ISSN 2764-6068

IJLCW

International Journal of
Law in Changing World

Volume 5 Issue 1 July 2026

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International Journal of Law in Changing World

IJLCW

v. 5, n. 1, Ano 2026

ISSN XXXX-XXXX (printed) | ISSN 2764-6068 (online)

Rio de Janeiro, July 29, 2025

Publisher: International Journal of Law in Changing World – IJLCW

Editors: Elizaveta A. Gromova and Daniel Brantes Ferreira

International Journal of Law in Changing World

Volume 4 Issue 2 (2025) ISSN 2764-6068

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International Journal of Law in Changing World

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Editorial

We are pleased to present Volume 5, Issue 1 of the *International Journal of Law in Changing World* (IJLCW). This issue carries a meaning beyond its contents: with it, the journal completes five years of uninterrupted activity. We reach this milestone with pride and gratitude: pride in having built and sustained an independent, fully open-access journal that charges nothing to authors and nothing to readers; and gratitude to the global community of authors, reviewers, and readers who have made those five years possible. From its first issue, IJLCW set itself a simple but demanding task: to publish rigorous legal scholarship from every corner of the world and to keep that scholarship freely available to anyone, anywhere, who wishes to read it. This issue is a faithful expression of that commitment.

The present issue gathers eight contributions from eighteen authors based in ten jurisdictions across four continents: Spain, Iran, Indonesia, Vietnam, Afghanistan, Uganda, Nigeria, Sierra Leone, the United Kingdom, and Brazil. The geographic center of gravity lies, as it so often does in our pages, in the Global South (Latin America, the Middle East, South and Southeast Asia, and sub-Saharan Africa are all substantively represented) while European and comparative reference points anchor the analysis in the wider international conversation. Several contributions are themselves the fruit of cross-border collaboration, joining authors from different continents and legal traditions around shared questions. The breadth on display is not ornamental: it reflects a research community for which the most urgent legal problems of our time, namely artificial intelligence, digital trade, cultural heritage, refugee protection and the constitutional governance of force, are inescapably global and best examined from many vantage points at once.

The issue may be analyzed along four interconnected analytical axes.

A first group of contributions examines how artificial intelligence is reconfiguring legal authority and the allocation of responsibility. **Abbas Mirshekari and Jamshid Zargari** (Iran) interrogate civil liability in the age of artificial intelligence, moving from traditional to modern theories. Drawing on a doctrinal and comparative-analytical method, they weigh electronic personhood, collective compensation, and hybrid liability against the limits of fault- and risk-based regimes and propose a conditional-pluralist framework that maps distinct liability tools to concrete technical, contextual, and risk-related variables: balancing victim protection, fair risk allocation, and continued innovation. **Ujang Badru Jaman, Armansyah** (Indonesia), and **Thomas Sheku Marah** (Sierra Leone) turn to intellectual property governance in the same era. Through a comparative socio-legal and interpretive governance framework spanning the United States, the European Union, China, and selected Global South jurisdictions — and reading the *Thaler v. Perlmutter* and DABUS controversies side by side — they recast intellectual property law as a contested governance arena in which authority over algorithmic creativity

Published July 2026

is negotiated among states, technology corporations, and transnational digital infrastructures, rather than as a matter of mere doctrinal inconsistency.

A second group addresses the governance of trade, investment, and the digital economy at a moment of multilateral strain. **Martín Jesús Urrea Salazar** (Spain) situates ICSID arbitration within the contemporary architecture of international economic law. Combining doctrinal legal methodology with documentary and institutional analysis of the Washington Convention, the 2022 ICSID Arbitration Rules, Spain's bilateral investment treaties, and caseload data through 2026, he shows how investor–State dispute settlement has consolidated its practical relevance even as it confronts critiques of legitimacy, transparency, regulatory chill, and recent Latin American denunciations. **Collins Ekpenisi** (Uganda), **Joseph Ekpe Edet** (Nigeria), **Paul Atagamen Aidonojie** (Uganda), and **Amos Godfrey Atim** (United Kingdom) ask what comes after the WTO for digital trade. Using a doctrinal and comparative approach, they diagnose the fragmentation of a governance order still anchored in a pre-digital framework and trace its evolution toward hybrid, sovereignty-driven systems, advocating a reconceptualized model capable of reconciling digital integration, regulatory sovereignty, and effective global coordination.

A third group turns to cultural heritage, corporate purpose, and the design of national legal orders. **Moh. Fahrial Amrulla, Afifah Kusumadara, Budi Santoso, and Yenny Eta Widyanti** (Indonesia) confront the ambiguity of Article 38(1) of Indonesia's Copyright Law, which vests traditional cultural expressions in the state but leaves the scope of that authority undefined, exposing batik motifs to misappropriation. Through normative-juridical analysis (statutory, conceptual, comparative, and teleological) and drawing on UNESCO, UNDRIP, the Nagoya Protocol, FPIC, and ABS, they reconstruct state authority as public trusteeship and propose an Enabling Protection model that pairs defensive registration with custodial empowerment of communities. **Nguyen Ngoc Sang** (Vietnam) examines how company law institutionalizes shareholder-value and stakeholder-value theory. Comparing the United Kingdom's enlightened shareholder value model under Section 172 of the Companies Act 2006 with Germany's co-determination and two-tier board structure, he advances a doctrinal and comparative argument for a hybrid model suited to Vietnam's evolving corporate governance framework.

A fourth group addresses international law, human rights, and constitutional order under pressure. **Ali Ahmad Mowahid and Fazl Ahmad Ahmadi** (Afghanistan) assess the effectiveness of international legal frameworks in protecting Afghan asylum seekers and refugees in Pakistan. Using a qualitative, descriptive-analytical, and doctrinal methodology, along with a longitudinal review of Pakistani policy across four periods from 1979 to 2024, they argue that the protection gap stems less from Pakistan's non-accession to the 1951 Refugee Convention than from the refugee regime's structural dependence on host-state political will. They therefore treat international law as an independent variable in a non-party State**.** **Thiago Perez Bernardes de Moraes** (Brazil) closes the issue with a theory of retaliatory constitutionalization, explaining how states elevate nuclear command and retaliatory commitments from ordinary policy into constitutional or quasi-constitutional form. Bridging comparative constitutional law, international nuclear law, command-and-control studies, and AI-governance debates, he introduces two exploratory measures — the Nuclear Constitutionalization Index and the Retaliatory Constitutionalization Score — and applies them to a forty-five-jurisdiction comparative map, concluding that nuclear law remains far stronger at regulating possession than at governing decision, delegation, and automation.

A word on method is warranted because it reveals a shared sensibility beneath the diversity of subject matter. The contributions in this issue are predominantly doctrinal and comparative, yet they are doctrinal in the most ambitious sense: they read national legal materials against international instruments and foreign jurisdictions to build frameworks, including a conditional-pluralist model of AI liability, an enabling-protection model for cultural heritage, a hybrid model of corporate governance, a Nuclear Constitutionalization Index, and a Retaliatory Constitutionalization Score. Where the questions demand it, the authors reach beyond description toward measurement and design. This is comparative legal scholarship doing what it does best: turning the encounter between legal traditions into something usable.

The geographic distribution of this issue deserves a final word. The presence of authors from Brazil, Spain, and the United Kingdom anchors the issue in the Latin American, Iberian, and European traditions; the contributions from Iran, Afghanistan, Indonesia, and Vietnam give substantive weight to the legal scholarship of the Middle East and of South and Southeast Asia; and the contributions from Uganda, Nigeria, and Sierra Leone extend the conversation across sub-Saharan Africa. IJLCW is not, and does not aspire to be, the journal of any one region. It is a forum in which regions speak to one another and, as an open-access publication, a forum whose doors are open to readers who could never reach the scholarship behind a paywall.

That openness is the achievement we are proudest of as we complete our fifth year. Remaining independent and fully open-access for five years is not a small thing. We are grateful to the authors for the rigor and originality of their work, to the members of our editorial board for their guidance, and to the peer reviewers for the care with which they engaged every submission. To our readers, who have accompanied this journal across its first five years, we extend our warmest thanks.

We wish you a productive reading.

Rio de Janeiro – Brazil/ Chelyabinsk – Russia, June 2026.

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Published July 2026

International Journal of Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.180

THE IMPACT OF INTERNATIONAL LAW ON THE PROTECTION OF AFGHAN ASYLUM SEEKERS AND REFUGEES IN PAKISTAN

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Article Information:

Received
April 8, 2026
Reviewed & Revised
May 21, 2026
Accepted
June 26, 2026
Published
July 30, 2026

Keywords:

Afghan asylum seekers, non-refoulement, refugee rights, international law, Pakistan

ABSTRACT | 摘要 | RESUMEN

This article examines the effectiveness of international legal frameworks in protecting Afghan refugees and asylum seekers in Pakistan, analyzing the persistent gap between normative commitments and protection outcomes. Employing a qualitative, descriptive-analytical and doctrinal methodology, the study draws on primary international legal instruments, including the 1951 Refugee Convention, the 1967 Protocol, and the Convention on the Rights of the Child, alongside secondary scholarly sources and Pakistan's domestic legal framework, combined with a longitudinal review of Pakistan's refugee policies across four periods (1979–2024). It argues that international law's failure to protect Afghan refugees stems not solely from Pakistan's non-accession to the 1951 Convention, but from the international refugee regime's structural dependence on host states' political will and domestic legal infrastructure. This deficiency has produced systematic rights violations, including forced deportations. The study contributes by treating international law as an independent variable across distinct historical and political contexts in a non-party state.

FOR CITATION:

Mowahid, A. J., & Ahmadi, F. A. (2026). The Impact of International Law on the Protection of Afghan Asylum Seekers and Refugees in Pakistan. International Journal of Law in Changing World, 5 (1), 4-31. DOI: https://doi.org/10.54934/ijlcw.v5i1.180

1. INTRODUCTION

Forced human displacement in the contemporary international order is no longer regarded as an exceptional or temporary phenomenon; rather, it has become a persistent feature of the global political and legal reality. The escalation of armed conflicts, state collapse, and the intensification of economic crises have compelled millions of individuals to cross national borders in search of security, livelihood, and survival. Under such circumstances, the international legal system faces a fundamental challenge: whether it is capable of translating its normative commitments into effective protection for refugees, or whether these commitments remain confined to declaratory instruments. According to global data reported by the United Nations Department of Economic and Social Affairs (UNDESA), the number of international migrants worldwide reached 304 million in 2024—almost double the 154 million recorded in 1990. International migrants now constitute approximately 3.7 percent of the world's population, reflecting the unprecedented expansion of cross-border human mobility in recent decades. [35] A substantial proportion of this population consists of refugees and asylum seekers who are forced to flee their countries of origin not by choice, but as a consequence of coercive conditions. These groups, particularly in developing host states, frequently face serious legal and protection gaps.

Afghanistan represents a prominent example of a country in which multidimensional crises have rendered forced migration a structural and enduring phenomenon. Decades of armed conflict, political instability, and institutional collapse have not only impeded sustainable return but have also continuously generated new waves of displacement. According to the United Nations High Commissioner for Refugees (UNHCR), the Afghan displacement crisis ranks among the most protracted and geographically widespread refugee situations worldwide. Within this context, Pakistan has played a central role as one of the primary destinations for Afghan refugees. [12] Despite hosting millions of Afghans over several decades, their legal status in Pakistan remains ambiguous and precarious. The absence of a comprehensive national legal framework for refugee protection, combined with Pakistan's non-accession to the 1951 Refugee Convention, has resulted in a protection regime largely shaped by ad hoc policies and security-driven considerations.

Recent developments—particularly the implementation of large-scale forced deportation policies against Afghan refugees—have further intensified the critical question of the extent to which international legal norms and standards have influenced the conduct of the host state. From this perspective, the situation of Afghan refugees in Pakistan constitutes not merely a case study, but a broader test of the practical effectiveness of international refugee law in non-party states to the classical refugee protection regime.

Accordingly, the central research question is: To what extent has international law been effective in protecting Afghan refugees in Pakistan, and what legal, political, and structural factors explain the gap between normative commitments and protection outcomes? The hypothesis posits that international law has failed to ensure effective protection not merely due to Pakistan's non-accession to the 1951 Convention, but because the enforcement architecture of international refugee law is structurally dependent on the political will of host states—rendering normative obligations largely aspirational without binding compliance mechanisms. The novelty of this study lies in treating international law as an independent variable across four historical periods (1979–2024), examining how geopolitical shifts, institutional deficiencies, and structural limitations have interacted to produce protection failures in a non-party state.

2. LITERATURE REVIEW

Research on Afghan refugees in Pakistan remains limited, with most studies focusing on social and economic conditions rather than international legal analysis. Existing scholarship provides important insights but lacks a systematic examination of how international law has influenced Pakistan's treatment of Afghan refugees.

Keyhanlou (2021) discusses legal mechanisms such as prima facie refugee status and temporary protection in response to Afghan displacement, yet does not explain why these mechanisms have failed to ensure consistent protection in host states like Pakistan. Khuhro et al. (2024) describe Pakistan's relatively accommodating refugee policies despite its non-signatory status to major refugee conventions, but their analysis remains largely descriptive and overlooks the structural causes behind policy shifts between protection and coercion.

Hashimy (2024) highlights the ambiguity of refugee protection obligations in non-signatory states and argues that weak legal safeguards have facilitated forced deportations, though the study lacks a systematic framework connecting international law with domestic practice. Similarly, Masudi and

Mustafa (2022) emphasize the unclear legal status of Afghan refugees and its impact on economic rights, but do not analyze the broader effectiveness of international legal norms on Pakistan's refugee policies.

Recent studies by Nisar et al. (2024), Hamza and Shaukat (2024), and Rahatullah et al. (2024) address forced repatriation, socio-economic rights, and the shortcomings of the Responsibility to Protect (R2P) doctrine. While these studies reveal significant gaps between international legal standards and the lived realities of Afghan refugees, they generally treat international law as a background principle rather than critically assessing its operational effectiveness within Pakistan.

Overall, the existing literature lacks a longitudinal critical legal analysis of international law as an independent variable shaping refugee protection in a non-signatory host state. While prior studies have documented specific rights violations, they have not systematically interrogated why the international legal framework has been structurally incapable of compelling compliance in states outside the core treaty regime. This study addresses that gap by examining how geopolitical imperatives, domestic institutional deficiencies, and structural limitations of international enforcement mechanisms have shaped Pakistan's treatment of Afghan refugees across four distinct historical periods.

3. METHODOLOGY

This study adopts a qualitative descriptive-analytical and doctrinal legal approach, focusing on the interpretation of international legal texts and their application within a specific geopolitical context. The research relies on the analysis of primary sources, including international refugee and human rights instruments, UN resolutions, and UNHCR reports, as well as secondary sources such as academic articles, policy studies, and scholarly books on refugee law and Afghan refugees in Pakistan.

The four-period periodization (1979–1989, post-1989, post-2001, and post-2021) is not an arbitrary chronological device but reflects four documented ruptures in the geopolitical environment shaping Pakistan's refugee policy: the Cold War-era Soviet occupation of Afghanistan, the post-Soviet civil war and the rise of the Taliban, the post-9/11 United States-led intervention, and the Taliban's return to power in 2021. Each rupture corresponds to an identifiable shift in Pakistan's posture toward Afghan refugees, from open-door admission to coercive repatriation, providing a principled rather than purely temporal basis for the periodization.

https://doi.org/10.54934/ijlcw.v5i1.180

News sources—including reporting by international wire services, regional outlets, and human rights organizations—are incorporated alongside academic and institutional materials because Pakistan's refugee policy in the most recent period, particularly since 2021, has evolved largely through executive announcements, ministerial directives, and field-level enforcement measures that peer-reviewed scholarship, given its longer publication cycle, has not yet had the opportunity to document. Contemporaneous reporting therefore supplies empirical detail on policy implementation that would otherwise be unavailable for the final period under study.

The analysis is conducted in two stages: first, examining the legal framework governing refugee protection; second, evaluating Pakistan's treatment of Afghan refugees across four historical periods (1979–1989, post-1989, post-2001, and post-2021) in light of these legal standards. This approach allows for a critical assessment of the political, institutional, and structural factors shaping the implementation of international refugee law.

As a doctrinal study, the research does not include empirical methods such as interviews or surveys and is limited primarily to the legal and policy dimensions of refugee protection in Pakistan. Beyond the absence of empirical fieldwork, three further limitations should be noted: reliance on secondary and media sources for the most recent period, which may vary in the precision of reported figures; the unavailability of internal Pakistani governmental deliberations, which confines the analysis to public policy outputs rather than decision-making processes; and the predominance of English-language sources, which may underrepresent perspectives available only in Urdu, Pashto, or Dari.

4. THE LEGAL STATUS OF ASYLUM SEEKERS AND REFUGEES IN INTERNATIONAL LAW

In the contemporary world, the phenomenon of asylum seeking—particularly within the context of protracted crises and armed conflicts—has emerged as one of the most pressing issues in international law and international human rights law. A substantial share of today's cross-border migration is not the result of voluntary choice, but rather stems from direct threats to life, liberty, and human dignity. In this regard, Afghan asylum seekers represent a prominent example of populations that, as a consequence of political and security developments, have been compelled to cross international borders. This situation has placed significant legal, economic, and security pressures on host states, while simultaneously underscoring the growing importance of the international refugee protection regime.

In classical international law, prior to the emergence of modern international institutions, asylum was not recognized as an independent legal right. Instead, it was generally addressed within broader legal frameworks such as extradition law or the legal status of aliens. With the establishment of the League of Nations, the first organized and institutionalized efforts to protect refugees were initiated. Following the Second World War, this process entered a new phase with the creation of specialized institutions within the framework of the United Nations. The establishment of the International Refugee Organization (IRO) in 1946, followed by the creation of the Office of the United Nations High Commissioner for Refugees (UNHCR), marked a critical turning point in the institutionalization of international protection for refugees. [20, p. 125]

4.1. Granting Refugee Status and Collective Approaches in Crisis Situations

One of the fundamental challenges of the international refugee protection regime lies in responding to large-scale and sudden influxes of asylum seekers—situations in which individual status determination becomes practically unfeasible. In such circumstances, the Office of the United Nations High Commissioner for Refugees (UNHCR), through its *Handbook on Procedures and Criteria for Determining Refugee Status* and subsequent guidelines, has recommended the use of prima facie or group-based recognition of refugee status as a temporary and pragmatic solution. This approach is premised on the assumption that members of a particular group are generally exposed to a shared risk and, in the absence of contrary evidence, should be afforded initial protection. [14, pp. 2–3]

The experience of the large-scale displacement of Afghan asylum seekers following the political developments of 2021 demonstrates that while collective approaches may provide an immediate response to humanitarian emergencies, the absence of complementary legal and administrative mechanisms can result in prolonged legal uncertainty and heightened vulnerability for asylum seekers. Consequently, without pathways toward individualized assessment, durable solutions, or secure legal status, group-based protection risks transforming an emergency measure into a source of structural precarity.

4.2. Temporary Protection

In situations where individual refugee status determination is not feasible, the concept of temporary protection emerges as an emergency mechanism. Guidelines issued by the Office of the United Nations High Commissioner for Refugees envisage temporary protection for circumstances such as large-scale cross-border displacement and protracted or unstable crises. [36, pp. 1119–1127] Within this

https://doi.org/10.54934/ijlcw.v5i1.180

framework, the admission of asylum seekers must be carried out without discrimination, and the principle of non-refoulement must be fully respected.

Nevertheless, practical experience demonstrates that temporary protection has, in many cases, evolved into a tool for postponing final status determination, thereby restricting refugees' access to durable legal rights and long-term protection. [33; 31]

4.3. Private Rights of Refugees and the Principle of Minimum Equality

Refugees, as foreign nationals, are entitled to a minimum set of private rights grounded in the principle of human dignity. These rights—including ownership of movable and immovable property as well as rights related to personal status—are guaranteed in many legal systems either through domestic legislation, international treaties, or the principle of reciprocity. Nevertheless, the practical enjoyment of these rights remains largely contingent upon domestic state policies and prevailing attitudes toward non-nationals.

In the field of personal status, although the dominant trend in private international law favors the application of the foreigner's national law, the effective exercise of such rights often depends on reciprocal recognition and the discretionary will of the host state. [6, p. 826] This situation poses particular challenges for refugees who lack valid identity documentation, rendering them especially vulnerable to legal uncertainty and restricted access to fundamental private rights.

4.4. The 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol

The 1951 Refugee Convention and its 1967 Protocol form the principal international legal framework for refugee protection. They define the legal status of displaced and stateless persons and guarantee key rights, including protection against discrimination, religious freedom, access to justice, and the rights to employment and education. Central to the Convention is the principle of non-refoulement, which bars States from returning individuals to places where their lives or freedoms would be threatened. It also calls on States to implement humane policies on admission and residence and to cooperate with international organizations in fulfilling these obligations. Some of the most important provisions of the Convention are presented in Table 1.

Table 1. Principal Provisions of the 1951 Refugee Convention

https://doi.org/10.54934/ijlcw.v5i1.180

Subject	Explanation
Non-Refoulement	Article 33 establishes that states must refrain from transferring refugees to any country where they would face serious risks to their life or personal liberty on grounds such as race, religion, nationality, social affiliation, or political beliefs. This obligation, often characterised as the central pillar of protection within the 1951 Refugee Convention, is generally recognised as having the status of a rule of customary international law. While some commentators have suggested that this rule may rise to the level of a peremptory norm (jus cogens), scholarly opinion remains divided and no authoritative determination has been made. In addition, the principle is relevant to extradition practices, as several extradition agreements incorporate provisions consistent with the doctrine of non-refoulement. [23]
Public Education	Article 22 obliges state parties to facilitate refugees' enjoyment of educational opportunities, including access to formal schooling, validation of academic credentials obtained abroad, and eligibility for financial assistance such as scholarships. As an illustration of positive practice, Austria waives university tuition fees for refugees. In contrast, Ethiopia has formulated reservations with respect to Articles 17 and 22, thereby interpreting the provision of public education not as a binding duty but rather as a non-mandatory guideline. [2]
Right to Work and Social Security	Articles 7, 18, 19, and 24 of the 1951 Convention collectively emphasize that refugees are entitled to access employment opportunities and social protection mechanisms within host states. A practical illustration can be found in Luxembourg, where pursuant to the Ministerial Decree of 25 May 1955, refugees who become unemployed for reasons beyond their own control are accorded the same legal status as nationals who are unemployed. Accordingly, they may benefit from unemployment allowances, provided that they hold permanent residence in the Grand Duchy and are in possession of a travel document issued by the Ministry of Foreign Affairs in accordance with Article 28 of the Convention. [2]

https://doi.org/10.54934/ijlcw.v5i1.180

Expulsion of Refugees	Article 33 affirms that a state party is not permitted to remove a refugee who is lawfully present on its territory unless such action is justified by considerations of national security or public order. Moreover, any measure of expulsion must be carried out in conformity with procedural safeguards and the requirements of due process (Adebayo, 2015).
Naturalization	Article 34 encourages states parties to take appropriate measures, insofar as practicable, to promote the integration and naturalization of refugees lawfully residing within their territories, including by easing procedures and reducing barriers related to nationality acquisition. [2]
Irregular Refugees	Article 31 provides that refugees shall not be subjected to penalties for irregular entry or presence, provided they can demonstrate that they fled from a situation of danger and present themselves to the authorities within a reasonable time. In a number of legal systems, including those of Austria and Belgium, asylum seekers are required to lodge their claims promptly after arrival; failure to do so, such as remaining for extended periods in a third country or delaying without valid justification, may adversely affect their entitlement to residence. [2]
Housing	Article 21 of the 1951 Convention addresses the issue of accommodation by obligating contracting states to provide refugees who are lawfully staying in their territory with appropriate treatment in matters related to housing, in accordance with domestic regulations or the supervision of public authorities. At a minimum, the standard of treatment afforded to refugees must be no less favorable than that granted to other non-nationals in comparable situations. [30]

Despite its significance, the 1951 Refugee Convention was initially subject to important limitations. Most notably, its scope was restricted to refugees who had been displaced prior to January 1951, and States were permitted to limit the application of the Convention exclusively to refugees located within Europe. As a result, refugees outside Europe were effectively excluded from the protections afforded by international refugee law. The emergence of new waves of forced displacement during the 1950s and 1960s exposed the inadequacy of these temporal and geographical limitations. This issue was subsequently addressed in the sessions of the Executive Committee of the United Nations High Commissioner for Refugees in 1964 and 1965. Following these discussions, a conference was convened

https://doi.org/10.54934/ijlcw.v5i1.180

in Bellagio, Italy, in 1965, which led to the drafting of a Protocol aimed at removing the temporal and geographical restrictions of the 1951 Convention. This Protocol was approved by the United Nations General Assembly on 16 December 1966. [13, p. 565]

Accordingly, a convention that was originally designed to address the situation of European refugees in the aftermath of the Second World War acquired a significantly broader scope of application with the adoption of the 1967 Protocol.

4.5. Declaration on Territorial Asylum

The Declaration on Territorial Asylum, initiated by the United Nations Commission on Human Rights, was adopted by consensus of the General Assembly on 14 December 1967. General Assembly Resolution 2312 (XXII) related to this Declaration serves as a key instrument and primary source of international refugee law. The Declaration highlights the international community's obligation, through the United Nations, to grant asylum to eligible individuals and ensure their protection and assistance. It also confirms that anyone facing serious threats to life or freedom due to violations of rights recognized in the Universal Declaration of Human Rights has the right to seek and receive asylum. [18, p. 50].

4.6. The UNHCR Statute and Its Role in Refugee Protection

The Statute of the United Nations High Commissioner for Refugees sets out the general framework for international refugee protection and the promotion of durable solutions, and is regarded as a key foundation of international refugee law. It specifies the mandate, functions, and legal authority of the High Commissioner in safeguarding refugees and facilitating lasting solutions. In addition, it regulates the institutional relationship between UNHCR and the main organs of the United Nations, such as the General Assembly, the Economic and Social Council, and other specialized bodies. [20, p. 133] UNHCR (n.d.)was created by the United Nations General Assembly in 1950 in response to the mass displacement following the Second World War. It currently carries out its protection mandate in 122 countries, demonstrating the global reach of its activities.

4.7. The Universal Declaration of Human Rights and the International Covenants

Adopted in 1948, the Universal Declaration of Human Rights established human rights as a universal standard. While it is not legally binding, its broad acceptance makes it a key reference for

https://doi.org/10.54934/ijlcw.v5i1.180

evaluating state compliance with human rights norms. Article 13 guarantees the right to freedom of movement and residence within a state, as well as the right to leave any country, including one's own, and to return. This right extends to foreign nationals, although host states may impose lawful restrictions based on security or economic considerations. The International Covenant on Civil and Political Rights reinforces these protections in Article 12, ensuring that all individuals lawfully present in a country can move freely and choose their residence, and can leave any country, including their own. Restrictions are permitted only if established by law and necessary to safeguard national security, public order, public health or morals, or the rights of others, in accordance with the Covenant's provisions. [25, pp. 220–222]

4.8. International Legal Protection of Children: The Convention on the Rights of the Child Framework

Adopted by the United Nations General Assembly in 1989, the Convention on the Rights of the Child (CRC) is widely regarded as a cornerstone of the global system for safeguarding children's rights. Comprising 54 articles, the Convention addresses a broad range of protections, many of which are directly relevant to migrant and refugee children. Several provisions specifically highlight the rights and special safeguards owed to migrant children, the most important of which are summarized in Table 2:

Table 2. Principal Articles of the Convention on the Rights of the Child Relevant to Migrant Children.

Article	**Summary of the Provision**	**Relevance to Migrant and Refugee Children**
Article 2	Guarantees all Convention rights to every child without discrimination, including discrimination based on parents' status, and prohibits punitive treatment on that basis.	Extends protection to all children regardless of nationality or migration status, covering migrant, refugee, and stateless children.
Article 7	Requires immediate birth registration and the right to a name, nationality, and parental care, with States obligated to prevent statelessness.	Highlights the urgency of birth registration for migrant children, who face heightened risk of remaining undocumented.
Article 22	Obligates States to provide protection and humanitarian assistance to asylum-seeking and refugee children, and to assist in family tracing for reunification.	Directly secures refugee children's access to education, healthcare, and social services, and supports family reunification.

Article 28	Establishes the right to education, including free primary schooling, accessible secondary/higher education, and measures to reduce drop-out.	Confirms migrant and refugee children's right to education and obliges States to remove access barriers for vulnerable groups.

Source: UNICEF, 1989

Overall, the Convention on the Rights of the Child establishes that all children, regardless of nationality or migration status, are entitled to fundamental rights, including access to social, educational, and health services. These provisions aim to safeguard the well-being and protection of migrant and refugee children in host countries.

4.9. UN General Assembly Resolutions and UNHCR Executive Committee Decisions

The United Nations General Assembly has significantly influenced the development of refugee and asylum seeker rights. Through multiple resolutions, it has gradually expanded the mandate and responsibilities of the UNHCR without formally altering its Statute, offering new interpretations that broaden the categories of individuals eligible for protection.

During the 1960s and 1970s, these measures notably extended UNHCR's activities beyond refugees to include asylum seekers, stateless persons, and certain national or regional groups. Additionally, the UNHCR Executive Committee issues annual conclusions and decisions on refugee-related matters. While not legally binding, these decisions often reflect international consensus and highlight protection gaps, thereby reinforcing the global framework for refugee protection. [18, p. 50]

4.10. Other International Instruments Concerning Refugees

The instruments discussed so far are primarily focused on refugee protection and can be considered the core of international refugee law. However, in addition to these specialized instruments, a broader set of human rights texts exists which, while not exclusively addressing refugees, establish important principles and standards for their treatment. In this context, particular attention is given to States' responsibilities to uphold the human rights of refugees, as derived from human rights treaties, conventions, and other relevant international instruments.

The following section highlights some of these instruments as examples. They include the 1949 Fourth Geneva Convention on the Protection of Civilian Persons in Time of War and its 1977 Additional

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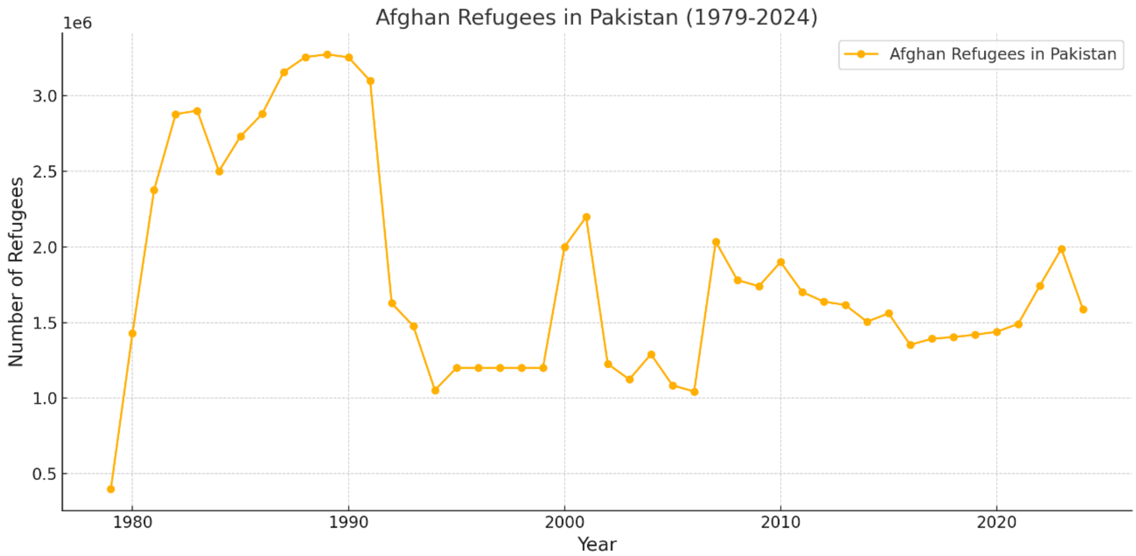
Protocols; conventions addressing the status of stateless persons and the prevention of statelessness; the Convention on the Rights of the Child; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; the Additional Protocols to the 1949 Geneva Conventions on the protection of victims of armed conflicts; the Convention on the Prevention and Punishment of the Crime of Genocide; and the International Convention on the Elimination of All Forms of Racial Discrimination.[13, p. 568]

5. AFGHAN ASYLUM SEEKERS AND THEIR LEGAL STATUS IN PAKISTAN

The history of Afghan asylum seekers in Pakistan dates back to 1979 and 1980, following the rise to power of the communist government in Afghanistan. Since that time, this phenomenon has experienced numerous fluctuations (see Figure 1). Similar to Iran, Pakistan has been one of the most accessible destinations for Afghan asylum seekers and, as a result, has hosted a large number of them over the decades.

Figure 1. The Presence of Afghan Asylum Seekers in Pakistan (1979–2024)



Source: UNHCR, 2024

However, the legal status of Afghan asylum seekers in Pakistan can be examined within the framework of four distinct historical periods.

5.1. The Domestic Statutory and Institutional Framework

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In the absence of dedicated refugee legislation, Afghan asylum seekers and refugees in Pakistan are governed by the Foreigners Act, 1946, a colonial-era statute concerned with the entry, residence, and removal of non-citizens rather than with refugee protection as such. Section 3 of the Act empowers the federal government to regulate the entry, presence, and departure of foreigners, while section 14(2) criminalizes unlawful entry or presence, and section 14(B) sets out the procedure for the deportation of foreigners convicted under the Act. [38] Because the Act draws no distinction between a refugee fleeing persecution and an ordinary undocumented migrant, Afghan nationals without valid registration documents are, as a matter of domestic law, treated as illegal aliens subject to removal, irrespective of any protection needs recognized under UNHCR's mandate.

A further layer of policy was added by the National Action Plan, adopted in January 2015 in the aftermath of the Peshawar Army Public School attack, which directed the registration and eventual repatriation of Afghan nationals as part of a broader counter-terrorism strategy. Successive cabinet decisions tied to the Pakistan–Afghanistan–UNHCR Tripartite Commission extended registered refugees' Proof of Registration status into 2017 and beyond, illustrating how refugees' legal standing has been periodically renewed through executive action rather than fixed by statute. The Tripartite Agreement itself, first concluded in 2003 and renewed at successive Commission meetings, commits the three parties to voluntary, safe, and dignified repatriation, but it does not establish enforceable individual rights and has not prevented the coercive returns documented in the post-2021 period.

Pakistani superior courts have, on occasion, supplied protections that the statutory framework withholds. In *Rahil Azizi v. State* [40]. the Court quashed proceedings against an Afghan woman threatened with deportation under the Foreigners Act, holding that her circumstances as a person fleeing Taliban persecution required protective treatment. In the *Hamdullah Saboor* case [41], the Court recognized that children born in Pakistan, including to Afghan parents, acquire citizenship by birth under section 4 of the Pakistan Citizenship Act, 1951. More recently, in proceedings before the Supreme Court challenging the 2023 Illegal Foreigners' Repatriation Plan, the federal government assured the Court that holders of Proof of Registration and Afghan Citizen Cards would not be apprehended or deported, an assurance the government has periodically renewed rather than codified. Taken together, this jurisprudence indicates a judiciary willing to extend incremental protection within the existing statutory architecture, but unable, absent legislative reform, to supply the durable legal status that the Foreigners Act does not provide.

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5.2. The Period of Initial Reception

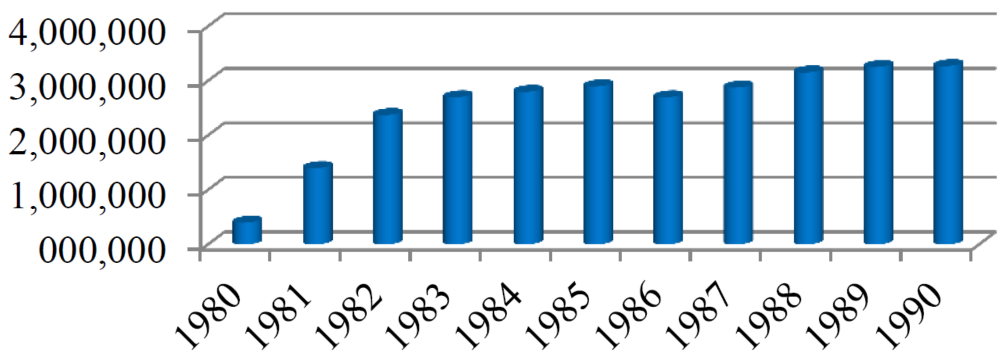
Following the overthrow of President Daoud Khan and the subsequent rise of a pro-Soviet communist regime in Afghanistan, widespread political instability triggered the first large-scale wave of Afghan migration. This phase, spanning roughly from 1979–1980 to 1990, witnessed the forced displacement of millions of Afghans to Pakistan (see Figure 2). Due to geographical proximity and relative ease of access, Pakistan—alongside Iran—emerged as one of the principal destinations for Afghan migrants and refugees during this period. Aligned with the U.S.-led bloc during the Cold War, Pakistan adopted an "open-door" policy toward Afghan refugees fleeing the political turmoil and socio-economic disruption that followed the Soviet intervention in Afghanistan. This welcoming approach was largely influenced by extensive support from the United States as a key actor in the proxy war against the Soviet Union, as well as by assistance from international organizations such as the United Nations High Commissioner for Refugees (UNHCR), which supported newly arrived Afghan refugees in Pakistan.

Accordingly, the Pakistani government promptly admitted Afghan refugees and delegated responsibility for their management to provincial authorities in the former border regions, including the North-West Frontier Province (now Khyber Pakhtunkhwa) and Balochistan. According to UNHCR assessments, during this period the standard of living of the majority of refugees was relatively higher than their previous conditions and, in some cases, even higher than that of local populations. [37, pp. 32–33] Afghan refugees were settled in designated areas or settlements commonly referred to as "villages," which facilitated administrative management, identification, and the provision of basic services. Nevertheless, refugees were prohibited from purchasing land or property and from participating in Pakistan's political life; they were only permitted to establish their own political organizations. [1, p. 197] In this context, the *International Herald Tribune* reported that military resistance against the Kabul government was being coordinated from refugee camps in Pakistan and that the country was allegedly using the presence of UNHCR as a protective cover to organize and strengthen resistance groups. [24, pp. 12–13] Although these allegations were officially denied by UNHCR, the presence and organization of Afghan jihadist groups in Pakistan during the years of armed struggle against communism in Afghanistan remain undeniable historical realities.

Nevertheless, notwithstanding political manipulation, Pakistan's approach toward Afghan asylum seekers during the Cold War period was generally generous. The Commissionerate for Afghan Refugees (CAR), established by the Government of Pakistan in each refugee camp, was responsible for registering and monitoring refugee communities. These commissions issued identification cards, commonly known as *Shanakhti Passes*, to the head of each refugee household. Possession of this card allowed Afghan asylum seekers to move freely and engage in employment within the informal sector. Employment in the informal sector meant that none of the refugees' assets were formally registered or monitored by governmental or non-governmental institutions.

However, holders of these cards were not permitted to own immovable property, vehicles, or other registered assets. From this perspective, it may be argued that although the general policy of the Pakistani government toward Afghan asylum seekers during the Cold War was largely benevolent, their legal status remained ambiguous. This ambiguity was further reinforced by inconsistent and contradictory policies adopted by Pakistani authorities, including police harassment, lack of effective access to courts, and insecurity of businesses and property due to the absence of formal legal registration. [26, pp. 11–13]

Figure 2. Annual Trends of Afghan Refugees in Pakistan (1980–1990)



Source: UNHCR Reports, 1980 ~1990, Khan & Farooq, 2021, p. 72

5.3. The Post-1989 Period

Following the fourteen-year struggle of the Mujahideen and the eventual defeat of the Soviet occupying forces, Soviet troops withdrew from Afghanistan in 1989, and Mujahideen groups came to power. Consequently, the Government of Pakistan began to call for the return of Afghan refugees and asylum seekers to their country of origin. Afghan refugees themselves, having endured prolonged displacement, were also strongly inclined to return home. During this period, according to 1992 statistics, approximately three million registered refugees and around half a million unregistered asylum seekers were present in Pakistan. The Pakistani government showed a greater inclination toward facilitating the return of registered refugees rather than unregistered asylum seekers. [15, pp. 73–74]

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Over time, Pakistan's relations with Afghan refugees gradually deteriorated due to geopolitical considerations and the decline of international financial support. Despite the Soviet withdrawal in 1989, ongoing internal conflicts in Afghanistan and the Taliban's seizure of power in 1996 contributed to the continued flow of refugees into Pakistan. Throughout the 1990s, reductions in international assistance-stemming from geopolitical shifts, the collapse of the Soviet Union, and diminished global attention to Afghanistan-created an increasingly negative and hostile environment toward Afghan refugees in Pakistan. In 1999, following General Musharraf's coup, Pakistan closed its borders to new refugees, declaring that it could no longer accommodate such large numbers without sustained international support. Although assistance from non-governmental organizations continued, it proved insufficient to adequately address the challenges faced by Afghan refugees. [17, p. 1280]

Under incentive-based repatriation programs implemented by the United Nations High Commissioner for Refugees (UNHCR)-including the provision of USD 100 in cash and 300 kilograms of wheat per returning household-approximately 1.4 million Afghan refugees were repatriated from various camps in Pakistan to Afghanistan within a relatively short period. However, the outbreak of internal conflicts among Mujahideen factions over control of central power in Kabul from 1992 onward significantly undermined the sustainability of return and rendered repatriation increasingly difficult for many Afghan refugees.

