Technology transfer and investment law

2025

edited by
Zoltan Vig

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Zoltan Vig*

Editorial: Technology transfer and investment law

Technology transfer and investment law are central elements in the global economy, particularly in promoting innovation, enhancing economic growth, and ensuring the sustainable development of industries. Understanding their interrelationship is vital for developing effective legal frameworks that facilitate the movement of technology across borders while also ensuring investments contribute positively to host economies.

Technology transfer enables the movement of knowledge, skills, and innovations, often from developed to developing countries, helping to boost productivity, foster innovation, and improve the welfare of local workforces.

Investment law provides the legal structure within which technology transfer occurs, influencing the ability of foreign direct investments to bring new technologies into host countries. Foreign direct investment serves as a major source of capital and is a critical driver of technological innovation and transfer. The interaction between domestic businesses and foreign businesses can lead to enhanced productivity and technological advancements, particularly in developing economies where local businesses may lack the necessary resources for research and development. This relationship highlights the importance of investment law, which must foster

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an environment conducive to attracting foreign direct investments that brings in advanced technologies.

Effective investment laws can require or incentivise foreign investors to transfer technology, ensuring that host countries benefit not just from capital inflows but also from technological advancement and capacity building. However, the success of these laws depends on clear regulations, enforcement mechanisms, and the protection of intellectual property rights, which encourage both foreign investment and the willingness to share advanced technologies. In certain economic sectors, technology transfer through foreign investment contracts is crucial for accessing cutting-edge techniques and expertise, but must be carefully managed to align with national interests and long-term development goals. The relationship between technology transfer and investment law is thus symbiotic: appropriate legal frameworks attract investment and facilitate technology flows, while technology transfer enhances the value and impact of those investments for host economies. Ultimately, aligning investment law with technology transfer objectives is essential for sustainable economic growth, innovation, and global competitiveness. Such synchronisation is essential as it helps safeguard the rights of both investors and innovators, influencing a balance between promoting investment and protecting local interests.

The development of a comprehensive legal regime is also crucial in navigating the complexities of technology transfer across multiple sectors. Facilitating technology transfer requires a supportive infrastructure, which often relies on consistent investment flowing from well-defined legal systems that protect investments. Investment law must therefore adapt to promote infrastructure investments that support technology transfer activities.

Moreover, the evolving nature of international investment law necessitates a nuanced understanding of how legal frameworks can be structured to maximise the benefits of technology transfer. Advancements in investment laws and international arbitration efforts can lead to enhanced sustainable development outcomes, thereby boosting the capacity of host nations to benefit from technological inflows while ensuring compliance with international standards. This highlights the potential for investment law not only to facilitate technology transfer but also to encourage sustainable practices among foreign investors.

The interrelatedness of technology transfer and investment law is crucial for enhancing economic development and promoting innovation. A well-regulated investment law regime creates a environment conducive to technology transfer by attracting foreign investments while ensuring that local economies benefit from innovation and technology. The synthesis of these legal frameworks can bolster the effectiveness of technology transfer initiatives, ultimately leading to sustainable growth and the development of competitive advantages in an increasingly interconnected global marketplace.

This volume is a collection of studies that address some of the aforementioned issues. The first paper, written by Dominik Boros, titled “Technology transfer and IP licensing: key tools for sustainability”, explores how technological innovation and legal frameworks can support sustainable consumption and the green transition. It focuses on recent EU regulatory developments, particularly the 2023/1066 R&D Block Exemption Regulation that impacts technology transfer and standardisation. The study analyses these changes and offers practical recommendations to enhance the adoption of sustainable, eco-friendly technologies within the EU single market.

In her paper “Current legal issues in Hungarian public investment” Kitti Gondos analyses Hungary’s recent construction law reform, centred on Act LXIX of 2023 on Public Construction Investment (PCIA), which separates public and private construction regulation. The law introduces a comprehensive, lifecycle-based approach to public construction projects, aiming for cost-effectiveness, environmental sustainability, and greater transparency. It encourages SME participation and mandates digital tools like Building Information Modelling (BIM) for large-scale projects. The study also examines related amendments, such as the 2025 Budget Law and the new Green Public Procurement Decree, and evaluates the reform’s impact using public procurement data. The author comes to the conclusion that the Public Construction Investment Act, in force for two years, has significantly restructured Hungary’s public investment system by centralising project management under the Ministry of Construction and Transport. It replaced fragmented procedures with a unified, cost-effective framework covering the full lifecycle of public works. The reform has improved efficiency, reduced reliance on costly external resources, and introduced sustainability into public procurement. While the legal framework shows promise, its effectiveness depends on proper implementation. Challenges remain in adapting to the new system, and the true impact of the reform can only be assessed through ongoing monitoring, professional dialogue, and long-term data analysis. The study concludes that the PCIA marks a positive shift, but sustained effort is needed to ensure its long-term success.

Balázs Horváthy in “Forced Technology Transfer and WTO Reform” provides context on forced technology transfer and the ongoing institutional crisis of the World Trade Organization (WTO). The paper’s main aim is to examine how disputes over

technology transfer between developed and developing nations have evolved into a fundamental challenge that already threatens the institutional integrity of the multilateral trading system. The first part provides a working definition of forced technology transfer and describes the main problem as a structural contradiction between liberal trade policies, and international development as well as domestic industrial policies. The second part traces the historical development of technology transfer from a development policy perspective. The third part then focuses on how forced technology transfer has given rise to the current WTO institutional crisis, particularly through US–China trade disputes. In conclusion, the paper advocates clarifying existing WTO rules and developing new, specific regulations that prohibit forced technology transfer practices. This would address the role of state-owned enterprises and improve market access commitments. While multilateral negotiations should continue, the paper suggests that plurilateral approaches may be necessary as transitional solutions if consensus cannot be achieved.

Irina Iacovleva in "Expropriation in international investment law: concepts, classifications, and practice" provides a comprehensive analysis of the legal nature of expropriation within the framework of international investment law, with a particular emphasis on the approaches adopted by the International Centre for Settlement of Investment Disputes (ICSID). Expropriation, as discussed in the paper, represents a critical intersection between public international law and private investor rights. A central theme of the paper is the conditions under which expropriation is considered lawful under international law. For a state's action to be deemed legitimate, it must serve a public purpose, be non-discriminatory, follow due process, and include the payment of prompt and adequate compensation. These principles are consistently reflected in bilateral and multilateral investment

treaties, which aim to strike a balance between a state's right to regulate and the protection of foreign investments. The paper also delves into the jurisprudence of international arbitral tribunals, particularly those operating under ICSID, noting that the legality of expropriation and the entitlement to compensation are frequently the core issues in investor-state disputes. Due to the lack of a universally accepted definition of indirect expropriation, tribunals have adopted a case-by-case approach. This flexible methodology considers the cumulative effect of state actions, investor expectations, and the overall impact on the investment. The author argues that the modern concept of expropriation in international law has significantly expanded beyond traditional notions of direct seizure. The nuanced forms of indirect expropriation, and the need to interpret them in the context of evolving state practices and investor protections, underscore the complexity of this legal institution. A situational, individualised approach remains essential for assessing whether specific state actions constitute expropriation and whether they meet the legal standards established by international law.

Bengi Sargin's work titled "A barrier for foreign investors: the obligation to use Turkish language in business under Turkish law with the related judicial practice" examines Law No. 805, enacted in 1926 and still in force, which mandates the use of Turkish in the operations of economic enterprises. The law requires Turkish companies to conduct all business-related transactions in Turkish and imposes limited obligations on foreign companies in dealings with Turkish entities and authorities. Amid growing international trade and the dominance of foreign languages like English, the law has gained renewed relevance, especially concerning legal uncertainties in arbitration agreements. A key debate centres on whether foreign-language contracts between Turkish and foreign entities violate the law, particularly since the term

"contract" is not explicitly mentioned in the law and court rulings have been inconsistent. The study explains the law's provisions, explores doctrinal debates, analyses case law, and offers an overall legal assessment of its application and implications.

In his study Mehmet Cemil Türk "Status of no-challenge clauses in patent licences under Turkish law" explores the legal status of no-challenge clauses in patent licence agreements under Turkish law, which prohibit licensees from disputing the validity of licensed patents. While common internationally, these clauses lack thorough academic analysis in Turkey. The study assesses their enforceability through the lens of contract law, commercial law, and competition law, examining their compatibility with principles like good faith, personality rights, and business prudence. It also analyses the 2019 Vestel v. Philips decision, the only Turkish precedent on the matter, which evaluates the potential anti-competitive effects of such clauses. By addressing a gap in Turkish legal doctrine, the work offers practical guidance and sets a foundation for future academic and legislative developments in technology licensing.

Marie Valerie Uppiah contributed to this volume with a work entitled "Examining the regulation of Non-Fungible Tokens (NFTs) in Mauritius". Blockchain technology and digital assets are transforming business and finance by enabling decentralised, transparent, and efficient transactions. Cryptocurrencies like Bitcoin have emerged as alternatives to traditional banking, while Non-Fungible Tokens (NFTs) provide unique digital ownership and new revenue models for creators. Despite their benefits, these assets face challenges such as volatility, fraud risks, environmental impacts, and limited regulation. In Mauritius, the Virtual Asset and Initial Token Offerings Services (VAITOS) Act 2021 establishes a comprehensive framework for regulating cryptocurrencies and

NFTs, with the Financial Services Commission overseeing licensing, consumer protection, and compliance with international anti-money laundering standards. By classifying NFTs as collectibles, securities, or virtual assets, the law adopts a functional approach that balances innovation with regulation. While Mauritius promotes itself as a hub for digital assets through tax incentives and robust oversight, gaps remain, particularly in banking recognition and investor safeguards, highlighting the need for ongoing legal adaptation in this rapidly evolving sector.

Dominik Boros*

Technology transfer and IP licensing: key tools for sustainability

Abstract: Technological development and innovation can play a key role in achieving sustainable development goals. One of the fundamental objectives of sustainable consumption (as a significant branch of the sustainable development goals) is to encourage consumers to choose environmentally friendly, durable, and repairable products, thereby contributing to resource conservation and the promotion of a circular economy. However, the widespread adoption of the necessary technologies – such as energy-efficient products, reparability standards, and eco-design principles – largely depends on the legal and economic conditions of technology transfer. In recent years, the European Union has taken significant steps to ensure that the competition law framework is capable of addressing sustainability challenges. One important outcome of these efforts is the 2023/1066 R&D Block Exemption Regulation, as well as the new Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal cooperation agreements, with a particular focus on R&D and standardisation agreements.

The objective of this work is twofold: first, to analyse the latest regulatory developments in research and development (R&D) and standardisation, paying particular attention to technology transfer mechanisms and the licensing of intellectual property rights; second, to examine how these new rules can contribute to promoting sustainable consumption.

Overall, the work integrates the legal and economic aspects of sustainable consumption and formulates practical recommendations on how R&D, standardisation, and technology transfer mechanisms can more effectively support the green transition. Special attention is given to regulatory challenges and legal instruments that can facilitate

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the broader dissemination of sustainable innovations within the single market.

Keywords: IP licensing, sustainability, innovation, R&D Block Exemption Regulation, patent

1. Introduction

The relationship between competition law and intellectual property law (IPR) is heavily conflicted. While competition primarily focuses on innovation and the liberalisation of the market, intellectual property rights, in contrast, achieve economic efficiency precisely by temporarily restricting competition[1], thereby ensuring incentives for innovation.[2] The existence and enforcement of intellectual property rights grant a certain level of exclusivity to the rights holder, which serves to offset the market risks associated with developing new technologies or other technical solutions.[3]

A paradox of the green transition is that while sustainable innovation appears to be most efficiently achieved in less concentrated markets[4], this ideal often contradicts the legitimate claims of IPR-protected green technology owners seeking remuneration for their efforts in creating eco-friendly products.

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[1] Thomas F Cotter, 'Intellectual Property and the Essential Facilities Doctrine' (1999) 44 *Antitrust Bulletin*.

[2] Yo Choi and Andreas Heinemann, 'Restrictions of Competition in Licensing Agreements: The Worldwide Convergence of Competition Laws and Policies in the Field of Intellectual Property' (2016) 17 *European Business Organization Law Review*.

[3] Tóth András, *Versenyjog és határterületei - A versenyszabályozás jogági kapcsolatai* (HVG-ORAC, 1st edn. Budapest 2016).

[4] Daniel Fernández-Kranz and Juan Santaló, 'When Necessity Becomes a Virtue: The Effect of Product Market Competition' (2010) 19 *Journal of Economics and Management Strategy*.

The most efficient solution to this issue can be the institution of technology transfers, where the IPR owners can decide if they want to give access to their IPR protected technology, thus creating a bridge between the freer competition and ensuring some degree of exclusivity and the protection of the interests of the IPR owners. Licensing is generally not mandatory[5]; nevertheless, technology transfer agreements play a vital role in ensuring the wide spreading of scientific knowledge, which provides a fundamental stimulus for the development of innovative products and services, increases the commercial exploitation of inventions, improving the efficiency and effectiveness of research and development efforts and guarantees significant incentives to innovate.[6]

Due to the environmental challenges the world faces there is a huge emphasis on researching, developing and utilising green technology. In a 2020 survey[7], it was shown that 93% of the respondents implemented sustainable corporate polices in general, and one third of R&D investments were aimed at sustainability, which increased to 46% in 2022[8]. That is why it is relevant to examine one of the most essential factors of

[5] Ioannis Lianos, 'Competition Law and Intellectual Property (IP) Rights: Analysis, Cases and Materials' in Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law* (Hart Publishing, 1st edn. 2017,), Chapter 13.

