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Articles

Book Review

International Simulated Negotiation Competition: Challenges, Causes and Strategies

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Abstract: International simulated negotiation competitions, as an emerging form of legal education, impose high demands on participants' interdisciplinary integration, dynamic negotiation skills, and team collaboration. Drawing on the authors' experience in the Fourth Belt and Road Practical Simulated Negotiation International Competition, this paper identifies five core qualities: interdisciplinary and multi-dimensional knowledge, handling dynamic negotiation situations, language proficiency and cultural communication, seeking flexible solutions within established rules, team collaboration and coordination. For students, it is difficult to fully possess these qualities because of compartmentalized knowledge, inability to execute strategy effectively, lack of international experiential learning, psychological stress, and trust deficits. In response, the authors propose a multi-tier strategy: establishing interdisciplinary coordination and incentive mechanisms at the institutional level; implementing a four-dimensional capability assessment system in selection; enhancing simulation training with complexity and dynamism; building a dual-track faculty system integrating theory and practice; and strengthening psychological and ethical training. This framework offers a replicable model for competing universities to enhance their competitiveness in international negotiation competitions.

Keywords: International Simulated Negotiation Competition; Legal Education; Moot Court Competition; the Belt and Road Initiative

1. Introduction

Traditional moot court competitions have long been a staple of legal education, training students in adversarial advocacy and doctrinal rigor through structured formats such as the Jessup or Vis Moot.[2] In contrast, international simulated negotiation competitions represent a paradigm shift, emphasizing consensus-building across diverse stakeholders in settings where legal, political, economic, and cultural factors intersect. These competitions simulate real-world negotiation environments, such as those under the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (hereinafter referred to as the Belt and Road Initiative), where success depends not on legal victory but on crafting mutually beneficial solutions.

For competing universities, however, participation poses significant challenges:

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[2] See Rebecca Spitzmiller, *The Phillip C Jessup International Law Moot Court Competition: A Tool For Teaching/ Learning Legal English*, 3(2) European Journal of Legal Education 111, 111-119 (2006).

limited resources, faculty expertise, and student exposure to multilingual, multicultural settings hinder effective preparation.[3] This paper draws on the experience of a team from Shanghai University of Political Science and Law in the Fourth Belt and Road Initiative Simulation Competition—a diverse cohort facing elite opponents. Through a reflective analysis of their journey to the finals, this study moves beyond descriptive accounts to offer a structured framework for building interdisciplinary competence, institutional capacity, and curricular innovation. It argues that simulated negotiations serve as transformative pedagogical tools, equipping students with the pragmatic, collaborative skills essential for global legal practice.

Notably, existing legal education research has paid insufficient attention to non-adversarial, consensus-building practical teaching models like simulated negotiations.[4] Most negotiation theories are rooted in Western cultural and institutional contexts,[5] whose applicability in the culturally diverse the Belt and Road Initiative context remains underexplored and questionable. This study addresses these gaps by constructing a context-adapted analytical framework and strategic system, enriching the theoretical and practical landscape of international negotiation education.

2. Qualities and Skills Required for the Competition

International simulated negotiation is highly practical, closely replicating real international negotiation scenarios.[6] Thus, it requires not only legal knowledge but also expertise in international negotiation, diplomacy, and even finance. Additionally, skills such as language proficiency and etiquette are key to performance.[7] During preparation, team members faced challenges in five aspects: Interdisciplinary, practicality, language, flexibility, and collaboration.

2.1 Interdisciplinary and Multi-dimensional Knowledge

From the perspective of the team, composed entirely of law students, one of the most distinctive features of this competition, compared with traditional moot court exercises, lies in the fact that the problem is deeply embedded in the complex context of multilateral political negotiations. Moot courts generally confine participants to a highly formalized legal setting, where disputes are narrowly framed as issues of statutory interpretation or the application of codified law.[8] By contrast, this competition extends far beyond that familiar legal terrain. During the preparation, the authors observed that although the problem does contain legal issues, their resolution does not rely exclusively on statutes or judicial precedent. Rather, it draws more

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[3] See Christopher Honeyman, James Coben & Noam Ebner *et al., Assessing negotiation competitions*, *Assessing Our Students, Assessing Ourselv*es, https://digitalcommons.hamline.edu/dri_press/4/ (accessed on December 1, 2025).

[4] See Pauline Collins, *Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-adversarial Practice*, 23(3) Australasian Dispute Resolution Journal 205, 206-215 (2012).

[5] See Michele Gelfand & Naomi Dyer, *A Cultural Perspective on Negotiation: Progress, Pitfalls, and Prospects*, 49(1) Applied Psychology 62, 62-99 (2000).

[6] See Kaufman J., *Using Simulation as a Tool to Teach about International Negotiation*, 28(1) International Negotiation 59, 59-75 (1998).

[7] See Xiao Pan, Xiaoyu Luo & Shawn P. Daly, *Language Skills in Business Negotiation from the Perspective of Adaptation*, 2(4) International Journal of Multidisciplinary and Current Educational Research 181, 181-187 (2020).

[8] See Ronald A. Brand, *Building on the Bergsten Legacy: The Vis Moot as a Platform for Legal Education*, 34(1) Journal of Law and Commerce 17, 17-21 (2016).

heavily on a plurality of normative frameworks, including treaties, conventions, policy guidelines, technical standards, and mechanisms of soft law governance. For instance, the Belt and Road Initiative, Environmental Impact Assessment mechanisms, relevant provisions of the Convention on Biological Diversity, as well as regional free trade agreements provide an essential institutional background. These frameworks do not operate in a purely legal vacuum; they embody broader political choices, economic priorities, and developmental strategies. In practice, negotiators must weigh competing values such as investment security, environmental sustainability, and regional integration, which cannot be resolved by reference to black-letter law alone.[9]

This implies that law students do not necessarily enjoy a natural disciplinary advantage. Even with a solid command of legal provisions, participants must be able to transcend disciplinary boundaries and grasp economic and political rationales in order to develop workable negotiation strategies. Accordingly, the competition presupposes that participants possess an interdisciplinary and multidimensional knowledge base.[10] To be specific, negotiators need to possess not only in-depth professional knowledge but also a broad understanding of various disciplines, including international law, international relations, economics, politics, and history.[11] As such, negotiators are required to cultivate cognitive flexibility and the ability to synthesize diverse knowledge streams to address complex, real-world negotiation scenarios.[12]

This also underscores the competition's broader practical significance. In real-world international affairs, law never operates in isolation; it is constantly intertwined with economic interests, political strategies, and social policies.[13] By situating participants within an interdisciplinary setting, the simulation breaks away from the confines of a single disciplinary framework and inspires participants to integrate diverse knowledge resources. In practice, legal reasoning must be contextualized within broader geopolitical and economic realities. As a recent study demonstrates, interdisciplinary simulations—such as those replicating EU–U.S. trade negotiations—enable students to place specific legal issues within a global context and thereby cultivate deeper, holistic understanding.[14]

2.2 Handling Dynamic Negotiation Situations

The essence of negotiation lies in the exchange of information, where participants gradually disclose and acquire critical knowledge through questions and responses in order to compensate for their own limited perspectives and thereby advance the bargaining process.[15] In international moot negotiation competitions, this

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[9] See Jay Mitchell, *Whiteboard and Black-Letter: Visual Communication in Commercial Contracts*, 20(4) University of Pennsylvania Journal of Business Law 805, 815-862 (2017).

[10] See Helen Drury, *Knowledge Building: How Interdisciplinary Understandings are Realised in Team Negotiation*, 41(2) Australian Review of Applied Linguistics 157, 157-184 (2018).

[11] See Charles Craver, *What Makes a Great Legal Negotiator?*, 56(1) Loyola Law Review 101, 101-337 (2010).

[12] See Moti Nissani, *Fruits, Salads, and Smoothies, A Working Definition of Interdisciplinarity,* 29(2) Journal of Educational Thought 121, 121-128 (1995).

[13] See Jeanne M. Brett, *Culture and Negotiation Strategy*, 9(1) Handbook of Advances in Culture and Psychology 245, 245-290 (2022).

[14] See Mark T. Nance, Gabriele Suder & Abigail Hall, *Negotiating the Transatlantic Relationship: An International, Interdisciplinary Simulation of a Real-World Negotiation*, 49(2) Political Science and Politics 335, 335-338 (2016).

[15] See Helmut Crott, Egon Kayser & Helmut Lamn, *The Effects of Information Exchange and Communication in an Asymmetrical Negotiation Situation*, 10(2) European Journal of Social Psychology 149, 149-163 (1980).

characteristic is faithfully reproduced. For instance, in the present competition, parties' positions were determined by lot prior to the session, with each side possessing independent and confidential information inaccessible to the other three parties. Such an asymmetric information design mirrors real-world multilateral negotiations, where states or organizations typically withhold certain policy bottom lines or red lines, which only become apparent through interaction and strategic bargaining.[16]

In circumstances where the positions of other parties remain unclear and negotiation thresholds cannot be known in advance, participants must demonstrate strong adaptability and dynamic adjustment skills. While the preparation stage may involve brainstorming and scenario planning to anticipate possible developments, the complexity of actual negotiations requires adaptability and situational awareness.[17] Situations within negotiations can evolve rapidly, requiring individuals and teams to adjust their strategies and tactics accordingly.[18]

Consequently, participants are required to operate under conditions of "bounded rationality," meaning that negotiators cannot always achieve fully optimal solutions given limited time and incomplete information.[19] Instead, they must rely on satisfactory and adaptive decision-making processes.[20] In practice, this entails the ability to interpret evolving signals from counterparts, integrate new information in real time, and adjust argumentative strategies accordingly. As recent negotiation scholarship highlights, the process should not be viewed as a one-time presentation of predetermined claims but rather as a dynamic and interactive exchange where flexibility, adaptation, and continuous recalibration are essential.[21]

2.3 Language Proficiency and Cultural Communication

A high degree of proficiency in the working language of the competition, typically English, is a definite prerequisite. This proficiency must be multi-faceted, including not only speaking and comprehension but also advanced reading and writing skills for drafting complex legal documents like resolutions.[22]

In negotiation simulations, the language burden becomes even more pronounced due to the dual demands of legal English and negotiation-specific communication. Participants must not only speak clearly and accurately but also demonstrate mastery of specialized terminology, subtle phrasing, and rhetorical strategies appropriate for high-stakes legal discourse. The ability to articulate a legal position in a way that is both convincing and culturally sensitive requires a nuanced command of language that

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[16] See Bernardo S. Silveira, *Bargaining with Asymmetric Information: An Empirical Study of Plea Negotiations*, 85(2) Econometrica 419, 419-452 (2017).

[17] See Chin-Yueh Chou, K. Rorbert Lai & Po-Yao Chao *et al*., *Negotiation Based Adaptive Learning Sequences: Combining Adaptivity and Adaptability*, 88(2) Computers & Education 215, 215-226 (2015).

[18] See Henrike Heunis, Niels J. Pulles & Ellen Giebels *et al*., *Strategic Adaptability in Negotiation: a Framework to Distinguish Strategic Adaptable Behaviors*, 35(2) International Journal of Conflict Management 245, 245-269 (2024).

[19] See Filipa Figueira & Benjamin Martill, *Bounded Rationality and the Brexit Negotiations: Why Britain Failed to Understand the EU*, 28(2) Journal of European Public Policy 1, 1-19 (2020).

[20] See Gerd Gigerenzer & Reinhard Selten, *Bounded Rationality, The Adaptive Toolbox (New Edition),* MIT Press, pp. 37-50 (2001).

[21] See Jared R. Curhan & Gavin J. Kilduff, *Getting Ahead of the Curve: Dynamic Adaptation in Negotiation Processes*, 15(2) Academy of Management Annals 523, 523-555 (2021).

[22] See John J. Gumperz, *Language, Communication, and Public Negotiation, in Anthropology and the Public Interest*, Academic Press, pp. 273-292 (1976).

goes far beyond conversational fluency.[23] For instance, the necessity to convey firmness in a party's stance without appearing aggressive, or to respond diplomatically to unexpected objections while maintaining credibility, requires high-level linguistic dexterity and quick thinking. Some researcher also referred to this as Cultural Intelligence.[24]

Moreover, these simulations often ban the use of electronic devices, which removes access to real-time translation tools, legal databases, or even simple vocabulary aids. Participants are limited to printed materials, demanding a deep familiarity with both the facts of the case and the legal issues involved. This restriction significantly raises the stakes: competitors must internalize legal concepts, remember key clauses and arguments, and anticipate counterpoints—all without digital support.

Spontaneity is another major challenge. During simulated negotiation sessions, teams must respond immediately to new developments, or shifting strategies from opposing counsel. This tests not just their legal knowledge, but also their capacity to think critically and respond persuasively under pressure—all in a second language.[25] For many, the stress of performing in English, combined with the pressure to advocate effectively for their client, magnifies the cognitive load. As such, mastering both the language and the simulation format becomes a defining factor in a team's success, especially for students from non-native English backgrounds.

2.4 Seeking Flexible Solutions within Established Rules

This negotiation simulation was structured around multiple distinct segments and a variety of document formats—including agreements, draft and final resolutions, and press statements—which collectively placed a premium on participants' ability to adapt flexibly to the competition's schedule and the evolving logic of multilateral mechanisms. However, the ad hoc negotiation was designed to offer flexibility within a procedure based on the equal distribution of allocated time, as well as speaking and listening opportunities in this negotiation, which upheld both fairness and adaptability. The segments required teams not only to draft legally sound documents, but also to shift seamlessly between roles and formats, all while conforming to implicit and explicit timing cues. Navigating this complexity tested more than legal knowledge; it demanded a deep understanding of procedural dynamics and operational fluency.[26]

Equally central to scoring was participants' grasp of procedural rules. The adjudicators evaluated each team's ability to invoke, interpret, and apply procedural stipulations—whether referring to deadlines, amendment windows, or points of order—without disrupting the flow of simulations. As the negotiation elements became more varied and fluid, the degree of procedural uncertainty escalated. This

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[23] See Prawiraharja Cahya & Dwi Aryanti Semnani, *Navigating Cross-Cultural Communication in International Business Negotiations: Insights and Strategies for Effective Negotiation Outcomes*, 3(2) Kampret Journal 72, 72-79 (2024).

[24] See Darla K Deardorff, *Identification and Assessment of Intercultural Competence as a Student Outcome of Internationalization*, 10(1) Journal of Studies in International Education 241, 241-266 (2006).

[25] See Ahmed Elfatatry & Paul J. Layzell, *A Negotiation Description Language,* 35(4) Software: Practice and Experience 323, 323-343 (2005).

[26] See Boris I. Khasan & Issaack M. Yustus, *Mass and Individual: Organized Conflict Against Spontaneity*, 11(2) Journal of Siberian Federal University, Humanities & Social Sciences 233, 233-242 (2018).

aligns with the framework proposed by Schauer, Majer, and Trötschel (2023),[27] who describe how negotiations can be affected by multiple layers of uncertainty—such as issue-based, strategy-based, and context-based uncertainty—which in turn create psychological stress and impair decision-making. But modular solutions can help cope with such situation when teams can structure a resolution with protocols or annexes that allow states to opt-in to certain provisions, breaking a monolithic "all-or-nothing" deadlock.[28]

For participants, simulated negotiations challenge time management, information integration, and collaborative communication.[29] While negotiation competitions typically do not mandate formal preparations (e.g., business cards or project proposals), many teams choose to include such elements, which often impress judges. From a practical perspective, however, this practice raises fairness concerns, as these requirements are not stipulated in the rules and may not even apply in real negotiations. Catering solely to judges' preferences for higher scores risks deviating from the competition's original purpose.

Although the competition doesn't require optional add-ons like business cards or external project proposals, many teams opt to produce them. While such extras can sway judges positively, they also risk creating unfairness: these embellishments are neither required by the rules nor reflective of real-world practice. Over-investing in judge-pleasing formality can thus undermine the competition's educational intent—teaching procedural mastery and substantive advocacy under uncertainty—by rewarding superficial presentation over strategic substance.

2.5 Team Collaboration and Coordination

Each team comprised nine members with only three of them participating in each oral negotiation, necessitating careful planning of time nodes and task allocation during preparation. The division of labor among on-stage members was equally critical—whether assigned by issue or by opposing party required deliberate consideration. Coordination and collaboration among on-stage members were also key evaluation factors. Studies have shown that team loyalty, acceptance of team leadership, and members' initiative in handling opinions all influence the negotiation process.[30] However, most teams formed by universities consist of students selected solely through individual selections rather than group interview, often lacking familiarity and demonstrating strong independence. Many universities even do not designate a team leader; consequently, differing opinions may be rejected without democratic discussion, or contradictory solutions may go unaddressed, severely affecting negotiation preparation efficiency and strategy formulation.[31]

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[27] See Macro Schauer, Johann Majer & Roman Trötschel, *Nine Degrees of Uncertainty in Negotiations,* 39(2) Negotiation Journal 207, 207-228 (2023).

[28] See Theunis Kotzé, *New Perspectives for the Making of Space Law: UNIDROIT's Cape Town Approach Compared with Traditional UNCOPUOS Law-Making,* 48(1) South African Yearbook of International Law 54, 54 (2023).

[29] See Joshua Fisher & Beth Fisher-Yoshida, *Educating Negotiators: Using Theory, Practice, Case Studies, and Simulations in an Integrated Learning Experience*, 10(4) Negotiation and Conflict Management Research 1, 1-15 (2017).

[30] See Minyoung Choi & Jae-Suk Yang, *Exploring the Complexities of Negotiation: Strategies for Successful Intra- and Inter-Team Negotiation in Organizations*, 27(3) Journal of Artificial Societies and Social Simulation 4, 4 (2024).

[31] See Victor Sanchez-Anguix, Reyhan Aydogan & Vicente Julián *et al*., *Unanimously Acceptable Agreements for Negotiation Teams in Unpredictable Domains*, 13(1) Electronic Commerce Research and Applications 4, 243-265 (2014).

Negotiation competitions differ from traditional moot court competitions in their emphasis on adversariality and persuasiveness, whereas moot courts prioritize knowledge accumulation and language expression.[32] This distinction was evident during preparation: moot court teams typically conduct comprehensive legal research and draft response scripts, while negotiation teams frequently engage in confrontation training. Off-stage members must fully exchange ideas and engage in ideological clashes with on-stage members to cultivate appropriate in-match reactions. However, as noted by Omar K. Sabri (2025), task-related conflicts may escalate into relational conflicts, which hinder negotiation preparation.[33]

If unaddressed, this drift from healthy intellectual challenge into toxic friction can paralyze teams. When energy shifts from refining strategy to navigating interpersonal tension, focus dilutes, and psychological safety erodes. This compromises not only preparation efficiency but also in-match cohesion—leading to contradictory proposals or fragmented advocacy in front of judges.

In sum, successful negotiating teams must navigate complex coordination challenges: allocating roles among a larger squad, choosing effective division strategies, fostering internal trust and leadership acceptance, and managing conflict to prevent it from undermining preparation. Only by balancing structured collaboration with healthy debate can teams present unified, persuasive advocacy under pressure.

3. Analysis of Internal Causes for Challenge Formation

Behind the five major requirements of "interdisciplinarity, practicality, language, flexibility, and collaboration" lie difficulty in applying law strategically, weakness in executing strategies, lack of international practical experience, psychological stress barriers, and mutual trust deficits. These causes have become key factors that competing universities need to overcome.

3.1 Difficulty in Applying Law Strategically under Interdisciplinary

A deficiency in interdisciplinary perspectives often constrains and narrows the legal reasoning process when determining applicable laws. The Fourth Belt and Road Initiative Simulation Competition case covers multi-dimensional issues such as investment, geopolitical strategy, labor rights, indigenous protection, and environmental assessment, deriving from fields like public policy, regional governance, and diplomatic compromise. Their resolution often relies on soft law frameworks such as treaties, conventions, and policy guidelines rather than single domestic laws. This means that law is but one of several dynamic forces at play in a negotiation. Participants face difficulties in the breadth of knowledge structure and contextual switching ability, rather than the depth of legal application alone. Team members must quickly familiarize themselves with multiple norms, including the Belt and Road Initiative, Environmental Impact Assessment mechanisms, core conventions of the International Labour Organization, regional free trade agreements, biodiversity conventions, and corporate governance, and abstract them into negotiation strategy language. This reveals a crucial competency for an effective negotiator: the ability to dynamically identify, prioritize, and integrate the relevant frameworks—from a vast

[32] See Hamzeh Abu Issa, Thair Kaddumi & Naji Alwerikat, *The Impact of Moot Courts on the Quality of Legal Education: Students of the Faculty of Law at the Applied Science Private University as a Model*, 23(19) Journal of Higher Education Theory and Practice 266, 266-270 (2023).

[33] See Omar K. Sabri, *Strategic Negotiation in Construction Disputes: Overcoming Power Imbalances and Enhancing Resolution Through Structured Approaches*, 11(1) Frontiers in Built Environment 1, 1-9 (2025).

and uncertain landscape.

This predicament reflects that participants essentially still adhere to the position-based or legal-based debate methods inherent in traditional moot court competitions. This method involves arguing over fixed, hard-and-fast positions. In contrast, the most effective modern negotiation theory emphasizes a move beyond these fixed positions to discover underlying "interests"—the basic needs, wants, and motivations of the parties involved.[34] This approach, known as "principled negotiation" or "interest-based bargaining," involves four key elements: separating the people from the problem, focusing on interests rather than positions, inventing options for mutual gain, and insisting on the use of objective criteria.[35] The competition's multi-dimensional case, which encompassed issues of investment, geopolitics, labor rights, and environmental assessment, inherently demanded this interest-based approach. The complexity of the issues, which touched upon public policy, regional governance, and diplomatic compromise, compelled participants to move beyond arguing over a single legal position and instead abstract diverse normative claims into a coherent, multi-faceted negotiation strategy. This transition from a single-disciplinary perspective to a cross-disciplinary one represents a significant cognitive leap required for effective negotiation.[36]

Unlike domestic legal systems, which possess a centralized legislative body and a unified, hierarchical court system, international law lacks a single authority to dictate a clear hierarchy of rules. Its sources are often plural and non-hierarchical, drawn from treaties, customary international law, and general principles. This inherent structural reality means that a negotiator must become adept at navigating an environment where the hierarchy of rules is not given but is, in fact, a subject of negotiation and strategic assertion.[37] From a more advanced perspective, the absence of a "closed set of legal authorities" is the very condition that allows a negotiator to act as an active role, who strategically identifies, synthesizes, and frames legal principles to create negotiating power. As Nancy S. Kim pointed out, this dynamic role is in stark contrast to the passive search for a definitive rule. A superior understanding of the "background law"—the substantive law that governs the subject matter of a dispute—confers a significant strategic advantage. This advantage is known as "knowledge power".[38] All team members were experienced participants in conventional moot court competitions. The participants' previous experience in conventional moot courts provided them with "knowledge power" in a highly specific, predefined legal context. However, when confronted with a different and more complex type of "background law"—a web of soft law, international conventions, and domestic regulations—their existing "knowledge power" was rendered less relevant. The participants' "struggle" was thus a direct result of their existing expertise being less applicable in this new context. The competition is a realistic test of whether they could adapt and build a new form of "knowledge power" by undertaking the rigorous

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[34] See Anne L. Lytle, Jeanne M. Brett & Debra L. Shapiro, *The Strategic Use of Interests, Rights, and Power to Resolve Disputes*, 15(1) Negotiation Journal 31, 31-51 (1999).

[35] See Boniface Michael & Rashmi Michael, *Interest-Based Bargaining: Efficient, Amicable and Wise?*, 35(5) Employee Relations 460, 460-478 (2013).

[36] See Katie Shonk, *Principled Negotiation: Focus on Interests to Create Value*, https://www.pon.harvard.edu/daily/negotiation-skills-daily/principled-negotiation-focus-interests-create-value/ (access on June 18, 2025).

[37] See Edward W. Miles, *Developing Strategies for Asking Questions in Negotiation*, 29(4) Negotiation Journal 383, 383-412 (2013).

[38] See Nancy S. Kim, *Bargaining Power and Background Law*, 12(1) Vanderbilt Journal of Entertainment and Technology Law 93, 93-113 (2009).

task of identifying a "wide range of legal principles from diverse jurisdictions or theoretical frameworks".[39] The objective was not to find the right answer but to construct a resilient, adaptive argumentative structure capable of responding to a fluid legal landscape.[40]

This legal indeterminacy also introduced a high level of strategic unpredictability. Given that opposing teams might draw on a wide range of legal principles from diverse jurisdictions or theoretical frameworks, forecasting their arguments proved exceptionally difficult. As a result, conventional modes of preparation were inadequate under such circumstance. The team was compelled to go beyond typical research and drafting routines, undertaking intensive scenario planning and simulated argument mapping. The goal was to anticipate, as fully as possible, the range of potential legal sources and argumentative approaches that other teams might employ. Only by doing so could the participants construct a more resilient, adaptive argumentative structure capable of responding to the open-ended legal landscape presented by the competition. This shift required both greater analytical agility and deeper interdisciplinary integration to ensure that the team remained responsive and persuasive in the face of a highly fluid legal environment.

3.2 Weakness in Executing Strategies

The competition arrangement includes confidential information held by each party before the match, which is invisible and prohibited from disclosure to others, highly simulating the information asymmetry in international negotiations. This design creates a structural dilemma: with opaque role positions and undisclosed minimum demands, participants must form provisional hypotheses about other parties' intentions and interests, develop appropriate tactical strategies, then progressively probe, test, and revise those strategies through dynamic interaction. This delayed-revelation mechanism not only heightens uncertainty in the negotiation, but also puts forward higher requirements for competitors to implement the established strategies.

Heunis *et al.* (2023) proposed that information asymmetry not only causes cognitive delays but also significantly affects the coherence of strategies and semantic structures: new issues or stances suddenly raised by one party disrupt the original speaking logic and order, forcing the other party to respond immediately and switch gears without prior preparation.[41] Studies have shown that in an incomplete information structure, "strategic adaptability"—the ability to continuously reconstruct positions and adjust goals based on negotiation process clues—is key to successful consultation.[42] Liu and Carter (2022) used game theory models to demonstrate how to design dynamic adjustment strategies in information-asymmetric environments to improve decision-making stability and negotiation efficiency.[43] Additionally, Zhou (2022) analyzed that the uncertainty of issue logic leads to "context disintegration" in the negotiation process, where statements lose their pre-established logical

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[39] *Ibid.*

[40] See Noa Nelson, Rotem Shacham & Rachel Ben-Ari, *Trait Negotiation Resilience: A Measurable Construct of Resilience in Challenging Mixed-Interest Interactions*, 88(1) Personality and Individual Differences, 209-218 (2016).

[41] *Supra* note 18.

[42] *Supra* note 18.

[43] See Frank Bodendorf, Barbara Hollweck & Jörg Franke, *Information Asymmetry in Business-to-Business Negotiations: A Game Theoretical Approach to Support Purchasing Decisions with Suppliers*, 31(3) Group Decision and Negotiation 723, 723-724 (2022).

relationships and become passively responsive reconstructions.[44] Evidently, the dynamic nature of negotiations and structural opacity form a closed-loop dilemma: lack of information makes stance prediction difficult, leading to unstable strategies and distorted expressions, which in turn exacerbate information concealment. Within the highly compressed competition time, this closed-loop dilemma severely hinder.

3.3 Lack of International Practical Experience

In international simulated negotiations, language serves as both a communication medium and a means to understand culture. However, for Chinese participants, English is not frequently used in daily life; many students avoid engaging with English altogether outside of exams. As a result, English remains an academic "course" rather than a practical "tool" for some Chinese students. However, the master of second language requires multidimensional experience from the perspectives of linguistics, psychology, and neuroscience.[45] Besides, international simulated negotiation competitions mandate English as the sole language of communication, imposing high expressive demands on non-native speakers. Participants must not only use professional legal and negotiation English to convey positions, improvise responses, and resolve disputes but also balance assertiveness with cultural empathy during communication—a significant challenge to both language proficiency and cross-cultural communication skills.

The distribution of international practice resources in China demonstrates regional variation, which has implications for student preparation in this competition. Prior research indicates that international exposure opportunities are often unevenly distributed due to structural and locational factors in higher education.[46] Universities in metropolitan areas—such as Beijing, Shanghai, Guangzhou, and Shenzhen—tend to maintain broader networks with overseas institutions and host more frequent international activities. Students in these cities may engage more regularly in exchanges, English-medium courses, or interactions with international peers, which collectively enhance cross-cultural competence. In contrast, universities in other regions typically operate with more limited international partnerships and programs.These differences extend to practical engagement, including internships with international organizations and participation in global academic forums, which are more concentrated in metropolitan centers. For students outside these hubs, access is often mediated through online channels or occasional projects.

From the perspective of university resources, even in the Yangtze River Delta region—a relatively advanced area in terms of educational development—there are noticeable disparities in international platforms and opportunities among institutions. For example, only Shanghai University of Political Science and Law possesses the platform called China National Institute for Shanghai Cooperation Organisation International Exchange and Judicial Cooperation, which provides students with systematic and regular access to international internships and study programs. This significantly enhances their practical exposure to global affairs. In contrast, students from many other universities often lack similar platforms and structured mechanisms for international engagement. As a result, when preparing for highly realistic

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[44] *Supra* note 4.

[45] See Xiaojun Lu & Yang Jing, *Second Language Embodiment of Action Verbs: the Impact of Bilingual Experience as a Multidimensional Spectrum,* 28(4) Bilingualism: Language and Cognition 1117, 1117-1133 (2025).

[46] See F. Huang, *The Internationalization of Higher Education in China: Institutional Diversity and Regional Variation,* 75(3) Higher Education Quarterly 361, 361-378 (2021).

international competitions such as The Fourth Belt and Road Initiative Simulation Competition they frequently encounter difficulties due to insufficient hands-on experience. Without adequate training in real-world cross-border negotiation scenarios, intercultural communication, and practice aligned with international norms, these students often struggle with inadequate preparation and poor on-the-spot responsiveness during simulated negotiations. Thus, the imbalance in international resources among universities constitutes a major constraint on the development of students' practical competencies.[47]

3.4 Psychological Barriers Arising from Procedural Rules

Procedural restrictions in simulated negotiation competitions substantially constrain participants' room for maneuver. However, when these rules are open-ended or ambiguous, they often become potential psychological barriers. At the cognitive level, open procedural rules leave negotiators without a clear framework for strategic choices, priority setting, and information filtering, which leads to cognitive overload and decision fatigue. Research has shown that when individuals face multiple options without clear boundaries, they are more likely to experience "choice overload," manifesting as hesitation, anxiety, or even avoidance[48]. At the emotional level, the uncertainty embedded in procedural rules heightens negotiators' sensitivity to mistakes and perceptions of unfairness, creating a psychological "high-pressure environment." Over time, this results in emotional exhaustion, decreased subjective satisfaction, and even negative attitudes toward the negotiation process itself.[49] At the social interaction level, open-ended procedures frequently require negotiators to continually define their own role boundaries and adjust modes of collaboration. This process easily triggers role conflict and a sense of "expanded responsibility," thereby producing psychological impediments in negotiation.[50]

The specificity of competition rules and on-site contexts easily triggers negative emotional states such as anxiety among participants. Tversky and Kahneman (1991) found in their research that the inherent uncertainties of competitive contexts—including but not limited to the unpredictability of opponents' strategies and the subjectivity of judges' evaluation criteria—activate participants' loss aversion psychology, which significantly increases their reliance on procedural rules.[51] Schlenker and Leary (1982) similarly argued that the public performance nature unique to simulated negotiations easily induces "social evaluation anxiety," which may further suppress participants' on-site improvisation.[52] Notably, these two psychological mechanisms do not act independently but form a reinforcing cycle

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[47] See Rafis Abazov, *Will the Shanghai Cooperation Organization Reconfigure Regional Educational Cooperation?* https://www.cacianalyst.org/publications/analytical-articles/item/13814-will-the-shanghai-cooperation-organization-reconfigure-regional-educational-cooperation.html? (accessd on June 18, 2025).

[48] See Emma Russell, Lynne Millward Purvis & Adrian Banks, *Describing the Srategies Used for Dealing with Email Interruptions According to Different Situational Parameters*, 23(4) Computers in Human Behavior 1820, 1820-1837 (2007).

[49] See Jared R. Curhan, Hillary Anger Elfenbein & Heng Xu, *What do People Value When They Negotiate?,* 91(3) Journal of Personality and Social Psychology 493, 493-512 (2006).

[50] See McPherson Frantz, C., & Janoff-Bulman, R., *Considering Both Sides: The Limits of Perspective Taking,* 22(1) Basic and Applied Social Psychology 31, 31-42 (2000).

[51] See Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106(4) The Quarterly Journal of Economics 1039, 1039-1061 (1991).

[52] See Barry R. Schlenker & Mark Leary, *Social Anxiety and Self-Presentation: A Conceptualization and Model*, 92(3) Psychological Bulletin 641, 641-669 (1982).

through a "anxiety-avoidance-conformity" chain reaction: initial competition anxiety prompts participants to seek procedural guarantees, and procedural dependency behaviors trigger group imitation due to their apparent "security", ultimately leading to the homogenization of strategic choices across the entire participant pool.

These ambiguity-driven dynamics translate into layered constraints on strategy and performance. Individually, participants struggle to structure substantive issues and channel attention, defaulting to perceived-safe procedural scripts rather than innovation. At the team level, decision making becomes conservative, crowding out novel proposals from the agenda. At the tournament level, innovation is systemically curtailed: even when participants value originality, procedural legitimacy—as inferred from ambiguous norms—takes priority. The root cause is a design shortfall: competition architecture leaves guidance gaps (unclear templates, decision rights, and rubrics) that, combined with the above psychological mechanisms, repeatedly crowd out innovation.

Conventional moot court competitions are typically built upon a strictly binary adversarial structure. In such formats, both sides engage in direct confrontation over a fixed set of legal issues, adopting mutually exclusive positions.[53] The fundamental logic of these competitions requires both parties to fully reject the legal arguments presented by their opposing counsels, with the aim of establishing a clear winner through the strength of legal reasoning.

The simulated negotiation at issue adopts a non-zero-sum architecture that acknowledges overlapping interests and shared objectives. Such overlap widens the strategy space and—absent crisp guidance—raises goal and path ambiguity: teams must locate zones of possible agreement and design reciprocal trades without a single correct doctrinal pathway, making reliance on ad hoc anchors more likely. This is precisely what the FDI-themed scenario embodies: although the competition sets clear role definitions and negotiation objectives, it affords considerable latitude—e.g., multiple feasible equity allocations, staged equity transfers across project phases, options for bringing in additional capital, and different distributions of effective control. Any redesign along these dimensions can reshuffle the strategic landscape.

The quadrilateral stakeholder configuration further amplifies role ambiguity: who sequences issues, who concedes first, how coalitions form or realign, and what counts as a "fair" split are left under-specified. Because each proposal revises the other three parties' beliefs, payoffs, and coalition incentives, moves trigger second-order reactions and feedback loops (responses to anticipated responses), producing path dependence and a combinatorial explosion of contingencies. As uncertainty about "acceptable moves" rises, teams gravitate toward safe, imitative scripts and visible etiquette as anchors. The result is heightened cognitive load and an anxiety–avoidance–conformity dynamic that entrenches over-reliance on procedural signals, suppresses improvisation, and ultimately builds psychological barriers that crowd out innovation.

In the FDI Moot's non-zero-sum, four-party negotiation framework, the blurred procedural boundaries and ambiguous evaluation cues significantly elevate participants' subjective perception of "error costs." This heightened uncertainty triggers mechanisms of loss aversion and social evaluation anxiety, leading to an anxiety–avoidance–conformity behavioral chain. To mitigate uncertainty, teams deploy visible compliance signals, which paradoxically result in two adverse outcomes:

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[53] See Stephen R. Dunlop, *Using a Moot Court Experience in the Education of Psychiatric Residents*, 6(4) Journal of the American Academy of Psychiatry and the Law Online 423, 423-432 (1978).

Firstly, a form of innovation anemia and strategic homogenization emerges. Under the pressure of conformity, the strategic space collapses into a narrow range of safe scripts. Teams gravitate toward anchoring at a tasks' baseline or slight variations, systematically avoid complex structures such as staged acquisitions, earn-outs, or the separation of voting and economic rights, and hesitate to introduce subordinated or third-party capital. Instead of employing issue bundling and cross-thematic linkages, teams approach negotiations item-by-item. As procedural discourse crowds out substantive creativity, this leads to delayed packaging inflection points, fewer contingent or interactive clauses, reduced concession bandwidth, and ultimately lower creativity scores. This reflects a behavioral performance tax—a cognitive cost imposed not by a lack of capacity but by psychological reactions to procedural ambiguity.[54]

Secondly, teams experience distorted learning transfer. When high scores are misattributed to "procedural propriety" rather than "substantive innovation," and when ambiguous standards disproportionately reward visible normative behavior, preparation efforts begin to center on reproducibility over creativity. A rapid diffusion of templates, flowcharts, and standard scripts replaces high-variance, high-reward generative training—such as multi-issue linkage modeling, complex valuation structures, and second-order reactive simulations.[55] Consequently, team risk tolerance declines, in-situ improvisation and repackaging skills weaken, and the misleading mental model is transferred to subsequent coursework and practice. This weakens sensitivity to incomplete information, dynamic interlinkages, and rights reallocation.

3.5 Team Collaboration and Coordination Issues

The challenges in team collaboration observed during simulated negotiation competitions originate from several structural tensions within the team design. One of the main problems occurs at the level of organizational structure. The preparation team typically consists of nine members, while only three are selected to participate in the actual on-stage negotiation. Due to the mismatch between team composition and playing roster, the team experienced uneven participation levels. Most contributors who engage in legal research, rule interpretation, and factual investigation do not have opportunities to express their work in the oral session. Their efforts, while substantial, are often invisible in the final performance. At the same time, because only three members are selected to represent the team, internal competition may emerge. Members may focus on securing a spot in the final stage rather than supporting others. This dynamic can gradually weaken collective trust and reduce cooperation. The result is a team that appears united externally but experiences internal fragmentation. This issue has parallels in studies on team performance, such as the one by Katzenbach and Smith (1993), who emphasized how overvaluing visible roles may obscure backstage contributions.[56] They argue that teams often struggle when members perceive unequal value attached to different types of work.

Another key difficulty lies in how tasks are assigned. Teams usually choose between two methods. One is issue-oriented division. This method gives each member

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[54] See Max Bazerman, Ann E. Tenbrunsel & Kimberly A. Wade-Benzoni, *Negotiating With Yourself And Losing: Making Decisions With Competing Internal Preferences*, 23(2) Academy of Management Review 225, 225 (1998).

[55] See Yair Livneh , *Overcoming the Loss Aversion Obstacle in Negotiation*, 25(1) Harvard Negotiation Law Review 187, 188-192 (2020).

[56] See Jeremy Hope & Robin Fraser, *Beyond Budgeting: How Managers Can Break Free from the Annual Performance Trap,* Harvard Business Press, pp. 115-123 (2003).

responsibility for a topic, such as investment frameworks, human rights standards, or geopolitical risks. The other is role-oriented division. In this setup, members act as representatives of specific stakeholders, including governments, corporate investors, or regional blocs. Each method has weaknesses. The first one causes fragmented preparation. Each member becomes familiar with only one topic and may lack understanding of the full case. The second method locks members into one perspective. This limits their ability to consider opposing views or shift strategies. Both approaches can reduce flexibility during live negotiations. Hackman (2002) notes that successful teams need a design that supports knowledge integration. When roles are too fixed or knowledge is too narrow, group performance suffers.[57]

Role clarity and authority distribution are also difficult to manage. Team members often do not know who should lead or who should coordinate tasks. Without clear structure, informal hierarchies form. This problem has been described in Tuckman's group development model (1965). If a team cannot move beyond the early "storming" phase, internal disagreements persist and affect productivity. In competitions with strict timelines, teams do not have enough time to build stable cooperation. As a result, unresolved disputes over task scope, authority, and credit can remain present until the final round.

4. Coping Strategies for Competing Universities

Based on the above analysis and the author's team preparation experience, the following replicable strategies are shared, which are theoretically grounded in negotiation theory, educational management theory, and interdisciplinary integration theory:

4.1 Top-Level Design

4.1.1 Improving Interdisciplinary Coordination Mechanisms

In the preparation for the Belt and Road simulated negotiation competition, the case topics typically span multiple disciplines such as law, economics, international relations, and environmental science, placing extremely high demands on participants' comprehensive literacy and cross-disciplinary collaboration capabilities. However, the current preparation process commonly suffers from issues like single-discipline knowledge structures and insufficient cross-field collaboration, making it difficult for teams to effectively address complex and multi-dimensional negotiation scenarios.

The mastery of complex negotiation skills has a positive correlation with team simulation outcomes, especially in handling composite issues involving politics, economy, law, and environment. Interdisciplinary knowledge integration significantly enhances the team's overall decision-making efficiency and performance.[58] Therefore, it is necessary to establish a systematic interdisciplinary coordination mechanism within the university-faculty-team three-tier system to promote collaborative cultivation of cross-field talents.[59]

The core of the mechanism lies in clarifying the responsibility boundaries of

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[57] See Anthony T. Cobb & J. Richard Hackman, *Leading Teams: Setting the Stage for Great Performances,* 48(4) Administrative Science Quarterly 712, 712 (2003).

[58] See Caroline Haythornthwaite, *Learning and Knowledge Networks in Interdisciplinary Collaborations*, 57(8) Journal of the American Society for Information Science and Technology 1079, 1079-1092 (2006).

[59] See Deborah Shmueli, Wallace Warfield & Sanda Kaufman, *Enhancing Community Leadership Negotiation Skills to Build Civic Capacity*, 25(2) Negotiation Journal 249, 249-266 (2009).

each tier at the top-level design to achieve macro-level disciplinary resource allocation. First, a Belt and Road Simulated Negotiation Pre-Competition Steering Committee should be established at the university level to coordinate competition policy interpretation, expert resource integration, and case topic research. This committee will build an information-sharing and linkage mechanism across colleges and disciplines, promoting regular collaboration and curriculum resource docking among law, economics, international relations, environmental science, and other fields. At the faculty level, relevant departments should jointly establish an "Interdisciplinary Joint Preparation Office," led by teachers with international competition or practical negotiation experience. The office will form composite preparation teams with complementary professional and skill sets around case topics, promoting the implementation of joint teaching, training, and evaluation mechanisms to break disciplinary barriers. At the team level, a flat team structure of "mentors + multi-disciplinary members" should be constructed. Through case studies, scenario simulations, role-playing, and live drills, knowledge sharing, ideological collisions, and role coordination will be strengthened to enhance the team's overall multi-dimensional analysis and dynamic negotiation capabilities.

4.2 Selection System

4.2.1 Multi-Dimensional Initial Selection

Performance evaluation of negotiators should cover cognitive, emotional, and behavioral dimensions. Specifically, the negotiation competence model proposed by Smolinski and Xiong Yun (2020) systematically considers comprehensive abilities such as language expression, legal logic, international vision, and dynamic adaptability, providing a theoretical basis for formulating selection criteria.[60] It is necessary to comprehensively strengthen selection standards and establish a four-dimensional comprehensive evaluation system covering language expression, legal logic, international vision, and dynamic situation response capabilities.[61] Through simulated practical drills and interdisciplinary knowledge tests, ensure the selection of team members with complete cross-field negotiation literacy. The selection system should focus on four core competencies: Firstly, language expression ability. Focus on the fluency and persuasiveness of participants' multilingual expression; Secondly, legal logic ability. Focus on their ability to apply rules, construct arguments, and refute. Thirdly, international vision. Evaluate their depth of understanding of international rules, geopolitics, and global issues. Fourthly, dynamic Adaptability. Examine their on-site response and team collaboration skills in emergency situations.

In terms of evaluation methods, a dual-path model of "theoretical cognition + practical simulation" should be adopted. Not only should interdisciplinary knowledge tests be used to inspect participants' theoretical reserves,[62] but also impromptu speeches, scenario negotiations, role switching, and other practical drills should be employed to comprehensively observe their adaptability and collaboration capabilities.

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[60] See Remigiusz Smolinski & Xiong Yun, *In Search of Master Negotiators: A Negotiation Competency Model*, 36(4) Negotiation Journal 365, 365-388 (2020).

[61] See Amy-Jane Griffiths, James Alsip & Shelley R. Hart *et al.*, *Together We Can Do So Much: A Systematic Review and Conceptual Framework of Collaboration in Schools*, 36(2) Canadian Journal of School Psychology 1, 1-27 (2020).

[62] *Supra* note 60.

Furthermore, to achieve integrated selection and cultivation with closed-loop feedback, selection results should form a visual "competency profile" for team member grouping and the formulation of personalized training plans. Meanwhile, provide personalized capability analysis and improvement suggestions for non-selected candidates to build a reasonable talent pipeline. Through this scientific and systematic composite selection mechanism, universities can not only accurately identify talents with high-level negotiation literacy but also lay a solid talent foundation for subsequent training and competitions, enhancing the overall team's interdisciplinary collaboration level and international competitiveness.

4.2.2 Phased Promotion and Dynamic Assessment Mechanism

Negotiators' self-efficacy significantly influences their strategic choices. Especially in information-asymmetric contexts, those with lower self-efficacy tend to resort to avoidance or deceptive strategies to cope with pressure, affecting the stability of team performance.[63] In the preparation for the Belt and Road simulated negotiation competition, information asymmetry and dynamic strategy adjustment constitute core challenges for participants. However, the current selection and training system remains weak in addressing uncertain environments, lacking a systematic training mechanism.

In competition scenarios, participants face not "closed tasks" in standardized assessments but "complex practices" embedded in changing material and social structures. Learning often involves on-site "reconstruction" of knowledge to adapt to new contexts rather than transferring classroom knowledge. Therefore, education should not only cultivate stable capabilities but also enhance students' "adaptive capacity"—the ability to collaboratively handle unexpected situations in complex systems.[64]

Thus, it is necessary to construct a "phased promotion" dynamic assessment mechanism, dividing the training cycle into three stages: "basic adaptation—strategic growth—combat consolidation." Relying on modular promotion paths, the mechanism gradually guides team members from mastering rules to addressing complex game scenarios. In mid-to-late training, information asymmetry modules and emergency simulations (e.g., "critical clause mutations" or "opponent stance concealment") are introduced to comprehensively assess participants' on-site response, strategic adaptation, and psychological regulation capabilities.

4.2.3 Dynamic Management of Echelon Cultivation Mechanism

The current talent echelon cultivation mechanism does not sufficiently focus on interdisciplinary and information-dynamic adaptation training. Developing detailed training programs for different types of simulated negotiations and implementing dynamic adjustments in team training can help cultivate participants' ability to quickly adapt to and effectively address complex negotiation scenarios.[65] Cross-role playing and multi-issue, multi-party simulated negotiation training can effectively narrow the capability gap between core and reserve team members, achieving a virtuous cycle of

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[63] See Filipe Sobral, Gustavo Moreira Tavares & Liliane Furtado, *et al.*, *Deceitful When Insecure: The Effect of Self-Efficacy Beliefs on the Use of Deception in Negotiation*, 32(1) Business Ethics, the Environment & Responsibilit 179, 179-190 (2022).

[64] See Tim Fawns, Tamara Mulherin & Dai Hounsell *et al. Seamful Learning and Professional Education*, 43(7) Studies in Continuing Education 360, 360-376 (2021).

[65] See Peter Kesting & Remigiusz Smolinski, *A Practical Guide to Negotiation Simulation Writing,* 39(3) Negotiation Journal 297, 297-315 (2023).

senior-led junior development.

Therefore, implement a "two-echelon cultivation model," establish a normalized observer system, and build a layered, progressive training path. Core team members focus on high-intensity simulation and combat strategy training to maintain proficiency in multilateral issues, while reserve members accumulate practical experience in document compilation, strategy modeling, and auxiliary collaboration through synchronized but difficulty-adapted training modules. Meanwhile, a normalized observer system should be established, opening combat observation channels for junior students, encouraging them to participate in recording, evaluation, and post-game analysis, and gradually promoting them to the reserve team to construct a continuous flow of talent.

Furthermore, through multi-issue, multi-role, and multi-round cross-negotiation scenario simulations, guide team members to hone their adaptability in information asymmetry and strategic games. Combined with a promotion mechanism integrating teacher scoring and peer evaluation, dynamically adjust the team composition to form a three-stage growth path of "observers—reserve echelon—core echelon," ensuring the preparation team always maintains a stable professional echelon and sustained competitiveness.

4.3 Training Paths

In the course of examining international legal education practices, the authors found that Structured Technical Assistance mechanisms are widely applied in the training systems of moot court, international arbitration, and mediation competitions. This mechanism is composed of three key elements: systematic knowledge input, scenario-based practical simulation, and continuous feedback optimization. It emphasizes a closed-loop structure of "competency diagnosis—tailored input—practical adaptation—performance feedback," which has proven effective in enhancing participants' practical capabilities and interdisciplinary team coordination under high-intensity competitive conditions.[66]

For example, the Jessup International Law Moot Court adopts a training structure that combines role-separated team formats, simulated hearings, and judge-led feedback sessions during the preliminary rounds. The Vis International Commercial Arbitration Moot emphasizes modular procedural law training and real-time response drills to surprise questions from arbitrators. These practices show that Training and Technical Assistance (hereinafter referred to as the TTA) mechanism effectively supports cross-disciplinary teams in navigating complex legal rules, dynamic contexts, and multilingual communication under pressure.

However, when applied in the Chinese context—particularly in Belt and Road Initiative Simulation Competition—this imported model faces several structural and turnover, unequal resource allocation, and the heavy demands of non-native language environments. Therefore, this paper builds on the core logic of the TTA mechanism while integrating the organizational structures and practical constraints of Chinese universities. The resulting optimized training framework aims to retain the structural advantages of TTA while improving its adaptability and efficacy in non-elite institutions and diverse competition contexts.

4.3.1 Strengthening Interdisciplinarity in the Basic Training Stage

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[66] See Jasmine Victoria Idrogo & Logan A. Yelderman, *et al.*, *Perceived and Actual Knowledge Gain among Juvenile Drug Treatment Court Team Members: A Pre-post Analysis of On-site Training and Technical Assistance*, 59(17) Family Court Review 769, 769-789 (2021).

Current basic training overly relies on single legal theory input, and trainees lack systematic cognition of the diverse governance fields involved in the Belt and Road Initiative, such as environmental protection standards, financial rules, and cross-border trade. Negotiation simulations with clear teaching objectives significantly enhance learning effectiveness.[67] Therefore, it is necessary to reconstruct the theoretical input module.

Firstly, a database of interdisciplinary typical cases should be carefully selected, covering dimensions such as political cases (e.g., sovereign guarantee clause negotiations in the China-Pakistan Economic Corridor), economic cases (e.g., BOT financing disputes in Southeast Asian high-speed rail projects), environmental cases (e.g., ecological compensation mechanisms for wind power projects in Kazakhstan), and human rights cases (e.g., labor rights protection in overseas industrial parks). This promotes team members to establish interdisciplinary cognitive frameworks and language integration capabilities to address comprehensive negotiation scenarios in competitions.

Secondly, trainees should be required to simultaneously integrate international investment law, religious and cultural customs of countries along the Belt and Road initiative, and geopolitical variables when analyzing cases, cultivating cross-field knowledge integration and communication skills.

Compared to traditional TTA mechanisms that primarily focus on legal rule transmission and procedural understanding, this training model incorporates interdisciplinary cognitive frameworks and policy-oriented discourse from the outset. By integrating multidimensional topics—such as geopolitics, economic governance, and cultural variation—particularly within the Belt and Road Initiative context, participants gain enhanced analytical capacities for complex negotiation environments. This approach is also highly applicable to competitions like the Jessup International Law Moot Court, which requires nuanced handling of international human rights, state responsibility, and the United Nations Security Council powers, as well as the World Trade Organization (hereinafter referred to as WTO) Law Moot, where participants must address policy conflicts between trade and environmental regulation. The proposed model's structure—combining policy logic, legal reasoning, and interdisciplinary case discussion—can be readily adapted into those competitions to bridge legal argumentation with broader policy literacy and expression competence.

4.3.2 Enhancing Complexity and Dynamics in the Competency Strengthening Stage (Single-Issue, Multi-Issue, and Multi-Party Simulation Training)

Current training content in the competency strengthening stage is overly simple, failing to effectively simulate the complexity and uncertainty of actual competitions. Simulated training with information asymmetry scenarios and sudden issues should be increased, encouraging team members to adjust strategies and reconstruct language structures in real time during simulations. The complexity and uncertainty of multi-issue and multi-party negotiation simulations create deep learning opportunities.[68]

By adding information asymmetry elements to single-issue negotiations, such as national confidentiality clauses, and constructing means similar to geopolitical contradictions and economic benefit balancing, the complexity of negotiations can be increased. Meanwhile, trainees should be required to adjust legal argumentation logic

[67] *Supra* note 65.

[68] See Lawrance E. Susskind & Jason Corburn, *Using Simulations to Teach Negotiation: Pedagogical Theory and Practice*, Working Paper 99-1, Program on Negiation at Harvard Law School (1999).

and language strategies in real time during simulations, learning how to shift from assertive claims to consensus-building expressions, thereby enhancing adaptability to the complex context of the Belt and Road Initiative negotiations.

This stage introduces multi-round, multi-role, and multi-issue simulations, layered with scenario variability and strategic shocks, to cultivate participants' adaptability in non-ideal environments. Such training is especially applicable to competitions like the Vis International Commercial Arbitration Moot, where participants must manage arbitrator-directed surprise questions and transitions between oral and written advocacy under pressure, or the ICC Moot Court, where teams face real-time challenges such as witness availability shifts or jurisdictional objections. Traditional TTA models often emphasize static rule comprehension; in contrast, this approach embraces volatility, complexity, and interactivity as core design principles. It can thus be transferred into other contexts through structured multi-stage hearing simulations, hybrid procedural training, and exercises in legal narrative restructuring under time constraints.

4.3.3 Refined Simulation Training

Current high-intensity simulation training suffers from overly simplified scenarios and excessive information transparency, which fail to authentically replicate the dynamic complexity and unpredictability of actual competition environments. This limits trainees' ability to develop adaptive negotiation strategies and robust stress management capabilities. To bridge this gap, training design must incorporate mechanisms that simulate real-world volatility, ambiguity, and tension.

Therefore, refine simulation training scenarios, introduce on-site release mechanisms for confidential information and new issues, and focus on improving team members' agility and accuracy in adjusting on-site language structures and dynamically transforming strategies.[69] For instance, mid-session disclosure of classified investment protection clauses or covert environmental assessments can compel participants to recalibrate alliance formations and reassess trade-offs on the fly. These elements mirror real-world negotiations where parties must operate with incomplete and shifting information, encouraging mental flexibility and situational awareness.

To support this complexity, simulation scenarios should include on-site release mechanisms for both confidential documents and unexpected issues, with time-sensitive decision windows and performance-linked consequences. This will train participants not only in legal reasoning and strategic planning, but also in crisis-time linguistic agility—adapting speech tone, modifying argument structure, and repositioning normative claims in real-time. These scenarios should be crafted to stress-test multiple dimensions simultaneously: legal logic, political sensitivity, cultural nuance, and team coordination.

Furthermore, a comprehensive multi-dimensional evaluation system should be established. In addition to the conventional multi-criteria scoring approach, evaluators should deploy behavioral tracking tools to capture critical actions during negotiations, such as momentary rhetorical shifts, micro-decision inflection points, and conflict de-escalation strategies. Legal argumentation should be assessed both in terms of doctrinal accuracy and adaptive flexibility—particularly when participants are required to handle mandatory issue transitions under adversarial pressure. For example, how effectively a participant reframes a rigid legal stance into a

[69] *Supra* note 65.

consensus-building proposal under time constraints should be a key evaluative metric.

The output of this system should culminate in individualized performance profiles that map each participant's negotiation competency landscape. These "defect profiles" should quantify areas for improvement, such as cross-cultural sensitivity, treaty interpretation precision, emotional regulation under pressure, or responsiveness to dynamic agendas. The profiles should serve not only as evaluative tools but also as diagnostic roadmaps for targeted, personalized follow-up training.

This program incorporates high-intensity simulations embedded with real-time confidential disclosures, timed strategic pivots, and rhetorical structure adjustments—key features often underdeveloped in standard TTA frameworks. These enhancements are particularly relevant for competitions with high demand for situational awareness and stress resilience, such as the Willem C. Vis Moot or the FDI Moot, where teams must address asymmetric information, shifting clauses, and cultural misunderstandings under tight timelines.[70] The design emphasizes on-the-spot strategy recalibration and discourse agility, training participants to restructure legal arguments and communication tone instantly. In practice, these modules can be adapted into exercises such as "mid-hearing treaty amendment disclosures" or "implicit arbitrator bias detection," increasing transferability and practical readiness across a broad range of moot contexts.

4.3.4 Post-Competition Review Mechanism

Accumulating valuable experience from past competitions is a critical component of effective training.[71] Institutions that lack systematic post-competition reflection often fail to inherit and consolidate their competitive advantages, leading to team discontinuity and the loss of institutional memory. Therefore, it is essential to establish a structured and in-depth post-competition review mechanism at the team level, supported by institutionalized procedures to ensure its long-term sustainability.

At the core of the team-level review process should be scenario-reconstruction-based review meetings, led by faculty coaches and organized around four key dimensions: (1) Case Reconstruction—revisiting the factual background and assigned roles to guide team members in reassessing the rationality of their position design and strategic planning; (2) Strategic Review – analyzing critical decision-making points during the negotiation (such as position concessions, alliance building, and agreement drafting), evaluating their outcomes, and exploring alternative strategies; (3) Language Analysis-reviewing competition recordings and speech scripts to assess logical structure, persuasive power, and the use of diplomatic discourse; (4) Coordination Diagnosis-identifying internal weaknesses in task division, information flow, and on-site responsiveness from a teamwork perspective.

To institutionalize this mechanism and transform it from an ad hoc activity into a regular practice, universities must implement complementary structural measures. On the one hand, standardized documentation templates should be developed—such as Post-Competition Meeting Minutes, Key Speech Comparison Sheets, and Strategic Decision Logs—to ensure consistency, traceability, and comparability across different years and teams. On the other hand, a competition documentation archiving system should be established to systematically organize all review materials by topic, strategic path, and language template, forming a university-level Simulated

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[70] See Thao Le Thi & Luong Doan Duc, *Practicing Law for Students Through Legal Competitions*, 1(2) Journal of Legal and Political Education 53, 53-71 (2024).

[71] See Yana O. Alimova & Natalia M. Golovina, *Moot Court Competitions and their Role in Practice Oriented Training of Law Students*, 6(2) Kutafin Law Review 237, 237-271 (2019).

Negotiation Case Repository for future teams to consult and build upon.

Moreover, review quality should be formally linked to key performance metrics such as training assessments, team promotions, and award recommendations, embedding the review process into the broader competition management cycle. By building an efficient review mechanism at the team level and reinforcing it through institutional design, non-top universities can overcome the fragmentation of experience and the isolation of training processes—transforming individual breakthroughs into sustained organizational capabilities.

4.4 Faculty Strength

In most international negotiation or moot court competitions, interdisciplinary integration constitutes a major barrier in the preparation process. For instance, in the Jessup International Law Moot Court, participants must bridge the gap between abstract principles of international law and the concrete dynamics of geopolitical conflict. In competitions such as the Vis International Commercial Arbitration Moot, emphasis is placed on procedural reasoning, strategic expression, and the synthesis of arbitration practice with precise legal drafting. The ability to efficiently mobilize and coordinate guidance from multiple expert domains is often what differentiates higher-performing teams from the rest.

Beyond domain-specific legal expertise, most competitions also demand proficiency in non-native language expression, and require participants to maintain mental clarity and emotional resilience under prolonged pressure. As such, the integration of language coaches, psychological support staff, and ethics consultants has become increasingly essential for ensuring consistent performance during high-intensity cross-examination sessions and argumentative exchanges.

4.4.1 Construction of a Faculty Team Integrating Professional Theory and Practical Experience

In the context of simulation-based legal competitions such as the Belt and Road negotiation tournament, the faculty team plays a pivotal role not only as knowledge transmitters but also as strategic designers and crisis response mentors. While non-top competition universities may face limitations in staff numbers or international exposure, the quality and relevance of instructors often matter more than quantity. In this regard, the TTA has been shown to significantly enhance team members' perceived and actual knowledge gains.[72]

It is necessary to introduce "multi-track experts," including lawyers with investment dispute resolution experience, local language experts, and international affairs officials who have participated in negotiations. Faculty team construction should follow a "quality-first, multidimensional competence" principle. Specifically, institutions should invest in building core faculty teams that blend legal scholars, policy researchers, and experienced practitioners. This includes inviting visiting lecturers such as arbitrators, investment treaty lawyers, officials with multilateral negotiation experience, and regional affairs experts fluent in local languages. The faculty should not only explain rules and legal doctrines, but also simulate strategic framing, opposition forecasting, and crisis messaging, all of which are essential to real-time negotiations. Furthermore, adopting a dual-track instructional model—where academic mentors focus on analytical and conceptual depth, and practical mentors guide students in the operationalization of these concepts under

[72] *Supra* note 66.

dynamic pressure—can dramatically increase the training's effectiveness. Legal issues such as investor-state arbitration, sovereign guarantees, or labor compliance clauses often appear abstract in class, but through real-case walkthroughs with practitioners, students gain a holistic view of how law interacts with strategy, timing, and power asymmetry. Institutions should also formalize these mentor roles within their teaching credit and faculty evaluation systems, incentivizing sustained participation and long-term engagement in competition coaching.

4.4.2 Multi-Dimensional Coaching Team

While legal content and strategic reasoning form the backbone of negotiation preparation, a truly competitive team also requires support across psychological resilience, ethical reasoning, and linguistic agility.[73] However, many current training systems neglect these "soft but decisive" components, resulting in performance bottlenecks when students encounter ethical dilemmas, cognitive overload, or intense emotional pressure during the tournament.

To address this, universities should assemble multi-dimensional coaching teams including mental health professionals, ethics educators, and language specialists. Psychological counselors can conduct regular assessments to monitor stress levels, build individual coping strategies, and intervene when signs of burnout or performance anxiety emerge. Ethics experts should move beyond abstract normativity and immerse students in dilemma-based roleplay scenarios, where values conflict, trade-offs are inevitable, and consequences are non-linear—simulating the moral ambiguity inherent in real negotiations.

For instance, trainees should be exposed to simulations such as the Cambodian land expropriation case, where economic development objectives clash with forced displacement claims, requiring both legal argumentation and principled reasoning within frameworks like the OECD Guidelines or UNGPs. Coaches can challenge trainees to articulate corporate social responsibility commitments while navigating conflicting stakeholder demands. Meanwhile, language coaches should support multilingual communication under time constraints, helping students maintain rhetorical clarity, cultural appropriateness, and persuasive tone in multiple negotiation registers. This triangulated coaching model—legal, psychological, ethical—will foster well-rounded negotiators capable of thriving under pressure without compromising integrity or efficacy.

The dual-track faculty structure and multi-dimensional support system proposed in this paper aim to build precisely such an infrastructure of rapid knowledge deployment and expert coordination—functioning like a high-speed expressway system across academic disciplines. By establishing internal mechanisms that allow for the swift integration of legal, linguistic, psychological, and practical expertise, this model not only optimizes preparation for Belt and Road negotiation simulations, but also offers broad applicability to other composite competitions such as the WTO Moot, FDI Moot, and IHL Moot, where complexity, cross-disciplinarity, and stress management are equally critical to competitive success.[74]

4.5 Psychological State Management and Ethical Awareness Cultivation

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[73] See Louise Parsons, *Competitive Mooting: An Opportunity to Build Resilience Skills for Legal Practice*, 4(1) Australian Journal of Clinical Education 1, 1-20 (2018).

[74] See Edward F. Kammerer Jr., *Coaching and Teaching Competitive Moot Court: Comparing Faculty Approaches*, 16(3) Journal of Political Science Education 1, 1-12 (2018).

