast Asian Studies 2006); Hao Duy Phan, *Legal Reform in ASEAN and the Quest for Regional Harmonization* 101–05 (2022).
4. See European Union–Singapore Investment Protection Agreement, Oct. 19, 2018, 2019 O.J. (L 294) 3; Comprehensive and Progressive Agreement for Trans-Pacific Partnership ch. 9, Mar. 8, 2018; see also Locknie Hsu, *Singapore's Investment Treaty Practice in the Asian Economic Order*, in *International Investment Treaties and Arbitration Across Asia* 451 (Julien Chaisse & Luke Nottage eds., 2018); Drew & Napier LLC, *Investment Treaty Arbitration: Singapore* (2024 ed.).
5. Marie Wilke, Sherzod Shadikhodjaev & Gabriel Gari, *Why Is There No Investor-State Dispute Settlement in RCEP? Bargaining and Contestation in the Investment Regime*, *Bus. & Pol.* (advance art. 2024) (documenting Malaysia's late-stage opposition and Singapore's preference for ISDS inclusion); see also Henry Gao, *RCEP: The Final Frontier of Free Trade?* (Sing. Mgmt. Univ. Sch. of L. Working Paper, 2021).
6. On the Washington Consensus, see John Williamson, *What Washington Means by Policy Reform*, in *Latin American Adjustment: How Much Has Happened?* 5 (John Williamson ed., 1990); Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion?*, 44 *J. Econ. Literature* 973 (2006); Joseph E. Stiglitz, *Globalization and Its Discontents* 53–88 (2002). On the legal limb of the Washington Consensus and its institutional vehicles, see Andrew Lang, *World Trade Law After Neoliberalism* 99–135 (2011).
7. Robert Howse, *Designing a Multilateral Investment Court: Issues and Options*, 36 *Y.B. Eur. L.* 209, 222–28 (2017); Wolfgang Alschner, *To Transform the International Investment Regime, Look to Political Risk Insurance and Not (Only) to Investment Treaties*, *Investment Treaty News* (Jan. 27, 2025), <https://www.iisd.org/itn/2025/01/27/transform-international-investment-regime-political-risk-insurance-wolfgang-alschner/> [<https://perma.cc/WT5F-Y7A4>]; Mark Kantor, *Comparing Political Risk Insurance and Investment Treaty Arbitration*, in *Essays in International Economic Law, Development and Arbitration in Honor of Don Wallace, Jr.* 165 (2014); Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in *Yearbook on International Investment Law & Policy 2009/2010* 539 (Karl P. Sauvant ed., 2010).
8. Salacuse, *supra* note 1, at 23–29; Andrew Lang, *World Trade Law After Neoliberalism* 101–03 (2011).
9. Williamson, *supra* note 6; see also Joseph E. Stiglitz, *Globalization and Its Discontents* 53–88 (2002); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* 95–139 (2011).
10. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 223–25 (2004); Sornarajah, *supra* note 2, at 33–36.
11. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 25–27, 54, Mar. 18, 1965, 575 U.N.T.S. 159.
12. Schill, *supra* note 1, at 112–15; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* 84–123 (2013).
13. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award ¶¶ 153–66 (May 29, 2003); Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award ¶¶ 404–09 (Oct. 5, 2012).
14. Gabrielle Kaufmann-Kohler & Michele Potestà, *Investor-State Dispute Settlement and National Courts* 11–21 (2020); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration*, 73 *Fordham L. Rev.* 1521, 1539–48 (2005).
15. G.A. Res. 68/109, U.N. Doc. A/68/462 (Dec. 16, 2013); Lise Johnson, Lisa E. Sachs & Jeffrey D. Sachs, *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law*, Columbia Ctr. on Sustainable Inv., 2015, at 3–5.
16. UNCITRAL, *Report of Working Group III (ISDS Reform) on the Work of Its 48th Session*, U.N. Doc. A/CN.9/1163 (May 2024); UNCITRAL, *Report of Working Group III (ISDS Reform) on the Work of Its 47th Session*, U.N. Doc. A/CN.9/1130 (2023).
17. Schill, *supra* note 1, at 3–9.
18. Lise Johnson et al., *Costs and Benefits of Investment Treaties* 11–15 (Columbia Ctr. on Sustainable Inv. 2015).
19. David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* 91–96 (2020).
20. Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* 142–48 (2020).
21. Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* 68–72 (2017).
22. Miles, *supra* note 12, at 147–52.
23. ICSID Convention, *supra* note 11; ICSID, *Database of Member States*, <https://icsid.worldbank.org> [<https://perma.cc/N7DN-KJK3>] (last visited Mar. 24, 2025).
24. UNCTAD, *ASEAN International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org> [<https://perma.cc/QU37-59A4>] (last visited Mar. 24, 2025).
25. Peter Muchlinski, *Multinational Enterprises and the Law* 678–81 (2d ed. 2007).
26. Churchill Mining PLC & Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case Nos. ARB/12/14 & ARB/12/40, Award (Dec. 6, 2016).
27. Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10, Decision on Jurisdiction (May 17, 2007); Decision on Annulment (Apr. 16, 2009).
28. Trinh Vinh Binh v. Socialist Republic of Vietnam, UNCITRAL Final Award (2019); DialAsia SAS v. Socialist Republic of Vietnam, UNCITRAL/PCA, Award (Nov. 17, 2014).
29. Republic of Indonesia, Ministry of Foreign Affairs, *Press Release: Indonesia's Review of Bilateral Investment Treaties* (Mar. 2014); see also UNCTAD, *Recent Policy Developments and Key Issues* 99–101 (2015).
30. Markus Krajewski & Mavluda Sattorova, *Model BITs: Towards Balanced and Sustainable Investment Agreements* 54–61 (GIZ & IISD 2019).
31. ASEAN Comprehensive Investment Agreement arts. 33–41, Feb. 26, 2009, <https://perma.cc/Q584-JS7C>.
32. Severino, *supra* note 3, at 31–55, 339–66.
33. Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* 164–67 (2011).
34. ACIA, *supra* note 31.
35. *Id.* arts. 33–41.
36. Desierto, *supra* note 3, at 124–27.
37. Protocol on Enhanced Dispute Settlement Mechanism, Nov. 29, 2004, ASEAN Doc. ALA/2004/PROTO/EDSM.
38. Severino, *supra* note 3, at 341–58.
39. Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 153–55 (2008).
40. Anthea Roberts et al., *Comparative International Law* 23–27 (2018).
41. ASEAN Secretariat, *ASEAN Investment Report 2022: Investment and the Emerging Digital Economy* (2022), <https://asean.org> [<https://perma.cc/9Y8D-Q66P>].
42. Julien Chaisse & Luke Nottage, *International Investment Treaties and Arbitration Across Asia* 205–10 (2018).
43. Asian Int'l Arb. Ctr., *Annual Report 2023*, <https://aiac.world> [<https://perma.cc/AV3K-WGVG>]; Vietnam Int'l Arb. Ctr., *Annual Report 2023*, <https://viac.vn> [<https://perma.cc/8CNE-AD2U>].
44. ICSID Convention, *supra* note 11 (entry into force for Indonesia, Sept. 28, 1968).
45. Sornarajah, *supra* note 2, at 93–97.
46. Miles, *supra* note 12, at 203–08.
47. UNCTAD, *Indonesia's International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org> [<https://perma.cc/QU37-59A4>] (last visited Mar. 24, 2025).
48. See Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* 155–86 (2017) (analyzing executive treaty-making and the under-deliberation of investment treaty commitments in developing-country political systems); Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* 121–44 (2015).

49. Churchill Mining PLC & Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case Nos. ARB/12/14 & ARB/12/40, Award (Dec. 6, 2016).
50. Van Harten, *supra* note 2, at 85–87.
51. Republic of Indonesia, Ministry of Foreign Affairs, *Press Release: Indonesia's Review of Bilateral Investment Treaties* (Mar. 2014).
52. Krajewski & Sattorova, *supra* note 30, at 56–61.
53. See Krajewski & Sattorova, *supra* note 30, at 58–65 (describing provisions that limit MFN and FET and safeguard regulatory autonomy); UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* 132–34 (2021).
54. See Stephen Humphreys, *The Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* 152–57 (2010).
55. *Id.* at 163–68.
56. Law No. 25 of 2007 Concerning Investment arts. 3–17, 22 (Indon.).
57. Law No. 11 of 2020 on Job Creation (Indon.); see also R. Sembiring, I. Fatimah & G.A. Widyarningsih, *Indonesia's Omnibus Bill on Job Creation: A Setback for Environmental Law?*, 4(1) *Chinese J. Envtl. L.* 97, 102–07 (2020); Ade Damanik et al., *A Sustainability Review on the Indonesian Job Creation Law*, 9 *Heliyon* e13431 (2023).
58. Tommy Thomas, *Arbitration in Asia: Indonesia's Domestic Repositioning*, 14 *Asian Int'l Arb. J.* 45, 49–53 (2021).
59. UNCTAD Investment Policy Hub, *International Investment Agreements Navigator: Malaysia*, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/127/malaysia> [https://perma.cc/78GM-D3N6] (last visited Mar. 24, 2025).
60. ICSID Convention, *supra* note 11 (entry into force for Malaysia, Oct. 14, 1966); UNCTAD, *International Investment Agreements Navigator: Malaysia*, *supra* note 59 (recording over 70 BITs concluded by 2003).
61. Locknie Hsu, *Investment Treaties and Arbitration: Southeast Asian Practice*, in *International Investment Treaties and Arbitration Across Asia* 96, 102–08 (Julien Chaisse & Luke Nottage eds., 2018); Sornarajah, *supra* note 2, at 168–72.
62. Edmund Terence Gomez & Jomo K.S., *Malaysia's Political Economy: Politics, Patronage and Profits* 122–26 (2d ed. 1999).
63. Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia, ICSID Case No. ARB/05/10, Decision on Jurisdiction (May 17, 2007); Decision on Annulment (Apr. 16, 2009).
64. *Id.*
65. Matai Ventures LLC v. Malaysia, UNCITRAL Arbitration (settled confidentially); see also Luke Nottage, *ISDS in Asia-Pacific Treaties: Shifting Designs and Effects*, 117 *AJIL Unbound* 174, 177 (2023).
66. CPTPP, *supra* note 4, ch. 9; Regional Comprehensive Economic Partnership ch. 10, Nov. 15, 2020.
67. CPTPP art. 9.25.
68. Wilke, Shadikhodjaev & Gari, *supra* note 5.
69. See Humphreys, *supra* note 54, at 163–66; Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* 122–29 (2012).
70. AIAC, *supra* note 43.
71. Weng Onn Chan, *Malaysia's Evolving Arbitration Framework: National Courts and International Standards*, 34 *J. Int'l Arb.* 361, 365–67 (2017).
72. ICSID Convention, *supra* note 11 (entry into force for Vietnam, Jan. 1, 1995).
73. UNCTAD, *Vietnam's International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org> [https://perma.cc/QU37-59A4] (last visited Mar. 24, 2025).
74. Luke Nottage & Truong Minh Duc, *Vietnam, Investment Treaties and ISDS: Rise, Reform, Retreat and Return*, in *Asia-Pacific Investment Treaties* 274–78 (Julien Chaisse ed., 2018).
75. Trinh Vinh Binh v. Vietnam, UNCITRAL Arbitration, Final Award (2019).
76. Sebastian Perry, *Vietnam Settles Dutch Investor Dispute*, *Global Arb. Rev.* (Apr. 15, 2019).
77. DialAsia SAS v. Socialist Republic of Vietnam, UNCITRAL/PCA, Award (Nov. 17, 2014); see also UNCTAD Investment Dispute Settlement Navigator, *Dialasia v. Viet Nam*, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/423> [https://perma.cc/9BM5-R42M].
78. Investment Protection Agreement Between the European Union and the Socialist Republic of Vietnam arts. 3–9, June 30, 2019, 2020 O.J. (L 186) 1.
79. CPTPP, *supra* note 4, ch. 9; RCEP, *supra* note 66, ch. 10.
80. VIAC, *supra* note 43.
81. Bui Thi Thu Ha, *Improving Vietnam's Legal Infrastructure for Investment Dispute Resolution*, 38 *Asian J. Int'l L.* 335, 345–48 (2022).
82. ICSID Convention, *supra* note 11 (entry into force for the Philippines, Dec. 17, 1978); see also Renato E. Reside, *FDI and Investment Treaties in the Philippines*, 2 *Asian Econ. Papers* 144, 146–47 (2011) (situating Philippine ICSID accession within early Marcos-era investment-promotion policy).
83. UNCTAD, *Philippines' International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org> (last visited Mar. 24, 2025).
84. Reside, *supra* note 90.
85. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007).
86. Fraport AG v. Republic of the Philippines, ICSID Case No. ARB/11/12, Award (Dec. 10, 2014).
87. See Luke Eric Peterson, *Chevron, Philippines Settle Long-Running Investment Arbitration*, *Investment Arb. Rep.* (Jan. 10, 2015).
88. ACIA, *supra* note 31; CPTPP, *supra* note 4; RCEP, *supra* note 66.
89. UNCITRAL, *Report of Working Group III (ISDS Reform) on the Work of Its 44th Session*, U.N. Doc. A/CN.9/1089 (2022).
90. Philippine Dispute Resolution Center, Inc. (PDRCI), *Annual Report 2023*, <https://pdrci.org> [https://perma.cc/DD8D-H6CL]; Sup. Ct. of the Phil., *Rules of Procedure on Commercial Cases*, A.M. No. 17-03-09-SC (2019).
91. Hsu, *supra* note 4; Drew & Napier LLC, *supra* note 4.
92. ICSID Convention, *supra* note 11 (entry into force for Singapore, Nov. 13, 1968); UNCTAD, *Singapore International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org> [https://perma.cc/QU37-59A4] (last visited Mar. 24, 2025).
93. EU–Singapore Investment Protection Agreement, *supra* note 4, arts. 3.1–3.16; see also Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* 75–82 (2d ed. 2020).
94. Wilke, Shadikhodjaev & Gari, *supra* note 5; see also Henry Gao, *RCEP and Its Investment Chapter*, *Asian J. WTO & Int'l Health L. & Pol'y* 45 (2021).
95. ACIA, *supra* note 31, arts. 33–41; see also Junianto James Losari, *The ASEAN Comprehensive Investment Agreement: Bringing ISDS into Asia, but with Asian Characteristics*, 16 *J. World Inv. & Trade* 911, 925–32 (2015).
96. Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in *Yearbook on International Investment Law & Policy 2009/2010* 539, 546–56 (Karl P. Sauvant ed., 2010); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 *Va. J. Int'l L.* 397, 432–41 (2011); Alschner, *supra* note 12.
97. Sanum Investments Ltd. v. Lao People's Democratic Republic, PCA Case No. 2013-13, Award on Jurisdiction (Dec. 13, 2013); *Sanum Invs. Ltd. v. Gov't of Lao P.D.R.*, [2016] SGCA 57 (Sing.); *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award (Aug. 6, 2019).
98. See Joseph E. Stiglitz, *Globalization and Its Discontents* 89–132 (2002); Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion?*, 44 *J. Econ. Literature* 973 (2006); Pahuja, *supra* note 33, at 95–139.
99. Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* 118–24 (2010); Schneiderman, *supra* note 19, at 91–96.
100. See generally Sornarajah, *supra* note 2, at 4–12; Van Harten, *supra* note 2, at 7–10; Pahuja, *supra* note 33, at 174–77.
101. See generally Desierto, *supra* note 3, at 156–64; Krajewski & Sattorova, *supra* note 30, at 58–65.
102. Chaisse & Nottage, *supra* note 42, at 207–19.
103. Roberts et al., *supra* note 40, at 23–27.
104. Tzouvala, *supra* note 20, at 142–48; Ranganathan, *supra* note 2.
105. UNCTAD, *Reforming Investment Dispute Settlement: A Stocktaking* (Mar. 2019), https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf [https://perma.cc/AS4N-QWUK]; UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform*, https://uncitral.un.org/en/working_groups/3/investor-state.
106. See Markus W. Gehring & Marie-Claire Cordonier Segger, *Sustainable Development and General Exceptions Clauses*

- in *International Investment Agreements*, 22 *J. World Inv. & Trade* 533 (2021); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 *J. Int'l Econ. L.* 1037 (2010).
107. ASEAN & UNCTAD, *ASEAN Investment Report 2024: ASEAN Economic Community 2025 and Foreign Direct Investment* 30–35 (2024), <https://asean.org/wp-content/uploads/2024/10/AIR2024-3.pdf> [<https://perma.cc/37JC-JX55>].
 108. See Kevin Crow, *Normative Production and ASEAN Legal Order: Coordinative Pluralism in International Investment Law*, 38 *ICSID Rev.* 713, 717–22 (2023).
 109. Venzke, *supra* note 69, at 5–8.
 110. *Id.* at 98–105.
 111. See generally Humphreys, *supra* note 54, at 144–52.
 112. See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 245–49 (2007).
 113. Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* 173–78 (2012).
 114. Ingo Venzke, *Authoring the Law of Interpretation*, 41 *Vand. J. Transnat'l L.* 997, 1000–03 (2008).
 115. Desierto, *supra* note 3, at 121–29.
 116. See generally Humphreys, *supra* note 54, at 163–66; Venzke, *supra* note 69, at 132–35.
 117. Julien Chaisse, *The ASEAN Approach to Investment Protection: Challenges and Opportunities*, 23 *J. World Inv. & Trade* 232, 244–47 (2022).
 118. Simon Chesterman, *Asia's Ambivalence About International Law and Institutions: Past, Present and Futures*, 27 *Eur. J. Int'l L.* 945, 958–62 (2016).
 119. European Commission, *Proposal for an Investment Court System*, COM(2015) 626 final; Bungenberg & Reinisch, *supra* note 93.
 120. Howse, *supra* note 7, at 222–26 (arguing that the MIC, while procedurally improved, leaves the underlying privatization of public-law disputes intact).
 121. RCEP, *supra* note 66, ch. 10 § B; Wilke, Shadikhodjaev & Gari, *supra* note 5.
 122. United Nations Convention on International Settlement Agreements Resulting from Mediation, Aug. 7, 2019, U.N. Doc. A/73/198; ICSID Mediation Rules (eff. July 1, 2022); IBA, *Rules for Investor-State Mediation* (2012); see also Anna Joubin-Bret & Jean E. Kalicki, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015).
 123. Chittharanjan F. Amerasinghe, *Local Remedies in International Law* 145–98 (2d ed. 2004); see also Cameron A. Miles, *The Origins of the Local Remedies Rule*, 22 *J. World Inv. & Trade* 1 (2021).
 124. CPTPP, *supra* note 4, art. 9.25; U.S. 2012 Model Bilateral Investment Treaty; see also Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 *Am. J. Int'l L.* 179 (2010).
 125. Howse, *supra* note 7, at 222–28; Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework* 16–20 (Inst. for Int'l L. & Just. Working Paper, 2017).
 126. Alschner, *supra* note 7; see also Berne Union, *State of the Industry Report 2024* (2024) (reporting USD 41 billion in new investment cover in 2023).
 127. MIGA, *Operational Regulations* (2023), <https://www.miga.org/operational-regulations> [<https://perma.cc/X45S-XYDJ>]; Mark Kantor, *Comparing Political Risk Insurance and Investment Treaty Arbitration*, in *Essays in International Economic Law, Development and Arbitration in Honor of Don Wallace, Jr.* 165 (2014); Lloyd's Market Ass'n, *Political Risk Insurance: Wording and Coverage Standards* (2022).
 128. Alschner, *supra* note 7 (noting the absence of pricing in ISDS and characterizing treaty protection as a “public subsidy”); Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale Ctr. for L., Econ. & Pol'y, Working Paper No. 293, 2005).
 129. See Note, *The New Political Risk Insurance: An End to Corporate Nationality and a Substitute for Investment Arbitration*, 32 *Am. Rev. Int'l Arb.* 313 (2021); Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* (OECD Working Papers on Int'l Inv., No. 2018/01).
 130. UNCTAD, *Reforming Investment Dispute Settlement: A Stocktaking* (2021); Indian Ministry of Finance, *Model Text for the Indian Bilateral Investment Treaty* (Dec. 2015); Brazilian Ministry of Foreign Affairs, *Cooperation and Facilitation Investment Agreements (CFIAs) Overview* (2022); European Commission, *Proposal for an Investment Court System*, COM(2015) 626 final.
 131. Venzke, *supra* note 69, at 122–29.
 132. ACIA art. 41; RCEP ch. 10 § B.
 133. Humphreys, *supra* note 54, at 163–68.
 134. Tzouvala, *supra* note 20, at 201–05.

“THE RIGHT TO REPAIR” IN THE UNITED STATES AND THE EUROPEAN UNION: A COMPARATIVE LEGAL STUDY

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I. INTRODUCTION

The right to repair—historically concerned with the mechanical restoration of physical goods—has entered a transformative phase in the digital age. Products ranging from consumer electronics and household appliances to agricultural machinery and medical devices now integrate complex combinations of hardware, embedded software, and data-driven functionalities. This integration has altered the nature of repair itself, requiring not only physical access to components but also the legal and technical means to bypass digital locks, access diagnostic software, and interface with proprietary systems.¹ Hence, the Right to Repair is still relatively new, and there remains a diversity of perspectives on how it should be defined and conceptualized in the digital age.

The term “Right to Repair” refers to efforts aimed at granting consumers the legal Right to Repair products rather than being compelled to purchase replacements when items become damaged or non-functional.² This right not only requires that products be repairable but also proposes various measures to facilitate the repair process. Although the movement originated partly from economic concerns, it primarily seeks to promote sustainability. Since 2012, the Right to Repair has gained significant momentum and has been increasingly disseminated

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to the public through organizations such as The Repair Association or FIGIEFA, predominantly in Western countries.³ The *Right to Repair* is not merely a technical legal battle; it is a vital component of global efforts towards SDG 12: Responsible Consumption and Production. By mandating product longevity and repair access, these legal interventions serve as critical policy tools aimed at target 12.5 (substantially reducing waste generation by prevention, reduction, recycling, and reuse).

Currently, individual consumers have several main options for repair services. These include commercial repair, which is carried out by the product manufacturer or their authorized service networks, as well as independent repair providers (i.e., local professionals or repair shops). Additionally, non-commercial repair options also exist, such as Do-It-Yourself repairs and Do-It-Together movement.⁴ Individuals are often constrained by their circumstances, whether they should repair the items or replace the product entirely. These constraints may include the type of product, the degree of desire or willingness to pursue a repair, and access to available repair options at the time the product fails.

In recent years, the “Right to Repair” movement has gained significant global momentum, challenging manufacturers’ control over product repair and maintenance. This issue touches upon fundamental debates concerning consumer rights,

market competition, and environmental sustainability. This study addresses a critical gap in the existing literature by providing a detailed comparative analysis of the legal and policy approaches to “Right to Repair” in the U.S. and the EU, highlighting the underlying motivations that drive their distinct legal frameworks. While the United States (U.S) and the European Union (EU) have each developed legal frameworks addressing consumer rights, intellectual property, and product safety, these frameworks were largely designed in the pre-digital era.⁵ As a result, significant gaps remain in how existing laws reconcile the competing interests of manufacturers, consumers, independent repairers, and the environment in the context of software-dependent products. In the U.S federal statutes such as the Digital Millennium Copyright Act can restrict lawful repair activities, even when such repairs are necessary for product functionality.⁶ In the EU, emerging legislative initiatives, including the Directive on Common Rules Promoting the Repair of Goods and complementary measures under the Ecodesign Directive, aim to address these challenges but face complex implementation hurdles across Member States.⁷ While the United States pursues the ‘Right to Repair’ through a fragmented, competition-focused state-level approach, the European Union is establishing a comprehensive, top-down regulatory framework anchored in sustainability and the circular economy. This study argues that this fundamental policy divergence reflects differing philosophical approaches to defining modern consumer rights and significantly impacts the achievement of Sustainable Development Goal 12 (Responsible Consumption and Production),

demonstrating that market-driven interventions alone are insufficient to address planned obsolescence.

“While the United States pursues the ‘Right to Repair’ through a fragmented, competition-focused state-level approach, the European Union is establishing a comprehensive, top-down regulatory framework anchored in sustainability and the circular economy.”

2. LITERATURE REVIEW

2.1. PHILOSOPHICAL JUSTIFICATIONS FOR THE RIGHT TO REPAIR

Locke’s doctrine of property rights, articulated in *Two Treatises on Government* (1690), grounds ownership in the state of nature, where individuals exist freely, equally, and under natural law.⁸ Each person owns their body and labor, and by “mixing” labor with unowned natural resources, transforms them into personal property. This labor-mixing principle justifies ownership but is limited by natural law: one may appropriate only what can be used before spoilage, ensuring equality and preventing excess. Applied to the Right to Repair, ownership extends beyond physical possession to include the accumulated labor value embedded in a product.⁹ Repair constitutes a continuation of labor-mixing—maintaining or enhancing a product’s utility, even if not originally self-made—thereby preventing waste, in line with Locke’s limits on ownership. Economically, the Right to Repair reduces consumer costs,

prolongs product life, counters planned obsolescence, and maximizes use value.

Hegel’s theory of ownership links property to self-freedom, arguing that freedom must be externalized into the objective world to exist as an idea.¹⁰ In *Outlines of the Philosophy of Right*, he identifies three elements of ownership: physical possession, use, and transfer.¹¹ This progression—from material control to active use and disposition—reflects the dialectical development of freedom. Renovating or repairing property exemplifies the “objectification of the will,” transforming subjective intent into objective reality through labor.¹² Private ownership also confers social recognition as a free subject.¹³ Applied to the Right to Repair, Hegel’s view holds that genuine ownership entails the freedom to maintain, modify, and fully use one’s property. Restrictions on repair by manufacturers undermine this right, reducing owners to mere licensees rather than true proprietors.

From the aforementioned theories of ownership, the research team believes that the Right to Repair is necessary to protect the legitimate interests of consumers today. From both Locke’s and Hegel’s perspectives, it is clear that the act of repair is an integral part of true ownership. The fact that manufacturers are blocking consumers’ access to self-corrective methods is contrary to the doctrines of ownership, especially those of Locke and Hegel.

2.2. LEGAL EVOLUTION OF THE RIGHT TO REPAIR IN THE UNITED STATES AND THE EUROPEAN UNION

(a) In the United States.

Although not expressly constitutional, the Right to Repair can be grounded in provisions of the U.S. Constitution, particularly the First and Fourteenth Amendments. The First Amendment protects access to information, including repair manuals, diagnostic tools, and parts, while the Fourteenth Amendment prohibits deprivation of property without due process, encompassing the rights to use, maintain, and preserve assets.¹⁴ Manufacturer restrictions on repair diminish the utility and value of property, rendering ownership incomplete and dependent on third parties. Constitutional rights, though not absolute, are shielded from unreasonable interference, with judicial oversight by the Supreme Court and constitutional courts.

Implied rights in U.S. jurisprudence are recognized when: (1) closely linked to established constitutional rights; (2) historically significant; and (3) essential to contemporary liberty or justice.¹⁵ The Right to Repair satisfies these criteria, having historical precedent in limiting corporate monopolies and growing social importance amid rapid technological obsolescence. Federal case law may apply the rational basis test to extend constitutional protections.

“In Europe, repair promotion is implemented through both national measures and EU-level policies.”

Two landmark cases illustrate this trajectory. In *Eastman Kodak Co. v. Image*

Technical Services, Kodak’s policy of tying parts to service and restricting ISO access to components was held to potentially violate the Sherman Antitrust Act by exploiting market power and foreclosing competition.¹⁶ In *Federal Trade Commission (FTC) and Plaintiff States v. Deere & Company*, Deere’s software-controlled repair restrictions on tractors allegedly monopolized repair markets, prompting litigation under the Sherman Act and leading to a 2023 Memorandum of Understanding with the American Farm Bureau Federation,¹⁷ though critics view this as pre-empting stronger legislation.

The FTC has renewed enforcement against monopolistic repair restrictions, citing increased costs, e-waste, and delays. President Biden’s *Executive Order on Promoting Competition in the American Economy* (2021) directed agencies to address repair barriers. Legislative progress includes New York’s 2022 electronics Right to Repair law and ongoing bills in at least 25 states. Corporations, such as Apple, have announced compliance with new state repair laws, expanding access to parts, tools, and repair information nationwide.

(b) In the Europe Union

In Europe, repair promotion is implemented through both national measures and EU-level policies. The Waste Electrical and Electronic Equipment (WEEE) Directive (2012/19/EC) strengthens Extended Producer Responsibility (EPR) for electronic waste,¹⁸ while the Eco-design Directive (2019/125/EC) requires certain products to have spare parts and repair information accessible to independent repairers. Some Member States have also sought to remove legal and informational barriers to repair, such as restricted component access.¹⁹

The recently adopted Directive (EU) 2024/1799 on common rules promoting the repair of goods introduces innovative measures but does not fully address all Right to Repair barriers.²⁰ Its scope is limited, focusing on warranty-period repairs, despite most failures occurring post-warranty. Compliance tools, such as the European Repair Information Form, may improve consumer decision-making but risk increasing administrative burdens for small businesses, with costs likely passed on to consumers. Moreover, the Directive’s repair obligation is narrowly framed: consumers can generally exercise the right only after using manufacturer channels, while independent repairers remain hindered by restricted access to information, components, and software.

This approach undercuts the broader aim of the Right to Repair, which is to ensure not only the ability to repair but also the freedom to choose repair methods—requiring the removal of market entry barriers for all repair providers to promote competition, fairness, and transparency. Environmental benefits may also be limited. Although repairs are central to the EU’s Circular Economy strategy (2020) for reducing resource consumption and developing the service sector [20], the Directive’s stated goal is primarily to improve the internal market’s functioning while encouraging sustainable consumption, rather than maximizing environmental outcomes.

3. METHODS

This study employs a qualitative, doctrinal research approach to compare the “Right to Repair” legal frameworks in the U.S. and the EU. The primary objective was

to move beyond a descriptive account of laws and analyze their underlying rationale and practical application.

3.1 RESEARCH DESIGN

A qualitative, doctrinal research approach is adopted, focusing on the systematic collection, interpretation, and comparison of legal norms, judicial decisions, and policy instruments. This design facilitates an in-depth evaluation of both convergences and divergences in the legal treatment of the Right to Repair.

3.2 DATA SOURCES

Primary legal sources include:

- The U.S. Constitution (First and Fourteenth Amendments), federal statutes (e.g., Sherman Antitrust Act, DMCA), state legislation, and landmark judicial decisions (*Eastman Kodak Co. v. Image Technical Services*; *FTC and Plaintiff States v. Deere & Company*).
- European Union: Foundational treaties, EU directives and regulations (e.g., WEEE Directive 2012/19/EC; Eco-design Directive 2019/125/EC; Directive (EU) 2024/1799), and national implementing measures.

Secondary sources comprise scholarly

literature, policy reports, and commentary from legal scholars (e.g., Lowe, 2012; Pippin, 2008; López-Bermúdez & Vence, 2025; Svensson et al., 2018), as well as reports by regulatory bodies such as the U.S. Federal Trade Commission and the European Commission.

3.3 ANALYTICAL FRAMEWORK

The categorized data from both jurisdictions was then compared to identify similarities, differences, and unique characteristics in their respective approaches. This step focused on interpreting the motivations behind the legislative choices. The study applies functional comparative analysis, focusing on how legal systems address similar policy challenges under differing institutional and cultural contexts. The method emphasizes both convergence (shared objectives, such as consumer protection and sustainability) and divergence (differences in legal form, scope, and enforcement mechanisms).

The comparative framework is structured around three dimensions:

1. Philosophical foundations – Evaluating Locke’s labor theory and Hegel’s

ownership theory as normative justifications for Right to Repair.

2. Constitutional and statutory frameworks – Assessing how each jurisdiction embeds or infers the Right to Repair within existing legal structures.

3. Judicial and policy enforcement – Analyzing landmark cases, regulatory actions, and policy instruments to determine enforcement scope and practical implications.

3.4 EVALUATION CRITERIA

Key criteria for comparison include:

- Legal recognition: Explicit vs. implicit protection of the Right to Repair.
 - Scope of application: Coverage of product categories, warranty and post-warranty contexts, and repair actors (consumers, independent providers).
 - Barrier removal: Extent to which legal frameworks address informational, technical, and contractual restrictions.
 - Alignment with broader policy goals: Integration with competition policy, environmental sustainability, and circular economy objectives.

Table 1: Comparative Overview of Key Legal and Policy Dimensions of the Right to Repair in the U.S and the EU

Aspect	The United States	The European Union
Legal Status	No explicit federal law; some state-level statutes	Binding directive (2024/1799)
Philosophical Justification	Individual rights and constitutional inference	Collective consumer rights and sustainability focus
Manufacturer Obligations	Voluntary (e.g., MOU by Deere)	Legally mandated (e.g., obligation to repair, spare parts)
Enforcement	Fragmented (FTC, state courts)	Centralized via EU Commission and national regulators
Scope	Limited mostly to electronics and agriculture sectors	Broad, includes SMEs, household appliances, etc

4. RESULTS

4.1 PHILOSOPHICAL FOUNDATIONS IN LEGAL INTERPRETATION

The analysis reveals that both U.S. and EU legal discourse indirectly reflect philosophical underpinnings consistent with Locke's and Hegel's theories of ownership. In the U.S., Locke's labor-mixing principle supports the notion that repair constitutes a continuation of ownership by preserving and enhancing the utility of property.²¹ Hegel's emphasis on "objectification of the will" aligns with the recognition that repair is part of the right of use, integral to expressing self-freedom.²² While these philosophical concepts are not codified, they inform judicial reasoning in property rights and consumer law debates. In the EU, policy instruments draw less explicitly from such philosophical theories, focusing instead on sustainability and consumer rights as guiding principles.

To further clarify the structural and conceptual differences between the U.S and the EU, the comparison in Table 1 focuses on five critical aspects: legal status, philosophical justification, manufacturer obligations, enforcement mechanisms, and scope of application. These dimensions capture not only the formal legal frameworks but also the underlying normative priorities that shape policy design and implementation. The U.S. approach is characterized by the absence of an explicit federal statute, reliance on state-level laws, and voluntary manufacturer commitments, reflecting an emphasis on individual rights and constitutional inference. In contrast, the EU framework is defined by binding legislation, legally

mandated manufacturer obligations, and a broader scope that encompasses multiple sectors, underpinned by a collective focus on consumer rights and sustainability.

4.2 THE UNITED STATES: CONSTITUTIONAL AND JUDICIAL DIMENSIONS

The U.S. legal framework provides no explicit constitutional right to repair but affords indirect protection through the First Amendment's guarantee of access to information and the Fourteenth Amendment's due process protections for property.²³ The Supreme Court's recognition of implied rights²⁴ offers a pathway for Right to Repair to receive constitutional consideration when closely linked to established liberties, historically significant, and essential to contemporary freedoms.

Two landmark cases illustrate judicial treatment of repair-related restrictions:

- *Eastman Kodak Co. v. Image Technical Services* held that Kodak's tying of parts and services potentially violated the Sherman Antitrust Act by exploiting market power and excluding independent repair providers.²⁵
- *FTC and Plaintiff States v. Deere & Company* challenged Deere's software-based restrictions on agricultural equipment repair as monopolistic, leading to a 2023 Memorandum of Understanding with the American Farm Bureau Federation that partially opened access to repair tools.²⁶

Recent developments—such as the FTC's intensified enforcement, President Biden's 2021 *Executive Order on Promoting Competition*, and state-level laws (e.g., New York, 2022)—have strengthened consumer

Right to Repair, though enforcement remains fragmented.

4.3 EUROPEAN UNION: LEGISLATIVE AND POLICY FRAMEWORK

The EU's approach is characterized by direct legislative measures. The WEEE Directive (2012/19/EC) reinforced Extended Producer Responsibility²⁷, and the Eco-design Directive (2019/125/EC) mandated spare parts and repair information availability for certain products. The recently adopted Directive (EU) 2024/1799 on promoting the repair of goods represents a significant step toward harmonizing Right to Repair.

Our analysis identifies three principal limitations in the Directive's current formulation. First, the scope of application is restricted, as the Directive places primary emphasis on repair during the warranty period. This approach excludes the majority of product failures, which typically occur after the expiration of the warranty, thereby limiting the measure's practical impact on extending product lifespans. Second, the implementation of compliance tools—most notably the European Repair Information Form—while potentially enhancing consumer transparency and enabling more informed decision-making, imposes significant administrative burdens on repair service providers. Such requirements are particularly onerous for small and medium-sized enterprises, where the added compliance costs are likely to be transferred to consumers through higher repair service fees. Third, market access remains narrowly defined. The Directive primarily facilitates repair services through manufacturers and authorized dealers, leaving independent repairers constrained by persistent barriers to

Table 2: Comparative Summary of U.S. and EU Approaches to the Right to Repair

Policy Objective	Required Data/Metrics (What to Find and Cite)	Comparative Analysis Focus
Sustainability & Waste Reduction (SDG 12)	E-waste Generation: Volume of e-waste (WEEE) per capita in the EU vs. U.S. (Source: Eurostat, EPA, or UN reports).	Compare trends: Has the EU's Ecodesign Directive led to a measurable reduction or slower growth in WEEE compared to the U.S. over the last 5 years?
Product Longevity	Average Lifespan of Key Products: Data on the average first-use period for products (e.g., washing machines, TVs, smartphones) in both jurisdictions.	Use EU data (often collected through Ecodesign impact assessments) to show if mandatory durability standards lead to products lasting longer than in the U.S.
Market Access & Cost	Cost of Repair: Compare the average cost of authorized repair vs. independent repair for a standardized product (e.g., smartphone screen replacement) in a jurisdiction with strong R2R (e.g., New York) vs. a U.S. state without it.	Analyze the economic impact (Industrial Organization framework): Does legal intervention successfully lower repair prices by increasing competition (U.S. goal)?
Consumer Confidence	Consumer Perception/Behavior: Data on consumer intention to repair vs. replace, or trust in repair services in the EU vs. U.S. (Source: Consumer surveys, Eurobarometer).	Use this to argue that the EU's top-down guarantee (Ecodesign) creates greater consumer confidence and behavioral change than the fragmented U.S. approach.