[6] Stefano Barazza, 'The Technology Transfer Block Exemption Regulation and Related Guidelines: Competition Law and IP Licensing in the EU' (2014) 9(3) *Journal of Intellectual Property Law & Practice.*

[7] Lesley Potters and Nicola Grassano, The 2020 EU Survey on Industrial R&D Investment Trends (EUR 30518 EN, Publications Office of the European Union, Luxembourg 2021).

[8] Elisabeth Nindl, The 2022 EU Survey on Industrial R&D Investment Trends (Publications Office of the European Union, Luxembourg 2022).

developing green technology regarding technology transfer: R&D agreements and the exploitation of the results.

The success of a R&D process heavily relies on the pre-existing standards, which are needed in order for the newly-developed technology to be compatible with others. However, there are many regulatory issues appearing in the field of licensing standards, also worthy of investigation due to its influence on R&D investments.

This paper aims to examine the regulatory framework and occurring challenges of technology transfer within R&D and standardisation agreements, focusing on the balance between exclusivity and competition and the possible effects on sustainable innovation.

The first chapter includes description of the importance of R&D activities and sustainable technology transfers, plus an account of what are the new regulations regarding R&D and the exploitation of the results. The second chapter will describe the necessity of green standards and the new modernised approach regarding standardisation agreements. The last chapter evaluates the landscape of technology transfer and concludes with policy recommendations and future research directions, addressing how regulatory adjustments could better align competition law with sustainability objectives.

2. The relationship between R&D and technology transfer

The importance of R&D agreements was reflected early in the case law of the European Union. The IV/34.776 - Pasteur Mérieux-Merck case[9] was a competition law case in which the

[9] Commission Decision of 6 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA

European Commission evaluated the cooperation between Pasteur Mérieux and Merck & Co., Inc., focusing on its potential anti-competitive effects.

In the background of the case, Pasteur Mérieux (a subsidiary of the French Institut Pasteur) and the American company Merck established a joint venture for the research, development, production, and marketing of vaccines. The goal of this collaboration was to combine their resources and expertise in the vaccine industry. The European Commission evaluated the impact of this cooperation on competition within the vaccine market, particularly within the European Economic Area (EEA). The establishment of the joint venture itself was not ruled to significantly distort competition. However, the Commission attached high importance to ensuring that the collaboration did not hinder market entry for other companies or lead to the exclusion of competitors.

One of the main conditions of the Commission's approval was that the parties must maintain market competition and avoid anti-competitive behaviours. This case highlighted the Commission's willingness to support R&D agreements as long as they did not lead to market monopolisation or abusive practices.

From an academic perspective,[10] R&D agreements can have an enormous impact on fostering green innovation and spreading

Agreement (IV/34.776 - Pasteur Mérieux-Merck), OJ L 309, 2.12.1994., 1—23.

[10] Xuefeng Shao, Yifan Zhong, Yameng Li and Mehmet Altuntas, 'Does Environmental and Renewable Energy R&D Help to Achieve Carbon Neutrality Target? A Case of the US Economy' (2021) 296 *Journal of Environmental Management*, David Sarpong, Derrick Boakye, George Ofosu and David Botchie, 'The Three Pointers of

green technologies, when the undertakings make use of green technology transfer. Green technology transfer refers to the process of disseminating and adopting environmentally friendly technologies, practices, or innovations from one entity to another.[11]

When the newly researched green innovations are being shared or transferred between firms, it drives the adoption of green technologies within the industry.[12] Therefore, green technology transfer plays an essential role in spreading sustainable innovations resulting from R&D efforts. Furthermore, R&D support can enable cooperation and partnerships with external entities, such as research institutions or other firms, which bring with them valuable practical and theoretical knowledge relating to green technologies.[13] The transfer of this external knowledge through collaboration enhances a firm's ability to innovate sustainably, serving as a connection between R&D support and the adoption of green technologies.

Research and Development (R&D) for Growth-Boosting Sustainable Innovation System' (2023) 122 *Technovation*.

[11] Samuel Adomako and Mai Dong Tran, 'Exploring the Effect of R&D Support, Green Technology Transfer, Sustainable Innovation' (2024) 32(5) *Sustainable Development*. Shaobo Hou, Kangkang Yu and Rilong Fei, 'How Does Environmental Regulation Affect Carbon Productivity? The Role of Green Technology Progress and Pollution Transfer' (2023) 345 *Journal of Environmental Management*.

[12] Anders Brantnell and Enrico Baraldi, 'Understanding the Roles and Involvement of Technology Transfer Offices in the Commercialization of University Research' (2022) 115 *Technovation*.

[13]Günther Schuh, Tim Latz and Jana Lorenz, 'Governmental Support Options for the Technology Transfer of Deep Tech Innovations' (2022) 25 *Information Technology and Management Science*.

2.1. R&D BER regulation[14]

R&D agreements are an exemption under the TTBER regulation, thus the 2023/1066 regulation contains unique features regarding some form of technology transfers. The core concept of the new R&D Regulation remains the promotion of innovation, as it enhances competitiveness, sustainability and contributes to economic development.[15]

To this end, the new R&D Regulation also grants exemption for certain types of R&D cooperation and the exploitation of their results. The exemption applies without market share limitations to R&D agreements between non-competitors, whereas for agreements between competitors, it is only applicable if the parties' combined market share does not exceed 25% in the relevant product and technology markets.

The exemption is valid for the duration of the R&D activity; however, if the results are jointly exploited, it remains applicable for an additional seven years and beyond, provided that market shares remain below the 25% threshold. In response to the needs identified during the review process and to enhance flexibility, the new R&D Regulation also grants exemption for a two-year period following the exceeding of the 25% threshold. Flexibility is further supported by allowing market share calculations to be based on estimates and by permitting the use of the average of the previous three years' data instead

[14]The 2023 HGL contains two types of R&D categories: the R&D BER and those R&D agreements which fall outside of the scope of R&D BER. In terms of technology licensing the R&D BER is more relevant to my topic, that is why this paper is going to only analyse the R&D BER regulation.

[15] Lois Elshof, 'Corporate Sustainability Due Diligence and EU Competition Law' (2024) 15(3) *Journal of European Competition Law & Practice.*

of the data from the preceding year, if the latter is not deemed representative.[16]

2.1.1. Exploitation of the results

The outcome of an R&D process under Regulation 2023/1066 can be diverse, encompassing tangible technologies, intellectual property rights, or know-how. Following the acquisition of prior technologies and intellectual property rights[17], as well as various observations, measurements, and technical demonstrations, the need naturally arises for the participating undertakings in the R&D agreement to exploit the results in some feasible manner.

The advantage of utilising the results is also emphasised in Recitals 7 and 8 of Regulation 2023/1066, as cooperation is highly likely to promote technical and economic progress. This is particularly true when the parties contribute complementary skills, resources, or activities to the collaboration, ultimately benefiting consumers through the introduction of new or improved products, technologies, or processes, the faster market entry of such products, technologies, or services, or price reductions made possible by the development of new or improved products, technologies, or processes.

The results achievable through R&D activities can take various forms, and accordingly, the methods of their exploitation may also differ. Such methods may include the production and commercialisation of products, the application of technologies

[16] Nóra Váczi, 'A horizontális korlátozásokra vonatkozó európai szabályozás felülvizsgálata / Review of the European Regulatory Regime for Horizontal Cooperations' (2023) 2023(2) *Versenytükör* 138.

[17] Includes industrial property rights, for example patents and trademarks, as well as copyright and neighbouring rights.

or processes, the transfer or licensing of intellectual property rights necessary for such production or application, or the disclosure of know-how.

The results of R&D activities may be exploited either jointly by the participating parties or individually. Regulation 2023/1066 emphasises that R&D agreements must ensure full access to the results for all parties involved. The exploitation of the results cannot be restricted, except in cases where the parties explicitly specialise in certain areas or where specific participants (e.g., research institutions) intend to use the results solely for further research purposes.[18]

The use of results for further research and development cannot be disproportionately restricted. If compensation is required for access to the results (e.g., license fees), the amount must not effectively hinder access. This regulation ensures that licensing fees do not obstruct the dissemination of technology, thereby preventing anti-competitive abuses.

The R&D BER places significant emphasis on safeguarding the exploitation of research and development results. Under Article 8, certain restrictions are considered particularly severe from a technology licensing perspective:

- the fixing of prices when selling the contract products or licensing the contract technologies to third parties, with the exception of the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint

[18] Moreover, the parties may also agree upon the conditions for licensing of the results of the R&D to third parties. Such licence agreements are not covered by the R&D BER but may be covered by the Technology Transfer Block Exemption Regulation if the conditions of that Regulation are fulfilled, Technology Transfer Guidelines, point 74.

exploitation of the results: includes the joint distribution of the contract products or the joint licensing of the contract technologies; and is carried out by a joint team, organisation or undertaking, or is jointly entrusted to a third party;

- the restriction of the territory in which, or of the customers to whom, the parties may passively sell the contract products or license the contract technologies, with the exception of the requirement to exclusively license the results of the research and development to another party
- the restriction of active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation
- the requirement to refuse to meet demand from customers in the parties' respective territories, or from customers otherwise allocated between the parties by way of specialisation in the context of exploitation, where such customers would market the contract products in other territories within the internal market
- the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market.

Furthermore, Article 10 of Regulation 2023/1066 also safeguards the free movement of technologies, as the Commission may withdraw the benefit of the exemption granted under this Regulation pursuant to Article 29(1) of Regulation (EC) No 1/2003, particularly if:

- the existence of a research and development agreement substantially restricts the access of third parties to the relevant market for the contract products or contract technologies (…)

1.2. Possible criticism of technology transfer rules regarding R&D agreements

In the Commission's evaluation document (regarding HGLs and HBERs)[19], many respondents emphasised the need to modernise the technology transfer rules applicable to R&D activities, suggesting that "paid-for" R&D cooperation should be removed from the scope of the R&D BER and instead be assessed under different regulations, such as the TTBER.

The root of this issue lies in the shortcomings of the regulatory framework containing technology transfer regarding R&D. Firstly, the sole existence of multiple block exemptions contributes to fragmentation within the landscape of technology transfer regulation, as the development of a new technology or intellectual property right and its licensing may simultaneously fall under multiple regulatory frameworks. One respondent notes that the EU's block exemption regime is more fragmented than the U.S. Department of Justice's (DoJ) Business Review Letter system concerning R&D agreements, particularly in the energy sector. The U.S. DoJ's Business Review Letters can address various antitrust concerns arising from a specific business conduct in a single administrative measure. In contrast, in the EU, the same innovation process may require separate self-assessments under the R&D Block Exemption Regulation, the guidance on standardisation agreements within the Horizontal Guidelines, and the TTBER regime.[20]

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[19] Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations (2021).

[20] Niccolò Galli, Marco Botta, Pier Luigi Parcu, Paula C Ramada, Mayumi Louguet, Dano Meiske, Alexandros Giannoulas, Peter McNally, Baptiste Faure, Emmanuel Hassan, Davide Fina, Emilia Sandri and Elena Volino, Support Study for the Evaluation of the Technology Transfer Block Exemption Regulation.

Further challenges arise from the fact that certain R&D-related activities fall outside the scope of both the TTBER and the R&D BER. For instance, the current framework does not cover the licensing of research tools, technological assets used in further research activities. At the same time, such situations do not necessarily fall under the R&D BER either, which is strictly limited to (a) the joint R&D of contractual products or contractual technologies, (b) the agreed R&D of contractual products or contractual technologies, and (c) and (d) their joint exploitation. If interpreted stiffly, it appears that a significant category of licensing agreements is excluded from the TTBER's scope (and likewise does not fall under the R&D BER or seemingly any other block exemption), which raises questions about the TTBER's relevance.

Moreover, uncertainty remains as to whether joint ownership agreements aimed at exploiting technological rights can qualify for block exemption or benefit from the conditions for presumed compatibility outlined for technology pools in the TTBER Guidelines. The seriousness of this issue is also indicated by the fact that patent pools have a positive impact on R&D activities, yet they also carry significant risks, as they can facilitate price-fixing cartels and, due to high investment costs, only a few wealthier companies can fully benefit from them, thereby negatively affecting competition and consumer welfare.[21]

Finally, a lack of coherence persists between the TTBER and the R&D BER rules. Legal literature comparing the TTBER and R&D BER highlights inconsistencies in their respective market

[21] However, licensees are able to use patent pools as a highly convenient means of one-stop shopping, alleviating the burden of licensing each patent individually. See: Martin Konigs, 'The Guidelines on Technology Transfer Agreement: The Second Edition and Its Consequences on Patent Pools' (2014) 9 *Journal of Intellectual Property & Practice* 1012.

share thresholds. For instance, Bastidas Venegas (2022) notes[22] that the R&D BER provides more forgiving conditions, allowing parties with up to a 25% market share to qualify for block exemption, whereas the threshold under the TTBER is set at 20%.

Overall, the R&D BER has introduced further legal uncertainties in the regulatory landscape governing technology transfer. Ignoring this issue would be a significant misstep by the Commission, as greater legal certainty and clearer applicability of the rules are essential to achieving broader sustainability goals.

Even if the Commission does not necessarily support the idea of fully merging the R&D BER and the TTBER, it would be advisable to develop a clear and well-structured set of guidelines on the application of the TTBER. At the same time, updating the Horizontal Cooperation Guidelines to better address the aforementioned and other potential technology transfer-related issues would be an enormous step toward improving regulatory clarity.