In response, the Government of Pakistan adopted a more coercive approach aimed at reducing the refugee population. This shift was accompanied by mounting pressure on Afghan refugees, including violations of refugee rights, arbitrary detention, harassment, and abuse. As a result, Afghan refugees during this period were subjected to widespread humiliation, extortion, ill-treatment, and forced deportations practices that affected even those holding valid identification cards. [26, pp. 15–17] This deterioration occurred against the backdrop of escalating civil war in Afghanistan, coinciding with the emergence of the Taliban as a critical turning point in the country's internal conflict. Although the Taliban's rise to power brought about a degree of relative stability in certain areas, persistent violence and insecurity prevented large-scale returns. Consequently, only about 270,000 Afghan refugees returned from Pakistan to Afghanistan between 1995 and 1996. During this same period, both UNHCR and the World Food Programme (WFP) suspended food assistance to most camp-based refugees—a decision that appeared to receive tacit approval from the Pakistani authorities. In 2000, amid intensified fighting between the Taliban and the Northern Alliance and one of the most severe droughts in Afghanistan's history, a new influx of approximately 172,000 Afghan refugees entered Pakistan. In contrast, only about 77,000 Afghans returned to their country of origin during the same year. Pakistan's restrictive policies toward Afghan refugees remained firmly in place until the onset of the United States–led military intervention in October 2001. [15, pp. 76–77]

5.4. The Post-2001 Period

The third phase began with the arrival of hundreds of thousands of Afghan asylum seekers following the United States' military intervention in Afghanistan in 2001. The belief that the terrorist attacks of 11 September 2001 in the United States had been planned and executed from Afghan territory prompted the United States and its allies to intervene militarily in Afghanistan later that year. This intervention, known as *Operation Enduring Freedom* [26, pp. 14–15], triggered a renewed wave of displacement. As a result of intensive aerial bombardments by the U.S.-led coalition forces and widespread uncertainty regarding Afghanistan's future, approximately 1.5 million Afghans fled the country within a matter of weeks, seeking refuge primarily in neighboring states, particularly Pakistan. [3, p. 6]

Following the establishment of a new internationally supported democratic government in Afghanistan backed largely by the United States and the broader international community renewed hopes emerged for reconstruction and political stability. Consequently, in 2002, approximately 1.5 million Afghan refugees returned from Pakistan to Afghanistan. This marked the largest refugee repatriation operation in the previous three decades. Although UNHCR had initially projected the return of around 800,000 individuals, the program exceeded expectations, with hundreds of thousands of repatriation requests registered within just 15 weeks. This development reflected both Afghan refugees' confidence in the newly established government in Kabul and the international community's commitment to Afghanistan's reconstruction. [15, pp. 78–79]

During the 1970s through the 1990s, Afghan migrants—many of whom were regarded as *Mujahideen* resisting Soviet occupation were generally treated with respect and enjoyed broad political and social support in Pakistan. However, following the political and security transformations after the events of 11 September 2001, the attitude of both the Pakistani government and society toward Afghan migrants shifted markedly. Afghan refugees increasingly faced police harassment, arbitrary detention, extortion, and even mass deportations. Many were pushed into poverty due to the non-renewal of identification documents and deteriorating economic conditions. At the same time, return to Afghanistan remained largely unfeasible for many refugees because of persistent insecurity, limited livelihood opportunities, and inadequate infrastructure.

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Despite these challenges, Afghans have made significant contributions to Pakistan's economy and society and, through extensive social and economic linkages, have become an integral part of the country's social fabric. Nevertheless, the Pakistani government's increasingly restrictive policies and the frequent stigmatization of Afghan refugees as "terrorists" or affiliates of "Al-Qaeda" have rendered everyday life precarious for many of them. Such discriminatory practices have resulted in a persistent lack of security and stability for Afghan refugees, even for those holding valid legal documentation (BBC Persian, 2012). Moreover, although Pakistan's nationality law is formally based on the principle of *jus soli* (right of the soil), this principle has never been effectively applied to Afghan migrants. Second- and third-generation Afghans born in Pakistan remain deprived of citizenship rights and are instead issued only temporary registration cards. These documents significantly restrict access to essential public services, including education and healthcare. As a consequence, many Afghan children are driven into informal labor markets or early marriage. Although certain initiatives have been undertaken to improve the educational and economic conditions of Afghan migrants, widespread public opposition and security-related concerns have prevented proposals such as the granting of Pakistani citizenship to Afghan refugees from being implemented. [27]

In a 2017 report, Human Rights Watch stated that "since July 2016, the Pakistani government has carried out a campaign of harassment and intimidation against Afghan migrants, resulting in the forced return of nearly 600,000 individuals." This group constituted one of the largest populations subjected to forced return in recent years. Many Afghan refugees reported that a combination of factors—including police abuse, threats of deportation, and hostility from local communities—compelled them to return to Afghanistan. Nevertheless, through these actions, Pakistan violated international legal norms prohibiting forced return (*non-refoulement*) to unsafe territories. These deportations occurred at a time when Afghanistan was experiencing escalating violence, widespread displacement, and severe poverty. [10]

5.5. The Taliban's Return to Power (Post-2021 Phase)

On 15 August 2021, the Taliban seized control of Kabul, the capital of Afghanistan. Concurrent with the withdrawal of U.S. forces and the rapid deterioration of security conditions, thousands of Afghans rushed to Hamid Karzai International Airport in an attempt to flee the country. Evacuation operations led by the United States and its allies began on 14 August 2021 and were widely described as one of the largest airlift operations in modern history. Within a two-week period, more than 124,000 individuals were evacuated from Kabul through a total of 387 military flights and 391 civilian flights. In addition to the

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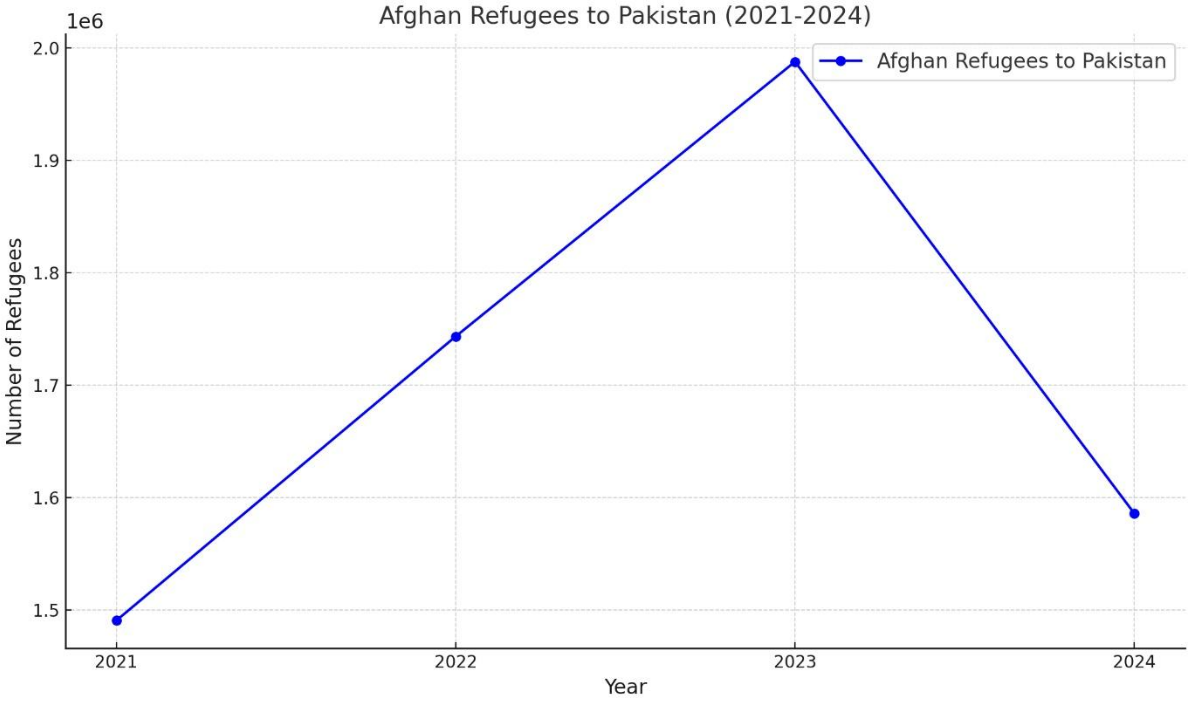
United States, several countries undertook extensive efforts to evacuate their citizens and Afghan nationals considered to be at risk. Germany, the United Kingdom, Canada, Australia, and other Western allies organized special evacuation flights to extract their diplomatic staff, local employees, and affiliated Afghan personnel. At the same time, a substantial number of Afghan civilians sought to leave the country through both formal and informal routes, crossing borders into neighboring states such as Iran, Tajikistan, Uzbekistan, and Pakistan. [4, p. 10]

At present, Afghanistan has approximately 8.2 million migrants residing in 103 countries worldwide, constituting one of the largest and most protracted refugee crises in the seven-decade history of the United Nations High Commissioner for Refugees (UNHCR). Afghan refugees represent the third-largest displaced population globally, following Syrians and Ukrainians. Notably, between 2021 and 2022 alone, approximately 3.6 million Afghans were newly displaced as a direct consequence of the Taliban's return to power. [21] Of this number, only around 600,000 sought refuge in Pakistan. This figure indicates a significant surge in the presence of Afghan refugees in Pakistan during this period (see Figure 3). Nevertheless, Pakistan responded to this new influx with increasingly restrictive and coercive measures toward Afghan refugees.

A particularly significant development was the Pakistani government's announcement in September 2023 of its intention to forcibly expel more than 1.7 million undocumented Afghan migrants-a move widely regarded as unprecedented in scale and severity. [7] Although intervention by the UNHCR and negotiations with the Pakistani authorities temporarily halted the deportation process, more than 630,000 Afghan refugees were forcibly returned during this period, accounting for approximately 57 percent of all returnees to Afghanistan. [28] These measures can be characterized as the harshest policies ever imposed on Afghan refugees in Pakistan. Furthermore, Pakistani authorities have indicated their intention to proceed with second and third phases of forced returns, potentially targeting even documented Afghan refugees holding Afghan Citizen Card (ACC) and Proof of Registration Card (PoR cards). As a result, many Afghan refugees currently reside in Pakistan under precarious conditions, often living in hiding due to fear of arrest, detention, or deportation. [11]

Figure 3. Presence of Afghan Asylum Seekers (2021–2024)



Source: UNCHR, 2024

6. DISCUSSION

International legal instruments recognize core rights of refugees, including non-refoulement, access to education, employment, adequate housing, and pathways to nationality. The principle of non-refoulement, enshrined in Article 33 of the 1951 Refugee Convention, prohibits returning refugees to places where their life or freedom is at risk. Although Pakistan is not a party to the 1951 Convention, non-refoulement is widely recognized as a norm of customary international law binding upon all states. [23] Pakistan's large-scale forced deportations—particularly the 2023 campaign targeting over 1.7 million undocumented Afghans [7]—thus constitute potential violations of customary international law. This raises a fundamental structural problem: the absence of effective enforcement mechanisms capable of compelling state compliance with customary norms. The reliance on voluntary compliance and diplomatic pressure has proven insufficient to deter coercive repatriation policies driven by domestic security considerations.

Economic and social rights, including the right to work and education, are largely unmet. Afghan refugees are restricted to informal employment, while children face limited access to formal education. This reveals a critical tension: while the 1951 Convention establishes rights regarding employment

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(Articles 17–19) and education (Article 22), these provisions assume host states possess both institutional capacity and political willingness to implement them. In Pakistan, the absence of domestic refugee legislation creates a legal vacuum where international norms lack a domestic basis for enforcement, leaving refugees subject to executive discretion. Housing and nationality rights face similar obstacles, with no effective pathways for permanent residency or citizenship. The non-application of jus soli to Afghan-born children, despite its formal existence in Pakistani law, illustrates how the gap between legal entitlement and administrative practice produces de facto statelessness. [27]

Although Pakistan has ratified the Convention on the Rights of the Child, many refugee children remain undocumented, limiting access to healthcare, education, and social protection. This discrepancy underscores a broader critique: treaty ratification without corresponding domestic legislation does not translate into effective protection. The historical analysis across four periods reveals that shifts in refugee policy have been driven primarily by geopolitical calculations—Cold War alliances, post-9/11 security paradigms, and declining international support—rather than by international legal obligations. This confirms the study's hypothesis that the structural dependence of international refugee law on state political will constitutes its fundamental limitation, highlighting the need for enforceable compliance mechanisms within the international refugee protection regime.

7. CONCLUSION

Over the past four decades, Afghanistan has faced continuous crises, causing a significant portion of its population to migrate. Pakistan has hosted large numbers of Afghan refugees across generations; however, many still lack fundamental human rights. International law, through the 1951 Refugee Convention, the 1967 Protocol, the Convention on the Rights of the Child, and other instruments, has provided a normative framework for refugee protection. However, this study demonstrates that implementation in Pakistan has been systematically undermined by structural limitations of the international legal order. Although Pakistan is not a party to the 1951 Convention, its obligations under customary international law—particularly non-refoulement—and ratified instruments remain legally binding, yet the absence of enforceable compliance mechanisms has rendered these obligations largely aspirational. The findings confirm the study's hypothesis: international law has failed to ensure effective protection for Afghan refugees in Pakistan not merely due to non-accession to key treaties, but because the enforcement architecture of international refugee law is structurally dependent on the political will of host states. Pakistan's refugee policies have been shaped primarily by geopolitical imperatives rather than by adherence to international legal norms. The principle of non-refoulement, the right to education and employment, adequate housing, and pathways to naturalization remain unrealized, and children—due to lack of documentation—remain the most vulnerable group. This study demonstrates that the gap between normative commitments and protection outcomes is structural, rooted in the absence of binding enforcement mechanisms and the subordination of refugee rights to state sovereignty. Bridging this gap requires developing domestic refugee legislation in host states and reforming the international enforcement architecture to reduce its dependence on voluntary state compliance.

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https://doi.org/10.54934/ijlcw.v5i1.180

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ABOUT THIS ARTICLE

Conflict of interest: The authors declare no conflicting interests

CrediT contribution:
Ali Ahmad Mowahid: Conceptualization, Methodology, Investigation, Formal Analysis, Resources, Data Curation, Writing - Original Draft, Writing – Review & Editing.
Fazl Ahmad Ahmadi: Supervision, Validation, Methodology, Writing - Review & Editing.

Declaration of AI use: During the preparation of this manuscript, the author used an AI-based language model solely to assist with grammatical proofreading and with the formatting and verification of reference citations. The author reviewed and edited all AI-assisted output and takes full responsibility for the content of this article.

Funding: This research received no external funding.

Data availability: This is a doctrinal legal study; thus, it used existing datasets. All sources analyzed are publicly available and cited in the reference list.

EL IMPACTO DEL DERECHO INTERNACIONAL EN LA PROTECCIÓN DE LOS SOLICITANTES DE ASILO Y REFUGIADOS AFGANOS EN PAKISTÁN

RESUMEN

Este artículo examina la eficacia de los marcos jurídicos internacionales en la protección de los refugiados y solicitantes de asilo afganos en Pakistán, analizando la brecha persistente entre los compromisos normativos y los resultados reales de protección. Mediante una metodología cualitativa, descriptivo-analítica y doctrinal, el estudio se basa en instrumentos jurídicos internacionales primarios —incluidos la Convención sobre el Estatuto de los Refugiados de 1951, el Protocolo de 1967 y la Convención sobre los Derechos del Niño—, así como en fuentes académicas secundarias y el marco jurídico interno de Pakistán, todo ello complementado con una revisión longitudinal de las políticas pakistaníes sobre refugiados a lo largo de cuatro períodos (1979–2024). Se argumenta que la incapacidad del derecho internacional para proteger a los refugiados afganos no deriva únicamente de la no adhesión de Pakistán a la Convención de 1951, sino de la dependencia estructural del régimen internacional de refugiados respecto a la voluntad política y la infraestructura jurídica interna de los Estados de acogida. Esta deficiencia ha dado lugar a violaciones sistemáticas de derechos, incluidas las deportaciones forzosas. El estudio aporta valor al abordar el derecho internacional como una variable independiente en distintos contextos históricos y políticos dentro de un Estado que no es parte de los tratados pertinentes.

Palabras clave: solicitantes de asilo afganos, principio de no devolución (*non-refoulement*), derechos de los refugiados, derecho internacional, Pakistán

国际法对巴基斯坦境内阿富汗寻求庇护者及难民保护的影响

摘要

本文探讨了国际法律框架在保护巴基斯坦境内阿富汗难民与寻求庇护者方面的有效性，分析了规范性承诺与实际保护成效之间持续存在的差距。研究采用定性、描述性分析及法学教义学方法，依据《1951年难民公约》、《1967年议定书》及《儿童权利公约》等主要国际法律文书，结合学术文献与巴基斯坦国内法律框架，并对巴基斯坦四个时期（1979–2024年）的难民政策进行了纵向考察。文章指出，国际法未能有效保护阿富汗难民，其根源不仅在于巴基斯坦未加入《1951年公约》，更在于国际难民体制在结构上依赖于东道国的政治意愿及国内法律基础设施。这种缺陷导致了包括强制驱逐在内的系统性侵犯权利行为。本文的贡献在于，将国际法视为一个在非缔约国特定历史与政治背景下的自变量进行考察。

关键词：阿富汗寻求庇护者，不推回原则，难民权利，国际法，巴基斯坦

https://doi.org/10.54934/ijlcw.v5i1.180

International Journal of
Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.187

THE ICSID ARBITRATION IN THE CURRENT CONTEXT OF INTERNATIONAL TRADE

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Article Information:

Received
May 25, 2025
Reviewed & Revised
May 26, 2025
Accepted
June 26, 2025
Published
July 30, 2026

Keywords:

investment arbitration,
ICSID,
international trade,
bilateral investment treaties,
foreign direct investment

ABSTRACT | 摘要 | RESUMEN

This article analyses, through a doctrinal legal methodology combined with documentary and institutional analysis, the role of ICSID arbitration in the current context of international trade. The study examines the Washington Convention, the 2022 ICSID Arbitration Rules, Bilateral Investment Treaties concluded by Spain, and ICSID Caseload Statistics up to 2026. Findings indicate that ICSID has consolidated its practical relevance, with over 1,000 cumulative cases and 63 new registrations in 2025, predominantly grounded in BITs (58%), confirming the functional interdependence between the ICSID system and the conventional architecture of international economic law. The 2022 reforms address legitimacy and transparency concerns and respond, alongside critiques relating to regulatory chill and recent denunciations by Latin American States, to evolving demands for systemic adjustment. The article contributes by situating ICSID within the broader public regulatory framework of international trade in a moment of multilateral crisis.

FOR CITATION:

Urrea Salazar, M. J. (2026). The ICSID Arbitration in the Current Context of International Trade. International Journal of Law in Changing World, 5 (1), 32-55. DOI: https://doi.org/10.54934/ijlcw.v5i1.187

1. INTRODUCTION

It cannot be overlooked that addressing arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank Group requires reflection on a subject that has been widely discussed and on which numerous doctrinal and practical considerations exist. This is not only due to its historical background — the Centre was established pursuant to the 1965 Washington Convention[1] — but also because of its practical development, which allows it, without a doubt, to be regarded as a successful mechanism for the resolution of international commercial disputes.

However, this prior experience and the extensive doctrinal treatment of its functioning do not render irrelevant a few brief reflections on its current context. Starting from its instrumental role as a tool for the promotion of investment, the need to adapt to the commercial, economic, and political realities of each moment advises a contemporary treatment and contextualization that aligns with the ever-changing reality of the international society. And this international society is currently undergoing turbulent circumstances that point to a modification of the international order established after the Second World War — not only politically, and consequently in the international relations between States and in the balance of power, but also in the general economic sphere and in commercial activity in particular.

Leaving aside the wartime context and focusing on trade aspects, what has been termed the "tariff war," "tariff escalation," or "trade conflict," euphemistically speaking, is nothing more than the evolution of a latent situation that has persisted for nearly a decade and is more related to the balance of power among preexisting and emerging economic and political powers. The crisis of legitimacy of the World Trade Organization finds its origin in the United States' position regarding its internal functioning and in the blockage of the Appellate Body, a key component of the WTO Dispute Settlement System[2]. In 2018,

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded in Washington on 18 March 1965. In force for Spain since 17 September 1994, by virtue of the Instrument of Ratification published in the Official State Gazette (BOE) No. 219, of 13 September 1994, pages 28286 to 28294.

[2] The Appellate Body of the WTO is composed of seven members, experts in international trade, appointed by consensus of the 166 WTO members. A minimum of three members is required to constitute the panel that decides each specific appeal. By December 2019, only three judges remained in office, the minimum number required for any panel to function. On 11 December

https://doi.org/10.54934/ijlcw.v5i1.187

U.S. President Donald Trump announced an increase in tariffs on steel and aluminum, and, considering that his country was being treated unfairly by the Organization, he halted the renewal of the Appellate Body. Although the underlying context of this situation involved the trade confrontation between China and the United States, American mistrust of the multilateral system began well before the Trump administration, during George W. Bush's government between 2001 and 2009, and continued under Barack Obama's administration between 2009 and 2017.

It therefore seems clear that the multilateral trade system, as we know it today, is due for review. Yet, one might still ask to what extent this context also affects the regulatory framework of international investment, and more specifically, the investment protection system based on ICSID arbitration.

Indeed, although the ICSID mechanism has been implemented through Bilateral Investment Treaties (or Bilateral Agreements on the Promotion and Reciprocal Protection of Investments), which frequently refer to arbitration under the Washington Convention [15], in practice it has generated a quasi-multilateral system, similar to that of the World Trade Organization. Nevertheless, it can be observed that both systems evolve in parallel, albeit without institutional coordination, applying different logics (investor protection versus trade liberalization) and potentially entering into tension or normative inconsistency. It may be affirmed that the investment arbitration system has evolved toward a form of substantive multilateralism, yet without the institutional structures of the multilateral trade system, thereby generating fragmentation and inconsistencies in international economic law. As Schill (2009) evidences, the investment arbitration system, despite its bilateral basis, has evolved toward a materially multilateral model, generating common principles through arbitral practice and functionally approximating the WTO system.

In sum, both ICSID and the WTO operate as autonomous yet interdependent regimes, without a clear hierarchy between them, reflecting a fragmentation of international economic law and the need to establish coordination or harmonization mechanisms between investment and trade. [17] This functional interdependence is clearly reflected both in their objectives — both systems aim to provide predictability and legal certainty — and in the common principles they share: fair and equitable treatment (ICSID) and national treatment and most-favored-nation treatment (WTO), thereby generating normative parallels.

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of that same year, two of them completed the maximum eight-year term for which they were authorized, thereby rendering the Body inoperative.

From this perspective, the paralysis of the Appellate Body places the WTO's "multilateralism" in serious crisis, which largely relies on the existence of enforcement mechanisms and the appellate function, bringing it closer to the weaknesses of the international investment system. Given the interrelation between the two, the transformation or even potential dismantling of the international trade system designed in Marrakech is likely to directly affect the international regulation of investments.

Against this background, the present study employs a doctrinal legal methodology, complemented by documentary, institutional, and statistical analysis. Doctrinal analysis examines the normative framework of the ICSID system — the 1965 Washington Convention, the 2022 ICSID Arbitration Rules, the ICSID Additional Facility Rules, and a sample of Bilateral Investment Treaties concluded by Spain — alongside the relevant case-law and the specialized scholarship that has developed around the operation of the Centre. The selection of primary sources was guided by three criteria: their direct binding force within the ICSID system, their representativeness of the Spanish position within the broader European Union framework, and their relevance to the current debates on the legitimacy of investor-State dispute settlement.

Documentary and statistical analysis draws on the ICSID Caseload Statistics published by the Centre up to 2026, official publications of the World Bank Group, and reports from UNCTAD, the European Commission, and other public institutions of relevance to the investment-protection framework. These data are used to test the functional relevance of the ICSID system in a context of multilateral trade crisis and to examine the temporal evolution of caseload, treaty basis, and procedural reform.

The temporal scope of the analysis runs from the entry into force of the Washington Convention in 1966 to early 2026, with particular attention to the period following the 2022 reform of the ICSID Rules. The jurisdictional scope is principally focused on Spain and the European Union, with comparative references to selected Latin American States (Bolivia, Ecuador, Venezuela, Honduras), South Africa, Indonesia, India, and China, which have either denounced the Convention, renegotiated bilateral instruments, or proposed structural reforms within UNCITRAL Working Group III. The chosen design does not pursue causal inference but seeks rather a contextualized normative interpretation of the ICSID system within the broader public regulatory framework of international trade. Among the principal limitations of the design are the absence of empirical fieldwork, the dependence on aggregated ICSID statistical data, and the necessarily synthetic treatment of the comparative dimension.

2. THE ICSID MECHANISM AS A MODEL OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

ICSID constitutes an essential element of investment protection, and therefore of the promotion of international investments. In this regard, it is currently considered the principal international arbitration institution in the field of disputes between private investors and host States. It was established through a convention adopted in 1965, known as the Washington Convention, which entered into force on 14 October 1966, once the minimum required number of ratifications (20 States) was achieved, and with its seat established in Washington, D.C. The Convention was drafted by the Executive Directors of the International Bank for Reconstruction and Development as the result of an extensive technical preparatory process. This process built upon prior work conducted by Bank staff, with partial collaboration from legal experts appointed by the governments of member States. Furthermore, several international consultative meetings were held in Addis Ababa, Santiago de Chile, Geneva, and Bangkok, complemented by deliberations of an ad hoc Legal Committee convened in Washington. The drafting process, which extended over four years, aimed to establish a regulatory framework capable of achieving broad acceptance. In this regard, the Convention successfully reconciled the interests of both capital-exporting States and developing countries, and it was also notable for adopting innovative consultation and negotiation methods within an international organization.

Within the international context of the time, characterized by the expansion of global trade and the emerging development of international investment arbitration, the ICSID Convention was configured as an instrument integrated into the international community's efforts to articulate a multilateral normative framework in this field. The consideration of foreign direct investment as a necessary complement to resources derived from bilateral and multilateral official sources, in the implementation of plans adopted to promote the growth of developing economies, formed the basis of the preparatory work for the Convention. Indeed, in order to overcome the obstacles and uncertainties confronting foreign investors, several initiatives emerged, among which the Draft Convention on the Protection of Foreign Property, formulated by the Organization for Economic Co-operation and Development (OECD), and the proposal for the creation of an International Investment Insurance Organization, advocated by the United Nations Conference on Trade and Development (UNCTAD), stood out. While these proposals were not directly linked to, nor did they refer to, ICSID, they were mentioned during the preparatory work for the Convention. [9]

None of these initiatives were entirely disregarded. Despite the apparent failure of the OECD project, which, although approved by the OECD Council in October 1967, did not enter into force as a multilateral treaty due to the lack of necessary ratifications, it exerted a profound influence on Bilateral Investment Treaties (BITs), which incorporated the substantive standards proposed by the OECD. Thus, principles such as fair and equitable treatment, protection against expropriation without adequate compensation, and the free transfer of capital became essential elements of BITs from the late 1960s onwards, especially in those adopted between the 1970s and 1990s. In sum, they constituted the foundation of the contemporary investment protection system.

The initiative promoted by UNCTAD, which sought to create an international mechanism to secure investments against political risks such as expropriation, war, or currency restrictions, did achieve direct institutional materialization through the creation in 1988 of the Multilateral Investment Guarantee Agency (MIGA), incorporated within the World Bank Group.

In this context, ICSID was conceived as an institution specialized in the resolution of disputes between States and foreign investors, thus contributing to the promotion of foreign direct investment. However, its institutional design did not entail the establishment of substantive investment protection norms, nor did it impose a general obligation on the parties to submit their disputes to arbitration or conciliation under its auspices. [18]

The articulation of arbitration as a mandatory mechanism (generally at the investor's choice) emerged later, primarily through its incorporation into the provisions of Bilateral Investment Treaties (BITs) concluded in the 1990s. Originally, ICSID arbitration was designed as a voluntary mechanism, to which the parties could resort upon expressing their consent. Hence the literal text of Article 1(2), which states that "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention." Likewise, Article 25(1) provides that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

In any case, the possibility of submitting a dispute of this nature to arbitration, avoiding classical mechanisms such as diplomatic protection by the investor's home State or recourse to the administrative courts of the host State, with the consequent application of its domestic law, represented a significant advance in the field of investment protection.

As already noted, however, the most significant development in the use of the arbitration mechanism under the auspices of the World Bank came through Bilateral Investment Treaties. Both the Investment Treaties and the ICSID mechanism share the same objective: to promote economic development through foreign direct investment. ICSID thus became the standard dispute resolution mechanism in the majority of BITs, consolidating the Investor-State Dispute Settlement (ISDS) model.

As instruments intended to establish a legal framework for the protection of foreign investors within the territory of the host State, BITs incorporate normative standards that prohibit discriminatory treatment and guarantee, among other aspects, compensation in the event of expropriation, the free transfer of capital, and the repatriation of profits. Moreover, these treaties typically provide binding dispute settlement mechanisms, often through international arbitration, applicable to disputes arising from the interpretation or application of their provisions. [16] Collectively, these guarantees help ensure minimum standards of protection for foreign investors, strengthening legal certainty in the host State and promoting the attraction of international investment.

However, the success of ICSID can only be measured empirically. Until the year 2000, international investment arbitration disputes filed with ICSID and under its rules amounted to fewer than ten cases per year. Between 2001 and 2010, the average rose to around twenty registered cases per year. The figure increased significantly during the period 2011–2020, with the annual average of ICSID-registered arbitration cases exceeding forty-six cases per year. The upward trend in ICSID cases (including conciliation and arbitration under the supplementary mechanism) continued in subsequent years, with 66 cases recorded in 2021, 41 in 2022, 57 in 2023, and 55 in 2024. [10]

From an empirical perspective, therefore, ICSID maintains high practical relevance. In 2025, 63 new cases were registered (56 arbitrations under the ICSID Convention, 6 under the supplementary mechanism, and 1 conciliation), surpassing 1,000 cumulative cases, which evidences the consolidation of the system and its growing demand. [10] Furthermore, the majority of cases are based on Bilateral

https://doi.org/10.54934/ijlcw.v5i1.187

Investment Treaties (58%), reflecting the interdependence between the ICSID system and the conventional architecture of international economic law[3].

Nonetheless, the ICSID dispute settlement mechanism is not without doctrinal criticism. Firstly, the lack of jurisprudential coherence has been questioned, arising from the absence of a binding precedent system or an appellate mechanism, which generates divergent decisions in similar cases and results in a perceived lack of legitimacy. [20]; [6]. In this regard, certain authors have emphasized that, although an appellate mechanism may improve coherence, consistency, and predictability in ISDS jurisprudence, its implementation raises significant institutional challenges, including the need to mitigate financial burdens on developing countries, reduce procedural delays, and ensure a transparent, independent, and geographically diverse composition of adjudicators. [12]

Secondly, the limited transparency of proceedings has been noted, traditionally characterized by confidentiality, although this aspect has been partially mitigated by recent reforms. In particular, the 2022 revision of the ICSID Rules introduced greater publicity of awards, decisions, and hearings, as well as the increasing application of the UNCITRAL Transparency Rules. One measure implemented to enhance transparency concerns the obligation to disclose third-party funding in the proceedings[4]. That is, the possibility that a natural or legal person, initially unrelated to the arbitration, provides the claimant or respondent with financial resources to pursue the claim. In the case of ICSID, and given the actors involved, it is typically the claimant investor who resorts to third-party funding, which will logically be compensated, usually as a percentage of any award obtained in the event of a favorable decision. It is precisely the high cost of ICSID proceedings — another significant criticism of the World Bank institution — that underlies this practice, which has increased over the past decades [14], and which has both positive and negative impacts on arbitration.

On the positive side, third-party funding allows a claimant to obtain the necessary resources to pursue a dispute in cases where such funds are lacking, or even to allocate them according to a schedule

[3]The remaining categories forming the basis of consent invoked to establish ICSID jurisdiction are investment contracts between investors and host States (15%), the Energy Charter Treaty (10%), host State investment laws (7%), and Free Trade Agreements (NAFTA, USMCA, and CAFTA-DR), as well as bilateral and multilateral agreements containing a provision for dispute settlement under ICSID (10%).

[4]Rule 14 of the 2022 version of the ICSID Arbitration Rules, entitled "Notice of Third-Party Funding."

aligned with the company's financial situation. On the other hand, the use of external funding may raise ethical concerns [4], as it can be employed as a leverage tool to pressure the respondent through claims that are weakly founded (frivolous claims) but sufficient to initiate negotiation, thereby compelling concessions in favor of the claimant and its funder. Added to this is the potential risk to arbitral impartiality, given that many prospective arbitrators provide their services at law firms affiliated with the funders themselves.

A further structural criticism points to how the system may restrict the regulatory space of States, particularly in sensitive areas such as public health, environmental protection, or economic policy, by allowing legitimate regulatory measures to be challenged by foreign investors. This concept has been articulated in the doctrine as the phenomenon of regulatory chill, whereby the threat or existence of ICSID proceedings discourages governments from adopting public policies for fear of costs or litigation. [8]; [11] This tension between investment protection and State sovereignty has fueled the ongoing debate regarding the legitimacy of the ISDS system. Indeed, UNCTAD's 2003 World Investment Report[5] introduces, for the first time in its analysis, the concept of "national policy space," highlighting the potential tension between market liberalization and the need for States to regulate in order to maximize the benefits and minimize the risks associated with openness. [1];[2] With regard to investment regulatory law, the conclusion of bilateral investment treaties (BITs) may constrain the sovereign prerogatives of the signatory State, giving rise to regulatory chill and potentially subjecting democratically enacted domestic legislation to external review by an international body, such as an arbitral tribunal. This may even extend to areas such as human rights, public health, and environmental protection.

In response to these criticisms, significant reforms have been advanced, such as the 2022 revision of the ICSID Rules mentioned supra, aimed at improving the transparency, efficiency, and accessibility of arbitration, as well as the introduction of alternative mechanisms such as mediation. Parallel to these reforms, certain States have adopted increasingly critical positions vis-à-vis the World Bank system, going so far as to denounce the ICSID Convention, as in the cases of Bolivia (2007), Ecuador (2009, with readmission in 2021), Venezuela (2012), and, more recently, Honduras (2024). This development, at first sight, appears to reflect a broader trend of skepticism toward the ICSID framework among Latin American

[5]UNCTAD. (2003). World Investment Report 2003: FDI Policies for Development — National and International Perspectives. United Nations.

States. In such circumstances, however, it is worth considering whether this phenomenon amounts to a genuine trend or rather constitutes a reaction to specific and context-driven factors.

In this respect, one may once again invoke the argument concerning the evolutionary character of the Convention. The most recent denunciation, that of Honduras, may be better understood as a response to a series of recent developments, particularly the increasing number of investment claims brought against the State[6], rather than as part of a generalized process of dissatisfaction with the functioning of the system. Furthermore, particular consideration should be given to the Próspera dispute, which appears to have played a significant role in shaping Honduras' decision to denounce the ICSID Convention. The case, Honduras Próspera Inc. et al. v. Honduras (ICSID Case No. ARB/23/2)[7], arises under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA) and initially involved a claim reportedly amounting to USD 10.775 billion. The dispute stems from the Honduran government's decision to dismantle the legal framework governing the so-called Zones for Employment and Economic Development (ZEDEs), established in 2013, which the current administration of Xiomara Castro has characterized as incompatible with national sovereignty.

In the arbitral proceedings, Honduras raised several procedural objections, alleging that ICSID acted in breach of "law and procedure" by registering the claim without verifying compliance with the requirement to exhaust local remedies, a condition attached to its consent upon ratification of the Convention in 1988[8]. The State also challenged aspects of the tribunal's constitution, including the appointment of arbitrators, invoking concerns over alleged conflicts of interest. For its part, Próspera contends that Honduras has violated several substantive protections under DR-CAFTA, including the standards of fair and equitable treatment, legal stability, protection against expropriation, and the free transfer of funds. Notably, in October 2025, Honduras Próspera Inc. announced a substantial reduction of

[6]Honduras' decision to denounce the ICSID Convention came in the wake of reports indicating its intention to do so as early as August 2023, following the registration by ICSID of a seventh case against the State in that same year.

[7]ICSID. Case Details: ARB/23/2 (ICSID Case Database). https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/2 (accessed 13 April 2026).

[8]In a decision issued on 26 February 2025, the arbitral tribunal dismissed the preliminary objection of lack of jurisdiction raised by Honduras, understanding that the claimants were not required to exhaust local remedies as a prerequisite for initiating arbitration.

its claim, reportedly by approximately 85%, bringing the amount in dispute down to USD 1.63 billion. The tribunal, presided over by Juan Fernández-Armesto, is currently seized of the dispute.

The present situation, therefore, cannot be equated with that which arose during the first decade of the twenty-first century.

Other countries, in contrast, have chosen to reform their investment policies by terminating or renegotiating bilateral treaties, such as South Africa, India, or Indonesia, or by developing alternative models, as in the context of the European Union following the Achmea case[9].

Both South Africa and Indonesia have opted to terminate numerous BITs. South Africa did so in order to adopt a domestic investment law prioritizing domestic courts over investment arbitration, based on the view that such treaties limited the State's regulatory capacity in policies of social and economic transformation. Indonesia, for its part, chose to renegotiate BITs under a new model aimed at greater balance and reciprocity, often incorporating clauses that protect the right to regulate. India likewise revised its model by significantly restricting the definition of "investment," limiting fair and equitable treatment clauses, and requiring the exhaustion of local remedies before resorting to international arbitration.

The European Union, for its part, promoted the termination of intra-EU BITs through a multilateral agreement signed by 23 Member States, following the Achmea judgment of the Court of Justice of the European Union, which held that investor-State arbitration clauses in intra-EU treaties are incompatible with EU law. Subsequent institutional reform has focused on replacing traditional investor-State arbitration with an Investment Court System (ICS) in new trade and investment agreements, such as those with Canada and Vietnam. The ICS is designed as a permanent judicial mechanism with independently appointed adjudicators and the possibility of appeal, differing from ad hoc arbitration and aiming to enhance legitimacy, transparency, and neutrality.

However, the debate on the global reform of the ISDS system remains ongoing within UNCITRAL Working Group III, and it may be appropriate, before concluding this section, to briefly address China's

[9] In the Achmea case (CJEU, 6 March 2018, C-284/16), the Court of Justice of the European Union declared that investor-State arbitration clauses contained in bilateral investment treaties between EU Member States (intra-EU BITs) are incompatible with Union law. The Court held that such arbitrations could affect the autonomy of the EU legal order by removing the interpretation of European law from the Union's judicial system. As a consequence, the termination of intra-EU BITs was promoted, and the rejection of ICSID arbitration within the European space was further reinforced.

position in this regard. Notably, China is currently one of the most significant global economic and political actors. This position may be understood within a contextual and evolutionary framework. In contrast to readings that tend to characterize it as ambiguous or merely opportunistic, some authors [7] argue that the Chinese approach reflects a pragmatic rationale, shaped by domestic institutional factors, considerations of sovereignty, and a strategy of gradual integration into global investment governance. This stance is situated between incremental reformism and more ambitious structural proposals, such as the establishment of a multilateral investment court. In sum, it advocates reform, but within the confines of the classical arbitral paradigm.

These trends reflect a growing concern about the impact of investor-State arbitration on regulatory sovereignty and the legitimacy of the system. We may therefore conclude that, although ICSID arbitration continues to be an essential pillar of international investment law, characterized by its effectiveness and wide use, its current evolution is marked by a process of reform and questioning aimed at balancing investor protection with the interests and preservation of States' regulatory space.

3. THE INTERNATIONAL REGIME FOR THE PROTECTION OF FOREIGN INVESTMENTS: BILATERAL INVESTMENT TREATIES SIGNED BY SPAIN

In the preceding sections, we have addressed the key role that BITs play within the investment protection framework. It is now appropriate to consider the public framework for investment protection and the position occupied therein by Investment Protection Treaties, taking into account also the critical aspects, namely the externalities generated by foreign investment. The current economic environment, marked by tariff wars and various armed conflicts, overlays a preexisting context of critical review regarding the manner in which foreign direct investment interacts with host States. Moreover, one of the defining features of contemporary international investment protection law is its decentralized character. From this perspective, it can be stated that, in the current scenario, the consideration of public interest in inter-State relations coexists with economic factors. The need to promote investments to foster economic development in States coexists with the interest (or necessity) to coordinate legal and political systems designed to cover private economic relations. [13]

The economic factor is prominent and links countries that export investment with those that import it, and even countries that import investment among themselves. This conjunction of economic factors and public interest, together with the scarcity of multilateral international instruments regulating investment, has determined this decentralized character. At present, there are several thousand International Investment Agreements, the majority of which are bilateral, including BITs, but also investment chapters within Free Trade Agreements and international agreements on double taxation. In this context, special attention must be paid to the manner in which States' domestic laws adapt to the obligations undertaken under applicable international instruments. This is so regardless of whether the State follows a monist or dualist model of reception of international law in its constitutional framework, except, of course, in the case of self-executing provisions.

In any event, this situation generates an increasing interconnection among diverse legal and political systems, creating an "interaction space" that is not always harmonious. It is the domestic public law of States — principally administrative and tax law — that is responsible for transposing and regulating internationally assumed commitments at the domestic level. This situation has fostered what some authors have termed the globalization of administrative law [3], and even invoked the crisis of the modern conception of the State, with the emergence, alongside States, of other global actors, namely large corporations, which effectively shrink the world. [5]

At the beginning of this brief study, we referred to the interrelation between the international regulatory system for investments and the multilateral normative framework of the WTO[10]. International investment law is situated within the public regulatory framework of international trade alongside the multilateral and plurilateral trade agreements adopted within the World Trade Organization and contained in Annexes 1 and 4 of the Marrakesh Agreement, which allows us to affirm that it will share the same principles and foundations. The same reasoning applies to Sustainable Development Goal (SDG) No. 17 ("Partnerships for the Goals"), in its targets 10, 11, and 12, which refer to the need to promote a universal, rules-based, open, non-discriminatory, and equitable multilateral trading system. In this regard, Target 4 of this same SDG contemplates the need to adopt and implement investment promotion systems in favor of least developed countries.