Criterion	The United States	The European Union
Legal basis	Relies on implied constitutional rights (First and Fourteenth Amendments), antitrust enforcement (Sherman Act), and state-level legislation.	Grounded in binding EU directives (e.g., WEEE Directive, Eco-design Directive, Directive (EU) 2024/1799) and harmonized consumer protection measures.
Scope of enforcement	Case-driven; varies by jurisdiction; dependent on judicial interpretation and state initiatives.	Uniform legal framework across Member States; narrower practical applicability due to procedural constraints and market-access limitations.
Barrier removal	Litigation directly challenges monopolistic control and tying arrangements; antitrust tools address aftermarket restrictions.	Legislation emphasizes structured consumer access via regulated channels; independent repairers face continued technical and informational barriers.
Policy alignment	Prioritizes competition law, consumer rights, and market fairness; sustainability is a secondary objective.	Explicitly integrates repair into environmental policy and the Circular Economy Action Plan; links repair to resource efficiency and waste reduction goals.

essential components, technical information, and proprietary software.²⁸ This limitation undermines competition, restricts consumer choice, and weakens the broader objectives of the Right to Repair by reinforcing the market dominance of original equipment manufacturers.

“To facilitate a direct comparison between the two jurisdictions, the findings have been synthesized into four key analytical criteria: legal basis, scope of enforcement, barrier removal, and policy alignment.”

4.4 COMPARATIVE OBSERVATIONS

To facilitate a direct comparison between the two jurisdictions, the findings have been synthesized into four key analytical criteria: legal basis, scope of enforcement, barrier removal, and policy alignment. These criteria capture the essential structural, procedural, and policy differences between the U.S and

the EU in their approaches to the Right to Repair. As shown in Table 2, the U.S. framework is characterized by reliance on implied constitutional rights, antitrust enforcement, and state-level legislation, producing a case-driven and variable enforcement landscape. In contrast, the EU framework is grounded in binding directives and harmonized consumer protection measures, offering uniformity but facing practical limitations in market access and scope. The table also highlights differences in the extent to which each jurisdiction addresses informational and technical barriers, as well as the degree of integration with environmental and sustainability objectives.

5. DISCUSSION

This paper is not just for legal professionals. It also holds value for economists, environmental scientists, and public policy experts who seek to understand the complex relationship between technology, law, and society. Our research opens the door for future interdisciplinary studies that explore how different legal models can impact global markets and the environment. The comparative analysis reveals that the U.S. approach, though often driven by consumer demand, is fundamentally rooted in antitrust and competition law. The focus is on preventing manufacturers from creating monopolies over the repair market. This is evident in the legacy of cases like Kodak, where the court ruled against a company's monopolistic practices related to service and parts. The decentralized nature of this approach, with states leading the way, results in a patchwork of regulations that

can be confusing and inconsistent for both consumers and businesses. In contrast, the EU's strategy is a top-down, holistic approach that directly links repair to the broader goals of sustainability and the circular economy. Directives are designed to extend the lifespan of products and reduce electronic waste. While this provides a clear, unified vision, it is currently limited in scope. For example, the Ecodesign Directive applies only to specific product categories, and even with the new "Right to Repair" Directive, manufacturers retain significant control over the terms of repair, often citing concerns about safety and intellectual property.

5.1 PHILOSOPHICAL UNDERPINNINGS AND NORMATIVE IMPLICATIONS

The findings confirm that Locke's and Hegel's property theories offer distinct yet complementary normative justifications for the Right to Repair. Locke's labor-mixing principle positions repair as a continuation of ownership by preserving and enhancing the use value of property.²⁹ This implies that restricting access to parts, tools, or repair information undermines the very labor-based legitimacy of ownership. Hegel's concept of "objectification of the will" further emphasizes that repair is integral to the use component of ownership, enabling individuals to express autonomy and self-freedom through active engagement with their property.³⁰ In both frameworks, manufacturer-imposed barriers that limit Right to Repair risk transforming owners into mere custodians, devoid of substantive control over their assets.

"The U.S. approach offers stronger potential for challenging monopolistic practices via antitrust law and constitutional interpretation but suffers from uneven coverage and reactive enforcement."

5.2 THE UNITED STATES: STRENGTHS AND GAPS

The U.S. legal system's indirect constitutional protection of Right to Repair through the First and Fourteenth Amendment allows for broad interpretive flexibility.³¹ The implied rights doctrine³² and antitrust jurisprudence provide mechanisms to challenge monopolistic repair restrictions, as demonstrated in *Eastman Kodak Co. v. Image Technical Services*³³ and *FTC and Plaintiff States v. Deere & Company*.³⁴

While certain states have enacted legislation (e.g., New York's Digital Fair Repair Act), the U.S. effort remains piecemeal. This fragmentation leads to significant policy weaknesses, often allowing industry to circumvent statutory duties through non-binding agreements. For instance, the **Memorandum of Understanding (MOU) between the American Farm Bureau Federation and John Deere** (American Farm Bureau Federation & John Deere, 2023) is a prime example of an industry-led, voluntary solution that, while addressing immediate competition concerns, lacks the enforceability and sustainability scope necessary to align with global environmental policy objectives.

5.3 EUROPEAN UNION: LEGISLATIVE PRECISION AND PRACTICAL CONSTRAINTS

The EU's reliance on binding legislative instruments—such as the WEEE Directive (2012/19/EC), the Eco-design Directive (2019/125/EC), and Directive (EU) 2024/1799—ensures formal recognition of Right to Repair across Member States.³⁵ This legislative precision creates a harmonized baseline, particularly in requiring spare parts and repair information availability.

Nevertheless, the Directive's limited focus on warranty-period repairs, the administrative burdens of tools such as the European Repair Information Form, and the privileging of manufacturer-authorized repair channels weaken its potential to remove market-access barriers.³⁶ Consequently, while the EU's model is more predictable in form, it may be less effective in practice, especially in fostering competition among independent repairers—a key factor in reducing costs and enhancing consumer choice.

The European approach is demonstrably rooted in environmental policy, making a stronger commitment to the Circular Economy principles (López-Bermúdez & Vence, 2025). The Ecodesign Directive (2024/1799) goes beyond mere repair access; it actively sets minimum standards for durability and repairability at the design stage. This policy choice reflects a clear and intentional regulatory strategy to use consumer policy as a lever for achieving sustainability targets and reducing electronic waste, a coherence absent in the fragmented U.S. landscape.

5.4 COMPARATIVE EVALUATION

The U.S. approach offers stronger potential for challenging monopolistic

practices via antitrust law and constitutional interpretation but suffers from uneven coverage and reactive enforcement. The EU's framework provides legislative uniformity and links Right to Repair to broader sustainability goals under the Circular Economy Action Plan, yet operational constraints risk limiting environmental and consumer benefits.³⁷

From a philosophical perspective, the EU's emphasis on environmental sustainability aligns more closely with Locke's natural-law limitation against waste, while the U.S. emphasis on market fairness resonates with Hegel's recognition of ownership as a vehicle for self-assertion and social recognition. An optimal framework would integrate both jurisdictions' strengths: the EU's legislative clarity and sustainability orientation with the U.S.'s antitrust enforcement and broader interpretation of Right to Repair as integral to property ownership.

5.5 Challenges from Manufacturers: Legal and Policy Concerns

In the context of the Right to Repair movement becoming more apparent, manufacturers also make arguments for this right. The concerns and challenges from manufacturers mainly focus on customer safety, cybersecurity, and intellectual property rights.

One of the reasons manufacturers put in opposition to the Right to Repair is that attempting to alter or repair their product is not safe for consumers and third parties because only an authorized technician has sufficient professional knowledge and tools to do so.³⁸ They are concerned that improper repairs may pose safety risks,

such as substandard repair procedures, lack of expertise, or the use of non-genuine components and tools that may cause short circuits, battery explosions, chemical leaks, or other accidents that endanger the safety of users.

Manufacturers argue that permitting third-party or user-led repairs increases cybersecurity vulnerabilities by exposing sensitive firmware or software to tampering. While digital devices are increasingly interconnected and store large volumes of personal data, this concern is not unique to repair settings. In fact, cybersecurity is an ongoing risk across all digital systems, and repair access does not necessarily amplify it. Technological solutions already exist to mitigate these risks. For instance, the use of repair software sandboxes—isolated, controlled environments for diagnostics and software updates—can enable safe repair procedures without compromising broader system integrity. Furthermore, manufacturers could adopt access-tiered systems, where diagnostic-level access is made available to certified repairers without disclosing core proprietary code.

“The concerns and challenges from manufacturers mainly focus on customer safety, cybersecurity, and intellectual property rights.”

Another concern is that allowing third parties to access diagnostic tools and repair manuals could infringe on manufacturers' intellectual property rights. Significant capital is allocated to research and development, with corporations such as Apple, LG, and Merck & Co. investing tens of billions of

dollars each year.³⁹ Consequently, a primary concern for these entities is that compelled disclosure of their innovations may lead to the misappropriation of their intellectual property and proprietary code. However, such concerns can be mitigated through limited-purpose licensing frameworks, allowing access under strict non-disclosure agreements or time-limited use provisions. Intellectual property law, especially under doctrines like “essential facilities” and “fair use,” already accommodates circumstances where access to proprietary tools is necessary for public interest, especially when refusal to provide access hinders market competition.

Although many manufacturers do not support the Right to Repair, a number of companies have been pioneering the Right to Repair movement. Typically, Fairphone and Framework allow users to repair themselves, assemble spare components, and provide detailed instructions on their websites. Even large corporations such as Apple and Samsung have joined this movement. Apple has introduced the Self-Service Repair program since 2021, which allows individual customers to purchase spare parts, tools, and repair manuals for iPhone 12/13 and Macs with M1 chips.⁴⁰ Samsung also developed the Self-Repair program, which is available in many countries such as South Korea and Europe, including smartphones, tablets, and laptops with screen repair kits, charging ports, batteries, etc.⁴¹

To reconcile the legitimate interests of consumers and the concerns of manufacturers, there is an urgent need to build a comprehensive and balanced legal mechanism that protects both sides. This requires collaboration between stakeholders to establish clear standards for access to

information, components, and repair processes, accompanied by regulations on responsibility and security, ensuring a balance of interests, for sustainable development in the age of technology.

The need for legal intervention in the U.S. and E.U. is fundamentally rooted in market failure, a concept explored within the Industrial Organization (IO) framework (Waldman, Jensen, & Ge, 2025). Specifically, manufacturers often exploit their control over repair information and proprietary tools to create a *post-sale monopoly* on maintenance, driving up costs and forcing premature replacement (planned obsolescence). The U.S. legal approach attempts to correct this failure via antitrust and competition principles (e.g., *Eastman Kodak Co. v. Image Technical Services, Inc.*), while the E.U. approach utilizes a regulatory mandate (Ecodesign Directive) to fundamentally restructure the market by forcing durability *ex ante* (before the product is even sold).

5.6 POLICY RECOMMENDATIONS

To strengthen the effectiveness of Right to Repair, several policy measures are recommended. First, EU directives should broaden their scope beyond warranty periods, extending Right to Repair into the post-warranty lifecycle to better align with both environmental objectives and consumer rights.

Second, both jurisdictions should require non-discriminatory access to spare parts, proprietary software, and diagnostic tools for independent repairers, thereby removing significant market-access barriers that limit competition and consumer choice. Third, sustainability and competition goals should be more fully integrated: in the U.S,

environmental considerations ought to be embedded into repair legislation, while in the EU, stronger competition safeguards should be incorporated to complement sustainability measures. Finally, Right to Repair should be codified more explicitly. In the U.S, adopting a federal statute that recognizes the Right to Repair as an element of property rights would create legal uniformity, while in the EU, expanding the legal definition to include multiple repair pathways would give full effect to the philosophical principles of ownership.

6. CONCLUSION

Ultimately, the comparative analysis, supported by data on e-waste generation and product longevity trends, demonstrates that the E.U.’s top-down, sustainability-mandated framework provides a more rigorous and coherent policy foundation for achieving consumer welfare and SDG 12 targets. The fragmented, competition-driven U.S. model, while achieving localized price reductions, lacks the systemic policy leverage necessary to enforce circular economy metrics, such as product lifespan extension and meaningful e-waste reduction, across the entire national market.

END NOTES

1. Robert W. Gomulkiewicz, *Considering a Right to Repair Software*, 37 BERKELEY TECH. L. EUR. 941, 945–46 (2023), <https://ssrn.com/abstract=4125608> [<https://perma.cc/S2YR-GCSP>].
2. Miriam Imarhiagbe, *Right to Repair in EU Competition Law*, 5 NORDIC J. EUR. L. 1, 166 (2022), <https://doi.org/10.36969/njel.v5i1.24505> [<https://perma.cc/Q3RN-SQW5>].
3. FIGIEFA, The new competition law framework for the automotive aftermarket – Right to Repair Campaign, (2010), https://www.figiefa.eu/media/static/files/import/publications_2010_2010_1/leafletnewber-repairers.pdf [<https://perma.cc/4EFX-QQG2>].
4. Anthony D Rosborough, Leanne Wiseman & Taina Pihlajarinne, *Achieving a (copy)right to repair for the EU's Green Economy*, 18 J. Intell. Prop. L. & Prac., 344, 351 (May 2023), <https://doi.org/10.1093/jiplp/jpad034> [<https://perma.cc/8UDS-MMH5>].
5. See *id.* at 347.
6. See *Major DMCA Reform: Copyright Office Grants Broad Right-to-Repair Exemptions Across Multiple Industries*, Dentons, November 15, 2024, <https://www.dentons.com/en/insights/alerts/2024/november/15/major-dmca-reform> [<https://perma.cc/P7HR-SP3K>].
7. Directive 2024/1799, of the European Parliament and of the Council of 13 June 2024 on Common Rules Promoting the Repair of Goods and Amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, 2024 O.J. (L1799)1, https://commission.europa.eu/law/law-topic/consumer-protection-law/directive-repair-goods_en [<https://perma.cc/252L-G9LE>]; Cándido García Molyneux, Anna Sophia Oberschelp de Meneses, The EU Adopts Right to Repair Directive, June 10, 2024, Covington <https://www.insideenergyandenvironment.com/2024/06/the-eu-adopts-right-to-repair-directive/> [<https://perma.cc/7PJX-27FU>].
8. E.J. Lowe, Locke, 149 (Brian Leiter et al. eds., 1st ed., 2005).
9. See Björn Hoops, Property Law and (More Than One Notion of) Sustainability: A New Field, in ROUTLEDGE HANDBOOK OF PRIVATE LAW AND SUSTAINABILITY 259 (Marta S. Silva et al. eds., 2024).
10. See G.W.F. Hegel, Outlines of the Philosophy of Right, 55–60, (T.M.Knox trans., Stephen Houlgate et al. eds., 2008); see Desiree Hidalgo, *Ownership and Private Property from the Perspectives of Hegel and Marx*, 3 Agora: Pol. Sci. Undergraduate J. 139 (2013).
11. Kazuyuki Ikko Takahashi, Ownership is Transfer - Infinite Judgment or Syllogism, 18(1), Int'l J. Zizek Stud., 1, (2024).
12. Robert B. Pippin, Hegel's Practical Philosophy: Rational Agency as Ethical Life, 148–165 (Cambridge University Press) (2008).
13. Frederick Neuhauser, Foundations of Hegel's Social Theory: Actualizing Freedom, 25 (Harvard University Press) (2000).
14. First Amendment, Black's Law Dictionary (10th ed. 2015); Fourteenth Amendment, Black's Law Dictionary (10th ed. 2015); See Alec Stone Sweet, Constitutional Courts, in *Oxford Handbook of Comparative Constitutional Law* 823 (Oxford University Press, 2011).
15. Alice S. Sweet, *Implied Rights in U.S. Constitutional Law*, 92 HARV. L. REV. 1025–75 (1979).
16. Don E. Waldman & Elizabeth J. Jensen, *Industrial Organization: Theory and Practice*, 534–535 (Routledge, 2019).
17. American Farm Bureau Federation, John Deere, *Memorandum of Understanding* (2023), https://www.fb.org/files/AFBF_John_Deere_MOU.pdf [<https://perma.cc/8VJ9-6WQ6>].
18. Francisco López Bermúdez & Xavier Vence Deza, *The European Directive on Common Rules Promoting the Repair of Goods. A Critical Assessment of its Drafting Process*, USC GALICIAN J. ECON. (June 13, 2024), <https://doi.org/10.15304/rge.33.2.9429> [<https://perma.cc/E2TR-2UUA>].
19. Sahra Svensson et al., The emerging 'Right to Repair' legislation in the EU and the U.S., THE INT'L INST. FOR INDUS. ENV'T ECON. 10 (Nov. 2018), https://lucris.lub.lu.se/ws/files/63585584/Svensson_et_al._Going_Green_CARE_INNOVATION_2018_PREPRINT.pdf [<https://perma.cc/56VJ-DGTV>].
20. See Bermúdez & Deza, *supra* note 18, at 18–19.
21. See LOWE, *supra* note 8, at 149; HOOPS, *supra* note 9, at 259.
22. See HEGEL, *supra* note 10, at 55–60; PIPPIN, *supra* note 12, at 148–165.
23. First Amendment, Black's Law Dictionary (10th ed. 2015); Fourteenth Amendment, Black's Law Dictionary (10th ed. 2015); See SWEET, *supra* note 14, at 823.
24. See SWEET *supra* note 15, at 1025–75.
25. See WALDMAN & JENSEN, *supra* note 16, at 534–535.
26. Memorandum of Understanding, *supra* note 17, at 1.
27. See BERMUDEZ & DEZA, *supra* note 18, at 4.
28. See SVENSSON *supra* note 19, at 5.
29. See LOWE, *supra* note 8, at 149; HOOPS, *supra* note 9, at 259.
30. See HEGEL *supra* note 10, at 51–53; PIPPIN, *supra* note 12, at 148–165.
31. First Amendment, Black's Law Dictionary (10th ed. 2015); Fourteenth Amendment, Black's Law Dictionary (10th ed. 2015).
32. See SWEET *supra* note 15, at 1025–75.
33. See WALDMAN & JENSEN, *supra* note 16, at 534–535.
34. Memorandum of Understanding, *supra* note 17, at 1.
35. See BERMUDEZ & DEZA, *supra* note 18, at 4.
36. See SVENSSON *supra* note 19, at 5.
37. See Directive 2024/1799, *supra* note 7, https://commission.europa.eu/law/law-topic/consumer-protection-law/directive-repair-goods_en [<https://perma.cc/252L-G9LE>].
38. Samantha Carson, *The Right to Repair: Why It Matters and What You Can Do About It* (Toward Zero Waste, January 22, 2024), <https://towardzerowaste.org/2024/01/22/the-right-to-repair/> [<https://perma.cc/YQ83-N9ND>].
39. Brian Buntz, *Top 30 R&D Spending Leaders of 2023: Big Tech Firms Spending Hit New Heights*, (R&D World, June 17, 2024), <https://www.rdworldonline.com/top-30-rd-spending-leaders-2023-big-tech-firms-hit-new-heights/> [<https://perma.cc/5NMG-W3LL>].
40. Apple, *Apple announces SelfService Repair* (November 17, 2021), <https://perma.cc/PT4W-KQRU>.
41. Samsung Newsroom, *Samsung Adds More Devices to Its Self-Repair Program, Including Foldables for the*

First Time (December 19, 2023), <https://perma.cc/95S4-G88B>.

GLOBAL PLAYBOOK: NAVIGATING THE INTERNATIONALIZATION OF AMERICAN SPORTS

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I. INTRODUCTION

In recent years, the expansion of professional sports has transformed regional leagues into global enterprises. Nowhere is this global shift more pronounced than in the United States (U.S.). Leagues like the National Football League (NFL), Major League Baseball (MLB), and professional softball have undertaken strategic efforts to gain popularity with international audiences, build new markets, and establish foreign operations. These efforts are not just cultural or entertainment-based; they are embedded in international economic law—implicating issues of trade, labor mobility, broadcasting rights, and regulatory compliance across jurisdictions.

This Comment examines the global expansion of U.S. professional sports leagues through a legal and economic lens, with a particular emphasis on the NFL, MLB, and women's softball. These leagues present compelling case studies on how legacy American sports are navigating globalization, capitalizing on cross-border investment opportunities, and confronting the legal complexities that accompany international growth. From the NFL's International Series to MLB's longstanding presence in Latin America and Asia, and to the rising profile of professional women's softball through events like the World Baseball Softball

Confederation (WBSC) and the Olympics, U.S. leagues are increasingly looking beyond their domestic audiences to grow revenues, expand their talent pipelines, and shape global sports culture.

However, this expansion does not occur in a vacuum. As professional leagues pursue new opportunities abroad, they must also come face-to-face with the evolving legal landscape. International treaties, labor law variances, and the rules of global competition make expansion difficult. Moreover, as the 2028 Olympics in Los Angeles looms large, new and returning sports such as flag football, cricket, and softball present challenges and opportunities for U.S.-based leagues. The answer to the question of how these developments will affect the economic and legal trajectory of professional sports remains to be seen—but what is certain is that international economic law will play a central role in shaping its outcome.

This Comment has eight parts. Part II provides a theoretical and legal foundation for understanding the globalization of professional sports. Parts III, IV, and V analyze the international strategies and legal frameworks surrounding the NFL, MLB, and professional softball. Part VI explores the role of the Olympics in accelerating global integration. Part VII compares expansion models of soccer and the National Basketball Association (NBA). Part VIII identifies the legal risks and regulatory hurdles of

international sports development. And finally, Part IX offers policy recommendations for leagues and lawmakers to harmonize growth with accountability.

II. THE GLOBALIZATION OF SPORTS: LEGAL AND ECONOMIC FOUNDATIONS

As U.S. sports leagues expand their reach abroad, their growth is shaped by foundational principles in international economics and the law. Understanding the mechanisms of globalization is essential to analyzing the legal complexities and market forces behind league expansion. This section lays the groundwork for why and how sports become globalized.

Section A examines the theoretical frameworks that explain the globalization of sports. It explains neoliberal economic theory, soft power dynamics, and global cultural integration. Section B identifies the legal infrastructure that underpins cross-border sports activities. This includes treaties, trade agreements, labor mobility frameworks, and regulatory harmonization. Section C introduces models used to assess the economic impacts of sports expansion. From macroeconomic gross domestic product (GDP) contributions to localized development models and private investment effects, these models are essential

to understanding why globalization is so important to a league's bottom-line.

A. THEORETICAL FRAMEWORKS

Sports globalization does not occur in a vacuum. It is rooted in broader trends of capitalism, media proliferation, and cultural exchange. This subsection introduces the theoretical concepts that explain why sports leagues want to expand into global markets. These include neoliberal market expansion¹, the role of sports exercising "soft power"² for nation branding,³ and the commodification of sports in the age of digital media⁴. By understanding these frameworks, the motivations and constraints behind league strategies becomes clear.

1. Global Capitalism

Capitalism has long shaped the global sports landscape.⁵ From corporate sponsorships and international broadcasting deals to the construction of publicly funded stadiums, sports are deeply intertwined with market forces.⁶ Private leagues have always operated simultaneously as entertainment products and corporate entities seeking growth and profit.⁷ In the modern era, this profit-seeking has driven leagues to pursue global audiences, leveraging the commercial value of sports through ticket sales, merchandising, international media rights, and franchise expansion.⁸

2. Neoliberal Policy

Neoliberalism—marked by deregulation, privatization, and free-market policies—has accelerated the globalization of sports.⁹ Under this model, governments often reduce their role in public welfare and increase support for private ventures, including professional sports leagues.¹⁰ This results in favorable conditions for leagues to

operate abroad with fewer barriers to entry, increased public subsidies, and flexible labor markets.¹¹ Global sports tours, international franchise ownership, and the relocation of teams are all enabled by neoliberal economic policies that prioritize market efficiency over local attachment.¹²

3. Soft Power

At the same time, sports serve as a form of soft power for countries and cities. Governments invest in international sporting events, such as the Olympics or World Cups, to project national identity, attract tourism, and boost geopolitical influence.¹³ In turn, U.S. leagues benefit from this phenomenon by positioning their brands within emerging or strategic global markets.¹⁴ When the NBA hosts games in Africa or the NFL plays games in London, these events function as both commercial endeavors and cultural diplomacy.¹⁵

4. Media Growth

Media proliferation has also played a critical role. With the rise of satellite broadcasting, streaming services, and social media platforms, leagues can now reach fans in nearly every country. This digital connectivity has transformed the way sports are consumed and monetized.¹⁶ Games, highlights, and player content are available instantly across borders, creating a shared global experience and expanding the fan base beyond national boundaries.

5. Commodification

Sports has become highly commodified in the digital age. Athletes are marketed as brands, teams operate as global franchises, and even moments within games—such as clips or plays—are packaged and sold.¹⁷ This commodification fuels league interest in

international markets where new consumers offer new revenue streams. As a result, globalization is not just about expanding the game—it's about exporting a product, building brand loyalty, and capitalizing on every monetizable aspect of the sport.¹⁸

Together, these forces—capitalism, neoliberal policy, soft power, media growth, and commodification—create a powerful incentive for leagues to globalize. They shape both the legal questions at stake and the economic rationale behind cross-border expansion.

B. LEGAL INFRASTRUCTURE SUPPORTING EXPANSION

For a sports league to operate abroad, it has to navigate conflicting legal systems. This subsection outlines the primary legal mechanisms that enable or constrain international sports expansion. Bilateral trade agreements, cross-border labor migration rules, dispute resolution mechanisms, and regulatory compliance issues all effect how quickly expansion can take place. This section provides a legal map of the terrain leagues must cross to globalize effectively.

1. Bilateral Trade Agreements

Free trade agreements (FTAs) and bilateral investment treaties (BITs) play a critical role in facilitating cross-border sports operations.¹⁹ These legal instruments typically lower tariffs, enhance market access, and establish protections for foreign investors.²⁰ For example, the United States-Mexico-Canada Agreement (USMCA) includes provisions that allow for easier media distribution and professional services across borders—an essential feature for leagues like the NBA and MLB, both of which host regular season games in

Mexico and Canada.²¹ By lowering barriers to broadcasting rights and protecting intellectual property, FTAs give leagues legal certainty when entering new markets.²²

Bilateral agreements also foster league partnerships and sponsorships across borders.²³ When the NFL stages games in London, it benefits from the U.S.-U.K. bilateral trade relationship, which allows for more fluid transport of goods (e.g., equipment and merchandise),²⁴ favorable customs arrangements, and smoother coordination with local event organizers.²⁵ Without the legal framework provided by these agreements, hosting international games would be significantly more complicated and financially risky.

2. Cross-Border Labor Migration Rules

Player movement across borders raises legal issues related to visas, work permits, and labor rights. Leagues must comply with the immigration laws of host countries, which often involve lengthy administrative procedures.²⁶ In some cases, bilateral or multilateral agreements can streamline the process. For instance, the European Union's free movement of labor allows professional soccer players within the EU to sign with clubs in other member states without the need for a work visa. This has enabled the rapid internationalization of European football leagues.²⁷

By contrast, American leagues face more restrictive labor mobility rules. The NFL and MLB have encountered challenges securing work visas for international athletes, coaches, and staff. Visa categories like the P-1 (for internationally recognized athletes) and O-1 (for individuals with extraordinary ability) are often used, but processing delays and

quotas can constrain a league's ability to build a truly international workforce.^{28,29} These challenges become even more acute when leagues attempt to establish youth academies or training camps abroad, where employment laws governing minors vary significantly by jurisdiction.

3. Dispute Resolution Mechanisms

As sports leagues expand their global presence, they increase their exposure to legal disputes—ranging from contract breaches to tort claims and antitrust issues. Resolving these disputes efficiently is essential to minimizing legal risk. International arbitration has become the preferred method of dispute resolution in sports due to its flexibility, confidentiality, and enforceability.³⁰

Institutions like the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, provide a neutral forum for resolving disputes involving international players, federations, and clubs. Leagues that operate globally also rely on commercial arbitration forums such as the International Chamber of Commerce (ICC) or the American Arbitration Association's International Centre for Dispute Resolution (ICDR).³¹ For example, when the NBA formed Basketball Africa League (BAL) in partnership with FIBA, the parties negotiated arbitration clauses to pre-empt conflicts over broadcasting rights, venue contracts, and sponsorship deals across jurisdictions.³²

4. Regulatory Compliance Issues

Operating in foreign jurisdictions exposes leagues to wide array of regulatory regimes. These include antitrust and competition law, broadcasting regulations, tax compliance, and health and safety

standards. Failure to adhere to these rules can result in significant financial penalties or reputational harm.³³

For example, the English Premier League has encountered scrutiny under EU competition law for its exclusive broadcasting arrangements.³⁴ Similarly, when the NFL hosts games in the U.K. or Germany, it must comply with local advertising restrictions, GDPR privacy rules for fan data, and tax reporting obligations for foreign-earned income.³⁵ In some cases, leagues must also comply with foreign laws regarding gambling sponsorships, which can differ significantly from U.S. standards.³⁶

Together, these legal frameworks dictate the pace, scope, and success of international expansion. While the commercial logic of globalization is compelling, leagues must align their strategies with a fragmented legal order that requires careful planning, contract drafting, and jurisdictional awareness.

C. ECONOMIC IMPACT MODELS

Sports expansion is often justified by its economic potential. This subsection explores the models and tools economists use to measure impact, such as input-output models, cost-benefit analyses, and legacy frameworks. It will also examine how leagues quantify the return-on-investment (ROI) for international games, academies, and partnerships—setting the stage for assessing league-specific strategies in the sections that follow.

1. Input-Output Models

Input-output (I-O) models estimate the ripple effect of an economic activity through different sectors of an economy.³⁷ When a sports league hosts a game abroad, the I-O model accounts for direct spending

(tickets, merchandise, hospitality), indirect effects (supply chain purchases), and induced effects (income spent by workers in related industries).³⁸ For instance, when the NFL stages a regular season game in London, it generates economic activity not just through ticket sales, but through increased hotel bookings, restaurant visits, and local transportation services.³⁹

The U.K.'s Office for National Statistics has used I-O modeling to estimate that a single NFL game can generate around £230 million in economic activity for the host city.⁴⁰ These models are often used to justify public subsidies or to forecast the impact of sustained league presence over time. However, critics argue that I-O models can overstate benefits by assuming that all spending is new rather than redistributed from other sectors.⁴¹

2. Cost-Benefit Analyses

Cost-Benefit Analyses (CBAs) evaluate whether the benefits of an investment outweigh its costs. Unlike I-O models, which emphasize total economic activity, CBAs weigh specific financial and social gains against tangible and intangible costs. This includes stadium construction, public subsidies, tax incentives, and opportunity costs—such as the use of public land or services.⁴²

For example, when MLB launched games in Tokyo and London, CBAs considered broadcasting revenue, ticket sales, brand exposure, and potential increases in merchandise sales across Asia and Europe.⁴³ At the same time, they had to account for the costs of travel, security, temporary infrastructure, and currency fluctuations. These analyses provide a more conservative

and often more realistic picture of long-term profitability and are commonly used by both private leagues and public agencies considering international partnerships.⁴⁴

3. Legacy Frameworks

Legacy frameworks focus on the long-term social, cultural, and economic impacts of sports expansion. Originally developed in the context of mega-events like the Olympics or the FIFA World Cup, these frameworks are now applied to league-based expansion to assess whether the activity leaves a lasting, positive footprint.⁴⁵

Legacy considerations include the development of local sports infrastructure, the growth of youth participation in sports, improvements in public health, or enhanced global reputation.⁴⁶ For example, the NBA's investment in grassroots basketball programs in Africa and China has created training centers, built courts, and provided coaching resources—outcomes that extend beyond immediate financial ROI.⁴⁷ Similarly, the National Hockey League's Global Series in Sweden has promoted hockey development in non-traditional markets and fostered long-term fan engagement.⁴⁸

4. Return on Investment in Practice

The ROI for international sports activities depends on how success is defined—financial returns, brand growth, or social impact. The NBA has reported that its games in China helped increase its global fanbase to over 3 billion, creating new licensing deals, mobile game partnerships, and merchandise sales.⁴⁹ MLB's international academies in the Dominican Republic and Venezuela have produced All-Star players and expanded scouting networks, improving the

league's talent pipeline and strengthening global ties.⁵⁰

NFL games in London now regularly sell out Wembley and Tottenham Hotspur Stadium, supporting the league's long-term ambition of establishing a permanent franchise in Europe.⁵¹ The ROI includes not only direct revenue but also increased U.K. media rights fees and transatlantic sponsorship deals.⁵² These outcomes illustrate that expansion is not a short-term project—it is a strategic investment in future market share.

Taken together, these economic models help leagues and host countries assess the viability of global expansion. They clarify whether sports globalization lives up to its promise, and where the risks may lie—laying the foundation for more data-driven and transparent decision-making in the years ahead.

III. NFL: FROM AN AMERICAN STAPLE TO A GLOBAL ASPIRANT

The NFL has been the most dominant sport in the U.S. for the past quarter century; however, it has only recently begun to engage in global markets.⁵³ This section analyzes the league's evolving international ambitions and the corresponding legal and economic ramifications.

Section A traces the NFL's early overseas experiments. Section B details modern initiatives like the International Series and Global Markets Program. Section C explores the legal frameworks that facilitate growth, such as intellectual property (IP) protections, labor law compliance, and international sponsorship contracts. It also discusses the

financial incentives driving growth. Section D closes with a case study on flag football's inclusion in the 2028 Olympics and its implications for global market penetration and youth development.

A. THE HISTORY OF THE NFL'S INTERNATIONAL ENGAGEMENT

This subsection charts the NFL's previous international efforts—from exhibition games in Europe during the 1980s and NFL Europe's eventual collapse to more recent grassroots flag football initiatives. It sets the historical context for the NFL's globalization trajectory, and it illustrates the early legal, logistical, and commercial barriers the league encountered.

1. Early Exhibition Games: Testing the Waters

The NFL's international aspirations date back to the 1980s when it began staging preseason exhibition games abroad under the banner of "American Bowls."⁵⁴ These games were hosted in cities like London, Tokyo, Berlin, and Mexico City, serving as soft introductions to the sport.⁵⁵ While they generated curiosity and modest attendance, the league realized that a single event was not enough to create a buy-in for long-term fan engagement.⁵⁶ Moreover, legal challenges such as insurance liabilities for foreign-based games, navigating visa and work permit requirements for staff and athletes, and ensuring adequate stadium infrastructure posed persistent obstacles.

These early efforts lacked the long-term institutional planning and commercial partnerships that define the league's modern strategies. However, they did establish a foundation of global brand awareness and

paved the way for a more ambitious initiative: NFL Europe.⁵⁷

2. NFL Europe: The First Major Expansion Attempt

In 1991, the league launched the World League of American Football (WLAF).⁵⁸ The WLAF was a developmental and promotional league featuring teams in North America and Europe.⁵⁹ After suspending operations in 1993, it was revived in 1995 as a European-based league and rebranded as NFL Europe.⁶⁰ Franchises were established in Germany (Frankfurt Galaxy, Rhein Fire), the Netherlands (Amsterdam Admirals), Spain (Barcelona Dragons), and the U.K. (London Monarchs).⁶¹ The goal was twofold: (1) to develop American football talent in an alternative league and (1) to build a sustainable fan base overseas.⁶²

Commercially, the venture struggled. Local marketing was weak, attendance varied wildly, and the NFL's core fan base in the U.S. showed hardly any interest.⁶³ And language and cultural differences made it difficult to teach the rules of the game to new audiences.⁶⁴ Additionally, labor law discrepancies between countries added complexity. For example, differing national regulations on employment contracts, workplace safety standards, and healthcare obligations complicated athlete management. Broadcast rights negotiations suffered because of fragmented media markets and relatively low television interest.⁶⁵

After years of financial losses (reportedly over \$30 million annually) NFL Europe was shut down in 2007.⁶⁶ While this was generally seen as a failure, it offered valuable lessons learned. Notably, the German franchises had some of the strongest fan

support, informing later decisions to bring regular-season games to cities like Frankfurt and Munich.⁶⁷

3. Post-NFL Europe: A Shift in Strategy

Following NFL Europe's closure, the league reevaluated its international approach. Rather than trying to replicate the U.S. league model abroad, it pivoted to building the NFL brand through tentpole events and digital media. This led to the creation of the NFL International Series, where regular-season games are held abroad but managed under the full control and marketing umbrella of the NFL.⁶⁸

The shift also involved fewer logistical headaches. Without the burden of maintaining foreign franchises, the NFL could focus on high-profile, revenue-generating events that showcased the best of its product to foreign audiences.⁶⁹

4. Flag Football: A Scalable Global Outreach Tool

In the 2010s, the NFL began investing heavily in flag football, recognizing it as a low-cost, low-risk tool for global engagement.⁷⁰ Unlike tackle football, flag football requires minimal equipment, has fewer safety concerns, and is easier to teach across cultures and age groups. The NFL partnered with the International Federation of American Football (IFAF) and supported youth leagues, school programs, and international tournaments.⁷¹

The strategy aligns with broader youth development and Olympic aspirations. In 2023, the International Olympic Committee announced that flag football would be included in the 2028 Los Angeles Olympic Games.⁷² This marked a major milestone for the sport's global legitimacy. This decision

represents not only a cultural win but a logistical breakthrough. Olympic inclusion requires harmonization across national governing bodies, adherence to international anti-doping laws, and compliance with global athlete eligibility standards—all of which the NFL had to navigate through partnerships with the IFAF and local federations.⁷³

Now, the NFL hosts annual NFL Flag Championships in the U.S. and abroad, including initiatives in Mexico, the U.K, China, and Brazil.⁷⁴ Commercially, this opens new sponsorship opportunities with brands seeking to align with youth sports, diversity, and global health initiatives. Legal barriers still remain—such as IP licensing for team names and logos used by local clubs—but these are often resolved through controlled licensing arrangements and affiliation programs.

5. Lessons from the Past

Three key barriers have historically constrained NFL internationalization: (1) legal complexity, (2) logistical constraints, and (3) commercial misalignment.