Apart from the Commission's evaluation document one further issue lies within the regulatory framework of R&D BER, which is the possible limitation of the exploitation rights of universities, research institutes. These entities also fill an essential role in sustainable development regarding technology transfer[23], that is why it seems unusual to restrict their right to

[22] Vladimir Bastidas Venegas, 'Intellectual Property Rights, Enforcement Costs and EU Competition Law' (2023) 11(1) *Journal of Antitrust Enforcement*.

[23] Charles Verharen, John Tharakan, Flordeliz Bugarin, Gada Kadoda and George Middendorf, 'Survival Ethics in the Real World: The Research University and Sustainable Development' (2013) 20 *Science and Engineering Ethics*.

exploit the results of the R&D agreement, which results in less competition and incentives to innovate in a technology market. Overall, the fragmented regulatory framework and the unresolved regulatory gaps can discourage undertakings or research entities to invest more in R&D, hence it is obvious that the aforementioned issues have an indirect negative impact on the green transition.

3. The relationship between standardisation agreements and technology transfer

R&D investments are not made in a vacuum; sometimes technology standards are required for the newly developed technology to be compatible with other technologies and products. Technology standards contain specific category of voluntary norms within a technological domain, explicitly designed to be applicable to a broad range of stakeholders.[24]More precisely, a technology standard creates a technological solution that gains widespread acceptance as the preferred method for fulfilling a particular function.
It is widely believed that standards and standardisation processes have a positive impact on the European internal market.[25] Moreover as reflected in European policy documents[26], the primary positive effect of standardisation is to

[24] Raghu Garud, Sanjay Jain and Arun Kumaraswamy, 'Institutional Entrepreneurship in the Sponsorship of Common Technological Standards: The Case of Sun Microsystems and Java' (2002) 45 *The Academy of Management Journal* 196.
[25] Jacques Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) 25 *Journal of Common Market Studies* 249.
[26] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A Strategic Vision for European Standards: Moving Forward to Enhance

boost economic and consumer welfare. Furthermore, standards promote cost savings through economies of scale in production and supply, reduction of transaction costs, and network effects. They also improve trade and economic growth by lessening information asymmetries between demand and supply side of the market. Additionally, standards enhance compatibility and interoperability, thus improving cross-border market access. By establishing a common framework, they foster competition at the product level and create an ecosystem for incremental innovation. Moreover, standardisation supports the transfer of research outcomes to the market by providing a platform for the practical application of fundamental research results across various firms.[27]

Regarding sustainability standards, the Commission has highlighted that sustainability standardisation agreements often have pro-competitive effects by supporting sustainable development through the creation of new products and markets, enhancing product quality, and improving supply and distribution conditions. By providing information on sustainability aspects, such as through labelling, these standards can enable consumers to make a well-informed purchasing decision, thus fostering the growth of sustainable product markets. Additionally, they help establish a level playing field among producers facing varying regulatory requirements.[28]

3.1. The accessibility of standards

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and Accelerate the Sustainable Growth of the European Economy by 2020.

[27] Knut Blind, Martin Kenney, Aija Leiponen and Timothy Simcoe, 'Standards and Innovation: A Review and Introduction to the Special Issue' (2023) 52(8) *Research Policy.*

[28]Communication from the Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements, para 542.

In the context of standards involving intellectual property rights, it is possible to differentiate three main groups of undertakings, with differing interests in the standard development process. First and foremost, there are upstream-only undertakings, which sole purpose are developing and marketing technologies thus gaining revenue via licensing and creating royalties. Secondly there can be found downstream-only companies, which only manufacture products or supply services by paying royalties based on technologies developed by others. Lastly there are firms who are mixing the two aforementioned activities, namely these undertakings can develop their own IPR protected technology and also, they manufacture products for which they need a licence.[29]

One of the negative side effects of the standardisation agreements appears when the participant firms prevent certain undertakings from gaining access to the results of the standard development process. This phenomenon may lead to anti-competitive results which can distort the competition. In this situation, the re-emerging concept of the colliding interest between competition and IPR can be observed[30].

On the one hand, in a competitive technology market the undertakings which did not participate in the standardisation process still require the standardised technology in order to be able to compete with the other firms appearing in the same market. Denying access or creating such restrictive licence

[29]Communication from the Commission, Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements, para 440.

[30] see further Peter Drahos and Imelda Maher, 'Innovation, Competition, Standards and Intellectual Property: Policy Perspectives from Economics and Law' (2004) 16(1) I*nformation Economics and Policy*.

terms, which may discourage the other undertakings from wanting the result of the standard development process, may enable the companies owning the IPR protected standard to take advantage of a dominant position.

For instance, a standardisation agreement may result in upstream foreclosure. While replacing one technological solution with another is relatively easy during the early stages of standard development, it becomes much more difficult once the standard is finalised. Combining different technologies requires significant development efforts, and after these investments are made, switching to an alternative solution can be highly challenging. As a result, technologies that are not included in the standard may never reach end-users, forcing their owners out of the market.[31]

On the other hand, there are the economic interests of the undertakings which are seeking some form of revenue return or compensation for their effort in order to develop the newly-created standardised technology. Forcing them to provide their IPR protected technology freely or under conditions of reduced license fees/royalties will result in a vast amount of loss of economic power which not only disincentivises further standard setting agreements but also stifles the much-needed innovation process.

In order to cut the Gordian knot and resolve the tension between competition and intellectual property law, the 2023 HGL refers to the FRAND terms. FRAND stands for Fair, Reasonable And Non-Discriminatory; utilising these terms in the technology licensing process among the participating undertakings in the standardisation agreements as well as third parties can prevent

[31] Marta Stryszowska, 'EU Competition Law vs. Standard Setting Agreements' (2011) 4(4) *Global Antitrust Review*.

the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) (for raising concerns of cartelisation) and simultaneously Article102 of the TFEU (for raising concerns of a firm abusing its dominant position).[32]

FRAND terms can be understood as the licensing terms that would have been agreed upon before the standard was established, assuming its economic value was already known. This approach estimates how much each patent contributes to the standard.[33]

3.1.1. Issues surrounding SEPs

Sometimes the technology embedded in a standard is often protected with so-called Standard Essential Patents (SEPs) When a standard includes patented technology, manufacturers must obtain a license from the patent holders to avoid infringement lawsuits. SEP holders have the right to receive compensation, which can be an upfront payment, royalties, or any other agreed form. However, determining fair compensation is complex and often leads to disputes and legal battles.[34] Furthermore technology transfers can be hindered by the existence of excessive royalties, as has been proved by recent research which investigated 800+ early-stage technology transaction negotiations.[35]

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[32] Tim W Dornis, 'Standard-Essential Patents and FRAND Licensing—At the Crossroads of Economic Theory and Legal Practice' (2020) 11(10) *Journal of European Competition Law & Practice*.

[33] Stryszowska (2011) 91.

[34] Pierre Larouche and Geertrui Van Overwalle, 'Interoperability Standards, Patents and Competition Policy' (2014).

[35] Patrick Doran, Richard Thomson and Emma Webster, 'When Royalties Impede Technology Transfer' (2025) 50 *Journal of Technology Transfer*.

3.1.1.1. Patent ambush

First and foremost, the SEP holder can engage in deceptive behaviour, such as 'patent ambush'. This phenomenon occurs when a SEP holder undertaking withholds information about a patent which is a crucial part of the standard from other Standard-Setting Organisation (SSO) members in the early standard setting and development stage, when this SEP could be avoided. When the standard is set in such way that the patent in question becomes an SEP, the firm in question then asserts its patent against implementers.[36]

One of the famous cases about patent ambush is the Rambus case[37], which revolves around allegations that the company engaged in a patent ambush during the standard-setting process for DRAM memory technologies. The European Commission made an investigation concerning whether Rambus misled the standard-setting organisation JEDEC by not disclosing its patents during the development phase and later demanding high royalties once its patents became essential to the standard. The European Commission found that Rambus' actions undermined trust in the standard-setting process, which is meant to support innovation and market development. Making use of its dominant position, Rambus demanded high licensing fees that it would not have been able to charge under normal market conditions.

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[36] Keith Maskus and Stephen A Merrill, *Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communication Technology* (National Research Council 2013).

[37]Commission Decision of 9 December 2009 relating to a proceeding under Article 102 TFEU and Article 54 EEA Agreement, Case COMP/38.636 – RAMBUS.

3.1.1.2. Patent holdup

After a patent becomes SEP, issues arise, when a SEP holder demands higher fees from the undertaking which intends to utilise the mentioned patent or outright refuse the SEP holder to grant a license for the other firms.[38] Obviously this practice contradicts FRAND terms and raises some issues.
The first issue is about how to set fair and reasonable royalty rates. SEP (owners and companies using the standard often disagree on what a fair royalty should be. However, in most cases, they reach a deal through negotiations. If talks fail, they can go to court or arbitration, depending on what their FRAND agreement allows. Some companies also file complaints with competition authorities about FRAND terms. Secondly many SSOs have vague patent policies, leading to disputes over the rights and obligations of SEP holders. One major concern is whether SEP holders can block sales while negotiating a licence. Recent legal battles over 3G standard patents have involved companies like Apple vs. Motorola (Google) and Samsung[39]. Ideally, such lawsuits should be avoided, so companies can focus on research, development, and innovation instead.

3.1.1.3 Patent thickets

The last main problem surrounding SEPs is patent thickets, which refers to the phenomenon when the relevant patents are so dispersed amongst the many patent holders that users must first hack their way through a dense jungle of overlapping

[38] Johan Verbruggen and Anna Lörincz, 'Patents and Technical Standards' (2000) 33 *International Review of Industrial Property and Copyright Law* 125.
[39] Peter Camesasca, Gregor Langus, Damien Neven and Pat Treacy, 'Injunctions for Standard-Essential Patents: Justice is Not Blind' (2013) 9 *Journal of Competition Law and Economics*.

patents before they can implement a technology and commercialise their product.[40]

A related issue is royalty stacking, which means that licensing fees owed to multiple patent holders can create a significant burden. To address this issue, the introduction and enforcement of a maximum licensing fee cap has been suggested.[41]

3.1.2 New solution by the Commission?

On 2023.4.27. the European Commission proposed[42] a new regulation on standard essential patents and amending Regulation (EU)2017/1001. The proposal aims to improve the efficiency of SEP licensing by tackling key issues such as the lack of transparency, unclear FRAND terms, and high costs associated with negotiations and legal disputes.

As mentioned before, there is an information asymmetry regarding patent owners, licensing fees, and which patents are truly essential, making it difficult for companies to navigate the system. Defining and applying fair, reasonable, and non-discriminatory (FRAND) licensing conditions is also challenging, often leading to costly and time-consuming disputes between patent holders and implementers.

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[40] Carl Shapiro, 'Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard Setting' in Adam B Jaffe, Joshua Lerner and Scott Stern (eds), *Innovation Policy and the Economy*, vol 1 (MIT Press 2001).

[41] Valerio Torti, 'Enforcement of a Maximum Licensing Cap in Standardization Environments' (2013) 35 *European Intellectual Property Review*.

[42] Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001.

To tackle these problems, the proposal suggests creating an SEP register managed by the European Union Intellectual Property Office (EUIPO), making independent essentiality checks to verify whether patents are truly necessary for a standard, and introducing a dispute resolution system to help establish fair licensing terms. It also considers setting a maximum total royalty cap to prevent excessive fees from piling up, which is able to place a huge burden on companies using standardised technologies.[43]

Additionally, the proposal seeks to promote innovation and support European businesses, especially in the IoT sector. The main goal is to make standardisation more accessible and attractive for European companies while ensuring fair and balanced conditions for both patent owners and licensees.

Furthermore, the Commission's proposal is going to indirectly effect sustainable innovation. As stated in the impact assessment report of Proposal for a Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001[44] efficient SEP licensing on fair and clean terms is essential for the widespread adoption of technologies that support the EU's green transition. Fair licensing would allow more companies to enter new markets, develop innovative products, and drive green innovation. Easy

[43] This Regulation shall apply to patents that are essential to a standard that has been published by a standard development organisation, to which the SEP holder has made a commitment to license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms and conditions.

[44] Commission Staff Working Document, Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001.

access to licensing solutions supports the use of standardised technologies and research in energy-efficient applications.[45]

Unfortunately, it seems from the Commission's 2025 work programme[46] that the proposed regulation regarding SEPs will be withdrawn by the Commission due to the Commission's inability to reach a compromise with the Council and the Parliament, meaning that the Commission has to start seeking a solution all over again.

All in all, the restricted accessibility of SEPs limits both competition and sustainable innovation. Moreover, the regulatory challenges arising from standardisation agreements negatively influence R&D investments, resulting in a more difficult and more complicated entry process for essential products and technologies in the internal market of the European Union.

4. Conclusions

Numerous regulatory hurdles impede the creation and transfer of environmentally friendly technologies, often deepening the inherent conflict between competition law and intellectual property rights. This in turn jeopardizes the success of the green transition.

The importance of R&D agreements is undeniable and it seems that the R&D BER gives efficient guidance on how to manage the exploitation of the results. However, on the other side of the regulatory framework, the landscape of technology transfer is immensely fragmented, making it difficult for the undertakings

[45] ibid. 258.

[46] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2025.

to navigate among the different regulations. Moreover, there can be several inconsistencies be found between R&D BER and TTBER downplaying the coherence of the technology transfer landscape. In the foreseeable future the Commission may possibly combine the R&D BER and TTBER in a single clear regulation and thus update the HGLs. Furthermore, the potential restrictions relating to research centres and universities also need to be revaluated.

