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CONTENTS

ARTIFICIAL INTELLIGENCE, DIGITAL TECHNOLOGIES & DATA GOVERNANCE

Siddharth Badkul

From Data Mining to Copyright Infringement:

Legal Challenges in Training Artificial Intelligence 237

Osman A. Izhaev, Dmitry L. Kuteynikov

Governing AI Foundation Models:

Regulatory Approaches and Global Perspectives 269

Firuz M. Abbasova, Kamran I. Khalilov

Comparative Analysis of Personal Data Protection Laws:

The Case of Azerbaijan and the European Union's

General Data Protection Regulation (GDPR) 296

Tatiana A. Topilina

The Use of Digital Technologies in the Judicial Stages of Criminal

Proceedings: A Comparative Analysis of Foreign Experience 334

INTERNATIONAL INVESTMENT, OVER-THE-COUNTER DERIVATIVES & RESOLUTION OF ECONOMIC DISPUTES

Mostafa Abadikhah, Rishat V. Nigmatullin

Bilateral Investment Treaties in the Russian Federation

and the State of Qatar in the wake of Maritime Investment.

Part 2: BMIT as a Coherent Solution 354

Aleksey P. Klementyev

International Commercial Arbitration

and Over-the-Counter Derivatives 391

GOVERNANCE, CONSTITUTIONALISM & PUBLIC POLICY REFORM

Edi Saputra, Eman Suparman, Zainal Muttaqin

Hybrid Governance Model without Regional People's Representative

Council (DPRD): A Constitutional Study on Representation

in Nusantara Capital City 426

Tran Vang-Phu, Nguyen Thanh Giao

Vietnam's Air Pollution and Policy Gap 452

HUMAN TRAFFICKING AS A TRANSNATIONAL CRIME

Subir Kumar Roy

Human Trafficking in South Asian Countries:

An Analysis from the Prism of Law 471

ARTIFICIAL INTELLIGENCE, DIGITAL TECHNOLOGIES & DATA GOVERNANCE

Article



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From Data Mining to Copyright Infringement: Legal Challenges in Training Artificial Intelligence

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Abstract: Legal controversies pertaining to the use of copyrighted material in artificial intelligence training datasets have been fuelled by the fast development of large language models. The paper explores the complex legal issues resulting from data mining activities and possible copyright violations associated with the training of AI. The paper includes the technological perspective of data mining and training of AI models. Further, the paper deals with the legal challenges, scrutinising whether specific technological methods such as the use of unrecognisable examples, watermarking techniques, machine unlearning, dataset de-duplication, etc., thereby exploring how their application prevents copyright infringement. As original contributions, the paper analyses the theories related to copyright law and evaluates the effectiveness of the aforementioned technological method in fulfilling the objectives of these theories. The paper provides an original framework of assessment of copyright issues in AI training datasets, by contrasting systems in the EU, U.S., and India. It reveals regulatory loopholes in the copyright law in India and suggests a hybridized approach to Indian copyright law, the Fair Learning Doctrine that combines the concepts of transformative

use and proportionality. The paper adopts a doctrinal and analytical approach, analysing case laws, statutory interpretation, and technological literature to assess the relationship between AI and copyright vis-à-vis training of AI model.

Keywords: text and data mining; fair use doctrine; large language models; copyright infringement; AI training data

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Contents

I. Introduction	239
II. Data Mining and Copyright Violation: Legal Perspectives	
from European Union and United States of America	240
III. Technical Perspective	248
IV. Legal Challenges in Training AI: From Data Mining	
to Copyright Infringement	250
IV.1. Whether Infringement or not? A Jurisprudential Perspective	252
IV.2. Philosophical Approaches to Copyright and AI Training	253
IV.3. Critical Legal Perspective	254
IV.4. Suggestions: Technological methods and Strategies	256
IV.4.1. Unrecognisable Examples	256
IV.4.2. Watermarking Techniques	256
IV.4.3. Machine Unlearning	257
IV.4.4. Dataset De-duplication	257
IV.4.5. Alignment Strategies	257
IV.4.6. Improved Training Algorithms	257
IV.5. Proposed Changes in Legal Framework	259
IV.6. Proposed Integrated Framework	261
IV.7. Lessons for India	261
V. Conclusion	264
References	264

I. Introduction

The interplay between copyright law and artificial intelligence presents a multifaceted scenario, particularly with respect to the utilization of copyrighted material for training AI models. An essential element of this junction pertains to the training of these models, which frequently necessitates the utilization of extensive datasets that may encompass copyrighted materials. This method raises significant legal concerns, particularly regarding potential copyright infringement during the data-mining phase, in which algorithms extract patterns and insights from large datasets. This method raises significant legal concerns, particularly regarding potential copyright infringement during the data-mining phase, in which algorithms extract patterns and insights from large datasets. The primary concern pertains to whether the utilization of copyrighted content for training of AI qualifies as fair use or is subject to alternative exclusions within copyright law. As AI technology continues to advance, copyright considerations become increasingly critical to promoting innovation while respecting authors' rights. As AI technology continues to advance, copyright considerations become increasingly critical to promoting innovation while respecting authors' rights. The use of copyrighted photos for training generative AI systems has incited copyright infringement litigation, complicated the legal framework and underscored the conflict between technological progress and existing intellectual property rights (Quang, 2021).

The issues in this domain may be categorized into three principal stages: the learning and training phase, the generation of AI-produced content, and the operation of the AI model itself. Each stage gives rise to distinct legal challenges, particularly in relation to intellectual property rights. This paper deals with the training phase (Leibler, 2024).

The paper is guided by three research questions: (1) Is the current copyright law adequate to address all of the extensive and transformative copying involved in AI training? (2) To what extent do the doctrines of fair use in the United States and fair dealing in the European Union and India apply? (3) What practical measures should India adopt to reform its regime in accordance with global standards?

II. Data Mining and Copyright Violation: Legal Perspectives from European Union and United States of America

For the purpose to develop trained models that are capable of executing a broad spectrum of tasks, machine learning necessitates an abundance of data. Despite the fact that data or information is not considered subject matter under the copyright law, a substantial portion of the materials used as datasets for machine learning are protected by copyright law, including texts, images, and videos (Kretschmer et al., 2024). Data scraping is a standard initial step in the task of machine learning, which involves the collection and organization of information from online sources. The technologies of mining, learning, and scraping are frequently perplexed, much like the legal frameworks that govern their regulation (Margoni et al., 2022).

Both texts and images are frequently employed as training data. They become viable subjects for protection under copyright as literary or artistic works when expressed in an original form. In general, copyright law distinguishes between protected and unprotected content. Original expressions in literature and artistic creations are represented by the former. The latter is a broad category that does not warrant protection for a variety of reasons, including the absence of originality, the absence of a stable and objective expression, and the expiration of the protection term (Kretschmer et al., 2024).

The central question in the ongoing global debate, including in the United States and the European Union, is whether the use of copyrighted works to train generative AI models constitutes copyright infringement or is protected under exceptions for transient and temporary copying and text and data mining in the EU, or under the fair use doctrine in the United States. EU legislators have mandated that providers of generative AI systems must publicly disclose a summary of the utilization of training data protected by copyright law. This is notwithstanding the fact that the European Union AI Act is not explicitly designed for copyright law.¹ The processes necessary to develop an AI

¹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU)

system are the primary concern from an input perspective. The scraping and extraction of relevant information from foundational datasets, which frequently contain copyrighted materials, is a necessary step during the training phase of AI systems. In the EU, these activities are primarily governed by two text and data mining (TDM) exceptions outlined in the 2019 Copyright in the Digital Single Market (CDSM) Directive,² which address TDM for scientific purposes (Art. 3) and what is referred to as “commercial” TDM (Art. 4).

Further, the EU AI Act requires that providers of general-purpose AI models disclose summaries of the data used for training in order to assure compliance with existing EU copyright laws and enhance transparency (Guadamuz, 2025). Nevertheless, the AI Act demonstrates deficiencies in this context, including deficient provisions for transformative uses that are comparable to the fair use doctrine and ambiguous data disclosure requirements. Furthermore, the requirement for non-EU AI providers to adhere to EU copyright standards entails substantial compliance burdens, which have the potential to restrict the accessibility of AI technologies within the EU market and stifle innovation. It is imperative to further refine these limitations in order to strike a balance between the facilitation of AI development and the preservation of intellectual property (Leibler, 2024).

TDM is described under the CDSM Directive as any automated analytical method intended to examine digital text and data in order to provide information, such as patterns, trends, and correlations. This extensive definition will potentially include various training activities crucial for the creation of AI systems, especially machine learning types, including generative AI systems, owing to its clarity (Margoni et al., 2022).

2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). European Union. Available at: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng> [Accessed 09.06.2026].

² European Parliament and of the Council. (2019). 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. European Union, <https://eur-lex.europa.eu/eli/dir/2019/790/oj/eng> [Accessed 09.06.2026].

The CDSM Directive stipulates two exceptions related to TDM in Art. 3 and 4. Article 3 lays down an exemption for research organizations and cultural heritage institutions to engage in acts of TDM for the purpose of scientific research, which encompasses both natural and human sciences. This exemption is contingent upon the fact that the organizations must have lawful access to the copyrighted works or subject matter in question, as well as the fulfilment of several additional conditions.

Further, Art. 4 establishes an exception for the reproduction and extraction of lawfully accessed works/subject matter. The objective is to grant legal certainty for actions that may not satisfy the “impermanent and transient copy exception” requirement stipulated in Art. 5(1) of the InfoSoc Directive. In the case of work that is publicly available online, the new exception is subject to reservation by rights holders, including the use of metadata and the terms and conditions of a website or service. Such a reservation shall not impact the application of the TDM exception for scientific purposes under Art. 3 (Dermawan, 2024).

Both TDM exceptions have been criticized for their restrictive nature, which may result in the exclusion of a multitude of applications in this field, particularly those regarding the advancement of AI technologies. However, the commercial TDM exception has regained momentum as a viable, scalable policy option to address generative AI. This is due to the emergence of generative AI and its clash with the copyright domain, as well as a favorable political landscape and timing (Margoni et al., 2022).

As reflected in Germany under Sections 44b and 60d of UrhG (the German Copyright Act), the Art. 3 and 4 of the CDSM Directive, highlight the potential and difficulties of text and data mining exceptions, particularly in relation to AI training. The legal framework is designed to balance the interests of copyright holders with the needs of researchers and commercial entities involved in TDM. Although scientific research is broadly protected under these provisions, commercial AI training remains less well-defined, as it relies on explicit opt-outs and machine-readable notices to determine lawful access. This structure was examined and substantively clarified on 27 September 2024 in

the Hamburg Regional Court's judgment in *Kneschke v. LAION e.V.*,³ the first major court decision on the EU TDM exceptions in the AI context. The *Kneschke* decision established that such protection extends to preparatory work that may not directly generate research findings but constitutes a necessary and essential step in the scientific research process. In that case, the Hamburg Court found that *LAION e.V.*, a non-profit organization, qualified as a research organization authorized to conduct TDM for dataset creation intended for subsequent AI research by others, provided the organization operated non-commercially and commercial partners did not exert decisive influence over research findings (Leistner and Antoine, 2025).

A German approach exemplifies a wider European tendency in which TDM exceptions are intended to promote innovation while preserving intellectual property rights. However, the effective enforcement of these exceptions continues to be challenging, as the legal framework remains in development and the definition of what comprises "lawful access" is the subject of a continuing debate (Rosati, 2025). The problem is considerably more complex due to the necessity of establishing a clear distinction between TDM and AI training. This is because AI training involves additional copyright considerations that are not entirely encompassed by the existing exclusions. In addition, Art. 4(3) of the CDSMD's opt-out mechanism, intended to protect right holders, could unintentionally hinder AI progress by making things legally unclear and hard to work for AI developers (Ziaja, 2024). This shows how important it is to have a more nuanced regulatory approach that works for both non-commercial and commercial purposes. One way to do this may be to employ a hybrid model that combines statutory exceptions for non-commercial usage and opt-out clauses for commercial applications (Thongmeensuk, 2024).

The legal issue in the United States, unlike the EU, is whether such artificial intelligence training operations constitute fair use in light of the lack of a specific TDM exception. Under the judgments given in the

³ Robert Kneschke v. LAION e.V., Case No. 310 O 227/23 (Hamburg Regional Court, Germany, 27 September 2024).

cases *Authors Guild v. HathiTrust*⁴ and *Authors Guild v. Google*⁵ the doctrine of fair use in the United States has been contended to permit a broad spectrum of text and data mining activities involving copyrighted works. The bottom line is that U.S. copyright law may be among the most lenient globally regarding TDM activities, especially when compared to jurisdictions that impose more stringent exceptions and limitations, such as the EU. Furthermore, the Generative AI Copyright Disclosure Bill of 2024 (Leibler, 2024) which was introduced in the House of Representatives and is presently being reviewed by the House Judiciary Committee in the United States proposed that AI developers must send a notice to the U.S. Copyright Office concerning the uses of copyrighted materials in their training datasets. This bill is akin to the EU AI Act in that it prioritizes transparency and disclosure. Its primary objective is to guarantee that copyright holders are informed about the utilization of their works in generative AI systems (Leibler, 2024).

The evolving legal framework concerning fair use, particularly following the decision of Supreme Court of the United States 2023 decision in *Andy Warhol Foundation v. Goldsmith*⁶ and the 2025 decision by United States District Court for the District of Delaware in *Thomson Reuters v. ROSS Intelligence*,⁷ has significant implications for the permissibility of training artificial intelligence systems on copyrighted material. The Court limited the definition of transformative use in the

⁴ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). The case is concerned with the issue that whether the act of HathiTrust Digital Library to digitise the copyrighted works for access and full text search for visually impaired users, can be called as fair use or not. The Second Circuit Court affirmed that creating a searchable database and providing access to print-disabled individuals were fair uses under U.S. copyright law. The case mark a significant victory for fair use and library digitization efforts.

⁵ *Authors Guild v. Google*, 804 F.3d 202, 217 (2d Cir. 2015). The Authors Guild and other plaintiffs alleged that practices by Google to digitise books infringed upon their copyrights. The Second Circuit Court affirmed that digitization and display of snippets by Google constituted fair use under 17 U.S.C. § 107. The court emphasized the transformative nature of these uses, noting that they served different purposes from the original works and did not substitute for them. The court acknowledged the commercial nature of Google but also concluded that the public benefits of the project outweighed any potential harm to the rights holders.

⁶ *Andy Warhol Foundation v. Goldsmith*, 598 U.S. 508 (2023).

⁷ *Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc.*, No. 1:20-cv-613-SB (D. Del. 11 Feb. 2025) (Memorandum Opinion).

Warhol case. It ruled that a secondary use does not qualify as transformative solely because it adds a new meaning or aesthetic if the commercial objective is quite similar to that of the original. The Court weakened reliance on broad technological transformativeness as a defense for AI training by rephrasing earlier judgements like *Authors Guild v. Google* to emphasize commerciality and the specific goal of the usage (Lin, 2023).

This narrower view of what is transformative is shown in the *ROSS* judgement. The Delaware District Court determined that reproducing Westlaw headnotes for the purpose of training a competing AI-based research tool was not considered transformative, emphasizing that the use duplicated the expressive content of the headnotes. The court stressed how the usage would hurt Westlaw's current subscription market and other licensing markets that may reasonably be expected to happen. It decided that these factors made the use not fair use. The court also refused to accept comparisons to cases of intermediate copying that involved functional code. It declared that headnotes had creative expression that an AI system may copy or use (Sookman, 2025). When read together, these cases show that U.S. courts are paying more attention to how the market works, what motivates creators, and the specific functional role of copyrighted inputs in AI training. This makes it harder for commercial machine learning systems to use data without permission.

The above approaches also expose gaps and lingering doctrinal issues vis-à-vis the applicability of traditional fair use principles to AI training. In *Warhol* case, the Court limited its analysis to the narrow question of licensing. It left unanswered the question that whether large-scale ingestion of copyrighted works for model training (an upstream activity that does not itself generate output for consumers) should be treated differently from downstream commercial licensing. This raises a fundamental question: does the fair use analysis conflate "use in training" with "use in final outputs," hence imposing an excessively stringent requirement on a phase of AI development that is arguably comparable to intermediate copying? The *ROSS* decision compounds the situation by attributing considerable importance to possible licensing markets, suggesting that copyright holders can create future markets to undermine fair use assertions. If courts persist in endorsing such arguments, the doctrine may evolve into a framework where the

mere potential for a licensing market is suffices to preclude fair use, consequently obligating AI developers to operate within a completely licensed training environment, irrespective of the nature or intent of the use. The dismissal of the intermediate-copying argument also warrants examination, as its rationale may not readily apply to other categories of inputs such as structured datasets, metadata, or embedded content that may operate more as facts or functional systems rather than as creative expressions. Furthermore, the distinction established in ROSS between generative and non-generative AI introduces significant ambiguity, i.e., if generative models produce novel expressions, will courts afford them greater leniency under Warhol, or will the increased emphasis on market harm be applied more rigorously? These unresolved issues underscore that the existing jurisprudence, although safeguarding rightholders, may still lack a consistent and technologically nuanced framework for assessing AI training within the scope of fair use.

In addition of the above, Katharina de la Durantaye in her work has done a comprehensive examination of how various jurisdictions address the use of copyrighted content for training generative AI models (Durantaye, 2025). A tabular representation is provided below to present a global perspective.

Table 1

Juris-diction	Control by Rights Holders	Compensation Mechanisms	Transparency Requirements	Legal Certainty	Notable Features
United States	Fair use doctrine allows certain uses without explicit consent	No statutory compensation; relies on fair use assessments	Minimal; transparency not mandated	Fair use is flexible but can be unpredictable	Fair use provides broad leeway for AI training, but outcomes can vary case by case
Canada	Fair dealing permits specific purposes	No statutory compensation; depends on fair dealing applicability	Not specifically addressed	Fair dealing is more restrictive than U.S. fair use	No specific TDM exception; fair dealing applies to limited purposes like research and education

United Kingdom	Proposed opt-out mechanism for rights holders	Potential for compensation through licensing; details under consultation	Proposals include transparency obligations for AI developers	Legal framework under development	Government proposes allowing AI training on copyrighted works unless creators opt out. (However, no approved policy currently allows AI training unless creators opt out, it was only proposed)
European Union	Rights holders can opt out of TDM exceptions	No direct compensation; opt-out mechanism allows control	Transparency obligations under the AI Act	Clear rules under CDSM Directive and AI Act	Favourable conditions for AI companies; legal certainty provided by specific directives
Israel	Fair use applies	No statutory compensation; relies on fair use assessments	Not specifically addressed	Fair use provides some flexibility (no explicit case law yet)	No specific TDM exception; fair use is somewhat similar to U.S. model
China	Rights holders have significant control	No statutory compensation; unauthorized use is prohibited	Transparency requirements are stringent	Clear but restrictive legal framework	AI training on copyrighted works requires explicit permission; strong enforcement mechanisms
Singapore	Specific exception for computational data analysis	No compensation required under the exception	Transparency not mandated under the exception	Clear provisions under the Copyright Act	Exception allows AI training for both commercial and non-commercial purposes with lawful access
Japan	Broad exception for information analysis	No compensation required under the exception	Transparency not specifically addressed	Clear legal framework supports AI training	Permits use of copyrighted works for AI training without consent, fostering innovation

III. Technical Perspective

From a technical perspective, there are two aspects that require deliberation regarding copyright violations. These are, first, the various stages of training AI models and copyright violations associated with each state and second, the process of converting the training data into synthesised content.

The various stages of AI model training and the associated copyright concerns are outlined below:

Stage	Copyright Issues
Stage 1: Data Collection & Organization	Sourcing often involves copyrighted material (texts, images, etc.), raising reproduction and adaptation rights concerns
Stage2: Training	Involves reproduction of works, potentially infringing unless covered by exceptions or licenses
Stage 3: Deployment & Use	Model outputs may resemble protected content; traditional infringement rules may apply

From the second perspective, AI models have advanced significantly in their ability to generate a diverse range of synthesized content, including text, images, graphics, audio, and code. For example, advanced image-generation models, such as diffusion models (DMs), can produce highly realistic and intricate images and artworks.

Likewise, large language models (LLMs) such as ChatGPT, can be utilised to generate cohesive and imaginative textual content across diverse genres and narratives. These advanced models are termed “Deep Generative Models” (DGMs). Nonetheless, due to the exceptional fidelity and authenticity of the content produced by DGMs, questions have emerged over the related copyright issues (Ren et al., 2024).

In this section, an overview of present computational approaches proposed for copyright protection are discussed from a technical standpoint. These are feasible alternatives for both AI model creators and users regarding copyright protection. Generally, these computational techniques can be classified based on the copyright holder as below mentioned.

Firstly, for the “source data owners.” They can protect their original works by: (a) “crafting unrecognisable examples,” which involves

manipulating data to obstruct DGMs from extracting information; (b) employing “watermark techniques” to trace and identify whether a generated work is derived from their original creation; (c) utilising “machine unlearning” to request the deletion of their data from the model or its output upon detecting copyright infringement; (d) implementing “dataset de-duplication” to eliminate redundant data, thereby reducing the memorisation effect and preventing the generation of training data; (e) applying “alignment,” which employs a reward signal to diminish memorisation in LLMs; and (f) exploring other methods, including enhanced training and generation algorithms for improved LLM behaviour (Ren et al., 2024).

Secondly, for users who create new works with the help of DGMs (Deep Generative Models), the protected work constitutes the content generated by these models. Copyright for such content does not depend much on how the DGM created it, since traditional copyright methods can still be used to protect it. To identify and trace ownership, DGM providers often use “watermarking strategies” by embedding invisible marks in the content or the model itself (Ren et al., 2024).

Illustratively, consider the programs like Stable Diffusion, Midjourney and DALL-E 2 that use generative AI to create new visuals. In each program, the end user submits a textual description (i.e., prompt) specifying the desired image, and via a complex process, the program produces a new image that aims to correspond with the given description. The AI picture generating program relies on a ‘text encoder’ and an ‘image decoder.’ The text encoder converts the prompt into a ‘transition output.’ The latent output can subsequently be decoded by the image decoder into images. Neither the image encoder, the latent representation, nor the image decoder contains images in themselves (Shoemaker, 2024).

It is also pertinent to discuss the lawsuit of GitHub Copilot. GitHub Copilot was developed by GitHub in collaboration with OpenAI. An AI-powered code completion tool assists developers by suggesting code snippets as they type. It leverages upon the Codex model of OpenAI that is trained on a big corpus of publicly available code, including the repositories hosted on GitHub. While Copilot aimed to enhance productivity, it was surrounded in legal controversies concerning copyright

and open-source license compliance. In November 2022, a class-action lawsuit was filed against GitHub, Open AI and Microsoft, alleging that GitHub Copilot infringed copyright laws by reproducing code from open-source projects without proper attribution. The lawsuit claimed violations of the Digital Millennium Copyright Act, open-source licenses, and other legal frameworks. In July 2024, a California court allowed only two claims to proceed pertaining to violation of open source license and breach of contract. The court found that the code generated by Copilot was not sufficiently similar to the original works so as to constitute copyright infringement.

The most appropriate precedent on the above situation is the Authors Guild v. Google case.⁸ Herein, as discussed above, the Second Circuit Court of Appeals held that Google's act of scanning millions of copyrighted books for computer analysis and indexing their contents to provide text snippets in response to user search requests constituted fair use. The court also held that the use of copyrighted books was transformative, since the corpus further enhanced access to information. Google replicated entire books to fulfil its revolutionary objective of indexing their contents for computational analysis and search. Moreover, since Google supplied only three concise excerpts from each book, the snippets were unlikely to adversely affect the market for the books.

IV. Legal Challenges in Training AI: From Data Mining to Copyright Infringement

Several fundamental questions give rise to the legal disputes about data use in machine learning. Firstly, there is significant ambiguity regarding the legal status of input data, which complicates the use of data without risking copyright violations. Many datasets for training models contain copyrighted content that needs permission under copyright law, which creates challenges for creators. Furthermore, the exemptions permitted for text and data mining or research might not cover every company operation, leading to uncertainty about legal rights. By making access dependent on right-holder approval, the EU's legal ac-

⁸ Authors Guild v. Google, 804 F.3d 202 (2nd Cir. 2015).

cess criteria might ironically stifle innovation and create even more uncertainty for machine learning applications. Finally, obligations for artificial intelligence companies to reveal their training data could add more administrative load and complexity, stressing the need for more precise legal frameworks to promote innovation and copyright protection (Kretschmer et al., 2024).

The crux of the discussion is the legality of data mining from copyrighted material and whether this practice qualifies as fair use or violates intellectual property rights. The implications of data mining from copyrighted material on the concept of fair use in intellectual property law are significant and multifaceted. The ongoing debate, exemplified by the Getty Images and Stability AI case, highlights the tension between the need for large datasets in AI training and the rights of copyright holders, raising questions about whether such uses can be classified as fair use or infringement (Lintang Kanaya and Santoso, 2025). In the U.S., the fair use doctrine emphasizes transformative use, yet recent analyses suggest a shift towards considering market harm, which could complicate the legal landscape for generative AI outputs. Conversely, the European Union has introduced specific exceptions for text and data mining, particularly for scientific research, reflecting a more permissive approach to balancing copyright protection with innovation needs (Fernández-Molina and De La Rosa, 2024). This divergence in legal frameworks underscores the necessity for adaptive copyright laws that accommodate the evolving digital environment and the growing importance of data mining in different fields.

A rigorous analysis indicates that neither the TDM exceptions in the EU nor the U.S. fair use doctrine consistently address the conflict between innovation and market detriment. The *Getty Images v. Stability AI*⁹ case in the UK shows that arguments about copyright infringement must make a clear difference between direct reproduction and the wider, secondary effects of AI model output. In the U.S., on the other hand, the *Concord* case¹⁰ shows how contributory and vicarious liability can apply to the systematic use of protected works. It is clear that there

⁹ *Getty Images (US) Inc & Ors v. Stability AI Limited*, EWHC 2863 (Ch) (2025).

¹⁰ *Concord Music Group v. Anthropic*, — Cv-01092 (M.D. Tenn. 18 Oct. 2023) (2023).

needs to be a “intermediate copyright exception” just for AI training. This exception should require clear transformation, a market substitution analysis, and transparency.

IV.1. Whether Infringement or not? A Jurisprudential Perspective

Although copyright law delineates explicit regulations about copying, reproduction, and fair use, these principles were established before to the advent of AI and may not adequately fulfil the justifications of copyright law and philosophy in their application to AI-related use cases. The application of classical doctrines to AI learning necessitates a re-evaluation of essential copyright concepts, especially concerning the transformative use of data in AI models, considerations of market harm, and the overarching objectives of copyright law.

The reproduction right, conferred by U.S. law, is among the most fundamental aspects of copyright. AI training frequently entails the reproduction of works — be it photos, text, music, or other copyrighted materials — enabling the analysis of these works for patterns by machine learning algorithms. Initially, this reproduction may appear to constitute copyright infringement due to the unauthorized duplication involved. The characteristics of reproduction in AI training contest conventional concepts of infringement. AI models do not utilize these works for their emotive content, as a person would; rather, they employ them for the underlying data. Machine learning algorithms analyze works by breaking them down into data points, patterns, and relationships, which are subsequently utilized to train the model. This prompts a vital inquiry: does this form of usage qualify as copying as defined by copyright law (Price, 2022)?

Copyright law safeguards the expression of concepts, not the concepts themselves. AI training often emphasizes the conceptual or informational elements of works, prioritizing data extraction over the reproduction of expressive content. This contrast corresponds with overarching copyright theories, especially utilitarianism, which posits that copyright serves to reconcile the protection of authors with the advancement of the collective benefit through the spread of innovative information (Lemley, 2015).

A significant defense for AI engineers is the idea of fair use, especially its focus on transformative use. As described earlier, in instances such as *Authors Guild v. Google*, the court determined that Google's digitization of books to establish a searchable database was significantly transformative, as the application diverged from the original intent of the works. Likewise, AI training may be regarded as transformative since it employs works for data extraction instead of mere expressive replication. Nonetheless, not all AI training can be considered transformative.

The degree to which AI training is deemed transformational hinges on whether the model merely replicates the original work or employs it for a markedly distinct objective. In the case of *Concord Music Group v. Anthropic*, the plaintiffs assert that Anthropic's Claude model was trained on copyrighted songs. If the model were explicitly built to replicate these lyrics or provide outputs that closely mimic them, the case for transformative use appears to diminish. Conversely, generalized training, when the AI is exposed to a diverse array of resources to cultivate broad competencies, may provide a more compelling argument for transformational usage.

From this viewpoint, generalized training can be likened to human learning, wherein exposure to diverse materials underpins the emergence of novel creativity. Ecclesiastes' declaration "there is nothing new under the sun" and Newton's characterization of "standing on the shoulders of giants" profoundly resonate in this context. The overarching objective bolsters a transformative use claim; yet the unpredictability of fair use doctrine implementation may introduce ambiguity that could impede innovation.

IV.2. Philosophical Approaches to Copyright and AI Training

In addition to legal principles and litmus tests, diverse views of copyright law provide unique viewpoints on the legitimacy of AI training. The natural rights theory, as proposed by John Locke, posits that creators possess intrinsic rights to govern and derive benefits from their works. This viewpoint suggests that use copyrighted resources for AI training without specific consent infringes upon these essential rights,

irrespective of the intent or result (Locke, 1823). Conversely, utilitarian theories, shaped by philosophers such as Bentham and Mill, underscore the broader societal advantages of permitting AI systems to utilize huge datasets, even protected materials. Advocates contend that such access stimulates innovation, augments technological competencies, and tackles significant societal issues, like bias reduction and the enhancement of decision-making processes. This approach promotes a balance between safeguarding creators' rights and advancing the public good through technological innovation. Theory of personality, linked to Hegel, asserts that creative works are manifestations of the creator's identity. AI training that replicates an individual's distinctive creative style or voice may violate the personal rights of creators, as evidenced by lawsuits such as *Concord Music Group v. Anthropic*. This approach emphasizes the significance of honoring the personal relationship between creators and their works, even in cases of transformative replication (Leibler, 2024).

Beyond Locke, Bentham, and Hegel, a relational perspective should guide the formulation of copyright policy for artificial intelligence. Rawlsian principles of distributive justice (Freeman, 2018) necessitate regulatory frameworks that fairly reconcile collective advancement with creator autonomy, particularly in contexts where AI broadens access to knowledge while potentially undermining individual expression (Gabriel, 2022; Liu, 2012). Applying digital constitutionalism and commons theory (De Gregorio, 2022), influenced by thinkers like Lawrence Lessig (1999; 2001) and James Boyle (2018), further reinforces the conceptualization of data as a semi-common (shared resource), thereby justifying graduated exceptions for transformative AI training in conjunction with comprehensive remuneration for creators (Warso and Tarkowski, 2024).

IV.3. Critical Legal Perspective

The existing copyright law appears inadequate in addressing the intricacies of AI training, especially the differentiation between generalized and tailored training. Copyright law fundamentally aims to reconcile the rights of authors with the overarching public interest in the

distribution of knowledge and ideas. Historically, copyright law has acknowledged the significance of enabling individuals to learn from and expand upon preexisting works. The idea-expression distinction demonstrates that copyright safeguards the particular expression of ideas, excluding the concepts from protection. Nonetheless, depending exclusively on fair usage for AI training has certain issues.

The absence of legal certainty might deter innovation, especially for smaller developers who may not possess the means to manage the intricacies of copyright litigation (Leibler, 2024).

AI training, especially when aimed at identifying patterns and data points within extensive datasets, frequently concentrates on these unprotectable components rather than the expressive substance of creations. From this viewpoint, AI training can be regarded as an integral aspect of the inherent processes of learning and invention, endeavors that copyright law has historically aimed to encourage (Lemley, 2015). Moreover, a licensing-based method, although ostensibly simple, prompts apprehensions around possible restrictions on training data. Dependence on licensing may confine training data to public domain materials, a corpus that may not accurately reflect modern society and potentially reinforce biases in AI systems. This underscores the necessity to investigate alternate legal frameworks that guarantee access to varied training data while safeguarding authors' rights (Gravett, 2020).

Legal uncertainty on “temporary copies” e.g., *Infopaq International A/S v. Danske Dagblades Forening* (2009)¹¹ directly affects AI training. In *Infopaq International A/S v. Danske Dagblades Forening*, the Court held that even very short fragments reproduced transiently in the course of a technical process may constitute a “reproduction in whole or in part.” This ruling created a restrictive baseline for EU law, meaning that temporary copies generated during automated processes — including TDM and AI training — may require authorization unless an exception applies. The Supreme Court of India in *R.G. Anand* reaffirmed the idea — expression dichotomy. It held that infringement occurs only when the “substantial and material” expression is copied,

¹¹ *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) EU:C:2009:465 (2009).

and the ordinary observer would unmistakably identify the later work as a copy. Copying of ideas, themes, or general concepts is not infringement. This is a foundational principle in Indian copyright law. This insight supports the legitimacy of transformative, data-driven learning where outputs are not substitutive of the original. Policymakers should accordingly consider a graduated access model with tiered dataset permissions based on the degree of transformation and commercial impact.

IV.4. Suggestions: Technological methods and Strategies

The following technological strategies help protect original content from misuse by DGMs through prevention, tracing, removal, and responsible model training practices.

IV.4.1. Unrecognisable Examples

The objective of this technique is to inhibit models from acquiring notable characteristics of the source works. This strategy entails altering the dataset so that the training samples lack identifiable characteristics. For example, data proprietors can implement tactics such as introducing noise, blurring, or modifying colours to hinder DGMs from extracting valuable information. The result frequently yields inferior or entirely dissimilar outputs from those intended, thereby safeguarding the original content from direct reproduction (Shan et al., 2025).

IV.4.2. Watermarking Techniques

The purpose of watermarking technique is to monitor the utilisation of original content and enable owners to substantiate ownership. Watermarks may be embedded within images or various data formats in a manner that is undetectable to human observers yet discernible by specialised algorithms. These watermarks assist data proprietors in verifying whether their data has been utilised for training AI models, allowing them to address any unauthorised usage. It serves as a deterrent to unauthorised duplication (Christ et al., 2023).

IV.4.3. Machine Unlearning

The primary objective of machine unlearning is to enable data proprietors to “remove” their contributions from a model. This entails a process aimed at inducing a trained model to forget a certain subset of its training data. Upon a data owner’s request for content removal, the model parameters are modified to simulate a condition where that item was never part of the training dataset. This is especially crucial for maintaining continuous protection, even subsequent to the training of models with the data (Chen and Yang, 2023).

IV.4.4. Dataset De-duplication

The aim is to decrease the likelihood of memorization by DGMs, thereby diminishing the chance of copyright violation. Data proprietors may establish procedures to eliminate redundant entries from the training datasets prior to their utilization. This ensures the model does not acquire redundant features. Reducing redundancy diminishes the likelihood that the model will unintentionally produce outputs that closely resemble the original works (Webster et al., 2023).

IV.4.5. Alignment Strategies

It aims to inhibit rote memorisation during model training. Employing reinforcement learning methodologies in which the model receives feedback to emphasise original traits while disregarding memorised specifics constitutes a method of alignment. This technique promotes the creation of generative content that is inspired by, rather than directly replicated from, the training data.

IV.4.6. Improved Training Algorithms

It endeavours to promote lawful model training that adheres to copyright regulations. Researchers are always advancing novel algorithms and approaches that emphasise responsible model training.

The paper presents a novel contribution by illustrating how conventional copyright theories and general legal principles can be me-

thodically integrated with technical interventions that influence them. By synthesising these elements, it establishes a coherent theoretical framework that has been largely lacking in existing scholarship. The following framework contextualises the same.

Table 2

Theory of Copyright Law	Core Principle	Implications for AI Training	Relevant Technical Interventions	Justification / Explanation
Natural Rights Theory	Creators have inherent rights over their creations	Unauthorized use of works violates moral claims of authors	Machine Unlearning, Watermarking Techniques	Unlearning allows for revocation of consent post-training, aligning with authorial control. Watermarking ensures moral ownership is traceable
Utilitarian Theory	Promote greatest public good through knowledge dissemination	Limited use may be justified if it leads to social benefit	Alignment Strategies, Improved Training Algorithms	These promote ethical, generalized learning that reduces harm while enhancing innovation — a utilitarian objective
Personality Theory	Works reflect the author’s identity and spirit	Replication of style or voice harms creator’s personality rights	Unrecognizable Examples, Dataset Deduplication	De-personalization of training data and filtering duplicates limit replication of stylistic signatures
Economic/ Market-Based View	Protects commercial interest and market viability of works	Uses that substitute or devalue original works harm markets	Dataset Deduplication, Watermarking Techniques	Reduces direct substitution risks; watermarking assists in enforcement of market-related claims

Fair Use Doctrine (U.S.A.)	Allows limited, transformative use if it serves public interest without harming rights	Certain AI training qualifies as fair use based on purpose, effect, and transformation	Alignment Strategies, Improved Training Algorithms	These prioritize transformation and abstraction, aiding fair use arguments by ensuring outputs are not derivative
Idea-Expression Dichotomy	Protection applies to expression, not facts or concepts	AI typically extracts data points, not expressive content	Improved Training Algorithms, Dataset Deduplication	Technical focus on data generalization and abstraction aligns with non-infringing idea-level usage
Transformative Use (subset of Fair Use)	New use with different purpose or meaning may be permitted	Generalised training is more likely to qualify than replication	Alignment Strategies, Unrecognizable Examples	Promotes transformation over reproduction; suppresses surface-level similarities
Access to Knowledge and Learning	Balances author incentive with public benefit in learning	AI as a learning mechanism should be supported legally	Improved Training Algorithms, Machine Unlearning	Promotes responsible access while ensuring retractability of content in sensitive cases

IV.5. Proposed Changes in Legal Framework

In addition to the aforementioned technological strategies, several legal proposals are advanced by the author to address the complexities arising at the intersection of AI and copyright.

First, the proposed “Fair Learning” doctrine represents an extension of the existing fair use framework, specifically tailored to machine learning (ML) systems. Conventional fair use frequently encounters challenges in accommodating the distinctive data utilisation patterns

in AI, where context, predictability, and intent diverge from traditional copyright scenarios (Gravett, 2020).

Second, the proposed “Presumption of Fairness” approach would grant AI developers a rebuttable presumption of fairness when using data elements that are not protected by copyright, including ideas, facts, and functional aspects of works. This assumption recognises that although the AI may utilise copyrighted materials for learning, it does not constitute infringement unless it replicates the protected speech (Gravett, 2020).

Third, the proposed “Data Mining Safe Harbor Provisions” would establish legal protections shielding developers from liability in specified circumstances, thereby encouraging data use without fear of infringement. This means defining unambiguous boundaries inside which developers can operate and train their models. According to the proposed safe harbor, an AI system may not infringe if it uses portions of a literary work only for analysis or idea extraction. Such rules will reduce legal uncertainty for smaller businesses or start-ups, hence allowing them to engage with large databases free of litigation risk. It might be organised to ensure that although developers would not need permits for every data used in training, they must nonetheless respect the rights of authors by avoiding direct copying of their original content for business reasons (Gravett, 2020).

Fourth, “Statutory AI Training Exceptions” may be considered. Although some jurisdictions address AI training under existing fair use doctrines or text and data mining exceptions, there is a growing call for narrowly tailored, clearly defined statutory exceptions that balance innovation with the protection of creators’ rights. Implementing opt-out mechanisms, such as metadata tagging or licensing tools like Creative Commons AI licenses, empowers rights holders to control the use of their works (Buick, 2025).

Finally, as a matter of policy reform, the establishment of centralized licensing platforms may be considered. Such platforms would manage and license copyrighted works, monitor usage, ensure compliance, and distribute royalties to rights holders on the basis of actual use. By implementing revenue sharing models similar to music rights management, these platforms can provide fair compensation to creators.

IV.6. Proposed Integrated Framework

The study suggests an Integrated Framework for AI Training and Copyright Governance. The approach is intended to connect doctrinal principles, legislative instruments, and regulatory outcomes into a cohesive model. At the centre of this framework lies the Fair Learning Doctrine, based on a systematic four-factor assessment (i) purpose of use, (ii) nature of source material, (iii) extent and significance of extraction, and (iv) potential market impact. It is designed to distinguish socially advantageous machine learning practices from exploitative or substitutive copying.

The framework will also integrate safe-harbour provisions to ensure transparent, accountable, and non-substitutive AI training procedures, along with opt-out mechanisms that uphold the autonomy of right holders in commercially sensitive situations. This hybrid approach regards AI training datasets as semi-commons infrastructure, harmonizing the interests of creators with the public benefit derived from data-driven innovation.

IV.7. Lessons for India

Under the present regime, Section 52 of the Indian Copyright Act (1957) establishes a limited enumeration of exceptions to copyright infringement, including fair dealing for purposes of research, private study, criticism, and news reporting. The scenario stems from Anglo-Saxon copyright traditions, which provides predictability but constrains adaptation to emerging technological challenges. The doctrinal gap is evident: Section 52 contains no express provision authorizing text and data mining or artificial intelligence training activities. The purpose of Section 52 includes research, criticism, news reporting, and similar traditional uses. They were drafted in an era preceding generative AI and do not contemplate the characteristics of machine learning systems. While it can be argued that “research” might be interpreted broadly to encompass AI training, such interpretations remain contested and uncertain, leaving developers, rights holders, and courts without clear statutory guidance. This uncertainty is currently being tested in ANI

Media Pvt. Ltd. v. OpenAI, pending before the Delhi High Court, in which ANI alleges that OpenAI used its copyrighted news content without authorization to train ChatGPT (Jha and Bernd, 2025). OpenAI, in response, has raised jurisdictional challenges arguing that its data storage and training occurs outside India. Meanwhile, *amicus curiae* have called for a two-step assessment: 1) determining whether the use falls within a Section 52 exception, and 2) conducting a fairness analysis (Jha and Bernd, 2025).

Accordingly, to address the doctrinal gap in Section 52 of the Indian Copyright Act (1957) the introduction of a “Fair Learning Exception” is proposed. This exception would expressly authorize AI training activities, subject to carefully calibrated and clearly defined conditions. Unlike traditional fair dealing, this exception would recognize AI training as a distinct form of use, permitting copying for transformative computational analysis while maintaining robust copyright protection for works outside the scope of exception.

The exception should be guided by core principles balancing innovation with creator rights. AI training must serve genuinely transformative purposes (i.e., extracting patterns or knowledge rather than reproducing creative expression) and it should not substitute the original works. The Fair Learning Doctrine can operationalize this through a four-factor test examining the purpose and character of training, the nature of copyrighted works, the quantity used, and the impact on market value.

Rights holder’s interests should be protected through a centralized opt-out registry, enabling them to exclude works from AI training datasets. Developers must search the registry before commencing training and exclude registered content. Transparency and accountability obligations would require detailed documentation of dataset composition, curation methods, technical safeguards against unauthorized memorization, and compliance with the registry, accessible to the Copyright Board and affected rights holders.

Commercial deployment must include safeguards preventing outputs that replicate copyrighted works. Developers should monitor

outputs for unauthorized reproduction, remediate any incidents, and maintain accountability. Compliance with international obligations, particularly the three-step test under Berne Convention, should be explicitly incorporated.

The Copyright Board should be empowered to issue interpretive guidelines, manage registry operations, resolve disputes, and oversee enforcement. Technological safeguards like watermarking, dataset deduplication, and machine unlearning should be encouraged. The exception would operate alongside licensing mechanisms, allowing revenue-sharing models while providing a baseline of permissible unlicensed use.

A phased implementation is recommended, beginning with pilot programs designed to build institutional capacity and refine procedural frameworks. The amendment should align with constitutional commitment to freedom of expression and promotion of scientific progress, integrate with the national AI strategy, and reflect international developments while tailoring governance to Indian legal and developmental context. Regular review by the Copyright Board would ensure the exceptions remain effective and adapt to technological and market evolution.

Translating this framework into Indian law necessitates a phased and carefully structured approach. First, targeted amendments to the Copyright Act should clarify the legal status of temporary copies, text and data mining, and non-substitutive AI training. Second, the Department for Promotion of Industry and Internal Trade (DPIIT) should issue regulatory guidelines defining permissible training practices, transparency duties, and metadata standards for dataset documentation.

Finally, the paper proposes a tripartite oversight mechanism comprising: (i) the Copyright Board, responsible for statutory interpretation and the administration of compulsory licensing; (ii) an independent AI Ethics Committee tasked with evaluating technical compliance and transparency standards; and (iii) rights-management platforms to administer remuneration schemes, opt-out mechanisms, and dataset permissions. This institutional structure would anchor the Fair Learning Doctrine within India's broader copyright ecosystem, providing clarity for developers while safeguarding creators' interests.

V. Conclusion

In conclusion, AI training and copyright law represent a paradigm shift in the digital age, necessitating legal principles to adapt to technological advancement.

This paper has examined the complex intersection of copyright law and artificial intelligence training, identifying a critical regulatory gap where existing fair use and fair dealing doctrines prove inadequate. Through analysis of the European Union and United States approaches, this paper argues that neither statutory text-and-data-mining exceptions nor flexible fair use doctrine consistently resolve tensions between AI innovation and creator protection.

The solutions proposed herein combine AI training with copyright to build technologies and protect intellectual property. The fair learning doctrine, safe data mining harbours, and ethical requirements together form an effective framework for the same. The Integrated Framework proposed herein exemplifies that doctrinal principles, technological realities, and policy design can be harmonised to shape a coherent approach to AI training. By adopting them Indian copyright law can evolve into a balanced model that supports innovation without compromising the integrity of creative labour.

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Governing AI Foundation Models: Regulatory Approaches and Global Perspectives

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Abstract: This article analyses the approaches of the European Union, the United States, and the Russian Federation to the legal regulation of the development and deployment of AI foundation models. Drawing on regulatory approaches reflected in the EU Artificial Intelligence Act, U.S. Executive Order 14110, the NIST AI Risk Management Framework, and relevant legal acts of the Russian Federation, it shows that legal regulation is primarily based on the classification of models according to their capabilities and associated risks.

Based on the findings derived from an analysis of the legal and ethical regulations in the Russian Federation, the study concludes that there are no specific rules dedicated to the development and deployment of foundation models.

To address this regulatory gap, the article formulates recommendations for policymakers in the Russian Federation. In particular, it proposes that foundation models be classified into two groups based on the computational resources required for their training. The first group includes models that do not pose significant risks, while the second group includes the most advanced models with potentially hazardous capabilities.

The proposed approach may contribute to the safe and secure development and deployment of foundation models in the Russian Federation by enabling a differentiated regulatory framework that takes into account their potential impact on human rights.

Keywords: artificial intelligence; AI systems; foundation models; general-purpose AI models; frontier models; large language models; training compute; AI governance; transparency; EU AI Act

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Contents

I. Introduction	270
II. Foundation Models: Key Concepts and Terminology in Legal Regulation	271
III. Understanding the Regulatory Approaches to the Development and Deployment of Foundation Models in the European Union, the United States and Russia	278
IV. Conclusion	290
References	291

I. Introduction

In recent years, the development of artificial intelligence (AI) has shifted towards increasingly general-purpose systems. Alongside specialised AI models designed for narrow tasks, a new class of large, adaptable systems has emerged. In 2021, researchers from Stanford University’s Centre for Research on Foundation Models (CRFM) introduced the term “foundation models” to describe models trained on broad data (typically using self-supervision at scale) that can be adapted, such as through fine-tuning, to a wide range of downstream applications (Bommasani, 2021).

Foundation models possess the following essential characteristics: a) emergent capabilities — the ability to exhibit new, unpredictable capabilities; and b) homogenization — the possibility of using an AI model as the foundation for developing different AI products. The aforementioned issues have led to several legal challenges, in addition to those already existing in the field of AI regulation and governance.

Firstly, many foundation models are general-purpose software that provides broad opportunities for their application in various fields. Sec-

only, developers (or upstream providers) of foundation models may avoid legal liability because they may not put their models on the market themselves. Instead, developers can provide access to their models to downstream providers on various terms, who then create AI systems based on the models and put them on the market. Thirdly, this type of relationship within the AI value chain creates an inequality of rights between developers and downstream providers, as it shifts legal obligations exclusively to the latter (Brown, 2023). This also limits the interests of end users of products, as they cannot directly influence developers to protect their rights. Fourth, only developers have access to the infrastructure, source code, parameters, and training data of the models, which leaves other downstream providers vulnerable to unilateral model modifications by the developer or in the event of errors or emergencies. Finally, fifthly, all foundation models have diverse characteristics, and the most advanced ones are under-researched, potentially posing systemic risks to human rights and society as a whole.

The response of legislators to these issues has been uneven (Chun et al., 2024): some countries are adopting a wait-and-see approach, while others have already formulated their own strategies to regulate the development and deployment of AI foundation models (Aloncho et al., 2025, p. 914). Thus, it is timely to conduct research in order to analyse different regulatory approaches and identify their shortcomings.

This study employs doctrinal legal analysis and comparative legal analysis of regulatory frameworks in the European Union, the United States, and the Russian Federation, and develops a normative proposal concerning the classification of foundation models based on technical criteria.

II. Foundation Models: Key Concepts and Terminology in Legal Regulation

The research in the field of the legal regulation of the development and deployment of foundation models is complicated by the fact that the terminology is unclear (Winter and Bullock, 2024). Alongside foundation models, related terms such as “large language models,” “gen-

eral-purpose AI models,” “generative AI,” “dual-use foundation models,” and “frontier models” are also used (Fernández-Llorca et al., 2025, pp. 875–888). In this paper, the term “foundation model” is used as the primary analytical category. However, when analysing legal and policy documents, the original terminology employed in those documents (e.g., “general-purpose AI models” or “frontier models”) is retained to ensure the accuracy of legal interpretation. It is assumed that these categories share essential characteristics inherent in foundation models. This approach ensures terminological clarity and internal logical consistency, which is necessary to achieve the objectives of the study.

Accurate definitions in legal acts are crucial, especially in interdisciplinary fields such as AI (Koivisto et al., 2024, pp. 412–432). Vague or overlapping definitions can create legal uncertainty and complicate law enforcement. In this regard, it seems appropriate to study the approaches in different jurisdictions. The European Union, the United States of America and the Russian Federation were selected as the objects of analysis. This choice was motivated, on the one hand, by the desire to cover approaches from different regions of the world, and on the other hand, by the need to consider the limited scope of the study.

In the European Union, approaches to terminology have evolved significantly during the drafting of the EU AI Act (hereinafter referred to as the AIA). In the AIA draft presented by the European Commission in April 2021, the regulation only applied to operators of AI systems (Hacker et al., 2025). Later, in December 2022, references to general-purpose AI (GPAI) systems appeared in the EU Council’s General Approach, and the text approved by the European Parliament already provided for the regulation of both foundation models and generative AI. The discussion of this section of the AIA draft sparked some of the most heated debates in the trilogue (Casonato and Olivato, 2024, pp. 87–112). As a result of the negotiation process, a compromise was reached, consisting of separating general-purpose AI models from those with systemic risk into distinct groups.