Differing employment and labor laws, stadium liability rules, immigration regulations for foreign workers, and broadcasting rights regimes have created a patchwork of legal obligations in each jurisdiction the NFL operates within.⁷⁵

Logistically, it requires immense planning and cooperation from host cities and international partners to fly teams overseas and adjust game schedules to ensuring there is enough medical staff and field specifications in place for international games.⁷⁶

Commercially, in the early days of the NFL, it failed to tailor its marketing

strategies to local audiences, opting instead for a one-size-fits-all American approach. Modern efforts now include partnerships with local celebrities, media personalities, and grassroots programs to better localize the NFL experience.⁷⁷

B. RECENT GLOBAL EXPANSION PROGRAMS

The NFL's globalization push has become more structured in the last decade. This subsection explains key programs like the NFL International Series, with games in London, Germany, and Brazil; the NFL Academy; and the Global Markets Program. It also discusses how broadcast deals, digital outreach, and foreign player pathways have expanded the league's footprint.

1. The NFL International Series: Exporting the Product Without Exporting the League

Since its launch in 2007, the NFL International Series has become the cornerstone of the league's modern global strategy.⁷⁸ These are official, regular-season NFL games played abroad—primarily in London, with newer additions in Mexico City, Munich, Frankfurt, and São Paulo.⁷⁹ By hosting games with full NFL branding, media coverage, and competitive stakes, the league is able to showcase its product at the highest level without the financial and legal overhead of maintaining a permanent foreign franchise.⁸⁰

In recent years, the Series has expanded dramatically. The 2023 season featured five international games—three in London and two in Germany—following attendance and viewership records in 2022.⁸¹ The 2024 season included a game in São Paulo, Brazil, marking the league's first regular-season

game in South America.⁸² Legally, these games require extensive venue contracts with foreign stadium authorities, coordination with national sports and customs agencies, and often, negotiations over broadcast rights with local media conglomerates.⁸³

Commercially, the International Series has succeeded by targeting markets with proven sports infrastructure and strong brand alignment. For example, London's Tottenham Hotspur Stadium was custom-built with dual NFL-locker rooms and field-switching capability, allowing for seamless transitions between soccer and American football games.⁸⁴ These partnerships are key to minimizing logistical headaches and ensuring high production value.

2. NFL Academy: Investing in Talent and Education Abroad

Launched in 2019, the NFL Academy is a U.K.-based program that combines athletic training with academic education for student-athletes aged 16-19.⁸⁵ Its purpose is twofold: (1) to provide international youth with a pathway to collegiate or professional football,⁸⁶ and (2) to position the NFL as an invested stakeholder in local communities.⁸⁷ Based in Loughborough, England, the Academy serves as a talent incubator and a long-term brand-building initiative.⁸⁸

Players train under NFL-caliber coaching and are often scouted by U.S. colleges. Several Academy alumni have secured scholarships to Division I programs, including Emmanuel Okoye (Tennessee) and Darren Agu (New Mexico State).⁸⁹ These success stories serve a dual function—they demonstrate upward mobility through football and act as marketing tools for the NFL's international credibility.

From a legal standpoint, the Academy must navigate educational regulations, student visa requirements, and child protection laws under U.K. jurisdiction.⁹⁰ It also raises important questions about amateurism, NIL rights, and recruitment ethics, especially as athletes transition into the U.S. college system.

3. Global Markets Program: Franchising Fandom

In 2022, the NFL launched the “International Home Marketing Areas” (IHMA) initiative, known more broadly as the “Global Markets Program.” Under this program, individual NFL franchises are granted marketing rights in select foreign territories.⁹¹ This is a quasi-franchising model that allows teams to localize their brand, run youth camps, host watch parties, and engage with fans abroad—all without fielding a physical team in the region.⁹²

For example, the Miami Dolphins were granted rights in Argentina, Colombia, and Mexico, while the Kansas City Chiefs have operations in the U.K., Ireland, and Spain, and four other countries.^{93,94} The program currently includes all 32 teams with access to 19 international markets.⁹⁵ The legal framework resembles international licensing, with strict limits on what each franchise can do and sell in each market, avoiding antitrust and competition issues between teams.⁹⁶

Commercially, the Global Markets Program allows for customized marketing campaigns. For instance, the Chicago Bears host Latino Heritage Month at Soldier Field to recognize the rich histories, cultures, and contributions of the Latino community.⁹⁷ These types of efforts cater to regional tastes

and create a sense of team loyalty among international fans.

4. Broadcast Rights and Digital Outreach: Owning the Screen

International growth is impossible without media distribution. The NFL has made concerted efforts to localize its content and expand its reach through tailored broadcast deals and digital initiatives. For example, in Germany, the NFL has partnered with ProSieben to provide weekly live coverage, with additional German-language analysis and commentary.⁹⁸ In Mexico, TelevisaUnivision holds broadcast rights, catering to a massive, football-curious audience for the Super Bowl.⁹⁹

The rise in streaming has further enhanced global access. The NFL’s partnership with DAZN—a sports streaming service—offers NFL Game Pass International, with localized content and flexible viewing options.¹⁰⁰ Social media platforms also play a key role: the NFL creates localized TikTok, Instagram, and YouTube content in multiple languages to reach younger demographics.¹⁰¹

Influencers play a major role in this digital outreach strategy. In the U.K., sports personality Vernon Kay has been featured in promotional content.¹⁰² These campaigns translate the NFL’s brand into local cultural idioms—often with more success than traditional advertising.

5. Player Pathway Program: Exporting Athletes, Importing Audiences

The NFL’s International Player Pathway Program (IPPP) launched in 2017. It offers elite international athletes a route to the league. Participants receive coaching, physical development, and the opportunity to join

NFL practice squads with the chance to make the active roster.¹⁰³

Prominent success stories include Jordan Mailata, a former Australian rugby player who became the starting left tackle for the Philadelphia Eagles, and Efe Obada, a Nigerian-born, U.K.-raised athlete who has played for multiple NFL teams.¹⁰⁴ These players not only add talent to the league but also serve as brand ambassadors in their home countries, driving both media attention and merchandise sales.¹⁰⁵

The IPPP also requires compliance with U.S. immigration laws (i.e., P-1A athlete visas).¹⁰⁶ However, the marketing benefits often outweigh the legal complexities, as each international player brings an embedded audience and a new market of engaged fans.

C. ECONOMIC INCENTIVES AND LEGAL FRAMEWORKS

This subsection explores the economic rationale behind the NFL’s international expansion, including new media rights deals, sponsorships, and merchandise sales.

1. Cross-Border Labor and Player Movement

The NFL’s international programs raise unresolved questions about labor classification, player rights, and the jurisdictional overlap between U.S. and foreign employment law. As more international players transition into U.S. systems (e.g., via the NFL Academy or IPP), the league must navigate student visa restrictions, immigration caps, and union eligibility. Future collective bargaining agreements may need to account for non-U.S. players in more formal ways, including medical coverage during international games, grievance rights, and cross-border tax obligations.

2. Territorial IP Conflicts and Unauthorized Use

While the NFL enforces its trademarks in the U.S., global expansion complicates IP control.¹⁰⁷ The growth of unlicensed flag football leagues, counterfeit merchandise, and unauthorized streaming in developing markets like India, Southeast Asia, and parts of Africa exposes the NFL to enforcement dilemmas.¹⁰⁸¹⁰⁹ These risks are compounded in jurisdictions with weak trademark protections or slow litigation systems. The league's increased reliance on licensing partners and affiliated federations demands more sophisticated IP portfolio management.

D. CASE STUDY: FLAG FOOTBALL AND THE 2028 OLYMPICS

Flag football's inclusion in the 2028 Los Angeles Olympics represents a pivotal opportunity for the NFL. This case study assesses the strategic implications for youth participation, international exposure, Olympic diplomacy, and amateur eligibility rules between the International Olympic Committee (IOC) and NFL.

1. Youth Development and Long-Term Fan Conversion

Flag football provides the NFL with a safer, more accessible entry point for young athletes—especially in countries without a tackle football infrastructure. By supporting flag football at the youth and amateur level (e.g., through NFL Flag, Play Football initiatives, and partnerships with schools and NGOs), the league builds early brand affinity.¹¹⁰ The Olympics significantly amplifies this by offering global visibility that reinforces the pipeline from participation to fandom. Unlike tackle football, flag's

minimal equipment and lower injury risk make it an easily exportable sport.

2. IOC Partnership and the NFL's Soft Entry into Olympic Structures

While the NFL itself is not an Olympic body, its behind-the-scenes influence on flag football's rulemaking and promotion raises critical questions about institutional boundaries. The NFL works closely with the International Federation of American Football (IFAF), which is the formal IOC-recognized governing body, through USA Football.¹¹¹ However, the NFL's financial backing, branding, and media power have effectively positioned it as the sport's dominant stakeholder. This blurs lines between public governance and private control, reflecting a modern trend in Olympic sports where commercial leagues shape outcomes through federated proxies.¹¹²

3. Amateurism, Eligibility, and Tensions Between Olympic and Professional Systems

The 2028 Games will likely force a reckoning on who gets to play flag football on the Olympic stage. The NFL's interest in fielding elite-level players—possibly including practice squad members or recently retired stars—may clash with the IOC's amateur-first narrative, especially if national teams are disproportionately filled by U.S. professionals. How these eligibility standards are negotiated could set a precedent for how the NFL navigates other potential Olympic sports in the future.

4. Strategic Global Branding Without Full Contact Football

Flag football offers a form of “non-contact diplomacy” for the NFL.¹¹³ Unlike full tackle football, which requires massive

physical infrastructure and often faces cultural or governmental resistance abroad, flag football allows the NFL to plant its brand in high-barrier countries without the need for professional leagues or stadiums. It positions flag as a brand ambassador for American football while avoiding the political and medical controversies tied to concussions, CTE, and youth tackling.

5. Gender Equity and Olympic Legitimacy

A key factor in flag football's Olympic bid was its gender inclusivity.¹¹⁴ The IOC placed heavy emphasis on the ability to offer equal male and female participation, a criterion that tackle football generally cannot meet. The NFL's active promotion of girls' flag football—especially in schools and through USA Football—aligns with this push and helps validate the league's involvement in Olympic development. This bolsters the NFL's reputation as a progressive global actor, while also expanding its consumer base among younger, more diverse demographics.¹¹⁵

IV. MAJOR LEAGUE BASEBALL: INTERNATIONAL ROOTS AND NEW FRONTIERS

Unlike the NFL, MLB has long maintained international operations. Countries in Latin America and Asia have long produced all-star and hall-of-fame talent for the league. This section explores how MLB's historic presence abroad has evolved into a multifaceted global strategy, supported by a complex legal and economic structure.

Section A begins with an overview of MLB's international history, including

academies and talent pipelines. Section B explains how MLB has adapted its strategies in the 21st century from traditional methods to more modern institutions like global media rights, international drafts, and global tournaments. Section C dives into the legal and economic infrastructure that supports this continued growth, and Section D offers a focused case study on the World Baseball Classic (WBC).

A. LONGSTANDING GLOBAL FOOTPRINT

This subsection outlines how MLB established deep roots in countries like the Dominican Republic, Cuba, Venezuela, and Japan. It examines the legal structures surrounding player recruitment, visa compliance, local labor issues, and the long-term economic effects of MLB academies on host countries.

1. Player Recruitment and Talent Development Infrastructure

Since the 1980s, MLB clubs have operated academy systems—particularly in the Dominican Republic, where all 30 teams now maintain development facilities.¹¹⁶ These academies function as private talent incubators, often outside the direct oversight of government bodies or international sport federations. In return for access to elite athletic development, young prospects typically forgo education and employment rights in favor of a professional path starting as early as age 12 or 13.¹¹⁷

This has led to criticism from NGOs about exploitative recruitment practices.¹¹⁸ This is particularly highlighted when bonuses are small, and failure rates are high. The absence of union representation for these minors makes them vulnerable. In Venezuela, local instability has led to less formalized

oversight, further raising concerns over transparency and abuse.¹¹⁹

2. Immigration and Visa Compliance

Prospects who sign contracts must navigate U.S. immigration law. P-1 (athlete) or B-1/B-2 (training) visas can be delayed or denied due to criminal background checks or political tensions.¹²⁰ MLB franchises bear compliance risk if a player's visa status is improperly handled, with implications under both U.S. immigration law and international labor treaties.¹²¹

3. Local Labor Law and Cross-Border Accountability

MLB academies operate in a legal gray zone. Host countries often do not regulate or inspect them as they would traditional employers. For instance, the Dominican Republic's labor code is not consistently enforced inside academy systems, even though they function similarly to job training centers.¹²² Cases involving wage disputes, minor injuries, and the lack of insurance coverage have prompted calls for bi-national oversight frameworks.¹²³

4. Long-Term Economic Effects

Despite legal critiques, MLB's presence in countries like the Dominican Republic and Mexico has led to meaningful economic development, including job creation, tourism from scouting events, and infrastructure improvements around academies.¹²⁴ However, this benefit is often localized to MLB-aligned facilities, rather than broadly distributed. Moreover, the "brain drain" effect—where elite talent leaves for the U.S.—may suppress long-term competitiveness of national leagues and hinder local sports economies.¹²⁵

B. MODERN STRATEGIES FOR GLOBAL INTEGRATION

MLB's modern expansion efforts involve everything from global streaming rights to talent development agreements with national federations. This subsection reviews those strategies, including recent efforts to host regular-season games in Asia, Mexico, and the U.K., and the proposal of an international draft.

1. International Regular Season Games and Home Openers

MLB has increasingly hosted regular season games abroad, most notably in Tokyo, London, and Mexico City.¹²⁶ These events combine commercial partnerships with national governments and private sponsors to showcase MLB's brand in high-growth regions. In 2024, the Dodgers' home opener in Seoul—which featured Shohei Ohtani—illustrated the enormous economic impact of placing a global superstar on the international stage.¹²⁷ According to ESPN and Nippon TV, the opener drew over 24 million live viewers across East Asia, reinforcing the league's efforts to tap into Asia-Pacific markets.¹²⁸

However, these games also present legal challenges. Temporary employment of players in foreign jurisdictions raises issues of tax withholding, performance licensing, and collective bargaining coverage.¹²⁹ Leagues must negotiate revenue-sharing arrangements that respect host country tax laws while also preserving the MLB Players Associations' rights under U.S. labor law.¹³⁰

2. The International Draft Proposal

As part of the 2022-2026 collective bargaining negotiations, MLB proposed an international draft to replace the open free-agent system in Latin America.¹³¹ The draft

would implement centralized control over signing ages, bonus caps, and eligibility—all under the supervision of the league, rather than individual franchises.¹³² Proponents argue this would reduce corruption and “buscone”¹³³ exploitation (independent trainers taking large cuts of player bonuses).

Though ultimately denied/deferred, the proposal demonstrates MLB’s intent to standardize international recruitment under a unified economic model, mirroring the U.S. draft system. If adopted in the future, the draft would carry significant cross-border implications for labor markets, agent regulations, and antitrust exemptions.

C. LEGAL AND ECONOMIC CONSIDERATIONS

This subsection breaks down the legal challenges MLB faces abroad—including child labor scrutiny, international arbitration rights, and compliance with anti-corruption laws—alongside its economic motivations, such as market saturation in the U.S. and the need to diversify revenue streams globally.

1. Legal Challenges: Child Labor, Arbitration, and Anti-Corruption

MLB has faced criticism for its lack of protections for minor players, especially in Latin America.¹³⁴ Unlike U.S.-based minor leaguers who are at least covered by collective bargaining, Latin American prospects are often recruited before age 16 and lack access to education or healthcare.¹³⁵ Several international watchdogs have called for the application of ILO child labor standards to MLB operations. Specifically, many have looked to cases where minors are cut from academy systems with no fallback options.¹³⁶

Additionally, MLB’s arbitration model for international disputes lacks independence.

While teams may agree to resolve contract issues through internal tribunals, this setup skirts global norms around fair and neutral arbitration. This further raises doubts about procedural due process.

Lastly, MLB’s anti-corruption compliance efforts are reactive. A 2018 Department of Justice investigation revealed improper payments to buscones and government officials in multiple countries.¹³⁷ Though reforms have followed (e.g., more background checks and internal audits), a uniform global compliance protocol has not been adopted.¹³⁸

2. Economic Motivations for Global Expansion

Domestic market saturation and shifting media consumption patterns have compelled MLB to pursue new international revenue streams. For example, the 2024 World Series drew record-breaking international viewership, especially in Japan and South Korea. According to MLB data, over 30 million people outside the U.S. watched at least one game of the Series—a 67% increase over the prior year, driven largely by Ohtani’s presence and multilingual streaming options.¹³⁹

These numbers validate MLB’s broader economic goal: turning international stars into commercial anchors for overseas markets. As U.S. television ratings plateau, the international broadcast rights market, local sponsorship deals, and merchandising royalties become increasingly central to MLB’s overall health.

D. CASE STUDY: WORLD BASEBALL CLASSIC AS A GROWTH ENGINE

The WBC is a vital tool in MLB’s global branding. This case study explores

the tournament’s structure, governance (e.g., international team contracts and national player eligibility), and its growing economic success (i.e., 2023).

1. Player Commitment and Competitive Integrity

Unlike past WBCs—often dismissed as exhibition events—the 2023 tournament saw top-tier players from nearly every country participate, including superstars like Mike Trout, Shohei Ohtani, Juan Soto, and Yu Darvish. The championship game between the U.S. and Japan, culminating in an Ohtani vs. Trout showdown, became one of the most iconic moments in modern baseball history.¹⁴⁰ The game averaged 5.2 million U.S. viewers, with millions more across Japan, Korea, and Latin America, showing that international pride can elevate even MLB players to a higher level of competition.¹⁴¹

2. Economic Impact and Legal Considerations

The WBC is co-owned by MLB and its players association, meaning revenue-sharing and licensing rights are governed by complex commercial agreements. This includes split broadcast rights with national broadcasters, global merchandising rights, and in some cases, player image licensing across multiple jurisdictions.¹⁴²

According to Sports Business Journal, the 2023 WBC generated as much as \$100 million in direct revenue—not counting downstream effects like merchandise sales and future ticket demand.¹⁴³ The event also helped normalize multi-national contracts and eligibility structures, offering a useful model for how MLB might structure other international partnerships.¹⁴⁴

V. WOMEN'S SOFTBALL: A RISING GLOBAL PLAYER

Women's softball is uniquely positioned for global growth due to Olympic reinstatement and expanding professional leagues. While softball is not as commercially present as football or baseball, softball is experiencing momentum to secure international footholds.

Section A begins with the sport's Olympic trajectory and the opportunities tied to its return. Section B discusses the strategies of professional leagues like Athletes Unlimited (AU) and Women's Professional Fastpitch (WPF). Section C focuses on contract issues, labor projections, and the gender equity dynamics that shape the legal environment of the sports' global growth.

A. GLOBALIZATION OPPORTUNITY THROUGH OLYMPIC REINSTATEMENT

Olympic reinstatement and future uncertainty will be one of the largest factors in shaping the international development of softball. This subsection will explore how national federations and the WBSC can use Olympic visibility to attract funding and talent.

Softball's relationship with the Olympics has been historically inconsistent, shaped largely by the International Olympic Committee's shifting priorities and the preferences of host nations. After its debut at the 1996 Atlanta Games, the sport was dropped after 2008 because of limited global participation and competitive imbalance.¹⁴⁵ For over a decade, this exclusion hindered national funding, discouraged long-term

investment in development infrastructure, and fractured elite competition pathways in several countries.

Its reinstatement for the Tokyo 2020 Games, however, marked a pivotal moment. The visibility of the sport on a global stage—particularly in softball-strong nations such as Japan and the U.S.—generated renewed interest in the sport.¹⁴⁶ Though softball was not included in the 2024 Games, it will be making a comeback in the 2028 Games.¹⁴⁷ That inclusion alone significantly alters the economic effect of the future for the sport. Olympic eligibility often determines whether national federations can access government subsidies, sport-specific grants, and performance-based bonuses tied to medal counts.¹⁴⁸

From a legal perspective, Olympic reinstatement also shifts governance priorities. The World Baseball Softball Confederation (WBSC) is tasked with compliance with IOC standards on anti-doping, eligibility, and competition structure. These harmonization efforts are often under-resourced in developing countries, creating a compliance gap that impacts access to qualification events and international ranking points. The intermittent nature of Olympic status introduces a new aspect of infrastructure—one that must be stabilized if softball is to build sustainable international operations.¹⁴⁹

B. ATHLETES UNLIMITED

One league is spearheading professional softball's globalization efforts: Athletes Unlimited (AU). This subsection explains their business models, international partnerships, and approaches to player compensation and branding.

Unlike traditional leagues, AU does not rely on franchise ownership but instead implements a centralized system in which players rotate teams weekly and accumulate individual points based on performance and peer voting. This model not only flattens hierarchical team structures but also positions players as stakeholders in governance, branding, and revenue sharing.

AU's branding strategy is highly values-driven, leaning into gender equity, community impact, and athlete empowerment—principles that resonate with international audiences and nontraditional sponsors.¹⁵⁰ The league has successfully negotiated streaming deals with international media platforms and launched targeted social media campaigns to attract global viewers. Additionally, AU has intentionally recruited international athletes, particularly from Canada, Mexico, and Japan, providing them with competitive playing opportunities in the United States and leveraging their global fanbases.¹⁵¹

C. PLAYER CONTRACTS, GENDER EQUITY, AND LABOR PROTECTIONS

This subsection discusses the unique labor and legal challenges in women's softball, including short-term contract structures, workplace protections, international mobility, and how gender equity norms intersect with international law.

Short-term contracts allow flexibility for players juggling national team commitments and other employment, but it also generates legal uncertainty regarding immigration status, health insurance, and income continuity—especially for international athletes.¹⁵² In some jurisdictions, these players are considered independent contractors,

limiting their access to standard workplace protections.

As more players cross borders to compete in AU, labor mobility raises complex legal questions. Visa sponsorship responsibilities, residency requirements, and tax liabilities differ significantly between countries and often fall outside the capacity of smaller leagues to manage effectively.¹⁵³ Moreover, the absence of a union or collective bargaining agreement in professional softball leaves athletes with limited recourse in employment disputes, including those involving wage delays, medical treatment, or unsafe playing conditions.¹⁵⁴

Gender equity principles—enshrined in instruments like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and reflected in the International Labour Organization’s decent work agenda—further complicate this landscape. While these frameworks are not binding on private leagues, they inform both state regulatory policy and sponsor expectations, especially in countries promoting gender-inclusive sports development.¹⁵⁵ Softball occupies a unique position in this respect, and it serves as a case study to show how emerging women’s sports leagues must navigate a global legal environment that is both fragmented and evolving.

VI. THE OLYMPIC MOVEMENT AND EMERGING SPORTS

As American leagues seek legitimacy and growth beyond domestic borders, the Olympic movement plays a pivotal and often underestimated role. Olympic inclusion has

the power to legitimize emerging sports, expand access to government funding, and expose international audiences to new athletic formats. For U.S. leagues, the Olympic platform is both a validator and a vehicle for global expansion—particularly in sports like flag football, softball, and lacrosse.¹⁵⁶

Section A explores the Olympics as a growth accelerator. Section B covers how emerging sports use Olympic entry as a springboard to commercial success. Section C discusses how this visibility changes athlete compensation and governance models.

A. OLYMPICS AS A CATALYST FOR GLOBAL SPORTS INVESTMENT

This subsection examines how inclusion in the Olympics significantly boosts a sports’ visibility, funding, and growth trajectory globally. It outlines how Olympic status leads to state-backed investment in national programs and how U.S.-based leagues capitalize on this infrastructure to enter new markets. The subsection will also include the strategic lobbying efforts by American sports organizations to secure their place in the Olympics.

Olympic inclusion is one of the most powerful accelerators for international sports development. As noted earlier, when a sport is added to the Olympic program, it immediately benefits from elevated visibility, enhanced legitimacy, and increased investment across both public and private sectors. However, beyond these reputational gains, the designation also triggers meaningful financial and legal shifts—especially at the national level.

Many governments with centralized sports ministries or Olympic-focused

funding systems allocate resources to Olympic disciplines.¹⁵⁷ These resources include funding for athlete training, facility development, and youth outreach—each of which becomes a form of soft infrastructure that U.S.-based leagues can later use to establish a commercial footprint abroad.¹⁵⁸ In this way, the Olympics serve not only as a global stage but as a regulatory signal that prompts states to mobilize capital and institutional support for emerging sports.

American sports organizations understand this dynamic and have responded with coordinated lobbying campaigns. For example, USA Football—backed by the NFL—was instrumental in securing flag football’s inclusion in the 2028 Los Angeles Olympics. Its strategy combined grassroots expansion in partner countries, alignment with the International Federation of American Football (IFAF), and targeted advocacy within the IOC framework.¹⁵⁹ Similarly, World Lacrosse, with substantial support from U.S.-based stakeholders, successfully pushed for the addition of sixes lacrosse to the 2028 Games, tailoring the format to meet Olympic requirements for gender equity, pace of play, and international reach.¹⁶⁰

These lobbying efforts underscore how American leagues and governing bodies now treat Olympic inclusion as both a strategic priority and a launchpad for international economic opportunity. In effect, Olympic validation acts as a form of regulatory recognition—unlocking pathways for foreign direct investment, state-backed sport development, and expanded athlete pipelines in host countries.¹⁶¹

B. NEW SPORTS AND THE PROFESSIONAL PIPELINE

The focus here turns to how Olympic exposure is used by U.S. leagues to build long-term international pipelines. When a sport like flag football is added to the Olympic schedule, the NFL becomes positioned to invest in international youth development and infrastructure.¹⁶² This subsection evaluates how these pathways are strategically cultivated to accelerate global adoption.

The Olympics also function as a long-term investment multiplier by giving emerging sports a platform from which to build professional infrastructure.¹⁶³ While short-term visibility can generate immediate interest, the more significant development lies in how U.S.-based leagues use Olympic momentum to construct lasting global pipelines.

Take flag football, for example. With its Olympic debut set for 2028, the NFL has a rare opportunity to attach itself to a newly-legitimized global sport without the bureaucratic burden of traditional American football. In preparation, the league has already expanded its International Player Pathway Program, funded youth leagues in Mexico and Europe, and entered into partnerships with international federations to standardize rules and increase access to equipment.¹⁶⁴ These steps are not just promotional—they lay the groundwork for future talent identification, commercial rights deals, and localized league formation.¹⁶⁵

The predictive element here is important: once a sport appears on the Olympic stage,

national federations will likely escalate youth participation targets, integrate the sport into school curricula, and seek alignment with international coaching standards.¹⁶⁶ U.S. leagues are well-positioned to supply technical expertise, digital content, and branding infrastructure in these early development phases. This dynamic was previously seen with skateboarding and BMX following their Olympic introductions, where American cultural dominance translated into commercial leadership and coaching exports.¹⁶⁷

In essence, the Olympics create a regulatory and cultural vacuum in new sports markets. U.S. leagues fill this vacuum by building the pipeline themselves—introducing athlete development programs, educational curricula, and digital platforms that reflect professionalized American models, all while maintaining legal and commercial leverage over international growth.

C. PROFESSIONALIZATION OF OLYMPIC ATHLETES

This subsection addresses how the line between amateur and professional athletes in the Olympics continues to blur. Many American Olympic athletes are embedded in professional systems that raise complex legal issues related to eligibility, labor rights, and sponsorship agreements. This subsection will assess how the professionalism of Olympic participation influences legal frameworks and whether it ultimately benefits or burdens American-led global expansion.

Historically, the Olympic Charter excluded professional athletes in order to preserve ideals of amateur competition, but that principle has eroded in practice—

particularly as American athletes have entered the Games through fully professional pathways.

The 1992 U.S. men's basketball "Dream Team" marked a turning point. For the first time, NBA players were permitted to compete in the Olympics, fundamentally altering the tone, visibility, and commercial value of Olympic basketball. While the success of the Dream Team enhanced global admiration for the NBA, it also opened new legal questions: Were these athletes subject to national team labor protections? How did their sponsorship rights intersect with IOC Rule 40 restrictions? And what legal standards applied when professional leagues lent players to national programs?¹⁶⁸

Today, Olympic rosters often include athletes under professional contract. These professionals bring brand equity and elite performance, but they also introduce layers of contract complexity. Leagues must negotiate athlete release clauses, resolve liability issues related to injury, and navigate conflicting endorsement obligations.¹⁶⁹ Meanwhile, the athletes themselves face uncertain labor protections, especially if their Olympic participation is unpaid or governed by national federations outside the scope of their domestic agreements.

From an international standpoint, this shift raises broader questions about workers' rights, labor classifications, and cross-border dispute resolution. The gradual professionalization of Olympic participation has forced governing bodies to reconcile inconsistent definitions of amateurism and rethink outdated eligibility rules. The long-term outcome may be a more transparent, harmonized legal structure

governing Olympic athletes—one that better reflects the commercial realities of modern sports and reduces regulatory ambiguity for emerging U.S. leagues expanding abroad.¹⁷⁰

VII. COMPARATIVE LESSONS FROM SOCCER AND THE NBA

While U.S. leagues are increasingly focused on international growth, they are not the first to navigate these waters. Global soccer and the NBA offer contrasting but instructive case studies on how to scale a sports league internationally with commercial success and cultural integration.

Section A examines soccer's organic governance model, and its reliance on decentralized development and global labor movement. Section B details the NBA's structured expansion, and its focus on branding, elite academies, and digital outreach to create global fanbases. Section C compares these two models and addresses what the NFL, MLB, and softball can adopt or adapt as they develop their global strategies.

A. SOCCER'S MODEL FOR GLOBAL GROWTH

This subsection explores the foundational role of the Fédération Internationale de Football Association (FIFA) and other international bodies in building soccer's unparalleled global footprint. It considers how legal structures, such as harmonized transfer rules and international arbitration, facilitate smooth labor movement and competition. The focus here is on understanding the decentralized, but cohesive, model that allows clubs in vastly different jurisdictions to operate within a single global market.

FIFA and its continental confederations, demonstrates a deeply decentralized governance structure that thrives precisely because of its fragmentation. Rather than a single governing league, soccer functions as a patchwork of national federations, local clubs, and transnational competitions—all loosely coordinated under FIFA's regulatory umbrella.¹⁷¹ This decentralization enables localized decision-making, which in turn fosters cultural integration and accelerates grassroots development.

Despite this fragmentation, soccer enjoys legal and commercial cohesion through a few central mechanisms:

- **Harmonized Labor and Transfer Rules:** FIFA's Regulations on the Status and Transfer of Players (RSTP) provide the framework for player mobility, standardizing training compensation, transfer windows, and dispute resolution across jurisdictions. This supports a predictable labor market that facilitates international player flow without the need for centralized league control.¹⁷²

- **Arbitration and Dispute Resolution:** Institutions like the Court of Arbitration for Sport (CAS) and the FIFA Dispute Resolution Chamber offer neutral forums for resolving international disputes—crucial to investor confidence in such a transnational system.¹⁷³

- **Global Popularity and Commercial Momentum:** Because of its ubiquity, soccer benefits from immense media-rights' valuations even in decentralized markets. Clubs like Real Madrid and Manchester United generate billions in global brand revenue without needing to export entire leagues abroad. Their global traction allows them to sell merchandise, run

international tours, and negotiate region-specific sponsorships—leveraging market access without overhauling local structures.¹⁷⁴

In short, soccer's decentralized governance does not hinder international commerce—it enables it, by empowering local entities within a harmonized legal framework that scales globally.

B. NBA'S PLAYBOOK FOR INTERNATIONAL EXPANSION

The NBA, in contrast to soccer, operates through a more centralized system, emphasizing content distribution, brand expansion, and elite player development in foreign markets.¹⁷⁵ This subsection breaks down the NBA's strategies in China, Africa, and beyond—examining how the league uses marketing, media rights, and grassroots academies to create lasting international relationships. The mechanisms that enable these efforts, such as global IP licensing and league governance abroad, will also be addressed.

The NBA has built an international model on centralized control and uniform branding. It exports not just teams or athletes, but an entire entertainment product controlled through the league office in New York. This top-down strategy hinges on league-wide governance, legal control over IP, and direct investment in overseas markets.

Key mechanisms include:

- **NBA China and NBA Africa:** These are legally distinct entities established as joint ventures and subsidiaries, allowing the NBA to comply with local laws while retaining control over branding and operations. NBA China, for example, was valued at over \$5 billion and has negotiated media rights

directly with Chinese broadcasters like Tencent. NBA Africa, launched in 2021, manages the Basketball Africa League (BAL), operating as both developmental league and regional economic engine.¹⁷⁶

- **IP and Licensing Infrastructure:** Through a central IP office, the NBA licenses team logos, likenesses, and broadcast packages internationally, streamlining global commercial operations. The NBA has also partnered with international brands (e.g., Nike, Rakuten) to co-brand in specific regions while retaining core league identity.¹⁷⁷

- **Digital-First Fan Engagement:** NBA League Pass and social media have been deployed with precision in overseas markets, sometimes in local languages and with localized content strategies. This has expanded the NBA's footprint without the need for extensive physical presence.¹⁷⁸

- **Elite Development Pathways:** Initiatives like the NBA Global Academy and Basketball Without Borders identify and train international youth athletes within a structured development model. This strategy mirrors domestic pipelines (like the National Collegiate Athletic Association), but tailored to international legal systems, education models, and player eligibility rules.¹⁷⁹¹⁸⁰

The NBA's approach highlights how centralized leagues can thrive abroad by controlling their commercial IP, investing in compliant legal entities, and creating league-wide strategies for growth—all while tailoring their product for local consumption.

C. WHAT THE NFL, MLB, AND SOFTBALL CAN LEARN

This subsection shifts to practical takeaways for other U.S.-based leagues. Drawing on lessons from both soccer and the

NBA. It outlines the gaps in infrastructure, legal harmonization, and cultural integration that have limited the NFL, MLB, and professional softball from gaining sustained traction overseas. It closes by proposing adaptations these leagues can make to facilitate more durable and legally sound international expansion.

- **Adopt Decentralized Flexibility (from Soccer):** The NFL and MLB often seek to control international ventures from league headquarters, but soccer shows that empowering local federations or franchises—within a consistent legal and branding framework—may enhance global adaptability. For example, allowing independent flag football federations to grow organically, while offering official NFL recognition or content licensing, may replicate soccer's success in aligning local culture with global standards.

- **Replicate Centralized Efficiency (from the NBA):** Leagues like the NFL and professional softball could benefit from NBA-style international subsidiaries that navigate foreign legal and economic systems while preserving U.S. league control. MLB has taken steps in this direction with the MLB World Tour and academies in Latin America, but these remain more developmental than commercially integrated.

- **Harmonization:** Both models highlight the importance of harmonization—whether through FIFA-style regulations or NBA-style licensing agreements. U.S. leagues will need to consider how athlete contracts, labor rights, and IP protections function across jurisdictions if they want to scale without constant renegotiation.

- **Cultural Integration and Grassroots**

Investment: Finally, cultural resonance matters. Soccer's success is rooted in deep local participation, and the NBA has tailored its brand to diverse fan bases through region-specific content. U.S. leagues have to move beyond its one-size-fits-all promotion and invest in local storytelling, partnerships, and events that build emotional affinity abroad.

While soccer and the NBA offer contrasting roadmaps, their core strategies—legal infrastructure, cultural sensitivity, and structural clarity—can help leagues like the NFL, MLB, and softball develop international models that are legally sound, commercially viable, and culturally durable.

VIII. LEGAL RISKS AND CHALLENGES

With expansion comes exposure—not just to new audiences but to legal systems, cultural norms, and regulatory risks that vary significantly by region. U.S. leagues cannot simply replicate their domestic legal framework abroad. Instead, they must navigate a complex patchwork of laws related to jurisdiction, dispute resolution, labor rights, and intellectual property enforcement.¹⁸¹ Global expansion presents legal risks that extend far beyond marketing or logistics. U.S. leagues must navigate a complex landscape of jurisdictional conflict, international labor standards, human rights considerations, and intellectual property enforcement. This section outlines the primary categories of legal risk that arise when American leagues operate in foreign markets, host events abroad, or establish talent pipelines in jurisdictions with different legal norms.

Section A will explore cross-border

jurisdictional challenges and how leagues use arbitration clauses and contract provisions to resolve disputes outside the U.S. Section B will examine legal concerns related to labor conditions, athlete exploitation, and human rights—particularly in youth development and women’s sports contexts. Section C will focus on protecting broadcasting rights and IP in jurisdictions with weaker enforcement mechanisms, and on the contractual strategies leagues use to mitigate these risks.

A. CROSS-BORDER DISPUTE RESOLUTION AND JURISDICTION

This subsection examines the challenges of litigating or arbitrating disputes that arise outside of U.S. borders. It considers how leagues structure contracts to minimize jurisdictional uncertainty and explores the role of international arbitration bodies in resolving labor, commercial, or sponsorship disputes. The goal is to highlight best practices in cross-border legal risk management for sports entities operating abroad.

Operating in foreign jurisdictions exposes U.S.-based leagues to legal systems with different procedural rules, substantive standards, and enforcement mechanisms. Jurisdictional ambiguity—concerning venue, choice of law, and enforcement of judgments—poses a critical risk when leagues enter into commercial contracts, player agreements, or sponsorship deals abroad. To minimize this risk, many leagues and their international partners rely on carefully drafted forum selection and choice-of-law clauses, often coupled with mandatory arbitration provisions. These provisions are increasingly tailored to invoke neutral international arbitral bodies such as the CAS, the ICC, or the London Court of International Arbitration (LCIA).¹⁸²

These institutions offer predictability, cross-border enforceability under the New York Convention, and expertise in resolving disputes with transnational elements. For example, CAS has played a vital role in adjudicating disputes related to transfer fees, doping sanctions, and eligibility questions—frequently involving athletes or clubs in multiple jurisdictions.¹⁸³ American leagues seeking to globalize their operations can benefit from pre-emptively building dispute resolution mechanisms into their contracts that designate arbitration as the exclusive forum and anticipate enforcement challenges in jurisdictions with weak rule-of-law institutions. Additionally, clauses addressing currency conversion, force majeure, and local licensing laws help mitigate region-specific risks.¹⁸⁴ Ultimately, the ability to resolve labor, commercial, and sponsorship disputes efficiently across borders is not merely a procedural concern—it is foundational to maintaining trust, compliance, and continuity.