Overall, the field of standardisation presents numerous significant challenges. However, a new regulation emerging from discussions surrounding the Commission's proposal might yet address the market information asymmetry and strike a balance between implementers and SEP owners.

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Kitti Gondos*

Current legal issues in Hungarian public investment

Abstract: The new public construction investment law in Hungary has brought significant changes to the management of public construction projects. The aim of the Act is to increase efficiency and predictability in the preparation and implementation of investments, while ensuring sustainability and cost-effectiveness. The new legislation will also have an impact on the public procurement market, and in addition to the specific legal provisions, it will be up to the practitioners to navigate the field of statutory and regulatory provisions. Ultimately, though, the Act's entry into force represents an important step in the modernisation of the Hungarian construction sector and the promotion of sustainable development.

Keywords: public investment law, public works, public procurement procedures for works

1. Introduction

Comprehensive regulatory reform[47] is underway in Hungary in the field of construction law. One of the key elements of this

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[47] In particular, the legislation adopted in the framework of the reform includes Act C of 2023 on Hungarian architecture, Government Decree No 280/2024 (IX. 30.) on the basic regulations on settlement planning and building requirements, Government Decree No 281/2024 (IX. 30.) on the basic regulations on settlement planning and building requirements, and Government Decree No 280/2024 (IX.

reform is the new law on public construction investments, Act LXIX of 2023 (hereinafter: the PCIA), which explicitly separates the regulation of public and private construction activities. The legislator intends the new legislation to create a restrictive framework for the implementation of public construction projects specifically for the State. This legislation will regulate the entire life cycle of public works, from preparation to operation, with an emphasis on cost-effectiveness and environmental sustainability. The law aims to unify public investments, integrate previously fragmented projects and ensure predictability for participants. In addition, the law guarantees transparency and predictability of investments, which contributes to the possibility for domestic small and medium-sized enterprises (hereinafter: SMEs) to participate in public projects.

Since the law came into force, a number of amendments have been made, and these have further strengthened the legislation. Examples include Act LXXIV of 2024 on the Establishment of Hungary's Central Budget for 2025, which affects the financing of public investments, and the "Green Public Procurement Decree", which entered into force on 1 January 2025 and introduces environmental requirements for construction projects.

A key element of the paradigm shift introduced by the new law is the use of digital technologies, such as Building Information Modelling, which has become mandatory for the whole life cycle of construction projects for investments at or above the

30.) on the basic regulations on settlement planning and building requirements. Decree on procedures and inspections by the building authority, Government Decree No 283/2024 (IX. 30.) on architectural and town planning councils, Government Decree No 282/2024 (IX. 30.) on municipal green infrastructure, green space certification and the green mark.

EU public procurement threshold. This not only makes planning processes more efficient, but also improves the transparency and environmental sustainability of construction projects.

The current research aims both to explore the details of the paradigm shift brought about by the new law and to analyse how it affects the implementation and management of public construction projects. The study covers the previously enacted legislation, details the provisions of public procurement procedures for public works and uses public procurement statistics to assess the impact of the changes on the public works market.

2. The Public Construction Investment Act

2.1. A paradigm shift in the law

On 31 October 2023, Act LXIX of 2023 on the Regulation of Public Construction Investments, i.e. the PCIA, was published. The Bill on the Regulation of Public Construction Investments was submitted on 19 April 2023 under No. T/3677, and was finalised as a result of several amendments and ultimately a Constitutional Court decision.

On the basis of the preliminary review petition initiated by the President of the Republic on 12.07.2023, the Constitutional Court in its decision 19/2023 (VIII.7.) AB established the unconstitutionality of the provisions that were the subject of the petition[48] on the basis of three points of examination, along the lines outlined in the President of the Republic's petition.[49] The

[48] According to the AB decision: the wording of § 4(3), § 16(1) of Bill T/3677 "or the Ministerial Decree under § 4(3)" and § 59(2)(a) of Bill T/3677.

[49] Szabó Annamária Eszter, *The Constitutional Court found that certain provisions of the Act on the Regulation of Public Construction*

draft law designated the Minister of Public Investment as the person authorised to issue regulations, but despite the provisions of Article 5 (1) of Act CXXX of 2010 on Legislation, it did not specify the subject matter, framework, scope, criteria and further limits of the authorisation and was incomplete in that the enabling provisions did not specify the rules from which the Minister could derogate. Furthermore, the Bill contained not only the power to issue a ministerial decree, but also, for example, a government decision, which ultimately violated the fundamental requirement of the legal instrument of cardinality. In this context, the Constitutional Court also found that the non-existing norms were unconstitutional. However, following the adoption of the amendment proposal to eliminate the unconstitutionality, all obstacles to the new legislation were removed and, pursuant to Article 60 of the Constitutional Act, it entered into force on the eighth day following its promulgation, subject to the transitional provisions.

The Law puts the system of public investment in construction on a new footing. It aims to increase the efficiency and predictability of the implementation of public works by providing adequate legal, professional and budgetary guarantees for the actors involved in the investments, and to strengthen and unify the public organisation involved in the implementation of public works. It does this with the aim of placing Hungary at the forefront of successful public construction investment in Europe by 2030.[50]

According to the Explanatory Memorandum of the Law, its creation was preceded by an examination of public investment

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Investments were contrary to the Fundamental Law (2023/11) Hungarian Law 672.

[50] The final explanatory memorandum to Act LXIX of 2023 on the Regulation of Public Construction Investments: the Table of Reasons 2023/120.

practices in the Member States of the European Union. A public analysis available at[51] shows that EU Member States regularly make efforts to improve public investment management practices. The evidence taken into account in this analysis, published in 2022, shows that a wide-ranging reform of public investment management systems is underway or has recently been completed in several Member States. Most of these reforms have adopted an integrated approach to public investment management and address all stages of the investment cycle.

The Law introduces fundamental conceptual changes compared to the previous legislative environment, as it rethinks the entire regulatory framework for public investment and introduces significant structural changes. The focus of the analysis will be on the new Act and its predecessor, Act CXXXVIII of 2018 on the Implementation of Public Investments in Public Works (hereinafter: the PIBCA), and the main areas affected by the paradigm shift introduced by the new Act will be explored through this comparative analysis. Although the two pieces of legislation under study cannot be compared in all respects in view of their provisions, the nature of the system of public works investment that the two pieces of legislation aim to create can be explored.

[51] Cristiana Belu Manescu: *New Evidence on the Quality of Public Investment Management in the EU* (Discussion paper 177 | December 2022) <https://economy-finance.ec.europa.eu/publications/new-evidence-quality-public-investment-management-eu_en> accessed 1 March 2025.

2.1.1. Establishing a coherent and comprehensive regulatory framework

One of the most important conceptual changes in the new law is that it creates a single framework for all public construction projects. In comparison, the PIBCA only laid down rules for one type of construction investment, namely building construction. According to this, building construction is *"any construction work carried out in the context of a building activity for the construction, renovation, extension or alteration of a building which, depending on its intended use, has one or more levels of construction relative to the adjacent level of the ground, or is being constructed, and includes the construction, renovation, extension or alteration of structures of a specific type which are essential for the safe use of the structure for its intended purpose at or below the connected level of the built-up area".*[52]

The PIBCA introduced the concept of building construction projects as a novelty, and the provision also introduced the concepts of public building construction projects and government building construction projects.[53] It should be emphasised that separate provisions also applied to municipal building construction projects using central budget support.[54]

While the General Public Works Act sets out rules for different types of public works projects using only central budget funds, the new legislation extends the concept of public works to all projects *"the amount of central budget funds or non-direct EU funds used for the preparation and implementation of which, individually or in combination, exceeds fifty percent of the*

[52] PIBCA. § 1 (4).
[53] Draft law T/3367 on the implementation of public works on buildings, with explanatory memorandum
HVG Orac Online Legal Code
[54] PIBCA § 1 (1) 3. point 3.

estimated value of the project, regardless of whether the project is for the benefit of the state."[55] This definition is significantly broader than previous definitions.

Under the previous legislation, the tasks of public building construction projects were performed by the Investment Agency, a public service company wholly owned by the state and operating in the form of a joint stock company. The Investment Agency is the body which acts for and on behalf of the State in the preparation and implementation of government building works.[56] The Government has designated the Ministry of Construction and Transport as the Investment Agency.[57] Finally, the general explanatory memorandum of the final proposers of the new law, citing the need to exploit existing synergies, reduce operating costs and simplify operations, abolished and simultaneously integrated, as of 1 January 2023, the five companies that were responsible for public works projects under the ownership of the Ministry, whose functions were eventually taken over by the Ministry of Construction and Transport (formerly the Ministry of Construction and Investment).[58] Under the new law, the role of the Investment Agency is now performed by the Minister responsible for public investment (hereinafter referred to as the Minister).

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[55] PCIA § 1 (1) point 1.

[56] PIBCA 5. § (1).

[57] Government 299/2018 (XII. 27.) on public investments in building construction.

[58] The same justification is contained in the final explanatory memorandum of the Government Decree No 362/2022 (IX. 19.) on the takeover by the central budgetary body of tasks performed by 100% state-owned companies under the ownership of the Ministry of Construction and Investment and on the dissolution of companies and the settlement of procedural issues related thereto – Explanatory memorandum 2022/91.

It is necessary to mention that the scope of the Act covers public works for the construction of a new building, part of a building or complex of buildings, as well as for the renovation, extension, conversion or demolition of an existing building, up to the national public procurement threshold.[59] However, the law also provides for exceptions to the personal and material scope of the law, in the form of a general exception[60] , a specific decision of the Government[61] , and an exemption or reduction of obligations[62] , the details of which are laid down in a separate law[63].

It should be mentioned, among other things, that the PCIA contains considerably more extensive and detailed regulations than its predecessor. While the former is divided into five chapters and consists of 65 sections, excluding the final provisions, the PIBCA is a much more concise piece of legislation, with five chapters and 11 sections, excluding the final provisions. The latter basically provided a narrower set of rules, supplemented by rules in implementing regulations. However, the paradigm shift envisaged by the new law also required the adoption of additional sources of legislation to ensure the implementation of the new law along specific themes. These sources of law, which will be in force at the end of the study, will be indicated in the description of the specific legal provisions.

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[59] The final explanatory memorandum to Act LXIX of 2023 on the Regulation of Public Construction Investments: the Table of Reasons 2023/120.
[60] PCIA § 4 (1).
[61] PCIA § 4 (2).
[62] PCIA § 4 (3).
[63] Government Decree No 148/2024 (VI. 28.) on the detailed rules of exemption and granting of benefits under Act LXIX of 2023 on the Regulation of Public Construction Investments.

2.1.2. Life cycle approach

The rules of the Public Works Act covered the construction activity following the preparatory phase of the building construction project and all ancillary tasks necessary for its realisation.[64] Thus, while the previous legislation focused primarily on the implementation phase, the new Act takes a full life-cycle approach, covering the process from preparation, design, construction, operation and maintenance of the resulting construction.[65] This approach can facilitate long-term planning and sustainability.

For example, the law also regulates the preparation phase in detail, dividing it into two separate phases, which was not so structured before. The first phase includes the phases of the sectoral construction investment needs, preparation of the preparation documents, inclusion in the framework programme, and the second phase includes the selection of the designer, preparation of the permit application documents, preparation of the construction documents, and the licensing procedure.[66]

It is also worth mentioning that the new law reintroduces the institutional system of plan control. In addition, the technical inspector is selected by the developer before the preparation of the public procurement procedure for the procurement of design services and must be available from the design to the completion of the construction.[67]

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[64] PIBCA 1 § (1) 6. point 6.
[65] PCIA § 2 b).
[66] PCIA § 6 (2).
[67] The final explanatory memorandum to Act LXIX of 2023 on the Regulation of Public Construction Investments: Table of Reasons 2023/120.

2.1.3. Framework-based implementation

The most significant innovation of the Act is the introduction of the framework programme system. This system aims to fundamentally change the process of planning and approving public investment. Instead of the ad hoc investment planning of the past, the new law requires that public works investments are to be implemented on the basis of a comprehensive framework programme.[68] The framework programme is based on policy sector investment concepts and sector investment plans[69], which aims to provide a structured approach to project planning. The first framework programme will run until 31 December 2035 and the list of public works to be carried out under it is public and will be published by the Minister responsible for public investment.[70]

2.1.4. Application of a monitoring and control system

The new law introduces a comprehensive monitoring and control system. The Ministry operates several information systems, including a publicly accessible cost information system, a product technical information system[71] , a central IT system and a Building Information Modelling (BIM) based technical monitoring system[72] . While the former two systems are set up to monitor and provide transparency on costs and construction products to be installed in public works, the central IT system is designed to monitor projects. One of the most important innovations of the law, however, is the mandatory introduction of BIM, which is a technological innovation

[68] PCI § 26 (2).
[69] PCI § 1 (2) a).
[70] The list was not publicly available at the time of submission of the manuscript of this paper.
[71] PCI § 10 (2).
[72] PCI § 11 (1).

compared to the traditional design and construction method. BIM is a project-specific digital tracking system that requires a concept for implementation to be drawn up before the design phase begins. All processes from design to construction, operation and maintenance are based on this concept.[73]

The Law also establishes bodies with an advisory role for the monitoring of public works, the so-called monitoring committees[74], which monitor the preparation and implementation of the works, paying particular attention to the use of budgetary resources.[75] This monitoring system was not as structured and comprehensive in the previous legislation.