[10]A brief analysis of international trade regulation reveals a clear interrelation between this area and the promotion, and especially the protection, of investments. Within the WTO framework, for example, and in relation to goods, we find the Agreement on Trade-Related Investment Measures (TRIMs Agreement). Preferential trade agreements (PTAs) provide, to a greater or lesser extent, for investment regulation. The same consideration applies with respect to regional trade agreements.

https://doi.org/10.54934/ijlcw.v5i1.187

Moreover, the existence of integration processes constitutes one of the essential characteristics of contemporary international society. The economic dimension underlies the genesis of the majority of these processes, which also manage the public interests linked to this area of international law. In the case of the European Union, the transfer of the common commercial policy as an exclusive competence to the Union has implied the subordination of this sector to Union law.

As we explained in the preceding section, the Court of Justice of the European Union held that bilateral investment treaties concluded between Member States (intra-EU BITs), and in particular the investor-State arbitration clauses therein, were contrary to Union law, leading to the conclusion of the aforementioned agreement for the termination of bilateral investment treaties among EU Member States. A total of 190 treaties were affected, of which nine corresponded to Spain as a contracting State (Annex A of the Termination Agreement).

Focusing on Spanish investment policy, and more specifically on the arbitral mechanisms incorporated into our treaties, it can be noted that BITs concluded by Spain typically offer two international arbitration options to the investor: (a) an ad hoc arbitration based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); and (b) institutional arbitration administered either by the International Chamber of Commerce in Paris (ICC) or by the International Centre for Settlement of Investment Disputes (ICSID).

However, in some cases an additional option is provided for the investor to bring the dispute before the domestic courts of the respondent State (for example, in bilateral treaties with China and Peru), or an ad hoc arbitration may be designed within the bilateral instrument itself with support from the International Court of Justice (for instance in treaties with Venezuela and Cuba).

In brief, it can be stated that the general content of the investment protection agreements concluded by Spain revolves around the following clauses: (a) standards of fair and equitable treatment, national treatment, and most-favored-nation treatment; (b) a guarantee that measures of expropriation, nationalization, or other measures with effects similar to expropriation may only be adopted in a non-discriminatory manner, for reasons of public interest, and upon prompt, adequate, and effective compensation; (c) the right to the free transfer of capital, profits, and payments related to the investment; (d) assurance of compliance with contractual obligations assumed by the host State toward the investor; and (e) arbitration mechanisms intended to resolve disputes that may arise between the States Parties to the Agreement, as well as between investors and the State concerning any failure by the latter to comply with obligations under the Agreement. Currently, there are more than 60 BITs in force concluded by Spain, in addition to the EU investment protection agreements with Singapore and Vietnam, and the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

4. ICSID ARBITRATION: BRIEF OVERVIEW OF THE PROCEDURE

Although arbitration is the best-known dispute resolution mechanism, ICSID proceedings also include conciliation, mediation, and fact-finding. They are governed either by the ICSID Convention or the ICSID Additional Facility Rules, and are characterized by being binding, final, and specialized in international investment law.

A particularly important distinction exists between standard or "classic" ICSID arbitration and arbitration under the Additional Facility, which was established in 1978 to extend the Centre's services to situations falling outside the scope of the original Convention. Typically, these are situations in which one or neither party is a Contracting State to ICSID or a national of a Contracting State. The Additional Facility covers both arbitration and conciliation proceedings and is governed by a set of rules known as the "ICSID Additional Facility Rules"[11], adopted by the ICSID Administrative Council.

This distinction entails a dual legal regime, whose differentiation is most apparent in the recognition and enforcement of awards. Under standard ICSID arbitration, awards benefit from a unique and simplified enforcement regime, administered pursuant to the Convention rules, and are considered final and binding in any Contracting State, meaning they cannot be reviewed by national courts (they may only be annulled through ICSID's internal annulment procedure). By contrast, under the Additional Facility, awards do not benefit from automatic enforcement and must be recognized and enforced in accordance with domestic law or the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

It should be clarified, however, that in practice the commendable purpose pursued by the World Bank through the Additional Facility was not met with the expected reception. Nonetheless, following the

[11]The ICSID Additional Facility comprises a core set of rules, namely: the ICSID Additional Facility Rules; the ICSID Additional Facility Administrative and Financial Regulations; the ICSID Additional Facility Conciliation Rules; and the ICSID Additional Facility Arbitration Rules.

2022 reforms, it appears to be gaining relevance as a mechanism for expanding investment arbitration and as a strategic tool for ICSID's adaptation. Historical data from 1972 to December 2025 show that out of a total of 1,085 registered proceedings, 983 followed the standard ICSID arbitration route, representing nearly 91% of all cases, while only 87 were arbitrations administered under the Additional Facility, i.e., barely 8%. The remaining registered proceedings were conciliation cases: 13 under the ICSID Rules and 2 under the Additional Facility. [10]

Since 1 July 2022, arbitration proceedings are governed by the 2022 Registration Rules. Focusing on ICSID arbitration, both for being the most commonly used in practice and as the immediate subject of this study, and more specifically on procedural rules, the ordinary procedure can be divided into seven distinct phases: (i) initiation of the proceeding (request for arbitration and registration); (ii) constitution of the tribunal; (iii) first session; (iv) written submissions phase; (v) oral proceedings; (vi) issuance of the award; and (vii) post-award phase.

The 2022 reform also introduced a new procedural modality called "Expedited Arbitration," subject to shorter deadlines, fewer procedural steps, and which the parties may opt into at any stage of the proceeding. This procedure is particularly useful for small and medium-sized enterprises or for disputes of lower complexity. [22] Expedited arbitration is decided by a sole arbitrator, unless the parties agree in writing that the tribunal shall consist of three members. If the parties do not notify the Secretary-General of their choice within 30 days of the notice of consent to the expedited proceeding, the tribunal will be composed of a sole arbitrator (Rule 76).

In summary, once the tribunal is constituted, the procedure comprises the following steps: (i) holding the first procedural session, which will be conducted virtually (30 days after tribunal constitution); (ii) submission of the first round of pleadings, with a 200-page limit (the memorial for the claimant is due 60 days after the first session, and the response memorial 60 days after the claimant's submission); (iii) submission of the second round of pleadings, with a 100-page limit (the reply is due 40 days after the respondent's submission, and the rejoinder 40 days after the reply); (iv) holding the hearing (within 60 days after the rejoinder submission); (v) cost estimation (within 10 days following the hearing); and (vi) issuance of the award (within 120 days following the hearing).

In the ordinary arbitration procedure, and to expedite the process, there is an obligation to submit filings to the Secretary-General electronically (Rule 4 of the Arbitration Rules), although the Tribunal may also order that documents be submitted in a different format. The request for arbitration must include information regarding the subject of the dispute, the identity of the parties, and their consent to arbitration, and it will be sent to the Secretary-General, who will forward a copy to the other party and proceed with its registration, unless the dispute is manifestly outside the jurisdiction of the Centre (Art. 36 ICSID Convention). The Rules on Commencement provide more detailed guidance on the steps to be taken from the submission of a request for arbitration or conciliation under the ICSID Convention until the date of registration or denial. They establish a more detailed regulation of the content of the request for arbitration (Rule 2), the documentation to be submitted, the languages in which it may be drafted (English, French, or Spanish), the representation of the parties, recommended additional information, and the registration procedure.

Articles 37 to 40 of the Convention govern the constitution of the Tribunal[12] and the appointment of arbitrators. The timeframe for constitution will be that agreed by the parties, or, failing that, 90 days from the issuance of the registration notice by the Secretary-General. Once constituted, and after resolving any issues concerning its own jurisdiction, the first session will be convened, to be held in person or remotely within 60 days following the constitution, or within any other period agreed by the parties. Prior to this first session, the Tribunal will invite the parties to submit their observations on procedural matters, in particular those described in Rule 29(4) of the Arbitration Rules.

Following the first session, the written proceedings take place, beginning with the submission of the first round of written submissions. The claimant's memorial must contain a statement of relevant facts, the applicable law, arguments, and requests for relief. The respondent's memorial, in turn, must include a statement of relevant facts, including acceptance or denial of the facts set out in the claimant's memorial and any additional relevant facts, a statement of law in response to the memorial, arguments, and the respondent's requests for relief (Rule 30 of the Arbitration Rules). If applicable, a second round will follow, consisting of the reply and rejoinder, which shall be limited to responding to the most recent submission and addressing any new relevant facts that could not have been known before the submission of this second round of written submissions.

[12] According to Article 37 of the Convention, the Tribunal shall be constituted by a sole arbitrator or by an odd number of arbitrators, appointed in accordance with the agreement of the parties. In the absence of such an agreement regarding the number or method of appointment, the Tribunal shall be constituted with three arbitrators: one appointed by each party and the third, who shall preside over the Tribunal, by mutual agreement.

https://doi.org/10.54934/ijlcw.v5i1.187

The next phase is that of the oral proceedings. Rule 32 provides that the Tribunal shall hold, unless the parties agree otherwise, one or more hearings, during which any member of the Tribunal may ask questions and request explanations from the parties. The Tribunal's subsequent deliberations are conducted in private and may take place by any means the Tribunal deems appropriate, including in person, by telephone, videoconference, or correspondence. Decisions are adopted by a majority vote (abstentions are considered votes against), although the parties may agree that the President of the Arbitral Tribunal decide without consulting the other members in urgent cases, with the possibility that the decision be reviewed by the full Tribunal.

The Arbitral Tribunal only issues an award within the framework of the procedure, which resolves the entirety of the matter. Other decisions made during the proceedings do not have this status and cannot be appealed under the Convention until the award is rendered. Regarding its content, Rule 59 enumerates in detail the elements to be addressed: a) the identity of the parties; b) that of their representatives; c) a statement that the Tribunal has been constituted in accordance with the provisions of the Convention, as well as a description of the method of its constitution; d) the name of each Tribunal member and who appointed each; e) the date and place of the first session, case management conferences, and hearings; f) a brief summary of the proceedings; g) a statement of facts deemed relevant by the Tribunal; h) a brief summary of the parties' arguments, including their requests for relief; i) the Tribunal's decision on each issue submitted to it, and the reasons on which the award is based; and j) a statement of the costs of the proceedings, including the fees and expenses of each Tribunal member, as well as the reasoned decision regarding those costs.

In the post-award phase, both actions aimed at challenging the award and the enforcement of the award itself are included. Regarding the former, the ICSID Convention addresses, in Articles 50–52, the remedies of clarification, review, and annulment, to which must be added the request for a supplementary decision or correction by the same Tribunal as provided in Article 49.2 of the ICSID Convention (Rule 61.2 of the Arbitration Rules) for cases in which the Tribunal has omitted the resolution of any issue or has made material, arithmetic, or similar errors. As for recognition and enforcement, Article 54 of the Convention grants pecuniary obligations contained in the award the same status as a final judgment of the

https://doi.org/10.54934/ijlcw.v5i1.187

courts of the place where enforcement is sought[13]. The award is binding on the parties and must be respected and complied with in all its terms.

We conclude by noting that the latest version of the Arbitration Rules has introduced significant modifications to the ordinary ICSID arbitration procedure, aimed at a more agile and efficient process (Urdaneta Cordido-Freytes, 2022). Not only the introduction of the new expedited procedure available to the parties, but also provisions regarding the electronic submission of documents, the Tribunal's ability to convene one or more case management conferences with the parties to identify uncontested facts, clarify or narrow the dispute, or address procedural or substantive issues (Rule 31), the setting of time limits for issuing awards, supplementary or corrective decisions, and decisions in clarification, review, and annulment proceedings, among other innovations, are intended to have a positive impact on the proceedings and reduce timeframes.

5. FINAL REFLECTIONS

The turbulent and unstable times we are currently experiencing have not interfered with the role that ICSID investment protection mechanisms are called upon to play. Undoubtedly, the current crisis of the multilateral trading system, together with the context of armed conflicts affecting the world today, will impact the environment of international business and its regulation. To that extent, and due to the interrelationship between the multilateral trading system and international investment law, the mechanisms for the promotion and protection of foreign direct investment, particularly ICSID arbitral proceedings, are likely to be affected. International trade has historically been a driving force for the social and economic development of society, evolving in parallel with the international community itself. Consequently, ICSID mechanisms have evolved and continue to evolve in line with the new global social and economic reality.

Throughout this brief work, we have referred in a concise manner to the evolution of arbitration administered by ICSID since the adoption of the 1965 Washington Convention on the Settlement of

[13] Article 54 of the ICSID Convention provides that: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and shall enforce within its territories the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State."

https://doi.org/10.54934/ijlcw.v5i1.187

Investment Disputes between States and Nationals of Other States. We have also highlighted the importance of its interaction with Bilateral Investment Treaties, specifically referred to in our legal system as Agreements for the Promotion and Reciprocal Protection of Investments (APPRIs), as well as the critical factors that have, in many cases, led to the withdrawal of arbitration clauses by certain States and even by international integration organizations such as the European Union. Indeed, the alleged lack of legitimacy and transparency, together with the phenomenon known as "regulatory chill," based on the externality that the system may restrict States' regulatory space in sensitive areas such as public health or the environment, are factors to be taken into account and should serve as a basis for future regulatory reforms of the system.

These reforms are currently under discussion at the multilateral level within UNCITRAL Working Group III, where a range of divergent positions has emerged, spanning from more far-reaching reformist approaches to more moderate stances, such as that advanced by China. The latter occupies an intermediate position between incremental reformism and more ambitious structural proposals, including those advocating for the establishment of a multilateral investment court.

In line with the work carried out by the International Centre for Settlement of Investment Disputes (ICSID), a brief overview has been provided of the arbitration procedure resulting from the latest amendment of its Rules in 2022, as well as of the innovations introduced with a view to improving its operation. Ultimately, the consideration of foreign direct investment as a driver of States' economic development, which underpinned the adoption of the Washington Convention, remains as relevant today as it was in 1965. The fact that social demands and the socio-economic context have evolved significantly merely entails the necessary development of international investment law in order to adapt to this new reality

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https://doi.org/10.54934/ijlcw.v5i1.187

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ABOUT THIS ARTICLE

Conflict of interest: The author declares no conflicting interests

Data Availability Statement: All data supporting this study are publicly available from the cited sources, in particular the ICSID Caseload Statistics published by the International Centre for Settlement of Investment Disputes.

AI Use Disclosure: AI-assisted tools were used only for orthographic review and linguistic adjustment. No AI system is listed as author or co-author. The author assumes full responsibility for the conceptual framework, source selection, interpretation, analysis, conclusions, and final manuscript.

EL ARBITRAJE DEL CIADI EN EL CONTEXTO ACTUAL DEL COMERCIO INTERNACIONAL

RESUMEN

Este artículo analiza, mediante una metodología jurídico-doctrinal combinada con un análisis documental e institucional, el papel del arbitraje del CIADI en el contexto actual del comercio internacional. El estudio examina el Convenio de Washington, el Reglamento de Arbitraje del CIADI de 2022, los Tratados Bilaterales de Inversión (TBI) suscritos por España y las estadísticas de casos del CIADI hasta 2026. Los resultados indican que el CIADI ha consolidado su relevancia práctica, con más de 1.000 casos acumulados y 63 nuevos registros en 2025 —basados predominantemente en TBI (58%)—, lo que confirma la interdependencia funcional entre el sistema del CIADI y la arquitectura convencional del derecho económico internacional. Las reformas de 2022 abordan preocupaciones sobre legitimidad y transparencia y responden, junto con las críticas relativas al efecto disuasorio sobre la regulación (*regulatory chill*) y las recientes denuncias por parte de Estados latinoamericanos, a las demandas cambiantes de ajuste sistémico. El artículo aporta valor al situar al CIADI dentro del marco regulatorio público más amplio del comercio internacional en un momento de crisis multilateral.

Palabras clave: arbitraje de inversión, CIADI, comercio internacional, tratados bilaterales de inversión, inversión extranjera directa

当前国际贸易背景下的ICSID仲裁

摘要

本文结合法学理论研究方法与文献及制度分析，探讨了ICSID仲裁在当前国际贸易背景下的作用。研究考察了《华盛顿公约》、2022年《ICSID仲裁规则》、西班牙缔结的双边投资协定（BITs）以及截至2026年的ICSID案件统计数据。研究结果表明，ICSID已巩固了其现实重要性：累计案件量超过1000起，且2025年新增立案63起，其中绝大多数（58%）基于双边投资协定；这证实了ICSID体系与国际经济法既有架构之间存在功能上的相互依存关系。2022年的改革回应了关于合法性与透明度的关切，并针对“监管寒蝉效应”的批评及拉美国家近期的退出行动，响应了对体系性调整不断变化的需求。本文的贡献在于，将ICSID置于多边主义危机背景下国际贸易更广泛的公共监管框架中进行考察。

关键词：投资仲裁，ICSID，国际贸易，双边投资协定，外国直接投资

https://doi.org/10.54934/ijlcw.v5i1.187

International Journal of
Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.185

DIGITAL TRADE GOVERNANCE BEYOND THE WTO: REGULATORY FRAGMENTATION, DIGITAL SOVEREIGNTY AND THE FUTURE OF E-COMMERCE LAW

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Article Information:

Received
May 16, 2025
Reviewed & Revised
May 30, 2025
Accepted
June 6, 2025
Published
July 30, 2026

Keywords:

digital trade governance, digital sovereignty, regulatory fragmentation, e-commerce law, cross-border data governance

ABSTRACT | 摘要 | RESUMEN

The emergence of digital trade is dramatically changing how international commerce is conducted today. However, current digital trade governance remains anchored in an outdated World Trade Organization (WTO) framework largely designed for a pre-digital trade era. This governance structure has been unable to respond effectively to emerging issues in digital trade. Simultaneously, states and regional blocs are developing divergent regulatory models that reflect their sovereign digital interests and generate significant governance fragmentation. Using the doctrinal method alongside a comparative approach, this paper examines the deficiencies in current WTO-centered digital trade governance models and argues that the governance system is evolving from traditional multilateral trade structures toward hybrid, sovereignty-driven systems involving multiple actors. The paper advocates a reconceptualized framework capable of balancing digital integration, regulatory sovereignty, innovation, and effective global governance coordination in an evolving digital economy.

FOR CITATION:

Ekpenisi, C., Edet, J. E., Aidonojie, P. A., & Atim, A. G. (2026). Digital Trade Governance Beyond the WTO: Regulatory Fragmentation, Digital Sovereignty and the Future of e-Commerce Law. International Journal of Law in Changing World, 5 (1), 56-80. DOI: https://doi.org/10.54934/ijlcw.v5i1.185

1. INTRODUCTION

Something fundamentally new and complex is happening in the manner in which we conduct cross-border trade. While it is without doubt that trade has migrated to the internet, something far more profound than this migration is occurring universally. The structure of the global economy is now based on data, as the core element of wealth creation. [12] Every cross-border payment, cloud-based business application, algorithmically facilitated marketplace, and digital service delivered across borders, represents a node in the vast digital infrastructure that has evolved to support global trade. Digital trade is currently viewed as an important component of the world's economy. [11] Mwange et al. (2026) asserted that the impact of digital technologies on international business is creating new pathways for competitive advantage and global economic integration through digital trade. Businesses use their digital infrastructure to sell products, provide services, make payment transactions, retain customer information, and communicate with customers in many countries at once. Cross-border transactions are increasingly moving from cargo ships to data flows, as the major vehicle of movement of economic value across national boundaries. [13]

Digital trade has evolved over time from its initial limited reference to as online retail, into the dominant model of contemporary international trade that it stands for today. [11] Presently, it includes e-commerce (the buying and selling of goods and services over the internet), cross-border movement of data, digital infrastructure, cloud computing systems, algorithmic service providers, streaming services, online educational content, digital advertising, fintech platforms, AI-based commercial systems, and other platform-related economic activity that support such transactions. [38] In this regard, digital trade represents not only the purchase and sale of products, but also the broader digital ecosystems through which commercial values are created, processed, and delivered on a global basis. [45] Effective governance is necessary to create common standards internationally, promote competitive equality among nations, protect consumers internationally, and facilitate the free flow of digital information across borders. [13] However, while this necessity exists, developing a coherent multilateral framework for governing digital trade has proven extremely challenging.

Lateef (2025) asserts that most of the existing international trade governance structures have remained tied to legal constructs originally developed to govern traditional forms of commerce. According to Aaken (2023), these governance frameworks are ill-equipped and lack the required institutional capacity to deal with the realities of a digitally facilitated economic system. [12] Chen (2025) explained that the World Trade Organization (WTO) was established to provide a forum for regulating trade in physical goods and conventional services located within the territory of an economically independent nation-state. Clearly, the WTO did not anticipate the emergence of digital trade, including cross-border data flows, AI-facilitated commerce, cloud services, cybersecurity, and digital taxation. [24] According to Rehman (2025), most of these components or aspects of digital trade presently exist outside the scope of existing multilateral trade rules or continue to thrive under a state of legal uncertainty and varied interpretations among states and other stakeholders. According to Zhang & Gong (2023), the differing understanding, applications, and approaches towards digital trade governance have resulted in an array of fragmented regulatory systems that exist beyond centralized WTO Agreements. States and regional blocs are pursuing digital sovereignty by asserting control over digital infrastructure and data flows. The disconnection between the regulatory standards applicable to traditional commerce and those applicable to digital commerce constitutes one of the greatest challenges confronting international economic law today.

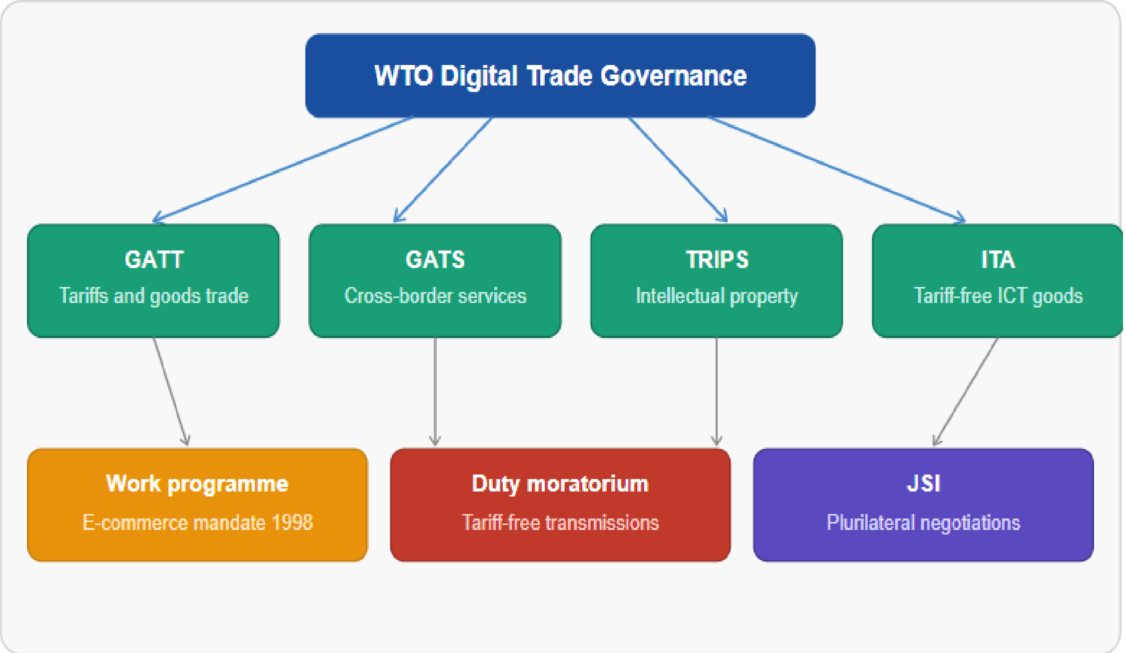
A considerable body of research has focused on WTO e-commerce negotiations, digital trade liberalization and the institutional impediments to multilateral governance. Burri (2021), highlights the development of the WTO and preferential trade agreement regimes. The work is based on the WTO multilateral system as the sole normative framework. This study disputes this approach by presenting that fragmentation is not a departure from the multilateral order, but is instead the structural replacement for it. Mitchell & Mishra (2021), advocate for the establishment of clear multilateral rules. This study modifies this recommendation by demonstrating that the WTO's consensus-based organizational structure is unable to produce the legally-binding commitments required for the effective regulation of digital trade. Rather than treating digital sovereignty as a distinct analytical construct, Chander & Sun (2022) and Pohle et al., (2024), conceptualize digital sovereignty as a discrete analytical phenomenon rather than as the primary driver of regulatory fragmentation, which this study advances. In addition to examining how trade agreements could reduce the adverse impacts of fragmentation, Deane et al. (2024) maintain the current multilateral regime as the basis of their normative horizon, rather than advocating for the reconceptualization proposed by this study. Similarly, Meltzer (2019) views regulatory divergence as an issue to be resolved within the existing multilateral regime, rather than as a new form of structural governance condition, which this study proposes. Most extant research on digital trade still views it primarily through the scope of multilateral trade liberalization rather than as a fragmented governance order comprising multiple active players.

In response to the gaps identified above, this study will re-conceptualize digital trade governance, as a plural and fragmented order that has already been established. The study therefore makes a transition from diagnosis to the development of a specific institutional structure that incorporates binding instruments, specialized regulatory bodies, and platforms accreditation frameworks. This reform should be capable of balancing the elements of global digital integration, national regulatory sovereignty and international governance coordination. Thus, the study aims to critically evaluate the limitations associated with WTO governance of digital trade and propose an improved framework for future global e-commerce regulation that balances global integration through digitization, regulatory sovereignty, and transnational coordination between stakeholders. This study has important policy significance. Since states, regional institutions, international organizations, and digital platforms increasingly create global e-commerce opportunities, there is an increasing demand for models of governance capable of managing innovation, global economic integration, cybersecurity risks, regulatory autonomy, and protection of individual rights in a digitally connected world.

2. METHODOLOGY

This study employs a doctrinal research methodology, supplemented by structured comparative legal analysis. The doctrinal component of the methodology consists of a systematic identification, interpretation, and critical analysis of primary legal sources related to digital trade. As shown in Figure 1, the sources include GATT, GATS, TRIPS, ITA, WTO Work Programme on Electronic Commerce, WTO Moratorium on Customs Duties on Electronic Transmissions, Joint Statement Initiative on E-Commerce. The doctrinal analysis will proceed in three sequential steps: Identifying the normative content of each instrument, then a critical evaluation of the interpretive and structural limitations of each instrument when applied to cross-border data flows, AI-driven commerce, platform governance, cybersecurity, and digital taxation and the positioning of these limitations within the broader governance architecture, in order to illustrate how their accumulation produces a multilateral governance vacuum.

Figure 1: WTO Digital Trade Governance

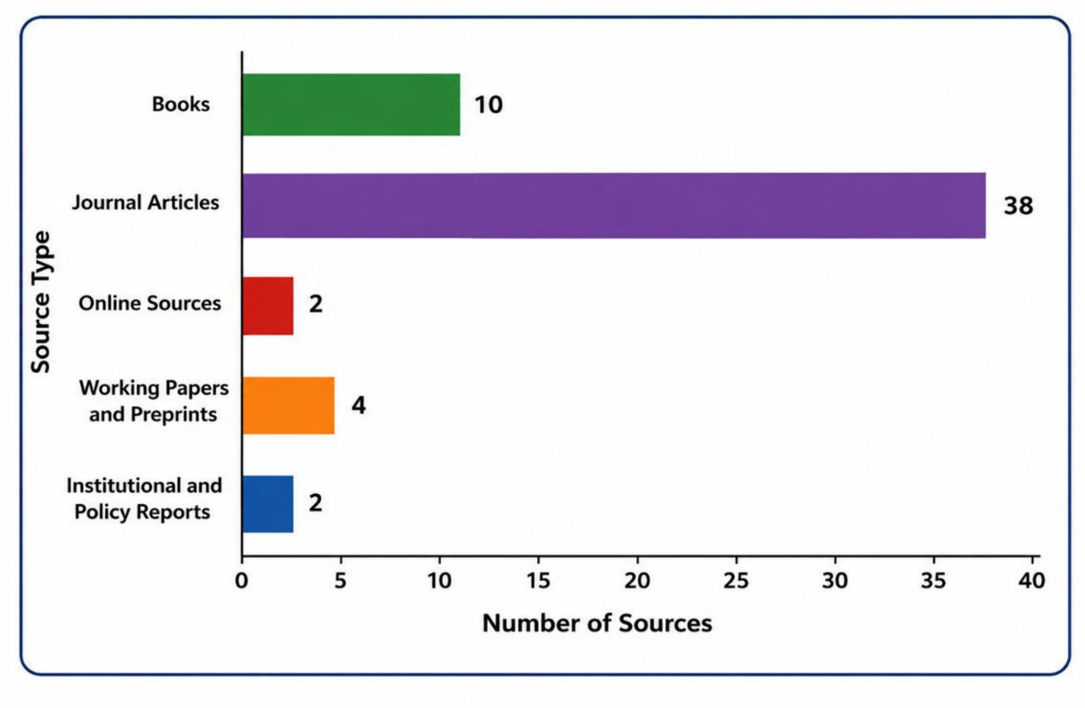


Sources: Authors' own compilation and design, based on data obtained from WTO instruments like GATT, GATS, TRIPS, ITA, WTO Work Programme on Electronic Commerce, WTO Moratorium on Customs Duties on Electronic Transmissions, Joint Statement Initiative on E-Commerce and from (Burri, 2021), (Chen, 2025) and (Kersan-Skabic, 2021).

The comparative aspect examines three regulatory models that are representative of the dominant approaches to digital trade governance. The models include the European Union, the United States, and China. These three models are not just representing the major structurally incompatible approaches to digital trade governance, but are also generating regulatory fragmentation internationally. In using this comparative approach, the study identifies how each jurisdiction addresses issues relating to the governance of digital trade, while mapping out where the points of incompatibility exist between each jurisdiction. Developing economy perspectives were included, especially as it relates to the issue of customs duty, Moratorium and JSI negotiations.

Secondary materials were identified using structured searches on HeinOnline, JSTOR, Google Scholar, SSRN, Westlaw, and the WTO document system. These materials include peer-reviewed journal articles, books, Internet Article, Institutional and Policy Reports, Working Papers on WTO and digital trade governance. Keyword combinations used includes, digital trade governance, WTO e-commerce, regulatory fragmentation, digital sovereignty, cross-border data flows, and platform regulation.

Figure 2: Distribution of Secondary Research Sources



Sources: Authors' own classification and count of secondary sources based on structured searches on HeinOnline, JSTOR, Google Scholar, SSRN, Westlaw, and WTO documents.

Secondary materials selected for inclusion met one or more of the three selection criteria below: the material has direct relevance to the subject matter of digital trade governance and its WTO dimensions, the material is published in a peer-reviewed academic journal, a reputable academic press or an authoritative institutional source, and the material was published during the time frame of 2018-2026. Older foundational works have been included as they have been referenced by authors in recent literature as authoritative. Materials which address governance issues arising from digital technologies but do not engage with the trade law dimension, and those which address WTO law without reference to digital trade issues, have been excluded from primary analysis but have been consulted for their use in providing context to this study when appropriate.

Using both a doctrinal and comparative analysis allows the research to showcase the deficiency of the current WTO-based governing frameworks in regulating digital trade and reconceptualization of the digital trade governance framework based upon norms that are institutionally feasible.

3. RESULTS AND DISCUSSION

3.1 WTO and the Evolution of Digital Trade Governance

The establishment of today's global trade system could be said to have occurred at an early point in history when the majority of international trade depended on the physical transportation of products from one country to another. In the post-World War II era, governments were attempting to create a set of rules that would be able to promote free trade, reduce tariff levels, and prevent protectionist economic policies that have historically caused conflict around the globe. [31] According to Rehman (2025), this effort resulted in the formation of the General Agreement on Tariffs and Trade (GATT) in 1947. As globalization has expanded in recent years, coupled with the increasingly complex growth of international economic relationships among nations, GATT evolved into the World Trade Organization (WTO) in 1995, as a trading system aimed at trade liberalization. [23] Although described as ancient and outdated, GATT is still the starting point of this discussion because it laid the very foundation of our present digital trade.

The General Agreement on Tariffs and Trade (GATT) was made in 1947 with the aim of eliminating protectionist measures and promoting economic cooperation. [31] Article I of GATT sets forth the Most-Favored Nation Treatment obligation, wherein WTO members agree to treat their fellow WTO members equally in terms of trade advantages. Article III articulates the National Treatment principle, which prohibits discrimination between imported products and domestically manufactured products. Then, Article II addresses tariff bindings and the resulting market access commitments made by WTO members regarding their traded goods. [18] Together, these measures create a non-discrimination regime for international trade in physical commodities. Emphasis should be placed on the term "physical commodities" because it immediately presents a classificatory problem with regard to digital trade. The drafters of GATT in 1947, perhaps, 'unintentionally,' accounted for digital trade, but with certain fundamental limitations. Article I and III of GATT, ostensibly and theoretically, apply to "digitally ordered" goods, with the intention that they can move across borders without discriminatory tariffs, thereby preventing states from favoring domestic digital products over foreign equivalents. While this is acknowledged, Chen (2025) extrapolates that it presents some critical restrictions as regards electronically

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transmitted products. In this light, Abdelrehim, Khan and Soomro support that GATT was negotiated at a time when electronically transmitted products had not come into existence, and there lies the challenge. [2] For instance, when software, movies, music, or video games are shipped to consumers physically, through a CD, DVD, etc., then GATT's "goods" structure applies directly. Their importation is subject to tariffs under Article II, and the goods are likewise subject to the national treatment constraints imposed by Article III. But when this same content is transmitted electronically, when it is either downloaded, streamed, or otherwise made available through a cloud-based application, there exists considerable uncertainty regarding applicable law. This issue of how to classify digitally traded products into either goods or services is yet to be resolved.

The General Agreement on Trade in Services (GATS) agreed in 1994, is one of the most significant WTO Agreements influencing contemporary digital trade. It is to be noted that GATS address trade in services as opposed to GATT, which addresses trade in goods. Article I:2 of GATS outlines four different methods of trade in services. Mode 1 pertains to cross-border service supply. Given the fact that many online services are provided electronically without having to transport consumers or suppliers across borders, this mode seems quite applicable to digitally facilitated commerce. [47] However, this is not exactly the case. GATS relies on specific commitments made by members under Articles XVI (Market Access) and XVII (National Treatment), which vary significantly depending on country and sector. These commitments were made before the rise of digital services. This means that many of them exclude or ambiguously cover such concepts as cloud computing, digital infrastructure services, online platforms or data processing. [9] This creates uneven regulatory coverage. Some digital services fall within binding commitments, while other services remain unregulated or are subject to wide-ranging limitations. Applying GATS to modern digital commerce and emerging digital models continues to be quite difficult. [27] According to Słok-Wódkowska & Czarny (2026), many digital platforms provide multiple forms of service, including advertising, payment systems, cloud storage, data analysis, delivery of entertainment content and AI-assisted commercial operations. Service classifications presently utilized by the WTO do not take into account technologically integrated ecosystems such as those referenced above. There is considerable legal ambiguity associated with classifying digitally-supplied services under the GATS framework.

Perhaps, a cursory look at the WTO's dispute settlement jurisprudence can demonstrate how classifying digital trade through pre-digital frameworks is a limiting constraint on legal classification in digital trade. In the United States – Gambling (DS285), the WTO Appellate body decision confirmed that electronically delivered services fall within GATS Mode 1 cross-border supply, establishing that digital services can, in principle, trigger binding market access and national treatment obligations under Articles XVI and XVII. This decision also demonstrated the structural limitation of the system by confirming that GATS obligations only apply where specific commitments have been made by a member. [20] However, the schedules were drafted almost thirty years ago and did not contemplate services provided through cloud computing, platform intermediaries, AI-driven service platforms, etc. Therefore, creating arbitrary coverage gaps. Similarly, in China - Audiovisual Products (DS363), the Appellate Body determined that GATT and GATS obligations can be applied simultaneously to the same measure. However, it failed to determine whether the transmission of content through digital means constitutes trade in goods, services or both. This ambiguity is exacerbated dramatically when applied to streaming and digital content distribution. [7] Collectively, these decisions represent the most sophisticated engagement by the WTO system with the classification of digital trade. They also help in illustrating why this system cannot provide coherent governance for contemporary digital commerce.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) creates minimum standards for IP protection within the context of the WTO framework. Within the digital economy, TRIPS assumes a unique role due to the ability of digital technologies to reproduce, distribute and transmit copyrighted works, software, audiovisual content and digital products across borders at rapid speeds. [50] Article 9 of TRIPS addresses substantive provisions of the Berne Convention with respect to copyrights. Articles 41-61 require WTO members to ensure that effective procedures and remedies are available against IP infringement. Both articles assume great importance in digital commerce contexts that are characterized by digital piracy, unauthorized streaming and platform-based diffusion of protected content. Recent technological advancements have, however, demonstrated numerous limitations inherent in TRIPS. [21] Specifically, TRIPS was drafted prior to the advent of social media platforms, generative AI, algorithmic commerce, large-scale digital content ecosystems, etc. This era is what Hashimy (2025) referred to as Industry 6.0, and which, according to him, is marked by AI and quantum technologies. Therefore, TRIPS is rooted in traditional human inventorship and authorship, offering limited guidance relative to platform liability, AI-generated works, automated copyright enforcement systems and algorithmic monetization systems.[46] Also, the advancements in technology have made it easier to infringe copyrights globally using digital means. It is possible today for copyrighted material to be simultaneously uploaded, disseminated and consumed across multiple jurisdictions through technologically facilitated systems that transcend traditional territorial bounds. This has further challenged long-standing assumptions about territorial enforcement of IP rights under TRIPS. [22]

The Information Technology Agreement (ITA), negotiated in 1996 under the auspices of the WTO, sought to enhance technological development through the elimination of tariffs on a wide array of information technology products. [26] Participating members are committed to eliminating customs duties on products such as computers, semiconductors, telecommunication equipment, hardware related to software and other technological products. ITA played a significant role in developing the global infrastructure required for digital communications by lowering costs for technological products needed for accessing the Internet, cloud systems, telecommunications and digital commercial activity. From this perspective, ITA promoted indirect growth of e-commerce and digitally facilitated trade. Nonetheless, ITA represents limits in early digital trade governance frameworks because it focuses on tariffs on hardware products rather than the data-driven and platform-based economy currently driving digitally facilitated commerce. [30] Moreover, it is only applied to its limited signatories; therefore, most WTO members do not fall under its provisions.

Recognizing the growing importance of e-commerce, WTO members endorsed the Work Programme on Electronic Commerce through the adoption of the Declaration on Global Electronic Commerce in 1998. [14] Under this declaration, several WTO bodies were instructed to study trade issues that arise from electronic commerce within the scope of existing WTO agreements. [26] Despite its expansive mandate, its program has yielded relatively few concrete legal results. One main reason for this lies in the increasing divide between developed and developing countries with regard to digital trade governance. Developed nations tend to advocate greater freedom for cross-border digitally facilitated commerce. In contrast, many developing countries stress concerns about digitally dependent economies, unequal levels of technological sophistication, domestic industrialization possibilities and national regulatory capacity. [36] This disagreement, along with the consensus-based nature of WTO negotiations, contributes to institutional stagnation within the multilateral digital trade governance.

Another major outcome from the WTO E-Commerce Work Programme is the Moratorium on Customs Duties on Electronic Transmissions. With this Moratorium, WTO members have agreed not to impose customs duties on electronically transmitted products such as software downloads, digital media, online audiovisual content, and other electronically transmitted products. According to Agrawal & Mishra (2022), the purpose behind moratorium is to facilitate unencumbered digital trade through prevention of

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tariff barriers being imposed on electronically delivered content. But despite its notable intentions, it has generated increasing controversy, particularly among Global South nations who believe that permanent prohibition on imposing customs duties on electronically transmitted products could damage domestic industrialization plans and limit potential sources for revenue for governments. They further assert that benefits derived from tariff-free digital trade will disproportionately benefit large technology firms located in developed economies.[4]

The lack of progress by the multilateral Work Program led 71 WTO member states to launch the Joint Statement initiative (JSI) on e-commerce in 2017, with the objective of moving forward the negotiation of an enforceable agreement. [26] In late 2022, the parties reached agreement on almost all provisions of a preliminary draft agreement. [36] Topics considered in JSI include paperless trading and newly emerged policy issues. [33] Proponents consider JSI as a practical approach for overcoming the institutional limitations hindering the WTO framework, by allowing willing members to negotiate more flexible rules in rapidly evolving, digitally facilitated commerce markets. However, critics argue that JSI may decrease the legitimacy of the WTO's multilateral structure by diminishing the negotiating power of developing countries. Critics also suggest that JSI places emphasis on advancing digital liberalization while neglecting the advancement of digitally facilitated sovereignty, data localization, cybersecurity regulation, and domestic policy discretion. [36] Also, issues related to market access and permanent moratorium remain unresolved due to diverging philosophies among the countries. Thus, criticisms surrounding JSI reflect challenges facing the balance between openness in digitally facilitated commerce and national regulatory authority within increasingly fragmented global digital commerce regimes.

It can be deduced that the WTO framework is a cornerstone of international trade in the digital economy. These frameworks help in promoting non-discriminatory treatment and provide a means to ensure fair access to markets and protection of intellectual property rights. These factors have been instrumental in establishing an environment that allows stable development of international digital commerce. However, the WTO faces two significant institutional impediments. Firstly, its decision-making process relies on achieving consensus among member countries, which results in long delays in responding to new issues as they arise, especially those related to rapid technological advancements such as artificial intelligence (AI), governance of online platforms, and digital taxation. Secondly, the increasing fragmentation of digital governance outside of the WTO raises concerns regarding whether national regulatory and sovereign interests will be prioritized over the principles of free trade liberalization embodied by the WTO. Ultimately, the current WTO frameworks have provided a foundation for international digital governance, but they lack the flexibility to evolve at a rate consistent with developments within the digital economy. There is therefore a need for alternative, adaptable forms of digital governance.