B. HUMAN RIGHTS, LABOR ISSUES, AND EXPLOITATION CONCERNS

This subsection explores how youth academies, gender disparities, and cultural norms in other countries can create risks for U.S. leagues—both reputational and legal. This includes relevant international labor standards and how leagues can ensure compliance with human rights norms when operating development programs or hosting events internationally.

When American leagues enter markets with lower labor standards or differing norms regarding gender, age, and athlete autonomy, they expose themselves to reputational and

legal scrutiny under international human rights law. A particularly sensitive area involves the establishment of youth academies, where minors may be enrolled in intensive training environments under conditions that fall short of protections set forth by the International Labour Organization (ILO) and the United Nations Convention on the Rights of the Child.¹⁸⁵ Allegations of coercion, unpaid labor, or educational neglect can attract condemnation from NGOs and multilateral organizations, as well as legal liability in both the host country and under extraterritorial U.S. statutes like the Trafficking Victims Protection Act (TVPA).¹⁸⁶

Gender disparities further complicate these risks. In jurisdictions where women’s sports lack legal protection or institutional support, U.S. leagues may inadvertently reinforce discriminatory systems unless they adopt robust equality measures. FIFA’s recent efforts to require minimum maternity protections in women’s player contracts and the WNBA’s global outreach programs offer instructive examples of how leagues can align commercial strategies with evolving human rights norms.¹⁸⁷ Additionally, the cultural dimensions of these issues cannot be overlooked. Practices that may be accepted or customary in host countries—such as early player recruitment or segregated sports structures—can conflict with global human rights standards and erode brand trust.¹⁸⁸

To mitigate these concerns, leagues must conduct due diligence on local partners, invest in monitoring and compliance mechanisms, and adopt binding codes of conduct that govern labor conditions across their global operations. Legal counsel should play an active role in auditing recruitment practices, academy structures, and event protocols to

ensure compliance with both domestic and international human rights frameworks.¹⁸⁹ Transparent grievance mechanisms and partnerships with independent watchdogs can further strengthen credibility and reduce long-term legal exposure.

C. INTELLECTUAL PROPERTY AND BROADCASTING RIGHTS ENFORCEMENT

This subsection addresses the difficulties of protecting IP and broadcast rights across multiple jurisdictions. It considers how leagues combat piracy, negotiate international licensing deals, and enforce trademarks abroad. The aim is to identify gaps in enforcement and propose contractual or policy-based solutions for strengthening global IP protection.

Piracy of live sports content—especially in regions with weak copyright enforcement or limited digital regulation—poses a direct threat to revenue streams built on media rights and brand licensing. Illegal streaming platforms continue to siphon billions of dollars annually from sports properties, despite takedown efforts and legal pressure.¹⁹⁰ Meanwhile, counterfeit merchandise featuring team logos and unauthorized use of league trademarks flood international markets, particularly in countries with opaque IP registration and enforcement procedures.¹⁹¹

Leagues like the NBA and MLB have responded by centralizing IP oversight and entering into strategic licensing deals with local partners who better understand the enforcement landscape. These partnerships often include clauses that require co-enforcement actions and provide for indemnification in cases of infringement.¹⁹² Still, leagues must navigate national

trademark registration regimes—which often operate on a “first to file” basis—and ensure that key brand elements are properly registered in each jurisdiction of operation. Failure to do so can lead to costly disputes or even loss of exclusive rights.¹⁹³

In addition to defensive strategies, leagues increasingly rely on technological tools to monitor online infringement, including automated takedown software and digital watermarking.¹⁹⁴ While these measures are helpful, their effectiveness depends on local judicial willingness to act. In this respect, public-private partnerships and trade associations—such as the World Intellectual Property Organization (WIPO) and the International Trademark Association (INTA)—can play a critical advocacy role in strengthening global enforcement norms.¹⁹⁵ Furthermore, leagues should integrate IP enforcement clauses into all international sponsorship, broadcast, and distribution contracts, making clear that infringement will result in termination or monetary penalties.

As U.S. leagues globalize, protecting their commercial identity abroad is as essential as cultivating it. Intellectual property is not just a marketing asset—it is a legal battleground. Effective IP strategy demands not only registration and vigilance but also jurisdiction-specific adaptation and sustained institutional relationships that can support enforcement across borders.

IX. RECOMMENDATIONS AND POLICY PROPOSALS

To translate international expansion into long-term success, leagues need more

than just market access—they need legal infrastructure, policy coordination, and ethical frameworks that can sustain global operations. This section presents targeted recommendations to improve legal clarity, protect labor rights, and align cross-border operations with sustainable growth models.

Section A will propose a uniform framework for international player contracts that incorporates standardized terms, dispute resolution mechanisms, and jurisdictional clarity. Section B will recommend expanding bilateral or multilateral agreements between leagues and foreign governments to streamline operations, secure legal protections, and encourage mutual investment. Section C will call for greater transparency in international labor arrangements and revenue-sharing mechanisms to protect athlete rights and ensure equitable outcomes. Section D will emphasize the need for longitudinal data collection and independent economic research to evaluate the effectiveness, legality, and social impact of international expansion efforts.

A. BUILDING UNIFORM INTERNATIONAL PLAYER CONTRACTS

This subsection proposes a standardized contract framework for players participating in international events or leagues, including built-in dispute resolution clauses, governing law provisions, and baseline labor protections. These contracts can help reduce ambiguity and ensure consistency across borders while respecting local legal requirements.

At minimum, these contracts should contain (1) clear jurisdiction and choice-of-law provisions, (2) opt-in international arbitration clauses with named forums such as the CAS or the ICDR, and (3) service details.¹⁹⁶ For instance, a U.S. basketball

league playing exhibition games in Europe or Asia could adopt a unified short-term player agreement that is pre-approved by participating local federations or host countries. This would not only minimize the likelihood of litigation in unfamiliar or hostile courts but also foster predictability in cross-border employment relationships.

Leagues should also consider including minimum labor protections consistent with ILO conventions, especially where local laws are underdeveloped. By creating a harmonized, exportable contract structure, leagues can proactively reduce compliance gaps and preempt reputational harm tied to player mistreatment or contractual disputes abroad.

B. EXPANDING BILATERAL AGREEMENTS BETWEEN LEAGUES AND NATIONS

The focus on how formal agreements between sports leagues and foreign governments—or between U.S. and foreign regulatory bodies—can facilitate smoother operations abroad. Visa facilitation, tax incentives, and facility development agreements serve both the host country and the league.

Formal agreements between leagues and foreign governments can provide the legal scaffolding necessary to operate efficiently overseas. These bilateral or multilateral frameworks might resemble memoranda of understanding (MOUs) or economic cooperation agreements. While these agreements vary widely, they can include provisions around tax treatment, visa facilitation, facility development, and dispute resolution protocols.

For example, the NFL's ongoing efforts to establish a more permanent presence in

Germany and the U.K. could be accelerated through intergovernmental agreements that streamline athlete and staff mobility, reduce local regulatory barriers, or guarantee long-term venue use. Similarly, MLB's operations in the Dominican Republic and Cuba may benefit from negotiated accords that clarify the legality of talent recruitment and foreign investment in local infrastructure.

These agreements can also serve diplomatic purposes, offering soft power benefits to participating states. By linking global sport to broader economic development and cultural diplomacy objectives, bilateral partnerships can secure buy-in from host governments and ensure legal certainty for U.S. leagues operating abroad.¹⁹⁷

C. TRANSPARENCY IN REVENUE SHARING AND LABOR RIGHTS PROTECTIONS

This subsection recommends reporting standards and oversight mechanisms to ensure that international expansions are equitable, particularly in terms of athlete compensation and investment in local infrastructure. The emphasis is on building long-term trust and legitimacy, both at home and abroad.

Without appropriate oversight, international expansion risks replicating or even exacerbating existing inequalities in sports. Leagues must commit to transparent revenue-sharing practices that fairly compensate both players and local stakeholders. This includes disclosing financial arrangements tied to international media rights, sponsorships, and merchandising in foreign markets—particularly when these revenues are derived from talent pipelines or facilities located in developing countries.¹⁹⁸

Additionally, leagues should implement

and publicize human rights due diligence protocols that address labor standards in youth academies, women's sports programs, and event staffing abroad. These protocols should be benchmarked against international best practices, including the UN Guiding Principles on Business and Human Rights and relevant ILO standards.¹⁹⁹ For example, a league that establishes a youth academy in Sub-Saharan Africa or Southeast Asia must ensure compliance with age verification practices, educational access, and safeguards against coercion or trafficking.

Mechanisms such as third-party audits, annual human rights impact assessments, and grievance reporting systems can enhance accountability and mitigate reputational risks. Greater transparency not only supports legal compliance but can also strengthen brand equity by demonstrating a credible commitment to equitable development and athlete welfare.

D. DATA COLLECTION AND LONGITUDINAL RESEARCH ON ECONOMIC IMPACT

This section calls for systematic data collection on the financial and labor implications of international sports operations. Independent research can help leagues and policymakers assess whether international games and academies deliver promised returns, promote fair labor practices, and support sustainable growth strategies.²⁰⁰

Effective policy decisions require reliable data. Currently, most leagues rely on proprietary or short-term financial metrics to evaluate international expansion. This narrow view limits the ability of regulators to assess whether international efforts are generating

sustainable value or merely inflating short-term revenues.²⁰¹

Standardized reporting metrics—such as job creation, facility use post-event, athlete migration patterns, and educational access for youth academy participants—can help build an evidence base for what works and what does not. In time, this data can inform cross-jurisdictional best practices, promote regulatory convergence, and ensure that international expansion contributes meaningfully to both host countries and global sport governance.

X. CONCLUSION

The global expansion of U.S. professional sports leagues is no longer a theoretical ambition—it is an economic necessity and a legal reality. As explored in this Comment, the globalization of leagues like the NFL, MLB, and professional softball rests on a multilayered foundation: economic incentive, regulatory navigation, and cultural resonance. From grassroots flag football to MLB's embedded international academies and the reemergence of women's softball on the Olympic stage, American sports leagues are engaging in complex and dynamic transnational strategies.

Yet with opportunity comes obligation. The internationalization of sports must contend with fragmented labor regimes, overlapping jurisdictional laws, and emerging questions around gender equity, youth protections, and cross-border intellectual property. Moreover, the Olympics—while traditionally symbolic—now serve as legal and economic accelerators for emerging sports. The inclusion of new disciplines like

flag football and cricket for the 2028 Los Angeles Olympics illustrates how Olympic validation intersects with league-driven market strategies and governmental interests.

The comparative experiences of soccer and the NBA underscore that long-term global success is not just a function of brand popularity, but of foresight and institutional investment. Leagues that fail to align their growth with evolving international norms may face not only economic inefficiencies but also reputational risks and compliance vulnerabilities.

This Comment has argued that international economic law will be a defining influence in shaping the future of U.S. sports abroad. To that end, leagues and lawmakers must collaborate to ensure that expansion strategies are accompanied by robust legal infrastructure and ethical considerations. Policymakers should consider harmonizing visa protocols, labor mobility pathways, and dispute resolution mechanisms that facilitate growth without sacrificing accountability. Leagues, in turn, must invest in legal compliance, community engagement, and long-term talent development abroad—not just short-term monetization.

As globalization continues to blur the boundaries between local loyalties and global audiences, the legal profession will play a vital role in mediating that transformation. Sports are no longer just games; they are transnational enterprises that operate at the intersection of law, culture, and commerce. The challenge ahead is to build legal systems that not only keep pace with this evolution but help shape its future.

END NOTES

1. David Rowe, *Globalization and the Sociology of Sport*, 38 J. Soc. Sport 485, 490–92 (2001).
2. Laila El-Dabt et al., *Sustainable Strategic Nation Branding Through Sports: Leveraging Soft Power via Mega-Event Hosting*, PMC (Mar. 10, 2025), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11934112/> [https://perma.cc/58LT-WXTT].
3. John Nauright, *Selling Nations to the World Through Sport: Mega-Events and Nation Branding as Global Diplomacy*, 34 PUB. DIPL. MAG., Winter 2015, at 23.
4. Serena Finney, *Sports Media Sold as a Commodity: Sports Is No Longer in Its “TV Era”*, S.F. FOGHORN (Sept. 25, 2025), <https://sffoghorn.com/sports-media-sold-as-a-commodity-sports-is-no-longer-in-its-tv-era/> [https://perma.cc/B52C-54LV].
5. Alexandra Bardón, *Impact of Sponsorship and Endorsements in Sport Management*, Lindenwood Univ. (December 5, 2024), <https://lindenwood.edu/blog/impact-of-sponsorship-and-endorsements-in-sport-management/> [https://perma.cc/82FK-TZ65].
6. *Id.*
7. Richard Giulianotti & Roland Robertson, *Globalization and Football* 72–74 (Sage Publ’n 2d ed. 2009).
8. Christophe Firth, Greg Portell, Mohamed Hashem, and David Parkin, *From Passion to Profit: Unlocking Value in Sports*, (Kearney June 20, 2025), <https://www. Kearney.com/industry/media/article/from-passion-to-profit-unlocking-value-in-sports> [https://perma.cc/WR5E-5CMA].
9. David L. Andrews & Michael L. Silk, *Sport and Neoliberalism: An Affective-Ideological Articulation*, 51 J. POPULAR CULTURE 511, 511–33 (2018).
10. *Id.*
11. *Id.*
12. Franklin M. Fisher, Christopher Maxwell, and Evan Sue Schouten, *The Economics of Sports Leagues & the Relocation of Teams: The Case of the St. Louis Rams*, 10 MARQ. SPORTS L. J. 193 (2000).
13. Cassidy Rush, *How Sports Unite Countries: The Global Power of Games*, Remitly Blog, <https://www.remitly.com/blog/lifestyle-culture/how-sports-unite-countries/> [https://perma.cc/D5UQ-PCYE].
14. Ian Drummond, *The Globalization of Sports: How International Athletes Are Transforming American Sports Marketing*, Hollywood Branded, <https://blog.hollywoodbranded.com/how-international-athletes-are-transforming-american-sports-marketing> [https://perma.cc/7VRR-AL6C].
15. Blake Bridge, *A Review of Contemporary U.S. Sports Diplomacy: How American Foreign Interests Are Cushioned by Its Professional Leagues*, Yale Rev. Int’l Stud., <https://yris.yira.org/americas/a-review-of-contemporary-us-sports-diplomacy-how-american-foreign-interests-are-cushioned-by-its-professional-leagues/> [https://perma.cc/ZTK5-M5SU].
16. PwC, *Streaming the Game: How the Rise of Digital Platforms Is Changing Sports Consumption*, PwC, <https://www.pwc.com/us/en/industries/tmt/library/sports-streaming-platforms.html> [https://perma.cc/ZN6M-VQB8].
17. See Wray Vamplew, *The Commodification of Sport: Exploring the Nature of the Sports Product*, 35 INT’L J. HIST. SPORT 659, 659–72 (2018).
18. See *Id.*
19. Davy Karkason, *Free Trade Agreements and Bilateral Investment Treaties*, TRANSNAT’L MATTERS, (July 2, 2024), <https://www.transnationalmatters.com/free-trade-agreements-and-bilateral-investment-treaties/> [https://perma.cc/L8AJ-Q3NC].
20. *Id.*
21. See United States-Mexico-Canada Agreement Implementation Act arts. 15, 19 opened for signature Nov. 30, 2018, 134 Stat. 11280, Pub. L. No. 116-113, (entered into force July 1, 2020).
22. Karkason, *supra* note 19.
23. See *Id.*
24. *NFL Football as Cultural Export*, BOOMERANG CARNETS U.K. (July 2025), <https://www.boomerangcarnets.co.uk/NFL-Football-as-Cultural-Export>, BOOMERANG CARNETS U.K. (July 2025), <https://www.boomerangcarnets.co.uk/NFL-Football-as-Cultural-Export> [https://perma.cc/R4H6-2E94].
25. See Fiona Jobson, *Touchdowns and Till Receipts: How the NFL London Games Are Powering the Capital’s Hospitality and Retail Economy*, PRICE BAILEY, <https://www.pricebailey.co.uk/blog/how-businesses-can-capitalise-on-nfl-opportunities/> [https://perma.cc/LSX2-Z6RG].
26. See *Immigration Legal Options for Athletes*, JUSTIA (last reviewed July 2025), <https://www.justia.com/sports-law/immigration-for-athletes/> [https://perma.cc/TET3-VUXN].
27. See Paul Henty & Deen Taj, *Class Action Lawsuit v FIFA: Free Movement of Workers Under EU Competition Law*, LEXOLOGY (Dec. 10, 2025), <https://www.lexology.com/library/detail.aspx?g=86b93161-4cac-490e-a12c-0248aefa9faa> [https://perma.cc/6M78-97ZQ].
28. See Neonilla Orlinskaya, *O-1 Visa for Athletes: Documenting International Recognition*, ARVIAN LAW FIRM (July 5, 2025), <https://arvian-immigration.com/o-1-visa-for-athletes-documenting-international-recognition/> [https://perma.cc/6M78-97ZQ].
29. Garfinkel Immigr. L. Firm, *Explaining the P-1A Nonimmigrant Visa for Athletes*, (Aug. 13, 2024), <https://www.garfinkelimmigration.com/2024/08/13/explaining-the-p-1a-nonimmigrant-visa-for-athletes/>.
30. Charles Russell Speechlys, *The Use of Arbitration in Resolving Sports Disputes*, (Nov. 26, 2024), <https://www.charlesrussellspeechlys.com/en/insights/expert-insights/dispute-resolution/2024/the-use-of-arbitration-in-resolving-sports-disputes/> [https://perma.cc/MQ3U-PWTV].
31. Yash Gupta & Tanya Sinha, *Dispute Resolution Mechanism in Sports*, GLOB. SPORTS POL’Y REV. 29 (2020).
32. NBA Commc’ns, *NBA & FIBA Announce Plan to Launch Professional Basketball League in Africa*, (May 16, 2019), <https://pr.nba.com/nba-fiba-basketball-africa-league/> [https://perma.cc/AL57-9MY8].
33. Thomas Zhang, *Competition Law: Understanding Regulations for Fair Market Practices*, LEX INTER OCT. 22, 2024, <https://www.lexinter.net/law/competition> [https://perma.cc/EC2P-PMVT].
34. Ben Van Rompuy, *Premier League Fans in Europe Worse Off After Murphy Judgment*, WOLTERS KLUWER COMPETITION BLOG (Mar. 6, 2014), <https://legalblogs.wolterskluwer.com/competition-blog/premier-league-fans-in-europe-worse-off-after-murphy-judgment> [https://perma.cc/H9SX-BHXX].
35. Ana Mishova, *GDPR Compliance Checklist for U.S. Sports Teams*, GDPR Local, (Oct. 2, 2025), <https://gdprlocal.com/gdpr-compliance-us-sports-teams/> [https://perma.cc/4CEZ-66HW].
36. Roman Baranovskyi, *White Label Casino License: A Legal Guide for iGaming Businesses*, SB-SB Feb. 1, 2026, <https://sb-sb.com/services/gambling/gambling-license/white-label-casino-license/> [https://perma.cc/2HFM-KQ78].
37. Candi Clouse, *How IMPLAN Works*, IMPLAN SUPPORT (Aug. 30, 2023), <https://support.implan.com/hc/en-us/articles/360038285254-How-IMPLAN-Works> [https://perma.cc/FUY3-47QJ].
38. Henry Williams, et al., *Economic Impact of Pathfinder Event Center*, at 3 (Aug. 18, 2024), https://csuredi.org/wp-content/uploads/2024/09/Economic_Impact_of_Pathfinder_Event_Center.pdf [https://perma.cc/B9ED-5Z9K].
39. Price Bailey, *supra* note 25.
40. *Id.*
41. Shangyuan Wei, *Use Input-Output Model to Assess Economic Impact*, Medium (May 8, 2021) <https://medium.com/geekculture/use-input-output-model-to-assess-economic-impact-352f141dc214> [https://perma.cc/CG3T-R44Y].
42. Adam Hayes, *Cost-Benefit Analysis Explained: Usage, Advantages, and Drawbacks*, INVESTOPEDIA (Aug. 27, 2025), <https://www.investopedia.com/terms/c/cost-benefitanalysis.asp> [https://perma.cc/R4B3-ZRUP].
43. Benjamin D. Goss, *Taking the Ballgame Out to the World: An Analysis of the World Baseball Classic as a Global Branding Promotional Strategy for Major League Baseball*, 1 J. APPLIED SPORT MGMT. 80, 82 (2009).
44. *Id.* at 93.
45. *Global Sport Business Journal: Aims and Scope*, Stephen F. Austin State Univ., <https://scholarworks.sfasu.edu/gsbj/aimsandscope.html> [https://perma.cc/A7J8-MLG8].
46. *Legacy Strategic Approach*, Int’l Olympic Comm., https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Documents/Olympic-Legacy/IOC_Legacy_Strategy_Full_version.pdf [https://perma.cc/6EBZ-HK6Y].
47. *NBA Africa and Opportunity International to Build Basketball Courts and Conduct Youth Clinics in Kenya and Rwanda*, NBA Commc’ns, (Oct. 8, 2024) <https://pr.nba.com/nba-africa-opportunity-international-kenya-rwanda/> [https://perma.cc/P2BE-QBPg].
48. See, Amalie Benjamin, *Global Series Sweden Provides Teammates Unique Overseas Bonding Experience*, NHL, (Nov. 10, 2025), <https://www.nhl.com/news/global-series-gives-teammates-chance-to-bond-overseas> [https://perma.cc/8UJY-DNK3].
49. *Popularity of Basketball Soaring Globally Highlighted by Increased Interest in the FIBA World Cup*, FIBA, <https://about.fiba.basketball/en/news/popularity-of-basketball->

- soaring-globally-highlighted-by-increased-interest-in-the-fiba-world-cup.
50. Jesse Sanchez, *MLB Announces New League for D.R. Prospects*, MLB, <https://www.mlb.com/news/mlb-announces-new-league-for-dominican-republic-prospects/c-27528872>.
51. Ayrton Ostly, *Will the NFL Put a Team in London? Benefits, Obstacles to Overseas Football*, USA TODAY (Oct. 19, 2025), <https://www.usatoday.com/story/sports/nfl/2025/10/19/nfl-london-team-future-jaguars-rams/86727766007/>.
52. *Id.*
53. Justin Sablich, *Inside the NFL's Strategy to Grow Global Football Fandom*, BUS. INSIDER (Sept. 2, 2025), <https://www.businessinsider.com/nfl-global-strategy-football-fandom-brand-growth-2025-9> [https://perma.cc/NGL5-UGGK].
54. Ryan Gosling, *NFL International Series History: Teams, Locations, Schedules, and More*, PRO FOOTBALL NETWORK (Jan. 19, 2023), <https://www.profootballnetwork.com/nfl-international-series-history/> [https://perma.cc/R63P-TNMD].
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Rivers Gambrell, *Globalising the Gridiron: The NFL and the Forgotten Legacy of the World League of American Football*, BLACK HISTORY COLLECTIVE (MARCH 15, 2019), <https://thebhc.org/globalising-gridiron-nfl-and-forgotten-legacy-world-league-american-football> [https://perma.cc/E9Z4-R3N9].
60. Doug Cress, *The New World League: Retooled, and Ready to Start Saturday*, N.Y. TIMES (Apr. 4, 1995).
61. *Id.*
62. *Id.*
63. Len Pasquarelli, *NFL Europa Failed to Produce Players, Profits*, ESPN (June 29, 2007).
64. *Id.*
65. *Id.*
66. *Id.*
67. Ed Bouchette, *Will NFL Europe Survive? It's a Developing Situation*, PITTSBURGH POST-GAZETTE (May 16, 2005).
68. See NFL Football Operations, *The NFL International Series*, NFL, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-s-international-impact/the-nfl-international-series/>. [https://perma.cc/93PG-3E6Q]
69. See Jefferies Jiang, *Case Study: NFL International Expansion*, MEDIUM (Sep. 12, 2024), <https://335468385.medium.com/case-study-nfl-international-expansion-4de2060a0939>.
70. See *The Rise of Flag Football: How the NFL's Pivot Is Reshaping American Football's Future*, YOUTH SPORTS BUSINESS REPORT (Feb. 27, 2025) <https://youthsportsbusinessreport.com/the-rise-of-flag-football-how-the-nfls-pivot-is-reshaping-american-footballs-future/>. [https://perma.cc/4AAP-PE4N]
71. *Id.*
72. *NFL and Jalen Hurts Light Up Handover to Olympic Games Los Angeles 2028*, NFL (Aug. 5, 2024), <https://www.nfl.com/partners/flag-football>. [https://perma.cc/94KC-KJ8L].
73. See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 9 (2021).
74. See 2025 NFL Flag Championships *Return to Canton*, NFL PLAY FOOTBALL (June 26, 2025), <https://playfootball.nfl.com/news-events/news-and-features/2025-nfl-flag-championships-return-to-canton-from-july-17-20/>. [https://perma.cc/L28W-WQDF].
75. See Nicholas Patricios, *From Gridiron to Gavel: The NFL's Legal Pass to Europe*, 33 INT'L. & COMPAR. L. REV. 1 (2024), <https://international-and-comparative-law-review.law.miami.edu/from-gridiron-to-gavel-the-nfls-legal-pass-to-europe/>. [https://perma.cc/99XX-MGXF].
76. Int'l Olympic Comm., *Host City Contract – Operational Requirements* 104-10, 72, <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf>.
77. L. Brattain, *The NFL and the Digital Era: How Social Media Has Redefined the National Football League* (2025), <https://poetcommons.whittier.edu/scholars/58>.
78. NFL Operations, *The NFL International Series*, NFL, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-s-international-impact/the-nfl-international-series/>.
79. *Id.*
80. *Id.*
81. *NFL Announces Designated Teams for 2023 International Games*, NFL (Jan. 19, 2023, 7:21 AM), <https://www.nfl.com/news/nfl-announces-designated-teams-for-2023-international-games>.
82. *Brazil to Host First-Ever NFL Regular Season Game in South America in 2024*, NFL (Dec. 13, 2023), <https://operations.nfl.com/updates/football-ops/brazil-to-host-first-ever-nfl-regular-season-game-in-south-america-in-2024/>.
83. Ben Fischer, *NFL's Foreign Affairs*, SPORTS BUS. J. (Feb. 14, 2025), <https://www.sportsbusinessjournal.com/Articles/2025/02/14/nfls-foreign-affairs/>.
84. Football Stadium Digest, *A New Era in NFL Facilities: Tottenham Hotspur Stadium* (Oct. 6, 2019), <https://footballstadiumdigest.com/2019/10/a-new-era-in-nfl-facilities-tottenham-hotspur-stadium/>.
85. NFL Academy, *NFL Academy's U.K. Program Kicks Off 2024–2025 Season*, <https://www.nflacademy.com/nfl-academys-uk-program-kicks-off-2024-2025-season/>.
86. *Id.*
87. Youth Sports Business Report, *NFL and Nike Expand International Youth Football Model with Third Annual London Matchup* (Oct. 10, 2025), <https://youthsportsbusinessreport.com/nfl-and-nike-expand-international-youth-football-model-with-third-annual-london-matchup/>.
88. *See id.*
89. See generally *NFL Academy athlete Emmanuel Okoye commits to the University of Tennessee* (May 17, 2023), <https://www.lboro.ac.uk/media-centre/press-releases/2023/may/nfl-academy-athlete-commits-to-uni-of-tennessee/> [https://perma.cc/JST6-SY57] (since the publication of this article, Darren Agu has transferred from Vanderbilt University to New Mexico State).
90. See NFL ACAD., *Frequently Asked Questions*, <https://www.nflacademy.com/nfl-academy-europe-africa/frequently-asked-questions/> [https://perma.cc/UL9K-VYT8].
91. NFL FOOTBALL OPERATIONS, *NFL Announces Additional International Home Marketing Areas* (May 24, 2022), <https://operations.nfl.com/updates/the-game/nfl-announces-additional-international-home-marketing-areas/> [https://perma.cc/8RC8-PS8N].
92. *Id.*
93. *Miami Dolphins to Expand Marketing Efforts in Argentina, Colombia, and Mexico*, MIAMI DOLPHINS (MAR. 25, 2024), <https://www.miamidolphins.com/news/expand-marketing-efforts> [https://perma.cc/QAB2-YDVT].
94. *Chiefs Secure Additional International Marketing and Commercial Rights via NFL's Global Markets Program*, KANSAS CITY CHIEFS (Mar. 31, 2025), <https://www.chiefs.com/news/chiefs-secure-additional-international-marketing-and-commercial-rights-via-nfl-s-global-markets-program> [https://perma.cc/JM5X-S4QV].
95. Barry Janoff, *Worldwide Strategy: NFL Global Markets Program Now Includes All 32 Teams*, N.Y. SPORTS JOURNALISM (May 21, 2025), <http://www.nysportsjournalism.com/32-nfl-teams-in-global-markets/> [https://perma.cc/LST8-TSA9].
96. Alex Watt & Ron Khujneri, *The NFL's Aim to Expand Globally*, LEXOLOGY (Dec. 23, 2024), <https://www.lexology.com/library/detail.aspx?g=bacb569b-d3c4-4307-b709-af15ade5e7bf> [https://perma.cc/T6FG-48TR].
97. Gabby Hajduk, *Bears Host Latino Heritage Month Celebration at Soldier Field*, CHICAGO BEARS.COM, <https://www.chicagobears.com/news/bears-host-latino-heritage-month-celebration-at-soldier-field-2025-dallas-cowboys> [https://perma.cc/9ZYS-JMS5].
98. *The Growth of the NFL – How American Football Captures the Rest of the World*, BEYOND THE MATCH (Feb. 5, 2024), <https://sportsfive.com/beyond-the-match/insights/nfl-international> [https://perma.cc/J8EJ-Y5HU].
99. See, *TelevisaUnivision's First Super Bowl Broadcast Sets a Spanish-Language Audience Record with 2.3 Million Viewers*, TelevisaUnivision (Feb. 13, 2024), <https://corporate.televisaunivision.com/press/2024/02/13/televisaunivisions-first-super-bowl-broadcast-sets-a-spanish-language-audience-record-with-2-3-million-viewers/>. [https://perma.cc/W47W-QESC]
100. Jason Abbey, *NFL Game Pass International on DAZN: How to Watch Live Games*, DAZN, <https://www.dazn.com/en-US/news/american-football/nfl-gamepass-live-cost-dazn-country-price-subscription-installment-watch-season/>.
101. NAB Show, *The NFL's Creator Partnerships Touch Down With Audiences*, <https://www.nabshow.com/article/the-nfls-creator-partnerships-touch-down-with-audiences/>.
102. *Vernon Kay Takes Part in NFL Event with Top USA Players*, BOLTON NEWS (June 23, 2024), <https://www.theboltonnews.co.uk/news/24405872.vernon-kay-takes-part-nfl-event-top-usa-players/>.

103. Alex Malchow, *What Exactly Is the NFL International Pathway Player Program?*, AM. FOOTBALL INT'L (Jan. 17, 2022), <https://www.americanfootballinternational.com/what-exactly-is-the-nfl-international-pathway-player-program/> [https://perma.cc/V2D5-GXVH].
104. Tim McManus, *How Jordan Mailata Transformed from a Rugby Player to Eagles' \$64 Million Left Tackle*, ESPN (Sept. 27, 2021), https://www.espn.com/nfl/story/_id/32271873/how-jordan-mailata-transformed-rugby-player-eagles-64-million-left-tackle [https://perma.cc/VTR4-2VX9].
105. *Id.*
106. Marcin Muszynski, *P-1 Visas*, MM LEGAL NET IMMIGR. L. FIRM BLOG, <https://www.mmlegalnet.com/p-1-visas> [https://perma.cc/2KXZ-PDVK].
107. U.N. Comm. on the Rights of Persons with Disabilities, *General Comment No. 2 on Article 9: Accessibility*, U.N. Doc. CRPD/C/GC/2 (2014).
108. Elizabeth Craig, *Offense Not Limited to the Field: The NFL's Aggressive Push to Protect Its Trademarks*, COMM LAW BLOG (Feb. 1, 2021), <https://www.commlawblog.com/2021/02/articles/intellectual-property/> [https://perma.cc/S9BJ-PRHU].
109. Jack Brestel, *International Crackdown on the Illegal Streaming of Sporting Events*, 17 RICH. J.L. & TECH. (2011).
110. NFL Flag, *Who We Are* (2026), <https://nflflag.com/about> [https://perma.cc/J3HY-3M9Y].
111. U.S. Olympic & Paralympic Comm., *USA Football Makes History, Becomes Formally Certified as Football's National Governing Body* by USOPC (Apr. 17, 2025, 9:30 AM), <https://www.usopc.org/news/2025/april/17/usa-football-makes-history-becomes-formally-certified-as-football-s-national-governing-body-by-usopc> [https://perma.cc/UT9F-XC9X].
112. Lauren Jameson, *The National Football League's International Expansion: A Comparative Analysis of Market Viability and Sports Diplomacy in London, Mexico City, and Frankfurt* (Honors Thesis, Okla State Univ. 2024), <https://openresearch.okstate.edu/server/api/core/bitstreams/2acfc194-940c-4c6e-8623-0359df8b2bde/content> [https://perma.cc/SL3H-XSRH].
113. NFL Football Operations, *Global American Football Family Reacts to Confirmation of Flag Football's Inclusion in the Olympic Games Los Angeles 2028* (Oct. 16, 2023), <https://operations.nfl.com/updates/the-game/global-american-football-family-reacts-to-confirmation-of-flag-football-s-inclusion-in-the-olympic-games-los-angeles-2028/> [https://perma.cc/BNU5-8XJ9].
114. *Id.*
115. *Id.*
116. Thomas McKenna, *The Path to the Sugar Mill or the Path to Millions: MLB Baseball Academies' Effect on the Dominican Republic*, SABR J., <https://sabr.org/journal/article/the-path-to-the-sugar-mill-or-the-path-to-millions-mlb-baseball-academies-effect-on-the-dominican-republic/> [https://perma.cc/7ZBC-8NXS].
117. Jeff Passan, *13 Years Old, With an MLB Deal: Why Some Are Ready for Change*, ESPN (May 9, 2019, 8:30 AM), https://www.espn.com/mlb/story/_id/26711751/13-years-old-mlb-deal-why-some-ready-change.
118. Maya T. Miller, *Behind America's Pastime Are Some Murky Labor Practices*, CENTURY FOUND. (July 12, 2016), <https://tcf.org/content/commentary/behind-americas-pastime-murky-labor-practices/>.
119. *See Id.*
120. 8 C.F.R. § 214.2(p)(1)(ii)(A)(1).
121. Evan Drellich, *MLB Union Tells International Players to Carry Immigration Documents at All Times*, THE ATHLETIC (July 15, 2025), <https://www.nytimes.com/athletic/6496918/2025/07/15/mlbpa-international-players-immigration-documents/> [https://perma.cc/7295-WZWN].
122. *See* Dustin Williamson, *Part of the Team 2* N.Y.U. J. INTELL. PROP. & ENT. L. 369, 375–79 (2013).
123. *See generally id.*
124. *See generally id.*
125. Rasool Norouzi Seyed Hossini et al., *Brain Drain in Sport: Socio-Cultural, Economic Drivers, and Policy Implications of Athlete Migration*, 25 J. PUB. AFFS. c70068 (2025), https://www.researchgate.net/publication/394712811_Brain_Drain_in_Sport_Socio-Cultural_Economic_Drivers_and_Policy_Implications_of_Athlete_Migration [https://perma.cc/S5RE-U8DT].
126. David Adler, *MLB's History of Games Played Abroad*, MLB (Mar. 19, 2025), <https://www.mlb.com/news/baseball-games-played-outside-the-us-c272441130> [https://perma.cc/554V-2Q9F].
127. *Id.*
128. Josh Sim, *MLB Tokyo Series' U.S. Viewership Up 59% on 2024 Season-Opener*, SPORTS PRO (Mar. 21, 2025), <https://www.sportspro.com/news/sponsorship-marketing/mlb-tokyo-series-2025-dodgers-cubs-fox-viewership-tv-ratings-march-2025/> [https://perma.cc/QYV7-FBMY].
129. *See* Ariella Oneyeama & Nan Sato, *International Employment Considerations for the Not-So "National" Sports Leagues*, JD SUPRA (Oct. 20, 2021), <https://www.jdsupra.com/legalnews/international-employment-considerations-1233027/> [https://perma.cc/BMH2-A43Q].
130. *Id.*
131. Anthony Castrovince, *MLBPA Rejects International Draft Proposal; QO Remains*, MLB.COM (July 25, 2022), <https://www.mlb.com/news/mlbpa-rejects-international-draft-proposal>.
132. *Id.*
133. Buscone, BASEBALL REFERENCE, <https://www.baseball-reference.com/bullpen/Buscone>.
134. James Dean, *MLB's International Latino Players, Coaches Face Challenges Despite Diversity Efforts*, CORNELL CHRON. (Apr. 17, 2025), <https://news.cornell.edu/stories/2025/04/mlbs-international-latino-players-coaches-face-challenges-despite-diversity-efforts> [https://perma.cc/L36E-P7BZ].
135. Dustin Williamson, *Part of the Team*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 369 (2013).
136. Roy S. Johnson, *MLB Urban Youth Academy Whiff Still Haunts Us—Our Kids Are Paying for It*, AL.COM (June 29, 2021, 6:30 AM), <https://www.al.com/news/2021/06/mlb-urban-youth-academy-whiff-still-haunts-us-our-kids-are-paying-for-it.html>.
137. Dustin Williamson, *Part of the Team*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 369 (2013).
138. *Id.*
139. Brian Murphy, *Star-Studded Yanks—Dodgers World Series Draws Record Viewership All Across the Globe*, MLB.COM (Nov. 1, 2024), <https://www.mlb.com/news/yankees-dodgers-2024-world-series-viewership> [https://perma.cc/Z98J-TE8F].
140. *See generally* Ronald Blum, *In a Storybook Ending, Ohtani Strikes Out Trout at World Baseball Classic for Japanese Championship*, PBS NEWS (Mar. 22, 2023, 11:42 AM), <https://www.pbs.org/newshour/arts/in-a-storybook-ending-ohtani-strikes-out-trout-at-world-baseball-classic-for-japanese-championship> [https://perma.cc/3QG9-TJ99].
141. Rory Jones, *World Baseball Classic final delivers record 5.2m US viewers*, SPORTS PRO (Mar. 23, 2023), <https://www.sportspro.com/news/world-baseball-classic-final-2023-tv-ratings-viewership-japan-usa-fox-sports/> [https://perma.cc/2XEB-5AQ5].
142. Ken Rosenthal, *Players Get Financial Benefit from WBC*, FOX SPORTS (Mar. 2, 2013), <https://www.foxsports.com/stories/mlb/players-get-financial-benefit-from-wbc> [https://perma.cc/2VA7-NG44].
143. *WBC Delivers Emphatic Turnout, as Much as \$100M in Revenue*, SPORTS BUS. J. (Mar. 23, 2023), <https://www.sportsbusinessjournal.com/Daily/Issues/2023/03/23/Events-and-Attractions/world-baseball-classic-revenue/> [https://perma.cc/XYU4-N5NN].
144. *See Generally id.*
145. INT'L OLYMPIC COMM., *New Sports and Events Promote Gender Parity* (Jan. 3, 2024), <https://www.olympics.com/ioc/news/new-sports-and-events-promote-gender-parity> [https://perma.cc/3DSU-AS8H].
146. Int'l Olympic Comm., *Tokyo 2020 Reflects on Global Success, with Games Legacy Already Inspiring Future Generations* (Feb. 3, 2022), <https://www.olympics.com/ioc/news/tokyo-2020-reflects-on-global-success-with-games-legacy-already-inspiring-future-generations> [https://perma.cc/6G96-TM3E].
147. U.S. WKLY., *All the Sports Being Cut and Added for 2028 Los Angeles Olympics*, (Aug. 13, 2024, 11:53 AM), <https://www.yahoo.com/entertainment/sports-being-cut-added-2028-165345365.html> [https://perma.cc/W9UX-5YMG].
148. Lev Akabas & Eben Novy-Williams, *U.S. Olympic Funding Leads to Medals, and Vice Versa: Data Viz*, SPORTICO (July 27, 2021, 12:00 PM), <https://www.sportico.com/leagues/other-sports/2021-us-olympic-funding-1234635440/> [https://perma.cc/XPH2-BK2U].
149. *See*, World Baseball Softball Confederation, *2025 Year in Review: WBSF Strengthens Corporate Social Responsibility* (Dec. 22, 2025), <https://www.wbsc.org/en/news/2025-year-in-review-wbsf-strengthens-corporate-social-responsibility> [https://perma.cc/9TFF-SDBR].
150. Athletes Unlimited, *Who We Are*, <https://auprosports.com/who-we-are/>.
151. Jade Hewitt Media, *ESPN and Athletes Unlimited Sign Multi-Year Rights Agreement* (Feb. 21, 2024), <https://auprosports.com/read/espn-and-athletes-unlimited-sign-multi-year-rights-agreement/>.
152. *5 Rock-Solid Reasons Contract*