Among the actors assigned by law to public investments, the State Investment Interest Conciliation Council (hereinafter: the Council), which is the forum for proposing, commenting and professionally reconciling the interests of public investments, should be highlighted.[76] The Decree defines the composition and other tasks of the Council, including the fact that it is composed of 20 professional organisations and chaired by the Minister.[77] The Council is responsible, *inter alia*, for the development of a set of conditions for design and technical implementation based on the building information model and for the development of different contract models for different

[73] The final explanatory memorandum to Act LXIX of 2023 on the Regulation of Public Construction Investments: the Table of Reasons 2023/120.
[74] Their chairpersons are appointed by a separate law: the Government Decree No 182/2022 (24 May) on the duties and powers of the members of the Government.
[75] PCI § 11 (3).
[76] PCI § 13 (1).
[77] PCI § 13 (2)-(3).

types of public works and building functions.[78] This system of professional supervision did not previously exist in this form.

2.1.5. Sustainability and cost-effectiveness

The role of the state is increasingly shifting towards social and economic responsibility, in contrast to the principles of fiscal discipline and good governance that have been proclaimed in the past.[79] The new law places a strong emphasis on sustainability and environmental aspects, which were less emphasised in previous regulations. Environmental sustainability is clearly included in the principles[80] and objectives[81] of the new law. The law also lays down basic rules for public works investments, taking into account the requirements of cost-effectiveness, efficient and effective use of budgetary and EU resources, and environmental sustainability. This complex approach takes into account both economic and environmental aspects. The Law requires that maintenance costs should be reflected in the plans[82] , which encourages a whole life-cycle cost approach instead of the previous focus on investment costs.

In connection with this sub-chapter, it is necessary to mention, in the context of cost-effectiveness, the Government Decree of 26 March 2025[83] , which lays down the detailed rules for the liability insurance required for the design activity and the

[78] PCIA § 13 (4).
[79] Judit Glavanits, *Modernity and Public Procurement* (Special Issue 2020) Law-All-Politics 43.
[80] PCIA § 1 (1).
[81] PCIA § 2 b).
[82] PCIA § 19 (1) c).
[83] Government Decree No 55/2025 (III. 26.) on the detailed rules of liability insurance for design activities and contractor's activities in public works.

contractor's activity in public works projects. The purpose of the Government Decree, by setting out the rules for compulsory liability insurance, is to ensure that, in the face of drastically increased construction costs, the occurrence of damages as a result of professional malpractice on the part of the designer or contractor during the implementation of public works projects does not result in the delay of the implementation of the projects and further increase their cost, which also contributes to cost efficiency.

2.2. Public procurement reforms

In terms of reforms, the PCIA also introduces significant changes to public procurement procedures by setting out specific rules for public works procedures. This comprehensive legislation gives particular attention to the regulation of public procurement procedures, a key element of public works.

The scope of the Investment Act extends to public construction projects reaching the national public procurement threshold pursuant to Section 15 (1) (b) of Article 15 of Act CXLIII of 2015 on Public Procurement (hereinafter: the PPA)[84] , the amount of central budget or non-direct European Union funds used for the preparation and implementation of which, individually or collectively, exceeds fifty percent of the estimated value of the investment[85] . While the new law is based on the national public procurement threshold, for building works the threshold for the mandatory participation of the Investment Agency is the estimated value of over HUF 700 million.

[84] PCIA § 3 (1) a).
[85] PCIA 5. § (1) 1.

As already mentioned in the study, public construction investments can be divided into a preparatory phase and a realisation phase. Both stages of the preparation phase (first and second) include public procurement procedures and their preparation. In the preparatory phase, public procurement procedures for design services are particularly important, while in the implementation phase, public procurement procedures for the selection of the contractor are given priority.

The Decree stipulates that in the case of public works projects, public procurement procedures for the selection of the contractor may be launched only if the construction documents based on the final construction or installation permit and approved by the contractor are available. The construction documents shall also include an itemised budget at a fixed price.[86] The construction file must therefore be available at the time of launching the public procurement procedure for the selection of the contractor, which ultimately ensures that prospective contractors can bid on the basis of the most accurate information.

However, in relation to the above provisions, it should be noted that the Government may grant exemptions or reductions from certain obligations to the member of the project organisation to be set up, including, for example, the requirement to have the construction documents available at the time of the launch of the public procurement procedure.[87]

In comparison to the Kbt., a special regulation for public construction projects is that public procurement procedure for the selection of the contractor may be conducted in a negotiated

[86] PCIA § 43 (1).
[87] PCIA § 4 (3).

procedure according to the general rule[88]. If the negotiated procedure is applicable, it is also necessary to mention the involvement of a new public procurement procedure actor, which is provided for by the PCIA in several areas, namely the cost expert. The cost expert will be responsible for preparing decisions on the prices and costs to be applied in public works contracts, carrying out cost audits, helping to examine disproportionately low prices and other disproportionate commitments in the procurement procedure and also examining the evolution of costs.[89]

In a public procurement procedure for the selection of a contractor, the contracting authority is obliged to allow for partial tendering, but this also requires that the partial tender is not unreasonable in relation to the technical and economic content of the project.[90] This provision may facilitate the participation of small and medium-sized enterprises in public procurement, in line with one of the main objectives of the law. Although environmental responsibility and public procurement criteria are often difficult to reconcile[91], the new law aims to define the criteria for the evaluation of tenders in public procurement procedures for the selection of a contractor.[92]

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[88] In this context, infringement proceedings have been launched against Hungary on the grounds that the law obliges contracting authorities to use a specific type of procedure, the negotiated procedure, for all public procurement covered by the law. See for more information European Commission infringement procedure INFR (2024)2270<https://hungary.representation.ec.europa.eu/kotelezettsegszegesi-eljarasok-magyarorszagra-vonatkozo-dontesek-2025-februar-2025-02-12_hu?prefLang=fi> accessed 28 March 2025.
[89] PCIA § 22 (1).
[90] PCIA § 44 (2).
[91] Andrea Gyulai-Schmidt: *Public procurement dilemmas in the context of environmental responsibility* (2020/2.) Pro Futuro 175.
[92] PCIA § 45 (1).

Almost all of these proposed criteria are linked to some environmental requirement, which may lead to an overlap with the environmental evaluation criteria set out and applicable in the "Green Public Procurement Regulation", i.e. Government Decree No 235/2024 (VIII.8) on the environmental requirements applicable to public procurement which entered into force on 1 January 2025.

The new Act stipulates in Article 44 (4) that the contracting authority is obliged to provide for the ineffectiveness cases pursuant to Article 75 (2) (e) of the Public Procurement Act in the invitation to tender, i.e. it is obliged to declare its procedure ineffective if at least two tenders are not received within the tender submission deadline. This obligation of the contracting authority is also specifically mentioned in Information Notice of the President of the Public Procurement Authority on the application of Article 75 (2) (e) of the Public Procurement Act. This is also confirmed by the amendment to Article 198 (1) of the Public Procurement Act, which entered into force on 1 January 2025 and which, with a view to ensuring competition as widely as possible, allows the Government to provide by law for the mandatory application of the reason for ineffectiveness pursuant to Article 75 (2) (e) of the Public Procurement Act.

Pursuant to Article 44 (5) of the new Act, the contracting authority shall disclose to the public the part of the tender submitted by the successful tenderer that does not concern business secrets. The non-business secret part of the tender submitted shall include the itemised budget. However, two pieces of legislation allow for derogations from this provision in the case of their respective regulatory fields, namely, civil engineering works for the national security of law

enforcement[93], and civil engineering works for the national security of civil national security.[94]

An important rule is that for public works projects with an estimated value at or above the EU public procurement threshold, the contractor is obliged to require the use of BIM-based technical implementation throughout the life cycle of the project, from which the Ministry may only derogate on the basis of economic considerations.[95]

The new law lays down different rules in the Kbt. compared to the provisions on public procurement contracts, *inter alia* by providing separately for the applicable model contracts[96] and by listing the mandatory content of a works contract. The legislation also stipulates that the Minister may only agree to changes in costs which have been fixed in advance in the works contract. The construction contract must ensure that the risk of unforeseeable variations in the cost of materials is covered by the obligation to fix in advance a percentage band. The Decree also specifically lays down the amount of the reserve margin that may be provided for in the works contract, the purpose for which it may be used and the rules for its authorisation.[97]

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[93] Government Decree No 277/2024 (IX. 26.) on different provisions concerning public construction investments in buildings for national security purposes and for the use of law enforcement agencies under the control of the Minister responsible for law enforcement.
[94] Government Decree No 199/2024 (29 July) on different provisions concerning public construction projects concerning buildings of the civil national security services for national security purposes and purposes.
[95] PCIA § 38 (1)-(2).
[96] The model contracts are available on the Investment Portal: < https://beruhazas.gov.hu/dokumentum-sablonok/szerzodesmintak> accessed 30 March 2025.
[97] PCIA § 46-48.

With effect from 1 January 2025, different rules will be established for the procedural regime for public procurement contracts for public investments[98] in order to ensure cost control. The aim of the regulation is to ensure that all procurement and public procurement procedures for public works, whether or not covered by the Public Works Act, which are financed from central budget or EU funds to the extent specified in a government decree, may only be launched as conditional procurement or public procurement procedures and that the commitment to the procedure is subject to the opinion of the Minister responsible for public investments on cost control.[99] The government decree in question, which would lay down the detailed rules for public investment cost control, is still subject to public consultation at the time of the completion of the study.[100]

Among these actors, the State Investment Stakeholder Council also has a role in public procurement procedures, as it proposes, among other things, the set of professional qualification and evaluation criteria that are part of the content of the tender documents for the preparation of the design, permit and construction documents.[101] In this context, it is also worth drawing attention to another actor who is also a member of the project promoter required by the new law, i.e. the project promoter under the Government Decree on the rules of public

[98] Act LXXIV of 2024 on the Foundation of the 2025 Central Budget of Hungary.

[99] The final explanatory memorandum to Act LXXIV of 2024 on the Foundation of the 2025 Central Budget of Hungary - Explanatory memorandum 2025/3.

[100] Ministry of Construction and Transport: draft legislation< https://kormany.hu/dokumentumtar?categories=2&ministry=26&limit_rows_on_page=8&limit_page=0> accessed 30 March 2025.

[101] PCIA § 13 (4) b).

procurement of works.[102] The main task of the project promoter is to coordinate the implementation of the construction project.[103]

Among the actors involved in the public procurement process, it is also necessary to highlight the responsible accredited public procurement consultants. With the entry into force of the new law, the institution of accredited public procurement consultants in charge will be restructured and will continue to operate as a public procurement consultant. A transitional provision, justified by the extensive changes in the conditions for the provision of public procurement expertise in public procurement procedures, will allow sufficient time to prepare for the application of the new legislation in certain public procurement areas[104], currently with a deadline of 30 July 2026.[105]

On the basis of the above specific legal provisions, it can be concluded that the new law provides overall a more modern and comprehensive regulatory framework for public procurement of public works, with a greater emphasis on efficiency, transparency and the promotion of participation of small and medium-sized enterprises as a key area of sustainable public procurement policy with strategic objectives[106], while in some

[102] PCIA § 15 (2) c).
[103] Government Decree No 322/2015 (X. 30.) on the Detailed Rules of Public Procurement of Construction Projects and Design and Engineering Services Related to Construction Projects.
[104] The final explanatory memorandum to Act LXIX of 2023 on the Regulation of Public Construction Investments: the Table of Reasons 2023/120.
[105] Kbt. 197/E. § (1).
[106] Anita Németh: *Public procurement policy then and now - Turns in the harmonisation of public procurement law II* (2018/2.) Iustum Aequum Salutare 93.

respects replacing and further developing the previous public procurement of building works. Given that not much time has elapsed since the entry into force of the new law, conclusions on its practical application are still to be drawn.

Finally, in preparation for the application of the PCIA, the "investment freeze" imposed by the Government in spring 2022 should also be mentioned. The legislation does not include a specific "investment freeze" law or regulation, but rather a series of government decisions and regulations aimed at restricting public investment. Of particular note, however, is the Government Decree No 174/2023 (12 May) on emergency rules for certain investments, which set out the applicable procedural regime for investments financed from suspended or stopped central budget resources. It stipulated that the civil law or grant contracts for these investments would be terminated and the unused funds would be returned to the central budget. As a result, the fate of nearly 300 construction projects has been sealed, based on data contained in a parliamentary paper[107] of September 2022. The projects included transport infrastructure investments, school and public facility development projects, investments in health and sports facilities, and investments to upgrade energy systems, among others.

The suspension and halting of projects has also led to a reduction in public procurement, which may have affected the construction industry and the public procurement market.

If we take the statistics on public works procurement procedures based on the year following the suspensions, i.e. 2023, we can see that the distribution of the total value of public procurement by type of object has changed significantly compared to

[107] Parliamentary Papers K/1003 <https://www.parlament.hu/irom42/01003/01003-0001.pdf> accessed 30 March 2025.

previous years, as the total value of the previously most important works contracts accounted for less than one third (31.7%) of the value of the successful procedures. The reason for these changes was that while the number of public procurement procedures for works was only 1.9% lower than in 2022, their value fell by a third in one year. In 2023, there were only 57 fewer procedures for works compared to 2022, but their value fell significantly, by more than 66.4%.[108]

3. Concluding thoughts

The Public Investment Act, which entered into force two years ago, has brought fundamental changes to the preparation, implementation and operation of public investment projects. The aim of the new legislation was to bring together dispersed and often opaque procedures into an integrated, uniform and cost-effective system that would make projects financed by public and EU funds more efficient. The introduction of the law has brought many benefits but also new challenges.