3.2. Regulatory Fragmentation, Digital Sovereignty, and the Challenges of Contemporary Digital Trade Governance

Issues related to regulatory fragmentation, digital sovereignty, and the challenges associated with contemporary digital trade governance are presented in this section. This discussion is important because in recent years, the governance of global digital trade has shifted toward a fragmented, multi-layered regulatory environment, instead of a centralized multilateral system. As earlier stated, during the post-Cold War era, the World Trade Organization (WTO) became the primary organizational framework for the governance of international trade. However, earlier discussions in this study have shown that the rapid expansion of digital technologies, data-driven markets, platform economies and artificial intelligence have showcased many structural limitations in the ability of the WTO-based governance framework to deal with the changing trading system.[41] States and regional organizations are developing independent digital trade regulatory frameworks to govern business transactions outside of the traditional multilateral systems. Therefore, today's digital trade governance does not occur through a single worldwide accepted framework. Rather, it occurs through overlapping and competing regulatory systems. [24] A cursory look at different jurisdictions points to this fragmented, multi-layered regulatory environment.

The European Union (EU) digital trade regulatory model, which evolved progressively since 1995, is centered around individuals' rights to protect their privacy, provide consumers with rights in the digital marketplace, hold technology platforms accountable, and ensure that the EU maintains democratic oversight over its regulatory decisions.[6] In the USA, since the dot-com boom of the 1990s, the country has been following a market-based model in digital governance. [44] The US emphasizes innovation, expansion of technologies across borders, cross-border data flow, and limited private sector governance. In general, the US prefers less regulatory intervention and provides support for open digital markets using both bilateral and multilateral trade agreements.[48] For China, in recent years, the government established a state-based digital sovereignty model that focuses on maintaining cyber sovereignty, localizing data, regulating cybersecurity, and maintaining tight state control over all digital platforms and technological systems. [8] China's central government exercises extensive control over what can be posted

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online, AI systems use, and all elements of digital infrastructure. This is part of their larger national security strategy for achieving technological independence. [37] Presently, whether in the Global South or North, many countries are developing their own 'country-fitted' digital trade regulatory framework and this is posing a huge challenge to the WTO digital trade governance system.

Indeed, through the adoption of digital sovereignty, even countries that are generally classified as developing, emerging, or less industrialized are making efforts to develop adequate regulatory capacity for international digital trade. In this regard, the Brazilian regulatory trajectory becomes particularly instructive. The Brazilian system cannot be seen as an example of the US liberal marketplace or a China-style sovereignty-based model. It can best be viewed as a good example of an emerging market model of digital sovereignty. One that is asserting meaningful control of its data and digital infrastructure while also seeking to participate in the global digital trade network. The Marco Civil da Internet (Law 12.965/2014), created a rights-based approach to digital governance. This included provisions that are related to data localization. [15] The Marco Civil da Internet promotes the idea of digital sovereignty and reflects it as a legitimate form of democratic governance. This serves as a response to issues related to infrastructure dependency and foreign surveillance. A similar regulatory example can also be seen in the Lei Geral de Proteção de Dados Pessoais, or LGDP, (Law 13.709/2018). This law provides certain restrictions related to international data transfers. It, however, generates trade frictions when used in conjunction with Brazil's GATS commitments. This remains legally unaddressed.[16] In addition to Brazil, there are other examples of countries in Latin America, such as Chile and Mexico, where their national laws and regulations regarding domestic data protection are conflicting with their obligations under free-trade agreements, including the CPTPP and bilateral agreements. All these create fragmentation, which poses a huge challenge to the WTO digital trade framework.

Another major issue is digital sovereignty. Borgogno & Zangrandi (2024), explain that most recently, States are seeking greater control over major aspects of their digital systems operating within their respective jurisdictions. To Rehman (2025), this trend is rooted in a growing belief that unrestrained globalization of digital commerce will harm national security, economic autonomy, democratic accountability, and domestic regulatory authority. In this light, countries like China and Russia are increasingly advocating for regulations designed to protect these critical infrastructure assets and reduce reliance on foreign technological systems. Currently, some of these states require specific types of data to remain inside their respective borders through the use of data localization measures, while others prohibit foreign entities from accessing sensitive information pertaining to their citizens, financial systems, or government agencies.[37] Related to this are issues of data privacy, data transfers, surveillance, cybersecurity, digital rights, etc. Jurisdictions increasingly employ differing approaches toward regulating these aspects of the digital world. [47] For instance, while the European Union employs very strict standards regarding privacy and data protection, under its General Data Protection Regulation (GDPR) [28], other jurisdictions like the US, employ more commercially favorable approaches toward data governance. These differences create conflicts regarding permitted cross-border data transfers and regulatory compatibility.[11]

Another hallmark issue pertaining to modern digital trade governance is the increased regulatory influence being exercised by transnational digital platforms. Major companies like Amazon, Google, Alibaba, Meta, TikTok, Apple, etc., are no longer simply acting as participants in global e-commerce. [33] They are now major governance actors, helping to define the rules governing how digital commerce operates around the globe. [28] Platforms use algorithms, platform policies, automated moderation systems, and technical architecture designs to determine market access, visibility on search engines, advertising allocation, and pricing strategies. [42] All these affect billions of end-users. And there are hundreds or even thousands of such businesses operating globally. Since platforms are simultaneously operating transnationally across numerous jurisdictions, the question is: who governs them? They often operate outside of formal state authority in many instances, especially in developing countries. This raises several issues pertaining to accountability, transparency, competition, and democratic oversight for digital trade.

Additionally, Artificial Intelligence (AI) poses a significant challenge to digital trade governance. AI is becoming an increasingly common driver for e-commerce. AI systems now drive a wide variety of aspects of digital trade, ranging from advertising, purchasing logistics, recommendation systems, financial transactions, fraud detection, and automated purchasing decisions, for many companies and millions of end-users globally. [51] Similarly, algorithmic systems are driving how digital markets function by controlling visibility, search results, content distribution, and platform engagement. However, few governance frameworks exist for regulating AI-driven commerce globally. [11] WTO has not expressly provided for this. Also, more issues surround transparency, explainability, and accountability in the use of AI. Also, notwithstanding rapid growth in the size, value, and activity around global digital trade, participation remains extremely unequal among nations, states, and economies.[49] Large inequalities

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continue to exist in terms of access to internet connectivity, digital infrastructure, and technological capabilities among nations. Developing countries rely extensively on foreign-built, designed, bought, and maintained digital infrastructure.

Finally, and most fundamental is the issue of enforcement. While WTO agreements like GATT, GATS, TRIPS, and ITA contain provisions that are legally binding, none of them were created for modern digital trade issues. Instead, all were designed for traditional international trade in goods, services, and intellectual property at the time prior to the development of large scale transnational digital platforms, AI, algorithms and cross-border data flow. In contrast, other WTO initiatives dealing with digital trade, like the Work Programme on Electronic Commerce, the Moratorium and the JSI, remain primarily non-binding soft-law agreements. [11] Therefore, there exists an enormous institutional enforcement challenge in the global digital trade regulation. Moreover, the lack of coordination among national enforcement agencies complicates this issue. For example, the EU uses regulations such as the GDPR to enforce digital trade rules globally. Conversely, the US relies on industry-led enforcement by using platform self-regulation as an effective mechanism. Lastly, China utilizes state oversight to enforce digital trade rules and emphasizes data sovereignty and cybersecurity. Therefore, while the WTO provides a foundation of global principles regarding digital trade, enforcement mechanisms remain fragmented and inadequate. [39] This highlights the need for harmonized flexible global enforcement mechanisms.

3.3. Reconceptualizing Global Digital Trade Governance Beyond WTO-Centered Frameworks

There exist significant shortcomings in the applications of WTO digital trade governance models. Although the WTO still plays an important role in international economic law, the legal architecture of the WTO was established for trade in tangible products and territorially defined services. They are not clearly meant for cross-border data flows, cloud-based systems, artificial intelligence, and algorithmically facilitated transactions that currently drive global e-commerce. [41] Therefore, we need to reconceptualize the framework governing the global digital trade system. It is imperative that we move from traditional WTO-centered trade liberalization models toward a plural and interdependent governance system that includes the stakeholders that are involved in the process. This requires creating a singular and integrated governance structure that addresses all of these issues.

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Any proposed reform must as a matter of importance, consider a multi-layered hybrid governance system. At the moment and from our observations, it is nearly impossible for digital trade governance to function solely through centralized multilateral institutions. This is because, as earlier shown, digital trade governance presently involves so many different stakeholders like states, regional organizations, international institutions, digital platforms, and private technological actors. Together, they address issues related to data governance, cybersecurity, AI regulation, platform accountability, and digital rights. Thus, there can no longer be a singularly centralized multilateral body governing all aspects and layers of digital trade. To create effective digital trade governance frameworks, therefore, all aspects and stakeholders in the digital trade governance must be coordinated. In this regard, a hybrid form of digital trade governance becomes particularly relevant. This polycentric framework will create a layered model of authority. It should therefore be based on a combination of formal international legal standards, national/regional principles, private standards and best practice guidelines by industries and multi-stakeholders. [47]

Additionally, this hybrid model must be sufficiently flexible to allow for changes in procedures. There should be provisions for continuous reviews of regulations necessary to respond rapidly to developments in technology. Furthermore, this model of digital trade governance should, while aiming at international coordination, also consider the need to preserve the ability of nations to exercise sovereignty over their own regulatory affairs. [19] Achieving complete legal uniformity is unrealistic since each nation possesses unique political systems, developmental priorities, and cultural norms. At the same time, excessive fragmentation generates significant compliance costs, creates legal uncertainty, and weakens opportunities for cross-national cooperation.[1] Therefore, future governance systems must pursue harmony in the absence of uniformity by establishing common standards for all aspects of digital trade.

There is also a need for institutional coordination. Due to the diversity and interdependence of digital trade governance, no single institution can provide an effective response to the challenges presented by digital trade. [1] Therefore, a reformed framework must promote increased collaboration among existing institutions like the WTO, OECD, WIPO, UNCTAD, as well as regional organizations like the EU and ASEAN. This is aimed at eliminating duplication and promoting greater coherence in governance. Moreover, broader participation by stakeholders (both public and private) is essential. National and private stakeholders like Google, Amazon, Meta, Alibaba, etc., should also be carried along. Also, future governance frameworks must establish higher international standards for accountability, transparency, competition, and digital rights protection of platforms. In this light, the use of emerging technologies like

AI in digital trades, especially by big companies, should be regulated. Jones (2023), supports the view and need for the establishment of more formal guidelines that enable proactive regulatory responses to emerging technologies.

Then, on the issue of cross-border enforcement, it must be recommended that the WTO should create binding and enforceable digital trade frameworks. Also, it is reiterated that the traditional territorial system of jurisdiction faces difficulties in enforcing commerce that occurs simultaneously across multiple territories. Therefore, future frameworks must include new forms of harmonized transnational enforcement regimes as well as specialized digital dispute resolution mechanisms. [5] This should include an online and AI-supported dispute resolution system, alongside sufficient transparency and human oversight. Despite growing demand for access to the internet, data infrastructure, and regulatory capacity, many low-income countries face significant barriers in accessing these resources. Therefore, future governance systems should support digital industrialization, data center development, and institutional capacity building, while addressing concerns about data colonialism and dependence on technology. [9] Most importantly, there is also a strong need for future governance to remain focused on humanity, thereby ensuring digital rights, privacy, democratic accountability and fair representation for all people, while facilitating innovation and economic growth.

4. CONCLUSION

The accelerated growth in digitization has significantly changed the way that global trade takes place. The exchange of data across borders, the use of artificial intelligence (AI) by corporate entities, the utilization of cloud computing as a means to store and process information, and the growing presence of algorithmically based business models are all new elements of global commerce. All these could not have been envisioned when the World Trade Organization (WTO) was established about 30 years ago. Although it still plays an important role in the system of international economic governance, the WTO's current framework for both regulation and governance is finding it increasingly difficult to deal with the rapidly changing nature of modern-day digital commerce. The study has demonstrated that there is a trend toward decentralized or fragmented forms of regulation concerning global digital trade. This form of regulation is developing away from centralized forms of multilateral regulation, toward pluralistic forms of governance. As such, states are creating different methods of regulating data governance, cybersecurity, accountability among digital platforms, digital taxation, and AI regulations based on their respective national objectives, interests, and other factors. Therefore, regulatory fragmentation and digital

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sovereignty are increasingly playing major roles in defining the path forward for global e-commerce law. This study concludes by suggesting that any future governance frameworks related to digital trade governance should seek to develop more flexible and coordinated systems involving all stakeholders, rather than focusing solely on trade liberalization models. Ultimately, effective global e-commerce governance will depend on striking a balance between innovation, digital integration, regulatory autonomy, accountability, and digital justice in an increasingly digitally integrated but also fragmented world.

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https://doi.org/10.54934/ijlcw.v5i1.185

ABOUT THIS ARTICLE

Conflict of interest: The authors declare no conflicting interests

Acknowledgments: The authors are grateful to the management of The International Journal of Law in Changing World (the IJLCW) for their editorial commitment towards the success of this research. We also appreciate Kampala International University, Kampala, Uganda; the University of Calabar, Cross-River State, Nigeria; and Anglia Ruskin University, Cambridge, UK, for providing us with the enabling environments to conduct this research.

AI-use Disclosure: This manuscript did not utilize any large language model, generative AI, or any form of artificial intelligence technology to conduct the research, analyze the data, or write the manuscript. However, the authors used Grammarly's language editor for proofreading.

GOBERNANZA DEL COMERCIO DIGITAL MÁS ALLÁ DE LA OMC: FRAGMENTACIÓN REGULATORIA, SOBERANÍA DIGITAL Y EL FUTURO DEL DERECHO DEL COMERCIO ELECTRÓNICO

RESUMEN

El surgimiento del comercio digital está transformando radicalmente la forma en que se lleva a cabo el comercio internacional en la actualidad. Sin embargo, la gobernanza actual del comercio digital sigue anclada en un marco obsoleto de la Organización Mundial del Comercio (OMC), diseñado en gran medida para una era anterior al comercio digital. Dicha estructura de gobernanza no ha logrado responder eficazmente a las cuestiones emergentes en este ámbito. Paralelamente, los Estados y los bloques regionales están desarrollando modelos regulatorios divergentes que reflejan sus intereses soberanos en materia digital y generan una significativa fragmentación de la gobernanza. Mediante el método doctrinal y un enfoque comparado, este trabajo examina las deficiencias de los modelos actuales de gobernanza del comercio digital centrados en la OMC y sostiene que el sistema está evolucionando desde las estructuras comerciales multilaterales tradicionales hacia sistemas híbridos, impulsados por la soberanía y con la participación de múltiples actores. El artículo aboga por un marco reconceptualizado capaz de equilibrar la integración digital, la soberanía regulatoria, la innovación y una coordinación eficaz de la gobernanza global en una economía digital en constante evolución.

Palabras clave: gobernanza del comercio digital, soberanía digital, fragmentación regulatoria, derecho del comercio electrónico, gobernanza de datos transfronterizos

WTO之外的数字贸易治理：监管碎片化、数字主权与电子商务法的未来

摘要

数字贸易的兴起正在深刻改变当今国际贸易的运作方式。然而，现行的数字贸易治理体系仍植根于世界贸易组织（WTO）过时的框架之中，而该框架主要针对的是数字贸易时代之前的环境。这一治理结构已无法有效应对数字贸易中涌现的新问题。与此同时，各国及区域集团正制定各异的监管模式，以体现其数字主权利益，从而导致了显著的治理碎片化。本文结合法学教义分析与比较研究方法，剖析了当前以WTO为核心的数字贸易治理模式的缺陷，并指出治理体系正从传统的各种多边贸易结构，向涉及多方主体的、混合型且由主权驱动的体系演变。文章主张构建一个经重新构想的框架，以便在不断演变的数字经济中，实现数字一体化、监管主权、创新与有效全球治理协调之间的平衡。

关键词：数字贸易治理、数字主权、监管碎片化、电子商务法、跨境数据治理

https://doi.org/10.54934/ijlcw.v5i1.185

International Journal of
Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.181

ENABLING PROTECTION MODEL OF TRADITIONAL EXPRESSION OF BATIK MOTIFS HELD BY THE STATE FOR THE BENEFIT OF THE INDONESIAN NATION

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Article Information:

Received
April 21, 2025
Reviewed & Revised
May 10, 2025
Accepted
May 30, 2025
Published
July 30, 2026

Keywords:

traditional cultural expressions,
Batik,
Free, Prior and Informed Consent,
Access and Benefit Sharing,
Communal Intellectual Property

ABSTRACT | 摘要 | RESUMEN

Article 38(1) of Indonesia's Copyright Law (Law No. 28 of 2014) vests authority over Traditional Cultural Expressions (TCEs) in the state through the phrase "held by the state," yet leaves the scope of that authority, the protective principle, and benefit-sharing mechanisms undefined. This ambiguity exposes traditional batik motifs to misappropriation, including foreign claims and culturally inappropriate commercial use. Using normative-juridical analysis with statutory, conceptual, comparative, and teleological approaches, this study reconstructs the phrase as public trusteeship rather than ownership or administrative control. Constitutional jurisprudence and international instruments—the UNESCO Convention, UNDRIP, the Nagoya Protocol, FPIC, and ABS—converge on a participatory, benefit-oriented state role. The study proposes Enabling Protection: a hybrid framework recasting state authority toward facilitative stewardship, combining defensive registration with custodial empowerment through FPIC and ABS.

FOR CITATION:

Amrulla, M. F., Kusumadara, A., Santoso, B., & Widyanti, Y. E. (2026). Enabling Protection Model of Traditional Expression of Batik Motifs Held by the State for the Benefit of the Indonesian Nation. International Journal of Law in Changing World, 5 (1), 81-103. DOI: https://doi.org/10.54934/ijlcw.v5i1.181

1. INTRODUCTION

Batik is one of Indonesia's most significant traditional cultural forms. Its documented origins are traceable at least to the tenth century through the Gulunggung inscription of 929 CE, which records processes of cloth-making [45]; Yuliati, 2010). What began as a courtly craft has become a globally recognised cultural symbol; UNESCO inscribed Indonesian batik on the Representative List of the Intangible Cultural Heritage (ICH) of Humanity in 2009. That recognition confirms its status as a Traditional Cultural Expression (TCE)—a cultural inheritance transmitted across generations and freighted with spiritual symbolism, philosophical meaning, and social value. [4]; [5]

Individual traditional batik motifs carry profound normative significance. The Parang Rusak motif, traditionally attributed to Panembahan Senopati and designated by Sultan Hamengku Buwono I as a forbidden motif (awisan dalem) in 1785, symbolises leadership, authority, and royal power, and was historically reserved for the nobility.[39] The Kawung motif represents wisdom and equilibrium [26], while Udan Liris denotes prosperity and fertility. Within the Surakarta court context [15], specific motifs were regulated through the Maklumat Solo and the Serat Tatakrama Kedhaton, a manuscript dated 1788–1820 that prescribes dress codes for palace servants according to rank and function.[18] These motifs are not merely decorative; they function as normative-ritual systems recognised under living customary law.[23]

Despite this cultural depth, traditional batik motifs are increasingly vulnerable. Data from the Directorate General of Intellectual Property (DJKI) show that, of 2,335 registered Communal Intellectual Property (CIP) records, 1,338 (59%) are classified as TCEs [60], yet existing legal protection remains inadequate. Several recent incidents demonstrate the acute protection gap. In July 2020, China's Xinhua News claimed batik as a traditional Chinese craft [38]; the Indonesian footwear brand Brodo used the sacred Parang Rusak motif on shoe soles, in clear violation of customary norms [33]; and a French national obtained copyright registration (No. 030376) over a Balinese flower motif, then used the registration to sue authentic Balinese silver artisans.[35] Indonesia thus possesses a legal framework that fails to protect its custodians—a paradoxical formalism that this study seeks to diagnose and remedy.

Article 38(1) of Law No. 28 of 2014 provides that "[c]opyright on Traditional Cultural Expressions is held by the State." The provision is intended to signal state responsibility for protection, but it does not specify the scope of that authority. It is not clear whether "held" denotes administrative control, representative authority as guardian, or legal authority akin to material ownership.[55] Three competing readings remain plausible—full ownership (dominium), administrative control (beheersdaad), or trusteeship (public trust)—and the legislator has supplied no metric for choosing among them. The result is legal uncertainty that harms custodians by casting the state as a "holder" without any corresponding obligation to return benefits to those who create and preserve cultural value.

Existing Indonesian scholarship on TCE protection operates predominantly within a defensive paradigm focused on preventing foreign claims through registration and documentation. Sakul (2020) examines the international-law dimensions of copyright protection for batik, while Yulia (2023) analyses CIP within the national legal system from a customary-law perspective. Neither study addresses the more fundamental question identified here: does the existing framework actually produce benefits for custodians? The present study identifies a critical theoretical gap—the absence of an enabling dimension in the current architecture—and conceptualises Enabling Protection as a necessary complement to existing defensive approaches.

Within international scholarship, similar concerns have animated several strands of analysis on which the present study explicitly builds. Drahos (2014) characterises post-colonial intellectual property regimes for indigenous knowledge as "extractive," arguing that symbolic recognition without substantive entitlement reproduces the very vulnerabilities that protection purports to redress. Coombe (1998) frames cultural property as relational rather than proprietary, emphasising the dialogic processes by which communities sustain meaning. Carpenter, Katyal, and Riley (2009) offer the most influential alternative architecture in recent property scholarship: a "stewardship model of property" grounded in peoplehood, in which non-owners hold fiduciary obligations toward cultural resources. Antons (2009) maps the variety of Asia-Pacific approaches to TCE protection and identifies the recurring challenge of reconciling state administration with community authority. Dutfield (2004) and Yu (2008) analyse the limits of conventional intellectual property doctrines as applied to traditional knowledge and intangible heritage, while Forsyth (2013) and Graber (2012) examine implementation gaps in sui generis regimes. These literatures inform the analysis that follows, but, as yet, they have not been systematically brought to bear on Article 38(1) of Indonesia's Copyright Law.

Against this background, the study formulates three research questions. First, what is the proper meaning of the phrase "held by the state" in Article 38(1) of the Copyright Law within a benefit-oriented protection framework? Second, what legal principles govern state authority—under both national law and international conventions—over the TCE of traditional batik motifs? Third, what is the ideal legal

https://doi.org/10.54934/ijlcw.v5i1.181

protection model for traditional batik motifs that are "held by the state" so as to deliver benefits to the Indonesian nation?

2. RESEARCH METHODOLOGY

This study employs a juridical-normative research design, supported by a limited set of qualitative empirical materials used solely to enrich interpretive context. Four interrelated approaches structure the analysis. The statutory approach analyses regulations governing the protection of TCEs hierarchically, beginning with the 1945 Constitution as the superior norm and proceeding to relevant international instruments—the 2003 UNESCO Convention, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the 2010 Nagoya Protocol—together with implementing national legislation. The conceptual approach examines the doctrinal constructs that underlie state authority over communal cultural resources: dominium, beheersdaad, the public trust doctrine, FPIC, and ABS. The comparative approach is described separately below. The teleological approach interprets norms in light of the philosophical and social objectives that the legislator pursued.[31]

The comparative approach merits explicit methodological justification, as the reviewers correctly emphasised. The selection of comparators rests on four criteria: (i) representation of distinct protection logics rather than mere descriptive variation—namely, defensive documentation, participatory institutional architecture, sui generis registration with prior informed consent, and regional model legislation; (ii) availability of evaluative scholarly literature sufficient to support analytical rather than descriptive comparison; (iii) operational maturity, in the sense that the regime has produced observable implementation outcomes; and (iv) relevance to Indonesia's legal-cultural setting, whether through civil-law tradition (Peru) or through shared regional and intangible-heritage concerns (Thailand, the Pacific). Four comparators were chosen on these criteria: India (defensive—TKDL combined with the Biological Diversity Act (2002), Thailand (participatory institutional—the 2016 ICH Act and the national commission), Peru (sui generis—Law 27,811 of 2002 with collective-knowledge registry and prior informed consent), and the Pacific Model Law 2002 (regional framework introducing "Traditional Cultural Rights" and a Cultural Authority). The four comparators jointly map the protection logics most relevant to the reconstruction of Article 38(1) proposed in this study.

The legal materials used in this study comprise three categories. Primary legal materials include the 1945 Constitution, Law No. 28 of 2014 on Copyright, Law No. 5 of 2017 on the Advancement of Culture, the relevant Constitutional Court decisions, and the international instruments listed above.

Secondary legal materials include legal textbooks, peer-reviewed journal articles, expert opinions, and official documents of international bodies such as the World Intellectual Property Organization (WIPO) and UNESCO. Tertiary legal materials include reference works and qualitative empirical inputs used to enrich interpretive context.

Two qualitative empirical inputs supplement the doctrinal analysis. The first is a single semi-structured key-informant interview conducted in 2025 with Mr. Iqbal, Secretary of the Policy Formulation Team of the DJKI, in his official capacity. The interview, lasting approximately ninety minutes, addressed the administrative interpretation of the phrase "held by the state," the role of custodial communities in the CIP inventory process, and the procedural status of the National Inventory of Communal Intellectual Property under Government Regulation No. 56 of 2022. The transcript was coded thematically using descriptive coding followed by axial categorisation, and the informant's statements are reported only where they constitute the official administrative interpretation rather than personal opinion. The second input is a field observation conducted at the Museum Danar Hadi in Surakarta in 2025, focused on the curatorial classification, presentation, and provenance protocols applied to traditional motifs. Field notes were recorded and triangulated against the documentary materials cited above, particularly the Serat Tatakrama Kedhaton and Maklumat Solo. Because both inputs involved public officials and a public institution speaking in administrative capacities on matters of public concern, and because no personal identifiers of private individuals were collected, the research did not require institutional ethics review under prevailing Indonesian standards for legal-doctrinal research; informed consent for citation was nonetheless obtained from Mr. Iqbal prior to attribution. The empirical materials are used in this study solely as tertiary materials supporting interpretation; the analytical claims rest on doctrinal and comparative reasoning.

3. RESULTS AND DISCUSSION

3.1. Theoretical Framework: Analytical Foundations for TCE Protection

This research rests on four interlocking legal-theoretical foundations. The first is the theory of legal protection. In his Rechtsidee doctrine, Radbruch insists that good law must realise three values proportionally: legal certainty (Rechtssicherheit), justice (Gerechtigkeit), and utility (Zweckmäßigkeit) [1]. Applied to TCEs, these three values require clear and predictable legal rules (certainty), fair outcomes for custodians (justice), and meaningful benefits for society (utility). Bentham's utilitarian standard, which assesses law by the aggregate welfare it produces, suggests that a regime that merely registers batik motifs without generating returns for artisans and custodians fails its protective function.[41] Rahardjo's theory of substantive justice complements this position by insisting that good law must touch the conscience of the people and serve their welfare [40]; law must function as an instrument of social empowerment, not as a static normative text.

The theory of intellectual property forms the second foundation. The two most influential theories in the field—Locke's labour theory and Hegel's personality theory—both ground rights in individual creative effort. Locke (1690) argues in The Second Treatise of Government that a person is entitled to the fruits of their own labour [46]; Hegel emphasises that creative works are expressions of the creator's personality and identity.[36] Applied to communal cultural property, both theories encounter significant difficulty. Traditional batik motifs emerge from a blend of individual creativity, ritual practice, and intergenerational cultural transmission. Soepomo (2007) argued, in his theory of Indonesian customary law, that rights arising from communal creation must vest in the community rather than in any individual. Ter Haar (1976) treats such authority as a right to regulate communal property in the public interest.

Contemporary international scholarship has substantially extended this critique. Carpenter, Katyal, and Riley (2009) argue that the dominant individual-ownership model is poorly suited to indigenous cultural property because indigenous communities seek to fulfil an ongoing duty of care toward cultural resources, often in the absence of formal title; they propose a "stewardship model" in which non-owners bear fiduciary obligations grounded in peoplehood, and in which property is reconceived to embrace a broader and more flexible set of interests. Coombe (1998) reframes cultural property as relational and dialogic rather than purely proprietary. Drahos (2014) interrogates the persistence of an "extractive" intellectual property order that recognises indigenous knowledge symbolically while denying substantive entitlements, and proposes a developmental order grounded in regulatory convening and high-trust networks. Dutfield (2004) elaborates the limits of conventional IP doctrines for traditional knowledge linked to biogenetic resources, while Yu (2008) analyses the difficulty of fitting intangible cultural heritage within standard intellectual property categories. These contributions converge on a shared diagnosis: collective cultural production calls for collective and stewardship-based legal architectures that classical IP theory cannot supply. The implication for Indonesia is direct: a credible TCE regime must be built on collective rights organised through tiered access—state governance, custodial moral authority, and licensed commercial users—rather than on individualistic ownership categories. As Waldron (2004) observes, ownership does not always take the form of an exclusive individual right; property systems can be communal, and those in authority over communal property act not as absolute owners but as stewards executing collective decisions.

The theory of legal utility forms the third foundation, adding economic and social perspectives. Wignjosoebroto (2013) reminds us that law cannot be separated from the social context in which it operates; accordingly, batik protection cannot be standardised under individualistic Western intellectual property rules but must accommodate the collective rights of custodians. Indicators of legal utility in this domain include (i) formal recognition of custodians' moral rights; (ii) fair distribution of economic returns; (iii) community involvement in legal decision-making; and (iv) harmonisation between state interests and community cultural values. Legal protection for TCEs must therefore produce tangible social and economic benefits for custodial communities, rather than exist solely within the formal legal frame. As Hananto (2025) observes in extending Bentham's framework, utility is measured not by economic profit alone but by the extent to which law guarantees the continuity of cultural values and the welfare of artisans. The framework must guard against two extremes: excessive privatisation, which commodifies sacred elements without mutual benefit, and complete openness, which strips custodians of their moral standing as protectors. Good law should accomplish both objectives—safeguarding moral values and supporting economic flourishing.

The public trust doctrine (PTD) forms the fourth foundation. Rooted in the Roman concept of res communes—resources shared by all and protected by the state for the public good—the doctrine underwent significant development in Anglo-American law, notably in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892), which held that the state holds public resources in trust for the people and cannot alienate them to private interests.[20] Wood (2009) frames the contemporary obligation precisely: opacity in the management of public resources amounts to a fundamental breach of public trust, because secrecy is incompatible with a trustee's duty of loyalty to beneficiaries. In the Indonesian legal system, the PTD is reflected in the constitutional interpretation of Article 33(3) of the 1945 Constitution: "controlled by the state" (dikuasai negara) does not imply absolute ownership but rather authority and management (trusteeship) exercised for the greatest possible prosperity of the people.[9]

3.2. The Meaning of "Held by the State" in Article 38(1) of the Copyright Law

The first research question concerns the proper meaning of the phrase "held by the state" (dipegang oleh negara) in Article 38(1). The analysis proceeds in three interpretive layers—grammatical, systematic, and teleological—and concludes that the phrase denotes a form of public trusteeship. Before turning to the doctrinal analysis, the methodological premise underlying it must be addressed, because the reviewers correctly observed that the transposition of Article 33(3) jurisprudence onto Article 38(1) requires explicit justification. The two provisions occupy different constitutional registers: Article 33(3) governs natural resources, while Article 38(1) governs intangible cultural expressions. The transposition is therefore analogical rather than direct, and rests on three structural parallels. First, both provisions vest state authority over assets that belong constitutionally to "the Indonesian people" rather than to the state qua proprietor; the state is the constitutional intermediary, not the owner. Second, both provisions are subject to the constitutional duty under Article 33(3) to use such assets "for the greatest possible prosperity of the people", a duty that the Constitutional Court has read as applicable to all forms of patrimonial public authority, not only natural resources. Third, the structural logic that the Constitutional Court developed in Decision No. 35/PUU-X/2012 on coastal management rights—namely, that state authority over communal resources must be exercised with due regard for customary community rights, to the extent that those rights continue to exist and are recognised—applies a fortiori to Article 38(1), because TCEs are, by definition, objects in which living customary law has continuing constitutive claims.[11] The Article 33(3) line of jurisprudence is therefore not directly transposed but applied analogically through this shared constitutional logic of public custodianship over patrimonial assets in which the people, and customary communities within them, hold continuing material and moral interests.

From a grammatical perspective, the Copyright Law deliberately uses the term "held" (dipegang) rather than "owned" or "controlled." As clarified by the Constitutional Court in Decision No. 002/PUU-I/2003, "controlled" refers to arrangements made in the public interest and does not imply ownership, while "owned" refers to private property with full rights to transfer and exploit. "Held" belongs to a distinct category—that of a mandate-holder—where the state acts as bearer of authority for the collective interest rather than for its own.[24] Widyanti (2020) emphasises that the state functions as administrator of TCEs while ownership or custodianship remains with the community or traditional society that creates, preserves, and develops them. State management aims at the greatest possible prosperity of the people, particularly traditional communities.[54] This interpretation is confirmed by the administrative position of the DJKI: the state assumes responsibility for protection and inventory, but where a custodian exists, the custodian retains priority and the state does not hold a monopoly (Mr. Iqbal, Secretary of the Policy Formulation Team of the DJKI, personal communication, 30 September 2025).

Systematically, the meaning of "held by the state" cannot be read in isolation; it must be integrated into the relevant constitutional architecture. Article 18B(2) of the 1945 Constitution recognises and respects indigenous peoples and their rights. Article 28I(3) guarantees that cultural identity and the rights of traditional communities will be respected in line with the progress of the times. Article 32(1) charges the state with promoting national culture while leaving citizens free to preserve and develop their cultural values. These three provisions establish a normative architecture that prohibits any interpretation of Article

https://doi.org/10.54934/ijlcw.v5i1.181

38(1) as a transfer of custodial collective rights to the state.[53] Constitutional Court Decision No. 35/PUU-X/2012 reinforces this position by affirming that state control over communal resources must be exercised with due regard for the rights of customary law communities, to the extent that they continue to exist and are recognised.[11]

From a teleological perspective, Article 38(1) must be understood within the broader framework of the TCE protection system, which aims to safeguard TCEs from misuse, promote cultural sustainability, and preserve the nation's cultural dignity. "Held by the state" is best read as a means to those ends rather than as an end in itself. Teleological reasoning thus supports the reading that "held" denotes normative stewardship of the creativity, knowledge, and practices that give TCEs their living cultural value.[28] Drawing the three layers of interpretation together, the study concludes that "held by the state" refers to a public trust. The state acts as a public trustee, exercising administrative authority rather than holding exclusive ownership. It functions simultaneously as regulator (setting rules of protection), facilitator (providing participation infrastructure), and trustee (holding copyright as a fiduciary responsibility to the custodian community). This reading is consistent with the WIPO Intergovernmental Committee's evolving treatment of state authority as representative rather than proprietary in the context of TCEs.[58]

3.3. Legal Principles Governing "Held by the State" Under National Law and International Conventions

The second research question asks what legal principles govern state authority over TCEs. At the national level, the Constitutional Court (Decision No. 001-021-022/PUU-I/2003) clarified that state control over public resources consists of five distinct functions: policy (beleid), administration (bestuursdaad), regulation (regelendaad), management (beheersdaad), and supervision (toezichthoudensdaad). All five are directed to the greatest possible prosperity of the people. The decision draws a clear line between public ownership, where the people are the true owners, and the state's role as the authority responsible for managing that mandate. Law No. 5 of 2017 on the Advancement of Culture reinforces this framework by requiring the government to establish mechanisms for community involvement in cultural development, provide the necessary funding, and promote the active role of communities in every decision concerning the management of cultural heritage. These provisions directly support the enabling protection model proposed in this study.

At the international level, the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage frames the relevant state function. Article 11 requires States Parties to identify and designate elements of intangible cultural heritage in their territory with the participation of relevant communities, groups, and non-governmental organisations. Article 13 further obliges states to adopt policies, institutions, and administrative measures supporting safeguarding, including documentation, research, and transmission through education and community engagement. UNDRIP requires states to provide effective mechanisms, including restitution, for the taking of intellectual and cultural property without free, prior, and informed consent.

Article 19 of UNDRIP articulates the FPIC standard. "Free" refers to consent given voluntarily, without pressure or intimidation from any party, including the government. "Prior" requires consent to be obtained before any exploitation activities begin. "Informed" requires that communities be provided with complete and understandable information in a language and format appropriate to their cultural context, covering social, economic, and cultural impacts as well as potential risks. "Consent" requires that approval be reached through the community's own traditional decision-making process.[49] FPIC is not a procedural formality; it is a prerequisite for lawful utilisation of TCEs. Benefit-sharing is governed by the Access and Benefit Sharing (ABS) framework. The Nagoya Protocol (2010), adopted in Indonesia through Law No. 11 of 2013, makes ABS and FPIC mandatory principles in the use of genetic resources and associated traditional knowledge [32]; the ABS logic, by analogy, supports a corresponding regime for TCEs. To date, however, this principle has not been fully transposed into Indonesian domestic law for TCEs.

Synthesising the national and international layers, four legal principles govern state authority over the TCE of traditional batik motifs. First, the principle of normative stewardship: the state is authorised to "hold" TCEs as a public trust, not as property. Second, the principle of substantive participation: all policies and decisions regarding TCEs must genuinely and meaningfully involve custodians, not merely through formal consultation. Third, the FPIC principle: no legitimate commercial use of TCEs may occur without the free, prior, and informed consent of the custodial community. Fourth, the ABS principle: any economic benefit derived from the use of TCEs must be fairly and proportionally shared with the custodian community through transparent and auditable mechanisms.

3.4. Comparative Perspective: India, Thailand, Peru, the Pacific Model Law, and Indonesia's Structural Gaps

The third research question is addressed through an analytical comparative discussion, selected on the four criteria specified in Section 2. The comparison is organised by protection logic rather than by jurisdiction, allowing each comparator to illuminate a distinct architectural element of the Enabling Protection model proposed in Section 3.5.

India represents the defensive-documentary logic. Section 2(c) of the Copyright Act 1957 defines “artistic work” to include paintings, sculptures, engravings, photographs, and other visual works.[13] Under this framework, Indian TCEs such as Madhubani paintings, Warli art, textile patterns, and tribal wood carvings receive partial protection through their tangible documented forms. Because such works are communal and transmitted across generations, however, they often fail the “originality” requirement of modern copyright doctrine. India responds with a flexible approach to originality that emphasises the tangible form as documented or reproduced by custodians. The state does not claim copyright over the underlying TCE but allows custodians to protect the physical forms they create or restore. Section 57 enables rights-holders to prevent modifications damaging the cultural integrity of a work, and Section 63 provides criminal enforcement under which copyright infringement may attract imprisonment of at least six months or a fine of at least Rs. 50,000.[13] The Traditional Knowledge Digital Library (TKDL), constructed by the Council for Scientific and Industrial Research, supplies prior-art evidence to international patent offices and is the most cited defensive instrument of its kind.[57] India complements this defensive logic with the benefit-sharing provisions of Section 21 of the Biological Diversity Act 2002.[6] Analytically, India demonstrates that defensive infrastructure can deliver legal certainty and a measure of enforcement, but, on its own, leaves the empowerment of custodians underdeveloped.

Thailand represents the participatory-institutional logic. The Commission for the Promotion and Preservation of Intangible Cultural Heritage, established under Section 10 of the Promotion and Conservation of Intangible Cultural Heritage Act, B.E. 2559 (2016), is responsible for establishing national ICH lists, coordinating documentation, and ensuring community involvement.[37] Thailand’s capacity-building model, developed in cooperation with UNESCO, combines workshops for national and local stakeholders with pilot projects such as the inventorying of Pgakenyaw Karen rotational farming and Lakhon Chatri performing arts.[48] Analytically, Thailand demonstrates that institutional architecture—especially the combination of a national commission with formal mechanisms for community engagement—can position the state as an enabler that supplies tools, knowledge, and resources, allowing communities to act as subjects of preservation rather than as objects of regulation.

Peru represents the sui generis logic with prior informed consent and a dual registry. Law No. 27,811 of 24 July 2002—the first national law in the world dedicated to the protection of indigenous collective knowledge—establishes a sui generis regime built around three institutional features.[8] First, the law recognises indigenous peoples' collective right to decide over their knowledge and treats that knowledge as part of their cultural heritage, inalienable and imprescriptible. Second, it institutes a tripartite registry system—public, confidential, and local—managed by INDECOPI, designed to provide defensive evidence in international fora while protecting sensitive knowledge from disclosure. Third, it operationalises prior informed consent through licence contracts concluded between representative organisations of indigenous peoples and third parties, and it mandates contributions from commercial use to a Fund for the Development of Indigenous Peoples. Analytically, Peru demonstrates a workable architecture for combining defensive registration with consent-based licensing and a dedicated benefit-sharing fund, although critics have noted persistent implementation difficulties for communities lacking organisational capacity.[22] For the Indonesian setting, the Peruvian model is particularly instructive because Peru, like Indonesia, operates within a civil-law tradition and faces the practical challenge of mediating between national administrative authority and dispersed customary communities.

The Pacific Model Law 2002—formally, the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, endorsed by Pacific Ministers of Culture in Noumea in 2002 under the auspices of the Secretariat of the Pacific Community—represents the regional-framework logic. The Model Law introduces a category of "Traditional Cultural Rights," distinct from copyright and not subject to its term limits or originality requirements, vested in the traditional owners; it establishes a Cultural Authority to administer prior and informed consent procedures and to mediate between traditional owners and prospective users; and it recognises traditional moral rights independently of economic rights.[43]; [50] Implementation has been uneven—Fiji, Vanuatu, Papua New Guinea, and Palau have moved toward incorporation, with substantial variation in scope and enforcement.[19] Analytically, the Pacific Model Law demonstrates that traditional cultural rights can be conceptualised as a category of intellectual rights distinct from copyright proper, and that an institutional intermediary (the Cultural Authority) can mediate between custodial communities and external users without thereby transferring the underlying right to the state.