Thus, according to Para. 63 Art. 3 of the AIA, “a GPAI model is an AI model, including where such an AI model is trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable of competently performing a wide range of

distinct tasks... and that can be integrated into a variety of downstream systems or applications.”¹ The AIA does not provide a literal definition of general-purpose AI models with systemic risk, but it follows from its provisions that these are general-purpose AI models that are capable of performing a wide range of distinct tasks and can be integrated into a variety of downstream systems or applications. The AIA does not provide a literal definition of AI models with systemic risk, but it follows from the entirety of its provisions that these are general-purpose AI models that pose high-impact capabilities. In turn, high-impact capabilities mean capabilities that match or exceed the capabilities recorded in the most advanced general-purpose AI models.

Based on the above definitions, it is impossible to determine in practice which group a particular model should be classified under. In this regard, European legislators in the AIA have established technical criteria for identifying GPAI models with systemic risk (GPAISR). According to Art. 51 of the AIA, a model should be recognized as a GPAISR model in the following two cases.

1) The model demonstrates high-impact capabilities, which are determined based on the application of appropriate technical metrics, including relevant criteria and benchmarks. Part 2 Art. 51 of the AIA clarifies the meaning of the previous provision and states that if the total amount of computations used to train the model, expressed in floating point operations (FLOP), is greater than 10^{25} , it is presumed to have high impact capabilities.

2) The model is recognized as posing a systemic risk by decision of the European Commission, either at its discretion or following notification from the Scientific Panel of Independent Experts.² Annex XIII to the AIA explains that the Commission may take such a decision based on the criteria such as the number of model parameters, the quality and size of the dataset, the amount of computing power spent on training the model, and many others.

¹ Artificial Intelligence Act. Available at: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj> [Accessed 15.08.2025].

² The Scientific Panel of Independent Experts was established in accordance with Art. 68 of the AIA and Implementing Regulation 2025/454 of 7 March 2025 of the European Commission. Available at: https://eur-lex.europa.eu/eli/reg_impl/2025/454/oj/eng [Accessed 15.08.2025].

However, the AIA does not contain similar criteria for defining a regular GPAI model (without systemic risk). This gap is filled by the European Commission's Guidelines on the scope of the obligations for general-purpose AI models.³ According to Para. 17 of the Guidelines, a GPAI model is one where the computational power spent on training it exceeds 10^{23} FLOP and it is capable of generating natural language (whether in the form of a text or an audio, text-to-image or text-to-video).

Thus, in the EU, GPAI models are divided into two separate groups: those with systemic risk (GPAISR models) and those without it (GPAI models). In both cases, the training compute is used as a proxy for identifying the capabilities and risks of the models.

The United States takes a different approach. In particular, in October 2023, the U.S. President issued Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.⁴ The next U.S. President repealed this order, but it contains a number of essential concepts that reveal the U.S. approach to terminology that are still relevant today.

First, the decree formulated the definition of a “dual-use foundation model” means an AI model that is trained on broad data; generally uses self-supervision; contains at least tens of billions of parameters; is applicable across a wide range of contexts; and that exhibits, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters, such as by:

a) substantially lowering the barrier of entry for non-experts to design, synthesize, acquire, or use chemical, biological, radiological, or nuclear (CBRN) weapons;

b) enabling powerful offensive cyber operations through automated vulnerability discovery and exploitation against a wide range of potential targets of cyber attacks; or

³ Guidelines on the scope of obligations for providers of general-purpose AI models under the AI Act. Available at: <https://digital-strategy.ec.europa.eu/en/library/guidelines-scope-obligations-providers-general-purpose-ai-models-under-ai-act> [Accessed 15.08.2025].

⁴ Executive Order 14110 of 30 October 2023. Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. Available at: <https://www.federalregister.gov/d/2023-24283> [Accessed 15.08.2025].

c) permitting the evasion of human control or oversight through means of deception or obfuscation.

Secondly, the decree also effectively referred to dual-use models as: a) any model that has been developed using more than 10^{26} FLOP of training compute; b) models that were trained primarily using biological data sequences and whose training required more than 10^{23} FLOP of training compute.

The approach implemented in California State Law SB-53 Transparency in Frontier Artificial Intelligence Act (TFAIA)⁵ deserves special attention. In particular, foundation models in the act are defined as models trained on large datasets, designed for the generality of their output, and adaptable to a wide range of distinct tasks. At the same time, the act formulated a definition of a frontier model, which refers to a foundation model trained using more than 10^{26} FLOP.

Thus, both in the European Union and in the United States, legal definitions of foundation models are based on dividing them into two separate groups. The first group includes models that possess the essential characteristics of foundation models — the ability to perform a wide range of tasks and serve as a basis for creating other AI products. At the same time, it is believed that they do not pose significant threats to society and the state. The second group, on the contrary, includes foundation models that generate high or systemic risks, which requires increased attention from regulators. Their approaches are based on using the amount of computing power spent on training the model as a proxy for its capabilities and risks.

Another approach to terminology can be found in the legal acts of the Russian Federation (Ivanova, 2022, p. 204). For instance, some key terms are stipulated in the Decree of the President of the Russian Federation No. 490 dated 10 October 2019, which approved the “National Strategy for the Development of Artificial Intelligence for the Period until 2030” (hereinafter referred to as the Russian AI Strategy).⁶ The

⁵ SB-53 Artificial intelligence models: large developers. Available at: https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20250260SB53 [Accessed 15.08.2025].

⁶ Decree of the President of the Russian Federation No. 490 of 10 October 2019 “On the Development of Artificial Intelligence in the Russian Federation” (together

decree provides definitions for a number of terms: “AI model,”⁷ “large generative model,”⁸ and “large foundation model.”⁹ A common feature of these definitions is that they are human-centric. An AI model, and therefore a foundation model, is an entity that solves problems at a level comparable to human intellectual work.

The anthropomorphisation of AI is a common phenomenon in the science fiction literature, but not in modern regulatory contexts. It is debatable whether the definition of AI in the Russian Federation’s Strategy “fully corresponds to the generally accepted understanding of AI as the implementation of thought processes inherent in the human brain by a computing device” (Polyakova and Smirnov, 2024, pp. 89–106). A correct understanding of the foundation model is required, at the very least, to limit the scope of regulation. If we compare AI to a human being, the latter becomes the main criterion for AI, which is a gross simplification (Placani, 2024, pp. 691–698). Under current conditions, many devices can imitate human intellectual activity, from calculators to programmed chatbots. If we equate any model that performs tasks that a human could perform, then the subject of regulation in the field of AI will be extremely broad (Finocchiaro, 2024, pp. 1961–1968).

In addition, the Russian AI Strategy defines a “large foundation model” as one that contains at least 1.5 billion parameters. However, the threshold of 1.5 billion parameters allows models with relatively modest performance to be included in this group. For example, GPT-2, which was released back in 2019, contains 1.5 billion parameters, while

with the “National Strategy for the Development of Artificial Intelligence for the Period up to 2030”) // Official Internet Portal of Legal Information: <http://www.pravo.gov.ru> [Accessed 15.08.2025].

⁷ An AI model is a software (or its component) designed to perform intellectual tasks at a level comparable to or exceeding the results of human intellectual activity, using algorithms and datasets to derive patterns, make decisions or predict outcomes.

⁸ Large generative models are AI models capable of interpreting (providing information based on queries, e.g., about objects in an image or analysed text) and creating multimodal data (text, images, video material, etc.) at a level comparable to or exceeding the results of human intellectual activity.

⁹ Large foundation models are AI models that form the basis for the development and modification of various types of software. They are trained to recognize certain types of patterns, contain at least 1 billion parameters, and are used to perform a wide range of tasks.

one of the many modern foundation models, GPT-oss-120 b (an open-weight model similar to GPT-3.5), has 120 billion parameters.¹⁰ Thus, large foundation models in the sense of the Russian AI Strategy are not analogous to the most advanced foundation models and, therefore, pose a danger.

The total number of parameters is indeed related to model capabilities and associated risks, and this criterion is also easy to measure and simple to apply. However, it also has significant drawbacks. For example, some model architectures, such as Mixture of Experts (MoE), can significantly change the number of model parameters without necessarily increasing their capabilities and risks (Villalobos et al., 2022). At the same time, the number of model parameters can be manipulated through post-training techniques such as model pruning without necessarily decreasing the model's capabilities and risks (Cheng et al., 2023).

It follows from the above that in the Russian Federation, foundation models are not classified into separate groups depending on their technical characteristics. The chosen approach to defining foundation models by specifying the number of parameters has significant drawbacks, both in terms of the threshold value of 1.5 billion and the limited effectiveness of such a metric for assessing the real capabilities of models and the associated risks.

Among the available proxies for model capabilities and risks, the computational power spent on training the model represents a practical and measurable technical criterion (Raman et al., 2025). This criterion has a number of significant advantages: a) it is difficult to circumvent reducing the amount of computation required to train the model limits its capabilities, thereby reducing potential risks; b) it can be assessed in advance, which simplifies preventive regulation; c) it is subject to external verification: such assessments can be performed by third party organisations, including providers, without disclosing confidential information about the model (Heim and Koessler, 2024). In addition, training compute has characteristics that are important for regulating the field of AI, such as detectability, excludability, measurability, and a narrow circle of entities dominating the chip supply chain (Sastry et al., 2024).

¹⁰ Data on AI Models. Available at: <https://epoch.ai/data/ai-models> [Accessed 15.08.2025].

At the same time, science also highlights several limitations of using training compute as a proxy (Caputo, 2025). In particular, advances in algorithms and hardware efficiency may render existing thresholds obsolete, and model capabilities may also depend on factors such as architecture, dataset characteristics, and post-training modifications (Price, 2025). Therefore, training compute should not be regarded as a definitive or exclusive indicator of model risk. Rather, it represents a practical and measurable proxy suitable for the purposes of preliminary classification and the development of differentiated regulatory approaches.

Taking into account the current legal framework and the absence of specific classification criteria for foundation models in the Russian Federation, it appears appropriate to consider the use of training compute as a technical criterion for their preliminary classification. We believe that a more reasonable approach would be to divide foundation models into two separate groups based on the computing power required for their training. The first group would include foundation models that do not pose significant risks to society and the State, while the second group would comprise the most advanced models with potentially dangerous capabilities. For the purposes of this study, significant risks refer to the potential of foundation models to have a substantial impact on protected legal interests, including fundamental rights, information security, public safety, and other societal interests, due to their scale, capabilities, and potential deployment contexts.

This approach would enable the establishment of a differentiated framework for regulating the development and deployment of foundation models, based on an assessment of their predicted impact on human rights and societal interests.

III. Understanding the Regulatory Approaches to the Development and Deployment of Foundation Models in the European Union, the United States and Russia

The European Parliament proposed establishing several stringent requirements for providers of foundation models. For example, the development of a risk management system, the use of high-quality and

transparent datasets, as well as measures to ensure the reliability, security, interpretability and adjustability of the model at all life cycle stages, which had to be confirmed by an independent assessment.¹¹ In turn, the European Council *de facto* proposed equating foundation models with high-risk systems, thereby imposing increased obligations on their providers.¹² As noted in the scientific literature, this would turn the EU's risk-based approach on its head (Hacker, 2023).

In a joint non-paper, Italy, France and Germany proposed establishing self-regulation through codes of conduct in November 2023.¹³ The primary measure of this approach was the publication of model cards by the relevant suppliers, which would reflect data on the model, including information on its capabilities and associated risks. At the same time, failure to comply with this recommendation would not entail any sanctions (Datta, 2025, pp. 119–138).

It is believed that the agreement between European Union institutions on general-purpose AI models was the result of a significant political compromise (Gstrein et al., 2024). This compromise is reflected in the fact that providers of general-purpose AI models were not subject to requirements similar to those imposed on providers of high-risk AI systems. The requirements proposed by the European Parliament were also not included in the final version of the act.

In the current version of the Act, the regulatory approach is based on the distinction between two groups of models: GPAI models and GPAISR models. The AIA sets specific requirements for each model provider group.

In accordance with Art. 51(1) of the AIA, providers of GPAI models are subject to the following obligations. First, providers are required

¹¹ Amendments adopted by the European Parliament on 14 June 2023. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.pdf [Accessed 15.08.2025].

¹² Artificial Intelligence Act: Council calls for promoting safe AI that respects fundamental rights. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/> [Accessed 15.08.2025].

¹³ Joint Non-paper by Italy, France and Germany. Available at: https://logistic-natives.com/wp-content/uploads/2023/11/9aaf68af_2128_4aa6_b8d6_a61212e5fd46_France_German_231122_140916.pdf [Accessed 15.08.2025].

to maintain technical documentation on the development and testing of the model, which must be made available to regulators upon request. Second, they must make information about the model available to downstream providers. This must include information about the model that enables providers of AI systems to have a clear understanding of the capabilities and limitations of the general-purpose AI model. A specific list of the minimum information required is set out in Annex XII. Third, it is necessary to ensure compliance with the EU copyright legislation, including Art. 4(3) of Directive (EU) 2019/790 (machine-readable reservations). Fourth, providers must make publicly available a sufficiently detailed summary about the content on which the model has been trained.

The obligations outlined above also apply to GPAISR model providers. However, Art. 55 of the AIA imposes additional obligations on them. Specifically, they must perform model evaluation, assess and mitigate systemic risks; promptly report serious incidents and possible measures to eliminate them to the competent state authority, and ensure an adequate level of cybersecurity and the corresponding physical infrastructure.

Thus, in the EU, GPAI model providers are required to comply with different sets of requirements depending on whether they pose systemic risks. Regarding regular GPAI model providers, the primary requirement is transparency. In particular, intended purposes for which a model can be used, as well as acceptable use policies, model release date, distribution methods, and a range of other information must be specified (Annexe XII).

It should be noted that detailed information for complying with the requirements for providers of both types of GPAI models is specified in the voluntary Code of Practice,¹⁴ which was developed in collaboration with industry representatives for the period until harmonized standards were developed. In particular, it contains a model documentation form that specifies the procedure for disclosing relevant information about the model and the requirements for the content of a copyright policy.

¹⁴ General-Purpose AI Code of Practice. Available at: <https://digital-strategy.ec.europa.eu/en/policies/ai-code-practice> [Accessed 15.08.2025].

Regarding GPAISR model providers, the Code stipulates that the signatories must develop a safety and security framework and model reports.

The EU approach has both supporters (Casonato and Olivato, 2024, pp. 87–112) and opponents (Smuha and Yeung, 2025, pp. 228–258; Finocchiaro, 2024, pp. 1961–1968). In the context of the issue discussed in the article, it is noteworthy that transparency obligations are insufficient. In particular, providers are required to disclose information about models to the competent public authority and other downstream providers. Moreover, it follows from the Code of Practice that the organizations that have signed it undertake to publish only information from the Safety and Security Framework that is relevant to the public's understanding of systemic risks and, where necessary, information on the assessment and mitigation of those risks. Thus, transparency measures do not fully cover the interests of end users of AI products, as the latter will only have access to limited information about the relevant models.

Following the election of Donald Trump as the new American President in 2016, the United States embarked on a course to remove regulatory barriers limiting the development of AI technologies. First, Trump issued Executive Order 14179, "Removing Barriers to American Leadership in Artificial Intelligence,"¹⁵ which repealed, among other things, the previous U.S. President's Executive Order 14110, "On the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."¹⁶ Following this measure, executive authorities were instructed to review all documents developed in accordance with Executive Order No. 14110. Also in July 2025, the U.S. Presidential Administration issued the AI Action Plan,¹⁷ which, in particular, contains a provision that the government should not allow federal funding for AI technology development to be directed to states with burdensome AI regulations. Experts note that

¹⁵ Removing Barriers to American Leadership In Artificial Intelligence. Available at: <https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/> [Accessed 15.08.2025].

¹⁶ Executive Order 14110 of 30 October 2023. Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. Available at: <https://www.federalregister.gov/d/2023-24283> [Accessed 15.08.2025].

¹⁷ America's AI Action Plan. Available at: <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf> [Accessed 15.08.2025].

the existence of such a funding principle, in the absence of comprehensive federal regulation, could negatively affect public confidence in AI technologies.¹⁸ Thus, the regulatory landscape in the United States in the field of AI is a combination of disparate mandatory rules, advisory documents (Siddiqui et al., 2025), and judicial practice (Bullock et al., 2024) that do not form a coherent system of legal regulation.

Regarding foundation models specifically, the approach to regulating their development can be found in several guidance documents prepared by the National Institute of Standards and Technology (NIST). First and foremost, it is the AI Risk Management Framework (AI RMF), which was established in 2023 to lay the groundwork for developing risk management systems among entities that develop and deploy AI systems. In response to the widespread use of foundation models, NIST has also developed the AI RMF: Generative AI Profile.¹⁹ The latter was developed to help organizations to determine the best way to manage risks at different stages of the GenAI lifecycle.

GenAI Profile provides over 200 recommendations for AI actors. Its undeniable advantage is the high level of detail in its recommendations. For example, organizations that use third party GenAI systems are advised to review their contracts with the relevant suppliers (GV-6.2-007). In particular, it is recommended to be wary of provisions that allow providers to terminate services arbitrarily and suddenly, or that allow them to unpredictably shift responsibility for incidents to the organizations themselves, as well as those that give providers or third parties the right to process data generated by the organization as it uses the GenAI system.

However, the advantages mentioned above also imply certain disadvantages of the framework. First and foremost, there is no clear distribution of rights and responsibilities among specific AI actors located throughout the AI ecosystem chain. It is unclear which recommendations apply to which group of AI actors. For example, recommendation GV-6.1-005 suggests that organizations implement a system for assess-

¹⁸ Federation of American Scientists Statement on the Preemption of State AI Regulation in the One Big Beautiful Bill Act. Available at: <https://fas.org/publication/fas-opposes-ai-regulation-preemption/> [Accessed 15.08.2025].

¹⁹ AI RMF: Generative Artificial Intelligence Profile. Available at: <https://doi.org/10.6028/NIST.AI.600-1> [Accessed 15.08.2025].

ing compliance by third parties involved in the development of GenAI with standards for ensuring the traceability of data and technologies in order to detect anomalies or unauthorized changes in the operation of the system. It is unclear whether only those entities that use third party AI systems in their activities should follow this recommendation, or whether it also applies, for example, to developers who train the model and operators who refine the model through fine-tuning. This also raises the issue of the complexity of applying the document in practice. On the one hand, there are numerous recommendations, but on the other hand, due to their quantity and quality, it becomes difficult for specific entities to implement the entire process within their organizations. This requires significant labor resources and, moreover, calls into question the correct understanding of the distribution of roles and responsibilities of organizations in the AI chain ecosystem.

Other researchers have also drawn attention to the above and several other shortcomings. For example, as part of the U.S. Open Loop program, an analysis was conducted of the framework provisions and the practice of its direct implementation in the activities of 15 companies specializing in NIST AI 600-1 or GenAI Profile.²⁰ The experts and company representatives surveyed identified the following as the main shortcomings of the framework: a) the lack of distributed roles and responsibilities for specific AI actors throughout the AI ecosystem chain; b) the lack of measures reflecting the specific impact of open-source models on risk management; c) difficulties in the interoperability of this framework with other similar documents.

In the United States, AI regulation is developing not only at the national institutional level, such as NIST, but also within the framework of industry regulators developing their own guidance documents. One of the key cross-cutting acts is the AI Accountability Policy Report (2024) prepared by the National Telecommunications and Information Administration (NTIA).²¹

²⁰ Generative AI Risk Management and the NIST Generative AI Profile (NIST AI 600-1). Available at: https://openloop.org/reports/2024/10/report-2-nist-generative-ai-profile.pdf?utm_source=chatgpt.com [Accessed 15.08.2025].

²¹ AI Accountability Policy Report, (2024). Available at: <https://www.ntia.gov/issues/artificial-intelligence/ai-accountability-policy-report> [Accessed 15.08.2025].

The report emphasizes that ensuring the proper exchange of information between all participants at all stages of the AI system lifecycle is critical to the development of accountable and secure technologies. In this regard, the NTIA proposes that executive authorities implement several measures aimed at enhancing the transparency and accountability of developers.

First, it is recommended to use existing or newly granted powers to mandate independent audits of high-risk AI systems. Such audits should confirm that models comply with established standards of security, ethics, and non-discrimination.

Second, the NTIA encourages government agencies to collaborate with stakeholders to enhance disclosure standards. The report notes the need to tailor disclosures to the target audience, which may require the creation of multiple reporting formats with varying levels of detail or the involvement of specialized information intermediaries. Recommended transparency tools include model/system cards, data sheets, and AI nutrition labels.

The report also emphasizes the need to strengthen interdepartmental cooperation and develop institutional capabilities for managing cross-cutting risks associated with AI. To this end, the government is encouraged to establish a system of measures to ensure transparency and control over the use of AI technologies.

In particular, it recommends to adopt the following measures: establishing a national register of high-risk AI use cases and a platform for reporting incidents; maintaining a public register of AI system audits; participating in the development of audit standards and auditor certification; conducting preliminary testing and certification of high-risk systems prior to their implementation; collecting regular confirmation of the characteristics of implemented solutions; coordinating accountability policies with other government agencies, including foreign partners.

In the United States, there is also the Centre for AI Standards and Innovation (CAISI) that plays an essential role in the chain of interaction between the government and representatives of the technology business. Its key functions include developing recommendations and best practices for assessing and improving the security of AI systems

in collaboration with NIST. For example, in January 2025, CAISI published the second draft of guidelines on Managing Misuse Risk for Dual-Use Foundation Models (NIST AI 800-1) that contain best practices for identifying, assessing, and mitigating risks to public safety and national security at different stages of the AI lifecycle.

Another critical area of CAISI's work is conducting independent assessments of foundation models, both American²² and those from foreign countries. In particular, CAISI recently conducted an assessment of models developed by the Chinese company DeepSeek. Based on the results of the assessment, CAISI made a number of conclusions, namely: AI models from developer DeepSeek were found to lag behind U.S. models in performance, cost, security and adoption; security shortcomings and censorship may pose risks to application developers, consumers and U.S. national security; DeepSeek models advance Chinese Communist Party narratives; DeepSeek's products are contributing to a rapid rise in the global use of models from China.

Thus, all the measures outlined above are designed to form a unified system of government oversight and accountability in the field of AI. However, given the U.S. policy of deregulation in this area, the political and, even more so, the legal significance of such recommendations remains highly questionable. At the same time, political initiatives in the United States in previous years²³ have led to leading companies in the field of AI developing and publishing their own security

²² CAISI, in collaboration with UK AISI, evaluated OpenAI's o1 and Anthropic's Claude 3.5 Sonnet foundation models. They tested these models to assess their capabilities in three areas: 1) cyber capabilities, 2) biology capabilities, and 3) software and AI development. Pre-Deployment Evaluation of OpenAI's o1 Model. Available at: <https://www.aisi.gov.uk/work/pre-deployment-evaluation-of-openais-o1-model> [Accessed 15.08.2025]; Pre-Deployment Evaluation of Anthropic's Upgraded Claude 3.5 Sonnet. Available at: <https://www.aisi.gov.uk/work/pre-deployment-evaluation-of-anthropics-upgraded-claude-3-5-sonnet> [Accessed 15.08.2025].

²³ Fact Sheet: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI. Available at: <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/> [Accessed 15.08.2025].

frameworks.²⁴ Although such frameworks are voluntary and government agencies do not monitor their compliance, they appear to contribute to greater transparency and security in the functioning of foundation models.

The regulation of AI in Russia is currently the subject of active scientific debate (Khabrieva, 2025, p. 610). Domestic doctrine has accumulated a substantial body of research addressing issues of terminology (D'yakonova, 2024, pp. 52–63), legal liability (Zenin et al., 2024, pp. 163–173; Bakhteev, 2024, pp. 9–23), data flow (Kovaleva and Zhirnova, 2024, pp. 109–121), and numerous other topics (Kiselev, 2024, pp. 140–151; Zykov, 2024, pp. 131–139). However, despite their diversity, the problems of legal regulation of the development of foundation models have not yet become an independent subject of study. In this regard, the study of the Russian Federation's approach will be based on an examination of existing legal initiatives and acts in the field of AI.

It seems appropriate to begin with the Russian AI Strategy. Although it defines large foundation models, it does not envisage any special regulation regarding their providers. The only relevant provision is Para. 38 of the Russian AI Strategy, which identifies “defining rules for working with large generative models and their use” as one of the primary directions for developing regulation in the field of AI. To date, such rules have not been developed, and it is unknown at what level and of what nature they are planned to be established.

It is likely that the Russian AI Strategy does not pay much attention to legal regulation because it was developed with the aim of stimulating innovation. At the same time, a systematic analysis of its other provisions leads to the conclusion that the Russian Federation intends to regulate the development and application of so-called “trusted AI technologies” first and foremost. These are understood to be “technologies that meet safety standards, developed in accordance with the principles of objectivity, non-discrimination and ethics, and which, when used, exclude the possibility of causing harm to humans and violating their

²⁴ Frontier AI Safety Policies. Available at: <https://metr.org/faisc> [Accessed 15.08.2025].

fundamental rights and freedoms, or damaging the interests of society and the State.”

The thesis outlined above is based on the fact that, according to the Russian AI Strategy, only AI products that are “trusted” will be allowed to be used in critical infrastructure (government administration, medicine, etc.). In particular, Para. 35 of the Russian AI Strategy provides for the creation of a register of trusted AI technologies for public authorities and organizations (including foundation models);²⁵ the introduction in federal government bodies of only those AI solutions that have been certified; ensuring the centralized development and distribution in government bodies and organizations of model solutions created on the basis of trusted AI technologies.

The Federal Service for Technical and Export Control (FSTEC) is responsible for developing the procedure for classifying specific AI technologies as trusted. Open-source reports indicate that by the end of 2025, the FSTEC will submit a draft standard for the secure development of AI systems for public discussion.²⁶ Based on the available data, it is not possible to conclude whether the proposed standard will address the issues associated with foundation models in any way.

At the legislative level, the draft federal law “On the Regulation of Artificial Intelligence Systems in the Russian Federation” (Balashova and Lisycina, 2025) deserves attention (the text of the draft is available to the authors). This initiative has clear advantages and addresses significant issues in the field of AI regulation, including content labeling, establishing legal liability, and determining the legal framework for results using AI-generated output. However, the initiative does not reflect the fact that many AI systems operate on the basis of foundation models. This necessitates a different approach to defining the range of entities involved in the development and deployment of AI systems, as

²⁵ Artificial intelligence will gain trust through a registry. Available at: <https://www.comnews.ru/content/239300/2025-05-21/2025-w21/1007/iskusstvennyy-intellekt-obretet-doverie-cherez-reestr> [Accessed 15.08.2025]. (In Russ.).

²⁶ FSTEC has taken up the development of a standard for the safe development of AI. Available at: <https://www.comnews.ru/content/241320/2025-09-19/2025-w38/1007/fstek-vzyalas-za-razrabotku-standarta-bezopasnoy-razrabotki-iskusstvennogo-intellekta> [Accessed 15.08.2025]. (In Russ.).

well as establishing specific requirements depending on whether the foundation models are frontier or not.

One can also consider the draft Concept for the Development of Regulation in the Field of Artificial Intelligence Technologies until 2030.²⁷ The document recognizes the critical role of foundation models and predicts an increase in their influence on the industry. However, it also contains some highly controversial provisions, in particular stating that large language models belong to the “category of narrow AI, as they are effective in specific areas, but do not have the ability to generalize knowledge and transfer experience to fundamentally new tasks.” This statement appears to be incorrect. After all, the architecture of large language models,²⁸ especially those based on transformers, allows the knowledge gained from training on general data to be used to solve new, previously encountered tasks (Bommasani et al., 2021). For example, a model trained on texts can successfully apply the accumulated knowledge to generate code, translate, summarize documents, or analyze legal texts — even though it was not directly trained to do so.

The Concept contains several significant shortcomings, which the expert community has critically analyzed.²⁹ Of particular concern is the lack of clear regulatory guidelines for foundation models. Despite their critical importance and potential risks, the document does not provide specific guidelines for either classifying foundation models or developing appropriate legal regimes. Instead, there is a clear tendency to delegate these issues to mechanisms of soft law.

This circumstance makes it relevant to analyze the soft law mechanisms existing in the Russian Federation, their effectiveness and readiness to address the relevant issues. The primary documents in Russia

²⁷ The Ministry has prepared a concept for regulating artificial intelligence. Available at: <https://www.vedomosti.ru/economics/articles/2025/08/20/1132830-mintsifri-podgotovilo-kontseptsiyu-regulirovaniya-iskusstvennogo-intellekta> [Accessed 15.08.2025]. (In Russ.).

²⁸ Large language models are a type of a foundation model.

²⁹ Draft concept for the development of AI regulation until 2030: analysis of key provisions and potential risks. Available at: <https://pravo.hse.ru/religionandlaw/news/1079313649.html> [Accessed 15.08.2025]. (In Russ.).

on ethical issues are the “AI Code of Ethics,”³⁰ the “Declaration on Responsible Generative AI,”³¹ and the “AI Code of Ethics in Medicine and Healthcare”³² developed by the AI Alliance. Among them, the most significant for the purposes of this study is the Declaration on Responsible Generative AI, which is a concise document containing recommendations for developers and users of generative AI systems.

The document uses the terms “foundation models” and “generative AI-based services,” but the relationship between these concepts is not explained, which creates some confusion. An analysis of the content of the recommendations to developers reveals that they are, in fact, addressed to developers of end AI products — entities involved in adapting and implementing applications. For example, Point 2 of the recommendations requires organizations to “thoroughly test generative AI-based services before launching them, as well as to develop and implement systematic monitoring procedures.” Such wording clearly refers to the stage of implementing specific applications, which leads to the conclusion that the recommendations are aimed at downstream providers rather than developers of foundation models. It follows from the above that ethical documents do not impose any obligations specific to developers of foundation models.

The next possible level of regulation is the internal documents of the companies, which develop foundation models. For example, Yandex has developed a family of large language models called YandexGPT 5,³³ and Sber has developed GigaChat.³⁴ This raises the logical question of whether these companies have policies in place to regulate the development of such models.

³⁰ Code of Ethics in the field of AI. Available at: <https://a-ai.ru/code-of-ethics/> [Accessed 15.08.2025]. (In Russ.).

³¹ Declaration of Responsible Generative AI. Available at: <https://ethics.a-ai.ru/genai-declaration/> [Accessed 15.08.2025]. (In Russ.).

³² Code of Ethics in the field of AI in medicine and healthcare. Available at: https://a-ai.ru/?page_id=3025 [Accessed 15.08.2025]. (In Russ.).

³³ YandexGPT 5.1 Pro. Available at: <https://ya.ru/ai/gpt> [Accessed 15.08.2025]. (In Russ.).

³⁴ GigaChat. Available at: <https://developers.sber.ru/dev> [Accessed 15.08.2025]. (In Russ.).

To date, it is known that Yandex has obtained ISO/IEC 42001³⁵ international standard certification, confirming that the company has established a responsible management system related to the development and provision of large language models through the Yandex Foundation Models³⁶ service. Sber is taking various steps to promote a responsible approach to the development of AI systems, particularly within the framework of the aforementioned AI Alliance. In particular, the company, like many others, is a signatory to the AI Ethics Code. However, as noted above, this and other ethical documents do not contain specific provisions relating to the development of foundation models. The authors were unable to find any other relevant internal policies or frameworks from open sources.

It follows from the above that in the Russian Federation, both at the legal and ethical levels of AI governance, there is a gap in ensuring accountability of foundation models towards developers. None of the existing documents regulating the responsible and ethical use of AI contains provisions directly addressed to entities that train such models.

IV. Conclusion

The analysis conducted in this article demonstrates that the Russian AI regulation lacks specific rules covering relations related to the development and deployment of foundation models. Strategic and conceptual documents only provide general guidelines and do not address issues such as the classification of foundation models or the need to develop specific regulations for their development. Even soft law mechanisms are primarily addressed to developers implementing AI solutions, leaving out a key link in the chain of AI system creation — the developers of foundation models.

Meanwhile, it is precisely at the stage of designing and training a foundation model that key risks arise in relation to data quality, architectural solutions, energy efficiency, security and the stability of sys-

³⁵ Responsible AI. Available at: <https://ya.ru/ai/responsible-ai> [Accessed 15.08.2025]. (In Russ.).

³⁶ Certificate. Available at: https://yastatic.net/s3/lpc-ext/static/maxmax/pp-browser/yandex_%D1%81_42001_25.pdf [Accessed 15.08.2025].

tems that operate on the basis of such models. The absence of principles and standards governing the activities of basic level developers effectively leaves a fundamental element of the entire AI ecosystem uncontrolled, rendering further attempts at regulation fragmented and futile.

In order to overcome the identified gaps, it seems appropriate to adhere to the following recommendations when formulating the Russian Federation's policy on AI regulation:

- to develop a classification of foundation models based on their level of impact on human rights, state interests and society. As a technical criterion for such a classification, it seems appropriate to use the computing power spent on training the relevant model;

- to establish separate legal statuses for foundation model developers, foundation model providers, and downstream providers;

- to consider the possibility of establishing special requirements for model developers and providers aimed at raising awareness among downstream providers about the capabilities and limitations of the model (e.g., encourage the publication of model or system cards);

- to develop soft law mechanisms, in particular, prepare a code of conduct, best practices, and ethical recommendations for developers and providers of foundation models;

- to consider the possibility of establishing links between the emerging regime for trusted AI technologies and the development of foundation models, in particular, when designing requirements for trusted technologies, take into account aspects related to the fact that such products may function on the basis of foundation models.

It appears that taking these recommendations into account will enhance the quality of artificial intelligence regulation in Russia, aligning it more closely with international standards and contemporary technological realities.

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Comparative Analysis of Personal Data Protection Laws: The Case of Azerbaijan and the European Union's General Data Protection Regulation (GDPR)

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Abstract: The paper is dedicated to the comparative analysis of legal regulations on the protection of personal data in the Republic of Azerbaijan, with reference to the European Union framework. The purpose of this research is to identify the gaps and shortcomings in the legislative framework of the Republic of Azerbaijan by comparatively analyzing the key concepts and principles in the field of personal data protection, the area of application of normative acts, the rights of data subjects, applicable administrative and legal sanctions for data protection breaches, and the effectiveness of institutional control mechanisms. For this purpose, formal legal and comparative analysis, as well as various scientific research methods, including the doctrinal method are used. The Constitution of the Republic of Azerbaijan, the Law of the Republic of Azerbaijan “On Personal Data” and other related normative documents have been analyzed. By using this approach, the research achieved its principal goal, specifically to conduct a comparative analysis between the two legal systems. Although the normative framework for the protection of personal data in Azerbaijan meets modern requirements, reforms are needed to increase data subjects’ rights, deepen legal compliance, tighten sanctions, and establish a central control mechanism to enhance regulatory coherence with reference to the GDPR as a comprehensive and functionally developed regulatory framework. In this context, the paper emphasizes the obligation to ensure full compli-

ance of the legislation on the protection of personal data in the Republic of Azerbaijan with the GDPR and presents recommendations and conclusions for its development by using the experience of the European Union. The proposals prepared based on the results obtained have practical importance for increasing the effectiveness of the personal data protection mechanism.

Keywords: personal data protection; GDPR; mechanism; Regulation; legislation; comparison

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Contents

I. Introduction	297
II. Materials and Methods	302
III. Substantive Legal Comparison between Azerbaijan's Law and the GDPR	303
III.1. Scope of Application	303
III.2. Conceptual Framework: Alignment of Key Definitions	306
III.3. Processing Principles and the Protection of Data Subject Rights	311
III.4. Legal Consequences and Penalties for Data Breaches	316
III.5. Institutional Governance and Oversight Mechanisms	318
IV. Discussion	323
V. Conclusion	328
References	330

I. Introduction

As a result of the rapid development of technological innovations and the integration of digitalization into daily life, the collection, processing, and sharing of personal data have increased significantly. From people's birth dates to marriage and divorce information, as well as records related to court, property, election, and other legal activities, and biometric indicators are collected and processed in real-time by various interested parties, especially government authorities. D.J. Solove and P.M. Schwartz (2024) write that it is almost impossible today

to live without any record being taken of us. This reality shows that personal data has become not only information, but also a tool for economic worth and social power. The mass surveillance of human behaviour by states and governments, and the collection of personal data for various purposes and its conversion into economic worth create serious risks. According to V.P. Shehu and V. Shehu (2023), in today's rapidly advancing digital technologies, the free flow of personal data globally raises serious concerns regarding human rights, and legal norms ensuring data confidentiality aim to both promote technology driven development and protect personal liberties. Normative documents regulating the use of personal data are considered one of the essential foundations of information security in modern societies. Such legislative acts identify the legal framework for the collection, processing, transfer, and protection of personal data. Their principal function is to grant certain rights to citizens, determine the legal obligations of data-processing institutions, and provide possible legal defences in case of law violations (Gstrein and Beaulieu, 2022).

Contemporary legal systems have established legal regulations at international, regional, and national levels, based on fundamental principles such as transparency, accountability, and individual consent in the processing of personal data over time. Although the Universal Declaration of Human Rights, adopted by the United Nations in 1948, does not explicitly recognize personal data protection as an autonomous right, Art. 12 establishes protection against arbitrary interference with privacy, family life, home, and correspondence.¹ The first international instrument specifically addressing personal data protection was the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data² adopted in 1980. These Guidelines established core principles aimed at facilitating the free cross-border movement of personal data while ensuring minimum standards of privacy protection. Despite their advisory nature, they played a foundational role in shaping a more systematic and coordinated international approach to personal data protection, emphasizing principles such as transparency and accountability (Anderson et al., 2021).

¹ Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [Accessed 10.07.2025].

² Available at: <https://lnk.ink/btda4> [Accessed 29.07.2025].

The application that best regulates the security of personal data at the regional level belongs to the European Union. There is no doubt that A.L. Newman (2015) evaluates the European approach to personal data protection based on a unified, organized, integrated, consistent, and reliable doctrine, in comparison to the “fragmented” American approach based on a multitude of different rules without a regulator.

One of the first steps taken to meet the need for personal data protection within the framework of the European Union was the approval of Convention 108 in 1981.³ The Republic of Azerbaijan is a Party to Convention 108, having ratified the Convention in 2010.⁴ This document, the first legally binding international convention in the field of personal data protection, aimed to protect individuals from legal risks arising from the processing of personal data and to regulate cross-border data transfers between countries.

In 2018, a revised version of the Convention, known as “Convention 108+”, was adopted with the aim of enhancing transparency in personal data processing, granting additional rights to individuals, and strengthening the accountability and responsibilities of data processors. Consequently, the Convention has been adapted to the challenges of the digital era and control mechanisms have been further enhanced.⁵

Directive 95/47/EC of the European Parliament and of the Council, adopted in 1995, aimed to strengthen the protection of personal data while facilitating the free movement of such data within the European Union. As a directive, it required transposition into national law, which resulted in divergent national implementations and a fragmented

³ Council of Europe. (1981, January 28). Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. Available at: https://www.edps.europa.eu/data-protection/our-work/publications/legislation/council-europe-convention-no-108-data-protection_en.

⁴ Law of the Republic of Azerbaijan No. 879-IIIQ “On the Ratification of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data” (2009, September). Available at: <https://e-qanun.az/framework/18625> [Accessed 08.07.2025].

⁵ European Union Agency for Fundamental Rights, Council of Europe, and European Data Protection Supervisor, (2018). Handbook on European Data Protection Law. Publications Office of the European Union. Pp. 1–404. Available at: <https://book.coe.int/en/european-court-of-human-rights/10091-pdf-handbook-on-european-data-protection-law-2018-edition-czech-version.html> [Accessed 04.07.2025].

regulatory landscape across Member States. This structural limitation highlighted the need for a more uniform and directly applicable legal instrument at the EU level. In 2016, the European Parliament adopted Regulation 2016/679, known as the “General Data Protection Regulation (GDPR).”⁶ This regulation is considered one of the most significant legal reforms in the field of personal data protection on an international scale. The GDPR was established to ensure the inviolability of personal data and to propose specific legal requirements for parties involved in the processes of collecting, storing, and processing data. The GDPR was implemented in 2018, not only established the fundamental standard for data protection in the EU but also provided encouragement for other countries to review their privacy policies (Aljeraisly et al., 2021). Another reason for its acceptance is, naturally, the increasing need to effectively protect privacy in light of technological advancements. According to A. Wodi (2023), the GDPR has managed to become a crucial milestone in shaping data protection law worldwide since its implementation. The GDPR has been characterized by an enhancement in the level of user data protection and the effective application of administrative fines during the initial five years of its implementation.

According to K. Yeung and L.A. Bygrave (2022), the most important elements underlying the Regulation are the protection of transparency in personal data processing, goal alignment, and fundamental principles of law. It is not by chance that C. Labadie and C. Legner (2019) point out that the principles established within the GDPR shaped the structure of this legal regulation and its approach to the processing of personal data. However, for the principles to be functionally applicable, it is essential that they are comprehended accurately. One of the authors, R. Ducato (2020), emphasises that the principle of transparency should not only be a formal legal obligation but should also be applied in a way that is adapted to human behaviour. Furthermore, the information presented to the data subject must be provided through more user-focused and behaviour-based mechanisms.

S. Zuboff (2019) states that regulatory frameworks such as the GDPR are essential for protecting the rights and freedoms of individu-

⁶ Available at: <https://gdpr-info.eu/> [Accessed 20.08.2025].

als in democratic societies. In this context utilising the GDPR experience, especially when identifying deficiencies in national legislation, is one of the most effective ways to establish ideal standards for states in the field of personal data protection.

M. Nakashima (2022) presents a clear table based on a comparative analysis of how different legal systems regulate the right to personal data portability. The author analyzes the approaches in the GDPR and the U.S. legislation to highlight the deficiencies in Japanese law. This research shows that the legal framework not only identifies the existence of the right but also reveals how it can be integrated with technical standards and market policy.

S. Lim and J. Oh (2025) carried out a comparative study on how personal data protection is regulated globally in the modern digital era, using data from five different jurisdictions (EU, U.S., Japan, China, and South Korea). The authors have demonstrated that the historical, political, and cultural contexts of each country shape its legal framework for privacy. Their research identified similarities and differences in key areas such as consent mechanisms, cross-border applicability, the scope of rights, sanctions, and corporate responsibility, emphasizing deficiencies in current legal frameworks and opportunities for international harmonization. Their comparative analysis, evaluating the similarities and differences, identified key recommendations for how the current research can enhance Azerbaijan's personal data legislation. In this context, the study recognizes that the harmonization of national laws with international principles and standards such as the GDPR is an essential tool for establishing a more flexible and effective legal framework.

Consequently, the aim of this study is to analyse GDPR practices for the development of legislation in the Republic of Azerbaijan in the field of personal data protection. The research has identified the following tasks in order to achieve the defined objectives: 1) to examine GDPR and the legislation of the Republic of Azerbaijan; 2) to identify current legal deficiencies and shortcomings in Azerbaijan's law within the framework of a comparative analysis of both legal approaches; 3) to present specific suggestions and recommendations for amendments to the legislation in the field of personal data protection in Azerbaijan.

II. Materials and Methods

The research incorporated multiple forms of analysis to explore the topic from diverse perspectives. This study uses a comparative legal methodology to assess the level of convergence and divergence between the General Data Protection Regulation (GDPR) and the national legal framework of the Republic of Azerbaijan for personal data protection. A structured analysis of primary substantive and procedural components within both legal systems is made possible by the comparative method. These elements include the scope of application, some necessary definitions, fundamental principles, legal grounds for data processing, rights of data subjects (especially the right to erasure and the right to data portability), legal sanctions and role of supervisory authorities from each system. This comparative assessment seeks to explore how Azerbaijani's legal framework responds to the evolving challenges of personal data protection in the digital age and evaluates the degree to which it aligns with the advanced regulatory tools embedded in globally accepted standards, such as the GDPR.

Through the legal formal method, it became possible to examine how personal data protection norms are framed and structured within the legislative framework. Thus, the research focused in particular on GDPR (2018), Law of the Republic of Azerbaijan No. 998-IIIQ “On Personal Data” (2010),⁷ In addition, this core legislation, other relevant laws, such as Criminal Code of Azerbaijan (2000), Administrative Offences Code of Azerbaijan (2015),⁸ Civil Code of Azerbaijan (1999), the Law of the Republic of Azerbaijan No. 460-IQ “On Information, Informatization, and Protection of Information” (1998),⁹ the Law of the Republic of Azerbaijan No. 651-IIIQ “On Biometric Information” (2008),¹⁰ the Law of the Republic of Azerbaijan 1024-IIQ “On Obtaining Information” (2005),¹¹ Order of the Cabinet of Ministers of Azerbaijan No. 161 “Requirements for the protection of personal data” (2010).¹²

⁷ Available at: <https://e-qanun.az/framework/19675> [Accessed 01.07.2025].

⁸ Administrative Offences Code of the Republic of Azerbaijan (2015, December). Available at: <https://e-qanun.az/framework/46960> [Accessed 11.07.2025].

⁹ Available at: <https://e-qanun.az/framework/3525> [Accessed 14.07.2025].

¹⁰ Available at: <https://e-qanun.az/framework/15144> [Accessed 12.07.2025].

¹¹ Available at: <https://e-qanun.az/framework/11142> [Accessed 23.07.2025].

¹² Available at: <https://e-qanun.az/framework/20046> [Accessed 22.07.2025].

To ensure a structured comparison, the research adopts a functional comparative method that analyzes how each legal system addresses the same regulatory issues in practice. This allows the study to identify not only textual and conceptual differences but also divergences in regulatory approach and enforcement mechanisms. For example, the analysis contrasts the extraterritorial reach of the GDPR, as defined under Art. 3 of the Regulation, with the predominantly territorial scope of Azerbaijani data protection law, as well as the GDPR's clearly defined legal bases for data processing with the relatively underdeveloped and scattered provisions in Azerbaijani framework, within a functional comparative methodology.

In addition to textual and normative comparison, the study employs a critical legal analysis to evaluate the effectiveness and adequacy of Azerbaijani data protection framework in practice. This involves interpreting the substantive content of laws, examining their implementation potential, and reflecting on their alignment with international standards and best practices.

The doctrinal approach was adopted to examine the legal framework governing personal data protection, allowing for a structured interpretation of relevant legal provisions and facilitating an understanding of how core principles are interconnected within the system. Additionally, the analytical method is employed to evaluate the internal consistency, normative clarity, and effectiveness of each framework. Furthermore, attention is paid to address terminological contradictions and institutional differences, both of which have the potential to have an effect on the efficient implementation of data protection standards.

III. Substantive Legal Comparison between Azerbaijan's Law and the GDPR

III.1. Scope of Application

The Law of the Republic of Azerbaijan No. 998-IIIQ "On Personal Data" (2010) implemented the first comprehensive regulation on data protection in the country. Before this law, there was not a unified and specific normative framework for the protection of personal data in Azerbaijan. It is true that although laws such as the "On Biometric In-

formation” (2008) and the “On Information, Informatization, and Protection of Information” (1998) exist, the implemented legal norms had a scattered, unsystematic, and hard-to-control structure. The Law of the Republic of Azerbaijan No. 998-IIIQ (2010) determines the legal relationship related to the collecting, processing, and protection of personal data, as well as the rights and responsibilities of the state and other subjects in this area. Additionally, the law also encompasses issues such as controlling personal data at the national sphere and its cross-border transfer. The main goal of the law is not only to determine the current principles in the field of personal data regulation, the foundations of state control, and the rules for processing and transferring data in information systems, but also to guarantee the privacy of an individual’s private and family life legally as well as human and civil rights and freedoms. (Para. 1). Although both the GDPR and the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) serve similar goals, some differences are observed regarding their rules and scope.

The first legal gap in the law is that, although its scope encompasses both legal entities and natural persons, it contains no provision regarding the representations or branches of foreign legal entities in the Republic of Azerbaijan. However, under Art. 53 of the Civil Code of the Republic of Azerbaijan¹³, representations and branches may act on behalf of a foreign legal entity. In this regard, it should be explicitly stated in this law or in future legislation that the scope of application should include representative offices and branches of foreign legal entities. When it comes to the natural persons, laws on data protection and data privacy equally apply to all the individuals whose personal data is collected, stored, processed, and used in the Republic of Azerbaijan and are applied both to the citizens of the Republic of Azerbaijan and citizens of foreign states. Unlike the GDPR, the norm is not provided for the protection of the personal data and the extraterritorial application of data privacy in Azerbaijan’s law. In the context of increasing cross-border data processing, the absence of explicit provisions on the extraterritorial application of personal data protection rules constitutes a

¹³ Civil Code of the Republic of Azerbaijan (1999, December). Available at: <https://e-qanun.az/framework/46944> [Accessed 24.08.2025].

significant gap in the current legal framework, because the rise of complex global challenges has increasingly called into question traditional objections to extraterritorial jurisdiction (Walsh, 2013). As a result, there are no direct or indirect norms presented regarding situations such as a “foreign operator” or the processing of Azerbaijani citizens’ data by a subject operating abroad. For example, if a foreign company collects data on Azerbaijani citizens from abroad, the power to influence this activity is weak with the existing legislation. In fact, norms governing the cross-border transfer of data are set out in Art. 14 of the Law of the Republic of Azerbaijan No. 998-IIIQ (2010). However, these norms primarily apply to local entities that transfer data, and they do not define specific requirements concerning the data processing activities of foreign entities or the security guarantees applicable to such activities.

However, the GDPR is a regional regulation, its scope extends beyond the borders of the EU (Voigt and Bussche, 2017). Thus, the GDPR carries global importance not only for EU member states but also for other countries wishing to create economic relations with the EU. In other words, Art. 3 of the GDPR determines its geographical scope and encompasses three major situations: 1) data processing activities carried out within the borders of the EU; 2) offering of goods and services to individuals located in the EU, regardless of whether they are processed within the EU, and 3) monitoring of their behaviour located in the EU. If a data controller and a person or organization that acts on their behalf operate within the EU, the norms of the GDPR apply. At this point, the most important condition is that the data subject is situated within the EU borders. Consequently, it does not matter whether this person is an EU citizen or not. For legal entities, the fundamental criterion is not where they are registered but where they operate. For instance, if a legal entity that is established and registered in Azerbaijan processes personal data within the framework of economic relations with Germany, this activity will fall under the jurisdiction of the GDPR, and as a result, the norms of the GDPR will apply in case of violations.