In this respect, the PCIA radically changed the management system for publicly funded projects. The legislation was based on the recognition of the need for a comprehensive, unified framework for projects prepared and implemented by different state-owned companies, which had previously operated in a fragmented way. The aim of the Act is to bring the entire process of development classified as public works under the supervision of the Ministry of Construction and Transport and to re-regulate the entire life cycle of the works, from preparation to operation. The centralised institutional system has several advantages. On the one hand, it eliminates overlaps within the former fragmented organisation and, on the other hand, it ensures that

[108] Public Procurement Authority Report to Parliament 2023 <https://kozbeszerzes.hu/hatosag/kozbeszerzesi-hatosag/eves-beszamolok/> accessed 12 March 2025.

certain investment-related tasks can be carried out by the competent public institution. Previously, these may have required the involvement of external resources, sometimes at higher cost.

The law emphasises cost-effectiveness and value for money, which are essential requirements for the responsible use of public funds in modern public management.

It should be mentioned that the new Public Works Act has also brought about a comprehensive reform in the field of public procurement. A unified framework and the incorporation of sustainability aspects can improve the efficiency and quality of procedures, while contributing to long-term economic and environmental goals. At the same time, it will be essential for operators to adapt quickly to the legislative changes in order to maximise their positive effects.

As noted by the Public Procurement Authority, "the fundamental problem in the creation of the new public investment regime is not the inadequacy of the existing public procurement rules, but the practical application of the legislation".[109] The success of the new law will therefore be determined not only by the legal framework, but also by its practical application.

Overall, the introduction of the new Public Construction Investment Act is a revolutionary step in the regulation of publicly funded investments, but the assessment of the impact of the new law remains a complex issue. One of the main messages of the concluding reflections is that the objectives of the reform are encouraging, but that continuous monitoring,

[109] Lívia Flek, Péter Ferge *Report on the Public Procurement Expo organised by the Public Procurement Authority on 14 May 2024* (2024, Volume VI, No 8) Public Procurement Bulletin Plus 25.

detailed statistical analysis and the integration of extensive professional consultations are essential to assessing the impact of the law.

The reforms outlined under the specific legal provisions could be a positive step forward for the construction investment system, but the long-term effects and stability of the system can only be clear after several years of empirical data. In the spirit of reform, it is worth embracing proactive development at this juncture rather than doubt, as adaptation to a changing economic and social environment is a *sine qua non* for the success of a modern public investment system.

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Forced technology transfer and WTO reform

Abstract: This paper examines the relationship between forced technology transfer (FTT) practices and the ongoing need for World Trade Organization reform within the framework of international trade law. The primary objective is to analyse how technology transfer disputes, particularly between developed and developing countries, have evolved into a fundamental challenge threatening the multilateral trading system's institutional integrity. The first part begins by establishing a working definition of FTT as state practices requiring foreign companies to share technology as a condition for market access through joint venture requirements, licensing mandates, or administrative pressures. The second part of the paper traces the historical development of technology transfer from a development policy perspective, examining the North-South divide and early multilateral efforts through UNCTAD in the 1970s. The third part focuses on how FTT issues have given rise to the current WTO institutional crisis, particularly through US-China trade disputes. The paper analyses the escalation from early negotiation-base policy to the Section 301 investigations, subsequent unilateral tariff measures, and the systematic blocking of WTO Appellate Body appointments that effectively paralyzed the dispute settlement mechanism. The paper argues that despite the institutional crisis, multilateral solutions remain both necessary and possible. The paper advocates for clarifying existing WTO rules while developing new specific regulations prohibiting forced technology transfer practices, addressing state-owned enterprises, and improving market access commitments. It suggests that while multilateral negotiations should continue, plurilateral approaches may be necessary as transitional solutions if consensus cannot be achieved.

Keywords: WTO law; forced technology transfer, WTO reform

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1. Introduction

Forced technology transfer has long been a central issue in international economic law, particularly in relations between developed and developing countries.[110] However, there is no consensus in legal scholarly literature on the exact definition of the concept of "*forced technology transfer*" (FTT),[111] and the line between voluntary and forced technology transfer is blurred also in the legal practice. For this reason, this study does not attempt to establish an exclusive concept, but rather refers to practices that can be linked to technology transfer issues in international trade law using a broad working definition. In this sense, FTT refers to a state practice[112] whereby foreign investor companies are forced to share their own technology as a condition of market entry, which can be achieved by various means. This may manifest itself in the form of joint venture requirements, license transfer requirements, or other administrative regulatory pressures.

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[110] Keith E. Maskus, 'Encouraging International Technology Transfer' (May 2004) ICTSD–UNCTAD Issue Paper No 7.

[111] For different definitions and approaches, see: Jyh-An Lee, 'Forced Technology Transfer in the Case of China' (2020) 26 *Boston University Journal of Science & Technology Law* 2; Jessica Brum, 'Technology Transfer and China's WTO Commitments' (2019) 50 *Georgetown Journal of International Law* 3; Peter K. Yu, 'The US–China Forced Technology Transfer Dispute' (2022) 52 *Seton Hall Law Review* 4; Julia Ya Qin, 'Forced Technology Transfer and the US–China Trade War: Implications for International Economic Law' (2019) 22 *Journal of International Economic Law* 4; Alan O. Sykes, 'The Law and Economics of "Forced" Technology Transfer and Its Implications for Trade and Investment Policy (and the US–China Trade War)' (2021) 13 *Journal of Legal Analysis* 1.

[112] The paper does not specifically address the distortive practices of companies and other private actors, nor the competition law aspects of forced technology transfers.

Over the past two decades, FTT has gained new prominence in disputes between WTO member states, primarily through trade conflicts between the United States and China. However, behind the trade law disputes related to technology transfer, there is in fact a *per se* structural contradiction. While liberal trade policy based on free trade promotes the free flow of economic factors, but including also technology under effective protection of intellectual property, the international development policy and domestic industrial policies – which in many cases are the direct points of reference for developing countries – emphasize preferential access to advanced technologies and the fair, equitable sharing of technology.[113] Therefore, when assessing disputes related to technology transfer, in addition to rational, legal regulatory responses, certain ethical issues related to development policy cannot be ignored.

The following chapter looks into the background of technology transfer, placing it in the context of key moments of conflict between the interests of developed and developing countries, and analyses the debates over the shortcomings of the WTO's legal instruments in light of the current crisis and reform processes.

2. Trade and technology transfer from the angle of the development policy

Looking back at the international trading system in the decades following World War II, it is difficult to deny that FTT was an important tool in many countries for promoting economic growth and enabling the countries concerned to catch up with the more developed regions of the world in terms of

[113] For this aspect in context with China, see Petros C. Mavroidis and André Sapir, 'China and the World Trade Organisation: Towards a Better Fit' (2019) Bruegel Working Paper No 2019/06.

technological advancement. An essential element of the above working definition is that technology transfer is stipulated as a condition for market access, i.e., this practice affected those investing companies that mostly wanted to enter the markets of developing countries and were therefore obliged to transfer their technology. This "transferring technology for market access" policy[114] was implemented by developing countries in the 1970s and became an important tool for the adoption of new technologies from the developed world. In this post-colonial period, foreign ownership restrictions or requirements to establish joint ventures for foreign investment were common practice in investment transactions in developing countries. The ethical implications of this issue are most evident at this point – along the North-South divide – in the expectation that regulations should be sensitive and fair to the situation of developing countries and take into account that the development of these countries can only be effectively imagined in conjunction with their technological development. The fundamental problem, however, was that the legal infrastructure of international economic law was unable to strike a balance between the protection of intellectual property rights and the equitable dissemination of technology. Putting it differently, it was hardly feasible to reconcile the innovation needs of developed countries and the industrialization efforts of developing nations within the actual framework of the international economic law.

In the early days, requirements for technology transfer were mostly found in national laws and regional cooperation agreements.[115] Examples of the domestic legislative method can

[114] This early "trade-technology-for-market" policy is discussed *en détail* by Lee, as well as Yu. See: J.-A. Lee, 324; P. K. Yu, 1020.

[115] The method of domestic legislation was widespread not only in regulating specific questions, but in larger domains, e.g. in investment protection as well. The domestic legislation, however, was less

be found in a number of Latin American countries, particularly Brazil, Colombia, Mexico, and Argentina, which included regulations on technology transfer in their investment laws in the early 1970s.[116] In the second method – cooperation within agreements –, the role of the Andean Pact serves as an illustrative example. In 1970, the countries participating in the Pact adopted a code ("*Decision 24*")[117] that harmonized foreign investment rules in the member countries of the Andean Pact.[118] The Andean Pact code was particularly strict with regard to technology transfer agreements between parent companies and subsidiaries, prohibiting royalty payments for patent and trademark licensing.[119]

However, the most spectacular steps towards regulating the development aspects of technology transfer were taken within the framework of multilateral international cooperation. These efforts can be traced back to the establishment of the United

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effective, as it could be changed unilaterally or repealed quickly. Cf. with Zoltan Vig, The fair and equitable treatment in the Energy Charter Treaty (Iurisperitus Publishers, Szeged, 2021) 9.

[116] Robert J. Radway, 'Comparative Evolution of Technology Transfer Policies in Latin America: The Practical Realities' (1980) 9 *Denver Journal of International Law and Policy* 197.

[117] Decision No. 24 Establishing the Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties, Andean Community; <https://www.wipo.int/wipolex/en/legislation/details/9483> accessed 31 July 2025.

[118] Bolivia, Colombia, Ecuador, Peru, Venezuela. The aim of the common investment code was to reduce foreign economic influence and to plan the regional industrial structure more efficiently, so that no single member country would gain a significant economic advantage over the others. Rafael Vargas-Hidalgo, 'An Evaluation of the Andean Pact' (1978) 10 *University of Miami Inter-American Law Review* 401.

[119] See Decision No. 24.

Nations Conference on Trade and Development (UNCTAD) in 1964. Even in 1964, when the UN established the organization reinforced the conviction of developing countries that the UN plays a central role in promoting the transfer of science and technology to developing nations and in helping developing countries overcome obstacles to accessing the necessary knowledge and information.[120] Studies conducted by UNCTAD in the 1970s highlighted the acute dependence of developing countries on a limited number of technology suppliers and the problem of inadequate or non-existent scientific and technological infrastructure in recipient countries, which influenced the debate on technology transfer.[121] In addition to this, UNCTAD served as a forum for further action as well. In 1974, a number of developing countries drew up a series of proposals for the establishment of a *New International Economic Order* aimed at bringing about fundamental changes in the international economic system by shifting power, wealth, and resources from the developed countries of the North to the

[120] United Nations General Assembly Resolution 1995 (XIX) on the establishment of the United Nations Conference on Trade and Development as an organ of the General Assembly, 30th December 1964 (UN Doc A/RES/1995(XIX)

[121] Michael Waibel and William Alford, 'Technology Transfer' (June 2014) *Max Planck Encyclopedia of Public International Law* (MPEPIL).

less developed countries of the South.[122] The Declaration[123] adopted in 1974, recognized that the benefits of technological progress are not shared equitably among all members of the international community, and particularly emphasized the need and possibility of negotiations on the role and power of transnational corporations. Among the foundational principles, the Declaration underlines the access of developing countries to the achievements of modern science and technology. It is highlighted the promotion of transfer of technology, moreover "*the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies.*"[124]

Later, building on this momentum, developing countries sought to establish new multilateral norms to promote international technology transfer. In 1977, the UN called for a conference to negotiate and take all necessary decisions for the adoption of an international code of conduct on technology transfer under the auspices of UNCTAD.[125] The negotiations, which began in 1978, reflected the assumption that technology transfer to developing countries was desirable and that the transfer process

[122] This initiative revealed a conflict of interests between North and South similar to that which later became apparent in the intense debate on trade and environmental protection. For more on the latter aspect, see: Zoltan Vig, Szabadkereskedelem és környezetvédelem: a WTO Vitarendezési Testületének gyakorlata [Free trade and environmental protection: the case law of the WTO Dispute Settlement Body] in Zoltán Csehi and Katalin Raffai (eds) *Állam és magánjog [State and Private Law]* (Pázmány Press, Budapest, 2014).
[123] The Declaration on the New International Economic Order (A/RES/S-6/3201), adopted on May 1, 1974, at the Sixth Special Session of the UN General Assembly.
[124] See Declaration, paragraph 4.
[125] P. K. Yu, 1033.

would increase their prosperity.[126] One of the main objectives of the technology transfer code was to remove from technology transfer contracts clauses that are detrimental to the economic development of developing countries, as well as other restrictive foreign investment practices.[127]
Despite its ambitious goals, the elaboration of the transfer of technology code faced problems from the outset, and the UNCTAD negotiations progressed very slowly, and the negotiations stalled in 1985. A year later, however, countries turned their attention to GATT reform and negotiations on the establishment of the WTO.

3. Forced Technology Transfer and the need to reform the WTO

Even during the GATT system, there was an expressed need to link market access to share technology, which, as seen above, was a legitimate development strategy for developing countries, while developed countries focused on innovation advantages and intellectual property protection. The Uruguay Round, launched in 1986, led to the establishment of the WTO and carried out the most comprehensive reform of multilateral trade, introducing profound institutional changes as well as substantive legal amendments in the WTO legal order. The extended scope of WTO law not only covered the GATT on trade in goods, but also included important provisions on trade

[126] The latest version of the draft text was published in 1985, see: UNCTAD, *Draft International Code of Conduct on the Transfer of Technology as at the close of the 6th session of the Conference on 5 June 1985* (UNCTAD Secretariat, Geneva, 1985).
[127] The 1985 version of the draft identified 14 specific practices, which might be related to technology transfers, e.g. grant-back provisions, challenges to validity, restrictions on research, patent-pool or cross-licensing agreements, payments and other obligations etc. See UNCTAD, 8.

in services (GATS) and intellectual property protection (TRIPs).