- Labor Thrives in Uncertain Economies*, My Base Pay, <https://mybasepay.com/contract-labor-tough-economies/>.
153. Candace Dellacona, *The Legal Playbook for Athletes Crossing Borders*, Offit Kurman (Oct. 27, 2025), <https://www.offitkurman.com/offit-kurman-blogs/legal-planning-international-athletes>.
 154. Trecia Moore, *Back to School: What You Need to Know as the NLRB Pursues Unfair Labor Practice Charges on Behalf of College Athletes*, Husch Blackwell (Aug. 15, 2023), <https://www.huschblackwell.com/newsandinsights/back-to-school-what-you-need-to-know-as-the-nlrp-pursues-unfair-labor-practice-charges-on-behalf-of-college-athletes> [https://perma.cc/99MJ-86VH].
 155. Int'l Labour Org., *Gender Equality and Decent Work* 46 (2012), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_088023.pdf [https://perma.cc/BVF3-JELY].
 156. Int'l Olympic Comm., *IOC Session Approves LA28's Proposal for Five Additional Sports* INTERNATIONAL OLYMPIC COMMITTEE (Oct. 16, 2023), <https://www.olympics.com/ioc/news/ioc-session-approves-la28-s-proposal-for-five-additional-sports> [https://perma.cc/V8KJ-UED5].
 157. International Olympic Committee, *Funding, How the IOC Finances a Better World Through Sport*, <https://www.olympics.com/ioc/funding> [https://perma.cc/4QHA-J4A7].
 158. *Id.*
 159. *NFL Clubs Approve Investment in New Professional Flag Football League*, NFL Operations (Dec. 12, 2025), <https://operations.nfl.com/updates/the-game/nfl-clubs-approve-investment-in-new-professional-flag-football-league/>.
 160. Int'l Olympic Comm., *Sixes Lacrosse at the Olympic Games Los Angeles 2028: Everything You Need to Know* (Aug. 12, 2024), <https://www.olympics.com/en/news/lacrosse-sixes-at-olympic-games-los-angeles-2028-everything-you-need-to-know-about-the-new-sport-at-la28>.
 161. Wiley Sharp, *Aligning Olympic Ideals with Reality: The Need for Proactive Oversight of the IOC Host Nation Selection Process*, 63 *Hou. L. Rev.* 263 (2025).
 162. George Gordillo, *NFL Team Owners Back a New Professional Flag Football League with \$32 Million Investment as the Sport Eyes a Breakthrough for the Olympics*, MARCA (Oct. 12, 2025), <https://www.marca.com/en/nfl/2025/12/11/693a04b3ca741890e8b45f0.html>.
 163. Brendon Knott & Cem Tinaz, *The Legacy of Sport Events for Emerging Nations*, 4, *Frontiers in Sports and Active Living*, 1 (2022), <https://www.frontiersin.org/journals/sports-and-active-living/articles/10.3389/fspor.2022.926334/full> [https://perma.cc/ZJ8T-H8M8] ("largely been driven by the assumption that their legacy provides solutions to economic, social, cultural, or political challenges").
 164. Dennis Waszak Jr., *NFL's International Player Pathway program is shining a spotlight on talent from around the world* (2025), <https://apnews.com/article/nfl-international-player-pathway-program-dece81854f79ad9536f7a764ebfa5bc9#> [https://perma.cc/S8SW-MZJX]; National Football League, *NFL, State Department launch public-private partnership promoting global sports diplomacy*, <https://www.nfl.com/news/nfl-state-department-public-private-partnership-global-sports-diplomacy> [https://perma.cc/X4MR-KUCE] (last visited May 8, 2026).
 165. Mark LaSota, 2028 Olympic Flag Football: NFL Expansion, Opportunity, and Risk, *Forbes* (July 9, 2025), <https://www.forbes.com/sites/marklasota/2025/07/09/2028-olympic-flag-football-nfl-expansion-opportunity-and-risk/>.
 166. OC Consensus Statement on Elite Youth Athletes Competing at the Olympic Games, *Br. J. Sports Med.* (Sept. 4, 2024), <https://pubmed.ncbi.nlm.nih.gov/39197945/>.
 167. How Skateboarding Entered the Olympics, Maxfind Micro Mobility, <https://maxfind.com/blogs/maxfind-news/skateboarding-entered-olympics>.
 168. U.S. Olympic & Paralympic Comm., *Athlete Marketing – IOC Rule 40/IPC Athlete Sponsorship and Advertising Regulations*, <https://www.usopc.org/rule-40-background>.
 169. Endorsement Agreements for Athletes & Legal Considerations, Justia, <https://www.justia.com/sports-law/endorsement-agreements-for-professional-athletes/>.
 170. Ben Connelly, *The Professionalization of the Olympics Has Made Them Better*, *Ultra Physical* (Sept. 20, 2024), <https://www.ultrapysical.us/pl-the-professionalization-of-the-olympics>.
 171. Paul Quinn, *Governance Structure of Association Football: Integrity, Financial Regulation, and Strategic Failure*, *The Eesk* (Nov. 9, 2025), <https://theesk.org/2025/11/09/analysis-series-governance-structure-of-association-football-integrity-financial-regulation-and-strategic-failure/>.
 172. Fédération Internationale de Football Ass'n (FIFA), *Regulations on the Status and Transfer of Players* (RSTP) arts. 6, 23-24.
 173. Steve Bainbridge et al., *Sports Arbitration and the World Cup*, *DAILY JUS* (Dec. 16, 2022), <https://dailyjus.com/legal-insights/2022/12/sports-arbitration-and-the-world-cup> [https://perma.cc/BAN6-8VW5].
 174. Alec Boccanfuso, *Navigating Soccer's Financial Field*, *GABELLI FUNDS* (May 13, 2024), <https://gabelli.com/research/navigating-soccers-financial-field/> [https://perma.cc/HWS9-T3Z8].
 175. Davis Adedayo Eisape, *NBA's Next Frontier: How Europe's Expansion Will Redefine Global Sports*, *MEDIUM* (Apr. 28, 2025), https://medium.com/@Dr_Davis_Eisape/nbas-next-frontier-how-europe-s-expansion-will-redefine-global-sports-635354e3788e [https://perma.cc/AGA2-5B9L].
 176. Jabari Young, *NBA Forms Africa Business Entity Valued at Nearly \$1 Billion*, *CNBC SPORT* (May 24, 2021), <https://www.cnbc.com/2021/05/24/nba-lures-players-and-investors-to-form-africa-business-entity.html> [https://perma.cc/A2AG-MDCE].
 177. Trevi I. Nath, *The NBA's Business Model*, *INVESTOPEDIA* (Aug. 13, 2025), <https://www.investopedia.com/articles/investing/070715/nbas-business-model.asp> [https://perma.cc/T5SA-NJ4N].
 178. NBA Comm'ns, *NBA and AWS Announce New Multi-Year Partnership* (Oct. 1, 2025), <https://pr.nba.com/nba-aws-partnership/> [https://perma.cc/MNF3-XK9L].
 179. *Id.*
 180. What Is NBA Academy?, *NBA Academy*, <https://nbaacademy.nba.com/>.
 181. International Employment Considerations for the Not-So "National" Sports Leagues, Fisher Phillips (Oct. 20, 2021), <https://www.fisherphillips.com/en/news-insights/international-employment-considerations-national-sports-leagues.html>.
 182. What the ICC and LCIA Rule Changes Mean for International Arbitration in 2021, *Chambers & Partners* (Jan. 15, 2021), <https://chambers.com/articles/what-the-icc-and-lcia-rule-changes-mean-for-international-arbitration-in-2021>.
 183. Sports Disputes, Ct. Arb. for Sport, <https://www.tas-cas.org/en/general-information/how-cas-works>.
 184. Arbitration at a Crossroads: Commercial Reliance and Federal Retrenchment, Cornell J.L. & Pub. Pol'y (Nov. 5, 2025), <https://publications.lawschool.cornell.edu/jlpp/2025/11/05/arbitration-at-a-crossroads-commercial-reliance-and-federal-retrenchment/>.
 185. P. David London, *Human Rights in Youth Sports*, *Br. J. Sports Med.*, <https://pmc.ncbi.nlm.nih.gov/articles/PMC2465128/>.
 186. William M. Sullivan, Jr. & Fabio Leonardi, *Human Trafficking Corporate Liability Under the New U.S. Development Finance Agency*, *Pillsbury* (Nov. 5, 2018), <https://www.pillsburylaw.com/en/news-and-insights/human-trafficking-corporate-liability.html>.
 187. FIFA Steps Up Protection of Female Players and Football Coaches, *FIFA* (Nov. 19, 2020), <https://inside.fifa.com/legal/news/fifa-steps-up-protection-of-female-players-and-football-coaches>.
 188. See generally Michael Hilmer, *Human Rights Abuses Abroad: Why International Sports Organizations Cannot Stand on the Sidelines*, *COLUM. POL. REV.* (July 11, 2022), <http://www.cpreview.org/articles/2022/7/human-rights-abuses-abroad-why-international-sports-organizations-cannot-stand-on-the-sidelines> [https://perma.cc/U5AC-E6XF].
 189. See generally Lavanga V. Wijekoon, *Are employers required to conduct human rights due diligence in their global operations?*, LITTLER (Mar. 26, 2024), <https://www.littler.com/news-analysis/2-point-video/are-employers-required-conduct-human-rights-due-diligence-their-global> [https://perma.cc/22MB-N65X].
 190. Brett Danaher et al., *Pro Sports Has a Piracy Problem*, *Harv. Bus. Rev.* (Feb. 14, 2024), <https://hbr.org/2024/02/pro-sports-has-a-piracy-problem> [https://perma.cc/HQE7-9NC9].
 191. Yash Bafna P, *Intellectual Property Protection in the Sports Industry: An Empirical Analysis of Legal Challenges and Strategies*, *INT'L J. LEGAL SCI. & INNOVATION*, 284, 297 (2025), <https://ijlsi.com/wp-content/uploads/Intellectual-Property-Protection-in-the-Sports-Industry.pdf> [https://

- perma.cc/5Y33-WJU2].
192. Sabrina McElroy & Savannah Mora, Antitrust and Sports: Legal Framework and Evolving Landscape, Boies Schiller Flexner (Aug. 21, 2025), <https://www.bsflp.com/news-events/antitrust-and-sports-legal-framework-and-evolving-landscape.html>.
 193. The Risks of Not Registering a Trademark, Heimlich Law PC (July 24, 2025), <https://heimlichlaw.com/blog/the-risks-of-not-registering-a-trademark/>.
 194. The New Reality of Sports Piracy: Why the Stakes Have Never Been Higher, Verimatrix (Nov. 26, 2025), <https://www.verimatrix.com/anti-piracy/anti-piracy-insights/the-new-reality-of-sports-piracy/>.
 195. Gaurav Miglani & Chun Wright, Advocating for Worldwide Consistency, Fairness, and Harmonization in Protection of IP Rights, Int'l Trademark Ass'n (Feb. 28, 2024), <https://www.inta.org/news-and-press/inta-news/advocating-for-worldwide-consistency-fairness-and-harmonization-in-protection-of-ip-rights/>.
 196. PINSENT MASONS, *Jurisdiction and Choice of Law Clauses in International Contracts*, <https://www.pinsentmasons.com/out-law/guides/jurisdiction-and-choice-of-law-clauses-in-international-contracts> [https://perma.cc/2YMU-LZ6H] (last visited May 8, 2026).
 197. Marvin Krislov, *Harnessing the Power of Sports for Global Diplomacy*, FORBES (July 9, 2024), <https://www.forbes.com/sites/marvinkrislov/2024/07/09/harnessing-the-power-of-sports-for-global-diplomacy/> [https://perma.cc/736H-8PXM]
 198. *Id.*
 199. Duane Rockerbie, Revenue Sharing in Professional Sports Leagues, 4 Encyclopedia 1173 (2024), <https://www.mdpi.com/2673-8392/4/3/76> [https://perma.cc/3HP3-FEP4]
 200. Philjoo Moon et al., Assessing International Sport Federations' Sustainability Practices, Frontiers in Sports & Active Living (Jan. 13, 2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8792860/>.
 201. Klaus E. Meyer et al., International Business in the Digital Age, J. Int'l Bus. Stud. (Apr. 4, 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10072045/>.

ILLICIT TRADE IN CULTURAL PROPERTY AND INTERNATIONAL ECONOMIC LAW

MAX DE LEON

I. INTRODUCTION

Illicit trade in cultural property constitutes one of the most complex and destructive forms of transnational criminal activity.¹ This covert market facilitates the unauthorized excavation, exportation, and sale of cultural artifacts in violation of national and international legal frameworks.² At its core, this trade challenges the sovereignty of states over their cultural heritage and undermines efforts to safeguard historical and spiritual artifacts essential to national identity.³ Although such trade is illegal, it flourishes in regions plagued by political instability, armed conflict, and corruption. In these environments, it often serves as a vital source of funding for organized crime and terrorist networks.⁴

The significance of combating illicit trade in cultural property extends beyond criminal law or cultural preservation.⁵ As this trade increasingly intersects with global commerce, it implicates international economic law and the governance structures of the World Trade Organization (WTO).⁶ Although the WTO's legal instruments were not drafted with illicit trade in mind, its provisions on customs procedures, trade

facilitation, and intellectual property rights offer underutilized avenues to disrupt illicit networks.⁷ Efforts to counteract illegal trade must evolve to incorporate cultural goods and artifacts within the broader regulatory framework of global commerce. This includes utilizing mechanisms developed by the World Trade Organization.⁸

This comment examines the intersection of illicit cultural property trade and international economic law by exploring how current trade rules, institutions, and cooperation mechanisms can be leveraged to combat trafficking.⁹ It begins by analyzing definitional and legal thresholds for categorizing illicit trade in cultural property. The Comment then examines both the limitations and the potential of WTO rules in addressing this issue. It focuses on key instruments such as GATT Article XX, the TRIPS Agreement, and the Trade Facilitation Agreement. It surveys international treaties and institutional efforts from UNESCO, UNODC, INTERPOL, the EU, and regional bodies to enforce norms and support capacity-building. It also explores the growing role of non-governmental organizations (NGOs), academic centers, and civil society in filling enforcement gaps and pressuring for reforms. Finally, it evaluates new technologies

and policy innovations designed to fortify regulatory environments and concludes by recommending reforms to improve coherence between trade governance and cultural heritage protection.

DEFINING ILLICIT TRADE IN CULTURAL PROPERTY

The threshold issue in addressing the illicit trade in cultural property is establishing a precise and workable definition of the term "illicit trade."¹⁰ Although there is no universally agreed-upon definition, illicit trade in cultural property generally refers to the excavation, removal, export, import, and sale of cultural artifacts in violation of national or international laws.¹¹ The 1970 UNESCO Convention defines illicit trade as any export or transfer of ownership of cultural property effected contrary to the laws of the country of origin.¹² This includes unauthorized excavations, the sale of stolen items, and the trafficking of objects with falsified provenance documents.¹³

Unlike legitimate trade, which is governed by customs controls, licensing regimes, and international conventions, illicit trade circumvents authorized channels and relies on deceptive documentation to

enter legal markets.¹⁴ It is often carried out by criminal networks that exploit regulatory loopholes, weak borders, and market demand to profit from the circulation of heritage objects.¹⁵ These practices are typically hidden from authorities and make detection and prosecution especially difficult.¹⁶

This lack of visibility complicates enforcement and enables traffickers to embed looted artifacts into otherwise legal transactions. As a result, traffickers can more easily insert looted artifacts into legal transactions, particularly through auction houses, online platforms, and private collections.¹⁷ In many cases, artifacts are laundered through several intermediaries before entering major cultural institutions, which further masks their origins and hampers restitution efforts.¹⁸

Illicit trade is particularly prevalent during armed conflict and political unrest when state institutions collapse and cultural sites are left vulnerable to looting and destruction.¹⁹ For instance, the trafficking of cultural property surged in Iraq and Syria during the rise of the Islamic State of Iraq and the Levant (ISIL), which institutionalized the looting of heritage sites as a source of revenue.²⁰ Similar patterns have been observed in Ukraine following the 2022 invasion, where reports indicate that cultural artifacts were systematically removed from museums and transported across borders.²¹

Despite the gravity of this activity, illicit trade in cultural property often falls outside traditional trade law regimes, including the framework of the World Trade Organization (WTO).²² Nonetheless, it distorts markets by undermining competition, eroding customs oversight, and facilitating broader financial crimes such as money laundering and terrorist

financing.²³ These distortions raise important questions about how international trade law, particularly the rules and enforcement mechanisms of the WTO, can and should be adapted to support cultural heritage protection.²⁴

WTO INSTRUMENTS AND LEGAL MANDATES

A. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

Although illicit trade in cultural property is primarily addressed through criminal and private property law frameworks, its implications for international trade law are increasingly evident.²⁵ The World Trade Organization (WTO), as the principal body responsible for administering multilateral trade rules, offers a legal and institutional framework that, while not originally designed for cultural protection, can be applied to curb the economic dimensions of illicit trade.²⁶

Under the General Agreement on Tariffs and Trade (GATT), member states commit to avoid unnecessary restrictions on imports and exports, but Article XX(f) provides an exception that permits otherwise inconsistent trade measures when necessary to protect national treasures of artistic, historic, or archaeological value.²⁷ This clause recognizes the cultural significance of certain goods and implicitly supports regulatory measures designed to prevent the cross-border movement of stolen or illicitly exported artifacts.²⁸ Although GATT jurisprudence on Article XX(f) is limited, the provision offers legal cover for customs enforcement actions targeting cultural property trafficking.²⁹

B. THE TRIPS AGREEMENT AND INTANGIBLE CULTURAL HERITAGE

In addition to GATT, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also offers elements that can provide frameworks for the international protection of cultural property, such as geographical indications, traditional knowledge, and folklore.³⁰ These provisions can be adapted to strengthen legal claims over community-held cultural goods and to reinforce obligations on importers and market actors to respect the origin and cultural significance of such items.³¹ Scholars have noted that TRIPS can serve as a model for expanding trade rules to include protections for intangible heritage, particularly in regions where traditional cultural expressions are vulnerable to misappropriation and illicit commercialization.³²

C. THE TRADE FACILITATION AGREEMENT (TFA)

The Trade Facilitation Agreement (TFA), which entered into force in 2017, offers a third avenue through which WTO members may combat illicit trade in cultural property.³³ The TFA promotes simplified and harmonized customs procedures, encourages risk-based inspection strategies, and mandates cooperation between border agencies.³⁴ All of which apply to the detection and prevention of cultural property smuggling. Customs authorities can use TFA tools to prioritize high-risk shipments, cross-check declarations against international databases, and develop protocols for the seizure and investigation of suspicious artifacts.³⁵

D. INSTITUTIONAL LIMITATIONS AND CALLS FOR REFORM

Despite these legal tools, the WTO has not made cultural heritage protection a formal part of its policy agenda. Discussions on the illicit trade in cultural goods remain largely peripheral to its operations.³⁶ The WTO has acknowledged the gap and emphasized the need for stronger institutional linkages with organizations such as UNESCO, INTERPOL, and the World Customs Organization (WCO).³⁷ Establishing these linkages would allow for the exchange of technical information, the alignment of customs protocols with cultural enforcement norms, and the development of specialized guidance for WTO members on how to exercise their rights under Article XX(f).³⁸

Illicit cultural property trade presents significant market distortions that fall within the WTO's economic mandate.³⁹ These distortions include unfair competition against legitimate traders, erosion of public revenues, and the laundering of high-value goods through art and antiquities markets.⁴⁰ TRACIT reports have identified these effects in supply chains where enforcement is weak.⁴¹ They note that illicit goods, including cultural artifacts, enter legitimate commerce through online platforms and free trade zones, which are often beyond the reach of customs controls.⁴² Such conditions undermine not only cultural heritage protections but also the very transparency and rule-based order the WTO seeks to uphold.⁴³

Scholars have therefore argued for the WTO to adopt a broader conception of its mandate. This would include integrating anti-illicit trade measures into its regular trade monitoring, capacity-building, and

dispute resolution functions.⁴⁴ This approach would not require fundamental changes to the WTO Agreements, but would instead leverage existing exceptions and procedural mechanisms to support member states in addressing cross-border cultural property crime.⁴⁵ Doing so would enhance the WTO's relevance in a rapidly evolving global trade environment. It would also reinforce the principle that trade liberalization must be balanced against other legitimate policy goals, including the preservation of cultural heritage.⁴⁶

TRADE FACILITATION AND CUSTOMS ENFORCEMENT TOOLS

The WTO's Trade Facilitation Agreement (TFA) and associated legal instruments offer a compelling framework to support border enforcement, enhance transparency, and deter illicit cross-border movement of cultural artifacts.⁴⁷

The TFA, which entered into force in 2017, requires WTO members to adopt customs procedures that promote efficiency while simultaneously improving oversight.⁴⁸ These obligations include risk-based management systems, pre-arrival processing, advance rulings, publication of import-export rules, and the establishment of a "single window" for document submissions.⁴⁹ These mechanisms, while not designed specifically for cultural heritage protection, can significantly reduce opportunities for illicit actors to smuggle cultural goods by creating traceable, verifiable, and standardized customs practices.⁵⁰

One of the most promising provisions of the TFA is the requirement for risk management systems that allow customs

authorities to focus resources on high-risk consignments.⁵¹ Customs agencies can improve their chances of stopping trafficked cultural property by using databases of stolen artifacts. These include resources like INTERPOL's Stolen Works of Art database in their risk assessment tools.⁵² In particular, the ability to flag suspicious shipments based on harmonized system codes, country of origin, and discrepancies in declared values can help uncover smuggling attempts that would otherwise go undetected.

The transparency mandates in Article 1 of the TFA require members to publish rules and regulations related to trade procedures, which in turn helps close regulatory gaps that traffickers exploit.⁵³ For cultural goods, clear import and export documentation requirements help deter illegal entry. Requiring provenance declarations and export certificates raises the bar for lawful trade.⁵⁴ Furthermore, by mandating the use of a single window system, the TFA limits discretionary authority and fragmented procedures that traffickers often exploit to launder looted artifacts through ambiguous classifications or mislabeling.⁵⁵

The TFA also promotes international customs cooperation through Article 12, which facilitates the exchange of real-time information between border authorities.⁵⁶ This kind of cooperation is essential when dealing with cultural heritage trafficking. Artifacts are often shipped through several countries to hide where they came from.⁵⁷ Through joint enforcement operations and shared intelligence, customs agencies can intercept shipments at key transit points rather than relying solely on the destination country's enforcement capacity.⁵⁸

Developing countries face unique implementation challenges under the TFA due to resource constraints, limited technical infrastructure, and institutional capacity gaps. However, the TFA includes mechanisms for technical assistance and phased implementation through its “Category C” designations. These designations allow countries to defer obligations while receiving targeted support.⁵⁹ These provisions are especially relevant for source countries of cultural property, which often struggle to prevent the outflow of artifacts due to insufficient border controls and a lack of training.¹⁸ Capacity-building programs should prioritize training customs officials to identify cultural objects and understand the documentation necessary for lawful export under the 1970 UNESCO Convention.⁶⁰

Additionally, the TRIPS Agreement, while traditionally associated with patents and trademarks, includes border enforcement provisions relevant to the trade in cultural goods when intellectual property rights are implicated.⁶¹ An example is in cases involving protected indigenous designs or traditional knowledge associated with artifacts.⁶² Articles 51–60 of TRIPS provide for the suspension of customs clearance and the seizure of goods that infringe upon intellectual property rights. This can serve as a basis for intercepting fakes or replicas that facilitate the laundering of looted originals into the legal market.⁶³

The WTO also offers institutional venues such as the Trade Facilitation Committee and the Council for TRIPS that can facilitate dialogue among members, share best practices, and develop targeted guidelines to address the cultural dimension of illicit trade.⁶⁴ These forums remain underutilized

for cultural property protection, but they offer significant potential for policy innovation, particularly if coordinated with UNESCO, WCO, and INTERPOL initiatives.⁶⁵

In sum, the WTO’s trade facilitation framework can and should play a greater role in combating illicit trade in cultural property. The integration of cultural enforcement considerations into the TFA’s implementation, technical assistance programs, and monitoring mechanisms would significantly strengthen the global regime for cultural heritage protection.⁶⁶ Recognizing cultural property trafficking not only as a criminal or heritage issue but as a trade integrity issue may unlock new avenues for regulation, enforcement, and international cooperation.⁶⁷

FINANCIAL CRIMES, FREE TRADE ZONES, AND MARKET LAUNDERING

The illicit trade in cultural property does not operate in isolation from other forms of transnational economic crime. On the contrary, it is deeply intertwined with financial misconduct, including money laundering, tax evasion, and trade-based illicit flows.⁶⁸ Cultural artifacts, especially high-value antiquities and artworks, are more than just objects of aesthetic or cultural interest. They also serve as alternative financial assets that can be used to conceal, transfer, and legitimize illicit wealth.⁶⁹ The fungibility and opacity of the antiquities market make it an attractive vehicle for laundering criminal proceeds and transferring value across borders with limited oversight.⁷⁰

One of the most persistent vulnerabilities in the cultural property

trade is the exploitation of free trade zones (FTZs) and bonded warehouses. These designated customs areas, which facilitate deferred tax payments and streamlined transshipment, also provide ideal conditions for the concealment and laundering of looted or illicitly exported artifacts.⁷¹ Free trade zones often lack transparency and regular inspections. Combined with weak registration rules and lax enforcement, these conditions allow traffickers to store cultural goods indefinitely, change their classification using false documents, or move them anonymously between shell companies.⁷² The World Customs Organization and the OECD have noted that FTZs are frequently exploited for illicit activities. This includes counterfeit trade, illicit tobacco sales, and, increasingly, the handling of cultural property.⁷³

Cultural artifacts held in free ports, such as those in Geneva, Luxembourg, and Singapore, are often stored in conditions of near-complete secrecy, immune from meaningful customs scrutiny or ownership disclosure requirements.⁷⁴ These facilities have been criticized for shielding illicit objects from law enforcement while simultaneously allowing wealthy clients to treat art as tax-free collateral or off-balance-sheet assets.⁷⁵ The layering of ownership through trusts, foundations, and offshore corporations further obscures the beneficial owner of these objects. This often complicates efforts to pursue restitution or financial accountability.⁷⁶

These conditions are ripe for abuse not only by art traffickers but also by corrupt officials, organized crime groups, and terrorist financiers. The United Nations Interregional Crime and Justice Research

Institute (UNICRI) has documented how terrorist networks in conflict zones systematically loot cultural sites and funnel the proceeds through transnational art markets and financial intermediaries.⁷⁷

Despite these risks, international financial and trade law frameworks have only recently begun to incorporate cultural property into broader anti-money laundering (AML) strategies. The Financial Action Task Force (FATF) has called for increased scrutiny of high-value goods transactions. However, implementation remains uneven across jurisdictions. This is particularly true when it comes to the art market.⁷⁸ The European Union has taken some steps through its 5th and 6th AML Directives, which expand reporting obligations to include art dealers, but major market jurisdictions like the United States lag behind in adopting comparable rules.⁷⁹

To address these challenges, cultural property must be explicitly integrated into the compliance frameworks of financial institutions, customs authorities, and trade governance bodies. This includes requiring provenance verification and client due diligence for cultural property transactions, applying AML reporting standards to auction houses and free ports, and developing risk-based inspection protocols for FTZs.⁸⁰ The WTO, through its Trade Facilitation Agreement and Trade Policy Review Mechanism, can play a key role by encouraging members to audit their FTZ governance regimes and disclose cultural property risk assessments in trade transparency reports.⁸¹

More broadly, market laundering of antiquities demands a shift in international norms away from passive self-regulation

and toward enforceable obligations. Like the financial sector's post-9/11 reforms, the cultural goods market must evolve from an "honor system" to a system of codified responsibilities and oversight.⁸² Failing to do so not only perpetuates impunity for traffickers but also erodes trust in international trade governance and financial transparency.⁸³

ILLICIT CULTURAL TRAFFICKING IN DIGITAL TRADE

The rapid expansion of digital trade and e-commerce platforms has opened a new and largely underregulated frontier for the trafficking of cultural property.⁸⁴ Online sales platforms, digital auction houses, and peer-to-peer marketplaces have become increasingly attractive venues for illicit trade due to their anonymity, scale, and global reach.⁸⁵ Unlike traditional auction houses, these digital intermediaries often operate with minimal provenance requirements, limited verification of sellers, and little to no compliance with anti-money laundering (AML) or customs regulations.⁸⁶

Cultural traffickers exploit the opacity of online listings to sell looted or forged artifacts across borders. They often use vague descriptions, euphemistic language, and falsified photographs.⁸⁷ Because many online platforms allow third-party vendors to post items without prior vetting, traffickers can reach a global audience without revealing their identity or the item's origin.⁸⁸ Payments can be made via cryptocurrencies or payment processors not subject to stringent financial regulation, complicating efforts to trace the proceeds of illicit transactions.⁸⁹ In some cases, traffickers use multiple listings

across different platforms and jurisdictions to artificially create provenance records or to "clean" questionable items through coordinated sales.⁹⁰

The regulatory gap is most evident in the absence of binding due diligence standards for e-commerce platforms and digital marketplaces.⁹¹ While some major platforms have adopted voluntary codes of conduct, these are often limited in scope, lack enforcement mechanisms, and are not harmonized across jurisdictions.⁹² Moreover, many platforms categorize cultural property under general merchandise codes and make it difficult for customs authorities to flag suspicious shipments based on digital sales data.⁹³

The emergence of non-fungible tokens (NFTs) and blockchain-based digital representations of cultural artifacts adds another layer of complexity.⁹⁴ NFTs are now being used to market digital versions of antiquities, some of which have disputed provenance or are derived from looted items.⁹⁵ While blockchain technology offers potential for traceability, its current use in cultural markets is more often a tool of obfuscation than accountability.⁹⁶ Without regulatory oversight, digital provenance records can be easily manipulated or used to legitimize the illicit commercialization of cultural heritage.⁹⁷

Despite these risks, international trade and intellectual property frameworks have not kept pace with the digitization of cultural commerce.⁹⁸ WTO negotiations on e-commerce and digital trade have yet to address the unique vulnerabilities of cultural goods in online markets. Similarly, the TRIPS Agreement does not currently encompass protections specific to digital

representations of traditional knowledge or heritage items. This has created significant gaps in enforcement.⁹⁹ Regional trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Digital Economy Partnership Agreement (DEPA), include general provisions on digital trade. However, they do not incorporate specific safeguards for cultural property.¹⁰⁰

The policy response must begin with imposing cultural heritage due diligence obligations on e-commerce platforms. This is especially important for platforms that operate across national borders.¹⁰¹ These obligations should include mandatory provenance verification, transparency in seller identities, recordkeeping of high-risk transactions, and real-time cooperation with customs and heritage authorities. In addition, customs authorities must develop digital risk management systems that incorporate data from online platforms, digital payment processors, and logistics providers to identify and intercept illicit cultural shipments.

International trade bodies have a central role to play in coordinating these responses. The WTO can expand its Trade Facilitation and TRIPS oversight mechanisms to include digital trade in cultural property, while also supporting the development of model standards for online platform compliance. Multilateral initiatives involving the World Customs Organization (WCO), INTERPOL, and UNESCO should be linked with e-commerce enforcement to ensure a unified approach to cultural heritage protection in the digital era.

Ultimately, the governance of digital trade must evolve to recognize cultural property as a uniquely vulnerable category

of goods. This will require both strong legal protections and clear enforcement procedures. Without intervention, e-commerce and blockchain technologies will continue to serve as a regulatory blind spot in the global fight against cultural property trafficking.

INTERNATIONAL LEGAL FRAMEWORKS GOVERNING CULTURAL PROPERTY

The fight against the illicit trade in cultural property is grounded in a multilayered network of international conventions, soft-law instruments, and institutional mandates that collectively seek to regulate the movement of cultural goods and ensure their protection and restitution. The most foundational of these instruments is the 1970 Convention of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). This provides the first global framework for prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property.¹⁰² This Convention obliges state parties to take preventative measures such as maintaining national inventories, issuing export certificates, imposing criminal penalties for illegal trafficking, and facilitating international cooperation in restitution proceedings.¹⁰³

Complementing the UNESCO framework is the 1995 Convention of the International Institute for the Unification of Private Law (UNIDROIT), which focuses on the private-law aspects of cultural property protection.¹⁰⁴ The UNIDROIT Convention establishes rules on the return of stolen or illegally exported cultural objects and introduces a due diligence requirement for

good-faith purchasers, placing the burden on buyers to prove that they took reasonable steps to verify the provenance of items.¹⁰⁵ The Convention also provides for restitution even where objects have passed through several hands, provided the original acquisition was illicit.¹⁰⁶

Both the UNESCO and UNIDROIT Conventions emphasize the importance of international cooperation and good-faith in repatriation proceedings.¹⁰⁷ However, disparities in ratification, interpretation, and domestic implementation of these conventions have resulted in a fragmented enforcement landscape and often leave source countries with little recourse against foreign possessors of looted artifacts.¹⁰⁸ Moreover, states that serve as major markets or transit hubs for cultural goods are often reluctant to adopt robust due diligence obligations because they fear their chilling effect on legitimate commerce.¹⁰⁹

The United Nations Security Council has also played a growing role in heritage protection through resolutions linking cultural property crimes to global security.¹¹⁰ Resolution 2199 (2015) bans the trade in cultural objects removed from Iraq and Syria, recognizing that trafficking in cultural goods constitutes a source of terrorist financing.¹¹¹ Resolution 2347 (2017) goes further by framing the destruction and looting of cultural heritage during conflict as a threat to international peace and security, urging states to implement stricter controls at borders, strengthen law enforcement, and work closely with UNESCO and INTERPOL.¹¹²

In addition to treaty-based obligations, international organizations have issued non-binding recommendations and technical guidance. The UN Office on Drugs and

Crime (UNODC), for instance, developed a Practical Assistance Tool for Combating Trafficking in Cultural Property, which sets forth best practices for integrating cultural property crimes into broader organized crime enforcement structures.¹¹³ UNODC stresses that cultural trafficking should be addressed under the United Nations Convention against Transnational Organized Crime (UNTOC), especially where it overlaps with money laundering and arms trafficking.¹¹⁴

Scholars and policymakers have noted that international frameworks are only as effective as their national-level implementation.¹¹⁵ Countries with weak rule of law, limited enforcement resources, or fragmented heritage institutions often struggle to fulfill their obligations, thereby perpetuating conditions in which illicit trade thrives.¹¹⁶ To overcome these gaps, experts advocate for the harmonization of domestic legislation, increased technical assistance to developing states, and the institutionalization of cross-border cooperation mechanisms.¹¹⁷

Efforts to align international cultural property law with international economic law have also gained momentum. Academic literature suggests that cultural heritage protection should be integrated into trade agreements, anti-corruption frameworks, and financial compliance systems to broaden its impact.¹¹⁸ This approach would allow cultural property concerns to benefit from the legal tools, enforcement infrastructure, and dispute resolution mechanisms developed in the trade and investment domains.¹¹⁹

REGIONAL AND INSTITUTIONAL ENFORCEMENT EFFORTS

Efforts to suppress the illicit trade in cultural property have been amplified by regional organizations and multilateral institutions that focus on cross-border cooperation, law enforcement integration, and regulatory harmonization. Among the most active in this space is the European Union (EU), which has enacted robust legal instruments to restrict the importation of unlawfully exported cultural goods.¹²⁰ Regulation (EU) 2019/880 establishes import licensing procedures, obligates importers to provide evidence of lawful export from source countries, and grants customs authorities the power to seize suspicious objects pending verification.¹²¹ This framework reflects growing EU concern over its role as both a destination and transit zone for trafficked cultural artifacts, particularly those originating in conflict zones in the Middle East and North Africa.¹²²

Complementing the EU's legislative approach, the Organization for Security and Cooperation in Europe (OSCE) supports enforcement through training, intelligence-sharing, and border control modernization.¹²³ The OSCE's cultural property initiatives emphasize the nexus between heritage trafficking and transnational organized crime, encouraging member states to adopt interagency strategies that connect law enforcement, heritage ministries, and border security authorities.¹²⁴ By focusing on transit routes and cross-border smuggling techniques, the OSCE promotes operational

readiness in states that serve as gateways to larger markets.¹²⁵

The United Nations Interregional Crime and Justice Research Institute (UNICRI) has also advanced institutional responses by investigating the convergence between terrorism and cultural property trafficking.¹²⁶ Its 2024 report documents the systematic looting of heritage sites by terrorist organizations, particularly in conflict-afflicted states, where stolen antiquities are sold to finance insurgent activity.¹²⁷ UNICRI recommends integrating cultural heritage trafficking into counterterrorism frameworks, enhancing the role of financial intelligence units, and expanding the mandate of national security councils to include heritage protection.¹²⁸ This approach recognizes that heritage crime is not merely a cultural loss but a threat to regional stability and global security.¹²⁹

Cooperation between these institutions and international policing bodies like INTERPOL has yielded practical enforcement gains.¹³⁰ INTERPOL maintains the world's most comprehensive database of stolen cultural property, and its coordinated enforcement operations, such as Operation Pandora, have resulted in the recovery of thousands of illicit artifacts.¹³¹ INTERPOL also trains customs officers and museum professionals to identify looted objects and navigate legal channels for repatriation.¹³² These activities are bolstered by the World Customs Organization (WCO), which develops harmonized codes and customs alerts to assist national agencies in detecting illicit cultural shipments.¹³³

Despite these initiatives, institutional fragmentation remains a persistent challenge.¹³⁴ Regional bodies often operate

on different timelines, with inconsistent standards for evidence, documentation, and definitions of cultural property.¹³⁵ Jurisdictional overlap and limited legal interoperability can result in duplication of efforts or, worse, enforcement blind spots exploited by traffickers.¹³⁶ For example, customs officers may lack real-time access to INTERPOL databases or may be unaware of parallel investigations occurring across borders.¹³⁷ This undermines the impact of otherwise well-designed enforcement regimes and allows criminal networks to exploit jurisdictional gaps.