According to Art. 3(2)(b) of the GDPR, tracking internet users’ behaviour via cookies is considered “behavioural tracking.” If this tracking is applied to individuals who live in the European Union, the activity of data processing is encompassed by the scope of the GDPR. In the EU

region, the intention to offer goods and services of the data controller to individuals located in the EU is of particular importance for the application of the GDPR. If a company directs goods or services to these individuals, the norms of the GDPR must apply. At this point, clear expression of intention is very important. For example, using the English language on any website and providing an email address is not sufficient for application. But, using a widely spoken language in the EU and offering the euro or other currencies as payment choices is an obvious example of the existence of clear intention.

Based on this foundation, it is possible to say that even if located outside the EU, platforms operating within the EU, such as Amazon, Google, and Meta, must comply with requirements of the GDPR. The GDPR's extraterritorial reach allows it to exert influence globally, thereby challenging conventional notions of sovereign immunity and non-intervention. This approach to extraterritoriality differs from the stance taken in the *Lotus* case (1927), where the Permanent Court of International Justice held that states are free to determine their own domestic legal norms, provided that they do not contravene any explicit rule of international law.¹⁴

III.2. Conceptual Framework: Alignment of Key Definitions

An accurate legal definition of personal data in regulations is an important tool for the effectiveness of its subsequent implementation mechanisms. An analysis of some terms used in the national legislation shows that it is behind in comparison to the GDPR. For instance, in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), personal data is described as any information that can identify a person directly or indirectly, but it is not clearly mentioned which information is considered direct personal data and which is considered indirect personal data. Direct personal data typically includes identifiers such as a person's name, surname, identification number, and date of birth, whereas indirect personal data may encompass information such as IP addresses,

¹⁴ The PCIJ Judgement. The case of the S.S. "Lotus" (France v. Turkey), Judgement No. 9, 1927 PCIJ (ser. A) No. 10. (Sept. 7). (1927). Available at: https://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm [Accessed 18.06.2025].

mobile device IMEI codes, cookies, and patterns of user behaviour. In this regard, the definition mentioned does not fully and comprehensively explain the notion of personal data. On the other hand, according to Art. 3.0.2 of the Law of the Republic of Azerbaijan 1024-IIQ (2005), information about private and family life is equated with the notion of personal data. This approach shows that the national legislator interprets the notion of personal data in a wider framework and directly links the inviolability of private life with the protection of personal data. This naturally leads to confusion.

The notion of personal data is regulated more systematically and broadly through the GDPR and is now defined as any information relating to a specific or identifiable natural person (Art. 4.1). This individual can be determined directly or indirectly, especially based on their name, identification number, geographical location indicators, online identifiers, and physical, genetic, psychological, economic, cultural, or social characteristics. This definition can include both information that directly reveals a person's identity and other content that allows for the indirect identification of an individual. This definition can encompass both information that directly reveals an individual's identity and other content that allows for the indirect identification of an individual.

In contrast to the legislation of the Republic of Azerbaijan, the GDPR further broadens the scope of personal data to add genetic information (Art. 4.13), biometric information (Art. 4.14), and health-related information (Art. 4.15) of natural individuals. Nevertheless, the legislation of the Republic of Azerbaijan adopts a general approach to this area, recognizing the individual's fingerprints, facial image, eye retina, voice recording, DNA analysis results, body measurements, handwriting, and signature as defining characteristics of personal data.¹⁵ Regulating this concept not in the primary data protection law, "On Personal Data," but instead in a separate and more general statute, "On Biometric Information," creates legal uncertainty and undermines the consistency of the regulatory framework, particularly given the heightened sensitivity of biometric data.

¹⁵ Law of the Republic of Azerbaijan No. 651-IIIQ "On Biometric Information." Art. 35.1.

In general, the legislation of the Republic of Azerbaijan recognizes four groups of subjects as the primary participants in the field of personal data protection: the subject of personal data, the data owner, the operator, and the user. In the GDPR, these are primarily defined as the data subject, controller, processor, recipient, and the third party. Regarding the data subject, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), proceeding from the same position as the GDPR, considers the natural person whose personal data is collected, processed, and protected, and who is identified or identifiable as the subject of personal data (Art. 2.1.2). In Azerbaijan's law, the term "owner" refers to a state or local self-government body, or a legal or natural person who holds the rights of ownership, use, and control over a personal data information system or resource, and determines the purposes of personal data processing (Art. 2.1.9). The term "controller" used in the GDPR considers a natural and legal entity, public authority, agency or any other body that, independently or collaboratively with others, determines the goals and means of processing personal data (Art. 4.7). Although the terms are similar in the general context, a minor difference is noticeable in the terms of legal interpretation. Consequently, the owner is legally and technically responsible for the information system. Thus, its institutional function is highlighted at the core of its ownership. Nevertheless, the notion of a controller in the GDPR does not have such a technical nature. The controller determines the goals and means of data processing. However, this does not mean technical ownership of the information system, instead who has the authority to make decisions regarding the data.

The next term that is used in the legislation of the Republic of Azerbaijan is "operator." The operator is considered the owner of personal data, responsible for its collection, processing, and protection or the state or local government body or legal or natural person to whom these functions are assigned to a certain degree and under specific conditions. Two problematic issues arise in the legislative approach. First, the operator is equated with the owner of the personal data. More precisely, the operator is understood as the person who both makes decisions in accordance with the data subject's wishes and carries out the given instructions. Second, the idea that the operator's power can be

transferred “to a certain extent and under certain conditions...” is an excessively abstract notion because the extent and conditions of the authority that will be granted are not specified.

The term “operator” partially aligns with the term “processor” in the GDPR. Therefore, according to the GDPR, a processor is a natural or legal entity, state body, agency or any other body that processes personal data on behalf of the controller (Art. 4.8). Thus, the notion of a processor appears to be limited solely to execution functions. There is clearly a significant need for clarification, as the approach adopted by Azerbaijani law is multifaceted and broad. By contrast, the legal boundaries between the concepts of “processor” and “controller” are clearly defined in the GDPR.

The other participant acts as the user of the personal data. According to the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), the user is a state or local government body, a legal or natural entity who has the right to use personal data within their authority and in the manner and scope identified by the data subject, only for the aim of acquiring information essential for their needs (Art. 2.1.11). In the GDPR, the term “recipient” is used, which aligns with this notion. The recipient may be any natural or legal entity, government body or any other organization to whom personal data is transferred or revealed (Art. 4.9). The main difference is that in the legislation of Azerbaijan, the user obtaining information is limited by the phrase “...in the manner and scope determined by the owner...”. Furthermore, the information acquired by the user should only be what is essential for them. However, there are no limiting requirements established for the recipient regarding the scope and purpose of such information. Additionally, when a state making an inquiry under the GDPR is notified, this situation is regulated by specific rules. However, no such exception is provided for the user in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010). Consequently, the GDPR approach is more comprehensive and flexible in nature.

Finally, the term “third party” as defined by the GDPR (Art. 4.10) is generally not provided for in the legislation of Azerbaijan.

The term “pseudonymization” is also used in the GDPR as a new notion (Art. 4.5). This notion is a technique used to guarantee that personal data is not known to belong to a particular person. In this case,

supplementary information identifying the data owner is stored separately and protected by specific technical and organizational measures. Consequently, without the additional information, the fundamental data can no longer be linked to a specific person independently (Art. 4.5). Thus, data that has been modified in this manner is still considered personal data and is subject to the GDPR rules (GDPR, Recital 26) because this data along with additional information can be related to a particular person and their identity can be determined. It should be noted that the notion of “pseudonymisation” is not used in any normative document of Azerbaijan’s personal data legislation. In this regard, it is essential for this concept to be normatively defined separately in national legislation and for the legal framework to be established.

However, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) characterizes the notion of anonymization and defines it as bringing personal data in a state that does not allow for the identification of the data subject (Art. 2.1.15). The concept of anonymization, achieved through randomization and generalization,¹⁶ aligns with the regulatory approaches of Azerbaijan and the GDPR (GDPR, Art. 5(1) (e)). For comparison, it should be noted that, unlike pseudonymized data, anonymized data is information that no longer permits the identification of the data subject; therefore, it is regarded as data whose ownership cannot be determined. Consequently, the GDPR does not apply a specific protection regime for anonymized data (GDPR, Recital 26).

The comparisons conducted show that the legal status, functions, and mutual relationships of entities engaged in personal data processing under Azerbaijani legislation have not been fully clarified or addressed in a systematic manner. Therefore, it is essential to align current concepts with the level of technological advancement and international and European standards, to clearly identify functions, and to allocate responsibility precisely. All of these will significantly enhance the quality of work by data owners, as well as government and local institutions engaged in this domain.

¹⁶ Art. 29 Data Protection Working Party (A29WP) (2014). Opinion 05.2014 on Anonymization Techniques, 0829.14.EN, WP216. Brussels, pp. 1–37. Available at: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp216_en.pdf [Accessed 24.08.2025].

III.3. Processing Principles and the Protection of Data Subject Rights

The processing, collection, storage, use, and transfer of personal data must be carried out in accordance with the law. A valid legal basis is the primary requirement for lawful processing. Otherwise, the processing of personal data is considered unlawful and may give rise to legal liability. In this regard, the consent of the data subject is indicated as the main legal tool for the collection of personal data in Art. 8.1 of the Law of the Republic of Azerbaijan No. 998-IIIQ (2010). Furthermore, the legislation provides for certain situations related to the protection of state and public interests (Art. 9). However, other alternative legal bases, such as the performance of a contract, are either only partially regulated or not mentioned at all. By contrast, the GDPR specifies six essential legal bases for the processing of personal data (Art. 6), which form a more comprehensive and coherent regulatory framework compared to Azerbaijani law.

In the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), the fundamental principles for the collection, processing, and protection of personal data are specified, including those provided for in the Constitution, specifically the principles of legality, confidentiality, and the reconciliation of voluntariness with compulsion (Art. 4). Because of this approach being quite broad, it can reduce the practical effectiveness of principles during the protection of personal data.

The fundamental principles are specifically listed in Art. 5 of the GDPR. The first of these principles is “Lawfulness, Fairness and Transparency,” and only one of these, the principle of legality, is included in Azerbaijani legislation (Art. 4). Among the key principles, fairness stands out as one of the most debated yet least clearly defined concepts. Fairness is frequently reduced to compliance with procedural requirements. However, meeting formal conditions does not always guarantee that data processing outcomes are fair. Therefore, additional elements such as good faith, non-discrimination, the prevention of harmful effects, and respect for individual autonomy should be taken into account when interpreting this principle (Häuselmann and Custers, 2024).

Subsequently, “Purpose limitation” requires that data must only be collected only for predetermined clear and lawful purposes and should not be processed in a way that contradicts these purposes. Occasionally, the initial goal changes over time or may arise new purposes. In this case, if the processing is not based on new consent or another legal basis, the data controller must assess the compatibility of the new purpose with the original purpose based on the GDPR. Although the GDPR establishes a number of criteria for this, this principle is reflected incompletely in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010). Specifically, while it is stated that personal data must be collected only for legal, predetermined and declared purposes and processed through methods suitable for those specified purposes (Art. 9.1) analogical verification criteria are not provided for in Azerbaijan’s law.

According to the principle of data minimization, personal data must be collected and utilized only to the extent necessary and adequate for processing purposes (GDPR, Art. 5.1(c)). It should be highlighted that while this principle is not explicitly stated as a separate principle in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), it is reflected within the framework of the conditions considered during the processing of personal data: *“The volume and nature of personal data collected and processed must align with declared purposes and the rights of the owners”* (Art. 9.2).

The subsequent principle, accuracy ensures that personal data is accurate and updated as needed. Regarding this principle, the approach of the GDPR (Art. 5.1(d)) and Azerbaijan’s law (Art. 9.3) is the same.

Nevertheless, it is difficult to say the same opinion when comparing the “Storage limitation.” This principle requires that personal data be kept only for as long as essential to achieve the purposes for which it was processed (GDPR, Art. 5.1(e)). Similarly, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) requires the immediate destruction of data when the goals of collecting and processing personal data are attained and the necessity for their retention has ceased (Art. 9.4). However, Azerbaijan’s law does not provide a clear mechanism for determining who is responsible for destroying the data and what procedure they should follow. Furthermore, there are no defined legal or technical criteria for evaluating the data retention period.

Finally, according to the principle of “integrity” and “confidentiality,” personal data must be safeguarded through appropriate technical and organizational measures against unauthorized or unlawful processing, as well as accidental loss, destruction, or damage (GDPR, Art. 5.1(f)). This principle aims to ensure both the integrity and the confidentiality of personal data. It is also closely linked to the concept of “security of processing” enshrined in Art. 32 of the Regulation, which requires a risk-based approach. In this regard, measures such as encryption, pseudonymization, audit mechanisms, and internal policy frameworks are recommended as practical safeguards. The Law of the Republic of Azerbaijan No. 998-IIIQ (2010), adopts a similar position (Art. 5.8), however, unlike the GDPR, it does not explicitly embrace a risk-based approach. Instead, the determination of appropriate technical and organizational measures is delegated to a separate normative act. Specifically, the Order of the Cabinet of Ministers of the Republic of Azerbaijan No. 161 (2010) stipulates concrete security obligations for information systems processing personal data (Art. 2). While this regulatory framework provides clarity in terms of technical safeguards, it lacks the flexibility and contextual adaptation inherent in the GDPR, where security measures are designed to correspond to the likelihood and severity of risks to individuals’ rights and freedoms.

Differences are observed between the GDPR and the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), regarding the consent mechanism, which plays a crucial role in the processing of personal data. Under the GDPR, consent must be freely given, specific, informed, and unambiguous, and its withdrawal of consent must be as easy as giving it (Art. 4(11) and 7(3)). By contrast, the requirements for consent under the Law of Azerbaijan are less detailed, although they reflect efforts to approximate European standards. Article 8.1 of the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) provides that consent may be granted in writing or by other means, including electronic signature. However, the specific components of consent enumerated by the GDPR are absent. Consequently, Azerbaijan’s framework is less practical, as it does not embody the requirement of explicit and clearly expressed consent by the individual regarding the processing of their personal data.

In the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), the cases permitting the processing of personal data without the data subject's consent are strictly limited. These exceptions primarily include the protection of an individual's life and health, as well as the fulfilment of public interests defined by law. In contrast, the GDPR considerably broadens the scope of such exceptions by incorporating, *inter alia*, such grounds as the performance of contract, compliance with legal obligations, and the pursuit of legitimate interests (GDPR, Art. 6). Article 5 of the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) distinguishes between two categories of personal data: open and confidential, with each category subject to different levels of protection. For instance, biometric data, health-related information, and data concerning religious or political beliefs are treated as confidential and may only be processed based on the explicit consent of the data subject, unless otherwise provided by law. By contrast, information such as an individual's name or surname, when disclosed by the data subject or officially made public by law, is considered more accessible. In addition, Art. 2.1.6 of the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) introduces a third type of personal data referred to as "special category data." Notably, this provision stipulates that special categories be classified either as open data or as confidential data. This indicates that the legislation of the Republic of Azerbaijan adopts a more complex classification model, distinguishing personal data as open, confidential, or special category, whereas the GDPR does not establish such a division. Primarily, this model of data protection in the legislation of the Republic of Azerbaijan differs fundamentally from the GDPR's unified approach. This is because, under the GDPR approach, personal data are subject to the same level of protection regardless of whether they are of a public or private nature. In other words, personal data are defined in a uniform manner, with only certain categories (such as health data, religious or political beliefs, biometric data) subject to stricter safeguards under Art. 9.

Another significant distinction becomes evident in the comparative analysis of two legal frameworks, specifically concerning the right to be forgotten. This right, allowing individuals to manage their personal data and request its erasure when appropriate, was first formally established in the GDPR. It gained widespread public attention following the

landmark judgment of the Court of Justice of the EU (CJEU) in *Google Spain v. AEPD and Mario Costeja González*. In that decision, the Court clarified the essence of the right to be forgotten, granting it substantial legal recognition and laying the groundwork for its consolidation within the GDPR.¹⁷ The case involved a lawyer who objected to the fact that, when his name was searched via the Google search engine, results displayed newspaper articles from years earlier covering the sale of his property due to outstanding social security debts. He argued that such information was no longer relevant and violated Directive 95/46/EC. The CJEU concluded that if personal data published in connection with an individual's name has lost its relevance or purpose, and its processing is no longer practically necessary, such data must be erased. Thus, relying on the principles of respect for private life and the purpose of limitation of data processing, the CJEU recognized the legal foundation of the right to erasure.

By contrast, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) does not recognize the right to be forgotten as an autonomous legal concept. Although Art. 7 of Law of the Republic of Azerbaijan No. 998-IIIQ (2010) underscores the necessity of obtaining the data subject's consent for data processing, it does not address the withdrawal of such consent or the erasure of personal data. As a result, the right to be forgotten remains unrecognized within the national legal framework.

One of the key differentiating elements is the right to data portability that entitles data subjects to transfer their personal data to another data controller. This right, introduced for the first time under the GDPR, grants individuals the ability to obtain personal data collected about them under specific conditions and to transmit such data to another entity. Its primary objective is to enhance the individual's control over their personal data and to strengthen user autonomy within the digital environment by facilitating greater freedom of choice (GDPR, Art. 20.1). For instance, if a person uses a service provider, such as a social network or cloud storage, they should be able to transfer their

¹⁷ The CJEU Judgement (Grand Chamber). *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12 (2014). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62012CJ0131> [Accessed 18.06.2025].

data to another provider without obstacles. This right also places technical obligations on data controllers. Therefore, they are required to collaborate on appropriate formats to facilitate such data transfers and to ensure that their systems operate in a mutually compatible manner (GDPR, Art. 20.2). However, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) does not provide for the right to data portability, leaving this crucial aspect of personal data protection unregulated.

III.4. Legal Consequences and Penalties for Data Breaches

When examining sanctions for breaches of persons' data confidentiality, it is evident that Azerbaijan's law and the GDPR adopt distinct frameworks. Firstly, the Regulation places responsibility for the lawful processing of personal data not only on the data controller but also on the data processor. Therefore, all participants in data processing activities are liable for any infringements of the law resulting from the processing of data. In this context, under the provisions of the Regulation (Art. 3.2), sanctions may also be imposed against cloud service providers that carry out processing activities outside the EU. Although the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) provides certain obligations on persons engaged in the processing of personal data, its liability provisions are formulated in a rather general manner. Article 19 of the Law stipulates that individuals who commit violations in this area shall bear responsibility in accordance with the legislation of the Republic of Azerbaijan. However, the Law itself does not define the substance, scope, or specific types of sanctions, leaving such matters to be regulated mainly by the Criminal Code and the Administrative Offences Code of the Republic of Azerbaijan.

Thus, according to the Administrative Offences Code of the Republic of Azerbaijan, the collection or processing of personal data in an information system that is subject to state registration but has not been duly registered, as well as the failure of the owner or operator to ensure the protection of such data, or the failure to destroy or discontinue their transfer within the prescribed period, entails a fine ranging from 300 to 500 manats (approximately 150 to 250 EUR) (Art. 375). In addition,

under the Criminal Code of the Republic of Azerbaijan,¹⁸ the unlawful collection or disclosure of personal or family secrets is punishable by a fine ranging from 1,000 to 2,000 manats (approximately 500–1,000 EUR), or by community service from 240 to 480 hours, or by corrective labour for up to one year. In cases involving aggravating circumstances, imprisonment may be imposed (Art. 156). Furthermore, the creation of information systems of personal data without the required license, or the operation of such systems without authorization, may result in a fine of up to four times the amount of the unlawful income, or imprisonment for a term of up to seven years (Art. 192).

The GDPR empowers national supervisory authorities of the member states to impose various administrative sanctions in cases of non-compliance with the Regulation. This mechanism aims to ensure harmonization and legal certainty within the EU.¹⁹ Supervisory authorities under the GDPR may issue fines for non-compliance with fundamental principles of personal data processing, including consent requirements and data subjects' rights, as well as for unlawful international data transfers. For undertakings, penalties can reach up to 20 million euros or 4 % of the total global annual turnover, while less severe violations carry fines of up to 10 million euros or 2 % of global turnover (Art. 83.4-5).

The comparison indicates that, in terms of liability, legislation of the Republic of Azerbaijan exhibits three main gaps: 1) sanctions for personal data violations are not primarily included in the main law but in the Criminal Code and Administrative Offences Code; 2) the amounts of fines are considerably lower compared to the GDPR; 3) criminal liability sometimes arises not directly for violations of personal data but generally for infringements of personal privacy. In other words, criminal responsibility is applied indirectly with regard to personal data protection.

Addressing these issues would require the development of regulatory mechanisms aligned with EU standards, improvements to the ex-

¹⁸ Criminal Code of the Republic of Azerbaijan (2000, December). Available at: <https://e-qanun.az/framework/46947> [Accessed 17.07.2025].

¹⁹ European Union Agency for Fundamental Rights, Council of Europe, and European Data Protection Supervisor (2018). Handbook on European Data Protection Law, pp. 1–404.

isting infrastructure, and comprehensive legislative reforms. A key element in this process is the establishment of a centralized and unified normative framework dedicated to personal data protection.

III.5. Institutional Governance and Oversight Mechanisms

The collection and use of personal data for various purposes may ultimately lead to violations of individuals' rights and unwanted interferences. Although legal mechanisms have been established at the national, regional, and international levels to prevent such situations, the existence of independent and effective supervisory authorities remains of particular importance in ensuring compliance with these rules. The supervisory mechanism for personal data protection in the Republic of Azerbaijan is relatively fragmented and multi-layered. Although the Ministry of Digital Development and Transport is primarily responsible for overseeing the implementation of the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), other state bodies also hold specific competencies in this area. According to the Order of the Cabinet of Ministers of the Republic of Azerbaijan No. 161 (2010), personal data protection is carried out by the Ministry of Digital Development and Transport, the State Security Service, the Ministry of Internal Affairs, the Ministry of Justice, the Foreign Intelligence Service, the Special Communication and Information Security State Service, and the Central Bank of the Republic of Azerbaijan. As evident, no centralized authority is instituted for personal data protection in Azerbaijan, instead each state body performs these functions within its own mandate and jurisdiction.

The Law of the Republic of Azerbaijan No. 1024-IIQ (2005) initially envisaged the creation of the position of an "Information Commissioner." However, the 2012 amendments to the Law No. 1024-IIQ assigned these functions to the Commissioner for Human Rights of the Republic of Azerbaijan (Art. 42). Although the Commissioner for Human Rights submits annual general reports, the specific issues of this sphere remain unaddressed. This gap directly undermines the effectiveness of oversight in the field. Moreover, while Azerbaijan has ratified the "Convention for the Protection of Individuals with regard to Automatic processing of personal data," it has not signed the "Additional Protocol to the Convention for the Protection of Individuals with

regard to supervisory authorities and transborder data flows” (2001). However, one of the key objectives of the Additional Protocol was to ensure that each party to the Convention establishes an independent supervisory authority responsible for safeguarding personal data protection (Art. 1).

Consequently, the Republic of Azerbaijan lacks a unified and specialized authority in the area of personal data protection. Instead, various state executive bodies perform their functions within their respective mandates. The absence of a coordinated framework results in institutional fragmentation, weak oversight, and delayed responses to breaches of personal data protection. Accordingly, the formation of a single, centralized regulatory authority through legislative amendments would offer a more reliable guarantee of adequate data protection standards in Azerbaijan.

Unlike Azerbaijan’s law, Art. 51 of the GDPR requires each member state to designate one or more supervisory authorities. In cases where a country establishes more than one supervisory authority, the responsibility for determining which authority (or authorities) shall represent that state in the European Data Protection Board (EDPB) lies exclusively with the respective member state. The designated supervisory authority (or authorities) is obliged to cooperate both with domestic institutions and with the institutions of the EU to ensure the effective implementation of the Regulation. Furthermore, Art. 57 of the GDPR imposes additional obligations on supervisory authorities, such as informing the public, issuing recommendations aimed at safeguarding fundamental rights and freedoms, and fostering cooperation with other supervisory bodies. In this respect, the principal duty of a supervisory authority is to oversee and secure compliance with the Regulation within its jurisdiction.

According to the Regulation, supervisory authorities must possess an independent status and remain free from both direct and indirect external influence (Art. 52(1–4)). The mandate of the members of the supervisory authority shall not be shorter than four years (Art. 54(1)), and each member must have sufficient adequate knowledge and professional expertise in the field of personal data protection (Art. 53(1–2)).

The GDPR stipulates that every data controller, in the event of a personal data breach, must notify the supervisory authority without

undue delay and, in any case, within 72 hours of becoming aware of the breach (Art. 33). Where data processing is likely to result in a high risk, the data controller is required to consult the supervisory authority prior to carrying out the operation (Art. 36). However, the legislation of Azerbaijan does not prescribe any specific timeframe for notifying the supervisory authority in the event of such a breach.

The regulation also provides for a complaint mechanism aimed at safeguarding the rights of individuals whose personal data has been unlawfully processed. Under its provisions, a data subject who has suffered harm as a result of unlawful processing may bring claims not only against the data controller but also against the data processor. However, both the controller and the processor may be exempted from liability if they are able to demonstrate that they are not responsible for the infringement (GDPR, Art. 82). Furthermore, an individual who believes that his or her personal data has been unlawfully processed is entitled to lodge a complaint with the supervisory authority in the EU member state where he or she resides, works, or where the alleged violation occurred (GDPR, Art. 77.1). In addition, the data subject may bring the matter before a court in cases where he or she remains dissatisfied with the decision of the supervisory authority or faces undue delays in the resolution of the complaint (GDPR, Art. 78–79).

A similar approach can be found in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010). Pursuant to Art. 7.4 of the Law No. 998-IIIQ, a person whose rights have been infringed may also apply not only to the court but to other executive authorities specified in Order of the Cabinet of Ministers of the Republic of Azerbaijan No. 161 (2010). Since they are numerous, each of them considers complaints within the scope of its own competence.

One of the crucial factors is that two fundamental legal instruments introduced by the GDPR to regulate the supervision mechanism are absent in the legislation of Azerbaijan. Firstly, the GDPR requires the designation of a Data Protection Officer (DPO), who is responsible for providing guidance on personal data processing, ensuring cooperation with auditing authorities, and preparing relevant compliance reports (GDPR, Art. 37). Secondly, the Regulation stipulates the obligation to conduct a data protection impact assessment (DPIA). According

to Art. 35 of the GDPR, if a data controller determines that a planned processing activity may involve risks, it must carry out an assessment prior to commencing the processing. If the assessment indicates that the processing entails a high risk and could potentially violate the Regulation, the controller is obliged to consult the supervisory authority before proceeding. By contrast, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) or other legislative acts regarding personal data does not set out a specific legal framework for assessing potential risks in personal data processing, nor does it assign a supervisory authority responsible for overseeing the outcomes of such assessments.

Finally, it should be emphasized that supervisory authorities in the EU are mandated to prepare annual activity reports detailing the measures undertaken and violations identified. These reports must be submitted to national parliaments, governments, and other competent bodies of the member states, as well as made available to the public, the European Commission, and the EDPB (GDPR, Art. 59). In Azerbaijan, according to Order of the Cabinet of Ministers of the Republic of Azerbaijan No. 161 (2010), supervisory bodies are required to conduct monitoring at least once a year to ensure the proper organization of data protection within information systems (Art. 3). However, neither the Decision nor the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) provides a normative framework regulating the procedures for such monitoring or the submission of reports on its results.

Thus, based on the foregoing analysis, the principal differences between the GDPR and the legislation of Azerbaijan can be summarized in the following table.

**A comparative assessment of data protection rules
between the EU and Azerbaijan**

Main criteria	European Union	Azerbaijan
Primary legal act	GDPR (2018)	The law of Azerbaijan “On Personal Data” (2010)
Conceptual framework	Personal data is defined broadly with technical and practical criteria	Definitions are general and lacks detailed technological references

Extraterritorial application	Applies extraterritorially to non-EU entities processing EU resident's data (GDPR, Art. 3)	No clear extraterritorial scope. Application limited to national territory
Consent to data processing	Consent is composed of four critical elements: freely given, specific, informed and unambiguous (GDPR, Art. 4.11)	Consent is governed by a flexible approach that does not enforce limiting conditions (Law, Art. 8.1)
Data subject's fundamental rights	Comprehensive, broad, and modern legal guarantees.	The approach aligned with the GDPR, though some rights remain limited: right to erasure and data portability (Law, Art. 7)
Penalties applicable to breaches	Maximum EUR 20 million or 4 % of yearly revenue (GDPR, Art. 83)	Maximum fine amounting to 2,000 AZN (roughly 1,000 EUR)
Effectiveness of control authorities	Supervisory authorities of other member states cooperate by applying procedures of collaboration, consistency, and urgency	Authority is divided among several state bodies: due to the lack of a centralized system, coordination efficiency falls short of standards
Term of supervisory members	No less than four years (GDPR, Art. 54.1)	No defined period exists
Reporting of data breaches	Notification deadline is set at 72 hours	No exact time limit has been determined
Existence of DPO	Statutorily required for particular organisations (GDPR, Art. 37)	Not stipulated

Source: Developed by the author of this analysis with reference to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016), the Law of Azerbaijan No. 998-IIIQ (2010), Criminal Code of Azerbaijan (2000)

As a result, the systematic comparison reveals that although the legislative frameworks of the Republic of Azerbaijan and the EU on personal data protection share certain common features in the general context, they differ significantly in terms of structure, conceptual definitions, legal mechanisms, and implementation tools. These differences

primarily concern the scope of legal mechanisms, the precision of definitions, the clarity of implementation procedures, and the functionality of supervisory structures. While Azerbaijan's law incorporates certain fundamental principles and modern regulatory provisions in the field of data protection, compared to EU standards, it still requires substantial reforms both in its normative framework and in the mechanisms of enforcement.

IV. Discussion

The terminological approach adopted by the GDPR in defining the concept of personal data is precise, comprehensive, and fully aligned with contemporary technological requirements (Art. 4(1)). As Purtova (2018) observes, the notion of an "identifiable person" under the GDPR is closely tied to the idea of the targetability within the information society, meaning that any form of connection enabling behaviourally driven targeting or decision-making regarding an individual is considered personal data. Thus, Purtova's analysis underscores that the GDPR frames the concept of personal data not merely as a legal formalism but as one that is functionally and technologically responsive. Drawing inspiration from this perspective, the present study points out the importance of normative reforms in the legislation of the Republic of Azerbaijan.

Unlike the GDPR, Azerbaijan's law does not explicitly address digital identifiers such as cookies, device IDs, or profile-based targeting tools, which are central to contemporary data-driven environments. Consequently, the legal framework should be reformed to accommodate the challenges of the digital era. This includes treating biometric, health-related, and digital identifiers within a unified legal framework, thereby redefining the concept of personal data in line with modern technological realities, an issue that ought to be taken into account in future amendments to the Law of the Republic of Azerbaijan No. 998-IIIQ (2010).

The current study illustrates that the extraterritorial application of the GDPR constitutes one of its key legal innovations. Kuner et al. (2021) argue that this approach challenges the very notion of legal sovereignty in the global digital economy and provides a modern instru-

ment for governing cross-border data flows. In comparison, the legislation of Azerbaijan remains confined to a local framework and displays clear legal gaps in regulating the responsibilities of international actors. The scope of application explicitly articulated in Art. 3 of the GDPR, with its extraterritorial reach, stands in stark contrast to the more limited and fragmented regulation under Azerbaijan's law. This finding reinforces Greenleaf's (2014) concept of the "comprehensiveness deficit." Greenleaf highlights that in several Asian jurisdictions, such as the Philippines and Thailand, privacy legislation is formally in place but suffers from serious shortcomings in terms of scope and enforcement mechanisms. In this regard, the results of the present study align with Greenleaf's observations, particularly in demonstrating the necessity of developing the scope application in Azerbaijan's data protection framework.

Moreover, while Azerbaijan's law employs terms such as owner, operator, and user, the GDPR makes use of the concepts of controller, processor, recipient, and third party, which determine normative functions and the boundaries of legal responsibility with greater precision. Bygrave (2002) highlights the importance of maintaining consistent terminology as a necessary condition for legal clarity and effective allocation of obligations. However, the research reveals that in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), the notion *operator* may encompass the functions of both a controller and a processor. In this context, Fuster (2013) notes that significance of terminological distinctions and their role in safeguarding individual rights, which directly corresponds with the core objectives of the current study.

The research on data subject rights has evidenced that, unlike the GDPR, Azerbaijan's law does not fully provide for such important rights as the right to erasure and the right to data portability. Nonetheless, these rights are considered one of the essential attributes of modern legal governance in ensuring the protection of digital identity. The Estonian experience, which can serve as a model in this regard, demonstrates that the integration of digital technologies with legal mechanisms in the field of personal data protection produces effective results. As emphasized in the study by Solvak and Vassil (2016), in Estonia, transparency, respect for data subjects' rights, and the robustness of

legal grounds in data exchange constitute fundamental principles of digital governance. This may serve as a reference point for Azerbaijan in terms of introducing more precise mechanisms within legislation.

In the field of sanctioning mechanisms, Greenleaf (2021) points out that the scope and severity of measures applied to strengthen effective personal data protection should be deterrent. Hert and Papakonstantinou (2012) assess the fines imposed under the GDPR for infringements as an effective and preventive sanctioning model. By conducting this comparative analysis, the research may serve as a driving force for amending the relevant provisions of the Criminal Code and Administrative Offences Code of the Republic of Azerbaijan concerning personal data protection.

Brown and Korff (2021) note that the effective operation of supervisory authorities is possible not only through legal independence but also through institutional and functional guarantees. This aspect, while meeting the requirements set out in Art. 52 of the GDPR, also provides an academic basis for comparative findings that reveal the gaps in Azerbaijan's supervisory mechanisms in relation to EU standards.

Greenleaf and Kaldani (2025) write that while several Central Asian countries have adopted regulatory frameworks resembling the GDPR, enforcement and implementation mechanisms remain underdeveloped. Their analysis demonstrates that in the absence of effective supervisory structures, the legal impact of regulatory instruments is considerably weakened. In Azerbaijan, the supervisory authorities lack a centralized institutional status and operational mechanisms, which in turn limits their capacity for effective communication and their ability to respond promptly to violations. This situation diverges significantly from the concept of independent supervisory authorities envisaged under the GDPR (Art. 52–59). Consequently, the findings of this study may also serve as a warning for Azerbaijan, emphasizing the urgent requirement for reform and further improvement of the regulatory framework.

Hajduk (2021) analyzes the powers of supervisory authorities under the GDPR as a basis for shaping personal data processing practices. It is argued that the independence endowed upon supervisory authorities under the Regulation enables them to exercise their full competencies, which in turn influences practice across regulated entities. Admin-

istrative penalties play a crucial role, as their imposition sets precedents that encourage other entities in similar circumstances to align their practices with the standards defined in such decisions. In addition, guidance such as opinions, recommendations, and field-specific codes issued by supervisory authority functions as a reference for administrators, thereby providing a notable preventive effect.

Kasirzadeh and Clifford (2021) critically examine the extent to which the principle of fairness is integrated into the requirement of conducting a Data Protection Impact Assessment (DPIA) under Art. 35 of the GDPR (730). Their findings indicate that the current regulatory guidance offers only limited clarification on the operational definition of fairness, leaving its practical interpretation largely to the discretion of data controllers. This regulatory gap not only generates technical and organizational challenges but also significantly undermines the effective implementation of fairness in practice. The author's insights are particularly relevant for the present study, since the legislation of the Republic of Azerbaijan does not currently provide for a DPIA mechanism. Consequently, legal and ethical risks associated with high-risk data processing activities cannot be adequately assessed in advance. In this context, the study offers practical implications for Azerbaijan, emphasizing the importance of establishing a risk-based governance framework and translating the fairness principle into actionable standards.

Similarly, Fenwick (Fenwick et al., 2017) writes that the rapid advancement of technology has consistently outpaced the modernization of legal frameworks, thereby limiting the law's capacity to effectively address emerging challenges. From this perspective, Azerbaijan should seek to adopt GDPR standards more comprehensively and set the objective of bringing its data protection regime in line with the highest international benchmarks in the near future.

Analyzing the sociological and normative philosophy of data protection law, Pichlak and Gaczol (2023) identify two core approaches to the implementation mechanisms of the GDPR: simple reflexivity and advanced reflexivity. According to them, simple reflexivity refers to a normative system that merely monitors its own functioning, whereas advanced reflexivity signifies a legal system that does not only react

but also operates as a preventive and adaptive learning mechanism. The study defines that at the level of advanced reflexivity, the GDPR introduces instruments such as risk-based approaches, Data Protection Impact Assessments (DPIAs), and data protection by design. These tools transform the GDPR into more than a legal act, turning it into a dynamic governance instrument. By contrast, when compared with these findings, Azerbaijan's legislative framework on personal data protection remains fragmented across multiple normative acts and currently operates at the level of simple reflexivity. As a result, the tools of characteristic of advanced reflexivity has not yet been fully integrated into the national legislation. Consequently, the enhancement of Azerbaijan's legal framework requires not only strengthening substantive provisions but also the institutional embedding of reflexive approaches in the application of the law.

According to Buckley et al. (2024), the future of the GDPR can be assessed through four main drivers: geopolitical dynamics, the effectiveness of enforcement structures, public trust, and the rapid pace of technological change. This framework is equally relevant for Azerbaijan's law, where data protection continues to display notable shortcomings. In particular, supervisory authorities face limitations in institutional capacity, cross-border data transfer mechanisms remain underdeveloped, and the legal system has yet to establish flexible tools to address emerging technological challenges. Against this backdrop, three reform priorities appear essential: a) strengthening supervisory bodies and clarifying the scope of their powers; b) aligning data transfer procedures with established international standards, and c) designing a responsive legal framework capable of adapting to rapid technological change.

According to B. Kinikoglu's (2023) comparative research on Türkiye's domestic data protection legislation and the GDPR offers several findings that are highly relevant to the current situation in Azerbaijan. The research notes that Türkiye's decision of a comprehensive data protection law through a rapid legislative process, carried out without sufficient public deliberation, has created considerable challenges for both societal and business adoption. As a result, Türkiye's legislation does not incorporate key rights such as the "right to erasure" and the "right

to data portability,” thereby limiting both the scope and effectiveness of data subject rights. Furthermore, in the context of cross-border data transfers, the Turkish law relies solely on the principles of explicit consent and adequacy, without providing alternative mechanisms such as “Standard Contractual Clauses” or “Binding Corporate Rules.” Similar findings in the existing literature indicate that Azerbaijan’s legislation likewise exhibits significant gaps regarding both the scope of data subject rights and the safeguards for cross-border data transfers. These observations underscore the importance of broad and comprehensive deliberations during legislative reforms in Azerbaijan, while also highlighting the need to ensure long-term alignment with GDPR standards in order to mitigate comparable risks.

V. Conclusion

Today, the rapid development of technological tools, particularly the emergence of platforms facilitating direct user participation, has resulted in the extensive collection and processing of personal data. In this context, the presence and efficacy of legal regulations regarding the protection of personal data are critically significant. The EU’s GDPR document is recognized as a widely accepted international normative framework that establishes legal standards. In this regard, the systematic approach proposed by the GDPR can be considered an exemplary model for the pertinent legislation of the Republic of Azerbaijan, in both theoretical and practical contexts. A systematic comparison between the GDPR and Azerbaijan’s law, specifically the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) has shown that the GDPR provides a more comprehensive and systematic approach in terms of the scope of application of the legislation. EU law applies not only its territorial boundaries but also to entities that supply goods and services to EU citizens in general and monitor their behaviour. Azerbaijan’s law does not contain any norms regarding extraterritorial application within itself, and legal uncertainty is specifically observed in case of the representative offices and branches of legal entities in Azerbaijan.

Systematic comparison has demonstrated that the most important and modern concepts of personal data protection are based on legisla-

tion within both legal systems. Nevertheless, EU legislation has encompassed numerous discrepancies regarding terminological precision and the explicit determination of the definitional boundaries. Therefore, the GDPR distinctly separates legal responsibilities and functions through the use of concepts such as controller, processor, recipient, and third party. Azerbaijan's law uses terms such as "owner," "operator," and "user." While the term "owner" has a terminological meaning that is entirely distinct from these, it actually corresponds to a certain extent to the concept of a "controller." On the other hand, the term "operator" encompasses specific features of both "controller" and "processor" concepts in the GDPR; it poses some practical challenges. The term "user," while partially similar to "recipient" in the GDPR, is more constrained in both functional and normative contexts.

Regarding fundamental principles and rights, both legal systems also have different directions. The GDPR explicitly delineates principles and rights related to data processing, which are broadly acknowledged. Azerbaijan's law, while encompassing certain principles, possesses inadequate mechanisms for their implementation and protection. The Law of the Republic of Azerbaijan No. 998-IIIQ (2010) does not incorporate key GDPR requirements, including the need for consent to be freely given, specific, informed, and explicit (Art. 6), as well as the obligation to provide data subjects with comprehensive information regarding the conditions under which their data will be transferred (Art. 13–14).

The classification of data into public and private categories in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010), along with the implementation of a dual protection framework and the lack of contemporary rights such as "right to erasure" and the "right to data portability," suggests that it is time for new changes to be made to the Law.

In the area of sanctions enforcement, the GDPR is more stringent and imposes substantial financial penalties. In the EU, penalties are determined as either a fixed amount or a percentage of the company's annual turnover, specifically 2 % or 4 %. In Azerbaijan's law's imposition of penalties up to approximately 1,000 EUR indicates that the sanctions are deficient in terms of scope, scale, and impact.

One of the crucial reforms needed in the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) are related to the independence and

functionality of supervisory authorities. The GDPR requires that supervisory authorities function with total independence. This requirement is one of the important elements for the institutions involved to function more efficiently, flexibly, and sustainably. In Azerbaijan, there is no single, centralized audit institution. While the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) imposes obligations for data “controller” and “processor,” it does not benefit from the “Data Protection Officer” (DPO) and data impact assessment obligations offered by the GDPR. In practice, even if the supervisory authority exists, the Law of the Republic of Azerbaijan No. 998-IIIQ (2010) must be updated immediately regarding the swift investigations of violations, the precision of audits to be conducted, accountability, and transparency. The ongoing and systematic implementation of legal reforms in Azerbaijan in the future, taking into account current practices and ensuring international standards, will enhance regulations regarding personal data protection.

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The Use of Digital Technologies in the Judicial Stages of Criminal Proceedings: A Comparative Analysis of Foreign Experience

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Abstract: The development of digital justice is a global trend. At the initial stage of introducing digital technologies, States demonstrated noticeable restraint due to the specific nature of the administration of justice. However, over time, these technologies have proven their reliability and are now being actively integrated into law enforcement practice. The complexity of digitalizing criminal proceedings lies in the need for a comprehensive and systemic approach that takes into account technical, legal, organizational, and socio-humanitarian issues. This branch of law faces the greatest resistance to digital technologies, as it is here that fundamental human rights may be most significantly affected. Nevertheless, the gradual adaptation of society to the automation of legal matters is reducing distrust, transforming digital justice from an intimidating unknown into a comprehensible tool for ensuring legal certainty. Within the professional legal community and among participants in the judicial process, a generational shift is taking place: a new generation, accustomed to digitalization, is replacing those used to paper-based bureaucracy. It must be acknowledged that the digitalization of criminal proceedings is inevitable; however, technological progress is outpacing the doctrinal understanding of the changing nature of justice, creating a conflict between functional efficiency and classical procedural guarantees.

The object of the research is the social relations that arise during the application of digital technologies at the judicial stages of criminal proceedings. The subject of the research encompasses the norms of foreign

and domestic legislation regulating electronic document management, remote participation in court sessions, and the use of artificial intelligence elements in judicial decision-making. The aim of this work is to conduct a comparative analysis of foreign experience in the digitalization of criminal proceedings at the judicial stages. The methodological basis of the study includes general scientific methods (analysis, synthesis, induction) and specific legal methods, primarily the comparative legal method, which allowed for a comparison of approaches to digitalization in 15 post-Soviet countries (as a group with a common Soviet legacy) and 18 leading countries in the development of e-government.

Keywords: criminal process; e-government; electronic document management; artificial intelligence

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Contents

I. Introduction	335
II. Remote Participation via Videoconferencing and Its Limits	339
III. Algorithmization: From Narrow Artificial Intelligence to Justice by Choice ..	343
IV. Conclusion	350
References	351

I. Introduction

One of the digital tools used in criminal proceedings is the electronic submission of procedural documents, i.e., electronic document management. This possibility is provided for in the criminal procedure of Australia (Art. 1.23 of the Federal Court Criminal Procedure Rules¹),

¹ Federal Court (Criminal Proceedings) Rules 2016. Available at: <https://www.legislation.gov.au/F2016L01726/latest/text> [Accessed 05.04.2026].

Azerbaijan (Art. 51-1 of the Criminal Procedure Code of the Republic of Azerbaijan²), Armenia (Part 6, Art. 8 of the Criminal Procedure Code of Armenia³), Bahrain (Art. 411 of the Criminal Procedure Code of Bahrain⁴), the United Kingdom (Art. 4.2 of the Criminal Procedure Rules⁵), Germany (Art. 32a of the Criminal Procedure Code⁶), Denmark (Art. 148c of the Administration of Justice Act (*Bekendtgørelse af lov om rettens pleje*)⁷), Iceland (Art. 2a of the Icelandic Criminal Procedure Act⁸), Kazakhstan (Art. 42-1 of the Criminal Procedure Code of Kazakhstan⁹), Spain (Art. 258 of the Criminal Procedure Code of Spain¹⁰), the Republic of Korea (Republic of Korea Act on the Use of Electronic Docu-

² The Criminal Procedure Code of the Republic of Azerbaijan (adopted by the Law of the Republic of Azerbaijan No. 907-IQ of 14 July 2000) (as amended and supplemented as of 28 February 2025). Published in: Collection of Legislative Acts of the Republic of Azerbaijan, 2000, No. 8; Azerbaijan newspaper, 20 July 2001, No. 162.

³ The Criminal Procedure Code of the Republic of Armenia No. ZR-306 of 27 July 2021 (as amended and supplemented as of 14 July 2025). Available at: <http://www.parliament.am/legislation.php?sel=show&ID=7747&lang=rus> [Accessed 05.04.2026].

⁴ The Criminal Procedure Law of Bahrain (Legislative Decree No. 46 of 2002). Legislation and Legal Opinions Commission (LLOC). Available at: <https://www.lloc.gov.bh/PDF/L4602.pdf> [Accessed 05.04.2026].

⁵ Criminal Procedure Rules 2014 (SI 2014/1610). Available at: <https://www.legislation.gov.uk/ukxi/2014/1610/article/4.2/made> [Accessed 05.04.2026].

⁶ The Criminal Procedure Code 1877. Available at: [gesetze-im-internet.de/englisch_stpo](https://www.gesetze-im-internet.de/englisch_stpo) [Accessed 05.04.2026].

⁷ The Law of the Kingdom of Denmark “On the Administration of Justice” (*Bekendtgørelse af lov om rettens pleje*). Official website of normative legal acts of the Kingdom of Denmark. Available at: <https://www.retsinformation.dk/eli/lta/2024/250> [Accessed 05.04.2026].

⁸ The Criminal Procedure Act of Iceland 88/2008 (*Lög um meðferð saka mála*). Available at: <https://www.althingi.is/lagas/nuna/2008088.html> [Accessed 05.04.2026].

⁹ The Criminal Procedure Code of the Republic of Kazakhstan No. 231-V of 4 July 2014 (as amended and supplemented as of 8 March 2026). *Kazakhstanskaya Pravda*, 10 July 2014, No. 133 (27754); Official Gazette of the Parliament of the Republic of Kazakhstan, August 2014, No. 15-II (2664-II), Art. 88.

¹⁰ The Criminal Procedure Law of Spain of 14 September 1882 (*Ley de Enjuiciamiento Criminal*). Official State Gazette (BOE). Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036> [Accessed 05.04.2026].

ments in Criminal Proceedings¹¹), the Kyrgyz Republic (Part 6, Art. 264 of the Criminal Procedure Code of the Kyrgyz Republic¹²), the Republic of Latvia (Art. 317.1 of the Criminal Procedure Code of the Republic of Latvia¹³), the Republic of Lithuania (Art. 8.1 of the Criminal Procedure Code of Republic of Lithuania¹⁴), the Republic of Moldova (Part 3³, Art. 300 of the Criminal Procedure Code of Republic of Moldova¹⁵), the Netherlands (Part 4, Art. 257e of the Criminal Procedure Code¹⁶), New Zealand (Art. 2.3 of the New Zealand Criminal Procedure Rules¹⁷), Norway (§ 3a of the Norwegian Rules for Electronic Communication with Courts¹⁸), the UAE (Art. 425 of the UAE Criminal Procedure Code¹⁹),

¹¹ The Act of the Republic of Korea on the Use of Electronic Documents in Criminal Proceedings No. 10258 of 15 April 2010. Available at: <https://law.go.kr/lsc.do?section=&menuId=1&subMenuId=15&tabMenuId=81&eventGubun=060101&query=%ED%98%95%EC%82%AC%EC%82%AC%EB%B2%95%EC%A0%88%EC%B0%A8%EC%97%90%EC%84%9C%EC%9D%98+%EC%A0%84%EC%9E%90%EB%AC%B8%EC%84%9C+%EC%9D%B4%EC%9A%A9+%EB%93%B1%EC%97%90+%EA%B4%80%ED%95%9C+%EB%B2%95%EB%A5%A0#undefined> [Accessed 05.04.2026].

¹² The Criminal Procedure Code of the Kyrgyz Republic No. 129 of 28 October 2021 (as amended and supplemented as of 1 January 2026). Erkin Too, 16 November 2021, No. 122–123.

¹³ Criminal Procedure Code of the Republic of Latvia of 21 April 2005 (as amended and supplemented as of 1 April 2026). Available at: <https://likumi.lv/ta/id/107820-kriminalprocesa-likums> [Accessed 05.04.2026].

¹⁴ Criminal Procedure Code of the Republic of Lithuania of 14 March 2002 (as amended and supplemented as of 12 February 2026). Available at: <https://www.e-tar.lt/portal/lt/legalAct/TAR.EC588C321777/asr> [Accessed 05.04.2026].

¹⁵ Criminal Procedure Code of the Republic of Moldova No. 122-XV of 14 March 2003 (as amended and supplemented as of 14 February 2026). Official Monitor of the Republic of Moldova of 7 June 2003, No. 104-110/447.

¹⁶ Criminal Procedure Code of the Netherlands (Wetboek van Strafvordering). Official Legal Information Portal of the Netherlands. Available at: <https://wetten.overheid.nl/BWBR0001903/2026-01-01> [Accessed 05.04.2026].

¹⁷ Criminal Procedure Rules of New Zealand 2012 (Criminal Procedure Rules 2012). Available at: <https://www.legislation.govt.nz/secondary-legislation/pco-drafted/2012/415/en/latest/#DLM4914753> [Accessed 05.04.2026].