The latter is particularly important, as the WTO TRIPS Agreement formally established legal harmonization as well as the protection of intellectual property, and also attempted to channel development policy considerations, thus establishing fairness towards developing countries. The objectives of TRIPS require that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[128]

The TRIPS requires the developed member states to provide incentives to their enterprises for the purpose of promoting and encouraging technology transfer to least-developed countries "*in order to enable them to create a sound and viable technological base*."[129]

However, it is important to note that despite the mandatory formulation of this provision, it is regarded as rather a rule of programmatic nature than an enforceable obligation of the developed WTO members. On the other hand, the least developed countries are also granted specific exemptions,[130] providing a narrow window of opportunity to overcome certain obligations and gain access e.g., to pharmaceutical licenses.[131] The Doha Round later set the goal of resolving the issue of

[128] TRIPS Article 7.
[129] TRIPS Article 66.2.
[130] TRIPS Article 66.1.
[131] See WTO, *Analytical Index: TRIPS Agreement – Article 66* (WTO, Geneva) 2.

technology transfer, but as the round remained unfinished, it was not offered a solution to these problems. In Doha in November 2001, ministers agreed that the TRIPS Council would "*put in place a mechanism for ensuring the monitoring and full implementation of the obligations*".[132] Even though the WTO Council adopted a decision[133] in order to set up this mechanism, major open questions around the technology transfer rules could not been resolved.

Recently, during the COVID-19 period, this issue has also been raised intensively in connection with vaccine technology, with the symbolic message that collective health interests have clashed with the intellectual property interests of large companies.[134]

The issue of technology transfer is also particularly relevant in the context of the current institutional crisis. It is no exaggeration to say that the causes of the current WTO crisis are largely rooted in the trade relationship between the US and China. It should be recalled that the United States originally supported China's accession to the WTO, but at the end of the 2000s, disputes arose, in which practices related to technology

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[132] WTO, *TRIPS: Issues. Technology transfer* (WTO, Geneva) <https://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm> accessed 31 July 2025.

[133] IP/C/28. Decision of the Council for TRIPS of 19 February 2003. Implementation of Article 66.2 of the TRIPS Agreement.

[134] In 2022 at the 12th Ministerial Conference (MC12), the WTO member states adopted the Ministerial Decision on the TRIPS Agreement, which gives members greater scope to take direct action to diversify production of COVID-19 vaccines and to override the exclusive effect of patents through a targeted waiver over the next five years. Carlos María Correa and Nirmalya Syam, *The WTO TRIPS Decision on COVID-19 Vaccines: What is Needed to Implement It?* Research Paper No 169 (South Centre, Geneva 2022).

transfer played a major role. In general, however, the opinion began to emerge that the promises made in connection with China's accession had not been fulfilled, and there was growing scepticism about whether China's integration into the global trading system had achieved its intended goals.

Concerns about China's membership came to the fore even during the Obama administration. The issue of technology transfer touched on criticisms related to market access, but practices related to subsidies and state-owned enterprises were also the subject of debate, with the US arguing that China's trade law routines did not meet its obligations and undermined fair competition in global markets.[135] Concerns were raised about China's use of non-tariff barriers and other trade restrictions that limited US exports. The US pointed to cases where China had applied regulatory measures that disproportionately affected foreign companies, thereby calling into question the transparency and fairness of its trade practices. One of the main arguments was that China had violated intellectual property rights and that its policy forced technology transfer, which not only harmed American companies but also contravened the principles of fair trade expected within the framework of the WTO.[136]

And how this path led to the current institutional crisis? In 2009, the United States still fundamentally relied on multilateral tools to address Chinese technology transfer practices. However, the subsequent development the dispute towards institutional criticisms related to the WTO led to these concerns that the WTO Dispute Settlement Body was ineffective in addressing

[135] Stuart S Malawer, 'Obama, WTO Trade Enforcement, and China' (2016) 2 *China and WTO Review* 361.
[136] Bruna Bosi Moreira, 'Between Contention and Engagement: US Response to China's Rise in the Obama and Trump Administrations' (2019) 8 *Brazilian Journal of International Relations* 3.

the systemic issues raised by China. Although the US has successfully brought a number of cases against China before the DSB, frustration has arisen over the lengthy process and perceived limitations on the enforcement of decisions.[137] In addition, China has won certain cases that were of critical importance to the US.[138] These concerns have contributed to a broader debate on reforming the WTO dispute settlement mechanism, particularly with regard to how to better address issues related to large economies such as China, including problems related to technology transfer, and subsequently, the US has turned slightly to more assertive steps. In 2011, it was not really noticed that the US government refused to support the routine re-appointment of the US Member of the Appellate Body (AB), giving no reasons for its decision. But five years later, in 2016, it immediately made headlines that the US blocked the re-appointment of the South Korean AB Member, arguing that he had failed to act within his mandate and his performance did not reflect the role assigned to the AB by the WTO rules.

During the first Trump administration in 2017, the United States Trade Representative (USTR) initiated a Section 301 proceeding against China, investigating its technology transfer, intellectual property rights, and innovation practices. This decision marked a paradigm shift in US trade policy, as Section 301 measures had not been used against WTO members since the WTO has been established. The USTR report was published

[137] Malawer, ibid.

[138] See the "zeroing practices" and the "double remedies" by imposing antidumping and countervailing duties on the same product. Thomas J Prusa and Luca Rubini, 'United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu all over again' (2013) 47 *Journal of World Trade* 409; Sungjoon Cho and Thomas H. Lee, 'Double Remedies in Double Courts' (2015) 26 *European Journal of International Law* 519.

in 2018 and essentially made more accusations against China.[139] The first accusation was forced technology transfer, stating that China uses joint venture requirements, foreign investment restrictions, and administrative review and licensing processes to require or coerce technology transfers from US companies. The report also analysed the allegedly discriminatory licensing terms in Chinese legislations. These rules deprive US companies of the opportunity to set terms on a market basis in licensing and other technology negotiations. This was particularly evident in the Technology Import and Export Regulations (TIER) of China and joint venture regulations. It was also argued that strategic investments and acquisitions from US companies to acquire cutting-edge technologies in the service of Chinese industrial policy. According to the report, China directs and unfairly facilitates systematic investment and acquisitions of US companies and assets to create large-scale technology transfers. Based on the findings of the investigation, the US introduced a 25% additional tariff on certain groups of products in several phases. China responded immediately to the US decision by introducing tariffs of the same magnitude, and the dispute escalated into a tariff war. The escalation reached its peak in July 2018 when President Trump announced that he was prepared to impose additional tariffs on all Chinese imports.[140]

The legal relevance of the measures imposed under Section 301 and the unfolding dispute within the WTO are also important in the debate over technology transfer. Criticism had already been

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[139] USTR, *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (Office of the United States Trade Representative, 2018).

[140] Of worth in USD 526.2 billion, CBS, 'Trump says he's willing to hit all Chinese imports with tariffs', *CBS News* (20 July 2018) https://www.cbsnews.com/news/trump-says-hes-willing-to-hit-all-chinese-imports-with-tariffs/

voiced regarding measures imposed unilaterally under Section 301 even before China's accession, and in 1999 a panel found that these measures were contrary to WTO law.[141] However, in the current US-China debate, the counterargument was that WTO rules are not suitable for dealing with China's state-controlled economic model. Even before the introduction of tariffs, the US initiated WTO consultations against China, where it was focused on the provisions of the TIER and the Chinese Joint Venture Regulations.[142] The US argued that the Chinese law violated the national treatment obligation and the exclusive rights of patents of the TRIPS Agreement. However, in June 2019, the panel's work has been suspended on DS542 due to ongoing negotiations between US and China on the Phase One trade agreement. As the panel's work was ultimately not resumed, its authority lapsed in 2021.[143]

During the first Trump administration, a partial solution to the tariff war was finally negotiated in the Phase One trade agreement. The agreement, signed in January 2020, specifically addressed the issue of technology transfer, and China formally and explicitly committed to ending all practices that force foreign companies to transfer technology.[144] The agreement set out obligations regarding the technology transfer and market access, outward investments and administrative procedures.

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[141] DS152: United States – Sections 301–310 of the Trade Act 1974.
[142] DS542: China – Certain Measures Concerning the Protection of Intellectual Property Rights.
[143] Parallel to the US procedure, the European Union also initiated WTO proceedings against China in 2018, see: DS549: China – Certain Measures on the Transfer of Technology.
[144] Economic and Trade Agreement between the United States of America and the People's Republic of China, January 15, 2020. https://ustr.gov/phase-one.

However, from the perspective of the above conflict, the most significant consequence during this period was the culmination of the WTO's institutional crisis. The criticisms previously mentioned in relation to WTO law and the dispute settlement mechanism were embedded in a much more comprehensive strategy aimed at undermining the WTO's entire functioning.[145] In line with this, in 2018 the US continued to block the appointment of new AB members,[146] with the result that only three members remained in office at that time. However, the terms of two of these members expired on December 10, 2019, meaning that the AB lost its quorum and effectively ceased to exist. On that day, also the intense debates over technology transfer turned into a real, serious institutional crisis for the WTO.

Negotiations on the possible reform of the WTO have been ongoing since 2018, with the European Union itself being one of the key proponents of the reform, offering a solution to the US's objections including the issue of technology transfer as well. However, the trade disputes between the US and China, which intensified in the period 2018–2020, did not ease under the Biden administration, meaning that the Biden administration's trade policy towards China was in fact nearly consistent with that of the previous administration. The striking example is the CHIPS and Science Act of 2022, which imposed investment restrictions prohibiting any company receiving US

[145] Rachel Brewster, 'The Trump Administration and the Future of the WTO' (2018) 44 *Yale Journal of International Law Online* 3; Richard H Steinberg, 'The Impending Dejudicialization of the WTO Dispute Settlement System?' (2018) 112 *Proceedings of the ASIL Annual Meeting* 316.

[146] For the US concerns of the Trump administration specifically regarding the WTO dispute settlement, see USTR, *President's 2018 Trade Policy Agenda* (Office of the United States Trade Representative, 2018).

government assistance under the Act from engaging in significant transactions in China related to the material expansion of semiconductor manufacturing capacity. The Biden administration subsequently tightened restrictions on exports of semiconductor and artificial intelligence technology to China, which included chip design, design automation software, and a range of related equipment, with the aim of preventing China from acquiring or producing advanced chips. However, no substantive results were achieved in the WTO negotiations either. Although there were high expectations ahead of the WTO's 13th Ministerial Conference (MC13) in 2024, member states ultimately concluded the conference without reaching a compromise. Consequently, the resolution of the institutional crisis and, specifically, multilateral reform relating to technology transfer, remains pending.

4. Conclusions – What reform do we need?

Although the above analysis presented a less optimistic trend, two findings might be clear from the above overview. First, there is still a need for rules that can strike a balance between the legitimate development policy interests of developing countries, and the technology transfer concerns of developed countries, including the need to guarantee intellectual property rights. On the other hand, there is still a chance for effective solutions to open issues at the multilateral level, for which the ongoing WTO reform negotiations could provide an adequate forum.

The EU's 2018 concept paper provides a good starting point for the key issues that could lead to a successful agreement. This means that existing rules (GATT, TRIPS, GATS, and TRIMs) need to be clarified, but even more importantly, new specific rules need to be developed that explicitly reflect possible member state practices. This would prohibit acts that force

companies to share their innovations and technologies with the state or their competitors. A separate regulatory issue – not covered properly by current WTO rules – is the status of state-owned enterprises (SOEs). The relevant new international rules should focus on the commercial activities of state-owned enterprises, in line with the disciplinary measures already accepted in several free trade and investment agreements. Equally important is the objective – also included in the EU proposal – of promoting reform in terms of general market access conditions. The current WTO market access commitments for goods and services do not correspond to the actual circumstances in many countries and do not reflect changes in the weight of certain states in the global economy.

Although the negotiations are essentially taking place at the multilateral level, it must be reckoned with the possibility that it will still not be feasible to reach a consensus. In this case, the implementation of certain elements of the reform related to technology transfer may also raise the need for the more ambitious WTO member states to take further steps through a plurilateral approach. We already see workable solution to this in the reform process as well (e.g., the Multi-Party Interim Appeal Arbitration Arrangement), but this can only be a temporary, transitional solution.

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Expropriation in International Investment Law: Concepts, Classifications, and Practice

Abstract: The article examines the legal nature of expropriation in the context of international investment law, with an emphasis on the ICSID approaches to defining and classifying this phenomenon. Particular attention is paid to the distinction between direct and indirect expropriation, as well as to the analysis of the practice of international arbitrations in cases involving state intervention in the property rights of foreign investors. The conditions for the legality of expropriation are considered, including the need to comply with public interests, non-discriminatory nature of measures, procedural guarantees and payment of adequate compensation. As a result, a conclusion is made about the expansion of the content of the concept of expropriation in modern international practice and the need for an individual approach to assessing each specific case of state intervention in investments.