The psychological and ethical dimensions of competition readiness are frequently underestimated in academic settings, yet they are crucial differentiators in high-stakes, multilateral negotiation environments. The high-intensity and high-pressure preparation process, coupled with the marathon-style consultation characteristics of the Belt and Road Initiative negotiations, easily lead to cognitive exhaustion. Psychological fatigue has a negative impact on tactical performance in competitive environments.[75]

To address this, a standardized psychological intervention system should be established, including regular psychological pressure and stress resistance training, personalized tracking of mental states, and timely psychological counseling and rest adjustments to ensure team members maintain optimal mental states during competitions. Meanwhile, personalized psychological recovery programs should be designed—for example, addressing the phenomenon of reduced self-efficacy after trainees make concessions by combining cognitive training with historical cases of "retreat as advance" along the Silk Road. Special attention should be paid to cultural and psychological differences in countries along the route, analyzing the impact mechanism of Central Asian grassland nomadic thinking on decision-making models.

In terms of ethical awareness cultivation, beyond abstract preaching, the focus should be on constructing simulated training scenarios. Through in-depth analysis of typical cases such as the environmental dispute of Myanmar's Myitsone Hydropower Station, design multi-pressure situations where community protests and environmental standard conflicts co-occur, requiring trainees to balance the interests of all parties while implementing the environmental responsibility principles of the UN Global Compact. Particular emphasis should be placed on training trainees to identify ethical traps wrapped in cultural differences—for example, by analyzing how Southeast Asian "face culture" leads to obstacles in acknowledging contract loopholes, and then training them to use constructive ambiguity techniques to defuse such special ethical risks. Finally, establish an ethical decision-making capability certification mechanism, incorporating trainees' response speed and handling effectiveness in various special scenarios into the evaluation system.

5. Conclusion

This study has examined the structural challenges faced by competing universities in international simulated negotiation competitions, identifying five core areas of qualities: interdisciplinary and multi-dimensional knowledge, handling dynamic negotiation situations, language proficiency and cultural communication, seeking flexible solutions within established rules, team collaboration and coordination. These challenges stem from applying law strategically, weakness in executing strategies, lack of international practical experience, psychological stress barriers, and mutual trust deficits.

In response, the authors propose a comprehensive framework comprising: (1) an interdisciplinary coordination mechanism at the university-faculty-team levels; (2) a dynamic selection system emphasizing real-time response and cross-cultural skills; (3) a refined training pathway incorporating high-fidelity simulations; (4) a dual-track faculty structure blending theoretical and practical expertise; and (5) integrated psychological and ethical training. This model not only addresses immediate

[75] See Suzanna Russell, David G. Jenkins & Shona L. Halson *et al.*, *How do Elite Female Team Sport Athletes Experience Mental Fatigue? Comparison Between International Competition, Training and Preparation Camps,* 22(6) European Journal of Sport Science 877, 877-887 (2021).

competitive needs but also supports the long-term institutionalization of negotiation literacy within legal education.

It is important to acknowledge that this study has limitations: as a qualitative research based on the practical experience of a single team, the generalizability of the findings may be restricted by factors such as institutional resource disparities and competition format differences. Future research could validate and expand this framework across diverse university settings and competition types to improve its applicability.

Looking ahead, the authors advocate for a reimagining of legal pedagogy—from doctrinal transmission to global problem-solving—supported by technological innovations such as AI-driven simulations and virtual negotiation platforms. By embracing these strategies, non-top universities can transcend resource limitations and cultivate a new generation of legally adept, ethically grounded, and globally conscious practitioners, thereby contributing to a more adaptive and equitable transnational legal order.

Evaluating China's Short Video Copyright Infringement Challenges Through the Lens of the EU Directive on Copyright in the Digital Single Market

Mengyi Mei[1]

Abstract: In the 5G era, short video-sharing platforms (hereinafter referred to as SVSPs) such as Douyin (the Chinese version of TikTok) have reshaped the landscape of content creation and dissemination through user-generated videos in short video format. While these platforms have contributed substantially to China's digital economy, they have also intensified short-video copyright infringement, particularly the repeated dissemination of identical or substantially similar infringing short videos derived from popular audiovisual works. The short duration of such videos, their low production and editing costs, and their rapid dissemination, combined with the multifunctionalities and commercialised manners of SVSPs (including algorithmic recommendation technology, live-streaming, advertising, integrated e-commerce, and monetisation schemes), create structural conditions in which infringement can be replicated at scale and reappear after removal. This article contends that China's existing safe harbour regime is inadequate to regulate short-video copyright infringement by incorporating these dynamics because it imposes a low duty of care, lacks clear proactive governance obligations, and relies heavily on an increasingly ineffective notice-and-takedown procedure. As a comparative and potential reform pathway, the article evaluates whether the platform-liability framework under Article 17 of *the EU Directive on Copyright in the Digital Single Market*, with its stronger and more clearly articulated platform duties, offers a workable template for tackling large-scale and repeated short-video infringement in China.

Keywords: Short-Video Copyright Infringements; Short Video-Sharing Platforms; Safe Harbour Provisions; the EU Copyright Directive; Digital Single Market

1. Introduction

This article posits that China's safe harbour provision[2] is insufficient to

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[2] Safe harbour provisions aim to protect online service providers (hereinafter referred to as OSPs) from liability for copyright infringement from user-uploaded content under certain conditions. China's copyright regime largely mirrored that of § 512 of *the Digital Millennium Copyright Act* (hereinafter referred to as the DMCA) of the United States (hereinafter referred to as U. S.) in 1998, both heavily sharing similarities in the categories of OSPs, such as mere conduit, caching, hosting, and linking, and conditional exemptions, including knowledge requirement, financial benefits elements, and notice-and-takedown procedures. See *Regulations on the Protection of the Right to Network Dissemination of Information*, State Council Decree No. 634 (2013) (hereinafter referred to as the 2013 Network Dissemination Regulations), Articles 20-23; *Title 17 of the United States Code* (hereinafter referred to as 17 U. S. C.), § 512(a)-(d).

adequately govern large-scale and repeated short-video[3] copyright infringement[4] on SVSPs,[5] particularly infringement involving popular films and television programmes.[6] The core regulatory difficulty is not merely the volume of infringement. In the high-speed dissemination of the current digital environment, infringing short videos on SVSPs have become a systemic and repeatable phenomenon driven by rapid sharing, algorithmic amplification, and low-threshold re-uploading.[7] A platform liability regime designed for passive hosting is therefore structurally ill-suited to allocate liability in a manner that manifests SVSPs' actual influence over content visibility, their commercial incentives, and their technical capacity to manage infringement.

China's safe harbour provision regards SVSPs as passive hosting service providers, which mismatches their real operational mode with the corresponding responsibilities.[8] It subjects platforms that actively and systematically shape content visibility and monetisation to a liability regime designed for services that primarily store user-uploaded content.[9] This misclassification generates weak compliance incentives precisely where platforms possess both the capacity and the commercial motivation to manage infringement risks. This article, therefore, contends that China requires a differentiated approach to SVSP governance within (or alongside) its safe harbour provision, calibrated to platform functionality rather than premised on platform neutrality. This is not a claim that SVSPs require a wholly separate statute; rather, it is a claim that platform obligations should be differentiated and calibrated to SVSP functionality, capacity, and monetisation structures, given the systemic

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[3] The term short video refers to an emerging type of video assets ranging from seconds to 5 minutes in duration. Its features include short duration, low-cost production, rapid spread, strong connections between producers and consumers, and strong social interaction, all aligned with audiences' evolving preferences for quick, accessible entertainment. See Qian Zhang, Ke Li & Minglei Li *et al.*, *Research on Judicial Protection of Short-video Copyright*, 3(1) Intellectual Property 3, 5 (2023).

[4] Short-video copyright infringement refers to the editing and reproduction of copyright-protected works without authorisation, such as films and television programmes, into short video format, which is then uploaded and distributed via short video-sharing platforms. See Beijing Internet Court, *Beijing Internet Court Released the Circumstance from the Trial of Copyright Cases Concerning Short Videos*, https://www.ccpit.org/a/20220421/202204214a25.html (accessed on October 22, 2025).

[5] SVSPs refer to the platforms especially for shooting, editing, uploading, playing, sharing and interacting in short video formats associated with the ability to monetise user-generated content through their featured functions of advertising, live streaming, and e-commerce, such as Douyin and TikTok. *Supra note 3*; Shicong Ma, *The Special Research Report of China's Short-Video Market in 2016*, https://www.analysys.cn/article/detail/1000134 (accessed on October 22, 2025).

[6] See Hui Tian, *Research on Legal Issues of Copyright Infringement of Short Video Platform—From the Perspective of Disputes Between Long Video Platform and Short Video Platform*, https://cstj.cqvip.com/Qikan/Article/Detail?id=7112360338&from=Qikan_Search_Index (accessed on October 23, 2025); 12426 Copyright Monitoring Centre, *The 2022 Network Copyright Monitoring and Protection Report*, https://zhuanlan.zhihu.com/p/654824322 (accessed on October 23, 2025).

[7] *Supra* note 3; *Supra* note 4; *Supra* note 6.

[8] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022)(hereinafter referred to as the *Worm Valley* case); *Viacom International, Inc., v. YouTube, Inc.,* 718 F. Supp. 2d 514, 526-527 (S.D.N.Y. 2010); 17 U.S.C. § 512(c). Chinese short-video copyright infringement cases applied the hosting service providers' safe harbour provision to determine whether they were liable for short-video copyright infringement on their services. However, there is a lack of reason for it. Regarding YouTube, a video-sharing platform, the U.S. District Court in *Viacom v. YouTube* case held that the replication, transmittal, and display of videos on YouTube constituted activity by reason of the storage at the direction of a user within the meaning of 512(c)(1). As China's safe harbour provision largely mirrors that of the U.S., this would be a reason why SVSPs are applied for hosting providers' liability.

[9] *Ibid.*

character of large-scale and repeated short-video copyright infringement.

In recent years, the growth and widespread popularity of SVSPs, most notably Douyin (the Chinese version of TikTok),[10] have fundamentally reshaped the pattern of digital content creation, distribution, and consumption in China.[11] SVSPs' commercial success is closely tied to platform features that transform user-generated short videos into economic value, including integrated simple filming and editing tools, social networking features,[12] monetisation channels (via live-streaming,[13] advertising,[14] e-commerce[15])[16], and algorithmic recommendation systems[17] that optimise attention and retention.[18] These functionalities suggest that SVSPs do not merely provide digital storage. They organise, prioritise, categorise, and promote content in ways that materially affect dissemination, audience reach,[19] user engagement,[20] and revenue generation.[21] This operational structure distinguishes SVSPs from classic hosting providers and strengthens the case for regulatory duties that reflect platform activity and control.

The scale and impact of short-video copyright infringement have continued to grow.[22] A particularly prevalent pattern involves short-video generators editing or reproducing original segments of films and television programmes without authorisation to attract views and monetisation opportunities.[23] Despite recurring

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[10] See Chunmeizi Su, *Douyin, TikTok and China's Online Screen Industry: The Rise of Short-video Platforms*, Routledge, pp. 88-90 (2023).

[11] See Tao He, *Short-Video Blue Book: Annual Research Report on the Development of Short Videos in China*, https://mp.weixin.qq.com/s/BzHbvGtmGnxWDg8XGW091A (accessed on October 22, 2025).

[12] *Ibid.*

[13] *Supra* note 10, at p. 79 & pp. 98-99; Trend Insight and Douyin, *Douyin Annual Observation Report in 2023*, https://file.digitaling.com/eImg/uimages/20240202/1706853402934638.pdf (accessed on October 23, 2025).

[14] *Supra* note 10, at p. 79; *Supra* note 13.

[15] *Supra* note 10, at p. 79 & pp. 94-103; *Supra* note 13.

[16] *Supra* note 13, at pp. 51-52. The Douyin Report reveals that the platform actively incentivises user engagement by creating various tasks designed to encourage content creation for monetisation purposes. According to the Report, the primary sources of income for creators to monetise their content are as follows: traffic sharing (the platform's advertising revenue-sharing scheme), short video marketing (videos introducing product information and promoting sales), Douyin submission tasks, e-commerce sales (via live streaming), and picture-and-text sales (using images and text to promote and sell goods). This multifaceted monetisation structure reflects Douyin's strategic integration of user-generated content with commercial activity.

[17] *Supra* note 6; *Supra* note 10, at pp. 78-79.

[18] See Fan Guo, *Analysis of the Commercial Value and Profit Model of Short Videos on Douyin*, 12(1) Media Management 59, 59-60 (2018); Fengquan Wang & Jihai Jiang, *How Does the Internet Short Video Business Model Realise Value Creation? A Comparative Case Study of Douyin and Kuaishou,* 43(2) Foreign Economics & Management 3, 3-19 (2021).

[19] See China Internet Network Information Centre, *The 55th Statistical Report on China's Internet Development* (author's translation), https://www.cnnic.net.cn/n4/2025/0117/c88-11229.html (accessed on October 23, 2025); Stacy Jo Dixon, *TikTok–Statistics & Facts* (*Statista*, September 30, 2025), https://www.statista.com/topics/6077/tiktok/#topicOverview (accessed on October 23, 2025).

[20] *Supra* note 18.

[21] *Ibid.*

[22] *Supra* note 4; *Supra* note 6; Xingsheng Dong, *15 Associations, 5 Major Video Platforms, and 53 Film and Television Companies Jointly Issued a Statement about Infringements on Short Video-Sharing Platforms*, https://baijiahao.baidu.com/s?id=1696557786499637934&wfr=spider&for=pc (accessed on October 23, 2025).

[23] *Supra* note 16.

copyright enforcement campaigns,[24] takedown measures,[25] and warning mechanisms,[26] infringement persists in environments characterised by high-volume uploads, dissemination and algorithmic amplification.[27] For example, *the White Book of the China Short Video Copyright Protection in 2021* reports that between January 2019 and October 2020, the 12426 Copyright Monitoring Centre monitored original short videos, works listed on the Copyright Administration's key works in early-warning lists, and clips from key films and television programmes.[28] It identified 30.09 million suspected infringing videos, involving approximately 2.72 trillion views.[29] The figures highlight both the scale of infringement and its mass audience reach.

Most importantly, large-scale and repeated short-video copyright infringement on SVSPs produces a sustained imbalance of economic interests among copyright holders, SVSPs, and short-video generators.[30] Infringing short videos derived from audiovisual works[31] generate significant viewership,[32] monetisation opportunities,[33]

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[24] See National Copyright Administration of China (hereinafter referred to as NCAC), *The National Copyright Administration and Other Four Departments Launched the Special Action of 'Sword Net 2022'*, https://www.gov.cn/xinwen/2022-09/09/content_5709237.htm (accessed on October 23, 2025); NCAC, *The NCAC and Other Four Departments Launched the Special Campaign 'Sword Net 2025'*, https://www.gov.cn/li
anbo/bumen/202505/content_7023978.htm (accessed on October 23, 2025).

[25] SVSPs are eligible to take down infringing material upon receipt of a takedown notice from the rightsholder, under the so-called notice-and-takedown procedure. See *Regulations on the Protection of the Right to Network Dissemination of Information*, Articles 14-17 and 22(5) (2013).

[26] Since 2005, the NCAC, together with other state authorities, has launched the annual "Sword Net" campaign to combat online copyright infringement and piracy. These campaigns strengthen supervision, enhance copyright enforcement, and target the unauthorised dissemination of online literature, news, film, and television programmes, serving as a key mechanism in China's copyright enforcement system. See NCAC, *Overview of China's Copyright Undertaking*, https://en.ncac.gov.cn/aboutus/overviewofncacwork/202201/t20220119_57101.html (accessed on 1 October 2025); NCAC, *'Sword Net' Campaign from 2013 to 2022*, https://www.ncac.gov.cn/xxfb/bqzfjg/jwxd/ (accessed on October 23, 2025); NACA, *Early Warning Lists of Key Copyright-protected Works from 2014 to 2025*, https://www.ncac.gov.cn/searching/index.html?searchword=预警 (accessed on October 23, 2025).

[27] *Ibid.*

[28] See 12426 Copyright Monitoring Centre, *Case Analysis: Short Video Sharing Platform Loses Second Trial Over Short-Video Copyright Infringement of Overseas Film*, https://zhuanlan.zhihu.com/p/700042425 (accessed on December 19, 2025). The date of *the White Book of the 2021 Short Video Copyright Protection* was cited in this paper by the 12426 Copyright Monitoring Centre.

[29] *Ibid.*

[30] As Hua notes, the balance of interests scheme is the fundamental basis of copyright law and the driving force behind its development and reform. The increasing trend of short-video copyright infringement suggests that the copyright framework has failed to function effectively in this area. Also, China's safe harbour provision, mirrored from the § 512 of DMCA established in 1998, also reveals its outdated nature in regulating copyright infringement on modern platforms and disrupts the original balance of the interests of content owners, online and other service providers, and information users in the current internet ecosystem. See Jiehua Jerry, *Toward A More Balanced Approach: Rethinking and Readjusting copyright Systems in the Digital Network Era*, Springer, p. 41 (2014); U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights*, pp. 18-19 & pp. 27-34 (2020).

[31] Douyin's report shows that in 2023, the total number of video views on Douyin related to film, television and variety shows exceeded 3.6 trillion, of which television shows accounted for 2.3 trillion, movies for 830 billion, and variety shows for 470 billion. This can prove the remarkable popularity of films, television and variety shows on SVSPs. See Yang Liu, *The Market Size of China's Online Audio-Visual Industry Exceeded RMB 1.22 Trillion in Last Year*, https://www.gov.cn/yaowen/liebiao/202503/content_7015798.htm (accessed on October 23, 2025).

and brand partnerships for short-video generators,[34] while platforms benefit from considerable advertising revenues,[35] increased user engagement,[36] and market valuation.[37] By contrast, copyright holders bear cumulative economic losses[38] that are difficult to remedy through isolated takedowns and individual litigation.[39] This 'value gap'[40] dynamic strengthens the normative case for recalibrating platform duties to ensure fairer distribution of costs and benefits in the short-video ecosystem and to rebalance the interests at stake through more robust SVSP obligations.[41]

This article argues that it is essential to adopt a more effective, duty-oriented approach explicitly tailored to the technical sophistication, operational practices, and commercial incentives of SVSPs. Drawing on the regulatory logic and the purpose of closing the 'value gap' reflected in Article 17 of *the EU Directive on Copyright in the Digital Single Market* (hereinafter referred to as *the EU Copyright Directive*),[42] this article contends that China's framework could benefit from establishing a proactive and duty-oriented liability regime, which more accurately reflects SVSPs' operational realities. This article is divided into the following: Section 2 discusses the challenges of regulating short-video copyright infringement in China; Section 3 discusses how

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[32] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022). The television programme in question, Worm Valley, was very popular in China. It was exclusively broadcast as a series on Tencent Video on August 31, 2021. In just 8 hours, it achieved 100 million views. According to the data on the Tencent Video page, the series was played 1.09 billion times on September 20, 2021, 1.19 billion times on September 23, 2021, and 1.59 billion times on February 28, 2022. These data show that the television programme is a very well-known popular program. The total number of infringing short videos played on Douyin reached 571 million, and Douyin generated significant advertising revenue from these infringements.

[33] *Supra* note 16.

[34] *Supra* note 18, at pp. 51-52; Xiaoxia Li, *Douyin's E-commerce GMV Reached Approximately RMB 3.5 Trillion in 2024, With Top Influencers Contributing Approximately 9% to the Overall Market*, https://36kr.com/p/3166066575158018 (accessed on October 23, 2025).

[35] Douyin E-commerce achieved RMB 2 trillion (GBP 209.77 billion) in gross merchandise value (GMV) and generated RMB 400 billion (GBP 41.95 billion) in ad revenue. See Xiaoxia Li, *Douyin E-commerce Clarifies Ad Revenue Rumours Amid Online Speculation,* https://kr-asia.com/douyin-e-commerce-clarifies-ad-revenue-rumors-amid-online-speculation (accessed on October 23, 2025).

[36] *Supra* note 19.

[37] See Brand Finance, *Global 500 2025: The Annual Report on the World's Most Valuable and Strangest Global Brands*, https://brandirectory.com/reports/global (accessed on October 23, 2025).

[38] *Supra* note 3, at p. 26.

[39] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022). In the *Worm Valley* case, Tencent claimed, the infringing short videos caused it approximately RMB 419 million (GBP 43.28 million) in operating losses, while the defendant (Douyin) reportedly earned RMB 80.4 million (GBP 8.30 million) in advertising revenue from 571 million of the total views of the infringing short videos. Additionally, by disseminating the show without authorisation, Douyin avoided paying approximately RMB 100 million (GBP 10.3 million) in licensing fees.

[40] See Michael Stedman, *Mind the Value Gap: Article 17 of the Directive on Copyright in the Digital Single Market*, https://ssrn.com/abstract=3810144 (accessed on October 23, 2025).

[41] *Ibid.* SVSPs derive significant benefits from massive-scale and repeated short-video copyright infringement, which may encourage the existence of infringements on their platforms in order to increase the number of users, enhance user engagement, and attract more traffic to maximise their profits from it, associated with algorithmic systems.

[42] See *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC*, 2019 O.J. (L 130) 92 (hereinafter referred to as *the EU Copyright Directive*), Article 17(1)-(3).

the EU Copyright Directive can be referenced in China to address this issue more effectively; Section 4 summarises the challenges of regulating short-video copyright infringement in China and how Article 17 of *the EU Copyright Directive* provides a more effective solution to these complexities.

2. China's Short-Video Copyright Infringement Challenges

Section 2 explains why China's existing safe harbour provision has struggled to address large-scale and repeated short-video copyright infringement on SVSPs. The challenge is that the liability structure developed for passive hosting providers is limited, under-specified, and increasingly misaligned with SVSPs' operational realities.[43] In practice, this misalignment weakens incentives for meaningful platform governance, particularly where infringing short videos generate traffic and monetisation opportunities for both short-video generators and platforms.[44] Despite administrative enforcement campaigns,[45] judicial decisions,[46] and relevant judicial interpretation issued by the Supreme People's Court[47] and the relevant guidelines issued by the Beijing Higher People's Court[48] encouraging stronger duties of care in relation to film and television excerpts, repeated infringement continues to rise. This persistence indicates the need for a more effective allocation of obligations that better reflects SVSP functionality, commercial incentives, and technical capacity. This article argues that China's safe harbour provision is ill-suited to regulating short-video infringement on SVSPs because it reflects an outdated passive-hosting paradigm and imposes limited and ambiguous obligations that do not adequately address large-scale

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[43] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22 (2013); *Supra* note 6; *Supra* note 11; *Supra* note 18, at pp. 59-60; *Supra* note 18, at pp. 3-19.

[44] *Supra* note 13; *Supra* note 18, at pp. 59-60; *Supra* note 18.

[45] *Supra* note 24; *Supra* note 26.

[46] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022).; *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021) (hereinafter referred to as the *Douluo Dalu* case); *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018) (hereinafter referred to as the *Story of Yanxi Palace* case).

[47] See *Provisions of the Supreme People's Court on Several Issues Related to the Application of Law in the Trial of Civil Cases Involving Disputes over Infringement of the Right of Dissemination on Information Networks* (hereinafter referred to as SPC Provisions on Network Dissemination), https://uk.practicallaw.thomsonreuters.com/w-030-4365?transitionType=Default&contextData=(sc.Default) (accessed on October 23, 2025).

[48] Principle of trial under this Guide is that in the trial of copyright infringement cases, when exercising discretionary power, the protection of copyright should be increased, the creation of works should be encouraged, the dissemination of works should be promoted, and the interests of all parties should be balanced. See *the Guide to the Trial of Copyright Infringement Cases by the Beijing High People's Court* (2018). The Guiding Opinions are based on *the 2013 Network Dissemination Regulations* and systematically stipulate how to judge whether an OSP has infringed upon the rights. First, the elements of tort liability are clarified, and then the information network communication behaviour is defined. Special emphasis is placed on the identification of 'fault', and the content of the exemption conditions stipulated in *the 2013 Network Dissemination Regulations* is refined and explained. See *Guidance Opinions of Beijing High People's Court on the Trial of Several Issues Involving Copyright Disputes in the Network Environment* [2010] No. 166.

and repeated infringement.[49] This legal uncertainty can enable SVSPs to evade their responsibilities and potentially disregard large-scale and repeated infringements.[50]

When Chinese courts heard copyright infringement cases related to online service providers (hereinafter referred to as OSPs), Articles 20 to 23 of *the Regulations on the Protection of Right to Network Dissemination of Information 2013* (hereinafter referred to as *the 2013 Network Dissemination Regulations*)[51] became the main standard for assessing platform liability for user-uploaded infringing content,[52] also known as the safe harbour provision.[53] Those cases suggest that SVSPs fall within the category of hosting service providers[54] under Article 22 of *the 2013 Network Dissemination Regulations*.[55] Accordingly, this section examines why a passive hosting-provider safe harbour is inadequate for allocating liability and governance obligations to SVSPs.

China's safe harbour provision, introduced in 2006,[56] mirrored by *the Digital Millennium Copyright Act of the United States* in 1998,[57] which applies particularly to §512(c)-(d), which was designed for an earlier internet ecosystem.[58] The Chinese and the U.S., hosting safe harbour frameworks, therefore, share a common design logic rooted in the late-1990s internet environment.[59] Over the past two decades, the rapid development of internet technology and platforms has rendered the shortcomings of applying the safe harbour provision to contemporary SVSPs within the current

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[49] *Supra* note 3*;* Xingyang Li & Yanjie Hu, *Study on the Scope of Obligations of Short-form Video Platforms in the Era of Digital Copyright*, http://www.social.uestc.edu.cn/en/article/doi/10.14071/j.1008-8105(2022)-4016 (accessed on October 23, 2025).

[50] *Supra* note 6, at p. 175.

[51] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Articles 20-23 (2013).

[52] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Viacom International, Inc., v. YouTube, Inc.,* 718 F. Supp. 2d 514, 526-527 (S.D.N.Y. 2010); 17 U.S.C. § 512(c); *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021) ; *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.*, (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018).

[53] *Supra* note 6; Caixing Xiao, *Research on Copyright Infringement Issues in Short Video Platforms in the Context of Algorithmic Recommendation*, 13(1) Advances in Social Behaviour Research 40 (2024). Articles 22 to 23 of the 2013 Network Dissemination Regulations, known in Chinese as Bi-Feng-Gang-Yuan-Ze and in English as the safe harbour provision.

[54] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22 (2013). Hosting service providers are one of the OSPs that store or host user-generated content on their servers and make it accessible to the public on request. Under copyright law, they are typically passive platforms that do not actively curate, select, or modify user-uploaded content.

[55] *Ibid.*

[56] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Articles 20-23 (2013).

[57] *Supra* note 28; 17 U.S.C § 512 (1998). § 512 of the DMCA of 1998, referred to as the "safe harbour", addresses certain copyright issues arising from the use of digital media to distribute copyrighted materials and the widespread adoption of the internet.

[58] See Kepan Lu, *The Responsibility of Internet Service Providers in the New Media Era—From the Perspective of Online Video Copyright Infringement*, https://doi.org/10.12677/OJLS.2023.116880 (accessed on October 23, 2025).

[59] See Alvin Hung, *Assessing the Potential Involutionary Effects of New Copyright Laws: A Techno-legal Analysis Based on the Impact of Web 3.0 on Copyright Protection*, 14(1) Seattle Journal of Technology, Environmental & Innovation Law 1, 1 (2024).

internet ecosystem increasingly outdated and misaligned with the operational and technological realities.[60] As a result, applying a passive, limited, and under-specified liability structure to multifunctional SVSPs risks leaving large-scale and repeated infringement under-regulated.

Under Article 22 of *the 2013 Network Dissemination Regulations*, there are five conditional exemptions for determining SVSP liability for infringing video disseminated through their platforms.[61] However, only three of them are central to the judgement of the short-video copyright infringement cases, which are whether SVSPs know or have reasonable grounds to know the content provided by users are infringements (hereinafter referred to as knowledge standard);[62] whether they directly received financial benefits from the content provided by the users (hereinafter referred to as financial benefits elements);[63] whether they delete the alleged infringement after receiving the notification from the rightsholders (hereinafter referred to as notice-and-takedown procedure).[64] The remainder of Section 2 analyses three interlocking reasons why China's safe harbour provision underperforms in the SVSP context: (i) the limited and uncertain scope of platform liability; (ii) the structural ineffectiveness of notice-and-takedown in high-volume, rapidly replicable short-video environments; and (iii) SVSPs' operational and monetisation models, particularly algorithmic recommendation and commercial integration, which amplify infringement incentives and circulation. Together, these features enable SVSPs to adopt a largely reactive posture while large-scale and repeated infringement persists.

2.1 Exemptions and their Ambiguous SVSPs Liability

The ecosystem created by Article 22 of *the 2013 Network Dissemination Regulations* allows SVSPs to passively regulate short-video copyright infringement.[65] Firstly, the lack of proactive obligations to review, monitor, and filter copyright-infringing content makes it difficult to apply the knowledge standard consistently and to define the scope of platform responsibilities in relation to large-scale infringement.[66] This is also the core defence of SVSPs, who argue that they are hosting providers that only store content without proactively or actively engaging with user-uploaded content.[67] In this circumstance, they are not supposed to know or have no reason to know of the infringement on their service, as Article 22(3) of *the 2013 Network Dissemination Regulations* stipulates. Under this passive-hosting logic, platforms may consider knowledge as arising only upon notification by rightsholders or the initiation of litigation, even where infringement is widespread. In this context, it is challenging to motivate SVSPs to self-regulate short-video copyright infringement,

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[60] *Ibid*, at pp. 4-16.

[61] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22(1)-(5) (2013). Whether SVSPs (1) clearly indicate that the information storage space is provided for the service object, and disclose the name, contact person and network address of the network service provider; (2) change the content provided by users; (3) know or have reasonable grounds to know the content provided by users is infringements (hereinafter referred to as knowledge standard); (4) directly received financial benefits from the content provided by the users (hereinafter referred to as financial benefits elements); (5) delete the alleged infringement after received the notification from the right holders (hereinafter referred to as notice-and-takedown procedure).

[62] *Ibid*.

[63] *Ibid*.

[64] *Ibid*.

[65] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22 (2013); *Supra* note 49.

[66] *Supra* note 6; *Supra* note 49.

[67] *Supra* note 16, at p. 57.

as the legal provision does not require them to do so, leading them to adopt a completely passive regulatory approach to this issue.

Secondly, the lack of definition of the terms established by the legal provision and judicial interpretation results in ambiguous SVSP liability, thereby allowing them to escape their responsibility and obligations for widespread, high-viewership infringement. Under Article 22(3) of *the 2013 Network Dissemination Regulations*, "do not know" or "do not have reasonable ground to know" applies to hosting service providers,[68] but the relevant judicial interpretation issued by the Supreme People's Court, "clearly know" or "should know" is used to them.[69] In relevant cases, the Chinese courts prefer to use "clearly know" or "should know" as the knowledge standard.[70] Additionally, due to the lack of clarification regarding the differences between those terms, the conditions for satisfying these different terms and the corresponding liability behind them are unclear.[71] In response, courts sometimes adopt an expansive approach in the short-video copyright infringement cases.[72] For example, in terms of determining or clarifying differences between the different levels of knowledge standards, they prefer to limit their judgment on whether the platform "should know" the existence of infringement.[73] Once the "should know" standard is satisfied, it also means they meet the scope of "clearly know".[74]

The author argues that this broader solution renders meaningless the distinction between different levels of liability with different terms for the platform. This is because varying levels of knowledge should correspond to the degree of SVSPs' liability for copyright infringement. A broad and undifferentiated approach may also fail to reflect the varying degrees of platform control, incentive, and capacity implicated in different infringement scenarios. These uncertainties regarding key criteria not only result in ambiguity in the scope of platforms' responsibilities and obligations, but also lead platforms to invoke safe harbour defensively in ways that may weaken incentives for proactive governance.[75] By limiting platform liability to only those who file lawsuits, platforms can continue to tolerate the increased spread of infringing short videos amidst these unclear legal obligations. Copyright holders' copyright protections and the substantial and ongoing economic damage they suffered, however, remain unprotected and unresolved.

Furthermore, the author questions the necessity of the existence of this knowledge standard for SVSPs. In the absence of proactive obligations to be responsible for infringing videos, it is challenging to expect platforms to proactively admit that they are aware of the existence of infringing videos, or to require rightsholders to prove whether the platform's knowledge about the infringement, or to clearly distinguish and judge whether the platform meets the requirements of actual

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[68] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22(3) (2013). The Chinese term "不知道也没有合理的理由知道" is translated as "does not know and has no reasonable grounds to know".

[69] *Supra* note 47. Article 8 stated that the court shall determine whether the OSP bears liability for instigation or contributory infringement based on the fault of the OSP. The fault of the OSP includes knowing or should know that the user violated the information network dissemination right. Article 12 stated that in any of the following circumstances, the court may, based on the specific circumstances of the case, determine that the OSP providing information storage space services should know that the user had infringed the information network dissemination right.

[70] *Supra* note 46.

[71] *Supra* note 47.

[72] *Supra* note 46.

[73] *Supra* note 46.

[74] *Supra* note 16, at pp. 64-65.

[75] *Supra* note 34.

knowledge and constructive knowledge. The author also argues that, given the substantial commercial benefits platforms derive from user-generated short videos, they inherently bear a responsibility and obligation to manage the widespread dissemination of infringing short videos on their platforms, irrespective of their actual or constructive knowledge. In particular, films and television programmes that are clearly susceptible to infringement, as well as works listed on the Copyright Administration's early warning lists,[76] should not be freely or repeatedly disseminated on such platforms.

Moreover, considering the advanced technical and algorithmic capabilities of contemporary SVSPs, it is increasingly difficult to justify SVSPs as passive hosting service providers or to assess their liability solely through the lens of knowledge of specific infringing items.[77] For example, Douyin, as an SVSP, no longer functions solely as a passive or neutral host service provider. It actively organises, selects, promotes, and monetises uploaded content through algorithmic mechanisms,[78] thereby amplifying the dissemination and monetisation of potentially infringing material.[79] This combination of under-specified duties and an outdated platform classification may incentivise emerging, multifunctional platforms to tolerate infringement while extracting economic value from engagement-driven traffic. Any reform, however, should be framed as proportionate and risk-based, calibrated to platform scale, technical capacity, and monetisation structures, rather than as a general duty to monitor all user uploads.

Finally, China's current safe harbour provision imposes no explicit duty on platforms to proactively monitor content.[80] As a result, SVSPs may seek to limit liability by emphasising the absence of knowledge, despite their algorithmically enhanced capacity to detect repeated infringement patterns.[81] This uncertainty not only weakens enforcement efficacy but also generates uneven incentives across platforms, particularly where courts apply expansive constructive-knowledge reasoning without clear statutory guidance.[82] Thus, reforming and codifying a clear knowledge standard, explicitly tailored to SVSPs' operational realities and integrated with proportionate prevention duties, would support more consistent and fair enforcement. Taken together, ambiguity, inconsistency, and under-specification in the knowledge requirement under China's safe harbour provision undermine its effectiveness in regulating large-scale and repeated short-video copyright infringements.

2.2 Ineffectiveness of Enforcement: Large-Scale and Repeated Infringement

Under China's safe harbour framework, the notice-and-takedown procedure is

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[76] *Supra* note 26.
[77] *Supra* note 31; *Supra* note 49; *SPC Provisions on Network Dissemination*, Article 8.
[78] *Supra* note 3, at pp. 78-79; *Supra* note 6.
[79] *Supra* note 46.
[80] See *SPC Provisions on Network Dissemination*, Article 8 (2020).
[81] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021) ; *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018).
[82] *Supra* note 30, at pp. 9-11.

commonly regarded as the principal mechanism through which SVSPs demonstrate compliance and secure conditional limitations on liability.[83] In particular, Article 22(5) of *the 2013 Network Dissemination Regulations* centers on whether a platform acts expeditiously to remove or disable access to infringing material upon receiving a valid notification from the rightsholder.[84] The procedure is intended to operationalise the balance embedded in the safe harbour provision, which platforms obtain conditional protection by responding to valid notices, while rightsholders gain a comparatively low-cost enforcement route without the time and cost of resorting to litigation.[85] However, the notice-and-takedown procedure was designed for a digital environment with comparatively lower content volumes and slower dissemination.[86] In contemporary short-video ecosystems, it has become increasingly inadequate as a primary governance mechanism for large-scale and repeatedly occurring infringement.[87]

The principal problem is structural, that the notice-and-takedown procedure is reactive and instance-based, whereas short-video copyright infringement, especially involving audiovisual works, operates as a high-volume, rapidly replicated, and persistently recurring phenomenon.[88] The procedure requires rightsholders to identify infringing short videos and trigger SVSPs' action through repeated notifications, yet imposes no further or proactive obligation to combat recurrence beyond the notified instance.[89] As a result, rightsholders must identify and report each instance of infringement individually, imposing impractical monitoring and enforcement costs. In a high-velocity environment, infringing short videos can circulate rapidly through sharing and recommender-driven distribution.[90] It can be re-uploaded across accounts with minimal edits, producing a predictable 'upload–takedown–reupload' cycle. [91] Even diligent responsiveness to takedown requests, therefore, does not necessarily translate into durable suppression.

Empirical monitoring data from China underscores why notice-and-takedown struggles to function as an effective governance mechanism for short-video copyright infringement in contemporary digital environments.[92] In 2022, the 12426 Copyright Monitoring Centre monitored approximately 8.89 million works and identified 42.25 million links suspected of infringement.[93] Notably, suspected infringement is

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[83] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22(5) (2013).
[84] *Ibid*.
[85] *Supra* note 30, at p. 71. It stated that "[t]he structure of the notice-and-takedown system reflects this desire for cooperation. § 512 encourages copyright owners to notify OSPs of allegedly infringing material as described in § 512(c)(3). By doing so, copyright owners can obtain the benefit of having the material removed expeditiously without the time or cost of resorting to litigation."
[86] *Supra* note 59, at pp. 1-35.
[87] *Supra* note 6; *Supra* note 59, at pp. 1-35; Wangwei Cui, *Reconstruction of Notice-Deletion Rule for the Digital Works in China*, 43(1) Journal of China West Normal University Philosophy Social Sciences 48, 48 (2021).
[88] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22(5) (2013).
[89] *Ibid*.
[90] *Supra* note 18; QuestMobile, *The 2025 Panoramic Ecological Traffic Semi-Annual Report*, https://www.questmobile.com.cn/research/report/1944965712683569153 (assessed on October 23, 2025). As of March 2025, the monthly active users of Douyin exceeded 1 billion, reaching 1.022 billion, an increase of 13.5% year-on-year. Within this vast user base, tens of millions of videos are generated daily.
[91] *Supra* note 46.
[92] *Supra* note 4; *Supra* note 6; *Supra* note 28.
[93] *Supra* note 6.

overwhelmingly concentrated in audiovisual works, which comprise the dominant source of short-video infringement pressure. For example, 6.37 million monitored audiovisual works (approximately 71.65% of all monitored works) corresponded to 33.81 million suspected infringing links (approximately 80.02% of all suspected infringing links).[94] By contrast, literary works accounted for 6.52 million suspected infringing links (approximately 15.43%), musical works for 1.69 million (approximately 4.02%), and other categories collectively represented only a marginal share.[95] This distribution is legally salient for evaluating the notice-and-takedown procedure. This is because it shows that enforcement pressure is concentrated in a category that is particularly easy to fragment, recombine, and repost at low cost.[96] In other words, audiovisual infringement in short-video ecosystems is structurally prone to recurrence.

The same data also highlights a systemic imbalance in the allocation of enforcement burdens between platforms and rightsholders in the short-video context.[97] At the scale identified by the 12426 Monitoring Centre, effective enforcement would require rightsholders to submit enormous volumes of notices, imposing substantial time and financial costs.[98] Rightsholders must identify infringing videos within vast volumes of uploaded content on the platform, prepare compliant notices, and repeat the process whenever content reappears through reposting, minimal editing, or redistribution across accounts, given the fast dissemination of the current digital environment.[99] In practice, it is unrealistic to ask rightsholders to identify and notify all infringing short videos circulating on SVSPs. Notice-driven removals, therefore, tend to operate as temporary interruptions rather than durable suppression, leaving platforms with significant practical control over the visibility and continued dissemination of infringing content.

By contrast, platforms are permitted to adopt a largely passive compliance posture, in which regulatory action is triggered only upon receipt of valid notices specifying infringing items with sufficient precision. SVSPs often fail to implement meaningful preventive measures, even after receiving infringement notifications,[100] because of the limited obligations and one-time enforcement under China's safe harbour provision. Uncertainty persists regarding what constitutes a valid notice, the timeframe for response, and the legal consequences of non-compliant notices.[101] These uncertainties can contribute to delayed responses or inaction. In practice, even where rightsholders provide substantial contextual information suggesting

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[94] *Ibid.*
[95] *Supra* note 6.
[96] *Ibid.*
[97] *Supra* note 6; *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022).
[98] *Supra* note 3, pp. 72-73.
[99] *Supra* note 90.
[100] See *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021); *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.*, (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018).
[101] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Articles 14-17 (2013); *Supra* note 6.

infringement across multiple URLs,[102] platforms may remain inactive to the notice due to a lack of certainty of the legal effect of non-compliant or incomplete notices,[103] despite having the capacity to detect largely similar content with their current technology. Illustratively, in the *Douluo Dalu* case, Douyin allegedly failed to respond to more than 200 notices involving approximately 23,000 infringing links;[104] in the *Worm Valley* case, Douyin reportedly failed to respond to more than 100 notices involving 6,299 infringing links;[105] in the *Story of Yanxi Palace* case, the platforms completely ignored the notice and warning letters sent by the rightsholder because the content in those materials was flawed.[106] These cases illustrate the disjunction between procedural formalism and platform capability.[107] This also results in a mismatch between SVSPs' role in disseminating high volumes of infringing short videos and monetising attention-driven traffic, and the limited, reactive obligations imposed by the existing notice-and-takedown procedure.

Enforcement-output indicators further reinforce the point.[108] In 2022, the 12426 Monitoring Centre reported that, pursuant to rightsholder-authorised complaints, 11.02 million infringing links were successfully blocked, and the average notice-driven takedown rate among major platforms reached 96.6%.[109] High responsiveness may demonstrate procedural compliance once notified, but it does not establish effective suppression of repeated infringement at scale. Where infringement is persistent and highly replicable, even high compliance rates may translate into continuing enforcement workloads rather than durable reductions in availability. In a short-video environment characterised by rapid circulation and low-friction replication, the key regulatory question is not whether removal occurs in individual cases, but whether the legal framework generates incentives and obligations capable of interrupting systemic recirculation.

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[102] See *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021); Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd. (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018); *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Viacom International, Inc., v. YouTube, Inc.,* 718 F. Supp. 2d 514, 526-27 (S.D.N.Y. 2010); 17 U.S.C. § 512(c).

[103] *Ibid*. Infringing short videos of popular films and television programmes often attract significant viewership and generate considerable advertising revenue for platforms. Consequently, platforms may strategically downplay or disregard infringement notifications in order to preserve the traffic and economic benefits derived from such content.

[104] *Supra* note 46.

[105] *Supra* note 8.

[106] *Supra* note 46.

[107] See *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021); Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd. (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018); *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Viacom International, Inc., v. YouTube, Inc.,* 718 F. Supp. 2d 514, 526-27 (S.D.N.Y. 2010); 17 U.S.C. § 512(c). In these cases, the courts emphasised that Douyin should have been aware of the extent of infringement occurring on its platform and possessed the technical capacity to monitor and remove the widespread infringing videos involving the popular work.

[108] *Supra* note 6.

[109] *Ibid.*

Finally, platform-level takedown rankings in the audiovisual domain indicate that SVSPs are particularly salient sites of infringement governance. In the 12426 Monitoring Centre's rankings of takedown of copyright-infringing short videos related to audiovisual works by SVSPs, compared with traditional long-form video-sharing platforms, search service platforms, and content aggregation service platforms, SVSPs tend to take down more infringing videos, suggesting that the infringing short videos involving audiovisual works happen more frequently on SVSPs.[110] For example, Kuaishou,[111] as one of the Chinese SVSPs, recorded the highest takedown volume (1.43 million links).[112] Haokan Video[113] (0.62 million links) and Douyin[114] (0.37 million links), both as SVSPs in China, also appeared among the top platforms.[115] By comparison, Tencent Video, a traditional long-form video sharing platform in China, has a lower takedown volume (0.35 million links) for infringement involving audiovisual works.[116] Takedown volumes are enforcement-output measures shaped by monitoring coverage and complaint strategies; they do not directly measure the underlying incidence of infringement. Nonetheless, they provide a useful indication of where governance burdens and audiovisual infringement disputes are concentrated. Although search services and aggregation platforms also feature in the rankings, the prominence of leading SVSPs is particularly relevant to the critique of the notice-and-takedown procedure. This is because SVSPs combine rapid dissemination, recommender-driven visibility, and low-cost replication in short-duration videos,[117] precisely the conditions under which reactive, notice-triggered removal is least capable of interrupting repeated circulation.

This concentration is reinforced by broader sectoral and institutional signals. In April 2021, fifteen industry associations, five major video platforms, and fifty-three film and television companies jointly issued a statement condemning the unauthorised editing, cutting, reposting, and dissemination of film and television works on SVSPs.[118] They warned that such practices harm rightsholders' legitimate interests and may undermine the integrity of works and distort authorial intent, with downstream harm to the industry's sustainable development.[119] They also warned that such infringement not only infringes rightsholders' legitimate interests but may also impair the integrity of works and distort authorial intent, with downstream harm to the industry's sustainable development. Regulatory enforcement priorities similarly underscore policy attention to copyright infringements on SVSPs. China's National Copyright Administration has repeatedly prioritised special campaigns against infringement and piracy in sectors including SVSPs and copyright infringement related to audiovisual works, and has reported large-scale deletions of infringing links through these initiatives.[120] The Beijing Internet Court reported that short-video-related copyright infringement cases increased from 540 (2019) to 729 (2020) and 1,284 (2021), and that litigants were predominantly long-form video platforms and

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[110] *Ibid*.
[111] Kuaishou is China's first short-video sharing platform, launched in 2011.
[112] *Ibid*.
[113] Haokan Video is another short-video sharing platform in China, developed by Baidu Company and launched in 2017.
[114] Douyin is a short-video sharing platform, launched in 2016.
[115] *Ibid*.
[116] *Supra* note 6.
[117] *Supra* note 4.
[118] *Supra* note 22.
[119] *Supra* note 22.
[120] *Supra* note 24.

SVSPs. In these disputes, plaintiffs are typically long-form video platforms, while defendants are SVSPs.[121] Taken together, while there remain limited publicly available datasets that directly compare baseline copyright infringement incidence across platform types on a like-for-like basis, the convergence of (i) high takedown volumes of copyright infringement related to audiovisual works in SVSP-focused monitoring outputs, (ii) administrative campaigns concentrating on regulating audiovisual infringement on SVSPs, (iii) rising short-video copyright caseloads, and (iv) collective rightsholder mobilisation provides a defensible basis for arguing that audiovisual-work infringement is particularly concentrated and governance-intensive on SVSPs relative to traditional long-form video platforms, can prove the copyright infringement on SVSPs are more prevelent.

Moreover, the absence of proactive obligations such as reviewing, filtering, continuous monitoring, or measures to prevent systematic infringement under the safe harbour provision significantly contributes to large-scale and repeated infringements.[122] Although recent judicial opinions suggest a trend towards recognising platform responsibilities to proactively address repeated infringements,[123] legislative codification of these responsibilities remains absent. Without statutory obligations to proactively prevent infringement, SVSPs have minimal incentives to meaningfully take down repeated infringements, perpetuating a vicious cycle of infringement, takedown, and re-upload. This persistence suggests a mismatch between the legal design of notice-and-takedown and the operational realities of algorithmically amplified short-video dissemination. Therefore, the notice-and-takedown procedure in China is facing significant challenges in effectively regulating large-scale and repeated identical short-video copyright infringement. Any proactive duties regarding this section should be framed as proportionate, risk-based obligations calibrated to platform scale, technical capacity, and monetisation structures, rather than as an unbounded duty to monitor all user uploads.

Taken together, the monitoring and enforcement evidence indicates that short-video infringement, especially infringement involving audiovisual works on SVSPs, constitutes a systemic, repeatable phenomenon that outpaces the procedural logic of the notice-and-takedown procedure. This mismatch helps explain why the notice-and-takedown procedure, even when implemented with high levels of formal responsiveness, may underperform as an effective regulatory solution for large-scale and repeated infringement related to audiovisual works in algorithmically driven short-video ecosystems. This does not imply that this procedure is irrelevant; rather, it indicates that notice-and-takedown alone is unlikely to achieve effective governance where infringement is recurrent and scaled through contemporary dissemination mechanisms. The analysis, therefore, supports the argument that SVSPs require a more active regulatory approach to impose higher duties that address large-scale and repeated infringement, rather than relying predominantly on notice-triggered removals.

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[121] *Supra* note 4.

[122] *Supra* note 3, at pp. 24-26; *Supra* note 6; *Supra* note 49.

[123] See *the SPC Provisions on Network Dissemination*, Article 9 (2020); *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022).; *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021) (hereinafter referred to as the *Douluo Dalu* case); *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018) (hereinafter referred to as the *Story of Yanxi Palace* case).

2.3 SVSPs Operational Model: Amplifying Short-Video Infringement

Besides the deficiencies of existing legal frameworks and copyright enforcement mechanisms in addressing short-video copyright infringement, SVSPs' operational and monetisation models can further intensify the circulation of infringing short videos. Compared with traditional professional video-sharing services and general social media platforms, SVSPs exhibit strong integration and content monetisation capabilities, enabling them to combine content dissemination with multiple commercial functions.[124] Consequently, short videos are no longer merely vehicles for sharing creative expression but have become strategic tools for commercial benefits. As short videos constitute the core competitive asset of these platforms, operators seek to maximise profits by leveraging user-generated short videos to the fullest extent possible.[125] This profit-driven model also incentivises content generators to upload infringing videos and encourages viewership of such content, thereby amplifying traffic and advertising revenue.[126]

First, the classification and ranking mechanisms SVSPs employ for different types,[127] combined with their passive, negative regulatory approach to infringement, effectively guide content generators to generate infringing content related to audiovisual works. For instance, Douyin proactively organises content on its homepage into thematic channels such as films, music, and games. In principle, most film and television productions require a licence before they can be lawfully disseminated on such platforms. However, as SVSPs primarily specialise in short audiovisual content rather than full-length works, they often do not operate under the same licensing arrangements as professional long-form video platforms for complete films or television programmes.[128] This can create a regulatory and commercial grey area: platforms may benefit from audience demand associated with copyrighted audiovisual works without incurring licensing costs comparable to those of long-form video sharing services, while still benefiting from the traffic and viewership generated by those copyright-protected works. Consequently, a substantial proportion of short videos featured within these film and television programmes channels constitutes infringing material, as generators frequently edit and reproduce copyrighted works without authorisation. Through both the implicit influence of platform design and the indirect guidance provided by algorithms, generators often come to perceive that such practices are tolerated or even permissible, due to the large amount of content disseminated on the platform.[129]

Moreover, SVSPs often rank or rate popular films and television programmes, providing generators with a clear indication of trending content. In their pursuit of rapid traffic growth and viewership, many generators thus choose to edit and reproduce clips from popular audiovisual works.[130] These videos tend to attract significant attention and engagement because of their inherent public attractiveness, especially as many well-known films and television programmes are otherwise

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[124] *Supra* note 10, at p. 79 & pp. 94-103; *Supra* note 13; *Supra* note 18.
[125] *Supra* note 18.
[126] *Ibid.*
[127] *Supra* note 8. On Douyin's official website, the home page categorises content into specific columns such as "Films and Television Programmes," "Sports," and "Travel." Similarly, the Douyin mobile app provides ranking lists for various content categories, including a dedicated list for "Films and Television Programmes".
[128] *Ibid.*, at p. 77.
[129] *Ibid.*, at p. 71.
[130] *Supra note* 10, at pp. 51-52.

accessible only through licensed platforms that require a paid membership.[131] As a result, generators frequently edit and reproduce such works into multiple short videos and upload them sequentially, thereby compromising the integrity and completeness of the original works. This type of content not only enhances platform visibility and user engagement but also generates substantial advertising and commercial revenue.

Additionally, the dissemination of short-video copyright infringement is extended by algorithmic recommendation systems.[132] Short videos derived from trending films or television programmes are continuously promoted once viewed, searched for, or achieve high viewership.[133] This algorithmic amplification exacerbates the challenge of regulating infringing short videos, increasing enforcement difficulty and enforcement costs, particularly when platforms are not subject to proactive obligations to review, monitor, and filter infringing content. While it is understandable for platforms to diversify their content distribution channels to enhance popularity and user engagement, the author maintains that, where platforms curate categories that are foreseeably susceptible to infringement and fail to implement reasonable, proportionate risk-mitigation measures, questions arise as to whether they have discharged an appropriate duty of care. The issue, therefore, is not merely whether platforms possess actual or constructive knowledge of infringement; rather, it concerns their reasonable duty to monitor and prevent foreseeable infringements once they have proactively curated such channels. The absence of specific obligations under the safe harbour provision tailored to SVSPs has allowed them to evade these responsibilities, thereby perpetuating an environment of systemic infringement and profit-driven indifference.

Secondly, platform-based content monetisation mechanisms further incentivise generators to upload infringing short videos involving popular films and television programmes.[134] SVSPs commonly provide revenue-sharing or reward schemes that encourage generators to upload content in exchange for financial income.[135] In principle, the income-generating opportunities depend on the viewership of uploaded content. When user-generated videos achieve substantial viewership, they often attract collaboration opportunities with advertisers.[136] For instance, advertisements may be embedded directly within short video content, product links can be displayed beneath the video, or dedicated channels can be established for product promotion and sales.[137] Those commercial initiatives are fundamentally driven by traffic volume and viewers' engagement.

More specifically, a short-video generator with approximately 384,000 followers on a SVSP edited the popular Chinese TV series *The Age of Awakening* into several short videos and uploaded them.[138] The generator's collection reportedly consists entirely of excerpts from various film and television programmes, has received nearly five million likes, and the account's homepage store has sold more than 800 items.[139]

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[131] *Supra* note 46.
[132] *Supra* note 6, at pp. 167-169.
[133] *Supra* note 6, at pp. 167-169..
[134] *Supra* note 10, at pp. 51-52.
[135] *Ibid*.
[136] *Supra* note 18.
[137] *Supra* note 10, at pp. 51-52.
[138] See Qiong Liu, *More Than 90% of the Original Authors of Short Videos Have Been Infringed: After Watching a Movie in Five Minutes, The Content is Similar to Each Other*, http://www.xinhuanet.com/legal/2021-04/06/c_1127299803.htm?utm_source=chatgpt.com (accessed on December 27, 2025).
[139] *Ibid*.

Another generator on a SVSP with nearly 1.3 million followers, using the title "One Movie, One Story", updates almost daily with an edited version of a film or television programme.[140] During live streams, multiple currently showing films are reportedly played continuously, attracting hundreds of viewers. Behind the scenes of the live stream, the blogger directs users to download games via their promotional links in order to earn commissions from the respective manufacturers.[141] Taken together, these examples suggest that the short-video advertising and content monetisation ecosystem can reward audience scale and engagement performance, rather than systematically screening for whether the marketing-adjacent content is infringing.

A further reason why commercial collaborations may attach to accounts posting infringing clips is that advertisers are typically not positioned as the primary actors in the infringing act of reproduction or communication to the public. In practice, copyright enforcement and compliance demands are more frequently directed at uploaders and platforms, through takedown notices, account sanctions, and platform governance measures,[142] while advertisers often perceive their exposure as comparatively remote, particularly where collaborations are structured as standard ad placements, affiliate links, or performance-based promotions.[143] Once infringing short videos remain online long enough to accumulate substantial viewership, audience scale, and engagement, they can become attractive advertising inventory. Accordingly, advertiser decision-making may prioritise traffic and conversion metrics over copyright provenance, because the immediate commercial upside lies in reach and engagement, whereas the expected legal and reputational costs are perceived to be externalised to, or primarily managed by, platforms and rightsholders through the notice-and-takedown procedure and related enforcement pathways.

In this context, short-video generators would choose an easy and quick way to generate content. Combining the film and television programme channels with their ranking lists indirectly encourages content generators to produce content relevant to popular audiovisual works. To capitalise on more business opportunities quickly, many generators deliberately select clips from popular television programmes, thereby gaining instant attention, traffic, and views. These behaviours, in turn, amplify platform visibility, enhance user engagement, and expand the overall user base, ultimately boosting advertising revenue, e-commerce transactions, livestreaming income, and overall commercial value.[144] Given that SVSPs derive considerable economic benefit from user-uploaded infringing content,[145] the author argues that they

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[140] *Ibid*.
[141] *Ibid*.
[142] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22 & Articles 14-17 (2013); *SPC Provisions on Network Dissemination*, Articles 7-12 (2020); *Supra* note 24; *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Viacom International, Inc., v. YouTube, Inc.,* 718 F. Supp. 2d 514, 526-27 (S.D.N.Y. 2010); 17 U.S.C. § 512(c); *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021); *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018).
[143] See Azeta Tartaraj & Drita Avdyli *et al.*, *Accessing the TikTok Influencer Marketing on Consumer Behavior: An Econometric Examination*, 14(2) Journal of Educational and Social Research 346, 346-363 (2024).
[144] *Supra* note 18.
[145] *Supra* note 46.

bear an elevated duty of care and a corresponding obligation to address copyright infringements proactively, rather than relying solely on user notifications or reactive enforcement mechanisms.

Thirdly, the current business model of SVSPs calls into question the necessity of the financial benefit elements under Article 22(4) of *the 2013 Network Dissemination Regulations*. Another challenge in China's safe harbour provision lies in the narrow judicial interpretation of the "direct financial benefit" criterion, [146] which exempts platforms from liability unless they derive specific revenue explicitly linked to individual infringing content. Current judicial interpretations narrowly limit liability to direct and traceable advertising revenues from specific infringing videos, excluding broader revenue streams indirectly generated by widespread infringing content.[147] General advertising income or platform-wide service fees are excluded.[148] This narrow framing is increasingly incompatible with SVSPs' complex monetisation structures.[149] SVSPs, such as Douyin, monetise content through diverse mechanisms, including targeted advertising, e-commerce integration, algorithm-driven recommendations, and user-engagement incentives.[150] Such strategies generate substantial indirect revenue streams from high-engagement infringing videos, notably those featuring popular films and television programmes,[151] significantly increasing platform traffic and advertising revenues.[152]

Yet, under the current interpretation, unless a direct, tangible connection between specific infringements and distinct revenue streams can be demonstrated, SVSPs evade financial liability.[153] While platforms may not place advertisements directly on specific infringing videos, their systemic design incentivises and allows them to profit from high-viewership content, including infringing works.[154] For example, the considerable advertising revenues from high-viewership infringing videos featuring popular films and television programmes are difficult to consider as "direct" financial benefits. Some of the most appealing content for online traffic consists of free popular television programmes, many of which are protected by copyright.[155] The establishment of television programme sections on the platform clearly aims to attract and encourage users to upload these popular shows, thereby increasing the platform's traffic and visibility, and ultimately securing higher advertising revenue. While the platform does not explicitly encourage users to upload infringing content, nor does it

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[146] See *Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22(4) (2013).
[147] See *SPC Provisions on Network Dissemination*, Article 11 (2020).
[148] *Ibid*.
[149] *Supra* note 3, at p. 26; *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021); *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018). The significant economic harm caused by copyright-infringing short videos involving popular films and television programmes stems not from isolated individual acts, but from the widespread and repeated dissemination of a large volume of infringing content across the platform.
[150] *Supra* note 10, at pp. 51-52.
[151] *Supra* note 46.
[152] *Supra* note 18.
[153] See *the SPC Provisions on Network Dissemination*, Article 11 (2020).
[154] *Supra* note 46.
[155] See *the Regulations on the Protection of the Right to Network Dissemination of Information*, Article 22(4) (2013).

directly place targeted advertisements on such content, the establishment of a dedicated film and television programme channel or classification system may nonetheless constitute implicit guidance. Meanwhile, the benefit derived from such classifications is indirect and not tied to specific acts of infringement. Therefore, it is challenging to satisfy Douyin's liability under the "direct" financial benefits.

In sum, the narrow interpretation of "direct" financial benefit in China's safe harbour provision limits its effectiveness in holding SVSPs accountable, even though they can generate considerable advertising revenue from infringing short videos. Without such clarification, SVSPs will continue to exploit this legal gap, profiting from infringing content while evading meaningful liability. Accordingly, it is essential to clarify that the financial benefits platforms derive from infringing content constitute the "direct" standard under Article 22(4) of *the 2013 Network Dissemination Regulations*. It is more important to ensure and heighten SVSPs' duty of care, and to impose a proactive obligation on them to motivate them to self-regulate large-scale and repeated short-video copyright infringement, particularly involving copyright-protected works.

Accordingly, this article argues that it is essential to reconsider and reconstruct a liability model that aligns with the complex and multifaceted nature of modern SVSPs, rather than continuing to apply an outdated legal framework indiscriminately. The ineffectiveness of China's existing legal regime largely stems from its reliance on a responsibility mechanism designed for online platforms more than two decades ago.[156] With the rapid evolution of the Internet and digital technologies, such a framework is clearly misaligned with the realities of contemporary platforms,[157] particularly those characterised by the increased integration of short videos, user-generated content, advertising, live streaming, e-commerce, and algorithmic recommendation systems.[158] In turn, the challenges of China's short-video copyright infringement, such as a comprehensive lack of proactive regulatory oversight, an ambiguous and passive liability regime for SVSPs, the ineffective enforcement of notice-and-takedown procedures, and the comprehensive functional and diverse business model of SVSPs, demonstrate the systemic inadequacies of China's framework for regulating large-scale and repeated short-video copyright infringement by SVSPs. Such an outdated, inconsistent, and uncertain regime is inappropriate for SVSPs characterised by sophisticated algorithms, active content curation, and multifaceted monetisation methods, and can easily evade liability under current legal standards. Therefore, it is essential to adopt a more effective approach for regulating short-video copyright infringement that aligns with the current development of SVSPs. The subsequent section explores how Article 17 of *the EU Copyright Directive* provides valuable guidance for addressing these challenges.

3. Lessons from Article 17 of the EU Copyright Directive

The inadequacies identified in China's safe harbour provision for regulating short-video copyright infringement on SVSPs highlight the urgent need for regulatory

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[156] *Supra* note 59, at pp. 1-35; Kaixin Zhu, *Reconstruction of the Rules on the Indirect Infringement of Online Copyright*, 9(1) Renmin Chinese Law Review: Selected Papers of the Jurist 285, 285-300 (2022).
[157] *Ibid*.
[157] *Supra* note 82, at pp. 27-34.
[158] *Supra* note 10, at pp. 67-103; *Supra* note 18, at pp. 51-52; *Supra* note 18; *Supra* note 34; *Supra* note 37.

reform.[159] These limitations have contributed to a widening 'value gap',[160] whereby SVSPs profit considerably from infringing short videos,[161] while rightsholders bear disproportionate economic harm.[162] Consequently, China's platform liability regime under the safe harbour provision requires comprehensive modernisation to effectively address short-video copyright infringement, aligning with the realities of the SVSP ecosystem. *The EU Copyright Directive*, specifically Article 17,[163] presents a valuable model that explicitly addresses the evolving nature of digital platforms by imposing more clearly defined and robust duties of care upon online content-sharing service providers (hereinafter referred to as OCSSPs).[164] Article 17 moves beyond a passive safe harbour paradigm by recognising that certain platforms actively organise, promote, and monetise user-uploaded content. Importantly, the Article 17 framework is framed as a proportionate, best-efforts regime that takes account of platform type, scale, and technological and economic feasibility, rather than imposing an unbounded general duty to monitor. The EU model thereby provides insights that China can leverage to recalibrate its legal framework.

This section develops the argument in four steps. First, it explains why leading SVSPs can no longer be characterised as passive hosting providers and therefore should not automatically benefit from the safe harbour provision's exemptions. Second, it clarifies the doctrinal consequence of falling outside safe harbour provisions, namely, an expanded exposure to secondary infringement liability and an associated duty of care calibrated to platform capacity and the foreseeability and recurrence of infringement. Third, it argues that China's current notice-driven safe harbour provision leaves this duty under-specified and overly reactive, which is why legislative reform is required. Finally, drawing on Article 17 of *the EU Copyright Directive*, it proposes a proportionate, risk-based obligation set for high-capacity services operating as online content-sharing service providers.