¹⁸ Rules for Electronic Communication with the Courts of Norway of 28 October 2016. No. FOR-2016-10-28-1258 (Forskrift om elektronisk kommunikasjon med domstolene). Available at: <https://lovdata.no/dokument/SF/forskrift/2016-10-28-1258/%C2%A714%C2%A714> [Accessed 05.04.2026].

¹⁹ Federal Decree-Law No. 38 of 2022 “On the Enactment of the Criminal Procedure Code of the United Arab Emirates.” Official Legislation Portal of the UAE. Available at: <https://uaelegislation.gov.ae/ar/legislations/1609> [Accessed 05.04.2026].

the Russian Federation (Art. 474.1 of the Criminal Procedure Code of Russia²⁰), Saudi Arabia,²¹ Singapore (Art. 9 of the Supreme Court Electronic Document Management and Service Rules²²), the Republic of Uzbekistan (Art. 27 of the Criminal Procedure Code²³), Ukraine (Part 2, Art. 35 of the Criminal Procedure Code²⁴), Sweden (Ch. 33, Art. 1a of the Swedish Judicial Code²⁵), and Estonia (Art. 160.2 of the Estonian Criminal Procedure Code²⁶). At the legislative level, this form of interaction with the court is not established in Belarus, Georgia, Tajikistan, Turkmenistan, Finland, and Japan. Thus, in 11 out of 15 post-Soviet countries, there is a legislative provision for the electronic submission of procedural documents (i.e., 73 %). In 16 out of 18 leading countries, this possibility is also established in e-government development (i.e., 89 %).

The common features of the application of electronic document management in the aforementioned countries include: legislative consolidation of electronic document management; the use of electronic digital signatures to grant legal force to electronic documents; provid-

²⁰ The Criminal Procedure Code of the Russian Federation No. 174-FZ of 18 December 2001 (as amended and supplemented as of 8 March 2026). *Rossiyskaya Gazeta*, 22 December 2001, No. 249.

²¹ Procedural Guide on Electronic Court Services (Saudi Arabia), approved by Ministry of Justice Decision No. 8056 of 13.05.2020. Available at: https://laws.moj.gov.sa/en/legislation/myVO-TMtIwgPSdkK_pOfJw [Accessed 05.04.2026].

²² Criminal Procedure Code (Electronic Filing and Service for Supreme Court) Rules 2022. Available at: <https://sso.agc.gov.sg/SL/CPC2010-S259-2022?DocDate=20220331#:~:text=Search%20within%20Legislation,heard%20in%20the%20Supreme%20Court> [Accessed 05.04.2026].

²³ Criminal Procedure Code of the Republic of Uzbekistan (adopted by the Law of the Republic of Uzbekistan of 22 September 1994 No. 2013-XII) (as amended and supplemented as of 9 November 2025). *Vedomosti of the Supreme Council of the Republic of Uzbekistan*, 1995, No. 2.

²⁴ Criminal Procedure Code of Ukraine No. 4651-VI of 13 April 2012 (as amended and supplemented as of 31 July 2025). *Golos Ukrainy*, 19 May 2012, No. 90–91.

²⁵ Judicial Code of Sweden (*Rättegångsbalk*) (1942:740). Available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/rattgangsbalk-1942740_sfs-1942-740/ [Accessed 05.04.2026].

²⁶ Criminal Procedure Code of the Republic of Estonia of 12 February 2003. Available at: <https://www.riigiteataja.ee/akt/119032015021?leiaKehtiv> [Accessed 05.04.2026].

ing the parties to criminal proceedings with the opportunity to submit certain procedural documents in electronic form; the preparation of court hearing protocols in electronic form and granting the parties access to them for review. A particular aspect is the format of interaction between the participants in criminal proceedings and the court. Some countries use an electronic criminal case information system for this purpose (for example, Azerbaijan, Kazakhstan, and Kyrgyzstan), while others create a platform for the electronic submission of documents (for example, Russia and Belarus).

II. Remote Participation via Videoconferencing and Its Limits

The possibility of remote participation in criminal proceedings via videoconferencing is provided for in Australia (Section 279.2 of the Australian Criminal Code²⁷), Azerbaijan (Art. 51-2 of the Criminal Procedure Code of the Republic of Azerbaijan), Armenia (Art. 327 of the Criminal Procedure Code of Armenia), Bahrain (Art. 125 of the Criminal Procedure Code of Bahrain), Belarus (Part 31, Art. 286 of the Criminal Procedure Code of the Republic of Belarus²⁸), United Kingdom (Art. 51 of the Police, Crime, Sentencing and Courts Act²⁹), Germany (Art. 247a of the Criminal Procedure Code), Georgia (Art. 188 of the Criminal Procedure Code of Georgia³⁰), Denmark (Art. 748a of the Administration of Justice Act), Iceland (Art. 9 of the Icelandic Criminal Procedure Act), Spain (Art. 325 of the Criminal Procedure Code of Spain), Kazakhstan (Art. 213 of the Criminal Procedure Code of Kazakhstan), Republic

²⁷ Criminal Code Act 1995 (No. 12, 1995). Federal Register of Legislation of Australia. Available at: <https://www.legislation.gov.au/C2004A04868/latest/text> [Accessed 05.04.2026].

²⁸ Criminal Procedure Code of the Republic of Belarus No. 295-Z of 16 July 1999 (as amended and supplemented as of 17 February 2025). Vedomosti of the National Assembly of the Republic of Belarus, 25 August 1999, No. 28–29, Art. 433.

²⁹ Police, Crime, Sentencing and Courts Act 2022 (UK). Available at: <https://www.legislation.gov.uk/ukpga/2022/32/section/200/enacted> [Accessed 05.04.2026].

³⁰ Criminal Procedure Code of Georgia No. 1772-IIc of 9 October 2009 (as amended and supplemented as of 16 October 2025). Legislative Gazette of Georgia (LGG), 3 November 2009, No. 31.

of Korea (Art. 165.2 of the Criminal Procedure Code of the Republic of Korea), Kyrgyz Republic (Art. 290 of the Criminal Procedure Code of the Kyrgyz Republic), Latvia (Art. 140 of the Criminal Procedure Code of Latvia), Lithuania (Art. 8.2 of the Criminal Procedure Code of Lithuania), Moldova (Part 3.2 Art. 109 of the Criminal Procedure Code of Moldova), Netherlands (Art. 131a of the Criminal Procedure Code), New Zealand (Art. 9 of the New Zealand Courts Act (Remote Participation)³¹), Norway (Art. 29a of the Criminal Procedure Code³²), UAE (Art. 414 of the Criminal Procedure Code), Russian Federation (Art. 278.1 of the Criminal Procedure Code of Russia), Saudi Arabia,³³ Singapore (Art. 256C of the Criminal Procedure Code), Turkmenistan (Art. 369 of the Criminal Procedure Code³⁴), Uzbekistan (Art. 91-3 of the Criminal Procedure Code), Ukraine (Art. 336 of the Criminal Procedure Code), Finland (Ch. 8, Sec. 13 of the Finnish Criminal Procedure Act³⁵), Estonia (Part 5, Art. 287 of the Criminal Procedure Code), Sweden (Ch. 5, Art. 10 of the Swedish Judicial Code), Japan (Art. 157-b of the Criminal Procedure Code³⁶).

Thus, in 14 out of 15 post-Soviet countries, the possibility of participating in criminal proceedings at the judicial stages via videoconferencing is established at the legislative level (i.e., 93 %). In all 18 leading

³¹ New Zealand Courts (Remote Participation) Act 2010. New Zealand Legislation. Available at: <https://www.legislation.govt.nz/act/public/2010/0094/latest/DLM2600709.html> [Accessed 06.04.2026].

³² Criminal Procedure Act of Norway No. 25 of 22 May 1981. (Lov om rettergangsmåten i straffesaker). Lovdata. Available at: https://lovdata.no/dokument/NL/lov/1981-05-22-25/KAPITTEL_1-4#KAPITTEL_1-4 [Accessed 06.04.2026].

³³ Procedural Guide on Electronic Court Services (Saudi Arabia), approved by Ministry of Justice Decision No. 8056 of 13.05.2020. Available at: https://laws.moj.gov.sa/en/legislation/myVO-TMtIwgPSdkK_pOfJw [Accessed 05.04.2026].

³⁴ Criminal Procedure Code of Turkmenistan of 18 April 2009 (as amended and supplemented as of 12 April 2025). Continent Information System.

³⁵ Criminal Procedure Act of Finland No. 689 of 11 July 1997 (Laki oikeudenkäynnistä rikosasioissa 689/1997). Finlex: Finnish Legislation Database. Available at: <https://www.finlex.fi/fi/lainsaadanto/1997/689?language=fin&highlightId=989291&highlightParams=%7B%22type%22%3A%22BASIC%22%2C%22search%22%3A%22oikeudenkäynnistä+rikosasioissa+%22%7D> [Accessed 06.04.2026].

³⁶ Criminal Procedure Code of Japan No. 131 of 10 July 1948. Official Internet Portal of Japanese Legislation. Available at: <https://laws.e-gov.go.jp/law/323AC0000000131> [Accessed 05.04.2026].

countries in the field of e-government development, this possibility is also provided for.

An analysis of the legislation of the presented countries allows us to identify both standard approaches to the use of videoconferencing in the administration of justice in criminal cases, as well as specific features in different countries. The common approaches for all countries include the following features.

1. Grounds for application: most often, videoconferencing is used to ensure the safety of participants (witness protection), in cases of unsuitable health conditions for personal appearance and during the interrogation of minors.

2. Equality of evidentiary value: remote interrogation is equated with interrogation conducted in person.

3. Uniformity of procedure: remote interrogation is conducted according to the same rules as a regular one, i.e., participants must be able to hear the proceedings and ask questions in real time.

4. Mandatory recording: all actions via videoconferencing are subject to video recording, which is attached to the case file.

One can see the following peculiarities in the legal regulation of the use of videoconferencing.

1. Establishment of technical standards for communication quality. For example, in accordance with Art. 91-1 of the Criminal Procedure Code of Uzbekistan, technical means and equipment must meet the following minimum requirements: image resolution of 1920×1080 , 50 frames per second; audio frequency range of 100–12,000 Hz; and information security through the use of a protected communication channel via VPN.

2. Use of personal technical devices. For instance, according to Part 5 Art. 336 of the Criminal Procedure Code of Ukraine, participants in criminal proceedings take part in court hearings via videoconferencing from outside the courtroom using their own technical devices and a qualified electronic signature.

3. Ensuring the openness of court proceedings through online broadcasting. Pursuant to Part 1 Art. 290-1 of the Criminal Procedure Code of the Kyrgyz Republic, the court, upon request of the parties or on its own initiative, may authorize the live broadcast of a court session on television, radio, and/or the Internet.

4. Prohibition on the use of videoconferencing in jury trials. Such a ban is established, for example, in Russia (Part 4 Art. 241.1 of the Criminal Procedure Code of the Russian Federation).

5. Providing the possibility of participating in interrogations via videoconferencing from abroad. For instance, according to Part 3.2 Art. 109 of the Criminal Procedure Code of Moldova, if a witness is outside the country and their presence at the hearing is difficult, the interrogation may be conducted via videoconferencing. In this case, the procedure takes place at a diplomatic mission or consular office of the Republic of Moldova. P.A. Samsonov proposes introducing a remote participation format for defendants through Russian consular institutions into the Russian criminal process (Samsonov, 2024, p. 360).

For example, an independent expert observation of 370 court cases revealed that elements such as “voice,” “respect,” and “neutrality” in the administration of justice are significantly lower during hearings conducted via videoconferencing compared to in-person hearings (Baldwin et al., 2020, pp. 743–758). Thus, videoconferencing has transformed the principle of immediacy, as it no longer implies only the physical presence of the trial participants in the same room, but also the continuity and quality of the broadcast during remote participation. Surveys among professional participants in criminal proceedings (judges, lawyers) indicate that the remote participation of defendants via videoconferencing introduces vulnerabilities associated with an additional communication barrier. This is because the defendant, while in prison and in front of a camera, experiences a form of double isolation: they are separated not only from the court, but also from their own lawyer (McKay and Macintosh, 2024, pp. 323–324). This creates a communication barrier that may be misinterpreted by the judge as a lack of remorse or hostility, simply due to the quality of the video or the camera angle (McKay and Macintosh, 2024, pp. 323–324).

Given that some countries allow the use of videoconferencing without direct supervision of the person “on the other end,” in the future, countries may face the risk of real-time image substitution. This issue could be addressed by implementing biometric facial authentication before each hearing. In this regard, the question arises regarding the necessity of establishing a unified national biometric database.

III. Algorithmization: From Narrow Artificial Intelligence to Justice by Choice

The use of artificial intelligence in criminal proceedings in some countries during 2024–2026 has transitioned from the stage of conceptual discussion to practical implementation and legislative regulation. In academic literature, the following roles performed by AI during the AI integration into the justice system are identified: AI translator, AI argument constructor for the parties, AI judge's assistant, and AI decision-maker (artificial intelligence that makes decisions independently) (Volokh, 2019, pp. 1143–1156). A gradual implementation of artificial intelligence in criminal proceedings should be expected.

The current application of artificial intelligence in judicial activities has already moved beyond theoretical discussions and is actively used as an objective factor in the decision-making mechanism. Global practice shows that only “narrow” AI is currently in operation — capable of performing specific tasks faster than the human mind, but unable to think, reason, or learn.³⁷ For example, in the United States, the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) program predicts the likelihood of recidivism, assisting judges in determining sentences based on an analysis of the defendant's employment and social background.³⁸ In Malaysia, the AiCOS (the Artificial Intelligence in Court Sentencing) system provides real-time sentencing recommendations by analyzing a database of past decisions in similar cases.³⁹ In China, the Judicial Assistant handles intelligent review of case materials and generates draft documents, reducing judges' time expenditures by 50 percent.⁴⁰

³⁷ International Business Machines official website. Available at: <https://www.ibm.com/think/topics/artificial-intelligence-types> [Accessed 08.04.2026].

³⁸ The official website of the Wisconsin Department of Corrections, USA. Available at: <https://doc.wi.gov/Pages/AboutDOC/COMPAS.aspx> [Accessed 08.04.2026].

³⁹ The official website of the e-Kehakiman Sabah Sarawak (e-KSS) electronic justice system of the Malaysian states of Sabah and Sarawak. Available at: https://ekss-portal.kehakiman.gov.my/portals/web/home/article_view/0/5/1 [Accessed 08.04.2026].

⁴⁰ The official website of the Supreme People's Court of the People's Republic of China. Available at: https://english.court.gov.cn/2025-06/13/c_1100759.htm [Accessed 15.06.2025].

However, the implementation of such technologies gives rise to serious legal risks. The evaluation of evidence using mathematical algorithms, where each fact is pre-assigned a certain value, directly contradicts the fundamental principle of freedom of evaluation of evidence, which is enshrined in criminal procedure (Spiridonov, 2023, p. 490). There is a danger that if the historical set of decisions on which the AI was trained contained judicial errors or violations of law, the system will begin to reproduce them in new verdicts. A similar problem regarding the need to mitigate bias for certain population groups is also discussed in medicine in the context of the application of artificial intelligence, whose operation is based on historical data (Singh and Kecher, 2025). A proposed solution is the preliminary selection of judicial decisions that will be approved and embedded into the algorithm. However, this raises the question of the necessary number of such decisions (Reiling, 2020). The preliminary selection of expert-approved judicial decisions (reference samples) for training would allow the artificial intelligence not to inherit the flaws of judicial practice. It seems that in this situation, it would be advisable to start with a single qualification of an act for testing purposes, in order to subsequently determine the required number and quality of judicial decisions to be embedded in the algorithm. This would allow for the accumulation of error statistics without harming the rights of defendants. Furthermore, examples from the U.S. practice have revealed a problem of transparency: when the software code is protected as a trade secret, the defendant is deprived of the opportunity to understand and challenge the logic by which the system assessed them as “dangerous.”⁴¹ Thus, for criminal proceedings, only a state-developed algorithm may be suitable, the logic of which must be open to audit by the parties.

Despite the rapid digitalization, the post-Soviet countries maintain a procedural conservatism regarding the use of artificial intelligence in making decisions in criminal cases. The risks of implementing AI for decision-making can be summarized as follows. Firstly, artificial intelligence cannot bear criminal responsibility for issuing a knowingly unlawful verdict, as it is not a physical entity possessing legal con-

⁴¹ Supreme Court of Wisconsin. *State of Wisconsin v. Eric L. Loomis*. Decision No. 2015AP157-CR (2016). Available at: <https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb24-2l-3.pdf> [Accessed 11.06.2025].

sciousness. Secondly, a judge evaluates evidence based on their inner conviction, whereas artificial intelligence operates on the basis of mathematical probability and pre-programmed algorithms.

In the foreseeable future, the final decision on matters requiring the analysis of evidence in criminal proceedings can only be entrusted to a human, not a machine (Przhilenskiy and Vilkova, 2025). Artificial intelligence must remain an auxiliary tool that enhances the efficiency of the court, but does not replace the judge's inner conviction. Any implementation of such systems into practice, including in the Russian Federation, is only possible under the condition of prior approval of ethical and legal principles governing their use, such as transparency, impartiality, and respect for fundamental human rights. For example, the European Commission for the Efficiency of Justice (CEPEJ) has adopted five fundamental principles for the use of artificial intelligence in judicial systems and their surrounding environments: respect for fundamental rights, non-discrimination; quality and security, transparency, impartiality, and reliability.⁴²

Thus, at present, in the post-Soviet countries, only the prerequisites are being created for the use of artificial intelligence as a digital assistant to a judge, but not as a fully-fledged electronic judge. In the initial stages of AI implementation for making final decisions in criminal cases, a "double control" system may be established, where the algorithm issues a decision, and a human judge is required to approve it for compliance with the law. However, this should not become a mere formality, where the judge simply clicks OK.

In this regard, the Italian SICP (Sistema Informativo della Cognizione Penale – Criminal Cognition Information System) system and its modules Acts and Documents 2.0 and Proposal for Penalties deserve attention.⁴³ In this system, within the Acts and Documents 2.0

⁴² European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Surrounding Realities, adopted in Strasbourg on 3–4 December 2018, at the 31st Plenary Session of the European Commission for the Efficiency of Justice. ConsultantPlus Legal Reference System.

⁴³ Official website of the Italian Higher Council of the Magistracy. Available at: https://www.csm.it/web/csm-internet/il-processo-penale-telematico/sicp/console-del-pm-e-atti-documenti/-/journal_content/56_INSTANCE_edArvldFGFha/21768/119930?p_p_state=pop_up&_56_INSTANCE_edArvldFGFha_page=1&_56_INSTANCE_edArvldFGFha_viewMode=print#Atti_e_documenti [Accessed 05.04.2026].

module, the judge is offered a selection of the most appropriate wording to be included in the reasoning part of the judgment. The adoption and signing of the final decision remain with the human, who acts as a controlling entity with the ability to make edits. Such a system is an actual implementation of “double control” in the judicial decision-making process. The Proposal for Penalties module helps to eliminate errors in the qualification of the act and the calculation of terms for sentencing. Precise calculation of terms often becomes a subject of judicial disputes, as difficulties in their computation still arise.

Some countries practice the integration of state information systems and registries with procedural document constructors. For example, the Lithuanian IBPS (Integrated Criminal Procedure Information System) system allows for the automatic loading of data from dozens of state registries, ranging from the register of registered residents to data on border crossings and bank accounts.⁴⁴ As a result, judges do not need to send additional court requests to confirm or gather case-related information. Furthermore, this system automatically removes the personal data of participants in criminal proceedings. Thus, such judicial decisions are ready for official publication, which, on the one hand, addresses the issues of transparency and openness of court proceedings, and, on the other hand, preserves the privacy of the participants in criminal proceedings. At present, almost all court decisions are subject to publication on the official websites of courts. Apart from the defendant, who, if found guilty, receives public censure through the publication of information about the committed crime, other individuals also participate in criminal proceedings. It is extremely rare for information about a person’s participation as a victim or witness to be removed from published court decisions. The example of using the IBPS system demonstrates how an algorithm can protect the privacy of witnesses and victims more effectively than a human, who might mistakenly forget to remove personal data.

⁴⁴ Regulation on the Unified Information System of Criminal Proceedings, approved by Order of the Minister of the Interior of the Republic of Lithuania, the Prosecutor General of the Republic of Lithuania, and the Director of the National Judicial Administration of 27 September 2012, No. 1B-702/I-294/6II-101-(1.1). Available at: <https://www.e-tar.lt/portal/lt/legalAct/TAR.36CFoFD8075B/meGWSsOUSS> [Accessed 05.04.2026].

The adoption of a judicial decision in one criminal case is sometimes linked to the execution of a court decision in another criminal case. For example, this is necessary for assessing recidivism and selecting the most appropriate punishment. Such a system exists in Azerbaijan, it is called “Electronic Enforcement,” which allows a judge to see in real time the status of the execution of previous decisions regarding the defendant.⁴⁵

In the academic community, the concept of granting the defendant a choice between a traditional court and algorithmic justice is actively discussed. This algorithmic justice may serve as a second stage in the implementation of artificial intelligence for making decisions in criminal cases. This proposal is based on the idea of ensuring maximum “mathematical objectivity” and eliminating the subjective factor from a human judge. The defendant may prefer an algorithm if they believe that the case is typical and that the human factor could negatively affect the outcome of the proceedings. In this context, artificial intelligence does not act as a replacement for justice, but rather as an alternative mode of adjudication, guaranteeing impartiality through strict adherence to embedded algorithms. For the defendant, this also means predictability of the verdict, rather than a “lottery” of human factors.

This concept is largely based on the already existing institution of a jury trial in the Russian criminal process. Just as a defendant today has the right to choose between a professional judge and a jury panel, they are proposed to be given the choice in favor of algorithmic justice.

In both cases, the logic is identical: justice is rendered only with the consent (petition) of the individual themselves. If, in the case of a jury, the defendant seeks protection from a possible prosecution bias of the system, then in the case of artificial intelligence, they seek mathematical impartiality of the code. Thus, the algorithm can be not a coercive tool, but another procedural guarantee that expands the citizen’s right to a fair trial. If society trusts non-professional judges (jurors), who do not know the law, to decide a person’s fate, then why should an algo-

⁴⁵ Regulation on the Information System Electronic Court, approved by Decree of the President of the Republic of Azerbaijan No. 1043 of 1 June 2020 On Approval of the Regulation on the Electronic Court Information System. Available at: <https://e-qanun.az/framework/45080> [Accessed 11.06.2025].

rithm that knows the law be rejected? The right to choose a simplified criminal procedure with the participation of an algorithm removes the problem of the machine's lack of legal consciousness. The legitimacy stems not from artificial intelligence, but from the will of the defendant.

Larisa N. Maslennikova (2000) identified two trends in the development of criminal procedure: the complication and simplification of procedural forms. An algorithm can be viewed not merely as a technical tool, but as a new criminal procedure form. Within the system of existing differentiated procedures, justice based on the use of artificial intelligence could become the most simplified form of criminal proceedings, one that does not require deep judicial discretion. However, science issues warnings against excessive "digital romanticism." For example, Leonid V. Golovko insists on the preservation of the classical process, emphasizing that technologization should not replace the foundations of justice (Golovko, 2019, p. 21). Thus, an algorithm can be considered exclusively as an auxiliary tool, but not as an independent procedural form that could replace judicial discretion.

The first widely known example of algorithmic accountability is the system of automatic photo-fixation for exceeding the established speed limit, which constitutes an administrative offense. When this system was introduced, a 50 % discount for prompt payment of the fine was widely used. The reasons for the success of this project are obvious: the elimination of subjectivity, mathematical precision, speed of accountability, reduced workload, uniformity of practice, and the automation of routine tasks. Similar reasons are driving States toward the increasing application of artificial intelligence in the administration of justice. If an algorithm can flawlessly issue a fine for speeding, why can it not check for the elements of a crime in simple criminal cases and assign a punishment?

However, not everyone supports the ideas of techno-optimism in the administration of justice. Frank Pasquale (2019) argues that technologies should function as tools to enhance the intelligence of human lawyers, assisting them rather than replacing their decision-making function. Pasquale presents the following serious arguments: language is a human right and cannot be reduced to binary code, artificial intel-

ligence lacks sincerity, while criminal justice requires compassion, and there is a risk of losing control over the justice system and professional degradation.

The clash between the positions of digital reformers and procedural classicists is a natural stage in the transformation of justice. It seems that the true path of development lies in high-tech assistance, where digital tools take on routine operations, freeing up the judge's intellectual resources to resolve complex issues. The introduction of artificial intelligence into the administration of justice as an additional, voluntary procedure for obvious elements of a crime appears to be a promising direction. The application of artificial intelligence is suitable for resolving routine issues based on past experience, whereas a human lawyer should focus on the future and the strategic development of law.

Under the situation of court overload, a judge physically lacks the opportunity not only to show empathy and compassion, but even to delve into the essence of the dispute being considered. In a district court in Moscow, a judge may hear about 30 civil cases per day. This amounts to approximately 16 minutes per case, considering that some participants in the proceedings must leave the courtroom while others enter, and the judge must each time explain the rights and obligations to the parties. Because of this, judges often take a formal approach to conducting procedures such as, for example, case preparation for trial. In criminal cases, the situation is somewhat better (about 5 cases per day), but there is also a greater time requirement to comply with criminal procedure legislation. The media has widely covered a study that showed judges are statistically less likely to rule in favor of defendants before lunch.⁴⁶ In this regard, artificial intelligence will be able to treat everyone equally, regardless of gender, race, or even their lunch schedule.

In the context of a crisis in the accessibility of legal aid, the concept of rejecting the achievements of digitalization effectively becomes a justification for the high cost and low efficiency of the judicial process. The evolution of social relations directly leads to the complication of legal regulation. Thus, lawyers are required to retain more and more

⁴⁶ Available at: <https://www.kommersant.ru/doc/1639006> [Accessed 04.05.2026].

information in their memory. The history of the development of the legal profession demonstrates the inevitability of transformation due to technological progress. If, in the pre-digital era, updating regulatory legal acts required manual labor from a lawyer (purchasing newspapers, pasting in changes), the emergence of legal reference systems has relieved this burden. Richard Susskind predicted back in the 1990s that lawyers who “paste in changes” would disappear as a class, giving way to specialists in legal knowledge management (Susskind, 1996, p. 272). The discussion about the implementation of artificial intelligence in the work of human lawyers is a continuation of this process, but now there is a transition from the automation of searching for legal norms to the automation of their application. Digitalization cannot be considered a threat to the elimination of the profession, as it serves as a stimulus for its qualitative complication.

IV. Conclusion

The development of digital justice in 2024–2026 has definitively moved from the realm of science fiction into the sphere of everyday law enforcement practice. If, at the initial stages of introducing digital technologies, restraint prevailed — due to the specifics of criminal procedure relations and the risks of restricting constitutional rights — today, the automation of routine legal issues is becoming a tool for ensuring legal certainty. The conducted research on the digitalization of criminal proceedings has allowed for the formulation of the following conclusions.

1. Inevitability and global nature of digitalization. The transition of criminal case consideration at the judicial stages to a digital environment is recognized as a global trend and an objective necessity. This study shows that post-Soviet countries demonstrate a high rate of normative consolidation and application of digital institutions in criminal proceedings compared to the leading countries in e-government development: remote participation in courts is enshrined in 93 % of post-Soviet countries, and electronic document management in 73 %. Thus, the legislative consolidation of remote participation in courts is more developed than the possibility of submitting procedural documents electronically.

2. Transformation of fundamental principles (General Conditions of Judicial Proceedings in the Russian Federation). The use of videoconferencing transforms the principle of immediacy (in the Russian Federation, this is a general condition for judicial proceedings), creating new communication barriers and risks of reducing the level of respect and neutrality.

3. Phased Implementation of Artificial Intelligence. Currently, artificial intelligence is being fragmentarily introduced into the administration of criminal justice. At present, this is only in a small number of States; however, the same path was once taken by electronic document management, electronic criminal case files, and videoconferencing.

4. Maintaining a balance between efficiency and human rights compliance. The main obstacles to the automation of manual processes remain the conservatism of scholars and practicing lawyers, due to the lack of transparency of algorithms, the commercial secrecy of software code, and the inability of a machine to bear responsibility for an unlawful decision.

5. The algorithm serves as a new criminal procedure form of administering justice. Criminal procedure law knows various simplified and complex forms of administering justice: private prosecution, admission of guilt, pre-trial cooperation agreements, and trial by jury. Algorithmic justice can act as a new simplified form for conducting criminal proceedings.

6. Transformation of the legal profession. The technological process is irreversible, and therefore, a generation accustomed to paper bureaucracy has been replaced by specialists in legal knowledge management, who are now being succeeded by experts in its automated application.

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Bilateral Investment Treaties in the Russian Federation and the State of Qatar in the wake of Maritime Investment. Part 2: BMIT as a Coherent Solution

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Abstract: Bilateral Investment Treaties (BITs) serve as a crucial foundation for investment protection; however, the rapid expansion of maritime investments presents a complex challenge to this established framework. When investors choose to engage in maritime ventures, a thorough understanding of existing investment protection mechanisms — particularly through relevant BITs — is imperative. It raises a fundamental inquiry: do current BITs effectively establish a coherent and robust protective regime for maritime investments? On the one hand, the current system exhibits a fragmented structure that necessitates examination across four distinct branches of public international law: international investment law, the law of the sea, international environmental law, and international energy law. On the other hand, it is essential to recognize that investment protection must be pursued with due regard for the public interests of the sea. In this study, we conduct a qualitative and quantitative analysis of all BITs concluded by the Rus-

sian Federation and Qatar. Our findings indicate that the existing BIT framework is insufficient to address the unique and dual nature of maritime investments that are characterized by both their scattered legal foundations and the necessity for mutual respect between investment interests and maritime benefits. To address these limitations, current paper proposes the creation of a new category of agreements, termed Bilateral Maritime Investment Treaties (BMITs). These treaties would be designed specifically to cater to the intricate dynamics of maritime investments, thereby providing a more comprehensive protective system.

Keywords: BIT; BMIT; maritime investment; Qatar; Russian Federation

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Contents

I. Introduction	356
II. Legal System Governing Investment Protection System at Sea	359
II.1. Preamble	359
II.1.1. BITs of the Russian Federation and Qatar	359
II.1.2. UNCLOS	362
II.1.3. Environmental Agreements	363
II.1.4. International Agreements	365
II.2. Main Texts of Relevant Documents	366
II.2.1. BITs of the Russian Federation and Qatar	367
II.2.2. UNCLOS	370
II.2.3. Environmental Agreements	372
II.2.4. Energy Agreements	375
II.3. Comparison between Qatari and Russian BITs	376
III. BMIT as a Novel Solution	378
III.1. Preamble to a BMIT	381
III.2. Main Text of the Bilateral Maritime Investment Treaty	382
III.2.1. Investment and Investor Protection	382
III.2.2. Preserving Marine Environment and Public Interests	386
IV. Conclusion	387
References	389

I. Introduction

Bilateral investment treaties (BITs)¹ serve as primary instruments for safeguarding foreign investments. According to the Morocco — Russian Federation BIT of 2016, “The Contracting Parties make favorable conditions for foreign investors within their territories.”² In the contemporary context, BITs can be understood as a framework aimed at addressing the complex challenges faced by host States and investors, functioning as a conduit for mutual interests and benefits (Aak-en, 2008, p. 1). To date, a total of 2,834 BITs have been concluded globally, with this number continuing to rise annually.³ Recent statistics from the United Nations Conference on Trade and Development (UNCTAD) indicate that maritime States such as the Russian Federation and Qatar have shown a notable propensity for entering into BITs.⁴ The Russian Federation has concluded 84 treaties, while Qatar has established 63, collectively accounting for approximately 6 % of all existing BITs (Abadikhah and Nigmatullin, 2024). This focus on BITs underscores the strategic importance that these nations place on establishing legal frameworks to protect their investors abroad while simultaneously

¹ BITs are one of the types of international investment agreements. As 2007 has stated, international investment agreements include both the bilateral investment treaties (BITs) and the Treaties with Investment Provisions (TIPs). A BIT is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other’s territory. The great majority of International Investment Agreements (IIAs) are BITs. Also, the TIPs bring together various types of investment treaties that are not BITs. Three main types of TIPs can be distinguished: 1. broad economic treaties that include obligations commonly found in BITs (e.g., a free trade agreement with an investment chapter); 2. treaties with limited investment-related provisions (e.g., only those concerning establishment of investments or free transfer of investment-related funds); and 3. treaties that only contain “framework” clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues. UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, Terminology. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> [Accessed 28.09.2024].

² Morocco — Russian Federation BIT, Art. 3, date of signature: 15.03.2016, not in force.

³ UNCTAD, Investment policy Hub, 2024. Available at: <https://investmentpolicy.unctad.org> [Accessed 07.06.2026].

⁴ UNCTAD, Investment policy Hub, 2024.

attracting foreign investments to their domestic markets. The preamble to the Russian Federation — Palestine BIT further elucidates this commitment, stating, “Considering the necessity to create favorable terms for investments, and realizing that the enhancement and mutual sustenance of investments under the current BIT will facilitate the attraction of investments and contribute to the growth of mutually beneficial economic and commercial relations, the States have declared their consent to this BIT.”⁵ Thus, BITs are regarded as significant protective measures for investors, offering various safeguards that foster a stable investment climate (Freeman and Bartels, 2004, p. 213). Moreover, the International Centre for Settlement of Investment Disputes (ICSID) posits that “today, dispute settlement mechanisms are inextricably linked to the protection of foreign investors, as they are also associated with the protection of merchant rights under commercial treaties.”⁶ This assertion shows the significant role of dispute resolution frameworks in improving investor confidence in the complex landscape of investment law.

While it is authenticated that the current BITs serve as useful instruments to protect the investments in general, it is important to recognize that these agreements face major challenges when addressing investments at sea. The framework of existing BITs is predominantly focused on investments protection and does not sufficiently contain the main requirements of investment protection at sea. Maritime investments operate in a multifaceted legal landscape. On the one hand, the landscape is characterized by a fragmented system, which requires consideration across four branches of public international law including law of the sea, investment law, environmental law, and energy law. Each of the branches presents distinct regimes that must be addressed to ensure useful investment protection at sea. On the other hand, the regulations governing investment protection at sea are intrinsically mutual; for example, it is important to recognize that the investment protection at sea should be done with due respect for the public order of the maritime zones. This basic principle confirms the necessity of bal-

⁵ Palestine — Russian Federation BIT, date of signature: 11.11.2016, date of entry into force: 08.11.2017.

⁶ ICSID. *Wintershall Aktiengesellschaft v. Argentine Republic*, Para. 80, case No. ARB/04/14, 08.12.2008.

ancing the responsibilities and rights of investors with the interests of public governance and maritime ecological preservation.

This study serves as the second part of our previously published article in the “Kutafin Law Review” titled “Bilateral Investment Treaties in the Russian Federation and the State of Qatar in the wake of Maritime Investment. Part 1: Gaps in Regulation” (2024). In this continuation, we show the current legal gaps regarding maritime investments, by focusing on three main areas: (1) the exact delineation of maritime zones, (2) the classifications of investments at sea, and (3) the characterization of maritime investors. The current paper aims to highlight the complex and fragmented nature of the investment protection system at sea. In addition, we present a comprehensive solution designed to address the existing challenges within the BITs by introducing a precise framework, for which we offer a term of *Bilateral Maritime Investment Treaties (BMITs)*. In this context, there are three central hypotheses: first, the BITs do not sufficiently address the fragmented nature of the investment protection system at sea that covers four branches of international law including investment law, law of the sea, environmental law, and energy law. Second, the BITs fail to recognize the dual-faceted aspect of investment protection at sea, which requires that investment preservation be aligned with the public order of the seas and oceans. Third, to effectively bridge the gaps and establish a clear maritime investment protection framework, the useful solution is to establish BMITs. To substantiate the hypotheses, the present article is structured the following way. In the part “Legal System Governing Investment Protection System at Sea”, we analyze the legal framework governing the investment protection system at sea (sections II.1.1, II.1.2). Then we highlight two groups of regulations: the first one pertains to investment protection (section II.2.1), while the second goes through the public interests at sea (section II.2.2). In the part “BMIT as a Novel Solution”, we show a new draft for a good BMIT, outlining the challenging issues related to maritime investment, aligned with a set of regulations, designed to preserve maritime investments. Finally, the paper concludes and recommends for the advancement of investment protections at sea.

II. Legal System Governing Investment Protection System at Sea

The regulatory system governing maritime investments is characterized by its complexity and fragmentation. On the one hand, investors intending to engage in ventures within maritime zones must navigate multiple domains of international law, encompassing international investment law, environmental law, the law of the sea, and energy law. This multifaceted landscape arises from the absence of a coherent and integrated system of protective rules specifically tailored to maritime investments. On the other hand, these branches of international law embody a dualistic nature, wherein they serve two fundamental purposes: (1) the protection of the investor and (2) the safeguarding of public interests. The successful execution of an investment in maritime contexts hinges on the effective interplay between these two sets of regulatory frameworks. In the absence of such interaction, investors may encounter significant challenges that could impede their operations. In this part, we will examine the degree of interrelation between these two sets of rules within the governing system of maritime investment. Our analysis contains both the preamble and the substantive regulations of relevant documents, highlighting how the peaceful coexistence of investment protections at sea and public interest can lead to promote a conducive investment environment.

II.1. Preamble

II.1.1. BITs of the Russian Federation and Qatar

One of the primary instruments, which investors consult to see the dimensions of protection is a BIT. Significantly, several BITs of Qatar and Russia pay attention to the consideration of two categories of investment protection, namely investment protection and the preservation of public interests. Given that the preamble of a BIT articulates its overarching objectives, it is essential to undertake an analysis of this introductory section. For instance, in the preamble of the BIT between Finland and the Russian Federation, one can discern an indirect acknowledgment of the interaction between these two categories. The

preamble States that the contracting parties are “desirous of further developing and strengthening mutual ties in the field of commercial, economic, industrial, technical and scientific coordination and cooperation within the other contracting State’s territory,” while also taking into account the principles set forth in the Final Act of the Helsinki Conference on Cooperation and Security of 1 August 1975.⁷ This treaty does not explicitly foreground public interests; however, it emphasizes bilateral cooperation concerning investment in alignment with the principles of the Helsinki Conference that advocates for cooperation in the interest of humanity and acknowledges the common interest in fostering collaboration across Europe.⁸ Thus, the BIT implicitly necessitates that the States engage in cooperative efforts while respecting the public interests that underpin Europe’s stability and security. By highlighting these principles, the treaty reflects a commitment not only to investor protection, but also to the broader objectives of public interest, emphasizing the necessity for harmonization between the two facets within the maritime investment protection framework.⁹

The acknowledgment of public interests pertaining to the international community is notably reflected in the preamble of one of the Qatari BITs. Specifically, the preamble of the BIT between Ethiopia and Qatar articulates that “the contracting parties are willing to increase and encourage reciprocal useful investment opportunities and to cooperate for the purposes of compliance with the common rights and responsibilities under international law.”¹⁰ This preamble implicitly shows the importance of two branches of international law: law of the sea and environmental law. The invocation of public international law

⁷ Finland — Russian Federation BIT, preamble, date of signature: 08.02.1989, date of entry into force: 13.05.1999.

⁸ Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975. Available at: <https://www.refworld.org/docid/3dde4f9b4.html> [Accessed 21.02.2025].

⁹ The same goes for the Russian Federation — United States of America BIT (1992), which proclaims public rights by pointing to the internationally recognized rights of working people. See the preamble to the BIT. In the preamble of other Russian BITs, the interaction or existence of two different types of interests in the investment process is not considered.

¹⁰ Ethiopia — Qatar BIT, preamble, 2017.

in the preamble highlights the necessity for investments to accompany by the relevant responsibilities and rights, including those concerning the public benefits of marine environments and sustainable management of maritime resources. Failure to observe these obligations could result in substantial challenges in the way of investment. Therefore, the preamble plays great role as a vital reminder of the interconnectedness of investment operations and the imperative to reinforce international responsibilities, thus bolstering a balanced approach which preserves both investor and public interests.

To a certain extent, the preambles of various BITs of the Russian Federation and Qatar offer an implicit acknowledgment of the interplay between public interests and investor interests. However, such treaties necessitate careful interpretation. For example, the BIT between Morocco and the Russian Federation states that “the contracting parties intend to create and maintain favorable conditions for investments made by investors of the State of one Contracting Party in the territory of the State of the other Contracting Party.”¹¹ Similarly, the Qatar — Argentina BIT articulates a parallel intention, asserting that “the parties intend to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party.”¹² Within these preambles, two fundamental phrases emerge: “to create and maintain favorable conditions” and “within the territory of the other Contracting Party.”¹³ In the context of maritime investment protection, the phrase “to create and maintain favorable conditions” suggests that a successful investment process necessitates a cooperative relationship between investor protection and the safeguarding of public interests. Moreover, when considering this interaction in the realm of maritime investment, it is imperative to acknowledge public interests related to marine areas, including concepts such as innocent passage, the installation of submarine cables, traditional fishing rights, and the

¹¹ Morocco — Russian Federation BIT, Art. 3, date of signature: 15.03.2016, not in force.

¹² Argentina — Qatar BIT, Preamble, date of signature: 06.11.2016, not in force.

¹³ For more information on BITs of Qatar, see UNCTAD, investment policy Hub. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/171/qatar> [Accessed 16.02.2025].

overall marine environment. The United Nations Conference on Trade and Development (UNCTAD) has concluded in its studies on investment treaties that an increasing number of States emphasize, within their preambles, the fundamental objective of protecting investments. However, this goal must also encompass other vital policy considerations and public interests, such as health, safety, environmental protection, and the promotion of internationally accepted labor standards.¹⁴ Therefore, the evolving narrative within BITs underscores the necessity of integrating both investor interests and public benefits into the foundational principles governing international investment.

The agreements, like the Russia — Morocco BIT and the Qatar — Argentina BIT, which refer to the public interests in an indirect manner, necessitate precise clarification. On the one hand, the used phrasing, such as “to create and preserve favorable conditions,” may be understood by investors as basically aimed at protecting their interests, potentially overlooking the wider context of public interests. Consequently, it becomes imperative for public international law experts to interpret such terms. These interpretations must aim to inform investors about the intrinsic balance between their rights and the obligations concerning public interests incorporated within these agreements.

II.1.2. UNCLOS

The preamble to the United Nations Convention on the Law of the Sea (UNCLOS)¹⁵ underscores the mutual impacts of the economic operations and public interests at sea. The main goal of UNCLOS is to regulate activities at sea and oceans, including a wide spectrum of economic concerns incorporated in its provisions. For instance, phrases such as “contribution to the growth of the people of the globe,” “fair and effective utilization of the reserves of the oceans and seas to conserve their living resources and protect the marine environment,” “international

¹⁴ Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking, UNCTAD, pp. 3, 31 January 2007. Available at: <https://unctad.org/webflyer/bilateral-investment-treaties-1995-2006-trends-investment-rulemaking> [Accessed 16.02.2025].

¹⁵ United Nations Convention on the Law of the Sea, Preamble, 10 Dec. 1982, 1833 U.N.T.S. 397.

economic order,” “exploitation and exploration of the seabed and ocean floor,” and the notion of the “common heritage of humankind” underscore the convention’s commitment to both economic development and environmental stewardship. These expressions reflect the overarching objective of UNCLOS: to protect and facilitate investment and the sustainable exploitation of ocean resources while aligning these activities with the public interests of the international community. Thus, UNCLOS may be viewed as a complementary framework to the Bilateral Investment Treaties (BITs) of the Russian Federation and Qatar. Additionally, for any investment operations in maritime zones, it is vital to observe the mechanisms considered by UNCLOS, as the mechanisms serve as the exclusive way to obtain the relevant licenses for investment at sea and oceans. This framework not only presents a legal base for investment, but also upholds the imperative of balancing investment aspirations with the imperative of the maritime environment protection for the interests of future generations.¹⁶

II.1.3. Environmental Agreements

The goals of environmental agreements may vary notably in accordance with the specific circumstances and ecological issues related to a geographical area. While the primary attention of such agreements is not centered on the investment protection, it is important to note that, they may indirectly support investment initiatives relating to environmental protection. In this regard, we scrutinize the interplay between implicit investment protection at sea and the public interests accompanied with marine environments, as encompassed within the preambles of main treaties concerning protection of marine environment. For example, the preamble to the Convention on the Prevention of Marine

¹⁶ The preamble to UNCLOS takes into account two terms: “protection of the marine environment” and “promotion of the marine environment”. These two terms are different from each other. In protecting the environment, the investor in line with his investment only takes care not to harm the environment, but the promotion of the marine environment goes beyond this and not only does it take care not to cause any damage, but it also helps to improve the infrastructure to protect the environment or to improve the protection dimensions.

Pollution by Dumping of Wastes and Other Matter¹⁷ highlights the necessity for States to consider the public interests when exploiting maritime resources. It expresses that while States keep their sovereign rights to exploit maritime resources, such rights should be implemented in a way which does not adversely affect other States or the oceans at large. This statement upholds the notion that investments at sea should be undertaken with a precise awareness of the public benefits of the international community, especially in connection with the sustainable management of seas and oceans.¹⁸

The preamble to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties¹⁹ implicitly highlights the relationship between the investment protection and the preservation of public interests at seas. In accordance with the preamble, it is acknowledged that oil contamination in the high seas can adversely impact the interests of nations within “the Area.” Since this Area is recognized as the common heritage of humankind, there exists an inherent obligation to preserve it for the benefit of humanity. Consequently, the preamble articulates that protective measures are essential to safeguard both public interests and the integrity of the high seas. It is evident that the preservation of these interests is aimed not only at environmental stewardship, but also to create an atmosphere conducive to favorable investments in the future. Thus, the interplay between environmental protection and investment viability is central to the objectives delineated in this convention.

The preamble to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990 highlights a critical rationale for international cooperation in combating oil pollution: the associated benefits to governments operating within maritime areas. It posits that oil pollution poses a significant threat to the interests of States in these areas. These interests encompass both public and economic dimensions, including safety, environmental integrity, public health, international navigation, and the sustainable exploita-

¹⁷ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1046 UNTS 120, [ATS] 1985 16, 11 ILM 1294 (1972), UKTS 43 (1976).

¹⁸ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

¹⁹ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention), adoption: 29.11.1969.

tion of both living and non-living resources. Furthermore, the preamble underscores the importance of UNCLOS, illustrating the complementary role of international regulations that govern maritime investment.²⁰ This connection signifies that the endorsement and facilitation of investment activities at sea are inextricably linked to the protection and promotion of public interests. Consequently, effective safeguarding of these interests not only enhances environmental and public safety, but also create an atmosphere conducive to favorable future investment in maritime realms. Therefore, environmental treaties do not focus on the protection of specific investments; rather, they underscore that all forms of investment must be executed in alignment with environmental preservation. Principles such as sustainable development and cooperation can be applied within the framework of the categories of maritime investment. These environmental treaties serve to promote the application of these principles and regulations across all forms of maritime investments, ensuring that environmental considerations are integral to investment practices in these sectors.

II.1.4. Energy Agreements

The preamble to the International Energy Charter²¹ calls upon member States to collaborate with the objective of promoting economic progress while adhering to the principle of sustainable development. Sustainable development is framed as a foundational principle within the preamble, aligning with its acknowledged role in both environmental law and the law of the sea as it pertains to public interests. This preamble implies that States involved in investments at maritime energy sector are required to act in a manner that preserves the public interests, acknowledging that such operations do not result in adverse social or environmental consequences.²²

²⁰ For instance, here the preamble to the International Convention on Oil Pollution Preparedness, Response and Co-operation refers to UNCLOS.

²¹ Available at <https://www.energycharter.org/process/international-energy-charter-2015/overview/> [Accessed 03.04.2025].

²² Directly, the preamble to the International Energy Charter requires states to pursue economic development while taking into account the protection and preservation of the environment, as well as the states should consider environmental dimensions and its protection in cooperation for energy development.

The preamble to the European Energy Charter²³ asks States to uphold investments and economic operations in the energy sector while taking into consideration the sustainable development and the economic pros for the international community. It requests for the removal of any hurdles impeding the advancement of energy economic operation. Based on the charter, sustainable development is not only authenticated as a vital principle, but the necessity of removing impediments to investment is also considered. The text explicitly pays attention to the significance of coordination and cooperation between public interests and relevant investment. Neglecting public interests that govern maritime activities, such as international navigation, can result in significant impediments to maritime energy investment. Consequently, to prevent the creation of obstacles to investment, it is essential that the principles governing both public interests and investment frameworks interact effectively and play a complementary role.

In addition, the preamble to the Energy Charter Treaty²⁴ not only urges States to support and protect the environment, but also explicitly references a range of other environmental treaties, notably the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution, and various other international environmental agreements pertinent to energy, all of which align with the objectives of the Energy Charter treaty. This agreement shows the significance of addressing the public interests, like environmental considerations, as neglecting such interests may result in significant challenges to investment in the energy sector. Consequently, it stresses the necessity of adhering to uphold environmental regulations to ease sustainable investment operations.

II.2. Main Texts of Relevant Documents

The interplay of related legal frameworks regarding investment protection at sea requires a detailed examination of several instruments, like UNCLOS. This convention is important for clarifying the scope of public interests pertinent to the investments at maritime zones, as investment treaties often stay silent on such issues. In line with the BITs,

²³ European Energy Charter. Date of adoption: 17.12.1991.

²⁴ Energy Charter Treaty. Date of signature: 17.12.1994.

it is imperative to consider the preservation of public interests, such as environmental protection. Nevertheless, many BITs do not explicitly pay attention to environmental protection, which requires a reference to relevant environmental agreements for a comprehensive awareness of the legal system. Given environmental matters, agreements such as the Convention on Oil Pollution Preparedness, Response and Co-operation highlights the need of addressing UNCLOS terms to guarantee environmental protection. Therefore, while provisions directing investments at sea may be scattered across various instruments, they collectively play a supplementary role, operating as interrelated links in a broader legal chain. This part pays attention to the main topics of interdependence among four basic categories of sources related to this field: 1. the BITs of the Russian Federation and Qatar, 2. UNCLOS, 3. environmental agreements, and 4. energy agreements.

II.2.1. BITs of the Russian Federation and Qatar

Investment treaties clearly underscore the main clauses and terms concerning investment protection in the main body texts. Once investors decide to involve in economic operations at maritime zones, they have to carefully consider the relevant BITs to see the special protections available to them. In the cases where investments pertain to maritime energy sector, investors should also take the energy charter into consideration.²⁵ To obtain precise information regarding maritime zones, as well as to see the responsibilities and rights of States containing the preservation of public interests at sea, it is important to consult UNCLOS. The marine environment protection should be guaranteed through adherence to environmental provisions. Consequently, the set of regulations governing the maritime investment protection system complements one another, forming a comprehensive framework which addresses the issues regarding maritime investment. This integrated approach is critical for fostering both sustainable investment operations and effective governance of marine resources.