The four comparators jointly illuminate Indonesia's structural gaps. First, Indonesia lacks a comprehensive defensive infrastructure comparable to India's TKDL—an instrument essential for preventing foreign IP claims in international fora. Second, Indonesia lacks a participatory institutional structure comparable to Thailand's ICH Commission, dedicated specifically to community engagement. Third, Indonesia lacks statutory FPIC procedures and enforceable ABS mechanisms for the exploitation of TCEs, both of which are operationalised under Peru's Law 27,811 and the Pacific Model Law. Fourth, Indonesia lacks a distinct category of traditional cultural rights as introduced by the Pacific Model Law;

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instead, it relies on a copyright provision (Article 38(1)) whose contours, as Section 3.2 demonstrated, are constitutionally underdetermined. The phrase "held by the state," operating without supporting infrastructure on any of these four dimensions, paradoxically perpetuates the very vulnerabilities it purports to redress—the problem that the Enabling Protection Model is designed to address.

3.5. The Enabling Protection Model: Normative Reconstruction and Institutional Framework

The Enabling Protection Model is a hybrid participatory framework combining defensive and empowering protection, grounded in FPIC and ABS, and designed to deliver meaningful legal benefits to custodial communities. It is conceptually positioned in dialogue with the stewardship model of Carpenter, Katyal, and Riley (2009)—whose architecture of fiduciary obligations toward cultural resources held by non-owners offers a sound theoretical anchor for the state's trustee role—and with Drahos's (2014) developmental conception, which insists that intellectual property arrangements for indigenous knowledge must move beyond symbolic recognition to substantive entitlement. The Indonesian-specific elaboration developed here rests on five mutually reinforcing pillars.

The first pillar is the normative reconstruction of state authority. Under Enabling Protection, the state performs three functions. As regulator, the state adopts legislation defining which TCEs are protected, under what FPIC procedures, and through what ABS mechanisms. As facilitator, the state builds infrastructure for participatory documentation, dispute resolution, and international representation—including a national TCE registry, capacity-strengthening programmes for custodial communities, and cultural diplomacy at WIPO and UNESCO. As trustee, the state holds copyright on TCEs as a fiduciary responsibility rather than a property right, for the benefit of the Indonesian people and the custodial communities. The framework draws on Weber's theory of legal-rational authority, under which legitimate authority requires a rational and rule-bound basis [52]; applied to TCEs, this principle requires clearly defined normative limits on state authority. The state's position in this model corresponds closely to what Carpenter, Katyal, and Riley (2009) describe as the fiduciary obligations of non-owners toward cultural resources.

The second pillar is a Participatory National TCE Registry. Unlike the existing DJKI administrative registry, this participatory mechanism prioritises community-based identification through four sequential stages. In the community identification stage, custodians lead the documentation of motifs, recording philosophical meaning, social role, sacred status, and restrictions on use. In the verification stage, DJKI reviews the documentation with input from palace and customary authorities. In the classification stage, motifs are grouped according to permissible use—public, restricted, or sacred. In the publication stage, registration is made available to the public with appropriate access controls. Sacred motifs such as Parang Rusak, Udan Liris, Kawung, and Sekar Jagad, when registered with the label "Sacred / Restricted Use," produce clear legal consequences. Use of such motifs without the consent of the appropriate customary authorities constitutes an administrative offence enforceable by the state acting as trustee.[14] This pillar incorporates the dual-track logic of Peru's public and confidential registries while adapting it to Indonesian palace and customary structures.

The third pillar is the institutionalisation of FPIC for any commercial use of traditional batik motifs. Implementation requires the active participation of palace authorities, customary leaders, and the wider batik community. The "Free" element guarantees that consent is reached without economic or industrial pressure and that custodial communities may refuse commercial exploitation without sanction. The "Prior" element requires that consent be obtained before any commercial activity begins. The "Informed" element requires that information be made available in a culturally appropriate language and format, covering the nature and extent of the proposed use, anticipated financial returns, potential cultural-distortion risks, and the proposed benefit-sharing arrangement. The "Consent" element requires that approval be obtained through the community's own traditional decision-making process; decisions reached by the appropriate customary authorities are recorded in formal protocols, which serve as the legal basis for state licensing. The procedural architecture is modelled on the licence-contract mechanism of Peru's Law 27,811.

The fourth pillar is ABS, which shifts commercial use from extraction to enablement. Implementation is anchored in a Benefit-Sharing Fund (BSF) that disburses grants, supports industry partnerships, and receives royalties from licensed commercial exploitation of traditional batik motifs. Funds from the BSF are directed to four uses: (i) welfare measures for custodians through direct payments to artisans and communities; (ii) empowerment through training in batik production techniques, design innovation, and digital marketing; (iii) documentation and education to strengthen and broaden the registry; and (iv) legal advocacy to pursue misappropriation claims nationally and internationally. An Ethical Batik Mark, modelled on existing certification schemes, would signal to the market that a product complies with FPIC and ABS standards and meets baseline custodian-welfare criteria, translating legal protections into market-based incentives for compliant producers. The BSF architecture corresponds to the Fund for the Development of Indigenous Peoples established under Peru's Law 27,811 and to comparable mechanisms identified by Forsyth (2013) in Pacific implementation experience.

The fifth pillar is an Adaptive Legal Mechanism aligning customary law, national law, and international standards. Three institutional tools support this alignment. First, Cultural Protocols in the form of formal Memoranda of Understanding among DJKI, the Yogyakarta Palace (Keraton Yogyakarta), and the Surakarta Palace (Kasunanan Surakarta), defining each party's authority in co-managing TCEs in a manner that reflects Nonet and Selznick's (1978) conception of responsive law—law that adapts to social purposes through institutional learning rather than fixed rules. Second, a Code of Conduct for industry players ensures compliance with FPIC, supports ABS, and prohibits culturally inappropriate uses (for example, placing sacred motifs on the soles of shoes). Third, community-led digital repositories of traditional batik motifs serve defensive, educational, and preservation functions under the principle of community data sovereignty. Together, these tools create an institutional ecosystem in which the state safeguards administrative functions and cultural diplomacy through DJKI and related institutions, palaces and customary leaders exercise substantive authority, and the batik community benefits directly through training, ABS payments, and access to the creative economy.

3.6. Normative Implications: The Reconstruction of Article 38(1) of the Copyright Law

The Enabling Protection Model requires a redesign of the normative framework under Article 38 of the Copyright Law. The existing framework lacks adequate legal instruments to safeguard custodians as holders of cultural value: it contains no FPIC mechanism, no benefit-sharing system comparable to Section 21 of India's Biological Diversity Act 2002 or the BSF of Peru's Law 27,811, and no institutional structure comparable to Thailand's ICH Commission or the Pacific Cultural Authority. As Aragon (2012) observes, the Indonesian government's role as copyright holder of TCEs functions, in practice, as a form of intangible-property nationalism that paradoxically neglects the genuine interests of custodial communities.

A normative reconstruction of Article 38(1) should incorporate at least five essential elements. First, an explicit definition of "held by the state" as representative trust, signalling that state authority is fiduciary rather than proprietary. Second, FPIC provisions requiring the free, prior, and informed consent of custodial communities before any commercial exploitation. Third, an ABS mechanism establishing mandatory contributions to a Benefit-Sharing Fund from every commercial TCE licence. Fourth, a participatory registry process requiring the involvement of custodial communities in documentation and classification. Fifth, the establishment of a National TCE Institution with an institutional structure adapted from the Thai model and the Pacific Cultural Authority. These adjustments would bring Indonesian practice into alignment with the comparator regimes analysed in Section 3.4 while ensuring that the

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protection of batik as a TCE proceeds justly, participatorily, and in conformity with the constitutional mandate for cultural protection under the 1945 Constitution..

4. CONCLUSION

This study yields three principal conclusions. First, the phrase “held by the state” in Article 38(1) of Law No. 28 of 2014 on Copyright should be interpreted as normative stewardship (public trusteeship) rather than ownership (dominium) or full administrative control (beheersdaad). Grammatical, systematic, and teleological interpretation jointly support this reading. The state functions as trustee for the custodial community and the Indonesian public; it does not “own” TCEs as it owns state assets but bears a legal and moral mandate to protect, manage, and prevent misuse. This position is confirmed by the administrative interpretation of the DJKI and aligns with Articles 18B(2), 28I(3), and 32 of the 1945 Constitution, as well as with Indonesia’s international obligations under the 2003 UNESCO Convention, UNDRIP, and the Nagoya Protocol.

Second, the legal principles governing state authority over the TCE of traditional batik motifs—derived from both national law and international instruments—require a participatory approach and a benefit-oriented state role. The state must acknowledge the collective rights of custodians, promote participatory governance, guarantee restitution from unlawful appropriation, and ensure equitable benefits through ABS. The FPIC principle establishes free, prior, and informed consent as a binding precondition for lawful commercial use of TCEs, not as a programmatic aspiration.

Third, the most appropriate legal protection model for traditional batik motifs “held by the state” is the Enabling Protection Model, in the form of a participatory hybrid. The model combines defensive protection—prevention of misappropriation through digital documentation and a Participatory National TCE Registry—with empowerment of custodians through FPIC, ABS, capacity building, and adaptive legal mechanisms. The state functions as facilitator and trustee; the custodial community functions as the source of the TCE. The model ensures that the protection of traditional batik motifs delivers tangible benefits, prevents misuse, and advances the nation’s cultural heritage within a just, certain, and beneficial legal framework.

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ABOUT THIS ARTICLE

Conflict of Interest: The authors declare no conflicting interests

Data Availability: This study is based on publicly available legal instruments, published academic literature, and institutional documents. The interview transcript with Mr. Iqbal (DJKI, 2025) and field observation notes from Museum Danar Hadi are held by the authors and are available upon reasonable request.

AI-use Disclosure: AI-assisted tools were used only for translation assistance and linguistic refinement of selected passages. No AI system is listed as author or co-author. The authors assume full responsibility for the conceptual framework, source selection, interpretation, analysis, conclusions, and final manuscript.

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MODELO DE PROTECCIÓN HABILITADORA PARA LAS EXPRESIONES CULTURALES TRADICIONALES DE LOS MOTIVOS DEL BATIK BAJO LA TITULARIDAD DEL ESTADO EN BENEFICIO DE LA NACIÓN INDONESIA

RESUMEN

El artículo 38(1) de la Ley de Derechos de Autor de Indonesia (Ley n.º 28 de 2014) otorga al Estado la autoridad sobre las expresiones culturales tradicionales (ECT) mediante la expresión «bajo la titularidad del Estado»; sin embargo, no define el alcance de dicha autoridad, el principio de protección ni los mecanismos de participación en los beneficios. Esta ambigüedad expone a los motivos tradicionales del batik a la apropiación indebida, incluidas las reclamaciones extranjeras y el uso comercial culturalmente inapropiado. Mediante un análisis jurídico-normativo que emplea enfoques legales, conceptuales, comparativos y teleológicos, este estudio reinterpreta dicha expresión como una figura de fideicomiso público, en lugar de propiedad o control administrativo. La jurisprudencia constitucional y los instrumentos internacionales —la Convención de la UNESCO, la Declaración de la ONU sobre los Derechos de los Pueblos Indígenas (DNUDPI), el Protocolo de Nagoya, el Consentimiento Libre, Previo e Informado (CLPI) y el Acceso y Participación en los Beneficios (APB)— convergen en un papel estatal participativo y orientado a la distribución de beneficios. El estudio propone la «Protección Habilitadora»: un marco híbrido que reorienta la autoridad estatal hacia una gestión facilitadora, combinando el registro defensivo con el empoderamiento de los custodios mediante el CLPI y el APB.

Palabras clave: expresiones culturales tradicionales; Batik; consentimiento libre, previo e informado; acceso y participación en los beneficios; propiedad intelectual comunitaria

旨在造福印尼国民的由国家持有的蜡染（Batik）图案传统文化表达之赋能保护模式

摘要

印度尼西亚《版权法》（2014年第28号法律）第38条第1款通过“由国家持有”这一表述，赋予了国家对传统文化表达（TCEs）的管辖权，但未明确界定该权力的范围、保护原则及惠益分享机制。这种模糊性使传统蜡染图案面临被滥用的风险，包括遭受外国主张权利及不当的商业性文化利用。本研究采用规范法学分析方法，结合法条分析、概念分析、比较法及目的解释等路径，将上述表述重新解读为一种“公共受托”关系，而非所有权或行政管控关系。宪法法理与各项国际文书—包括联合国教科文组织（UNESCO）公约、《联合国土著人民权利宣言》（UNDRIP）、《名古屋议定书》以及关于“自由、事先和知情同意”（FPIC）与“获取与惠益分享”（ABS）的原则—均指向一种强调参与和惠益导向的国家角色。本研究提出“赋能保护”模式：这是一个混合型框架，旨在将国家权力重塑为促进性的管理职责，通过FPIC和ABS机制，将防御性注册与赋予保管权能相结合。

关键词：传统文化表达；蜡染；自由、事先和知情同意；获取与惠益分享；集体知识产权

International Journal of
Law in Changing World
Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.177

SHAREHOLDER VALUE THEORY AND STAKEHOLDER VALUE THEORY IN CORPORATE GOVERNANCE: PRACTICE FROM COMPANY LAW IN THE UNITED KINGDOM, GERMANY AND RECOMMENDATIONS FOR VIETNAM

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Article Information:

Received
April 2, 2025
Reviewed & Revised
April 27, 2025
Accepted
May 30, 2025
Published
July 30, 2026

Keywords:

corporate governance,
shareholder value,
stakeholder value,
ESV

ABSTRACT | 摘要 | RESUMEN

The article provides a comparative analysis of how company law in the United Kingdom and Germany institutionalizes shareholder value theory and stakeholder value theory, thereby identifying an appropriate reform orientation for Vietnam. The study combines doctrinal legal research and comparative legal analysis, employing an analytical framework that focuses on corporate purpose, directors' duties, board structure, employee participation, disclosure obligations, and enforcement mechanisms. The findings indicate that the United Kingdom operates under the enlightened shareholder value model, whereby Section 172 of the Companies Act 2006 requires directors to consider the interests of stakeholders while ultimately maintaining a duty to promote the success of the company for the benefit of its members. In contrast, Germany more robustly institutionalizes the stakeholder model through co-determination mechanisms, a two-tier board structure, and a strong supervisory role. On this basis, the article proposes that Vietnam adopt a hybrid model that balances long-term corporate objectives with enhanced mechanisms for protecting stakeholder interests.

FOR CITATION:

Nguyen, S. (2026). The Shareholder Value Theory and Stakeholder Value Theory in Corporate Governance: Practice from Company Law in the United Kingdom and Germany and Recommendations for Vietnam. International Journal of Law in Changing World, 5 (1), 104-122. DOI: https://doi.org/10.54934/ijlcw.v5i1.177

1. INTRODUCTION

The debate between shareholder value theory and stakeholder value theory is widely regarded as one of the core theoretical foundations of modern company law. Shareholder value theory is grounded in agency logic, whereby the corporate structure is primarily designed to control agency costs arising from the separation of ownership and control. In contrast, stakeholder value theory conceptualizes the firm as a distinctive institutional arrangement for coordinating the investments of multiple constituencies, including employees, suppliers, customers, creditors, the community, and the broader social environment [3]. Accordingly, corporate governance cannot be confined to the maximization of shareholders' short-term financial interests, but must also account for a balanced consideration of the interests of relevant stakeholders. The debate has moved beyond the theoretical realm and has been translated into concrete legal issues, such as determining the beneficiaries of directors' duties, defining the objectives of corporate governance, and designing appropriate mechanisms for the enforcement and oversight of such duties.

In comparative legal practice, the United Kingdom and Germany represent two archetypal models of institutionalization with distinct approaches. In the United Kingdom, Section 172 of the Companies Act 2006 establishes directors' duties in accordance with the "enlightened shareholder value" (ESV) approach. Under this provision, directors are required to act in good faith to promote the success of the company for the benefit of its members as a whole, while having regard to long-term considerations, the interests of employees, relationships with business partners, the impact on the community and the environment, as well as corporate reputation and fairness among shareholders. By contrast, in Germany, a two-tier governance structure is established with a clear separation between the Management Board and the Supervisory Board. The Supervisory Board not only performs oversight and appointment functions but also participates in key corporate decisions [5]. Notably, in companies subject to co-determination, the law formally recognizes employee participation in the supervisory body, thereby directly institutionalizing the role of stakeholders within the corporate governance structure.

For Vietnam, the Law on Enterprises 2020, as amended and supplemented in 2025, continues to maintain a corporate governance model for joint-stock companies centered on traditional institutions such as the General Meeting of Shareholders, the Board of Directors, and the Supervisory Board or Audit Committee, while ensuring a relatively comprehensive protection of shareholders' rights, particularly those of ordinary shareholders. However, aspects of corporate governance that integrate stakeholder interests, including disclosure requirements, governance of public companies, and sustainable development are primarily regulated in a fragmented manner across securities law, implementing regulations, and soft-law instruments such as codes of best practice. This reality indicates that the current legal framework remains normatively fragmented: while shareholders' rights are relatively clearly defined in company law, the obligation to consider and balance stakeholder interests in corporate governance has not yet been designed as a central legal institution [18].

This reality highlights the need to further refine company law in a more integrated manner so as to fully reflect the multi-stakeholder nature of modern corporations. Through a comparative analysis of the United Kingdom, Germany, and Vietnam, this article examines how shareholder value theory and stakeholder value theory are institutionalized within corporate governance law. The novelty of this research lies not only in its comparison of representative corporate governance models across common law and civil law systems, but also in its effort to establish a connection between corporate governance theory and the need for corporate law reform in Vietnam. Based on the "enlightened shareholder value" model in the United Kingdom and the co-determination mechanism in Germany, the study identifies several shortcomings in the current Vietnamese Law on Enterprises regarding stakeholder interests, employee participation mechanisms, and sustainable governance responsibilities. Accordingly, the article proposes a hybrid corporate governance model that seeks to balance economic efficiency and shareholder protection while progressively institutionalizing corporate social responsibility and mechanisms for protecting stakeholder interests.

2. LITERATURE REVIEW

The classical line of research on shareholder primacy is most prominently shaped by the works of Jensen and Meckling (1976), as they developed the theory of the firm on the foundation of agency costs, as well as by Hansmann and Kraakman (2001), who argue that the ideological dominance of shareholder primacy nearly represents the "end of history" in the evolution of modern company law. The book The Economic Structure of Corporate Law by Frank H. Easterbrook and Daniel R. Fischel (1991) argues that the corporation is a "nexus of contracts," in which shareholders serve as the residual claimants bearing ultimate risk; accordingly, the maximization of shareholder value constitutes a rational standard for guiding corporate governance. The authors also conceptualize company law as a system of default rules designed to reduce transaction costs and agency costs. At the same time, they criticize multi-objective models on the grounds that such approaches weaken managerial accountability due to the absence of clear evaluative criteria. Accordingly, shareholder value theory not only provides a coherent theoretical foundation for defining the objective of the firm, but also functions as a standardizing mechanism to enhance governance efficiency by minimizing agency costs and ensuring clarity in monitoring managerial behavior.

By contrast, the body of literature on stakeholder theory, originating from Freeman [8] and further developed by Blair and Stout (1999), as well as in more recent studies by Dirk Schoenmaker, Willem Schramade, and Jaap W. Winter (2023), approaches the firm as a coordinated investment space in which multiple actors contribute firm-specific assets. From this perspective, treating shareholders as the sole priority is not only descriptively inaccurate but may also lead to inefficiencies, particularly in the context of modern firms that increasingly depend on knowledge, supply networks, and human capital. Accordingly, stakeholder-oriented governance is not merely an ethical imperative, but also an institutional solution for addressing issues of cooperation, innovation, and risk allocation within the firm.

For the United Kingdom, a significant strand of scholarship focuses on analyzing Section 172 of the Companies Act 2006 as a paradigmatic expression of the "enlightened shareholder value" (ESV) model. Legislative history materials and reform policy orientations indicate that the legislature deliberately opted for the ESV approach, rather than fully transitioning to a comprehensive pluralist model [6]. Conversely, post-reform scholarship, such as the works of Andrew Keay (2013), Kingsley O. Mrabure and Alfred Abhulimhen-Iyoha (2020), generally agree that Section 172 has contributed to a "softening" of shareholder primacy by imposing a duty to consider stakeholder interests, yet without fundamentally altering the priority position of shareholders within the corporate governance structure. This suggests that the ESV model in UK company law represents a conciliatory adjustment: it broadens the scope of stakeholder consideration while maintaining the foundational priority of shareholders, thereby reflecting a cautious reform trajectory rather than a full transition to a stakeholder-oriented model.

For Germany, the theoretical foundations primarily focus on analyzing specific governance institutions such as co-determination mechanisms, the two-tier board model, and the empirical implications associated with employee participation in corporate oversight. Studies by Klaus J. Hopt (2012) and Mathias Siems and David Cabrelli (2018) view the German model as an explicitly legalized system of allocation and sharing of governance power, rather than merely a set of directional duties to consider stakeholder interests. Notably, empirical evidence suggests that co-determination does not necessarily diminish firm performance; on the contrary, in certain contexts, the presence of employee representatives, particularly within audit committees, can help curb opportunistic financial reporting, reduce tax avoidance behavior, and enhance the effectiveness of oversight over earnings management. Accordingly, the defining feature of the German model lies not in the rhetorical emphasis on "stakeholder value," but in the institutional design that enables stakeholders to participate meaningfully and exercise substantive monitoring functions within corporate governance.

Based on the literature review, the article identifies three main research gaps. First, existing studies tend to emphasize theoretical analysis and examine individual legal systems in isolation, thereby failing to clarify the fundamental distinction between "stakeholder consideration" and "stakeholder participation" in corporate governance. Second, in the Vietnamese context, research has largely remained at the level of practical recommendations and transparency standards, without being translated into structurally grounded legislative proposals within company law. Third, although standards such as the Vietnam Corporate Governance Code 2026 [24] and OECD-based guidelines [17] have been adopted, there remains a lack of a clear academic framework to guide their internalization in terms of priority setting, scope of regulation, and appropriate legal instruments.

2.1. Shareholder Value Theory and Stakeholder Value Theory in Corporate Governance in the United Kingdom

In the United Kingdom, modern corporate governance is profoundly influenced by two central theories: shareholder value theory and stakeholder value theory. Shareholder value theory, reinforced by the agency theory of Michael C. Jensen and William H. Meckling (1976), posits that the firm exists to maximize returns for shareholders, who provide capital and bear residual risk. This perspective has been internalized into UK law, most notably through Section 172 of the Companies Act 2006, which requires directors to act in the best interests of the company while taking into account long-term factors and the interests of stakeholders such as employees, suppliers, customers, and the community. This synthesis gives rise to the "enlightened shareholder value" (ESV) model, under which shareholder wealth maximization remains the core objective, but is pursued within a framework of sustainability and ethical responsibility. By contrast, stakeholder theory, developed by R. Edward Freeman in the 1980s, argues that firms should create value for all stakeholders connected to their operations. Although it has not been fully institutionalized as an independent legal doctrine in the UK, stakeholder-oriented thinking has significantly permeated corporate practice through mechanisms such as ESG standards, non-financial reporting, and responsible governance frameworks. In practice, major UK-based corporations such as Unilever [23], BP [4], and HSBC [12] have actively integrated social and environmental considerations into their business strategies. Overall, the contemporary UK corporate governance model does not treat these two theories as mutually exclusive but rather reconciles them, protecting shareholder interests while promoting long-term social responsibility thereby contributing to a more sustainable and accountable economic system in the context of globalization.

The "enlightened shareholder value" model represents a significant shift in corporate governance thinking in the United Kingdom, aiming to reconcile the objective of shareholder value maximization with the demands of business ethics and sustainable development. Unlike traditional shareholder value theory, which prioritizes shareholders' financial interests as the ultimate goal, ESV recognizes that firms cannot operate effectively or sustainably if they disregard the interests of stakeholders such as employees, suppliers, customers, the community, and the environment. ESV has been codified in the UK through Section 172(1) of the Companies Act 2006, which requires directors to act in good faith in the best interests of the company, while having due regard to long-term considerations, including the likely consequences of decisions on long-term sustainability, the interests of employees, relationships with suppliers and customers, the impact on the community and the environment, corporate reputation, and fairness among shareholders. This constitutes a fundamental distinction between the UK model and traditional shareholder value theory in the United States, where corporations are generally understood to owe direct legal duties primarily to shareholders.

According to the analysis of Lucian A. Bebchuk, Kobi Kastiel, and Roberto Tallarita (2022), the ESV model does not displace shareholder primacy but rather "softens" it by encouraging managers to take into account ethical considerations and long-term interests. However, empirical evidence suggests that such managerial discretion does not necessarily result in effective stakeholder protection, as corporate leadership behavior continues to be predominantly driven by the objective of shareholder value maximization [1]. According to these authors, the effectiveness of the ESV model in practice depends significantly on enforcement mechanisms, given that the law does not require directors to ensure or optimize stakeholder interests, but merely to "have regard" to them. This approach risks rendering ESV a form of "ethical veneer," while substantive decision-making remains oriented toward shareholder value maximization. Nevertheless, the UK experience demonstrates that ESV has contributed to shaping a legal framework that guides firms toward sustainable development. This is reflected in the practice of major corporations such as Unilever, BT Group, and Marks & Spencer, which have proactively integrated ESG factors into their governance strategies. In addition, research by Ilze Zumente and Julija Bistrova [25] indicates an increasingly evident shift from shareholder value theory toward a more balanced approach that incorporates stakeholder considerations. Their findings suggest that integrating ESG factors not only enhances financial performance and reduces risk, but also strengthens non-financial dimensions such as corporate reputation, stakeholder trust, and employee engagement, factors that are particularly significant for long-term value creation. This practice reflects a broader trend in which firms are no longer solely focused on short-term profit maximization for shareholders, but are gradually transitioning toward a sustainable development model in which stakeholder interests are regarded as a key condition for preserving and enhancing shareholder value in the long run.

A notable and innovative feature of the enlightened shareholder value model lies in its capacity to facilitate a "dialogue" between two seemingly opposing theories in corporate governance: shareholder value theory, which emphasizes profit maximization for shareholders, and stakeholder theory, which focuses on balancing the interests of multiple constituencies connected to the firm. ESV does not eliminate the central position of shareholders, an essential pillar of the free-market model and a key driver of capital attraction, but instead seeks to expand the ethical and long-term responsibility framework of the firm by requiring directors to consider the impact of their decisions on employees, customers, the community, and the environment. The "hybrid" nature of ESV is reflected in its avoidance of extremes: it neither absolutizes shareholder primacy as in the traditional U.S. model, nor establishes a legally mandated power-sharing structure akin to the co-determination system in Germany. Rather, ESV articulates a flexible governance mechanism in which directors are expected to integrate long-term value creation and social responsibility into strategic decision-making, while still maintaining the primary objective of promoting the success of the company for the benefit of shareholders, albeit in an "enlightened," ethically grounded, and sustainability-oriented manner. In the context of contemporary global challenges, such as climate change, social inequality, declining trust in corporations, and increasing demands for transparency, the ESV model can be viewed as a pragmatic intermediate solution. On the one hand, it preserves market-based principles and sustains investor confidence in value maximization. On the other hand, it encourages firms to enhance their social responsibility by embedding environmental, social, and governance (ESG) considerations as strategic imperatives rather than merely reactive measures. In this sense, ESV facilitates a transition from short-termism to long-term orientation, and from pure profit-seeking to a model of development that harmonizes economic efficiency with social ethics.

2.2. Shareholder Value Theory and Stakeholder Value Theory in Corporate Governance in Germany

In contrast to the corporate governance model in the United Kingdom, the system of corporate governance in the Federal Republic of Germany is deeply rooted in stakeholder theory. It represents one of the most prominent and long-standing examples of the legal institutionalization of a pluralistic approach to interests within the corporate framework, whereby employees, shareholders, the community, and other stakeholders are all afforded a voice in strategic decision-making and corporate oversight.

The most distinctive feature of the German model is the system of co-determination (Mitbestimmung), which is clearly stipulated in the German Stock Corporation Act (Aktiengesetz – AktG) and, in particular, the Co-Determination Act of 1976 (Mitbestimmungsgesetz). Under this framework, in companies with more than 2,000 employees, workers are entitled to occupy 50% of the seats on the Supervisory Board, the body responsible for appointing and overseeing the Management Board [10]. This demonstrates that employees, as key stakeholders, are not only protected by law but are also granted a structurally embedded role in corporate governance. On this basis, the German corporate model does not operate according to a strict logic of shareholder value maximization, but rather is oriented toward a long-term balance of interests, reflected in the notion of "sustainable enterprise value." Under this approach, strategic corporate decisions are not based solely on short-term financial metrics, but must also take into account their broader impact on employees, the environment, local communities, and the economy as a whole.

According to the analysis of Henry Hansmann and Reinier Kraakman (2001), the German co-determination model reflects a form of "legitimized distribution of interests," whereby the corporation is conceived as a social institution rather than merely a profit-generating instrument for shareholders. This sharing of governance power enables German firms to mitigate internal conflicts, orient decision-making toward the long term, and promote more sustainable development, in line with the principles of stakeholder theory. At the same time, the model preserves market discipline and financial efficiency in accordance with shareholder-oriented principles, as ultimate decisions must still be directed toward overall performance and profitability. In this sense, the German co-determination model embodies a deeply institutionalized and reconciliatory approach, effectively integrating the two major governance theories within a coherent and advanced legal framework.

However, this model does not entirely eliminate shareholder value theory. Shareholders continue to hold authority within the General Meeting of Shareholders and retain the power to approve major decisions such as dividend distributions, share issuances, or amendments to the company's charter. Nevertheless, this authority is balanced by the Supervisory Board, which has a dual structure composed of shareholder representatives and employee representatives, thereby creating an institutionalized forum of dialogue among competing interests, an emblematic feature of Germany's social market economy. This dialogical structure enables firms to maintain governance stability in the face of economic volatility, a challenge that many purely market-oriented systems continue to encounter.

In practice, the German governance system has enabled major corporations such as Volkswagen, Siemens, and BASF to sustain long-term stability and growth, even during periods of global financial crisis. Moreover, this model fosters stronger internal cohesion, reduces labor conflicts, and enhances corporate ethical reputation in international markets, an increasingly significant factor for global investors and ESG-oriented funds in the transition toward sustainable development. Thus, co-determination is not merely a corporate governance design, but a broader institutional solution that reconciles economic growth with social equity, and financial performance with corporate ethics in the era of globalization.

In Germany, the corporate governance model is organized under a two-tier structure consisting of a Management Board, which performs the function of corporate management, and a Supervisory Board, which is responsible for oversight, appointment, and control of the Management Board's activities. A distinctive feature of this model is the co-determination mechanism (Mitbestimmung), under which employees in companies with more than 2,000 workers are entitled to occupy up to 50% of the seats on the Supervisory Board. This mechanism represents a direct institutionalization of stakeholder value theory within corporate governance, ensuring that employees have a substantive voice in the strategic decision-making processes of the company. Numerous studies have demonstrated that the co-determination model contributes to strengthening the balance between shareholder interests and broader social interests, while also promoting sustainable development and the long-term stability of enterprises. By contrast, Vietnamese law has not yet recognized any mechanism for the direct participation of employees within the corporate governance structure, except in cases where the State appoints representatives to manage state capital in certain large enterprises or state-owned enterprises.

A notable characteristic of the German corporate governance model is the direct participation of employees in corporate supervision and decision-making, thereby creating a balancing mechanism between shareholder interests and the interests of other stakeholders, consistent with the orientation of a socially embedded market economy. Nevertheless, this model also presents certain limitations, such as the potential reduction of managerial flexibility due to the need to achieve consensus among multiple interest groups, as well as increased negotiation and internal coordination costs. For Vietnam, the adoption of co-determination principles could be implemented gradually through pilot mechanisms in state-owned enterprises or large corporations, for instance by allowing trade union representatives or employee representatives to participate in the Board of Directors or Supervisory Board. At the same time, it is necessary to establish a clear legal framework governing the rights, obligations, and responsibilities of employee representatives in order to minimize conflicts of interest, ensure effective corporate governance, and maintain the stability of business operations.

2.3. Shareholder Value Theory and Stakeholder Value Theory in Corporate Governance in Vietnam

In Vietnam, the current corporate legal framework is predominantly influenced by shareholder value theory, as reflected in the central position accorded to the rights and legitimate interests of shareholders in the design of corporate governance institutions. The Law on Enterprises 2020, as amended and supplemented in 2025, the most important legal instrument governing this field devotes a separate chapter to the regulation of shareholders' rights, particularly those of ordinary shareholders, including the right to attend and vote at the General Meeting of Shareholders, the right to receive dividends, the right to access information, and the right to initiate legal action to protect personal or corporate interests. The prevailing governance structure follows a one-tier model, in which the Board of Directors performs both strategic and, in certain cases, executive functions, with the Chairperson of the Board often concurrently serving as the Chief Executive Officer. This arrangement reflects a relatively centralized ("concentrated") characteristic of corporate governance [22].

By contrast, stakeholder theory, although reflected in various national policy orientations and sustainable development strategies, has not yet been clearly and comprehensively institutionalized within the current corporate legal framework. Stakeholders such as employees, customers, suppliers, the community, and the environment, despite their close connection to corporate activities, are primarily regulated through specialized laws, including the Labor Code, the Law on Environmental Protection, and the Law on Consumer Protection, rather than being directly integrated into the internal governance structure of enterprises. This has resulted in a governance reality in which many Vietnamese enterprises remain heavily short-term oriented, demonstrate limited commitment to sustainable development, and lack effective mechanisms for internal dialogue among different stakeholder groups. [21]

However, in the context of international economic integration and the growing prominence of ESG standards, Vietnam has begun to recognize and move toward integrating the principles of stakeholder theory into its corporate governance framework. Key policy instruments include Resolution No. 24-NQ/TW on climate change adaptation and sustainable development, the National Green Growth Strategy

https://doi.org/10.54934/ijlcw.v5i1.177

for the period 2021–2030, and commitments made at COP26, where Prime Minister Phạm Minh Chính, on behalf of Vietnam, pledged to achieve net-zero emissions by 2050. At the same time, Vietnam has formally joined two major initiatives closely related to the agricultural sector: (i) the Global Methane Pledge and (ii) the Glasgow Declaration on Forests and Land Use. These steps clearly reflect Vietnam's political commitment and sustainable development orientation in the face of intensifying climate change challenges. To operationalize these commitments and position Vietnam as a producer and supplier of food aligned with transparency, responsibility, and sustainability, the government has formulated a strategy for sustainable agricultural development in the coming period. The core focus of this strategy is the transformation of the food system toward a "green," low-emission, and climate-resilient model. In addition, Vietnam aims to increase investment in agricultural infrastructure, encourage deeper private sector participation in investment, development, and the application of scientific and technological advancements in agricultural production [15]. Expanding public-private partnership models and promoting the adoption of digital technologies across the entire agricultural value chain are also key priorities, aimed at enhancing efficiency, transparency, and the global competitiveness of the national agricultural sector.

The government's policy direction reflects a clear determination to transition toward a more sustainable development model, requiring enterprises not only to prioritize shareholder interests but also to consider their social and environmental impacts. A number of large listed companies have taken the lead in publishing sustainability reports in accordance with GRI standards and integrating corporate social responsibility into their internal governance frameworks. However, these initiatives remain largely voluntary and have yet to be embedded within a broadly binding legal framework. Accordingly, it can be observed that Vietnam's corporate legal system continues to place primary emphasis on the protection of shareholder rights, clearly reflecting the influence of shareholder value theory. In contrast, stakeholder theory remains at a "pre-institutionalization" stage, existing mainly as policy guidance or practical recommendations, rather than being translated into binding legal mechanisms or formal corporate governance structures. This situation creates a gap in balancing the interests of different constituencies, thereby generating an urgent need for corporate law reform toward a more progressive framework that reconciles economic efficiency with social responsibility. The study and internalization of stakeholder principles, combined with transparent oversight mechanisms and ESG commitments, will constitute a crucial foundation for enhancing governance quality, strengthening competitiveness, and advancing sustainable development among Vietnamese enterprises in the coming period.

2.4. Some Lessons Learned for Vietnam

Based on the study of corporate governance models in the United Kingdom and Germany, several important lessons can be drawn for improving Vietnamese corporate law toward a balance between economic efficiency and sustainable development:

Firstly, codifying the duty of the Board of Directors to balance the interests of shareholders and stakeholders. One of the key directions for corporate law reform in Vietnam is the gradual codification of the duty of the Board of Directors to consider and balance the interests of shareholders with those of stakeholders, including employees, customers, communities, and the environment. Accordingly, the Law on Enterprises should be amended to incorporate a provision similar to Section 172 of the United Kingdom's Companies Act 2006, requiring board members, when making decisions, to take into account long-term factors, social and environmental impacts, and employee interests in order to ensure the sustainable development of the enterprise. To facilitate effective implementation, it is necessary to promulgate guiding decrees on governance responsibility reporting and organize training programs for enterprises regarding disclosure obligations related to stakeholders. However, expanding governance obligations may increase compliance costs and create concerns among businesses. Therefore, implementation should follow an appropriate roadmap, initially applying on a pilot basis to public companies or large enterprises, while developing standardized reporting templates to minimize practical difficulties.

Secondly, piloting employee representation mechanisms in corporate governance. Experience from the German co-determination model demonstrates that employee participation in corporate governance structures can enhance transparency, reduce conflicts of interest, and promote long-term development orientations. On that basis, Vietnam may consider amending the Law on Enterprises to allow large enterprises, for example those employing more than 1,000 workers, to elect one or two members of the Board of Directors or Supervisory Board as employee representatives. This mechanism should initially be implemented on a pilot basis within certain state-owned enterprises or large private corporations in order to assess its feasibility before broader application. At the same time, it is necessary to establish transparent election procedures and clearly define the rights and responsibilities of employee representatives in corporate governance activities. Although this model may raise concerns among owners regarding the disclosure of business secrets or delays in decision-making processes, such risks may be mitigated through strict confidentiality obligations, internal dialogue mechanisms, and governance training programs for employee representatives.

Thirdly, strengthening transparency mechanisms and ESG sustainability reporting. In the context where ESG standards are increasingly becoming a common requirement in international markets, Vietnam needs to further improve its legal framework by strengthening corporate disclosure obligations relating to sustainable development, particularly for listed companies and large enterprises. Accordingly, the Law on Enterprises or regulations governing information disclosure should require enterprises to prepare and publish annual sustainability reports covering environmental, labor, corporate governance, and social responsibility issues. To ensure feasibility, regulatory authorities should issue technical guidelines based on international ESG standards, while strengthening coordination among the Ministry of Finance, the State Securities Commission, and professional organizations in supervising and supporting enterprises in compliance activities. Nevertheless, the implementation of ESG reporting obligations may create cost pressures and the risk of formalistic reporting practices. Therefore, it is necessary to establish standardized reporting criteria, provide technical support for small and medium-sized enterprises, and impose strict administrative sanctions for false or misleading disclosures in order to ensure effective legal enforcement.

3. RESEARCH METHODOLOGY

The article employs a combination of doctrinal legal research and comparative legal analysis. At the doctrinal level, it interprets statutory provisions, case law, and official guidance to clarify the content, scope, and internal logic of legal standards governing directors' duties, board structures, strategic reporting, and co-determination. At the comparative level, the article adopts a functional approach: rather than merely comparing the wording of legal provisions, it examines how different legal systems address the same governance problem, and how to compel companies to balance long-term value, shareholder interests, and impacts on stakeholders. This approach aligns with the tradition of "comparative anatomy" in company law, where the focus extends beyond legal form to institutional function and internal power structures within the corporation.

3.1. Sources and Research Approach

The primary sources of the article include international materials such as the Companies Act 2006, the Companies (Miscellaneous Reporting) Regulations 2018, the UK Corporate Governance Code 2024, research reports from the Department for Business and Trade, guidance issued by the Financial Reporting Council, as well as case law and case summaries relating to Section 172 in the United Kingdom; the Mitbestimmungsgesetz, the Aktiengesetz, the German Corporate Governance Code, and empirical studies on co-determination in Germany. Within the Vietnamese context, the author examines the Law on

Enterprises 2020 (as amended in 2025), the Green Growth Strategy, the Vietnam Corporate Governance Code 2026, and the Corporate Governance Manual 2025. Priority is given to authoritative official and scholarly sources, while secondary sources are used only for clarification or synthesis.

3.2. Comparative Legal Method

Six criteria are consistently applied throughout the analysis: (i) corporate purpose; (ii) the legal status of shareholder and stakeholder interests; (iii) board structure and the allocation of power; (iv) the degree of employee participation in governance; (v) disclosure obligations and accountability; and (vi) enforcement mechanisms, including the roles of shareholders, courts, soft law instruments, and market pressures. This analytical framework enables a clear distinction and avoids conflating two fundamentally different phenomena: on the one hand, legal systems that recognize stakeholder interests at the level of duty-based language but fail to establish corresponding enforcement mechanisms; on the other hand, systems that do not emphasize stakeholder value discourse yet successfully institutionalize effective representation and oversight mechanisms for these actors within the internal structure of the company.

3.3. Legal Analytical Method

The article employs three analytical techniques. First, normative analysis is used to identify positive legal obligations. Second, functional analysis examines how these rules operate in actual corporate governance practice. Third, normative evaluation assesses which model is more suitable for Vietnam based on criteria such as transparency, legal certainty, the promotion of long-term investment, the level of protection afforded to key stakeholders, and the feasibility of enforcement. Through this integrated approach, the article not only describes the law but also develops reform-oriented recommendations.