3.1 Turning SVSPs from Passive Hosting Providers to Proactive OCSSPs

SVSPs such as Douyin can no longer be plausibly characterised as passive hosting providers. In practice, these platforms actively categorise, promote, and monetise user-uploaded short videos[165] leveraging algorithms and data-driven recommendation systems to curate content, drive engagement, and generate revenue.[166] This operational reality is inconsistent with the conceptual premise

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[159] *Supra* note 3*; Supra* note 6; Fanshu Kong, *Research on Copyright Infringement of Short Video Platform*, https://doi.org/10.12677/DS.2023.95263 (accessed on October 23, 2025); Shaoling Chen, *Institutional Dilemma and Breakthrough in Solving Short Video Copyright Disputes*, http://www.wncyip.com/UploadFiles/20210923/20210923144924920.pdf (accessed on October 23, 2025).

[160] *Supra* note 40.

[161] *Supra* note 3, at p.26; *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078; *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021) ; *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018).

[162] *Ibid*.

[163] See *the EU Copyright Directive*, Article 17 (2019).

[164] *Ibid*.

[165] *Supra* note 10, at pp. 51-52.

[166] *Supra* note 10, at pp. 78-79; *Supra* note 6.

underpinning traditional safe harbour provisions, which are premised on platform neutrality and limited involvement in content dissemination.[167] SVSPs have moved beyond a merely technical role of storage by integrating e-commerce functions, advertising, and live-streaming mechanisms that facilitate extensive commercial exploitation of user-generated content.[168] These features substantially deepen platform involvement and reshape the incentives and capabilities of platforms in relation to content governance. For instance, Douyin promotes content through dedicated categories and trending lists (including ranking lists for films and television programmes), thereby amplifying user to upload copyright infringing short videos related to audiovisual works and monetising that content via its multifuctionalities.[169] Such activities significantly deviate from the passive hosting service provider's role traditionally presupposed by China's safe harbour provision. Yet China's existing classification still allows SVSPs to invoke hosting-provider exemptions even where platform design and commercial incentives contribute to the circulation and amplification of infringing short videos.[170] This under-inclusive allocation of responsibility weakens incentives for meaningful platform governance and contributes to the persistence of widespread short-video infringement. Therefore, maintaining SVSPs within a liability regime designed for passive hosts is increasingly difficult to justify.

The introduction of Article 17 of *the EU Copyright Directive* provides a useful comparative lens for rethinking platform classification and responsibility.[171] Compare to the traditional safe harbour provision in China, Article 17 of *the EU Copyright Directive* acknowledges that certain online platforms do not merely store content but are designed to organise and promote user uploads for commercial gain.[172] Accordingly, it introduces a more proactive governance structure for OCSSPs, premised on the platform's role in shaping and monetising content dissemination. In this respect, the EU approach provides conceptual and regulatory insights for addressing the mismatch between China's passive safe harbour provision and the operational realities of contemporary SVSPs.

To illustrate how Article 17's OCSSP framework may encompass platforms that host both long-form and short-form user-uploaded videos, YouTube is therefore used here as a mixed-format comparator within the broader OCSSP category, rather than as a representation for SVSPs. Scope clarification is necessary to ensure that the OCSSP framework does not differentiate platforms by the duration of videos they host; it differentiates them by function.[173] It targets services that store and give the public access to large amounts of user-uploaded protected content, which the service organises and promotes for profit.[174] Accordingly, the focus of this section is not that all short-form services should be regulated differently as a formal category. Rather, SVSPs are treated as the focal case as they are the paradigmatic manifestation of this profit-driven, algorithmically organised user-generated content model, and their dissemination architecture makes repeated infringement involving audiovisual works particularly difficult to address through a purely reactive notice-and-takedown

[167] *Supra* note 82*,* pp. 22-24.
[168] *Supra* note 10, at pp. 88-90; *Supra* note 13; *Supra* note 18.
[169] *Supra* note 138.
[170] *Supra* note 6.
[171] *Supra* note 163.
[172] See *Directive 2019/790 on Copyright and Related Rights in the Digital Single Market* (EU Copyright Directive), Article 2(6) (2019).
[173] *Ibid*.
[174] *Ibid*.

procedure.[175] A functional approach also avoids over-inclusion of long-form services that primarily distribute licensed professional content, which need not be captured unless they operate comparable large-scale user-generated content features.

YouTube and SVSPs share several functional characteristics, including video-sharing services with strong social features,[176] monetisation of user-generated content,[177] advertising and live-streaming.[178] These commonalities make YouTube a useful reference point for assessing how platform design and commercial incentives interact with copyright compliance expectations. YouTube accommodates both long-form and short-form video dissemination,[179] whereas SVSPs are structurally oriented around short videos as the dominant mode of creation and consumption.[180] As a practical matter, YouTube's more mature enforcement infrastructure and filtering practices have often been deployed against the unauthorised availability of full-length films and television programmes.[181] SVSPs, by contrast, amplify infringement risks because of their platform-specific affordances, such as short duration, low-cost editing, low-friction uploading, and rapid production, all of which facilitate replication and reposting.[182] When combined with high-velocity online dissemination and algorithmic recommendation systems that expand reach and accelerate virality, these features substantially increase the complexity of governing repeated short-video infringement on SVSPs. SVSPs also integrate e-commerce functionalities within the platform, which can deepen user engagement and stickiness and intensify the commercial incentives associated with attention-driven traffic, thereby further complicating the governance landscape.[183]

On this basis, the article argues that if a platform such as YouTube, capable of both long- and short-form dissemination and equipped to monetise user-generated content, can be recognised within the EU framework as OCSSP and treated as communicating to public and pursuing profit through user uploads rather than merely providing neutral storage, China may draw on the same functional insight to SVSPs. Instead of characterising multifunctional SVSPs primarily as hosting services that simply store user videos, a more conceptually accurate and normatively defensible approach is to calibrate platform obligations to the realities of their current operational models. In this respect, the innovative value of the EU approach lies not in transplanting its rules wholesale, but in its willingness to align legal responsibility

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[175] *Supra* note 4; *Supra* note 6; *Supra* note 49.

[176] *Supra* note 10, at p. 79 & pp. 98-99; *Supra* note 13; John M. Jordan, *The Rise of the Algorithms: How YouTube and TikTok Conquered the World*, The Pennsylvania State University Press, pp. 10-52 (2024).

[177] *Supra* note 6; *Supra* note 10, at pp. 78-79; *Supra* note 18; Paul Andrew Bourne, *Social Media Use, Power, and Money: Influence and Economic Implications*, 10(2) International Journal on Transformations of Media, Journalism & Mass Communication15, 15-26 (2025).

[178] See *YouTube Official Website*, https://www.youtube.com (accessed on October 23, 2025); *Douyin Official Website*, https://www.douyin.com (accessed on October 23, 2025); *TikTok Official Website*, https://www.tiktok.com (accessed on October 23, 2025).

[179] After the success of the short-video sharing platform, TikTok expanded to the market across the world, and YouTube also developed a new function in its service to compete with, called YouTube Shorts. YouTube Shorts are short-form vertical videos that have a duration of up to 180 seconds (3 minutes), and have various features for user interaction. Videos were limited to 60 seconds prior to September 2024.

[180] *Supra* note 3.

[181] The monitoring of copyright infringement on YouTube's long-form video sharing feature is stricter than on YouTube Shorts, as many full-length films and television programmes are uploaded as long-form videos. Therefore, they are more strict about the licensing agreements for those works.

[182] *Supra* note 4.

[183] *Supra* note 10.

with platform functions, technical capacity, and monetisation structures, an orientation that can inform the development of a more effective and proportionate liability framework for SVSPs in China.

Article 2(6) of *the EU Copyright Directive* defines OCSSPs as service providers that store, make available, and communicate to the public a large number of copyright-protected works uploaded by users, and that organise and promote this content for profit-making purposes.[184] This definition marks a departure from the safe harbour provision for passive hosting providers. It reflects the reality of platforms whose functions are built around the dissemination and monetisation of user-generated content.[185] This new category directly acknowledges that platforms such as SVSPs no longer operate merely as passive intermediaries.[186] Instead, they actively facilitate the large-scale uploading, dissemination, organisation, and monetisation of user-generated, copyrighted content.[187]

Practice under the transposition of Article 17 of *the EU Copyright Directive* also demonstrates the salience of the OCSSP framework for SVSPs. For example, in February 2024, users uploaded copyright-protected content to the TikTok platform (the international version of Douyin, SVSPs) without holding the necessary exploitation rights, which are managed by the company Nikita Ventures.[188] Consequently, Nikita Ventures filed a complaint against TikTok, seeking injunctive relief, information, and compensation, as the disputed films had been made available to the public. TikTok claimed an exemption from liability under Article 1(2), sentence 1, of the *Urheberrechts-Diensteanbieter-Gesetz* (Act on the Copyright Liability of Online Content-Sharing Service Providers, UrhDaG).[189] However, the *Landgericht München I* (Munich District Court I) ruled that TikTok did not qualify for the exemption under Sentence 1 of Article 1(2) because it had failed to meet the "best efforts" obligation to conclude licensing agreements in accordance with Sentence 1 of Article 4(1) and Article 4(2)(1).[190] This means that TikTok, as an SVSP, have the responsibility to undertake "best efforts" to negotiate licences, otherwise exposing it to injunctive and related claims concerning user-uploaded films.[191] While Article 17 is not confined to SVSPs, such litigation illustrates that SVSPs can be regarded as OCSSP-type services and lose liability protection where they do not demonstrate serious "best efforts" to obtain licences, reinforcing the idea that the OCSSP framework is function-based but practically salient for SVSPs in China.

Notably, reclassifying leading SVSPs in China as OCSSPs embodies a more

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[184] See *the EU Copyright Directive*, Recital 62 (2019).
[185] *Supra* note 163.
[186] See *the EU Copyright Directive*), Recital 62 (2019); Christina Angelopoulos & João-Pedro Quintais, *Fixing Copyright Reform: How to Address Online Infringement and Bridge the Value Gap*, https://infolawcentre.blogs.sas.ac.uk/2018/09/06/fixing-copyright-reform-how-to-address-online-infringement-and-bridge-the-value-gap/ (accessed on October 23, 2025).
[187] *Supra* note 184.
[188] See Sven Braun, *Munich District Court rules on TikTok's duty to negotiate licences seriously*, https://merlin.obs.coe.int/article/10016#:~:text=Institute%20of%20European%20Media%20Law,a%20licence%20by%20July%202022 (accessed on December 27, 2025).
[189] *Ibid*. The UrhDaG, which primarily transposes Article 17 of the Digital Single Market Directive (2019/790/EU), states that platform operators are not liable under copyright law for an act of communication to the public if they block unauthorised usage and conclude licensing agreements with the rightsholders.
[190] *Ibid*. This provision requires service providers to "undertake their best efforts to acquire the contractual rights of use for the communication to the public of copyright-protected works" and to block reported content expeditiously.
[191] *Ibid*.

realistic understanding of how these platforms operate and indicates that the scope of SVSPs' functionalities extends beyond hosting. SVSPs employ advanced algorithms that actively categorise, recommend, and amplify content to maximise user engagement, traffic, and revenue generation through targeted advertising, live-streaming integration, and e-commerce strategies.[192] For instance, Douyin actively promotes dedicated sections focused explicitly on popular films and television programmes, indirectly incentivising users to upload infringing materials to capitalise on existing audience demand.[193] These features not only drive direct sales but also create a commercial feedback loop where content popularity translates into monetised exposure.[194] Douyin's revenue model is inextricably linked to user-uploaded content, which forms the foundation for advertising sales, e-commerce conversions, and platform growth.[195] In this circumstance, SVSPs directly bridge business users, generators, viewers, and consumers by providing access to short videos, which demonstrates that the scope of SVSPs' functionalities extends beyond hosting.

Categorised channels, such as film and television programmes, are designed to attract and retain user attention, thereby reinforcing the monetisation loop through content algorithmically ranked and commercially incentivised.[196] This targeted categorisation aligns with multi-sided market theory under a platform economics perspective, in which increased user engagement enhances the platform's value proposition to advertisers.[197] Algorithmic recommendation systems then reinforce this engagement by ranking and promoting content within these categories based on prior user behaviour, predicted viewing preferences, and commercial potential.[198] This process creates a loop that concentrates engagement in a profitable category, leading to greater advertising demand, which incentivises both the platform and content creators to produce and promote similar material, thereby perpetuating the monetisation cycle.

Additionally, Douyin, as an SVSP, leverages algorithmically curated user-generated content to maximise engagement and, in turn, advertising revenue, thereby aligning its operational model and economic incentives with those of other OCSSPs. Thus, reclassifying leading SVSPs as OCSSPs on a functional basis better reflects their liability in accordance with the platforms' actual roles and economic motivations. This article contends that recognising the key connection between short videos, user engagement, and platform profits is crucial for assessing the true extent of the harm to copyright holders caused by widespread short-video copyright infringement.[199] This reconceptualisation supports recalibrating the allocation of responsibility among rightsholders, platforms, and generators. Article 17 of *the EU Copyright Directive's* explicit recognition of such platforms as OCSSPs reflects a crucial shift towards aligning legal responsibility with operational realities.[200] By reclassifying SVSPs

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[192] See *the EU Copyright Directive*, Article 17 (2019); Fabian Baumann & Nipun Arora et al., *Dynamics of Algorithmic Content Amplification on TikTok*, https://doi.org/10.48550/arXiv.2503.20231 (accessed on October 23, 2025).
[193] *Supra* note 127.
[194] *Supra* note 18.
[195] *Supra* note 10, at pp. 51-52.
[196] *Supra* note 10, at pp. 40-42.
[197] See David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale Journal on Regulation 325, 325 (2003); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1(4) Journal of the European Economic Association 990, 990-1029 (2003).
[198] *Supra* note 6; *Supra* note 10, at pp. 78-79.
[199] *Supra* note 4; *Supra* note 6; *Supra* note 22.
[200] *Supra* note 184.

within a new liability category, it acknowledges that their sophisticated technological systems and monetisation strategies necessitate heightened responsibilities.[201] This approach is significantly more aligned with contemporary digital economic dynamics than China's current passive-hosting classification. Adopting an analogous classification within China's framework would recalibrate platform responsibilities, requiring leading SVSPs such as Douyin to assume strengthened governance responsibilities for regulating large-scale and repeated copyright infringement.

3.2 A More Proactive Obligation for SVSPs

The doctrinal consequence of reclassifying SVSPs beyond mere hosting service providers should be made explicit. If a leading SVSP is not regarded as a passive hosting provider, the regulatory baseline cannot remain a hosting-style safe harbour combined with a purely notice-triggered response. The consequence is not necessarily strict liability; rather, SVSPs become more clearly exposed to secondary infringement liability, under which the expected duty of care is calibrated to the platform's governance capacity, business model, and the foreseeability and recurrence of infringement. In high-risk repertoires such as popular audiovisual works that are predictably targeted and repeatedly re-uploaded, this duty of care plausibly requires systemic risk governance measures that approximate monitoring for repeat infringement, because item-by-item notice is structurally incapable of interrupting rapid replication. China's current safe harbour provision leaves these expectations uncertain and overly reactive, thereby strengthening the case for legislative reform to articulate proportionate proactive obligations.

The challenges of regulating large-scale and repeated short-video copyright infringement on SVSPs have significantly contributed to the widening "value gap".[202] The disparity between the substantial revenue that SVSPs derive from unauthorised content and the corresponding substantial and ongoing economic harm suffered by rightsholders illustrates the imbalance of interests between copyright holders and platforms. Given the uncertain scope of SVSPs' obligation to govern copyright infringement under the knowledge standard[203] and the limited liability under the passive notice-and-takedown procedure, the current framework struggles to address large-scale and repeated infringement effectively.[204] This mismatch is further amplified by SVSPs' operational models and algorithmic recommendation systems.[205] Together, these dynamics highlight the urgent need to strengthen SVSPs' duties of care in relation to high-risk repertoires, particularly audiovisual works that are predictably susceptible to large-scale and repeated infringement.

Accordingly, this article argues that Article 17 of *the EU Copyright Directive* establishes a more specific authorisation framework and a clearer liability structure,

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[201] *Ibid*.
[202] *Supra* note 40.
[203] *Supra* note 6; *Supra* note 49.
[204] *Ibid*.
[205] See *Shenzhen Tencent Computer System Co., Ltd. and Tencent Cloud Computing (Xi'an) Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd. and Xi'an Flash Network Technology Co., Ltd.,*(2022) Shaan 01 Min Chu No. 3078 (Xi'an Intermediate People's Court, 2022); *Tencent Technology (Beijing) Co., Ltd., Chongqing Tencent Information Technology Co., Ltd.*, and *Shenzhen Tencent Computer System Co., Ltd. v. Beijing Weibo Vision Technology Co., Ltd,* (2021) Yu 01 Min Chu No. 1 (Chongqing First Intermediate People's Court, 2021) ; *Beijing iQIYI Technology Co., Ltd. v. ByteDance Technology Co., Ltd.,* (2018) Jing 0108 Min Chu No. 49421 (Haidian District People's Court of Beijing, 2018); Hua Li, *Improvement of Duty of Care in Copyright Infringement of Short Video Platforms under Algorithm Recommendation*, 6(8) Academic Journal of Humanities & Social Sciences 6, 6-10 (2023).

aligned with platform capabilities and operational realities, particularly regarding the unauthorised use of copyright-protected material and the prevention of re-uploading previously removed content.[206] Compared to the passive, limited, and uncertain hosting providers' liability regime under China's outdated safe harbour provisions, Article 17 of *the EU Copyright Directive*[207] provides legal certainty as to whether SVSPs fall within an OCSSP category, engage in copyright-relevant acts in relation to the acts of their users, as well as legal certainty for users.[208] Therefore, the author argues that Article 17 can contribute to closing the value gap and rebalance the interest between copyright holders and SVSPs.

More specifically, Article 17(1) and (3) of *the EU Copyright Directive* impose a proactive obligation on OCSSPs to perform an act of communication to the public when they give the public access to copyright-protected content uploaded by users, and therefore must obtain authorisation from rightsholders, for example by concluding a licensing agreement.[209] This authorisation requirement is significant because it directly confronts the "value gap" by affirming that platforms benefiting from user-uploaded content should not rely on passive hosting exemptions as their default compliance posture.[210] These provisions seek to promote the development of a more robust licensing market between rightsholders and OCSSPs by providing a legal foundation through which rightsholders can authorise the use of their works when uploaded by generators of those platforms. In doing so, it legally enhances rightsholders' opportunities for licensing and remuneration while simultaneously providing safeguards for users who generate and share content that may incorporate copyright-protected material.[211] These provisions also establish a legal basis that encourages SVSPs to engage proactively with the audiovisual sector to better manage the use of audiovisual works in short videos. This is particularly significant given the existing legal ambiguity regarding whether, and to what extent, SVSPs are required to obtain licensing for short-form uses of audiovisual works. By clarifying these expectations, Article 17 provides a pathway for more structured engagement between SVSPs and rightsholders, supporting a more balanced and sustainable copyright ecosystem. Article 17(4) further specifies that where authorisation is not granted, the platform may avoid liability only if it demonstrates that it has made meaningful efforts to obtain permission.[212]

Crucially, Article 17(4) of *the EU Copyright Directive* also requires OCSSPs to make "best efforts" to ensure the unavailability of specific works for which rightsholders have provided relevant and necessary information, and to act expeditiously to disable access to infringing content upon receiving a notice, while also making best efforts to prevent future uploads of the same works.[213] This obligation is directly relevant to the problem of repeated short-video infringement involving identical audiovisual clips. It shifts platform responsibility beyond one-off takedown responses to target systemic recurrence and platform-level risk governance.

Article 17(4) imposes affirmative obligations on platforms to make "best efforts"

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[206] *Supra* note 163.
[207] *Ibid*.
[208] See *Communication From the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM (2021) 288 final (June 4, 2021).
[209] *Ibid*.
[210] *Supra* note 188.
[211] *Ibid*.
[212] *Supra* note 163.
[213] *Ibid.*

to obtain authorisation of copyright-protected material from rightsholders and to ensure, in accordance with "high industry standards", the unavailability of infringing content for which rightsholders have provided relevant information.[214] This regime shifts the focus from the strict determination of platforms' knowledge requirements and direct financial benefits associated with passive takedown procedures[215] to a duty of proactive diligence to prevent and govern the infringement, thereby enhancing the original duty of care established by the safe harbour provision. For instance, under Article 17(4), SVSPs are required not only to secure licences for unauthorised content hosted on their platforms but also, in the absence of authorisation, to prove that they have made meaningful efforts to obtain permission.[216]

Article 17(4)[217] of *the EU Copyright Directive* also requires platforms to adopt measures directed at both initial availability and repeated uploads of previously removed infringing content.[218] Such affirmative obligations extend beyond China's reactive notice-and-takedown procedure[219] by requiring platforms to deploy technological and organisational solutions aimed at repeated infringement. Under these provisions, SVSPs would no longer be able to rely solely on the absence of knowledge or on waiting for content-specific takedown notices. Instead, they would be obligated to implement risk-based and proportionate measures to prevent the availability and re-appearance of notified works (including measures directed at substantially similar re-uploads in order to meet the "best efforts" standard.[220] This point also clarifies why a tiered model cannot be achieved simply by tiering notice-and-takedown. Even a tiered notice-and-takedown procedure remains notice-triggered and item-specific, whereas Article 17 obligations target systemic recurrence and platform-level risk governance.

Importantly, the "best efforts" standard Article 17(4) of *the EU Copyright Directive* is not absolute liability, and it is framed with proportionality constraints. It is designed to require meaningful, feasible, and context-sensitive measures, taking into account the type, audience, and scale of the service, as well as the availability of suitable and effective means. This feature provides a useful comparative reference for China, showing that a recalibrated regime could impose stronger obligations for SVSPs while still accounting for differences in platform size, function, and technological capability, thereby reducing the risk that proactive governance could become administratively excessive. This approach also aligns with the jurisprudential direction of Chinese courts, where it has increasingly been recognised that Douyin,

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[214] *Ibid*.

[215] Under China's safe harbour provision, the knowledge standard is lacking in interpretation, which leads to limited and ambiguous liability for platforms, and the direct financial benefit element is narrowly interpreted, excluding indirect value from classification, algorithmic promotion, or incentive schemes. This allows SVSPs such as Douyin to profit from large volumes of unauthorised short videos while avoiding liability by denying specific knowledge or direct benefit.

[216] *Supra* note 163.

[217] *Supra* note 163

[218] *Supra* note 163.

[219] See *Provisions on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(5) (2013).

[220] Under Article 17(4) of *the EU Copyright Directive*, the "best efforts" principle refers to the obligations imposed on OCSSPs to actively prevent copyright infringement when users upload content. This includes obtaining authorisation from rightsholders (e.g., through licensing agreements); ensuring the unavailability of specific copyrighted works identified by rightsholders (e.g., via content recognition tools); and acting expeditiously to remove or disable access to infringing content once notified, and preventing its future re-upload.

operating as a commercial entity with platform governance capabilities, should bear greater responsibility,[221] including seeking authorisation for disseminating popular film and television programmes and monitoring infringement of such works.

Article 17(4) of *the EU Copyright Directive* accommodates the unique commercial dynamics of SVSPs, where user-generated content, categorised channels (e.g., film and television programmes), and algorithmic promotion contribute to the proliferation and monetisation of infringing content. SVSPs like Douyin often amplify short-video infringement based on popularity and engagement metrics, which increases advertising value and incentivises further uploads,[222] yet under China's current safe harbour provision, they are rarely held accountable unless a specific takedown notice is issued.[223] Rather than considering whether SVSPs have actual or constructive knowledge of infringement,[224] the EU approach turns this into a means of judging the efforts they make to protect the copyright-protected works. To satisfy these conditions, SVSPs would be expected to pursue licensing where feasible and to leverage their technical capabilities to mitigate foreseeable recurrence, rather than relying on a purely reactive posture. It also encourages them to leverage their technological capabilities, such as automated content identification systems, to systematically prevent infringements, especially of frequently targeted and highly popular content. In short, the "best efforts" standard creates a heightened duty of care for platforms, balancing copyright protection with users' freedom of expression, and replacing the older passive hosting model under the safe harbour provision with a more active and certain responsibility for content management. This approach not only mitigates large-scale infringements but also significantly reduces repeated uploads of infringing content.

3.3 Graduated Responsibility Regime: Larger Platforms Do More

Compared to a one-size-fits-all approach under China's safe harbour provision, Articles 17(5) to (6) of *the EU Copyright Directive* provide a more flexible and graduated regime for different sizes of platforms. Article 17(5) of *the EU Copyright Directive* strengthens the liability regime for OCSSPs by introducing a proportionality test that assesses compliance based on several contextual factors.[225] These include the type and size of the service, the nature of the uploaded content, the audience it reaches, and the availability and cost of effective technological measures.[226] This approach reflects a flexible and graduated model of responsibility that better accommodates the operational capacities and commercial realities of different platforms. Although not codified in authoritative legislation, several Chinese judicial decisions,[227] judicial interpretations by the Supreme Pepeole's Court,[228] and court-issued guidelines[229]

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[221] *Supra* note 10, at pp. 57-69.
[222] *Supra* note 6; *Supra* note 18.
[223] *Supra* note 49.
[224] See *Provisions on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(3) (2013).
[225] See *the EU Copyright Directive*, Article 17(5) (2019).
[226] *Supra* note 163.
[227] *Supra* note 46.
[228] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Disputes Involving Infringement of Information Network Dissemination Rights*, Articles 10-12 (2020).

adopt analogous reasoning by assessing liability with reference to factors such as the popularity and visibility of the infringing content, the duration of its availability, user viewing statistics, the rightsholder's efforts to send takedown notices, and whether the platform has taken active steps to categorise, promote, or highlight the content in question. While these factors do not constitute binding legal standards, they do suggest an evolving judicial recognition that the severity and scale of infringements should influence the expected level of platform responsibility.

Importantly, the EU's adoption of a proportionality principle in Article 17(5) of *the EU Copyright Directive* offers a more structured and authoritative model that could inform future improvement of China's platform liability framework. Within China's framework, it continues to rely heavily on narrowly construed elements of knowledge,[230] the direct financial benefit,[231] and notice-and-takedown procedures,[232] which are often insufficient to address large-scale short-video copyright infringement on SVSPs. As such, the EU's proportionality model provides a compelling comparative reference, illustrating how liability can be better calibrated to the scale, function, and technological sophistication of developed SVSPs such as Douyin. By recognising operational and contextual indicators of infringement, rather than relying solely on reactive notice-based systems, this model encourages more proactive copyright governance. Accordingly, this article argues that incorporating a proportionality-based standard into China's regulatory frameworks would provide a more balanced and effective foundation for regulating SVSPs, addressing the persistent value gap in the platform economy.

Article 17(6) of *the EU Copyright Directive* further introduces a graduated liability model that modulates liability based on a platform's business hours,[233] annual turnover,[234] and the number of monthly visitors.[235] This differs from the one-size-fits-

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[229] See *Guidance Opinions of Beijing High People's Court on the Trial of Several Issues Involving Copyright Disputes in the Network Environment* [2010] No. 166. Article 9 stipulates the "should have known" standard for information storage OSPs. Under any of the following circumstances, an OSP may be presumed to "have reason to know the existence of the works, performances, or audio-visual recordings," absent evidence to the contrary: (1) the works or related information are located on the home page, the main page of a column, or other prominent positions; (2) the OSP actively selects, edits, modifies, sorts, recommends, or creates rankings for the content; (3) other circumstances. Article 10 addresses the judgment of whether an OSP "should have known" of the unauthorized nature of the content. It may be presumed that an OSP "reasonably should have known of the infringement" under the following circumstances, absent evidence to the contrary: (1) the user provides complete, professionally produced film, music, or other well-known works that are currently popular or in high demand; (2) the user provides works that are still in production and would not normally be authorized for dissemination; (3) other obvious facts of infringement.

[230] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(3) (2013).

[231] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(4) (2013).

[232] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(5) (2013).

[233] See *the EU Copyright Directive*, Article 17(6) stipulates that "... which have been available to the public in the Union for less than three years.

[234] See *the EU Copyright Directive*, Article 17(6) stipulates that "... and which have an annual turnover below EUR 10 million, ...".

all protection afforded by China's safe harbour provision.[236] Article 17(6) ensures that the regulatory burden is not uniformly imposed but is instead commensurate with each platform's operational capacity and economic footprint. It allows newly established platforms to assume limited liability, thereby enabling them to devote more time and resources to growth and development. In contrast, more developed platforms are required to uphold a higher duty of care. Smaller platforms with limited resources do not need to meet the same standards as dominant players, ensuring innovation is not stifled.[237] By contrast, where an SVSP meets the Article 17(6) thresholds for scale and maturity, it would be expected to fulfil higher obligations under this regime. A leading service such as Douyin would likely fall within the higher-responsibility tier, subject to the relevant statutory thresholds. This structure allows for differentiated duties of care across platforms, ensuring that dominant SVSPs bear a heightened responsibility to address repeated copyright infringement. At the same time, it allows for more leniency for smaller platforms that are still in development.

A leading SVSP such as Douyin would, in practice, be a paradigmatic candidate for the higher-responsibility tier. Given Douyin's sophisticated integration of user-generated content, advertising, live streaming, and e-commerce into its monetisation model, it is, therefore, unreasonable to apply a uniform and under-specified hosting safe harbour across all platform types, nor is it justifiable to disproportionately favour the platforms in this context. Under the EU approach, large SVSPs would be obligated to implement proportionate, risk-based technical and organisational measures, such as content identification tools and measures to prevent recurrence for notified high-risk repertoires. Platforms with significant economic scale, such as Douyin, would thus be required not only to remove infringing content upon notification but also to systematically prevent its re-upload, fundamentally addressing the challenge of repeated infringement. This differentiated responsibility structure addresses a key limitation of China's current one-size-fits-all approach, afforded by China's safe harbour provision,[238] which inadequately accounts for the varied capacities and influence of different platforms. The author argues that by adopting a tiered responsibility model similar to that of the EU, China can match regulatory obligations that reflect platforms' market realities and operational capacities, incentivising established SVSPs to adopt preventive measures proportionate to their substantial market power and technological sophistication.

The graduated liability approach prevents overburdening emerging or smaller platforms, ensuring innovation is not unduly stifled, while simultaneously holding established, highly capable SVSPs, like Douyin, to significantly stricter standards. The EU framework addresses this concern by allocating responsibilities in light of platform maturity and capacity. Under Article 17 of *the EU Copyright Directiv*e, such a platform would be required not only to acquire licences and respond swiftly to takedown requests but also to implement robust technological systems capable of preventing the re-upload of previously removed infringing content. While it does not

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[235] See *the EU Copyright Directive*, Article 17(6) stipulates that "... Where the average number of monthly unique visitors of such service providers exceeds 5 million, ... they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightsholders have provided relevant and necessary information."

[236] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22 (2013).

[237] *Supra* note 163.

[238] *Supra* note 163.

prescribe the exact mechanisms for such prevention,[239] it mandates supervision proportional to platforms' capability, thereby balancing regulatory flexibility with enhanced accountability.[240] This liability regime under Article 17 of *the EU Copyright Directive* not only clarifies and enhances the duty of care for SVSPs but also mandates that these platforms take action against videos that exhibit repeated infringement. Such measures can effectively address large-scale and repeated short-video copyright infringement. Consequently, the graduated liability approach affords platforms a degree of flexibility to engage in self-regulation, enabling them to align with the statutory requirements.

This flexible yet substantive regime under *Article 17 of the EU Copyright Directive* stands in stark contrast to the uniform and outdated frameworks in China, which apply the same standards across platforms regardless of their technological sophistication or market power.[241] Also, compared to China's uncertain and limited legal exemption, Article 17 of *the EU Copyright Directive* explicitly codifies proportionality, enhancing legal certainty and coherence in enforcement practices. Integrating such a proportionality framework, encouraging large SVSPs to obtain licensing agreements or develop innovative agreements that align with their unique features to authorise copyrighted works, and adopting technology to prevent repeated infringement in China's framework would provide clarity and predictability for both judicial authorities and platforms. It would explicitly outline scalable preventive measures, offering robust legal guidance that aligns platforms' duties of care with their actual operational and technological capabilities. Such clear statutory guidance would substantially improve enforcement effectiveness, specifically by addressing the seriousness of increasing and repeated short-video copyright infringements facilitated by powerful recommendation algorithms on large SVSPs. A tiered notice-and-takedown model would remain structurally reactive, because enforcement is triggered by rightsholders' ability to identify and notify each infringing instance. By contrast, the tiered approach developed here differentiates not merely notice-based obligations, but also systemic prevention and risk-governance duties for higher-capacity SVSPs, including measures directed at repeated re-uploads and algorithmically amplified circulation.

Collectively, Article 17 of *the EU Copyright Directive* offers a comparatively coherent and adaptable framework for addressing large-scale and repeated infringement risks on OCSSPs such as SVSPs. By acknowledging platforms' active role in organising and monetising user-uploaded content, and by introducing proportional and differentiated responsibilities, the framework provides a basis for recalibrating platform duties in line with capacity and risk. Adapting China's legal framework to incorporate core principles reflected in Article 17 of *the EU Copyright Directive* would enhance the effectiveness of copyright enforcement on SVSPs, reducing systemic infringement and the economic harms suffered by rightsholders, while avoiding a uniform burden on smaller or emerging services. Importantly, these obligations should be formulated as proportionate, risk-based duties rather than a general duty to monitor all uploads, thereby addressing the concern that proactive governance could become administratively excessive.

4. Conclusion

[239] *Supra* note 163.
[240] *Supra* note 188.
[241] *Supra* note 188.

This article has examined the challenges of regulating large-scale and repeated short-video copyright infringement on SVSPs under China's safe harbour provision.[242] These include ambiguous and uncertain liability for SVSPs and a lack of clearly specified, proactive, risk-based governance obligations, which leads to a completely passive regulatory approach that tolerates the proliferation of short-video infringements.[243] It has been shown that China's current framework is built around a passive-hosting service provider's liability and a reactive notice-and-takedown procedure,[244] yet SVSPs operate in a manner structurally inconsistent with their operational model, thereby amplifying the seriousness of such infringement. SVSPs do not merely store user-uploaded content; instead, they organise, select, categorise, recommend, and monetise those content at scale through algorithmic distribution, embedded advertising, e-commerce, and live-streaming functions.[245] In this environment, the notice-and-takedown procedure is often unable to prevent the volume of infringing short videos involving popular audiovisual works and their repeated re-uploads. The result is a governance mismatch in which liability remains ambiguous, proactive duties of care and monitoring remain under-specified, and enforcement is largely triggered only after rightsholders detect infringement and issue notices.[246] Collectively, these deficiencies enable persistent large-scale infringement and sustain a significant "value gap", whereby SVSPs can capture considerable attention-based revenue while rightsholders bear disproportionate and ongoing economic harm.[247]

On that basis, the article advances a layered regulatory conclusion. First, SVSPs should not automatically fall within China's hosting-style safe harbour provision, as their functional role in content dissemination and monetisation departs from the assumptions of neutrality and limited involvement that underpin safe harbour protection. Second, once SVSPs are no longer regarded as passive hosts, they are more appropriately assessed under secondary infringement liability, under which liability and remedies turn on the platform's knowledge, contribution, and control. Critically, the standard of duty of care is reasonably expected given its technological capabilities and commercial incentives. In the SVSP context, where copyright infringement is predictably recurrent and facilitated by platform design, the duty of care cannot be satisfied solely by responding to individual notices. Rather, it requires a degree of systemic, recurrence-oriented governance that approximates monitoring for repeat infringement risks, particularly for high-risk repertoires such as popular

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[242] *Supra* note 3; *Supra* note 4; *Supra* note 6; *Supra* note 49; *Supra* note 58.

[243] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(3)-(4) (2013); *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Disputes Involving Infringement of Information Network Dissemination Rights*, Articles 8-12 (2020).

[244] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Article 22(5) (2013); *Supra* note 6; *Supra* note 59, at pp. 1-35; *Supra* note 4; *Supra* note 22; *Supra* note 28.

[245] *Supra* note 3; *Supra* note 5; *Supra* note 6; *Supra* note 10, at pp. 88-90; *Supra* note 13; *Supra* note 18.

[246] See *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Hearing of Civil Dispute Cases Involving Infringement of the Right of Communication through Information Networks*, Articles 22(3)-(4) (2013); *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Disputes Involving Infringement of Information Network Dissemination Rights*, Articles 8-12 (2020).

[247] *Supra* note 4; *Supra* note 6; *Supra* note 28.

films and television programmes, while remaining calibrated to proportionality and feasibility constraints.

Article 17 of *the EU Copyright Directive* offers a coherent comparative model for operationalising this duty of care through an OCSSP framework. It aligns platform responsibility with the realities of services that organise and monetise large-scale user uploads, and it replaces the assumption of passive hosting with a structured set of affirmative obligations. These include seeking authorisation (licensing), making "best efforts" to ensure that unauthorised works for which rightsholders have provided relevant information are unavailable, and adopting proportionate measures to prevent repeated re-uploads.[248] Importantly, these obligations are framed as capacity-sensitive and feasibility-based, and are not an unbounded general duty to monitor all uploads.[249] The EU approach, therefore, provides a structured, forward-looking template that reduces uncertainty for platforms and rightsholders and shifts enforcement from purely reactive removals toward recurrence prevention and risk governance.

Accordingly, China should pursue legislative reform that explicitly recognises SVSPs' commercial operations and algorithmically driven content management, and that specifies a clearer set of proactive duties of care and monitoring for platforms that function as high-capacity content-sharing services.[250] Such reform should not abolish notice-and-takedown procedure, but should supplement it with (i) a functional classification that limits hosting-style safe harbour for SVSPs whose business model depends on the dissemination of user uploads; (ii) differentiated obligations calibrated to platform scale, resources, commercial incentive, and and technological capability; and (iii) recurrence-focused governance duties designed to address predictable repeat infringement in high-risk categories, supported by transparent compliance expectations and effective redress mechanisms. The objective is to rebalance incentives and responsibilities so that platforms that profit most from user engagement bear a proportionate share of the governance burden. It is also not to replace the notice-and-takedown procedure, but to supplement reactive removal with systemic, recurrence-oriented risk governance for higher-capacity SVSPs. These elements would better align China's copyright enforcement regime with the contemporary digital ecosystem, directly addressing the identified structural deficiencies and significantly reducing the prevalence of infringing short-video content. Ultimately, Article 17 of *the EU Copyright Directive* provides a compelling, practical model for reforming China's approach to platform liability. As SVSPs continue to lead digital innovation and the global platform economy in China, updating their legal framework is essential not only for improved copyright protection but also for sustaining long-term innovation and economic balance. By drawing on the EU's experience and adopting a more proactive, proportionate, and capacity-calibrated approach, China can strengthen enforcement against repeated infringement, mitigate the value gap, protect rightsholders, and support a fairer and more sustainable digital copyright ecosystem.

[248] *Supra* note 163.
[249] *Ibid*.
[250] *Supra* note 10, at pp. 88-90; *Supra* note 6; *Supra* note 13; *Supra* note 18.

Myth or reality: China-EU Competition of (Ir)Responsible Normative Powers in the EU Neighborhood?

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Abstract: Both the EU and China are highly active in Serbia and Bosnia and Herzegovina, funding and constructing crucial industrial and infrastructure projects, and are often viewed as competitors. Although the economic and political aspects of Chinese and EU projects, as well as their interactions in Serbia and Bosnia and Herzegovina, have received considerable scholarly attention, the normative dimension remains largely overlooked. The paper thus addresses this research gap by examining how the differing normative approaches of the EU and China impact the two Balkan countries and investigates whether there is competition between China and the EU for normative influence, with a special focus on business and human rights matters. For this, the paper reviews regulatory (business and human rights) developments in Serbia and Bosnia and Herzegovina, influenced by China and the EU, and analyses empirical evidence of China-EU competition in normative matters using data from banks and industrial and infrastructure projects. The findings reveal some signs of competition between China and the EU over normative influence in Serbia and Bosnia and Herzegovina, and a differing normative impact on the two countries. However, while the EU acts as a normative power, deliberately shaping business and human rights frameworks, China instead functions as a political and economic power with normative implications. It prioritizes favorable conditions for its projects over deliberate normative influence. The outcome of the EU-China normative competition in Serbia and Bosnia and Herzegovina largely depends on the progress of the countries' EU accession, the EU's ability to address their critical industrial and infrastructure needs, and specific domestic developments within Serbia and Bosnia and Herzegovina.

Keywords: Normative Competition; Business and Human Rights; Western Balkans; Infrastructure Projects

1.Introduction

The Western Balkans have historically lain at the intersection of competing influences, being a place where the strategic interests of East and West, and the aspirations of local actors, continually intersect and often collide. As the most influential external power in the region, the European Union (hereinafter referred to as EU) has long pursued its enlargement agenda, utilizing various regulatory, policy, and financial tools to draw the Western Balkan states into its sphere of influence. The formal process of EU accession for the Western Balkans started with the Thessaloniki Summit in June 2003, when the Western Balkan countries were declared as potential candidates for EU membership. At the Summit, the EU and the Western Balkan states affirmed that "the future of the Balkans is within the European Union" and that the Summit participants "all share the values of democracy, the rule

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of law, respect for human and minority rights, solidarity and a market economy, fully aware that they constitute the very foundations of the European Union".[2]

To support the EU integration of the Western Balkans, the EU has undertaken "dozens of major road and rail interconnections, upgrades at ports, and transformational energy projects".[3] It has launched several large-scale initiatives related to regional infrastructure and industrial development. First, through the Berlin Process, the EU promoted the Transport Community Treaty and the Energy Community Treaty and extended Trans-European Transport Core Networks into the region. Second, the EU has channeled billions of euros into transport (roads, rail, ports), energy (grids, renewables), and digital infrastructure through initiatives such as the Connectivity Agenda and the Economic and Investment Plan.[4] Some major projects include sections of the "Peace Highway" connecting Serbia and Kosovo towards Albania,[5] modernization of the Rail Corridor X in Serbia and North Macedonia,[6] and the development of the Trans-Balkan Electricity Corridor to enhance energy security and integration across the region. These initiatives have been primarily financed through the Instrument for Pre-accession Assistance and the Western Balkans Investment Framework (hereinafter referred to as WBIF) and sought to integrate the Western Balkan countries into the EU's economic and infrastructural networks. The European Investment Bank (hereinafter referred to as EIB) and European Bank for Reconstruction and Development (hereinafter referred to as EBRD) have been playing a significant role in funding the EU infrastructure initiatives in the Western Balkans.

It is well known that the path towards EU accession has encountered many challenges for most countries in the Western Balkans. In about 22 years since the Thessaloniki Summit, the only country in the region that joined the EU was Croatia, while for the other six countries, the perspectives of EU membership are far from certain. The EU accession process has been lengthy and complex, and faced a large decrease in support among some countries, such as Serbia.[7] At the same time, particularly since the 2010s, China's presence in the region has grown significantly. In 2012, China launched the "16+1" cooperation mechanism to promote relations with 16 Central and Eastern European countries, including the Western Balkans, and support its "the Silk Road Economic Belt and the 21st-Century Maritime Silk Road" (hereinafter referred to as the One Belt, One Road Initiative) in Europe.[8] As noted by Vangeli, between 2012 and 2017, the "16+1" platform achieved unprecedented growth, bringing together policymakers, civil servants, scholars, and professionals

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[2] See European Commission, *EU-Western Balkans Summit Thessaloniki (June 21, 2003)*, ec.europa.eu/commission/presscorner/detail/en/pres_03_163 (accessed on October 9, 2025).

[3] See European Commission, *EU-Western Balkans Boosting Connectivity*, https://enlargement.ec.europa.eu/document/download/043cc2e1-0ca6-4c0e-9b76-f9cc8c251a35_en (accessed on October 9, 2025).

[4] See European Commission, *EU Connectivity Agenda for the Western Balkans*, https://www.wbif.eu/storage/app/media/Library/6.%20Connectivity%20Agenda/brochure_wb_connectivity_agenda_en.pdf (accessed on October 9, 2025).

[5] See Gordana Kovačević, *A Road to Peace and EU Integration*, https://www.eib.org/en/stories/serbia-kosovo-peace-highway-eu-finance (accessed on October 9, 2025).

[6] See *Financing of Railway Corridor X in Serbia*, pp. 1-2 (2021).

[7] See Euronews, *Serbians Dreaming of EU Membership Feel Betrayed by Vučić's Government*, https://www.euronews.com/2023/12/13/serbians-dreaming-of-eu-membership-feel-betrayed-by-vucics-government-and-the-bloc (accessed on October 9, 2025).

[8] See Xinhua, *"16+1" Msechanism Set to Bolster China-Europe Ties*, https://govt.chinadaily.com.cn/s/201807/06/WS5b78134c498e855160e8b0b3/16-1-mechanism-set-to-bolster-china-europe-ties.html (accessed on October 9, 2025).

from diverse fields and all levels of government in numerous policy and exchange forums.[9] Moreover, China has been providing the capital essential to national and regional economic development, funding and constructing infrastructure and industrial projects across the Western Balkans.[10] This includes substantial loans, mainly from the China Export-Import Bank, for the energy and mining sector, like the Stanari and Tuzla 7 power plants in Bosnia and Herzegovina (hereinafter referred to as BiH), the Kostolac B3 power plant in Serbia, and major industrial acquisitions in Serbia, such as Zijin Mining and Smelting Basin Bor and Hesteel Group's Smederevo steel mill. Chinese firms have also undertaken transport projects across the region, most notably the Belgrade-Budapest railway, the Bar-Boljare Highway in Montenegro, and the Miladinovci-Shtip and Kichevo-Ohrid Highways in North Macedonia.

China's presence in the Western Balkans received a very controversial response from the EU. Notwithstanding China's state efforts to enhance the corporate social responsibility (hereinafter referred to as CSR) performance of Chinese enterprises operating overseas, many Chinese-led industrial and infrastructure projects in the Western Balkans have faced considerable concerns about transparency, human rights, environmental impact, and alignment with EU policy.[11] European Commissioner Johannes Hahn noted that some leaders in the Western Balkans might find China's blend of "capitalism and a political dictatorship" appealing, and Beijing may be turning some Western Balkan countries aspiring to join the EU into Trojan horses.[12] In the view of Gjorge Ivanov, the President of (North) Macedonia from 2009 to 2019, the EU's "abject failure to engage and invest in the Balkans" has allowed for strategic Chinese encroachment in the region.[13] In 2021, although not openly countering Chinese influence in the Western Balkan region, the EU launched the "Global Gateway", a large-scale infrastructure initiative aimed at providing "investments in quality infrastructure, respecting the highest social and environmental standards, in line with the EU's values and standards".[14] This €300 billion EU infrastructure initiative, also targeting the Balkan region, has been, though, widely regarded as a tool of geopolitical rivalry against China.[15] Regardless, as Pavlicevic argues, the EU has "moved to re-assert its centrality in the Balkans by

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[9] See Anastas Vangeli, *Global China and Symbolic Power: The Case of 16+1 Cooperation*, 27(13) Journal of Contemporary China 680, 680 (2018).

[10] See Plamen Tonchev, *China's Road: Into the Western Balkans*, European Union Institute for Security Studies (EUISS), p. 2 (2017).

[11] See Erblin Berisha & Giancarlo Cotella, *The Impact of China's Belt and Road Initiative on the Western Balkan Region: An Erosion of EU Conditionality?*, 28(2) European Spatial Research and Policy 165, 165 (2021).

[12] See Politico, *Beware Chinese Trojan Horses in the Balkans, EU warns*, https://www.politico.eu/article/johannes-hahn-beware-chinese-trojan-horses-in-the-balkans-eu-warns-enlargement-politico-podcast/ (accessed on October 9, 2025).

[13] See Telegraph, *EU Failure in Balkans "A Call to China and Russia" Says Macedonia President*, https://www.telegraph.co.uk/news/2017/11/04/eu-failure-balkans-call-china-russia-says-macedonia-president/ (accessed on October 9, 2025).

[14] See European Commission, *Global Gateway - European Commission*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/global-gateway_en (accessed on October 9, 2025).

[15] See Frederick Kliem, *Europe's Global Gateway: Complementing or Competing With BRI? – The Diplomat*, https://thediplomat.com/2021/12/europes-global-gateway-complementing-or-competing-with-bri/ (accessed on October 9, 2025); See Financial Times, *EU Plans €300bn Global Infrastructure Spend to Rival China*, https://www.ft.com/content/610faad4-bacc-4a5e-ba9a-fbcb2a8208f4 (accessed on October 9, 2025).

strengthening and exercising its structural power through a combination of institutional, policy, regulative, and financial means".[16]

In view of these developments, the current paper focuses on a particular dimension of the EU-China competition in the Western Balkans – the approaches of the two powers to Business and Human Rights (hereinafter referred to as BHR) matters. Although the economic and political aspects of Chinese and EU infrastructure and industrial projects, as well as their interactions in the Western Balkans, have received considerable scholarly attention,[17] the normative dimension remains largely overlooked. Coupled with the fact that multiple Chinese projects in the Western Balkans have faced legal controversies and provoked public resonance both locally and, in the EU, and given that there is no definite answer to whether and how China's normative approach in the region is derailing it from EU accession, the current research holds significant importance. To bridge this research gap, the paper takes Serbia and BiH as case studies and investigates the impact of the EU and China's approaches to BHR on the two Balkan countries. The research, thus, attempts to answer the following questions:

- What tools of influence do the EU and China use to impact Serbia and BiH's stances on BHR matters?
- How different or similar are these tools, and how impactful are they?
- What are the goals of the EU and China in terms of normative influence?

Following the introduction, the paper outlines the methodological approach and then explores the recent BHR developments in the Western Balkans, analyzing the mechanisms and conditions for the transfer of BHR norms from the EU and China to Serbia and BiH. For the EU, the key tools include 1) the framework for the EU accession and the conditionalities mechanism; 2) the extraterritorial effect of EU sustainability regulations, and 3) the investment banks, such as the EIB and EBRD, with normative conditionality attached to their funding. On its behalf, although China lacks accession mechanisms and an extraterritorial reach comparable to the EU, it employs various bilateral national-level agreements with Western Balkan states, as well as project contracts. Moreover, Chinese banks involved in infrastructure development also promote China's normative approaches. Finally, the paper acknowledges several key research limitations, proposes avenues for future research and concludes on whether there exists a competition between China and the EU for normative influence on BHR matters over Serbia and BiH.

2. Methodology

The studies on the EU-China competition have employed diverse methodologies. Kavalski approaches the topic from an International Relations (hereinafter referred to as IR) perspective and examines the foundational differences between the EU and China's normative power. The author contrasts Europe's normative power, which is rooted in rule-based governance that seeks compliance with Brussels' standards, with China's normative power, which emphasizes relational governance built on long-term engagement with Beijing. Kavalski argues that the EU's and China's ability to shape global norms is not inherent but depends on their recognition by the states they seek

[16] See Dragan Pavlićević, *Structural Power and the China-EU-Western Balkans Triangular Relations*, 17(4) Asia Europe Journal 456, 456 (2019).
[17] See Mladen Grgić, *Chinese Infrastructural Investments in the Balkans: Political Implications of the Highway Project in Montenegro*, 7(1) Territory, Politics, Governance 42, 60 (2019).

to influence, and the rise of the EU and China as global normative powers indicates they are beginning to compete for that recognition.[18] Lišanin also analyses the EU-China competition in the Western Balkans from an IR perspective and employs a methodology that is primarily realist and interpretive.[19] He specifically focuses on great power competition and spheres of influence in the case of Serbia, while also exploring other theoretical frameworks, such as the Neo-Gramscian perspective. According to Lišanin, increasing international profile and assertiveness of China threaten the EU's influence in the Western Balkans, and Serbia has become "a theater for the contest of influence" between China and the EU.[20] Current research delves into more detail, first exploring a specific area of competition between normative powers - Business and Human Rights - and second, focusing on a particular region subject to the EU's and China's exercises of normative power: the Western Balkans, and more specifically, Serbia and BiH. Such an approach enables a detailed examination of the underlying values, principles, and norms at play, which differs from a more traditional realist analysis of power politics. This research, thus, lies at the intersection of law and international relations and seeks to contribute to both disciplines.

Along with an IR methodology, some authors have also used qualitative methodology, such as interviews, to investigate similar relevant topics. In his study of the EU's normative power in EU-China dialogues, Taylor employed elite interviews and discourse analysis to examine the micro-level processes of the EU-China Human Rights Dialogue.[21] He found that although the EU-China dialogues are conceptually built upon EU values, which implies the presence of the EU's normative power, the EU exercises only limited influence due to its failure to systematically mainstream those values.[22] Alden and Large employed a qualitative, historical, and interpretive analysis, along with interviews, to examine how China's approach to post-conflict peacebuilding in Africa has shifted from a non-interference policy to one of selective engagement, and more recently, to actively shaping international norms around post-conflict reconstruction. The scholars argued that China's policymakers are deliberately challenging security norms in Africa so that those norms better serve China's strategic interests.[23] Current research acknowledges the importance of qualitative methods, such as interviews, but argues that since the EU's and China's normative influence on BHR over the Western Balkans has been a largely unexplored subject, the initial methodological approach should be based on institutional analysis, as the first step. Following this, future research can benefit from the insights gained from interviews. For now, the scope of this paper is to map out the key tools of normative influence used by the EU and China and to study them in this context.

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[18] See Emilian Kavalski, *Normative Power Europe and Normative Power China Compared: Towards a Relational knowledge-production in International Relations*,51(6) Korean Political Science Review, 249, 250 (2017).

[19] See Mladen Lišanin, *Prospects of European-Chinese Contest for Influence in the Western Balkans: The Case of Serbia,* In China and World Politics in Transition: How China Transforms the World Political Order, Springer Nature Switzerland, pp. 195-214 (2023).

[20] See Mladen Lišanin, *Prospects of European-Chinese Contest for Influence in the Western Balkans: The Case of Serbia*, In China and World Politics in Transition: How China Transforms the World Political Order, Springer Nature Switzerland, pp. 195 & 199 (2023).

[21] See Max Roger Taylor, *Seeking Common Ground: Assessing the Practical Implementation of the EU's Normative Power in EU-China Dialogues*, Ph.D. Dissertation, University of Bath, pp. 61-75 (2019).

[22] *Ibid*, at pp. 3 & 5 (2019).

[23] See Chris Alden & Daniel Large, *On Becoming a Norms Maker: Chinese Foreign Policy, Norms Evolution and the Challenges of Security in Africa*, Cambridge University Press (2015).

In contrast to the abundance of qualitative studies, quantitative methodology for studying normative influence has been relatively uncommon. Although some research has investigated how the norms can be operationalized into measurable indicators,[24] there has been a general lack of quantitative studies due to the inherent difficulty in measuring a primarily ideational concept. This makes it challenging to apply objective metrics.

Thus, the primary methodological approach in this paper is a comparative case study analysis, with a focus on institutional and policy analysis. The paper uses the Western Balkans (Serbia and BiH) as a case study to contrast the different normative influence mechanisms employed by China and the EU. The analysis delves into specific legal instruments (bilateral agreements and contracts) and institutional actors (banks, accession mechanisms, and regulatory extraterritoriality). The paper investigates the key mechanisms through which the EU and China advance their normative BHR agendas in Serbia and BiH, the host countries of their infrastructure projects. The investigation relied on both primary and secondary sources. The primary sources included official policies and regulations targeting BHR matters in the EU accession, bilateral agreements and contracts, as well as corporate bank documentation, such as statutes, basic documents and reports. The secondary sources included scientific literature on the research subject, as well as media reports.

3. The European Union and China: Mechanisms of Influence in the Western Balkans on Business and Human Rights Matters

3.1 European Union

It is argued that the EU normative influence on BHR matters in the Western Balkans relies upon the following three key tools: BHR matters in the EU accession mechanism (conditionality); the spillover effect of the EU BHR framework; and European banks (EIB and EBRD) as the promoters of the EU model for BHR.

3.1.1 Business and Human Rights matters in the EU accession conditionality mechanism

The Western Balkan countries (Albania, Bosnia and Herzegovina, Kosovo[25], Montenegro, North Macedonia, and Serbia) follow a distinct accession process known as the Stabilisation and Association Process (hereinafter referred to as SAP). The SAP aims to stabilize these partners politically and economically, preparing them for eventual EU membership. This is achieved by "providing financial assistance, allowing easy access to EU markets and promoting cooperation between countries in the region".[26] To address this, the European Commission introduced a new Growth Plan for the Western Balkans in 2023, aiming to accelerate accession readiness through economic reforms and investment.[27]

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[24] See Hendrik Huelss, *After Decision-Making: The Operationalization of Norms in International Relations*, 9(3) International Theory 381, 381-409 (2017).

[25] This designation is without prejudice to positions on status and is in line with UN Security Council Resolution 1244/1999.

[26] See European Union, *EU enlargement*, https://european-union.europa.eu/principles-countries-history/eu-enlargement_en (accessed on October 9, 2025).

[27] See European Commission, *Growth Plan for the Western Balkans*, https://enlargement.ec.europa.eu/enlargement-policy/growth-plan-western-balkans_en (accessed on October 9, 2025).

Serbia was identified as a potential EU candidate state in 2003, signed a Stabilization and Association Agreement (hereinafter referred to as SAA) with the EU in 2008 and submitted a membership application in 2009. Serbia was granted EU candidate status in March 2012, and a bilateral Stabilization and Association Agreement entered into force in September 2013.[28] Accession negotiations with Serbia officially commenced in January 2014, and as of March 2025, Serbia has opened 22 out of 35 negotiating chapters and provisionally closed two - Chapter 25 (Science and Research) and Chapter 26 (Education and Culture).[29] For BiH, the EU accession process started much later than for Serbia. The EU and BiH concluded a SAA in April 2015,[30] and in February 2016, the country applied for EU membership. In December 2022, the European Commission granted BiH candidate status. Following the Commission's recommendation, the European Council decided to approve accession negotiations with BiH in March 2024 conditionally.[31] In December 2024, the European Council highlighted that BiH needed to approve the Growth Plan, a national program for EU law adoption, and appoint a chief negotiator and national IPA III coordinator before the negotiations could proceed.[32]

There are three key points to be made concerning the BHR agenda in the legal framework for the EU accession of Serbia and BiH. First, there is no separate negotiations chapter on BHR. The field of BHR encompasses a variety of different issues and is transversal across various chapters. Although it is believed that Chapter 20 (Enterprises and Industrial Policy) is the chapter most closely related to the BHR (and CSR) agenda, the agenda also has close links to other chapters, such as those on tax, public procurement, and others.[33] At the same time, BHR in the EU accession negotiations is often viewed as a niche issue rather than a transversal one.[34] Second, the BHR agenda in the EU accession is relatively new and not yet widespread. In the past, for instance, during Slovakia's EU accession negotiations, there were no binding legal instruments in the EU regarding BHR, and, therefore, it was not included in the membership discussions.[35] Third, there is a low understanding of BHR among the EU candidate countries. The European Commission often notes that these countries tend

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[28] See European Commission, *Serbia*, https://enlargement.ec.europa.eu/enlargement-policy/serbia_en (accessed on October 9, 2025).

[29] The opened chapters are 4 (Free movement of capital), 5 (Public procurement), 6 (Company law), 7 (Intellectual property law), 9 (Financial services), 13 (Fisheries), 14 (Transport policy), 15 (Energy), 17 (Economic and monetary policy), 18 (Statistics), 20 (Enterprise and industrial policy), 21 (Trans-European networks), 23 (Judiciary and fundamental rights)), 24 (Justice, Freedom and Security), 25 (Science and research), 26 (Education and culture), 27 (Environment and climate change), 29 (Customs union), 30 (External relations), 32 (Financial control), 33 (Financial and budgetary provisions) and 35 (Other issues). See National Assembly of the Republic of Serbia, European Integratio*n*, http://www.parlament.gov.rs/activities/european-integration.4019.html (accessed on October 9, 2025).

[30] See Council and Commission Decision (EU, Euratom) 2015/998 of 21 April 2015 on the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (2015).

[31] See European Commission, *Bosnia and Herzegovina*, https://enlargement.ec.europa.eu/enlargement-policy/bosnia-and-herzegovina_en (accessed on October 9, 2025).

[32] See Council Conclusions on Enlargement 16983/24, paras. 64 & 74 (2024).

[33] See Alexandra Kuxova, Team Leader, Corporate Sustainability and Responsibility, DG for Internal Market, Industry, Entrepreneurship and SMEs, European Commission, at the "Corporate Sustainability in Action: Advancing EU Accession for Candidate Countries" conference at Wageningen University & Research (2025).

[34] See Heidi Hautala, Former Vice-President of the European Parliament, at the "Corporate Sustainability in Action: Advancing EU Accession for Candidate Countries" conference at Wageningen University & Research (2025).

[35] *Supra* note 28.

to perceive CSR primarily as corporate philanthropy rather than a broader framework of corporate responsibility.[36] At the same time, the lack of distinction between CSR and BHR, particularly in terms of human rights due diligence, is not unique to candidate countries but is a global issue. For example, a United Nations Development Program (hereinafter referred to as the UNDP) survey on readiness for the Corporate Sustainability Due Diligence Directive in Central and Eastern Europe and Central Asia revealed low preparedness for and considerable confusion about the concept of human rights due diligence among candidate countries.[37] Notwithstanding these challenges, the EU has continued to promote its BHR agenda in the EU accession countries. In this regard, two interconnected trends are evident.

First, the EU has been conditioning EU membership on the fulfilment of human rights, rule of law and democracy criteria. As demonstrated earlier, the EU has the power to impose normative conditionalities for initiating formal negotiations and during the negotiation process. The EU views democratic reforms as crucial to ensure stability and security in Europe, so it uses a "carrots and sticks" approach to achieve its goals.[38] Since 1988, it has used trade agreements, aid, association agreements, and membership offers as incentives for its eastern and southern neighbors to implement political and economic reforms, emphasizing democracy, gender equality, the rule of law and human rights. The "Copenhagen criteria" (1993) exemplify these requirements.[39] In the accession process, the EU holds a more powerful position vis-à-vis the accession countries, and the Copenhagen criteria contribute to the creation of this asymmetry.[40] Moravcsik and Vachudova note that the negotiations imply that accession countries adopt EU law in a detailed, non-negotiable, and uniformly enforced manner. They also highlight that for many former communist ex-accession countries, this process was a heavy burden, as it meant not only building a market economy from scratch but also establishing a modern regulatory state capable of implementing the EU acquis in its entirety.[41] If the accession countries fail to meet the EU accession requirements, the EU may deny assistance, association, or membership, and the country risks losing access to EU funds and the opportunity to proceed with the accession process.[42] One of the most recent examples is the EU's response to the adoption of the Law on Transparency of Foreign Influence and the 2024 elections in Georgia. In June 2024, the European Council claimed that the Law contradicts the Commission's recommendation for candidate status, "de facto leading to a halt of the accession process".[43] In November 2024, following the elections, the European Parliament first warned that banning legal political parties would harm EU relations

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[36] *Supra* note 28.

[37] See Siniša Milatovic, Business and Human Rights Specialist, UNDP, at the "Corporate Sustainability in Action: Advancing EU Accession for Candidate Countries" conference at Wageningen University & Research (2025).

[38] See Karen E. Smith, *The EU, Human Rights and Relations with Third Countries: "Foreign Policy" with an Ethical Dimension?*, Ethics and Foreign Policy, p. 187 (2001).

[39] See European Union, *Accession criteria (Copenhagen criteria)*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:accession_criteria_copenhague (accessed on October 9, 2025).

[40] See Andrew Moravcsik & Milada Anna Vachudova, *Preferences, Power and Equilibrium: The Causes and Consequences of EU Enlargement*, Routledge, p. 201 (2005).

[41] *Ibid*.

[42] See Frank Schimmelfennig & Hanno Scholtz, *EU Democracy Promotion in the European Neighbourhood: Political Conditionality, Economic Development and Transnational Exchange*, 9(2) European Union Politics 187, 190 (2008).