²⁵ Of course, the investor's home country must be a member of the Energy Charter treaty.

BITs of the Russian Federation and Qatar reflect various rules and principles pertaining to investor protection, though it is notable that the majority of these agreements lack explicit consideration for public interest. The substantive provisions for investor protection within these treaties may encompass concepts such as national treatment and the most-favored-nation clause,²⁶ as well as stipulations regarding the admission of investments and compensation.²⁷ However, this part will not focus on these substantive rules; instead, it seeks to explore the scope of public interest protection within the context of these BITs. Among the eighty two BITs entered into by Russia, only three treaties explicitly acknowledge public interests.²⁸ For instance, the USA — Russia BI states that the agreement “will not detract from... international obligations.”²⁹ This provision indicates that the protection of investments under this treaty cannot undermine the fulfillment of other international obligations, which may include environmental treaties, UNCLOS, and customary international law. Many provisions of UNCLOS are established as customary international law, encompassing the responsibilities and rights of third States in archipelagic waters and maritime zones.

²⁶ See, Italy — Qatar BIT, Art. 3, date of signature: 22.03.2000, date of entry into force: 01.08.2004. Also see, Iran — Russian Federation BIT, Art. 3, date of signature: 23.12.2015, date of entry into force: 06.04.2017. Some cases also have been raised regarding the violation of national behavior, such as: ICSID. Marvin Roy Feldman Karpa v. United Mexican States, case No. ARB(AF)/99/1 (also known as Marvin Feldman v. Mexico). Available at: <https://www.italaw.com/cases/435> [Accessed 07.06.2026]. See also ICSID. United Parcel Service of America Inc. v. Government of Canada, Case No. UNCT/02/1. Available at: <https://www.italaw.com/cases/1138> [Accessed 04.06.2026]. See also on most favored nation clause: ICSID. Señor Tza Yap Shum v. The Republic of Peru, case No. ARB/07/6, International Investment Agreement, decision on Jurisdiction and Competence, 2011. Available at: <https://www.italaw.com/cases/1126> [Accessed 04.06.2026].

²⁷ For more information about the rules under the BITs see also Kong, Q., (2013). See also, ICSID. Marvin Roy Feldman Karpa v. United Mexican States, case No. ARB(AF)/99/1 (also known as Marvin Feldman v. Mexico), 2002, award, Para. 136. Available at: <https://www.italaw.com/cases/435> [Accessed 04.06.2026].

²⁸ All three of these treaties were signed in the 20th century; Russian Federation — United States of America BIT (1992), Republic of Korea — Russian Federation BIT (1990), and Canada — Russian Federation BIT (1989).

²⁹ Russian Federation — United States of America BIT, Art. IX, date of signature: 17.06.1992, not in force.

Approximately ten bilateral investment treaties (BITs) between Qatar and other States have explicitly addressed public interests. These treaties generally adopt two distinct approaches. First, all ten treaties underscore the necessity of compliance with other international obligations.³⁰ Second, two of these agreements specifically highlight adherence to environmental obligations and labor rights.³¹ For example, the Qatar — Cyprus BIT states that “this BIT will not detract...from obligations of public international law.”³² Article 12 urges the investors to consider law of the sea, environmental laws and other relevant obligations, like energy law, when deciding to invest at sea. In addition, the Qatar — Ethiopia BIT expressly directs environmental regulations stating that “Investors will adhere to the environment and labor regulations...”. This article illuminates that the investment protection is not the only objective of such BITs; rather, it highlights that preserving investors should not come at the expense of human rights or environmental considerations.³³ Some BITs of Qatar and the Russian Federation reflect the balance between investment protection and the public interests. Obviously, these two sets of regulations play complementary roles to one another. For example, the Qatar — Ethiopia BIT (2017) incorporated investment protection clauses, such as “national treatment” and the “most-favored-nation” clause within the Art. 5 and 6, while Art. 14 significantly underscores the preservation of public interests, especially concerning environmental law. This dual focus indicates that the overarching aim of the BIT is to promote and preserve both sets of provisions, reinforcing the importance of aligning investment interests with broader societal and environmental responsibilities.

³⁰ Mongolia — Qatar BIT (2007), Art. 12; Gambia — Qatar BIT (2002), Art. 12; Armenia — Qatar BIT (2002), Art. 12; Qatar — Turkey BIT (2001), Art. 6; Croatia — Qatar BIT (2001), Art. 9; Cuba — Qatar BIT (2001), Art. 6; India — Qatar BIT (1999), Art. 12; Cyprus — Qatar BIT (2008), Art. 12.

³¹ Ethiopia — Qatar BIT (2017), Art. 14; BLEU (Belgium — Luxembourg Economic Union) — Qatar BIT (2007), Art. 5–6.

³² Cyprus — Qatar BIT, Art. 12, date of signature: 11.11.2008.

³³ Bilateral Investment Treaties of Qatar, International Investment Agreements Navigator, UNCTAD, 2024. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/171/qatar> [Accessed 04.06.2026].

II.2.2. UNCLOS

UNCLOS can be regarded as a comprehensive legal framework governing all maritime activities. As Tulio Treves articulates, “UNCLOS is considered the constitution of the oceans” (Treves, 2024). This treaty delineates various maritime areas, each characterized by distinct public interests in relation to their governance. UNCLOS categorizes the maritime realm into several areas, containing the territorial sea, the exclusive economic zone (EEZ), and the continental shelf. In these zones, coastal States have a wide range of sovereign rights to explore and exploit maritime resources and make necessary infrastructure in this way. Specifically, within the territorial sea, which extends up to twelve nautical miles from the baseline, coastal States retain the exclusive right to exploit marine resources. However, they must also uphold the principle of innocent passage for foreign vessels.³⁴ In addition to these recognized maritime zones, UNCLOS introduces the concept of archipelagic waters, wherein specific rights are conferred upon third States. These rights include traditional fishing rights, the right of innocent passage, and the rights to install submarine pipelines and cables.³⁵ Consequently, investors operating within archipelagic waters are required to respect these established rights, thereby balancing their interests with those of other States.

As one moves from the coast toward the high seas, the sovereignty of coastal States progressively diminishes (Gavouneli, 2015, p. 187). Beyond the territorial sea, coastal States retain only sovereign rights over their continental shelf, specifically for the exploration and exploitation of natural resources (Lauterpacht, 1950, p. 423). These rights are deemed “exclusive,” meaning that no party may utilize the resources without the explicit and unequivocal consent of the coastal State (Tanaka, 2019, p. 147). Consequently, UNCLOS confers exclusive rights to coastal States to issue permits for exploitation and drilling within this zone.³⁶ When a nation designates its exclusive economic zone (EEZ), which is outlined in UNCLOS Art. 77(3), it acquires sovereign rights

³⁴ UNCLOS, Art. 2, 19, and 27.

³⁵ UNCLOS, Art. 51.

³⁶ UNCLOS, Art. 81.

concerning the exploration, exploitation, management, and maintenance of non-renewable resources, as well as activities related to renewable energy production (UNCLOS, Art. 56(1)). In both the continental shelf and the EEZ,³⁷ coastal States possess the exclusive right to develop and utilize structures and installations necessary for the extraction of non-renewable resources and for achieving other economic objectives.³⁸ While UNCLOS does not explicitly define the terms “structure” and “installation,” it can be inferred that relevant States possess the exclusive authority to construct various forms of infrastructure to harness marine energy resources, both renewable and non-renewable, within these areas (Oude Elferink, 2013). This framework underscores the delineation of rights and responsibilities within maritime zones, facilitating effective resource management while respecting the legal entitlements of coastal States.

Under UNCLOS, the ocean floor is designated as the “Area” recognized as the “Common Heritage of Mankind.” Consequently, this Area has been entrusted to the International Seabed Authority for its governance and management (Rothwell and Stephens, 2016, p. 127). The international regime governing the Area specifically encompasses “all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.”³⁹ However, this regime does not extend to the exploitation of other non-living resources in the high seas, such as wave, wind, or solar energy (Zedalis, 2016, p. 114); all States are free to explore and exploit these energy resources, subject to the principles governing freedom in the high seas. Additionally, UNCLOS grants all States the right to construct “artificial islands and other facilities” in accordance with international law.⁴⁰ This provision signifies that States are afforded the freedom to utilize the high seas for new economic initiatives, including the exploitation of renewable ocean energies (Zedalis, 2016, p. 26). Furthermore, while the establishment of renewable energy installations and structures within the

³⁷ Normally the exclusive economic zone and the continental shelf overlap in a maritime zone up to 200 nautical miles.

³⁸ UNCLOS, Art. 60(1) and 80.

³⁹ UNCLOS, Art. 133(1).

⁴⁰ UNCLOS, Art. 87(d).

Area is permissible, it is contingent upon compliance with the activities regulated under the international deep seabed regime.⁴¹ Although there have been discussions regarding the formation of an international institution, such as the International Seabed Authority, specifically for the exploitation of marine renewable energy, such an initiative has yet to materialize (Castelos, 2013, p. 230). This underscores the current opportunities and challenges concerning the maritime resource management and the necessity for legal frameworks to deal with the emerging economic operation within the high seas.

UNCLOS presents a comprehensive legal framework managing economic operations at maritime zones, requiring that investors perform within the legal framework adopted by third and coastal States, and the Seabed Authority. Investors should be aware of whether the coastal States have the authority to give permission for investment within a specified maritime realm. It is important for investors to know whether the coastal States may halt the “innocent passage” right, consequently restricting or permitting investment operations in the realm. Moreover, they need to consider whether the coastal States have the authority to halt the rights of traditional fishing in archipelagic waters. In this way, it is crucial for investors to fully figure the regulative dynamics out; otherwise, they risk dealing with the investments which may disagree with public interests. Awareness of the legal landscape and the rights of various stakeholders is critical to ensuring compliance and mitigating potential liabilities associated with maritime investments.

II.2.3. Environmental Agreements

The present study has conducted a comprehensive analysis of treaties pertaining to the maritime environment; however, it is noteworthy that there is a lack of explicit regulations regarding investor support within their primary texts. Nevertheless, it is possible to interpret the principles and provisions governing environmental protection in a manner that implicitly protects investment. According to the United Nations Framework Convention on Climate Change (1992), Art. 4,

⁴¹ UNCLOS, Art. 47(3) and 60.

Para. 5, developed States are obligated to “supply new, reasonable, and appropriate technologies to developing States.” Indirectly, this provision indicates that reach to sustainable and novel technologies in developing States can uphold the investment protection. Although this influence is indirect, considering that the primary goal of the convention is to reduce pollution, it is obvious that new technologies result in less ecological damages compared to old ones. Therefore, while the direct effect of the provisions concentrates on ecological protection, they simultaneously facilitate an environment beneficial to the maritime investment. Additionally, this dual impact underscores the interdependence of ecological preservation and investment protection, emphasizing that efforts to maintain the environment may inadvertently uphold investment benefits.

In addition, principles like sustainable development and cooperation do play a big role in encouraging investors to stick to ecological considerations. States are obligated to give priority to the cooperation principle when considering investments or issuing licenses. Within the *MOX Plant case*, the tribunal indicated that “the principle of cooperation is a fundamental principle in avoiding pollution of the marine environment in accordance with the UNCLOS.”⁴² Similarly, in the *Southern Bluefin Tuna cases*, the tribunal underscored the importance of cooperation in reaching mutually beneficial agreements.⁴³ In this context, Japan’s overfishing operations prompted neighboring States to perceive their interests as being jeopardized. Given that fishing constitutes a significant form of maritime investment, it is imperative that States refrain from actions that could compromise the environment or the public interests of other States, thus emphasizing the necessity for cooperation. Such collaboration fosters respect for each state’s interests, particularly in areas such as the high seas, where the principle of the common heritage of mankind prevails, and all States possess the freedom to exploit the living resources found therein. This collective approach not only

⁴² ITLOS. *MOX Plant case* (Ireland v. United Kingdom), Provisional Measures, 3 December 2001, Para. 82. Available at: <https://www.itlos.org/en/main/cases/list-of-cases/case-no-10/> [Accessed 25.06.2025].

⁴³ ITLOS. *Southern Bluefin Tuna case* (New Zealand v. Japan; Australia v. Japan), Order of 16 August 1999, ITLOS Reports 1999, Para. 90.

safeguards the marine environment, but also ensures that investment activities align with broader ecological and communal objectives.⁴⁴

Another principle closely associated with offshore investment is sustainable development, that posits that the economic potential of the seas must be harnessed in a manner that protects the marine environment. The Convention on Biological Diversity articulates that sustainable and continuous use entails “use based on a manner and level that does not lead to a long-term reduction of biological diversity.”⁴⁵ In alignment with Art. 2 of the United Nations Fish Stock Agreement, the treaty aims to ensure the long-term preservation and sustainable use of migratory fish stocks through the effective implementation of relevant provisions outlined within the agreement (Fish Stock Agreement, 1995, Art. 2). Moreover, concepts related to rational and sustainable use are implicitly reflected in terminology such as “sustainable management,” “protection,” and “effective use.” Article 61 of UNCLOS emphasizes the necessity of safeguarding living resources, stating that “the coastal State must ensure through appropriate protective and management measures that the reserves of living organisms in the EEZ are not endangered by overfishing” (UNCLOS, Art. 61(2–3)). Considering the stipulations, investments in fisheries should be organized in a way that does not endanger fish stocks over an extended period. The incorporation of sustainability principle into investment process is essential for maintaining marine biodiversity, and ultimately advantaging both environmental integrity and economic effectiveness.

⁴⁴ UNCLOS has also dealt with this issue in some of its provisions. As stated in Art. 197, “States will cooperate with each other to preserve and protect the marine environment.” In addition, see, Art. 117 concerning Living Resources of the High Sea, Art. 199 regarding preparedness plans against pollution; Para. 4 Art. 208 regarding pollution from seabed activities subject to national jurisdiction; Para. 4 Art. 210 regarding pollution caused by waste; Para. 1 Art. 211 regarding pollution caused by ships, Para. 3 Art. 212 regarding pollution through the atmosphere, Para. 2 Art. 226 regarding the inspection of foreign ships and Para. 3 Art. 235 in line with responsibility for environmental damage, to the cooperation of States in line with the marine environment protection has been mentioned.

⁴⁵ Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69). Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVIII-8&chapter=27 [Accessed 25.06.2025].

II.2.4. Energy Agreements

Several agreements explicitly focus on the necessity of making a balance between investment protection, and the preservation of public interests. The International Energy Charter indicates that States should “pay attention to the three challenging international areas, including economic development, energy security and ecological protection, and work for sustainable development and make a balance between them.”⁴⁶ The charter highlights the significance of “sustainable development” and the necessity of a “balance between various ecological and investment interests” within the maritime investments, underscoring that access to the sustainable development is intrinsically subject to finding a harmony among multiple investment interests. Additionally, the Charter articulates that “with the intention of protection and amplify the flow of international investment, the member States shall try to nationally set a sustainable legal framework based on the related international provisions.” This wording aptly illuminates the interdependence between public interests of the maritime zones and investments at sea. It is imperative to recognize that any investment activities within maritime areas must adhere to two primary categories of international regulations: maritime environmental law and the law of the sea.⁴⁷

Furthermore, the Energy Charter Treaty represents a comprehensive framework that addresses the interaction between energy investment and public interests. The treaty mandates that its parties refrain from undertaking unreasonable and prejudicial actions that could adversely affect investment and its operating conditions, thereby requiring the establishment of stable and favorable conditions for investors.⁴⁸ However, States may occasionally resort to extreme measures aimed at advancing public interests, which can inadvertently undermine investment. In certain instances, it may be necessary to amend existing laws

⁴⁶ International Energy Charter. Agreed text for adoption in The Hague at the Ministerial Conference on the International Energy Charter on 20 May 2015.

⁴⁷ Exactly the same regulation is also mentioned in the European Energy Charter. This charter was signed in 1991. Therefore, it is clear that the approach of this Charter has influenced the International Energy Charter.

⁴⁸ Energy Charter Treaty, 1994, Art. 10(1), Part 3.

to safeguard and promote public interests within maritime areas subject to national jurisdiction and sovereignty. The Energy Charter acknowledges the potential for such adjustments, stipulating that any modifications must be implemented in a rational and non-discriminatory manner. This approach is essential for achieving a balance between the protection of investor rights and the preservation of public benefits.

II.3. Comparison between Qatari and Russian BITs

The marine investment protection system can be likened to a chain composed of interrelated links, wherein various mechanisms work in concert to safeguard both public interests and investor rights. BITs of the Russian Federation and Qatar exemplify efforts to balance these interests, although the extent of their commitment to public interests is variable. UNCLOS emphasizes the importance of economic interests, public interests, and environmental protection, establishing a multifaceted framework that may also reference relevant environmental conventions. Furthermore, energy agreements simultaneously maintain both public interests and investment interests, indicating the interdependence of these legal frameworks. In addition, investors attempting to involve in investments at seas should manage this complex view, which incorporates a various array of ecological, economic and legal considerations. While investment agreements often function as the key source for investors, an in-depth examination of the BITs of the Qatar and Russian Federation discloses a relevant deficiency concerning the public interests. Most of these treaties fail to provide a robust approach to safeguarding public interests, with a notable number neglecting this critical aspect entirely. Upon examining the preambles of these BITs, two predominant perspectives emerge regarding the interaction between investment interests and public interests. Some treaties explicitly reference public interests, advocating for their recognition and protection, while others emphasize the establishment and maintenance of favorable conditions for investors and investment, often at the expense of public concerns (Table 1). This dichotomy suggests a need for greater

alignment between investment frameworks and the imperative of public interest preservation, thus advocating for a more cohesive approach to marine investment regulation.

Table 1

STATE	BITs		
	Total	Noticed	Not noticed
Preamble: Attention to public interests in general			
Russia	82	2 ⁴⁹	80
Qatar	50	0	50
Preamble: Paying attention to favorable conditions for investment			
Russia	82	82	0
Qatar	50	50	0

Source: of Russia and Qatar uploaded on the UNCTAD website

The observation that all treaties illustrated in Table 1 emphasize the maintenance of favorable conditions does not necessarily indicate robust performance in their application. Rather, it suggests a predominant focus on investment protection; however, the notion of favorable conditions encompasses more than just the safeguarding of investments. Favorable conditions should be understood as involving a dual consideration of both investor interests and public interests. Consequently, the phrase “making and preserving favorable conditions” warrants nuanced interpretation by an expert in public international law. Also, an examination of the substantive BITs reveals two predominant approaches. The first approach underscores the importance of adherence to international obligations, thereby establishing a framework within which investors must operate. The second approach places particular emphasis on environmental law, acknowledging the critical interplay between investment activity and environmental stewardship (Table 2).

⁴⁹ Finland — Russian Federation BIT (1989) and Russian Federation — USA BIT (1992).

Table 2

STATE	BITs		
	Total	Noticed	Not noticed
Main texts: attention to the international obligations			
Russia	82	3 ⁵⁰	79
Qatar	50	10 ⁵¹	40
Main texts: special attention to the environment and labor rights			
Russia	82	0	82
Qatar	50	2 ⁵²	48

Source: of Russia and Qatar uploaded on the UNCTAD website

BITs of the Russian Federation and Qatar have demonstrated notable shortcomings in their implementation as outlined in the main text. Investors must possess a comprehensive understanding of the marine investment protection framework due to the fragmented nature of the applicable regulations. On the one hand, numerous BITs, as illustrated in Table 2, fail to address public interests entirely, thereby neglecting an essential component of responsible investment operations. On the other hand, those BITs that do incorporate references to public interests require further examination.

III. BMIT as a Novel Solution

To engage in maritime investment effectively, investors must possess a comprehensive understanding of the multifaceted dimensions inherent to such investments. The primary source of protection for an investor is the investment agreement. A thorough analysis of BITs reveals significant deficiencies regarding maritime investment, particu-

⁵⁰ Russian Federation — United States of America BIT (1992), Korea, Republic of — Russian Federation BIT (1990) and Canada — Russian Federation BIT (1989).

⁵¹ Mongolia — Qatar BIT (2007), Gambia — Qatar BIT (2002), Armenia — Qatar BIT (2002), Qatar — Turkey BIT (2001), Croatia — Qatar BIT (2001), Cuba — Qatar BIT (2001), India — Qatar BIT (1999), Cyprus — Qatar BIT (2008), Ethiopia — Qatar BIT (2017), BLEU — Qatar BIT (2007).

⁵² Ethiopia — Qatar BIT (2017), BLEU — Qatar BIT (2007).

larly in their failure to address critical issues such as the definitions of a maritime investor and investment, various types of maritime investments, and the dual categories of interests that govern these investments. Additionally, the fragmented nature of the existing regulatory framework for maritime investment protection exacerbates these gaps. Current landscape of international law governing maritime investment is characterized by a lack of cohesion and comprehensiveness, particularly in the BITs of the Russian Federation and Qatar. This situation necessitates the establishment of a coherent regulatory system that would bolster investor confidence and ensure more robust engagement in maritime ventures. Maritime investments encompass a wide array of activities, including investments in both renewable and non-renewable resources, living marine resources, offshore mining activities, the establishment of cables and pipelines, and the construction of artificial islands. Consequently, various branches of international law are implicated in these investments, complicating the investor's navigation of pertinent legal frameworks. In this regard, four main legal branches are particularly pertinent: law of the sea, investment law, energy law, and environmental law. Considering the interrelation and complexity of these branches of law, it is not a plain task for investors to get all the related regulations and rules effectively. Thus, the present article indicates that a comprehensive legal framework is necessary to ease investor perception. To tackle the specified deficiencies and to uphold the legal framework in this regard, the current study supports a new or revised version of existing BITs, which we suggest to determine as "Bilateral Maritime Investment Treaties" (BMITs).⁵³ Such agreements would intend to clarify and consolidate the regulations governing investments at sea, in turn filling current gaps and improving a more predictable and stable investment process. Below, the study presents a precise draft for a BMIT. This treaty would be structured into three parts:

1. Part I: Preamble

The preamble to the BMIT highlights the basic objectives concerning investments at sea. It underscores the mutual obligations of the parties to uphold sustainable development through impact-driven in-

⁵³ Of course, since this plan is new, at first this agreement can be presented in the form of a declaration or a political charter, such as the International Energy Charter.

vestments at sea. The preamble should also assert the importance of protecting investments while guaranteeing compliance with international legal system governing activities at sea.

2. Part II: Protective Legal Framework for Investments and Investors

This part illustrates the rules and regulations which protect investments in the maritime investment process. It includes regulations absent in existing BITs, containing:

- In-depth Determination of Maritime realms: A comprehensive framework that precisely categorizes and defines different maritime areas, including internal waters, territorial sea, EEZ, and continental shelf, according to UNCLOS.

- Description of Maritime Investment and investor: precise and clear definitions of a “maritime investment” and “maritime investor” are needed, considering the framework within which investors may act.

- To consider the types of investments at sea, a precise classification of investments should be offered, incorporating operations like renewable energy generation, offshore mining, fishing and the installment of maritime facilities like ports and artificial islands.

- Coastal States’ rights in maritime zones: an illumination of the coastal States’ rights over their maritime areas should be given, as considered by UNCLOS, guaranteeing compliance with the international standards while determining the authority of coastal States.

3. Part III: Rules and Principles Governing Public Interests in Maritime Zones

The last part deals with the regulations and principles determined to preserve public interests of the seas and oceans. This part relies on the provisions utilized by UNCLOS, investment agreements, energy agreements, and marine environmental treaties. It contains the following main aspects.

- Ecological preservation: it requires to establishment of frameworks that improve exact operations to protect marine biodiversity while easing investment operations.

- Public interests in maritime zones: they necessitate the affirmation of third States’ rights in maritime zones, focusing on the significance of cooperative management and respect for law of the sea.

— Coastal States' duties: it requires clear wording concerning the coastal States' obligation towards the rights of third States in maritime areas, containing responsibilities pertinent to the freedoms governing the high seas and the Seabed Authority. It encompasses obligations to reinforce principles of sustainability, accessibility and fair treatment in the exploration and exploitation of maritime resources.

III.1. Preamble to a BMIT

The preamble to a BMIT should focus on the dual goals of improving maritime investment while preserving the environment and public interests. Toward this aim, we present the preamble as follows:

The Member States to the BMIT:

1. Considering the importance of reinforcing economic cooperation to increase the benefits originated from maritime operations for the member States;
2. Given that investments at sea are essential for upholding global cooperations in tackling existing challenges concerning maritime investments at various levels including national, regional, and global;
3. Obligated to using their economic and financial resources to ease investment processes in maritime zones;
4. Trying to establish and preserve conducive conditions for investors of the contracting parties to act in each other's maritime realms;
5. Considering the need to support and encourage the investments of maritime investors of the contracting parties in each other's maritime jurisdictions;
6. Considering the principles incorporated within the Charter of the United Nation, as well as the regulations used by agreements governing investments at sea, containing documents presented by different international and regional conferences in this regard;
7. Affirming each State's sovereignty over its maritime resources;
8. Acknowledging the coastal States' rights to make domestic regulations governing maritime investments, based on their international responsibilities;
9. Recognizing the challenges of investments at sea and their potential disagreements with public interests, especially concerning the ecological protection;

10. Upholding the principles of cooperation and sustainable development in the context of maritime investments;

11. Striving to maintain a balance between policies promoting the exploitation of marine resources and those governing public and environmental interests;

12. Focusing on the reciprocal benefits to the states and the public interests of society, which are recognized as the “common heritage of humankind”

Hereby agree as follows:⁵⁴

III.2. Main Text of the Bilateral Maritime Investment Treaty

III.2.1. Investment and Investor Protection

Here, only the issues that do not exist in the current BITs of Qatar and Russian Federation and are related to maritime investment are raised.

1. Terminology

We describe three terms relevant to maritime investment, including: 1. definition and types of maritime investments, 2. the definition of maritime investor, 3. the exact scope of maritime areas.

1.1. Definition and Types of Maritime Investments

The term “maritime investment” refers to any property investment made by an investor from a contracting State engaged in marine economic activities within maritime areas, whether inside or outside the jurisdiction of the State. This definition encompasses investments that are governed by the laws and regulations of another contracting state that is recognized as a coastal State, as well as those that adhere to the

⁵⁴ This preamble is the result of the review of 132 preambles of the BITs of Qatar and Russian Federation, and then the issues considered in the present article are included in accordance with the investor’s interests and public interests and the environment in general. See, *Bilateral Investment Treaties of Qatar*, International Investment Agreements Navigator, UNCTAD. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/171/qatar> [Accessed 28.09.2025]. See also *Bilateral Investment Treaties of the Russian Federation*, International Investment Agreements Navigator, UNCTAD. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation> [Accessed 28.09.2025].

legal framework applicable to the high seas in areas beyond national jurisdiction. Furthermore, maritime investments are categorized based on the prevailing legal freedoms governing activities in the high seas (Abadikhah and Nigmatullin, 2024).

“Types of marine investment” include: 1. Investment in non-renewable marine energies, including oil and gas, 2. investment in renewable energies, including wind, wave and solar energy, 3. investment in exploitation of living resources, including fish and other biological diversity, 4. Investment in the construction of artificial islands for use in energy production or platforms used for fishing or living and recreation, 5. investment in the installation of pipelines and cables, 6. investment in marine mining. It is necessary to specify the exact concepts of marine investment types under the BMIT (Abadikhah and Nigmatullin, 2024, p. 81).

1.2. The Definition of a Maritime Investor

“Maritime investor” refers to a natural person or legal entity from the contracting States that has made an investment in the maritime zones under the jurisdiction of another State, or in maritime zones beyond the jurisdiction of both States. Such investments are guided by the types of maritime investment recognized under UNCLOS and must adhere to the rights and obligations established for States therein. Additionally, it is essential that these investments maintain a balance among public interests, environmental considerations, and the interests of the investors (Abadikhah and Nigmatullin, 2024, p. 76).

1.3. The Exact Scope of Maritime Zones

The consideration of maritime zones within the framework of the BMIT is deemed a fundamental pillar. Accordingly, the term “maritime zones” is defined as follows.

“Maritime zones” refer to areas of the sea that fall either within or outside the sovereignty or jurisdiction of the contracting States. UNCLOS classifies these areas into eight distinct zones: Internal Waters, Archipelagic Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone, Continental Shelf, High Seas, and the Area. According to the principles outlined in the law of the sea, contracting States may exercise sovereign rights and jurisdiction within the zones that are under

their authority. In contrast, for areas that lie outside the jurisdiction of States, the relevant legal regime established by UNCLOS shall apply.

2. Investors' Rights in Maritime Areas

— *Internal waters*: according to UNCLOS, States possess absolute sovereignty over marine resources within their internal waters.⁵⁵ This sovereignty allows States to exploit their own resources in these areas or to grant licenses for exploitation to third parties wishing to invest in the marine environment. However, it is imperative that, despite this absolute sovereignty, governments refrain from utilizing these regions in ways that could harm the interests of the international community or the integrity of the global environment.

— *Archipelagic waters*: according to UNCLOS, there is the innocent passage right within archipelagic waters, which contains the duty to observe installed submarine cables of other states, as well as respecting the traditional fishing rights of third States.⁵⁶ Consequently, any investment activities within these waters must be conducted in alignment with these public interests, while also ensuring the protection of the environment.

— *Territorial sea*: Contracting parties in this zone also exercise sovereignty and can undertake investments similar to those conducted in internal waters. However, given that the right of innocent passage prevails in this part, States are obligated to respect this public right in accordance with UNCLOS.⁵⁷ Furthermore, it is essential that any investment related to drilling and exploitation within the zone does not adversely impact the international environment or the public interests of the international community like navigation.

— *Exclusive Economic Zone*: According to UNCLOS, States within this area are entitled to freedoms of flight, navigation, and the installation of submarine pipelines and cables, as well as other global legal activities pertinent to these freedoms.⁵⁸ States operating within a coastal State's zone are required to exercise these freedoms while respect-

⁵⁵ As established in the 1958 Convention on the Territorial Sea, Art. 5(1), and in the 1982 UNCLOS, Art. 8.

⁵⁶ UNCLOS, Art. 46 and 51.

⁵⁷ UNCLOS, Art. 2(1).

⁵⁸ UNCLOS, Art. 55.

ing the rights and responsibilities of the coastal States (Patuzi, 2015, p. 150). In light of the rights that pertain to this zone, several important considerations must be observed. First, investments made by contracting States, which are also coastal States, in this zone — whether on the continental shelf, in fisheries, or for the construction of artificial islands — must not disrupt the freedom of navigation and flight, nor the investments of third States that have established pipelines or submarine cables in other regions. Second, given the exclusive right to invest in this zone, contracting States may grant such rights to investors from third countries. In accordance with the licenses obtained, these investors are required to fulfill their obligations and responsibilities towards the coastal States, as well as to uphold the rights of third States within the zone, as stipulated by UNCLOS.

— *Continental shelf*: Contracting States possess the exclusive right to issue drilling and investment permits within their continental shelves. However, this right must be exercised in compliance with regulations aimed at preventing, reducing, and controlling marine environmental pollution resulting from seabed activities. Furthermore, investments in this zone should not be conducted in a manner that obstructs the public interests of governments in utilizing the waters situated above this zone.⁵⁹

— *High sea*: Contracting States engaged in the exploitation of the high seas and oceans must act in accordance with the nature of maritime investments (Abadikhah and Nigmatullin, 2024). First, investments in non-renewable energy resources in the area require contracting States to obtain the necessary permits from the Seabed Authority before commencing exploitation, as stipulated by UNCLOS. Second, investments in other types of maritime activities under UNCLOS do not necessitate a special license from a specific authority or institution. However, it is essential that these investments align with the protection of public interests, which include maintaining public order at sea, ensuring freedom of navigation, and safeguarding the marine environment and biodiversity within that zone.⁶⁰

⁵⁹ The waters located above this zone are called contiguous zone or exclusive economic zone.

⁶⁰ UNCLOS, 1982, Art. 86.

III.2.2. Preserving Marine Environment and Public Interests

Contracting States should apply this part in two different categories: first, the maritime public interests in general and second, the marine environment.

1. Public interests

It is essential to analyze the third States' rights in maritime zones. For example, investors need to be mindful of traditional fishing rights or the right of innocent passage in archipelagic waters which belongs to third States. In addition, investors must know that third States have the innocent passage right within the territorial sea. Moreover, it is vital for investors to know about the rights of third States within the EEZ. Hence, the member States to the BMIT should fully illuminate all the third States' rights in maritime zones to guarantee compliance and clarity.

Furthermore, as indicated in a limited number of BITs involving Qatar and the Russian Federation, there is a need to comply with other international obligations (Abadikhah and Nigmatullin, 2024). Such provisions should also be incorporated into the BMIT. Specifically, the BMIT should explicitly outline additional international obligations pertinent to maritime investment, including the law of the sea, environmental law, and energy law, and require contracting States to operate in accordance with these international obligations.⁶¹

2. Marine environment

Out of the 132 BITs involving the Russian Federation and Qatar, only two Qatari agreements specifically reference environmental considerations and mandate that contracting States protect and preserve the environment. These agreements can serve as model frameworks for the BMIT. In other words, the negotiating States should clearly articulate the environmental principles and regulations pertinent to invest-

⁶¹ For example, in accordance with the Russian Federation — United States of America BIT, “this treaty shall not derogate from... international obligations...” (17.06.1992). Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2862/russian-federation---united-states-of-america-bit-1992-> [Accessed 25.06.2025].

ment within the BMIT to ensure that investors are adequately informed. Such principles may include cooperation and the sustainable use and development of resources. It is evident that the environment represents one of the most significant public interests and should be addressed explicitly. Additionally, it is essential to separately outline all marine environmental aspects related to investment in marine zones within the treaty.

IV. Conclusion

The system governing maritime investment protection is inherently complex due to the incorporation of two sets of often conflicting interests and regulations. While this system aims to safeguard investors' interests, it also seeks to preserve and promote public benefits at sea. Consequently, a successful maritime investment must consider both sets of interests; otherwise, it may encounter significant challenges. For example, if an investor decides to invest in the territorial sea, it is important to know about the innocent passage right in this area, acknowledging that their investment does not hinder this right. In addition, investors need to know that traditional fishing rights incorporated within archipelagic waters; hence, any fishing investment in this zone should observe such rights. Moreover, investors need to guarantee that their operations do not damage the maritime environment. Notably, among the 132 Bilateral Investment Treaties (BITs) of the Russian Federation and Qatar, only 13 agreements have explicitly addressed public interests and environmental concerns, either generally or specifically.

Furthermore, various branches of public international law should be integrated into the maritime investment protection system, including investment law, the law of the sea, environmental law, and energy law. It is evident that, to facilitate favorable investments, all these branches must be considered as interconnected elements, akin to links in a chain. However, the BITs of the Russian Federation and Qatar fail to acknowledge these interconnected links, both in the main provisions and in the preamble. As a result, the existing gaps in the BITs, coupled with the lack of attention to the regulatory framework governing mari-

time investment, necessitate the development of a new type of agreement: the Bilateral Maritime Investment Treaties (BMIT). The primary objective of the BMIT is to establish a coherent system for the protection of maritime investments. Currently, existing investment protections are both general in nature and insufficiently detailed regarding maritime investments. Moreover, they do not adequately account for the public interests associated with the seas and the marine environment, as outlined in the United Nations Convention on the Law of the Sea. Thus, the BMIT presents a new solution that intends to fill the gaps and establish a cohesive system of principles and regulations governing investments at sea.

The BMIT must be organized into three key parts. The first part, as a preamble, would illuminate the specific goals behind investment in maritime zones and the rationale for concluding the BMIT. The second part designates a set of protective regulations governing the investors' rights and their investments in the maritime investment protection system. This section includes provisions that are presently absent from current BITs. Vital regulations in this part include: 1. an in-depth illumination of maritime area; 2. a clear definition of maritime investments and investor; 3. a precise categorization of investments at sea; and 4. coastal States' rights in maritime zones, based on the UNCLOS. The third part deals with the rules and principles pertinent to ecological protection and the preservation of public interests within maritime realms. This segment would draw upon regulations found in investment agreements, UNCLOS, energy law treaties, and agreements related to the maritime environment. It is imperative that this section encompasses environmental protection efforts and public interests governing maritime zones, which include the rights of third States in these areas, as well as the obligations of coastal States concerning third States' rights, the responsibilities of coastal States regarding the Seabed Authority, and the freedoms currently enjoyed on the high seas. Undoubtedly, the BMIT, as a coherent framework, has the potential to significantly aid investors by clarifying all facets of maritime investment within a comprehensive and singular text.

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International Commercial Arbitration and Over-the-Counter Derivatives

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Abstract: Derivatives are complex financial contracts widely used in today's securities and commodities markets. Alongside promising speculative gains, they allow exporters, importers, lenders, borrowers and other commercial actors to hedge a range of risks they face in the course of their day-to-day operations. Equally, international commercial arbitration has become a preferred method of dispute resolution among legal entities and businessmen involved in international trade and commerce. Although being present in on-exchange rules of derivatives trading, arbitration clauses have been in fact neglected by derivative traders for decades. The article argues that this tendency has changed. Derivative traders embraced arbitration to resolve the disputes taking place in the interbank market as well as those occurring between traders and their clients. To justify that claim, the article considers recommendations published by International Swaps and Derivatives Association (ISDA), a private industry organization and a driving force in derivative markets. In addition to harmonization instruments published by ISDA, we also pay attention to standard master agreements proposed by European Banking Federation (EBF). The paper dwells upon a variety of arbitration clauses promoted by ISDA and EBF to maintain that arbitration currently has matched the status that litigation had over the years. The paper also considers the sanctions-related aspects of dispute resolution domain. It argues that arbitration will remain preferred method of dispute resolution despite the introduction of massive sanctions against the Russian Federation.

Keywords: Arbitration; Derivatives; ISDA; New York Convention; Dispute Resolution; Financial Contracts; Arbitration Clauses

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Contents

I. Introduction	392
II. International Commercial Arbitration and the Arbitrability of Financial Contracts	394
II.1. Arbitration: a Brief Landscape	394
II.2. Arbitrability of Derivative Contracts	398
III. Arbitration in Derivatives Disputes. On-Exchange and Over-the-Counter Transactions	402
III.1. Arbitration in On-Exchange Contracts	402
III.2. Privately Negotiated Transactions: Litigation Instead of Arbitration ...	405
IV. Movement towards Arbitration in International OTC Markets	409
IV.1. Arbitrating Disputes over OTC Derivatives and ISDA Arbitration Guides	409
IV.2. European Master Agreement: a Balanced Approach	413
V. Arbitrating Derivatives Disputes Involving Russian Counterparties in the Era of Unilateral Sanctions	416
V.1. Is There a Place for Arbitration for Russian Counterparties in OTC Derivatives Market	416
V.2. NAFMII Master Agreement as a Comprehensive Solution	420
VI. Conclusion	422
References	423

I. Introduction

According to the data published by the Bank of International Settlements, the volume of trading in derivatives¹ currently is comparable to the aggregate economic product of all nations.² The popularity of these complex financial products is quite easy to explain as they pro-

¹ Within this article we will use the terms “derivative,” “derivative financial product,” “derivative financial instrument,” “derivative trade” and “derivative contract” interchangeably.

² BIS OTC Derivatives Statistics. Available at: https://data.bis.org/topics/OTC_DER/tables-and-dashboards/BIS,DER_D7,1.0 [Accessed 20.07.2025].

vide an exceptionally wide range of opportunities for managing various kinds of business risk. Therefore, derivatives are used financial institutions, governments, commercial companies and international organizations alike. On many occasions these instruments are traded between entities from different countries thus adding a cross-border element to a business relationship between the parties. In contrast to exchange-traded derivatives privately negotiated (over-the-counter, OTC) derivative contracts offer tailored-made solutions to the needs of the parties to those contracts. OTC derivatives gained a lot of attention following a major financial crisis that devastated world economy in 2007–2008. The main emphasis of the post-crisis debate surrounding derivatives was made on poor regulation of OTC markets in preceding years. International community focused on possible regulatory responses to the challenges posed by these complex financial instruments.

ISDA Master Agreement, a standard contractual instrument governing the majority of derivatives globally, came under scrutiny. It appeared that the said framework agreement contained forum selection clauses submitting all future disputes to state courts in England and New York depending the governing law of the contract. Not surprisingly, international lawyers raised eyebrows over the lack of alternative method of dispute resolution associated with OTC derivative contracts. Subsequent doctrinal analysis revealed that many financial institutions generally preferred state courts over arbitration. Witnessing the growing European Master Agreement for international commercial arbitration in OTC derivatives sector, International Swaps and Derivatives Association (ISDA) responded with several soft law instruments in 2013 and 2018. According to some observers, these developments were expected to put international commercial arbitration in the forefront of dispute settlement in the financial industry.

In the present article we are trying to find out whether this is really the case in contemporary OTC derivatives markets. Confidentiality, known as one of the main advantages of international commercial arbitration, prevents us from referring to substantial number of arbitral awards issued by arbitration tribunals. Hence, we will address standard master agreements published by professional associations to evaluate the success of the pro-arbitration movement in international financial

markets. In particular, we will refer to model contracts developed by European and Chinese industry associations and published in a post-crisis era as they contain relevant arbitration clauses. To the same extent, ISDA guidance on the use of arbitration agreements will make an invaluable contribution to our research. In addition to these sources, we will quote trading rules of leading derivatives exchanges in both in Russia and abroad. The latter will allow us to illustrate historically existing prevalence of arbitration in organized derivatives trading in contrast to OTC markets. The article will also provide a practical-oriented guidance on arbitration in the derivatives market amidst Western sanctions introduced in respect of Russian corporations, individuals and financial institutions.

II. International Commercial Arbitration and the Arbitrability of Financial Contracts

II.1. Arbitration: a Brief Landscape

It is a matter of common knowledge that commercial relations have long become global. Venturing into foreign markets, entrepreneurs and legal entities may face conflicts and disagreements with their overseas business partners. Disputes may stem from cultural differences, discrepancies in applicable law, insolvency, general inability to perform obligations, political and sovereign risk events as well as from many other reasons. Irrespectively of the grounds for a particular dispute, continuing globalization requires commercial entities and entrepreneurs to seek dispute resolution opportunities addressing their needs. Proper mechanisms of cross-border dispute resolution should be able to mitigate the risks associated with international trade and investment. Due to various reasons, national courts do not always meet these expectations. Whenever an international counterparty proceeds to trial in state courts, it faces lengthy and costly court proceedings that often give its opponent a so-called home advantage. As domestic and foreign litigation has many disadvantages in the eyes of international business community, alternative methods of dispute resolutions arise.

Businessmen, legislators, regulators and legal scholars see international commercial arbitration as a decent alternative to state courts. The pre-requisite and the cornerstone of international commercial arbitration is a mutual written agreement of the parties. Existing in a form of a submission agreement or an arbitration clause in an international commercial contract, the arbitration agreement is commonly regarded as an instrument submitting an existing or a future dispute to arbitration. Submission agreement is made on a stand-alone basis and addresses a current dispute. However, more often an arbitration clause is incorporated into a contract at the outset of a commercial relationship of the parties. Irrespective of the drafting approach, in contrast to litigation arbitration is always consensual.³ Thus, mutual consent serves as a cornerstone of international arbitration. Therefore, it is crucial to have a valid and enforceable arbitration agreement in place.

Generally, international commercial arbitration operates as a “private dispute resolution system outside of national courts” (Moses, 2008, p. 39). The term “international commercial arbitration” has multiple meanings. It may relate to a field of law, a legal science studying international dispute resolution, a method of dispute settlement or an arbitral tribunal. The latter consists of a sole arbitrator or a panel of arbitrators, normally three. Although disputes may be resolved through ad hoc arbitration, international commercial arbitration is currently dominated by permanent arbitration institutions. These entities do not resolve a dispute *per se*. Rather arbitration institutions administer them by applying their own arbitration rules that are incorporated into international commercial contracts by reference.

London Court of International Arbitration Court (LCIA) and the International Chamber of Commerce (ICC) International Court of Arbitration headquartered in Paris are the most well-known arbitration institutions in Europe while Singapore International Arbitration Centre

³ However, international investment arbitration is based on an international convention or bilateral investment treaty. Therefore, foreign investors may seek compensation for their investments in absence of an arbitration clause present in a commercial contract concluded with a foreign State. Sometimes investment disputes are related to derivatives trading. See, e.g., ICSID. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*. Case No. ARB/09/2. Available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/09/2> [Accessed 20.07.2025].

(SIAC) and Hong Kong International Arbitration Center (HKIAC) play a major role in Asia. As a result of a large-scale arbitration reform implemented in the Russian Federation, international commercial disputes in Russia may be administered by several licensed permanent arbitration institutions including, *inter alia*, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) and Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (the RSPP Arbitration Centre).⁴

Nowadays, international commercial arbitration is regulated by a complex set of rules embedded in a handful of international treaties, statutes, and to a certain extent, soft law instruments. The 1923 Geneva Protocol⁵ and the 1927 Geneva Convention⁶ became the first international instruments pertaining to international commercial arbitration. Their adoption was an important step towards developing a robust legal framework regarding alternative dispute resolution. However, legal landscape of international commercial arbitration began to take shape after the World War II. The adoption of the famous New York Convention⁷ in 1958 became a real game changer in this field. This treaty enjoyed a major international success and massively contributed to spreading international commercial arbitration across the globe. Thanks to the New York Convention, an arbitral award made by an arbitral tribunal is enforceable in 172 countries, subject to limited exceptions.⁸ Apart from the New York Convention, international arbi-

⁴ Russian arbitration law reform. Alrud Newsletter dated 5 February 2019. Available at: <https://alrud.com/publications/5d4179155413e153ca2e870a> [Accessed 20.07.2025].

⁵ Protocol on Arbitration Clauses done at Geneva, 24 September 1923. Available at: https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=555&chapter=30&clang=_en [Accessed 20.07.2025].

⁶ Convention on the Execution of Foreign Arbitral Awards Signed at Geneva, 26 September 1927. Available at: https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/ [Accessed 20.07.2025].

⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). Available at: <https://www.newyorkconvention.org/english> [Accessed 20.07.2025].

⁸ Contracting States to the New York Convention. Available at: <https://www.newyorkconvention.org/contracting-states> [Accessed 20.07.2025].

tration relies on several other treaties of regional nature such as the European Convention on International Commercial Arbitration⁹ and Inter-American Convention on International Commercial Arbitration.¹⁰

In addition to international treaties, most countries have implemented their domestic laws on international commercial arbitration. Such laws operate either on a stand-alone basis or as a set of rules embedded into a larger statute generally governing commercial dispute resolution. Those legal rules are frequently based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law).¹¹ Adopted in 1985 and subsequently updated in 2006, this model act was designed to assist legislators in modernizing their local laws and regulations to meet the growing need for arbitration of cross-border disputes. Promoting pro-arbitration approach among national states, it covers all facets of arbitration process including the conclusion of arbitration agreement, composition of the tribunal and the degree of state intervention into the arbitral proceedings.

Although UNCITRAL Model Law is in high demand with lawmakers, some countries opt for developing their domestic laws on arbitration on an independent basis. England and Wales, a popular jurisdiction for international dispute resolution, provide such an example. The Arbitration Act governing domestic and international arbitration in several parts of the United Kingdom with the exception of Scotland was introduced in 1996 and amended in 2025.¹² In contrast to England and Wales, Russia as well as other former Soviet republics enacted their

⁹ European Convention on International Commercial Arbitration. Geneva, 21 April 1961. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en [Accessed 20.07.2025].

¹⁰ Inter-American Convention on International Commercial Arbitration. Concluded at Panama City on 30 January 1975. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf> [Accessed 20.07.2025].

¹¹ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [Accessed 20.07.2025].

¹² Arbitration Act 1996. Available at: <https://www.legislation.gov.uk/ukpga/1996/23/contents> [Accessed 20.07.2025].

II.2. Arbitrability of Derivative Contracts

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“Derivative” or “derivative financial instrument” is a generic term for a variety of commercial contracts in international financial markets. According to Practical Law Glossary, derivatives are bilateral contracts having two distinctive features.¹⁸ Firstly, their value depends on something else and secondly, they have a delayed performance date. These two essential traits of derivatives are widely shared among scholars and practitioners alike. J. Braithwaite noted that the value of a derivative is dependent on the price of a reference asset such as an underlying rate, commodity or index (Braithwaite, 2021, p. 14). J. Benjamin argues that in most cases, performance of a derivative contract takes place significantly after the date of the contract (Benjamin, 2007, p. 65). The list of derivatives contracts features futures, options, forwards, swaps as well as other analogous instruments (Wood, 1995, p. 207).

The main reason prompting commercial entities and financial institutions to enter into derivatives is market volatility. The fluctuations of exchange and currency rates, the prices of shares and commodities are omnipresent in the world economy (Golden and Lamm, 2016, p. 82). Speculators take advantage of price and rate movements gaining profits whenever the volatility in an underlying asset matches speculator’s expectations. In other words, they make a bet over the behavior of the underlying asset (Ramos-Muñoz, 2025). However, derivatives are most often used to hedge existing risks rather than to venture into risky speculative business. M.F. Rodríguez, a Spanish scholar, provides an example of such a trade (Rodríguez, 2015, p. 132). A citrus producer from Spain is exporting his products to USA which leads to currency rate exposure. The exporter may hedge against currency exchange risk through a foreign currency forward contract, the most basic type of a derivative. To conclude such a forward contract, Spanish farmer may approach a foreign or domestic derivatives trader and make a hedging derivative transaction thus transferring the currency risk to its counterparty.

¹⁸ Thompson Reuters Practical Law Glossary. Available at: [https://ca.practicallaw.thomsonreuters.com/9-107-6730?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&ppcid=ec2d6b0a1e0542f3aae2b87d27bbafac&firstPage=true](https://ca.practicallaw.thomsonreuters.com/9-107-6730?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=ec2d6b0a1e0542f3aae2b87d27bbafac&firstPage=true) [Accessed 20.07.2025].

Thus, derivative financial instruments often underpin international commercial operations as parties to many business contracts reach out to derivative traders with a view to reduce the risks associated with their export and import contracts as well as foreign investments they make. Commercial character of hedging instruments arises from the corresponding commercial nature of the underlying business transactions. In absence of hedging, commercial purpose of derivatives is determined by speculative motivation of risk-takers using financial instruments for generating profits. Therefore, we may describe derivatives as long-term commercial contracts with a value determined by an underlying asset such as an index, a currency exchange rate or an interest rate. These contracts are entered into with a view to transfer existing risks or to make a bet on the movement of the underlying asset.

In contrast to domestic arbitration, international commercial arbitration is focused on resolving cross-border disputes. Therefore, in addition to proving the arbitrability of derivatives, we must be able to provide examples of their cross-border nature. To address the international element of a derivative contract, Golden and Lamm refer to a hypothetical negotiation of a derivative trade between a trader residing in Hong Kong while being hired by a Swiss bank. The negotiations take place to hedge a commodity or weather risk of a Chinese investment made in Africa (Golden and Lamm, 2015, p. 11). Although purely imaginable, this case illustrates the transnational and globalized nature of many derivative transactions.