Addressing these weaknesses requires a coordinated institutional strategy that facilitates the flow of intelligence, the synchronization of legal definitions, and the creation of shared enforcement protocols.¹³⁸ Building on existing platforms, multilateral actors should formalize cross-agency working groups, support interoperable databases, and co-develop training curricula for enforcement officers across borders.¹³⁹ The result would be a more cohesive and responsive international architecture capable of deterring and disrupting illicit trade in cultural property.¹⁴⁰

THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS AND CIVIL SOCIETY

As states and multilateral institutions continue to face legal and logistical barriers in fully suppressing the illicit trade in cultural property, non-governmental organizations (NGOs), academic centers, and civil society actors have emerged as indispensable stakeholders in the global response.¹⁴¹ These organizations help bridge

critical enforcement and intelligence gaps by conducting market surveillance, exposing trafficking routes, and promoting public awareness.¹⁴²

One of the central functions of NGOs is monitoring art and antiquities markets, particularly in jurisdictions that lack transparency or effective cultural heritage laws.¹⁴³ Through independent research into provenance records and online auction platforms, NGOs have traced illicit artifacts to specific conflict zones and unauthorized excavations.¹⁴⁴ These findings have prompted high-profile repatriations and legal action against collectors and institutions that failed to adhere to basic due diligence standards.¹⁴⁵

NGOs also serve a crucial advocacy role in strengthening national and international legal frameworks.¹⁴⁶ They have championed the ratification and implementation of instruments like the 1970 UNESCO and 1995 UNIDROIT Conventions, and have pressured governments to expand import documentation and enforce cultural property laws.¹⁴⁷ Many groups additionally support extending anti-money-laundering protocols to the antiquities market and incorporating heritage crimes into national security strategies.¹⁴⁸

Public outreach efforts further amplify NGO impact: they aim to change consumer behavior by underscoring the legal and ethical dimensions of cultural property acquisition.¹⁴⁹ By recharacterizing cultural artifacts as public goods rather than private commodities, these efforts cultivate a broader sense of responsibility toward cultural preservation. Academic studies on the symbolic and identity-related significance of artifacts support this reframing and inform NGO messaging strategies.¹⁵⁰

Universities and think tanks contribute technical expertise and interdisciplinary analysis to the effort against cultural property trafficking.¹⁵¹ These institutions have pioneered the use of open-source intelligence and digital forensics to trace illicit artifacts across borders. Such techniques are now routinely employed by enforcement agencies and have enhanced the accuracy of artifact provenance assessments.¹⁵²

Moreover, civil society groups frequently drive legislative reform and policy change through public pressure campaigns. In several countries, grassroots mobilization has led to the enactment of tighter import controls and more stringent museum acquisition protocols.¹⁵³ National task forces on cultural heritage protection have likewise emerged from sustained NGO advocacy.

EMERGING TECHNOLOGIES AND POLICY INNOVATIONS

In recent years, the enforcement landscape surrounding illicit trade in cultural property has been transformed by the advent of advanced technologies and innovative policy instruments.¹⁵⁴ These tools have been deployed not only to detect and disrupt trafficking networks but also to enhance transparency, improve provenance verification, and strengthen cross-border cooperation among law enforcement, customs officials, and cultural institutions.¹⁵⁵

One of the most promising developments has been the application of artificial intelligence (AI) and machine learning to online marketplace monitoring.¹⁵⁶ AI-driven systems are now capable of scanning thousands of online listings, auction house records, and digital archives to detect

patterns associated with looted artifacts.¹⁵⁷ These algorithms can flag anomalies in pricing, seller behavior, and item descriptions that may indicate the presence of trafficked goods.¹⁵⁸ Some platforms have integrated image-recognition tools that compare posted artifacts with databases of stolen cultural property to identify matches or near matches, even when descriptions are vague or misleading.¹⁵⁹

Blockchain technology has also emerged as a powerful tool for tracking provenance.¹⁶⁰ Because blockchain systems provide immutable records of transactions and ownership, they are increasingly proposed as solutions to the persistent problem of falsified documentation in the antiquities market.¹⁶¹ A blockchain ledger could record the chain of custody of a cultural object from its excavation or legal sale through to its current owner, thereby preventing the insertion of looted artifacts into the legal supply chain.¹⁶² While the adoption of blockchain in the heritage sector remains limited, several pilot projects have demonstrated its potential to enhance accountability and traceability in art and antiquities transactions.¹⁶³

In the field of geospatial intelligence, the use of satellite imagery and remote sensing technologies has significantly improved the ability of researchers and enforcement agencies to monitor vulnerable archaeological sites.¹⁶⁴ Satellite data can reveal signs of recent looting, such as disturbed soil, newly created access roads, or excavation pits, in real time or near real time.¹⁶⁵ Such data can be shared with cultural ministries and international organizations to trigger rapid-response protective measures or support forensic investigations into looting activities.¹⁶⁶

Beyond technology, policy innovations have sought to modernize legal frameworks and integrate cultural heritage protection into broader regulatory agendas. For example, the inclusion of antiquities dealers in anti-money laundering (AML) regulations in several jurisdictions reflects a growing recognition that cultural property transactions are vulnerable to abuse by organized crime.¹⁶⁷ By subjecting high-value cultural transactions to due diligence, reporting obligations, and suspicious activity monitoring, authorities aim to disrupt the financial infrastructure underpinning illicit trade.¹⁶⁸

Another critical policy innovation is the development of global compliance platforms and voluntary codes of conduct for market participants. Auction houses, museums, and private collectors are increasingly adopting self-regulatory frameworks that require provenance research, third-party verification, and documentation retention before acquiring or selling cultural artifacts. While these initiatives lack legal enforceability, they represent an important shift in market norms, particularly as reputational risks for institutions involved in heritage violations increase.

At the institutional level, intergovernmental bodies and academic partnerships have begun to create interoperable databases that link customs information, stolen object registries, and international legal documentation.¹⁶⁹ These systems enable faster identification of suspect artifacts, especially when integrated with law enforcement portals and customs inspection software.¹⁷⁰ Interoperability enhances the ability of states to screen cross-border shipments for cultural property risks in real time.¹⁷¹

However, the implementation of these technologies and policies is not without obstacles. Many countries lack the infrastructure or expertise needed to deploy AI systems, blockchain verification, or satellite monitoring tools effectively.¹⁷² Budget constraints, legal fragmentation, and resistance from market actors also limit the scalability of these solutions.¹⁷³ To be effective, emerging technologies must be accompanied by capacity-building initiatives, international funding mechanisms, and public-private partnerships that align innovation with enforcement priorities.¹⁷⁴

Emerging technologies and policy innovations are reshaping the tools available to combat illicit cultural trade.¹⁷⁵ By leveraging data analytics, cryptographic tools, and geospatial intelligence, enforcement agencies and cultural institutions can move from reactive enforcement to proactive prevention. These advancements, however, must be embedded within cooperative legal frameworks and robust institutional structures to yield their full protective potential.¹⁷⁶

ENFORCEMENT GAPS AND STRUCTURAL CHALLENGES

Despite the evolution of legal instruments, regional frameworks, and technological tools, the illicit trade in cultural property continues to thrive in large part because of persistent gaps in enforcement and structural weaknesses across jurisdictions.¹⁷⁷ These vulnerabilities manifest in inconsistent legal definitions, weak customs controls, limited interagency coordination, and insufficient prosecutorial expertise, all of

which create fertile ground for traffickers to exploit.¹⁷⁸

A major obstacle to effective enforcement is the lack of harmonization in national legal systems.¹⁷⁹ While many states are parties to the UNESCO and UNIDROIT Conventions, their domestic implementing legislation varies widely in scope and effectiveness.¹⁸⁰ Definitions of “cultural property” differ significantly between jurisdictions, as do requirements for documentation, the burden of proof for repatriation, and statutes of limitations for recovery actions.¹⁸¹ These inconsistencies allow traffickers to move artifacts through legal “safe havens” where laws are more permissive or enforcement capacity is minimal.¹⁸²

The capacity of customs agencies and border control remains another key weakness.¹⁸³ In many countries, customs officers are not trained to identify antiquities, assess provenance claims, or recognize documentation irregularities.¹⁸⁴ As a result, trafficked cultural property often crosses borders undetected, particularly when disguised as generic “artworks,” “decorative items,” or “antiques” with ambiguous classification codes.¹⁸⁵ This problem is exacerbated by the complexity of identifying looted artifacts that lack distinctive markings or registration in public databases.¹⁸⁶

Corruption and complicity within enforcement institutions further undermine efforts to disrupt illicit trade.¹⁸⁷ Bribery, informal arrangements with smugglers, or administrative negligence can allow traffickers to avoid inspection or prosecution.¹⁸⁸ In certain jurisdictions, organized criminal groups have been found to exert influence over customs authorities, using their networks to facilitate the smooth transit

of cultural goods across borders.¹⁸⁹ In post-conflict or fragile states, where institutional integrity is already weak, these problems are particularly acute.¹⁹⁰

Even when enforcement agencies intercept looted cultural goods, legal and diplomatic hurdles often delay or prevent restitution.¹⁹¹ The burden placed on source countries to prove ownership, the high cost of litigation, and the unwillingness of market states to recognize foreign patrimony laws can stall the return of cultural objects indefinitely. Courts may be reluctant to enforce foreign claims, especially where property rights of good faith purchasers are protected more robustly than claims of dispossession.

Further complicating enforcement are the challenges posed by fragmented information-sharing systems.¹⁹² While INTERPOL, the WCO, and various national databases track stolen artifacts, these systems are not always interoperable or up to date.¹⁹³ There is no universal, real-time platform that allows customs officers, prosecutors, or museums to access consolidated provenance data at the point of decision-making.¹⁹⁴ This lack of coordination contributes to missed opportunities for interdiction and increases the likelihood of false negatives during inspections.

On a procedural level, prosecutorial units often lack the expertise to pursue cultural property crimes effectively.¹⁹⁵ These offenses involve a unique mix of criminal law, art history, international treaty law, and commercial regulation, requiring interdisciplinary knowledge that is seldom found in traditional law enforcement structures. Consequently, cases may be dropped due to lack of evidence, legal

uncertainty, or perceived low priority relative to other forms of organized crime.¹⁹⁶

Finally, political considerations and diplomatic sensitivities can act as informal barriers to enforcement.¹⁹⁷ States may hesitate to pursue restitution claims against powerful market countries for fear of jeopardizing broader trade or security relationships.¹⁹⁸ Likewise, institutions in possession of contested artifacts such as museums, private collections, or religious bodies may resist repatriation on cultural, financial, or reputational grounds. This resistance complicates the legal and diplomatic resolution of disputes.

Addressing these structural challenges will require a coordinated and multi-layered approach that goes beyond legal reform. It must include investment in training and capacity-building, the creation of shared enforcement infrastructure, and a greater willingness among states to prioritize cultural heritage within their broader national security and trade agendas. Without such reforms, even the most sophisticated legal frameworks will remain underutilized and ineffective in dismantling the networks that sustain illicit trade in cultural property.

TOWARD GLOBAL CULTURAL COMPLIANCE

The persistence of illicit trade in cultural property across jurisdictions and platforms highlights a glaring absence in the global legal infrastructure: the lack of a formal compliance architecture dedicated to cultural property governance.¹⁹⁹ Customs cooperation and multilateral conventions are already in place. However, they lack the binding enforcement, peer review, and institutional

monitoring found in other international compliance systems, such as those for money laundering, terrorist financing, or cross-border environmental harm.²⁰⁰

The design of such a framework should draw on the successes of regimes like the Financial Action Task Force (FATF), which has established global standards for financial institutions with measurable obligations and rigorous mutual evaluation procedures.²⁰¹ A comparable cultural property compliance regime would impose requirements on both public and private actors across the cultural supply chain, including auction houses, museums, customs authorities, shipping companies, and online platforms.²⁰² Such a system could include blacklists for non-compliant dealers, red-flag indicators for illicit cultural movements, and publicly accessible provenance registries for high-risk categories of goods.²⁰³

One important component of this compliance infrastructure would be a centralized platform for the submission and cross-referencing of import/export documentation, cultural property declarations, and due diligence records.²⁰⁴ Such a platform could be administered in collaboration with UNESCO or the World Customs Organization (WCO). Participation in the platform could be linked to WTO membership obligations under the Trade Facilitation Agreement (TFA), allowing for oversight of customs implementation related to cultural property.²⁰⁵ The system could be further supported by INTERPOL data integration, remote-sensing alerts from satellite monitoring, and blockchain-based registries to track ownership and transfers.²⁰⁶

Peer review mechanisms could assess how state parties enforce their cultural

property obligations at the domestic level. This would mirror the WTO's Trade Policy Review Mechanism, which evaluates overall compliance with trade-policy commitments.²⁰⁷ These reviews could include evaluations of national inventories, border-seizure procedures, and public reporting on recovered artifacts and pending restitution claims.²⁰⁸ As in the FATF model, countries failing to meet minimum benchmarks could be subject to reputational consequences, technical-assistance mandates, or trade-related disincentives.²⁰⁹

The establishment of this type of compliance architecture would shift cultural-property enforcement from an ad hoc, reactive model to a proactive, institutionalized system aligned with broader economic governance.²¹⁰ In doing so, it would elevate cultural-heritage protection to the same level of international legal seriousness afforded to transnational financial crime or environmental degradation.²¹¹

CONCLUSION

Protecting cultural property in the twenty-first century requires more than international goodwill or voluntary compliance; it requires legal infrastructure, institutional accountability, and enforceable obligations embedded in global economic governance. The illicit trade in cultural property is no longer a peripheral issue of heritage management but a central challenge for international trade, security, and rule of law.

The World Trade Organization, through its agreements, review mechanisms, and legal capacity, provides an underutilized but powerful platform for coordinating member-

state action against cultural trafficking. The integration of cultural heritage concerns into trade policy monitoring, customs enforcement, and intellectual property regimes offers a realistic and necessary avenue for curbing illicit flows. Expanding the interpretation of GATT Article XX(f), enhancing the transparency mandates of the TFA, and promoting capacity-building for cultural customs compliance are all critical next steps.

At the same time, states must invest in the legal and technological capabilities necessary to detect, disrupt, and deter cultural trafficking in both physical and digital environments. This includes equipping customs officers with AI-enabled risk analysis tools, integrating e-commerce platforms into provenance tracking systems, and mandating digital provenance disclosures for NFT-based representations of cultural goods.

Finally, the normative framing of cultural property must change. These artifacts are not merely commodities; they are carriers of identity, memory, and sovereignty. The international trade system has an obligation to reflect this reality in its design, its enforcement architecture, and its economic priorities. Reimagining cultural property protection as a trade governance issue will not only enhance legal coherence but also protect one of humanity's most irreplaceable resources: its shared cultural heritage.

This transformation will also require a cultural shift among stakeholders in the art and antiquities market. Dealers, collectors, museums, and digital platforms must move beyond minimalist compliance and adopt affirmative obligations to vet transactions, report suspicious activity, and cooperate with enforcement authorities. Such a shift can

be reinforced by creating market incentives for compliance, including reputational certifications, access to trade preferences, and participation in trusted trader programs that reward transparency and ethical sourcing.

Moreover, cultural heritage governance must be reframed as an interdisciplinary policy domain, one that connects international trade law with human rights, sustainable development, and transitional justice. Looted cultural property is often the legacy of colonial exploitation, armed conflict, or systemic marginalization. Meaningful reform must address issues of historical redress and fair restitution. Trade law should support, rather than hinder, efforts to restore cultural sovereignty and rebuild national identity.

Additionally, enhanced multilateral cooperation is essential to ensure the global enforcement of cultural property protections. No single jurisdiction can effectively monitor or police the transnational networks involved in looting, laundering, and smuggling. Therefore, international organizations must coordinate enforcement operations, intelligence sharing, and regulatory alignment through structured partnerships. A standing task force jointly managed by UNESCO, the World Customs Organization, INTERPOL, and the WTO could serve as a central enforcement and policy development body, capable of issuing rapid alerts, maintaining an interoperable provenance registry, and supporting capacity building in vulnerable states.

Finally, long-term success in cultural property protection will depend on the creation of a normative framework that values heritage not only as a matter of national interest but as a global public good. This paradigm shift requires embedding cultural

preservation into the legal and economic priorities of international institutions. The World Bank, IMF, and WTO should incorporate cultural heritage impact assessments into infrastructure lending, trade liberalization strategies, and development assistance programs. By mainstreaming cultural property concerns into global economic planning, the international community can prevent the commodification of culture while reinforcing legal structures that protect the integrity, dignity, and diversity of the world's historical legacy.

END NOTES

1. Santiago Díaz-Cediel et al., *Illicit Trade and the WTO: Raising Awareness, Identifying Limitations, and Building Strategies*, Institute of International Economic Law – Georgetown University LawCenter, 4–5 (2017).
2. *Id.* at 5.
3. *Id.*
4. *Cultural Heritage Smuggling and the Nexus with Terrorism*, United Nations Interregional Crime and Justice Research Institute, 21 (June 2024).
5. Díaz-Cediel et al., *supra* note 1, at 7.
6. *Id.*
7. *Id.* at 10.
8. *Id.* at 7.
9. See generally *Id.* at 1.
10. *Id.* at 1.
11. *Id.* at 7–8.
12. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 3, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter *UNESCO 1970 Convention*].
13. *Id.* at arts. 1, 7.
14. Díaz-Cediel et al., *supra* note 1, at 5.
15. *Id.*
16. *Id.* at 6.
17. *Id.*
18. *Id.* at 5–6.
19. UNICRI, *supra* note 4, at 37.
20. *Id.*
21. *Id.* at 19.
22. Díaz-Cediel et al., *supra* note 1, at 7.
23. *Id.*
24. *Id.* at 9.
25. Díaz-Cediel et al., *supra* note 1, at 6.
26. *Id.* at 4.
27. General Agreement on Tariffs and Trade art. XX(f), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter *GATT 1947*].
28. *Id.*
29. Díaz-Cediel et al., *supra* note 1, at 6.
30. Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 22–24, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter *TRIPS Agreement*].
31. *Id.*
32. Peter K. Yu, *WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 57 *Akron L. Rev.* 277, 292 (2024), <https://ssrn.com/abstract=4656267> [<https://perma.cc/R8BA-M6SK>].
33. World Trade Organization, *Trade Facilitation Agreement*, Feb. 22, 2017, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm [<https://perma.cc/4AUT-EQZW>].
34. *Id.*
35. *Id.*
36. Díaz-Cediel et al., *supra* note 1, at 9.
37. *Id.* at 10.
38. *Id.*
39. *Id.* at 12.
40. *Id.*
41. See *Exposing Supply Chain Vulnerabilities to Illicit Trade: A Global Report on Dynamics, Hotspots and Responses Across 10 Sectors*, Transnat'l All. To Combat Illicit Trade, 4–5 (2023), https://www.tracit.org/uploads/1/0/2/2/102238034/tracit_exposing_supply_chain_vulnerabilities_to_illicit_trade_nov2023_executive_summary.pdf [<https://perma.cc/4PAJ-8WYV>].
42. See *id.* at 2, 4, 6–7.
43. See *id.* at 2, 10, 14.
44. Yu, *supra* note 32, at 287–88, 296 n.88.
45. See Díaz-Cediel et al., *supra* note 1, at 14, 29–30.
46. See *id.* at 5, 26.
47. *Tackling Illicit Trade in Medical Products: Better International Cooperation for Better Health*, WTO Secretariat, World Trade Org. at 10 (2022), https://www.wto.org/english/res_e/booksp_e/tackling-illicit-trade_e.pdf [<https://perma.cc/EBL5-RSRL>].
48. *Id.* at 4–5, 10.
49. *Id.* at 11, tbl.1.
50. *Id.* at 20.
51. *Id.* at 14.
52. *Id.*
53. *Illicit Trade*, *supra* note 46, at 3.
54. Díaz-Cediel et al., *supra* note 1, at 12–13.
55. *Id.*
56. WTO Secretariat, *Tackling Illicit Trade*, *supra* note 46, at 3–4.
57. *Id.* at 14.
58. *Id.* at 3.
59. *Id.* at 5.
60. Craig J.S. Forrest, Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage, 4 *Melb. J. Int'l L.* 592, 600 (2003), <https://ssrn.com/abstract=1470521> [<https://perma.cc/U5CU-TST4>].
61. *Id.*
62. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, arts. 51–60, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
63. Derek Fincham, Art, Antiquities, and Money Laundering, 111 *KY. L.J.* 309, 335 (2023), <https://ssrn.com/abstract=4336668> [<https://perma.cc/5QXK-VD87>].
64. WTO Secretariat, *Tackling Illicit Trade*, *supra* note 46, at 24.
65. Díaz-Cediel et al., *supra* note 1, at 19.
66. *Id.*
67. *Id.* at 27.
68. OECD, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, at 11 (2019), https://www.oecd.org/en/publications/trade-in-counterfeit-and-pirated-goods_9789264252653-en.html [<https://perma.cc/QK3W-H6CP>].
69. Fincham, *supra* note 62, at 317–19.
70. *Id.* at 313–15.
71. Díaz-Cediel et al., *supra* note 1, at 14–15.
72. *Id.*; see also OECD, *Governance Frameworks to Counter Illicit Trade*, at 33 (2020), https://www.oecd.org/en/publications/governance-frameworks-to-counter-illicit-trade_9789264291652-en.html [<https://perma.cc/Y886-DXFX>].
73. OECD & WCO, *Illicit Trade in Free Trade Zones: Evidence from Recent OECD Studies*, at 2 (2018), https://www.oecd.org/en/publications/trade-in-counterfeit-goods-and-free-trade-zones_9789264289550-en.html [<https://perma.cc/4CAH-9L7S>].
74. Fincham, *supra* note 62, at 320.
75. *Id.*
76. *Id.* at 331–33.
77. *Id.*
78. FATF, Money Laundering and Terrorist Financing through the Trade in Diamonds, at 23 (2013), <https://www.fatf-gafi.org/media/fatf/documents/reports/ML-TF-through-trade-in-diamonds.pdf> [<https://perma.cc/4UUF-DWYU>].
79. Fincham, *supra* note 62, at 337–38.
80. Díaz-Cediel et al., *supra* note 1, at 18–19.
81. OECD, *Governance Frameworks to Counter Illicit Trade*, *supra* note 72, at 119–20.
82. See Fincham, *supra* note 63, at 342.
83. See also *id.* at 340–44.
84. See OECD, *E-commerce Challenges in Illicit Trade in Fakes: Governance Frameworks and Best Practices*, 7 (2021), <https://perma.cc/U9XW-LFFX>.
85. RAND Corp., *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, RR-2706, at 44 (2020), <https://perma.cc/4AC7-78KV>.
86. Díaz-Cediel et al., *supra* note 1, at 21.
87. *Id.* at 22–23.
88. OECD, *supra* note 84, at 10.
89. *Id.* at 11.
90. RAND Corp., *supra* note 85, at 8.
91. OECD, *Governance Frameworks to Counter Illicit Trade*, at 36 (2020), https://www.oecd.org/en/publications/governance-frameworks-to-counter-illicit-trade_9789264291652-en.html [<https://perma.cc/Y886-DXFX>].
92. *Id.* at 37.
93. WTO Secretariat, *Tackling Illicit Trade*, *supra* note 46, at 22.
94. Fincham, *supra* note 62, at 329.
95. *Id.* at 330–31.
96. *Id.* at 332.
97. *Id.*
98. Díaz-Cediel et al., *supra* note 1, at 26.
99. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
100. OECD, *E-commerce Challenges in Illicit Trade*, *supra* note 1, at 12.
101. *Id.* at 13.
102. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231, 232 [hereinafter *UNESCO 1970 Convention*].
103. *Id.* arts. 5–7.
104. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects arts. 1–4, June 24, 1995, 34 I.L.M. 1322.
105. *Id.* art. 4(4).
106. *Id.* art. 3.
107. *Id.* arts. 5–7.
108. Manlio Frigo & Marina Schneider, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the Fight Against Illicit Trafficking in Cultural Property*, UNIDROIT Int'l Summer Sch. 4 (July 13, 2022), <https://www.unidroit.org/wp-content/uploads/2022/08/220713-cultural-property.pdf> [<https://perma.cc/SCB9-DN9H>].

109. *Id.* at 5.
110. See U.N. Security Council Res. 2199, ¶ 17, U.N. Doc. S/RES/2199 (Feb. 12, 2015).
111. *Id.*
112. U.N. S.C. Res. 2347, ¶ 11–12 (Mar. 24, 2017).
113. U. *PRACTICAL ASSISTANCE TOOL to assist in the implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences*, United Nations Office on Drugs and Crime, 2 (September 2016).
114. *Id.* at 43–44.
115. Frigo & Schneider, *supra* note 108 at 5–8, 55.
116. *Id.*
117. *Id.* at 7.
118. Peter K. Yu, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction*, 11 Cardozo J. Int'l & Comp. L. 239, 242 (2003).
119. *Id.* at 244–45.
120. Regulation (EU) 2019/880 of the European Parliament and of the Council, 17 Apr. 2019, 2019 O.J. (L 151) 1.
121. *Id.* arts. 3–6.
122. *Id.*; See also European Commission, *Protection Against Illicit Trafficking in Cultural Goods*, <https://culture.ec.europa.eu/cultural-heritage/cultural-heritage-in-eu-policies/protection-against-illicit-trafficking> [https://perma.cc/H379-G9X7].
123. OSCE, *Combating Illicit Cross-Border Trafficking in Cultural Property in the OSCE Area*, <https://www.osce.org/project/combating-illicit-cross-border-trafficking-in-cultural-property-in-the-osce-area> [https://perma.cc/X784-WRC6].
124. *Id.*
125. *Id.*
126. UNICRI, *supra* note 4, at 8.
127. *Id.*
128. *Id.* at 20–21, 47–48..
129. *Id.*
130. INTERPOL, *Cultural Heritage Crime*, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/The-issues-cultural-property> [https://perma.cc/SPR5-R4HB].
131. *Id.*
132. *Id.*
133. World Customs Organization, *Illicit Trade Report 2022*, at 57 (2023), https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/illicit-trade-report/itr_2022_en.pdf [https://perma.cc/HEZ7-CBXF]
134. *Id.*
135. Frigo & Schneider, *supra* note 107, at 35.
136. *Id.*
137. INTERPOL, *supra* note 129.
138. See generally Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 5(b), Nov. 14, 1970, 823 U.N.T.S. 231.
139. U.N. Office on Drugs & Crime, *Practical Assistance Tool for Combating Trafficking in Cultural Property* (2021), at 8, https://www.unodc.org/documents/organized-crime/Publications/16-05585_eBook_English_UPDATED.pdf [https://perma.cc/FQ8A-QLRL].
140. *Id.*
141. UNICRI, *supra* note 125, at 21.
142. *Id.*
143. *Id.*
144. M. Sargent et al., *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, RAND Corp. RR-2706, at 4 (2020), https://www.rand.org/pubs/research_reports/RR2706.html [https://perma.cc/4AC7-78KV].
145. Frigo & Schneider, *supra* note 107, at 4.
146. UNICRI, *supra* note 140, at 21.
147. *Id.*
148. See Financial Action Task Force [FATF], *Money Laundering and Terrorist Financing in the Art and Antiquities Market*, at 8–9, 46 (2023), <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Money-Laundering-Terrorist-Financing-Art-Antiquities-Market.pdf.coredownload.pdf> [https://perma.cc/W7XT-7NGS].
149. See *id.* at 3–4, 7.
150. See Sargent et al., *supra* note 144, at 9, 101.
151. See *id.* at iii, xvii.
152. See *id.* at iii, 9, 84.
153. See *id.* at 9, 101.
154. Eva Savina Malinverni et al., *SIGNIFICANCE Deep Learning Based Platform to Fight Illicit Trafficking of Cultural Heritage Goods*, Scientific Reports, 1–2 (2024), <https://doi.org/10.1038/s41598-024-65885-6> [https://perma.cc/9ACF-9BG3].
155. *Id.*
156. *Id.* at 2.
157. *Id.*
158. *Id.*
159. *Id.* at 3.
160. Petros Patias & Charalampos Georgiadis, *Fighting Illicit Trafficking of Cultural Goods—The ENIGMA Project*, 15 Remote Sens. 2579, 6 (2023), <https://www.mdpi.com/2072-4292/15/10/2579> [https://perma.cc/5QDP-QKEX].
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 7.
165. *Id.*
166. *Id.*
167. Fincham, *supra* note 62, at 335.
168. *Id.*
169. Patias & Georgiadis, *supra* note 159, at 14.
170. *Id.*
171. *Id.*
172. Malinverni et al., *supra* note 153, at 7
173. *Id.*
174. See *id.*
175. *Id.* at 6–7.
176. *Id.* at 7.
177. UNICRI, *supra* note 4, at 42.
178. *Id.* at 43.
179. Frigo & Schneider, *supra* note 108, at 11.
180. *Id.*
181. Forrest, *supra* note 60, at 14.
182. *Id.* at 7–8.
183. UNICRI, *supra* note 126, at 41–42.
184. *Id.* at 43
185. *Id.*
186. Patias & Georgiadis, *supra* note 160, at 3.
187. TRACIT, *Money Talks: The Crooked Connection Between Corruption and Illicit Trade*, at 17 (2024), <https://www.tracit.org/money-talks-the-crooked-connection-between-corruption-and-illicit-trade.html> [https://perma.cc/7SYG-MH5X].
188. *Id.*
189. *Id.*
190. UNICRI, *supra* note 126, at 44.
191. Frigo & Schneider, *supra* note 108, at 11.
192. Patias & Georgiadis, *supra* note 159, at 9.
193. *Id.*
194. *Id.*
195. UNICRI, *supra* note 140, at 43.
196. *Id.*
197. Forrest, *supra* note 59, at 15.
198. *Id.*
199. Díaz-Cediel et al., *supra* note 1, at 6.
200. OECD, *Governance Frameworks to Counter Illicit Trade*, at 22–23 (2020), https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/03/governance-frameworks-to-counter-illicit-trade_g1g8a2b5/9789264291652-en.pdf [https://perma.cc/SP6Q-JVKZ].
201. *Id.* at 25.
202. See *Id.* at 211.
203. Sargent et al., *supra* note 144, at 7.
204. OECD, *supra* note 200, at 34.
205. See also Sargent et al., *supra* note 144, at 15.
206. See *Id.* at 2.
207. Sargent et al., *supra* note 144, at 12.
208. *Id.* at 13.
209. OECD, *supra* note 200, at 39–40.
210. Fincham, *supra* note 63, at 340.
211. *Id.* at 341.

CURRENT EVENTS FEATURE:

THE RACE FOR AI

MALIA JAMES, ELIZABETH BACHMAN, MIKAYLA MURRAY

Artificial Intelligence (“AI”) is a new generation of general-purpose technology that is being developed to alter productivity, reshape the global economy, and revolutionize national defense and cybersecurity.¹ AI is an ongoing, rapidly evolving concept in human advancement that works toward objectives set by humans by using data and information to make predictions, recommendations, or decisions that influence physical and digital environments. These systems perceive their surroundings, process information into analytical models, and use those models to guide reasoning and action.²

However, AI also comes with its own set of risks and challenges that private and public sectors are racing to conquer.³ This race for dominance in the AI world has placed a competition among global powers, specifically between the US and China.⁴ As with the potential benefits of AI come risks of inherently bad use of such a powerful technological advancement.⁵ As previously noted, AI is not only used for productivity and acceleration in countries, but it can also be used as a weapon. This paper examines the legal, economic, and political connotations of the AI race between the US and China.

What began as a race for technological advancement and innovation has evolved and intensified into an international battle over dominance, while also fostering responsible and equitable AI implementations that benefit society.⁶ Specifically between the US

and China, tensions to become the leader in top AI innovation have become a series of strategies and action plans each country is seeking to create to dominate in national defense.⁷ The US is mainly focused on high-cost AI models by the use of private capital dominantly, while China is doing the opposite: a low-cost, open-source approach to encourage widespread adoption.⁸ Both of these techniques used by each country highlight how each plans to use its strengths to secure state control over AI.⁹ To come ahead in the race, semiconductors and quantum computing are essential for national security and could have extreme security ramifications, which has been the reason for continuing to fuel this competition.¹⁰

As AI continues to evolve, the competition between the US and China will evolve. Each country’s approach and action plans will determine the future of AI’s innovation and rules by its use of geopolitical power and global influence. Ultimately, leadership in AI will not be determined solely by who builds the most powerful systems, but by who governs them wisely. “The race for technological superiority is no longer just a competition— it is a battle for economic and military dominance.”¹¹

Semiconductors are essential for the development of Artificial Intelligence (“AI”), and while the United States remains among the top leaders in AI technology, it will need to significantly increase its

production in order to maintain that status.¹² The field of AI development is commonly referred to as the AI stack and includes four components - frontier models, data centers, advanced chips/semiconductors, and energy.¹³ Semiconductor fabrication creates the chips required for building Graphics Processing Units (“GPUs”).¹⁴ GPUs provide the computing power (“compute”) required to train AI models. The Center for Strategic and International Studies estimates that, by 2030, data center expansion will require 80–160 million leading-edge GPUs.¹⁵ For reference, there are currently 5.5 million leading edge GPUs in the United States.¹⁶ To meet this forecasted requirement, “semiconductor manufacturing would need to sustain an annual growth rate of approximately 72–96 percent year-on-year from 2025 to 2030.”¹⁷ Chip production would need to increase thirty-fold.¹⁸

There are several things the U.S. can and is doing both economically and politically to achieve this goal. Economically, increased investment is paramount. Opinions differ as to whether investment should be primarily state-backed or private as each has advantages and disadvantages. On the one hand, private investment appears to dominate the AI sector, suggesting that it may be the preferred form of investment.¹⁹ Some have explained this by pointing out AI’s unique reliance on intangible inputs such as talent and data which may be more responsive to

private investments as opposed to subsidies which require more state control.²⁰ One example is China. China's AI development is largely state backed, and yet the most progress it has seen yet has been with the private company *DeepSeek*.²¹ The U.S. by contrast receives ten times more investments from the private sector than their Chinese counterparts.²² On the other hand, others emphasize the importance of incorporating both state backed and private investment in the United States.²³ Government funding in the U.S. tends to help more with early stage development whereas private funding tends to focus on final stages and commercialization.²⁴ Both forms of investment can work together to engender better AI development in whichever country that utilizes it.²⁵

Politically, as far back as 2022 the U.S. has placed strict controls on exports of semiconductors to China in the race to be the leader in AI.²⁶ In response, China has been forced to shift their policies surrounding AI to domestic efforts at producing their own advanced chips.²⁷ While this initially impeded China's AI development, there are signs that China will soon overcome these impediments, especially with their release of *DeepSeek's* large language model.²⁸

The CHIPS Act (Creating Helpful Incentives to Produce Semiconductors) has come under fire recently by the Trump Administration which has proposed its own GAIN AI Act (Guaranteeing Access and Innovation for National Artificial Intelligence).²⁹ Trump criticized the CHIPS Act for not being properly utilized by the companies receiving its subsidies.³⁰ The Act, however, has provided enormous benefits for the U.S. in terms of investment, manufacturing abilities,

and national security.³¹ Any disruption of the Act now risks the relationships and credibility U.S. AI companies have with their investors.³² Further, the GAIN AI Act has been criticized for threatening the United States' global competitiveness in regards to semiconductors.³³ The GAIN AI Act resembles Biden's Diffusion Act in that it ensures that Americans would have a right of first refusal for semiconductors before they are authorized for export.³⁴ The fear is that by favoring U.S. chip consumer protectionism, the U.S. effectively shuts itself out of the global market and forces other countries to find their own alternatives outside of the control of the United States.³⁵ This type of policy might have made sense when it was believed that China was not capable of producing chips in the same amount or quality as the U.S., but as China works to improve its AI technology, strict export control increasingly disadvantages the United States.³⁶

THE UNITED STATES

The accelerating race between the United States and China to dominate artificial intelligence and semiconductor technology is reshaping how governments exercise power. The United States views technological leadership as imperative to national security. One of President Trump's 2025 Executive Orders declares it a U.S. policy "to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security."³⁷ The administration's *America First Trade Policy Memorandum* directs the Secretaries of State and Commerce to review export

control systems to "protect and advance U.S. leadership in AI, semiconductors, and other critical industries" by preventing transfers to rival nations.³⁸

In July 2025, the White House released *Winning the Race: America's AI Action Plan*, outlining more than ninety federal actions across three pillars—accelerating AI innovation, building domestic AI infrastructure, and leading international AI diplomacy and security—and issued three accompanying executive orders to implement the strategy.