[43] See European Council meeting (June 27, 2024) -Conclusions EUCO 15/24, para. 36.

and hinder the accession process.[44] Then, in January 2025, the European Council suspended parts of the EU-Georgia visa facilitation agreement.[45]

While most ongoing EU accession negotiations incorporate some BHR conditionalities, these are generally limited in scope. For example, while the EU urges candidate countries to adopt policies aligned with the Non-Financial Reporting Directive, this appears to be the only recurring conditionality in EU progress reports that directly requires governments in the candidate countries to regulate companies on the BHR issues.[46] Overall, Higham argues that conditionality holds excellent potential for the EU to promote its BHR policies, but it did not fully exploit this opportunity.[47]

At the same time, the EU's BHR agenda has evolved rapidly in recent years, with the EU developing one of the most advanced BHR regulatory frameworks globally.[48] It is, therefore, reasonable to anticipate that BHR considerations will play an increasingly important role in future EU accession negotiations. In this regard, Faracik suggests that the European Parliament should urge European institutions to address the BHR agenda during the accession process and provide technical assistance to candidate countries in developing NAPs and implementing the United Nations Guiding Principles on Business and Human Rights (hereinafter referred to as UNGPs).[49] Higham proposes that the EU require Central and Eastern European candidates to include a national human rights strategy, with a specific chapter on business.[50] Additionally, the UNDP recommends subjecting aid packages to rule of law reforms, including compliance with BHR standards, introducing non-financial reporting obligations for large corporations, and designing funding opportunities to support national non-governmental organizations (hereinafter referred to as NGOs) in advancing the BHR agenda.[51]

Although the employment of the BHR conditionalities certainly has growth potential, there is little consensus on the effectiveness of the 'carrot and stick' approach to EU accession more broadly. Some studies show that despite a long history of EU accession, many Western Balkan countries remain "stuck in a hybrid status quo of competitive authoritarianism" and experience democratic backsliding

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[44] See European Parliament, *Parliament calls for new elections in Georgia*, https://www.europarl.europa.eu/news/en/press-room/20241121IPR25549/parliament-calls-for-new-elections-in-georgia (accessed on October 9, 2025).

[45] See Council of the European Union, *Georgia: Council suspends visa-free travel for diplomats and officials*, https://www.consilium.europa.eu/en/press/press-releases/2025/01/27/georgia-council-suspends-visa-free-travel-for-diplomats-and-officials/ (accessed on October 9, 2025).

[46] See Ian Higham, *Conditionalities in International Organization Accession Processes: Spreading Business and Human Rights Norms in Central and Eastern Europe?*, 9(1) Business and Human Rights Journal 54, 71 (2024).

[47] *Ibid*, at p. 56.

[48] It is also important to note that there has been some rollback in the EU BHR regulations, with the EU Omnibus Directive (February 2025) simplifying and reducing EU non-financial reporting obligations. See European Commission, Omnibus I package - Commission simplifies rules on sustainability and EU investments, delivering over €6 billion in administrative relief, https://finance.ec.europa.eu/publications/commission-simplifies-rules-sustainability-and-eu-investments-delivering-over-eu6-billion_en (accessed on October 9, 2025).

[49] See Beata Faracik, *Implementation of the UN Guiding Principles on Business and Human Rights*, requested by the European Parliament's Subcommittee on Human Rights, p. 43 ,https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf (accessed on December 1, 2025).

[50] *Supra* note 40, at p. 72.

[51] See *the Status of the Implementation of UNGPs in Eastern Europe*, p. 132 (2023).

despite significant EU support.[52] Although, as Juncos argues, the prospect of EU membership has been the most powerful normative tool for promoting democratic reforms in BiH, progress has been slow, which has raised doubts about the effectiveness of the EU's approach.[53] In this regard, Schimmelfennig and Scholtz emphasized that the EU needs to ensure the credibility of its conditionality with regard to both the threats of withholding rewards for non-compliance and the promises to deliver rewards for compliance.[54] Nonetheless, in the case of the Western Balkans, the external incentives model involving the EU conditionality approach fails to fully explain why candidate countries do not necessarily become more democratic as they advance toward accession.[55] Gafuri and Meltem suggest that the Western Balkan countries have a "reflex of valuing strongmen in power and the stability they bring over democracy".[56] Some local leaders have exploited the EU's unclear accession messaging and emphasis on stability and conflict prevention (and less on democracy) to suppress domestic opposition and boost their legitimacy.[57]

Furthermore, the EU conditionality approach is constantly challenged by additional internal and external factors. Internally, support for EU accession is far from high in some countries and regions, such as Serbia and Republika Srpska of BiH.[58] Most recently, the President of Republika Srpska, Milorad Dodik, expressed his preference for Republika Srpska's secession over pursuing the European path, preferring the efforts to secede the entity from BiH and rejecting the authority of the Constitutional Court and High Representative.[59] As regards external factors, China and Russia's involvement in the region is believed to have increased the complexity of democratic consolidation and potentially hindered the process of European integration.[60] A recent example concerns the China-built Linglong tyre factory in Serbia, where the European Parliament issued a resolution regarding Serbia's irresponsible business conduct and human rights violations. In this instance, the effectiveness of the EU's BHR conditionality is de facto compromised, as Serbia permits certain BHR practices that conflict with the EU's approach, despite the incentive of EU accession. In other words, the EU lacked sufficient leverage to

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[52] See Adea Gafuri & Meltem Muftuler-Bac, *Caught Between Stability and Democracy in the Western Balkans: A Comparative Analysis of Paths of Accession to the European Union*, 37(2) East European Politics 267, 267 (2021).

[53] See Ana E. Juncos, *Power Discourses and Power Practices: The EU's Role as a Normative Power in Bosnia* in Normative Power Europe: Empirical and Theoretical Perspectives, Palgrave Macmillan UK, p. 92 (2011).

[54] *Supra* note 37, at p. 191.

[55] *Supra* note 37, at p. 269.

[56] *Supra* note 37, at p. 272.

[57] *Supra* note 37, at p. 270.

[58] As of February-March 2024, the support for the EU accession in Serbia was around 40 percent, while 34 percent said they would vote against. See Ana Petruseva, *Balkan Support for EU Accession High, Except in Serbia – Survey*, https://balkaninsight.com/2024/05/14/balkan-support-for-eu-accession-high-except-in-serbia-survey/ (accessed on October 9, 2025).

[59] See N1 Sarajevo, *Dodik threatens secession: Europe has Failed, Trump will Change Everything*, https://n1info.ba/english/news/dodik-threatens-secession-europe-has-failed-trump-will-change-everything/ (accessed on October 9, 2025).

[60] For Russia's impact, see Bojana Zorić, *Assessing Russian Impact on the Western Balkan Countries' EU Accession: Cases of Croatia and Serbia*, 3(2) Journal of Liberty and International Affairs 9, 9 (2017). For China's impact, see Nana Markovic Khaze & Xiwen Wang, *Is China's Rising Influence in the Western Balkans a Threat to European Integration?*, 29(2) Journal of Contemporary European Studies 234, 234 (2021).

enforce BHR standards in this case.[61] Moreover, the efficiency of the conditionality approach is further questioned due to ambiguity surrounding the EU's stance on BHR in the Western Balkans. For example, Rio Tinto's Jadar lithium project in Serbia raises doubts in Serbia about the EU's commitment to its stated principles, as the EU has shown interest in the project while remaining silent on state repression of freedom of expression in Serbia.[62] In this context, in the words of Letnar Černič, "business and human rights standards have taken a backseat to economic and investment considerations".[63]

The last available European Commission reports on Serbia and BiH highlight ongoing challenges related to human rights, including its business dimension. In Serbia, the report notes moderate preparation in social policy and employment (Chapter 19) as well as in enterprise and industrial policy (Chapter 20). Although Serbia has made some progress by adopting laws and strategies for the development of SOEs and SMEs, the implementation of the legislative and institutional framework for upholding fundamental rights remains inconsistent. In fact, Serbia has not addressed many previous recommendations, particularly those regarding the strengthening of human rights institutions.[64] The report on BiH emphasizes the lack of a comprehensive policy framework for promoting and enforcing human rights, which results in uneven protection. The Human Rights Ombudsman in BiH lacks independence and is called to be more proactive, as it has not used its authority to address non-compliance with human rights standards in the past nine years.[65]

3.1.2 Spillover effect of the EU Business and Human Rights framework

As explained by Ye and Yang, the EU exercises its "normative power" through extraterritorial legal instruments, promotes the "human rights-based economy" and influences the behavior of foreign actors.[66] Regarding the Western Balkans, until the adoption of the EU Green Deal legislation package, there was limited interest in BHR and responsible business conduct standards among market players.[67] The EU Green Deal changed this by directly and indirectly impacting countries in the Western Balkans through contractual obligations on local business partners of the EU-based companies.[68]

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[61] See European Parliament, *Resolution on Forced Labour in the Linglong Factory and Environmental Protests in Serbia* (2021/3020(RSP)), https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2021/3020(RSP) (accessed on October 9, 2025).

[62] *Supra* note 32.

[63] See Jernej Letnar Černič, *Business and Human Rights at the Margins: A Case of Bottom-Up Campaign Against Rio Tinto's Jadar Lithium Project in Serbia*, 29(3) Australian Journal of Human Rights 559, 559 (2023).

[64] See Commission staff working document Serbia 2024 report accompanying the document communication from the commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of Regions 2024 communication on EU enlargement policy SWD (2024), p. 14 (2024).

[65] *Ibid*, at pp. 36-37 (2024).

[66] See Bin Ye & Kunhao Yang, *The Extraterritorial Effects of EU Law in the Context of Green Transition: An Examination of the CBAM and CSDDD Proposals*, 41(6) Chinese Journal of European Studies, 38, 38 (2023).

[67] See Beata Faracik, Jernej Letnar Černič & Olena Uvarova, *Business and Human Rights in Central and Eastern Europe: Trends, Challenges and Prospects*, 9(1) Business and Human Rights Journal 1, 10 (2024).

[68] See Business & Human Rights Resource Centre. *Governance, Rule of Law and Corruption in Eastern Europe and Central Asia: Barriers to Holding Corporations Accountable for Human Rights Abuses*. https://www.business-humanrights.org/en/blog/governance-rule-of-law-and-corruption-in-

Along with the EU-wide BHR regulations, some national laws in individual EU countries, such as those in Germany and France, are creating a spillover effect. In fact, companies in the Western Balkans are increasingly affected by national due diligence laws in the EU countries, such as Germany and France, as their business partners request information to comply with these laws. As explained earlier, Germany is also providing guidance and assistance to companies in Serbia regarding regulatory compliance.

Some studies have found that positive influences from EU-based investors have already prompted shifts toward responsible business practices in regions such as the Western Balkans.[69] Faracik, Letnar Černič and Uvarova believe that future normative developments in BHR will be shaped by EU policies on sustainability, environmental protection, and human rights, with mandatory human rights due diligence standards influencing the global supply chains of large EU-based corporations. These impacts will be felt most strongly in EU member states in the Central and Eastern European region but will also extend to candidate countries.[70]

3.1.3 European banks

As mentioned in the introduction, the EIB and EBRD are among the key players in the EU infrastructure initiatives in the Western Balkans. For example, in Serbia, the EIB has financed 98 projects with a total investment of 7.79 billion euros since 1977. The EIB focuses on supporting investment projects in various sectors, including key infrastructure, small and medium-sized enterprises, industry, services, and local authorities.[71] The EBRD has also been actively involved in the country. For instance, it aimed to advance EU legal standards within the Serbian Electric Power Industry (hereinafter referred to as EPS), particularly in the Kolubara and Kostolac industrial areas. The bank actively contributed to Serbia's shift away from coal and supported its alignment with the EU Acquis. Most recently, the EBRD approved emergency liquidity support of €300 million to EPS to "maintain the Company's financial stability and maintain Serbia's critical energy infrastructure".[72]

First, the EBRD mandate has a critical link between the political and economic aspects. The EBRD operates in countries undergoing transitions towards market-oriented economies, applying principles of multiparty democracy and pluralism. The Bank has established procedures to implement the political aspects of its mandate, recognizing the crucial link between political and economic aspects. Additionally, the EBRD promotes the harmonization of the Western Balkans with EU democratic standards and laws. For EU member and candidate countries, assessments by EU agencies serve as key reference points, supplemented by information from government agencies and non-governmental organizations.

Second, EBRD actively promotes civil and political rights in its operations. The EBRD's key policies priorities assessing political progress by emphasizing human rights, particularly those integral to multiparty democracy, pluralism, and market

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eastern-eu - rope-and-central-asia-barriers-to-holding-corporations-accountable-for-human-rights-abuses/ (accessed on December 1, 2025).

[69] *Supra* note 32.

[70] *Supra* note 32, at para. 11.

[71] See European Investment Bank, *Serbia and the EIB*, https://www.eib.org/en/projects/regions/enlargement/the-western-balkans/serbia/index.htm (accessed on October 9. 2025).

[72] See Serbia EPS liquidity support, *document of the European Bank for Reconstruction and Development* (2023).

economics, in accordance with international standards.[73] While the mandate primarily focuses on civil and political rights, the Bank acknowledges the potential consideration and promotion of economic and social rights, aligned with its objectives, in the course of its regular operations. The EBRD categorizes the rights most relevant to democratic change into four broad categories: Free Elections and Representative Government; Civil Society, Media, and Participation; Rule of Law and Access to Justice; and Civil and Political Rights.[74]

Third, our analysis of the Bank's environmental and social policies of various years indicates that the EBRD actively encourages its counterparts to follow the Bank's approaches to human rights. According to the 2024 EBRD Environmental and Social Policy, all projects financed by EBRD shall be structured to meet the requirements of the EBRD, which includes a human rights dimension.[75] The 2019 EBRD Environmental and Social Policy also stated that the EBRD would "require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts caused by the business activities of clients".[76] According to the 2014 EBRD Environmental and Social Policy, the Client can undertake further studies to complement its environmental and social assessment, especially those focusing on specific risks and impacts, such as human rights.[77] Moreover, based on environmental and social assessments and stakeholder input, the client must develop and implement an Environmental and Social Management Plan, which may include a Human Rights Action Plan.[78] Furthermore, in response to noncompliance with the political aspects of the EBRD's mandate, the Bank can cut, suspend, or terminate its operations in a recipient country.[79]

Fourth, the EBRD integrates human rights into its performance requirements regarding land acquisition, restrictions on land use, and the introduction of involuntary resettlement. Since the resettlement of people living near the plants was one of the issues faced by this paper's case projects, it is essential to note that the EBRD incorporates human rights considerations into relevant performance requirements. As per the EBRD regulations, "[a]pplication of this PR is consistent with the universal respect for, and observance of, human rights and freedoms, specifically the right to private property, the right to adequate housing and to the continuous improvement of living conditions".[80] No similar performance requirements were found in the analyzed documentation of the Chinese actors. Finally, the EBRD's procedures for environmental and social appraisal and monitoring of investment projects require the Bank's clients to establish a Human Rights Action

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[73] See European Bank for Reconstruction and Development, *EBRD Strategies and Policies*, https://www.ebrd.com/home/who-we-are/strategies-governance-compliance/ebrd-strategies-policies/.html (accessed on October 9, 2025).
[74] See *Political Aspects of the Mandate of the European Bank for Reconstruction and Development*, p. 5 (2013).
[75] See European Bank for Reconstruction and Development, *Environmental and Social Policy*, Section III, para. 2.2 (2024).
[76] *Ibid*, at para. 2.4 (2019).
[77] *Ibid*, Performance Requirement 1, para. 8 (2014).
[78] *Ibid*, Section 3.4.4 (2015).
[79] See European Bank for Reconstruction and Development, *Political Aspects of the Mandate of the European Bank for Reconstruction and Development*, p. 7 (2013).
[80] *Ibid*.

Plan.[81] Notably, no similar performance requirements were found in the analyzed documentation of the Chinese actors.

The EIB's human rights policy is very comprehensive and complex. First, as an EU entity, the EIB upholds the foundational values of the European Union outlined in Article 2 of the Treaty on the EU. In its operations, the EIB adheres to both European and international benchmarks, regulations and principles on BHR, and develops policies to mitigate human rights impacts.[82] These largely reflect the UNGPs and Organization for Economic Co-operation and Development Guidelines, among other benchmarks.[83]

Second, the EIB emphasizes disclosures, transparency, and public access to information. The disclosures typically include project details, impact assessments, and social studies.[84] The bank also publishes annual reports, notably the Sustainability Report, which offers a detailed overview of its global impact and corporate responsibility initiatives.[85] The EIB adheres to specific reporting frameworks, such as the Global Reporting Initiative and the Sustainability Accounting Standards Board.[86] Finally, it provides environmental information through a public register on its website.[87]

Third, being an EU entity, the EIB adheres to the EU Global Human Rights Sanctions Regime. This framework enables the EU to impose sanctions on individuals, entities, and organizations responsible for, involved in, or connected to serious human rights violations and abuses worldwide.[88] Furthermore, the EIB's Environmental and Social Policy requires its clients to fulfil their human rights responsibilities, aligning with the UNGPs.[89] The analyzed documentation of Chinese actors did not reveal comparable performance requirements.

3.2 China

China's efforts to build up a normative framework for its foreign investments, particularly within the One Belt, One Road Initiative, which both Serbia and BiH are part of, have been a subject of much debate. First, contracts, bilateral agreements, and memoranda of understanding are among its significant legal components. These documents vary widely and cover diverse areas, including trade, environmental issues, and labor conditions. While they typically reference existing international legal standards and rules to demonstrate alignment with the normative status quo, they have been criticized for using vague and overly general terminology, which some argue exploits elements of soft law to address sensitive issues.[90] At the same time, in some

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[81] See *European Bank for Reconstruction and Development Procedures for Environmental and Social Appraisal and Monitoring of Investment Projects* (2015).

[82] Among them, there are the Charter of fundamental rights of the EU; European Convention on Human Rights; the International Bill of Human Rights; the ILO Declaration on Fundamental Principles and Rights at Work and its fundamental conventions; ILO Convention on Indigenous and Tribal Peoples; the UN Declaration on the Rights of Indigenous Peoples; the UNGPs; the OECD Guidelines. See European Investment Bank, Human rights and the EIB, https://www.eib.org/en/about/cr/human-rights/index.htm (accessed on October 9, 2025).

[83] *Supra* note 75, at para. 3.

[84] *Supra* note 75, at para. 15.

[85] *Supra* note 75, at para. 15.

[86] *Supra* note 75, at para. 15.

[87] *Supra* note 75, at para. 15.

[88] See *the European Investment Bank's Approach to Human Rights*, p. 1 (2023).

[89] See *the EIB Group Environmental and Social Policy*, p. 6 (2022).

[90] See Heng Wang, *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*, 20(3) World Trade Review 297, 297 (2021).

cases, such as in Zambia, agreements with China are more favorably received than those with Western countries because they do not mandate political reforms.[91]

Second, in 2018, China established two international commercial courts specifically to handle cases related to international investments, including those stemming from China's infrastructure projects within the One Belt, One Road Initiative. As the official website of the China International Commercial Court says, this is the first time the People's Republic of China is creating global legal institutions,[92] and the courts are "propelling the Belt and Road with the rule of law".[93] As the newly established commercial courts are part of the Supreme People's Court of China, the judges must "handle these disputes in a way that is consistent with the law, acceptable to the leadership of their court and to the outside world",[94] which implies adhering to the "socialist core values with the work of the courts".[95] This directly correlates with Chinese domestic policies on the rule of law, as evidenced by the Central Committee of the Communist Party of China's issuance of a communique in October 2014 on building the "socialist rule of law with Chinese characteristics".[96] Therefore, it is observed that the new Chinese Commercial Investment Courts are committed to shaping the international legal discourse and actively participating in global economic rule-setting.[97] Furthermore, along with the establishment of the two courts, China set up the China-Africa Joint Arbitration Center, which is the first dispute resolution institution outside China. As Matthew Erie pointed out, "China is starting to promote its law overseas as a resource for the legal development of other states", while "the emergence of Chinese law on the world stage is eyebrow-raising given that only forty years ago, scholars were debating whether China even had a legal system".[98]

It is argued that in the Western Balkans (Serbia and BiH), China leverages two primary publicly visible channels to exert normative influence: bilateral agreements and contracts, supplemented by the modus operandi of Chinese banks.

3.2.1 Bilateral agreements and contracts

First and foremost, China has concluded a number of framework investment agreements, such as bilateral investment treaties (hereinafter referred to as BITs) with most countries in the Western Balkans, including Albania (1993), Serbia (1995), North Macedonia (1997) and BiH (2002). Both the China-Serbia and China-BiH BITs

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[91] See Ching Kwan Lee, *The Specter of Global China: Politics, Labor, and Foreign Investment in Africa*, University of Chicago Press (2018).

[92] See China International Commercial Court, *A Brief Introduction of China International Commercial Court*, https://cicc.court.gov.cn/html/1/219/193/195/index.html (accessed on October 9, 2025).

[93] See China International Commercial Court, *Propelling the Belt and Road with the Rule of Law*, https://cicc.court.gov.cn/html/1/219/208/209/2055.html (accessed on October 9, 2025).

[94] See Susan Finder, *Legal Trends in China in 2020 as Seen from the Chinese Courts (Civil/Commercial)*, Peking University School of Transnational Law Research Paper (2020).

[95] See Susan Finder, *Analysis of Supreme People's Court's Interim Report on the Pilot to Reorient the Four Levels of the Chinese Courts*, https://supremepeoplescourtmonitor.com/2022/09/20/analysis-of-supreme-peoples-courts-interim-report-on-the-pilot-to-reorient-the-four-levels-of-the-chinese-courts/ (accessed on October 9, 2025).

[96] See China Daily, *Highlights of the Communique of the 4th Plenary Session of the CPC Central Committee*, http://www.chinadaily.com.cn/china/2014-10/24/content_18799625.htm (accessed on October 9, 2025).

[97] See Nora Sausmikat and Daniel Sprick, *China's International Commercial Courts for the "Belt & Road"*, Study for the European Parliament's Greens/EFA Group, p. 15 (2019).

[98] See Matthew S. Erie, *The Soft Power of Chinese Law*, 61 Columbia Journal of Transnational Law 1, 6 (2023).

share the primary goal of promoting and protecting investments, ensuring that investors receive fair and equitable treatment. The key difference between the two BITs lies in the scope for investor arbitration.[99] The China-Serbia BIT limits investor-state dispute settlement to disputes concerning only the amount of compensation for expropriation, while the China-BiH BIT includes an investor-state dispute settlement clause that covers any dispute relating to investment.[100] Overall, the China-Serbia and China-BiH BITs are balanced in rights and obligations of each party and do not contain evidence of China exercising normative influence over the two Balkan countries, including on matters related to BHR.

However, apart from the BITs, there is a series of specialized bilateral instruments that are significantly more illustrative of China's normative influence over Serbia and BiH. The author will first cover China's agreements and contracts with Serbia and will then turn to the case of Bosnia and Herzegovina. Serbia's deepening ties with China have been significantly shaped by two key bilateral agreements, raising considerable concerns, particularly from the European Union. First, *the 2009 Agreement on Economic and Technical Cooperation in Infrastructure between China and Serbia* permits significant deviations from standard public procurement procedures. According to the Agreement, "[a]greements, contracts, programs and projects drawn up in accordance with Article 4 of the Agreement on the territory of the Republic of Serbia are not subject to the obligation to call for public tenders for the performance of investment works and the delivery of goods and services (…)".[101] This framework enables Chinese companies to secure contracts for major infrastructure projects, such as the Kostolac B3 power plant, without being subjected to public tender obligations.

Secondly, *the 2018 Agreement on Social Security between Serbia and China* has created a very particular jurisdictional challenge. This agreement stipulates that Chinese labor law can apply to Chinese workers for their initial five years in Serbia.[102] *The EU Parliament Resolution* 2021/3020(RSP) condemned Serbia's divergence from EU law and pointed out the major allegations of the violation of labor rights, such as the mistreatment of employees at Zijin Mining. Similarly, at the Linglong Tire factory, allegations include human rights violations, human trafficking, and poor conditions for Vietnamese workers, treated in contravention of Serbian labor law.[103]

Another notable tool of normative influence for China in the case of Serbia is the use of project contracts. The author shall take as an example the same Kostolac B3, a major Chinese-led project, financed by China Export-Import Bank through a preferential loan of $608.26 million.[104]

The pre-contract for the construction of the Kostolac B3 explicitly mandated the adoption of "Chinese and/or international codes and standards proposed by the Contractor", at the same time requiring that these codes and standards are adjusted in

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[99] See *China-Federal Republic of Yugoslavia BIT*, Article 9 (1995).

[100] See *China-BiH BIT,* Article 8 (2002).

[101] See *the Government of the Republic of Serbia, Serbia, China Sign Framework Agreement on Economic, Technological Infrastructure Cooperation*, https://www.srbija.gov.rs/vest/en/58295/serbia-china-sign-framework-agreement-on-economic-technological-infrastructure-cooperation.php (accessed on October 9, 2025).

[102] See *Agreement on Social Security between the Government of the Republic of Serbia and the Government of the People's Republic of China*, pp. 1-8 (2018).

[103] *Supra* note 61.

[104] See *Preferential buyer credit loan agreement on phase of the package project Kostolac-B Power Plant Project between the government of the Republic of Serbia,* represented by the Ministry of Finance, as borrower and the Export-Import Bank of China as lender, p. 3 (2014).

accordance with Serbian laws and regulations.[105] The preferential buyer credit loan agreement then emphasizes that the agreement, "as well as the rights and obligations of the parties any dispute arising out of or in connection with this Agreement shall be hereunder shall be governed by and construed in accordance with the laws of China".[106] Furthermore, the mechanism of dispute resolution agreed upon in the agreement says, "if no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (hereinafter referred to as the CIETAC) for arbitration. The arbitration shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing.[107] The same provision on dispute resolution was seen in China's contract with Montenegro on building the Bar-Boljare highway, which was financed through a loan worth $943.99 million issued by the China Export-Import Bank.[108] The contract indicated that "an arbitration court in China would have jurisdiction in the event of any legal dispute".[109]

As regards BiH, to the best of the author's knowledge, there are no bilateral agreements between China and BiH that touch upon BHR-related matters. The same applies to the BHR dimensions of the infrastructure project contracts between BiH and Chinese entities. The current state-of-the-art is also silent on this issue, and the author finds no evidence which indicates Chinese normative influence through either bilateral agreements or contracts. This said, some Chinese-led projects in BiH have also faced normative issues. For instance, in the case of the Tuzla 7, a thermal power plant project financed by China Export-Import Bank through a loan of €614.0 million,[110] a law review by Sheppard Mullin found that BiH's state guarantees to the China Export-Import Bank violated EU state aid rules and the 2005 Energy Community Treaty.[111] However, in mid-2021, BiH's State Aid Council declared the state guarantees to be illegal, reaffirming the primacy of European law.[112]

The visible differences between the BHR dimension of Chinese infrastructure development in Serbia and BiH lead to some preliminary assumptions. First, the extent of China's normative influence on BiH's BHR landscape has been considerably lower than in Serbia. Second, there exists a high degree of heterogeneity in China's normative relations with various Western Balkan countries.

3.2.2 Chinese banks

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[105] See EPS, *Pre-contract on the Implementation of the Project Package Kostolac - B Power Plant Project*, Article 6 (7) (2010).

[106] See *Preferential buyer credit loan agreement on phase of the package project Kostolac-B Power Plant Project between the government of the Republic of Serbia*, represented by the Ministry of Finance, as borrower and the Export-Import Bank of China as lender, Article 8.5 (2014).

[107] *Ibid*.

[108] See *Preferential Buyer Credit Loan Agreement on Bar-Boljare Highway Section Smokovac-Matesevo Construction Project Between the Government of Montenegro Represented by the Ministry of Finance*, as Borrower and the Export-Import Bank of China, Article 2.1 (2014).

[109] See EPR, *China's Strategic Interests in the Western Balkans*, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733558 (accessed on December 1, 2025).

[110] See *Službeni Glasnik BiH*, No. 54/18, Annex 8a, Section 3.2.4.

[111] See *Tuzla 7 Project Review Under EU State Aid Rules of the State Guarantee Granted by Bosnia Herzegovina*, Sheppard Mullin (2019).

[112] See Energy Community of South-East Europe, *Case ECS-10/18: Bosnia and Herzegovina / State Aid,* https://www.energy-community.org/legal/cases/2018/case1018BH.html (accessed on October 9, 2025).

Along with bilateral agreements and contracts, Chinese banks that fund infrastructure projects can also be considered as the tools of normative influence, particularly in the Western Balkans. Some scholars noted that China's state-to-state loans to the local governments provide a rapid alternative to EU funding, notably by "waiving due diligence and sustainability considerations as enshrined in EU standards".[113] This allows countries in the Western Balkans to quickly access financing for infrastructure projects, even if these were previously deemed unfeasible by the EU financial institutions, as in the case of the Bar-Boljare highway in Montenegro. Such practices are believed to undermine EU normative influence in the region.[114] This paper focuses on a central Chinese bank involved in infrastructure financing in Serbia and Bosnia and Herzegovina, specifically the China Export-Import Bank. The China Export-Import Bank's selection for the study is explained by its key role in funding multiple major Chinese-led projects across the Western Balkans, such as the Bar-Boljare motorway in Montenegro and the Kostolac B3 thermal power plant in Serbia.

First, unlike European banks analyzed in this paper, the China Exim Bank does not condition its loans on a borrower's human rights performance. This said, its 2022 Environmental and Social Framework does incorporate an "Environmental and Social Exclusion List". This list explicitly states the Bank "will not knowingly finance Projects involving the following: (i) Forced labour or harmful or exploitative forms of child labour". It also prohibits "Production of, or trade in, any product or activity deemed illegal under national laws or regulations of the country in which the project is located, or international conventions and agreements", citing examples like "products containing polychlorinated biphenyl" and "pharmaceuticals, pesticides/herbicides and other hazardous substances subject to international phase outs or bans". Finally, the list now also excludes "[c]oal mining, coal transportation and coal-fired power plants, as well as infrastructure services exclusively dedicated to support any of these activities".[115]

Second, a significant portion of the Bank's strategy is dedicated to environmental protection and compliance with legal requirements. According to its 2019 White Paper, the Bank requires adherence to host country regulations and, if those are lacking, observing Chinese standards or international best practice.[116] Its 2022 Environmental and Social Framework explicitly regards "environmental, social and governance management as the foundation of green credit",[117] and the Bank actively engages in international exchanges on green development, as evidenced by its participation in EBRD webinars, including in Serbia.[118] However, while environmental and compliance aspects are central, the broader BHR dimension is notably less developed and underrepresented in the Bank's policies and reports. For example, the Bank's financing of the Kostolac B3 project is framed as supporting "eco-friendly and sustainable energy development", aiming to meet both local demand and EU environmental requirements, while omitting substantial references to

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[113] See Wouter Zweers, Vladimir Shopov & Frans-Paul van der Putten *et al.*, *China and the EU in the Western Balkans*, Clingendael Report, p. 8 (2020).
[114] *Ibid*.
[115] See *Environmental and Social Framework of The Export-Import Bank of China*, Version 1.0, pp. 39-41 (2022).
[116] See *White paper on green finance and social responsibility of the Export-Import Bank of China* (2019).
[117] *Supra* note 100, Article 4.
[118] See *White paper on green finance and social responsibility of the Export-Import Bank of China* (2022).

the social dimension of the project.[119] In the case of the Bank's funding of infrastructure projects in Serbia and BiH, such as the Kostolac B3 and Tuzla 7 power plants, the bank's corporate communications reveal minimal references to human rights. Although the Bank's Code of Conduct emphasizes respecting the law, there is a notable absence of direct references to human rights, which suggests the existence of a potential gap in integrating these principles into its corporate culture and credit practices.

4. Western Balkans at the Crossroads of the EU and China's Normative Influence

The Western Balkans face challenges related to BHR. Awareness and expertise on BHR are generally low,[120] and there is only limited engagement with international BHR instruments, such as the UNGPs. In particular, neither Serbia nor BiH have BHR regulations, which would be based on international BHR standards. There are neither stand-alone policies on BHR nor National Action Plans on BHR under the UNGPs.[121] Additionally, judicial and non-judicial mechanisms in the region are not always well-equipped to provide access to remedies for business-related human rights abuses. Although the prospect of EU accession fosters judicial reforms and alignment with EU judicial standards, the feasibility of substantial reforms has often been questioned.[122] In this environment, local businesses often prioritize meeting basic legal requirements over implementing comprehensive BHR practices. Although civil society initiatives have pushed the BHR agenda, studies indicate that local companies often narrowly view CSR as philanthropy and lack a broader understanding of the concept.[123]

That being said, BHR frameworks in the Western Balkans are being shaped by developments in the EU and the EU's relations with the region. The EU is geographically close, and the economic and political ties with EU-based companies are strong. Some authors also argue that the EU leverages its "normative power" through extraterritorial legal instruments, advocates for a "human rights-based economy" and shapes the behavior of foreign actors.[124] In fact, the EU possesses a series of normative and political instruments to promote its BHR agenda in the Western Balkans.

However, deficiencies in local governance systems in the Western Balkans, combined with the pursuit of foreign investments by Balkan governments, have led to the neglect of human rights considerations in numerous infrastructure projects with foreign participation. The volatile domestic situation in the Western Balkans, combined with a lack of robust local BHR frameworks, leaves room for external normative influence. China's infrastructure engagement in the Western Balkans has led Balkan countries to accommodate China's conditions and interests in Chinese-led infrastructure projects. This paper showed that many Chinese projects lacked robust project-based BHR frameworks.

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[119] See *White Paper on Green Finance of The Export-Import Bank of China*, p. 44. (2016).
[120] Supra note 62, at p. 8.
[121] *Supra* note 46, at p. 16.
[122] See Marina Matic Boskovic, *The Perception of Justice in Western Balkans Countries*, 25(1) Regional Law Review 27, 27-30 (2021).
[123] *Supra* note 22, at para. 8.
[124] See Ye Bin & Yang Kunhao, *The Extraterritorial Effects of EU Law in the Context of Green Transition: An Examination of the CBAM and CSDDD Proposals*, 41(6) Chinese Journal of European Studies 38, 38 (2023).

Serbia and BiH, being located at the crossroads of the influence of both the EU and China, have a generally controversial approach to BHR. On the one hand, both countries have ratified most international and European human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[125] Additionally, both Serbia and BiH, as EU accession countries, are subject to significant EU influence in the interpretation of human rights. On the other hand, local governments are widely regarded as "stabilitocracies", i.e. "governments that claim to secure stability, pretend to espouse EU integration and rely on informal, clientelist structures, control of the media, and the regular production of crises to undermine democracy and the rule of law".[126] These governments have been frequently blamed for suppressing freedom of expression and freedom of speech in general, and also in relation to infrastructure projects (including the Chinese ones).[127] This has been admittedly due to local Balkan authorities prioritizing the economic benefits of the projects over human rights considerations.[128] Additionally, similarly to China, Western Balkan countries often view CSR as corporate philanthropy rather than a risk mitigation strategy to address human rights issues.[129]

Although China has been developing its BHR framework and pushing forward its "foreign-related" law's doctrine and, in parallel, increasing its political and economic influence in the Western Balkans, there is no direct evidence that the Chinese BHR agenda and regulations are having a spillover effect in the region. This said, China's significant political and economic influence over Serbia and BiH has normative implications. As noted in a Clingendael report, economic goals primarily drive China's "business-first" approach in the Western Balkans, and China cannot match the EU's comprehensive normative ambitions for the region. However, despite the EU's stronger existing ties, China's presence alone hinders EU norm diffusion across political, economic, and security spheres.[130]

5. Research Limitations and Areas for Further Research

The author acknowledges the existence of several research limitations and proposes avenues for further research accordingly. First, the primary methodological approach is a comparative case study analysis limited to only Serbia and BiH. This challenges the extent to which the findings on China's heterogeneous normative engagement can be fully generalizable to the entire Western Balkans or other countries in the EU neighborhood, such as Ukraine, Moldova, and Georgia. Thus, to be able to test the research findings, the author highlights the need to extend the geographical scope. Second, current research specifically addresses the normative dimension of the competition, with a focus on BHR matters. This naturally limits the analysis to exclude the broader economic and political aspects of Chinese and EU projects, which have been covered by separate scholarly attention. Therefore, the

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[125] For the status of ratification for Serbia, see United Nations Human Rights Treaty Body Database, *Ratification Status for Bosnia and Herzegovina*, tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=22&Lang=en (accessed on October 9, 2025).

[126] See Florian Bieber, *The Rise (and Fall) of Balkan Stabilitocracies*, 5(10) Horizons: Journal of International Relations and Sustainable Development 176, 176 (2018).

[127] *Supra* note 61.

[128] *Supra* note 46, at p. 16.

[129] *Supra* note 46, at p. 16.

[130] *Supra* note 98, at pp. 3 & 41.

author believes a deeper analysis of China-EU normative competition is necessary. This analysis must account for both the political orientation and economic interests that leverage or impede the success of normative tools, as well as the role of civil society in Serbia and BiH, specifically in terms of its support or opposition to the EU's and China's normative influence. For this, interviews with key stakeholders, such as government officials, parliamentary members, and civil society organizations, could provide crucial insights into the subject matter. Finally, the author suggests including a broader range of Chinese and European banks in the study. Although the EBRD, EIB and China Export-Import Bank are among the key financiers in the Western Balkans, further research would benefit from the inclusion of other financial institutions and the comparison of their BHR strategies.

6. Conclusions

The paper shared a detailed institutional analysis by mapping out the key tools of normative influence used by the EU and China. This research contributes to the legal discipline by analyzing specific legal instruments (such as bilateral agreements and contracts) and institutional actors (banks, accession mechanisms, and regulatory extraterritoriality) through which the EU and China promote their BHR agendas in Serbia and BiH. At the same time, the paper informs the IR discussion on great power competition and spheres of influence. Specifically, the paper revealed that China's normative engagement is heterogeneous across the Western Balkans and identified the critical IR and political factors that will determine the outcome of the EU-China normative competition.

The paper demonstrated the key differences between the EU and China's engagement in the Western Balkans. In fact, the EU is a "normative power" per se, which is deliberately seeking to influence and reform legal (including BHR) frameworks of the Western Balkan countries to secure their EU accession and alignment of domestic legal frameworks with those of the EU. For this, the EU uses a range of established tools, which range from the accession mechanism, the extraterritorial effect of its regulations, to investments with strong normative conditionalities. All these tools help the EU to promote its model of Business and Human Rights in the Western Balkans, including Serbia and BiH. On the contrary, China is a significant economic and political power that is not directly interested in the Western Balkan countries aligning their legal frameworks (including BHR) with the Chinese ones. Moreover, its regulatory and policy framework for BHR is not as advanced as the EU's one and lacks extraterritorial effect, as, for instance, in some EU regulations. That being said, China is interested in the success of its infrastructure projects and seeks to ensure the best conditions for them, while reaping benefits such as economic profit and political influence. Normative influence, including on the BHR agenda, plays only a supplementary role in China's engagement with the region. At the same time, this paper demonstrates that China's normative engagement with Western Balkan nations is heterogeneous, as observed in a significantly lower BHR influence in BiH compared to Serbia.

So, is China-EU normative competition over Serbia and BiH a myth or reality? This paper contends that this is a reality. However, while the EU has been described as a "normative power" in the Western Balkans, it is argued that China is a "political and economic power" with normative implications. The deliberate strategy of the EU to normatively influence BHR frameworks contrasts with China's primary focus on securing favorable conditions for its infrastructure projects. In light of this, it is believed that the outcome of the EU-China normative competition in Serbia and BiH

will largely depend on the two countries' progress in their EU accession, the EU's ability to address their critical industrial and infrastructure needs, and specific domestic developments within Serbia and BiH.

A Critique of the Legal Framework along the Strait of Hormuz: Maritime Security Issues and the Iran–US Conflict amid Threats to Close the Strait

Linda Collins Taylor[1]

Abstract: The oceans have changed significantly since Hugo Grotius in 1609 imagined the seas being available to all nations, for both trade and travel under the maxim of *Mare Liberum*. This paper debates the legal regime of the Strait of Hormuz analysing the law of the sea framework and security law perspective by examining past and recent maritime events along the Strait of Hormuz as well as critiquing Iranian and American interactions which influence navigation and maritime security. This was discussed by Klein who considered it "the protection of a state's land and maritime territory from harmful acts occurring at sea".[2] This paper aims to critique the legal regime along straits of international navigation with a focus on the Strait of Hormuz, the gateway to the Persian Gulf. It involves a deep dive into both historical and recent literature to gain an understanding of the complexities of transit in this region. However, academic analyses on the topic are repetitive and bland. The United Nations Convention on the Law of the Sea is the most referred to legal instrument in this paper and heavily critiqued. Furthermore, the study examines the power kinetics between the coastal state Iran and the foreign policy of America along the strait. It also discusses the principle of *Jus Ad Bellum* and the self defence mechanism for States. Extensive discussion was afforded to the legal weakness of the various frameworks but also to viable solutions. Finally, one looked at customary international law and its role in the legalities of passage through the Strait of Hormuz.

Keywords: Strait of Hormuz; UNCLOS; Transit Passage; Maritime Security; Iran–United States Relations; Customary International Law; Freedom of Navigation

1. Introduction

The Strait of Hormuz is of strategic importance as an oil and liquefied natural gas (hereinafter referred to as LNG) chokepoint due to the absence of an alternative route. Because of the development of rivalries between the Persians and the Arabs together with the political influence from the West, the region has become a hotbed of conflict as the Persian Gulf feeds the Strait of Hormuz and flows into the Gulf of Oman.

1.1 Persian Gulf Dynamics

Smaller islands in the region are the most significant and seven of them are owned by the coastal state of Iran, thereby giving it integral status in the control dynamics of the Persian Gulf. It is a partially enclosed body of water and is legislated for under Article 122 of *the United Nations Convention on the Law of the Sea (1982)*

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[2] See Maximo Mejia, *Maritime Security and the Law of the Sea*, 11(1) WMU Journal of Maritime Affairs 59, 59 (2012).

(hereinafter referred to as the UNCLOS).[3] However, the term "strait" is undefined in any Convention, which the writer finds alarming.

1.2 How Coastal States and International Law Collide

Article 123 of the UNCLOS[4] details how the cooperation of States protects an enclosed sea like the Persian Gulf.[5] Legal instruments are enforced with varying degrees of success and include maritime conventions such as the UNCLOS (Part III, Articles 34-45),[6] customary international law and the national law of coastal states along the Strait of Hormuz. The focus will be on Iran and America along the Strait of Hormuz and how they react to legislation/customs.

Crude could be transported overland via the Petroline through Saudi Arabia. This pipeline built during the Iran-Iraq war runs from the east coast of Saudi Arabia to the Red Sea coast on the west. However, carrying capacity is less and is more easily targeted.

2. A Critique of the Legal Framework

2.1 How Effective Are Legal Instruments Along Hormuz?

Since 1982, the primary legal instrument that governs movement on the oceans is the UNCLOS.[7] It establishes rules for navigation, including the right of passage through international straits connecting one part of the high seas to another. Legal categories of straits also rely on general navigational regimes, including the freedom of navigation and overflight (Article 36 of the UNCLOS)[8] as well as archipelagic sea lanes passage (Article 54 of the UNCLOS)[9] and permit based passage (Article 35 of the UNCLOS).[10] Globally there are approximately ten significant straits comparable to Hormuz, including Bab-el-Mandeb, Malacca and Gibraltar.

Discussions have ensued regarding the demarcation of territorial waters in the region, and these islands are still the source of many disputes. Although Iran has had a presence since 1970 on the Greater and Lesser Tunb Islands, the United Arab Emirates disputes ownership of both territories, as well as of Abu Musa.

2.2 Transit and Innocent Passage: The Root of Many Disputes

Navigational conflicts seem to develop over legal disputes between Iran and other countries. The legal regime here is highly complex with innocent and transit passage being at the centre of much of the disputes as condensed in table below:

Innocent Passage Article 17	**Transit Passage Article 38**
Overflight denied	Overflight permitted
Surface transit only-submarine	Submarine may be submerged

[3] See *the United Nations Convention on the Law of the Sea (1982)*, Article 122, https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx (accessed on December 1, 2025).
[4] *Ibid*, Article 123.
[5] *Ibid*.
[6] *Ibid*, Articles 34-45.
[7] *Ibid*.
[8] *Ibid*, Article 36.
[9] *Ibid*, Article 54.
[10] *Ibid*, Article 35.

Restricted operations	Normal Operations
Aircraft launch/recovery denied	Aircraft launch/recovery allowed
Significant restrictions	Minimal restrictions

Iran and Oman are the countries whose territorial waters vessels must traverse when transiting the Strait of Hormuz. Coastal states may set traffic lanes, also known as Traffic Separation Schemes (hereinafter referred to as TSS)[11] as vessels cross their territorial seas, as is standard in International Straits globally. Non-coastal state foreign ships must follow the navigational lanes as bound Article 39 (2) and Article 41 (7) of the UNCLIOS.[12] It might be good to briefly explain why TSS matters, e.g. for safety, predictability, conflict resolution etc.

Upon the UNCLOS drafting, other states opposed the concept of transit passage and its inclusion in the UNCLOS legislation, namely Spain regarding the Strait of Gibraltar and Russia regarding straits in the Arctic Ocean.[13] Hence, the great compromise was formed and granted states a territorial sea extension from 3nm to 12nm (Article 3 of the UNCLOS) but in return transit passage was allowed along the coastal territorial waters of international straits of navigation.

The Strait of Hormuz is narrow; hence, Iran's coast ill affords its claim to a 12 nm territorial sea as the UNCLOS allows for. As a result, the pressure is on Iran to accept transit passage past the 3 nm zone. However, as Iran has not ratified the UNCLOS the right of transit passage can only exist along an International Strait if it has achieved customary international law status. Once such status is reached, the custom is binding on all states, including non-parties. If there is no transit passage in the Iranian territorial sea, then Iran is permitted to claim only a 3 nm territorial sea. High seas freedoms would apply beyond that limit.[14]

The author strongly criticises the musings of Robin R. Churchill who said in Anderson's book[15] that he viewed the UNCLOS legislation as achieving a compromise between the coastal states of the strait and the commercial users. It is illogical to suggest that a coastal state like Iran with its large oil reserves would compromise on its territorial sea and geographical position.

Historically, *the Convention on the Territorial Sea and the Contiguous Zone (1958)*[16] also bound vessels to certain rules on the contiguous zone and territorial waters. It is important to note that Iran has signed the UNCLOS and ratified *the Convention on the Territorial Sea and the Contiguous Zone*. Iran has proclaimed that segments of the UNCLOS "are merely the product of quid pro quo which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character".[17] Although, the other coastal state along the Strait of Hormuz, Oman, has ratified the UNCLOS, Iran does not consider transit passage an element of customary international law. It argues that only parties who have ratified the UNCLOS are permitted this privilege.

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[11] See *the Convention on the International Regulations for Preventing Collisions at Sea (1972)*, https://www.imo.org/en/about/conventions/pages/colreg.aspx (accessed on December 1, 2025).
[12] *Supra* note 3.
[13] See Giuseppe Cataldi, *The Strait of Hormuz*, 76(1) Questions International Law Journal 5, 5 (2020).
[14] See James Naval, *Iran's Disingenuous Approach To Maritime Law*, https://www.defenseone.com/ideas/2015/05/iran-disingenuous-approach-maritime-law/111715/ (accessed on December 1, 2025).
[15] See Jill Barrett &Jean-Pierre Gauci, *British Contributions to International Law, 1915–2015*, Brill Nijhoff (2020).
[16] See *The Convention on the Territorial Sea and the Contiguous Zone (1958),* https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf (accessed on December 1, 2025).
[17] *The United Nations Convention on the Law of the Sea*, 1982 Declarations made upon signature.

The passage of vessels is governed under the category of innocent passage or transit passage (previous table). Innocent passage itself will cover the movement of a vessel through the territorial waters of another state if the passage is expeditious and continuous. Iran in its own national legislation refers only to innocent passage via its territorial sea if continuous and expeditious.[18] However, Iran views warships differently. The author notes that contradictions arise as both Oman and Iran insist on warships giving prior notification of passage. Article 9 of *the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea*,[19] clearly states that prior notification must be sought when certain ships, including warships traverse their territorial sea and interprets Article 19, Article 21 and Article 25 of the UNCLOS as requiring prior notification also. The writer identifies a failure in the UNCLOS legislation as it says that warships are not obliged to do so under Article 17 on innocent passage. Another criticism is directed at the UNCLOS preamble statement; it does not regulate naval warfare or hostilities at sea, which are instead governed by international law principles. Hence Iran analyses flag state status and ratification of the UNCLOS to decide if they will permit transit passage in its territorial sea.

2.3 Is Customary International Law Realistically Applicable Along Hormuz as well as Other Straits of International Navigation?

It is well outlined that the concept of innocent passage was enshrined in customary international law before its mention in the UNCLOS. Hence, Iran accepts an innocent passage regime for non-warships through its territorial sea. In addition, customary international law enshrines the extension of a coastal state's territorial sea from 3 nm to 12 nm and Iran need not ratify the UNCLOS[20] to claim a 12 nm territorial sea. Prior to the enactment of the UNCLOS,[21] we saw earlier cases tracing customary international law (hereinafter referred to as CIL) and the development of innocent passage. Take the seminal *Corfu Channel* case, for example,[22] which traced the customary law precedent set in relation to innocent passage as did the *SS Wimbledon* case.[23] Both cases recognised the customary value under international law of the right of all ships of innocent passage through international straits, as determined by the International Court of Justice on April 9, 1949. These decisions had lasting impressions on and contributed to the UNCLOS provision for transit passage (mentioned previously: the great compromise).

A seminal case also set precedent in the use of force as seen in the *Nicaragua case*[24] (discussed later). Generally, ships do not stop during innocent passage and cannot in any way interfere with the peace, security or order of the territorial state as it travels. However, anchoring may be allowed in cases of *force majeure*. In addition, the coastal state can ensure that the innocent passage does not interfere with its sanitary laws or interfere with the natural resources of the coastal state. The innocent passage of warships in peaceful times is generally allowed for and has not been

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[18] See *the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea*, 1993, Article 5, https://2009-2017.state.gov/documents/organization/58228.pdf (accessed on December 1, 2025).
[19] *Ibid.*
[20] *Supra* note 3.
[21] *Supra* note 3.
[22] See *Corfu Channel Case (UK v. Albania) (Merits),* [1949] ICJ Rep. 4.
[23] *See Britain et al. v. Germany,* [1923] P.C.I.J. ser. A No. 1.
[24] *See Military and Paramilitary Activities* (*Nicaragua v. the United States of America*), 1986 I.C.J. 4 (June 27) (separate opinion of Judge Ago).

specified either way under the UNCLOS legislation. The author considers this a flaw in the legislation arguing that warships movement in wartimes should be subject to legislation.

3. Who Controls International Straits of Navigation? Law of the Sea and *Jus Ad Bellum*

Iran may still be rooted in an Islamic ideology of resistance to Western powers as suggested by Kamran[25] or it may be simply acting out of its desire to protect national security and territorial sovereignty.[26]

3.1 But What Is *Jus Ad Bellum* Really?

In law we know, *Jus Ad Bellum* refers to the body of rules governing when a state may lawfully resort to force in a proportionate manner. Iran and America may one day find themselves relying on this framework.

Both Israel and the USA are military powerhouses with the financial and military capability to bring conflict to Iran. Iran, for its part, is often portrayed as an extremist actor, though its behaviour can also be explained through security concerns and regional power dynamics. Tensions have flared for decades between the USA and Iran: the dying days of the Iraqi war saw the USA launch Operation Earnest Will in 1987 and in 1988 Operation Praying Mantis. The conflict has also seen Iran provide Houthi rebels in Yemen with weapons to further destabilise relations in the region. Yet, in 2017, anecdotal reports emerged of a joint rescue venture between Iran and the USA to rescue survivors from a stricken Iranian fishing vessel by the USS Howard.[27]

The primary legal justifications that the USA and Israel could use to justify the use of force are the disruption of Iran's nuclear policy by imposing sanctions on Iran to ensure compliance. This is a top priority for the USA. For decades, it has been reported that Iran enriches its uranium in nuclear plants above permitted levels resulting in the potential for bomb making. As John Bolton, the former USA Ambassador to the United Nations, once declared rather outrageously "To stop Iran's bomb, bomb Iran".[28] Bolton's remark makes places him at the extreme end of policy discourse. For any legal attack on an Iranian nuclear reactor, Israel and/or the USA would require a valid self-defence justification under international law, whether claimed on an imminent threat or a claimed latent threat. This premise of law was outlined clearly as per the *Caroline* case.[29] However, *the Charter of the United Nations*, codifies the major principles of international law and makes clear that a threat of attack does not constitute the right to self-defence as outlined below in the Article 51 of Chapter XII:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

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[25] See Kamran Taremi, *Iranian Perspective on Security in the Persian Gulf*, 36(3) Iranian Studies 381, 381 (2003).

[26] See S. Lotafian, *New Challenges in the Persian Gulf: Analysing the Interests of Iran-US-GCC Triangle*, 13(1) Middle East Studies Quarterly 9, 9 (2008).

[27] See CRISIS GROUP, *Strait of Hormuz,* www.crisisgroup.org/trigger-list/iran-us-trigger-list/flashpoints/hormuz (accessed on December 1, 2025).

[28] See John R. Bolton, *To Stop Iran's Bomb, Bomb Iran*, www.nytimes.com/2015/03/26/opinion/to-stop-irans-bomb-bomb-iran.html (accessed on December 1, 2025).

[29] See *the Caroline v. the United States of America*, [1813] 11 U.S. 496.

Nations, until the Security Council has taken measures necessary to maintain international peace and security".[30]

Another viewpoint on the use of force in connection with rights of enforcement is that of Professor Donald R. Rothwell.[31] He argues that a vessel in transit passage threatening the security of the coastal state may expect the coastal state to act in self-defence under international law. Guidance on the use of force can be derived from *the Convention on the International Regulations for Preventing Collisions at Sea*.[32] However, the right of transit does not include the right or obligation on the part of the transiting vessel to patrol the strait in an intimidatory manner which some American ships arguably do as part of Freedom of Navigation Operations.[33] Furthermore, as stated by Heintschel von Heinegg:

"the violation by a foreign warship of the rules of (non-suspendable) innocent passage or transit passage in straits …might *per se* amount to the use of force under Article 2(4) of *the Charter of the United Nations* that triggers the applicability of *jus in bello*."[34]

Additionally, *the Charter of the United Nations* outlines its intention to prohibit the use of force as seen in Article 2(4).[35] An analysis of the use of force has been discussed since World War II.[36] In international law we refer to the *Nicaragua case*[37] whereby the USA laid sea mines and failed to alert maritime traffic of this. The International Court of Justice called an armed attack "condition *sine qua non",*[38] hence, the right of the USA to collective self-defence was disallowed and unjustified. The author's understanding of imminent threat is that proof must exist of Iran planning a nuclear attack. No proof currently exists, but international law does allow self defence against credible imminent threats.

It is reasonable to say that Tehran has repeatedly used the Strait as a geopolitical weapon in relation to its nuclear policy since 2008. When the USA President Donal J. Trump withdrew from the Iranian nuclear deal in 2019, the Strait was once again used as a tool to retaliate against his decision. However, Iran showed levels of cooperation in launching its Hormuz Peace Endeavour Initiative (hereinafter referred to as HOPE)[39] during the General Assembly of the United Nations in 2019 (might be good to briefly explain what HOPE entailed).

3.2 Why does the USA Maintain a Military Presence in the Persian Gulf?

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[30] See *the Charter of the United Nations*, 1945.
[31] See Donald Rothwell, Alex Oude Elferink & Karen Scott *et al*., *The Oxford Handbook of the Law of the Sea*, Oxford Academic Press, (2016).
[32] *Supra* note 11.
[33] See Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, p. 259 (2013) .
[34] See Wolff Heintschel von Heinegg, *The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities*, 98(2) International Review of the Red Cross 457, 457 (2016).
[35] See *the Charter of the United Nations*, 1945, Article 2 (4).
[36] See Mark Weisburd, *Use of Force: The Practice of States Since World War II*, Penn State University Press (1997).
[37] *Supra* note 24.
[38] See Mohamed S. Helal, *Clouds of War Over the Persian Gulf – A Jus ad Bellum Analysis (Part I)*, https://opiniojuris.org/2019/06/04/clouds-of-war-over-the-persian-gulf-a-jus-ad-bellum-analysis-part-i (accessed on December 1, 2025).
[39]See Saeed Khatibzadeh, *HOPE for a New Regional Security Architecture: Toward a Hormuz Community*, https://www.iai.it/en/publications/c03/hope-new-regional-security-architecture-toward-hormuz-community (accessed on December 1, 2025).

Since World War II ended, the USA has held a strong military presence in the Persian Gulf, primarily to ensure the seamless flow of oil to the West from the oil rich producing nations of the Gulf. The USA itself holds oil in reserve in the event of disruption along Hormuz. It currently holds 696 million barrels of crude oil in the Strategic Petroleum Reserve (SPR for short).[40] When the Cold War ended, America identified both Iran and Iraq as the states most likely to threaten unrest in the Gulf. A dual containment policy was mentioned in 1993 and was simply a USA security policy toward Iran and Iraq and was further compounded by Bill Clinton after the Gulf War.[41] There is a strong need for a security presence in the area as powerful Gulf states could and may yet threaten the flow of oil to Western Countries essentially halting any industry relying on oil or any of its byproducts. As well as the dual containment policy, the Gulf Cooperation Council (hereinafter referred to as the GCC)[42] was equipped by Washington with further military defences. The Council itself was established to encourage unity amongst member states as per its Article 4.[43] It incorporates Bahrain, Kuwait, Oman, Quatar, Saudi Arabia and the United Arab Emirates. In addition, the GCC has formed a cooperation agreement with the European Union which promotes positive dialogue on economic topics and climate change but more importantly on energy in the region. Upon incorporation, the GCC had ambitious plans to foster economic unity, form a customs union and develop a shared currency.[44] However, as the World Bank categorised all six GCC members as high-income economies,[45] the author doubts they will need to consider preferential trade routes to EU trade markets.

3.3 Maritime Security in the Persian Gulf: An Analysis

Tensions have always been high in the Gulf and as recently as 2023, the USA deployed two amphibious vessels to the area along with twenty thousand military personnel. This was in direct response to Iran threatening the disruption of commerce in the region. Disruption could be significant as the blockage of oil into/out of the Persian Gulf would halt economies and increase tensions after the return of American military to the Gulf. The Iranian Foreign Minister called his counterparts in both Kuwait and the United Arab Emirates to say that "we can have peace, stability and progress in the region without the presence of foreigners."[46]

A foreign military presence in the Gulf may protect oil movement but Iran will not forget the attack in 1988 on Iranian oil rigs and the sinking of Iranian ships. These attacks contributed to the ceasefire that effectively ended the Iran-Iraq war, but they also helped set the stage for the Iraqi invasion of Kuwait in 1990. Because of American involvement in the Iran/Iraq War and the later toppling of Saddam Hussein

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[40] See U.S. Energy Information Administration, *Stocks by Type*, December 29, 2011.
[41] See Harry L. Myers, *1997 The US Policy of Dual Containment Toward Iran and Iraq in Theory and Practice*, Biblioscholar (2012).
[42] See Gulf Cooperation Council, *Home*, https://www.gcc-sg.org/en/Pages/default.aspx.
[43] *Ibid*.
[44] See The European Centre for Democracy and Human Rights, *Assessing the Efficacy of EU-GCC Cooperation: A Critical Analysis*, www.ecdhr.org/assessing-the-efficacy-of-eu-gcc-cooperation-a-critical-analysis/ (accessed on December 1, 2025).
[45] See EU, *Trade Policy*, www.policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/gulf-region (accessed on December 1, 2025).
[46] See unknown, *Iran-US Gulf Persian Tensions*, www.apnews.com/article/iran-us-persian-gulf-tensions-military-deployments (accessed on December 1, 2025).

by the Bush administration, events have now opened the door for a Shia-led government in Iraq that is far more amenable to Tehran.

3.4 Tanker Wars on the Rocks!

This term refers to attacks on tankers transiting the Strait of Hormuz during the Iran-Iraq war from 1980-1988. The agenda was straightforward: Iran was getting useful military supplies by sea for their war efforts and Iraq began to attack ships carrying war cargo. In response, Iran retaliated and began to attack ships from countries in support of Iraq. Interestingly, only 23% of oil tankers were affected and are resilient to missile attack. Initially, movement reduced through Hormuz, Iran reduced oil prices to offset against higher insurance premiums after a tanker attack. The result was that less than 2% of marine trade in the Gulf was directly affected. Marine insurance paid out and transport costs are a small proportion of the overall cost of crude in barrels.[47] Statistics have also shown that a large-scale Iranian boat attack would affect just 5% of tankers and 12% if missiles were used. In terms of the Very Large Crude Carriers' just ten would be disrupted for every minefield used.[48] Apart from economic disruption, the laying of minefields along international straits of navigation or blockades in times of war to impede vessels not party to the conflict is considered illegal as discussed by Caminos and Cogliati-Bantz. [49]

As recently as 2019, Iranian forces captured a tanker flying a British flag, the *Stena Impero.* The boarding could be considered lawful under the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)*.[50] However, the flag state would need to be notified four hours prior to boarding, and the boarding officers would need to suspect offences. In 2019 efforts from a Coalition of countries named Operation Sentinel was soon formed. The aim of this grouping was to promote maritime stability and to ensure calm sailing through international waters. The nations involved included the USA and Australia, Bahrain, Britain, Qatar, Saudi Arabia and the United Arab Emirates. A similar European led group also operates along Hormuz to promote maritime security. It is titled EMASOH (European Maritime Awareness in The Strait of Hormuz). The writer is surprised that both groups appear to operate independently yet are noted to cooperate with each other. One criticises this arrangement as it offers little except perhaps a token presence along Hormuz and as such is not supported by any legislative framework. Understandably, Iran tends to test the presence of such coalitions and in 2020, some of its naval ships performed what the USA considered unsafe manoeuvres around USA coast guard vessels. In the same year, Iran also boarded and detained a tanker in the Strait of Hormuz, deploying both its conventional navy and the Islamic Revolutionary Guard Corps Navy (hereinafter referred to as IRCG Navy).

4. Lawfare or Warfare? Legal Complexities in a Geopolitical Pressure Cooker

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[47] See Strauss Centre, *Strait of Hormuz – Effects of Disruption*, https://www.strausscenter.org/strait-of-hormuz-effects-of-disruption/ (accessed on December 1, 2025).
[48] See Strauss Centre, *Strait of Hormuz – Tanker War*, https://www.strausscenter.org/strait-of-hormuz-tanker-war/ (accessed on December 1, 2025).
[49] See Alexander Lott Hybrid, *Threats and the Law of the Sea*, Brill, Chapter 2, (2022).
[50] See *the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)*, https://www.imo.org/en/about/conventions/pages/sua-treaties.aspx (accessed on December 1, 2025).

For years Iran and the USA have asserted they both have unimpeded access along the Strait of Hormuz. The USA assumes it has full freedom of navigation to and from the Persian Gulf with its warship fleet. Iran being a coastal state with territorial waters along Hormuz reasonably assumes it has supremacy over the Strait. The American presence could be considered a type of gun boat diplomacy.[51] This chapter will explore the legal concepts along the Strait and investigate their application and if they are fit for purpose.

4.1 Is Iran the Nightmare Neighbour Next Door?

Iran views Article 38 of the UNCLOS, regarding transit passage, as a treaty obligation but not one of customary international law. The other coastal state of significance, Oman, has always disputed that transit passage via international straits of navigation has customary international law status.

In fact, transit passage itself has no precedence in international law and was absent from mention in *the Convention on the Territorial Sea and the Contiguous Zone*. It was first introduced by the British delegation of the Conference and included in their draft articles on the territorial sea and straits.

Many years post UNCLOS, Iran has recognised and seems to accept the transit passage rights of vessels who fly the flag of a country party to the UNCLOS which explains why it has an abhorrence for the USA assumption that it has transit passage rights of its warships. The International Courts of Justice have decided cases in favour of recognising transit passage as a well-established practice of customary international law. The author suggests that the UNCLOS itself is somewhat outdated, as global conflicts and threats have increased in frequency since it was formed. Maritime security remains a universal problem confronting the global community. Nigeria has experienced the limitations of the UNCLOS on its coastal domain[52] and Iran is watching intently as events unfold. (might be good to briefly explain the Nigerian example).