Cross-border character of derivatives is supported by the international reach of ISDA, the leading market association and the developer of model contracts for the industry. Its impressive members list features hundreds of institutions from multiple jurisdictions.¹⁹ ISDA had an international focus from the outset. When this association was set up in 1985, it simultaneously retained law firms from London and New York to understand how to proceed (Borowicz, 2015, p. 50). Subsequently, it published a standard contract covering transnational derivative trans-

¹⁹ ISDA Members. Available at: <https://www.isda.org/membership/isda-members/> [Accessed 20.07.2025].

actions in 1992.²⁰ It may alternatively be governed by English or the state of New York law as its users may see fit. This model agreement and other contractual instruments drafted by ISDA currently govern the majority of privately negotiated derivatives worldwide.

On top of that, cross-border nature of many financial transactions is evidenced by case law.²¹ The most famous derivative dispute under English law arose in the beginning of the 1990s over capacity issues when a London borough entered into a number of swap transactions with a domestic investment bank.²² Nowadays, the litigants in derivative court cases often come from different jurisdictions. To support this statement, we may refer to a dispute between (i) a German bank and English municipal body over swap transactions,²³ (ii) Italian company and a German branch of an English bank,²⁴ (iii) a Polish company and a French bank,²⁵ (iv) a company from Sri Lanka and a major international bank incorporated in England,²⁶ (v) a German bank and an English company.²⁷

²⁰ Master Agreement (Multicurrency — Cross Border). Available at: <https://www.sc.com/en/uploads/sites/66/content/docs/1992-ISDA-Master-Agreement.pdf> [Accessed 20.07.2025].

²¹ LexisNexis summarized the key topics in derivatives litigation. The list includes capacity, legal nature of swaps, wagering and gaming, constructing standard agreements, payments and close-out amounts, disputes on jurisdiction, mis-selling and interest rates manipulation as well taxation and regulatory issues. Numerous disputes out of derivative contracts are of international nature as the parties to disputed transactions are domiciled in different jurisdictions. Derivatives — key cases. Published by a LexisNexis Banking & Finance expert. Available at: <https://www.lexisnexis.co.uk/legal/guidance/resolving-derivatives-disputes-key-cases> [Accessed 20.07.2025].

²² United Kingdom House of Lords. *Hazell v. Hammersmith and Fulham LBC* [1992] 2 AC 1.

²³ United Kingdom House of Lords. *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] UKHL 12.

²⁴ England and Wales High Court (Commercial Court). *Deutsche Bank AG London v. Comune di Busto Arsizio* [2021] EWHC 2706 (Comm).

²⁵ England and Wales High Court (Commercial Court). *Calyon v. Wytownia Sprzetu Komunikacyjnego PZL Swidnik SA* [2009] EWHC 1914 (Comm).

²⁶ England and Wales High Court (Commercial Court). *Standard Chartered Bank v. Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (11 July 2011).

²⁷ England and Wales High Court (Commercial Court). *MHB-Bank AG v. Shanpark Ltd* [2015] EWHC 408 (Comm).

III. Arbitration in Derivatives Disputes. On-Exchange and Over-the-Counter Transactions

III.1. Arbitration in On-Exchange Contracts

Thus, many derivative contracts feature a foreign element represented by the countries where the parties to them are incorporated. Arbitrability of disputes over derivatives and cross-border nature of those contracts provide a valid case for international commercial arbitration as a means of dispute resolution in derivative markets. To ascertain whether arbitration is a traditional method of settling disputes and other differences existing in derivatives trading, we shall divide the overall market of derivatives in two separate markets depending on the trading venue. First, we shall take a look organized trading in derivatives. Among professionals these are known as exchange traded derivatives. These financial instruments are mainly represented by futures and options. Their volumes, underlying assets and maturities are imposed by the exchange where they are traded. Moreover, the manner in which these contracts are settled is based on the clearing rules set out by a clearing house servicing the exchange.

On-exchange derivatives have quite a long history. Dojima Rice Exchange was founded in Osaka, Japan, as early as in 1697.²⁸ Given the enormous role that rice played in the Japanese economy, this exchange allowed the buyers to purchase rice at a fixed price ahead of time, thus facilitating futures trading. Another example of early derivative's trading is the 17th century Holland where tulip futures were traded during the notorious Tulip Mania (James, 1999, p. 1). In contrast to futures, options are more complicated financial instruments with an asymmetrical risk structure. The first options exchange, Chicago Board of Exchange (CBOE),²⁹ was set up in the United States in the 20th century. Tradi-

²⁸ Dojima Rice Exchange: What It is, How it Works, Example. Available at: <https://www.investopedia.com/terms/d/dojima-rice-exchange.asp> [Accessed 20.07.2025].

²⁹ The Creation of Listed Options at Cboe. 1 March 2024. Available at: https://www.cboe.com/insights/posts/the-creation-of-listed-options-at-cboe/?_gl=1*_jolid5*_up*_MQ..*_ga*MTY4OTYzNTUyMy4xNzQzNzQwNzA5*_ga_5Q99WB9X71*MTcoMzcoMDcwNy4xLjAuMTcoMzcoMDcwNy4wLjAuMA [Accessed 20.07.2025].

tionally, derivatives trading on the leading exchanges throughout the world involved commodities and securities such as bonds and shares. However, today's on-exchange derivatives trading proves to be highly innovative, especially in terms of its underlying assets. For instance, EUREX exchange launched trading in crypto derivatives to meet the growing need for hedging the risks existing in crypto markets.³⁰

Irrespectively of the underlying assets available, each exchange adopts its own set of trading rules applicable to all transactions of its participants. To resolve potential disputes between traders, exchange rules contain dispute resolution provisions. That said, members of securities and commodities exchanges have always been capable of resolving disputes on their own without any involvement of third parties and the State. In most cases on-exchange disputes were settled through arbitration. K.P. Berger maintains that alternative dispute resolution in stock exchanges is one of the oldest forms of arbitration (Berger, 2009, p. 54). For instance, London Securities Exchange (LSE) in England has always used arbitration clauses instead of litigation.³¹ Moreover, these opportunities for alternative dispute resolution greatly contributed to the popularity of LSE among traders and other businessmen (Weidemaier, 2019, p. 195). CBOE rules set out detailed provisions regarding arbitration for dispute resolution. To the contrary, the rules of Euronext, a highly innovative trading organizer, contain forum selection clauses. Therefore, disputes pertaining to this exchange will be resolved through litigation. However, these provisions shall not prejudice the arbitration agreements between the parties.³² Therefore, in some cases trading organizers may set default litigation provisions, but the traders may still opt them out by agreeing a bilateral arbitration clause.

³⁰ Eurex adds Ether to its crypto derivatives suite. 18 July 2024. Available at: <https://www.eurex.com/ex-en/find/news-center/news/Eurex-adds-Ether-to-its-crypto-derivatives-suite-4033676> [Accessed 20.07.2025].

³¹ Law, Lawyers, and Self Governance During the Heyday of the London Stock Exchange. Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4932&context=lcp> [Accessed 20.07.2025].

³² Euronext Rule Book. Book I: Harmonised Rules. Available at: https://www.euronext.com/sites/default/files/2020-11/Harmonised%20rulebook_EN.pdf [Accessed 20.07.2025].

The Moscow Exchange, the leading exchange for derivatives in Russia, offers a wide variety of derivative instruments as well. According to its trading rules, derivative products supported by the Moscow Exchange include options, futures and swaps with various underlying assets such as securities and foreign currencies. As opposed to privately negotiated derivatives traded within Russia, these instruments are standardized through the introduction of contractual specifications for each type of derivative product admitted to trading. Trading and clearing rules pertaining to these instruments contain arbitration clauses. For instance, Derivative Rules of the Moscow Exchange require that all disputes are referred to RSPP Arbitration Centre:

“2.12. Any dispute related to entering into, execution, and termination of Derivatives Contracts, use of SES³³ and access to Trading shall only be referred to the Arbitration Panel after every effort to resolve such dispute in an amicable way has been made. In case of full or partial refusal to satisfy a claim, or if no reply is received within seven (7) days after the claim was served, the claimant shall have the right to bring suit into the Arbitration Panel.

2.13. All civil legal disputes and disagreements arising from operations on the Moscow Exchange Derivatives Market, including those relating to executing, exercising, and terminating Derivative Contracts, and to the use of SES in accordance with these Rules, are to be considered and settled by the Arbitration Panel subject to Arbitration Procedures then in effect.

2.14. Any decision of the Arbitration Panel shall be final and binding. A decision of the Arbitration Panel that any party has failed to comply in a good faith manner, shall be enforced in accordance with the laws of the Russian Federation, or the laws of the jurisdiction where the enforcement takes place, or international treaties.”³⁴

RSPP Arbitration Centre is a legal successor of another arbitration institution, the Arbitration Commission of the National Association of Securities Market Participants (NAUFOR). In line with the Russian legislation on arbitration, RSPP Arbitration Centre is functioning under

³³ Simple Electronic Signature.

³⁴ Derivatives rules. Available at: <https://fs.moex.com/files/4989> [Accessed 20.07.2025].

the auspices of the Russian Union of Industrialists and Entrepreneurs (RSPP), a non-political non-governmental organization established in 1990 to promote the interests of Russian businessmen.³⁵ ICAC, the oldest international arbitration institution in Russia, is also capable of resolving disputes over derivatives. In 2001 it issued an arbitral award in relation to a dispute over an index forward transaction, a derivative contract that did not involve the actual delivery of an underlying asset.³⁶ As a result, ICAC treated the said contractual arrangement as an unenforceable betting transaction in accordance with applicable Russian rules and the practice of state courts that developed following the 1998 domestic financial crisis.

III.2. Privately Negotiated Transactions: Litigation Instead of Arbitration

The rise of OTC derivative trading is closely associated with ISDA whose contracts govern 90 per cent of OTC derivatives trading globally.³⁷ Before entering into derivative trades on a bilateral basis, parties to derivative contracts usually conclude a master agreement published by ISDA. Although 1992 ISDA Master Agreement still was in European Master Agreement with market participants in the 2000s (Muscat, 2009, p. 36), currently derivative traders and their clients will likely prefer the 2002 ISDA Master Agreement,³⁸ the most recent framework contract produced by ISDA. This powerful industry association has granted membership to the leading traders in swaps and other derivatives. In contrast to options, forwards and futures, swaps are relatively

³⁵ RSPP Arbitration Centre. Key Facts and Figures. Available at: https://arbitration-rspp.ru/files/other/Arbitration_centre_at_RSPP-Key_Facts_and_Figures_2024.pdf [Accessed 20.07.2025].

³⁶ ICAC Decision dated 21.02.2001, case No. 37/2000 Available at: <https://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=06E317BC6DCEF7E4061782BC64AF7724&mode=searchcard&base=ARB&n=19841&BASENODE=IiIiMSwoLEFSQjAwMiIiLCiMiwyMDMsQVJCQSiIiLCiMiwyLEFSQiIlg&rnd=aS2GA#Pj8B1rUug704UaRp2> [Accessed 20.07.2025].

³⁷ England and Wales Court of Appeal (Civil Division). *Lomas v. JFB Firth Rixson* [2010] EWHC 3372.

³⁸ Available at: <https://www.isda.org/book/2002-isda-master-agreement-mylibrary> [Accessed 20.07.2025].

new development in international financial markets. The first privately negotiated swap transaction took place between the World Bank and IBM (Fradique-Méndez, 2008, p. 6) in 1981. Since then, the markets for swaps and other OTC derivatives have demonstrated an exponential growth. As a result, OTC markets have “dwarfed” exchange trading in derivatives in terms of volume (Braithwaite, 2021, p. 15).

However, self-regulation model proposed by ISDA raised serious concerns following the 2006–2008 global financial crises. Its master agreements and other contractual instruments served as a legal basis for credit-default swaps. A credit-default swap or CDS is a complex financial instrument used for credit risk hedging purposes. These financial instruments played a major role in the development of the crisis. Troubled financial institutions, such as Lehman Brothers investment bank, AIG and Bear Sterns were massively exposed to CDS trading that became toxic at a certain point. Apart from the regulatory narrative in OTC derivatives market, the fall of Lehman Brothers and bail-out of other financial institutions revealed some discrepancies in dispute resolution techniques and prevailing market practice in other industries.

Following the discussion of the aftermath of 2008 financial crisis, K.P. Berger, a well-known legal scholar and international arbitrator, noted that arbitration had been ignored by financial institutions involved in derivatives trading (Berger, 2009, p. 54). He considered this kind of neglect astonishing for two reasons. Firstly, there was a stark contrast to other business industries that viewed arbitration as the preferred means of dispute resolution. Secondly, arbitration clauses were widely spread in on-exchange trading in derivatives, however, OTC markets refused to follow the same pattern. Indeed, we have earlier argued that arbitration is popular with exchanges and their clients until present day. However, it appeared that traders in OTC financial markets showed a strong commitment to national courts. The resolution of derivatives disputes was concentrated in leading Western financial centers such as London and New York.

In line with a dispute resolution clause embedded into 1992 and 2002 ISDA Master Agreements, the parties to derivative transactions should resolve their disputes in the following manner:

“(b) Jurisdiction. With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement (‘Proceedings’), each party irrevocably:

(i) submits:

(1) if this Agreement is expressed to be governed by English law, to (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court; or

(2) if this Agreement is expressed to be governed by the laws of the State of New York, to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City;

(ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and

(iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.”

The said approach was not limited to ISDA as the Foreign Exchange Committee (FXC) adopted the same approach to dispute resolution. FXC is functioning under the auspices of the Federal Reserve Bank of New York.³⁹ Since the beginning of the 90s FXC has been publishing a set of standard documentation to unify contractual practice pertaining to foreign currency derivatives, mainly forwards and options. The latest FXC model contract, International Foreign Exchange and Currency Option Master Agreement (IFXCO),⁴⁰ was published in 2009. IFXCO contains the following dispute resolution clause:

³⁹ Foreign Exchange Committee. Available at: <https://www.newyorkfed.org/fxc> [Accessed 20.07.2025].

⁴⁰ Available at: https://www.newyorkfed.org/medialibrary/microsites/fxc/files/ifxco_terms.pdf [Accessed 20.07.2025].

“Consent to Jurisdiction. (a) (b) *With respect to any Proceedings, each Party irrevocably (i) submits to the nonexclusive jurisdiction of the courts of the jurisdiction set forth in Part XIII of the Adherence Agreement, and (ii) waives any objection that it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum, and further waives the right to object, with respect to such Proceedings, that such court does not have jurisdiction over such Party. Nothing in the Agreement precludes either Party from bringing Proceedings in any other jurisdiction; nor shall the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction. Each Party irrevocably appoints the agent for service of process (if any) specified with respect to it in Part XIV of the Adherence Agreement. If for any reason any Party’s process agent is unable to act as such, such Party shall promptly notify the other Party and within thirty (30) days shall appoint a substitute process agent acceptable to the other Party.”*

Thus, disputes shall be submitted to national courts as set out in the Adherence Agreement. In turn, Part XIV of the Adherence Agreement allows the parties to make a choice between (i) the State of New York and the United States District Court located in the Borough of Manhattan in New York City, (ii) the courts of England and (iii) the Tokyo District Court. As in ISDA Master Agreements, the choice of a dispute resolution venue is linked to applicable law. IFXCO as well as several other standard agreements published by FXC may be governed by the laws of New York, the laws of Japan or England and Wales. The same provisions on jurisdiction are present in other model contracts published by FXC. In fact, this organization managed to develop a series of master agreements (DeRosa, 2014, p. 215) that rely on national courts for resolving disputes.

Obviously, courts in New York, Tokyo and London are well-positioned to resolve complex financial disputes as major financial centers are located in those cities. However, submitting disputes over derivatives to state courts in general has many disadvantages. On many occasions, court rulings are not enforceable abroad due to absence of international treaties on mutual recognition and enforcement of court decisions. Besides, as a general rule the parties to ISDA Master Agree-

ments, IFXCO and other model contracts published by FXC are not able to keep their dispute private. Furthermore, the parties are unable to appoint adjudicators. The ability to select the members of the tribunal may become crucial when a specific knowledge of financial sector is required from a judge. Moreover, litigation may take years as court decisions are capable of being challenged in an appellate court both on the grounds of law and fact.

IV. Movement towards Arbitration in International OTC Markets

IV.1. Arbitrating Disputes over OTC Derivatives and ISDA Arbitration Guides

Notwithstanding these downsides of litigation over derivatives, we have little evidence that prior to 2008 crisis disputes in OTC markets have been submitted to arbitration as financial industry traditionally preferred litigation over arbitration (Leonard and O'Donnell, 2022, p. 61). In 2004 P. Harding mentioned that some countries do not recognize or enforce judgements given in foreign courts, but are ready to accept international arbitration proceedings. To this end he offered an arbitration clause submitting disputes over ISDA Master Agreement to LCIA as an appointing authority and London as a place of arbitration. He suggested UNCITRAL Arbitration Rules as the rules applicable to dispute (Harding, 2004, p. 635). However, it appears that the users of ISDA documentation were reluctant to follow this advice.

One of the few reported cases is the dispute between *Bankers Trust International plc.*, a derivatives trader, and *PT Jakarta International Hotels & Development*, a company domiciled in Indonesia. Throughout 1997 these entities entered into a series of swap transactions under 1992 ISDA Master Agreement. The parties replaced the standard forum selection provision of 1992 ISDA Master Agreement with an arbitration clause. In accordance with it, all disputes were to be settled in the London International Court of Arbitration (LCIA).⁴¹ However, the In-

⁴¹ Thompson Reuters Practical Law Glossary. Available at: [https://uk.practicallaw.thomsonreuters.com/o-107-6094?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/o-107-6094?transitionType=Default&contextData=(sc.Default)&firstPage=true) [Accessed 20.07.2025].

donesian company refused to perform its obligations under swaps and launched a law suit in the local court in Indonesia thus ignoring the arbitration clause. English state court supported the arbitration clause and issued an anti-suit injunction staying procedures in Indonesia.⁴²

Another reported LCIA arbitration involving derivatives became known due to an international investment dispute between *Deutsche Bank AG and the Republic of Sri Lanka*.⁴³ The dispute considered a hedging agreement between a German derivatives trader and Ceylon Petroleum Corporation (CPC), a company controlled by the local government and accountable to the public (Ariyo, 2025, p. 5). It was resolved by the International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C. Notably, the ICSID award referred to another award concerning a dispute of the similar nature, this time between CPC and Citibank N.A., a U.S. derivatives trader.⁴⁴ The award was rendered on 1 August 2011 as the arbitral tribunal rejected the claims made by Citibank (Ariyo, 2025, p. 5). In general, CPC disputes concerned the issues of speculation, contractual capacity and mis-selling of financial products, a widely spread topic for litigation in derivative cases. Despite having a “star status” in international derivatives industry (Braithwaite, 2012, p. 784), ISDA has always been flexible in amending the terms of its standard agreements in line with existing market trends and legislative developments. On 19 January 2011 it shared a memo⁴⁵ with its members, which is of particular interest to us in connection with the topic of the present article as the memo addressed the use of arbitration under ISDA Master Agreement. In this document ISDA recognized

⁴² Queen’s Bench Division (Commercial Court). *Bankers Trust Co v. PT Jakarta International Hotels and Development* [1999] 1 Lloyd’s Rep 910.

⁴³ ICSID case No. ARB/09/02. Available at: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0474.pdf [Accessed 20.07.2025].

⁴⁴ LCIA. *Citibank N.A. v. Ceylon Petroleum Corporation*, First Partial Award, LCIA ab# 81215, 31 July 2011, Para. 5.71 to 5.78; 5.106 and 5.107.

⁴⁵ Memorandum for Members of the International Swaps and Derivatives Association, Inc. 19 January 2011. Available at: <http://www.efmlg.org/Docs/Meeting%2038/2011-03-22%20EFMLG%20-%20Item%208%20-%20ISDA%20memo%20on%20the%20use%20of%20arbitration%20under%20an%20ISDA%20Master%20Agreement.pdf> [Accessed 20.07.2025].

that model clauses on choice of jurisdiction present in its standard contracts are not always acceptable for the users of its documentation. In particular, Para. 4.3 of the memo stated the following:

“Historically, international financial transactions have tended to be documented under agreements governed by English or New York law and which contain jurisdiction clauses conferring jurisdiction on the English or New York courts. These are, of course, the options provided for in the 1992 and 2002 ISDA Master Agreements. The courts of both these jurisdictions have a reputation for probity and experience of resolving disputes arising out of derivative transactions, and they can generally be relied upon to do so with reasonable dispatch. Today, however, many parties to such transactions are based in emerging jurisdictions in which it is difficult to enforce a foreign judgment. Succeeding on the merits of a dispute may prove to be a pyrrhic victory if it is not possible to enforce the resulting judgment. Many counterparties in emerging jurisdictions are also increasingly reluctant to accept that any dispute will be resolved in the English or New York courts; arbitration is often a more acceptable alternative.”

Generally, the memo was intended to provide general guidance to facilitate further discussions of arbitration “as an alternative form of dispute resolution under an ISDA Master Agreement.” ISDA was seeking support of its initiative and requested the opinion of ISDA members. On 10 November 2011 ISDA published another memorandum evaluating the feedback received from its members and streamlining further policy options.⁴⁶ Finally, this preparatory work culminated in the release of 2013 ISDA Arbitration Guide 2013.⁴⁷ This guide outlines well-known advantages of arbitration including its speed, possibility to appoint arbitrators, finality and enforceability of arbitral awards. More importantly, this soft law instrument contains a model arbitral clause to be used with ISDA Master Agreements:

⁴⁶ The use of arbitration under an ISDA Master Agreement: feedback to members and policy options. 10 November 2011. Available at: <https://www.isda.org/a/DJDDE/arbitration-isda-memo-pt2-nov11-final.pdf> [Accessed 20.07.2025].

⁴⁷ Available at: <https://www.isda.org/a/6JDDE/isda-arbitration-guide-final-09-09-13.pdf> [Accessed 20.07.2025].

“Arbitration (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a ‘Dispute’), shall be referred to and finally resolved by arbitration.”

The list of approved rules of arbitration presented in the 2013 ISDA Arbitration Guide appears to be well-balanced. Alongside LCIA and International Chamber of Commerce (ICC) ISDA recommended two arbitration institutions located in Asia (SIAC and HKIAC). Swiss Rules of International Arbitration and the International Arbitration Rules of the American Arbitration Association — International Centre for Dispute Resolution (AAA-ICDR Rules) are also on the list. Panel of Recognized International Market Experts in Finance Arbitration Rules (P.R.I.M.E. Finance Rules) are of particular interest as P.R.I.M.E. Finance is the only specialized arbitration institution recommended by ISDA. P.R.I.M.E. Finance was established in 2012 to deal with disputes arising out of complex financial transactions (Marsman, 2021, 3-030). Its list of arbitrators includes world recognized financial specialists as well as international lawyers experienced in the resolution of commercial disputes.⁴⁸

The publication of the 2013 ISDA Arbitration Guide attracted a lot of attention both within the arbitration community⁴⁹ and above.⁵⁰ Encouraged by the success of 2013 ISDA Arbitration Guide the asso-

⁴⁸ See the list of experts at P.R.I.M.E. Finance website. Available at: <https://primefinancedisputes.org/page/experts-overview> [Accessed 20.07.2025].

⁴⁹ Kluwer Arbitration Blog October 2013 Maria Karamperlia October 23 2013 Cross-border Disputes in the Financial Sector: A Trend towards Arbitration and the Release of the ISDA Arbitration Guide. Available at: <https://arbitrationblog.kluwerarbitration.com/2013/10/24/cross-border-disputes-in-the-financial-sector-a-trend-towards-arbitration-and-the-release-of-the-isdarbitration-guide/> [Accessed 20.07.2025].

⁵⁰ Business Times. Ruling of the arbitration panel dismissing the claim in the oil hedging case. Available at: <https://www.sundaytimes.lk/110814/BusinessTimes/bt44.html> [Accessed 20.07.2025].

ciation decided to renew the guide in 2018.⁵¹ To ensure the quality of this project it retained a well-known London City law firm as a legal adviser.⁵² The basic structure of the document largely European Master Agreement remained unchanged. As 2013 ISDA Arbitration Guide, the 2018 edition highlighted the benefits of international arbitration widely known within dispute resolution professional. ISDA recommended arbitration to its members and other users of ISDA documentation 2018 ISDA Arbitration Guide containing a larger list of recommended arbitration institutions as well as a variety of seats of arbitration including London, Dublin, New York, Hong Kong, Singapore, Zurich, Geneva, London, the Hague, Stockholm, Frankfurt am Main, Dubai and Vienna.

IV.2. European Master Agreement: a Balanced Approach

It is clear that ISDA has been promoting international commercial arbitration for more than a decade. Recent years have seen a surge in including arbitration clauses into ISDA agreements (Eidenmüller, 2013, p. 92). However, to ascertain whether arbitration has become a lasting trend in the market for OTC derivatives, we should consider other standard agreements to search for arbitration clauses. In fact, the universe of model contracts existing in financial markets is not limited to contractual instruments developed by ISDA and FXC. National banking associations in Germany,⁵³ France⁵⁴ and Spain⁵⁵ publish their own master agreements governed by local laws. Sometimes, they may refer their parties to arbitration in case of disputes. However, these instruments

⁵¹ 2018 ISDA Arbitration Guide. Available at: https://arbinfinanz.uni-koeln.de/uploads/Dokumente/2018_ISDA_Arbitration_Guide.pdf [Accessed 20.07.2025].

⁵² ISDA publishes a new edition of its Arbitration Guide. Available at: <https://www.jdsupra.com/legalnews/isda-publishes-a-new-edition-of-its-58015/> [Accessed 20.07.2025].

⁵³ Deutscher Rahmenvertrag für Finanztermingeschäfte. Available at: <https://www.germanbanks.org/recht/rahmenvertrag-fuer-finanztermingeschaefte> [Accessed 20.07.2025].

⁵⁴ Convention-cadre FBF relative aux opérations de marché à terme. Available at: <https://www.fbf.fr/fr/convention-cadre-fbf-relative-aux-operations-sur-instruments-financiers-a-terme> [Accessed 20.07.2025].

⁵⁵ Contrato Marco de Operaciones Financieras. Available at: <https://www.ceca.es/eng/cmof/> [Accessed 20.07.2025].

are predominantly aimed at domestic transactions rather than cross-border operations with derivatives. Hence, they do not make a lasting international impact, although in some cases local master agreements may be used to facilitate derivatives trading with overseas counterparties.⁵⁶ In contrast to local banking associations, European Banking Federation (EBF), a professional association of banking unions established in Europe, is focused on international issues involving financial institutions linked to different jurisdictions. Alongside other issues, EBF is focused on the unification of contractual practices existing in OTC financial markets on the basis of a single framework agreement covering all types of financial transactions concluded by commercial banks between themselves and with their corporate clients. The result of these efforts, European Master Agreement (EMA), is currently in use in Europe (Johansson, 2009, p. 71). European Central Bank acts as a strong promoter of European Master Agreement as it imposes this standard contract on its counterparties (Litten, 2024, p. 200).

European Master Agreement is a multi-product multi-language standard contract facilitating a variety of financial market transactions such as interbank deposits, derivatives, repos and securities loans. At first glance, the multi-product concept should be very attractive to derivative traders when doing interbank business with their overseas counterparties with the same legal status. Instead of entering a separate framework agreement for each type of financial product they may simply execute European Master Agreement and a Product Annex addressing transactions they envisage to make within their future commercial relationship. The latest version of European Master Agreement published in 2020 is divided into two parts — General Provisions and Special Provisions. The General Provisions of 2020 European Master Agreement⁵⁷ contain the following clause related to dispute resolution:

⁵⁶ Federal Court of Justice (Bundesgerichtshof — BGH) Decision IX ZR 314/14 dated 09.06.2016. Available at: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=IX%20ZR%20314/14> [Accessed 20.07.2025].

⁵⁷ Master Agreement for Financial Transactions. General Provisions. Edition 2020. Available at: <https://www.ebf.eu/wp-content/uploads/2020/06/EMA-General-provisions-2020.pdf> [Accessed 20.07.2025].

“(2) Jurisdiction, Arbitration. *Each party irrevocably agrees that in respect of any dispute arising under or related to the Agreement (i) the courts specified in the Special Provisions shall have non-exclusive jurisdiction and each party irrevocably submits to such non-exclusive jurisdiction, or (ii) if so specified in the Special Provisions, any such dispute shall be finally settled by one or more arbitrators appointed and proceeding in accordance with the rules of arbitration specified in the Special Provisions, each party agreeing to comply with such rules.*”

Thus, 2020 European Master Agreement embraces litigation and arbitration in case of disputes (Braithwaite, 2021, p. 34). Such an approach gives the parties to this framework contract a high degree of flexibility. Special Provisions serve as a key point in choosing preferred dispute resolution techniques. To this end, EBF largely follows the pattern earlier chosen by ISDA. Generally, ISDA Master Agreement contains a choice of forum clause rather than an arbitration clause; however, the parties to the standard contract are free to replace it with an arbitration clause published by ISDA in 2013 and 2018 in its guides on arbitration. The key advantage of EBF approach is that the end-users of its standard documentation do not have to use alternative guidance to settle their disputes and differences via arbitration as the required wording is already in place. Under the 2020 European Master Agreement Special Provisions the recommended arbitration clause shall be as follows:

“The rules of arbitration referred to in Section 11(2) are the Rules of Arbitration of5 [Euro Arbitration – European Center for Financial Dispute Resolution] [the International Chamber of Commerce] § [other] § [with which each party agrees to comply]. The parties agree to submit those disputes to [a single] [three] arbitrator[s]. Such arbitration shall take place in [-]. The language[s] in which arbitration shall be conducted [is] [are].”⁵⁸

We find this alternative arbitration clause to be very narrow as EBF has recommended the rules of arbitration published by two arbitration institutions, namely by the European Center for Financial Dispute

⁵⁸ Master Agreement for Financial Transactions. Special Provisions. Edition 2020. Available at: https://www.ebf.eu/wp-content/uploads/2020/06/EMA-Special-Provisions_-2020.pdf [Accessed 20.07.2025].

Resolution and the International Chamber of Commerce (ICC). ICC arbitration clauses are present both in 2013 and 2018 ISDA Arbitration Guides, although ISDA chose not to recommend European Center for Financial Dispute Resolution to its members. However, in case of EBF the short list of arbitration institutions is easy to explain. EBF has published a set of standard contracts to be used in Europe, therefore, it had to put aside Asian arbitration centers in Hong Kong and Singapore. At the same time, the parties to 2020 European Master Agreement may always chose “other” rules of arbitration if they see it necessary.

While making the choice, the counterparties to European Master Agreement would most likely select a European arbitration institution. In our view, the seat of arbitration should be in Europe as well. In such a scenario European Master Agreement users may take advantage of ISDA recommendations pertaining to the choice of arbitration rules. Apart from the arbitration rules of ICC, 2018 ISDA Arbitration Guide features an impressive list of the arbitration rules adopted by the leading European arbitration institutions. The most obvious choice is LCIA as London plays the role of a recognized financial center. However, European Master Agreement counterparties may also opt for Arbitration Rules of the German Arbitration Institute, the Rules of Vienna International Arbitration Center or Swiss Arbitration Rules. In case the users of EBF standard documentation would like to have a special financial expertise, dispute resolution under the rules of PRIME Finance is a viable option.

V. Arbitrating Derivatives Disputes Involving Russian Counterparties in the Era of Unilateral Sanctions

V.1. Is There a Place for Arbitration for Russian Counterparties in OTC Derivatives Market?

International financial markets are global, therefore conflicts between states as well as restrictive measures and embargos introduced by economically significant powers against other nations may change the way derivatives are traded. Beyond any doubt, cross-border disputes in OTC markets are also affected by unilateral sanctions. The impact of

sanctions on derivatives trading and dispute resolution becomes evident when it comes to restrictive measures introduced against Russian financial sector. According to the widely shared opinion, European arbitration centers once popular among Russian businessmen no longer meet their needs. Such a view has already resulted in a decline of CIS-related cases administered by LCIA, a former dispute resolution venue of choice for Russian counterparties.

According to the report published by this arbitration institution on its website, only 2.6 per cent of disputes administered in 2024 involved a claimant or a respondent from Russia.⁵⁹ For instance, in 2020 such disputes accounted for 6.8 % of annual case load of this arbitration institution.⁶⁰ This outcome is even more surprising given that LCIA obtained a relevant license from the United Kingdom sanctions authority in 2022.⁶¹ The license was issued by the Office of Financial Sanctions Implementation (OFSI) in the form of a so-called general license under Regulation 32 of the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 and under Regulation 64 of the Russia (Sanctions) (EU Exit) Regulations 2019. Until its revocation in 2025, it covered arbitrations administered by LCIA pursuant to its arbitration rules and allowed the parties to LCIA arbitration to pay arbitration costs and representation fees.⁶²

Despite the general license being in force for three years, Russian parties to derivatives transactions preferred to ignore LCIA arbitration clauses existing in their international contracts with counterparties from the United Kingdom. Instead of initiating an arbitration in accor-

⁵⁹ LCIA Reports. Available at: <https://www.lcia.org/lcia/reports.aspx> [Accessed 20.07.2025].

⁶⁰ 2021 Annual Casework Report. Available at: <https://www.lcia.org/media/download.aspx?MediaId=890> [Accessed 20.07.2025].

⁶¹ LCIA procures a comprehensive, LCIA specific, general licence regarding the Belarus and Russia (Sanctions) (EU Exit) Regulations. Available at: <https://www.lcia.org/News/lcia-procures-a-comprehensive-lcia-specific-general-licence-re.aspx> [Accessed 20.07.2025].

⁶² General Licence — London Court of International Arbitration (LCIA) Arbitration Costs. INT/2022/1552576. Available at: https://assets.publishing.service.gov.uk/media/67e6b7a98ac59d1882eade07/LCIA_Costs_GL-INT-2022-1552576-_revoked_March_2025.pdf [Accessed 20.07.2025].

dance with LCIA rules, they opted for domestic courts. In doing so they rely on a set of Russian rules of civil procedure enacted in 2020. Widely known among Russian dispute resolution practitioners as the Lugovoy Law,⁶³ these provisions allow a Russian counterparty to an arbitration agreement to litigate at home in case the dispute is sanctions-related. In line with the Lugovoy law, existence of unilateral sanctions should create a genuine obstacle to justice so that Russian court has jurisdiction in the relevant case. However, these conditions have been interpreted by the Russian judiciary in a very broad and often frustrating manner.⁶⁴ On many occasions the courts adopted the view that Russian parties are deprived of access to justice *per se*. Moreover, Russian claimants may seek an anti-suit injunction to deter their former foreign business partners from submitting the case to arbitration in line with an arbitration clause.⁶⁵

With the Lugovoy Law being in force, the incentives to abide by the arbitration agreement sharply decrease. Recent Russian case law provides overwhelming evidence to this trend. Local financial institutions successfully sued their foreign counterparties over termination agreements relating to cross-border privately negotiated derivatives transactions.⁶⁶ Made with a view to wind up existing financial operations following the imposition of sanctions, those termination agreements included a standard LCIA arbitration clause. In case of VEB v. Barclays the dispute over such an agreement led to parallel proceedings in Rus-

⁶³ See Art. 248.1 of the Russian Arbitrazh (Commercial) Procedure Code.

⁶⁴ The Lugovoy Law Metamorphosis: The Russian Constitutional Court Declined the Request but Partly Aligned with the Amicus Curiae Briefs. Available at: <https://kiaplav.ru/press-centr/public/6783.html> [Accessed 20.07.2025].

⁶⁵ See Art. 248.2 of the Russian Arbitrazh (Commercial) Procedure Code.

⁶⁶ Ruling of the Moscow Commercial Court A40-194447/23-141-1534. Sovcombank v. J.P. Morgan Securities PLC. 8 February 2024. Available at: https://kad.arbitr.ru/Document/Pdf/d8542a52-4054-475f-99be-7f2cb9906b93/9f365bdb-fc23-48db-a5de-8905501a9bfo/A40-194447-2023_20240213_Reshenija_i_postanovlenija.pdf?isAddStamp=True [Accessed 20.07.2025]. Ruling of the Commercial Court of Saint-Petersburg and Leningrad Oblast A56-84760/2023. VTB v. OWH SE i.L. 1 December 2023. Available at: https://kad.arbitr.ru/Document/Pdf/efe9a23f-db51-41ff-a09a-of86b3229a04/b35786c6-3938-4903-8430-45ae11ac70b7/A56-84760-2023_20231207_Reshenie.pdf?isAddStamp=True [Accessed 20.07.2025].

sia⁶⁷ and the United Kingdom.⁶⁸ In addition to going on trial at home, on 21 June 2024 Barclays commenced arbitration under LCIA Arbitration Rules 2020 including Schedule of Costs 2023.⁶⁹

Despite this trend, a room for arbitration still remains as Russian businessmen and state corporations still conduct cross-border operations with East and West. Within that context, arbitration still remains the preferred method of dispute resolution.⁷⁰ However, submitting disputes to Western dispute resolution centers is not an option due to the risk of sanctions. Amidst sanctions pressure, Russian parties often choose Asian arbitration institutions such as SIAC and HKIAC.⁷¹ Both institutions were recognized by the Russian Ministry of Justice as a permanent arbitral institution in line with the Federal Law No. 382-FZ “On Arbitration (Arbitration Proceedings) in the Russian Federation.”⁷² Such a legal status allows SIAC and HKIAC to administer Russian-seated international arbitrations involving OTC derivatives, enabling parties to seek enforcement of SIAC and HKIAC arbitral awards in Russia.

2018 ISDA Arbitration Guide features standard arbitration clauses facilitating resolution of disputes arising under ISDA Master Agreements under the rules of SIAC and HKIAC. Should the parties to ISDA Master Agreement rely in those provisions drafted by ISDA in 2018 ISDA Arbitration Guide, the arbitration seat will be Singapore and Hong Kong, respectively. As for the law applicable to arbitration claus-

⁶⁷ Ruling of the Moscow Commercial Court. No. A40-111803/23-107-857. VEB v. Barclays. 30 July 2024. Available at: <https://kad.arbitr.ru/Card/2144a3ad-7c03-4b1e-bc4c-5f5848682aff> [Accessed 20.07.2025].

⁶⁸ Barclays Bank PLC v. VEB.RF [2024] EWHC 1074 (Comm) (10 May 2024). Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2024/1074.html> [Accessed 20.07.2025].

⁶⁹ Ruling of the Moscow Commercial Court A40-111803 — 9 July 2024. Available at: https://jusmundi.com/en/document/decision/ru-state-development-corporation-veb-rf-v-barclays-bank-plc-postanovlenie-arbitrazhnogo-suda-g-moskvy-a40-111803-tuesday-9th-july-2024#decision_67038 [Accessed 20.07.2025].

⁷⁰ Available at: <https://pravo.ru/story/257579/> [Accessed 20.07.2025].

⁷¹ International arbitration: why Russian business needs it today. Available at: <https://pravo.ru/story/257276/> [Accessed 20.07.2025].

⁷² Ministry of Justice of the Russian Federation. Activities/Areas of Activity. Arbitration Activities. Available at: <https://minjust.gov.ru/ru/activity/directions/961/> [Accessed 20.07.2025].

es, ISDA recommends the parties to choose the laws of Singapore and Hong Kong, as the case may be. Such a recommendation will lead to the split in the governing law of the contract and law applicable to the arbitration agreement, which is an integral part of the ISDA Master Agreement. However, this should not be viewed as a contradiction as arbitration clauses are legally separated from the underlying contract within the separability doctrine, which is widely accepted by the arbitration community worldwide.⁷³

V.2. NAFMII Master Agreement as a Comprehensive Solution

Executing ISDA Master Agreement featuring an arbitration clause may be a solution for a Russian counterparty, however, it does not address the issue in a comprehensive manner. Russian financial institutions, once active ISDA members, were deprived of their membership in 2022. Hence, commercial banks and other financial market players having Russian origin lost official access to ISDA contractual documentation. As a financial industry organization, ISDA vigorously embraced Western sanctions and pledged to follow them in the future. In particular, it published 2022 Russian Sanctions Additional Provisions booklet.⁷⁴ This document allows foreign parties to ISDA Master Agreement to exclude certain obligations that are restricted by sanctions imposed by Canada, the EU, Japan, Switzerland, the UK, and the US.

In light of this, a complex solution for dispute resolution and governing law issues is highly recommended for Russian counterparties transacting in the OTC derivatives market. Given the volume of cross-border trading with China, such a solution may be of Chinese origin. Luckily, Chinese authorities managed to set up a financial industry association many aspects analogous to ISDA. National Financial Associa-

⁷³ Revisiting the Doctrine of Separability. Available at: https://www.twobirds.com/en/insights/2024/singapore/revisiting-the-doctrine-of-separability?__cf_chl_rt_tk=6uo_DOYrnAC6Aavsr4cDyIVu74HuJORQez2WkRn07FY-1768720167-1.0.1.1-huoixClhzmZWibekJ9o.iUrjfEpbGM3jy.yELncIOhM [Accessed 20.07.2025].

⁷⁴ Thompson Reuters Practical Law Glossary. Available at: [https://uk.practi callaw.thomsonreuters.com/w-035-0417?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practi callaw.thomsonreuters.com/w-035-0417?transitionType=Default&contextData=(sc.Default)&firstPage=true) [Accessed 20.07.2025].

tion of Institutional Investors in the Financial Market (NAFMII) is a non-profit, self-regulatory organization responsible for promoting the development and standardization of the country's interbank financial market. In contrast to ISDA, which is a private entity not related to any governmental authority, NAFMII operates under the oversight of the People's Bank of China (PBOC). It is responsible for rule formulation, market development, financial supervision and providing member services.

As for the contract drafting domain, NAFMII took the responsibility to publish standard OTC derivatives market agreements. They are based on the same legal principles as ISDA Master Agreement and European Master Agreement. The latest major event in the market standardization process was the publication of NAFMII Master Agreement (Cross-border — 2022 Version) (the 2022 NAFMII Master Agreement),⁷⁵ the first cross-border standard contract for OTC derivatives fully governed by Chinese law. This standard agreement was drafted with a view to open the derivatives market of mainland China for the foreigners.⁷⁶ It may be applied in transactions between Chinese and foreign counterparties as well the entities non-resident in China⁷⁷ arguably making 2022 NAFMII Master Agreement the best choice for Russian financial institutions.

2022 NAFMII Master Agreement features the following clause addressing governing law and dispute resolution issues:

“Section 20

Dispute Resolution

(I) Governing Law

The Parties may specify in the Supplement the governing law of this Agreement which governs the relevant Transaction. If not specified, this Agreement shall be governed by PRC Laws.

⁷⁵ NAFMII Master Agreement (Cross Border — 2022 Version). Available at: <https://www.nafmii.org.cn/ggtz/gg/202208/P020220831632138066172.pdf> [Accessed 20.07.2025].

⁷⁶ Mastering cross-border derivatives in China — the new 2022 NAFMII Master Agreement (Cross-border Version). Available at: <https://www.lexology.com/library/detail.aspx?g=24d0a4d0-eaf2-433f-820b-a2e14401b109> [Accessed 20.07.2025].

⁷⁷ See Section 2 2022 NAFMII Master Agreement.

(II) Dispute Resolutions

The Parties may resolve, by consultation, any disputes, claims or disagreements under or in connection with this Agreement. If the Parties do not carry out such consultation or no agreement is reached from such consultation, unless otherwise specified in the Supplement, the Parties may agree to submit such disputes, disagreements or claims to China International Economic and Trade Arbitration Commission for arbitration to be conducted in Beijing in accordance with the Arbitration Rules of China International Economic and Trade Arbitration Commission then in effect; the arbitral tribunal shall consist of three arbitrators, and the arbitration award shall be final and binding on the Parties.”

China International Economic and Trade Arbitration Commission (CIETAC) is the primary and oldest permanent arbitration institution in Mainland China. Its international reputation is comparable to ICAC, an oldest Russian arbitration institution (Berzin et al., 2022, p. 13). As China is a party to the New York Convention, arbitral awards produced by CIETAC shall enjoy the highest degree of recognition and enforceability worldwide. Choosing Beijing as a place of arbitration in line with 2022 NAFMI Master Agreement will mean that the laws of the People’s Republic of China will govern the arbitration proceedings. Generally, Russian parties to 2022 NAFMII Master Agreement should familiarize themselves with the Arbitration Law of the People’s Republic of China adopted in 1994 and significantly revised in 2025.⁷⁸

VI. Conclusion

In this article, we focused on the many advantages of international commercial arbitration. The most vital of them is the ability to recognize and enforce arbitral awards in many countries around the globe. Although financial industry has historically been reluctant to embrace arbitration as a method of resolving international commercial disputes, it has changed in recent decades. ISDA, the professional association re-

⁷⁸ Arbitration Law of the People’s Republic of China. Machine Translation. Available at: <https://www.acerislaw.com/wp-content/uploads/2025/10/Chinas-Arbitration-Law-2025-Eng.pdf> [Accessed 30.04.2026].

sponsible for the publication of the most widely spread standard contracts within OTC derivative industry, has demonstrated its commitment to international commercial arbitration. Its arbitration guides outline the opportunities that arbitration provides and suggest arbitration clauses should be incorporated into ISDA Master Agreement. On top of that, EBF is promoting arbitration through its own standard contract, the European Master Agreement.

Despite the introduction of unilateral sanctions against Russia and the wide use of Lugovoy Law to undermine contractual arbitration clauses in OTC derivatives transactions, arbitration will remain in demand by Russian counterparties in the future. However, Western arbitration hubs once popular in the past will be replaced by Asian financial institutions such as HKIAC and SIAC. In our view, this process will be facilitated by the presence of standard arbitration clauses in 2018 ISDA Arbitration Guide. In case Russian counterparties wish to avoid using ISDA documentation in light of the existing sanctions commitments of this industry organization, they may opt for 2002 NAFMII Master Agreement containing CIETAC arbitration clause and featuring Beijing as a seat of arbitration.

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Hybrid Governance Model without Regional People's Representative Council (DPRD): A Constitutional Study on Representation in Nusantara Capital City

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Abstract: The relocation of the state capital to Nusantara Capital City (IKN) raises concerns about political representation. The IKN Authority, which operates at the ministerial level, performs local government functions without a Regional People's Representative Council (DPRD). This normative legal research analyzes the regulations regarding citizen representation as outlined in Law No. 3 of 2022 and compares these regulations with models from other special regions in Indonesia, as well as the capitals of other countries. The findings indicate that the current institutional design of the IKN is highly centralized under the oversight of the central government, which risks undermining democratic legitimacy. Comparative studies of Canberra and Brussels highlight the necessity for representative mechanisms, both full legislative and semi-legislative, to effectively articulate public aspirations. This study recommends adopting a hybrid model that integrates the supervisory functions of provincial DPRDs or local representative bodies with cen-

tral authority through structured coordination. This approach aims to establish special regional governance that is adaptive, accountable, and consistent with the principles of constitutional democracy.

Keywords: political representation; special regions; DPRD; IKN Authority; constitution

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Contents

I. Introduction	427
II. Methodology	429
III. Constitutionality of the Absence of Political Representation in the IKN Authority Region	430
IV. The Function of Local Democracy in the Local Government System	434
V. An International Comparative Perspective on Political Representation without Local Parliament	438
VI. Formulation of a Hybrid Political Representation Model for the IKN Authority	442
VII. Conclusion	447
References	447

I. Introduction

Modern democracy is based on the belief that every citizen has the right to express their aspirations and influence public decision-making through legitimate means. In local governance, local legislative institutions play a crucial role by not only drafting regulations but also overseeing functions and representing the community's interests. In various countries, political dynamics and institutional designs indicate that the presence of these institutions is not always deemed essential (Kresl, 1996, p. 795). Some regions, for historical, political, or administrative reasons, have opted for or been directed to adopt a government model without local legislatures. This raises an important academic question: to what extent can the principle of political representation be upheld

when one of the fundamental pillars of local democracy is removed from the structure of local government?

In Indonesia, the establishment of regions with special status often involves adjustments to the overall local government structure (Dressel and Mietzner, 2012, p. 391). Jakarta, Yogyakarta, and Papua exemplify different approaches to balancing administrative needs with the political legitimacy recognized by the constitution (Aspinall et al., 2003). In Jakarta, legislative authority is concentrated at the provincial level, which means that the city government does not have its own Regional People's Representative Council (DPRD). Yogyakarta, on the other hand, upholds a constitutional monarchy system where political authority is deeply rooted in cultural and historical frameworks (Suryadinata et al., 2003). Meanwhile, Papua combines the Papuan House of Representatives with the Papuan People's Assembly to serve as a platform for aspirations based on cultural identity (Halmin, 2006). These models illustrate that legislative arrangements in specific regions are not merely technical products of law, but also the outcome of political considerations that influence the quality of the relationship between citizens and government officials.

The Capital City of the Archipelago (IKN) is a special administrative area established under Law No. 3 of 2022 to serve as the center of Indonesia's new government. It operates directly under the President and does not have a Regional House of Representatives (DPRD). These characteristics set it apart from most other autonomous regions in Indonesia and present unique challenges in designing political representation and governance. According to Widnyani, multiple studies have examined the institutional design of special regions. However, most of this research has focused on the presence of regional legislatures as a crucial element of governance (Widnyani et al., 2024). Purnomo notes that studies specifically addressing special areas originally created without a DPRD, such as IKN, are still limited. Furthermore, the majority of research emphasizes the administrative and political aspects of decentralization rather than a normative-constitutional analysis of how the absence of regional legislative institutions affects the principle of political representation (Purnomo et al., 2025, p. 73). This research seeks to address this gap by proposing a synthesis approach that com-

bines constitutional analysis, international comparative studies, and the administrative characteristics of the IKN. It aims to formulate a model of political representation that is adaptive and suitable for governance in special administrative areas without a DPRD (Mukhlis et al., 2025, p. 121).

Unlike other special regions in Indonesia that have local legislative bodies, the institutional design of the Nusantara Capital City Authority does not include a Regional People's Representative Council (DPRD) as a formal means of political representation. The absence of this local parliament has created a new phenomenon in the structure of subnational governance in Indonesia, which has traditionally depended on regional legislatures as part of the principles of autonomy and public representation outlined in Art. 18 of the 1945 Constitution of the Republic of Indonesia. According to Ria, this situation opens up opportunities for studying the normative and administrative implications of a governance model without a DPRD. It also encourages the development of alternative mechanisms that can ensure the representation of public interests without compromising the effectiveness of the administration of the national capital (Ria et al., 2025, p. 53). The hypothesis of this study is that the absence of a DPRD in the Nusantara Capital Authority necessitates a different political representation model from the conventional one. Relying on the DPRD for political representation may no longer be suitable for special regions that have unique administrative and political characteristics (Ostwald et al., 2016, p. 143). This study aims to evaluate how well the institutional design of the IKN Authority meets the function of representation and to explore alternative models that are more appropriate for the constitutional and administrative conditions in the area (Urbinati and Warren, 2008, p. 387).