4. CONCLUSION

A comparison of company law in the United Kingdom and Germany demonstrates that the debate between shareholder value theory and stakeholder value theory cannot be resolved through rhetorical assertions, but must instead be operationalized through institutional design. The UK model reflects the enlightened shareholder value approach, whereby stakeholder interests are incorporated into directors' duty of consideration and reinforced through reporting mechanisms, while shareholders continue to occupy the central normative position. By contrast, Germany exhibits a deeper level of institutionalization, as stakeholder interests, particularly those of employees, are directly embedded into corporate governance structures and supervisory mechanisms. These two models should therefore not be understood as opposing extremes, but rather as alternative approaches to addressing the same fundamental issues of corporate purpose, internal power allocation, and legal enforcement techniques. On this basis, for Vietnam, an appropriate approach would be to develop a hybrid model that ensures the company is oriented toward long-term sustainable value, while progressively integrating duties to consider key stakeholders, strengthening accountability requirements for major decisions, enhancing internal oversight through independent directors and specialized committees, and developing appropriate institutional mechanisms to systematically reflect the voices of employees and other stakeholders in corporate governance. Such an approach would help mitigate the formalistic nature of stakeholder discourse without imposing institutional burdens beyond the enforcement capacity of the existing legal system.

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ABOUT THIS ARTICLE

Conflict of Interests: The author declares no conflicting interests

AI-use Statement: This article utilizes artificial intelligence (AI) tools as supportive instruments in the research and writing process. These tools are employed to assist the author in suggesting the structure of the paper, refining academic language, preliminarily synthesizing arguments, and guiding the search for relevant references.
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TEORÍA DEL VALOR PARA EL ACCIONISTA Y TEORÍA DEL VALOR PARA LAS PARTES INTERESADAS EN EL GOBIERNO CORPORATIVO: PRÁCTICA DEL DERECHO SOCIETARIO EN EL REINO UNIDO Y ALEMANIA, Y RECOMENDACIONES PARA VIETNAM

RESUMEN

El artículo ofrece un análisis comparativo de cómo el derecho societario del Reino Unido y Alemania institucionaliza la teoría del valor para el accionista y la teoría del valor para las partes interesadas (*stakeholders*), identificando así una orientación de reforma adecuada para Vietnam. El estudio combina la investigación jurídica doctrinal y el análisis jurídico comparado, empleando un marco analítico centrado en el propósito corporativo, los deberes de los administradores, la estructura del consejo de administración, la participación de los empleados, las obligaciones de divulgación de información y los mecanismos de aplicación normativa. Los resultados indican que el Reino Unido opera bajo el modelo de «valor ilustrado para el accionista» (*enlightened shareholder value*), en virtud del cual la Sección 172 de la Ley de Sociedades de 2006 (*Companies Act 2006*) exige a los administradores tener en cuenta los intereses de las partes interesadas, manteniendo al mismo tiempo el deber fundamental de promover el éxito de la empresa en beneficio de sus miembros. Por el contrario, Alemania institucionaliza con mayor firmeza el modelo de partes interesadas mediante mecanismos de cogestión, una estructura de consejo de administración de dos niveles y una sólida función de supervisión. Sobre esta base, el artículo propone que Vietnam adopte un modelo híbrido que equilibre los objetivos corporativos a largo plazo con mecanismos reforzados para proteger los intereses de las partes interesadas.

Palabras clave: gobierno corporativo, valor para el accionista, valor para las partes interesadas, ESV.

公司治理中的股东价值理论与利益相关者价值理论：英德公司法实践及对越南的建议

摘要

本文对英国和德国公司法如何制度化股东价值理论与利益相关者价值理论进行了比较分析，旨在为越南确定适宜的改革方向。该研究结合了法学教义研究与比较法分析方法，构建了一个侧重于公司宗旨、董事义务、董事会结构、员工参与、信息披露义务及执行机制的分析框架。研究发现，英国实行“开明股东价值”模式，即《2006年公司法》第172条要求董事在履行促进公司成功以造福股东（成员）这一最终义务的同时，必须考量利益相关者的利益。相比之下，德国通过共同决定机制、双层董事会结构以及强有力的监督职能，更为有力地制度化了利益相关者模式。基于此，本文建议越南采取一种混合模式，既兼顾公司长期目标，又强化保护利益相关者利益的机制。

关键词：公司治理，股东价值，利益相关者价值，开明股东价值（ESV）

https://doi.org/10.54934/ijlcw.v5i1.177

International Journal of
Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.188

CIVIL LIABILITY IN THE AGE OF ARTIFICIAL INTELLIGENCE: FROM TRADITIONAL TO MODERN THEORIES

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Article Information:

Received
June 2, 2025
Reviewed & Revised
June 5, 2025
Accepted
June 6, 2025
Published
July 30, 2026

Keywords:

Artificial Intelligence,
civil liability,
collective compensation,
electronic personhood,
hybrid liability

ABSTRACT | 摘要 | RESUMEN

The integration of AI into social structures has exposed fundamental shortcomings in traditional civil liability theories, which struggle to address autonomous action, opaque processes, and fragmented accountability across multiple stakeholders. This study adopts a doctrinal and comparative-analytical method to evaluate modern liability frameworks—including electronic personhood, collective compensation, and hybrid liability—against the limitations of conventional approaches. The findings indicate that dynamic legal personhood, vicarious liability for stakeholders, objective risk thresholds, and expert oversight mechanisms offer coherent pathways to address unclear causation and non-transparent algorithms. The primary contribution is a conditional-pluralism framework that balances victim protection, fair risk allocation, and technological progress, providing practical tools for managing AI-related disputes in an evolving legal landscape.

FOR CITATION:

Mirshekari, A., & Zargari, J. (2026). Civil Liability in the Age of Artificial Intelligence: From Traditional to Modern Theories. International Journal of Law in Changing World, 5 (1), 123-144. DOI: https://doi.org/10.54934/ijlcw.v5i1.188

1. INTRODUCTION

As artificial Intelligence (AI) increasingly permeates everyday life—restructuring legal, economic, and social frameworks—the question of civil liability arising from AI-related harms has emerged as a pressing global concern. International efforts, notably the European Union's AI Act, underscore an urgent need for coherent legal frameworks capable of addressing civil liability challenges.[1] In the absence of such frameworks, affected parties risk suffering harm without effective recourse to compensation. [1]; [16]

Existing scholarship has made sustained efforts to align legal doctrines with the practical realities of AI. Early studies highlighted the inadequacies of traditional liability theories when applied to autonomous and complex systems. [2]; [29]; [41] More recent work signals a shift toward innovative theories that better account for AI's distinctive characteristics. [5]; [11] This growing body of research, often grounded in comparative analyses and case studies, has exposed significant gaps in current legal approaches, thereby calling for a fundamental re-examination of established legal concepts.

Despite these advances, the literature remains characterized by a critical lacuna: While existing studies have effectively diagnosed the shortcomings of traditional liability regimes and proposed isolated solutions, a comprehensive, integrated framework that systematically compares traditional and modern approaches and offers a context-sensitive synthesis is notably absent. Most prior research tends to advocate for a single modern theory in isolation or confines its analysis to specific jurisdictions or sectors. [19]; [30]

The present study directly addresses this gap by undertaking a doctrinal and comparative-analytical examination that goes beyond mere diagnosis. Its originality resides in three interrelated dimensions. First, unlike previous work that predominantly contrasts "traditional" and "modern" theories as binary opposites, this study investigates their potential complementarity under clearly specified conditions. Second, it proposes a conditional and pluralistic approach to civil liability in the AI era—one that rejects monistic solutions and instead maps distinct liability tools to concrete technical, contextual, and risk-related variables. Third, it places particular emphasis on the operational and institutional challenges that any reform proposal must confront in practice, thereby bridging the gap between theoretical sophistication and real-world implementability.

Accordingly, this paper provides a precise examination of the transition from traditional civil liability to modern theories, in response to the emerging demands of the AI era. It is structured around several focused research questions: Which civil liability theories have been, or could be, developed to

[1] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on artificial intelligence (Artificial Intelligence Act (AIA)) [2024] OJ L 202/1–xx.

https://doi.org/10.54934/ijlcw.v5i1.188

manage AI-generated risks, while ensuring fair victim compensation and supporting continued innovation? Why do traditional theories prove inadequate when applied to AI-related harm? What obstacles do modern theories face, and which practical solutions may strengthen them?

Through a systematic comparison of established and emerging theories, this study evaluates their respective strengths and weaknesses and offers concrete recommendations for legal policymaking. In doing so, it aspires not merely to add another critique of existing frameworks, but to make a pragmatic contribution to the development of adaptive legal responses, capable of evolving alongside AI capabilities

2. METHODOLOGY

This study adopts a qualitative, doctrinal, and comparative-analytical research design. Doctrinal legal research is particularly suitable for examining civil liability theories because it operates through the systematic analysis, critique, and synthesis of legal rules, principles, and doctrines.

First, traditional civil liability theories (fault, no-fault/strict, vicarious, and product liability) are reconstructed from primary legal sources as well as authoritative secondary sources (peer-reviewed articles and recognized legal commentaries). Second, a comparative-descriptive analysis is employed to examine how three modern frameworks (electronic personhood, collective compensation, and hybrid liability) have been articulated in recent legal scholarship, institutional proposals (particularly the European Parliament's 2017 Resolution on Robotics and the EU AI Act), and soft law instruments (e.g., OECD AI Principles). Third, the study synthesizes these strands into a conditional-pluralist model, mapping each theory to concrete technical, contextual, and risk-related variables.

The primary focus on European Union law (especially the AI Act, the proposed AI Liability Directive, and the Civil Law Rules on Robotics) reflects the EU's status as the first major jurisdiction to adopt comprehensive, risk-based AI regulation, thereby providing the most developed positive legal framework for comparative doctrinal analysis. US materials (e.g., Colorado SB 24-205, Executive Order 14110) and select international soft law instruments (OECD, UNESCO, ISO/IEC standards) are included where they illustrate alternative approaches or emerging consensus on key concepts. The selection is purposive, rather than random, prioritizing jurisdictions and instruments that have produced explicit doctrinal innovations directly relevant to AI liability. No empirical data from courts or surveys were collected.

As a library-based doctrinal study, this research does not generate new empirical evidence and therefore cannot empirically verify how frequently certain challenges occur in practice. Consequently, the suggestions offered in Section 5 are presented as normative, conceptually reasoned proposals rather than empirical solutions.

3. TRADITIONAL THEORIES

Traditional civil liability theories were designed for human behaviors that have foreseeable and nearly similar consequences. Today, they must contend with AI's autonomous behavior, self-evolving mechanisms, and non-transparent decision-making. The present section explores how fault, no-fault, and product liability theories interact with AI technologies, and where these approaches appear likely to fall short in responding to the diverse harms that AI systems may produce.

3.1 Fault Liability

The first theory to be addressed is fault-based liability. This form of civil liability attributes responsibility to a party for damages resulting from negligent conduct that causes harm, requiring proof of fault, damage, and causation. [11]; [25] This framework is theoretically applicable to any actor in the AI lifecycle, including developers, manufacturers, or operators. However, it faces significant hurdles due to AI's inherent characteristics.

A primary obstacle is the so-called "black box" problem, which is particularly characteristic of machine-learning approaches based on deep neural networks, such as deep learning and transformer architectures. This opacity undermines the ability to trace outcomes back to specific human inputs or programming decisions, thereby complicating the establishment of causation and fault.[2] [30]; [35] The issue has motivated a distinct research agenda known as mechanistic interpretability, which seeks to reverse-engineer the learned algorithms and computational circuits within models. [6]

Moreover, AI's autonomous and self-learning capabilities further complicate fault attribution, as system behavior at the time of harm may diverge significantly from its initial design, rendering it difficult to assess what a reasonable person—such as the developer or operator—could have foreseen or prevented. [2]; [29]; [41] The notion of self-learning should be qualified by model architecture. Deterministic models follow fixed computations and produce identical outputs for identical inputs, enabling greater predictability. In contrast, probabilistic models—prevalent in deep learning and especially in generative transformer-based systems—generate outputs stochastically, leading to variability even under identical conditions. [50]

[2] G20 AI Principles [2019] adopted at the G20 Ministerial Meeting on Trade and Digital Economy, Tsukuba, Ibaraki Prefecture, Japan, 8–9 June 2019, Section 1.3; S.B. 24-205 Concerning Consumer Protections in Interactions with Artificial Intelligence Systems, 75th General Assembly, Regular Session (Colorado, USA) [2024], Section 6-1-1702(2); AIA, Article 78; Executive Order 14110: Safe, secure, and trustworthy development and use of artificial intelligence [2023] Federal Register 88(210)/75191, Section 10.

https://doi.org/10.54934/ijlcw.v5i1.188

The human-centric reasonable person standard, which evaluates conduct based on how a prudent and average individual would have acted under the same circumstances, struggles to accommodate non-human AI behavior and may require redefinition to reflect AI's unique operational modes.[3] [4] Finally, informational asymmetry—where AI stakeholders typically possess far more or better information than victims—combined with practical barriers to judicial redress, substantially intensifies the burden of proving fault and causation. [38]

3.2 No-Fault Liability

The second traditional theory covers a group of civil liability doctrines that remove fault as a necessary element to establish liability. Put simply, although these doctrines differ in theory and practice across jurisdictions, they generally impose liability on those who create or manage risks, regardless of fault.[4] [8]; [25]

3.2.1 Strict Liability

By following strict liability, stakeholders of high-risk AI systems cannot generally escape liability by merely invoking due diligence. [10]; [13] The European Union's AI regulatory framework reflects this approach[5] — it classifies AI systems according to risk level and requires strict compliance measures and ex-ante assessments. [19] That said, the exceptional character of these liability regimes limits their broad application to AI, since lawmakers usually confine them to clearly defined, high-risk activities. [16]

Notably, this doctrine also raises concerns about a chilling effect on innovation—the risk that fear of legal sanctions may discourage legitimate activity. Extensive liability exposure deters investment and experimentation for AI development. [43] Finally, while some regulatory efforts seek to define what constitutes a high-risk AI system, particularly in contexts involving critical decisions, serious difficulties remain.[6] Measuring AI-related risks and setting clear liability thresholds continues to pose challenges, largely because historical data is limited, and the long-term effects of AI remain only partially understood. [8]

[3] S.B. 24-205 (Colorado, USA), Sections 6-1-1702 & 1703; Resolution of the European Parliament of 20 October 2020 with Recommendations to the Commission on a Civil Liability Regime for Artificial Intelligence (Civil Liability for AI) (2020/2014(INL)) [2020] P9 TA (2020)0276, Article 8(2)(B).
[4] G20 AI Principles [2019], Sections 1.4 & 1.5.
[5] Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) [2021] COM (2021)206 final; AIA, Article 6 & Annex III; Civil Liability for AI, Article 4.
[6] S.B. 24-205 (Colorado, USA), Section 6-1-1701(9); AIA, Article 6.

https://doi.org/10.54934/ijlcw.v5i1.188

3.2.2 Absolute Liability

Building on the theory of liability without fault, absolute liability sets a more demanding framework. It holds individuals liable for harm caused by their AI systems, with no exceptions and no defenses. Unlike earlier doctrines, which allow defenses such as force majeure, absolute liability determines liability without regard to causation. [22]; [26]; [28] Given the autonomous and unpredictable behaviors of AI, this doctrine provides a strong incentive for stakeholders to comply with the highest safety and monitoring standards, because liability is established regardless of the precautions taken.

In the context of the EU AI Act, this strict liability approach finds partial alignment with the treatment of certain AI applications classified as prohibited practices,[7] which are deemed unlawful by default and banned outright from being placed on the market, put into service, or used within the EU.[8] In such cases, any deployment violating these prohibitions triggers inherent unlawfulness, leaving virtually no room for justification or defenses, thereby reinforcing a near-absolute form of accountability for harms arising from such uses.

This doctrine, however, deepens the concerns already linked to the previous doctrine, notably the risk of slowing innovation, and it also brings new difficulties with it. For example, liability without defenses may place an unfair burden on individuals who could not reasonably foresee or prevent the harm—especially where AI learning patterns behave unexpectedly, or where third-party interference, such as hacking, plays a role.

3.2.3 Vicarious Liability

Vicarious liability, another doctrine relevant to AI, extends the principles of liability without fault by imputing responsibility from an agent to a principal for wrongful acts committed within their relationship. [24] This doctrine serves to allocate liability to the party who is in the best position to control the conduct of the agent and bear the associated risks. However, in the context of contemporary agentic systems (commonly referred to as AI agents), the application of vicarious liability faces fundamental obstacles.

An agentic system is today understood as an autonomous AI system capable of pursuing complex, long-term goals with minimal human supervision, by perceiving its environment, reasoning over plans, and executing actions through iterative perception-reasoning-action loops. [39] The functionality, predictability, and risk profile of these agentic systems are thus heavily shaped by 1) the underlying model's architecture and training data (influencing generality, capabilities, and biases), 2) available

[7] AIA, Article 5.
[8] AIA, Article 5(1)(a-h).

integrations and tools (determining the scope of possible actions and environmental interactions), and 3) the specific deployment/use context (e.g., virtual software agents versus physical robotics, or enterprise versus consumer applications), which collectively affect controllability and the applicability of regulatory frameworks.

Crucially, the absence of legal personality for AI systems—even highly agentic ones—precludes their classification as agents in the strict legal sense required for vicarious liability. [30]; [44] Moreover, as these agentic systems exhibit increasing levels of goal-directed autonomy, proactivity, adaptability, and capacity for multi-step decision-making, the degree of direct human control becomes progressively attenuated. This erosion of effective control fundamentally blurs—and often severs—the traditional agency relationship between a human principal and the AI agent, thereby weakening (or eliminating) the doctrinal justifications for imposing strict vicarious liability on a human principal (developer, deployer, or user) for the AI system's acts or omissions. [5]; [10]; [13]; [45]

3.3 Product Liability

Product liability is the last of the traditional theories. It places liability on manufacturers and other supply chain actors for harm caused by defective products. [23] Notably, this theory differs from fault-based liability because it usually imposes liability without fault on producers—meaning, a person only needs to show that a defect in the product caused the harm.

By its nature, this doctrine suggests itself as a suitable framework for AI systems.[5] However, applying it to AI raises immediate difficulties tied to the definition of a product, especially whether software and algorithms qualify as such. [4] Many jurisdictions continue to wrestle with this issue and often classify AI software as a service. As a result, liability analysis shifts back toward fault-based liability. [5]; [7]

More troubling still, the continuous learning and autonomous evolution of AI systems appear to undermine the element of defect. An AI system's conduct at the moment harm occurs may not reflect any design flaw that existed at the point of manufacture. [3]; [16] This gap weakens the core premise of product liability and allows manufacturers to rely on the state-of-the-art defense. [36] Against this backdrop, the intricate, multi-stakeholder chains involved in AI development make matters worse. [5]

4. MODERN THEORIES

In the face of escalating complexities surrounding the establishment of robust legal frameworks for assigning responsibility and attributing liability in cases of harm caused by AI systems, modern theories have emerged as innovative solutions. These theories seek to bridge the gaps inherent in traditional liability theories. This section explores each theory, highlighting their conceptual foundations, practical implications, and distinct benefits.

4.1 Electronic Personhood

One of the most forward-thinking theories proposes granting legal personality to AI systems, a concept often denoted as electronic personhood. This approach envisions AI entities as independent actors capable of bearing direct liability for their actions, much like corporations. [11]; [45]; [46] At its essence, this theory posits that sufficiently advanced AI—those exhibiting capabilities such as machine learning, autonomous decision-making, and behaviors that could meet the cognitive benchmarks for civil liability—should be afforded a legal personality. This status would empower AI systems to assume responsibility for their conduct, even allowing the seamless application of established liability theories, especially vicarious liability. [12]; [27]; [42]

Foremost among advantages of this theory is its ability to resolve persistent difficulties in establishing causation and fault within the opaque architectures of AI systems, due to their non-transparent decision-making processes. By attributing personhood to AI, this framework simplifies the legal process for aggrieved parties, enabling more straightforward claims for compensation, without the need to disentangle the roles of multiple stakeholders. [4]

Moreover, a pragmatic view treats personhood not as an inherent, metaphysical property to be discovered, but as a flexible bundle of rights and responsibilities that society can tailor to specific needs. This allows the creation of bespoke solutions, such as making certain persistent and agentic AI systems directly sanctionable or contractually addressable, even in cases where tracing responsibility to human owners or developers becomes practically impossible. [32] This theory also fosters innovation by clarifying liability boundaries, which can encourage investment in AI technologies without the fear of unpredictable personal liabilities for human actors.

Institutionally, this idea has attracted significant attention, as evidenced by the European Parliament's 2017 deliberations on creating a specialized legal status for autonomous robots as electronic persons responsible for damages they cause.[9] Although this proposal has not yet translated into binding legislation [31], it represents a pivotal exploratory step toward embedding AI within comprehensive liability structures. Overall, the electronic personhood theory's primary strength lies in its potential to create a balanced ecosystem where AI's benefits are maximized, while safeguarding individual rights through direct liability and, over the longer term, supporting a coherent allocation of rights, duties, and societal responsibilities across both human and artificial entities.

[9] European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (Civil Law Rules on Robotics) (2015/2103(INL)) [2017] OJ C 252/239, Paragraph 59(f).

4.2 Collective Compensation

A second modern theory of civil liability, identified in legal literature, is the collective compensation theory. This theory supports a framework of shared liability among multiple stakeholders for compensating victims of AI–related harms.[10] [5] It developed as a practical response to the problem of AI's inherent opacity [19]; [30]; [48] — an opacity that makes it difficult, and often impossible, for plaintiffs to trace harm through traditional chains of causation. In many scenarios, harm arises from the cumulative interplay of contributions across these stages, making it exceedingly difficult to isolate a single causal actor or pinpoint individual fault under conventional doctrine. As a result, conventional linear doctrine of civil liability frequently fails.

Notably, the strength of the collective compensation theory lies in its no-fault character. Rather than focusing on prolonged investigations into individual fault, it places victim relief at the center of the legal response. By creating a dedicated compensation fund—financed through mechanisms such as levies on AI transactions or mandatory insurance obligations imposed on AI's stakeholders—the theory ensures timely and reliable compensation for injured parties, even when no single liable actor can be clearly identified. [14]; [18]

To implement such a mechanism feasibly in practice, several concrete execution steps would be required. These include: 1) defining the scope of covered AI systems and harms through clear regulatory criteria (e.g., high-risk applications, as per emerging frameworks); 2) establishing a centralized or decentralized fund administration body, potentially overseen by a public authority or industry consortium; 3) designing equitable contribution formulas based on factors such as the inherent hazard level, revenue from AI activities, compute usage, or market share in the value chain; 4) mandating participation via legislation or binding industry standards, with penalties for non-compliance; 5) creating efficient claims processes, including simplified evidentiary thresholds focused on demonstrating harm causation by the AI system, rather than fault; and 6) incorporating periodic audits, risk-based adjustments to contributions, and mechanisms for subrogation or recourse against grossly negligent actors to preserve incentives for safety.

In fact, it reflects principles of restorative justice and social solidarity by treating AI-related harm as a shared risk, rather than an isolated personal failure. The theory allocates the financial consequences of AI's risks across all those who benefit from the technology, which helps prevent any one stakeholder from absorbing disproportionate or unforeseeable losses. [16] Put simply, by channeling residual risks into collective mechanisms, the theory softens the deterrent effect of strict personal liability. [30]

[10] Civil Law Rules on Robotics, Paragraphs 57, 58 & 59; Civil Liability for AI, Article 22; Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) [2022] COM(2022)496 final, Paragraph 31, Article 5.

https://doi.org/10.54934/ijlcw.v5i1.188

4.3 Hybrid Liability

Another modern theory is hybrid liability. It presents a practical and carefully reasoned step forward in AI governance to remedy the shortcomings of civil liability theories by combining established doctrines with AI's characteristics. [36] This theory involves AI applications, from simple tools to highly autonomous systems, with their different levels of risk. As a result, it proposes a classified regime that adjusts liability based on factors such as opacity, supervision, autonomy, and the kind of harm. [30]

Structured in at least three tiers, the theory aligns liability with both the characteristics of the AI system and its operational context. At the first tier, low-risk AI systems with high transparency and strong human monitoring are subject to fault-based liability, where claimants must prove fault, damage, and causation. [19] For instance, this tier could apply to routine consumer AI applications, such as basic recommendation algorithms in spam filters in email services (mirroring the minimal or no-risk category in the EU AI Act, which imposes virtually no mandatory obligations[11]). Moving upward, the second tier applies strict liability to more complex, opaque, or autonomous systems. Here, the framework eases the plaintiff's burden by requiring proof of causation alone rather than fault—an approach that appears especially suitable in black box features where examining internal processes is often hidden. [8] Examples include high-risk deployments such as AI systems used in medical diagnostics (aligning with the high-risk category under the EU AI Act, which demands rigorous conformity assessments, risk management, and transparency measures to protect health, safety, and fundamental rights[12]). At the highest level, the third tier relies on absolute liability for AI systems that pose high-stakes or systemic risks, using no-fault doctrines to secure swift compensation for victims. [16]; [30] This tier would cover scenarios involving systemic or catastrophic potential, such as advanced autonomous vehicles in widespread deployment, where failures could affect large populations or public safety on a broad scale (echoing elements of the highest scrutiny in risk-based frameworks like the EU AI Act, while noting that truly unacceptable risks are typically prohibited outright rather than merely assigned absolute liability[13]).

The hybrid-liability tiers add value beyond merely mirroring the EU AI Act's risk categories by addressing two gaps the Act leaves open: (1) dynamic oversight adjustment — allowing liability to shift downward where effective human control is demonstrated, even for high-risk systems; and (2) jurisdictional adaptability — enabling non-EU regulators to adopt liability tiers calibrated to local legal contexts, without adopting the entire EU risk taxonomy. Thus, hybrid liability operationalizes risk classification into enforceable, context-sensitive legal standards.

[11] AIA, Article 95.
[12] AIA, Articles 6, 8–51, Annex III & Annex I.
[13] AIA, Article 5.

https://doi.org/10.54934/ijlcw.v5i1.188

The strengths of this hybrid approach are notable. Its adaptability allows regulators to respond differently across the AI applications, from routine consumer to critical infrastructure, such as medical AI. By adjusting liability standards to match risk levels, the framework helps avoid the chilling effects that uniform and overly punitive rules can create, while still motivating developers to invest in safer and more transparent systems. [19]

5. CHALLENGES AND SUGGESTIONS

Driven by practice, rather than theory alone, the move from traditional civil liability theories to modern theories in the field of AI reflects clear weaknesses in older frameworks. Those theories were built for human behavior, not for AI that acts autonomously, operates opaquely, and interacts across complex networks. As a result, they often struggle with core issues—establishing causation in black box algorithms, allocating fault among dispersed stakeholders, and delivering timely redress to victims.

By contrast, modern theories suggest a more workable path forward. They respond directly to AI's features and appear better suited to balancing fairness with practical enforcement. Notably, these approaches support innovation while still preserving accountability, making it more likely that society can benefit from AI without weakening legal protection for those harmed. Despite the persuasive benefits of modern theories, each one of them faces serious practical difficulties that call for workable responses. This section examines these challenges in detail and suggests strategies for addressing them in a realistic and effective manner.

5.1 Dynamic Legal Personhood

At the core of the granting legal personhood to AI systems lies a fundamental constraint: AI systems cannot hold independent financial resources to compensate for the damage they cause. [4] To deal with this problem, scholars suggest tools such as mandatory insurance schemes or dedicated compensation funds, specifically established for AI-related harm. [5] However, mandatory insurance itself faces significant practical obstacles, particularly during the early phase of implementation. Insurers are likely to exhibit considerable hesitation in underwriting civil liability coverage for AI systems, primarily because of the acute difficulty in reliably quantifying and pricing the novel, rapidly evolving, and highly context-dependent risks involved.

Drawing inspiration from ancient Roman law, some have proposed the idea of a Digital Peculium—a limited financial pool assigned to an AI system, similar to the resources once allocated to slaves, allowing AI to bear liability up to a defined ceiling. [9] This proposal, while creative, appears difficult to apply in practice, since compensation caps may leave victims without adequate redress, especially where harm is wide or the AI system becomes insolvent. [34] From a normative view, granting

https://doi.org/10.54934/ijlcw.v5i1.188

rights to AI without attaching corresponding duties risks reducing legal personhood to a symbolic label—one that lacks real legal substance. [15]; [19]; [47] Notably, there is also a real danger that corporations or individuals might use AI's legal personhood as a shield to avoid liability. [17]; [31]

Furthermore, the growing tendency to anthropomorphize AI systems—attributing human-like emotions, intentions, moral agency, or sentience to them—exacerbates these concerns. [33] While such features may enhance user engagement, they frequently lead to the neglect of robust functional governance, particularly in light of documented harms such as psychological distress, encouragement of self-harm, and privacy violations. [37] In the context of legal personhood debates, excessive anthropomorphization risks misdirecting normative arguments toward granting personhood on illusory, human-like grounds rather than pragmatic accountability needs, potentially obscuring corporate liability and complicating the allocation of responsibility for AI-caused harms.

Responding to these concerns, one can suggest a model of dynamic legal personhood that adjusts the scope of legal status according to an AI system's autonomy, adaptability, decision-making capacity, and degree of human control. Under this framework, highly autonomous systems would carry liability of their own, while systems operating under wide human oversight would keep liability for human actors. By translating this idea into practice, global standards could be developed to assess AI autonomy, using criteria such as algorithmic complexity, decision-making independence, and the extent of human intervention. Although the question arises as to which institution would be competent to develop and implement such standards, existing and emerging international bodies could play leading or collaborative roles in this process. For instance, established organizations such as the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC)—through their joint technical committee on AI (ISO/IEC JTC 1/SC 42)—already produce widely recognized technical standards for AI management, risk assessment, and governance frameworks that could be extended or adapted to include autonomy evaluation metrics.[14] Complementary efforts by intergovernmental entities like the Organisation for Economic Co-operation and Development (with its updated AI Principles) and the United Nations Educational, Scientific and Cultural Organization (UNESCO)[15] provide normative foundations and multi-stakeholder processes suitable for building consensus on autonomy criteria. More recently proposed or evolving mechanisms, including networks of AI Safety Institutes, the United Nations' initiatives such as the Independent International Scientific Panel on Artificial Intelligence, or dedicated

[14] For example, ISO/IEC 22989:2022 Artificial intelligence concepts and terminology; ISO/IEC 23053:2022 Framework for AI systems using machine learning (ML); ISO/IEC 23894:2023 Artificial intelligence — Guidance on risk management; ISO/IEC 5338:2023 AI system life cycle processes; ISO/IEC TR 24027:2021 Bias in AI systems and AI aided decision making.

[15] UNESCO, Recommendation on the Ethics of Artificial Intelligence (the General Conference 23 November 2021, document SHS/BIO/REC-AIETHICS/2021).

multi-stakeholder forums, could contribute to harmonized methodologies, ensuring both technical rigor and broad legitimacy across jurisdictions.

For AI systems granted complete legal personality and operating with little or no human supervision, national or international compensation funds would ensure effective victim compensation. At the same time, stakeholders involved with AI systems—where human supervision remains significant and legal personality is minimal—should remain liable under vicarious liability theory for the damage those systems cause.

5.2 Redesigning Collective Compensation

The collective compensation theory demands careful legal planning to prevent moral hazard, and to ensure it does not, in practice, protect negligent actors from liability. [36] The theory invites a setting in which corporations may neglect essential safety standards, trusting that liability will disperse across a collective fund. [49] This result weakens deterrence and erodes the principle of corrective justice—which expects wrongdoers to bear the costs of the harm they cause.[16]

Protecting against these risks requires a framework that firmly balances risk-sharing with individual liability. One practical approach would allow legislators to structure contribution schemes so they reflect not only a firm's market share or role in AI development, but also its safety record. As a result, actors that behave recklessly would carry heavier financial obligations, rather than hiding behind the collective.

Safety principles can be drawn from established sources, such as the EU AI Act, which adopts a risk-based approach emphasizing human oversight, technical robustness and safety, transparency, privacy and data governance, fairness, societal well-being, and accountability.[17] Alongside this, lawmakers could codify binding safety standards—drawing on internationally recognized frameworks, such as ISO/IEC 42001,[18] which focus on organizational governance, risk assessment, responsibility allocation, human oversight, technical robustness, incident management, and continuous improvement—rather than attempting to impose a single, rigidly fixed technical standard.

Such standards provide practical, evaluative tools that remain adaptable to the diverse forms of AI systems (varying in model types, training strategies, data regimes, and integration architectures) and their task- and context-specific effectiveness. An overly prescriptive, uniform technical standard risks becoming quickly outdated or stifling innovation, whereas safety-oriented standards offer certainty at the organizational level and can be legally operationalized—for instance, when determining whether an AI

[16] An age-old maxim says, "everyone is responsible, nobody is responsible."
[17] AIA, Recital 27, Articles 9, 10, 13, 14, 15, 16, & 43.
[18] International Organization for Standardization, ISO/IEC 42001:2023 Artificial Intelligence — Management System (2023).

operator has exercised due diligence, implemented sound governance, or adopted reasonable safety measures in a given use case. Additional guidance may also be informed by resources from organizations such as the OECD [40] and non-profits, including the Future of Life Institute [20], whose AI Safety Index evaluations highlight varying levels of safety practices across leading developers and underscore the value of independent assessments.

Importantly, the collective mechanism should not operate as an absolute liability shield. Where clear and convincing evidence demonstrates gross negligence, willful misconduct, or severe breach of mandatory safety obligations by a specific actor, the regime must preserve the possibility of supplementary or escalated individual accountability. This may take the form of an increased contribution coefficient applied retroactively to that participant, exclusion from certain protections of the fund, or — in particularly egregious cases — the activation of parallel direct civil liability outside the collective framework. Such a dual-track structure safeguards the deterrent function of liability law and prevents strategic reliance on the fund as a means of evading personal responsibility.

Notably, positive incentives may also play a role. Offering tax advantages or reduced fund contributions to companies that submit to regular third-party safety audits likely encourages liable conduct without stifling innovation. By embedding such safeguards, the collective compensation theory shifts from a narrow compensatory tool into a regulatory-liability model.

5.3 Thresholds Based on Objective Metrics

The hybrid liability theory also faces a practical issue that, in fact, appears manageable if addressed with care. That is, setting clear thresholds for moving between liability tiers—starting with low-risk systems under strong human oversight, extending to complex systems governed by strict liability, and reaching critical systems subject to absolute liability. These boundaries often remain unclear and depend on subjective judgments, which can draw courts into lengthy disputes and, as a result, delay compensation for victims.

By adopting a uniform method based on both quantitative and qualitative criteria, lawmakers can reduce this uncertainty. In particular, thresholds could incorporate assessments of three core dimensions frequently highlighted in AI safety frameworks: 1) the degree of autonomy (i.e., the system's capacity for independent, multi-step action with limited or no human intervention), 2) task competence (i.e., demonstrated performance level across designated functions or domains), and 3) scope of generality (i.e., breadth of applicability, adaptability to untrained tasks, and transfer learning ability).[19] Such

[19] The Society of Automotive Engineers (SAE) outlines six levels of driving automation, from Level 0 (fully manual) to Level 5 (fully autonomous). These levels have been adopted by the U.S. Department of Transportation.; ISO/IEC. (2023). ISO/IEC 23894: Artificial intelligence — Guidance on risk management. International Organization for Standardization/International Electrotechnical Commission.

multidimensional evaluation aligns closely with emerging proposals that differentiate risk tiers according to combinations of strength in autonomy, competence, and generality, thereby enabling more precise and defensible categorization of systems, from narrowly scoped tools to highly capable, open-ended ones. [21] To keep these standards current, an interdisciplinary expert committee made up of legal scholars and AI engineers could periodically review and revise the thresholds, ensuring they reflect technological developments and newly identified risks.

To mitigate the substantial risk of strategic under-classification — whereby developers might deliberately design or present systems in ways that minimize apparent risk exposure and thereby reduce liability obligations — independent third-party conformity assessment should be mandatory for all systems proposed for mid- or high-liability tiers. Such assessments, conducted by accredited bodies, would prevent self-serving misclassification and preserve incentives for advancing genuinely capable systems in high-stakes domains. Without robust safeguards against this form of regulatory gaming, developers may gravitate toward conservative, low-autonomy designs that trigger lighter liability regimes, even when technically superior and socially valuable applications exist in medicine, autonomous transport, or critical infrastructure. This distortion could suppress innovation precisely in those areas where AI has the greatest potential to deliver societal benefit, ultimately skewing market outcomes toward safer-but-less-impactful technologies and undermining the overall objectives of balanced risk allocation and technological progress.

5.4 Conditional Pluralism in Civil Liability Theories for AI

The foregoing analysis might suggest that it ultimately prefers hybrid liability as the most balanced and practicable framework. However, just as no single traditional doctrine can comprehensively address all AI-related harm scenarios, none of the modern proposals should be treated as the exclusive or universally superior solution.

Following a pluralist yet disciplined methodology, the present study submits that each theory contains partial but genuine truths, and offers valuable tools for distinct classes of problems. Theories are not final destinations, but instrumental means toward the overriding telos of civil liability in the AI era: achieving justice between victim protection, fair risk allocation among stakeholders, and the socially desirable advancement of beneficial technology.

Accordingly, the preferable path forward is not to select one modern theory and discard the others, but to construct a conditional, context-sensitive liability map that activates different elements, or combinations of elements, depending on clearly specified situational variables. The most relevant variables include at minimum: 1) degree of system autonomy (narrow-task tool vs. long-horizon agentic system), 2) opacity of the decision-making process, 3) severity and scale of potential harm (individual vs.

catastrophic), 4) availability and effectiveness of human oversight, 5) structure of the value chain (single developer vs. multi-layered supply chain involving foundation model providers, fine-tuners, deployers, cloud infrastructure, end-users), and 6) existence and enforceability of mandatory insurance or compensation funds.

Under this conditional-pluralist framework: 1) Electronic personhood (possibly dynamic / limited) gains strongest normative weight in long-lived, highly autonomous, minimally supervised systems — especially open-source or decentralized agentic AI — where tracing back effective human control becomes practically impossible, and a stable accountability locus is urgently needed; 2) Collective no-fault compensation mechanisms should be activated as the default or residual layer whenever multi-stakeholder opacity prevents reliable individual causation tracing, or when swift victim relief is regarded as more important than pinpointing fault; and 3) Hybrid liability constitutes the backbone regime for the largest share of currently foreseeable high-risk applications because it offers proportionality and preserves deterrence incentives while easing the victim's burden in opaque settings.

Such conditional pluralism avoids both monistic dogmatism and undisciplined relativism. It requires lawmakers and courts to transparently and revisibly articulate the precise triggering conditions and priority rules among the available tools. Doing so demands intellectual humility, analytical rigor, and moral responsibility. By embracing this disciplined pluralist stance, the legal system can better track technological reality, respond adaptively to new capabilities and risks, and remain oriented toward the overriding goal of justice rather than the idolization of any single doctrinal construct.

6. CONCLUSION

The rapid integration of AI into society signals a clear shift—one that brings serious legal concerns with it. Civil liability's traditional theories, built around human conduct, are poorly suited to AI systems that act autonomously, operate opaquely, and function within networks of actors. These theories often fail to trace causation inside black box algorithms, assign fault among scattered stakeholders, or deliver timely remedies to injured parties. As a result, gaps emerge in liability, victim compensation, and the careful balance between encouraging innovation and protecting safety. Over time, these weaknesses risk eroding public trust in AI technologies, which likely slows adoption and chills the innovation many sectors rely on. Moving away from outdated liability theories towards AI-specific theories is therefore necessary—these newer approaches seek to align liability with AI's distinctive features while supporting technological development.

Modern theories—electronic personhood, collective compensation, and hybrid liability—present practical and forward-looking responses to the problems of earlier theories. Yet, none of them should be elevated to the status of a sole, universally applicable paradigm. Instead, the most defensible position is a conditional, pluralist framework that accords each approach its appropriate domain and weight according to context-specific criteria (autonomy, opacity, harm scale, oversight feasibility, value-chain complexity). Such disciplined pluralism — while intellectually more demanding — better honors the complexity of AI-mediated harm, avoids the hubris of monistic solutions, and keeps the ultimate telos of civil liability firmly in view.

At the core, developing such a conditional-pluralist liability framework through global cooperation, shared standards, and interdisciplinary research stands as a legal necessity. By refining and selectively combining dynamic legal personhood, collective compensation, and hybrid liability under clearly stated conditions and priority rules, legal systems can adapt alongside AI, rather than lag behind it. This approach offers a realistically flexible yet normatively responsible path forward—one where responsibility keeps pace with technology. Supported by sustained theorizing and intellectual investment, such a framework allows technology and justice to grow together, protecting individual rights while opening space for AI's considerable potential.

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ABOUT THIS ARTICLE

Conflict of Interests: The authors declare no conflicting interests

CRediT Authorship Contribution Statement:

Abbas Mirshekari contributed to the supervision, project administration, and review & editing of the manuscript.
Jamshid Zargari was responsible for the conceptualization, methodology, investigation, writing of the original draft, and validation of the work.

Data Availability: This manuscript is a doctrinal and comparative-analytical study based exclusively on publicly available legal sources, including statutes, case law, official reports, and peer-reviewed academic literature. All sources cited in this paper are listed in the References section.

AI-use Disclosure: During the preparation of this manuscript, the authors used DeepL solely for language polishing and grammatical refinement. After using this tool, the authors reviewed and edited the content as needed and take full responsibility for the final version of the manuscript. No AI tools were used for idea generation, data analysis, or substantive intellectual work.

LA RESPONSABILIDAD CIVIL EN LA ERA DE LA INTELIGENCIA ARTIFICIAL: DE LAS TEORÍAS TRADICIONALES A LAS MODERNAS

RESUMEN

La integración de la inteligencia artificial (IA) en las estructuras sociales ha puesto de manifiesto deficiencias fundamentales en las teorías tradicionales de responsabilidad civil, las cuales presentan dificultades para abordar la actuación autónoma, los procesos opacos y la responsabilidad fragmentada entre múltiples partes interesadas. Este estudio emplea un método doctrinal y analítico-comparativo para evaluar los marcos modernos de responsabilidad —tales como la personalidad electrónica, la indemnización colectiva y la responsabilidad híbrida— frente a las limitaciones de los enfoques convencionales. Los resultados indican que la personalidad jurídica dinámica, la responsabilidad por actos de terceros (responsabilidad vicaria) atribuible a las partes interesadas, los umbrales de riesgo objetivo y los mecanismos de supervisión experta ofrecen vías coherentes para abordar la causalidad difusa y la falta de transparencia de los algoritmos. La principal contribución es un marco de pluralismo condicional que equilibra la protección de la víctima, la distribución equitativa del riesgo y el progreso tecnológico, proporcionando herramientas prácticas para gestionar los litigios relacionados con la IA en un panorama jurídico en constante evolución.