Iran's legal status as a coastal state is like that of any other coastal states along an international strait of navigation. Take for example the Montreux Convention,[53] in existence since 1932 to maintain security and stability along the Turkish Straits and Black Sea. Turkey has implemented this Convention rather successfully for almost double-digit decades. Commercial ships are afforded freedom of passage and warships are allowed passage but with restrictions which include twenty-one day stay limits and tonnage restrictions.[54] However, the Turkish Straits, incorporating travel through the Bosphorus, differ in value of cargo traffic and is a safter route than the Strait of Hormuz. Montreux demonstrates that peace and stability along straits of navigation may be achieved if the intentions of all stakeholders are honourable.

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[51] See Menefee & Samuel Pyeatt, *Gunboat Diplomacy in the Persian Gulf--An Alternative Evaluation of a Contemporary Nava Conflict*, 31(1) Vancouver Journal of International Law 567, 567 (1990).

[52] See *Ekundayo Oluwaremilekun Babatunde* & *Mutiat Mobolanle Abdulsalam*, *Towards Maintaining Peacefulness of the Sea: Legal Regime Governing Maritime Safety and Security in Nigeria*, 12(2) Beijing Law Review 529, 529 (2021).

[53] See Montreux Convention Regarding the Regime of the Straits, July 20, 1936.

[54] See *Implementation of the Montreux Convention*, https://www.mfa.gov.tr/implementation-of-the-montreux-convention.en.mfa (accessed on December 1, 2025).

In 2015, the *Maersk Tigris*[55] was seized by Iran along the Strait of Hormuz and subsequently turned over to the Iranian Revolutionary Guard Navy in a clear breach of customary international law. The *Maersk Tigris* was enjoying a right of transit passage through Iranian territorial seas. However, Iran wished to issue a claim *in rem* as per admiralty law and enforce maritime proceedings against the ship in lieu of a previous debt. However, Iran's actions, though genuine, were in fact limited under the UNCLOS as the ship was sailing through a Strait of International Navigation. Innocent passage is allowed for in customary international law territorial waters but national laws which are breached, for example, pollution or fishery offences, may result in the arrest of a ship.

A high-profile detention of the *Stena Impero* by Iran in 2019 was an example of the legal quagmire in this area of the Persian Gulf. Iran claimed that the English flagged vessel had been in collision with a fishing trawler as she sailed through Omani territorial waters. In fact, Iran ordered her to alter course to remain safe.[56] Shortly after that the Iranian Revolutionary Guard Navy boarded her for inspection on security grounds. Britain claimed that Iran's actions were simply a retaliation against the detention of Grace 1[57] along the Strait of Gibraltar. Technically the Iranian detention could be legal but did not constitute piracy, as defined by Article 101 of the UNCLOS[58] which applies to private vessels. Iran claimed that she veered away from the Traffic Separation Scheme of Hormuz and turned off her shipping tracker, AIS, in solid breach of *the International Convention for the Safety of Life at Sea* (hereinafter referred to as the SOLAS Convention).[59] Apart from allegedly turning off her AIS, the author observes that it is unclear as to what extent a coastal state can interfere if a ship leaves the Traffic Separation Scheme of an international strait whilst engaging in transit passage. This was also highlighted in Lotts article on the legal landscape along Hormuz.[60] Being Swedish owned but British flagged the United Kingdom issued a statement at the time indicating that her AIS was turned on and traceable.[61] The British foreign secretary at the time, Jeremy Hunt stated that Iran had committed an act of state piracy. The author calls this a fallacy, as piracy under international law occurs between private entities, not states.

4.2 Was Iran Justified in Seizing and Arresting *Stena Impero* in Omani Territorial Waters?

The author suggests that the *Stena Impero* had full transit rights to move through Omani waters, and as it can be verified that her AIS was on and transmitting, Iran

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[55] See R. Wright, *Iran's Swoop on Ship Linked to Decade-old Cargo Spat*, https://militarnyi.com/en/news/iranian-ship-sinks-in-caspian-sea-possibly-linked-to-arms-shipments-to-russia (accessed on December 1, 2025).

[56] See unknown, *Radio Exchanges Reveal Iran-UK Confrontation as Ship Seized*, www.bbc.com/news/av/world-middle-east-49061737/radio-exchangesreveal-iran-uk-confrontation-as-ship-seized (accessed on December 1, 2025).

[57] See Jennifer El-Fakir, *Retaliatory or Lawful? How Iran's Seizure of the Stena Impero in the Strait of Hormuz Violated International Law*, 59(1) Columbia Journal of Transnational Law 425, 425 (2021).

[58] *Supra* note 3, Article 101.

[59] See *the International Convention for the Safety of Life at Sea (1974)*, https://www.imo.org/en/about/conventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas),-1974.aspx (accessed on December 1, 2025).

[60] See Alexander Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits Series*, Brill, 2022.

[61] See Andrej Androjna & Marko Perkovič, *Impact of Spoofing of Navigation Systems on Maritime Situational Awareness*, 10(2) Transactions on Maritime Science 361, 361 (2021).

appears to have had no jurisdiction to interfere. Iran had stated that she was not using the correct shipping lane, but the routeing of shipping lanes is done by the International Maritime Organisation (hereinafter referred to as IMO) as enshrined in Chapter V of the SOLAS Convention for the safety of lives at sea.[62] This Convention was first adopted in 1914 as a direct response after the Titanic incident. Hence, any alleged breach of a shipping lane route by *Stena Impero* should have been dealt with under the SOLAS Convention. Additionally, Iran's report justifying her seizure was produced by its own Port Authority and as a result was not independent or impartial. Iran had no authority to conduct a detainment in the territorial waters of Oman and may even have violated Omani national laws. The owners of *Stena Impero* have further reported that there was no evidence of a collision between her and the fishing vessel.[63] Of course, this account of events by *Stena Impero* owners is unproven and could be said to suit their narrative.

It is unlikely that Iran was correct in her detention of the *Stena Impero* as it does appear to have wrongly detained her in Omani territorial waters and contrary to the UNCLOS as it had a right to transit passage privilege. It is also unlikely that Iran could appeal on countermeasure grounds as a direct response to the detention *of Grace I. How*ever, to claim a countermeasure is to admit a level of wrongdoing and then asking for permission to have done it. Under international law, in the absence of direct evidence it would be up to a state to prove a degree of proportionality for the act. Iran is unlikely to present itself to be scrutinised in this way especially as *Grace I* is no longer considered to be flying an Iranian flag unlike *Stena Impero* which is still British flagged. Great Britain was inaccurate when it described the seizure of *Stena Impero* as an act of State Piracy. Moreover, when *Grace I* was detained, a court decision sanctioned her detention for a period of fourteen days and when Iran detained *Stena Impero*, a decision from that court was pending. Iran at the time threatened retaliation on Great Britain if *Grace I* was held longer but failed to enter any negotiations or give notice of countermeasures.[64] It is also unlikely that countermeasures would be accepted as reason to detain *Stena Impero* as she was held for one month after *Grace 1* had been released.

Iran attacked vessels along Hormuz up to September 2019. It is possible that Iran used these detentions as a bargaining tool to get Britain to the sanctions table. The author affirms that they were in breach of international law.

If attacks are retaliatory, rapid solutions are needed, as disruption to sea traffic will escalate if ignored. However, unless allegations are proven Iran would be held in breach of Article 44 of the UNCLOS[65] as she broke a condition of her coastal state obligations:

"States bordering straits shall not hamper transit passage…and there shall be no suspension of transit passage".

Was Iran's seizure of the *Stena Impero* a wrongful, retaliatory act? Let one analyse this in terms of *The Charter of the United Nations*.[66] It is incumbent on member states to "refrain in their international relations from the threat or use of force

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[62] *Supra* note 59.
[63] See Wiwit Kharisma Putri, *Settlement of the Stena Ship Impero Detention Case in The Strait of Hormuz by the United Nations*, 2(2) Journal of International Review 1, 1 (2022).
[64] See *Report of the International Law Commission on the Work of its Fifty-third Session (2001)*, p. 135, https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf (accessed on December 1, 2025).
[65] *Supra* note 3.
[66] *Supra* note 30, Article 2 (4).

against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[67]

The Charter of the United Nations affords states the right to defend their sovereign territory and protect the integrity of their national laws. The principle is upheld as a fundamental right under customary international law. *The Charter of the United Nations* also provides for states to act in self-defence if justified.[68] Unfortunately, since the USA began to impose sanctions on Iran regarding its nuclear deal the fallout has been quite significant and the response quite menacing from Iran. This culminated in Iran threatening to bypass the International Atomic Energy Summit in 2019 with the leader of the Iranian Revolutionary Guard, Mohammad Ali Jafri, stating that Iran "will make the enemy understand that either everyone can use the Strait of Hormuz or no one."[69]

This statement enflamed relations, giving rise to the *Grace I /Stena Impero* feud. As mentioned, Iran breached the nuclear deal by reportedly enriching uranium to higher than permissible levels and then requesting the European Union to offer support against their imposed sanctions.[70] The Joint Comprehensive Plan of Action (hereinafter referred to as the JCPOA) was formed in 2015, required Iran to produce low-enriched uranium at a 3% concentration solely to produce fuel for nuclear power plants. The deal was struck with China, France, Germany, Russia, Great Britain and America. The concern is that Iran will once again enrich its uranium in a process designed for ill intent. The Strait of Hormuz is once again involved in a precarious political standoff which could result in catastrophic global consequences. Because America withdrew from the deal, commentators speculate that it is in breach of international law as per violation of Security Council violation by failing to engage in the dispute resolution process expected of participating signatories to the JCPOA. As Tarock's article notes, "winning a little, losing a lot".[71]

The International Law Commission[72] has set out instances whereby customary international law could permit the implementation of countermeasures in response to wrongful acts. The International Court of Justice[73] as the court organ of the United Nations would be set to decide on such an outcome. However, the legal solution along the Strait of Hormuz is not so easily concocted. With this being such a hotbed of politics and economics along with a sprinkle of history no one legal regime will operate here. Some might draw similarities between the events of 2019 and the tanker wars seen decades previously. However, the tankers wars occurred during the Iraqi war and as such were as a direct result of states at war. During this time the UNCLOS had not yet existed and the concept of transit passage was not part of the discussion. The UNCLOS was established as a living document, a convention for the sea, and does have a role to play in legislating for Strait of Hormuz and is used in tandem with customary international law.

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[67] *Supra* note 30, Article 2.
[68] *Supra* note 30, Article 51.
[69] See Owen Daniels, *Back to the future of Hormuz (2018)*, https://www.atlanticcouncil.org/blogs/new-atlanticist/back-to-the-future-off-hormuz/ (accessed on December 1, 2025).
[70] See W. Van Kemenade, *Cooperation and competition on the Iran nuclear dispute: The role of the European Union and China*, in F. P. Van der Putten & C. Shulong (eds.), *China, Europe and International Security: Interests, Roles and Prospects*, Routledge, 2011, p. 135.
[71] See Adam Tarock, *The Iran Nuclear Deal: Winning A little, Losing a Lot,* 37(8) Third World Quarterly 1408, 1048 (2016).
[72] See Bertie G. Ramcharan, *The International Law Commission,* Nijhoff, p. 31 (1977).
[73] See International Court of Justice, *Home*, https://www.icj-cij.org/home (accessed on December 1, 2025).

It is fair to state that Iran does have a history of detaining ships along the Strait of Hormuz. For example, Iran's surrounding of *MT Riah*[74] was in a comparable manner to that of the *Stena Impero* detention. However, the *MT Riah* was later deregistered by Panamanian officials when it was found to have deliberately violated international regulations by turning off its AIS system as it entered the Strait of Hormuz. Reports have circled and it is unclear if Iran performed a rescue or a seizure as IRGC were said to have boarded her in Iranian waters due to mechanical issues at sea.[75] The International Court of Justice would be the most likely forum to settle this dispute but Iran would need to consent to the designation of jurisdiction or joint referral based on the Doctrine of *forum prorogatum* sometimes revealed in the International Court of Justice[76] and was seen in the *Djibouti v France* case.[77] It is a fundamental principle of international law that no state can be compelled to submit its disputes to an international court or tribunal without its consent.[78] The author maintains that there is no possibility of Iran giving consent.

Perhaps *the Hague Convention on Choice of Courts (2005)* [79] would in time afford a better solution to such disputes, alas, its success lies only in its potential for international dispute resolution. Unfortunately, with just twenty-eight signatories, it is in its infancy and only time will determine its success to failure ratio. *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)*[80] could prove more suitable as it favours arbitration methods.[81] Nevertheless, the primary authority on international maritime dispute resolution established by the UNCLOS is the International Tribunal for the Law of the Sea.[82]

So, what does the future hold in terms of the heightened tensions between the United Staes and Iran, each seeking to assert dominance in the Persian Gulf specifically along the Strait of Hormuz? Disputes about the presence of foreign warships and the detention of oil tankers[83] as well as debates on territorial sovereignty are inextricably linked to the source of this conflict: The Iranian nuclear programme.

When Iran exerts its dominance along Hormuz, as seen in the *Oil Platforms case*, [84] the United States rolls out its foreign policy rhetoric and increases military presence along the Strait and consequently experts have argued that the foreign policy is

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[74] See Ida Caracciolo, *Enforcing Sanctions on Iran at Sea: Tensions over the Interpretation and Application of the Law of the Sea*, 6(1) Nuclear Non-Proliferation in International Law 479, 479 (2021).
[75] See Rupert Herbert Burns, *Energy Security and Maritime Security*, Routledge, p. 200 (2022).
[76] See Vincent Pouliot, *Forum Prorogatum before the International Court of Justice*, 3(3) Hague Justice Journal 28, 28 (2008).
[77] See *Djibouti v. France*, [2008] ICJ Rep. 177.
[78] See Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72(2) The University of Chicago Law Review 469, 469 (2005).
[79] See Craig Forrest, *The Hague Convention on Choice of Court Agreements: The Maritime Exceptions*, 5(3) Journal of Private International Law 491, 491 (2009).
[80] See *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)*, https://www.newyorkconvention.org/ (accessed on December 1, 2025).
[81] See R.A. Brand, *The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?*, 82(4) University of Pittsburgh Literature Review 847 (2021).
[82] See the International Tribunal for the Law of the Sea, *Home*, https://www.itlos.org/en/ (accessed on December 1, 2025).
[83] See Alexander Lott & Shin Kawagishi, *The Legal Regime of the Strait of Hormuz and: Law of the Sea and Law on the Use of Force Perspectives*, 53(1) Ocean Development & Attacks Against Oil Tankers International Law 123, 123 (2022).
[84] See *Islamic Republic of Iran v. the United States of America (the Oil Platforms case)*, [2003] ICJ Rep. 4.

"penetrative"[85] in nature. The USA assumes its rite of passage under customary international law, a right cemented by the UNCLOS. However, one could argue that as the USA has not ratified the UNCLOS, it simply enjoys non suspendable innocent passage along International Straits of Navigation. Legally, coastal states could still suspend innocent passage in their territorial sea if national security was at risk. This is an inferior version of transit passage which will be permitted without interference from the coastal state. In addition, Iran should be disallowed from claiming a 12 nm territorial sea as it too has failed to ratify the UNCLOS. Hence, both states heavily rely on older Treaties such as the Territorial Sea Convention of 1958[86] from which to derive their permissions. The UNCLOS permits transit passage via International Straits and America relies heavily on this provision. Ironically, Iran is a signatory to the 1958 treaty but has not ratified it and as such has limited permissions and is not bound by the Treaty save for it reflecting customary international law. A significant factor in the conflict has been the width of Hormuz being too narrow to afford Iran a 12 nm territorial sea, especially with Oman also asserting a 12nm territorial sea claim.

5. Will Iran ever Close the Strait of Hormuz?

One thing is certain: if conflict broke out again in the Middle East, the Strait of Hormuz would be a key pawn on the board of what once was the mystical land of Persia. The United States, of course, would be involved as they are seen to have foreign security interests in the area. However, as the author speculates, it is unsatisfactory that two of the main states not party to the UNCLOS rely on it so much to exert dominance along the Strait, with America using it to ensure the uninterrupted flow of oil imports.

5.1 Is it all just an International High Stakes Poker Game?

America also uses the UNCLOS allow it to exercise a military presence as part of its foreign policy agenda. Iran states that it reserves the right to require prior authorization for warships to exercise the right of innocent passage through its territorial sea.[87] However, Iran refuses to accept the USA Navy transit passage right to pass through the Strait. Iran has proven it can stand up to another superpower, with gusto, as seen in the *Oil Platforms case*.[88] This was an International Court of Justice Case in which Iran accused the United States of the destruction of some of its oil platforms by USA Naval warships between 1987 and 1988. Prior to the case and worth mentioning for context here is the *Nicaragua case*. The Court rejected USA arguments that the USA support for military and paramilitary activities in and against the *Nicaragua case* could be justified on a basis of collective self-defence. Findings showed that the USA had breached customary international law by interfering in the affairs of another state. The *Oil Platforms case* was based upon breaches of Article I and Article X of *the Treaty of Amity, Economic Relations, and Consular Rights (1955)*[89] with Article X insisting upon freedom of commerce and navigation between

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[85] See Abdolrasool Divsallar, *Shifting Threats and Strategic Adjustment in Iran's Foreign Policy: The Case of Strait of Hormuz*, 49(5) *British Journal of Middle Eastern Studies* 873, 873. (2021).
[86] *Supra* note 16.
[87] See Ramazani, Rouhollah K., *The Persian Gulf: Iran's Role*, University Press of Virginia (1972).
[88] *Supra* note 84, at p. 161.
[89] See *The Treaty of Amity, Economic Relations, and Consular Rights (1955)*, https://treaties.un.org/pages/showdetails.aspx?objid=0800000280142196 (accessed on December 1, 2025).

the territories of two nations. The International Court of Justice found insufficient evidence that attacks had been made on the USA ships *Sea Isle City*[90] and the *Samuel B. Roberts*.[91] The International Court of Justice also found that the attack on the oil platforms was of little significance as they had not been producing oil economically for some time. As stated by Foster,[92] the real value of the judgment in the *Oil Platforms case*[93] was the contribution it made, consistent with principles of legality, to anchoring discussion in the law on self-defence to a starting point well within existing law on the use of force. Particularly on the basic principles of necessity and proportionality. However, one must criticise the International Court of Justice for its rhetoric on the *Oil Platforms case*[94] as it seemed to remain ambiguous on the legal situation. This is unacceptable from a Court of such high standing. Courts must confront complex decisions and be unambiguous in their legal reasoning. Kreß "did not seem to exclude the possibility of an armed attack being directed against a merchant vessel of a state" [95] and Gray concluded that there was "considerable doubt as to whether a single attack on a merchant vessel (as opposed to a military vessel) could constitute an armed attack on a state and the Court itself did not directly address this issue".[96]

It is essential to determine if international law would prevent or permit the closure of Hormuz. Iran may have intentions to close it to warships or further still to all transits with an emphasis on oil shipments. Our primary legislation to determine the legality of a closure is the UNCLOS. It appears widely accepted that customary international law between states would permit any disruption through this integral oil artery but one will discuss if customary law is sufficient in Chapter 5. Under the UNCLOS, foreign warships during peaceful times are permitted to transit territorial waters if they do so expeditiously and continuously. However, we see an exception along the Straits of Malacca in that a ship may make a stop at Singapore port yet still be considered in a state of transit passage.

The United States Navy has held a military presence at sea along the Strait of Hormuz since the 1970's, sometimes in an anti-piracy role and other times in a military capacity. However, the effect of soft restrictions such as piracy along the Strait of Hormuz is relatively inconsequential when one considers the size of the oil value transition from the Persian Gulf to the rest of the world. The global demand for crude oil is so great that importers are willing to send their military to the Persian Gulf to help protect the flow of crude exports.[97]

There is a possibility that Iran could prevent American warships from entering/leaving the Strait of Hormuz if their intentions were to breach the UNCLOS transit passage parameters. However, Iran would need to differentiate between American warships in genuine transit passage or those acting more nefariously. Furthermore, Iran's 12 nm territorial sea does not extend the full length of the Strait as

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[90] See Judgement of the Court, at para. 61.
[91] See Judgement of the Court, at para. 72.
[92] See Caroline E. Foster, *The Oil Platforms Case and the Use of Force in International Law*, 7(1) Singapore Journal of International & Comparative Law 579, 579 (2003).
[93] *Supra* note 84.
[94] *Supra* note 84.
[95] See Claus Kreß, *The International Court of Justice and the 'Principle of Non-Use of Force* https://academic.oup.com/edited-volume/42607/chapter-abstract/357548891?redirectedFrom=fulltext&login=false (accessed on December 1, 2025).
[96] See C.D. Gray, *International Law and the use of Force* (4th ed.), Oxford University Press (2008).
[97] See Jun U. Shepard & Lincoln F. Pratson, *Maritime Piracy in the Strait of Hormuz and Implications of Energy Export Security*, 140(1) Energy Policy 111, 111 (2020).

there are nine nautical miles of sea beyond Iranian jurisdiction. If Iran were to attack an American warship along Hormuz, a massive counterattack would ensue that would lay waste to Iran's air defence systems in a matter of days, if not hours.[98] It is notable that the TSS lanes pass predominantly through Omani territorial seas and as a result the passage of merchant ships and warships entering the Gulf along this route is more favourable to passing Iranian territorial waters. Nandan and Anderson suggest that a breach of a TSS could lead to a ship being arrested in the coastal state's port. [99] This is an absurd suggestion as it would result in a legal quagmire.

As the Israel/Palestine war roars on, the world has witnessed shipping disruption in the Red Sea, with any disturbance being immediately reported. However, disruptions along navigational routes such as the Red Sea, whilst financially negative, are far less consequential than Hormuz disturbances. Iran's port of Jask could form part of its strategy for oil export by circumventing Hormuz. For instance, Qatar, the world's biggest exporter of LNG sends almost all its product via the Strait of Hormuz. As recently as 2023, the Marshall Islands shipping registry notified all Israeli/USA flagged to be on alert for increased threat of attack in Iranian territorial waters on route along the Strait of Hormuz.[100] America is responsible for much of the tensions here, as Crist outlines:

"Both Bush administrations dismissed Iranian goodwill gestures and refused to accept any dialogue that addressed Iran's legitimate security concerns. The United States supported Saddam Hussein and his Arabian bankrollers in a bloody war against the Islamic Republic that killed several hundred thousand Iranian soldiers".[101]

The Pentagon in the 1980's was reported to be more focused on defences against Soviet tanks than supervising the quasi war at sea, which lasted for two years between Iran and the USA. This author is convinced that the conflict at sea at that time tied in well with President Ronald Regan's foreign policy plan for the Middle East and navigation freedoms as well as being a persistent objector when he declared:

"The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses".[102]

America is the largest user of LNG, with Iran sitting in foutrh position. Approximately 25 per cent of the global trade of LNG passes Hormuz.[103] It could be disputed that USA is maintaining a permanent presence along Hormuz not as a peacekeeper but to protect American commercial interests *vis a vis* the safe consistent passage of its LNG cargo. Since 2017, America has sourced its natural gas from Canada yet insists on a military foothold in the Persian Gulf and along the Strait of Hormuz. This is surely not a coincidence.

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[98] See J. Matthew McInnis, *Escalation and De-Escalation in Conflict*, https://www.jstor.org/stable/resrep03265.7?seq=1 (accessed on December 1, 2025).

[99] See José A. Yturriaga, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982*, https://brill.com/display/title/9179 (accessed on December1, 2025).

[100] See Mohd Ridzuan Md Ariffin & Noraini Zulkifli, *Conflicts in the Strait of Hormuz: Implications Towards Oman and Iran*, 3(2) Journal of Strategic Studies & International Affairs 123, 123 (2023).

[101] See David Crist, *The Twilight War: The Secret History of America's Thirty-Year Conflict with Iran*, Penguin Publishing Group, 2013.

[102] See Ronald Reagan, *Statement on United States Oceans Policy Speech (1983)*, Washington, DC, March 10, https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy (accessed on December 1, 2025).

[103] See Justine Barden, *The Strait of Hormuz is the World's Most Important Oil Transit Chokepoint (2019)*, https://www.eia.gov/todayinenergy/detail.php?id=39932 (accessed on December 1, 2025).

A high-level threat was made in 2009 to close Hormuz with scholars indicating that it would be illegal to do so. However, as noted by maritime contributor, Ali Abbas:

"Yet it would be futile to engage in a discussion of whether Iran closing the Strait of Hormuz to international shipping would violate international law, as most of the shipping lanes lie in Omani territorial waters, as per the records of the International Maritime Organisation".[104]

The sea lanes of communication (SLOC for short) along the Strait of Hormuz are dominated by the seven islands previously mentioned. Because of their existence these islands could make it physically possible for Iran or a neighbouring state to block the Strait, at least theoretically. Iran does have shipping ports and military presence quite close to the international shipping lanes of navigation. On Abu Musa, Iran has stationed a team of 1,000 military trained personnel to protect the Mubarak oil field which is known to produce some of the highest yielding product in that region.[105] Even if Iran were to apply to establish new baselines incorporating the islands and increasing its stretch of internal waters,[106] Article 7, Article 8(2) and Article 35(a) of the UNCLOS would prohibit the claims and the diversion of international shipping traffic.[107]

China has also begun to increase economic ties with Iran since 2018 when the United States began imposing sanctions on the Islamic nation. In fact, their trade links go back to the annals of history with recorded deals being seen in 200 B.C. In 2004, trade between China and Iran hit a record $7 billion, a 42 percent increase since 2003. Both nations have initiated a 25-year strategic plan which will see China gain a foothold in the Middle East while Iran will be offered much needed economic support as its diplomatic isolation worsens. China may view this arrangement as a way of bolstering its political influence via its Iranian business partner. This sentiment was echoed by Nassar of the University of Tehran who said "Iran is very important as a source of energy, but also as a provider of the security in the region. In the future, Iran and China are going to be very closely interdependent" [108] and this will keep Hormuz open indefinitely as China will prohibit its closure.

China has also brokered diplomatic relations between Saudi Arabia and Iran in recent years, which may cause concern on Capitol Hill. Newly created relations with Saudi Arabia will only serve to strengthen Iran's hold on Hormuz, marking only the beginning of regional alliances. Oil exports from Iran to China tripled between 2020 and 2023.[109] a trend that poses a strategic concern for the USA, which relies heavily on oil imports from Gulf States (reworded this as oil imports to the USA increasingly come from the Americas. The author says the main thing for the USA is keeping the flow of oil constant, keeping global prices stable). Iran's involvement in the initiative

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[104] See أ. م. د حسين وحيد عزيز الكعبي, *The Geographical Location of the Strait of Hormuz and its Impact on International Policy-making*, 21(88) Journal of the College of Basic Education 437, 437 (2023).

[105] See Anthony H. Cordesman, *The Strait of Hormuz- Iran and Oil*, https://www.strausscenter.org/strait-of-hormuz-iran-and-oil/ (accessed on December 1, 2025).

[106] *Supra* note 3.

[107] *Supra* note 3.

[108] See Michael K. Singh, *China and the United States in the Middle East: Between Dependency and Rivalry*, https://link.springer.com/chapter/10.1007/978-3-030-64473-4_18 (accessed on December 1, 2025).

[109] See Manochehr Dorraj & Carrie L. Currier, *Lubricated with Oil: Iran-China Relations In a Changing World*, 15(2) Middle East Policy 66, 66-80 (2008).

will allow China to secure the overland flow of energy from the Middle East and Central Asia, to mitigate the risk posed by potential maritime interdiction".[110]

Statements in the past by America have suggested that the Strait of Hormuz could be closed. However, the author considers this bluff, inflammatory, and political rhetoric.

The Silk Road Economic Belt and the 21st-Century Maritime Silk Road (hereinafter referred to as the BRI) identifies the Middle East as the anchor location for connectivity between Europe, Asia, and parts of Africa. The BRI is expected to see investment in the region totalling around one trillion dollars, yet China has, thus far, chosen to limit its investment with Iran in the BRI roll out and has shown a preference for sending contracts to Saudi Arabia worth US$52 billion. Upon analysis, weaknesses are exposed in Iran's ability to be economically viable to China. Its banking system is poorly funded and technologically deprived, it has alienated itself from key states, and it relies heavily on oil exportation. The USA sanctions have also eroded Iran's economic purse. Furthermore, Iran holds a high-ranking position in the global corruption index, with Dadgar and Nizari pointing to 8,792 corruption cases in 1984, rising to 256,990 in 2010.[111]

Another port of particular interest to China is Chabahar in Iran. This is a deep-water port with direct sea access unimpeded and exempt from the USA sanctions. Its location near Pakistan and India allows Iran to foster economic relations with landlocked countries which could use the port as a gateway to other marine shipping routes and trade with other countries. Furthermore, Iran could leverage this port to bolster its regional standing and potentially mitigate against China and Russia gaining power in the region. [112]

5.2 Navigational Straits: Where Poverty Drives Piracy and it's all Big Business!

Other navigational straits have also seen the presence of American naval fleets and personnel. Take, for example, the Bab el Mandeb Strait, through which approximately fifty-two vessels pass daily, carrying four million barrels of oil. During this research, it became necessary to delve deeper into the workings of foreign policy and its presence in so many marine flashpoints around the world. The involvement of America in places like Iraq and Afghanistan was intended to create stabilisation in the area but in fact the results are not always as intended. Furthermore, the cost of such actions is often astronomical, as seen post-WWII, when Germany and Japan received $14 billion in aid for recovery.[113] However, maritime intervention at sea has seen success stories, none more notable than the pushback of Somalian pirates between 2005 and 2012. During this period, the pirates held 698 ships for ransom, collecting a cool $398 million. Piracy off Somalia has been reduced through the development of education centres on land for the population and an increase in national domestic product (NDP for short) as exports grew, providing alternatives to piracy.

Questions to evaluate include:

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[110] See Seyedashkan Madani, *Beyond Geopolitics: A Geoeconomic Perspective of China-Iran Belt and Road Initiative Relations*, 19(74) International Relations 53, 53 (2022) .

[111] See Yadollah Dadgar & Rouhollah Nazari, *The Impact of Oil Revenue on the Economic Corruption in Iran*, 2(1) Actual Problems of Economics 375, 375 (2012).

[112] See Soroush Aliasgary & Marin Ekstrom, *Chabahar Port and Iran's Strategic Balancing with China and India*, https://thediplomat.com/2021/10/chabahar-port-and-irans-strategic-balancing-with-china-and-india/ (accessed on December 1, 2025).

[113] See U.S. Bureau of the Census, *Statistical Abstract of the United State Table*, p. 899 (1955).

1. Could we see stabilisation in Yemen if American intervention, with other collaborative states, were applied along marine chokepoints?

2. Does poverty drive piracy?

3. Are attacks along international straits provoked by the USA foreign policy, which seeks to maintain American power but may incite impoverished, uneducated locals into attacks they are unlikely to succeed in?

Even as it appears that military presence appears to be effective, Somali piracy resurfaced as recently as January 2024 in the Gulf of Aden. The attacks were on international commercial ships but also on Iranian flagged fishing vessels thought to be illegally fishing off Somalia's waters. Prior to these incidents, marine insurers had removed the High-Risk Area (HRA for short) designation for waters off Somalia and the northern Indian Ocean as of the 1st of January 2023.[114]

The United States could consider using its leverage to develop a stronger maritime influence strategy. It is important to note that various international navies, including those of China, Russia, and Iran, are active in the Gulf of Aden. These navies collaborate with entities such as the U.S. National Geospatial-Intelligence Agency (NGA for short) and U.K. Maritime Trade Operations (UKMTO for short) to inform the shipping industry of potential risks. Collaboration among these international navies will be crucial for the success of the maritime influence strategy, as the USA alone cannot bear the entire security burden. The USA-led Combined Maritime Forces (CMF for short) could serve as a model for uniting naval forces from thirty-two countries, some of which might not traditionally form military partnerships, to ensure maritime security in the Middle East. Encouraging mutual participation from both Saudi Arabia and Iran, despite its apparent unlikelihood, should be a priority for the USA policymakers, as it could pave the way for dialogue to alleviate the humanitarian crisis in Yemen. Furthermore, contrary to standard the USA foreign policy, the USA leaders should consider acknowledging Iran for its contributions to international counter-piracy efforts off Somalia, while also ensuring that Saudi Arabia is held accountable for its role in exacerbating the dire humanitarian conditions in Yemen.[115]

6. Is Customary International Law still effective as a legal framework?

International law has two facets to its operation. It is both a system that imposes social rules on a coercive basis with state consent and a framework comprised of treaties and Customary International Law (formerly known as The Law of Nations). International Law is inherently a dynamic entity and must be open to change. Treaties are always changing as social needs change. Article 38 of *the Statute of the International Court of Justice*,[116] is the primary reference point when applying

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[114] See Crisis24, *Home*, https://crisis24.garda.com/alerts/2024/01/somalia-heightened-piracy-threat-in-arabian-sea-and-gulf-of-aden-likely-to-persist-through-late-january-update-2 (accessed on December 1, 2025).

[115] See Graham T. Allison, Dimitri K. Simes & James Thomson, *America's National Interests: A Report from The Commission on America's National Interests 2000*, https://www.belfercenter.org/publication/americas-national-interests-report-commission-americas-national-interests-2000 (accessed on Decmeber 1, 2025).

[116] See *The Statute of the International Court of Justice (1945)*, Article 38, https://www.un.org/zh/about-us/un-charter/statute-of-the-international-court-of-justice (accessed on December 1, 2025).

international law. It defines four sources of International Law treaties and conventions, custom, general principles of law, and judicial decisions and teachings.

6.1 Is this Simply Good Manners at Sea? Or more Sinister?

CIL was defined by Unger as "any recurring mode of interaction among individuals and groups.[117] However, CIL was first mentioned by Spanish Jesuit Francisco Suarez, who introduced the notion of the customary practice of nations as an important supplementary source of rules in international law.[118] The International Court of Justice is the most important institution for identifying and applying customary law. Custom can be said to act as a source for the creation of international legal obligations, along with treaties. Personally, the author considers customary international law ethereal concept compared with treaty. Customary International law is used between states to regulate behaviour based on long-standing practice rather than codified over time., although some do get codified over time. The United Nations and the International Court of Justice frequently recognise and apply this category of law.

The existence of a rule of customary law requires a settled state practice together with *opinio juris*,[119] for example, as seen in the *Peru and Columbia asylum case*.[120] State practice must be extensive effecting a substantial number of states. Additionally, the practice of the State must be consistent and uniform. Unfortunately, the weakness of CIL allows states to seek ambiguity in the law political or diplomatic gain. The *Nicaragua case* also involved an element of customary law.[121] The International Court of Justice held that the USA violated its customary international law obligation not to use force against another State when its activities with the contras resulted in the threat or use of force.

6.2 An Analysis of *Opinio Juris*

In the formulation of the International Court of Justice in its North Sea Continental Shelf judgment,[122] *opinio juris* is "a belief that a practice is rendered obligatory by the existence of a rule of law requiring it.". This case also developed the doctrine of SAS, or "specially affected states",[123] meaning that practice leading to the emergence of a customary rule must include that of states "whose interests were specially affected. *Opinio juris* was also central in the historical example involving France and Turkey in the *Lotus case*.[124]

Some international treaties may contain provisions with such a catalytic effect that they may be capable of creating the necessary impetus required for the practical and normative processes of customary law formation to take place. The author sees CIL as both conceptually and practically questioned as a means for generating

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[117] See Roberto Mangabeira Unger, *Law in Modern Society*, Free Press (1977).
[118] See Harold Hongju Koh, *Why Do Nations Obey International Law*?, 106(8) Yale Law Journal 2599, 2599 (1996).
[119] See Hanna Bourgeois & Jan Wouters. *Methods of Identification of International Custom: A New Role for opinio juris*?, https://link.springer.com/chapter/10.1007/978-3-319-90227-2_5 (accessed on December 1, 2025).
[120] See *Colombia v. Peru*, [1951] ICJ Rep. 15.
[121] *Supra* note 24.
[122] See *F.R.G. v. Denmark & Netherlands*, [1969] ICJ Rep. 3.
[123] See Kevin Jon Heller, *Specially Affected States and the Formation of Custom*, 112(1) American Journal of International Law 191, 191 (2018).
[124] See *France v. Turkey*, 1927 P.C.I.J. (ser. A) No. 10 (September 7).

international legal obligation. However, influential entities in law will still argue that CIL continues to play and important and necessary role in the international law-making system. The writer questions CIL as a source of international law and believes that to survive it must show the assent of states to the making of these customary obligations. Supporters of CIL have long argued that its importance is in its role in facing issues not already covered by an existing treaty or indeed to cover dynamic issues in our fast paced ever changing world. They maintain that CIL may make broadly subscribed provisions of a treaty binding on all states, including treaty outliers.[125]

In relation to *opinio juris* its subjective element is not useful for Hormuz as it is not possible to say that all states "think" the same when it comes to their actions.

Fair criticism has been directed at the International Court of Justice when making customary law decisions.[126] A critic is Professor Stefan Talmon who suggested that the International Court of Justice's methodology for the determination of rules of customary international law is neither induction nor deduction but, rather, simple assertion.[127] Furthermore, Proforsser Talmon also stated that international courts frequently assert the existence of principles of CIL, with little evidentiary or methodological basis, to fill perceived gaps in the law, and to avoid a *non liquet.*[128]

The second most referenced law identifying agency is the International Law Commission ((hereinafter referred to as the ILC).[129] The ILC was established by the General Assembly of the United Nations in 1947 and is composed of law experts nominated by states. It is fair to state that the ILC has a history of both descriptive and normative engagement, due to the relative opacity of the ILC's deliberations and methodology for identifying and weighing evidence relating to CIL.

Further criticisms of customary international law decisions are based solely on the number of sovereign states (195) in the world. Examining the Article 2(3) of *the Charter of the United Nations*[130] would require extensive, multi-year research into diplomatic protocol and evidence.

It has been said that customary rules develop from a general practice of international societies, so, customary international law could favour the status quo and may not promote changes to international laws. It is argued that the formation and application of CIL is disproportionally influenced by powerful, developed states. This line of criticism identifies mechanisms within the CIL framework which maintain the imbalance, including the dominance of first world practice when analysing the 'state practice' requirement, the development of the persistent objector doctrine, and the appropriation of the specially affected States doctrine by powerful states of the Global North.

Custom itself appears on the surface as a rather straightforward concept. Two types of custom are considered to exist:

1. General custom, which is binding upon the international community as a whole.

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[125] See Rüdiger Wolfrum, *Customary International Law*, Oxford University Press (2009).
[126] See Niels Petersen, T*he International Court of Justice and the Judicial Politics of Identifying Customary International Law*, 28(2) European Journal of International Law 357 (2017).
[127] See Alexander Orakhelashvili, *The Classification of International Legal Rules: A Reply to Stefan Talmon*, 26(1) Leiden Journal of International Law 89, 89 (2013).
[128] See Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26(2) European Journal of International Law 417, 417 (2015).
[129] *Supra* note 30, Article 13 (1) (*a*).
[130] *Supra* note 30, Article 2(3).

2. A local or regional custom, which is applicable only to a group of states e.g., the *Right of Passage case*.[131]

Another facet to consider is the persistent objector rule[132] (we see America along Hormuz as an example of this earlier in the text). The rule is said to provide states with an "escape hatch" from the otherwise universal binding force of customary international law. It holds that if a state persistently and openly objects to a newly emerging norm of customary international law during the formation of that norm, then the objecting state is exempt from the norm once it crystallises into law.[133]

Counterbalancing the persistent objector rule is the doctrine of *jus cogens*.[134] However, while *jus cogens* disallows genocide and other heinous crimes, states are notoriously slow to accept new *jus cogens* obligations. Hence, this rule does not cover all recent global developments, and neither does the UNCLOS.[135] State customs governed by CIL need to be viewed not as static but as living customs, changing customs and a custom once revered may now be considered outdated.

For CIL to function as an accurate source of international law, we must acknowledge objectivity concerns and empirical verifiability of that positivistic manifestation of affirmation and consent.[136] Furthermore, the International Court of Justice in the *Continental Shelf case*[137] recognised the customary law status of the "distance principle" for continental shelves enshrined in Article 76(1) of the UNCLOS.[138] Notably, it reached this finding without relying on state practice and *opinio juris*, instead drawing an analogy between continental shelves and exclusive economic zones.[139] This reveals inconsistencies in the Court's application customary law principles.

Daniel Joyner argued that for CIL to survive scrutiny, a structure of "objective manifestation and empirical verifiability of positive manifestations of affirmation and consent to be bound by states, resulting in the identification of CIL obligations must exist."[140]

It was Trachtman whose general thesis was that the codification of international rules through treaties has made CIL increasingly obsolete. [141] Perhaps even more pointedly, Simpson described international law as "a kind of furnace" with "fates buckled by it".[142] CIL still has a place as a source of international obligation, but it must provide clear, objective evidence of states' positive asset to remain an attractive and credible legal proposition.

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[131] See *Portugal v India*, [1960] ICJ Rep. 6.
[132] See Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59(3) International and Comparative Law Quarterly 779, 779 (2010).
[133] See James A. Green, *The Persistent Objector Rule in International Law*, Oxford University Press (2016).
[134] See Georg Schwarzenberger, *International jus cogens*, 43(1) Tex. L. Rev. 455, 455 (1964).
[135] *Supra* note 3.
[136] See Daniel H. Joyner, *Why I Stopped Believing in Customary International Law*, 9(1) Asian Journal of International Law 31, 31 (2019).
[137] See *Libya v. Malta* (the *Continental Shelf* case), [1985] ICJ Rep. 13.
[138] *Supra* note 3, Article 76(1).
[139] See Xinxiang Shi, *The Relationship between General Principles of International Law and Article 38(1) of the ICJ Statute: A Law of the Sea Perspective*, 148(1) Marine Policy 105, 105 (2023).
[140] Supra note 136.
[141] See Joel P. Trachtman, *The Obsolescence of Customary International Law*, 47(1) Harvard International Law Review 116, 116 (2014).
[142] See Gerry Simpson, *Duelling Agendas: International Relations and International Law (Again)*, 61(1) Journal of International Law 61, 61 (2004).

7. Conclusion

Whilst Iran has always sought to minimise the role of non-regional states along Hormuz to fit its preferred version of security there, the global significance and economic importance of this Strait will not allow Iran's vision to be met.

7.1 Make Peace not War? Or the Reverse?

Indeed, non-regional powers should seek to enter dialogue and seize chances to incentivise trade with Iran and develop economic relations. The author speculates that the Persian Gulf incorporating the Strait of Hormuz will always require and indeed benefit from non-regional intervention. However, external collaborations will only succeed if all actors respect and consider the geopolitics of the Gulf States. There is no magic panacea for peace, but foreign policy and friendly relations amongst all coastal states is essential for the continuation of global trade. Iran has also been vocal in its contribution with its Foreign Minister Javad Zarif stressing the importance of:

"Hotlines, early warning systems, military contact and the exchange of data and information".[143]

The author strongly maintains that the Strait of Hormuz will never be closed: a view shared by Waltz, who observed that although Iranian leaders indulge in inflammatory and hateful rhetoric, for example to close the Strait of Hormuz, they showed no propensity for self-destruction[144]. Iranian leadership appears to be sacrificing their need for a stable, developing economy by creating conditions for instability, and may benefit from external peacemakers, or as Naaz said "from external forces".[145]

7.2 The UNCLOS Needs a Reboot or an Upgrade!

The UNCLOS has made a significant contribution to the legal landscape by bringing legal clarity to previously uncertain areas, particularly regarding the scope of state jurisdiction over maritime zones. However, the writer criticises the UNCLOS[146] for not adapting to the increased maritime risks which exist today. Heightened tensions from coastal and non-coastal states exist as their thirst for power and control of the Very Large Crude Carriers cargo consumes them. But how to legally protect shipping along the Strait of Hormuz? States such as the USA, with a well-resourced naval fleet, are permitted to escort their oil cargo without any interference as per the UNCLOS[147] legislation. As we have seen sanctions can be imposed as countermeasures against Iran if there is illegal interference with merchant vessels by the coastal state. Unfortunately, the International Court of Justice has failed to clarify if military intervention of a merchant ship is defined as being seen as an armed attack. Moreover, the International Court of Justice in the *Oil Platforms case*[148] may have intended an armed attack to be a matter of state security if the merchant ship security was breached. Iran is also pushing to export to locations which circumvent USA

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[143] See Mohammad Javad Zarif, *What Iran Really Wants: Iranian Foreign Policy in the Rouhani Era*, 93(1) Foreign Affairs 49, 49 (2014).
[144] See Kenneth N. Waltz, *Why Iran Should Get the Bomb: Nuclear Balancing Mean Stability*, 9(1) Foreign Affairs 2, 2 (2012).
[145] See Kenneth M. Pollack, *Security in the Persian Gulf*, https://www.brookings.edu/wp-content/uploads/2016/06/middle_east_pollack.pdf (accessed on December 1, 2025).
[146] *Supra* note 3.
[147] *Supra* note 3.
[148] *Supra* note 84.

sanctions, and as recently as August 2024, quantities of crude were shipped to Oman and Bangladesh. Indeed, Fernando Ferreira Head of Rapidan Energy Group went as far as to declare "the Iranians have mastered the art of sanctions circumvention".[149]

So, what of international straits and security? As recently as the last August 22, an oil tanker in the Red Sea was targeted by Houthi rebels as part of the escalation of the Israel Palestine war,[150] and the USA military was said to have sent naval ships to the area. Once again, we see America getting involved in every trade route dispute. The writer suggests that their presence may sometimes be unwanted and not necessarily useful.

Another issue is that deliberately vague or insufficiently detailed treaty provisions leave room for competing interpretations on extremely sensitive issues such as the transit of warships. The UNCLOS[151] does not explicitly state if the freedom of navigation includes military activities. America considers this right as being unequivocally part of the "freedom of navigation". In addition, future technologies will develop fully autonomous vessels[152] and some will be classed as "uncrewed". Yet how should an "uncrewed" vessel be defined? If the vessel is controlled remotely, that controller may in effect be considered a crew member. Legislation will need to accurately define "uncrewed".

The author's recommendation is an immediate de-escalation especially in the absence of a United Nations security mandate. It is difficult to ensure innocent and transit passage through straits of international navigation and territorial waters. Unfortunately, parallel legal regimes conflict on transit passage, non-suspendable innocent passage, specific treaty regime, or permit- based passage. This causes legal uncertainty resulting in the escalation of conflicts along the Hormuz and Kerch Straits.[153] Tensions between Iran and America must therefore be reduced, as both sides bear responsibility for avoiding any further confrontation that could lead to the kind of war the world fears.

It will be essential to then offer sustainable medium-term solutions. These solutions will need to be flexible and dynamic and will need to use "honey, not hate", to include Iran. The author suggests the following or combinations of same to progress:

(1) Implement an Incidents at Sea Agreement,[154] also known as the INCSEA, taken from the USA/Soviet Union template but covering international straits of navigation. The original was signed in Washington in 1973 to foster respect between nations and to avoid attacks or interference with each other's non-military ships. Whilst it is not legislative in nature it could become part of the custom of the area, not customary international law, but maritime manners. Features of the original INCSEA included the avoidance of manoeuvres in areas of heavy sea traffic, notice of submarine activity nearby and avoiding attacks on the bridges of opposing ships and

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[149] See Hussein Qader, *The Impact of US Sanctions on Iran*, https://www.gssrr.org/Journal_Basic_Applied_Thesis/article/view/13036 (accessed on December 1, 2025).

[150] See Victoria Sainz, The Red Sea Shipping Crisis (2024–2025): Houthi Attacks and Global Trade Disruption, https://atlasinstitute.org/the-red-sea-shipping-crisis-2024-2025-houthi-attacks-and-global-trade-disruption/ (accessed on December 1, 2025).

[151] *Supra* note 3.

[152] See Hitoshi Nasu & David Letts, *The Legal Characterization of Lethal Autonomous Maritime Systems: Warship, Torpedo, or Naval Mine?*, https://digital-commons.usnwc.edu/ils/vol96/iss1/4/ (accessed on December 1, 2025).

[153] See Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, p. 259 (2013).

[154] *Supra* note 11.

accountability and "and annual meetings to review the implementation of the Agreement".[155] It could serve the interests of both the USA and Iran, be easy to verify, and easier still to hold violators accountable.[156]

(2) Involve Oman. Oman could play an important diplomatic role in opening communications together with other Gulf States and Iran. Over time, if it proves its worth, it could be upgraded to become a direct channel and be replicated in other flashpoints.

(3) Scaling back military presence in the Strait of Hormuz will have both a diplomatic and economic positive effect. Advantages of a stand back by USA navy would also ensure the freeing up of overextended U.S. forces to confront more pressing situations at home and abroad.[157]

(4) The Cooperative Mechanism was established 2007 under the IMO's "Protection of Vital Shipping Lanes" initiative, to foster cooperation and communication between the littoral States, user States and stakeholders of the Straits of Malacca and Singapore.[158] This has been successful and academics such as Robert Beckman have praised the initiative.[159] One of the recommendations recommends voluntary pilotage, and drawing on the Suez Canal's success, it may be useful for maintaining ships on their TSS and ensure their AIS is switched on, hence, negating the need for interception by a coastal state.

(5) In addition, combined task forces, for example, CTF152,[160] will need to play more of a role in fostering engagement with local communities to build trust and communication outlets.

(6) Technology will need to be at the forefront of surveillance in the Persian Gulf including AI software and unmanned vessels and drones. A united global response could be explored, where nations pool resources proportionate to their use of the Strait of Hormuz and cargo value. There are coalitions already in operation, including an eight-member one led by France: EMASOH.[161] However, any international military mission to control passage in the Strait of Hormuz without engagement with Iran would be a violation of the law of the sea. The author affirms that unmanned military vessels will need to be regulated and legislated.

The author surmises that the "big six" powers need to bring Iran back to the negotiating table. One approach could be to ease sanctions in response to a reduction in detentions/incidents from the Persian Gulf via the Strait of Hormuz. It is evident that imposing sanctions is only increasing hostility, so instead of poking the bear—Iran— offer constructive incentives instead. Sweeten the deals, pursue long-term trade agreements as Iran has done with China, and consider scaling back American presence

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[155] See *the Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents on and Over the High Seas (1972).*

[156] See David F. Winkler, *Cold War at Sea: High Seas Confrontation between the United States and the Soviet Union*, Naval Institute Press, p. 173 (2000).

[157] See Geoffrey F. Gresh, *Traversing the Persian Gauntlet: U.S. Naval Projection and the Strait of Hormuz*, 34(1) The Fletcher Forum of World Affairs 41, 41 (2010).

[158] See Joshua H. Ho, *Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: The Cooperative Mechanism*, 40(2) Ocean Development & International Law 233, 233 (2009).

[159] See Robert Beckman, *The Future of Ocean Regime-Building*, Brill Nijhoff (2009).

[160] See Matthew R. MacLeod & William M. Wardrop, *Operational Analysis at Combined Maritime Forces*, 32nd International Symposium of Military Operational Research, p. 205 (2015).

[161] See Saeed Bagheri, *Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective*, 13(1) The New Zealand Yearbook of International Law 83, 83 (2015).

along the Strait in exchange for greater cooperation from Tehran. The issue along this integral Strait of Navigation cannot be solved solely through international law or *the Charter of the United Nations*; only negotiation, dialogue, and the inclusion of Iran back at the table can produce suitable results.

So, the author conclude by suggesting that states engage with Tehran in an economic capacity and incentivise cooperation with a view to including other Arab states in the dialogue. Foster economic relations and attract Iranian power influencers to include IRCG Navy in discussions. Emulate success in historical zones of conflict, for example, in his 1998 Nobel Prize acceptance speech we heard John Hume say: Our differences are an act of birth".[162] He further emphasised that people must respect differences and work together to form common interests and to promote economic integration.[163] The author believe such a strategy is the only way forward for the geopolitical and legal landscape of Hormuz to experience calm waters. Let us give peace a chance.

[162] See Michael Lillis, *John Hume's Legacy*, 109(436) An Irish Quarterly Review 371, 371 (2020).
[163] See Frederick V. Perry & Wendy Gelman, *Iran, The United States, and the Strait of Hormuz: Can International Law Prevent Catastrophe*?, 70(1) Drake Law Review 333, 333 (2020).

Progressive Realization of Economic and Social Rights Amidst Sovereign Debt and Profit Motive of Corporations: Implications of Donegal V. Zambia

Musa Chanda[1]

Abstract: The enjoyment of economic and social rights by every human person in the world and the dignity they afford still suffer setbacks several decades after the adoption of the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights. This paper offers legal and moral reasons to support the idea of incorporation of human rights into investment agreements and debt contracts to secure such issues a central place within the reasoning and interpretation of courts and arbitral tribunals. It adopts a blend of doctrinal and theoretical methods in primarily analyzing the case of Donegal International Limited v. Zambia and summarizing relevant aspects of the legal frameworks for debt and socio-economic rights as well as philosophical ideas. The idea is to highlight reasons why it is imperative for debt contracts to reflect provisions protective of economic and social rights. The analysis leads to a simple, but significant message: Protect, respect, and fulfil economic and social rights by making them legal rights through channels of international diplomacy, domestic and contract law, just as you have done with any other rights recognised as paramount. The paper argues that embarking on the path to full realization of economic and social rights is essential to human dignity, strengthening the rule of law and maintaining broader global ends of world peace, justice, and freedom, founded on respect and protection of the dignity, equal and inalienable rights of every human person.

Keywords: Contractual protection of Economic and Social Rights; Sovereign Debt; United Nations Charter Values; Good Governance

1. Introduction

State Parties to *the International Covenant on Economic, Social and Cultural Rights* (hereinafter referred to as the ICESCR),[2] including Zambia,[3] have recognized that peace, justice and freedom in the world depend on a recognition that every person in the world has inherent dignity, equal and inalienable rights.[4] Unfortunately, realization of economic, social and cultural rights is a farfetched dream despite the undertaking by each State Party to the Covenant "to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the

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[2] See *International Covenant on Economic, Social and Cultural Rights* (1966) .

[3] See United Nations, OHCHR, *Status of Ratification Interactive Dashboard*, https://indicators.ohchr.org/ (accessed on August 28, 2024).

[4] See *International Covenant on Economic, Social and Cultural Rights* (1966), preamble; *Universal Declaration of Human Rights*, preamble (1948) .

full realization of economic social and cultural rights."[5]

The impediments are numerous and of varying types. For instance, the legal status debate on whether they are real rights or policy goals and apparent delegitimization.[6] A positive observation though is the claim that economic and social rights are increasingly being seen as real rights capable of enforcement just like civil and political rights.[7] A more menacing threat, however, is presented by a phenomenon of constant and continuing competition for scarce resources emanating from sovereign debt service obligations and the profit motive of those specialized corporations operating in the bond markets, which enjoy better legal protection in legal text at various levels and in practice at various fora. In contrast, economic and social rights are kept out of the text of bilateral agreements, domestic legislation and contract, thereby limiting their influence on government expenditure in times of extreme financial difficulties. The resulting situation fits the notion of a subtler risk responsible for weakening socio-economic rights structurally by complicating their realization. [8]

1.1 Contextual Background

In the history of the country, Zambia has accessed debt relief 9 times between 1983 and 2005,[9] and it recently attained 94 percent debt restructuring in its tenth episode.[10] Due to collapsed debt carrying capacity, Zambia defaulted on the US $ 3.5 billion debt in Eurobonds in 2020 and accumulated arrears to creditors but swift action by a group of industrialized nations (hereinafter referred to as the G20 group) to declare a 3 year moratorium, initiated the current debt restructuring process.[11] Zambia's total external debt rose sharply between 2011 and 2020 from US $1.98 billion to US$13.04 billion, and was accompanied by a steep rise in debt service to revenue ratio from 9 percent in 2011 to 51.7 percent by 2020. [12]

Spending 91.1 of percent of the domestic revenue to fulfil two main obligations: debt service and personal emoluments to public servants left 8.99 percent to spend on the remaining items in national budget and when misfortune struck in the form of Coronavirus Disease (COVID-19 for short) pandemic, Zambia was pushed into financial distress because its "unencumbered foreign exchange reserves shrunk to

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[5] See *International Covenant on Economic, Social and Cultural Rights* (1966), at Article 2(1).

[6] See Malcolm Langford, *The Justiciability of Social Rights, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, p. 4 (2008); Kristin Henrard, *Introduction: The Justiciability of ESC and the Interdependence of All Fundamental Rights*, 2(4) Erasmus Law Review 373, 377; Daphne Barak-Erez & Aetal M. Gross, *Exploring Social Rights*, Hart Publishing, p. 6 (2007).

[7] See Paul O' Connell, *The Death of Socio-Economic Rights*, 74(4) The Modern Law Review 532, 532 (2011) .

[8] See Marius Pieterse, *Beyond the Welfare State: Globalization of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa*, 14(1) Stellenbosch Law 3, 3 (2003).

[9] See Patrick Imam, *The Paris Club and Official Bilateral Debt*, https://www.imf.org>ResRep>debt-slides-hipc-presentation (accessed on August 11, 2024).

[10] See Ecofin Agency, *Zambia nears completion of debt restructuring at 94%, says finance Minister,* https://www.ecofinagency.com/news/3010-49964-zambia-nears-completion-of-debt-restructuring-at-94-says-finance-minister#:-text=zambia (accessed on December 2, 2025).

[11] See National Assembly of Zambia, *Ministerial Statement on the Restructuring Agreement With Official Creditors by the Minister of Finance and Economic Planning (Dr. Musokotwane) MP (2023)*, https://www.parliament.gov.zm/sites/default/files/images/publication_docs/Ministerial%20Statements%20-%20Debt%20Restructuring.pdf (accessed on November 22, 2025).

[12] *Ibid.*

US$970 million by the end of October 2020, against debt service of around US$1.4 billion."[13] These facts could justify Zambia's default as unavoidable on the ground of "economic necessity."[14]

In terms of the procedure for restructuring, the practice of the Paris Club demands that a sovereign debtor faced with a looming threat of defaulting on its debt should requests a renegotiation with creditors and undergo a three-stage process. First, hold discussion with the boards of International Monetary Fund (hereinafter referred to as the IMF) and the World Bank Group to secure an agreement on conditions for ending the balance of payments troubles and to receive a balance of payment loan. Second, engage in dialogue with the Paris Club, a conference of official creditors to reach an agreement on sustainable debt service amounts and new finance, and third, where applicable hold discussions and come up with an agreement with private creditors, including commercial banks through the London Club, an ad hoc committee formed by the banks.[15] In elaborating on the first stage of the process in the context of the Heavily Indebted Poor Countries (hereinafter referred to as the HIPC) relief, Walker and Faye, emphasized that it is for the boards of the IMF and the World Bank Group to decide whether a country qualifies for relief and reaching such a determination is called "the decision point".[16] In the case of Zambia, the decision point was published in 2024, thereby subjecting all commercial and bilateral bonds to the Joint World Bank-International Monetary Fund Debt Sustainability Framework, with a hope that successful completion of the process would help Zambia "to attract new investment, accelerate growth, generate jobs, and respond to urgent priorities."[17] The outcome of negotiations at the second stage are called "agreed minutes", which are consequently reflected in legally binding bilateral restructuring treaties.[18] On October 28, 2025, Zambia announced that it had completed 94 percent of debt restructuring because most bilateral creditors had signed or committed to signing agreements and that talks with the African Export Import Bank (Afreximbank) was key to ending Zambia's Default status.[19] About the third stage, part of the 94 percent completion rate of the total of US$13.3 billion debt was with private creditors, and this coupled with other positive economic indicators secured for Zambia an upgrade in credit rating to CCC+/C.[20] The whole restructuring process rests on fundamental principles of imminent default, conditionality and burden sharing.[21] The relief to Zambia, as Hagan would put it, takes the form of changes to the maturity dates of debt

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[13] *Ibid.*

[14] See United Nations Conference of Trade and Development, *Consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing (Amended and Restated as of 10 January 2012)*, Principle 15, https://unctad.org/topic/debt-and-finance/sovereign-lending-and-borrowing (accessed on December 2, 2025).

[15] See Alexis Rieffel, *The Role of the Paris Club in Managing Debt Problems*, Princeton University Press, p. 161 (1985).

[16] See Mark A .Walker & Barthélemy Faye, *Sovereign Debt Renegotiation: Restructuring the Commercial Debt of HIPC Debtor Countries*, 73(4) Law and Contemporary Problems 317, 317 (2010).

[17] See the World Bank Group, *World Bank Group Statement on Debt Restructuring Agreement for Zambia (2024)*, https://www.worldbank.org/en/news/statement/2024/03/26/world-bank-group-statement-on-debt-restructuring-agreement-for-afe-zambia (accessed on April 23, 2024).

[18] See August Reinisch, *The Need for an International Insolvency Procedure: State insolvency and a more institutionalized process of dealing with them*, 42(1) Österreichisches Bank-Archiv 115, 121 (1994).

[19] *Supra* note 15.

[20] See S & P GLOBAL INC & S & P GLOBAL RATINGS, *Zambia Foreign Currency Ratings Raised to "CCC+/C" On Improved Creditworthiness*, https://www.spglobal.com/ratings/en/regulation/article/-/view/type/HTML/id/348177 (accessed on December 2, 2025).

[21] *Supra* note 15.

instruments and reduction in the net value of the sovereign debtor's liability.[22] This means smaller instalments at lower interest rates but subject to upward adjustment should Zambia's debt carrying capacity and ratings improve.[23] There agreement that "in unavoidable sovereign debt restructuring, all stakeholders should share an equitable burden of adjustment and/or losses."[24] Similarly "non-cooperative behavior on the part of both creditors and sovereign debtors ought to be avoided to minimize sovereign insolvencies and their negative consequences."[25]

Whereas the World Bank Group and the IMF are optimistic about the economic and social impact of debt restructuring, some people are pessimistic and have called restructuring a "recipe for stagnations at best" and one likely to repeat government failures of the 1980s.[26] A 2017 report presented to the Human Rights Council[27] highlighted a conclusion, reached by several UN Bodies and human rights mechanisms, that financial crises and policy prescriptions for addressing them have led to budget cuts, prolonged economic crises and worsened the danger to the enjoyment of human rights.[28] However, a group of experts believe that responsible lending and borrowing can be good or bad."[29] Additionally, and while acknowledging and appreciating innovative debt relief solutions supported by the IMF and the World Bank Group, the losses to creditors after adjusting their entitlement under debt restructuring (the "haircut")[30] are inadequate for three reasons. First, efforts to curb inflation in creditor nations too often take the form of increased interest rates and this in turn translates into increased cost of borrowing. Second, the typical denominations of sovereign debt in foreign currency ensure that weaker debtor currencies are exposed to foreign currency exchanges losses, effectively increasing the actual instalments paid.[31] Third, there are corporations that exploit weaknesses of the legal regime for sovereign debt restructuring and have successfully converted the intended relief into their profits. Few good examples include the case of *Donegal International Limited v. Republic of Zambia and Another*[32] and the 11 debt collection actions taken by NML Capital against the Republic of Argentina in the Southern District of New

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[22] See Sean Hagan, *Designing a Legal Framework to Restructure Debt*, 23(36) Georgetown Journal of International Law 307, 307 (2005).
[23] *Supra* note 11.
[24] See United Nations Conference of Trade and Development, *Consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing (Amended and Restated as of 10 January 2012)*, Principle 15, https://unctad.org/topic/debt-and-finance/sovereign-lending-and-borrowing (accessed on December 2, 2025); Kei Nakajima, *Admissibility of Sovereign Bond Clams: Mass claims arbitration as a supplementary leverage over holdouts*, Cambridge University Press (2022).
[25] *Supra* note 14.
[26] See Joris Gort & Andrew Brooks, *Africa's Next Debt Crisis: A relational Comparison of Chinese and Western Lending to Zambia*, 55(3) Antipode 830, 830 (2023).
[27] See United Nations Human Rights Council, *Report of the Independent Expert on the effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (2017) A/HRC/37/54,* https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session37/list-reports (accessed on July 14, 2024).
[28] *Supra* note 11, at para. 23.
[29] *Supra* note 14.
[30] See Martin Guzman, *An Analysis of Argentina's 2001 Default Resolution*, 62(38) Comparative Economic Studies 701, 709 (2020).
[31] See Holger Schier, *Towards a Re-organisation System for Sovereign Debt: An International Perspective*, http://ebookcentral.proquest.com/lib/uccie-ebooks/detail.action?docID=468381 (accessed on August 8, 2024)
[32] See *Donegal International Limited v. Republic of Zambia and Another*, *EWHC 197 (2007)* .