II. Methodology

This study employs a normative legal approach that incorporates legislative analysis, conceptual studies, and comparative studies. The analysis of legislation focuses on examining the regulations governing the establishment and functions of the Nusantara Capital Authority, particularly concerning the mechanism of political representation.

Conceptual studies aim to develop a theoretical framework regarding political representation in special regions that lack regional legislative institutions. Additionally, comparative studies explore specific regional governance models in various countries to identify best practices and alternative models for effective political representation. The methodology utilized is qualitative, emphasizing the interpretation of legal norms and political concepts that underlie the formation of the Nusantara Capital Authority and its constitutional implications.

This study aims to examine the specificity of the Nusantara Capital Authority, particularly regarding its regional aspects, which notably lack a Regional People's Representative Council (DPRD) for political representation. It will focus on the normative and constitutional implications of this absence on the principle of representation as outlined in the 1945 Constitution. The study intends to formulate a model of political representation that aligns with the characteristics of special regions that do not have regional legislative institutions. This will be achieved through an analysis of normative frameworks, administrative needs, and institutional practices across various jurisdictions. The expected outcomes include mapping the challenges and opportunities related to the institutional design of the IKN Authority, along with policy recommendations that can serve as references for harmonizing constitutional norms and enhancing the effectiveness of local government administration in Indonesia.

III. Constitutionality of the Absence of Political Representation in the IKN Authority Region

The framework of local government in Indonesia is constitutionally regulated by Art. 18 of the 1945 Constitution of the Republic of Indonesia. This study affirms the principles of regional autonomy, the division of authority, and the existence of the Regional People's Representative Council (DPRD) as a key element in local governance, representing the people. The DPRD functions as a regional legislative institution with legislative, budgetary, and supervisory powers over the regional executive, making it a primary instrument for implementing the principle of checks and balances in local democracy. Local democracy emphasizes

citizen's participation and the representation of public aspirations as essential components in the decision-making process. In political representation theory, Pitkin defines representation as a relationship in which an individual or group acts on behalf of another party within an institutional framework that provides legitimacy (Pitkin, 1967). Urbinati and Warren further developed this concept by highlighting the deliberative dimension and accountability as key indicators of the quality of representation (Urbinati and Warren, 2008). This notion underscores that the DPRD is a constitutional mechanism designed to ensure political representation at the regional level. However, when a special area, such as the Capital City of the Archipelago (IKN), is established without a DPRD, a fundamental question arises about how these constitutional principles can be effectively realized without compromising the essence of political representation (Hendry et al., 2023, p. 78).

Local democracy refers to the application of democratic principles within local government, encompassing citizen participation, the representation of community aspirations, and accountability in public policy. The process of decentralization significantly impacts how responsive local governments are to community interests (Arifin et al., 2025, p. 63). Effective public policies, particularly in infrastructure development, can enhance political legitimacy at the local level (Napitupulu et al., 2024, p. 20). Studies on local councils further show that inclusive political representation is important because barriers to the participation of groups such as women may narrow the range of interests articulated in local decision-making (Sundström and Wängnerud, 2016, p. 361). In this context, the Regional People's Representative Council (DPRD) acts as an institutional mechanism that links community interests to the decision-making process at the regional level. The absence of the DPRD in special areas, such as the Nusantara Capital City (IKN), raises concerns about what mechanisms can effectively maintain political representation within the constitutional framework.

The relationship between the principles of local democracy and the institutional design of the special region can be clearly observed through the legal provisions that establish the Nusantara Capital City Authority. Law No. 3 of 2022 concerning the State Capital stipulates that the IKN Authority is a ministry-level institution led by a Head

and a Deputy Head, who are appointed and dismissed directly by the President (Art. 10, Para. 3). Notably, this structure does not include the establishment of a Regional People's Representative Council (DPRD), which is typically found in local governments. As a result, the legislative and supervisory functions normally carried out by representative institutions are excluded from the framework of the Authority. Article 12, Para. 1 of the Law grants the Authority full power to perform local government functions, including planning and implementation of development, without a legislative mechanism elected through general elections. Some normative analyses suggest that this single-executive model could undermine the balance between administrative effectiveness and democratic legitimacy, particularly if it is not supported by adequate public participation mechanisms (Sumodiningrat et al., 2022, p. 383). Understanding the Legal Design of the IKN Authority is crucial for assessing how well the principle of political representation can be maintained. This becomes more evident when compared to other special regional institutional models in Indonesia and abroad.

The IKN Authority has sole authority to perform local government functions, as outlined in Art. 10 and 12 of Law No. 3 of 2022. This law states that the Head and Deputy Head of the IKN Authority are appointed and dismissed directly by the President, granting them full authority to manage local government functions, including planning and implementing development projects. Notably, this occurs without the involvement of the DPRD, the local legislative body. This institutional model diverges from the typical framework of local government in Indonesia. To fully understand this distinction, it should be compared to other special regions that are also governed by specific legislation but still maintain formal avenues for political representation.

DKI Jakarta centralizes legislative authority within the provincial DPRD, ensuring that both legislative and supervisory functions exist at a single level of government. In contrast, Yogyakarta combines electoral legitimacy from the DPRD with the historical and cultural legitimacy associated with the position of the Governor. Papua employs a dual model, featuring the Papuan House of Representatives as the legislative institution and the Papuan People's Assembly, which channels aspirations based on cultural identity. This variety demonstrates that

specific territorial contexts do not necessarily lead to the elimination of legislative institutions. Instead, institutional design aims to maintain the representation function. The status of the IKN, which lacks a DPRD, indicates a paradigm shift that necessitates further normative studies to explore alternative forms of constitutionally equivalent mechanisms. The following Table 1 provides a comparative analysis of the political representation models in special regions of Indonesia and the position of the IKN.

Table 1

Comparison of Political Representation Structures in Special Regions in Indonesia

Special Regions	Political Representation Structure	Selection Mechanism	Legal Basis	Normative Notes
Jakarta	Provincial DPRD, without City/Re-gency DPRD	Provincial Election	Law No. 29 of 2007	Centralized legislation and oversight functions at the provincial level
Yogyakarta Resort & Spa	DIY DPRD + legitimacy of Sultan/ Hamengkubuwono as Governor	DPRD Elections; Governor’s office based on lineage	Law No. 13 of 2012	Dual legitimacy: electoral and historical-cultural
Papua	Papuan House of Representatives + Papuan People’s Assembly	DPRP Elections; MRP membership through customary/ religious/female selection	Law No. 21 of 2001 on Special Autonomy for Papua Province	Legislative and cultural representation accommodated
IKN	No DPRD	Local legislative election mechanism does not apply	Law No. 3 of 2022	Political representation through non-legislative mechanisms

Source: Data processed by the authors, 2025

A comparison of the political representation structure in Indonesia's special regions reveals variations in institutional design that reflect differing principles in the regulation of regional legislative functions. In DKI Jakarta, DIY Yogyakarta, and Papua, there is a formal representation mechanism through the Regional People's Representative Council (DPRD), either individually or in conjunction with institutions based on cultural identity. In these three regions, the legislative and supervisory functions continue to operate through constitutional mechanisms that allow for local legislative elections. In contrast, the IKN authority has eliminated this process and has not established a DPRD, resulting in a complete shift of political representation to a non-legislative mechanism, which is now centralized within the central government.

Normative-constitutional analysis reveals that these differences impact the balance between democratic legitimacy and administrative effectiveness. The absence of the Regional People's Representative Council (DPRD) in the new capital, IKN, raises concerns about weakening formal political representation, as outlined in Art. 18, Para. 3, and Art. 1, Para. 2 of the 1945 Constitution. These findings highlight the need to develop a political representation model that can effectively integrate representation functions within a special regional framework, even in the absence of regional legislative institutions.

IV. The Function of Local Democracy in the Local Government System

The principle of political representation and local democracy, as outlined in Art. 18 of the 1945 Constitution of the Republic of Indonesia, emphasizes that local governments are established to implement the widest possible autonomy. This autonomy is supported by a supervisory mechanism and channels for public aspirations through regional people's representative institutions. The Regional People's Representative Council (DPRD) serves as a key legislative body at the local level, playing a crucial role in ensuring self-governance, local accountability, and providing checks and balances between the local executive and legislative branches. The presence of the DPRD facilitates a participatory and accountable decision-making process, where regional policies are

evaluated not only from an administrative standpoint but also through the political legitimacy derived from general elections (Hidayat et al., 2025, p. 166). Recent literature indicates that formal political representation mechanisms at the local level significantly influence the quality of governance and the responsiveness of local governments to the needs of their citizens (Talitha et al., 2020, p. 702). Within the framework of constitutional law, the DPRD functions not only as a channel for public aspirations but also as a constitutional institution that ensures that public policy adheres to the principle of people's sovereignty (Irsyada and Wardana, 2024, p. 1695).

The function of the Regional People's Representative Council (DPRD) is significant when considering its absence in the IKN Authority. The DPRD serves as a constitutional instrument essential for maintaining the principles of self-government and local accountability, making it a key player in legislation, oversight, and the expression of public aspirations. As stipulated in Art. 10 and 12 of Law No. 3 dated 2022, the absence of the DPRD in the IKN Authority centralizes these functions entirely within the executive branch. This shift alters the power dynamics at the local level, moving from a two-branch power model to a single-executive model. Such a change poses a risk of diminishing legislative oversight over public policies (Minan et al., 2024, p. 48). Research on special regional governance indicates that the continuity of political representation functions is often preserved through institutional adaptations. For instance, the single DPRD model in DKI Jakarta or the combination of the DPRD with cultural institutions in Papua ensures ongoing citizen participation. However, the lack of a similar mechanism in the IKN creates a normative gap — specifically, the discrepancy between the constitutional principle of political representation and the institutional tools in place to facilitate it.

The single executive model implemented in the IKN Authority, which concentrates local government authority in the hands of the Head of the Authority, directly impacts the constitutional principles established in the 1945 Constitution of the Republic of Indonesia. This centralization of legislative functions and executive oversight alters the balance of power, which, according to Indonesia's constitutional design, is meant to be based on the separation and division of power at both

the central and regional levels. This configuration risks transforming the political accountability mechanism from horizontal accountability, characterized by interactions between the branches of power, into vertical accountability, which relies entirely on supervision from the central government (Ankamah, 2016, p. 292). Within the context of popular sovereignty, the elimination of local legislatures diminishes the formal avenues through which citizens can influence policy-making via their directly elected representatives. This situation may undermine democratic legitimacy in the special administrative region, as analyzed through the lens of constitutional design. Furthermore, the principle of protecting citizens' political rights, as defined in Art. 28D, Para. 3 of the 1945 Constitution, states that "Every citizen has the right to equal opportunities in government." This principle necessitates the existence of institutional mechanisms that enable effective participation in governance. The lack of a legislative framework at the local level in special areas like the IKN requires strong normative justification to avoid contradictions with higher constitutional norms.

The relationship between the principle of political representation outlined in Art. 18 of the 1945 Constitution of the Republic of Indonesia and the guarantee of equal participation for citizens specified in Art. 28D, Para. 3, requires the creation of an institutional mechanism. This mechanism must effectively balance democratic legitimacy and administrative efficiency. A normative analysis of the role of the Regional People's Representative Council (DPRD) shows that its legislative, oversight, and representative functions cannot be fully replaced by a single executive body without weakening political accountability. Constitutional findings indicate that removing local legislative institutions within the IKN Authority's structure shifts accountability from horizontal interactions among branches of government to vertical oversight centered in the central government (Dixon and Landau, 2021, p. 1356). This change is often associated with a decrease in public engagement in the legislative process. The current design of special regional governance, which excludes the DPRD, requires a comparative analysis to identify institutional models that can uphold the principle of political representation while meeting administrative goals. The normative analysis highlights a significant shift in regional power within the IKN,

directly impacting the quality of political representation and public accountability. To better understand these changes, a comparative visualization is necessary. This visualization should illustrate the key differences between the traditional local government model with the DPRD and the single executive model within the IKN, emphasizing the normative consequences and related constitutional implications.

Table 2

**Normative Analysis and Constitutional Implications
of the Absence of DPRD in IKN**

Aspects	With the DPRD (Regional General Model)	Without DPRD (IKN Model)	Normative Impact	Constitutional Implications
Function of Legislation	There is a process of regional legisla- tion through the DPRD	No local legis- lation	The loss of formal channels for the forma- tion of regional regulations	Concentration of legislation in the execu- tive, potentially reducing public control
Supervision Function	The DPRD super- vises the executive	No legislative oversight	Weakening the checks and bal- ances mecha- nism	Political ac- countability shifts to central vertical over- sight
Channeling Public Aspi- rations	Aspirations are channeled through the people’s represen- tatives as a result of the election	Aspirations are managed directly by executives	Potential bias in the selection of public issues	Reducing the right to effec- tive participa- tion (Art. 28D Para. 3 of the 1945 Constitu- tion)
Political Legitimacy	Obtained through electoral mandate	Depends on the President’s appointment	Potential legiti- macy deficit	Contrary to the principle of peo- ple’s sovereignty in Art. 1 Para. 2 of the 1945 Con- stitution

Source: Data processed by the author, 2025

The structural differences between the local government model that involves the DPRD (Regional People's Representative Assembly) and the single executive model in the IKN (National Capital City) demonstrate that changes in institutional configurations have significant impacts. These impacts include the functions of legislation and supervision, the distribution of public aspirations, and political legitimacy. This variation highlights the presence of layered normative consequences, which range from a reduction in the formal space for the creation of regional regulations to a weakening of the checks and balances mechanism. These changes can have implications for the principle of people's sovereignty and the guarantee of equal political participation, as stipulated in Art. 1, Para. 2 and Art. 28D, Para. 3 of the 1945 Constitution of the Republic of Indonesia. The comparative mapping of these differences provides an analytical framework to evaluate how the governance of the special IKN area aligns with the principles of political representation and administrative effectiveness from a constitutional perspective.

V. An International Comparative Perspective on Political Representation without Local Parliament

The normative gaps in the institutional design of the IKN Authority, especially regarding the lack of local legislative functions, raise significant questions about how political representation and accountability can be upheld within special administrative regions. To address this issue more thoroughly, a comparative study is necessary. This study should not only examine the formal differences between jurisdictions but also identify governance configurations that can effectively integrate democratic legitimacy with administrative efficiency across various political and legal contexts. The literature on specialized territorial governance indicates that the balance between political decentralization and the degree of administrative centralization is often a key factor in the success of institutional design (Falleti, 2010, p. 53). Understanding this variation in models is essential before exploring how international experiences can inform Indonesian governance.

One commonly referenced example in the study of special administrative regions is Washington, D.C. in the United States. For nearly two centuries, it had no local legislature and was directly controlled by Con-

gress. This arrangement is rooted in the U.S. Constitution, which grants Congress full authority to regulate federal territories (Spitzer, 2015, p. 835). During that period, the political accountability mechanisms in Washington, D.C. relied primarily on national legislative oversight, with limited avenues for consultation with city governments. This situation led to various criticisms regarding the restricted channels of citizen representation. Consequently, this motivated the establishment of the District of Columbia Home Rule Act in 1973, which created the Council of the District of Columbia with limited legislative authority (State Court Report, 2025). These developments indicate that while a system of governance without local legislatures can function administratively, the sustainability of democratic legitimacy requires institutional adjustments to better accommodate the principle of political representation.

The model of government in Washington D.C. represents one approach to managing special administrative regions, emphasizing primary control by the central government while ensuring political representation through institutional adjustments. In contrast, Canberra, as the capital of Australia, was designed to balance administrative efficiency with political representation. The Australian Capital Territory (Self-Government) Act of 1988 established a Legislative Assembly with 25 members who possess full legislative authority over local matters; however, these powers can still be revoked by the Australian Parliament within the framework of federal law (Chapman, 1990, p. 75). This structure promotes a pattern of shared governance, where executive and legislative functions operate separately yet are interconnected. Control over strategic issues such as defense and foreign relations remains the responsibility of the central government (Moon and Sharman, 2003, p. 128). Mechanisms for public participation are facilitated through five-year general elections and community consultation forums, which are integrated into the legislative process, providing citizens with a formal and ongoing opportunity to influence local policy direction.

A comparison of the models used in Washington, D.C., and Canberra reveals significant differences in the institutional design of special administrative areas. These differences range from scenarios where the central government maintains full control to those that create a more balanced distribution of powers between the executive and legisla-

tive branches. This variation suggests that institutional frameworks are closely tied to the political, legal, and historical contexts of each jurisdiction. To ensure political representation, adjustments must align with the existing governance structure. Comparative studies of governance indicate that the sustainability of democratic legitimacy in specific regions typically relies on a mix of established political oversight mechanisms and the executive’s capacity to address strategic issues. Analyzing the differences between Washington, D.C., and Canberra allows for an exploration of key variables, such as the distribution of authority, forms of citizen participation, and central-local hierarchical relationships. Together, these factors shape the institutional logic of special administrative regions. This approach goes beyond simply cataloging the structural characteristics of each jurisdiction; it also examines how different elements interact to influence the balance between democratic legitimacy and administrative effectiveness. The patterns identified in this study will help formulate relevant parameters for the institutional design of the IKN Authority and anticipate potential normative gaps during the implementation stage.

Table 3

**Comparison of Authority and Mechanism of Political Representation
in Special Administrative Regions**

Comparative Aspects	IKN (Indonesia)	Washington D.C. (AS)	Canberra (Australia)
Legal Status	Special administrative areas, regulated through Law No. 3/2022	Federal territories, regulated in the U.S. Constitution and congressional legislation	Federal territories, governed by the Australian Capital Territory (Self-Government) Act 1988
Local Legislative Authority	There is no DPRD; legislative function is vested in the Head of the Authority	There was no local legislature until 1973; there is now a Council of the District of Columbia with limited authority	There is a Legislative Assembly with full legislative authority in local issues

Policy Over-sight	Vertical supervision by the central govern-ment	National legisla-tive oversight (U.S. Congress) and limited consultation	Local legislative over-sight and Australian Parliament interven-tion when required
Formal Public Participation	Through executive channels and limited public consultation	Limited before 1973; expanded through lo-cal elections after the Home Rule Act	Five-year elections and community consulta-tion forums
Strategic Issue Control	Central government	U.S. Congress	Australian central government
Implications for Political Repre-sentation	Potentially creat-ing a normative gap between constitu-tional principles and institutional instru-ments	Administrative runs, but democratic le-gitimacy depends on institutional reform	The shared governance model maintains an administrative and representative balance

Source: Data processed by the author, 2025

A comparison of the governance models of special administrative areas, as shown in Table 3, reveals that each jurisdiction adopts an institutional configuration influenced by its unique constitutional context and political goals. These variations go beyond mere technical differences in the division of power; they also illustrate how the principle of political representation can be articulated differently based on the degree of autonomy granted and the accountability mechanisms in place. In the case of the IKN Authority, the absence of local legislative institutions positions its governance model closer to a centralized system than to Canberra’s shared-governance model. However, it shares some similarities with Washington, D.C., before the home rule reform. This comparative analysis is not meant to draw definitive conclusions but rather to outline a theoretically adaptable spectrum of institutional choices. This understanding paves the way for further discussion on the potential formulation of a political representation model that aligns with the Indonesian legal framework and supports the strategic objectives of IKN development, which will be detailed in the next section.

VI. Formulation of a Hybrid Political Representation Model for the IKN Authority

A comparative study of the institutional design of special administrative areas across various jurisdictions indicates that the absence of local parliaments does not necessarily mean a loss of political representation functions, provided that alternative mechanisms are available to ensure accountability and public participation. Each model adopted must be tailored to align with the unique constitutional conditions, political configurations, and socio-cultural characteristics of each country. In the context of Indonesia, designing a political representation model for the capital city requires integrating a normative analysis of the national legal framework with findings from comparative studies of specific domestic regions, as well as insights from relevant international experiences. This approach aims to create an institutional design that adheres to the principles of people's sovereignty outlined in the 1945 Constitution of the Republic of Indonesia, while also maintaining the necessary managerial capacity for effective administration of the national capital.

Strengthening the analysis of the institutional design of the IKN Authority reveals that the ideal political representation model is a hybrid approach, combining formal representation mechanisms with participation based on cultural identity. This model is developed in line with the principles of constitutional democracy outlined in Art. 1, Para. 2, and Art. 28D, Para. 3 of the 1945 Constitution of the Republic of Indonesia, which guarantees equality, legal certainty, and the right of citizens to participate in government. Administrative effectiveness is a crucial element for ensuring the government can perform its strategic functions without unnecessary procedural hurdles. At the same time, public accountability achieved through clear oversight and accountability mechanisms strengthens the legitimacy of institutions. This hybrid model positions the IKN Authority as a coordinating body among the central government, local administrative units, cultural representative institutions, independent supervisory agencies, and civil society. The coordinating relationships among these actors are illustrated in Fig-

ure 1 that outlines points of interaction and the coordination functions each actor plays in supporting political stability and adaptability within the governance of the special IKN region (Kuhlmann and Marienfeldt, 2023, p. 318).

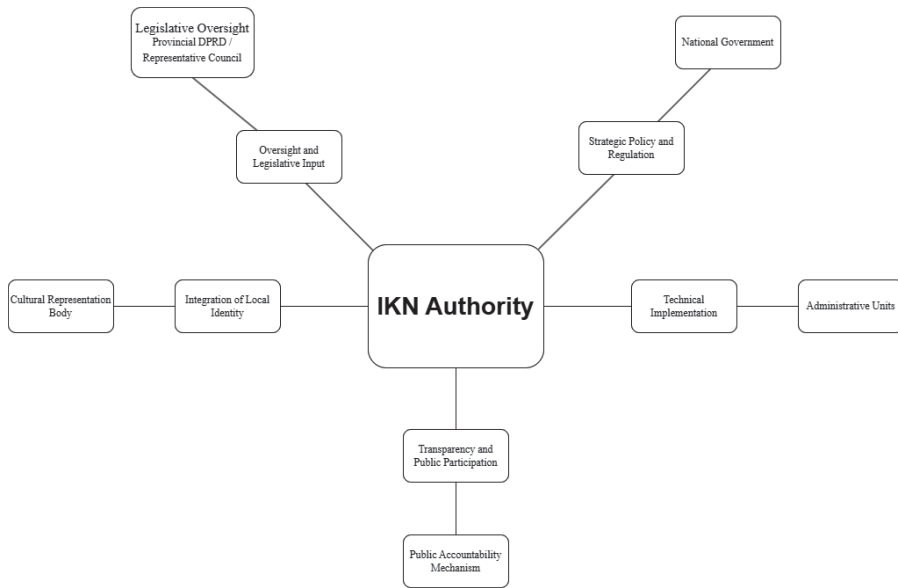


Figure 1. Coordination Chart of the IKN Authority Hybrid Model

Based on this conceptual framework, the relationship among institutional actors within the hybrid model of the IKN Authority is illustrated through a coordination. In Figure 1 highlights five main nodes: the central government, local administrative units of the IKN Authority, cultural representative institutions, independent supervisory agencies, and civil society. These nodes are interconnected by two-way coordination lines. Each node is assigned a coordination function that reflects its specific role, such as strategic policy formulation, normative oversight, delivery of public aspirations, and administrative implementation. The resulting coordination pattern is complementary, with the central government maintaining strategic control while the other nodes contribute to participation, oversight, and policy implementation. This visualization clarifies how power distribution and political representation can

be operationalized together without compromising administrative effectiveness.

The application of the principle of power distribution and political representation in special administrative areas necessitates an institutional design that recognizes the interrelationships among the executive body, channels for public participation, and the oversight mechanism. Relevant models for the IKN Authority may include an organizational structure with legislative or semi-legislative units that provide normative input for strategic policies, alongside administrative coordination with the central government. Public participation can be formalized through periodic consultative forums integrated into the policy planning and evaluation processes. This should be supported by procedural arrangements that ensure transparency in access to information and the decision-making process. Experiences from Canberra and Brussels demonstrate a pattern of shared governance that places control of strategic issues in the hands of central authorities, while domestic matters are managed through participatory mechanisms. This approach effectively balances democratic legitimacy with administrative efficiency (Askim et al., 2017, p. 569). In the context of IKN, this model can be adapted to maintain strategic control by the central government while also creating opportunities for structured political representation that sustainably articulates local aspirations.

Table 4

**Comparison of Institutional Elements as a Basis for Formulating
the Ideal Political Representation Model for the IKN Authority**

Key Aspects	Findings from IKN (Indonesia)	Findings from Washington D.C. (USA)	Findings from Canberra (Australia)	Relevance for the Ideal Model of IKN
Legal Position	Authority under the President, without the DPRD	City government under full control of Congress (pre-1973)	<i>Legislative Assembly</i> within the framework of federal law	Requires a clear position in the law and derivative regulations to regulate the representation function

Institutional Structure	Full executive centralization	Local executives without legislature, relying on central control	Separation of legislative-executive functions at the local level	Establishment of a limited local representative body with oversight functions
Political Representation Scheme	Consultation with the central government, limited participation	Citizen representation through non-legislative consultative mechanisms	Five-year elections and community consultation forums	Adoption of a hybrid mechanism combining limited local elections and structured public consultation
Administrative Effectiveness	Relatively high in the early phases; Low Citizen Participation	Administrative stable, democratic legitimacy low	Effective administration, high political participation	Balancing administrative effectiveness and democratic legitimacy
Normative Implications	Void of political accountability instruments	Home Rule Act reform strengthens legitimacy	The <i>shared governance model</i> maintains stability & representation	Development of special regulations that balance central government interests and citizens' participatory rights

Source: Data processed by the author, 2025

To identify the political representation model for the IKN Authority, we need to synthesize findings from the comparative studies discussed earlier. This synthesis aims to map the institutional elements that have been effective in various jurisdictions and then rearrange them to align with Indonesia's constitutional needs and administrative characteristics. The mapping process involves reviewing five key dimensions: legal standing, institutional structure, political representation schemes, administrative effectiveness, and normative implications. These dimensions serve as the analytical framework for developing an ideal political representation model. A comparative summary is presented to highlight the relevant similarities and differences, which will inform the formulation of a model for the IKN Authority.

The mapping of the five institutional dimensions serves as a tool for analyzing how well the political representation within the IKN Authority aligns with the principles of people's sovereignty and maintains

effective management capacity. Not all elements of the appellate jurisdiction were fully adopted due to variations in constitutional contexts, legal systems, and national political characteristics. The adaptation process involves selecting relevant elements, which include establishing a clear legal framework through derivative laws and regulations, creating a well-structured mechanism for public participation, and implementing a supervisory system that is accountable and proportionate to administrative needs.

According to Law No. 3 of 2022 concerning the State Capital, there is no formation of a Regional People's Representative Council (DPRD) in the IKN area. This means that political oversight is centralized and controlled by the central government, specifically through the IKN Authority. While this approach ensures adherence to national strategic policies, it risks limiting the political representation of local communities. This study proposes an alternative institutional design that involves a regional legislative oversight mechanism. For example, this could include the participation of the East Kalimantan DPRD or the establishment of a small-scale local representative body with the authority to provide normative input and supervise the strategic policies of the IKN Authority. This model integrates the principle of *trias politica* with a participatory political representation mechanism. In this structure, the executive function remains with the IKN Authority, the legislative function is limited and consultative, and public oversight is facilitated through an open accountability forum.

Figure 1 illustrates a five-dimensional coordination framework with the IKN Authority at the center. This central node interacts with five key components: (1) legislative oversight (DPR/Council) through supervision and legislative functions; (2) the National Government via strategic policies and regulations; (3) administrative authority through technical implementation; (4) cultural representation by integrating local identity; and (5) public accountability through information disclosure and community participation. This design aims to balance the strategic control of the central government with structured political representation at the local level, while also addressing gaps in the normative framework of IKN governance.

VII. Conclusion

The design of the Nusantara Capital Authority, which operates without a Regional People's Representative Council, raises significant concerns regarding the principles of political representation and local democracy as mandated by Art. 18 of the 1945 Constitution. A comparative analysis of special territorial governance models in Indonesia and various other national capitals indicates that even limited representative mechanisms are crucial for maintaining democratic legitimacy and public accountability. A fully centralised governance structure may restrict citizens' political participation, highlighting the need for a hybrid governance model that balances administrative effectiveness with the functions of political representation. This study recommends formulating new norms in the derivative regulations of Law No. 3 of 2022 to facilitate the establishment of local representative mechanisms in the IKN. This approach should not undermine the coordination and control abilities of the central government, thereby achieving a balance between the IKN's institutional design and the principles of constitutional democracy.

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Vietnam's Air Pollution And Policy Gap

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Abstract: Vietnam's rapid economic development since the 1986 *Doi Moi* reforms has been shadowed by a persistent and severe air pollution crisis. This review systematically analyzes the nexus between the evolution of Vietnam's environmental legal framework and corresponding air quality trends over three decades. Despite the progressive development of a comprehensive legislative architecture, culminating in the Law on Environmental Protection 2020, this study reveals a profound disconnect between policy ambition and environmental outcomes. Ambient concentrations of key pollutants, particularly fine particulate matter (PM_{2.5}), remain dangerously high, consistently exceeding both national standards and World Health Organization guidelines by a significant margin, thereby imposing substantial public health and economic burdens. The temporary air quality improvements during Covid-19 lockdowns starkly demonstrated that pollution levels are dictated more by the intensity of economic activity than by the efficacy of existing regulations. This review argues that the central problem is a critical implementation gap, originating not from inadequate laws but from deep-seated, systemic challenges. These include fragmented institutional governance, a de facto prioritization of economic growth over environmental protection, chronically weak enforcement mechanisms, and a constrained space for civil society to ensure accountability. The pattern of repeatedly revising legislation without addressing these foundational issues has created a "legislative treadmill," giving an illusion of progress while failing to achieve tangible improvements. The analysis con-

cludes that a fundamental paradigm shift — from policy formulation to a resolute focus on robust enforcement, institutional reform, and data transparency — is imperative for Vietnam to mitigate this environmental crisis and realize its sustainable development goals.

Keywords: Vietnam; Air Pollution; Environmental Law; Implementation Gap; Environmental Governance

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Contents

I. Introduction	453
II. Methodology	455
III. Results and Discussion	456
III.1. The Legislative Trajectory for Air Quality Management	456
III.2. Contemporary Air Pollution: Trends, Sources, and Hotspots	459
III.3. The Policy-Performance Disconnect	461
III.4. Systemic Barriers to Policy Implementation	464
IV. Conclusion	467
References	468

I. Introduction

Vietnam's remarkable economic trajectory following the 1986 *Doi Moi* reforms, which has lifted millions out of poverty, has concurrently incurred high environmental costs, most visibly manifested in severe air pollution. This challenge is characteristic of the development path in Southeast Asia, where rapid industrialization and urbanization have consistently outpaced the capacity for effective environmental governance. The result in Vietnam is a public health crisis, with metropolitan centers like Hanoi and Ho Chi Minh City (HCMC)¹ frequently ranking among the world's most polluted cities (Thang and Thi, 2023, pp. 1–5).

The primary pollutant of concern, fine particulate matter (PM_{2.5}), consistently reaches annual mean concentrations that significantly ex-

¹ Breathesafeair (2024). Air Pollution in Vietnam. 13 January 2024. Available at: <https://breathesafeair.com/air-pollution-in-vietnam/> [Accessed 25.04.2026].

ceed both Vietnam's national technical regulations (QCVN) and, by a much larger margin, the stringent guidelines of the World Health Organization (WHO) and UNDP² (Nhung et al., 2022, pp. 1–5; Linh-Thy et al., 2024, pp. 120–122). This is not an abstract indicator but a pervasive threat with a staggering toll: estimates attribute 60,000 to 70,000 premature deaths in Vietnam annually to air pollution, with associated economic losses exceeding US\$ 13 billion per year, or approximately 5 % of the national GDP³ (Thang and Thi, 2023, pp. 1).

In direct parallel with this escalating environmental crisis, Vietnam has developed a progressively sophisticated legal framework for environmental protection. This legislative journey began with the foundational Law on Environmental Protection (LEP) in 1993 and was subsequently revised and ostensibly strengthened in 2005, 2014, and most recently in 2020⁴ (Thang and Thi, 2023, pp. 5–7). Each legislative update integrated advanced governance mechanisms, ranging from comprehensive environmental standards to domestic carbon market frameworks, solidifying the government's formal political commitment.

However, the central thesis of this review is that despite this comprehensive legal architecture, a persistent and widening implementation gap has largely nullified its intended effects. This critical disconnect between policy intent and real-world outcomes has prevented meaningful, sustained improvements in air quality, thereby undermining the nation's long-term development aspirations. This review synthesizes over three decades of legal evolution and air quality data to provide a critical analysis of Vietnam's policy effectiveness in combating air pollution. The analysis first traces the development of the air quality management framework chronologically, then presents a data-driven

² United Nations Development Programme — UNDP (2024). Viet Nam's Heavy Air Pollution Needs Stronger Action. Available at: <https://www.undp.org/vietnam/blog/viet-nams-heavy-air-pollution-needs-stronger-action> [Accessed 25.04.2026].

³ World Health Organization — WHO (2026). National Scientific Conference on Combating Air Pollution and Improving Air Quality in Viet Nam. Available at: <https://www.who.int/vietnam/news/detail/25-04-2025-national-scientific-conference-on-combating-air-pollution-and-improving-air-quality-in-viet-nam> [Accessed 25.04.2026].

⁴ Socialist Republic of Vietnam. Law on Environmental Protection (versions 1993, 2005, 2014 and 2020).

portrait of the country's contemporary pollution status. Subsequently, the review critically examines the incongruent relationship between these two timelines and deconstructs the systemic causes of the identified implementation gap, before offering conclusions and strategic directions necessary to bridge this critical gap.

II. Methodology

This study was designed as a systematic review to provide a comprehensive, transparent, and reproducible synthesis of evidence on the relationship between Vietnam's environmental legislation and its air quality outcomes. The review was conducted in the first half of 2025 and covers the period from January 1993, when the first Law on Environmental Protection was enacted, to the present. To ensure a rigorous and unbiased analysis, the methodology adheres to established principles for conducting scientific reviews. A multi-faceted search strategy was employed to identify all relevant sources. This involved a systematic search of academic databases, including Scopus, Web of Science, and Google Scholar, using keyword combinations such as: ("Vietnam" OR "Ha Noi") AND ("air pollution" OR "air quality" OR "PM_{2.5}") AND ("policy" OR "law" OR "regulation" OR "governance").

The academic search was supplemented by a thorough review of primary legal and policy documents sourced from official government portals. These included the cornerstone *Law on Environmental Protection* from 1993, 2005, 2014, and 2020, along with their key implementing Decrees and Circulars. Additionally, grey literature, including technical reports and datasets from reputable organizations such as the World Health Organization (WHO), the United Nations Development Programme (UNDP), the World Bank, and Vietnam's Ministry of Natural Resources and Environment (MONRE), was systematically collected to provide essential data and context. The selection of materials for in-depth analysis was guided by specific inclusion criteria, prioritizing peer-reviewed articles, official government reports, and legal documents that presented empirical air quality data, analyzed Vietnamese environmental policy, or discussed governance challenges. News articles without primary data and studies not directly focused on Vietnam were excluded from the primary synthesis.

The analytical approach employed in this review is a narrative synthesis structured by a chronological framework. This method involved two sequential steps. First, a detailed timeline of major legislative and policy interventions related to air quality management in Vietnam from 1993 to 2025 was systematically mapped. Second, this legislative timeline was juxtaposed with time-series data and trend analyses of key air pollutants (primarily PM_{2.5}, but also NO_x and SO₂) derived from the peer-reviewed literature and official monitoring sources. This comparative approach allows for a critical evaluation of policy effectiveness by identifying correlations — or the conspicuous lack thereof — between policy enactment and subsequent changes in air quality. This analysis forms the basis for identifying the “implementation gap,” which is then further deconstructed through a qualitative synthesis of literature focusing on systemic barriers related to governance, economic priorities, and enforcement capacity.

III. Results and Discussion

III.1. The Legislative Trajectory for Air Quality Management

Vietnam’s legislative response to environmental degradation has evolved significantly over the past three decades, creating an increasingly comprehensive and complex legal framework for air quality management. This evolution can be understood as a series of reactive steps, with each new law attempting to address the shortcomings of its predecessor amid worsening pollution. This progression is detailed in Table 1. The journey began with the Law on Environmental Protection (LEP) 1993, a landmark piece of legislation enacted in the early years of the *Doi Moi* economic reforms. As the country’s first comprehensive environmental law, it established foundational principles and the State’s responsibility for environmental management. However, its provisions were largely general and lacked the specific mechanisms required for effective air pollution control. It introduced the concept of Environmental Impact Assessment (EIA), but in a rudimentary form that had limited practical effect on project approval and implementation.⁵

⁵ Netherlands-Commission-for-Environmental-Assessment, (2022). Vietnam Legislation at the Project Level. Available at: <https://www.eia.nl/en/countries/vietnam/legislation-at-project-level/> [Accessed 25.04.2026].

Recognizing these limitations, the LEP 2005 represented a substantial advancement. It introduced a more specific regulatory regime, most notably by establishing the system of National Technical Regulations (QCVN) as enforceable environmental standards. This law contained explicit articles requiring the control of dust, emissions, and noise from transportation and industrial activities, and mandated that vehicles meet emission standards. This marked a shift towards a more structured, standards-based approach to air quality management.⁶

The LEP 2014 continued this modernization trend, aiming to align Vietnam's framework more closely with international practices. It refined the EIA process, introduced the concept of strategic environmental protection planning, and, significantly, added a dedicated chapter on responding to climate change, formally linking it to air quality through the management of greenhouse gases (GHGs) and the promotion of clean energy. This law was buttressed by crucial implementing policies, chief among them the National Action Plan on Air Quality Management to 2020 (Decision No. 985a/QĐ-TTg), which set specific targets and assigned tasks to various ministries to control emission sources and expand monitoring networks.⁷

The current and most ambitious legislation is the LEP 2020 that took effect in 2022. This law represents a paradigm shift on paper, seeking to streamline and strengthen environmental governance through several key innovations. It integrates multiple permits into a single Environmental License, classifies projects based on their level of environmental risk rather than just their scale, and formally recognizes "residential communities" as key stakeholders with a role in monitoring. Critically, it lays the legal foundation for a domestic carbon market by mandating GHG emission quotas and trading systems. For the first time, it also requires all provinces to develop and implement their own air quality management plans, decentralizing planning while centralizing certain standards. This law is operationalized by the National Strat-

⁶ Socialist Republic of Vietnam. Law on Environmental Protection (version 2005).

⁷ Socialist Republic of Vietnam. Law on Environmental Protection (version 1993, 2005, 2014 and 2020).

egy for Environmental Protection to 2030, with a vision to 2050 (Decision No. 450/QD-TTg), which champions the development of a circular economy, the expansion of renewable energy, and stricter controls on waste and industrial pollution.

This nearly 30-year legislative history reveals a clear pattern. Each revision of the LEP was prompted by the acknowledged “deficiencies and shortcomings” of its predecessor and the mounting public and political pressure from ongoing environmental degradation. However, as the subsequent analysis will show, air quality failed to improve meaningfully after each revision. This suggests that the problem may not lie in the laws themselves but in persistent systemic barriers to their implementation. The cycle of reacting to policy failures by drafting new, more complex laws, without fixing the underlying enforcement machinery, has left Vietnam in a state of constant legal motion with little significant forward progress in environmental outcomes.

Table 1

**Chronology of major Vietnamese environmental laws
and air quality policies (1993–2025)**

Year	Law/Policy Title	Air Quality-Related Provisions
1993	Law on Environmental Protection (LEP 1993)	Established first general principles of environmental protection; Introduced rudimentary Environmental Impact Assessment (EIA)
2005	Law on Environmental Protection (LEP 2005)	Introduced National Technical Regulations (QCVN) as enforceable standards; Mandated control of industrial and transport emissions and noise
2014	Law on Environmental Protection (LEP 2014)	Refined EIA process; Introduced environmental protection planning; Added chapter on climate change response and GHG management
2016	Decision No. 985a/QD-TTg	Approved the National Action Plan on Air Quality Management to 2020, setting specific targets for emission reduction and monitoring expansion
2020	Law on Environmental Protection (LEP 2020)	Integrated permits into a single Environmental License; Classified projects by environmental risk; Mandated a domestic carbon market; Required provincial air quality management plans

2021	COP26 Commitment	Prime Minister pledged to achieve net-zero emissions by 2050 and phase out unabated coal power ⁸
2022	Decision No. 450/QĐ-TTg	Approved the National Strategy for Environmental Protection to 2030, vision to 2050, emphasizing a circular economy, renewable energy, and stricter waste management

III.2. Contemporary Air Pollution: Trends, Sources, and Hotspots

Despite the extensive legislative efforts, Vietnam's air quality remains a severe public health threat, particularly in its rapidly expanding urban and industrial regions. The data from the last decade paint a stark picture of a nation struggling with hazardous levels of pollution, with fine particulate matter (PM_{2.5}) emerging as the most prominent and dangerous pollutant (Linh-Thy et al., 2024, pp. 120–123). Annual mean PM_{2.5} concentrations in the industrial heartlands of the Red River Delta (such as Bac Ninh and Hung Yen provinces) and major cities like Hanoi frequently exceed Vietnam's national standard of 25 µg/m³ (QCVN 05:2013/BTNMT). For instance, 2019 data showed that Hanoi's annual average reached 40.8 µg/m³, whereas Ho Chi Minh City recorded a lower average of 20.9 µg/m³ (Nhung et al., 2022, pp. 1–5). More recently, in 2023, average nationwide PM_{2.5} levels were reported to be nearly six times the WHO-recommended level, underscoring the persistence of the problem.⁹ As illustrated in Table 2, the gap between reality and internationally recognized safe levels is vast. While other criteria pollutants, such as sulfur dioxide (SO₂) and nitrogen oxides (NO_x), are also significant concerns, PM_{2.5} remains the primary driver of the air pollution-related disease burden (Linh-Thy et al., 2024, pp. 120–121; Phung et al., 2016, pp. 9–16). Total national SO_x emissions were estimated at 750,000 tons in 2018, with over 91 % originating from thermal power

⁸ Climate Action Tracker, (2025). Viet Nam. 28 October 2025. Available at: <https://climateactiontracker.org/countries/vietnam/> [Accessed 25.10.2026].

⁹ United Nations Development Programme — UNDP, (2024). Viet Nam's Heavy Air Pollution Needs Stronger Action. Available at: <https://www.undp.org/vietnam/blog/viet-nams-heavy-air-pollution-needs-stronger-action> [Accessed 25.04.2026].

plants and industrial activities, underscoring the significant impact of the energy and manufacturing sectors (Linh-Thy et al., 2024, pp. 121).

Source apportionment studies consistently identify a multi-faceted and deeply embedded set of emission sources. Transportation is a dominant contributor in urban areas, driven by a massive and growing fleet of over 58 million motorbikes and millions of cars, many of which utilize outdated engine technology with poor emission controls (Thang and Thi, 2023, pp. 1; Bui et al., 2022, pp. 1–2; Vo et al., 2022, pp. 6–9). Industrial activities, including emissions from a growing number of coal-fired power plants, cement factories, steel production, and general manufacturing, are major sources of both PM_{2.5} and its precursors, such as SO_x and NO_x (Thang and Thi, 2023, pp. 1–5; Roy et al., 2022, pp. 1–2). Many of these facilities employ outdated, polluting technologies and lack adequate flue-gas treatment systems. Agriculture contributes significantly, especially seasonally, through the widespread practice of open burning of crop residues. This practice, particularly the burning of rice straw in the Red River Delta, can account for up to 40 % of total PM_{2.5} emissions during peak burning periods (Linh-Thy et al., 2024, pp. 120). Finally, dust from countless construction sites and the open burning of municipal and industrial waste further degrade air quality in and around population centers (Thang and Thi, 2023, pp. 15–20).

This pollution exhibits clear temporal and spatial patterns. A distinct “pollution season” occurs from October to April, when meteorological conditions, such as temperature inversions and low wind speeds associated with the northeast monsoon, trap pollutants close to the ground, leading to prolonged episodes of hazardous air quality (Bui et al., 2022, pp. 5–11).¹⁰ Spatially, air pollution is more severe in the north than in the south. This spatial disparity reflects a distinct heterogeneity in emission sources and economic structures between the two regions. In the North, particularly the Red River Delta, pollution is driven by a heavy reliance on coal-fired power generation and heavy industry. Recent source apportionment studies indicate that industrial activities and biomass burning are the predominant contributors in

¹⁰ World Health Organization — WHO, (2026). Air Pollution in Viet Nam. Available at: <https://www.who.int/vietnam/health-topics/air-pollution> [Accessed 25.04.2026].

Hanoi, accounting for approximately 29 % and 26 % of annual PM_{2.5} mass, respectively, while transport contributes around 15 %. The region accounts for nearly 65 % of the country's total coal ash generation, with major thermal power hubs concentrated in Quang Ninh and Hai Phong provinces, thereby intensifying regional haze events (Cuong et al., 2022, pp. 63).

Conversely, air quality in the Southern region, anchored by Ho Chi Minh City (HCMC), is more heavily influenced by transport emissions and a mix of anthropogenic sources typical of light industry and rapid urbanization. In HCMC, mobile sources and biomass burning, together with crustal dust, account for over 36 % of PM_{2.5}, with a significant portion of secondary aerosols (ammonium sulfate) derived from regional background sources (Tran et al., 2024, pp. 6–8). Unlike the North, where winter monsoon conditions frequently trap pollutants, the South benefits from better dispersion, yet localized hotspots near industrial zones such as Dong Nai and Binh Duong remain critical concerns due to the high density of manufacturing SMEs.

Table 2

Comparison of annual mean PM_{2.5} concentrations in key Vietnamese cities with National (QCVN) and WHO Guidelines

City/Region	Year	Annual mean PM _{2.5} (µg/m ³)	Exceedance factor vs QCVN 05:2013 (25 µg/m ³)	Exceedance factor vs WHO AQG (5 µg/m ³)
Hanoi	2019	40.8	1.6 times	8.2 times
	2021	42.9	1.7 times	8.6 times
	2023	28.3	1.1 times	5.7 times
Ho Chi Minh City	2019	20.9	0.8 times	4.2 times
	2021	24.4	1.0 times	4.9 times
	2023	28.3	1.1 times	5.7 times
Bac Ninh	2020	33.0	1.3 times	6.6 times

III.3. The Policy-Performance Disconnect

A critical analysis of Vietnam's environmental policy journey reveals a stark and troubling incongruence between legislative action and air quality outcomes. When the timeline of policy enactment is juxtaposed

posed with the timeline of pollution data, it becomes evident that the comprehensive laws and ambitious national strategies have had a limited, if any, sustained impact on reducing ambient air pollution. Despite the passage of four major environmental laws over three decades, there is no clear, demonstrable correlation showing that these interventions have durably bent the curve of pollution downwards. For example, the period from 2014 to 2020, following the implementation of the LEP 2014 and the National Action Plan (Decision 985a), did not usher in an era of cleaner air. Instead, PM_{2.5} levels in Hanoi remained stubbornly high, with some studies indicating that 2019 was a peak pollution year,¹¹ demonstrating a clear failure to meet the plan's objectives (Thao and Anh, 2023, pp. 44–45).

The nationwide lockdowns imposed during the Covid-19 pandemic in 2020 provided a powerful, albeit unintentional, “natural experiment.” The dramatic reduction in traffic, industrial production, and construction activities led to a significant and immediate improvement in urban air quality, with marked decreases in PM_{2.5} and carbon monoxide (CO) concentrations (Thao and Anh, 2023, pp. 44; Le et al., 2021, pp. 1–2). This period of cleaner skies provided a clear demonstration that ambient air quality in Vietnam is overwhelmingly determined by the intensity of economic activity rather than by the effectiveness of the existing regulatory framework. The argument is further strengthened by the rapid return of pollution to pre-pandemic levels, and in some cases worse, by 2023, once economic activities fully resumed.¹² This rebound strongly suggests that the underlying policy and enforcement mechanisms are insufficient to decouple economic growth from pollution.

This policy-performance disconnect is not an abstract observation but is reflected in the consistent failure to meet specific targets. Critical reviews of national environmental strategies have shown that many objectives are “far from accomplished” (Thang and Thi, 2023, pp. 4). For instance, a key goal for the 2011–2020 period was to treat 70 % of

¹¹ ICLEI, (2022). Addressing Air Pollution in Hanoi, Vietnam. Available at: https://acp.iclei.org/wp-content/uploads/2022/02/vie_air-quality.pdf [Accessed 25.04.2026].

¹² United Nations Development Programme — UNDP, (2024). Viet Nam's Heavy Air Pollution Needs Stronger Action. Available at: <https://www.undp.org/vietnam/blog/viet-nams-heavy-air-pollution-needs-stronger-action> [Accessed 25.04.2026].

domestic wastewater in urban areas; by 2020, the actual figure was a mere 13 % (Thang and Thi, 2023, pp. 4). Similarly, despite regulations requiring industrial zones to have centralized wastewater and emission treatment systems, a significant proportion remain non-compliant, continuing to discharge pollutants into the environment with minimal consequence.¹³ This pattern of setting ambitious goals that are subsequently missed points to a systemic breakdown between policy design and execution.¹⁴

This history fosters an “illusion of progress,” where the act of creating policy becomes a substitute for achieving results. Official communications from the government and its international partners often highlight the passage of new laws, such as the LEP 2020, or ambitious international commitments, like the net-zero pledge at COP26, as evidence of Vietnam’s strong commitment to environmental protection.¹⁵ While these actions are politically significant, they create a facade of progress that masks a reality of systemic inertia and continued environmental degradation.¹⁶ The true measure of success is not the sophistication of the legal text, but the quality of the air citizens breathe.¹⁷ External evaluations, such as the Climate Action Tracker, which rates Vietnam’s policies as “Critically Insufficient,” confirm that current ac-

¹³ General Statistics Office — GSO, (2025). The Status of Wastewater Treatment and Environmental Protection in Vietnam and Lessons from Denmark. Available at: <https://www.nso.gov.vn/en/other-news/2025/01/the-status-of-wastewater-treatment-and-environmental-protection-in-vietnam-and-lessons-from-denmark/> [Accessed 25.04.2026].

¹⁴ East Asia Forum, (2025). Vietnam’s Renewable Surge Shouldn’t Distract from Chronic Environmental Policy Failures. 24 May 2024. Available at: <https://eastasiaforum.org/2024/05/24/vietnams-renewable-surge-shouldnt-distract-from-chronic-environmental-policy-failures/> [Accessed 25.04.2026].