Palabras clave: Inteligencia artificial, responsabilidad civil, indemnización colectiva, personalidad electrónica, responsabilidad híbrida

人工智能时代的民事责任：从传统理论到现代理论

摘要

人工智能融入社会结构，暴露了传统民事责任理论的根本缺陷，使其难以应对自主行为、不透明的运作过程以及涉及多方主体的责任分散问题。本研究采用法理分析与比较分析相结合的方法，针对传统责任模式的局限性，评估了包括“电子人格”、集体赔偿及混合责任在内的现代责任框架。研究结果表明，动态法律人格、利益相关者的替代责任、客观风险阈值以及专家监督机制，为解决因果关系不明和算法不透明问题提供了切实可行的路径。本研究的主要贡献在于构建了一个“有条件的多元主义”框架，该框架在受害者保护、公平的风险分担与技术进步之间实现了平衡，为在不断演变的法律环境中处理人工智能相关纠纷提供了实用工具。

关键词：人工智能，民事责任，集体赔偿，电子人格，混合责任

International Journal of
Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.186

INTELLECTUAL PROPERTY GOVERNANCE IN THE AGE OF ARTIFICIAL INTELLIGENCE: REGULATORY FRAGMENTATION AND THE TRANSFORMATION OF DIGITAL AUTHORITY

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Article Information:

Received
May 18, 2025
Reviewed & Revised
May 25, 2025
Accepted
May 25, 2025
Published
July 30, 2026

Keywords:

Artificial Intelligence, intellectual property governance, regulatory fragmentation, algorithmic creativity, digital governance

ABSTRACT | 摘要 | RESUMEN

Regulatory fragmentation surrounding artificial Intelligence (AI) and intellectual property governance reflects deeper transformations in the organization of digital authority rather than mere doctrinal inconsistency. Existing scholarship frequently approaches AI-related copyright and patent disputes through narrow legal formalism, offering limited explanation of how algorithmic creativity reconfigures governance relations between states, multinational technology corporations, and transnational digital infrastructures. Using a comparative socio-legal and interpretive governance framework, this article analyzes legislation, judicial decisions, and regulatory instruments across the United States, the European Union, China, and selected Global South jurisdictions. The findings demonstrate that fragmented regulatory responses emerge from competing governance rationalities concerning technological sovereignty, innovation control, platform governance, and digital economic power. The article reconceptualizes intellectual property law as a contested governance arena through which authority over algorithmic production and digital innovation is increasingly negotiated within transnational technological ecosystems.

FOR CITATION:

Jaman, U. B., Armansyah, & Marah, T. S. (2026). Intellectual Property Governance in the Age of Artificial Intelligence: Regulatory Fragmentation and the Transformation of Digital Authority. International Journal of Law in Changing World, 5 (1), 145-169. DOI: https://doi.org/10.54934/ijlcw.v5i1.186

1. INTRODUCTION

Artificial Intelligence (AI) is rapidly transforming systems of cultural production, scientific innovation, and digital commerce in ways that increasingly destabilize foundational assumptions underpinning contemporary intellectual property (IP) law. [11] [20] Existing copyright and patent frameworks remain predominantly structured around anthropocentric conceptions of authorship, inventorship, ownership, and originality despite the emergence of algorithmic systems capable of generating autonomous or semi-autonomous outputs across creative, industrial, and knowledge-intensive sectors. [2] [37] As generative AI technologies become embedded within transnational innovation ecosystems, regulators confront increasingly complex questions concerning AI-generated works, machine-assisted invention, copyrighted training datasets, and platform-mediated governance infrastructures. [22] [23] The resulting disputes reveal growing tensions between territorially bounded legal regimes and digitally networked systems of production that transcend conventional jurisdictional boundaries.

These tensions are particularly visible in contemporary litigation concerning AI authorship and inventorship. Judicial disputes involving copyright claims over AI-generated outputs and patent controversies surrounding the DABUS system expose substantial divergence in how legal institutions conceptualize algorithmic creativity. In copyright law, Thaler v. Perlmutter reaffirmed the United States commitment to human authorship requirements by rejecting copyright protection for autonomously generated AI works lacking meaningful human creative contribution. [3] [14] [38] Comparable fragmentation has emerged in patent law through DABUS-related litigation, where different jurisdictions adopted divergent institutional responses to AI inventorship claims. While the United States Patent and Trademark Office (USPTO), the European Patent Office (EPO), and the United Kingdom Supreme Court rejected AI inventorship based upon statutory and doctrinal commitments to human inventors, South Africa recognized DABUS within its patent registration framework, while Australia experienced significant judicial contestation before appellate reversal. [1] These divergent institutional outcomes suggest that regulatory fragmentation cannot be explained solely as temporary doctrinal uncertainty. Rather, they indicate deeper tensions concerning authority allocation, innovation governance, and institutional adaptation under conditions of technological transformation.

Contemporary scholarship examining AI and intellectual property has expanded considerably in response to these developments, particularly concerning copyright attribution, patent inventorship, data ownership, and digital platform regulation. [10] [33] Nevertheless, much of this literature remains divided between doctrinal formalism and technologically deterministic approaches that conceptualize AI primarily as a technical legal problem requiring incremental regulatory adjustment. Legal scholarship frequently concentrates on whether algorithmically generated outputs satisfy existing thresholds of human authorship or inventorship, often privileging doctrinal continuity over broader institutional transformation. [24] [43] Pamela Samuelson's scholarship on digital copyright governance demonstrates that technological transformation repeatedly destabilizes inherited copyright assumptions and requires institutional adaptation beyond narrow doctrinal recalibration. [34] Similarly, Jane Ginsburg and Budiardjo work on authorship doctrine highlights the centrality of human creative contribution within copyright systems while simultaneously exposing tensions introduced by technologically mediated production processes. [13] More recent scholarship further suggests that AI-generated creativity may require greater doctrinal flexibility than conventional copyright frameworks presently allow. Gooding argues that emerging forms of human–AI collaborative production challenge binary distinctions between fully human and fully machine-generated works, proposing more permissive recognition of partial AI authorship within copyright doctrine. [14] This perspective highlights growing tension between inherited anthropocentric copyright principles and increasingly hybrid forms of algorithmically mediated creativity. Within patent scholarship, Annette Kur's scholarship on intellectual property protection frameworks further demonstrates how technological transformation increasingly challenges conventional legal categories governing ownership allocation and innovation protection, creating pressure for institutional adaptation within intellectual property systems. [25] Collectively, these contributions indicate that AI governance raises institutional questions extending beyond formal legal classification.

Parallel developments within governance scholarship provide additional explanatory insight. Julie Cohen's work on informational capitalism demonstrates how digital infrastructures redistribute economic and informational power through platform-mediated systems of governance, while Shoshana Zuboff's theory of surveillance capitalism explains how technological infrastructures increasingly shape authority relations within contemporary digital economies. [7] [46] Related scholarship by Mireille Hildebrandt, Laura DeNardis, and Nicolas Suzor further demonstrates that regulatory authority increasingly operates through hybrid governance arrangements in which private technological infrastructures exercise quasi-regulatory functions traditionally associated with state institutions. [9] [18] [36] These governance debates remain insufficiently integrated into contemporary intellectual property scholarship, which frequently treats regulatory fragmentation as a temporary consequence of technological novelty rather than as a structural characteristic of evolving digital governance regimes.

The omission is analytically significant because AI-related intellectual property disputes increasingly intersect with broader dynamics of platform capitalism, technological sovereignty, cross-border data extraction, geopolitical competition, and asymmetrical control over digital infrastructures. [32] [42] Under these conditions, intellectual property law functions not merely as a neutral mechanism for protecting innovation but increasingly as a governance technology through which states, multinational technology corporations, and international institutions negotiate authority within emerging digital economies. [19] [26] Existing scholarship frequently underestimates this political-economic dimension by privileging doctrinal coherence over institutional analysis and by insufficiently examining how regulatory divergence reproduces asymmetrical governance relationships between technologically dominant jurisdictions and structurally dependent regulatory environments.

The comparative dimension of these dynamics is particularly important. Major regulatory actors including the United States, the European Union, and China increasingly shape global AI governance standards through distinct institutional strategies. The United States continues to privilege innovation flexibility and market-oriented regulatory adaptation. The European Union increasingly emphasizes accountability, rights protection, and integrated digital constitutionalism through instruments such as the AI Act and broader digital governance frameworks. China adopts a sovereignty-centered regulatory approach integrating technological governance with industrial policy and strategic modernization objectives. Anu Bradford's theory of the "Brussels Effect" provides an especially important explanatory framework for understanding how regulatory power diffuses transnationally, demonstrating how large regulatory jurisdictions can externalize domestic governance preferences beyond territorial boundaries through market influence and institutional capacity. Global South jurisdictions, by contrast, frequently operate under conditions of regulatory diffusion and infrastructural dependency, shaping participation within AI governance architectures in institutionally asymmetrical ways. [17] [41]

Existing scholarship therefore provides only limited explanatory capacity for understanding why fragmentation persists despite growing recognition of the need for regulatory coordination. Much existing work treats fragmentation primarily as regulatory delay, legislative incompleteness, or technological novelty. Such explanations insufficiently account for how competing governance rationalities embedded within different political-economic systems produce durable forms of institutional divergence.

This article addresses these limitations by developing a socio-legal governance framework that conceptualizes regulatory fragmentation in AI-related intellectual property governance as an adaptive institutional response to competing governance rationalities within evolving digital political economy. Drawing upon regulatory governance theory and socio-legal institutionalism, the article argues that fragmentation cannot be understood solely as doctrinal inconsistency because it reflects broader transformations in authority distribution between states, private technological infrastructures, international regulatory institutions, and transnational platform ecosystems. [5] [28] This perspective enables a more institutionally grounded understanding of how algorithmic creativity destabilizes traditional legal categories while simultaneously generating jurisdictional competition, governance experimentation, and hybrid regulatory arrangements.

The article therefore examines how artificial Intelligence reconfigures intellectual property governance under conditions of transnational regulatory fragmentation and institutional asymmetry. It addresses two central research questions. First, how do contemporary intellectual property regimes respond to legal and institutional challenges generated by algorithmic creativity and AI-assisted innovation across jurisdictions? Second, how does regulatory fragmentation reshape digital innovation governance by redistributing authority among states, international institutions, and private technological actors? Methodologically, the study adopts a comparative socio-legal approach integrating doctrinal legal analysis with governance-oriented institutional interpretation to examine interactions between legal regulation, technological transformation, and evolving structures of digital authority.

The article advances existing scholarship in three principal respects. First, it reconceptualizes AI-related intellectual property disputes as governance conflicts embedded within broader transformations of digital political economy rather than isolated doctrinal inconsistencies. Second, it bridges fragmented scholarship across intellectual property law, platform governance, and regulatory institutionalism by demonstrating how algorithmic production intensifies tensions between territorially bounded legal systems and transnational technological infrastructures. Third, it develops a governance-centered interpretation of regulatory fragmentation that explains institutional divergence not as regulatory failure but as an adaptive manifestation of competing political-economic strategies shaping contemporary digital governance architectures. In doing so, the article contributes to broader debates concerning technological regulation, digital constitutionalism, governance pluralism, and the future distribution of legal authority within increasingly transnational digital economies.

2. MATERIALS AND METHODS

This study employs a comparative socio-legal and interpretive governance research design to examine how contemporary intellectual property (IP) regimes respond to regulatory challenges generated by artificial Intelligence (AI)-driven innovation and algorithmic creativity. The methodological framework integrates socio-legal institutionalism with regulatory governance theory, conceptualizing law not merely as a doctrinal system of formal rules but as a dynamic governance mechanism through which states, regulatory institutions, and private technological actors negotiate authority, innovation control, market organization, and digital sovereignty under conditions of technological disruption. [5] [7] [28] The analytical objective extends beyond identifying doctrinal inconsistencies within intellectual property law toward explaining how regulatory fragmentation emerges through competing governance rationalities embedded within contemporary digital political economy and transnational technological infrastructures. Accordingly, the study combines comparative doctrinal legal analysis with institutional interpretation to investigate the interaction between legal regulation, algorithmic production, and evolving configurations of digital authority.

The study adopts an interpretivist socio-legal orientation that treats legal norms, regulatory instruments, and governance arrangements as institutionally embedded processes shaped by political, technological, and economic contestation. [5] [7] This perspective permits analysis beyond formal statutory interpretation by examining how intellectual property governance increasingly intersects with platform infrastructures, industrial policy strategies, technological sovereignty objectives, and divergent institutional approaches to AI regulation. [9] [18] [36] The comparative design employs purposive jurisdictional selection based upon four analytical criteria: (i) global regulatory influence in AI governance; (ii) institutional distinctiveness in approaches toward intellectual property regulation and technological governance; (iii) demonstrated engagement with AI-related copyright, patent, or platform governance disputes; and (iv) comparative relevance for evaluating governance fragmentation across advanced and developing regulatory environments.

Applying these criteria, the study examines the United States, the European Union, China, and selected Global South jurisdictions comprising Indonesia and African Union governance frameworks. The United States was selected because it represents a market-oriented innovation governance model characterized by judicial adaptation, private-sector technological leadership, and strong anthropocentric intellectual property doctrine. The European Union was selected because it reflects a rights-based regulatory constitutionalist model emphasizing accountability, transparency, and integrated digital governance. China was included because it represents a sovereignty-centered techno-industrial governance model integrating AI regulation with state modernization and industrial policy objectives. Indonesia was selected as a Global South case because of its expanding digital economy, emerging AI governance initiatives, and institutional reliance upon externally developed technological infrastructures within ASEAN digital governance environments. African Union governance initiatives were incorporated to examine continental approaches toward digital sovereignty, ethical AI governance, and institutional adaptation under conditions of infrastructural dependency and asymmetrical technological capacity. Collectively, these jurisdictions capture variation across major governance rationalities shaping contemporary AI-related intellectual property regulation.

The evidentiary corpus consists of primary legal and institutional materials produced between 2018 and 2026, reflecting the accelerated development of generative AI technologies and corresponding governance responses concerning authorship, inventorship, copyright liability, platform accountability, algorithmic regulation, and digital sovereignty. Primary materials were selected based upon institutional significance, comparative relevance, and demonstrated influence over emerging governance approaches toward AI-related intellectual property regulation.

The analysis incorporates four categories of primary materials. First, judicial decisions addressing AI-generated intellectual property disputes were examined, including Thaler v. Perlmutter in the United States and DABUS-related patent litigation across multiple jurisdictions, including the United States Patent and Trademark Office (USPTO), the European Patent Office (EPO), the United Kingdom Supreme Court, Australian patent litigation, and South African patent registration developments. Second, legislative and regulatory instruments were analyzed, including the European Union Artificial Intelligence Act, the Digital Services Act, the Copyright in the Digital Single Market Directive, and China's Interim Measures for the Management of Generative Artificial Intelligence Services. Third, regulatory guidance documents and institutional governance materials were examined, including United States Copyright Office guidance concerning AI-generated works, World Intellectual Property Organization (WIPO) governance documents, African Union AI governance frameworks, and Indonesian and ASEAN digital governance initiatives. Fourth, parliamentary consultations, administrative policy statements, and institutional governance reports were incorporated to contextualize evolving regulatory trajectories. Secondary scholarship was utilized selectively to situate doctrinal developments within broader debates concerning socio-legal institutionalism, platform governance, regulatory capitalism, and digital political economy.

Materials were collected through systematic review of publicly accessible legal databases, judicial repositories, governmental regulatory publications, institutional documentation, and international governance databases. Comparative analysis proceeded through a structured qualitative coding framework designed to operationalize recurring governance dimensions identified within AI-related intellectual property regulation.

Coding procedures employed eight operational indicators. Human authorship requirements measured whether legal protection remained contingent upon identifiable human creative contribution.

Inventorship attribution examined whether AI systems could qualify as legally recognized inventors under patent frameworks. Data governance assessed regulatory treatment of training datasets, data extraction practices, and informational accountability obligations. Platform-centered governance evaluated the extent to which regulatory authority operated through platform obligations, intermediary governance mechanisms, or private technological infrastructures. Innovation orientation measured whether regulatory systems prioritized technological flexibility and innovation incentives. Sovereignty orientation assessed institutional emphasis on technological autonomy, strategic industrial coordination, and digital sovereignty objectives. Governance architecture examined whether regulatory arrangements reflected judicial adaptation, centralized administrative coordination, supranational oversight, or hybrid governance configurations. Finally, accountability mechanisms evaluated institutional requirements concerning transparency obligations, regulatory supervision, rights-holder protection, and public oversight.

Each legal and institutional source was coded according to these indicators and subsequently compared across jurisdictions to identify patterns of convergence, divergence, and institutional adaptation. Comparative interpretation focused specifically on how different governance systems constructed legal authority, balanced innovation incentives against regulatory accountability, distributed governance power between public institutions and private technological actors, and responded to challenges generated by algorithmic creativity. Cross-jurisdictional comparison further enabled identification of competing governance rationalities shaping regulatory fragmentation across transnational digital governance architectures.

Methodological robustness was strengthened through triangulation across judicial decisions, legislative instruments, institutional governance materials, and academic scholarship, facilitating cross-validation of interpretive findings and comparative consistency across institutional settings. Nevertheless, several limitations remain. Regulatory developments concerning generative AI continue to evolve rapidly, creating temporal constraints upon long-term governance assessment. In addition, regulatory documentation remains uneven across developing governance environments, particularly within emerging Global South institutional contexts. Finally, because the study prioritizes comparative institutional interpretation rather than quantitative behavioral measurement, its conclusions remain explanatory rather than predictive. These limitations are consistent with the study's objective of examining the institutional dynamics through which regulatory fragmentation reshapes intellectual property governance within evolving transnational digital ecosystems.

3. RESULTS AND DISCUSSION

3.1 Regulatory Fragmentation and Divergent Legal Conceptions of Algorithmic Creativity

Comparative evidence indicates that generative artificial Intelligence destabilizes foundational assumptions upon which contemporary intellectual property regimes remain structurally dependent. Existing copyright and patent systems continue to rely predominantly upon anthropocentric legal principles that associate ownership attribution, authorship, originality, and inventorship with identifiable human agency. [30] The emergence of increasingly autonomous algorithmic systems capable of generating text, images, software, scientific outputs, and technical solutions complicates these assumptions by challenging whether artificial Intelligence should be treated merely as an assistive technological instrument or as a productive actor requiring new legal categorization. [15] Regulatory fragmentation has consequently emerged not simply because legal systems face technological novelty, but because jurisdictions adopt fundamentally different institutional responses concerning innovation governance, accountability allocation, technological sovereignty, and regulatory authority.

The United States continues to preserve a strongly anthropocentric orientation toward intellectual property governance grounded in maintaining human creative contribution as the defining threshold for legal protection. [31] This institutional position is particularly visible within copyright doctrine. United States Copyright Office guidance has consistently maintained that copyright protection requires meaningful human authorship and excludes works generated entirely through autonomous artificial intelligence processes. Judicial reasoning in Thaler v. Perlmutter further reinforced this principle by affirming that copyright protection under existing statutory frameworks remains contingent upon human creative contribution rather than machine-generated production. [3]

The reasoning in Thaler is especially significant because it illustrates how legal doctrine operates as a governance mechanism for defining institutional boundaries surrounding technological innovation. Stephen Thaler sought copyright registration for an image generated autonomously by an AI system known as the Creativity Machine. The United States Copyright Office denied registration, concluding that copyright law requires human authorship. [14] [38] Subsequent judicial review upheld this determination, emphasizing that the Copyright Act and longstanding jurisprudential traditions conceptualize authorship as a fundamentally human legal category [38] The court did not merely reject machine authorship as a doctrinal technicality. Rather, its reasoning reflected broader governance concerns involving accountability allocation, ownership attribution, and institutional predictability within increasingly automated innovation ecosystems. Human authorship requirements therefore operate not solely as doctrinal continuity mechanisms but as governance tools preserving established distributions of legal authority within digital production systems. [13] [14]

Comparable tensions emerge within patent governance through litigation involving the Device for the Autonomous Bootstrapping of Unified Sentience (DABUS), developed by Stephen Thaler. DABUS has become a defining transnational test case concerning whether artificial intelligence systems may qualify as inventors under existing patent frameworks. [1] Jurisdictional responses reveal substantial divergence regarding how legal institutions conceptualize inventorship under conditions of algorithmic innovation.

United States patent authorities rejected DABUS inventorship claims on the basis that inventorship under the Patent Act requires natural person status. Federal judicial review subsequently reinforced this interpretation by emphasizing statutory language linking inventorship to human agency and legal accountability structures. [1] [29] Similar reasoning emerged within the European Patent Office (EPO), which rejected DABUS patent applications because the European Patent Convention presupposes inventorship as a human legal category capable of possessing rights and obligations. The United Kingdom Supreme Court adopted a comparable approach, concluding that existing statutory frameworks require identifiable human inventors and that policy considerations regarding AI innovation could not override legislative design.

Australia briefly departed from this emerging doctrinal convergence when initial judicial reasoning suggested that artificial intelligence systems might potentially qualify as inventors under evolving technological conditions. However, appellate review ultimately reversed this position and restored anthropocentric inventorship interpretation. South Africa presents the most significant institutional divergence. Unlike the United States, Europe, and the United Kingdom, South African authorities accepted a DABUS patent application through a registration-oriented administrative framework lacking substantive inventorship examination. Although South Africa's outcome does not necessarily indicate doctrinal endorsement of AI inventorship, it demonstrates how institutional design influences regulatory responses to technological disruption. [1] [29]

These divergent outcomes complicate scholarship treating regulatory fragmentation primarily as temporary legislative delay or transitional technological uncertainty. The comparative evidence instead suggests that fragmentation reflects competing governance rationalities embedded within distinct political-economic and institutional models of technological regulation. The United States prioritizes market-oriented innovation governance while preserving doctrinal continuity through anthropocentric conceptions of authorship and inventorship. European institutional responses prioritize legal accountability, regulatory coordination, and rights-based governance principles. China adopts a comparatively different governance model integrating technological regulation more directly within industrial policy coordination and techno-sovereignty objectives. [40] [45] Regulatory divergence therefore emerges not because jurisdictions misunderstand common governance challenges, but because institutional actors operationalize competing governance rationalities concerning innovation incentives, technological sovereignty, and regulatory authority allocation.

From a socio-legal governance perspective, algorithmic creativity exposes tensions between territorially bounded legal frameworks and increasingly transnational technological infrastructures. Intellectual property disputes concerning AI authorship and inventorship therefore operate not merely as doctrinal controversies but as institutional arenas through which states negotiate broader questions concerning technological sovereignty, innovation governance, accountability structures, and authority distribution within contemporary digital political economy. Regulatory fragmentation should consequently be understood not as regulatory failure alone but as an adaptive institutional condition emerging from competing governance rationalities shaping contemporary AI governance architectures. [5] [28] [35] To facilitate systematic cross-jurisdictional comparison, Table 1 synthesizes the principal regulatory approaches identified across the jurisdictions examined.

Table 1. Comparative Regulatory Approaches to AI-Related Intellectual Property Governance Across Jurisdictions

Governance Dimension	United States	European Union	China	Indonesia / African Union
Human Authorship Standard	Human authorship required under *Thaler v. Perlmutter* and US Copyright Office guidance	Human-centered copyright framework; AI governance integrated through AI Act and DSM Directive	No formal recognition of AI authorship; governance embedded within state AI regulation	Emerging frameworks; governance discussions emphasize ethical AI and human accountability
AI Inventorship Treatment	DABUS rejected by USPTO and federal courts	DABUS rejected by EPO	No formal AI inventorship recognition; innovation governed through industrial coordination mechanisms	Limited formal doctrine; regulatory development remains emerging
Data Governance Approach	Fair use doctrine and litigation-centered governance	GDPR + AI Act + Digital Services Act + DSM Directive	Interim Measures for Management of Generative AI Services	Regulatory adaptation and externally influenced governance development
Governance Coordination Model	Judicial interpretation + administrative guidance	Integrated supranational governance architecture	Centralized administrative governance	Hybrid and institutionally developing systems
Primary Regulatory Instruments	Copyright Office Guidance; Patent Act; *Thaler*; DABUS litigation	AI Act; GDPR; DSA; DSM Directive	Interim Measures for Generative AI Services	ASEAN digital governance initiatives; African Union AI frameworks

Source: Author synthesis derived from comparative analysis of judicial decisions, legislative instruments, and governance frameworks examined in Sections 3.1–3.3.

3.2 Algorithmic Creativity and the Redistribution of Regulatory Authority

Comparative evidence indicates that algorithmic creativity transforms not only the interpretation of intellectual property doctrine but also the institutional distribution of regulatory authority within contemporary digital governance systems. Artificial Intelligence increasingly operates through platform-mediated infrastructures controlled by multinational technology corporations that possess substantial influence over data access, computational resources, licensing architectures, and digital production ecosystems. [7] [9] [28] Intellectual property governance consequently extends beyond formal legal institutions into hybrid regulatory environments in which private technological actors increasingly exercise governance functions historically associated with state authority. The governance implications of artificial Intelligence therefore cannot be understood exclusively through doctrinal questions concerning authorship or inventorship because algorithmic production simultaneously restructures institutional authority within transnational digital political economy.

Julie Cohen's work on informational capitalism provides an important explanatory foundation for understanding this transformation. Cohen argues that digital infrastructures increasingly organize authority relations by concentrating informational and economic power within platform ecosystems rather than traditional public institutions. [7] Similarly, Laura DeNardis demonstrates that governance authority increasingly operates through infrastructural control mechanisms embedded within technological systems themselves rather than solely through formal regulatory intervention. [9] Nicolas Suzor further illustrates how private platforms increasingly perform quasi-regulatory functions by establishing behavioral norms, access conditions, and governance standards independent of direct state supervision. [36] Within AI governance, these dynamics become especially significant because intellectual property regulation increasingly depends upon access to computational infrastructure, training data, platform distribution systems, and proprietary technological ecosystems controlled by a relatively small number of multinational corporations.

This redistribution of authority becomes particularly visible in disputes concerning training datasets, data extraction practices, and ownership claims over AI-generated outputs. Litigation involving OpenAI, Stability AI, Getty Images, and major publishing industries illustrates escalating institutional conflict concerning the extraction and use of copyrighted materials for training generative AI systems. [8] [11] [39] These disputes extend beyond conventional copyright enforcement questions because they concern who possesses institutional authority to govern informational resources underpinning AI development itself.

Competing regulatory responses reveal broader struggles over innovation governance and regulatory power allocation. In the United States, fair use doctrine continues to function as a mechanism preserving technological flexibility and private innovation incentives even where copyright protections remain contested. [3] [8] The institutional orientation favors market adaptability and private technological experimentation while relying substantially upon litigation and judicial interpretation to resolve emerging conflicts. By contrast, the European regulatory model increasingly integrates copyright governance within broader accountability infrastructures through interaction among the Copyright in the Digital Single Market Directive, the General Data Protection Regulation (GDPR), and emerging AI governance mechanisms emphasizing transparency obligations and rights-holder protections. [12] [27] This institutional architecture reflects what Anu Bradford conceptualizes as transnational regulatory influence through market power and regulatory capacity. Bradford's theory of the Brussels Effect helps explain how large regulatory jurisdictions externalize governance preferences beyond territorial boundaries by establishing compliance expectations that multinational actors adopt globally. [6] European AI governance therefore shapes not merely domestic regulatory practice but broader transnational governance standards.

China follows a different institutional trajectory by embedding AI governance more directly within state-centered technological management strategies emphasizing industrial coordination, data governance, and technological sovereignty objectives [41] [44] Regulatory instruments governing generative artificial Intelligence integrate innovation promotion with centralized oversight mechanisms, reflecting governance priorities focused upon strategic technological competitiveness and state coordination capacity. The resulting divergence across governance systems demonstrates that regulatory fragmentation reflects competing institutional strategies concerning authority allocation rather than temporary failures of legal adaptation.

Private technological actors increasingly occupy governance positions traditionally associated with public institutions. Major AI developers exercise substantial influence over access to computational infrastructure, platform participation, training resources, licensing conditions, and content governance mechanisms through contractual arrangements, application programming interface restrictions, and proprietary technological systems. [16] [18] Governance consequently operates increasingly through hybrid public-private institutional arrangements rather than exclusively through formal legal systems.

Regulatory authority becomes distributed across states, multinational corporations, platform ecosystems, and transnational technological infrastructures simultaneously.

These developments expose substantial geopolitical asymmetries within contemporary AI governance architectures. Technology corporations headquartered primarily in the United States and China maintain disproportionate influence over AI development ecosystems because they control computational resources, platform infrastructures, investment capital, and large-scale technological capabilities. [32] [42] By contrast, many Global South jurisdictions remain institutionally constrained by technological dependency and externally generated regulatory standards. [17] Indonesia illustrates this challenge through continued reliance upon externally developed digital infrastructures despite expanding national digital governance ambitions. African Union digital governance initiatives increasingly emphasize ethical AI governance and technological sovereignty but remain constrained by infrastructural asymmetries and limited standard-setting capacity within global technology markets. [17] [21] Participation in AI governance therefore depends not only upon formal regulatory authority but increasingly upon access to computational infrastructure, technological ecosystems, and institutional capacity to influence governance standards.

From a socio-legal governance perspective, intellectual property regulation increasingly functions within hybrid governance environments rather than isolated doctrinal systems concerned solely with ownership protection. Algorithmic creativity restructures institutional authority by redistributing governance power across uneven technological and regulatory terrains shaped by platform concentration, geopolitical competition, infrastructural dependency, and transnational digital infrastructures. Fragmentation persists not because legal systems fail to adapt technically to innovation but because emerging governance architectures reorganize authority itself. AI-related intellectual property disputes consequently operate as broader institutional struggles concerning who possesses the capacity to govern digital production systems within contemporary transnational technological ecosystems.

3.3 Adaptive Governance, Institutional Experimentation, and the Future Trajectory of Digital Innovation Governance

The findings indicate that regulatory fragmentation in AI-related intellectual property governance generates not only legal uncertainty but also institutional experimentation through which emerging governance models are negotiated, contested, and recalibrated under conditions of technological acceleration.[5] [28] Fragmentation therefore cannot be interpreted exclusively as regulatory deficiency or governance failure. Rather, fragmented regulatory responses increasingly function as adaptive

https://doi.org/10.54934/ijlcw.v5i1.186

institutional mechanisms through which states, international organizations, private technological actors, and regulatory institutions respond to evolving technological conditions characterized by transnational interdependence and rapid innovation cycles. [4] [26] [35] From a socio-legal governance perspective, institutional divergence reflects ongoing processes of governance adaptation within a digital political economy increasingly shaped by hybrid regulatory authority and technological complexity.

The comparative findings demonstrate that conventional intellectual property frameworks alone are increasingly insufficient for governing AI-driven innovation ecosystems. Regulatory responses to algorithmic production now operate across interconnected institutional domains involving copyright governance, data governance, competition oversight, platform accountability, cybersecurity regulation, algorithmic supervision, and digital constitutional protections. Governance adaptation consequently involves institutional layering rather than simple doctrinal modification. Emerging regulatory architectures increasingly combine previously separate governance domains into integrated systems designed to address technological risks extending beyond conventional intellectual property concerns.

This institutional evolution reflects broader transformations in regulatory governance theory. Black's conception of regulatory pluralism emphasizes that governance authority increasingly operates across multiple institutional actors rather than exclusively through centralized state command structures. [5] Similarly, Levi-Faur's regulatory governance framework demonstrates that contemporary governance increasingly depends upon dispersed institutional coordination involving public regulators, private actors, and transnational governance mechanisms. [28] The findings extend these theoretical perspectives by demonstrating that artificial intelligence governance increasingly depends upon adaptive institutional capacity rather than doctrinal stability alone. Legal authority within AI governance environments is becoming progressively distributed across overlapping governance arrangements involving states, international institutions, multinational technology corporations, and infrastructure-based regulatory systems.

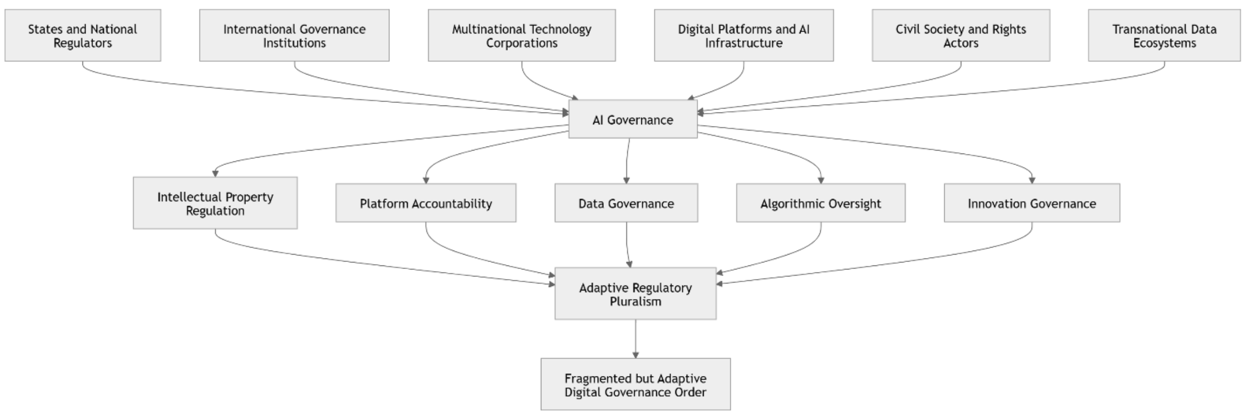
Institutional experimentation also reflects growing recognition that governance adaptation must reconcile competing objectives that frequently operate in tension with one another. Governments increasingly seek to preserve technological competitiveness, attract investment, stimulate innovation ecosystems, and secure strategic technological capacity while simultaneously responding to concerns involving copyright protection, market concentration, data extraction practices, informational asymmetries, and algorithmic accountability. These competing objectives generate governance environments characterized less by institutional convergence than by layered and overlapping regulatory architectures operating simultaneously across multiple governance domains.

https://doi.org/10.54934/ijlcw.v5i1.186

This tension is particularly visible in the interaction between digital sovereignty objectives and transnational technological interdependence. States increasingly pursue sovereign regulatory capacity concerning artificial Intelligence while remaining deeply embedded within globally interconnected technological infrastructures controlled by multinational actors. Governance adaptation therefore occurs under conditions where institutional autonomy and technological dependency coexist simultaneously. The result is not governance harmonization but adaptive regulatory pluralism characterized by multiple coexisting institutional approaches toward managing technological transformation.

The findings further suggest that fragmentation persists not because regulatory institutions have failed to coordinate effectively, but because contemporary AI governance operates across competing political-economic environments characterized by divergent institutional priorities, sovereignty concerns, market structures, and technological capacities. Fragmentation therefore reflects structural features of emerging digital governance systems rather than temporary regulatory incompleteness. Attempts to eliminate fragmentation entirely may consequently prove institutionally unrealistic because governance diversity increasingly reflects enduring differences in political-economic organization rather than merely incomplete regulatory development. Figure 1 conceptualizes the adaptive governance ecosystem emerging around AI-driven intellectual property regulation, illustrating how contemporary governance authority is increasingly dispersed across hybrid institutional and transnational digital infrastructures.

Figure 1. Hybrid Governance Ecosystem in AI-Driven Digital Innovation Regulation



Source: Developed by the author from the adaptive governance analysis and socio-legal institutional framework discussed in Section 3.3.

These dynamics are particularly significant within Global South governance environments, where institutional adaptation frequently occurs under conditions of technological dependency and asymmetrical infrastructural access. Many developing regulatory systems increasingly participate within transnational

https://doi.org/10.54934/ijlcw.v5i1.186

AI governance ecosystems while possessing comparatively limited influence over infrastructure ownership, computational capacity, investment concentration, and regulatory standard-setting processes. [17] Governance adaptation under these conditions involves navigating tensions between technological development objectives and structural dependence upon externally developed technological systems. The result is often adaptive regulatory incorporation rather than direct governance leadership.

The analysis consequently challenges assumptions that legal harmonization necessarily represents the optimal institutional solution to AI governance fragmentation. Governance effectiveness increasingly depends less upon doctrinal uniformity than institutional flexibility capable of responding to rapidly evolving technological conditions without reinforcing asymmetries in innovation capacity, infrastructural access, and regulatory authority. Regulatory resilience within AI governance environments therefore depends increasingly upon adaptive institutional design rather than complete legal convergence.

From a socio-legal governance perspective, intellectual property governance is evolving toward pluralized regulatory ecosystems in which authority is increasingly dispersed across hybrid governance arrangements linking states, international institutions, private technological actors, and transnational infrastructures simultaneously. AI-related intellectual property disputes consequently operate as broader institutional arenas through which struggles concerning technological authority, innovation governance, economic competitiveness, and digital sovereignty are continuously negotiated. The future trajectory of AI governance may therefore depend less upon achieving regulatory uniformity than upon constructing adaptive institutional frameworks capable of governing technological transformation under conditions of enduring regulatory pluralism. Comparative findings further reveal that AI-driven innovation reshapes intellectual property governance through identifiable institutional transformations extending beyond doctrinal adaptation alone. Table 2 summarizes the principal governance shifts identified through analysis of legislative developments, judicial reasoning, and regulatory interventions across jurisdictions. The table links observed governance transformations to specific primary materials examined in the study and illustrates how institutional responses contribute to broader patterns of regulatory fragmentation and adaptive governance.

Table 2. Governance Transformations and Institutional Evidence in AI-Related Intellectual Property Regulation

Governance Transformation	Evidence Identified	Primary Material	Institutional Consequence
Human authorship contestation	*Thaler v. Perlmutter* rejects autonomous AI copyright authorship	US judicial decision + Copyright Office guidance	Preservation of anthropocentric copyright doctrine
AI inventorship fragmentation	Divergent DABUS outcomes across USPTO, EPO, UK Supreme Court, Australia, South Africa	Judicial and patent authority decisions	Regulatory fragmentation across patent governance
Expansion of platform governance	OpenAI, Stability AI, Getty Images disputes	Litigation and platform governance mechanisms	Greater private-sector regulatory influence
Data governance expansion	AI Act + GDPR + DSM Directive interaction	EU legislative instruments	Multi-layered accountability obligations
Sovereignty-oriented AI governance	China Interim Measures	Chinese regulatory framework	Centralized AI governance coordination
Global South governance dependency	Indonesian AI governance initiatives + African Union frameworks	Regional governance materials	Uneven institutional participation

Source: Author synthesis from primary materials analyzed in the comparative study.

4. CONCLUSION

The expansion of artificial intelligence within systems of cultural production, technological innovation, and digital commerce has exposed fundamental limitations in contemporary intellectual property governance. This article has argued that the central challenge generated by AI-driven innovation extends beyond doctrinal uncertainty concerning authorship, inventorship, and ownership. Rather, the emergence of algorithmic creativity reflects a broader transformation in the institutional organization of regulatory authority across increasingly transnational and platform-mediated digital economies. Comparative analysis across the United States, the European Union, China, and selected Global South contexts demonstrates that contemporary regulatory fragmentation is not simply a temporary consequence of technological disruption, but a structural manifestation of competing governance rationalities concerning innovation control, technological sovereignty, market regulation, and digital economic power.

By integrating socio-legal institutionalism with regulatory governance theory, the article reconceptualizes fragmentation as an adaptive institutional condition emerging from tensions between territorially bounded legal systems and globally networked technological infrastructures. This governance-centered interpretation advances existing scholarship by demonstrating that AI-related intellectual property disputes cannot be adequately understood through doctrinal analysis alone because legal regulation increasingly operates within hybrid governance environments shaped simultaneously by states, multinational technology corporations, and transnational regulatory architectures. The findings therefore challenge state-centric and technocratic interpretations of AI governance that treat fragmentation primarily as legislative delay or regulatory insufficiency rather than as an institutional response to restructuring forms of digital authority.

The broader implications of the analysis extend beyond intellectual property law itself. The findings indicate that contemporary AI governance increasingly concerns the redistribution of regulatory authority across overlapping public and private institutional domains in which technological infrastructures, platform economies, and sovereignty-oriented governance strategies interact in complex and often conflicting ways. Under these conditions, legal frameworks organized exclusively around territorial sovereignty and doctrinal coherence may prove increasingly inadequate for governing transnational systems of algorithmic production and digital innovation. The article consequently contributes to wider debates concerning digital constitutionalism, platform governance, regulatory capitalism, and the transformation of legal authority within contemporary digital political economy.

At the same time, the study remains subject to several limitations. The analysis focuses primarily on formal regulatory developments and institutional responses within major governance jurisdictions and therefore cannot fully capture operational variations across less institutionalized regulatory environments. In addition, the rapidly evolving nature of generative AI technologies limits the long-term predictability of emerging governance trajectories. Future research should therefore examine how Global South jurisdictions negotiate technological dependency within evolving AI governance architectures and further investigate how platform concentration and data extraction reshape the political economy of digital innovation across asymmetrical regulatory environments. AI-related intellectual property conflicts ultimately reveal that contemporary digital governance is increasingly defined not by the stability of legal doctrine, but by the contested redistribution of regulatory authority across transnational technological infrastructures.

https://doi.org/10.54934/ijlcw.v5i1.186

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ABOUT THIS ARTICLE

Conflict of Interest: The authors declare no conflicting interests

Data Availability Statement: The data supporting the findings of this study are available from the author upon reasonable request. Corresponding author contact: ujang.badru@nusaputra.ac.id

AI-use Disclosure: LLM tools were used during manuscript preparation for language refinement, structural editing, and clarity enhancement. AI tools were not used in the original legal analysis, substantive arguments, or conclusions. All conceptual development, source verification, comparative analysis, and scholarly judgments were conducted by the authors, who assume full responsibility for the accuracy and integrity of the manuscript.