York.[33] Kolb observed that Donegal sued Zambia for payment when Zambia was receiving debt relief under the HIPC relief effort.[34]

Margerie and Vauplane have argued that borrowing is a lifeline of sovereign debtors, and that creditworthy ratings do not focus on whether a state can repay the debt in full but on whether it can keep up with paying instalments and remain in a position to continuously borrow.[35] It is no wonder, debtor governments prioritize debt repayments over expenditure directed at fulfilling social and economic rights. For example, with poverty levels affecting about 80 percent of its population in 1999, Zambia's biggest spending item of US$ 136 million was debt servicing.[36] Thirty-one years later, in 2020, it still accounted for the biggest spending item at close to 52 percent of national revenue. The link to ESR can be seen from Zambia's 2026 budget speech, where a huge reduction was noted in the waiting period for a pensioner to get their pension benefits from 3 years to 3 months during the 3-year moratorium declared by the G20 Group and the waiting gap widening to 1 year immediately after the country resumed its obligations to service external debt.[37]

Regionally, sovereign debts problems still take the shape of a permanent drain on the resources of heavily indebted poor countries, with no viable solution currently. The aggregate borrowing for the region from 1970 to 2002 was US$294 billion, about 96 percent of that borrowed sum was repaid in debt service but, at the end of that period, total regional debt stood at over US$278 billion.[38] This signifies a 5.4 percent reduction in the total debt after 31 years of paying debt service instalments. At this rate of dismantling the debt, a logical projection would indicate that about 640 years of debt service are required to fully liquidate the regional debt.

Prudent and disciplined conduct in contraction and management of debt is critical, particularly because the relief that bankruptcy laws provide at national level to allow businesses to regain financial stability and re-enter the business world, is not available at international level, such that sovereign debtors have little chance to develop economically to a level of being reliable trading partners with creditor countries.[39]

1.2 Research Question and Methodology

The interaction between investment, including sovereign bonds, and human rights has attracted the attention of the Human Rights Council and other researchers. Michalowski has answered the following pertinent question about a possible defence that would implicate human rights consideration:

> "From the legal perspective the question would … be asked whether, beyond moral and political considerations or economic necessities, debtor states might have a right, or even be under an obligation, not to repay their debt where they

[33] See *Republic of Argentina v. NML Capital Ltd.*, https://supreme.justia.o/cases/federal/us/573/134/ (accessed on December 5, 2025).
[34] See Robert W. Kolb, *The Virtue of Vultures: Distressed Debt Investors in the Sovereign Debt Market*, 40(4) The Journal of Social, Political and Economic Studies 368, 374 (2015).
[35] See Gilles De Margerie & Hubert. de Vauplane, *A defective Default: Keys to Understanding the Sovereign Debt Crisis – Part 2*, 6(2) Law and Financial Markets Review 171, 173-174 (2015).
[36] See April A. Gordon & Donald L. Gordon, *Understanding Contemporary Africa (5th ed.*), Lynne Rienner Publishers, p. 422 (2013).
[37] See *2026 Budget Speech*, para. 118 (2026).
[38] *Supra* note 36, at p. 421 (2013).
[39] *Supra* note 18.

can only do so at the expense of neglecting the basic social needs of their people."[40]

In some cases, the defence of fulfilling human rights obligations has been ignored or rejected, and the High Commissioner for Human Rights (hereinafter referred to as the UNHCHR), has advocated for striking the right balance.[41] A recommendation made was to include "the promotion of human rights among the objectives of investment agreement."[42] The suggestion was to expressly incorporate the promotion and protection of human rights within the objectives spelt out in the preamble or clauses of investment agreements. This paper hopes to expand on this suggestion by focusing on a specialized form of investment – sovereign debt – and suggesting reasons why it is important for state duties towards economic and social rights of citizens should feature in them and why courts and arbitral tribunal should consider these obligations in settling dispute between sovereign debtors and private creditors.

This paper claims that legal and moral justifications exist for the incorporation into debt contract negotiations, re-negotiation, drafting and interpretation of Article 2 of the ICESCR undertaking by states, to advance steadily towards the goal of full realization of economic, social, and cultural rights.

The objectives of this paper include (1) identifying persuasive legal justifications for the proposal to incorporate human rights considerations in the reasoning and interpretation of legal obligations owed to creditors in debt contracts; (2) identifying a strong moral basis for making human rights a key consideration in negotiation and drafting of debt contracts.

The research questions are (1) what legal reasons justify the incorporation in debt contract negotiations and contract drafting of sovereign debtor state obligations under Article 2(1) of the ICESCR? (2) Why should due weight attach to social and economic rights in the reasoning of courts and arbitral tribunals when interpreting existing debt contracts?

Doctrinal method is used to understand the case *Donegal v. Zambia*, the legal framework for debt restructuring and international instruments touching on social and economic rights and compare findings with a U.S. case of *Argentina v. NML Capital ltd*. In addition, the Theoretical method will be employed to view, through the lens of renowned philosophers, the proposed centrality of human rights considerations in dealing with debt related impediments to state obligations. In terms of data collection, the method desk and online research of international legal instruments, statutes, cases, scholarly articles from journals, books, websites, and various reports among other sources. Regarding analysis and interpretation of data, the approach was both deductive and inductive reasoning using data for the various sources alluded above.

The impact of litigation from corporations that use legal machinery to profit from the default of sovereign debtors becomes big when one looks at the statistics. For Instance, Kolb noted in 2015 that vulture funds sued almost forty-five per cent of countries that reached the HIPC point, especially the impoverished countries.[43] He noted statistics from the World Bank Group that estimate that about US$ 1 billion

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[40] See Sabine Michalowski, *Sovereign Debt and Rights-Legal Reflections on a Difficult Relationship*, 8(1) Human Rights Law Review 35, 36 (2008).

[41] See Johannes Hendrik Fahner & Matthew Happold, *The Human Rights defence in International Investment Arbitration: Exploring the Limits of Systemic Integration*, 68(3) International and comparative Law Quarterly 741, 741 (2019).

[42] See United Nations, *Economic and Social and Council, Report of the High Commissioner for Human Rights on Human Rights, Trade and Investment* (2003).

[43] *Supra* note 34, at p. 374.

went to vulture funds in court settlements. Thus, this paper hopes to contribute to a legal solution that balances the interests of creditors with human rights obligations of states, particularly economic and social rights.

The study alludes to cases from two major Common Law jurisdictions, but centres on a case decided at High Court level, hence it has limited value as a precedence because it is only persuasive to courts at the same level of judicial hierarchy in the UK. At the same time, it is useful to the extent that it reflects the English legal position as confirmed by the Supreme Court in the Ukraine debt case.[44]

The paper has four sections. Section one introduces the thesis, objectives, and the questions it seeks to answer. Section two summarizes the case of *Donegal v. Zambia*, considers the legal framework, and argues that actual debt contracts and the debt restructuring system present opportunities for incorporating economic and social rights as required under international legal and authoritative documents. Section three focuses on two moral theories to understand what would make human rights a powerful consideration in debt contracts. Finally, Section four concludes that contract, as a private legislative act, can complement public and international law values, principles and standards that find expression in duties to respect, protect and fulfil economic and social rights, which are deeply rooted in fundamental human interests, human dignity and linked to the rights protected by current legal regime.

2. The Case of *Donegal V. Zambia* and the Legal Framework for Debt and Socio-economic Rights

2.1 Introduction

In this chapter, the paper summarizes the case of Donegal and discusses contractual protection of rights in the context of English law. It then considers the governing law for sovereign debt to highlight openings for negotiating and incorporating human rights. Finally, it examines features of human rights and those aspects of the ICESCR that necessitate the incorporation of its obligations into debt contracts.

2.2 Role of Contract Law in Sovereign Debt Adjudication: The Case of *Donegal v. Zambia*

The case of *Donegal v. Zambia*[45] involved four questions, two of which were so central that their determination made it unnecessary to determine the remainder. The first one was whether English courts could exercise jurisdiction over Zambia, a fellow sovereign. The other was whether summary judgment could be entered against Zambia for the debt claimed by Donegal. The applications as summarized by the judge read as follows:

"i) Zambia made an application …on August 24, 2005 under Part 11 of the Civil Procedure Rules (hereinafter referred to as the CPR) for a determination that the court has no jurisdiction to try the claim because Zambia is a sovereign state and is entitled to assert state immunity in accordance with Section 1 of the *State Immunity Act*, 1978.

…

iii) Donegal applied on 7 February 2006 under Part 24 of the CPR for summary judgment against Zambia…"[46].

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[44] See *the Law Debenture Trust Corporation plc v. Ukraine*, UKSC 11 (2023).
[45] *Supra* note 32.
[46] *Supra* note 32, at para. 3.

The facts in brief are that Donegal sued Zambia for a total sum above US$55million (comprising principal and compound interest) following default on a settlement agreement dated on April 1, 2003. Remarkably, Donegal had purchased this debt from Romania for US$ 3.2 million. The settlement agreement recited the facts that explained how a debt originally contracted between two sovereigns, Romania and Zambia, on April 17, 1979 got assigned to Donegal, a private corporation, by Romania on January 19, 1999, and the existence of credit documents evidencing the debt and Zambia's acknowledgement of its indebtedness to Donegal.[47] Brief details of some clauses in the Settlement Agreement are necessary to appreciate the role that contract played in the determination of the matter. If not for the law of equity, contractual rights and obligations under the contract would have been unrestrained. The clauses are conveniently summarized under the two issues raised by the core applications: challenge to jurisdiction and the request for entry of summary judgment.

2.2.1 Objection of jurisdiction of English courts

Central to the resolution of the jurisdiction challenge are Clause 11 and Clause 12, with the former providing for the application of English law, and the latter making elaborate provisions for the jurisdiction of the English courts to settle disputes and the waiver of Zambia's sovereign immunities.[48] Clause 12.1 (a) and 12.4 read as follows:

> "12.1 The Republic of Zambia agrees that the courts of England have jurisdiction to settle any disputes in connection with this Agreement and the debt and accordingly submits to the jurisdiction of the English courts.
>
> …
>
> 12.4 The Republic of Zambia irrevocably and unconditionally:
>
> (b) waives any such right of immunity which it or its assets now has or may subsequently acquire, and
>
> (c) consents generally in respect of any such proceedings to the giving of any relief or the issue of any process in connection with those proceedings, including, without limitation, the making, enforcement or execution against any assets whatsoever (irrespective of its use or intended use) of any order or judgment which may be made or given in those proceedings."

In disposing of the objection to English court's jurisdiction over Zambia, Judge Andrew Smith relies of *the State Immunities Act (1978)*.[49] He notes that Zambia, as both a foreign and commonwealth State for the purposes of Section 14 of *the State Immunities Act*, generally enjoys jurisdictional immunities and procedural privileges. He observes further that there are statutory exceptions to State immunities, particularly those under Section 2 (1) and (2), which are in the following terms:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom;
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by prior written agreement… ".[50]

This exception says that a sovereign State is free to give up its immunities before any dispute that may lead to a court case (e.g., through a contract) or afterwards. On the facts before Judge Smith, as evidenced by Clause 12.4 of the Settlement Agreement, Zambia submitted to the jurisdiction of English courts way before the

[47] *Supra* note 32, at paras. 7- 9.
[48] *Supra* note 32, at paras. 16-17.
[49] *Supra* note 32, at para. 427.
[50] *Supra* note 32, at para. 427.

dispute by agreement. By Clause 11, it agreed that English law (including *the State Immunities Act*) should be used to decide any dispute about the Settlement Agreement. Therefore, Judge Smith was in order when he found that "Zambia have waived state immunities,"[51] and validly rejected Zambia's arguments "by way of challenge to the validity and enforceability and applicability of the settlement Agreement and Clause 12 thereof."[52]

Whereas State immunities implicate both international principles like equality of nations, big or small enshrined in *the Charter of the United Nations* (hereinafter referred to as the UN Charter) and other international instruments, in addition to *the State Immunities Act*, Judge smith made no reference to non-English law in bringing the matter to rest. The approach taken by Judge Smith in deciding the jurisdictional challenge application solely based on English law has recently been affirmed as legally correct by the United Kingdom Supreme Court (hereinafter referred to as the UKSC) in a sovereign debt case involving Ukraine.[53] In that case, the UKSC disapproved the application of provisions of the UN Charter, by the Court of Appeal, to determine that case on appeal. The disapproval rested on the position of English law that international law or foreign law does not provide a yardstick for deciding issues before English courts. This is what the court said:

> "The point is that non-domestic law, whether national ... or international law as in the present case, does not provide the relevant standard. That is not to deny that international law may not be relevant in some cases to an assessment of public policy, although not determinative of the issue…."[54]

It is settled then that English domestic law is decisive for claims to be decided by English courts. Contract law being part of English common law is incredibly significant. International law must be domesticated first before being elevated to a level of being a standard measure by which cases will be decided in English courts.

In summarizing this part of the application, contract law ensured that when the then Minister of finance for Zambia, Mr. Emmanuel Kasonde, appended his signature to the Settlement agreement containing a clause on waiver of State Immunities, Zambia gave up the sovereign immunities protected under international law and English domestic law. The effect of that singular act was to seal the outcome of the challenge to English court's jurisdiction even before Donegal sued. Consequently, Zambia's right to assert immunities under international law became outside the purview of Judge Andrew Smith as international law became irrelevant to the determination of the question of jurisdiction.

2.2.2 Summary judgment clauses

Similarly, determinative of the question of whether summary judgment could be entered against Zambia's liability in favour of Donegal, was Clause 2.3(d) and (e) of the Settlement Agreement. It provided for the rights to Donegal in the event of Zambia's default of payment. It used the following wording:

> "(d) Upon service of the Notice, this Agreement will be null and void and of no effect and Donegal will be entitled to judgment in respect of the Debt in full with interest at 8% per annum compounding quarterly having given credit for any amounts already received pursuant to clause 2.1 above.
>
> (e) Upon service of the Notice, the Republic of Zambia hereby consents to

[51] *Supra* note 32, at para. 500.
[52] *Supra* note 32, at para. 501.
[53] *Supra* note 44.
[54] *Supra* note 44, at para. 163.

the award of the judgment by the High Court in England for the full amount of the Debt together with interest both before and after judgment at a rate of 8% per annum compounding quarterly but after having given credit for any amounts already received pursuant to clause 2.1 above."[55]

This clause in Paragraph (d) gives Donegal the right to terminate the settlement agreement and sue for summary judgment. Further, Donegal was entitled to compounded interest on the balance of the debt from the time the notice is served to the time it is fully paid. The penal effect of such interest was summarized in Paragraph 510 and Paragraph 511 of the judgment, the latter paragraph demonstrated the burden to Zambia on paying all the instalments due but one and Donegal decided to exercise its rights under that clause. Zambia argued persuasively that had it "defaulted to make the last payment of US$363,019 after paying 35 instalments in due time, Donegal would be entitled to judgment of over US$29 million."[56]

Fortunately for Zambia, the law of equity supported by the history of the debt as recited in the Settlement agreement gave room for the judge to ascertain the right amount Donegal was entitled to under Clause 2.3 (d) "upon the true interpretation of the Settlement Agreement."[57] The question for the court was whether Donegal was entitled to US$ 55,568,545.74 claimed in the case or "to such sum as was in fact owed by Zambia at the date of the Settlement Agreement, which depended on the definition of 'debt' in the Settlement Agreement…"[58] In that regard, Zambia relied on the following test with equitable flavour in the speech of Gibson L. J.:

"When deciding whether a contractual provision for payment by a party in default is penal, the court looks at the substance of the matter and decides, construing the contract at the time that it was made rather than the date of breach, whether the provision is a genuine pre-estimate of the loss resulting from the default or whether it is extravagant and unconscionable in amount in comparison with the prospective loss and is to be seen as a payment required in terrorem of the party in default."[59]

Judge Smith rejected Donegal's reliance on *Thompson v Hudson*[60] because it applied to a case involving the preservation of existing rights and obligations. Clause 2.3 (d) and (e) was different because it went further to create new rights and obligations for the two parties to the Settlement agreement.[61] It was held that Zambia had a real prospect of defending the claim made by Donegal on the ground that this provision was penal.[62] In that connection, Judge Smith indicated that while Donegal could sue on a penal provision, it could not expect to get anything more than its actual loss.[63] This explains why Donegal was to be later awarded US$15 million instead of the US$55 million it claimed.

2.2.3 The role of equity

The decision to find Zambia liable to summary judgment under the Settlement Agreement for a claim of more than US$55 million, only to enter judgment for a sum

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[55] *Supra* note 32, at para. 124.
[56] *Supra* note 32, at para. 511.
[57] *Supra* note 32, at para. 503.
[58] *Supra* note 32, at paras. 502-503.
[59] *Supra* note 32, at para. 509, citing *Jeancharm Ltd v. Barnet Football Club Ltd.*, EWCA Civ. 58, at para. 27 (2003).
[60] See *Thompson v. Hudson*, 4 HL 1 (1869), cited in *Donegal International Limited v. Republic of Zambia and Another*, [2007] EWHC 197, at para. 512.
[61] *Supra* note 32, at paras. 519-520.
[62] *Supra* note 32, at para. 523.
[63] *Supra* note 32, at para. 524, citing *Jobson v. Jobson*, 1 WLR 1026, p. 1040 (1989).

of US$15 million may sound incomprehensible in the absence of a brief account of the role of equitable principles. For instance, there is an equitable principle distilled from the speech of Lindley L.J. in *Rochefoucauld v. Boustead*[64] that equity will prevent a Statute or the common law from being used as an instrument for committing fraud. The brief facts were that the plaintiff named Comtesse de la Rochefoucauld owned Delmar estates, a piece of land used as security for repayment of a debt of 25, 000l to the Dutch company, her husband acquired an interest in Delmar Estate through a post-divorce court order after July 1868. When the Dutch company called in the debt, she did not have enough money to pay them. To avoid losing the property through a sale, she made a written arrangement with the defendant and Mr. Duff, for them to purchase it on the understanding that they would hold on to it until they were repaid all moneys paid by them to the Dutch company and all expenses incurred "to work the estate as a coffee plantation". Mr. Duff withdrew, but the defendant proceeded and bought property on auction at the price of 57,000l. He was registered as absolute owner on May 27, 1873. However, he regularly sent remittances of money until he went bankrupt and his correspondence with her showed that he was a trustee. When he was sued, his defence included claims that he bought the estate as beneficial owner, not as a trustee, and that he was relying on the Statute of fraud because the trusts alleged were not proved by any writings signed by him. The court of first instance dismissed the case. In allowing the appeal, the Court of Appeal held as follows:

> "On principle of all later cases oral evidence is admissible, and the oral evidence taken with the letters prove conclusively that the defendant purchased on behalf of the plaintiff and was a trustee for her, subject to his lien for his expenditure… It is further established by a series of cases… that the Statute of Frauds does not prevent the proof of fraud; and that it is a fraud on the part of the person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself."[65]

This holding demonstrates the overriding power of equity to prevent the law from being used for improper purposes, such as fraud. Thus, the use of contract clauses by Donegal to inflate the debt to a level where it could claim more than US$55 million, a right which the original creditor did not have, was an improper attempt by Donegal to exploit Zambia's vulnerability, and Donegal response that their proper purpose was to make a profit, could not be allowed to stand at the altar of equity. Equity prevailed against penal interest entrenched by contract law.

A question might be asked: why protect social and economic rights through contract if equity will prevent injustice from being done. The answer lies in the discretionary nature of equity which has ensured that some maxims seem contradictory. For example, the maxim that "equity imputes an intention to fulfil an obligation",[66] and "equity does not interfere to grant relief in commercial agreements."[67] Commenting on the common features between equity and human rights, Lord Walker noted that equity, like human rights, is "superimposed on existing law as a modifying or ameliorating influence" and performs its function by employing "evaluative standards rather than 'rigid counter-rules' and appealing to natural law

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[64] See *Rochefoucauld v. Boustead*, UKLaw RP Ch. 180 (1896), http://commonlii.org/uk/cases/UkLawRpCh/1896/180.htl. (accessed on August 6, 2024).
[65] *Ibid*, at para. 206.
[66] See Georghios M. Pikis, *An Analysis of the English Common Law, Principles of Equity and their Application in Former British Colony, Cyprus*, Brill (2017).
[67] *Supra* note 66; *Mardorf Peach v. Attica Sea Carriers Corporation*, 2 All E.R. 249 (CA) (1976).

and broader conception of justice.[68] This observation when read together with the maxim that equity follows the law against broader fairness standards[69], suggest that equity complements rather than compete with the common law. The rights and obligations created under contract are not lightly interfered with as reflected in the following statement of the court: "Where the parties have made a clear (private) legislative choice in a contract or other instrument, their decision governs."[70] Therefore, in commercial contracts courts are reluctant to use equity to engender "disruption of the bargains freely made … around which persons have planned their affairs."[71]

In summary, rights entrenched in a contract were decisive to the question of the court's jurisdiction and liability of the sovereign debtor, Zambia, while equity intervened to remove unconscionable interest. Therefore, contractual protection of economic and social rights offers a more practical and reliable means of securing the interests of justice founded on dignity, equal and inalienable rights of people in debtor countries.

2.3 Legal Framework for Sovereign Debt

2.3.1 Introduction

A good starting point in analyzing the legal framework is to note that there is no universal and legally binding international treaty to govern sovereign debt, but that is just one source of international law unavailable because other sources exist, including customary international law and general principles of laws.[72] Of great significance to sovereign debt is the practice of state to enter into agreements where they create and define rights and obligations, as well as the application of the doctrine of *pacta sunt servanda* (obligations are to be honoured) which justifies international liability for breach of engagement. This section starts with a brief analysis of two of the many meanings of sovereign debt to bring out crucial elements of it before giving a brief analysis of some provisions in U.S. law sovereign debt adjudication and English law sovereign debt adjudication.

2.3.2 Meaning of sovereign debt

External debt has been defined as debt "expressed in some foreign currency typically payable abroad, governed by some external law and subject to the jurisdiction of external courts."[73] This definition is descriptive but broad enough to cover several basic elements of external debt, even though it is blind to the idea that loans from foreign residents are often guaranteed by their governments thereby making them a concern of those guarantor states. On the aspect of currency, there is

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[68] See R. Walker, *Equity and Human Right, Equity and Administration*, Cambridge University Press, pp. 380-406 (2016).
[69] *Supra* note 68, citing *Sturgis v. Champneys*, 5 My & Cr. 97 (Per Lord Cottenham) (1839).
[70] See *Pan Ocean Shipping Co. Ltd v. Creditcorp Ltd (The Trident Beauty)*, 1 W.L.R. 161, 166 (Lord Goff of Chieveley) (1994).
[71] See *In re Goldcorp Exchange Ltd. (In receivership)*, 1 A.C. 74, 98 (1995); P. J. Millet, *Equity's Place in the Law of Commerce*, 29(114)Law Quarterly Review 214, 214 (1998); Lord Neuberger of Abbotsbury, *The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity*, 18(1) Cambridge Law Journal 537, 543 (2009); *Vercoe v. Rutland Fund Management Ltd.*, EWHC 424 (Ch), 352 (2010).
[72] *Supra* note 31, at pp. 49-50.
[73] See International Law Association, *Sovereign Insolvency Study Group*, p. 9 (2010), cited in A. De Man & M Bello, *Prioritising Socio-economic Rights in Sovereign Debt Governance: The obligations of Private Creditors*, 46(1) Journal for Juridical Sciences 57, 60 (2021).

support from Schier's observation that U.S. Dollars and Euros form a usual choice for expression of sovereign debt.[74] But it is doubtful whether it is always the case that such debt is expressed in some foreign currency. For example, it would not be strange to have U.S. debt from China denominated in U.S. Dollars. Thus, there may be exceptions to the statement that sovereign debt is expressed in some foreign currency. The notion of "payable abroad "is broad enough to entertain the possibility that a state can borrow from different parties, including other states, private institutions and individuals, as well as from international financial institutions like the World Bank Group, the IMF and Regional Financial Institutions. Therefore, the above cited definition is limited compared to the one under the UN Human Rights Committee, which defines "foreign or external debt" as "an obligation …created under a contractual agreement and owed by a state to a non-resident lender, a private financial institution or a bond holder, or is subject to foreign law.[75] The latter definition includes examples such as supplier credit and loans of different forms including buyer credits, debentures, bonds, deposits and commercial credit and defines a loan as funds advanced to a debtor on condition that the debtor will repay the same at a future date.[76] In broad terms, both definitions bring out the contract law element of sovereign debt as it entails advances of finances or pecuniary benefit with the obligation on the debtor to repay the creditor at some point in the future.

On the governing law, Wood observes that there is a wide range of laws and fora available to the parties to a sovereign debt, including international law in particular cases, laws of either the sovereign debtor or lender's nation, the law of a neutral country or the law of the market.[77] It is also typical for these contracts to submit to foreign courts or private tribunals. The cases of *Donegal v. Zambia* and *Ukraine case* and *Argentina v. NML Capital Ltd.* provide clear examples of such debts being subject to the jurisdiction of foreign courts.

2.3.3 The U.S. laws and English laws on sovereign debt adjudication

2.3.3.1 The U.S. laws on sovereign debt adjudication

In the U.S., the law governing sovereign immunities is *the Foreign Sovereign Immunities Act (1976)* (hereinafter referred to as the FSIA).[78] The scope and extent of immunities it confers and the exceptions were summarized by Justice Scalia who delivered the opinion of the U.S. Supreme Court in *Argentina v. NML Capital ltd.*. In a petition for a writ of certiorari, Argentina wanted the Supreme Court to pronounce itself on the limits of authority set by the FSIA on the U.S. courts when it came to ordering "post judgment execution discovery on assets of a foreign state used for any activity anywhere in the world."[79] Immunities being a disability or limitation on a power, the Court opined that sovereign immunities were not conferred by the U.S. Constitution but were and still are "a matter of comity and grace on the part of the United States."[80] The Court emphasized that the FSIA contained a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state,"[81] including amenability to suits in U.S. courts[82], principles and standards for

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[74] *Supra* note 31, at p. 52.
[75] See *United Nations Global Partnership for Development, Human Rights*, Section 1(4).
[76] *Ibid.*
[77] See Philp R. Wood, *Law and Practice of International Finance*, Sweet & Maxwell, p. 128 (1980).
[78] See Foreign Sovereign Immunities Act (1976).
[79] *Supra* note 33, citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U. S. 480, p. 486 (1983).
[80] *Supra* note 33, citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U. S. 480, p. 486 (1983).
[81] *Supra* note 33, citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U. S. 480, p. 486 (1983).

assessing entitlement to immunity[83] and provisions vesting sole jurisdiction in the courts to decide claims to immunities by foreign states.[84] The Court held the view that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text."[85] It proceeded to outline the two types of immunities conferred by the FSIA of a foreign state: (1) immunity from jurisdiction with exceptions clearly set out in Sections 1605 to 1607, and (2) immunity of foreign state property in the U.S. from attachment, execution and arrest with exceptions provided in Section 1610 and Section 1611 of the Act. Based on Argentina's express waiver of immunities permitted under Section 1605 (a) (1), the Court said that it would be "liable in the same manner and to the same extent as a private individual under like circumstances." On the question it set out to answer, and heavily relying on the text of the FSIA, the Court found no provision in the FSIA "forbidding or limiting discovery in aid of execution of a foreign judgment debt," and upheld the decisions of the lower courts.

In line with the opinion of the Supreme Court, comments have been made that courts in the U.S. have the powers and competence under the FSIA to enforce contracts against a foreign sovereign in two scenarios: (i) when there is express or implied waiver of immunities in the contract,[86] and (ii) when the contract is for commercial activities to be carried out on the U.S. soil or when the contract is executed in the United States for commercial activities to be done outside but which causes a direct effect on the U.S..[87] In that regard, commercial activities like issuing bonds on the New York bond market by a foreign sovereign or default of payment that can have a direct impact on the United States have been held to constitute an implied waiver of state immunities. In that case, the court reasoned as follows:

> "When a foreign government acts, not as a regulator but in a manner of a private player within it [the bond market], the sovereign actions are "commercial" within the meaning of the *Foreign Sovereign Immunities Act*."[88]

2.3.3.2 The UK laws on sovereign debt adjudication

The application of *the State Immunities Act* was considered in the summary and discussion of the case of *Donegal v. Zambia*. The basic rule as expressed in Section 1(1) of *the State Immunities Act* is as follows: "A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of the Act".[89] The exceptions are found in Section 2 (1) and (2) of *the State Immunities Act* which reads as follows:

> "2. (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement…

Consequently, while a sovereign debtor has immunities, it can expressly denounce its immunities in a contract or by submitting to English courts when proceedings have been brought against it. This general rule in contracts involving a

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[82] *Supra* note 33, citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U. S. 480, p. 493 (1983).
[83] *Supra* note 33, citining *Samatar v. Yousuf*, 560 U. S. 305, p. 313 (2010).
[84] *Supra* note 33, citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U. S. 480, p.7 (1983), citing FSIA 28 U.S. §1602.
[85] *Ibid.*
[86] *Supra* note 22, at p. 311, citing FSIC U. S. C 1605 (a) (1).
[87] *Supra* note 22, at p. 311, citing FSIC U. S. C 1605 (a) (1).
[88] See *Republic of Argentina v. Weltover,* 504 U. S. 614 (1992).
[89] *Supra* note 32, at para. 427.

commercial transaction is different from the one provided by section 1. In that connection section 3 of the Act provides:

> "3. (1) A State is not immune as respects proceedings relating to:
>
> (a) commercial transaction entered into by the State; or
>
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.
>
> (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1) (b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law."

Judge Andrew Smith, in deciding the application mounted by Zambia to challenge English court's jurisdiction, observed that immunities would not be available to a sovereign in respect of rights under the Settlement Agreement that are linked to commercial transactions. [90]

Consequently, a first general rule under Section 3 is that immunity is not available in court cases based on a commercial transaction, defined under Subsection (3) to include a contract for supply of goods or services, loans of various kinds, and other transactions a state enters when it is not exercising sovereign authority.

A general overview of UK law and that of the U.S. on sovereign immunities of foreign states in the context of debt contracts indicates that the position is similar. By way of summary, It is noted that obtaining judgments by private persons against a sovereign has been made possible by modifications to sovereign immunities predominantly under the law of the U.S. and the UK, which govern the bonds issued in the bond markets.[91]

2.4 Legal frameworks for Economic and Social Rights

2.4.1 Introduction

This part starts with an allusion to the UN Charter[92] since it requires Member States to cooperate in solving problems of the human rights which this paper is concerned with. It then reproduces verbatim the provisions of Article 2 of the ICESCR and delves into the literature review, with particular focus on human rights minimum standards that should never be breached on the pretext of insufficient financial resources to carter for both economic and social rights, on one hand, and debt service obligations, on the other. It concludes that the obligation to respect, protect and fulfil economic and social rights require recognition as legal rights in bilateral treaties, domestic legislation and contractual agreements, and that urgent action is necessary to recover lost time due to inaction.

2.4.2 The UN Charter

In the preamble to the UN Charter, Member States of the United Nations expressed their determination, inter alia:

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[90] *Supra* note 32, at para. 522.

[91] *Supra* note 22, citing U. S. Foreign Sovereign Immunities Act, 28 U.S.C., p.1330 & pp. 1602-1611 (FSIA) (1976) and the UK State Immunities Act (1978); 10 Halsbury's Statutes, pp. 1-23 at 2946 (4th ed. 2001 re-issue).

[92] See United Nations, *Charter of the United Nations*, 1 UNTS XVI (1945).

"To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

… to promote social progress and better standards of life in larger freedom."[93]

All these words are extremely important in understanding the idea of human rights in the contemporary world. Henkin has brought implications of the idea of human rights.[94] First, they are claim rights a person holds on his/her country, which it is obligated to honour.[95] Second, economic and social rights are related to human welfare including the right to food, housing, education, health care, work and adequate standard of living. They express a commitment to the individual worth such that they are important in virtue of being human, and equality of human beings, not hierarchy.[96] Given that they resulted from a political act, he says that human rights constitute a political idea that has moral justifications which are compelling enough to impose limitations not only on governments, but also on the laws that can be made.[97] In other words, human rights are minimum standards that draw the line below which government actions or quality of law cannot fall. Philosophical foundations are not the only justification for human right, he notes, "human rights claims are justified rhetorically as required by human dignity, and by goals of freedom, justice, and peace."[98] To put it differently, when the nations of the world included human rights in legally binding international instruments, they provided legal justification for these rights such that a person claiming a violations of their human rights can simply point to a provision recognizing the existence of the right engaged.

Furthermore, the UN Charter incorporates, in its purposes and principles under Article 1 (3) and substantive provisions under Articles 55 and 56, the duty on states to achieve international co-operation in solving social, economic and cultural problems on the international plane. According to the UN GPFDHR, the goals of such co-operation include fostering development and reaching global respect for human rights and fundamental freedoms, to mention only two.[99]

Forsythe observes that whereas the UN Charter makes provision for human rights in very broad terms, *the Universal Declaration of Human Rights* (hereinafter referred to as the UDHR), the ICCPR and the ICESCR specifies and gives meaning to human rights and the duty of co-operation among State Parties.[100] It is necessary to indicate here that the broad language used by the UN Charter serves a greater purpose of indicating values that underlie the new world where fundamental rights are well balanced with the public interest. As a result, the UDHR and the ICESCR should be seen as way of translating these values into rules that guide sovereigns in the way they treat their people. In the sphere of economic and social rights, the next few paragraphs are dedicated to understanding certain fundamental features about obligations imposed by Article 2 (1) of the ICESCR.

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[93] See United Nations, *Charter of the United Nations*, 1 UNTS XVI (1945), preamble.
[94] See Louis Henkin, *The Universality of the Concept of Human Rights*, 506(1) Human Rights around the World 10, 11 (1989).
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Supra* note 75.
[100] See David P. Forsythe, *The Universal Declaration at Fifty: Reconciling American Political Science and the Study of Human Rights*, 31(1) Political Science & Politics 507, 507 (1998).

2.4.3 Progressive realization of economic and social rights: salient features of obligation

Article 2(1) of the ICESCR provides as follows:

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The implications of the obligations arising under this provision were a subject of discussion by a team of academics and the results were documented in the Maastricht Guidelines.[101] One of the resolution was that economic, social and cultural rights give rise to three types of duties on a state: respect, a negative obligations not to violate such rights; protect, a positive obligation to prevent third parties from violating and includes the act of a state as a regulator, and fulfil, which requires a state to put in place policies, laws, institutions, human and financial resources needed to make progress towards the full realisation of economic, social and cultural rights.[102] In agreeing with this typology of human rights obligations in relation to economic and social rights, Michalowski adds that the duty to fulfil is a far reaching duty for demanding that the state takes "appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights."[103] Additionally, Michalowski acknowledges the implications that full realization of economic, social and cultural rights is a process, yet he argues that all rights recognised in the Covenant have a minimum standard below which states action cannot fall, otherwise a violation would occur.[104] In other words the actions to realize these rights should be immediate and consistent and it is expected that the cumulative effect of such steps will be the full realization of all rights recognized over time. He illustrates the idea of immediacy of the steps by saying that a state that allows most people in the country to lack basics like food, shelter, health care, and education, among others has failed to comply with its obligations under the ICESCR.[105]

Other examples that speak to need for immediate actions covered under the obligations about economic and social rights are found in the Maastricht guidelines.[106] A state will be considered to have fallen below the minimum standard of expected conduct if failure to regulate third parties leads to violation of rights recognized under

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[101] See *the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)* (Adopted by a group of academic experts meeting in Maastricht 22-26 January 1997, later re-issued as UN Doc. E/C.12/2000/13).

[102] *Ibid*, at para. 6.

[103] *Supra* note 40, at p. 39.

[104] *Supra* note 40, at p. 40, citing the Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of state parties' obligationsE/1991/23, para. 10 (1990); the Committee on Economic, Social and Cultural Rights, Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C12/2001/10, paras. 15-18 (2001). Also see Phillip Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, 9(3) Human Rights Quarterly 332, 352 (1987).

[105] See Sabine Michalowski, *Sovereign Debt and Rights-Legal Reflections on a Difficult Relationship*, 8(1) Human Rights Law Review 35, 40-41 (2008); Phillip Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, 9(3) Human Rights Quarterly 332, 352 (1987); *the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)* (Adopted by a group of academic experts meeting in Maastricht 22-26 January 1997, later re-issued as UN Doc. E/C.12/2000/13).

[106] *Supra* note 101, at para. 6.

the ICESCR.[107] Of more interest to this paper, is the violation arising from a failure to commit resources towards the process of full realization of these right.[108] It implicates utilitarian calculations made by politicians in arriving at budgetary allocations, which in turn are affected by the quantum of awards courts grant to corporations. Connected to this is a violation of the covenant arising from a failure by the state to consider its obligations under the ICESCR when entering into bilateral or multilateral agreements with other states, international organizations, or multinational corporations[109].

The last example becomes significant in the light of the case of *Donegal v. Zambia*, where the settlement agreement revealed an absence of consideration of Zambia's obligations to pay the debt without compromising its ability to fulfil economic and social rights for its people. Moreover, the advice from the Attorney General did not refer to Zambia's human rights obligations impacted by the unconscionable quarterly compounding of interest charged on public funds. Zambia attempted to argue the readily apparent unfairness in terms of equity but failed to develop that argument as observed by the judge.

This chapter isolated one aspect of human rights practice to highlight three notable points: the role contract law can perform in enhancing human rights in practice, the opportunities in the debt restructuring process for negotiating human rights into actual debt contracts, and the duties to respect, protect and fulfil economic and social rights arising from the political project that produced authoritative texts like the UN Charter, the UDHR and the ICESCR. The next chapter summarizes two main moral ideas that explain why human rights deserve urgent consideration in the reasoning of courts and tribunals.

3. Morality of Human Rights Law

3.1 Introduction

The current chapter will explain, albeit briefly, two major moral theories: the fundamental Interest approach and Linkage Argument, which are relevant to the existence of subsistence rights and the connection to economic and social rights, generally. The idea of subsistence rights can provide moral justification for the economic and social rights as human rights, especially that very few nations have recognized them as justiciable rights in their domestic constitutions.[110] In another work, Bufacchi observed that moral foundations give human rights authority by explaining the basis for the belief that they exist and serve also, to clarify and deepen the understanding required in human rights interpretation.[111] The paper will briefly develop the Fundamental Interest Theory only and allude to Henry Shues idea that basic rights are part of the widely accepted rights. In developing the fundamental interest theory, it relies much on John Tasioulas and adopts the structure he used in delivering his 2015 lecture at Harvard University entitled "Human rights: three questions", particularly answering questions about the nature, foundation, and force of human rights, in that order.[112]

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[107] *Supra* note 101, at para. 15(d).
[108] *Supra* note 101, at para. 15(e).
[109] *Supra* note 101, at para. 15(j).
[110] *Supra* note 7.
[111] See Vittorio Bufacchi, *Theoretical Foundations for Human Rights*, 66(3) Political Studies 601, 602 (2017).
[112] See Harvard University - Radcliffe Institute for Advanced Study, *Human rights: A lecture by John Tasioulas*" , https://youtu.be/VbWY_qXuSng? (accessed on August 14, 2024).

3.2 The Nature of Economic and Social Rights

According to James Nickel, present day human rights have many characteristics, including being 'numerous and specific rather than few and general',[113] and being more egalitarian as evidenced by: (i) concepts of equality before the law and (ii) inclusion of social rights, and (iii) providing of positive rights serving to mitigate economic and social inequalities. To put it differently, economic and social rights are a class of specific rights like the right of access to work, education, health, among other rights that impose positive duties on states to address inequalities among other obligations. A caveat worth flagging at the outset is that the nature of human rights cannot reside, as Sir John Laws would put it, "in a single set of ideas that can conclusively be ascertained" because "reason and experience" indicate otherwise.[114] Therefore, strengths and weaknesses are to be expected and this will give rise to competing theories.

The fundamental interest approach does provide a useful way of understanding economic and social rights. According to John Tasioulas, an inquiry into the nature of human rights is a search for a core concept that incorporates standards for identifying and distinguishing them from other standards that regulate human conduct. He endorses the orthodox view of human rights which states that human rights are moral rights possessed by all human beings simply in virtue of being human.[115] Although this definition speaks to human rights in broad terms, it provides a test for evaluating specific rights like those recognised under the ICESCR. The two elements are: first, 'moral right' – the claims or entitlements that people have and which generate duties on others to honor and vindicate[116], – and second, 'in virtue of being human'- referring to dignity and other fundamental human interests of sufficient weight to place obligations on others to respect and further them[117] His idea builds on Griffins idea of personhood, that is, "our capacity to choose and pursue our conception of a worthwhile life."[118] He improves on it by suggesting that the list of fundamental interests go beyond autonomy and liberty proposed by Griffin.[119] He understands the concept of human dignity to refer to the irreducible intrinsic value of rational human beings.[120]

Applying the above test to Rights recognised in the ICESCR, economic, social and cultural rights would be understood as entitlements of individuals rooted in fundamental human interests that are so strong that they impose duties on governments to respect, protect and fulfil, and on other individuals to respect, the breach of which is a violation deserving of punishment or blameworthiness or requires compensation.[121] As the earlier example drawn from the Maastricht

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[113] See John Nickel, *Making Sense of Human Rights 2nd ed.*, Blackwell Publishing, p. 10 (2007).
[114] See John Laws Sir, *The Good Constitution*, 71(3) Cambridge Law Journal 567, 568 (2012).
[115] See Harvard University - Radcliffe Institute for Advanced Study, *Human rights: A lecture by John Tasioulas*" , https://youtu.be/VbWY_qXuSng?, (accessed on August 14, 2024); James Griffin, *Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights*, 101(1) Proceedings of the Aristotelian Society 1, 5 (2004).
[116] See John Tasioulas, *Human Rights, Universality and Values of Personhood: Retracing Griffin's Steps*, 10(1) European Journal of Philosophy 79, 96 (2002).
[117] *Supra* note 116, citng John Nickel, *Making Sense of Human Rights 2nd ed*. Blackwell Publishing, p. 94 & p. 172 (2007).
[118] See Vittorio Bufacchi, *Theoretical Foundations for Human Rights*, 66(3) Political Studies 601, 605 (2017), citing John Griffin, *On Human Rights*, Oxford University Press, p. 45 (2008).
[119] *Supra* note 116, at p. 95.
[120] *Supra* note 112.
[121] *Supra* note 112.

Guidelines shows, depriving a good number of people in a country of access to basic necessities of life like health care, education, food, shelter, among others would justify a finding that a state has failed to comply with its obligations under the ICESCR.[122] Clearly, human beings have fundamental interests in subsistence rights and such interests possess enough weight to impose duties on governments to honour them. The duties are both possible and not too burdensome because the obligations set by human rights are minimal standards as James Nickel suggests.[123]

Similarly, Henry Shue's linkage argument is one way to justify the existence of economic and social rights as moral rights. He says that basic right to subsistence encompassing access to minimal economic security, unpolluted air, adequate food, minimal public health care, unpolluted water, and adequate shelter, is part of any other recognised right because, as Nickel puts it, the effective implementation of the second right requires effective implementation of the first.[124] Shue's premises and conclusion as improved on by Nickel[125] leads to the following syllogism:

Major premise: A right that requires effective implementation for at least one other accepted right to be implemented effectively is a basic right.

Minor premise: The right to Subsistence requires effective implementation for the right to life to be implemented effectively.

Conclusion: Therefore, the right to subsistence is a basic right.

James Nickel cautions that the strength of the relationship between the basic right and the right it supports may vary when tested for both logical and practical consistency.[126] He demonstrates a very strong link between education as a basic right and the effective implementation of many other rights that require people to have the knowledge and understanding required to assert and vindicate their rights.[127] Indeed, the link is strong when one thinks of the role education plays in the effective enjoyment of fundamental freedoms of conscience, belief, expression and association, which are widely accepted rights. He adds that this linkage analysis can help to clarify and add content to human rights.

3.3 Moral Foundations of Economic and Social Rights

As James Nickel argues, understood in their sense as justified moral rights, human rights require strong reasons to support their existence.[128] Based on Tasioulas conclusion that human rights are rooted in autonomy, liberty, other fundamental human interests, and people's capacity for practical reason, all of which explain and develop the concept of human dignity,[129] economic and social rights would be grounded in those fundamental human interests that are of an economic and social character. For Henry Shue's basic rights, it is the need to guarantee actual enjoyment of a right against standard threats that makes basic rights significant.

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[122] See Sabine Michalowski, *Sovereign Debt and Rights-Legal Reflections on a Difficult Relationship*, 8(1) Human Rights Law Review 35, 40-41 (2008); *Maastricht Guidelines on Economic, Social and Cultural Rights*, para. 6 (1997).
[123] *Supra* note 113, at p. 10.
[124] See Henry Shue, *Basic Rights, 2nd ed*, Princeton University Press, pp. 11-88 (1996).
[125] *Supra* note 113, at p. 88.
[126] *Supra* note 113, at p. 89.
[127] *Supra* note 113, at pp. 89-90.
[128] *Supra* note 113, at p. 53.
[129] *Supra* note 115.

3.4 Force of Human Rights

Tasioulas sees the force of human rights in the fact that they go into practical deliberations as duties, not as interests, the idea that makes them resistant to tradeoffs. By practical deliberations, Tasioulas is referring to authoritative human rights documents like the UDHR, legally binding instruments like the ICESCR, national constitutions and other laws, institutional structures like states, intergovernmental organizations, and non-governmental organizations.[130] As for Shue, the fact that the implementation of uncontroversial rights requires effective implementation of subsistence rights, gives the latter moral force.

4. Final Discussion and Conclusion

4.1 Introduction

In light of preceding sections, It is time to discuss reasons why socio-economic rights should be incorporated into debt contracts and why they should feature centrally within the reasoning of courts when interpreting these contracts. The paper is mindful of the positivists influence on the legal system which manifests in the prioritization of strict adherence to the text of written documents in interpretation and the avoidance of recourse to matters that appear extraneous to matters under consideration. It, therefore, appeals to ascending levels of abstraction to show that values recognised in the UN Charter can help explain why fundamental economic and social rights are not peripheral to issues involved in debt contract adjudication, hence the need for their early inclusion in contracts, and later discussion in judgments of courts and tribunals seized with such matters. It will address legal reasons before turning to the moral ones.

4.1.1 Legal justification for incorporating into contracts provisions that are protective of social and economic rights.

4.1.1.1 Contracts are a practical means of creating rights and obligations that are legally enforceable.

Contracts can be a useful legal means to promote and give effect to human rights objectives and enable steady progress towards the full realization of social and economic rights recognized under the ICESCR. Sir John Laws once commented that fundamental rights in the common law are automatic.[131] Contract law as part of the Common Law does not oppose the introduction of provisions that protect social and economic rights in debt contracts. The freedom of contract also applies to states in their relations with other states as observed by Martha in the following words:

> "In transactions between states, international law … regulates the validity of the transaction, its life, and its construction. It also gives the parties the possibility of regulating their mutual relations through legal transactions - including the autonomy to perform a 'law-creating' act which may include the incorporation of domestic law of a country into their mutual relations…."[132]

This speaks to the freedom to contract enjoyed by sovereigns, and which can be employed to balance creditor interests with economic and social rights of citizens of

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[130] *Supra* note 115.
[131] *Supra* note 114.
[132] See Rutsel Silvestre J. Martha, *The Financial Obligation in International Law*, Oxford University Press, p. 12 (2015) .

debtor countries using bilateral agreements which feed into contracts. The three-stage process of the debt restructuring process is the starting point because the minutes and conditions agreed at those levels find their way into the legally binding debt and other investment contracts. Thus, there is a need to utilize the open channels at the international level (e.g., Bilateral and Multilateral Agreements) and the transactional level - actual debt contracts. The role of better contracts in improving the international architecture of sovereign debt has been suggested to overcome the delays in sovereign debt restructuring,[133] acknowledged and adopted by some states, including Argentina.[134] What is needed is to bring economic and social considerations into the calculus as suggested by the UNHCHR, especially that debt contracts have the potential to come in conflict with and negatively impact the progress towards the realization of these types of rights.

Another reason for making balanced contracts is the position of English law, which treats undomesticated international law and rules of customary international law misaligned with English law as an irrelevant source of rights and obligations.[135] Lord Oliver speech[136] put the English position bluntly:

> "Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of the rights or subjected to obligations; and it is outside the purview of the court… because, as a source of rights and obligations, it is irrelevant."[137]

Contract as a private legislative act recognized under English law can compel these courts to consider the sovereign debtor obligations under Article 2 (1) of the ICESCR thereby filling the void thus created.

4.1.1.2 Rule of Law requirement

If a State wants to rely on its duty to fulfil economic and social rights to disturb its agreement with a creditor, it must make this known in the contract so that the other party is not surprised by a defence they did not anticipate. In elaborating on the first implication of rule of law, about the law being accessible, intelligible, clear and predictable, Lord Bingham emphasizes the need for the law to be sufficiently "clear that a course of action can be based on it."[138] He supports this point by alluding to English cases,[139] and recites a passage from the jurisprudence of European Court of Human Right pointing to these attributes of the law, which reads in part as follows:

> "[T]he citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case… a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct…"

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[133] See ICMA, Standard collective action and Pari Passu clauses for Terms and Conditions of Sovereign Notes (2014), cited by Martin Guzman, *An Analysis of Argentina's 2001 Default Resolution*, 62(38) Comparative Economic Studies 701, 701 & 731 (2020).
[134] *Supra* note 30, at pp. 731-732.
[135] *Supra* note 44, at para. 157.
[136] See *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, 2 A.C. 418, pp. 499-500 (1990).
[137] *Supra* note 136, cited with the approval of *The Law Debenture Trust Corporation plc v. Ukraine*, UKSC 11, para. 157 (2023).
[138] See Lord Bingham, *The Rule of Law*, 20(66) Cambridge Law Journal 67, 69 (2007).
[139] See *Black Clawson International Ltd v. Papierwerke Waldohop-Aschaffenberg AG*, A.C. 591, p. 638 (1975); *Fothergill v. Monarch Airlines Ltd.*, A.C. 251, p. 279 (1981).

The private legislative qualities and freedom of contract offer sovereign debtors the opportunity to make contractual rules of such a quality that define and delineate the boundaries of the interests of all parties, including the obligations of States to fulfil the economic and social rights of their citizens. As argued above, human rights obligations of debtor nations will get a higher chance to feature prominently in interpretation if they are made part of the contract.

4.1.1.3 Equity complements rather than compete with Common Law

Donegal v. Zambia showed that equity severed the unconscionable interest but allowed the proper interest to go to Donegal. It is concerned with lessening the severity of the application of the law and rectifying errors at the as pointed out by Ellesmere L.C who stated:

> "[T]he office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions… and to soften and mollify the extremity of the law."[140]

In contrasting human rights from equity, Lord walker charges that the application of proportional analysis to arrive at remedies that fit the legitimate interests of a claimant in a case falls short of the "structured balancing of public and private interests involved in human rights analysis."[141] His analysis reveals one comparative advantage of human rights over equity. As James Nickel has noted human rights are many and specific.[142] This feature makes it easier to include them in contracts. For economic and social rights once perceived as difficult to implement as legal rights,[143] philosophical analysis as demonstrated by Tasioulas has provided clarity and rigor to identify the duties of governments and other persons.

4.1.1.4 Contracts can fill the gap of fulfilling Economic and Social Rights in domestic legislation

Zambia, for instance, makes no specific reference to economic and social rights in its current constitution.[144] They are reflected as values and principles of state policy under Article 8 of the Constitution, which under Article 9 must underlie the interpretation of the constitution and other pieces of legislation, the making of laws, and the formulation and implementation of state policy. Its Article 10 which is remarkable for choosing very specific words to protect local and foreign investments.[145]

These clauses use specific language to guarantee three layers of protection to local and foreign investors. To begin with domestic protection, the right against expropriation is incorporated by reference into Article 16 (1) of *the Zambia Bill of Rights* with the result that it acquires the status of a justiciable right at domestic level. Second, it makes protection of such investments a subject of diplomatic relations and bilateral or international agreements. Lastly, the rights of the state to interfere with

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[140] See *Earl of Oxford's case*, 1 Ch Rep. 1, p. 6 (1615).
[141] *Supra* note 68.
[142] *Supra* note 113, at p. 10.
[143] See Javaid Rehman, *International Human Rights Law 2nd edn*, Pearson Education Limited, p. 85 (2010); Rhona K. M. Smith, *International Human Rights Law, 9th edn*, Oxford University Press, p. 63 (2020).
[144] See *The Constitution (Amendment) Act*, *No. 2* (2016).
[145] *Ibid.*

such investment is limited by customary international law, making the General Assembly Resolution 1803 of 1962 applicable. [146]

Notable from paragraph 4 of the Resolution[147] is the fact that the government should have strong reasons for interfering with the property rights of private persons whether local or foreign investors. It is the protection of the interests of the poor and vulnerable which is unclear since Zambia is a dualist state that requires ratified international human rights law instruments like the ICESCR[148] to be domesticated to be a source of legal rights and obligations. The gap thus created concerning the obligation to fulfil the economic and social rights of its citizens can be filled by incorporating them into contracts.

Another reason for favoring the human rights sensitive contracts is that the recent consolidation of previous pieces of legislation dealing with public debt into a single statute,[149] does not appear to factor in the human rights impact assessment of debt among the functions of the Debt Management Office established under Section 5 of that Act.

Closely connected are Principle 1 and Principle 8 of the UNCTAD POPRLAB, which draw attention to the status of a sovereign debtor as an agent with authority to bind its principal (citizens and residents). These people have an interest in human dignity and autonomy among other interests that have been given expression to by the ICESCR. Peoples interest in the incremental progress towards the full realization of ESR can be protected by dedicating resources in national budgets just like interests of creditors are protected by including debt service instalments as items of expenditure. A protective clause could read like:

> "The government … enters this contract as an agent of its citizens ("the principal party) with an international commitment to avail resources towards progressive realization of ESR linked to SDGs, which can conflict with financial obligations to the creditor. Therefore, if due to unforeseen circumstances, and without its fault, the sovereign debtor becomes so financially distressed as to force it to exceed the 40 percent debt ratio limit, the debtor shall have the right to open negotiations for an orderly restructuring …."

Furthermore, to bring the defence of protecting ESR in the sovereign debt adjudication calculus, a proviso to jurisdictional and waiver of immunity clauses can specify the details of the defence. The proviso, and subject to further and better refinement, could read as follows:

> "Provided that it shall be a defence for a foreign state to prove that the sovereign debt default was necessitated by the dire need to avoid depriving its people of the minimum standards of ESR including, but not limited to, adequate food, basic health care, basic education, shelter, unpolluted water and air."

Such a proviso is meant for the worst-case scenario, where default is unavoidable like it happened with Argentina in 2001 and Zambia in 2020.

In summary, contracts are not unique to the Common Law jurisdictions and therefore provide a universal means to balance the protection of both private property rights and the social and economic rights of citizens in debtor states.

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[146] See United Nations General Assembly, *General Assembly resolution 1803 (XVII), Permanent sovereignty over natural resources* , UNGA Res 1803 (XVII) (accessed on August 26, 2024).
[147] *Ibid*, at para. 4.
[148] *Supra* note 3.
[149] See *Public Debt Management Act,* No. 15 (2022).

4.1.2 Moral reasons for making human rights central to interpretation of debt contracts

4.1.2.1 Balancing underlying values

Sovereign debt adjudication presents a delicate problem inherent in the nature of a sovereign defendant. This party to a case has 'horizontal obligations' to individuals as private creditors and 'vertical obligations' to individuals as citizens subject to the debtor.[150] It calls for balancing of values that lie much deeper than meets the eye. Sir John Laws, in his 2012 Sir David Williams Lecture, published in the Cambridge Law Journal of that year, argued that two moralities - of law and government are a feature of a good constitution in a democratic state. These moralities exist at the third level of abstraction and can help to explain why judges in the UK are seen to encroach upon the territory of elected governments in a bid to protect fundamental human rights. The morality of law requires that duties should be honoured, and rights vindicated and therefore a subject of fundamental human rights and the role of courts.[151] By contrast, the morality of government is about serving the public interest, achieving greater happiness for the greater number, and therefore a function assigned by the constitution to government (politicians).[152] He asserts that protection of fundamental rights has compelled judges to enter strategic issues traditionally viewed as policy decisions exclusively reserved for elected governments officials.[153] However, there is a limit, that is, courts should only interfere to the extent that the morality of government interferes with human rights, no more - no less. He emphasized the need for harmony between the two moralities – allowing each to exist to the least prejudice of the other.[154]

In applying the underlying values analysis to sovereign debt adjudication, it becomes necessary to identify values that underlie the limiting of state immunities and what other values they compete and where the balance lies. The two moralities identified by Sir Jonh Laws are broad enough to apply on the international plane. Reasonable people will agree "that the ruler should exercise the power of the state for the benefit of the people and not his own."[155] The brings in the notion of the morality of government in sovereign debt adjudication. Such courts and tribunals cannot dismiss such issues as being irrelevant issues of humanity and morality as Smith J. did.[156]

While treating a sovereign as a "fictional private person", for purposes of court jurisdiction, as the FSIA seem to suggest, particularly in commercial transactions with private persons, at a higher level of abstraction, a sovereign remains a sovereign, with the obligation to exercise the powers of government under its constitution for the benefit of people. Thus, the nature of this party to suits calls for consideration of policy issues hitherto regarded as peripheral. It requires striking the right balance between obligations to creditors and obligations of a good government. Contracts, being part of the Common Law, offer the kind of flexibility needed to "fashion

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[150] See Philip Sales, *Rights and Fundamental Rights in English Law*, 75(1) Cambridge Law Journal 86, 87 (2016).
[151] *Supra* note 114, at p. 573.
[152] *Supra* note 114, at p. 572.
[153] *Supra* note 114, at p. 567.
[154] *Supra* note 114, at p. 578.
[155] *Supra* note 114, at p. 567.
[156] *Supra* note 32, at para. 2.

something so delicate as setting the balance between individual rights and public interest."[157]

It is prudent not to keep citizens in a constant state bearing the cost without enjoying the benefits due to frustration of relief because of unreasonable refusal by corporations to agree to restructuring, "hoping to recover more than their fair share of the settlement."[158]

A balanced ruing from an adjudicative body relates to Greece. The legislative changes implemented had a cumulative effect of impoverishing several people in the country and particularly impacted the right to social security. In an application against Greece before the European Committee of Social Rights, the argument by Greece that the legislative changes it made to pensioner's social security protection resulted from a financial support mechanism it settled with the European Commission, the European Central Bank and the IMF in 2010 was found not to be persuasive.[159]

4.1.2.2 Fundamental Interest Theory

Additional support for the need for balancing different interests engaged in sovereign debt adjudication comes from the fundamental human-interest approach and the linkage arguments. The two theories were described as influential moral theories in claiming that economic and social rights exist independently of governmental recognitions. The interest theory roots them in dignity and fundamental interests' while the linkage argument claims that they are basic rights, and therefore, part of any right accepted as existing. To recap the argument of the fundamental interest theory, the force of moral rights, as Tasioulas demonstrated, lies in the fact that they give rise to duties to respect, protect and fulfil fundamental interests like dignity, autonomy, and subsistence. These are universal human interests that should not be ignored by courts in the context of debt crises, especially that economic and social rights come under real threat of violation. Moral rights are important because they regulate conduct even where legal rules are absent,[160] and if a rule aligns with accepted or justified moral reasons, this can enhance compliance.

4.2 Conclusions

This paper took a new angle by searching for legal and moral reasons to support the recommendation by the United Nations that human rights objectives should be incorporated in investment agreements. Starting from the premise that the implementation of economic and social rights is complicated by debt crises, the paper has highlighted the role that contract can play in the protection of these rights when they compete with debt service obligations and austerity measures designed to avoid default and obligations to service profit motives of corporations. It analyzed specific aspects of the case of *Donegal v. Zambia* to highlight the role played by contract in the outcome of the case and briefly highlighted common features from the case of *Argentina v. NML Capital ltd*. It explained the unusual decision to grant Donegal less that it claimed using principles of equity. Equity does intervene to prevent the law from being used as an instrument of fraud but relies on very broad standards of justice. Human rights on the other hand are well defined and philosophers have developed

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[157] *Supra* note 114, at p. 578.
[158] See Steven L. Schwarcz, *Sovereign Debt Restructuring: A Model Law Approach*, 6(2) Journal of Globalization and Development 343, 345 (2016).
[159] See *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76, para. 50 (2002).
[160] *Supra* note 113, at p. 49.

tools for defining and delineating them so that it is possible to incorporate them into contracts as legal rights protecting fundamental interests and dignity. As claimed by the fundamental interest approach, they are human interests of such weight that they give rise to duties on governments. The linkage argument claims that they are part of recognised rights because effective implementation of clear rights requires effective implementation of these basic rights. The duty imposing characteristic make them sufficiently powerful to win most of the time when they compete with other obligations of government.

Relying on both legal and moral reasons, it echoed and expanded on the proposed practical and human rights centric approach to solutions of problems caused by debt crises and profit motives of corporations, particularly by showing cause why the undertaking concerning economic, social and cultural rights should be incorporated in debt contract negotiation, renegotiations, drafting and interpretation. The reasons were both legal and moral. Legal reasons included the private legislative capacity of contracts, the rule of law requirement, the fact that equity complements rather than contradict the Common Law and the need to correct lapses in domestic law concerning the protection of economic and social rights. This paper showed that incorporating economic, social and cultural rights in debt and investment contracts is both possible and necessary. Moral reasons appeal to our sense of the general good being balanced with individual rights. The nature of the sovereign is that it must be both a good debtor and a good ruler, exercising powers conferred for the benefit of its people, a consideration that sovereign debt adjudication should not ignore.

The paper hopes that the claim it has made will be refined by further research to solve the problem of social and economic rights competing with debt service and corporate profit for scarce public resources.

The potential use of the private legislative capacity of contract should be explored to determine how far it can bridge the gap left by a failure to recognize social and cultural rights as legal rights.

The final recommendation is that states and the international community should consider protecting social and economic rights in the same way they protect other interests vital to them, through international agreements, domestic legislation and contracts.

The Implementation of China's Foreign Investment Law and its Impact on Foreign Direct Investment

Stephen O'Regan[1]

Abstract: This paper critically examines the effectiveness of China's Foreign Investment Law in reshaping the legal and regulatory framework governing foreign direct investment. Although the FIL was enacted in 2020 to signal greater openness, standardisation, and legal protection for foreign investors, its implementation has revealed a persistent gap between legislative intent and institutional reality. Through analysis of statutory provisions, regulatory mechanisms, and post-enactment investment trends, the paper argues that the FIL has not meaningfully improved investor confidence or legal predictability. Core weaknesses ,which include vague drafting, the absence of judicial remedies, decentralised enforcement, and the opacity of China's national security review system, continue to undermine the law's capacity for offering a transparent and rules-based investment environment. Drawing on commentary from legal scholars and official data, this paper argues that the FIL reflects a formal commitment to liberalisation constrained by structural features of China's governance model.

Keywords: Chinese Foreign Direct Investment; Foreign Investment Law; Wholly Foreign Owned Enterprise; Company Rights

1. Introduction

Since the advent of China's reform and opening-up policy in 1978, foreign direct investment (hereinafter referred to as FDI) has played a critical role in shaping the country's economic transformation. For decades, foreign investors navigated three major laws: The *Sino-Foreign Equity Joint Venture Law of the People's Republic of China* (1979), the *Sino-Foreign Cooperative Joint Venture Law of the People's Republic of China* (1988), and the *Wholly Foreign-Owned Enterprise Law of the People's Republic of China* (1986) (hereinafter referred to as WFOE). These three laws governed foreign investors' rights, obligations, and market access.[2]

However, by the mid-2010s, this system has been increasingly seen as fragmented, outdated, and inconsistent with the commercial realities and legal expectations of China's global investment partners.[3] To address these concerns, the *Foreign Investment Law of the People's Republic of China* (hereinafter referred to as FIL) was adopted by the National People's Congress on March 15, 2019 and entered into force on January 1, 2020.[4] The FIL marked a significant attempt to consolidate China's FDI framework into a unified legislative structure. Its core objectives, as

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[2] The *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (adopted on July 1, 1979, repealed on January 1, 2020); the *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures* (adopted on April 13, 1988, repealed on January 1, 2020); the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprises* (adopted on April 12, 1986, repealed on January 1, 2020).