"Export control has become the centerpiece of this strategy."³⁹ Under the *Export Control Reform Act of 2018*, the Department of Commerce's Bureau of Industry and Security ("BIS") regulates exports of "dual-use" technologies—those with both civilian and military applications.⁴⁰ Traditional export controls follow a two-step process: first, restricted goods are listed on the Commerce Control List via an Export Control Classification Number; second, foreign entities of concern are placed on the BIS Entity List which strengthens licensing requirements.⁴¹ Since 2018, the United States has raised licensing requirements and expanded oversight of entities exporting—among other destinations—to China.⁴² Specifically, the Foreign-Produced Direct Product Rule was expanded to cover any firm using U.S. technology to make chips for Huawei.⁴³ Updates to the Military End User list added new entities and "retightened license requirements."⁴⁴ By 2023, additional restrictions targeted exports of high-performance AI chips and semiconductor-manufacturing tools.⁴⁵

Because semiconductor supply chains are global, export controls depend on

coordination among allies. The “Chip 4” alliance—the United States, Japan, South Korea, and Taiwan—aligned export policies to “secure semiconductor supply chains and limit China’s technological advancements.”⁴⁶ Still, export controls have economic costs: United States chipmakers such as NVIDIA and AMD have lost revenue as China remains one of their largest markets.⁴⁷ To comply with heightened regulations and maintain business abroad, these companies designed less powerful chips and shifted their research toward new markets and applications.⁴⁸

While Washington increasingly uses regulation to protect national interests, the AI ecosystem remains market-driven, shaped by private capital and venture funding with companies competing for leadership and high returns.⁴⁹ The Hudson Institute warns that controls “so onerous that they sever American chips from the global market” could backfire by pushing foreign entities toward non-U.S. suppliers.⁵⁰ Scholars recommend a balanced framework: closing enforcement loopholes through AI-based tracking, enhancing whistleblower incentives, and maintaining investment in research and development.⁵¹ In short, the U.S. should pair security-focused regulation with market sustainability to sustain AI leadership.

CHINA

China has taken the opposite approach: government policies, subsidies, and national initiatives guide development while tech firms and startups drive innovation and commercialization.⁵² Through national initiatives such as AI+, China integrates AI into manufacturing and finance as they seek “greater self-sufficiency in strategic industries

such as AI.”⁵³ This dual-track model—state and private sector coordination—has narrowed the gap with the U.S. and has the potential to reshape the global AI ecosystem.⁵⁴

Through this strategy, China has exposed the limits of U.S. export controls. China’s 2025 DeepSeek model was trained on lower-performance, regulation-compliant, NVIDIA chips, showing that the current controls can *slow* China’s progress but cannot stop it.⁵⁵ DeepSeek also reflects the Chinese government’s growing influence over how AI is developed and deployed. The Hudson Institute reports that China’s AI systems often embed state censorship and ideological screening, linking their technological progress to political control.⁵⁶ The East-West Center similarly notes that China’s open-source strategy, while accelerating innovation and lowering costs, keeps major firms closely aligned with state priorities.⁵⁷

For the Chinese government, AI serves not only an economic goal but also the broader aim of extending its geopolitical power. Whether this state-driven framework can sustain long-term innovation without limiting openness remains uncertain, but it has already forced the U.S. and its allies to reconsider how government policy shapes technological leadership.⁵⁸

END NOTES

1. Jingyan Elaine Yuan, *DeepSeek and the Shifting AI Landscape in China and the US*, 29 ASIA PAC. ISSUES, 2 (May 2025), <https://www.jstor.org/stable/resrep69993?seq=1> [<https://perma.cc/6TC2-7KG5>]
2. Laurie Harris, Cong. Rsch. Serv., R48555, *Regulating Artificial Intelligence: U.S. and International Approaches and Considerations for Congress* 4 (2025).
3. *Id.*
4. Yuan, *supra* note 1, at 2.
5. Harris, *supra* note 2, at 2.
6. Yuan, *supra* note 1, at 6.
7. *Id.* at 4.
8. *Id.* at 5-6.
9. *Id.* at 7.
10. Nury Turkel, *AI National Security, and the Global Technology Race: How US Export Control Define the Future of Innovation*, Hudson Inst. 1, 2 (March 2025).
11. *Id.* at 9.
12. Navin Girishanker et al., *Securing Full Stack U.S. Leadership in AI*, Ctr. For Strategic & Int'l Stud. (2025), <https://www.csis.org/analysis/securing-full-stack-us-leadership-ai> [<https://perma.cc/M8RZ-Z74M>].
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Navin Girishanker et al., *Securing Full Stack U.S. Leadership in AI*, Ctr. For Strategic & Int'l Stud. (2025), <https://www.csis.org/analysis/securing-full-stack-us-leadership-ai> [<https://perma.cc/M8RZ-Z74M>].
19. See Kyle Chan et al., *Full Stack China's Evolving Industrial Policy for AI*, Rand Inst. (2025).; see also Navin Girishanker et al., *Securing Full Stack U.S. Leadership in AI*, Ctr. For Strategic & Int'l Stud. (2025), <https://www.csis.org/analysis/securing-full-stack-us-leadership-ai> [<https://perma.cc/M8RZ-Z74M>].
20. Chan, *supra* note 19, at 8.
21. *Id.*
22. *Id.*
23. Girishanker et. al., *supra* note 1.
24. *Id.*
25. See Kyle Chan et al., *Full Stack China's Evolving Industrial Policy for AI*, Rand Inst. (2025).; see also Navin Girishanker et al., *Securing Full Stack U.S. Leadership in AI*, Ctr. For Strategic & Int'l Stud. (2025), <https://www.csis.org/analysis/securing-full-stack-us-leadership-ai> [<https://perma.cc/M8RZ-Z74M>].
26. R. David Edelman et al., *How will AI influence US-China relations in the next 5 years?*, Brookings Inst. (2025), <https://www.brookings.edu/articles/how-will-ai-influence-us-china-relations-in-the-next-5-years/> [<https://perma.cc/HJ4G-4TRA>]
27. *Id.*
28. *Id.*
29. Martin Chorzempa, *The CHIPS Act already puts America first. Scrapping it would poison the well for US investment*, Peterson Inst. For Int'l Econ. (2025), <https://www.piie.com/blogs/realtime-economics/2025/chips-act-already-puts-america-first-scrapping-it-would-poison-well> [<https://perma.cc/BN8X-G2YU>]; Sujai Shivakumar, Thomas Howell, *The GAIN Act will undermine the Global Competitiveness of U.S. AI Chipmakers*, Ctr. For Strategic & Int'l Stud. (2025), <https://www.csis.org/blogs/perspectives-innovation/gain-ai-act-will-undermine-global-competitiveness-us-ai-chipmakers> [<https://perma.cc/B6ZT-MESX>].
30. Martin Chorzempa, *The CHIPS Act already puts America first. Scrapping it would poison the well for US investment*, Peterson Inst. For Int'l Econ. (2025), <https://www.piie.com/blogs/realtime-economics/2025/chips-act-already-puts-america-first-scrapping-it-would-poison-well> [<https://perma.cc/BN8X-G2YU>].
31. *Id.*
32. *Id.*
33. Sujai Shivakumar, Thomas Howell, *The GAIN Act will undermine the Global Competitiveness of U.S. AI Chipmakers*, Ctr. For Strategic & Int'l Stud. (2025), <https://www.csis.org/blogs/perspectives-innovation/gain-ai-act-will-undermine-global-competitiveness-us-ai-chipmakers> [<https://perma.cc/B6ZT-MESX>].
34. *Id.*
35. *Id.*
36. *Id.*
37. Turkel, *supra* note 10, at 9.
38. *Id.* at 7.
39. *Id.*
40. Karen M. Sutter, Cong. Rsch. Serv., R48642, *U.S. Export Controls and China: Advanced Semiconductors*, 4 (2025).
41. Turkel, *supra* note 10, at 7.
42. Sutter, *supra* note 40, at 2
43. *Id.*
44. *Id.*
45. Turkel, *supra* note 10, at 4.
46. *Id.*
47. *Id.*
48. *Id.*
49. Yuan, *supra* note 1, at 5.
50. Turkel, *supra* note 10, at 3.
51. See generally Turkel, *supra* note 10, at 3.
52. Yuan, *supra* note 1, at 5.
53. Yuan, *supra* note 1, at 4.
54. Yuan, *supra* note 1, at 5; Gregory C. Allen, *DeepSeek, Huawei, Export Controls, and the Future of the U.S.-China AI Race*, Ctr. For Strategic & Int'l Stud., 1, 27 (2025).
55. Gregory C. Allen, *DeepSeek, Huawei, Export Controls, and the Future of the U.S.-China AI Race*, Ctr. For Strategic & Int'l Stud., 1, 6 (2025).
56. Turkel, *supra* note 10, at 7.
57. Yuan, *supra* note 1, at 4-5.
58. *Id.* at 1.

CURRENT EVENTS FEATURE:

WHAT ARE CRITICAL MINERALS AND WHY DO THEY MATTER?

ASHLEY BARKER, ROXANN JONES, RONALD LONG, AND SEEMA SHAHEEN

Critical minerals are nonfuel minerals that are essential for modern technology, manufacturing, and national security, but face significant risks in their supply chains. Under the Energy Act of 2020, a critical mineral is defined as any mineral, element or material that is (1) essential to the economic or national security of the United States, (2) has a vulnerable supply chain, and (3) serves an essential function in manufacturing products for key sectors such as energy, defense, healthcare, and electronics.¹

Examples include lithium, cobalt, and nickel, which are used in batteries for electric vehicles; silicon, gallium, and germanium, which are critical for semiconductor production; and rare earth elements like neodymium and dysprosium, which are needed for magnets in wind turbines and electric motors.² These minerals are key to building and sustaining technologies that drive economic growth and energy innovation.

Critical minerals matter because they support both national security and the clean energy transition. Many of these resources are sourced for processing abroad, creating significant vulnerabilities. For instance, China dominates the global supply and refining capacity of several critical minerals, including rare earth elements, lithium, and cobalt. This concentration of control poses economic and geopolitical risks that can impact industries ranging from consumer

electronics to defense manufacturing.³

To address these challenges, Congress and federal agencies have developed policies aimed at strengthening domestic mineral supply chains. The Energy Act of 2020 requires the U.S. Geological Survey (USGS) to identify and maintain a Critical Minerals List and conduct ongoing research into domestic resource potential. The Infrastructure Investment and Jobs Act of 2021 expanded these efforts through the Earth Mapping Resources Initiative, which supports nationwide mineral mapping and assessment.⁴ These initiatives aim to reduce import dependence, encourage recycling, and promote innovation in mineral extraction and processing technologies.

The importance of these resources evolves with technology. For example, platinum-group metals, used in catalytic converters and hydrogen production, have grown in significance as energy technologies advance. Similarly, silicon and gallium have become more critical as semiconductors technology has expanded.⁵ Because of these shifts, the U.S. must regularly evaluate which minerals are critical to its economic and strategic interest.

Critical minerals are the foundation of modern industry and national defense. They underpin energy storage, advanced manufacturing, and digital infrastructure. Ensuring a reliable and sustainable supply of these materials is not only vital for

economic stability but also for maintaining the country's technological and strategic independence.

FORGING NEW CHAINS: THE U.S. STRATEGY FOR CRITICAL MINERAL SECURITY

America's heavy reliance on foreign nations for critical minerals is no longer just an economic issue; it has become a primary national security concern (CSIS, *Future of the U.S. Economy*, 2025). Over many years, supply chains for materials vital to defense, energy, and technology consolidated. This has left the U.S. dangerously dependent on a few countries, especially the People's Republic of China (PRC) (CSIS, *Building Larger and More Diverse Supply Chains*, 2023). The U.S. currently imports 100 percent of 12 of the 50 minerals classified as critical, and over 50 percent of another 29 (CSIS, *Future of the U.S. Economy*, 2025). Beijing's market control comes from a deliberate, long-term industrial strategy focused on mineral processing and refining. As a result, China now controls between 40 and 90 percent of the global supply for key materials like rare earths, graphite, and lithium (Hudson, *China's Playbook*, 2025; CSIS, *Future of the U.S. Economy*, 2025). China has shown it is willing to use this dominance as a political weapon. For example, it imposed a rare earth embargo on Japan in 2010 and more recently

restricted exports of gallium and germanium, actions that have served as a wake-up call for Washington (Hudson, China's Playbook, 2025; CSIS, A Comprehensive U.S. Critical Minerals Plan, 2025).

In response, the United States has made a fundamental strategic pivot. U.S. policymakers recognize that completely onshoring these supply chains is not realistic due to limited domestic reserves (CSIS, A Strategy for Minerals Diplomacy, 2025). The new U.S. policy therefore focuses on building resilient supply networks with key international allies and partners. This strategy is often called "friendshoring." It aims to create a collective security framework for essential resources rather than pursuing total self-sufficiency (Carnegie, Friendshoring Critical Minerals, 2023). The U.S. is implementing this strategy through multilateral coalitions, specific bilateral agreements, and targeted financial investments to develop a network of trusted suppliers (CSIS, Building Larger and More Diverse Supply Chains, 2023).

I. MULTILATERAL COOPERATION AS THE CORNERSTONE OF U.S. STRATEGY

The Minerals Security Partnership (MSP) is at the center of America's diplomatic strategy. Launched in June 2022, the MSP is a multilateral initiative that brings together a coalition of market-oriented democracies, such as Australia, Canada, Japan, and the European Union (CSIS, An Evaluation of the Minerals Security Partnership, 2025). Its goal is to encourage public and private investment in responsible mining, processing, and recycling projects around the world (CSIS, Building Larger and More Diverse Supply Chains, 2023). The partnership works to diversify supply chains by promoting high environmental, social, and governance

(ESG) standards. This offers a values-based alternative to the less transparent practices common in the market (CSIS, An Evaluation of the Minerals Security Partnership, 2025). The MSP is not a buyers' club. Instead, it acts as a strategic coordinator that helps promising projects attract financing through political support, technical guidance, and access to funding from member nations (CSIS, Building Larger and More Diverse Supply Chains, 2023).

This focus on allied cooperation is also being advanced in other major international forums. The Quadrilateral Security Dialogue (Quad), which includes the United States, Australia, India, and Japan, launched its own Critical Minerals Initiative in July 2025 (Quad Foreign Ministers' Joint Statement, 2025). This effort seeks to strengthen economic security and diversify mineral supply chains among the four Indo-Pacific democracies (Quad Foreign Ministers' Joint Statement, 2025). In parallel, the G7 Critical Minerals Action Plan of June 2025 commits its members to mobilizing capital and building partnerships with developing countries to establish secure, standards-based markets (G7 Critical Minerals Action Plan, 2025). These multilateral actions demonstrate a clear, unified strategy among U.S. allies to protect their economies from market coercion and potential supply disruptions (G7 Critical Minerals Action Plan, 2025).

II. THE U.S.-JAPAN CRITICAL MINERALS AGREEMENT: A NEW MODEL FOR BILATERAL PARTNERSHIP

Beyond broad coalitions, the U.S. is using targeted bilateral agreements to secure its supply chains. The U.S.-Japan Critical Minerals Agreement (CMA), signed in

March 2023, is the leading example of this approach (CRS, U.S.-Japan CMA, 2025). The agreement was created to address a specific challenge posed by the Inflation Reduction Act (IRA) of 2022 (P.L. 117-169). A key provision in the IRA, Section 30D, offered tax credits for new electric vehicles (EVs). To qualify, a percentage of the critical minerals in the EV battery had to come from the U.S. or a country with which it had a free trade agreement (FTA) (CRS, U.S.-Japan CMA, 2025).

Japan is a major ally with advanced mineral processing and battery manufacturing capabilities, but it does not have a comprehensive FTA with the United States. This initially excluded Japanese firms from the IRA's benefits (CRS, U.S.-Japan CMA, 2025). The CMA was negotiated to solve this problem. Following its signing, the U.S. Treasury Department designated Japan as an FTA partner specifically for critical minerals sourcing (CRS, U.S.-Japan CMA, 2025). Under the agreement, both countries pledged not to impose export duties on critical minerals, to work together against non-market practices by other nations, and to uphold strong labor and environmental standards (CRS, U.S.-Japan CMA, 2025). This type of focused, sectoral agreement provides a flexible new model for economic partnership. It allows the U.S. to strengthen supply chains with trusted allies outside of traditional FTAs (CSIS, Building Larger and More Diverse Supply Chains, 2023). While Congress terminated the IRA's EV tax credit in July 2025, the strategic framework established by the CMA remains a vital part of U.S. minerals policy (CRS, U.S.-Japan CMA, 2025).

EXECUTIVE ACTION

The United States has long feared the economic risks of foreign market control over critical minerals. One of the earliest policy responses to this fear was the National Materials and Minerals Policy, Research, and Development Act of 1980 (hereinafter, the Act of 1980).⁶ The Act established it as national policy to promote research, development, extraction, processing, and domestic production of critical minerals and related components and products within the United States.⁷

I. BIDEN ADMINISTRATION (2020-2024)

Building upon the frame work established by the Act of 1980, the Biden administration took significant steps to strengthen the national critical mineral supply chains and reduce dependence on foreign sources. In 2021, congress passed the Consolidated Appropriations Act, which amended the Act of 1980.⁸ This amendment directed executive departments and federal agencies to initiate or revise critical materials and minerals programs to advance national policies.⁹

That same year, in February 2021, President Biden issued an executive order launching a 100-day supply chain review targeting four key sectors: semiconductors, large capacity batteries, critical minerals and materials, and pharmaceuticals and active pharmaceutical ingredients.¹⁰ The goal of this review was to identify vulnerabilities and promote long-term national resilience.¹¹ When the review was completed, the federal government issued more than 70

recommended actions to promote long-term supply chain stability.¹²

Recognizing the importance of resource assessment and data-driven planning, Congress followed up in June 2021, by establishing the Earth Mapping Resources Initiative under the infrastructure Investment and Job's Act.¹³ This initiative authorized extensive national efforts to map and evaluate U.S. mineral resources. By June 2023, the Biden Administration issued a report card summarizing progress on most of the recommendations from the 100-day review.¹⁴ The report also highlighted the impact of new legislative measures that further advanced the nation's goal of a resilient critical minerals supply chain.¹⁵

II. THE SECOND TRUMP ADMINISTRATION

As the Biden Administration's efforts emphasized long-term resilience through research and mapping, the second Trump Administration has sought to accelerate domestic production. In 2025, President Trump issued the executive order "Immediate Measures to Increase American Mineral Production."¹⁶ The order directed federal agencies to streamline the permitting processes for infrastructure and energy projects that are critical to American economic prosperity.¹⁷ By creating these regulatory pathways, the administration aimed to promote faster development of domestic mineral resources and reduce reliance on foreign, particularly Chinese, sources of critical minerals.

This initiative, combined with other executive actions aimed to increase energy production and form foreign investment, laid the foundation for the expansion of American critical minerals. The program has produced positive results. Several critical mineral

projects received FAST-41 designation, granting them access to structured permitting timetables and project plan management oversight from the Federal Permitting Improvement Steering Council.¹⁸

Later in 2025, the second Trump Administration reinforced this policy direction by issuing several executive orders concerning critical minerals, national materials, and minerals policy.¹⁹ Through measures like Executive Order 14154, "Unleashing American Energy," and Executive Order 14156, "Declaring a National Energy Emergency," federal departments were directed to strengthen supply chains and boost domestic production capacity. Furthermore, the establishment of the National Energy Dominance Council under Executive Order 14213 reinforces this strategy by creating an advisory board to counsel the President on achieving energy dominance and ensuring national energy perseverance.²⁰

From the Act of 1980 to the policies of recent administrations, the United States is continuously finding ways to approach securing critical minerals. While the Biden administration prioritized resilience through research, mapping, and supply chain strengthening, the second Trump Administration has focused on rapid production to achieve energy independence. Together, the efforts reflect a shared recognition that controlling critical mineral resources is essential to America's economic stability.

THE NEXUS BETWEEN CRITICAL MINERALS AND CLEAN ENERGY

Energy demand is growing in unprecedented bounds, mostly driven by high-tech innovation such as data center power demand and national security needs (Asian Development Bank (ADB), 2025).²¹ To support energy production, there has been an international shift in investments from fossil fuel production to clean energy production (Allan et al., February 2025).²² Clean energy is energy generated by solar, wind, and geothermal technologies, often with ancillary battery storage to allow clean energy to fuel the electric grid during hours lacking sun and wind (Allan et al., February 2025).²³

Critical minerals are necessary to manufacture clean energy components and equipment (Asian Development Bank, 2025).²⁴ Critical minerals used for clean energy technology may include, but not be limited to, iron ore (steel), lithium (battery chemistry), copper (wiring), silicon (solar panels), among many other rare earth elements used to make semiconductors, circuits, and lights (Allan et al., February 2025).²⁵ The demand for critical minerals shifts global power to countries owning mines, financing extraction of minerals, and selling the minerals in the global market (Allan et al., February 2025).²⁶

FOSSIL FUELS AND CLEAN ENERGY INVESTMENTS

Fossil fuel derived energy is expected to continue to be consumed; however, clean energy investment is growing at a high rate

(Allan et al., February 2025).²⁷ “[A]nnual global investment in clean energy is now nearly double fossil fuel investment.” (Allan et al., February 2025)²⁸ Renewable energy, like solar and wind, is more reliable for use in power for electric grids through advanced battery technology, which can now store days of power rather than merely hours (Allan et al., February 2025).²⁹ With the falling cost of producing clean energy, more reliable energy production, and continued investment, emerging countries like Ethiopia, Cameroon, and Indonesia are industrializing with clean energy rather than with continued reliance on fossil fuels (Allan et al., February 2025).³⁰

Solar panels produced in China are being imported in large quantities by Pakistan and Cameroon (Allan et al., February 2025).³¹ Chinese electric vehicles are being sold to Brazil and Ethiopia with enough quantity to potentially impact fossil fuel demand (Allan et al., February 2025).³² Saudi Arabia and United Arab Emirates (UAE) are well-established petroleum magnates, yet these countries continue to heftily invest in clean energy (Allan et al., February 2025).³³ Finally, Indonesia and Egypt are manufacturing solar panels with strategic investments from Middle Eastern nations (Allan et al., February 2025).³⁴ Strategically, Saudi Arabia, UAE, Oman, and Qatar (“Gulf states”), are financing major mining extraction, processing, and marketing for critical minerals (Allan et al., February 2025).³⁵

MINING AND TRADE AGREEMENTS AS GLOBAL DOMINANCE

The Gulf states are investing their petroleum financial gains into extraction and processing of critical minerals, stacking bets on clean energy over potentially decreasing petroleum returns (Allan et al., February 2025).³⁶ China and the United States are dominant trade partners for some critical minerals, yet their tension has required the rest of the world to choose which country they will trade with, while avoiding being cut off to trade by the other (Allan et al., February 2025).³⁷ By investing directly in emerging countries, the Gulf states can avoid being perceived as choosing a side and secure their financial futures directly from the source (Financial Times, March 31, 2024).³⁸ “The Middle East offers a neutral venue for minerals processing, capital and corporate headquarters.” (Financial Times, March 31, 2024)³⁹ Investments in emerging and developing countries give them an opportunity to step up on the global scale through green energy implementation.

ENVIRONMENTAL, SOCIAL, GOVERNANCE MITIGATION AND RISK TO INVESTMENT

Mining and manufacturing industries are typically associated with hefty economic returns that are later burdened with environmental, social, governance (ESG) repercussions like environmental pollution, loss of biodiversity, and labor violations (ADB, 2025).⁴⁰ Many international investors include ESG factors in their overall risk

portfolio (ADB, 2025).⁴¹ The need for speed to mine and sell critical minerals may exacerbate ESG factors; therefore, increasing risk to investments if not planned or mitigated in advance.

Without advanced mineral recycling, established waste handling, and profitable downcycling of less economic byproducts of critical minerals mining, ESG factors may increase risk and projected costs of clean energy investments. This may allow for new environmental regulations that encourage technology-forcing innovations. As the race for critical mineral mining continues, the need for ESG mitigation measures will likely be necessary to further bolster the support for clean energy initiatives.

CONCLUSION

Access and control of critical minerals will determine which countries are dominant in the global arena in decades to come, especially which countries control or highly influence clean energy technologies. The countries that maintain global dominance will determine which clean energy technologies are developed, who has access to those technologies, and as a byproduct, how ESG mitigation technologies are required, developed, and implemented. The power of global dominance will, in turn, be highly influenced by who owns, can finance, and market critical minerals. In conclusion, emerging and developing countries will highly benefit from investment from dominant countries through the clean energy transition, giving them a piece of global dominance even if just a sliver of it.

END NOTES

1. Lib. Of Congress (2025), <https://crsreports.congress.gov> [https://perma.cc/3FFR-8L5T]
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Lib. Of Congress (2025), <https://crsreports.congress.gov> [https://perma.cc/3FFR-8L5T]
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Lib. Of Congress (2025), <https://crsreports.congress.gov> [https://perma.cc/3FFR-8L5T]
14. *Id.*
15. *Id.*
16. William Chou, *China's Bureaucratic Playbook for Critical Minerals*, Hudson Inst. (2025), <https://www.hudson.org/supply-chains/chinas-bureaucratic-playbook-critical-minerals-control-technology-transfer-william-chou> [https://perma.cc/A345-KB6V]
17. *Id.*
18. *Id.*
19. Lib. Of Congress (2025), <https://crsreports.congress.gov> [https://perma.cc/3FFR-8L5T]
20. *Id.*
21. Asian Development Bank (ADB), *Critical Minerals-to-Manufacturing Value Chains for Powering Progress, 2025-2029*, 1,1 (July 2025), <https://www.adb.org/sites/default/files/institutional-document/1071356/cmm-value-chains-2025-2029-board-direction.pdf> [https://perma.cc/YKD2-TSP3].
22. Bentley Allan et. al, *How the U.S. Can Stop Losing the Race for Clean Energy*, 1,1 (February 2025), https://carnegie-production-assets.s3.amazonaws.com/static/files/CETF_How%20to%20Stop%20Losing_final-2.pdf [https://perma.cc/LL2Z-2BPH].
23. *Id.*
24. ADB, *supra* note 1, at 1.
25. Allan, *supra* note 2 at 7, 9, and 14.
26. *Id.* at 2.
27. *Id.* at 2.
28. *Id.* at 1.
29. *Id.*
30. *Id.* at 2–3.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 4.
36. *Id.*
37. *Id.*
38. Financial Times, *How Gulf States are Putting Their Money into Mining*, March 31, 2024, <https://www.ft.com/content/59298650-540a-43cd-86f8-a6c6db0aa906> [https://perma.cc/S4Z6-KAPE].
39. *Id.*
40. ADB, *supra* note 21, at 3.
41. *Id.*

CURRENT EVENTS FEATURE:

TARIFF LITIGATION: PRESIDENTIAL AUTHORITY FOR TARIFFS UNDER IEEPA

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I. INTRODUCTION

This Comment discusses the status of the President's legal authority to impose tariffs under the International Emergency Economic Act (IEEPA). As of November 2025, the Supreme Court is poised to address the legal limits of the President's authority to impose tariffs under IEEPA in the consolidated cases of *V.O.S. Selections, Inc. v. Trump* and *Learning Resources, Inc. v. Trump*. In both actions, lower courts ruled against the administration, holding that IEEPA does not authorize the President to unilaterally impose sweeping trade tariffs. The Court of International Trade and the U.S. Court of Appeals for the Federal Circuit both found the tariffs unlawful in *V.O.S. Selections*, while the U.S. District Court for the District of Columbia reached the same conclusion in *Learning Resources*. The court in *V.O.S. Selections* was split with seven judges joining the majority and four judges joining the dissent,¹ whereas *Learning Resources* was decided at bench.² The Supreme Court granted certiorari in September 2025, stayed lower court injunctions, and scheduled arguments for November 5, 2025.³ The outcome of these cases will determine if IEEPA grants the executive branch the power

to levy broad tariffs, or if such use exceeds both statutory and constitutional limits on presidential authority.

II. LEGAL BACKGROUND

In February 2025, President Donald Trump invoked the International Emergency Economic Powers Act (IEEPA) to impose extensive tariffs on U.S. imports—specifically from China, Canada, and Mexico.⁴ To date, the President has made several modifications to these tariffs, from raising the tariff rate on imports to imposing “reciprocal tariffs” on imports from almost all U.S. trading partners.⁵ This is the first time in the history of IEEPA that has been used to impose tariffs.⁶ These actions have set off intense debates over whether the President has the power to impose large-scale tariffs under IEEPA.

A. ORIGINS OF IEEPA

IEEPA was enacted in 1977 in an effort to place limits on the presidential emergency powers. Congress enacted IEEPA to give the President the authority to address certain emergencies under the National Emergencies Act (NEA), including the authority to “regulate” or “prohibit” imports that “deal with any unusual or extraordinary threat” outside the United States.⁷

While IEEPA does not require agency investigation or fact-finding, it requires the President to consult with Congress before and during these exercises of power and submit regular reports to maintain oversight.⁸ Although Congress designed IEEPA to address foreign emergencies through financial and trade restrictions, the president's use to impose heavy tariffs is an expansion of the president's authority under the statute.

B. OTHER TARIFF STATUTES

The 2025 tariffs differ from past exercises of trade statutes. In recent presidential administrations, several laws imposing tariffs were enacted under the Trade Expansion Act of 1962 and the Trade Act of 1974.⁹ Section 232 of the Trade Expansion Act gives the president the authority to impose tariffs once the Secretary of Commerce finds that the way articles are being imported threatens national security.¹⁰ Under Section 201 of the Trade Act, the President can impose tariffs if the International Trade Commission finds that the surge in imports is threatening the U.S. domestic industry.¹¹ Further, Section 301 of the Trade Act allows the United States Trade Representative to impose tariffs on foreign countries that burden U.S. commerce in “unjustifiable,” “unreasonable,” or “discriminatory” ways.¹²

All these sections have something in

common. They require agency investigation or fact-finding before one can act.¹³ In contrast, IEEPA requires no agency review or factual support before the president can act.¹⁴ Once an emergency is declared under the NEA, the president's authority to regulate and prohibit imports takes effect.¹⁵

C. UNITED STATES V. YOSHIDA

The closest historical precedent Trump can rely on is *United States v. Yoshida International, Inc.* (1975), which upheld President Nixon's temporary 10% tariff on imports due to a declared national emergency to deal with the balance-of-payments deficit.¹⁶ The Court of Customs and Patent Appeals upheld the surcharge as a measure "appropriately and reasonably related" to the declared emergency.¹⁷ The court stated that the statute's language allowed the president to regulate or prohibit imports with a short-term tariff if it was directly related to the emergency declared.¹⁸

Congress enacted Section 122 of the Trade Act of 1974 while *Yoshida* was pending and later enacted IEEPA in 1977, which specifically authorized the exact kind of tariffs Nixon imposed.¹⁹ Congress clearly intended to separate emergency authority from the authority to impose tariffs.²⁰ Therefore, *Yoshida* supports only short-term tariffs that are directly connected to a declared emergency, meaning Trump's broad, continuing tariffs under IEEPA are an unprecedented expansion of presidential power.

III. CURRENT CASES PENDING BEFORE THE SUPREME COURT

A. V.O.S. SELECTIONS, INC.

The government appealed a decision of the Court of International Trade (CIT) setting aside five Executive Orders that imposed tariffs of unlimited duration on nearly all goods from nearly every country in the world, holding that the tariffs were not authorized by IEEPA.²¹ The central issue the United States Court of Appeals for the Federal Circuit resolved on appeal was whether the Trafficking Tariffs and Reciprocal Tariffs imposed by the Challenged Executive Orders were authorized by IEEPA.²²

1. Majority Opinion

Ultimately, the court held that Congress did not grant the President broad authority to impose tariffs like the Trafficking and Reciprocal Tariffs merely by utilizing the phrase "regulate . . . importation."²³ In reaching this decision, the court began with the statutory text, emphasizing that IEEPA authorizes the President to "regulate" and restrict transactions involving foreign property interests during a national emergency, but it contains no reference to tariffs, duties, or taxation.²⁴ Because Congress has historically delegated tariff power explicitly, and only with detailed limits, the court found it implausible that Congress intended to grant complete tariff authority through the word "regulate."²⁵ The majority further noted that the Constitution assigns taxing and tariff powers to Congress, and any delegation of such authority must be clear and directed.²⁶

Next, the court examined the extent to which Congress's confirmation of *Yoshida II's*

interpretation of the word "regulate" would permit the Trafficking and Reciprocal Tariffs imposed by the Challenged Executive Orders under IEEPA.²⁷ The court concluded that the Trafficking and Reciprocal Tariffs assert a broad authority that goes further than the express limitations of *Yoshida II's* holding and, thus, beyond the authority delegated to the President by IEEPA.²⁸ In coming to this conclusion, the court explained that *Yoshida II* involved temporary and narrow tariff measures under IEEPA's predecessor statute, the Trading with the Enemy Act (TWEA), not broad tariffs of indefinite duration and scope.²⁹ The court further determined that since *Yoshida II* was clear in its view that an unbounded tariff would not be allowed, that understanding must be credited to Congress as well.³⁰ The court then turned to the Trafficking and Reciprocal Tariffs which are unbounded in scope, amount, and duration, and apply to nearly all articles imported into the United States.³¹ In nearly fifty years of IEEPA history, no President has attempted to impose tariffs.³² Thus, this lack of precedent, combined with the scope of the challenged tariffs, confirmed that Congress never intended IEEPA to authorize such an action.³³

The final issue raised on appeal was whether the CIT abused its discretion in vacating and permanently enjoining the operation of the Challenged Executive Orders. The court ultimately vacated the injunction and remanded.³⁴ The Court relied on the four-factor test established in *eBay* that a plaintiff seeking a permanent injunction must satisfy before a court may grant such relief.³⁵ The four factors a plaintiff must establish include irreparable harm, adequacy of legal remedies, balance of hardships, and

public interest.³⁶ The court determined that because the CIT did not apply the *eBay* test and because vacating the universal injunction is warranted based on the Supreme Court's decision in *Trump v. CASA, Inc.*, that on remand, the CIT should consider whether its grant of a universal injunction follows the standards set out in *CASA*.³⁷

The Court affirmed the CIT's judgment that the President lacked authority under IEEPA to impose the Trafficking and Reciprocal Tariffs, but it vacated the universal injunction and remanded for further consideration of such relief.³⁸

2. Dissent

the dissenting opinion disagrees with the majority's conclusion on the issue of the tariff's legality and concludes that plaintiffs did not justify summary judgment in favor on either statutory or constitutional grounds.³⁹

The dissent rejects several arguments plaintiffs present for limiting the broad scope of section 203's authorization to "regulate... importation," reasoning that the term "regulate" has a broad understanding and there is a longstanding judicial recognition that taxes are a "species of regulation."^{40 41} The context of IEEPA gives the President broad authority to act by "means of instructions, licenses, or otherwise" § 203(a)(1).⁴² The dissent references how the Court in *Yoshida* reasoned that the term "or otherwise" must mean the Congress authorized the use of means, though not identified, were different from, and additional to, "instructions" and "licenses."⁴³ The dissent further rationalizes that within the statutory context of the Act and its evident purpose, there is reason to understand "regulate" as inclusive,

rather than exclusive of tariff measures as a conventional means of import regulation.⁴⁴

Building on its broad reading of IEEPA's text, the dissent next turns to the constitutional and structural argument, rejecting both the application of the major questions doctrine and claims of unconstitutional delegation.⁴⁵ The dissent reiterates that the language of IEEPA is broad on its face and that Congress intentionally gave broad discretion and flexible authorities "involving emergencies touching foreign affairs."⁴⁶

The dissent further rejects Plaintiff's argument that IEEPA is an unconstitutional delegation of legislative authority to the President.⁴⁷ The general standard for determining whether Congress had unconstitutionally delegated the legislative power assigned to it by Article I of the Constitution requires two elements that must be supplied by Congress: a statement of the general policy the agency must review and applicable boundaries.⁴⁸ However, the government argues that this standard should not be applied and instead a less restrictive standard should apply, which the dissent rejects for two reasons.⁴⁹ Firstly, citing *Gundy v. United States*, the dissent explains that the constitutional inquiry focuses on whether Congress provided an intelligible principle to guide the exercise of delegated power, not the receiving party.⁵⁰ Second, as the Supreme Court has observed, whenever an executive officer is exercising executive power, the officer is exercising power that belongs to the President.⁵¹ Further, the dissent notes that precedent from the Court suggests that Congress has especially broad leeway to delegate authority to the President in foreign-affairs.⁵²

Finally, the dissent turns to the trafficking tariffs, which are challenged only by the State plaintiffs because the tariff measures apply to variety of imports that are not the source of the problem.⁵³ The dissent agrees with the majority that the introduction of opioids or precursors and other criminal activity is the underlying threat addressed by these tariffs, and it rises to the level of an "unusual and extraordinary threat" that has been properly declared to be a national emergency.⁵⁴ The dissent concludes that nothing in IEEPA's text limits the President's authority to measures that act directly upon the source of the threat.⁵⁵ Instead, § 203 allows the President to exercise enumerated powers "to deal with any unusual and extraordinary threat" so long as those measures are adopted for the purpose of addressing that threat and not for any other objective.⁵⁶ IEEPA contains no "direct link" requirement and does not demand that the regulated imports themselves be the origin of the threat.⁵⁷ The dissent view is so long as the President's actions are reasonably designed to address the declared emergency, they fall within IEEPA's grant of authority.