CrediT Authorship Contribution Statement:

Ujang Badru Jaman: Conceptualization, Methodology, Formal Analysis, Investigation, Data Curation, Writing – Original Draft, Writing – Review & Editing.

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LA GOBERNANZA DE LA PROPIEDAD INTELECTUAL EN LA ERA DE LA INTELIGENCIA ARTIFICIAL: FRAGMENTACIÓN REGULATORIA Y TRANSFORMACIÓN DE LA AUTORIDAD DIGITAL

RESUMEN

La fragmentación regulatoria en torno a la inteligencia artificial (IA) y la gobernanza de la propiedad intelectual refleja transformaciones más profundas en la organización de la autoridad digital, más que una mera inconsistencia doctrinal. La literatura académica existente suele abordar las disputas sobre derechos de autor y patentes relacionadas con la IA desde un formalismo jurídico estrecho, ofreciendo una explicación limitada de cómo la creatividad algorítmica reconfigura las relaciones de gobernanza entre Estados, corporaciones tecnológicas multinacionales e infraestructuras digitales transnacionales. Mediante un marco comparativo sociojurídico y de gobernanza interpretativa, este artículo analiza la legislación, las decisiones judiciales y los instrumentos regulatorios de Estados Unidos, la Unión Europea, China y determinadas jurisdicciones del Sur Global. Los resultados demuestran que las respuestas regulatorias fragmentadas surgen de racionalidades de gobernanza en pugna relativas a la soberanía tecnológica, el control de la innovación, la gobernanza de plataformas y el poder económico digital. El artículo reconceptualiza el derecho de propiedad intelectual como un ámbito de gobernanza en disputa, a través del cual la autoridad sobre la producción algorítmica y la innovación digital se negocia cada vez más en el seno de ecosistemas tecnológicos transnacionales.

Palabras clave: Inteligencia artificial, gobernanza de la propiedad intelectual, fragmentación regulatoria, creatividad algorítmica, gobernanza digital

人工智能时代的知识产权治理：监管碎片化与数字权力的重构

摘要

围绕人工智能（AI）与知识产权治理的监管碎片化现象，反映了数字权力组织形式的深层变革，而不仅仅是法律教义上的不一致。既有研究往往局限于狭隘的法律形式主义视角来探讨与AI相关的版权及专利纠纷，难以充分阐释算法创造力如何重塑国家、跨国科技公司与跨国数字基础设施之间的治理关系。本文采用比较社会法律与解释性治理的分析框架，考察了美国、欧盟、中国及部分“全球南方”国家和地区的立法、司法判决与监管举措。研究发现，监管响应的碎片化源于各方在技术主权、创新控制、平台治理及数字经济权力等议题上相互竞争的治理逻辑。本文将知识产权法重新界定为一个充满博弈的治理场域；在这一场域中，针对算法生产与数字创新的权力，正日益在跨国技术生态系统中通过各种互动与协商得以重构。

关键词：人工智能，知识产权治理，监管碎片化，算法创造力，数字治理

https://doi.org/10.54934/ijlcw.v5i1.186

International Journal of Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v5i1.184

RETALIATORY CONSTITUTIONALIZATION: NUCLEAR COMMAND, CONSTITUTIONAL ENTRENCHMENT, AND CRISIS ESCALATION

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Article Information:

Received
May 12, 2025
Reviewed & Revised
May 24, 2025
Accepted
June 6, 2025
Published
July 30, 2026

Keywords:

retaliatory constitutionalization,
nuclear command and control,
international nuclear law,
emergency powers,
artificial intelligence

ABSTRACT | 摘要 | RESUMEN

Retaliatory Constitutionalization Theory explains how states may elevate nuclear command and retaliatory commitments from ordinary policy into constitutional or quasi-constitutional form. Drawing on comparative constitutional law, international nuclear law, command-and-control studies, and AI-governance debates, the article argues that this movement becomes more likely where existential threat perception, decapitation anxiety, executive personalization, and weak internal veto points converge. It introduces two exploratory qualitative measures, the Nuclear Constitutionalization Index and the Retaliatory Constitutionalization Score, and applies them to a 45-jurisdiction comparative map. North Korea appears as the paradigmatic case; Russia, Pakistan, Belarus, and anti-nuclear constitutional states operate as contrasting comparators. The article concludes that contemporary nuclear law remains stronger at regulating possession, transfer, testing, and disarmament than decision, delegation, automation, command survival, and constitutional signalling.

FOR CITATION:

Perez Bernardes de Moraes, T. (2026) Retaliatory Constitutionalization: Nuclear Command, Constitutional Entrenchment, and Crisis Escalation. International Journal of Law in Changing World, 5 (1), 170-188. DOI: https://doi.org/10.54934/ijlcw.v5i1.184

1. INTRODUCTION

International nuclear law has long been organized around a visible object: the weapon. Its core legal imagination is built around possession, transfer, testing, safeguards, prohibition, non-proliferation, and disarmament. [28] [29] That architecture remains indispensable, but it no longer exhausts the legal problem. A nuclear order can be destabilized even when the number of warheads is unchanged, because the decisive institutional question may move from the arsenal to the decision architecture. Who commands, who substitutes, under what conditions authority devolves, how emergency language is codified, and how retaliation is legally pre-committed are not marginal administrative matters. They are constitutional questions with strategic consequences. In a changing world, the legality of nuclear power cannot be separated from the domestic legal forms through which nuclear decision becomes credible, irreversible, or deliberately inflexible.

This article proposes Retaliatory Constitutionalization Theory as a mid-range account of that movement. Retaliatory constitutionalization occurs when constitutional or quasi-constitutional norms are used to codify, signal, or stabilize retaliatory commitments in extreme-security contexts, especially when the survival of the regime, the leadership, the territorial order, or the strategic command structure is perceived as threatened. The claim is not that all nuclear states constitutionalize nuclear use. Most do not. Nor is the claim that constitutions have suddenly replaced doctrine, operational planning, or alliance politics. The narrower claim is that, in a small but analytically consequential set of cases, the constitution or a law with quasi-constitutional status becomes part of the state's deterrent grammar. It speaks outward as well as inward. It instructs domestic elites, but it also warns adversaries, reassures loyal institutions, narrows ambiguity, and raises the political cost of restraint after certain thresholds have been publicly legalized.

The article is written against two forms of reductionism. The first is doctrinal reductionism, which treats constitutional war powers as an internal matter of institutional competence, legislative authorization, and executive discretion. That lens is necessary but incomplete. Constitutional texts can also be technologies of external signalling. The second is strategic reductionism, which treats deterrence language as if it floated above domestic legal form. That is also incomplete. Legal hierarchy matters. A doctrine placed in a speech does not have the same domestic and international texture as a doctrine embedded in a statute, basic law, constitutional amendment, or entrenched quasi-constitutional settlement. The difference is not merely formal. It affects durability, audience, reversibility, and the interpretive horizon available during crisis.

North Korea is used here as a critical case because it brings the mechanism into unusually sharp relief. The 2022 Law on the DPRK's Policy on Nuclear Forces codified leader-centered nuclear command, incorporated an automatic retaliation formula tied to danger to the nuclear command-and-control system, and gave legal form to a deterrent problem that command-and-control scholarship had already identified: a highly personalized regime must make retaliation credible without undermining the leader's monopoly over ultimate authority. [2] [12] Reporting on the 2026 constitutional revision further suggests that at least part of this nuclear command architecture may have been moved into the constitutional register, although the public record must still be handled cautiously because a consolidated official text remains difficult to audit in full. [11] [15] The evidentiary discipline is central. The available sources support the argument that North Korea has constitutionalized, or nearly constitutionalized, nuclear command authority and retaliatory continuity. They do not prove AI-delegated nuclear decision-making, and this article does not claim that they do.

The contribution is fourfold. First, the article gives a name and analytical form to a phenomenon that sits between comparative constitutional law, nuclear command and control, and international legal theory. Second, it introduces two exploratory tools, the Nuclear Constitutionalization Index, NCI, and the Retaliatory Constitutionalization Score, RCS, not as measurements of military strength, but as qualitative indicators of legal inscription and signalling density. Third, it distinguishes positive, negative, generic, extra-constitutional, and retaliatory modes of nuclear constitutionalization. This distinction is indispensable because Brazil, Palau, Japan, New Zealand, and the Philippines show that nuclear salience in constitutional law can restrain rather than escalate. Fourth, the article argues that artificial intelligence matters here without sensationalism. AI does not need to control launch decisions to destabilize the nuclear order. Its relevance lies in decision-time compression, early-warning uncertainty, target-identification pressure, and the increased value of pre-delegation and automaticity in moments of compressed crisis. [25] [26]

2. RETALIATORY CONSTITUTIONALIZATION AS A MID-RANGE THEORY

Retaliatory constitutionalization should be distinguished from the older categories with which it overlaps. It is not identical to authoritarian constitutionalism, although it may flourish inside authoritarian or personalist regimes. Authoritarian constitutions may distribute offices, ritualize political supremacy, and manage elite expectations even where liberal limits are weak. [6] Retaliatory constitutionalization refers to a more specific use of constitutional form: the codification of retaliation, command survival, and extreme-security continuity as legal messages to adversaries and internal actors. It is also not reducible to abusive constitutionalism. Landau's account of abusive constitutionalism explains how constitutional tools can be used to weaken democratic competition while preserving a formal constitutional surface. [14] Retaliatory constitutionalization may be abusive, but its distinctive object is different. It does not primarily manipulate democracy. It hardens escalation.

Nor should the concept be confused with emergency constitutionalism. Emergency powers regulate exceptional authority under crisis, sometimes by concentrating power temporarily, sometimes by attempting to domesticate exception through legal form. Retaliatory constitutionalization is narrower and sharper. It appears when the legal order codifies the expectation that certain attacks against leadership, command-and-control, territorial integrity, or regime survival may trigger retaliation. Emergency clauses say who governs during crisis. Retaliatory clauses say, or strongly imply, how the state binds itself to respond when the political center is attacked or strategically incapacitated. The two may reinforce each other, but they are not the same phenomenon.

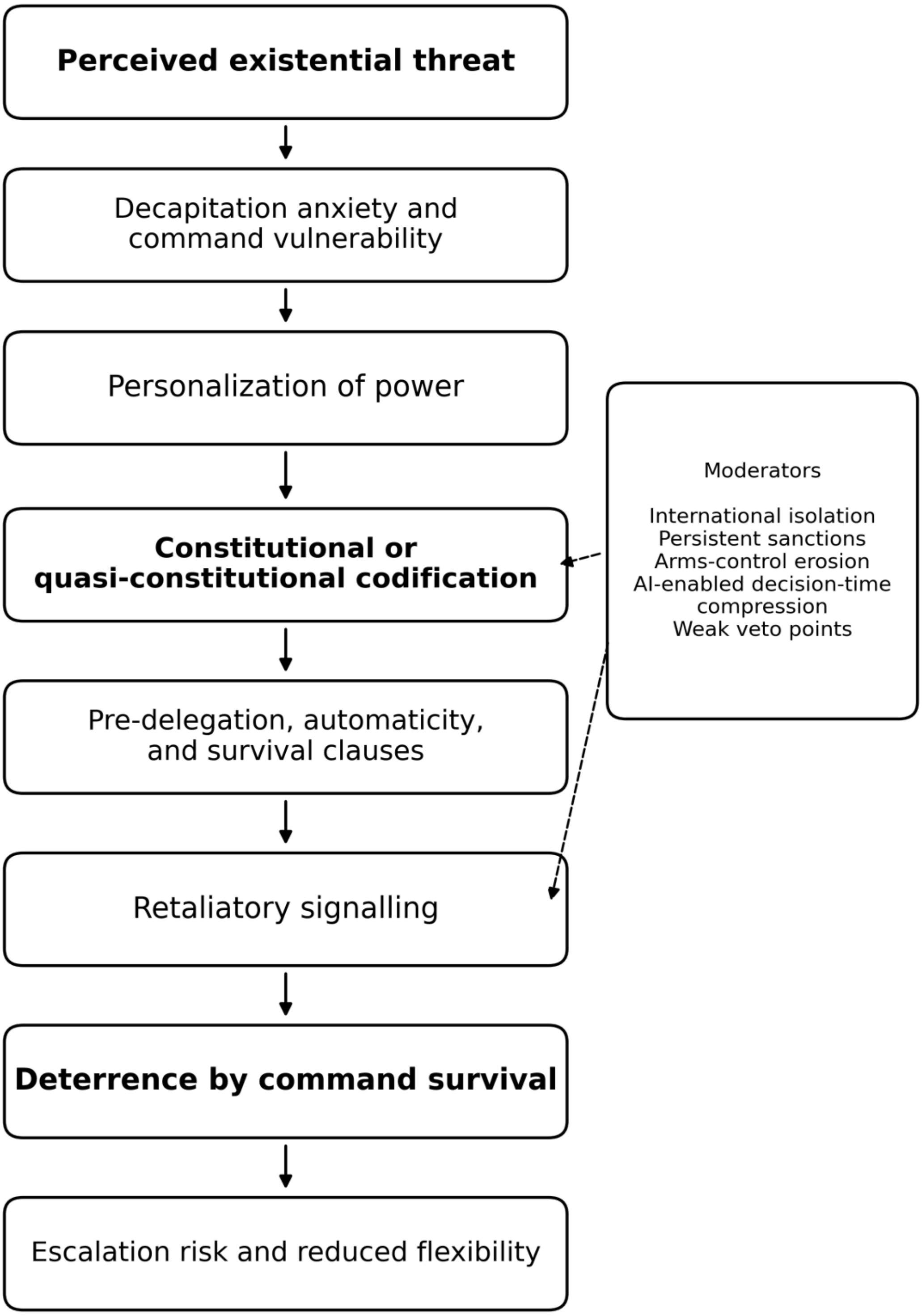
The theory also differs from nuclear doctrine. Doctrine may remain executive, military, classified, informal, or politically declaratory. A state may have elaborate nuclear doctrine without constitutionalizing it. Retaliatory constitutionalization begins when doctrine migrates upward into a constitutional or quasi-constitutional register. The phrase quasi-constitutional is necessary because some legal systems do not rely on a single codified constitution, and because some national security statutes perform a higher-order function within the political system. The United Kingdom and New Zealand, for different reasons, show why constitutional analysis cannot be limited to a single document. North Korea shows the opposite problem: a formal constitution may interact with statutes and official nuclear laws that already function as part of the regime's highest security settlement.

The causal mechanism can be stated plainly. The independent variable is perceived existential threat, intensified by fear of leadership decapitation, disruption of command-and-control, intervention, regime collapse, or territorial rupture. The key mediating variable is personalization of power. When the leader, the party, the state, the military command, and regime survival are fused, the leader becomes both the symbol of continuity and the single point of political failure. That creates a strategic contradiction. If all authority is concentrated in the leader, adversaries may infer that neutralizing the leader neutralizes retaliation. If authority is broadly delegated, the regime weakens the leader's sacral monopoly over the most consequential decision. Retaliatory constitutionalization tries to solve the contradiction by converting conditional retaliation into an authoritative legal commitment while maintaining leader-centered command as the visible principle of the system.

Several propositions follow. P1: the higher the perceived existential threat to the regime, the stronger the incentive to constitutionalize or quasi-constitutionalize retaliatory commitments. P2: personalist regimes are more likely to adopt retaliatory constitutionalization when the leader functions as a single point of political and military failure. P3: pre-delegation, automaticity, or pre-authorized continuity becomes more attractive when adversaries are perceived as capable of decapitation strikes or command disruption. P4: retaliatory constitutionalization can increase deterrent credibility while decreasing crisis flexibility. P5: AI and military automation do not cause retaliatory constitutionalization by themselves; they increase the legal and strategic significance of delegation, warning, timing, and meaningful human control. P6: international nuclear law remains comparatively stronger at regulating possession than at regulating the legal architecture of decision.

This is a theory of legal signalling under institutional pressure. Its dependent variable is not nuclear use, operational readiness, arsenal size, or battlefield doctrine. Its dependent variable is the constitutional or quasi-constitutional inscription of retaliatory command. The expected strategic effect is deterrence by command survival: adversaries are meant to understand that an attack on leadership or command may fail to eliminate the capacity, obligation, or expectation of response. The effect is double-edged. The same legal hardening that raises the cost of decapitation may reduce space for reinterpretation, delay, bargaining, or de-escalation. Analytically, the theory does not predict a simple positive effect of constitutionalization on security. It predicts a conditional effect shaped by threat perception, regime type, institutional veto points, technological compression, and crisis context.

Figure 1. Causal model of Retaliatory Constitutionalization Theory



https://doi.org/10.54934/ijlcw.v5i1.184

3. METHODOLOGY: COMPARATIVE MAPPING AND EXPLORATORY INDEXES

The article uses a mixed legal-comparative design. It combines theory-building, scoping review, comparative constitutional mapping, exploratory index construction, and critical-case analysis. The objective is not statistical inference. The sample is not designed to estimate population-level causal effects. It is designed to test conceptual boundaries, identify contrasts, and make the theory sufficiently falsifiable to be critically tested. The comparative map covers 45 countries: the five NPT-recognized nuclear-weapon states, the four nuclear-armed states outside the NPT framework, post-Soviet inheritance and renunciation cases, South Africa as a dismantlement case, anti-nuclear and pacifist constitutional cases, NATO umbrella or hosting cases, and authoritarian or presidential comparators with strong defense and emergency clauses.

The evidence base privileges constitutional texts, official legal materials, institutional treaty pages, recognized nuclear-security datasets, peer-reviewed scholarship, and specialist analysis. The Constitute Project is used as a constitutional mapping instrument [5], while UNODA, the IAEA, CTBTO, SIPRI, FAS, NTI, and the Bulletin of the Atomic Scientists are used for nuclear status, non-proliferation context, and arsenal background, including the SIPRI Yearbook's comparative nuclear-force data. [27] Media reporting is used only when primary legal texts are unavailable or politically opaque, and it is classified separately from legal evidence. This separation matters most for North Korea, where the 2022 nuclear-forces law is a high-confidence legal source, while reporting on the 2026 constitutional revision is treated as medium-confidence evidence pending wider public access to the consolidated constitutional text.

Two indices structure the comparison. The Nuclear Constitutionalization Index, NCI, measures how far nuclear issues are incorporated into constitutional or quasi-constitutional form. It ranges from 0 to 5: 0 means no meaningful nuclear relevance; 1 means only generic military command; 2 means indirect nuclear relevance through statutory or uncodified arrangements; 3 means the constitution materially shapes nuclear governance or anti-nuclear identity; 4 means strong command, peace, neutrality, or peaceful-use clauses with direct nuclear salience; 5 means direct constitutional or quasi-constitutional regulation of nuclear weapons, nuclear-free status, or nuclear-force command. The Retaliatory Constitutionalization Score, RCS, ranges from 0 to 10 and measures legal-retaliatory signalling.

The RCS uses an equal-weighted additive coding procedure. Each of the five dimensions receives 0, 1, or 2 points: 0 when the dimension is absent; 1 when it appears indirectly, weakly, or through ordinary political practice; and 2 when it appears directly in constitutional, quasi-constitutional, statutory, or officially entrenched strategic form. The five dimensions are: nuclear status in higher or quasi-constitutional law; leader or executive command personalization; automaticity or pre-delegation; formalized retaliatory triggers; and weak legislative or judicial counterweights. The final score is the sum of these five dimensions. Two ceiling rules discipline the coding: cases without a legally cognizable nuclear or strategic-command source normally cannot exceed 4, and cases without a formalized retaliatory trigger normally cannot exceed 6. Scores of 9 or 10 require the combination of leader-centered command, retaliatory triggers, and legal automaticity or pre-delegation.

Table 1. Exploratory indices and coding logic

Index	Scale	Coding logic
NCI	0-5	Degree to which nuclear issues enter constitutional or quasi-constitutional law: from no nuclear relevance to direct regulation of nuclear weapons, nuclear-free status, or nuclear-force command.
RCS	0-10	Equal-weighted additive score across five 0-2 dimensions: legal nuclear status, leader/executive command personalization, automaticity or pre-delegation, retaliatory triggers, and weak internal counterweights. Ceiling rules limit cases without legal nuclear sources or formalized retaliatory triggers.

The indices are intentionally qualitative. They do not measure warhead numbers, technical readiness, probability of use, doctrinal credibility, or actual military effectiveness. They measure legal inscription and signalling density. This limitation is not a defect. It is precisely what allows the comparison to distinguish Brazil from North Korea, Palau from Russia, and Japan from the United States. A high NCI can indicate restraint, prohibition, pacifism, or escalation, depending on legal content. The RCS then separates restraining constitutionalization from retaliatory constitutionalization. In other words, the NCI asks whether the nuclear question enters higher law; the RCS asks whether that entry hardens retaliation.

Table 2. Evidence hierarchy for legally opaque cases

Evidence level	Description	Use in article
High	Primary legal text or official legal publication.	May support direct legal claims.
Medium	Specialist institutional analysis or credible news reporting based on documents.	May support cautious claims with caveats.
Low	Media paraphrase, advocacy summary, social media, or sensationalized reporting.	Do not use for central claims.

4. COMPARATIVE CONSTITUTIONAL PATTERNS

The comparative map produces a first result that is theoretically important precisely because it is not spectacular: full retaliatory constitutionalization is rare. Most nuclear-armed states do not place nuclear launch authority or retaliatory conditions directly in constitutional text. They constitutionalize command in general terms and leave nuclear doctrine to statutes, executive arrangements, military practice, classified procedures, or political declarations. The United States has a powerful Commander-in-Chief clause and a long practice of presidential primacy in nuclear launch authority, but the Constitution does not itself contain a nuclear clause. [21] Russia's Constitution centralizes supreme command in the presidency and

https://doi.org/10.54934/ijlcw.v5i1.184

gives the president a decisive role in martial law, but its nuclear posture is largely located in presidential doctrine and decree. China constitutionalizes the Central Military Commission and the responsibility of its chair, yet its nuclear policy remains largely outside constitutional text. France and the United Kingdom likewise show that robust nuclear capacity may coexist with extra-constitutional or semi-constitutional command arrangements.

Russia deserves separate treatment because its nuclear posture sits close to, but still outside, the core of retaliatory constitutionalization. The 2020 Basic Principles of State Policy in the Sphere of Nuclear Deterrence and the 2024 revision are not constitutional provisions, but they are presidentially issued, public, general, and intended to stabilize expectations about nuclear response under extreme threat. [22] [23] The 2024 revision broadens the signalling environment by linking nuclear response more explicitly to aggression supported by a nuclear power and to threats against sovereignty and territorial integrity. For this reason, Russia's RCS is revised from 7 to 8. It remains below North Korea because the Russian materials do not constitutionalize automaticity or substitute command in the same way, but they are closer to retaliatory constitutionalization than ordinary doctrine.

India, Pakistan, and Israel sharpen the comparison among NPT-outside nuclear-armed states. India has a public nuclear doctrine and a Nuclear Command Authority arrangement that keeps authorization within a civilian political council, but its constitutional text does not itself codify nuclear retaliation. [7] Pakistan is more relevant to the quasi-constitutional category because the National Command Authority Act 2010 gives statutory form to strategic command and control; its posture remains legally more explicit than Israel's and more institutionally formalized than mere doctrine. [8] Israel is different again: its nuclear opacity produces strategic signalling through ambiguity and executive-security practice rather than through constitutional or statutory nuclear disclosure. [4] These cases confirm that nuclear capacity, public doctrine, statutory command, and retaliatory constitutionalization must be kept analytically separate.

A second pattern is negative nuclear constitutionalization. Palau and the Philippines are especially useful because they defeat the false inference that constitutional nuclear salience is inherently escalatory. Palau's Constitution constitutionalizes a nuclear-free commitment by requiring an extraordinary referendum threshold for the presence of nuclear weapons or related harmful substances. The Philippine Constitution contains a territorial nuclear-free policy. Brazil's Constitution limits nuclear activity to peaceful purposes and places it under congressional control. Japan's Article 9 is not a nuclear clause in a narrow textual sense, but it creates a peace-constitutional identity that has shaped the legal and political meaning of force, rearmament, and nuclear dependence. New Zealand lacks a single codified constitution, yet its Nuclear Free Zone, Disarmament, and Arms Control Act has a quasi-constitutional political status in the country's security identity. [16] These cases are analytically indispensable because they show that higher-law nuclearization can restrain the state rather than intensify retaliation.

A third pattern is accommodative nuclear re-entry. Belarus is the clearest example in the present sample. The 2022 constitutional referendum removed prior language associated with neutrality and nuclear-free status, creating a legal-political environment more compatible with Russian nuclear deployment. [17] Belarus should not be treated as a full case of retaliatory constitutionalization, because its posture remains derivative of Russian strategic command. Yet it is not a trivial case. It demonstrates that constitutional change can reopen nuclear possibility after a renunciation trajectory. The Belarusian case therefore belongs between negative constitutionalization and retaliatory constitutionalization. It is an enabling case, not a paradigmatic one.

A fourth pattern is military-generic constitutionalization. Many constitutions regulate armed forces, territorial integrity, war declaration, emergency powers, and civilian command without giving nuclear questions any direct textual status. Germany, Italy, the Netherlands, Belgium, South Korea, Turkey, Canada, Australia, Spain, Portugal, Mexico, Argentina, Colombia, Indonesia, Egypt, Venezuela, Cuba, and Vietnam fall into different subtypes of this broad family. Their constitutional texts matter because they structure who may declare war, command forces, approve emergency measures, authorize deployments, or discipline military power. But they do not generally constitutionalize nuclear retaliation. They are necessary comparators because they show the baseline from which retaliatory constitutionalization deviates.

The conceptual payoff is discriminant validity. Retaliatory constitutionalization is not any mention of the military. It is not any strong presidency. It is not any nuclear arsenal. It is not any emergency clause. It is a tighter configuration: perceived existential threat, leader-centered or executive-centered command, legal elevation of nuclear or strategic retaliation, conditional continuity under attack, and weak internal constraints on escalatory interpretation. On this definition, North Korea is not merely one case among many. It is the case that exposes the full mechanism.

Table 3. Comparative constitutional typology and provisional scores

Country or group	Type	NCI	RCS	Interpretation
North Korea	Retaliatory constitutionalization	5	10	Paradigmatic case of leader-centered nuclear command and conditional retaliatory continuity.
Russia	Presidential nuclear-doctrine entrenchment	4	8	Public presidential doctrine and 2024 revision create strong legal-retaliatory signalling without constitutional automaticity.
Pakistan	Quasi-constitutional strategic command	4	7	National Command Authority Act 2010 gives statutory form to strategic command and control.
United States	Extra-constitutional nuclear command on strong executive base	4	7	Powerful commander-in-chief architecture, with nuclear specificity largely outside constitutional text.
India	Public doctrine and civilian nuclear command	4	6	Nuclear Command Authority and public doctrine; no direct constitutionalization of nuclear triggers.
China	Party-state military centralization	4	6	Central Military Commission is constitutionally central, but nuclear triggers are not constitutionalized.
Israel	Strategic opacity	2	5	Nuclear ambiguity operates through executive-security practice rather than disclosed constitutional command.
Belarus	Accommodative nuclear re-entry	3	5	Constitutional change removed barriers associated with neutrality and nuclear-free status.
Palau	Negative constitutionalization	5	0	Direct constitutional nuclear restrictions with extraordinary popular threshold.
Philippines	Negative constitutionalization	5	0	Territorial anti-nuclear constitutional commitment.
Brazil	Peaceful-use constitutionalization	4	1	Nuclear activity constitutionally limited to peaceful purposes and congressional control.
Japan	Pacifist constitutionalization	4	0	Article 9 structures force and nuclear debate through peace-constitutional identity.
NATO umbrella cases	Generic/extra-constitutional nuclear dependence	2-4	3-4	Constitutional command exists, but nuclear dependence is mainly alliance-based.

5. NORTH KOREA AS THE CRITICAL CASE

North Korea's importance lies in the interaction between legal text, personalist command, and deterrence under perceived decapitation risk. The 2022 Law on the DPRK's Policy on Nuclear Forces is the central document. It identifies nuclear forces as integral to state defense and sovereignty, places those forces under the monolithic command of the president of the State Affairs Commission, and gives that leader decisive authority over nuclear weapons. It also provides that if the command-and-control system over the state nuclear forces is placed in danger by hostile attack, a nuclear strike shall be launched automatically and immediately according to an operation plan decided in advance. [12] This language is legally and strategically unusual. It translates the problem of command survival into a public legal commitment and should be read against recent scholarship on the DPRK's changed nuclear doctrine and nuclear-force development. [3] [13]

The provision should be read with care. It does not prove a fully autonomous technical system. It does not prove AI launch authority. It does not necessarily describe a mechanical dead-hand apparatus. Bernstein and Smith's analysis for 38 North is persuasive precisely because it rejects that shortcut. They read the law as pointing toward an automatic or pre-planned command model that attempts to preserve Kim Jong Un's primacy while reducing the strategic vulnerability created by one-person rule. [2] That is the core constitutional puzzle. A personalist nuclear regime needs credible retaliation after decapitation, but it cannot comfortably empower alternative centers of authority. Legal automaticity offers a way to communicate continuity without openly pluralizing sovereignty.

The 2026 constitutional revision intensifies the case, but it must not be overstated. Specialist reporting following the March 2026 Supreme People's Assembly session indicates that the constitution was revised, that Kim Jong Un's State Affairs Commission chairmanship was further formalized as the headship position of the state, and that the amended text appears to have removed reunification language while introducing a provision on delegated nuclear command authority. [11] [15] If confirmed in a consolidated official constitutional text, this would mark a clear movement from statutory nuclear policy toward constitutional nuclear command. Yet the article's argument does not depend on a maximalist reading. It is enough to say that the evidence strongly supports legal codification of leader-centered nuclear command and conditional automatic retaliation in 2022, and credibly suggests constitutional elevation of nuclear-force command in 2026.

A robustness check is therefore necessary. If later access to the consolidated 2026 constitutional text shows that the revision is more limited than current reporting suggests, three conclusions would remain intact: the 2022 law would still support the claim of quasi-constitutional nuclear command; North Korea would remain the strongest case of legal automaticity tied to command survival; and the theory would still explain why personalist regimes under decapitation anxiety may legally harden retaliation. What would change is narrower: the claim of formal constitutional elevation in 2026 would be softened, and North Korea's RCS could be read as 9 rather than 10 if delegation language is not confirmed. The theory therefore does not depend on the strongest version of the 2026 claim.

North Korea therefore scores high on both indices. It receives NCI 5 because nuclear command and nuclear-force status enter constitutional or quasi-constitutional legal form. It receives RCS 10 because the legal arrangement combines leader-centered command, explicit retaliatory continuity, conditional automaticity, weak countervailing institutions, and external signalling toward adversaries. The score is not a claim that North Korea possesses the largest arsenal or the most sophisticated command system. It is a claim about legal architecture. Indeed, uncertainty about operational capability makes the legal signal more important rather than less. Law becomes one of the instruments through which the regime tries to compensate for uncertainty, vulnerability, and asymmetry.

The case also reveals the theory's darker side. Retaliatory constitutionalization may improve deterrence by warning adversaries that leadership decapitation will not necessarily neutralize the state. At the same time, it can harden crisis behavior. A legal commitment to rapid retaliation under command threat may reduce the interpretive space needed to pause, verify, communicate, or de-escalate. Command survival becomes legally fused with national survival. The state's constitutional imagination begins to treat restraint as possible betrayal of the founding security commitment. That is why the constitutionalization of retaliation deserves legal attention even when no nuclear weapon is used. It alters the grammar of decision before the decisive moment arrives.

6. AI, AUTOMATION, AND THE SECOND-GENERATION CRISIS OF NUCLEAR LAW

Artificial intelligence enters this argument as a moderator, not as an independent proof of autonomous nuclear decision-making. The distinction is essential. There is no reliable legal evidence that North Korea has constitutionalized AI-based nuclear launch authority. Normative debate has largely moved in the opposite direction, toward preserving meaningful human control over nuclear-use decisions. SIPRI's recent work is more useful than sensational claims because it shows how AI may increase escalation risk even when humans formally remain in the loop. AI can affect warning, surveillance, data fusion, target recognition, decision support, cyber vulnerability, and the tempo of crisis interpretation. [25] [26]

This matters for retaliatory constitutionalization because the legal value of pre-delegation and automaticity rises as decision time shrinks. If leaders believe that adversaries can disable command, blind sensors, paralyze communications, or exploit automated vulnerabilities, the temptation to pre-authorize retaliation grows. Law then becomes a stabilizer and a destabilizer at once. It stabilizes expectations by specifying who commands and what follows from attack on command. It destabilizes crisis management by reducing flexibility exactly when information is degraded. The legal form becomes part of the escalation environment.

International law is underdeveloped on this dimension. The NPT [28] remains the central non-proliferation treaty, structured around non-acquisition, safeguards, peaceful use, and disarmament commitments. The TPNW [29] prohibits a wide range of nuclear-weapon activities for its parties. The CTBT's legal project centers on explosive testing, although entry into force remains incomplete. IHL debates emphasize humanitarian consequences, distinction, proportionality, unnecessary suffering, and the legality of use. These frameworks are indispensable, but their center of gravity is still possession, testing, transfer, use, or prohibition. They do not adequately regulate the domestic legal architecture of nuclear decision, delegation, automaticity, or constitutional signalling. The second-generation crisis of nuclear law is therefore a crisis of decision architecture.

Recent scholarship has already begun to connect artificial intelligence to fundamental rights, public security, and national-security governance across legal systems. [1] [10] [24] The present argument extends that discussion into a domain where law, security, technology, and constitutional form converge. The novelty is not that AI creates every risk. The novelty is that AI makes the legal architecture of decision more consequential. When decision time is compressed, the difference between flexible doctrine and constitutionalized retaliation becomes legally and strategically sharper.

7. DISCUSSION: FROM NUCLEAR POSSESSION TO NUCLEAR DECISION

The theory developed here shifts attention from nuclear possession to nuclear decision. That shift does not diminish non-proliferation law. It reveals its limits. A state may comply with certain visible formalities while constructing a domestic command architecture that heightens crisis instability. Conversely, a state may constitutionalize nuclear restraint, as Brazil, Palau, the Philippines, Japan, and New Zealand demonstrate. The legal question is no longer whether nuclear matters enter constitutional law. They already do, in different forms. The question is what kind of constitutionalization occurs and what strategic signal it sends.

Retaliatory constitutionalization also complicates the standard liberal assumption that constitutionalization is inherently restraining. Constitutional law can limit executive violence, but it can also solemnize it. It can democratize decisions over war, but it can also concentrate them. It can humanize security through rights, procedure, and parliamentary control, but it can also transform retaliation into an identity claim. This ambivalence is familiar in abusive constitutionalism, but nuclear command gives it a different scale. When escalation is constitutionalized, the constitutional text becomes part of the state's coercive posture. It is no longer only a forum of internal legality. It becomes a signal in the adversary's risk calculation.

The proposed indices are modest instruments for capturing that ambivalence. Their purpose is not to rank dangerous states. Their purpose is to separate legal salience from retaliatory salience. Without that separation, one might place Palau and North Korea in the same category merely because both constitutionalize nuclear questions. That would be analytically absurd. Palau constitutionalizes a barrier; North Korea constitutionalizes command and retaliation. Brazil constitutionalizes peaceful-use restriction; the United States constitutionalizes executive command in general while leaving nuclear specificity largely outside the text. Belarus removes a constitutional obstacle to nuclear dependence without becoming the source of independent retaliatory command. The conceptual map matters because it prevents nuclear constitutional analysis from collapsing into a single scale of threat.

There are limits. First, the dataset is exploratory and should be expanded. Second, authoritarian legal systems are difficult to interpret because text, practice, and propaganda overlap. Third, uncodified systems require careful treatment of statutes, conventions, and political entrenchment. Fourth, the North Korean constitutional revision of 2026 remains partly dependent on credible reporting rather than full public access to a consolidated official text. Fifth, the indices cannot measure actual operational reliability. A legal signal may be intentionally ambiguous, aspirational, deceptive, or performative. These limits delimit the article's claims and indicate where subsequent research should concentrate: larger coding exercises, deeper country studies, and closer integration between comparative constitutional law and nuclear-command scholarship.

8. CONCLUSION

Retaliatory Constitutionalization Theory identifies a narrow but important legal phenomenon: the elevation of retaliatory command, strategic continuity, and nuclear decision architecture into constitutional or quasi-constitutional form. Its central insight is that constitutions can become external signalling devices in extreme-security contexts. They may speak to citizens, courts, legislatures, and bureaucracies, but they may also speak to adversaries when the message concerns leadership survival, command continuity, and retaliation after attack.

The comparative evidence most directly supports P1 and P2: perceived existential threat and personalization of power explain why North Korea, and to a lesser degree Russia and Pakistan, occupy the high-retaliatory end of the map. It also supports P3 and P4, because pre-delegation, automaticity, and legal hardening increase deterrent credibility while narrowing crisis flexibility. P5 is supported more indirectly: AI does not cause retaliatory constitutionalization, but it increases the legal significance of pre-authorization and compressed decision time. P6 follows from the gap between nuclear treaty law and domestic decision architecture. International nuclear law remains stronger at regulating possession than at regulating command, delegation, and constitutional signalling.

The forward-looking agenda is therefore precise. Future research should refine the NCI and RCS, expand the coding matrix, distinguish constitutional rhetoric from operational reality, and ask whether emerging norms of meaningful human control can reach domestic nuclear-command architectures. Possession, transfer, testing, safeguards, prohibition, and disarmament remain central. Yet the next crisis may be decided not only by who possesses nuclear weapons, but by how domestic law structures the decision to use, delegate, delay, automate, or retaliate. A changing world requires a legal vocabulary for that architecture. Retaliatory constitutionalization is one proposed entry into that vocabulary.

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ABOUT THIS ARTICLE

Conflict of interests: The author declares no conflicting interests

CRediT Authorship Contribution Statement:

Thiago Perez Bernardes de Moraes: Conceptualization; Methodology; Investigation; Data curation; Formal analysis; Resources; Validation; Visualization; Project administration; Writing - original draft; Writing - review & editing.

AI-use Disclosure: AI-assisted tools were used only for orthographic review and linguistic adjustment. They were not used as authors, co-authors, sources of legal authority, or substitutes for scholarly judgment. The author assumes full responsibility for the conceptual framework, source selection, interpretation, analysis, conclusions, and final manuscript.

Data availability: The comparative coding is based on publicly accessible constitutional texts, institutional treaty materials, legal documents, and specialist sources listed in the references.

CONSTITUCIONALIZACIÓN DE LAS REPRESALIAS: MANDO NUCLEAR, BLINDAJE CONSTITUCIONAL Y ESCALADA DE CRISIS

RESUMEN

La teoría de la constitucionalización de las represalias explica cómo los Estados pueden elevar el mando nuclear y los compromisos de represalia desde el ámbito de la política ordinaria a una forma constitucional o cuasiconstitucional. A partir del derecho constitucional comparado, el derecho nuclear internacional, los estudios sobre mando y control y los debates sobre la gobernanza de la IA, el artículo sostiene que esta tendencia es más probable cuando convergen la percepción de una amenaza existencial, el temor a un ataque de decapitación, la personalización del poder ejecutivo y la debilidad de los mecanismos internos de veto. Se introducen dos medidas cualitativas exploratorias —el Índice de Constitucionalización Nuclear y la Puntuación de Constitucionalización de las Represalias— y se aplican en un análisis comparativo que abarca 45 jurisdicciones. Corea del Norte figura como el caso paradigmático, mientras que Rusia, Pakistán, Bielorrusia y los Estados con disposiciones constitucionales antinucleares sirven como términos de comparación. El artículo concluye que el derecho nuclear contemporáneo sigue siendo más eficaz a la hora de regular la posesión, la transferencia, las pruebas y el desarme que en lo relativo a la toma de decisiones, la delegación, la automatización, la supervivencia del mando y la señalización constitucional.

Palabras clave: constitucionalización de las represalias, mando y control nuclear, derecho nuclear internacional, poderes de emergencia, inteligencia artificial

报复性宪法化：核指挥、宪法固化与危机升级

摘要

“报复性宪法化”理论阐释了国家如何将核指挥与报复承诺从一般性政策提升为宪法或准宪法层面的规范。本文综合比较宪法学、国际核法、指挥与控制研究以及人工智能治理领域的探讨，指出当生存威胁感知、对“斩首”打击的焦虑、行政权高度个人化以及国内制衡机制（否决点）薄弱等因素交织时，这种宪法化趋势便更易出现。文章提出了“核宪法化指数”和“报复性宪法化评分”这两项探索性定性指标，并将其应用于涵盖45个司法管辖区的比较分析中。其中，朝鲜被视为典型案例；俄罗斯、巴基斯坦、白俄罗斯以及将“无核”写入宪法的国家则作为对照组进行分析。文章最后得出结论：当代核法在规制核武器的拥有、转让、试验及裁军方面较为有力，但在规制核决策、授权、自动化、指挥体系生存能力及宪法信号传递等方面，则相对薄弱。

关键词：报复性宪法化，核指挥与控制，国际核法，紧急权力，人工智能

https://doi.org/10.54934/ijlcw.v5i1.184

International Journal of Law in Changing World

Volume 5 Issue 1 (2026) ISSN 2764-6068

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International Journal of Law in Changing World

International Journal of Law in Changing World

ISSN 2764-6068 (online) | ISSN XXXX-XXXX (printed)

Semestral publishing

Editor

International Journal of Law in Changing World – IJLCW – Independent Publishing

Contact

editor@ijlcw.org | ijlcw.emnuvens.com.br | Av. Glaucio Gil, 760 – Recreio – Rio de Janeiro, RJ, Brazil

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Volume 5 Issue 1 July 2026 ISSN 2764-6068

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