[3] See Mo Zhang, *Change of Regulatory Scheme: China's New Foreign Investment Law and Reshaped Legal Landscape*, https://escholarship.org/uc/item/5xh829ms (accessed on June 19, 2025).

[4] See the *Foreign Investment Law of the People's Republic of China* (adopted on March 15, 2019, effective on January 1, 2020).

publicly stated by Chinese authorities, were to ensure national treatment for foreign investors by simplifying regulatory procedures, enhancing legal protections, and harmonising the treatment of foreign-invested enterprises with that of domestic companies.[5]

Notably, the FIL abolished *the Foreign Invested Enterprise Laws of the People's Republic of China* (hereinafter referred to as FIE), including the previous amended WFOE Law, the primary legislation that governed foreign enterprises.[6] The Chinese Government, under the new FIL, proclaimed that foreign-invested enterprises would now be subject to the same Company Law and other general laws as their domestic counterparts.[7] The law also introduced provisions on pre-establishment national treatment and a formalised Negative List system to govern sectoral access, while pledging improved protection of intellectual property and fair government procurement practices.[8] These reforms were, on their face, aligned with international norms and appeared to signal a more liberal and equitable investment environment.[9]

Rather than fundamentally restructuring China's approach to foreign investment, the FIL appears to reflect a symbolic alignment with international standards while leaving many of the underlying institutional and administrative problems intact. Nevertheless, the law's practical effect has been far more ambiguous. The legal text of the FIL is notably abstract in many of its provisions, frequently deferring to later administrative rules or "relevant departments," as mentioned in many of the FIL's articles.[10]

Adding to this uncertainty was the timing of the law's enactment, which coincided with the onset of the COVID-19 pandemic. While this paper does not seek to analyse the economic impact of the pandemic itself, it is worth acknowledging that the timing has complicated attempts to assess the FIL's effectiveness based on foreign investment data between 2020 and 2022.[11]

This paper argues that despite the reformist rhetoric surrounding the FIL, the law has so far failed to produce meaningful improvements in the practical experience of foreign investors in China. The vague drafting of key provisions, inconsistent local enforcement, and a continuing lack of clarity have limited the law's ability to foster real investor confidence.[12] While the FIL was presented as a major step toward legal harmonisation, transparency, and equal treatment, this author is of the opinion that its practical impact has been diminished by deeper structural features of China's governance system. This is a consequence of the continued dominance of administrative discretion, legal ambiguity, and the absence of enforceable institutional guarantees.

The analysis of this paper will proceed as follows: Section 2 outlines the historical and legal context that led to the enactment of the FIL, including the

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[5] See the Ministry of Commerce, *Foreign Investment Law: Interpretation and Guidelines* (2020); National People's Congress Standing Committee*, Explanation on the Draft Foreign Investment Law*, https://www.gov.cn/xinwen/2019-03/09/content_5372190.htm (accessed on June 19, 2025).

[6] See the *Law of the People's Republic of China on Foreign-Invested Enterprises* (amended in 2016).

[7] *Supra* note 4, Article 42.

[8] *Supra* note 4, Article 4, Article15, Article 22 & Article 23.

[9] See Xianjun Feng & Chuanhui Wang, *China's Foreign Investment Law: Moving Toward Greater Liberalization?* 37(1) China & WTO Review 53, 58-59 (2021) .

[10] *Supra* note 4, Article 7, Article 19, Article 24, Article 25, Article 36 & Article 38.

[11] See the Ministry of Commerce, *2022 Report on Foreign Investment in China* (2023), https://images.mofcom.gov.cn/wzs/202301/20230104194942451.pdf (accessed on June 19, 2025).

[12] See Bottaro C., *China's Foreign Investment Law and its impact on VIE operations,* https://unitesi.unive.it/handle/20.500.14247/24657 (accessed on June 10, 2025).

limitations of the pre-2020 investment regime; Section 3 examines the main features of the FIL, including its legal innovations and institutional structure; Section 4 evaluates the challenges surrounding its implementation, focusing on ambiguity, enforcement discretion, and the impact on investor expectations; Section 5 assesses the FIL's impact on FDI flows from 2020 to 2024, including data limitations and industry trends; and finally, Section 6 discusses the deeper political and legal implications of the FIL and questions whether the law constitutes genuine reform or legalistic performance. This Paper concludes by reflecting on the FIL's future trajectory and the broader prospects for foreign investment in China's increasingly complex regulatory environment.

2. Historical and Legal Context

China's approach to FDI has been characterised by significant evolution since the launch of its reform and opening-up policy in 1978.[13] The original legal framework governing foreign investment was established through a series of three laws, collectively known as the "Three Laws" enacted between 1979 and 1988. As mentioned in Section 1, these laws consisted of the *Law on Sino-Foreign Equity Joint Ventures of the People's Republic of China* (1979), the *Law on Wholly Foreign-Owned Enterprises of the People's Republic of China* (1986), and the *Law on Sino-Foreign Cooperative Joint Ventures of the People's Republic of China* (1988).[14] Each law provided a distinct legal vehicle for foreign investors, designed to regulate their participation in the domestic economy while operating in parallel with the laws applicable to domestic Chinese companies.[15]

This system served its purpose during the early decades of China's market reform, contributing substantially to economic growth, technology transfer, and the modernisation of China's industrial base.[16] However, by the early 2010s, it had been increasingly viewed as outdated, overly rigid, and inconsistent with the demands of a maturing economy integrated into global markets.[17] The case-by-case examination and approval model embedded in the "Three Laws" were no longer aligned with international norms or with China's own ambitions to establish a more transparent, rules-based investment environment.[18]

In his book, Wei Shen situates the FIL within a decades-long transition from ad hoc approvals and fragmented "Three Laws" governance to a unified framework designed for what he calls China's "new normal" of slower growth and heightened policy risk. He argues the consolidation was not merely legal housekeeping but a recalibration of governance: replacing bilateral bargaining and case-by-case discretion with a statute that signals openness while preserving central steering capacity. This helps explain why the FIL's enactment was politically urgent even before 2019 when

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[13] See Global Times, *China's Reform and Opening-up: A Distinctive Path and Remarkable Success*, https://www.globaltimes.cn/page/202312/1303863.shtml (accessed on July 7, 2025).
[14] See the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (adopted on July 1, 1979, repealed on January 1, 2020); the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprises* (adopted on April 12, 1986, repealed on January 1, 2020); the *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures* (adopted on April 13, 1988, repealed on January 1, 2020).
[15] *Supra* note 3.
[16] See the Ministry of Commerce, *Notes to the Foreign Investment Law of the People's Republic of China (Draft for Comment)* (January 19, 2015).
[17] See Stephen Roach, *Accidental Conflict: America, China, and the Clash of False Narratives,* Yale University Press (2022).
[18] *Supra* note 16.

China needed a modernised legal banner that could coordinate agencies and reassure investors without surrendering control over sensitive sectors. Read this way, Shen argues that the FIL's origins have already foreshadowed the later tension between formal liberalisation and administrative flexibility.[19]

The Chinese government itself acknowledged these limitations in official commentary. The Ministry of Commerce (hereinafter referred to as MOFCOM) has explicitly stated that the "Three Laws" were insufficient to meet the needs of a new open economic system and were obstructive to the activation of market vitality and the transformation of government functions, which could be a detriment to China's appeal as an FDI destination.[20] The overlap and occasional conflict between the "Three Laws" and the *Company Law of the People's Republic of China (1993)* further complicated legal compliance for foreign investors.[21] In addition, the existing framework failed to comprehensively regulate critical areas such as national security review, foreign mergers and acquisitions, and investment by means of contractual control structures, including Variable Interest Entities (hereinafter referred to as VIEs).[22]

The broader political context was equally significant. Key resolutions from the Third and Fourth Plenary Sessions, held in 2013 and 2014 respectively, explicitly called for the construction of a new and open economic system, with commitments to ensure that foreign and domestic investment would be governed by a unified legal framework that was stable, transparent, and foreseeable.[23] These commitments provided the legislative impetus for replacing the "Three Laws".

Against this backdrop, MOFCOM released a draft version of the FIL for public comment in January 2015.[24] This draft proposed major structural reforms, including: abolishing the case-by-case approval system; adopting a pre-establishment national treatment plus negative list approach; formalising a national security review mechanism; introducing comprehensive provisions for investment promotion, protection, and dispute resolution.[25]

Following several rounds of public and internal governmental consultation, the FIL was passed by the National People's Congress on March 15, 2019, entering into force on January 1, 2020.[26] The FIL formally repealed the "Three Laws", consolidating the legal regime governing foreign investment under a single, unified framework. Its stated goals included expanding China's opening-up, enhancing legal protections for foreign investors, and creating a level playing field between foreign-invested enterprises and domestic entities.[27]

However, as this paper will argue, the transition from the fragmented regime of the "Three Laws" to the unified framework under the FIL has not fully alleviated the challenges historically faced by foreign investors. Despite promising language, the law's vague drafting, coupled with an ongoing reliance on local administrative

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[19] See Wei Shen, *China's Foreign Investment Law in the New Normal: Framing the Trajectory and Dynamics,* Routledge, Chapters 1-2 (2023).
[20] *Ibid.*
[21] See the *Company Law of the People's Republic of China* (2023 revision).
[22] See Nicolas Runnels, *Securing Liberalization: China's New Foreign Investment Law*, 53(1) NYU Journal of International Law and Politics 38, 43-45 (2021).
[23] See the Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform, http://iolaw.cssn.cn/yw/2014/201405/t20140529_4627796.shtml (accessed on June 2025).
[24] *Supra* note 16.
[25] *Supra* note 16.
[26] *Supra* note 4.
[27] *Supra* note 4, Article 1.

discretion, has continued to undermine confidence in the stability and predictability of China's investment environment.

3. Key Features of the FIL

The FIL represents the most comprehensive overhaul of China's foreign investment regime in forty years. On paper, the FIL aligns with global investment norms by establishing several core principles intended to offer foreign investors a level playing field with domestic enterprises, improve legal protections, and promote market access.[28] These reforms are formally reflected in four central pillars:

(1) Pre-establishment National Treatment and the Negative List system;

(2) Investment Protection mechanisms;

(3) Investment Promotion provisions; and

(4) A formal National Security Review (hereinafter referred to as NSR) mechanism**.**

Nevertheless, as discussed further in the following sub-sections, the law's vague drafting, discretionary enforcement, and reliance on administrative regulations raise significant concerns about its effectiveness in practice.

3.1 Pre-establishment National Treatment and the Negative List System

The FIL formally adopts the principle of "pre-establishment national treatment plus a negative list" as the cornerstone of market access regulation.[29] Article 4 of the FIL states that foreign investors will receive treatment "no less favourable" than domestic investors at the point of market entry, except in sectors listed in the Negative List, which enumerates industries where foreign participation is either restricted or prohibited.[30] This provides foreign investors with the same regulatory conditions as Chinese investors when entering the market, unless specific restrictions in industry are met under the Negative List.

This mechanism replaces the previous case-by-case approval process and instead shifts to a presumption of openness unless an industry appears on the Negative List.[31] While the Negative List has been periodically revised to reduce restrictions, it remains significant in sensitive sectors such as telecommunications, energy, media, and national defence.[32]

The formalisation of the Negative List system is widely regarded by legal commentators as one of the FIL's most progressive features, aligning Chinese law more closely with international standards, including those of the WTO and OECD.[33] However, the discretion afforded to regulators in defining and interpreting the list, alongside the continued lack of transparency in certain industries, continues to undermine its predictability for investors.[34]

Wei Shen presents the negative list as an instrument of "managed openness." On paper it reverses the presumption that everything is open unless it is listed, but in practice, curation of the list, coupled with downstream licensing and standards-setting,

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[28] *Supra* note 4, Article 42.
[29] *Supra* note 4, Article 4.
[30] *Supra* note 4, Article 4.
[31] See the Ministry of Commerce, *Special Administrative Measures (Negative List) for Foreign Investment Access (2021 Version)* (effective on 1 January 2022).
[32] *Ibid.*
[33] *Supra* note 9.
[34] *Supra* note 9.

lets the state channel capital toward strategic aims. He emphasises that revisions to the list are policy tools, not merely technical updates: tightening or relaxing entries can respond to industrial policy, supply-chain priorities, or security concerns. This perspective clarifies why formal national treatment may coexist with practical constraints: access hinges less on the headline principle and more on how the list and ancillary approvals are administered at any given time. It is a liberalising form embedded in a control-oriented governance logic[35].

3.2 Investment Protection Mechanisms

The FIL introduces a set of legal protections designed to safeguard foreign investments from discriminatory treatment and arbitrary government action. These provisions are aligned with China's Bilateral Investment Treaties, which indicates China's treaty commitments to foreign investor protection. Key features include:

(1) Protection against expropriation without compensation. Article 20 stipulates that foreign investments may not be expropriated except under extraordinary circumstances related to the public interest, and even then, only with "fair and reasonable" compensation.[36]

(2) Free remittance of funds. Article 21 guarantees that foreign investors may freely transfer capital, profits, royalties, and liquidation proceeds in RMB or foreign currencies, addressing a long-standing concern among investors about capital controls.[37]

(3) Intellectual property protection and prohibition of forced technology transfer. Article 22 provides that technology cooperation shall be based on voluntary principles and commercial rules, prohibiting administrative organs and officials from forcing technology transfer through regulatory means.[38] However, as Sheng Zhang notes, the actual implementation of this provision remains ambiguous due to a lack of judicial interpretation and administrative enforcement mechanisms.[39]

(4) Protection of trade secrets. Government entities are prohibited from disclosing or unlawfully providing to others any confidential information obtained from foreign-invested enterprises.[40]

(5) Government integrity obligations. Article 25 requires that local governments honour policy commitments and contracts with foreign investors. This includes an obligation to compensate for any damages caused by unilateral changes made in the public interest, a provision aimed at addressing one of the most frequent complaints raised by foreign investors.[41]

3.3 Investment Promotion Provisions

Beyond protection, the FIL also contains explicit provisions intended to promote foreign investment. Article 1 establishes the legislative purpose to expand "opening-up" and "promote foreign investment".[42] Furthermore, Articles 10 and 19 require greater transparency in regulatory procedures and improved efficiency in government

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[35] *Supra* note 19, chapter 3.
[36] *Supra* note 4, Article 20.
[37] *Supra* note 4, Article 21.
[38] *Supra* note 4, Article 22.
[39] See Sheng Zhang, *Protection of Foreign Investment in China: The Foreign Investment Law and the Changing Landscape*, 23(1) European Business Organization Law Review 1049, 1049 (2022).
[40] *Supra* note 4, Article 23.
[41] *Supra* note 4, Article 25.
[42] *Supra* note 4, Article 1.

services, while Article 9 affirms that national development policies shall apply equally to foreign-funded enterprises.[43] Among the promotional tools are: Equal access to government support measures, including subsidies, grants, and standard-setting activities;[44]improved transparency in law-making, requiring that draft laws and regulations be published for public comment and that foreign enterprises be consulted where appropriate;[45] and, a national foreign investment service system, intended to provide foreign investors with legal, regulatory, and administrative support.[46]

While these commitments are promising, critics, including Mo Zhang, note that the scarcity of detail and accessibility regarding unilateral, binding enforcement mechanisms potentially render these provisions largely aspirational in practice, often subject to local interpretation or inaction.[47] Although the FIL sets out a formal commitment to transparency, fair treatment, and equal access to policy support, it does not establish judicial or administrative remedies when these principles are violated. For example, there are no clear guidelines or recourse when there is no unilateral application of subsidies or grants. Local authorities, moreover, retain wide discretion over how and whether to implement national policy goals at the operational level, leading to inconsistent application across provinces and sectors. As Runnels argues, the absence of binding administrative procedures or appeal rights means that the promotional aspects of the FIL often depend more on political will than legal obligation.[48] Zhang similarly cautions that without institutional mechanisms to hold regulators accountable, the law's promotional language risks serving primarily a signalling function, rather than altering the substantive regulatory environment in which foreign investors operate.

3.4 National Security Review Mechanism

A particularly significant feature of the FIL is the formal incorporation of a National Security Review regime, codified in Article 35 of the law.[49] The NSR applies to any foreign investment that affects or may affect national security, with the precise scope determined by a combination of the FIL, the *National Security Law of the People's Republic of China (2015)*, and the *Measures for the Security Review of Foreign Investment (2020*).[50]

The NSR framework applies not only to mergers and acquisitions but also to greenfield investments, expanding its coverage relative to earlier systems.[51] Key industries subject to review include defence, critical infrastructure, technology, energy, and industries "relating to national security," which remains an intentionally vague term.[52]

Legal scholars such as Robin Hui Huang argue that while the NSR mechanism reflects a convergence with similar U.S. models in form, the lack of procedural transparency and definitional clarity results in a system prone to arbitrary application,

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[43] *Supra* note 4, Article 9, Article 10 & Article 19.
[44] *Supra* note 4, Article 11 & Article 16.
[45] *Supra* note 4, Article 10.
[46] *Supra* note 4, Article 19.
[47] *Supra* note 3.
[48] *Supra* note 21.
[49] *Supra* note 4, Article 35.
[50] See the *National Security Law of the People's Republic of China* (adopted on July 1, 2015); the *Measures for the Security Review of Foreign Investment* (effective on January 18, 2021).
[51] *Ibid.*
[52] See Huang Robin Hui, *China's National Security Review of Foreign Investment: A Comparison with the United States*, 56(1) Vanderbilt Journal of Transnational Law 1261, 1271-1275 (2023).

further undermining foreign investor confidence.[53] Huang notes that, unlike its counterparts in other jurisdictions, China's NSR regime offers no formalised timeline, no clear procedural stages, and no published decisions or justifications. Huang details that the criteria for determining what constitutes a threat to national security remain vague and capacious, granting regulators wide latitude to restrict investments based on shifting political or strategic priorities. The fact that decisions rendered through the NSR process are final and not subject to administrative or judicial review, as stipulated in Article 35 of the FIL, exacerbates this uncertainty.[54] This opacity, Huang contends, not only discourages investment in traditionally sensitive sectors such as defence or telecommunications, but also extends to emerging industries like data services, healthcare technology, and artificial intelligence, where the boundaries of "national security" are undefined. As a result, foreign investors face significant legal and political risk, often without clear guidance on whether a transaction will trigger review, or how to comply proactively. This risk-aversion, in turn, diminishes the effectiveness of the FIL's broader liberalisation goals, as even legally permissible investments may be deterred by the unpredictability of NSR enforcement.

Wei Shen frames the national security review as both a security screen and a selective market-access lever. Beyond traditional defence industries, he notes its reach into data infrastructure, advanced manufacturing and platform-adjacent services, domains where "security" overlaps with industrial strategy. Crucially, he highlights the opacity of scope, thresholds and outcomes: the administrative design preserves discretion, while the absence of publicised decisions limits precedent and investor learning. In combination with the negative list, NSR becomes a gatekeeping layer that can condition, delay or reshape deals without wholesale prohibitions. This helps explain why investors face prediction problems even when transactions appear compliant with the letter of the FIL[55].

3.5 Implementation Regulations and Legal Ambiguity

The FIL is supplemented by the *Regulations on the Implementation of the Foreign Investment Law (2020)* (Hereinafter refer to as "*FIL Implementation Regulations*") issued by the State Council, which provide(s) procedural details regarding aspects such as reporting obligations, compliance mechanisms, and dispute resolution procedures.[56] However, several key issues remain unresolved, including:

(1) The treatment of VIEs, which are not mentioned in the FIL but, according to legal scholars such as Zhang, VIEs continue to operate in a legal grey area.[57]

(2) Persistent uncertainty surrounding the exact scope of "national security", with significant reliance on administrative discretion rather than judicial oversight.[58]

(3) Gaps between central-level policies and local-level enforcement, which continue to generate inconsistency in how the FIL is applied across different provinces and sectors.[59]

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[53] *Ibid* .
[54] *Supra* note 4, Article 35.
[55] *Supra* note 19.
[56] See the *Regulations for Implementing the Foreign Investment Law of the* People's Republic of China (effective January 1, 2020).
[57] *Supra* note 3.
[58] *Supra* note 52.
[59] See Sheng Zhang, *Protection of Foreign Investment in China: The Foreign Investment Law and the Changing Landscape*, 23(1) European Business Organization Law Review 1049, 1049 (2022); Nicolas Runnels, *Securing Liberalization: China's New Foreign Investment Law*, 53(1) NYU Journal of International Law and Politics 38, 43-45 (2021).

4. Implementation Challenges

Despite the FIL offering a significant legislative overhaul of China's foreign investment framework, its implementation has revealed serious limitations.[60] These challenges continue to undermine foreign investor confidence, casting doubt on whether the law can achieve its stated aim of providing a stable, transparent, and predictable investment environment. Three primary issues dominate academic and practical critiques: Vague statutory drafting; inconsistent and opaque enforcement; and a National Security Review mechanism that introduces significant legal uncertainty.

For Wei Shen, implementation frictions are not transient glitches but products of institutional design. Central policy signals (openness, equal treatment) operate alongside local execution where incentives vary. There could be fiscal pressures, industrial upgrading goals, and other local evaluation benchmarks and performance metrics. He argues this centre–local dynamic generates patterned inconsistency: provinces compete for projects yet protect incumbents; agencies coordinate nationally but prioritise sectoral mandates. Without strong, reviewable procedures or justiciable rights, the FIL's promotional and protective clauses struggle to discipline discretion. Shen's account thus complements doctrinal critiques by locating uncertainty in the political economy of enforcement, not only in statutory drafting[61].

4.1 Vague Language and Legal Ambiguity

The FIL's drafting relies heavily on broad, undefined language, particularly in areas central to investment governance. When implemented, the FIL caused doubt in foreign investors as it did not clearly define such key terms or procedures.[62] Furthermore, the absence of judicial or administrative precedents interpreting these clauses has left considerable uncertainty as to their enforceability.[63] The implementation process has revealed persistent issues in China's regulatory environment. Chief among them, decentralised enforcement, opaque approval processes, and significant local discretion.[64] These structural features have made it difficult for foreign investors to gauge the true extent of their legal protections or to anticipate the administrative barriers they may encounter in practice.

For example, Article 4 of the FIL, discussed in Section 3.1, establishes the "pre-establishment national treatment plus negative list" model but offers no procedural clarity regarding how the negative list is updated, applied, or challenged.[65] Furthermore, Article 2 defines foreign investment in broad terms but leaves ambiguous the status of indirect investments and corporate structures like VIEs.[66] The absence of any mention of VIEs in either the FIL or its Implementation Regulations is a conspicuous omission, especially considering how heavily foreign investors rely on such structures to access restricted sectors.[67]

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[60] See the China's Foreign Investment Law - A Look Back and Ahead (Debevoise), https://www.debevoise.com/insights/publications/2025/03/chinas-foreign-investment-law-a-look-back-and (accessed on July 1, 2025).
[61] *Supra* note 19.
[62] *Supra* note 19.
[63] *Supra* note 3.
[64] *Supra* note 22.
[65] *Supra* note 4, Article 4.
[66] *Supra* note 4, Article 2.
[67] *Supra* note 56.

Mo Zhang, one of the most widely cited scholars on this topic, concludes that the FIL represents a symbolic legislative shift rather than a substantive one**,** given the continued reliance on administrative discretion to fill critical legal gaps. Zhang highlights that the failure to define indirect investment or clarify the legal standing of VIE structures leaves foreign investors operating in a grey zone without reliable judicial protection or regulatory certainty.[68] Sheng Zhang similarly observes that, despite the FIL's reformist language, its drafting fails to constrain local discretion or provide concrete interpretive guidance, particularly concerning investment restrictions under the negative list or the mechanics of the national treatment regime. This intentional vagueness, Zhang argues, is not merely a drafting flaw but a feature that preserves maximum state flexibility at the expense of investor certainty.[69]

4.2 Inconsistent and Opaque Enforcement

Even where the FIL articulates clear principles, such as in Article 20 (protection against expropriation) and Article 22 (prohibition of forced technology transfer), the actual enforcement of these provisions remains highly discretionary.[70] The *FIL Implementation Regulations* offer further procedural detail. For example, Article 21 mandates that compensation for expropriation must be based on market value, and Articles 23-24 reinforce the prohibition against administrative coercion of technology transfers.[71] However, these regulations function more as administrative guidance than as enforceable legal guarantees.

This decentralisation leads to widely varying experiences for foreign investors depending on the region and industry in question. Nicolas Runnels argues that the lack of transparency in administrative rule-making, coupled with the absence of binding judicial review, renders the practical enforcement of the FIL inconsistent and unpredictable.[72] In particular, while the central government's rhetoric stresses openness, local officials retain significant discretion to approve, delay, or deny investments based on political, economic, or even informal considerations.

Even the MOFCOM 2023 & the MOFCOM 2024 Reports on Foreign Investment, while extolling the reduction of negative list items and procedural reforms, acknowledges a decline in actual foreign investment in key sectors, particularly technology and services. This suggests that legal reforms have not translated into practical improvements in investor confidence.[73] Other, non-governmental reports, add further weight to the decline in FDI.[74]

4.3 National Security Review: An Expansive Barrier

The most significant structural barrier to the FIL's effective implementation is the National Security Review framework. Codified in Article 35 of the FIL and expanded under Article 40 of the *FIL Implementation Regulations*, the NSR allows the state to prohibit or impose conditions on any foreign investment that affects or may affect

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[68] *Supra* note 3.
[69] *Supra* note 39.
[70] *Supra* note 4, Article 20 and Article 22.
[71] *Supra* note 56, Article 21, Article 23, Article 24, Article 39 and Article 40.
[72] *Supra* note 22.
[73] See the Ministry of Commerce, *2023 Report on Foreign Investment in China* (2023) & *2024 Report on Foreign Investment in China (2024).*
[74] See ASEAN+3 Macroeconomic Research Office, *FDI Monitor: Foreign Investment in China: Navigating a Challenging Landscape* (April 2024), *https://www.amro-asia.org/fdi-monitor-foreign-investment-in-china-navigating-a-challenging-landscape/* (accessed on June 23, 2025).

national security. [75] This applies broadly, covering not only mergers and acquisitions but also to greenfield investments, a scope that far exceeds comparable regimes in other jurisdictions. Robin Hui Huang, in his comparative study of China's NSR and the U.S. Committee on Foreign Investment (hereinafter referred to as CFIUS), concludes that China's system is characterised by a kind of radical intricacy. Unlike CFIUS, which operates under published procedures and offers some degree of administrative transparency, China's NSR process is non-transparent, non-appealable, and heavily discretionary. Huang observes that this has become a functional barrier to entry in sensitive sectors, with investors deterred not only by the possibility of rejection but also by the impossibility of predicting whether a transaction falls within the scope of national security.[76]

Runnels similarly warns that the vagueness of the NSR system enables selective enforcement, with foreign investments in sectors as broad as biotechnology, data infrastructure, education, and financial services now subject to review. The NSR thus serves not only as a legitimate tool for safeguarding security but also as a flexible mechanism for regulating market access based on political priorities rather than clear legal standards.[77]

4.4 Summary

In sum, while the FIL and its Implementation Regulations represent significant formal progress toward liberalising China's foreign investment framework, their implementation is fundamentally compromised by persistent legal ambiguity, inconsistent enforcement, and an expansive, opaque national security review mechanism. These shortcomings have prevented the FIL from achieving its stated goal of fostering a genuinely transparent and stable legal environment for foreign investment. More fundamentally, the challenges encountered in implementing the law reflect structural restrictions inherent in China's system of governance. Legal reforms, no matter how well-crafted in form, remain subordinate to political discretion and bureaucratic control. In the absence of independent judicial oversight, binding administrative procedure, or mechanisms to ensure uniform application, the FIL operates within a system that resists constraint by law. As such, its imperfections are not merely technical, but symptomatic of a broader rigidity within China's regulatory state, which is one that prioritises flexibility and control over predictability and legal certainty.

5. Assessment of the FIL's Impact (2020 – 2024)

The FIL came into force on January 1, 2020, just weeks before the COVID-19 Pandemic severely disrupted global markets. Although this coincidence complicates efforts to measure the FIL's effect in isolation, the years of post-implementation experience now allow for a provisional assessment. Drawing on government data, legal commentary, and academic critique, this section argues that the FIL has not delivered measurable improvements in investor confidence, legal certainty, or FDI inflows**,** largely due to persistent structural and procedural deficiencies.[78] Runnels

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[75] See *the Foreign Investment Law of the People's Republic of China* (adopted on March 15, 2019, effective on January 1, 2020), Article 35; the *Regulations for Implementing the Foreign Investment Law of the* People's Republic of China (effective January 1, 2020), Article 40.
[76] *Supra* note 52.
[77] *Supra* note 22.
[78] See Jing Fang, Alan Collins & Shujie Yao, *On the Global COVID-19 Pandemic and China's FDI*, 74(1) Journal of Asian Economics 101300, 101300 (2021).

notes in his conclusion that China's adoption of the FIL is uncompromised despite the pandemic running concurrently to its enactment.[79] In his view, the legislation proceeded on the basis of long-standing internal policy goals rather than in reaction to short-term global events, reinforcing the point that any shortcomings in the FIL's implementation are primarily endogenous. That is, the law's limited effect is not the result of pandemic-era volatility, but rather a reflection of the structural and institutional constraints that characterise China's regulatory system. These include an absence of legal remedies, decentralised and inconsistent enforcement, and the prioritisation of administrative flexibility over legal predictability. These are all factors that continue to restrict the law's capacity to meaningfully liberalise the investment environment.

Wei Shen's "new normal" frame, such as slower growth, securitisation of policy, and regulatory competition, helps interpret post-2020 FDI patterns: headline openings coexisted with escalating governance risks. He shows how list refinements, NSR practice, and parallel regimes (standards, data, sanctions-response) affected investment calculus in high-tech and services, encouraging smaller, modular entries over large, irreversible bets. In this reading, the FIL's limited impact on confidence is not an anomaly but an outcome of a policy mix prioritising resilience and control over scale. The result is a divergence between formal access and capital commitment that data since 2020 broadly reflect. Shen reads the FIL as part of a strategic adjustment: legal form aligns with international templates (national treatment, negative list, IP language), while instruments preserve discretionary capacity (list governance, NSR, industrial policy). He stresses that in a politically centralised system, statutes organise and signal, but do not necessarily constrain administrative choice in sensitive domains. This duality of law as coordination plus control explains the gap between the FIL's symbolism and its practical bite. It also clarifies why confidence hinges on institutional guarantees (reviewability, transparency) that remain limited by design[80].

5.1 Foreign Direct Investment Trends: a Downward Trend

China's official investment statistics highlight a troubling disconnect between the FIL's stated objectives and its market impact. According to the MOFCOM 2023 Report and its 2024 counterpart, China recorded its weakest years for inbound FDI since the global financial crisis, with pronounced contractions in high-tech and service sectors.[81] Although the total number of foreign-invested enterprises did not collapse, the value and scale of new projects dropped significantly.[82]

This trend is not unique to China, but legal scholars view it as a signal that the FIL's reforms have not sufficiently offset investor anxiety. As Feng and Wang note, the legal formalism of the FIL may appear impressive, but market players continue to experience a high degree of uncertainty when navigating approvals, particularly in sectors subject to indirect political oversight.[83]

Zhang Mo draws a conclusion in that the FIL has so far failed to reverse stagnation in FDI because it lacks substantive enforcement guarantees and retains too much room for discretionary administrative control.[84] In other words, investors see the law as rhetorical rather than transformative.

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[79] *Supra* note 22.
[80] *Supra* note 19, Chapter 12.
[81] *Supra* note 73.
[82] *Supra* note 73.
[83] *Supra* note 9.
[84] *Supra* note 3.

5.2 Liberalisation in Form, not Substance

One of the FIL's key selling points was its adoption of a Negative List model, shifting China's investment regime from a discretionary approval model to a presumptive liberalisation framework. However, actual access conditions remain highly regulated. Although the Negative List has been shortened over time, the criteria and process for revision remain opaque, and many sectors, especially those involving data governance, media, and technology, remain restricted without clear justification or appeal procedures.[85]

Sheng Zhang argues that while the shift to a national treatment model was a major structural step, it has been undercut by limited judicial review, no administrative remedy for rejected investments, and continued dominance of informal regulatory discretion.[86] The absence of detailed interpretive guidance or binding precedents leaves investors uncertain whether legal rights will be upheld in practice.

This sentiment is echoed by Clara Bottaro, who observes that the FIL's introduction was followed by a shift in client strategy rather than confidence. According to her thesis, foreign investors have not expanded their presence in China as expected post-FIL but have instead restructured operations to limit exposure or rely on holding entities to insulate risk.[87] This paper has argued that while the FIL represents a significant legislative development, it ultimately fails to deliver the liberalising effect that its drafters intended. Rather than transforming the regulatory environment for foreign investors in China, the FIL has been subdued by the deeper structural features of China's political and administrative system. This is most evident in the persistence of discretionary enforcement, legal ambiguity, and the absence of binding remedies.

These limitations are not incidental but systemic, reflecting the enduring dominance of administrative authority over legal predictability in China's investment governance.

The argument of this paper supports the conclusion that the FIL's shortcomings are not merely the result of technical gaps or poor timing but are symptomatic of a broader legal and political environment in which laws often serve declaratory purposes, rather than acting as enforceable legal restrictions on administrative power. Until China undertakes deeper institutional reforms to address these systemic issues, such as expanding judicial review, standardising regulatory implementation, and ensuring transparency, the FIL will continue to function more as an expression of intent than a driver of change.

5.3 Legal Certainty and the Limits of Protection

Although the FIL includes protections against expropriation (Article 20) and forced technology transfer (Article 22), enforcement remains discretionary and investor remedies are limited.[88] The *FIL Implementation Regulations* add procedural detail – for example, requiring market-based compensation for expropriation and

[85] See *China's New Negative List for Foreign Direct Investment* (adopted on January 11, 2022), https://www.wilmerhale.com/en/insights/client-alerts/20220111-chinas-new-negative-list-for-foreign-direct-investment (accessed on July 3, 2025).
[86] *Supra* note 39.
[87] *Supra* note 12.
[88] *Supra* note 4, Article 20 & Article 22.

confirming voluntary principles for technology cooperation – but do not provide enforceable judicial remedies.[89]

Runnels highlights the risk this poses, in that investors operate in a legal environment where rights exist on paper, but enforcement depends on opaque administrative decisions that lack procedural safeguards or judicial oversight.[90] This undermines both the credibility of the FIL and the incentive for long-term capital commitment.

Robin Hui Huang offers a similar conclusion in his comparison of China's national security review with that of the United States. He argues that China's approach is not only broader in scope but also marked by radical opacity and non-reviewability, which serves as a functional barrier to entry in politically sensitive sectors.[91]

These concerns reflect this paper's broader position in that the effectiveness of the FIL is fundamentally limited not by the absence of protective language, but by the lack of institutional mechanisms to guarantee its application. Legal rights without enforceable remedies offer little assurance in a system where administrative discretion prevails. As the views of Runnels and Huang suggest, the gap between formal legal commitments and their practical enforcement further represents a regulatory environment that prioritises flexibility over any rule-based governance. In this Author's opinion, this severely limits the FIL's capacity to attract stable, long-term foreign investment.

5.4 Policy Timing vs. Legal Effectiveness

The coincidence of the FIL's enactment with the COVID-19 Pandemic complicates any assessment of its immediate market impact. Foreign investment declined in 2020–2021 across most economies, including China. However, as China emerged from pandemic-related restrictions, FDI did not recover at a pace consistent with the government's liberalisation narrative. The MOFCOM 2023 report concedes this indirectly, noting significant declines in reinvestment rates and high-value FDI, particularly in sectors that should have benefited from regulatory easing.[92]

As Feng and Wang point out, this disjunction suggests that systemic legal uncertainty, not pandemic effects, now dominates foreign investment.[93]

5.5 Summary

Despite its legislative ambitions, the FIL has not produced a noticeable improvement in China's investment climate. While some reforms, particularly the repeal of the "Three Laws" and the adoption of a national treatment model, were significant, they remain undermined by regulatory ambiguity, discretionary enforcement, and unresolved structural constraints. The result is a law that signals reform but does not substantively transform the investment experience for most foreign enterprises.

Unless the government accompanies the FIL with stronger procedural protections, clearer judicial interpretation, and binding administrative standards, investor caution

[89] *Supra* note 56, Article 21, Article 23 and Article 24.
[90] *Supra* note 22.
[91] *Supra* note 52.
[92] *Supra* note 73.
[93] *Supra* note 9.

is likely to persist. This is especially true in strategic or politically sensitive sectors where access remains difficult and rights unpredictable.

6. Conclusion

The Foreign Investment Law was enacted to modernise China's legal framework for foreign investment by unifying legislation, improving transparency, and aligning with international legal standards. Its adoption marked a formal departure from the fragmented regime governed by the "Three Laws" and introduced principles such as national treatment, the Negative List, and investment protections that mirrored global norms. On paper, the FIL reflects a significant evolution in China's approach to foreign investment regulation.

However, as this paper has shown, the law's impact has been muted by several enduring limitations. Vague statutory drafting, a lack of national interpretive clarity, and highly discretionary enforcement mechanisms have undermined the FIL's ability to inspire confidence or deliver substantive improvements in the investment environment. The NSR system, in particular, remains expansive and opaque.

Despite the government's narrative of openness and reform, foreign direct investment has declined, especially in sectors that were intended to benefit from liberalisation. The continued reliance on local administrative discretion, and the limited transparency of the approval and review process all contribute to an environment in which legal guarantees cannot be meaningfully enforced on a national level.

The broader implications of the FIL lie in its function as a legal and political signal rather than a transformative regulatory shift. While it has consolidated existing policies into a coherent legislative framework, it has not substantively altered the balance of power between the state and foreign investors. The law exemplifies the limits of formal legal reform in a system where administrative flexibility is prioritised over any rule-based governance. Until this system evolves in line with global FDI, the law will continue to represent the promise of liberalisation more than its reality.

Organised Interests and the Neoliberal Turn: Assessing the Role of Organizations and Political Interests in Moving Mainstream Left Parties Toward Free Market Policies

Harpreet Chohan[1]

Abstract: This paper examines why Western mainstream left parties embraced neoliberalism and free-market economic policies in the late 20th century. Existing literature often attributes this shift to the rising affluence of the median voter and the need for parties to adapt to changing economic conditions. While influential, this explanation is incomplete. Drawing on Hacker and Pierson's concept of "politics by organised interests", this paper argues that the neoliberal turn was primarily driven by changing relationships between mainstream left parties and their affiliated organizations and political constituencies. A historical single-case analysis of the American Democratic Party illustrates this dynamic. In the mid-20th century, the party relied heavily on labor unions and social justice groups, which wielded significant influence over its policy agenda, pushing it toward social democratic policies. From the 1970s onward, the declining electoral leverage of these groups reduced their influence, while the Democrats increasingly sought support from wealthy investors and business interests. This realignment pushed the party toward free-market economic policies that reflected the priorities of its new allies. These findings illuminate similar processes in other Western mainstream left parties and provide insight into their responses to the Great Recession and their electoral challenges in the 2010s. By foregrounding the role of organized interests, this paper offers a more robust explanation for the neoliberal drift of mainstream left parties than median-voter theories alone.

Keywords: Democratic Party; Labor Unions; Politics by Organized Interests; Neoliberalism; Americans for Democratic Action; Democratic Leadership Conference

1. Introduction

Western, mainstream left-wing political parties in 2000 were markedly different in policy stances compared to their positions in 1960. In 1960, these parties were committed to Keynesian economics and the expansion of the welfare state. Their policy goals focused on strengthening labor power, creating and bolstering social programs, and, in some cases, pursuing the nationalization of key industries. By 2000, however, these parties had shifted direction. They distanced themselves from labor unions and embraced the superiority of the free market. Using their political power, they cut back on the welfare state, promoted free trade, and deregulated various sectors of the economy.[2]

The rightward drift of mainstream left parties in the late 20th century is well-documented, with an extensive body of literature dedicated to this transformation. In the mid-20th century, these parties were deeply social democratic, adhered to Keynesian economic principles, and maintained close ties with labor unions. From the

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[2] See Stephanie L. Mudge, *Leftism Reinvented: Western Parties from Socialism to Neoliberalism*, Harvard University Press (2018); Eunice Goés, *Social Democracy*, Agenda Publishing (2024).

1970s to 2000, however, these parties gradually embraced neoliberal capitalism, supporting free-market policies and reducing the role of the state in economic affairs.[3]

Existing literature often attributes this ideological shift to median voter theory. In contrast to the predictions of Meltzer and Richard (1981), many scholars argue that the electorate, in fact, became wealthier over time. During the late 20th century, industrialized countries saw a shift in the workforce from low-paying manufacturing jobs to higher-paying white-collar occupations. As a result, the economic status of the median voter rose, and with it, their priorities. Increased prosperity led the median voter to place less emphasis on redistribution, the nationalization of industries, and labor rights. Consequently, mainstream left parties had to adapt, jettisoning their traditional stances in favor of policies such as tax cuts, free trade, and other market-oriented measures to align with the preferences of this changing electorate.[4]

The emphasis placed by these authors on median voter theory as an explanatory framework is problematic for several reasons. First, the assumption that the median voter became economically better off is questionable. From 1980 to 2010, the average annual growth rate in Organisation for Economic Co-operation and Development (OECD for short) countries was just 2 percent, half the rate observed between 1950 and 1980.[5] Real wages for median earners largely stagnated after the 1970s, and in the United States — the most significant Western economy — real hourly wages actually declined.[6] At the same time, the cost of essential goods and services such as housing and childcare increased dramatically (Burns *et al*. 2021; Ruppanner *et al*. 2019; Fazal *et al.* 2022).[7]

Second, the theory presupposes that the median voter is politically attentive and informed about party platforms and policy positions. However, political science research consistently shows that the general public tends to be poorly informed. Across Western democracies, large segments of the electorate are unable to name their political representatives or identify the parties they belong to.[8] Voters often struggle to understand public policy and to connect it to overarching concerns such as

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[3] *Ibid.*

[4] See Allan H. Meltzer & Scott F. Richard, *A Rational Theory of the Size of Government*, 89(5) Journal of Political Economy 914, 914-927 (1981); Herbert Kitschelt, *Social Democracy in Decline? Analytical and Normative Extensions of the Argument,* in *The Transformation of European Social Democracy*, Cambridge University Press, pp. 280-302 (1994); Jonas Pontusson, *The Limits of Social Democracy: Investment Politics in Sweden*, Cornell University Press (1995); Jane Gingrich & Silja Häusermann, *The Decline of the Working-Class Vote, the Reconfiguration of the Welfare Support Coalition and Consequences for the Welfare State*, 25(1) Journal of European Social Policy 50, 50-75 (2015); *Supra* note 2.

[5] See David Harvey, *A Brief History of Neoliberalism*, Oxford University Press (2005).

[6] See Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83(2) American Sociological Review 213, 213-242 (2018); Michael Greenstone & Adam Looney, *The Great Recession May Be Over, but American Families Are Working Harder than Ever*, https://www.brookings.edu/articles/the-great-recession-may-be-over-but-american-families-are-working-harder-than-ever/ (accessed on March 13, 2024).

[7] See Suzanne Perea Burns, Rochelle Mendonca & Noralyn Davel Pickens *et al.*, *America's Housing Affordability Crisis: Perpetuating Disparities among People with Disability*, 36(1) Disability & Society 1, 1-19 (2021); Leah Ruppanner, Stephanie Moller, and Liana Sayer, *Expensive Childcare and Short School Days = Lower Maternal Employment and More Time in Childcare? Evidence from the American Time Use Survey*, 5(1) Socius 1, 1-14 (2019); Faizan Fazal, Tayyaba Saleem & Mohammad Ebad Ur Rehman *et al.*, *The Rising Cost of Healthcare and Its Contribution to the Worsening Disease Burden in Developing Countries*, 82(3) Annals of Medicine and Surgery 1, 1 (2022).

[8] See Phil Cowley, *Almost 70% of People Know the Name of Their MP*, https: //www. britishelectionstudy.com/bes-findings/almost-70-of-people-know-the-name-of-their-mp-by-professor-phil-cowley-university-of-nottingham/ (accessed on December 1, 2025).

inequality.[9] Rather than voting based on policy preferences, many make decisions based on name recognition and are heavily influenced by organized interest groups, peers, and media narratives.[10]

Third, these accounts assume that politicians and parties are primarily focused on the preferences of the median voter. In practice, however, political actors must also respond to a range of other constituencies, including donors, activists, and organized interests. The need to satisfy these groups often limits the extent to which median voter preferences shape political agendas.[11] Gilens and Page's (2014) influential study underscores this point, demonstrating that average citizens' policy preferences have minimal impact on policy outcomes in the United States, where enacted policies tend to reflect the interests of lobbyists and affluent donors instead.

There certainly is value in median voter theory. However, on its own it is an incomplete explanation for why mainstream left parties drifted rightward. This paper seeks to supplement this framework and provide an account for this drift using the "politics by organised interests" approach.[12] This approach suggests parties ought to be viewed not necessarily as outlets for voter expression, but that of organised groups. Political organisations fundraise, mobilise support for elections, lobby officials, and even craft policies. The work done by these organisations influences and shapes the policy stances of political parties. When parties change their stances, it is the result of changes in these organisations' abilities in carrying out such work and/or changes in their interests.[13]

This paper argues that, using the "politics by organised interests" approach, changes in political organizations pushed mainstream left parties to the right in the late 20th century. From the 1970s onward, unions and social justice organizations that once pushed these parties to the left declined in power and became increasingly ineffective. As their ability to support the parties weakened, their influence diminished. In response, wealthy investors and business groups stepped in to fill the void. In exchange for their support, mainstream left parties adjusted their policies to accommodate the interests of these groups, increasingly embracing free-market policies.

To support this argument, this paper provides a single-case historical analysis of the American Democratic Party and the groups it has been closely associated with from the mid-20th century to the 2000s. The analysis begins by examining how trade unions and social justice organizations supported and influenced the Democratic Party

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[9] See Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3(1) Perspectives on Politics 15, 15-31 (2005).

[10] See Jacob Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38(2) Politics & Society 152, 152-204 (2010); Cindy D. Kam & Elizabeth J. Zechmeister, *Name Recognition and Candidate Support*, 57(4) American Journal of Political Science 971, 971-986 (2013); Jonathan Mahler & Jim Rutenberg, *How Rupert Murdoch's Empire of Influence Remade the World*, https: //www. nytimes. com/interactive/2019/04/03/magazine/rupert-murdoch-fox-news-trump. html (accessed on December 1, 2025).

[11] See Alexander Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation*, Oxford University Press (2019); Thomas Ferguson, *Seduced and Abandoned: Rational Expectations, the Investment Theory of Political Parties, and the Myth of the Median Voter*, 14(1) American Review of Politics 497, 497-532 (1994); *Supra* note 10.

[12] *Ibid.*

[13] *Supra* note 10; See Christopher Witko, *Still So Happy Together? The Relationship between Labor Unions and the Democratic Party, in Left-of-Centre Parties and Trade Unions in the Twenty-First Century*, Oxford University Press (2017).

in the mid-20th century. It traces the changes within these groups and the decline of their influence over the Democrats. The paper then explores the rising influence of wealthy investors and business groups on the Democratic Party. The analysis concludes with a discussion of Democratic Party politics in the 1990s and 2000s, focusing on the significant role of wealthy, pro-market interests.

Selecting the American Democratic Party for this analysis is not without its challenges. The Democrats are not a typical Western mainstream left party. Their origins are not rooted in Marxism, they have historically maintained a strong affinity for business and free market principles, and their ties to trade unions and left-wing groups have been weaker than those of parties such as the British Labour Party or the Swedish Sveriges socialdemokratiska arbetareparti.[14] These differences complicate attempts to generalize findings to other mainstream left parties.

Despite these challenges, the Democrats were selected because their case illustrates how elite realignment shaped the trajectory of globalization as a policy outcome. Beginning in the 1970s, capital and goods became increasingly mobile internationally, particularly in countries that integrated into trading and single market blocs such as the European Union. Although globalization is often treated as an external pressure that constrains left-wing parties, in the case of the United States it can be understood as the product of political decisions made by business-aligned elites. The Democratic Party's policies, influenced by financial and corporate interests, both accommodated and encouraged the expansion of global capital mobility, thereby shaping the form and pace of globalization itself.[15]

The role of globalization in influencing European left-wing parties remains debated, but the American Democrats reveal a more direct relationship between elite realignment and globalization outcomes.[16] Rather than being compelled into globalization by external constraints, the Democrats were important agents in its advancement. The large size and productivity of the United States economy strengthened the influence of Democratic elites, enabling them to promote international economic integration without the vulnerabilities faced by weaker European economies.[17] Policies adopted or supported by Democratic administrations, including trade liberalization and financial market openness, helped globalize the economy in ways that aligned with the preferences of business and financial interests.[18]

Additionally, the choice of the American Democratic Party is supported by the extensive literature documenting its rightward shift, its relationships with labor unions, social justice organizations, and business interests, and its influence on major policy outcomes. This rich body of scholarship allows for a more comprehensive account of

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[14] *Supra* note 13; *Supra* note 2; *Supra* note 2.

[15] See Jonathan Hopkin & Mark Blyth, *The Global Economics of European Populism: Growth Regimes and Party System Change in Europe (The Government and Opposition/Leonard Schapiro Lecture 2017)*, 54(2) Government and Opposition 21, 21 (2019).

[16] *Supra* note 2, at pp. 81-83 (2024).

[17] See Jonathan Hopkin, *Anti-System Politics: The Crisis of Market Liberalism in Rich Democracies*, Oxford University Press (2020); *Supra* note 2.

[18] *Supra* note 17; See Pepper Culpepper & Raphael Reinke, *Structural Power and Bank Bailouts in the United Kingdom and the United States*, 42(4) Political & Society 427, 427-454 (2014); Jonathan Hopkin & Mark Blyth, *The Global Economics of European Populism: Growth Regimes and Party System Change in Europe (The Government and Opposition/Leonard Schapiro Lecture 2017)*, 54(2) Government and Opposition 1,1 (2018); Marion Fourcade-Gourinchas & Sarah L. Babb, *The Rebirth of the Liberal Creed: Paths to Neoliberalism in Four Countries*, 108(3) American Journal of Sociology 533, 533-579 (2002).

how elite realignment produced globalization in the United States than would be possible with a focus on many of its European counterparts.

2. The Party of the New Deal

Starting in the 1930s, the Democratic Party developed a close alliance with labor unions.[19] This relationship offered significant advantages to both.[20] For the Democrats, unions offered a large, electorally valuable constituency. By the mid-20th century, over a third of American workers were unionised. In key states such as Michigan and New York, unionisation rates reached as high as 45 percent.[21]

The significant size and geographic spread of union members made them a crucial demographic electorally. The alliance with unions gave the Democrats a distinct advantage in mobilizing this group. Union leaders and organizers leveraged their networks to rally members in support of Democratic candidates during elections.[22] They also provided Democratic politicians with opportunities to engage directly with unionized voters, inviting them to speak at union events. Additionally, unions coordinated efforts with party workers to target union households with canvassing, mail, and phone calls, encouraging them to vote Democratic.[23]

This access to union members proved advantageous in the mid-20th century. Democrats consistently secured the union vote by large margins at all levels of government, solidifying their position as the dominant party in the country.[24] Between 1932 and 1964, Democrats won over 60 percent of the union vote in seven out of nine presidential elections, securing victory in all seven.[25]

Beyond providing votes, unions also offered substantial organizational support to the Democratic Party. Paid organizers and volunteer union members canvassed, phone-banked, and sent mail to the public, urging them to vote Democratic. Unions encouraged their members to volunteer directly for political campaigns, leading to large contingents of union volunteers in Democratic efforts.[26] The organizational work performed by unions was extensive and often regarded as the backbone of the Democratic Party's political campaigns, contributing significantly to the party's successes during this period.[27]

Furthermore, unions provided significant financial support to the Democratic Party. With their large memberships, unions accumulated substantial funds, much of which were used to support Democratic campaigns. From the 1930s to the 1970s, unions were the primary source of funding for the party.[28] Unions also encouraged

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[19] *Supra* note 2; See Ed Burmila, *Chaotic Neutral: How the Democrats Lost Their Soul in the Center*, Bold Type Books (2022).
[20] *Supra* note 13.
[21] See Dianne Kantz, *The Decline of the American Labor Union – GIS Reports*, https: //www. gisreportsonline. com/r/decline-american-union/ (accessed on April 28, 2023); Barry T. Hirsch, David A. MacPherson & Wayne G. Vroman, *Estimates of Union Density by State*, 124(7) Electronic Journal 51, 51-55 (2001).
[22] *Supra* note 17; *Supra* note 2; *Supra* note 13.
[23] *Supra* note 13.
[24] *Supra* note 13; See Martin Halpern, *Jimmy Carter and the UAW: Failure of an Alliance*, 26(3) Presidential Studies Quarterly 755, 755-777 (1996); Taylor E. Dark, *The Unions and the Democrats: An Enduring Alliance, 2nd ed.*, Cornell University Press, p. 1 (1999).
[25] See Gallup, *Election Polls — Vote by Groups*, https: //web. archive. org/web/20110726155334/http: //www. gallup. com/poll/9454/Election-Polls-Vote-Groups-19601964. aspx (accessed on July 26, 2011).
[26] *Supra* note 13; *Supra* note 2.
[27] See Jefferson Cowie, *Stayin' Alive: The 1970s and the Last Days of the Working Class*, New Press (2010); *Supra* note 19.
[28] *Supra* note 13.

their members to make independent donations to campaigns and Democratic-aligned Political Action Committees (hereinafter referred to as the PACs). For instance, in the 1940s, the Congress of Industrial Organizations (hereinafter referred to as CIO) consistently raised over a million dollars per presidential cycle through small contributions from CIO members. These funds were particularly instrumental in supporting the presidential campaigns of Franklin Roosevelt and Harry Truman.[29]

In return for their support, unions gained considerable influence within the Democratic Party. Union leaders were frequently consulted by Democratic officials on policy matters and the direction of the party.[30] They were granted influential roles in selecting Democratic candidates, becoming a major voting bloc at *the Democratic National Convention*, which granted them significant sway over the party's presidential nominees at a time when conventions alone determined nominations.[31] Their influence also extended to state and local Democratic parties, where unions played a key role in selecting nominees for Congress and local offices.[32]

This influence, coupled with their support, led Democrats to align their policies with union interests. Politicians were pushed to promise measures aimed at expanding union power, such as curbing employer dominance in labor disputes, strengthening labor protections, and expanding collective bargaining practices.[33] When in power, Democrats were expected to deliver on these promises through legislation. For example, the Roosevelt Administration enacted several pro-union reforms, including the landmark *Wagner Act (1935)*.[34] Similarly, Lyndon Johnson made a notable effort to repeal Section 14(b) of *the Taft-Hartley Act*, a longstanding issue for unions, which permitted states to implement right-to-work laws.[35]

These policies extended beyond direct support for unions to broader social and economic reforms. Unions had long advocated for the creation and expansion of social programs due to their benefits for union members and the reduced dependence on employers for worker benefits.[36] This advocacy led Democrats to support and

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[29] See Louise Overacker, *American Government and Politics: Presidential Campaign Funds, 1944*, 39(5) The American Political Science Review 899, 899-925 (1945); Dennis Aaron Chandler, *The Truman Presidential Campaign of 1948: Money, Race, and the Role of Labor Unions*, https: //www. proquest. com/docview/305524340/abstract/90556919FDF94321PQ/1 (accessed on May 25, 2024).

[30] *Supra* note 24; See Travis M. Johnston, *A Crowded Agenda: Labor Reform and Coalition Politics during the Great Society*, 29(1) Studies in American Political Development 89, 89-105 (2015).

[31] *Supra* note 19; See Adam Hilton, *True Blues: The Contentious Transformation of the Democratic Party*, University of Pennsylvania Press (2021).

[32] *Supra* note 19; See Thomas Frank, *Listen, Liberal: Or, What Ever Happened to the Party of the People? Reprint ed.*, Picador USA (2017); Lily Geismer, *Left Behind: The Democrats' Failed Attempt to Solve Inequality*, PublicAffairs (2022).

[33] *Supra* note 13.

[34] See Enid M. I. Sefcovic & Celeste M. Condit, *Narrative and Social Change: A Case Study of the Wagner Act of 1935*, 52(4) Communication Studies 284, 284-302 (2001); Raymond L. Hogler, *The Rise and Decline of Organized Labor in the United States: American Unions from Truman to Trump, in The Cambridge Handbook of the Changing Nature of Work*, Cambridge University Press 173, 173-191 (2020).

[35] *Supra* note 30.

[36] *Supra* note 13; See Jae-jin Yang & Hyeok Yong Kwon, *Union Structure, Bounded Solidarity and Support for Redistribution: Implications for Building a Welfare State*, 42(2) International Political Science Review 277, 277-293 (2021); Maya Adereth, *When Do Trade Unions Support Universal Demands? Organisational Context and Trade Union Strategies in the US and UK at the Turn of the 20th Century*, 105(1) International Labor and Working-Class History 269, 269-289 (2024).

eventually establish social programs such as Social Security, unemployment insurance, and Medicare.[37]

Unions also pushed Democrats to support progressive taxation. Rather than shouldering the financial burden of these social programs themselves, unions sought to shift the costs onto employers and wealthy investors.[38] Democrats responded by implementing a progressive tax system, significantly increasing taxes on the country's wealthy. For instance, in the 1950s, the top marginal income tax rate for single individuals reached 91 percent on earnings above $200, 000. These funds were used to support and expand social programs.[39]

Moreover, unions advocated for regulating the financial sector. They were skeptical of unregulated finance, fearing it would empower investors to engage in capital flight when faced with high union power and labor costs.[40] Unregulated finance was also blamed by unions and many of their members for the economic instability that contributed to the Great Depression.[41] Encouraged by their union allies, Democrats introduced comprehensive capital controls and a range of robust financial regulations.[42]

While the Democrats' relationship with unions was the most significant during the mid-20th century, it was not the only one. The party also maintained ties with a variety of social justice groups, including consumer protection organizations, student activist societies, and civil rights groups.[43] These groups, with their wide memberships, mailing lists, and financial resources, provided valuable support to Democrats during elections. In turn, they received policies from Democrats, typically focusing on increased social spending, greater redistribution, and stricter controls on business practices.[44]

A social justice group deserving of significant attention is Americans for Democratic Action (hereinafter referred to as the ADA). Founded in 1947 by left-wing academics, labor leaders, activists, and progressive political figures, the ADA quickly emerged as one of the United States' most prominent progressive interest

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[37] *Supra* note 36; See Tito Boeri, Lars Calmfors & Agar Brugiavini, *Unions' Involvement in the Welfare State, in The Role of Unions in the Twenty-First Century: A Report for the Fondazione Rodolfo Debenedetti*, Oxford University Press, p. 3 (2001); David Rosner & Gerald Markowitz, *The Struggle over Employee Benefits: The Role of Labor in Influencing Modern Health Policy*, 81(1) The Milbank Quarterly 45, 45-73 (2003); Beatrix Hoffman, *Health Care Reform and Social Movements in the United States*, 98(1) American Journal of Public Health 69, 69-79 (2008).

[38] *Supra* note 36; See Giorgio Brunello & Daniela Sonedda, *Progressive Taxation and Wage Setting When Unions Strategically Interact*, 59(1) Oxford Economic Papers 127, 127-140 (2007).

[39] *Supra* note 86 note 32; See Sven Steinmo, *The Evolution of Policy Ideas: Tax Policy in the 20th Century*, 26(4) West European Politics 1, 1-22 (2003).

[40] *Supra* note 15; See Charles E. Lindblom, *The Market as Prison*, 44(2) The Journal of Politics 324, 324-336 (1982); James T. Bennett & Thomas J. DiLorenzo, *Unions, Politics, and Protectionism*, 5(3) Journal of Labor Research 287, 287-307 (1984).

[41] See Frank R. Dobbin, *The Social Construction of the Great Depression: Industrial Policy during the 1930s in the United States, Britain, and France*, 22(1) Theory and Society 1, 1-56 (1993).

[42] See Kris James Mitchener & Kirsten Wandschneider, *Capital Controls and Recovery from the Financial Crisis of the 1930s*, 95(2) Journal of International Economics 188, 188-201 (2015); Richard Barton, *Upending the New Deal Regulatory Regime: Democratic Party Position Change on Financial Regulation*, 20(1) Perspectives on Politics 1, 1-18 (2022).

[43] *Supra* note 19.

[44] *Supra* note 19; See Richard Flacks, *Students for a Democratic Society (SDS) (United States)*, https://doi.org/10.1002/9780470674871.wbespm399 (accessed on December 1, 2025).

groups during the 1950s and 1960s. The organization staunchly advocated for the creation of social programs, progressive taxation, and robust labor protections.[45]

Though not extraordinary in size, with membership peaking at only a few tens of thousands, the ADA was powerful. Its political strength stemmed from its organization and extensive network of connections. The group boasted a strong base of grassroots activists, capable of mobilizing significant numbers of voters to support or oppose policies and politicians.[46] Furthermore, the ADA had strong ties with major political figures, including former First Lady Eleanor Roosevelt and United Automobile Workers (hereinafter referred to as the UAW) leader Walter Reuther, both of whom were founders and members. The ADA's associations with such respected individuals enabled it to guide endorsements from these figures.[47] Additionally, the ADA wielded considerable influence over labor unions, Black voters, and other electorally significant demographic groups, allowing it to sway election outcomes.[48]

The ADA's power made it a valuable ally for the Democratic Party. Its network of activists provided essential organizational support for Democratic campaigns, mobilizing voters and encouraging public financial contributions to the party. The ADA also helped Democrats secure key endorsements and constituencies, boosting their electoral standing.[49]

In exchange for its support, the Democratic Party granted the ADA political influence. The group's lobbyists were frequently consulted on policy matters, and the ADA officials and members were given special advisory roles to Democratic leaders, including Presidents John Kennedy and Lyndon Johnson. From 1948 to 1964, many ADA leaders and prominent members were involved in crafting the party's presidential platform.[50] Additionally, the party supported the ADA leaders in their political aspirations, such as Hubert Humphrey, the ADA founder and later president, who used his ADA connections to become a U. S. Senator and Vice President.[51]

The ADA's support and influence pushed the Democratic Party to align with its policy positions. The ADA was instrumental in persuading President Harry Truman to veto the anti-labor *Taft-Hartley Act* in 1947 and to make a national healthcare program a central promise in his 1948 presidential campaign. Many Democratic platforms in the 1950s and 1960s were shaped by the ADA-backed initiatives, including national healthcare, expanded public education, and an increased minimum wage. Several key Great Society policies, from Head Start to Medicare, trace their origins to the ADA advocacy.[52]

3. The Breakdown of the Old Party

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[45] *Supra* note 2; See Clifton Brock, *Americans For Democratic Action: Its Role In National Politics, Literary Licensing*, LLC, p. 56 (2012); Scott Kamen, *Rethinking Postwar Liberalism: The Americans for Democratic Action, Social Democracy, and the Struggle for Racial Equality*, Ph.D. Dissertation, University of Illinois at Chicago, p. 12 (2017).

[46] *Supra* note 45, at p. 88; *Supra* note 45, at p. 45..

[47] *Supra* note 2, at p. 210; *Supra* note 45, at p. 92.

[48] *Supra* note 2; *Supra* note 45, at p. 56; *Supra* note 45, at p. 12.

[49] Supta note 45, at p. 105; *Supra* note 45, at p. 60.

[50] *Supra* note 2, at p. 315; *Supra* note 45, at p. 110.

[51] *Supra* note 2; See Bruce Miroff, *From Friends to Foes: George McGovern, Hubert Humphrey, and the Fracture in American Liberalism*, University of Illinois Press, p. 5 (2012).

[52] *Supra* note 2; *Supra* note 45; See Jonathan Oberlander, *The Politics of Medicare Reform*, 60(1) Washington and Lee Law Review 1095, 1095-1120 (2003).