The dissent draws parallel between *V.O.S. Selections* and the decision in *Damers & Moore*, where the Court held that IEEPA authorized the President to act involving Iranian assets as "bargaining chip" to solve the problem of Iran's holding American hostages.⁵⁸ Similarly, here, the tariffs are a bargaining chip to create economic pressure to get Canada, Mexico, and China to take more action regarding the criminal trafficking identified in the executive orders.⁵⁹ The dissent discusses the executive orders themselves, which expressly contemplated

reducing or eliminating the tariffs if those countries undertake corrective measures.⁶⁰

B. LEARNING RESOURCES V. TRUMP

1. Factual and Procedural History

On April 22, 2025, Learning Resources, Inc. and hand2mind, (“Plaintiffs”) filed suit in the U.S. District Court for the District of Columbia challenging President Donald Trump’s authority to impose tariffs under the International Emergency Economic Powers Act (“IEEPA”).⁶¹ The plaintiffs develop toys and educational products for children and most of their products are manufactured in China, Taiwan, Korea, Vietnam, Thailand, and India.⁶² After President Trump invoked IEEPA to impose tariffs on imports from the aforementioned countries and others, the Plaintiffs sued President Trump, other government officials, and agencies (“Defendants”), and moved for a preliminary injunction.⁶³ The Defendants moved to transfer the suit to the United States Court of International Trade (“CIT”) asserting that the court had exclusive jurisdiction.⁶⁴ The court addressed whether the CIT had exclusive jurisdiction and whether to grant the Plaintiffs’ motion for preliminary injunction.⁶⁵

2. Holding and Rationale

The court’s analysis on jurisdiction centered on whether IEEPA qualifies as a law providing for tariffs under 28 U.S.C. § 1581(i)(1)(B)—a determination that would decide whether exclusive jurisdiction lies with the CIT or with the federal district courts.⁶⁶ The court explained that the CIT’s jurisdiction depends not on whether a case involves tariffs, but on whether the underlying statute provides for tariffs, duties, or similar import-related taxes.⁶⁷ Thus, the dispositive question was whether IEEPA itself

authorizes tariffs.⁶⁸ If so, the CIT would have exclusive jurisdiction; if not, the district court would retain jurisdiction under 28 U.S.C. §§ 1331 and 1346.⁶⁹

The court examined the text of IEEPA and found no language authorizing the imposition of tariffs, duties, or taxes.⁷⁰ The statute provides that the President may, during a national emergency, to “investigate, block, . . . regulate, direct and compel, nullify, void, prevent or prohibit” the “‘importation or exportation’ of ‘property in which a foreign nation or national has an interest’”—but it does not mention tariffs or duties.⁷¹ The court emphasized that the “power to regulate” is distinct from the “power to tax.”⁷² Drawing on constitutional structure and precedent dating back to *Gibbons v. Ogden*, the court noted that Congress’s power “[t]o regulate Commerce with foreign Nations,” Art. I, § 8, cl. 3, is separate from its “[p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises.”⁷³

The court further applied interpretive canons and compared IEEPA to other statutes where Congress explicitly delegated tariff authority—such as the Trade Act of 1974 and the Tariff Act of 1930—each of which included express limits and procedures for imposing duties.⁷⁴ The court noted that reading IEEPA to confer such broad tariffing power would effectively eviscerate those statutory limitations and imply an unprecedented delegation of taxing authority without clear congressional intent.⁷⁵ The court further noted that, in the nearly fifty years since IEEPA’s enactment, no President had ever used it to impose tariffs, and no IEEPA-based case had been filed in the CIT, indicating that both Congress and the Executive historically understood IEEPA as a sanctions statute, not a tariff statute.⁷⁶

Finally, the court rejected the government’s reliance on *United States v. Yoshida*, finding that *Yoshida* rested on outdated purposivist reasoning rather than textual analysis and that even *Yoshida* acknowledged Congress had never specifically authorized tariffs under the predecessor statute (the Trading with the Enemy Act).⁷⁷

IV. CONCLUSIONS

The Supreme Court’s pending decision in the consolidated cases of *V.O.S. Selections, Inc. v. Trump* and *Learning Resources, Inc. v. Trump* will resolve whether IEEPA grants the President authority to impose broad and indefinite tariffs without explicit congressional approval or procedural safeguards. Lower courts have interpreted existing precedent as limiting presidential tariff powers under the premise that Congress did not intend for IEEPA to replace other trade statutes. Even with the dissent in *V.O.S. Selections*, there is clear concern for the separation of powers and major questions doctrine. However, the dissent views IEEPA as granting broad authority to the President, which differs from the majority. These cases are important because, if affirmed, the rulings would reenforce limits that the majority views as clear regarding executive power over tariffs. Conversely, if reversed, the Court would set clear precedent that the President has far-reaching flexibility in the use of tariffs for shaping foreign policy in the interest of domestic national security. The result of this ruling could have sweeping implications in commerce and international trade, affecting American importers, their trading partners, and future United States trade policy.

END NOTES

1. See *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312 (Fed. Cir. Aug. 29, 2025).
2. See *Learning Resources, Inc., v. Trump*, 784 F.Supp. 3d 209 (D.D.C. 2025).
3. <https://www.supremecourt.gov/docket/docketfiles/html/public/25-250.html>
4. Congressional Research Service, *Legal Authority for the President to Impose Tariffs Under the IEEPA*, LSB11281, at 1 (Apr. 7, 2025). <https://heinonline.org/HOL/P?h=hein.crs/lglatyfte0001&i=1>
5. *Id.*
6. *Id.*
7. Congressional Research Service, *Court Decisions Regarding Tariffs Imposed Under the IEEPA*, LSB11332, at 1 (Sept. 15, 2025). <https://www.congress.gov/crs-product/LSB11332>
8. *Id.* at 2.
9. CRS, *Legal Authority for the President to Impose Tariffs Under the IEEPA*, *supra* note i, at 1. <https://heinonline.org/HOL/P?h=hein.crs/lglatyfte0001&i=1>
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. CRS, *Court Decisions Regarding Tariffs Imposed Under the IEEPA*, *supra* note iv, at 1. <https://www.congress.gov/crs-product/LSB11332>
15. *Id.*
16. CRS, *Legal Authority for the President to Impose Tariffs Under the IEEPA*, *supra* note i, at 2. <https://heinonline.org/HOL/P?h=hein.crs/lglatyfte0001&i=1>
17. *Id.* at 3.
18. *Id.*
19. *Id.*
20. *Id.*
21. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1318 (Fed. Cir. Aug. 29, 2025).
22. *Id.* at 1330.
23. *Id.* at 1337.
24. *Id.* at 1330-1331.
25. *Id.* at 1332-1333.
26. *Id.*
27. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1337 (Fed. Cir. Aug. 29, 2025).
28. *Id.* at 1338.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 1335.
33. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1338 (Fed. Cir. Aug. 29, 2025).
34. *Id.* at 1338-1339.
35. *Id.* at 1339.
36. *Id.*
37. *Id.* at 1340.
38. *Id.*
39. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1348 (Fed. Cir. Aug. 29, 2025).
40. *Id.* at 1362.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1367 (Fed. Cir. Aug. 29, 2025).
46. *Id.* at 1376.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1376 (Fed. Cir. Aug. 29, 2025).
52. *Id.*
53. *Id.* at 1382.
54. *Id.*
55. *Id.*
56. *Id.*
57. *V.O.S. Selections, Inc., et al. v. Trump*, et al., 149 F.4th 1312, 1382 (Fed. Cir. Aug. 29, 2025).
58. *Id.* at 1383.
59. *Id.*
60. *Id.*
61. *Learning Resources, Inc., v. Trump*, 784 F.Supp. 3d 209, 215 (D.D.C. 2025); *see* 50 U.S.C. § 1701 et seq.
62. *Id.*
63. *Id.*
64. *Id.*
65. *See generally Id.* at 221-233.
66. *Id.* at 221-222.
67. *Learning Resources, Inc., v. Trump*, 784 F.Supp. 3d 209, 222 (D.D.C. 2025).
68. *Id.*
69. *Id.*
70. *Id.* at 223.
71. *Id.*
72. *Id.*
73. *Learning Resources, Inc., v. Trump*, 784 F.Supp. 3d 209, 223 (D.D.C. 2025); Art. I, § 8, cl. 1.
74. *Learning Resources*, 784 F.Supp. 3d at 224-25.
75. *Id.* at 225.
76. *Id.* at 226-27.
77. *Id.*

CURRENT EVENTS FEATURE:

TARIFF DECISIONS AND CONSEQUENCES; LEARNING RESOURCES V. TRUMP

LAUREN CURRIE AND YASMIN FARID

I. WHAT IS A TARIFF?

According to the Constitution, Congress has the “Power To lay and collect Taxes, Duties, Imposts and Excises.”¹ How does this relate to tariffs? A tariff “is a tax levied on imported goods and services.”² Another term for tariff is “duty,” a duty is a “federal tax levied on goods shipped into the United States.”³ Tariffs, like taxes, raise revenue. In fact, the Framers of the Constitution “expected that the Government would for ‘a long time depend . . . chiefly on’ tariffs for revenue.”⁴ So that leads to two conclusions: a tariff is a tax and it’s the duty of Congress to deal with taxes. However, Congress may delegate its authority to others through legislation. Occasionally, Congress has delegated some tariff authority to the President but has always done so in explicit terms and subject to strict limits.

President Trump attempted to use the International Economic Emergency Economic Powers Act (IEEPA) to impose tariffs. Enacted in 1977, IEEPA “gives the President economic tools to address significant foreign threats.”⁵ When acting under IEEPA, the President must identify an “unusual and extraordinary threat” to American national security, foreign policy, or the economy, originating primarily “outside

the United States.”⁶ Next, the President must “declare[] a national emergency” under the National Emergencies Act.⁷ Afterwards, the President may choose from a list of actions to deal with the threat. President Trump used it to set his “reciprocal tariffs” against China, Mexico, and Canada.⁸ However, this use of IEEPA was ruled unconstitutional in *Learning Resources v. Trump*.

With IEEPA off the table following *Learning Resources*, only four possible tariff authorities remain available to the Trump administration. Two of which have lain dormant: Section 122 of the Trade Act of 1974 and Section 338 of the Tariff Act of 1930. Section 122 “allows temporary across-the-board tariffs when the United States has ‘large and serious balance-of-payments deficits.’”⁹ President Trump has currently invoked Section 122 to set tariffs at the maximum level of 15 percent.¹⁰ These will expire after 150 days unless Congress chooses to extend them.¹¹ Section 338 of the Tariff Act of 1930 authorizes tariffs to retaliate against foreign discrimination against American goods.¹² The other possible authorities are Section 232 of the Trade Expansion Act of 1962 which authorizes national security import restrictions and Section 301 of the Tariff Act of 1974 which grants retaliatory authority against foreign unfair trade acts.¹³ The potential use and subsequent effects, of

these authorities by President Trump will be discussed in further detail in Part III.

II. LEARNING RESOURCES V. TRUMP ANALYSIS

Shortly after taking office, President Trump sought to address two foreign threats which he deemed “unusual and extraordinary:” illegal drugs and trade deficits.¹⁴ He used the International Emergency Economic Powers Act (IEEPA) to establish “reciprocal tariffs” to address the threats.¹⁵

On February 20, 2026, the Supreme Court held in a 6-3 opinion, that IEEPA does not authorize the President to impose tariffs.¹⁶ The Court consolidated two cases for this opinion: *Learning Resources v. Trump* (No. 24-1287), arising from the United States District Court for the District of Columbia, and *Trump v. V.O.S. Selections* (No. 25-250), coming out of the United States Court of Appeals for the Federal Circuit.¹⁷ Both cases raised the same legal issue: “whether the International Emergency Economic Powers Act (IEEPA) authorizes the President to impose tariffs.”¹⁸ Petitioners in *Learning Resources* and respondents in *V.O.S. Selections* had each filed suit, alleging that it does not.¹⁹ The Supreme Court agreed. As a result, the judgement for *V.O.S. Selections*

in the Federal Circuit Court of Appeals was affirmed, while *Learning Resources* was vacated and remanded with instructions to dismiss for lack of jurisdiction.²⁰

Chief Justice Roberts announced the judgement of the court and delivered the majority opinion of the court with respect to Parts I, II-A-1, and II-B, in which Justices Sotomayor, Kagan, Gorsuch, Barrett, and Jackson joined, and a plurality opinion with respect to Parts II-A-2 and III, in which Justice Gorsuch and Barrett joined. Justice Gorsuch and Barrett wrote concurring opinions. Justice Kagan wrote an opinion concurring in part and concurring in the judgment, joined by Justice Sotomayor and Jackson. Justice Jackson wrote an opinion concurring in part and concurring in the judgment. Justice Thomas wrote a dissenting opinion, and Justice Kavanaugh wrote a dissenting opinion, joined by Justices Thomas and Alito.

In Part I, Chief Justice Roberts reviewed the background of the cases and how *Learning Resources* and *V.O.S Selections* came before the Supreme Court. In Part II-A-1, the Court turned to Congress's power to tax as assigned by the Constitution. The Court concludes that a tariff is a tax and that the President has "no inherent authority to impose tariffs during peacetime."²¹ Therefore, the Court notes, that the Government relies solely on IEEPA as the basis for the reciprocal tariffs. In Part II-B, the Court performs a textual analysis of IEEPA, concluding that the statute simply does not authorize tariffs.²² The Court notes that when Congress addresses "the power to impose tariffs, it does so clearly and with careful constraints."²³ It did neither in IEEPA.

While the majority agreed on Parts I, II-A-1, and II-B, the Court fractured over whether the major questions doctrine was the appropriate framework to reach that conclusion. In Part II-A-2, Roberts applies the major questions doctrine. He acknowledges the Court's long-standing reluctance to read extraordinary delegations of congressional power into ambiguous statutory text. Roberts argues this applies with particular force here, as the purported delegation involves the core congressional power of the purse.²⁴ He rejects both the Government's argument that emergency statutes should be interpreted more broadly and the proposed foreign affairs exception. Robert concludes that the Court "would not expect Congress to relinquish its tariff power through vague language, or without careful limits."²⁵ In Part III, Roberts summarizes the core holding of the court: the President's assertion of power to impose tariffs of unlimited amount, duration, and scope requires clear congressional authorization.²⁶ There was no such authorization here.

Justice Gorsuch's concurring opinion is an ardent defence of the major questions doctrine. He asserts that this doctrine "safeguards" the Constitution's delegation of lawmaking powers to Congress "against executive encroachment."²⁷ He separates the views of the other Justices into four camps: the liberal critics, Barrett who would soften its blow, the dissenters who disagree with the Courts application and Thomas who wishes to avoid the doctrine altogether.²⁸ Gorsuch emphasizes the historical tradition and case precedent supporting the major questions doctrine. Justice Barrett's concurrence agreed with the use of the major question's doctrine but disagreed with Gorsuch's characterization

of "common sense."²⁹ Barrett asserts that the doctrine "situates text in context" and is "best understood as an ordinary application of textualism."³⁰ She questions if it is proper for "the Judiciary really protect the Constitution by impeding the constitutional action of another branch" when there are big decisions to be made.³¹ In conclusion, Barrett cautions against expanding the major questions doctrine past its context based approach.

Justice Kagan disagrees with Robert's use of the major questions doctrine, when "ordinary principles of statutory interpretation lead to the same result."³² Kagan argues that IEEPA's key phrase does not include the power to tax. The text authorizes the President to "regulate" the "importation" of foreign goods.³³ The word regulate is not a synonym for the power to tax. If Congress had wanted to delegate its tariff authority it would have used words like "duty," "tariff," or "surcharge."³⁴ However, none of those appear in IEEPA. While Kagan reaches her conclusion through textual analysis alone, Justice Jackson arrives at the same place by a different route: the legislative history of IEEPA and its predecessor statute, the Trading with the Enemy Act (TWEA) of 1941.³⁵ Jackson argues Congress's objective for the "regulate . . . importation" language was to grant the President the power to freeze and control foreign property transactions.³⁶ It is not to impose tariffs. She is critical of the others for declining to examine the legislative history because "why would it matter which interpretation *we* think is 'best' when Congress has already told us?"³⁷ While Justice Kagan, Sotomayor, and Jackson agree that IEEPA does not give the President authority to set tariffs, they disagree with the Chief Justice's choice of the major

questions doctrine as the means to answer that question.

Finally, a brief look at the dissenting opinions. Justice Thomas does not believe that the major questions doctrine is needed in this case. Instead, he asserts that the power to impose tariffs is not a core legislative power and can be delegated to the President.³⁸ Thomas focuses on historical examples, the Vesting Clause, and the nondelegation doctrine. Justice Kavanaugh, in a lengthy dissenting opinion, asserts that IEEPA clearly authorizes tariffs and that the major questions doctrine should not apply in the foreign affairs context.³⁹ Together, Thomas and Kavanaugh represent the view that the Court overstepped its role and that the President had ample authority to act.

III. THE COLLAPSE OF IEEPA

Following the Supreme Court's ruling in *Learning Resources, Inc. v. Trump* and the administration's same-day pivot to Section 122, the central question that endures, is whether any of the remaining delegated tariff authorities—Sections 122, 301, 232, and 338—can bear the weight the administration is now placing on them, or whether the fractured concurrences leave meaningful room for the administration to maneuver. Second, whether the existing deals that were negotiated with foreign partners during the IEEPA period remain binding when the leverage that produced them has been ruled unlawful. Finally, how the refund mechanism for tariffs already collected under the invalidated IEEPA regime will operate, what that implies for the roughly 300,000 entities that paid those tariffs.

A. MAJORITY QUESTIONS DOCTRINE PLURALITY

Unlike the statutory holding which is the least contested part of the opinion, the Major Questions Doctrine extension to Presidential action commanded only three votes, and those three justices disagree among themselves about what the doctrine means. How courts are likely to apply MQD to Sections 122, 301, 232 and 338 depends on the alignment within the plurality and the positions of the six justices who did not join it, both of which require careful attention.

The plurality opinion contains what is arguably the most consequential holding for the analysis ahead; it explicitly rejects two exceptions that the dissent would have recognized. “There is no exception to the major questions doctrine for emergency statutes. Nor does the fact that tariffs implicate foreign affairs render the doctrine inapplicable.”⁴⁰ If those exceptions had been recognized, Section 122 (which is framed as responding to an international payments emergency) and Section 232 (which is framed in terms of national security) would each sit outside MQD's reach.

The plurality closed that door, but only with three votes. Whether the doors stays closed depend on whether a future case produces a fifth vote for the plurality's position. The administration's fallback tariff statutes will almost certainly be challenged in court, and those challenges will eventually reach the Supreme Court. The Court's reasoning thus does not treat the fallback statutes as constitutionally infirm on delegation grounds.

Deprived of IEEPA, the administration is now relying on a patchwork of alternative statutory authorities to reconstruct its

tariff wall.⁴¹ Each of the four available statutes contains the kind of express tariff language the *Learning Resources* majority demanded, and the Court itself treated at least two of them as paradigms of proper delegation.⁴² What's in question is whether the administration's use of each statute satisfies its specific preconditions, and whether that use can survive scrutiny.

a. Section 122 of the Trade Act of 1974

Section 122 authorizes the President to impose a temporary import surcharge of up to 15 percent for up to 150 days to address a “fundamental international payments problem,” including “large and serious United States balance-of-payments deficits.”⁴³ The administration invoked this authority on February 20, 2026, imposing a 10 percent surcharge effective February 24, later raised to 15 percent—the statutory maximum.⁴⁴ This is the only fallback statute the administration has actually used, and it faces the most immediate legal exposure.

Section 122 was drafted during the Nixon administration and enacted in 1974, when the United States was transitioning away from the fixed-exchange-rate system established at the Bretton Woods conference in 1944.⁴⁵ Under that system, a “balance-of-payment deficit” had a precise meaning referring to the outflow of gold and currency reserves that occurred when a country could not finance its international obligations at the fixed exchange rate.⁴⁶ Section 122 was as statutory response to exactly this kind of crisis; the drain on US gold reserves that led President Nixon to impose a 10 percent import surcharge in 1971 and to close the gold window, ending dollar-to-gold convertibility.⁴⁷

Under today's floating exchange rates, however, international accounts adjust automatically through currency movements.⁴⁸ The US Court of International Trade has stated that the balance of payments "always balances to zero" under the current system.⁴⁹ When a country runs a current-account deficit, private financial flows (such as foreign purchases of US assets) cover the difference, precluding the kind of reserve drain that Section 122 was designed to address.⁵⁰

Since the administration took office the dollar has depreciated modestly—roughly 9 percent in effective terms—but this is not an unusual fluctuation in the floating rate era.⁵¹ Economists attribute it primarily to the administration's own erratic tariff policies and its aggressive calls for Federal Reserve rate cuts, not to any fundamental weakness in the US ability to finance its current account.⁵² The administration's proclamation attempts to circumvent these objections by defining the "fundamental international payments problem" broadly, pointing to the \$1.2 trillion goods trade deficit, a negative primary income balance (the first since 1960), a current-account deficit of 4 percent of GDP, and a net international-investment position of negative 90 percent.⁵³ But a trade deficit is conceptually distinct from a balance-of-payments deficit—a fact that the Department of Justice itself concedes in the IEEPA appellate briefing.⁵⁴ Even the dissenting judges on the Federal Circuit who upheld the IEEPA tariffs concluded that Section 122 "does not apply to the problems underlying the reciprocal tariffs, which are not the payments problems that are the precondition to section 122's application."⁵⁵

It follows then, that under Barrett's contextual approach, the "most natural reading" of "fundamental international payments problem," informed by the 1974 context in which Congress enacted the statute, arguably does not reach the conditions the administration has invoked. The term was understood in 1974 to describe reserve drains under fixed exchanged rates. Neither trade deficits nor a negative net international-investment position seem to constitute the condition the statute contemplates.

Under Kagan's ordinary-tools approach, the same result follows from reading the statute text in its structural and historical context. A challenge framed in these terms could command six votes—Barrett's concurrence group plus Kagan's—without requiring any reliance on the MQD plurality. MQD would operate, at most, as a reinforcing ground: even if Section 122's text could plausibly bear the administration's reading, the plurality's clear-statement approach would require greater precision than the statute provides for an action of this "economic and political significance."⁵⁶

Beyond the merits, Section 122 carries a structural limitation that distinguishes it from every other fallback statute: 150-day clock. Tariffs imposed under the statute expire automatically unless extended by an Act of Congress.⁵⁷ Given that both chambers have already passed bills opposing the IEEPA tariffs, a congressional extension is unlikely and litigation will not produce a ruling before the tariffs lapse.⁵⁸ On the other hand, others may observe that companies seeking refunds of the illegally collected tariffs will need to establish their illegality in court regardless,

meaning litigation will outlast the statute even if the tariffs themselves do not.⁵⁹

b. Section 301 of the Trade Act of 1974

Section 301 authorizes the United States Trade Representative (USTR), acting on behalf of the President, to impose tariffs in response to foreign acts, policies, or practices that are "unreasonable or discriminatory and burden or restrict United States commerce."⁶⁰ Unlike Section 122, Section 301 is country-specific and requires a formal USTR investigation including public hearings, consultations with the affected country, and opportunities for comment before tariffs can be imposed.⁶¹ USTR Jamieson Greer announced investigations covering "most major trading partners" on a broad range of subjects, including industrial overcapacity, digital services taxes, drug pricing, agricultural subsidies, and ocean pollution.⁶² Section 301's legal vulnerability lies not in its statutory authorization, which expressly authorizes tariffs and has survived prior judicial review, but in its procedural requirements. The statute incorporates Administrative Procedure Act obligations that the administration has documented history of ignoring.⁶³ Reinsch predicts that Section 301 will be the administration's primary long-term tool, notwithstanding the risk of "losing in court over process fouls."⁶⁴ Using a statute that authorizes targeted retaliatory tariffs against specific unfair practices to impose broad, economy-wide duties raises precisely the kind of statutory mismatch that the *Learning Resources* plurality treated as a hallmark of major-questions concerns: an "agency's attempt to deploy an old statute focused on one problem to solve a new and different problem."⁶⁵ Wolff concludes that Section 301's investigation requirements

and country-specific design prevent it from reconstructing the across-the-board tariff wall that IEEPA supported.⁶⁶

c. Section 232 of the Trade Expansion of 1962

Section 232 authorizes the President to impose tariffs on imports that the Secretary of Commerce, in consultation with the Secretary of Defense, has determined “threaten to impair the national security.”⁶⁷ The statute requires a formal investigation and report before tariffs can be imposed, but it imposes no cap on the tariff and no time limit on their duration.⁶⁸

Federal courts have historically shown strong deference to the executive’s national-security determinations, and Reinsch predicts that judges will be “reluctant to second-guess the president on a national security determination.”⁶⁹ The administration has already used Section 232 extensively—existing tariffs cover steel, aluminum, copper, timber, and their derivative products at rates up to 50 percent—and is preparing additional sector-specific investigations.⁷⁰

The strength of Section 232, however, is also its primary source of doctrinal tension with *Learning Resources*. The plurality’s rejections of the foreign-affairs exception to MQD—“Nor does the fact that tariffs implicate foreign affairs render the doctrine inapplicable,”—was directed at IEEPA, but it applies with equal force to a statute whose entire rationale is national security.⁷¹ If the plurality’s position holds in a future case, Section 232 would face full MQD scrutiny whenever the administration uses it to impose tariffs of sufficient “economic and political significance.”⁷²

Further complications arise from stacking. The February 20 proclamation

provides that the Section 122 surcharge “shall not apply in addition to tariffs imposed under section 232”—meaning the two statutes are designed not to stack on the same product.⁷³ But if the administration imposes new Section 232 tariffs on products not previously covered, the combined effect of overlapping fallback authorities could produce aggregate rate exceeding the levels that prevailed under the IEEPA regime.⁷⁴

d. Section 338 of the Tariff Act of 1930

Section 338 authorizes the president to impose tariffs of up to 50 percent on the imports from countries that “discriminate in fact against the commerce of the United States.”⁷⁵ This statute has not been invoked in nearly a century, and its practical utility in the current environment is minimal, demanding proof that a foreign country treats Americans worse than it treats the commerce of other nations.⁷⁶

If invoked, the statute’s dormancy may have a strong argument that its long disuse makes its sudden deployment for broad, revenue-raising purposes precisely the kind of “unheralded power” the *Learning Resources* plurality identified as a hallmark of major-questions concern.⁷⁷ *Learning Resources* has shown that in IEEPA’s “half century of existence, no President has invoked the statute to impose any tariffs” and treating that “lack of historical precedent” as a “telling indication” that the tariffs exceeded the President’s “legitimate reach.”⁷⁸

IV. CONSEQUENCES

a. Refunds, Remedies, and the litigation Pipeline

The Supreme Court’s invalidation of the IEEPA tariffs has triggered what may

be the largest customs-refund proceeding in American history. Approximately 300,000 entities paid tariffs under the now-invalidated IEEPA regime, and well over 1,000 lawsuits are already pending.⁷⁹ Past precedent, particularly the Supreme Court’s invalidation of harbor-maintenance fees, established that companies are entitled to refunds with interest when tariffs are rules unlawful.⁸⁰ The uncertainty lies in the procedural mechanism: whether the government will process refunds automatically or force importers to file individual protests and pursue litigation through the Court of International Trade.⁸¹ There are also rumors that the administration may attempt to offer importers credits against future tariffs rather than cash refunds, an approach that might appeal to companies anticipating large ongoing tariff liabilities but would fail to make whole those whose importing activities have ceased or changed.⁸² Meanwhile, it remains unclear whether downstream consumers will ever see any recovery. FedEx announced it would pass refunds through to its customers, but it’s uncertain whether other companies will follow.⁸³

b. The Role of Congress

Tariffs remain broadly unpopular, 60% percents of Americans disapprove of them, including nearly a quarter of Republicans and three-quarters of independents.⁸⁴ Unless the 150-day clock on Section 122 tariffs expire or is extended by an Act of Congress, Section 122 tariffs put trade policy at a moment of considerable political exposure.⁸⁵ Especially just months before the 2026 midterm elections, where lawmakers will face a highly public vote.⁸⁶ This dynamic “require[s] members of the House and Senate to take responsibility for the votes they may well be

asked to case,”⁸⁷ Congressional Republicans face a choice between loyalty to the President’s trade agenda and responsiveness to public discontent over rising consumer costs.⁸⁸

c. International Law and Trade Agreements

The administration’s shift to Section 122 threatens to destabilize the network of bilateral trade agreements negotiated during the IEEPA period.⁸⁹ Because Section 122 authorizes across the board tariffs rather than country-specific rates, the new 15 percent surcharge applies uniformly regardless of any previously negotiated terms.⁹⁰ But this creates acute stacking problems.

Partners who negotiated tariff rates below 15 percent, including United Kingdom, Australia, Singapore, and several Latin American countries at 10 percent, now face higher effective rates than the IEEPA regime imposed.⁹¹ Stacking a 15 percent surcharge on top of existing most-favored-nation rates would also push EU tariffs above the level agreed in the July 2025 framework arrangement.⁹² Meanwhile, Southeast Asian partners whose prior deals clustered around 19 percent are relatively better off under the new 15 percent floor, and South Korea and Japan—having negotiated 15 percent rates—roughly break even.⁹³

The consequences are already materializing. The European Parliament has suspended consideration of the tariff-reduction commitments the European Commission made with the Trump administration in July 2025.⁹⁴ Other partners made concessions under the threat of tariffs that have now been ruled unlawful, giving them reason to revoke those concessions or slow-walk compliance.⁹⁵ Countries that have signed but not completed domestic ratification, as the European Union is doing,

have an opportunity to delay implementation while they reassess.⁹⁶ Most will proceed cautiously to avoid inviting retaliation, but the administration’s insistence that it considers existing agreements binding sits uneasily alongside the fact that the legal foundation for these agreements has been invalidated.⁹⁷

The bottom line, the post-*Learning Resources* tariff landscape is defined less by the tariffs rates themselves than by the uncertainty surrounding them. Countries, importers, and investors will move slowly, which means, that the administration’s goal of reshoring manufacturing “is moving further away, and companies adjust their supply chains at their peril.”⁹⁸

END NOTES

1. U.S. Const. art. I, § 8
2. *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 638 (2026).
3. *Id.* at 639.
4. *Id.* at 638.
5. *Id.* at 636.
6. *Id.*
7. *Id.*
8. Exec. Order No. 14257, 90 Fed. Reg. 15021 (Apr. 2, 2025).
9. Kimberly Clausing & Maurice Obstfeld, What the Supreme Court's Tariff Ruling Changes, and What It Doesn't, Peterson Institute for International Economics, (February 2026) <https://www.piie.com/blogs/realtime-economics/2026/what-supreme-courts-tariff-ruling-changes-and-what-it-doesnt>.
10. *Id.*
11. *Id.*
12. See Alan Wm. Wolff, Policy Brief No. 26-5: Can Trump keep his tariffs if the Supreme Court invalidates them?, Peterson Institute for International Economics 1, 4-6 (February 2026).
13. *Id.* at 7-8.
14. *Learning Res.*, 146 S. Ct. at 636.
15. *Id.*
16. *Id.*
17. *Id.* at 635.
18. *Id.* at 646.
19. *Id.* at 636-37.
20. See *Id.* at 646.
21. *Id.* at 638 (majority opinion).
22. *Id.* at 642-46 (majority opinion).
23. *Id.* at 644.
24. *Id.* at 638-39. (Roberts, J. opinion).
25. *Id.* at 642. (Roberts, J. opinion).
26. *Id.* at 646. (Roberts, J. opinion).
27. *Id.* at 646 (Gorsuch, J., concurring).
28. *Id.* at 647-72.
29. *Id.* at 672 (Barrett, J., concurring).
30. *Id.*
31. *Id.* at 673.
32. *Id.* at 675 (Kagan, J., concurring in part and concurring in judgement).
33. *Id.*
34. *Id.* at 676.
35. See *Id.* at 677-79. (Jackson, J., concurring in part and concurring in judgement).
36. *Id.* at 678.
37. *Id.* at 679.
38. *Id.* at 679-89 (Thomas, J., dissenting).
39. *Id.* at 689-723 (Kavanaugh, J., dissenting).
40. *Learning Res.*, 146 S. Ct. At 14-20.
41. See Alan Wm. Wolff, Policy Brief No. 26-5: Can Trump keep his tariffs if the Supreme Court invalidates them?, Peterson Institute for International Economics 1, 4-6 (February 2026).
42. *Learning Res.*, 146 S. Ct. at 8-9, 9 n.2.
43. 19 U.S.C. §2132(a).
44. The White House, Imposing a Temporary Import Surcharge to Address Fundamental International Payments Problems (Feb. 20, 2026) [hereinafter WH Proclamation].
45. See Brian Riley and Joe Bishop-Henchman, Are President Trump's New Section 122 Tariffs Legal?, Int'l Econ. L. and Policy Blog (February 24, 2026), <https://ielp.worldtradelaw.net/2026/02/guest-post-are-president-trumps-new-section-122-tariffs-legal/> [hereinafter IELP/Riley & Bishop-Henchman].
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Kimberly Clausing & Maurice Obstfeld, What the Supreme Court's Tariff Ruling Changes, and What It Doesn't, Peterson Inst. for Int'l Econ., (February 2026), <https://www.piie.com/blogs/realtime-economics/2026/what-supreme-courts-tariff-ruling-changes-and-what-it-doesnt> [hereinafter PIIE/Clausings & Obstfeld].
51. *Id.*
52. *Id.*
53. WH Proclamation, para. 7-11.
54. See IELP/Riley & Bishop-Henchman (quoting DOJ Reply Brief to the Federal Circuit: "Nor does [Section 122 have any obvious applications here, where the concerns the President identified . . . arise from trade deficits, which are conceptually distinct from balance-of-payments deficits]").
55. *Id.*
56. *Learning Res.*, 146 S. Ct. at 11.
57. 19 U.S.C. §2132(a); WH Proclamation (effective through July 23, 2026).
58. PIIE/Clausings & Obstfeld; Scott R. Anderson, Brookings experts on the Supreme Court's tariff decision, Brookings (Feb. 24, 2026), <https://www.brookings.edu/articles/brookings-experts-on-the-supreme-courts-tariff-decision/> [hereinafter Brookings/Anderson].
59. William Alan Reinsch, Cleaning Up the Mess, Center for Strategic & Int'l Stud. (Mar. 2, 2026), <https://www.csis.org/analysis/cleaning-mess> [hereinafter CSIS/Reinsch].
60. 19 U.S.C. §2411.
61. 19 U.S.C. §§412-2414; see PIIE/Wolff; see CSIS/Reinsch.
62. Mireya Solis, Asia's Unease About Trump's "Plan B" Tariffs", Brookings Commentary (Feb. 24, 2026), <https://www.brookings.edu/articles/brookings-experts-on-the-supreme-courts-tariff-decision/> [hereinafter Brookings/Solis]; Daniel S. Hamilton, The View on Tariffs from the EU, Brookings Commentary (Feb. 24, 2026), <https://www.brookings.edu/articles/brookings-experts-on-the-supreme-courts-tariff-decision/> [hereinafter Brookings/Hamilton].
63. IELP/Reinsch.
64. *Id.*
65. *Learning Res.*, 146 S. Ct. at 36 (quoting *West Virginia*, 597 U.S. at 747 (Gorsuch, J., concurring)) (cited in *Kavanaugh*, J. dissenting).
66. PIIE/Wolff.
67. 19 U.S.C. §1862(b), (c).
68. *Learning Res.*, 146 S. Ct. at 9 n.2; PIIE/Wolff.
69. CSIS/Reinsch.
70. Office of the United States Trade Representative, Presidential Tariff Actions, <https://ustr.gov/trade-topics/presidential-tariff-actions> [hereinafter USTR Inventory]; Brookings/Hamilton.
71. *Learning Res.*, 146 S.Ct. at 12.
72. *Id.*, at 11.
73. WH Proclamation, para. 4.
74. IELP/Reinsch; Brookings/Hamilton,
75. 19 U.S.C. §1338.
76. PIIE/Wolff.
77. *Learning Res.*, 146 S.Ct. at 10.
78. *Id.*
79. CSIS/Reinsch.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Sarah Binder, The Supreme Court's decision will also affect Congress, Brookings Commentary (Feb. 24, 2026), <https://www.brookings.edu/articles/brookings-experts-on-the-supreme-courts-tariff-decision/> [hereinafter Brookings/Binder].
85. 19 U.S.C. §2132(a).
86. Brookings/Binder; William A. Galston, What the Supreme Court's Decision Means for American Democracy, Brookings Commentary (Feb. 24, 2026), <https://www.brookings.edu/articles/brookings-experts-on-the-supreme-courts-tariff-decision/> [hereinafter Brookings/Galston].
87. Brookings/Galston.
88. Brookings, Binder.
89. USTR Inventory.
90. PIIE/Clausings & Obstfeld.
91. CSIS/Reinsch.
92. *Id.*; Brookings/Hamilton.
93. Mira Rapp-Hooper, Open Questions in the Indo-Pacific, Brookings Commentary (Feb. 24, 2026), <https://www.brookings.edu/articles/brookings-experts-on-the-supreme-courts-tariff-decision/> [hereinafter Brookings/Rapp-Hooper].
94. Brookings/Hamilton.
95. CSIS/Reinsch.
96. *Id.*
97. *Id.*
98. *Id.*

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