¹⁵ United Nations Development Programme — UNDP, (2024). Viet Nam’s Heavy Air Pollution Needs Stronger Action. Available at: <https://www.undp.org/vietnam/blog/viet-nams-heavy-air-pollution-needs-stronger-action> [Accessed 25.04.2026].

¹⁶ World Health Organization — WHO, (2026). National Scientific Conference on Combating Air Pollution and Improving Air Quality in Viet Nam. Available at: <https://www.who.int/vietnam/news/detail/25-04-2025-national-scientific-conference-on-combating-air-pollution-and-improving-air-quality-in-viet-nam> [Accessed 25.04.2026].

¹⁷ International Trade Administration, (2024). Vietnam — Environmental Technology. U.S. Department of Commerce. Available at: <https://www.trade.gov/country-commercial-guides/vietnam-environmental-technology> [Accessed 25.04.2026].

tions are not aligned with stated goals. This decoupling of policy-making from tangible outcomes is a central feature of Vietnam's environmental challenge.¹⁸

The disconnect between policy and practice regarding air pollution is a shared challenge across rapidly developing Southeast Asian economies. Nations such as Indonesia and Thailand similarly face hazardous air quality levels driven by industrialization and urbanization outstripping regulatory capacity. However, the governance response varies significantly within the region. While some ASEAN contexts have begun to utilize judicial mechanisms to drive accountability, Vietnam's environmental governance model predominantly emphasizes legislative development and administrative compliance. Consequently, the primary challenge in the Vietnamese context is not the absence of legal frameworks, but rather the transition from policy formulation to effective field implementation. This comparative lens suggests that to address the implementation gap, Vietnam must focus on strengthening the practical authority of local enforcement agencies and effectively integrating community-based monitoring roles already codified in the 2020 Law on Environmental Protection.

III.4. Systemic Barriers to Policy Implementation

The persistent gap between Vietnam's environmental policy aspirations and its air quality reality is not accidental but is rooted in a complex interplay of systemic barriers. Deconstructing this implementation gap reveals deep-seated challenges in governance, political economy, and enforcement capacity. These barriers, summarized in Table 3, collectively undermine the effectiveness of the nation's legal framework.

A primary cause is institutional and governance failure. Environmental management in Vietnam is characterized by fragmentation and poor coordination. Responsibilities are split across multiple ministries, including the Ministry of Natural Resources and Environment (MONRE), the Ministry of Industry and Trade, and the Ministry of Transport, often leading to conflicting priorities and a lack of unified

¹⁸ Climate Action Tracker, (2025). Viet Nam. 28 October 2025. Available at: <https://climateactiontracker.org/countries/vietnam/> [Accessed 25.04.2026].

action (Thang and Thi, 2023, pp. 9–16).¹⁹ This is compounded by what has been termed as a “paradox of over-decentralization” (Thang and Thi, 2023, pp. 9–11). While laws delegate enforcement responsibilities to provincial-level Departments of Natural Resources and Environment (DONREs), this delegation is often not accompanied by the necessary financial resources, technical expertise, or, most importantly, the political authority to enforce regulations against powerful state-owned or private enterprises that are crucial to the local economy.

This leads directly to the second major barrier: the primacy of economic growth. Despite official state policy embracing sustainable development, there is a clear and consistent lack of “operational commitment” to this principle (Thang and Thi, 2023, pp. 15–20). At both the national and provincial levels, economic growth targets frequently override environmental protection mandates. Local governments, whose performance is often judged by GDP growth and the attraction of investment, are reluctant to impose costly environmental standards on industries that provide jobs and tax revenue.²⁰ This dynamic fosters an environment of regulatory forbearance and weak compliance. The country’s declining adjusted net savings rate, a metric that accounts for the depletion of natural resources and pollution damage, serves as a stark indicator of this unsustainable development trend (Thang and Thi, 2023, pp. 3–5).

Consequently, the legal framework is crippled by weak enforcement and a culture of low compliance. While authorities uncover tens of thousands of environmental violations annually, the penalties imposed are often too low to serve as an effective deterrent, making it economically rational for polluters to pay the fine rather than invest in expensive treatment technologies.²¹ The absence of mandatory, independent

¹⁹ Vietnam News Agency, (2025). Environmental Law Enforcement to Be Further Strengthened. Vneconomy. Available at: <https://en.vneconomy.vn/environmental-law-enforcement-to-be-further-strengthened.htm> [Accessed 25.04.2026].

²⁰ East Asia Forum, (2025). Vietnam’s Renewable Surge Shouldn’t Distract from Chronic Environmental Policy Failures. 24 May 2024. Available at: <https://eastasiaforum.org/2024/05/24/vietnams-renewable-surge-shouldnt-distract-from-chronic-environmental-policy-failures/> [Accessed 25.04.2026].

²¹ Vietnam News Agency, (2025). Environmental Law Enforcement to Be Further Strengthened. Vneconomy. Available at: <https://en.vneconomy.vn/environmental-law-enforcement-to-be-further-strengthened.htm> [Accessed 25.04.2026].

third-party monitoring for most industries means that enforcement relies on under-resourced and sometimes compromised government agencies (Nguyen et al., 2018). This is exacerbated by data gaps and a lack of transparency. Vietnam’s official air quality monitoring network remains limited and fragmented, hindering accurate pollution assessment, source apportionment, and public warning systems.²²

Finally, a fundamental contradiction exists regarding the role of civil society. The LEP 2020 formally empowers “residential communities” to participate in environmental protection and monitoring. Public demand for a cleaner environment is a recognized driver of policy change (Thang and Thi, 2023, pp. 9–11). However, in practice, the state has used ambiguous legal instruments, such as tax laws, to imprison and silence some of the country’s most prominent and effective environmental advocates and NGO leaders, creating a chilling effect on independent activism (Huong Thien, 2024). This act of legally inviting public participation while politically punishing effective, critical oversight neutralizes a vital mechanism for holding both the State and corporate polluters accountable, thereby ensuring the implementation gap remains firmly in place.

Table 3

Systemic barriers to effective environmental policy implementation in Vietnam

Barrier category	Specific barrier	Description
Governance & Institutional	Inter-agency Fragmentation	Overlapping mandates and poor coordination between ministries (MONRE, Industry, Transport) lead to conflicting policies and inaction
	Over-decentralization	Provincial authorities (DONREs) are given enforcement responsibility without adequate financial resources, technical capacity, or political power to act against powerful polluters

²² World Health Organization — WHO, (2026). National Scientific Conference on Combating Air Pollution and Improving Air Quality in Viet Nam. Available at: <https://www.who.int/vietnam/news/detail/25-04-2025-national-scientific-conference-on-combating-air-pollution-and-improving-air-quality-in-viet-nam> [Accessed 25.04.2026].

Economic & Political	Primacy of Economic Growth	De facto prioritization of GDP growth and investment attraction over environmental protection at both national and local levels
	Lack of Operational Commitment	The national goal of balancing growth and environment is not translated into concrete, enforceable actions and budgets
Enforcement & Legal	Weak Sanctions and Deterrence	Fines for environmental violations are often too low to deter polluters, who find it cheaper to pollute and pay than to comply
	Limited Monitoring & Data	The official environmental monitoring network is insufficient and fragmented, hindering effective management, forecasting, and public information
Technical & Social	Constrained Civil Society Space	While laws encourage community participation, the state actively suppresses independent environmental activists and NGOs, neutralizing a key accountability mechanism
	Low Public Awareness/ Access	Limited public access to real-time, reliable environmental data and a lack of transparency about industrial polluters hinder public pressure for change

IV. Conclusions

Vietnam's three-decade endeavor in environmental governance has produced an advanced legal architecture for air quality management that, on paper, meets international standards. This review's definitive conclusion, however, is that this legislative progress is fundamentally disconnected from the reality on the ground, where hazardous air pollution persists as a major threat to public health and economic stability. This chasm between policy and performance is not a procedural delay but a systemic failure, rooted in institutional fragmentation, the continued subordination of environmental integrity to economic targets, ineffective enforcement, and the paradoxical suppression of civil society. The nation's reactive cycle of amending laws in response to past failures has created a "legislative treadmill," producing the appearance of action without achieving substantive results. Consequently, until Vietnam confronts these foundational challenges, its sustainable development goals will remain unattainable. A paradigm shift is required one that

moves beyond policy formulation to a resolute commitment to enforcement, institutional accountability, data transparency, and the empowerment of independent oversight. Ultimately, ensuring breathable air for its citizens requires Vietnam to pivot from the symbolism of legal reform to the substantive work of vigorous, transparent implementation.

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HUMAN TRAFFICKING AS A TRANSNATIONAL CRIME

Article



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Human Trafficking in South Asian Countries: An Analysis from the Prism of Law

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Abstract: Human trafficking is an international crime perpetrated by the traffickers for unlawful gain through the heinous act of sex trafficking, forced labor, begging, pornography, forced marriage, removal of organ, etc. Traffickers are using the information technology and online services to facilitate trafficking and to promote sex industry and sex slavery. Several laws and policies have been framed but failed to address the root cause of this menace. This study revisits the existing legal system to unfold the changing dimensions of Human Trafficking, focusing on the conditions of victims in South Asian Countries. The issues like changing pattern of slavery with changing attitude towards sexuality and gender, growing inequality, economic depressions, migration, sex tourism, etc. has been critically analyzed to address the challenges before the existing legal system coupled with human right responses with legal arguments. The above study is based on analytical study with an empirical insight by incorporating secondary data and advocates in favor of collaborative governance. This paper, drawing on available scientific evidence, validates the hypothesis that the issue must be addressed through a human rights — centered approach within a comparative legal framework. It argues that states in the South Asian region have failed to assume the

necessary responsibilities and that, since the Covid-19 pandemic, the global polity has been experiencing an unprecedented human crisis. In this context, the social work profession must intensify awareness programs and help ensure the welfare of affected individuals.

Keywords: trafficking in person; modern slavery; transnational crime; human rights; cultural degradation

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Contents

I. Introduction. Human Trafficking: An International Crime	472
II. Human Trafficking: An Organized Crime Stampeding the Criminal Justice Delivery System	477
III. Human Rights-Centric Approach to Trafficking: Legal Measures to Combat the Menace	479
IV. Understanding the State Responsibility in South Asian Region to Address Trafficking	484
V. Conclusion: Searching a Path for Freedom from Enslavement	494
References	496

I. Introduction. Human Trafficking: An International Crime

Human trafficking is certainly a crime that undermines the dignity of a human being and is a form of modern-day slavery. Every year a considerable number of men, women and children fall prey to traffickers across the globe as the traffickers have their nets spread in almost all the countries. Often it is argued on the part of the researchers that the term “trafficking” is akin to the categories like prostitution, smuggling and migration and does not contain any different status or meaning. However, the offence of trafficking should not be downplayed by placing it within any fixed pattern or category of crime; rather, it should be understood as a violation of the fundamental rights of trafficked persons, one that undermines their dignity and constitutes a direct assault on their integrity. A holistic and integrated approach is needed to address the heinous crime of human trafficking and to curb the activities of traffickers.

Broadly, the trafficking is done for the purpose of forced labor and sex and thus involved a modern form of slavery. The crime of trafficking may occur within or across state boundaries and entails grave violations of human rights, whereby freedom of speech and expression, freedom of movement, the right to life, bodily autonomy, the right to privacy, the right to live with dignity, and the right to preserve one's integrity and sanctity are brutally jeopardized. Almost all the countries across the globe are affected by traffickers as they commit the crime in the country of the origin, transit or destination of the victims (Liv, 2019, p. 1). Trafficking is a process through which the victims are placed in an exploitative situation with an immoral and illegal motive for gaining undue economic advantages. Victims of modern-day slavery are often recruited through deception or subjected to coercion, duress, force, or threats of immediate harm or injury, and are subsequently compelled to work in domestic service, agriculture, restaurants, hair and beauty salons, hotels and pubs, strip clubs, the commercial sex trade, and forced marriages, among other exploitative settings. As a result, a significant section of society falls prey to an inhumane cycle of discrimination, sustained violence, and injustice.

It is deeply unfortunate that the international community remained silent for so long on the formulation of a universally accepted definition of trafficking, and until the late 1990s, no serious attempt was made to distinguish trafficking in persons from related practices such as prostitution, smuggling, and illicit migration. The first internationally accepted definition of trafficking was incorporated into the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) (2000).¹ For the first time the above trafficking protocol, along with the UNTOC, considered trafficking as a crime having a transnational character that can be investigated and prosecuted (Nee, 2018, p. 2).

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. Available at: <https://www.ohchr.org/sites/default/files/Protocolontrafficking.pdf> [Accessed 05.06.2026].

By incorporating the above Trafficking Protocol of 2000, the international community decided to take an effective measure to fight and eliminate trafficking in persons especially women and children by formulated appropriate legal measures related to the occurrence of crime of trafficking in origin, transit and destination. It was eventually recognized, albeit rather late, that a separate international instrument was required to address trafficking in persons, as it could not be effectively combated through instruments designed to deal with other forms of exploitation, particularly those affecting women and children.

The State Parties to this Protocol had also decided to supplement the UNCTOC to strengthen the fight against transnational organized crime including trafficking in persons. The above Trafficking Protocol (2000) incorporated a broader outlook to define “trafficking in persons” as recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or by applying deceitful tactics or by using the fiduciary positions or by abuse of power or by obtaining consent by way of offering money or any other consideration with a sole object to exploit them by compelling the victims to join the activities of prostitution or other forms of the activities of sexual exploitation or forced labor or work in the nature of slavery or for the purpose of removal of organs.²

² Art 3 of the Trafficking Protocol (2000) says, “For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.

(d) ‘Child’ shall mean any person under eighteen years of age”.

Thus, regrettably, slavery continues to persist in the twenty-first century in a new form, namely human trafficking, whereby traffickers exploit victims either by subjecting them to forced labor or by coercing them into commercial sexual exploitation for pecuniary gain at the expense of their bodily autonomy and human dignity. Human trafficking primarily takes two major forms — forced labor and sex trafficking — and is carried out for a range of exploitative purposes, including labor exploitation, sexual exploitation, and organ removal, largely for economic gain. Trafficking, as a form of modern slavery, includes, but is not limited to, forced labor, domestic servitude, and sexual exploitation, and constitutes a lucrative criminal activity with a global reach.

Traffickers use their victims as commodity for financial gain violating their integrity and dignity. Human trafficking is ranked as the third most profitable and organized crime and enable the traffickers to earn estimated 32\$ per annum worldwide (Miranda, 2011, p. 7). However, in the absence of specific data, particularly regarding the number of victims, it is difficult to estimate with precision the profits derived by traffickers from exploitation. Victims are often treated as commodities, with their value determined through transactions between traffickers; the illicit profits generated by trafficking vary according to the scale, structure, and typology of the criminal organizations involved. Large criminal organizations earn more illicit profits than the smaller ones.³ On the other hand, victims of human trafficking are deprived of their freedom, liberty, and dignity. They often find themselves in deeply devastating circumstances, with their hopes for a secure and meaningful life shattered, and are compelled to live under conditions of extreme fear. Many are subjected to sustained physical and psychological abuse, and some experience sexual violence and exploitation.

Trafficked women and children are particularly vulnerable and, in many instances, suffer more severe forms of sexual abuse and exploitation than trafficked adult men. They are frequently denied autonomy over their own bodies and exposed to repeated violations of their bodily integrity. Analysis of court cases conducted by the United Nations Of-

³ UNODC, Global Report on Trafficking in Persons 2020 (United Nations publication, Sales No. E.20.IV.3). Available at: https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf [Accessed 05.06.2026].

fice on Drugs and Crime (UNODC) indicates that the physical or extreme violence inflicted by traffickers on female victims is three times higher than that inflicted on male victims, while children face such violence at twice the rate experienced by adults.⁴

However, the number of male victims, including both boys and men, has increased considerably, with an estimated rise of approximately 3 % since 2019, despite the overall global decline in reported trafficking incidents.⁵ This increase in the proportion of male victims may be attributable to demand for forced labor and other forms of exploitation, as well as to the failure, or lackadaisical attitude, of member states and countries of origin to improve the socio-economic conditions of impoverished communities and to provide adequate protection against traffickers through effective law enforcement and stronger legal safeguards.⁶

However, according to the Global Estimates of Modern Slavery Report (2022)⁷ published by the ILO and its partner organizations, an estimated 50 million people worldwide were living in conditions of modern slavery on any given day. Of this total, 12 million were children, while women and girls constituted 54 % of the affected population. According to the above global estimates, the number of females subjected to modern slavery in 2021 was higher than that of males, which appears, at least *prima facie*, to be inconsistent with the findings of the UNODC report. However, the UNODC analysis is based on trends in the profiles of detected victims during the period from 2004 until 2020. It is pertinent to note that the Global Estimates of Modern Slavery Report addresses the broader phenomenon of modern slavery, which rests primarily on two principal components: forced labor and forced marriage.

⁴ UNODC, Global Report on Trafficking in Persons 2022 (United Nations publication, Sales no.: E.23.IV.1). Available at: https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf [Accessed 05.06.2026]. P. XII.

⁵ UNODC, Global Report on Trafficking in Persons 2022.

⁶ UNODC, Global Report on Trafficking in Persons 2022. P. XI.

⁷ Global Estimates of Modern Slavery: Forced Labour and Forced Marriage. International Labour Organization (ILO), Walk Free, and International Organization for Migration (IOM), Geneva, 2022. ISBN: 978-92-2-037483-2. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf [Accessed 12.06.2026].

In this framework, forced labor encompasses debt bondage, slavery and slavery-like practices, as well as human trafficking. The report further provides data, disaggregated by income group, on the number of persons (in millions) and the percentage of the population living in conditions of modern slavery in 2021.⁸

According to the Global Estimates Report (2022), in 2021, approximately 27.6 million people are subjected to forced labor worldwide. Of this total, 3.3 million are children, while women and girls account for 11.8 million. The report further indicates that 86 % of all forced labor is imposed by private actors; within this category, 63 % involves labor exploitation and 23 % involves forced commercial sexual exploitation. Remaining 14 % are engaged in force labor by the state concerned. Globally, an estimated 22 million people are living in forced marriage, of whom 14.9 million are women and girls. This figure suggests that approximately three in every 1,000 people are subjected to forced marriage, reflecting the alarming scale of this form of exploitation. In this context, forced marriage refers to situations in which individuals are compelled to marry without their free and full consent, and this includes child marriage.

II. Human Trafficking: An Organized Crime Stampeding the Criminal Justice Delivery System

Human trafficking is one of the most heinous and barbaric crimes committed worldwide, which is shaming the humanity. It is a serious human right issue as the rights of the trafficked persons are infringed either in their countries of origin or abroad. Thus, the crime of trafficking involves transnational or cross-border jurisdiction, as the acts constituting trafficking may occur in the victim's country of origin, in a transit country, or in the country of destination. Ordinarily, trafficking in persons is regarded as a continuing offence and may therefore give rise to both intra-territorial and extra-territorial jurisdiction. There is no doubt that human trafficking is a transnational crime; however, it remains debatable whether it should invariably be characterized as or-

⁸ Global Estimates of Modern Slavery: Forced Labour and Forced Marriage. P. 20.

ganized crime. Many scholars contend that the concept of transnational organized crime is itself vague. The organized crime thesis seeks to establish that human smuggling is carried out through well-organized networks, operates in a hierarchical manner, and is linked to the trafficking of other goods and services, including women, weapons, and drugs (Baird, 2013, pp. 11–12). The organized crime thesis posits that, like other forms of organized criminal activity, human trafficking involves a central command-and-control structure operating within a hierarchical framework, often under transnational coordination, where decisions are made in a concerted manner with the aid of modern technologies.

However, many scholars reject this view based on evidence relating to human smuggling, which suggests the absence of a mafia-style hierarchical structure in the commission of such offences (Baird, 2013, pp. 11–12). The justification may be there in the organized crime thesis but it is true that the traffickers work through a network through which they remain in contact with each other. Currently, traffickers take the advantages of the modern information technologies; they use a social networking system to maintain liaison among themselves to commit the crime of trafficking. However, this does not mean that the offence of human trafficking is never committed by individuals acting alone, although such instances typically occur on a smaller scale. An analysis of court cases conducted by the United Nations Office on Drugs and Crime (UNODC) reveals that individual traffickers do operate independently. Nevertheless, the proportion of trafficking offences committed by such individuals is significantly lower than that committed by structured criminal organisations.⁹

Here it is pertinent to mention Art. 2 of the UNCTOC that defined *an organized criminal group* as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing the crime(s) of a serious nature for financial or other material gain.¹⁰ Thus, in the light of the definition given above, it can

⁹ UNODC, Global Report on Trafficking in Persons 2022.

¹⁰ United Nations Convention against Transnational Organized Crime (UNTOC) Available at: https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf [Accessed 05.06.2026].

safely be concluded that most of the crime of trafficking is committed in an organized and structured way. Under the international law regime, the offence of trafficking mainly comes within the cross-border crime framework and for that reason it advocates in favor of solidarity among the nations (Turner, 2019, p. 105).

III. Human Rights-Centric Approach to Trafficking: Legal Measures to Combat the Menace

Poverty, socio-economic crises, cultural degradation, patriarchal hegemony, the lack of democratic space in decision-making processes, the misuse of technological advancements — particularly information technology and cyberspace — for unethical purposes, social disparities, war and international terrorism, environmental degradation leading to environmental displacement, the growing activities of drug traffickers, and unchecked population growth are among the root causes underlying the emergence and proliferation of human trafficking. Human trafficking is a crime perpetrated against the underprivileged. Offenders — often linked to networks of power and political influence — exploit the vulnerability of impoverished individuals. They entrap victims through inducements directed either at the individuals themselves or at their immediate custodians, obtain consent through deceitful means such as fraud and misrepresentation, or coerce them through threats directed at them or their loved ones. Victims are subsequently exploited, and their bodies and labor are commodified for unlawful monetary and material gain.

However, the politics of human trafficking rarely allows for a discussion on the issues concerning migration, global inequalities and border politics to resolve such inhuman activities; rather, it prefers to highlight the dichotomies between the offender and the victim, in which the victim is generally a woman in prostitution to play with the sentiments of the people (Plambech and Pedersen, 2019, p. 17). Some exponents highlight the issue of “double speak” in political and legal parlances by politicians and law makers so that they can construe selective narratives as per the situation. For example, they support the issue of the rights and well-being of migrants and, at the same time, oppose the unlawful

migratory practices and migrants especially those without legal status (Sibley and Meulen, 2022, p. 409).

The Covid-19 pandemic not only affected global health and the economy but also had an unprecedented impact on human rights. It starkly exposed the vulnerability of poorer and marginalized sections of society, particularly women and children, and intensified the harms inflicted upon them. During the pandemic, millions of people lost their livelihoods and faced hunger, food insecurity, and malnutrition on an alarming global scale. The resulting socio-economic distress created conditions conducive to trafficking in persons, enabling traffickers to adapt their methods and expand their operations.

Notably, there was a significant rise in online commercial sexual exploitation and sex trafficking, including online sexual exploitation of children (OSEC). Reports indicated an increased demand for and distribution of child sexual exploitation material (CSEM), alongside persistent patterns of forced labor, during the pandemic period.¹¹ Since then, traffickers have been continually developing new strategies to exploit women and children, particularly through cybersex and other forms of online abuse. By leveraging the internet and social media platforms, they traffic individuals with false promises — often related to employment or other opportunities.

Over the past decade, the human trafficking has become a major concern of the world polity and gradually the awareness is growing within the international community to end with barbaric human exploitation. With the growth of the international legal mechanism, the claim for human rights-centric approach towards human trafficking is gradually intensifying across the globe. A human rights — centric approach to trafficking in persons requires recognition that governments bear both a legal and moral obligation to protect the life and dignity of all individuals within their jurisdiction, including non-citizens. Accordingly, states must take effective measures to prevent individuals from being subjected to human exploitation for unlawful or immoral purposes.

¹¹ Trafficking in Persons report (2021). Department of State, USA. Available at: <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf> [Accessed 05.06/2026].

It must be ensured that no individual is compelled to compromise his or her fundamental rights to life, liberty, and dignity. Governments are therefore obligated to work toward the elimination of trafficking and related forms of exploitation. A human rights — centric approach further requires that all laws, policies, and practices aimed by the government at combating trafficking be assessed in light of their impact on the rights and well-being of trafficked persons and those in vulnerable situations. States must also address the structural conditions that enable trafficking, including disparities in the distribution of societal resources, inequities in the justice delivery system, systemic discrimination based on race, caste, sex, and other statuses, as well as social exclusion and entrenched prejudices against marginalized communities. These factors constitute significant impediments to the eradication of human trafficking and contribute to the violation of the inalienable right to live with dignity.

A human rights — centric framework imposes corresponding responsibilities on the United Nations and its principal organs, international agencies, and multinational corporations to collaborate in formulating and implementing effective measures to combat this menace. Such efforts must be grounded in the well-established principle that violations of human rights are both a cause and a consequence of trafficking in persons.¹²

However, various international instruments have been incorporated to initiate legal measures in combatting human trafficking. Over the past decades, we have witnessed the development of a comprehensive legal framework consisting of international and regional treaties as well as broad range of soft-law instruments concerning human trafficking. The most important international instrument to address the issues of trafficking was Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UNCTOC also known as the Palermo Protocol.

¹² Recommended Principles and Guidelines on Human Rights and Human Trafficking. Office of the High Commissioner for Human Rights. Available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf> [Accessed 05.06.2026].

The Trafficking Protocol is incorporated to prevent and combat trafficking in persons especially women and children, to protect the human rights of the trafficked persons and to promote cooperation among State Parties to achieve the above objectives (Art. 2). Article 5 of the Trafficking Protocol requires States Parties to adopt appropriate legislative and other measures to criminalize human trafficking, attempted human trafficking, and participation in or abetment of trafficking, in accordance with the conduct defined in Art. 3. Thus, it addresses the definition and constituent elements of the offence, including abetment.

The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950) marked the first concerted effort by the UN to establish criminal liability in this field. It required the punishment of any person who procures, entices, or leads another into prostitution, or who exploits the prostitution of another, with a view to suppressing trafficking in persons for the purpose of prostitution.

The International Labor Organization (ILO) regards trafficking as a modern form of slavery and has primarily focused on addressing forced labor and forced marriage. To this end, it adopted the Forced Labor Convention (1930) (No. 29) and the Abolition of Forced Labor Convention (1957) (No. 105). In addition, the Slavery Convention (1926) obliges States Parties to abolish all forms of slavery and to prevent and suppress the slave trade, as defined in Art. 1 of the Convention.¹³ The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) further strengthened this framework by requiring the elimination of slavery, the slave trade, and analogous institutions and practices.

¹³ Art. 1 of the Slavery Convention signed at Geneva on 25 September 1926 provides for the following definitions:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Available at: <https://www2.ohchr.org/english/law/pdf/slavery.pdf> [Accessed 05.06.2026].

Human trafficking deprives victims of their inalienable rights, including the right to life, bodily integrity, liberty, privacy, freedom, and dignity. Accordingly, States are obliged to comply with applicable international human rights instruments. For instance, Art. 1 of the Universal Declaration of Human Rights (UDHR) affirms that all human beings are born free and equal in dignity and rights. Article 4 unequivocally prohibits slavery in all its forms, while Art. 5 prohibits torture and cruel, inhuman, or degrading treatment or punishment. These obligations extend not only to citizens but also to non-citizens within a State's jurisdiction.

The binding nature of these principles is further reinforced through their incorporation into the International Covenant on Civil and Political Rights (ICCPR) that entered into force on 23 March 1976.¹⁴ In addition to the aforementioned instruments, one of the most significant international legal frameworks for the suppression of trafficking in women is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979). General Recommendation No. 38 (2020) of the Committee on the Elimination of Discrimination against Women represents an important development in this regard. It obliges States to take comprehensive measures to prevent the trafficking of women and girls; to ensure their sustainable development; to identify, assist, and protect survivors; to prevent revictimization; to prosecute and punish perpetrators; and to secure effective remedies and access to justice for victims.

Additional legal instruments aimed at safeguarding the right of women and children to live with dignity, particularly in the context of trafficking and sexual exploitation, include the Charter of Fundamental Rights of the European Union (2000) and Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (2011); the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002); the Optional Protocol to the Convention on the

¹⁴ Available at: <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> [Accessed 05.06.2026].

Rights of the Child on the sale of children, child prostitution and child pornography (2000); and the Convention on the Rights of the Child (1989).

In addition to binding treaties, a number of “soft law” instruments contribute to the normative framework for combating human trafficking. Although these instruments do not directly impose legally binding obligations on States, they provide important guidance in preventing trafficking, prosecuting offenders, and facilitating victims’ access to justice. Such non-treaty instruments are often developed by specialized bodies, including UNICEF (e.g., the UNICEF Guidelines on the Protection of Child Victims of Trafficking) and UNHCR (e.g., guidance relating to the application of the 1967 Protocol Relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked). Soft law instruments serve as authoritative guidance and normative standards for governments, reminding them of their responsibilities and directing their efforts toward more effective and rights-based responses to trafficking.

IV. Understanding the State Responsibility in South Asian Region to Address Trafficking

South Asia — comprising Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka — serves as a source, transit, and destination region for trafficking in persons. Trafficking in this region encompasses forced labor, sexual exploitation, domestic servitude, forced marriage, and organ removal, among other forms of exploitation. Populations across South Asia face multiple vulnerabilities that facilitate trafficking, including poverty, socio-economic inequality, gender discrimination, lack of access to education, and, in certain areas, open and porous borders.

These challenges are compounded by weak law enforcement mechanisms, insufficient political will, limited public awareness and vigilance, deficiencies within the criminal justice system, systemic corruption, high levels of unemployment and underemployment, and the persistence of child labor. Collectively, these factors create an enabling environment for traffickers to operate with relative impunity.

According to the UNODC Global Report on Trafficking in Persons (2016), approximately 88 % of trafficking victims in South Asia are trafficked domestically.¹⁵ According to UNODC observations based on available records, trafficking in persons is most commonly perpetrated for the purposes of forced labor and sexual exploitation. However, it also occurs in other forms, including exploitative surrogacy arrangements, fraudulent or forced marriages, sex tourism, forced begging, medical or drug testing, organ removal, etc. Migrant smuggling from this region predominantly occurs along routes leading to Europe and North America.¹⁶ Under the UNODC Global Report on Trafficking in Persons (2020), of the 7,644 detected victims of trafficking in South Asia (excluding Afghanistan), 11 % were adult males, 44 % were adult females, 24 % were male children, and 21 % were female children.¹⁷

The Report on Global Trafficking in Persons (2022) clarified that almost all victims found in the above region were trafficked domestically.¹⁸ The Report further states that many victims from the above region are detected in outside of the region and in the countries in East Asia and the Pacific, Western and Southern Europe, North America, victims of trafficking in person from South Asian region have been found in an increasing number since 2017.

It is noteworthy that Bhutan and Pakistan, among the South Asian States, are not parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), supplementing the UNCTOC.¹⁹ However, all Member States of the South Asian Association for Regional Cooperation have signed the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. The Convention emphasizes that trafficking in women and children for the purpose of prostitution is contrary to hu-

¹⁵ Available at: <https://www.unodc.org/southasia/en/topics/frontpage/2009/trafficking-in-persons-and-smuggling-of-migrants.html> [Accessed 05.06.2026].

¹⁶ UNODC's Global Trafficking in Persons Report (2016).

¹⁷ Available at: https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf [Accessed 05.06.2026].

¹⁸ Available at: https://www.unodc.org/documents/data-and-analysis/glo-tip/2022/GLOTiP_2022_web.pdf [Accessed 05.06.2026].

¹⁹ Global Report on Trafficking in Persons (2020).

man dignity and honor, constitutes a grave violation of human rights, and requires regional cooperation for its effective suppression.²⁰ The above Regional Convention directs the member States to incorporate the effective provisions in their respective legal systems to ensure that trafficking in any form is an offence and to inflict appropriate punishment to the offenders. It calls for coordinated efforts in protection, rehabilitation, assistance, repatriation of victims, and prosecution of offenders, in line with relevant international instruments.²¹ To attain the above objectives there should be the mutual legal assistance among the State Parties.²² The Convention further provides that trafficking in persons shall be treated as an extraditable offence between the Parties, subject to the existence of an extradition treaty between them.²³ The above Convention directs sharing of information related to the offence of trafficking among the States, supervision over employment agencies, establishment of Regional Task Force to implement the provisions,²⁴ establishment of protective homes or shelters and making arrangements for providing legal advice, counselling, job training and health care facilities to victims.²⁵

Thus far, the legal narratives of South Asian countries remain inadequate to effectively challenge traffickers, curb their activities, ensure their prosecution and incarceration, and bring victims to justice in order to prevent trafficking at its roots. In India, we can find a structured legal system to combat trafficking in person endorsed by its Supreme Law, i.e., the Constitution of India. The Constitution of India envisions a threefold conception of justice — social, economic, and political — for its people in their dealings with the state as well as with the fellow-citizens (Nariman, 2023, p. 95). To achieve this objective, it incorporates a set of fundamental rights in Part II known as political and civil rights,

²⁰ Available at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_251026.pdf [Accessed 12.06.2026].

²¹ SAARC Convention on Preventing and Combating Trafficking... Art. III.

²² SAARC Convention on Preventing and Combating Trafficking... Art. VI.

²³ SAARC Convention on Preventing and Combating Trafficking... Art. VII.

²⁴ SAARC Convention on Preventing and Combating Trafficking... Art. VIII.

²⁵ SAARC Convention on Preventing and Combating Trafficking... Art. IX.

fundamental rights in Part III, and a set of Directive Principles of State Policy in Part IV that reflect social, economic, and cultural rights. Together, these provisions form the constitutional framework for the protection and promotion of human rights.

Notably, the Constitution of India explicitly prohibits trafficking in human beings, beggar, and other similar forms of forced labor²⁶ and employment of any children below the age of fourteen years in factories, mine or any other hazardous employment.²⁷ Apart from the above, the Constitution advocates in favor of “equality before law” and “equal protection of law,”²⁸ fundamental freedoms especially under Art. 19(1) and the “right to life and personal liberty”²⁹ that are immensely important for a human being to live with dignity and to enjoy a meaningful life. If the above rights of the people are not honored, then not only the victim or his legal representative but any public-spirited individual may approach the High Court on the ground of violation of fundamental rights or any other rights³⁰ or the Supreme Court — the highest Court of India.³¹

The Constitution of India also mandates to secure a social order to ensure welfare of the people,³² distributive justice along with the equal pay for equal work and well-being of the workers and child,³³ equal justice and free legal aid,³⁴ just and human conditions of work and maternity relief,³⁵ living wages to workers,³⁶ opportunity to the workers to participate in a decision making process of the industries,³⁷ to

²⁶ The Indian Constitution. Art. 23. Available at: <https://www.legislative.gov.in/static/uploads/2025/07/c9fe9c9b6840524844316f74bb1c556c.pdf> [Accessed 05.06.2026].

²⁷ The Indian Constitution. Art. 24.

²⁸ The Indian Constitution. Art. 14.

²⁹ The Indian Constitution. Art. 21.

³⁰ The Indian Constitution. Art. 226.

³¹ The Indian Constitution. Art. 32.

³² The Indian Constitution. Art. 38.

³³ The Indian Constitution. Art. 39.

³⁴ The Indian Constitution. Art. 39A.

³⁵ The Indian Constitution. Art. 42.

³⁶ The Indian Constitution. Art. 43.

³⁷ The Indian Constitution. Art. 43A.

improve public health,³⁸ etc., which are crucial to eliminate the offence of trafficking. Apart from the above, India enacted the Immoral Traffic (Prevention) Act long back in 1956 to eliminate immoral trafficking. In 2021, India introduced a draft bill titled The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill to curb trafficking by ensuring the prosecution of offenders and by providing welfare measures for the rehabilitation and protection of victims within an enabling environment. Unfortunately, the bill has not attained the status of a statutory enactment. Also, India enacted a number of important laws to ensure the protection of women and children, namely: the Protection of Women from Domestic Violence Act (2005), The Prohibition of Child Marriage Act (2006), The Prohibition of Child Marriage (Amendment) Bill (2021), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013), The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (1989), The Bonded Labour System (Abolition) Act (1976), etc.

Indian criminal jurisprudence prescribes stringent punishments to curb the various facets of this offence. For instance, it provides penalties for offences such as wrongfully confining any person for unlawful intent or gain,³⁹ committing assault or inflicting criminal force on wrongfully confined persons,⁴⁰ kidnapping of a person from India or from lawful guardianship,⁴¹ kidnapping or abduction with an intention to confine the victim wrongfully and secretly,⁴² trafficking of persons for illegal and immoral purposes and for wrongful gain,⁴³ compelling any women into forced marriage,⁴⁴ procurement of a minor girl,⁴⁵ importation of a girl below the age of 21 years,⁴⁶ trafficking a minor for sexual exploita-

³⁸ The Indian Constitution. Art. 47.

³⁹ Section 127 of the Bharatiya Nyaya Sanhita (BNS) (2023).

⁴⁰ Section 135 of BNS (2023).

⁴¹ Section 137 of BNS (2023).

⁴² Section 140 of BNS (2023).

⁴³ Section 143 of BNS (2023).

⁴⁴ Section 87 of BNS (2023).

⁴⁵ Section 96 of BNS (2023).

⁴⁶ Section 141 of BNS (2023).

tion⁴⁷ for indulging into the act of slavery,⁴⁸ selling minors for the act of prostitution or illicit intercourse,⁴⁹ buying minor for prostitution,⁵⁰ forced labour,⁵¹ etc. (Mishra, 2024, pp. 693–729)

No doubt, India has a strong and stringent legal base to combat the offence of trafficking, but unfortunately, the offence of trafficking in persons is going on rampantly. A large segment of the population belonging to the lower strata of society, as well as marginal and vulnerable groups, constitutes the worst victims of sexual and physical exploitation and continues to suffer conditions akin to slavery and servitude. In view of this factual scenario, the U.S. Department of State ranked India as Tier 2 in its Trafficking in Persons Report (2022), implying that although the Government of India does not fully meet the minimum standards for the elimination of trafficking, it is making significant efforts toward that end.⁵²

The Report on Human Trafficking (2020) published by the National Crime Records Bureau revealed that 2,278, 2,208, and 1,714 cases of human trafficking were reported under the Indian Penal Code for investigation in the years 2018, 2019, and 2020, respectively, indicating a gradual decline in the reporting of cases for investigation. However, in 2020, the total number of victims trafficked was 4,709, of whom 1,912 were male and 2,797 were female. According to the report referenced above, the police filed chargesheets in 85.2 % of cases to initiate prosecution against alleged offenders. However, the conviction rate stands at only 10.6 %, a figure that is markedly low.⁵³

In addition to the low conviction rate, the aforementioned NCRB report indicates that only 0.1 % of cases are registered under cognizable

⁴⁷ Section 144 of BNS (2023).

⁴⁸ Section 145 of BNS (2023).

⁴⁹ Section 98 of BNS (2023).

⁵⁰ Section 99 of BNS (2023).

⁵¹ Section 146 of BNS (2023).

⁵² 2022 Trafficking in Persons Report: India. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/india/> [Accessed 25.03.2023].

⁵³ Report of NCRB. Available at: https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2014.6_3.pdf [Accessed 25.03.2023].

offenses.⁵⁴ The low rate of registration of cases involving trafficking in persons, the low conviction rate, and the limited registration of cases under cognizable offenses collectively signify a lack of governmental commitment to the elimination of such crimes. These indicators further reflect deficiencies in vigilance among competent police authorities, inadequate accountability of prosecuting authorities and other law enforcement agencies in securing convictions, instances of misconduct and deeply rooted corruption at various levels of government, and insufficient sensitization of judges, police personnel, and prosecutorial officials. Additionally, they suggest a lack of integration and coordination among relevant departments in addressing such cases, as well as the possible weakening of cases at the stages of First Information Report (FIR) registration and the filing of chargesheets by the police.

The U.S. Department of State's Trafficking in Persons Report (2022) identified several deficiencies in India's response to trafficking, including shortcomings in victim protection services, the Government's failure to update its National Action Plan (NAP), and the absence of adequate or effective rehabilitation policies for victims. The Report further observed that an excessive emphasis on establishing *mens rea* in prosecutions — particularly under provisions such as Section 370 of the Indian Penal Code, which addresses trafficking for exploitative purposes — has hindered efforts to effectively combat trafficking in India.⁵⁵

In addition to the Constitutional guarantees of equality before law,⁵⁶ protection of the rights to life and personal liberty,⁵⁷ the pro-

⁵⁴ Cognizable offences are those in which the police are authorized to arrest an accused person without a warrant or prior approval of a court of law. These offences generally encompass heinous and serious crimes and are distinguished from non-cognizable offences by the gravity of punishment prescribed, which may range from imprisonment exceeding three years to life imprisonment. Section 156(3) of the Criminal Procedure Code 1973 (CrPC) — now repealed and replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) — and its corresponding provision, Section 175(3) of the BNSS, set forth the procedure governing the investigation of cognizable offences.

⁵⁵ 2022 Trafficking in Persons Report: India.

⁵⁶ Section 27 of the Constitution of the People's Republic of Bangladesh (Act No. of 1972). Available at: <http://bdlaws.minlaw.gov.bd/act-367/section-24562.html> [Accessed 12.06.2026].

⁵⁷ Section 32 of the Constitution of the People's Republic of Bangladesh.

hibition of forced labour,⁵⁸ the emancipation of working classes and people belonging to backward section of the society from all forms of exploitation,⁵⁹ and the promotion of public health and morality — including efforts to prevent prostitution and gambling⁶⁰ — Bangladesh enacted the Prevention and Suppression of Human Trafficking Act (PSHTA) (2012) to eliminate all forms of trafficking.

In compliance with the mandate of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), Bangladesh expanded its criminal justice framework and, in 2020, established specialized anti-trafficking tribunals to expedite the prosecution of human trafficking cases nationwide. Notwithstanding these measures, Bangladesh's record in eliminating trafficking remains unconvincing. For these and related reasons, the U.S. Department of State has classified Bangladesh as a Tier 2 country in its trafficking assessment.⁶¹

The Trafficking in Persons Report (2022) placed Pakistan in the Tier 2 category, which states that it does not fully meet the minimum requirements to eliminate the offence of human trafficking but is initiating significant efforts towards that end.⁶² Pakistan has enacted the Prevention of Trafficking in Persons Act (PTPA) (2018) to eliminate the crime of human trafficking, but the legal mechanism is not capable enough to successfully investigate and prosecute the offenders for their wrongdoings.

According to the Trafficking in Persons Report (2022), significant impediments to combating trafficking include inadequate law enforcement mechanisms to address labor trafficking, insufficient efforts toward victim identification, governmental inaction in initiating criminal

⁵⁸ Section 34 of the Constitution of the People's Republic of Bangladesh.

⁵⁹ Section 14 of the Constitution of the People's Republic of Bangladesh.

⁶⁰ Section 18 of the Constitution of the People's Republic of Bangladesh.

⁶¹ 2022 Trafficking in Persons Report: Bangladesh. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/bangladesh/> [Accessed 12.06.2026].

⁶² 2022 Trafficking in Persons Report: Pakistan. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/pakistan/> [Accessed 12.06.2026].

proceedings despite credible reports of trafficking, the absence of a robust victim protection and support framework, and corruption.⁶³

According to the United Nations Office on Drugs and Crime (UNODC) Global Report on Trafficking in Persons (2022),⁶⁴ the number of trafficking offences recorded in Pakistan for the years 2019, 2020 and 2021 was respectively 7, 15, and 6 respectively. Such markedly low figures raise concerns regarding the adequacy of detection and reporting mechanisms and suggest a limited institutional response to the problem of trafficking. Moreover, Pakistan acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) only in 2022. This delayed accession may be viewed as indicative of the State's historically limited engagement with the international legal framework addressing human trafficking and exploitation.

Although Sri Lanka has not enacted comprehensive standalone legislation specifically addressing human trafficking, its Penal Code contains stringent provisions to combat the offense. Section 360C of the Penal Code of Sri Lanka provides that any person convicted of trafficking shall be punished with imprisonment for a term of not less than two years and not exceeding twenty years, with or without a fine. In cases involving child victims, the prescribed penalty is imprisonment for a term of not less than five years and not exceeding twenty years, and may also include a fine.⁶⁵ Section 360A of the Penal Code prescribes a term of imprisonment ranging from two to ten years for the offense of procuring a person, primarily for illicit purposes. Section 360B provides for a term of imprisonment ranging from five to twenty years, with or without a fine, for the offense of sexual exploitation of a child. Despite the existence of stringent penal provisions, the Government's efforts to eliminate trafficking and to safeguard the human rights of victims appear inadequate. In addition to the low number of registered trafficking cases, only a limited number of offenders were investigated and/or

⁶³ 2022 Trafficking in Persons Report: Pakistan.

⁶⁴ Available at: https://www.unodc.org/documents/data-and-analysis/global-tip/2022/South_Asia.pdf [Accessed 12.06.2026].

⁶⁵ Available at: http://hrlibrary.umn.edu/research/srilanka/statutes/Penal_Code.pdf [Accessed 12.06.2026].

prosecuted between 2017 and 2020, and no convictions were secured for trafficking offenses during that period;⁶⁶ due to such poor performance, Shri Lanka has been assessed as Tier 2 by the U.S. Department of State.⁶⁷

Although Nepal acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) only in 2020, it has long relied on the Human Trafficking and Transportation (Control) Act (HTTCA), 2007 to address sex and labor trafficking. However, the Act contains certain inherent shortcomings and does not fully conform to the definition of trafficking set forth in the Trafficking Protocol. Nepal is classified as a Tier 2 country by the U.S. Department of State.⁶⁸ Notwithstanding these limitations, Nepal's performance with respect to prosecution and conviction rates for trafficking offenses has been comparatively commendable within the South Asian region. According to available records, the conviction rate in 2020 was approximately 50 %, a notably significant figure in the regional context.⁶⁹

Bhutan is not a signatory to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000). In light of concerns regarding its efforts to eliminate trafficking, the U.S. Department of State has placed Bhutan on the Tier 2 Watch List in its trafficking assessment.⁷⁰ Afghanistan acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) in 2014 and enacted the Law to Combat Crimes of Trafficking in Persons and Smuggling of Migrants in 2017 with the objective of addressing all forms of trafficking. Despite these formal measures, serious concerns persist regarding the protection of human rights within the country, particularly under the current Taliban regime, where the rights of women and children have been significantly

⁶⁶ The Penal Code of Sri Lanka. Section 360C.

⁶⁷ 2022 Trafficking in Persons Report: Sri Lanka. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/sri-lanka> [Accessed 25.03.2023].

⁶⁸ 2022 Trafficking in Persons Report: Nepal. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/nepal/> [Accessed 25.03.2023].

⁶⁹ 2022 Trafficking in Persons Report: Nepal.

⁷⁰ 2022 Trafficking in Persons Report: Bhutan. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/bhutan/> [Accessed 25.03.2023].

curtailed. In its trafficking assessment, the U.S. Department of State has classified Afghanistan as a Tier 3 country, indicating that it does not meet the minimum standards for the elimination of trafficking. The Maldives acceded to the Trafficking Protocol in 2016, although it had previously enacted the Maldives Anti-Human Trafficking Act (Act No. 12/2013) to criminalize trafficking offenses. The Act was amended in 2021 to strengthen provisions relating to the elimination of trafficking in persons, including measures addressing child trafficking. Despite these legislative efforts, the Maldives has been designated as a Tier 2 country by the U.S. Department of State, reflecting concerns regarding the adequacy of investigations and prosecutions, limited progress in eliminating trafficking, and shortcomings in capacity-building initiatives for judges and relevant officials tasked with addressing such cases.⁷¹

V. Conclusion: Searching a Path for Freedom from Enslavement

Trafficking in person is a crime as well as a deep-rooted social problem whereby the victims are compelled to accept the situations of slavery, bonded labor, sexual exploitation, forced marriage, etc. Thus, their elementary rights of life and liberty are infringed. This heinous practice is a serious challenge to the global polity posing a serious threat to the human dignity and humanity. Despite sustained measures taken at the international and national level the crime of trafficking is accelerating and challenging the criminal justice delivery system. A plethora of laws, international instruments, protocols, covenants, and policies have been enacted; yet this cruel and inhuman practice of the slavery system remains in vogue. The Covid-19 pandemic proved a boon for traffickers, enabling them to explore new avenues of exploitation. One of its most significant consequences has been the shift of this illicit practice to on-line platforms. At present, the digital environment has increasingly become a hub for commercial sexual exploitation, sex trafficking, and the buying and selling of human beings for immoral purposes.

⁷¹ 2022 Trafficking in Persons Report: Maldives. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/maldives/> [Accessed 25.03.2023].

The process of enslavement has been further expedited by ongoing conflicts in various parts of the world, which are gradually intensifying due to the direct or indirect involvement of developed and other influential states, thereby causing the global energy crisis and exacerbating climate change. Conflict and global warming are both responsible for producing refugees, compelling people — mainly those who are poverty-stricken and those from marginalized and weaker sections of society — to migrate from their secure habitats to insecure and unsettled patterns of life, rendering them more vulnerable to falling prey to traffickers. This situation is further aggravated by the discrimination and injustice suffered by a considerable section of society, especially in South Asian countries. Besides, ensuring the good governance, introduction of welfare economy with strong political will for elimination of the offence of trafficking, a holistic criminal justice delivery system and a vigilant law enforcement mechanism is needed in the South Asian Countries. Besides ensuring good governance, the introduction of a welfare-oriented economy backed by strong political will for the elimination of the offence of trafficking, along with a holistic criminal justice delivery system and a vigilant law enforcement mechanism, is urgently needed in the South Asian countries. It is the need of the hour to adopt a coordinated approach within criminal jurisprudence to expedite and strengthen investigations, prosecutions, and convictions of trafficking offenders, to ensure that no individual is exploited on account of miserable socio-economic conditions, and to initiate sensitization programs for judges and allied officials so that they do not unnecessarily insist upon the fossilized formula of corroboration as a prerequisite for conviction. The policy makers must understand that the nature of the offence of trafficking is not akin to other types of crime because of its hidden nature. In the offence of trafficking, seldom do the victims approach the law enforcement agencies for justice (Pfeffer, 2018, p. 1). For the above reasons, it is needed to formulate pragmatic human rights-centric National Action Plans based on a victim-oriented approach for its eradication (Farbey, 2007, p. 16). Apart from the above, the establishment of fast-track courts to deal with trafficking cases, the provision of anti-trafficking training to officials engaged in the elimination of such offences, close monitoring of porous borders, strict vigilance over the ac-

tivities of recruitment agencies, and strengthened coordination among South Asian countries — considering the transnational character of the crime — are *sine qua non* for ending this process of enslavement.

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