Union membership relative to the broader population began to decline in the 1960s. Factors such as the growth of the United States's service sector and the recovery of economies previously ravaged by war limited the expansion of American manufacturing and other traditionally unionized sectors.[53] As a result, union membership remained stagnant during the 1960s and 1970s, hovering around 15 million members between 1960 and 1980. Population growth meant that union membership as a percentage of the workforce declined, with union density falling from about 33 percent in 1960 to 21 percent in 1980.[54]

This stagnant membership and declining density limited the support unions could provide to the Democratic Party. With a smaller share of the American population, union members had less influence on elections. Organizationally, unions struggled to recruit and provide sufficient numbers of organizers and volunteers for essential tasks such as canvassing, mailing, and phone banking. Additionally, stagnant membership meant lower revenue from union dues. Rising campaign costs further strained unions' ability to provide financial support, and independent contributions from union members also declined.[55]

The weaknesses of unions became apparent to many Democratic insiders as early as the 1968 Presidential election. Democratic nominee Hubert Humphrey received significant financial and organizational support from unions, including a large mobilization effort that secured 63 percent of unionized voters. However, Humphrey was outraised by his Republican opponent.[56] Despite strong union support, the organizational efforts proved insufficient as Humphrey lost the election, securing barely 40 percent of the vote.[57]

At the same time, unions were becoming increasingly problematic and unreliable allies. The wider electorate grew concerned with the Democratic Party's ties to unions. Corruption scandals, strikes, and controversies over union practices made labor unions less popular.[58] Public support for unions dropped below 60 percent for much of the 1970s, hitting a record low of 55 percent in 1979.[59] The party's relationship with unions became a political liability, with Republicans using it as ammunition in their campaigns.[60]

Additionally, many unions became antagonistic toward other Democratic allies. Due to their support for the Vietnam War, union leaders and members developed a scorn for social justice groups aligned with the same party.[61] George Meany, long-time President of the American Federation of Labor and Congress of Industrial

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[53] See Henry S. Farber, *The Decline of Unionization in the United States: What Can Be Learned from Recent Experience?*, 8(1) Journal of Labor Economics 75, 75-105 (1990); Zachary Schaller, *The Decline of U. S. Labor Unions: Import Competition and NLRB Elections*, 48(1) Labor Studies Journal 5, 5-34 (2023).

[54] *Supra* note 53; See Leo Troy & Neil Sheflin, *Labor Market Reporter: US Trade Union Membership*, http: //www. publicpurpose. com/lm-unn2003. htm (accessed on December 1, 2025).

[55] *Supra* note 24; *Supra* note 19, at pp. 55-56 (2022).

[56] See Raymond Walter Apple Jr., *The 1972 Campaign*, The New York Times (1972).

[57] See H. G. Nicholas, *The 1968 Presidential Elections*, 3(1) Journal of American Studies 11, 11-15 (2009).

[58] *Supra* note 19; See Cal Winslow, *The 1970s: Decade of the Rank and File*, https: //jacobin. com/2021/01/1970s-decade-strike-workers-labor-history (accessed on December 1, 2025).

[59] See Gallup, *Labor Unions*, https: //news. gallup. com/poll/12751/Labor-Unions. aspx (accessed on December 1, 2025).

[60] See Thomas Edsall, *Organized Labor Flexes Muscle with Democrats*, Washington Post (1997).

[61] *Supra* note 19; See Julian Zelizer, *How Labor Unions and Democrats Fell out of Love*, CNN (2014); Jason Long, *Organised Labor and the Vietnam War Movement*, State University of New York Press, p. 1 (2023).

Organizations (hereinafter referred to as the AFL-CIO), used his platform in the late 1960s and 1970s to publicly criticize anti-war protestors and environmentalists.[62] This tension culminated in the Hard Hat Riots of 1970, when 400 construction workers attacked 1, 000 anti-war protestors in New York City.[63] Democratic leaders struggled to balance these competing factions, as supporting one group risked alienating the other.[64]

Unions' inconsistent backing of Democratic candidates led many party insiders to feel that unions were not fulfilling their part of the relationship. While Humphrey won a significant share of union voters, many were initially inclined to support his opponent, George Wallace.[65] The AFL-CIO broke with tradition in 1972 by refusing to support George McGovern's Presidential bid, the first time the country's leading union group did not back the Democratic nominee.[66] In 1980, several labor unions not only refused to support Jimmy Carter but actively supported his opponent, Ronald Reagan.[67] Both McGovern and Carter won barely half of unionized voters, a strikingly low share for any Democratic candidate since the 1930s.[68]

The ADA also faced numerous issues starting in the 1960s. The Vietnam War, War on Communism, and other contentious issues caused the group to become disheveled and consumed by infighting. Factionalism within the ADA resulted in disorganisation, hindering its ability to craft coherent policy goals, grassroots activism campaigns, and endorsements.[69]

Infighting and disorganisation led to a plummet in the ADA membership. With fewer members, the group had a much smaller network of activists and members to call upon.[70] Many respected figures in American politics, including Humphrey, distanced themselves from the ADA.[71] The criticism of Lyndon Johnson over the Vietnam War from its large anti-war faction alienated voters such as many union members who supported the war and large swaths of Black voters loyal to the President for his civil rights initiatives.[72]

These problems meant they could not support the Democratic Party as effectively as before. The ADA struggled to mobilise voters, financially back Democratic

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[62] *Ibid.*

[63] See David Paul Kuhn, *The Hard Hat Riot: Nixon, New York City, and the Dawn of the White Working-Class Revolution*, Oxford University Press, p. 1 (2020); David Austin Walsh, *The Hard Hat Riot: Nixon, New York City, and the Dawn of the White Working-Class Revolution.* 55(2) Journal of Social History 554, 554-556 (2021).

[64] *Ibid.*

[65] See Damen Stetson, *Meany Says Labor Will Fight Swing to Wallace Among Union Members; A. F. L. -C. I. O. Plans 'Education' Drive*, The New York Times (1968); Irving Crespi, *Structural Sources of the George Wallace Constituency*, 52(1) Social Science Quarterly 115, 115-132 (1971).

[66] See Phillip Shabecoff, *A. F. L. -C. I. O. Chiefs Vote Neutral Stand on Election*, The New York Times (1972).

[67] See Bill Prochnau, *Reagan Endorsement Flouts Union Chief*, Washington Post (1980).

[68] See *Poll Says Nixon Won Labor Vote*, The New York Times (1972); Jack Rosenthal, *Desertion Rate Doubles*, The New York Times (1972); *Supra* note 19.

[69] See Paul S. Boyer, *The Oxford Companion to United States History*, Oxford University Press, p. 1 (2004); Manfred Berg, *Review of From Union Halls to the Suburbs: Americans for Democratic Action and the Transformation of Postwar Liberalism by Scott Kamen*, 52(3) History: Reviews of New Books 51, 51-52 (2024).

[70] *Supra* note 69; See Mark Kleinman, *A World of Hope, A World of Fear: Henry A. Wallace, the Reinhold Niebuhr, and American Liberalism*, Ohio State University Press, p. 1 (2000).

[71] *Supra* note 51.

[72] *Supra* note 70; *Supra* note 51; *Supra* note 69.

candidates, and guide important figures and constituencies into supporting the Democrats.[73]

Like unions, the ADA also became problematic allies. Democratic leaders saw the group as failing to fulfil their end of the bargain. Despite Johnson accommodating the ADA members and implementing many of their policy desires, major factions of the group openly criticised the President and encouraged public dissent against him.[74] The group gave Humphrey, a founder and former ADA president, tepid backing in his 1968 Presidential run. In 1972, the ADA threatened to withhold its endorsement of the Democratic Presidential candidate if Humphrey won the nomination.[75]

The ADA's issues were made clear in the 1972 Presidential election. The group strongly endorsed George McGovern in the primaries and helped him secure the nomination despite widespread fears from Democratic leaders that his stances would make him 'unelectable'.[76] However, the ADA's support was limited. They could no longer mobilise voters or secure key endorsements and constituencies as before. The ADA's inability to support McGovern in the general election, despite their crucial support in the primaries, resulted in him succumbing to a historic landslide defeat, winning less than 38 percent of the vote and just one state.[77]

The stories of unions and the ADA are not unique. Various other social justice groups tied to the Democrats underwent similar declines in their ability to support the party. Membership fell, some became very disorganised, and others outright ceased to exist. They could no longer mobilise voters or provide the organisational and financial support to Democrats as before.[78] Some groups refused to support the party despite gaining policy preferences and influence. Others proved more damaging to the party's reputation with the greater electorate.[79]

The various problems Democrats had with their allied organisations caused serious difficulties in the 1970s and into the 1980s. The party could no longer rely as much on others to mobilise voters and struggled to run effective campaigns without organisational support. With fewer financial contributions, Democrats fell well behind their Republican opponents. By the mid-1980s, Republican candidates were capable of outspending Democratic candidates by a significant margin.[80]

These difficulties led to electoral decline. Democrats, once dominant in Presidential contests in the mid-20th century, became consistent losers from the late 1960s into the early 1990s. In 1980, the party lost the Senate and were unable to recapture it for six years, their longest period outside of power in the chamber since the 1920s. The party also experienced losses at the state and local levels.[81]

With Republicans holding greater power, they wielded it in ways that hurt Democratic allies. Students were a primary source of activists for social justice groups. Republicans initiated university funding cuts, creating financial barriers and pressures

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[73] *Ibid.*
[74] *Ibid.*
[75] *Supra* note 51; *Supra* note 68.
[76] *Supra* note 19; *Supra* note 51.
[77] *Supra* note 69; *Supra* note 19.
[78] *Supra* note 19; *Supra* note 69; *Supra* note 17.
[79] *Supra* note 19; *Supra* note 69; See Dan Berger, *Outlaws of America: The Weather Underground and the Politics of Solidarity*, AK Press, p. 1 (2006).
[80] *Supra* note 19; *Supra* note 13; *Supra* note 10; See Thomas Edsall, *Reagan Campaign Gearing Up Its 'Soft Money' Machine for '84*, Washington Post (1983).
[81] *Supra* note 19; See Robert Mason, *Ronald Reagan and the Republican Party: Responses to Realignment*, Palgrave Macmillan US, pp. 151-172 (2008).

that prevented students from becoming activists.[82] State programs overseeing civil rights and the environment were cut or eliminated, forcing civil rights, environmental, and other social justice groups to dedicate more funds towards litigation and away from community organising and political activities.[83] Stronger right-to-work measures and union-busting tactics were permitted, causing union membership to drastically fall.[84] In the private sector, membership fell from 15 million in 1980 to 10 million in 1990, and union density declined from 21 percent to 12 percent during that period.[85]

These pressures exacerbated the Democratic Party's electoral problems. With fewer voters to mobilise and more limited organisational and financial support, the party struggled.[86]

For many Democratic insiders, the party and its allies' problems in the 1980s are best exemplified by Walter Mondale's 1984 Presidential campaign. Mondale, representative of mid-20th-century Democrats, held strong ties to unions and social justice groups, advocating for greater redistribution, labor protections, and other social democratic policies. His campaign was strongly supported by labor unions and social justice groups.[87]

Their support, however, was far from sufficient. Unions and social justice groups were too weak and disorganised to effectively support the campaign organizationally. Although unions mobilised members for Mondale, union members comprised a much smaller portion of the electorate.[88] Financially, Mondale's campaign struggled to compete with Reagan's. Factoring in the contributions from campaigns, national parties, state and local parties, and independent expenditures, Mondale's spending was a fraction of Reagan's.[89] Consequently, Mondale succumbed to one of the most abysmal Presidential election performances in American history, winning only 40 percent of the vote and one state in the electoral college.[90]

The failure of these groups to deliver results diminished their influence within the Democratic Party. Starting in the 1970s, union leaders were less consulted on policy and the party's direction by Democratic officials.[91] Many social justice groups struggled to engage with Democratic politicians. The party adopted a primary system

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[82] See Deborah Verstegen, *Education Fiscal Policy in the Reagan Administration*, 12(4) Educational Evaluation and Policy Analysis 355, 355 (1990); Joseph Gfroerer, *Rising Youth Drug Use in the 1990s*, Cambridge University Press, pp. 126-143 (2018); Jon Schwarz, *The Origin of Student Debt: Reagan Adviser Warned Free College Would Create a Dangerous 'Educated Proletariat'*, The Intercept (2022).

[83] *Supra* note 69; See Justin Gomer & Christopher Petrella, *Perspective | How the Reagan Administration Stoked Fears of Anti-White Racism*, Washington Post (2021); Lief Fredrickson & Christopher Sellers *et al*., *History of US Presidential Assaults on Modern Environmental Health Protection*, 108(S2) American Journal of Public Health 1, p. 1 (2018).

[84] *Supra* note 17; See Joseph McCartin, *PATCO Strike and the Decline of Labor*, https://oxfordre.com/americanhistory/ (accessed on December 1, 2025)

[85] *Supra* note 53; *Supra* note 54; *Supra* note 59, Troy and Sheflin.

[86] *Supra* note 80; *Supra* note 13; See *UPI,* Second Big Union Endorses Reagan - UPI Archives (1980); Jonathan Hopkin, *The Problem with Party Finance*, 10(4) Party Politics 627, 627 (2004).

[87] *Supra* note 19; See Ronald B. Rapoport & Walter J. Stone *et al*., *Do Endorsements Matter? Group Influence in the 1984 Democratic Caucuses*, 85(1) American Political Science Review 193, 193-203 (1991); Jeff Greenfield, *Walter Mondale: The Last Old-School Democrat*, POLITICO (2021).

[88] *Supra* note 19; *Supra* note 24.

[89] See Associated Press, *CAMPAIGN NOTES; Spending by Mondale Outpaces Reagan's*, The New York Times (1984); Herbert Alexander & Brian Haggerty, *Financing the 1984 Election*, Lexington Books (1987); Alan Neustadtl & Denise Scott *et al*., *Class Struggle in Campaign Finance? Political Action Committee Contributions in the 1984 Elections*, 6(2) Sociological Forum 219, 219-38 (1991); *Supra* note 10.

[90] *Supra* note 87.

[91] *Supra* note 13; *Supra* note 19.

for selecting candidates in large part to limit these organisations' influence on the nomination process.[92]

With these organisations declining and their influence waning, the party detached itself from their policy preferences. When Democrats gained control of Congress and the White House in 1976, President Jimmy Carter, along with several Democratic Congressmen, refused to pass a significant economic stimulus proposing public job creation to improve the environment and infrastructure.[93] Many Democrats also resisted pressure from the AFL-CIO and other unions to strip Section 14(b) of *the Taft-Hartley Act* or pass a variety of federal labor protections.[94] A national healthcare program, a long-time promise of the Democrats, was gradually abandoned. The party refused to implement such a program in the late 1970s, and by the 1980s, it was excluded from its platform.[95]

Many Democrats nationwide aided the Republican war on unions. Carter invoked *the Taft-Hartley Act* and attempted to use federal powers to break up a major coal miners' strike, and nearly did so with a truck drivers' strike.[96] Democratic governors in the 1970s and 1980s broke up strikes and passed state-level union restrictions.[97] During Reagan's presidency, a significant portion of Congressional Democrats supported Republican spending cuts to programs like Medicaid and food stamps.[98]

4. The Remaking of the Democrats

The economic challenges of the 1970s, exacerbated by the social democratic policies implemented by mid-20th century Democrats, set the stage for a powerful backlash from wealthy investors and businesses. As high wages, full employment, and inflation, along with increased taxation and capital controls, threatened their wealth and power, the business community responded by using their financial resources to reshape the political and economic landscape.[99]

In this context, wealthy elites aimed to reduce government intervention in the economy, seeking a free market system with minimal oversight, lower taxes, and fewer regulations. This shift would allow them to engage in strategies that maximized profits such as speculation, outsourcing, market monopolisation, and suppressing

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[92] *Supra* note 86 note 32; *Supra* note 19; See Bruce Miroff, *The Liberals' Moment: The McGovern Insurgency and the Identity Crisis of the Democratic Party*, University Press of Kansas, p. 1 (2009).
[93] See Rick Halpern, *Jimmy Carter and the UAW: Failure of an Alliance*, 9(4) Journal of Policy History 755, 755–777 (1997); W. Carl Biven & James L. Anderson, *Jimmy Carter's Economy: Policy in an Age of Limits*, 36(4) History: Reviews of New Books 905, 905–907 (2004); *Supra* note 19.
[94] *Supra* note 63, at pp. 759-764.
[95] See Peter T. Kilborn, *DEMOCRATS MAKE PLANS TO AVOID 'BIG SPENDER' LABEL*, The New York Times (1984); Anne-Emanuelle Birn & Theodore M. Brown *et al*., *Struggles for National Health Reform in the United States*, 93(1) American Journal of Public Health 86, 86-91 (2003).
[96] *Supra* note 93, at pp. 759-764; See Michael Camp, *Carter's Energy Insecurity: The Political Economy of Coal in the 1970s*, 26(4) Journal of Policy History 459, 459-478 (2014).
[97] *Supra* note 13; *Supra* note 19.
[98] See Steven Roberts, *CONGRESSIONAL PANELS ADOPT REAGAN'S PLAN TO SLASH FOOD STAMP PROGRAM*, The New York Times (1981); D. Rowland & B. Lyons *et al*., *Medicaid: Health Care for the Poor in the Reagan Era*, 9 Annual Review of Public Health 427, 427-450 (1988); Stephen Mihm, *Reagan's Revolution Devolves Into a Food-Stamp Skirmish*, Bloomberg (2013).
[99] See Jonathan Hopkin & Mark Blyth, *The Global Economics of European Populism: Growth Regimes and Party System Change in Europe*, 54(2) Government and Opposition 193, 193-225 (2019); M. Kalecki, *Political Aspects of Full Employment*, 14(4) The Political Quarterly 322, 322-330 (1943).

labor, all without having to contribute significant portions of their wealth back to the state.[100]

To achieve this vision of a deregulated, market-driven economy, investors and business leaders deployed a multi-pronged political strategy. They created influential lobbyist teams, formed organizations like the Business Roundtable, and funded think tanks that produced research supporting their agenda. The goal was to persuade politicians to enact policies that favoured free-market principles and limited government interference.[101]

One of the most significant political strategies that bolstered the power of these elites was their increasing role in campaign funding. The 1970s saw several pivotal Supreme Court decisions, particularly *Buckley v. Valeo (1976)*, which deemed restrictions on campaign donations as unconstitutional, citing the protection of free speech under the First Amendment. These rulings led to a dramatic shift in the political financing landscape, allowing wealthy individuals and business interests to contribute unlimited funds to political campaigns and parties.[102] The PACs and independent political groups further enhanced their ability to influence elections, as these entities could now spend unlimited amounts to support candidates and causes aligned with their interests.[103]

The increased involvement of investors and businesses in funding political campaigns provided a significant advantage to the Republican Party. Republicans were seen as the most natural allies of these wealthy groups, as they were more likely to implement policies that aligned with their interests.[104] The influx of donations gave the Republican Party a substantial financial edge over the Democrats, enabling them to run large and expensive campaigns. With this financial support, Republicans were able to produce high-quality advertisements, recruit skilled organizers, and efficiently manage canvassing, mail, and phone banking initiatives.[105] This financial advantage allowed the Republicans to make strong appeals to the electorate, contributing to their electoral successes in the 1970s and 1980s. Once in power, Republicans rewarded their financial supporters by becoming more responsive to pro-business lobbyist groups and pursuing free-market policies like deregulation and tax cuts.[106]

Despite their natural alignment with Republicans, investors and businesses gradually developed a mutually beneficial relationship with the Democrats from the 1970s into the 1990s.[107] The decline and unreliability of unions and social justice groups posed significant challenges for the Democrats, who could no longer rely on these groups to mobilize key constituencies or provide necessary organizational support for campaigns. As a result, Democrats found themselves increasingly responsible for financing and organizing their own campaigns, a costly endeavor. With the decline of allied organizations, the Democrats were left with limited financial resources, making it difficult to fund essential election activities.[108]

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[100] *Supra* note 40; *Supra* note 10; *Supra* note 17.
[101] See*Supra* note 86;*Supra* note 10; *Supra* note 17.
[102] *Supra* note 86; See Melvin I. Urofsky, *The Campaign Finance Cases: Buckley, McConnell, Citizens United, and McCutcheon*, University Press of Kansas, p. 1 (2020).
[103] *Supra* note 32; *Supra* note 19.
[104] *Supra* note 19; *Supra* note 32.
[105] *Supra* note 10; See Lewis Gould, *Republicans in the Reagan Era, 1974-1988, in The Republicans: A History of the Grand Old Party*, Oxford University Press, p. 1 (2014).
[106] *Ibid.*
[107] *Supra* note 10; *Supra* note 19.
[108] *Supra* note 13; *Supra* note 19.

Wealthy investors and businesses stepped in to fill this financial void. Their donations enabled the Democrats to run large, expensive campaigns, allowing them to remain competitive with the Republicans and make strong appeals to the electorate, thereby improving their electoral prospects.[109]

For wealthy investors and businesses, the Democratic Party shifted from being an opponent to becoming a potential ally. Historically, the Democrats had been their political rivals, advocating for labor protections, progressive taxation, and other policies that were often at odds with the interests of wealthy groups.[110] However, to attract and maintain the support of these affluent donors, the Democrats needed to adapt. As a result, the party began to become more receptive to business and investors' interests in influencing policy and the direction of the party. Their influence steered the Democrats towards free-market policies, including deregulation, free trade, and tax cuts.[111]

The relationship between Democrats and wealthy investors began to solidify in the late 1970s. During the 1976 election cycle, many Democratic congressional candidates received modest but strategically important support from investors and business interests. When Democrats entered office with the White House and a filibuster-proof Senate majority, many expected another New Deal-styled programme of social democratic policy priorities. Yet the business and investor community had, by the mid-1970s, begun to build strong ties to key Democratic lawmakers. Armed with expanding lobbying capacity, particularly through organizations like the Chamber of Commerce and the newly formed Business Roundtable, these groups were increasingly capable of shaping the legislative agenda from within the Democratic coalition.[112]

A striking example was the early 1978 effort to create an Office of Consumer Representation, an institutional advocate for consumers in regulatory rulemaking. Many civic and labor groups aligned with the Democratic Party strongly supported the measure. In 1975, Democrats had passed a similar bill with relative ease, only to see it vetoed by Republican President Gerald Ford. Yet, despite controlling the presidency and commanding substantial congressional majorities in the session of 1977-78, including a 292 to 143 House majority, Democrats could not pass the bill again. Business and investor organizations mounted an intense lobbying and public-relations campaign, using their influence over Democratic lawmakers to block the measure. Speaker Tip O'Neill described the pressure as the most intense he had ever witnessed. The bill ultimately failed 189 to 227, with 106 Democrats voting against it.[113]

This defeat symbolized a deeper shift. As Hacker and Pierson (2011) argue, the Carter years reflected not a single president's ideological turn, but a broader transformation inside the Democratic Party: unions and civic groups were weakening, business was newly organized and lavishly funded, and many Democrats felt growing institutional and electoral incentives to respond to business concerns.[114] Combined with Carter's lack of ideological commitment to the party's social democratic traditions and the Stagflation crisis, this transformed the Carter Presidency into one

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[109] See*Supra* note 86; *Supra* note 10; *Supra* note 19.
[110] *Supra* note 13; *Supra* note 2; *Supra* note 19.
[111] *Supra* note 13; *Supra* note 2; *Supra* note 19; *Supra* note 10.
[112] See Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class*, Simon & Schuster, pp. 116-134 (2011); Louis Kohlmeier, *The Big Businessmen Who Have Jimmy Carter's Ear*, The New York Times (1978).
[113] *Ibid.*
[114] *Ibid.*

which advanced many policies aligned with the interests of economic elites. Among the achievements of the Democrats in the late 1970s was the deregulation of the finance industry and the halving of capital gains tax, aligned with elite interests.[115]

By 1978, this evolving alignment translated directly into campaign finance. Investors and business donors rewarded cooperative Democratic incumbents, such as Tim Wirth, with substantial contributions. Carter also received large sums from business-aligned donors for his 1980 re-election campaign, which helped him secure a difficult renomination and remain competitive for much of the general election.

Although the Democratic Party lost both the Presidency and Senate in the 1980 election, the increased alignment with business during the 1970s left a lasting mark on the party. In the 1980s, several intra-party organizations emerged to deepen the party's relationship with economic elites.[116] One of the most significant of these was the Democratic Leadership Council (hereinafter referred to as the DLC). Formed after Walter Mondale's loss in 1984, the DLC identified the party's distance from investors and businesses as a critical issue. The group explicitly advocated that Democrats abandon traditional priorities of redistribution and labor advocacy, instead embracing wealthy interests for financial support and appealing to "business-minded" voters.[117] In particular, the DLC's founding mission was explicitly anti-union, seeking to reduce the influence of organized labor and other traditional interest groups within the party. It argued that electoral success required Democratic politicians to champion free-market policies aligned with the interests of business leaders and their supporters, including deregulation, free trade, and tax cuts.[118]

The DLC was a relatively small yet powerful network of influential Democratic politicians and wealthy elites. Unlike larger organizations like the ADA or other social justice groups, the DLC lacked the grassroots support and activist-driven infrastructure required for extensive community organizing. However, it more than made up for this shortcoming through its significant influence within the party, successfully steering the Democratic Party toward a more business-friendly direction.[119]

The DLC exerted its influence over Democratic campaigns through powerful endorsements and financial backing. Politicians affiliated with the DLC, many of whom held positions of authority within the party, could either support or undermine campaigns based on their preferences. Wealthy members of the DLC were able to financially back preferred candidates, creating a domino effect that encouraged other investors and businesses to follow suit. As a result, Democratic candidates who cultivated strong ties with the business community and endorsed free-market policies were more likely to succeed. This, in turn, incentivized incumbent Democrats to build and maintain these connections and align themselves with the DLC's agenda.[120]

The DLC also had considerable wealth, effectively practicing what it preached. It raised millions of dollars each year from Wall Street, the tech sector, and major

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[115] *Supra* note 93, at pp. 605-617; See David Cohen & Chris Dolan, *Debunking the Myth: Carter, Congress, and the Politics of Airline Deregulation,* 1(2) White House Studies 197, 197-224 (2001); *Supra* note 19; *Supra* note 32.

[116] *Supra* note 19; *Supra* note 32.

[117] *Supra* note 19; See Jon F. Hale, *The Making of the New Democrats*, 110(2) Political Science Quarterly 207, 207-232 (1995).

[118] *Supra* note 19; *Supra* note 117; *Supra* note 2; *Supra* note 32; See Robin Toner, *Eyes to Left, Democrats Edge Toward the Center*, The New York Times (1990).

[119] *Supra* note 117; *Supra* note 32.

[120] *Supra* note 86 note 32; *Supra* note 19; *Supra* note 120; See Ed Kilgore, Requiem for the DLC, The New Republic (2011).

industrial players. Some of the most prominent contributors to the DLC included corporations like AT&T, Merck Pharmaceuticals, and Philip Morris.[121] With this financial clout, the DLC was able to significantly influence the direction of the party. The group utilized PACs and independent organizations to direct funds toward the campaigns of its favored Democratic candidates. In addition to direct campaign contributions, the DLC used its wealth to build soft power by hosting lavish events, including banquets and parties, where supportive politicians could network, enjoy high-quality meals, and socialize with influential figures. These gatherings further solidified the bonds between the DLC and the political elite, reinforcing the group's agenda and influence within the Democratic Party.[122]

The pressure and incentives offered by wealthy donors and organizations like the DLC were instrumental in pushing the Democratic Party towards a business-friendly direction during the 1980s. Seeking to compete with the financial dominance of the Republican Party, Democrats increasingly sought donations from wealthy individuals and business leaders, enabling them to run larger, more expensive campaigns that were on par with the Republicans' financial strength.[123] As a result, the party became more receptive to the demands of business-aligned lobbying groups and regularly consulted with business leaders when shaping policy stances. This shift led Democrats to adopt more market-oriented positions, joining Republicans in passing free-market policies. For example, many Democratic members of Congress supported Ronald Reagan's deregulation and tax cuts, while several Democratic governors participated in anti-union efforts.[124]

The growing financial reliance of the Democratic Party on investors and business interests did not go without significant criticism. Labor unions, social justice groups, and many traditional Democratic politicians were alarmed by this shift, believing the party's policy changes contradicted its foundational values. President Jimmy Carter's obsequiousness to the business world and his pursuit of free-market policies were particularly contentious. These policies drew sharp criticism from unions, activists, and even major party officials, sparking a primary challenge from Ted Kennedy. Kennedy, who represented more traditional social democratic values, garnered strong support from unions and social justice groups, framing his candidacy as a repudiation of Carter and much of the party's business-aligned policies.[125]

The DLC and other similar organizations were harshly criticized and distrusted by labor unions and many union-aligned Democrats.[126] This distrust became particularly evident during the 1984 Democratic primaries. The AFL-CIO, deeply opposed to the DLC's influence and the business-oriented stance of candidates like Gary Hart, rallied strongly behind Walter Mondale, who was viewed as more aligned with traditional Democratic values.[127]

In response to the growing shift within the Democratic Party, organizations like Jesse Jackson's Rainbow Coalition emerged in the 1980s, aiming to uphold the party's social democratic principles and challenge the growing influence of business.

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[121] *Supra* note 2; *Supra* note 120.
[122]*Supra* note 117; *Supra* note 120; *Supra* note 122; See Josey Ballenger, *When the Democrats Wined and Dined, Here's Who Paid the Piper*, http://publicintegrity.org/politics/ (accessed on December 1, 2025).
[123] *Supra* note 10; *Supra* note 19.
[124] *Supra* note 10; *Supra* note 19; *Supra* note 32.
[125] *Supra* note 93; *Supra* note 19.
[126] *Supra* note 120; *Supra* note 122; *Supra* note 19.
[127] *Supra* note 19; *Supra* note 32; See Maurice Carroll, *MONDALE RIDICULES HART'S 'NEW IDEAS,'* The New York Times (1984).

The Rainbow Coalition, alongside other similar groups, sought to mobilize working-class voters and communities of color in support of policies that emphasized social justice, labor rights, and economic equality.[128]

Despite this resistance, the efforts to maintain mid-20th century social democratic positions ultimately faltered. Unions, the Rainbow Coalition, and similar groups lacked the organizational capacity and financial resources necessary to shift the party's direction. Without the ability to mobilize key voters or provide the essential organizational infrastructure for successful campaigns, these groups struggled to compete with the financial influence of investors and businesses. They could not build soft power or rally donations in the same way that the DLC could.[129]

The Democratic Party's strong performance in the 1986 midterm elections further solidified the belief among party insiders that fostering relationships with wealthy donors was electorally advantageous.[130] The infusion of financial contributions from investors and businesses enabled Democrats to run large, expensive campaigns that ultimately led to an expansion of the House majority to 81 seats and the regaining of control of the Senate, gaining eight seats. These gains were particularly significant among candidates with close ties to the business community. For example, Bob Graham, a DLC member, won his contentious Florida Senate seat by advocating for tax cuts and free trade, benefiting from significant donations from Wall Street and the technology sector.[131]

The relationship between the Democrats and wealthy donors deepened with the 1988 presidential election. Michael Dukakis, the Democratic nominee, had well-established ties to investors and business groups.[132] Dukakis leveraged these connections to raise an impressive $68 million in donations, primarily from the financial and technology sectors. This funding allowed him to run an extensive, high-budget campaign, enabling robust voter outreach and advanced canvassing efforts.[133]

In return for their financial support, Dukakis made policy concessions to his donors. Throughout the campaign, he signaled his intention to maintain many of the Reagan-era tax cuts and deregulations, advocated for further expanding free trade agreements, and hinted that he would support *the North American Free Trade Agreement* (hereinafter referred to as NAFTA). Moreover, Dukakis declined to back policies that would bolster labor protections or strengthen unions, further cementing his alignment with business interests.[134]

Michael Dukakis's decisive loss in the 1988 presidential election did not weaken the Democratic Party's ties to economic elites; rather, it reinforced the perception among party insiders that the Democrats needed to double down on pro-business policies. The defeat was framed by the DLC and prominent party officials not as a

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[128] *Supra* note 19; See Darryl S. Tukufu, *Jesse Jackson and the Rainbow Coalition: Working Class Movement or Reform Politics?*, 14(2) Humanity & Society 158, 158-173 (1990).

[129] *Supra* note 128; *Supra* note 117; *Supra* note 19; See Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14(3) Perspectives on Politics 681, 681-699 (2016).

[130] *Supra* note 19; See Peter Kilborn, *DEMOCRATS' IDEAS ON ECONOMY SHIFT*, The New York Times (1986).

[131] See Kenneth S. Baer, *Reinventing Democrats: The Politics of Liberalism from Reagan to Clinton*, University Press of Kansas, p. 1 (2000); *Supra* note 32; *Supra* note 19.

[132] See Lily Geismer, *Michael Dukakis Was Bill Clinton Before Bill Clinton*, Jacobin (2023); *Supra* note 19.

[133] See Richard Berke, Campaign Finance, The New York Times (1988); *Mastermind of the Dukakis Success*, The New York Times (1988); Paul Houston, *Bush, Dukakis Got Record Big Gifts*, Los Angeles Times (1988).

[134] *Supra* note 19; *Supra* note 32; *Supra* note 32.

repudiation of business-friendly Democrats, but as a signal that the party had not gone far enough in that direction.[135]

Emboldened by this interpretation, the DLC mobilized more aggressively than ever. In 1989, it established the Progressive Policy Institute (hereinafter referred to as the PPI), a think tank tasked with generating a steady stream of policy proposals for DLC-aligned Democrats and the broader party. Funded largely by major corporations such as AT&T, the PPI advanced policies through market- and elite-friendly mechanisms, reflecting the DLC's vision of achieving social objectives while prioritizing economic liberalization and business interests.[136]

In 1990, the DLC elected Governor Bill Clinton of Arkansas as its president, signaling a new phase of influence within the Democratic Party. Clinton immediately sought to further expand the DLC's role in intra-party politics, leveraging his leadership to strengthen relations with finance and business donors. Under Clinton's stewardship, the DLC revenues increased by nearly 50 percent between 1990 and 1992, improving the group's capacity to influence candidates and campaigns.[137] That same year, with Clinton's strong support, the DLC codified its strategic vision through the New Orleans Declaration, which formalized the party's embrace of market-oriented policies, reduced state intervention, deregulation, and retrenchment of the welfare state.[138]

The DLC's post-Dukakis strategy paid significant political dividends by 1992. The Democratic Party had broadly adopted the DLC's business-friendly orientation, with Bill Clinton securing the party's presidential nomination. Clinton's campaign drew extensively on the DLC's network of wealthy investors and corporate donors, receiving major contributions from financial institutions such as Stephens Inc. and Goldman Sachs. This funding allowed for a large, well-organized, and financially robust campaign, capable of sophisticated voter outreach, canvassing operations, and advertising.[139]

On the campaign trail, Clinton branded himself a "New Democrat", explicitly distancing himself from the party's New Deal/Great Society legacy. He pledged to prioritize the interests of business and investors, integrating the PPI's market-oriented policy proposals into his platform, including tax cuts, a school choice plan, deregulation, and support for NAFTA. Clinton also committed to balancing the federal budget, signaling both fiscal discipline and a decisive break from the pro-union, redistributive policies that had previously defined the Democratic Party.[140]

5. The New Democrats

Bill Clinton's 1992 presidential victory marked the culmination of the Democratic Party's deepening ties with wealthy investors and business interests. During his presidency, these relationships only grew stronger. The 1990s saw the Democratic Party become increasingly reliant on substantial financial support from the wealthy, with Clinton accepting tens of millions of dollars in direct contributions

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[135] *Ibid.*

[136] *Supra* note 32; *Supra* note 2; Progressive Policy Institute*, History*, https: //www. influencewatch. org/non-profit/progressive-policy-institute/(accessed on November 28, 2025).

[137] *Supra* note 120; *Supra* note 122; *Supra* note 32.

[138] *Supra* note 32; *Supra* note 118.

[139] *Supra* note 19; See Sara Fritz, Lawyers, *Lobbyists Top List of Clinton Contributors*, Los Angeles Times (1992).

[140] *Supra* note 19; See Gwen Ifill, *THE 1992 CAMPAIGN: Democrats* (1922); *Balanced Budget Proposal Termed Harmful by Clinton*, The New York Times (1992).

and receiving backing from the PACs and third parties linked to Wall Street, Disney, and other major corporations.[141] Congressional and gubernatorial campaigns also followed suit, raising millions from wealthy business figures, investors, and corporations, at times surpassing their Republican counterparts in terms of financial backing.[142]

Democratic politicians, including Clinton, used this financial support to run large, well-organized campaigns that were largely self-sufficient. These campaigns were designed to effectively mobilize voters, manage canvassing operations, create advertisements, and carry out other essential campaign activities with minimal outside assistance. In return for their contributions, wealthy donors were granted exclusive access to party leaders and officials. Clinton and other Democratic figures were notably receptive to business lobbying groups, far more so than the party was in the late 1970s.[143]

Wealthy donors were often invited to exclusive events, including Clinton's high-profile 50th birthday celebration at Radio City Music Hall.[144] The relationship between Clinton and his wealthy supporters became more controversial when it was revealed that donors were regularly invited to stay at the White House, dine with the president, and even sleep in the Lincoln Bedroom, an arrangement that eventually became the focus of national scandal.[145]

The financial support and privileged access allowed wealthy donors to secure a major influence over Democratic policy. Clinton, in turn, pushed through free-market policies that aligned with his donors' interests. His administration secured the passage of expanded free trade initiatives and passed sweeping deregulations of various economic sectors, particularly the financial industry. The repeal of *the Glass-Steagall Act*, a cornerstone of New Deal-era financial regulation, was the most significant of these deregulations.[146] Moreover, the Democrats implemented tax cuts that predominantly benefitted the wealthy, including reducing the highest capital gains tax rate from 28 percent to 20 percent in 1997.[147]

Despite its increasingly close relationship with investors and business, the Democratic Party in the 1990s did not fully sever ties with its traditional allies, such as social justice groups and labor unions. These groups remained vital supporters of the party, particularly in down-ballot races, where their financial contributions and organisational support played a crucial role. Unions were especially important in Bill Clinton's 1996 re-election campaign, providing significant resources, mobilising voters, and driving efforts in canvassing, phone banking, and other campaign activities.[148]

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[141] See Thomas Ferguson, *Bill's Big Backers*, Mother Jones (1996); Public Citizen, *1996 Federal Campaign Spending Up 33% From 1992*, Public Citizen (1997).
[142] *Supra* note 141; *Supra* note 32.
[143] *Supra* note 141; *Supra* note 19.
[144] See Paul Richter, *Clinton Attends Birthday Party at Radio City Music Hall*, Los Angeles Times (1996); David E. Rosenbaum, *1996 Democratic Chief Admits Arranging Access for Big Donors*, The New York Times (1997).
[145] See Peter Baker & Susan Schmidt, *Washingtonpost. Com: Campaign Finance Special Report*, The Washington Post (1997).
[146] *Supra* note 32; *Supra* note 19; See Ranajoy Ray Chaudhuri, *Deregulation and the Great Recession: The 1990s and the 2000s*, Palgrave Macmillan US, pp. 111-146 (2014)..
[147] *Supra* note 32; *Supra* note 19; See Charles Kadlec, *The Dangerous Myth About The Bill Clinton Tax Increase*, Forbes (2012); Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, Oxford University Press, p. 1 (2009).
[148] *Supra* note 13; See *Richard Shoch*, Contesting Globalization, p. 1 (2000); *Supra* note 19.

In return for their support, Democrats offered some degree of influence to unions and social justice groups, though this influence was considerably diminished compared to earlier decades. Despite this, the party still engaged with the leaders of these groups on policy matters, allowing their input to shape certain decisions.[149] This influence was reflected in a few key policy changes. For example, while unsuccessful, Clinton's push for healthcare reform in the 1990s was partly driven by the desire to increase access to affordable healthcare, a priority for many social justice groups.[150] Additionally, Democrats expanded the Earned Income Tax Credit, a redistributive policy designed to assist low and middle-income families.[151]

However, when the interests of the party's traditional allies conflicted with those of their new allies, the Democrats consistently sided with the latter. The financial and electoral support provided by wealthy donors was considered more valuable than the contributions of unions and activists. This was notably seen with the battle over NAFTA. Unions strongly opposed the deal, fearing it would undermine workers' rights, encourage companies to relocate jobs to Mexico, and put downward pressure on wages.[152] Social justice groups, particularly those focused on environmental and civil rights issues, also criticised NAFTA, citing concerns about its potential to exacerbate economic inequality, harm the environment, and disproportionately affect minority communities.[153]

In contrast, the party's wealthy donors were firm supporters of NAFTA, viewing it as a means to reduce labor costs and increase profits. By eliminating tariffs and lowering wages, NAFTA promised to further enrich investors and business owners, providing them with a stronger competitive edge both domestically and globally.[154]

Clinton ultimately aligned with the interests of investors and businesses on NAFTA. Although he attempted to address some concerns raised by unions and social justice groups by incorporating labor and environmental protections, these provisions were insufficient to satisfy critics. In the face of significant opposition, Clinton pushed Congressional Democrats to pass the agreement, which was later signed into law, securing the interests of his wealthy backers.[155]

After Clinton's presidency, unions and social justice groups sought to reclaim influence within the Democratic Party and American politics more broadly. They lobbied for limits on the role of wealth in politics, contributing to the passage of *the McCain-Feingold Act (2002)*. Despite initial opposition from unions, this landmark legislation banned corporate political donations and restricted the amount of money parties and candidates could accept during campaigns.[156] With the financial leverage of wealthy donors curtailed, unions and social justice groups intensified their

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[149] *Supra* note 13; See Kevin Sack, *Testing of a President*, The New York Times (1998); Nelson Lichtenstein, *A Fabulous Failure*, The American Prospect (2018).

[150] *Supra* note 19; See Joseph Godfrey & Bernard Grofman, *Pivotal Voting Theory: The 1993 Clinton Health Care Reform Proposal in the U.S. Congress*, Springer, pp. 139-158 (2008).

[151] *Supra* note 19; See Emilie Courtin & Heidi Allen *et al*., *Effect of Expanding the Earned Income Tax Credit to Americans Without Dependent Children on Psychological Distress*, 191(8) American Journal of Epidemiology 1444, 1444-1452 (2021).

[152] *Supra* note 19; *Supra* note 148; See Jeffrey W. Steagall & Ken Jennings, *Unions, PAC Contributions, and the NAFTA Vote*, 17(3) Journal of Labor Research 515, 515-521 (1996).

[153] *Ibid.*

[154] *Supra* note 141; *Supra* note 148; *Supra* note 152.

[155] *Supra* note 19; *Supra* note 148; *Supra* note 152.

[156] See Thomas E. Mann, *Linking Knowledge and Action: Political Science and Campaign Finance Reform*, 1(1) Perspectives on Politics 69, 69-83 (2004); Samuel L. Popkin, *Crackup: The Decline of Party Responsibility and the Rise of Political Strongmen*, 53(2) PS: Political Science & Politics 363, 363-374 (2020)

mobilization efforts, expanding their reach and strengthening their organizational capacity to support political campaigns.[157]

At the same time, the Democratic Party became more receptive to the efforts of unions and social justice groups following the poor results of the 2000 election. Despite winning the popular vote, Al Gore's loss under deeply controversial circumstances was widely seen as a stunning failure, especially as Republicans secured their first federal trifecta in nearly fifty years. Like Clinton, Gore raised significant sums from finance and business, but this funding failed to mobilize historically loyal Democratic constituencies, particularly Black and unionized Americans, whose turnout reached record lows. For Democratic insiders, this shocking defeat raised urgent concerns that the party had drifted away from its traditional allies.[158]

This alignment of interests ensured that, in the 2000s, unions and social justice groups assumed a more central role within the Democratic Party. They were instrumental in the rise of more progressive politicians reminiscent of earlier decades. Senators like Barack Obama, Sherrod Brown, and Bernie Sanders, who entered the Senate between 2004 and 2006, gained substantial backing from these groups.[159] Howard Dean also became a prominent figure during the 2004 Democratic presidential primaries, largely due to his support from unions and social justice organisations.[160]

Meanwhile, the DLC and other factions that had championed the party's business-friendly approach began to decline. Controversial positions, along with poor management, led to a loss of members and funding, weakening the influence of the DLC within the Democratic Party.[161]

Despite all of this, their legacy was nonetheless intact as the Democratic Party's reliance on investors and business interests remained strong throughout the 2000s. The Supreme Court's weakening of campaign finance regulations, combined with the Democrats' adept exploitation of loopholes, allowed the party to continue securing significant financial support from wealthy donors. The Democrats recognised the importance of this funding, viewing it as too vital to forgo in the context of competitive elections.[162]

Howard Dean's loss of the Democratic nomination to John Kerry in 2004 exemplified the enduring influence of business interests. Despite Dean's strong support from unions and social justice groups, Kerry's campaign received millions of dollars from wealthy donors, including those with ties to major corporations like

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[157] *Supra* note 13; See Timothy Minchin, *A Pivotal Role? The AFL–CIO and the 2008 Presidential Election*, 57(1) Labor History 1, 1-24 (2016).

[158] *Supra* note 19; See Richard B. Freeman, *What, Me Vote?, National Bureau of Economic Research*, p. 1 (2003); Thomas E. Mann, *Reflections on the 2000 U.S. Presidential Election*, Brookings Institution (2001).

[159] See John S. Jackson, *The Making of a Senator: Barack Obama and the 2004 Illinois Senate Race* (2006); Julian Borger, *Vermont Poised to Elect America's First Socialist Senator*, The Guardian World news (2006); OpenSecrets, *Democracy for America PAC Donors*, https: //www. opensecrets. org/political-action-committees-pacs/democracy-for-america/C00370007/donors/2022 (accessed on July 23, 2024).

[160] *Supra* note 19; See Matthew Hindman, *The Real Lessons of Howard Dean: Reflections on the First Digital Campaign*, 3(1) Perspectives on Politics 121, 121-128 (2005).

[161] *Supra* note 19; See Ben Smith, *The End of the DLC Era*, POLITICO (2011).

[162] See Gerard J. Clark & Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation after McConnell*, SSRN (2007); Karen Sebold & Andrew Dowdle, *Can "Letting in Sunlight" Lead to Accidental Sunburn?*, 17 (3) Election Law Journal: Rules, Politics, and Policy 209, 209-220 (2018).

Comcast and Goldman Sachs.[163] Dean's campaign, despite its early momentum, collapsed within the first several primary contests, while Kerry secured the nomination somewhat comfortably.[164] Similarly, when Democrats regained control of the House and Senate in the 2006 midterms, they did so with candidates who had garnered unprecedented financial support from the wealthy.[165]

Even politicians with close ties to unions and social justice groups, such as Barack Obama and Sherrod Brown, accepted substantial donations from large corporations like Microsoft and Humana.[166] After his presidential campaign, Howard Dean also accepted millions in contributions from wealthy investors and business leaders for his Democracy for America PAC.[167]

Throughout the 2000s, the Democratic Party continued to reciprocate the support of its wealthy donors by granting them influence and access, just as it had in the 1990s. In exchange for their contributions, Democrats upheld free-market policies and maintained close ties with business interests. The Progressive Policy Institute remained a major architect of Democratic policymaking. John Kerry pledged to preserve much of the tax and regulatory framework established during the Clinton administration and expressed interest in pursuing additional trade agreements. Democratic lawmakers worked alongside Republicans to pass further free trade deals, deregulate the financial sector, and weaken regulatory agencies. At the state level, Democratic governors and legislatures implemented tax cuts that primarily benefited high-income earners.[168]

6. Conclusion

In the late 20th century, Western mainstream left parties underwent significant changes in their political positions. They shifted from traditional social democratic stances, such as supporting redistribution and labor protections, towards embracing free market policies. The existing literature on why this evolution occurred emphasises the changing interests of the median voter. The increasing affluence of the median voter from the 1960s to the 2000s pushed them away from supporting redistributive and pro-labor policies and towards backing free market policies. As a result, these mainstream left parties had to accommodate these changing interests to remain electorally relevant.[169]

The emphasis on the median voter, however, is problematic. It is unclear whether the median voter truly became more affluent, or whether politicians and parties consistently respond to voter preferences, particularly given uneven levels of voter

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[163] *Supra* note 19; See Lisa Getter, *Among Kerry Donors: The Special Interests He Condemns*, Los Angeles Times (2004).
[164] See Elizabeth Shelburne, *Inside the Dean Campaign*, The Atlantic (2004).
[165] *Supra* note 19; *Supra* note 32.
[166] See Claire Obusan, *Barack Obama's Billionaire Backers*, NBC News (2009); Taylor Popielarz, *Brown Accepted Donations from Drug Companies Named in Suit*, Spectrum News, p. 1 (2023).
[167] See Alena Selyukh, *Billionaire Soros Pledges $1.5 Million to Democratic 'Super PACs,'* Reuters (September 27, 2012); *OpenSecrets, Rep. Sherrod Brown - Ohio District 13*, https: //www. opensecrets. org/members-of-congress/sherrod-brown/industries?cid=N00003535&cycle=2006&recs=20&type=P (accessed on July 23, 2024).
[168] *Supra* note 19; *Supra* note 32.
[169] *Supra* note 4; *Supra* note 2.

engagement. While shifts in the median voter may have played a role, this explanation is incomplete.[170]

A more compelling account comes from Hacker and Pierson's "politics by organised interests" approach, which emphasizes the influence of organised groups and their relationships with political parties.[171] In the late 20th century, unions and social justice groups—key supporters of social democratic policies—were no longer able to back mainstream left parties as effectively as before. Consequently, these parties became increasingly detached from redistribution, labor protections, and other social democratic policies. They turned instead to wealthy investors and the business community, whose financial resources enabled competitive campaigns, nudging parties toward policies aligned with these patrons' interests.[172]

To support this argument, this paper undertakes a historical case analysis of the American Democratic Party and its relationship with various political forces. During the mid-20th century, the Democrats were strongly supported electorally by labor unions and social justice groups like the ADA. These groups developed significant influence within the party and used it to push the Democrats to support labor protections, expansions of the welfare state, and various other social democratic policies.[173]

However, for various reasons, unions and social justice groups began to decline in the 1970s. They could no longer provide the same level of electoral support and subsequently saw their influence within the party wane. The gap they left was filled by wealthy investors and the business community, whose donations to the party and Democratic candidates helped them compete electorally. In return for this support, the party shifted its policy positions and increasingly backed free trade, deregulation, and free market initiatives favoured by their wealthy benefactors.[174]

Although the American Democrats have a unique background and operate within a distinct electoral system, their trajectory shows that the evolution of Western mainstream left parties cannot be understood solely through external globalization pressures. In the United States, globalization was not an unavoidable constraint but a policy project advanced by business aligned politicians, including those within the Democratic Party. This indicates that organizational change, particularly the weakening of unions and social justice groups and the growing influence of economic elites, plays a more decisive role in shaping the economic orientations of parties of the mainstream left, such as the British Labour Party and German Sozialdemokratische Partei Deutschlands.[175]

This analysis of the role organized interests and patrons played in shaping the political stances of mainstream left parties enhances the understanding of the evolution of their electoral coalitions. Historically, these parties relied heavily on working-class and low-income voters, particularly those in urban areas and unionized sectors, to secure electoral support. The shift in party platforms, driven by the growing influence of wealthy donors, opened the parties to more affluent

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[170] *Supra* note 141; *Supra* note 10; See Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12(3) Perspectives on Politics 564, 564-581 (2014).
[171] *Supra* note 10.
[172] *Supra* note 19; *Supra* note 141; *Supra* note 10; *Supra* note 86.
[173] *Ibid.*
[174] *Ibid.*
[175] *Supra* note 2; See Rob Manwaring & Paul Kennedy, *Why the Left Loses: The Decline of the Centre-Left in Comparative Perspective*, Policy Press, p. 1 (2017); Culpepper & Reinke, *Structural Power and Bank Bailouts*, p. 1 (2014).

constituencies. They cultivated support among the very wealthiest in Western society but, more significantly, captured large shares of the professional-managerial class: college-educated, professional, non-unionized white-collar workers, including lawyers, academics, and business managers. These voters' socio-economic positions made them less concerned with labor protections and redistribution and more focused on policies such as the free movement of capital and goods, lower property taxes, and moderate progressive taxation; positions the parties increasingly embraced. By the early 21st century, this demographic had become a central constituency, demanding sustained attention and policy catering from party elites.[176]

This analysis of the role organised interests and patrons played in shaping the political stances of mainstream left parties enhances the understanding of their responses to the 2007-08 Financial Crisis and the Great Recession. During the late 2000s and 2010s, many of these parties found themselves in positions of power and thus played significant roles in their countries' economic responses. However, these parties were often reluctant to support welfare state expansions, implement substantial financial sector reforms, or pursue other social democratic policies, despite widespread public support for such measures.[177] Instead, many turned to austerity, endorsing cuts to public spending.[178]

This paper argues that the decisions made by mainstream left parties can largely be attributed to their relationships with various interest groups and patrons. As these parties became increasingly detached from unions and social justice organisations, groups that well-represent the working class and needs of ordinary people, they grew less responsive to these constituencies. At the same time, their growing alignment with wealthy investors and businesses led to policies that favoured these affluent groups. Consequently, they rejected calls for substantial public oversight of the financial practices of wealthy investors and banking institutions. Through austerity measures, they also made unemployment more difficult to endure, pressuring workers to accept lower wages. Both outcomes served to protect the financial interests of the wealthy and expand their share of the economic pie.[179]

Additionally, this paper contributes to the decline of Western mainstream left parties in the 2010s. The vote share of European Social Democratic parties hovered around 30 percent for much of the 20th century and 2000s. In the late 2010s, it fell to 19 percent.[180] Across the Atlantic, the American Democratic Party experienced significant electoral losses during the 2010s, losing record numbers of Congressional, state, and local seats, and a shock Presidential loss in 2016.[181]

Many authors attribute the decline of mainstream left parties to their growing distance from traditional working-class voters. This can be traced to two interconnected factors. First, the weakening of unions and social justice groups undermined the parties' capacity to mobilize working-class voters. These organizations had historically been the primary vehicles for organizing electoral support, but financial and membership challenges—compounded by the lack of robust

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[176] *Supra* note 19; *Supra* note 32; *Ibid.*

[177] *Supra* note 32; *Supra* note 19; See Daniel Carpenter, *Institutional Strangulation: Bureaucratic Politics and Financial Reform in the Obama Administration*, 8(3) Perspectives on Politics 825, 825-846 (2010).

[178] *Supra* note 175; *Supra* note 86; *Supra* note 2.

[179] *Supra* note 177; *Supra* note 10; *Supra* note 2; See Julie Froud & Michael Moran *et al.*, *Wasting a Crisis? Democracy and Markets in Britain after 2007*, 81(1) The Political Quarterly 25, 25-38 (2010).

[180] See Catherine De Vries & Sara B. Hobolt, *Political Entrepreneurs: The Rise of Challenger Parties in Europe*, Princeton University Press, pp. 23-25 (2020).

[181] *Supra* note 19, at pp. 237-253.

support from mainstream left parties throughout the late 20th and early 21st centuries—left them less able to turn out voters. Even with attempts to rebuild ties in the 2000s, as seen with the Democrats following McCain-Feingold and the 2000 election, the relationship between these groups and their political allies was neither as strong nor as cooperative as it had been in the mid-20th century, limiting effective organization in the 2010s.[182]

Second, the growing accommodation of economic elites in policymaking—often at the expense of social democratic commitments to working-class and low-income voters—had clear electoral consequences. Mainstream left parties abandoned many policy pledges that had historically benefited their core constituencies. This was particularly evident during the economic crises of the late 2000s and 2010s, when working-class supporters endured insecurity, job losses, and social hardship while these parties held power. Although parties gained professional and wealthy voters in return, these gains did not compensate for the loss of their traditional base. This policy drift away from the working class towards the wealthy left the first with fewer incentives to support mainstream left parties. Subsequently, many of these voters opted to abandon them.[183]

[182] *Supra* note 19; *Supra* note 86; See Theda Skocpol, *Diminished Democracy: The Julian J. Rothbaum Distinguished Lecture Series*, Volume 8, Oxford University Press, p. 1 (2004).
[183] *Supra* note 175; *Supra* note 19;*Supra* note 86; See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, Harvard University Press, p. 1 (1970).

China's Techno-Development: Gilded Cage or Topical Trash?

A Review of Professor Ya-Wen Lei *The Gilded Cage: Technology, Development, and State Capitalism in China*

If China is the *Gilded Cage*, what would be the metaphor for contemporary America?

Of course, Professor Ya-Wen Lei never answered this question in her *tour de force* exposé of China's techno-development. But it is a fair question as she set out to present her account of "technology, development and state capitalism in China" in a comparative framework. [p187] Instead of poring through texts in which Lei expressly compared China with America on issues of dubious significance, I think, uncovering how she implicitly used America as the standard against which China was measured will get more bang for the buck in this short review.

Thanks to her training in law and background in Chinese culture and language, Lei has superb command of primary sources and vast secondary literature relating to her subject. The extensive field work she did in China must have sharpened her sensitivity and enriched her appreciation of the "contradictions between appearance and reality". Unlike the former Vice President candidate Tim Walz whose going in and out of China in the late summer of 1989 was so tangential, Professor Lei is truly into China as a scholar.

If Walz is excusable for being "a knucklehead at times", Lei's crafty construction of a theory-laden metaphor merits critical unpacking. "Cage" seems to have an impeccable intellectual pedigree. On the theoretical end, it is no less an intellectual giant than Max Weber who coined "iron cage" as a metaphor for capitalism instrumentality. On the empirical end, according to Lei, it was Yun Chen, one of the top Chinese leaders in the late 1970s and early 1980s who used the bird/cage metaphor to describe how the economy should be managed by the State. And further, the Chinese idiom *Teng Long* (shuffling cages) *Huan Niao* (changing birds) is indeed part of official discourse on economic development strategy.

Having inherited a century-old metaphor that has also been used in American academia in depicting Chinse legal development in recent decades (Stanley Lubman's "Bird in a Cage", which was later adopted by Professor Sida Liu), Lei bent over to explain that *gilded* was used not because its association with the gilded age of American industrialization. To the contrary, stated Lei, "…I seek to highlight the darker implications of these changes … but I still included the word *gilded* to acknowledge China's extraordinary success in building a globally leading digital capitalist system." At page 22, Lei gave away her game and foreshadowed her lacking original thoughts and imaginations that plagues her entire book.

To be clear, neither Yun Chen nor local officials in China ever used the English word *Cage*. Cage was a translation of the Chinese word *Long* (笼). *Long* certainly has the connotation of confinement. But that was clearly not what was meant by Yun Chen or the local economic officials in their colorful remarks. *Long* in *bird/long* as a figure of speech in the Chinese discourse on economic development mostly means macro environment or institutional infrastructure in the sense that the Dodd-Frank Act is a piece of apparatus aiming to prevent the overflow of financial risks or the Biden administration erects "small yard and high fence" to restrict the flow of high-tech

know-how to China. In using bird/long metaphor to discuss economic development, the human agency in general and governmental initiative in particular that dynamically negotiates between change and stability is at the center of the imagery. Yet Lei chose the darker side of *Long*'s connotation, and she made it clear at the get-go with a sleight of hand that is nearly impossible for readers in the West to detect.

When Yun Chen (1905-1995) was around, private ownership of cars was unthinkable in China. By the time when Lei was drawing a picture of the gilded cage, millions of ordinary Chinese routinely travel in and out of China and massive exports of Electric Vehicles from China is changing the global economic order. If every cloud has a silver lining, for Lei, every Chinese techno-development milestone has a darker implication. She steadfastly devoted her book to spelling out those darker implications.

Lei openly searched for "grievances" in the shadow of China's techno-development and declared "paradoxes" when grievances did not appear in the large scale as anticipated. [p302] Law enforcement campaigns against low-end sectors, long hours of "coding elites", unequal access to education by migrants' children, couriers risking injuries under strict disciplines of algorithms are major examples of grievances in the wake of the bird/cage regime of techno-development.

What do all these darker stories in contrast to the *gilded façade* add up to – as far as a theorist is concerned? Would Lei advocate trading servers earning 15% tips (hopefully tax-free in the coming years) for migrant workers' struggle for equal benefits, professionals mired in tuition loans for coding elites' long hours, or zoom-induced housing shortage (according to Paul Krugman) for gig workers' lacking autonomy?

Of course, Lei is above the fray in terms of specific policies. Yet she spoke with authority and confidence from an elevated point of view in her negative judgment on the Chinese government's continuous effort in guiding development from low-end to high-end sectors. If Beijing wrote "If winter comes, can spring be far be behind?", she will challenge Beijing for favoring spring over winter without voting or inputs from the public sphere.

Lei did acknowledge that the U.S. also played active roles in industrial development, albeit under the disguise of defense research & development and did so in limited manner. Yet Lei failed to confront that even the U.S. government had to reform in order to adapt to the changed circumstances. Biden's signature legislation Inflation Reduction Act has made industrial policy an open pursuit. As Jake Sullivan eloquently stated: *A modern American industrial strategy identifies specific sectors that are foundational to economic growth, strategic from a national security perspective, and where private industry on its own isn't poised to make the investments needed to secure our national ambitions. … This is about crowding in private investment—not replacing it. It's about making long-term investments in sectors vital to our national wellbeing—not picking winners and losers.*

Lei never made it clear by what standard she declared Chinese instrumental rationality a "hyper" one. She obviously felt the national pride of her interview subjects and informants in China, yet she never appreciated the sheer magnitude of the challenge in raising living standards of 1.4 billion people in one generation. She piled up catch phrases such as digital capitalism, instrumental power over people, without thinking them through. Her moral and intellectual high ground ultimately hinges on the widely shared belief that the U.S. political system is based on election and the rule of law against which China's performance-based governance is

self-evidently inferior. It never occurs to Lei that both election and rule of law are mechanisms of accountability which have everything to do with performance of the governance. Lei understandably suffers from "learned helpless" in seeking accountability from the ruling class as in her lifetime American political vision has completed the full rotation from G. W. Bush's "ownership society" on the right to Kamala Harris' "opportunity economy" on the left. She is not alone in running out of imaginations.

Exhausted in her theoretical wandering in the face of the relentless Chinese facticity, Lei sought comfort from Habermas' concepts, though without engaging in any real analysis. [p318-319] Habermas' communicative rationality is demonstrably feeble if not defenseless against corporate electioneering communication in various forms of political advertising protected by the First Amendment. *Citizens United vs. Federal Election Commission* (2010) stands as a rule of law (not the "rule by law" as Lei would emphatically point out) handed down by the 5 to 4 vote of the Supreme Court Justices whose appointments have long but still traceable line of influence by corporations and billionaires, or to use Lei's word, "capital". Other than conclusively stating civil sphere has been stifled in China in recent years, Lei made no serious attempt to lay out how Habermas' communicative rationality works anywhere in the real world and can be a viable substitute to the dreadful "hyper instrumental rationality" in China.

His real and rich experience in Chinese Mainland notwithstanding, Walz somehow was compelled to focus on his being in Chinese Hong Kong (a place far from Beijing, but closer to hearts and minds of American elites than Puerto Rico is) in 1989, not in May as he falsely claimed for years but in August. Poor Walz had to toe the *right* line in terms of talking about his China experience, tweaking dates as he must.

Lei's factual report of China's techno-development experience could be a great contribution in its own right. Yet Lei, not unlike Walz, compressed it into a worn-out metaphor as a "self-satisfying artifact", to borrow Stanley Fish's term. Lei's peer-reviewers and intended readers experience a sense of "flattering" as their beliefs and ways of seeing China are reinforced by Lei's "rhetorical" presentation.

In recent years, China has dazzled the world with its technology advancements. Huawei, e-commerce giants such as TEMU, social media giants such as TikTok and RedNote, renewable energy giants such as BYD, and now AI start-up DeepSeek, which won't be the last one. And to the credit of the well-funded American academia and think-tanks, there have been no lacking comments and scholarly works on China. Yet, none of those well-funded research were even close in predicting techno-development trajectory of China.

The cage, or the "Closing of Mind" may well be on the States side. The consensus on China is so strong and entrenched that we need to step out the *field* to get some fresh air.

"For me a work of fiction exists only insofar as it affords me what I shall bluntly call aesthetic bliss... There are not many such books. All the rest is either topical trash or what some call the Literature of Ideas, which very often is topical trash coming in huge blocks of plaster that are carefully transmitted from age to age until somebody comes along with a hammer and takes a good crack at Balzac, at Gorki, at Mann."

Vladimir Nabokov, the author of *Lolita* made the above statements in defense of his book. China is no Lolita by any stretch of imagination. But America will do well by seeing China with fewer half-baked conceptions.

The Gilded Cage: Technology, Development, and State Capitalism in China, Lei Ya-Wen, Princeton University Press, 2023.

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