Keywords: expropriation, nationalisation, international investment law, international private law, direct expropriation, indirect expropriation, multilateral agreements, bilateral agreements, foreign investment, ICSID

1. Concept of expropriation of property of a foreign investor

One of the foundations of international investment law is the expropriation of property of a foreign investor. Expropriation and nationalisation measures are directly related to issues of property rights of foreign investors. Despite the provision of guarantees for the safety of their property, in some situations it

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is possible for it to be seized by the state accepting the investment.

When deciding to invest abroad, a foreign investor pays attention not only to the provision of national treatment or most-favoured-nation treatment, but also to the availability of reliable guarantees for the protection of his investments. First of all, the investor is interested in protection from possible forced seizure of assets by the host state, as well as from unilateral termination or change of the terms of previously concluded contracts.

The state's right to alienate foreign investments and private property belonging to foreign individuals and legal entities is based on the principle of state sovereignty – one of the fundamental principles of international law. It is sovereignty that gives the state the authority to regulate economic processes on its territory, including making decisions on expropriation in compliance with established international standards.

Expropriation and nationalisation of assets of foreign entities have a dual legal nature. On the one hand, they relate to the sphere of public law, since the relevant provisions are enshrined in international multilateral and bilateral agreements concluded between states and are thus regulated by the norms of international public law. On the other hand, these processes affect the private property interests of foreign individuals and legal entities, which also makes them subject to regulation by international private law.

The right of a state to forcibly expropriate property is an integral part of its sovereignty and is recognised by both national and international law. The very fact of expropriation does not contradict legal norms if it is carried out within the framework of established requirements. International and national legal practice allows such measures, subject to a number of criteria:

the presence of a socially significant goal, the procedure being carried out without discrimination, compliance with procedural guarantees, and the provision of prompt, fair and effective compensation to the investor.

Most multilateral and bilateral agreements on the procedure for foreign investment contain provisions in their articles on expropriation, the procedure for protection and guarantees of fair compensation in the event of a forced seizure of the property of a foreign investor. For a deeper understanding of the phenomenon of expropriation in international law, a more in-depth study of its concept and types will be provided below.
In one of the works, the authors N.G. Doronina and N.G. Semilyutina raise the issue that issues of foreign investment in international private law were mainly considered in relation to acts of nationalisation of foreign private property in the context of compensation for damage caused to the investor[147]. At the same time, they note that *"the proclamation of sovereignty and independence in new states was often accompanied by the adoption of acts on the nationalisation of foreign property on their territories."*[148]

According to the position of Western governments, in accordance with international law, all states are obliged to provide foreign citizens with at least a minimum standard of protection.[149] At the same time, international investment law establishes the admissibility of expropriation of the property of a foreign investor if it is accompanied by prompt, adequate, and

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[147] Н. Г. Доронина and Н. Г. Семилютина, *Международное частное право и инвестиции: монография* (Институт законодательства и сравнительного правоведения при Правительстве РФ; Юридическая фирма «Контракт» 2012) 22.
[148] ibid 23.
[149] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 13.

effective compensation.[150] According to the established doctrine of international law, full compensation is considered a mandatory prerequisite for the legitimacy of expropriation. If compensation is not paid to a foreign investor at all or is not paid in full, the state thereby finds itself in a position in which it is unjustifiably enriched at the expense of a foreign person. At the same time, the existence of a violation of an international treaty or agreement is not a necessary condition for recognising the fact that failure to pay compensation gives the investor's home state grounds to demand restitution or compensation for damages due to unjust enrichment. In addition, such a state has the right to resort to all means of pressure provided for by international law in order to ensure the fulfilment of the relevant requirements.

There is no general definition in international literature when it comes to expropriation. In legal literature, national legal acts and international treaties, along with the term "expropriation", the concept of "nationalisation" is widely used. At the same time, the legislation of many countries and doctrinal sources provide different interpretations of this phenomenon.

The legal encyclopaedic dictionary contains the following definition of expropriation, which characterises this measure as requisition or confiscation. *"Expropriation (Latin expropriation - deprivation of property) - the forced alienation of property by the state, gratuitous or for a fee, with payment of compensation is called requisition, and without payment – confiscation."*[151]

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[150] Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, OUP 2022) https://doi.org/10.1093/law/9780192857804.001.0001 accessed 2 April 2025, 183.

[151] S. A. Friedman, *Expropriation in International Law* (Stevens & Sons 1953) 5.

At the same time, according to Borisov, *"Nationalization (French, English nationalization) is a general measure of the state to implement socio-economic changes, by virtue of which property in private ownership is transferred to the ownership of the state (for redemption or without redemption); one of the grounds for termination of property rights."*[152]

Nationalisation is generally considered as one of the grounds for the loss of property rights. For example, G. E. Vilkov defines nationalisation as the forced transfer of property from private to state ownership.[153] At the same time, I. Z. Farkhutdinov notes that in international investment law the term "confiscation" should be used to describe cases of illegal expropriation or nationalisation, as well as in situations of restoration of violated property rights on the basis of international norms.[154]

M. Sornarajah proposes to use the broad term "taking" to denote various forms of state interference in property rights. Within this general concept, he distinguishes three types: confiscation, expropriation and nationalisation. Confiscation, in his opinion, is an involuntary seizure of property in favour of the state without compensation, as a rule, carried out under authoritarian or oligarchic regimes.[155] This form of deprivation of property, from the point of view of international law, is qualified as illegal.

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[152] А. Б. Борисов, *Большой юридический словарь* (2nd edn, Книжный мир 2012) 416.
[153] Г. Е. Вилков, *Национализация и международное право* (Изд-во Института международных отношений 1962) 7.
[154] И. З. Фархутдинов, *Международное инвестиционное право: теория и практика применения* (Волтерс Клувер 2005) 267.
[155] M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 363.

However, such a classification gives rise to certain objections, since it is based on heterogeneous criteria: confiscation is differentiated by the target feature, while the difference between nationalisation and expropriation is based on the level of coverage – that is, the scale of seizure. Such an approach violates the principle of logical integrity and complicates the application of this typology in law enforcement practice.

According to Sornaraja's approach, nationalisation is a mass seizure of property from all participants in a certain industry, which, as a rule, accompanies fundamental political changes, in particular, the transition to socialist forms of government.[156] In contrast, expropriation is viewed as a selective intervention in which the state takes property from specific investors, citing public needs or economic expediency. Friedman views expropriation as a legal form of deprivation of property rights that is applied in any state – both in relation to the property of citizens of a given country and in relation to assets belonging to foreigners, provided that this occurs within the jurisdiction of a given state.[157]

According to the definition by Rubins and Kinsella, expropriation is the seizure by the state receiving the investment of property belonging to a foreign investor and located on its territory. In the classical form of expropriation, the state acts within the framework of national legislation, cancelling the investor's right of ownership or actual possession of the relevant property. If necessary, such seizure may be accompanied by the use of force against the investor.[158] At the

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[156] ibid 365.

[157] S. A. Friedman, *Expropriation in International Law* (Stevens & Sons 1953) 5.

[158] Noah Rubins and S. N. Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Oceana Publications 2005) 6–7.

same time, they note that the terms "nationalisation" and "expropriation" are often used as synonyms, but there is an important difference between them. In a technical sense, nationalisation is one of the forms or manifestations of expropriation. Nationalisation is usually understood as a large-scale state policy aimed at alienating all or a significant part of foreign investment in a certain sector for the purpose of social or economic transformation.[159] The same definition can be found in the work of Comeaux and Kinsella. [160]

As Danelyan points out, the Western scientific tradition is dominated by the approach according to which all forms of forced seizure of property, leading to the loss of property rights by individuals, are covered by a single concept – expropriation.[161]

Wortley identifies the types of expropriation that are provided with adequate compensation, which can be divided into the following three categories:
(i) Expropriation carried out by law in the public interest, accompanied by prior and adequate compensation. This is the classic form and is often referred to simply as "expropriation".
(ii) Expropriation in cases where adequate compensation cannot be paid in advance is usually (but not always) called "requisition"; it is a justified special emergency measure.

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[159] ibid 9.
[160] Paul E Comeaux and N Stephan Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk* (Oceana Publications 1997).
[161] А. А. Данельян, *Правовые вопросы национализации и экспроприации: Сборник документов* (Центр гуманитарных инициатив 2014) 12.

(iii) "Nationalisation" is the seizure into state ownership of all sectors of the economy that may be included in any of the above categories.[162]

Thus, the analysis of doctrinal approaches to the interpretation of the concepts of "expropriation" and "nationalisation", as well as the literal interpretation of the provisions contained in multilateral international treaties and bilateral agreements on the promotion and protection of investments, allows us to conclude that at the current stage of development of cross-border investment law, both terms are usually combined under a single concept – "expropriation". International agreements, as a rule, do not make a clear distinction between these concepts, considering them as varieties of the same legal phenomenon. There is also no uniformity in the definition of the term "expropriation" in international legal acts. Thus, the 1985 Seoul Convention on the Establishment of the Multilateral Investment Guarantee Agency is interpreted as *"Any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of its ownership or control of, or a substantial benefit from, its investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territory."*[163] In this case, the concept excludes measures of general regulation of economic activity applied by the state on a non-discriminatory basis.

The norms establishing the procedure for expropriation, the conditions for its legality and guarantees for the protection of the rights of foreign investors are recorded in both multilateral and bilateral international agreements. Since such agreements

[162] B. A. Wortley, *Expropriation in Public International Law* (CUP 1959) 24.

[163] Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) (1985), art. 11.

are concluded between states, the relevant provisions are included in the subject of regulation of international public law. Thus, Article 13 of the Energy Charter Treaty (ECT) contains a definition of expropriation and establishes its admissibility only if a number of conditions are met. According to this provision, *"Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation."*[164]

A similar expression – "measures equivalent to expropriation" – is also used in the Canada-United States-Mexico Agreement (CUSMA) Energy Charter, which emphasises the similarity of approaches in various international treaties. Such formulations indicate a broad interpretation of the concept of expropriation in international investment law. It is not limited to formal deprivation of property rights, as is implied in its literal meaning. At the same time, the CUSMA provides that *"No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:*
(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and
(d) in accordance with due process of law."[165]

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[164] Energy Charter Treaty (1994), art. 13.
[165] Canada-United States-Mexico Agreement (CUSMA) (2020), art. 14.8.

It should be noted that in the text of CUSMA the terms "expropriation" and "nationalisation" are used as equivalent, which confirms the tendency to combine them within a single legal concept. It is especially indicative in this context that the CUSMA agreement introduces the categories of "direct" and "indirect" expropriation, as well as "measures equivalent to expropriation".

Almost identical approach can be tracked in the ASEAN Comprehensive agreement, which also states that *"A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalization ("expropriation"), except:*
(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation; and
(d) in accordance with due process of law." [166]

Through analysing the existing treaty texts, we can see that most articles on expropriation are following as similar, if not the same structure and pattern (COMESA Investment Agreement[167], EU-Canada Comprehensive Economic and Trade Agreement (CETA)[168], EU–Vietnam Investment Protection Agreement[169], Regional Comprehensive Economic Partnership Agreement (RCEP)[170]).

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[166] ASEAN Comprehensive Investment Agreement (2009), art. 14.
[167] Common Market for Eastern and Southern Africa Investment Agreement (COMESA) (2007), art. 20.
[168] Comprehensive Economic and Trade Agreement (CETA) (EU–Canada, 2017), art 8.12.
[169] EU-Vietnam Investment Protection Agreement (2019), art. 2.7.
[170] Regional Comprehensive Economic Partnership Agreement (RCEP) (2020), art. 10.13.

At the same time, most of the agreements, follow a similar understanding that that the mere fact that a measure is carried out in the public interest and is not discriminatory is not sufficient grounds for concluding that expropriation did not take place. Expropriation may be carried out even if all formal requirements of legality are met. Characteristics such as arbitrariness, bad faith, disproportionality or other violations are not mandatory features of expropriation and their absence does not exclude the possibility that the seizure of property did take place.

It is worth mentioning that some of the Agreements, while not following the same explanatory structure, still mention the expropriation as one of the immunities in their texts. On one hand, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) in Article 11 specifies, that *"[...] the Agency may guarantee eligible investments against a loss resulting from [...] (ii) Expropriation and Similar Measures - any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of nondiscriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories"*.[171]

At the same time, Convention Establishing the Inter-Arab Investment Guarantee Corporation in Article 18 provides that *"The insurance provided by the Corporation may cover all or part of the losses resulting from any one or more of the following non-commercial risks [...] Measures taken by the public authorities in the host country, either directly or through an*

[171] Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) (1985), art. 11.

agency, whereby the investor is deprived of his substantial rights with respect to his investment, and, in particular, confiscatory measures, nationalization, sequestration, expropriation, compulsory seizure, deprivation of a creditor of his rights including the right of assignment, and the imposition of moratoria of unreasonable length." [172]

Thus, despite differences in structure and wording, both agreements – the Convention Establishing the Multilateral Investment Guarantee Agency and the Convention Establishing the Inter-Arab Investment Guarantee Corporation – recognise expropriation and similar measures among the political or non-commercial risks subject to insurance. Both documents emphasise that deprivation of an investor's control or substantial rights over an investment, including confiscation, nationalisation and other coercive actions, may be grounds for obtaining insurance coverage, while excluding measures of general economic regulation implemented on a non-discriminatory basis.

Both in scientific doctrine and in international arbitration practice, a stable division of expropriation into direct and indirect has developed, as well as the recognition of a special category of measures that, although not formal expropriation, are equivalent to it in their effect.

2. Direct and Indirect Expropriation

It should be noted that expropriation is divided into direct and indirect. Direct expropriation is a situation in which a state takes actions that result in the actual deprivation of an investor's investment or the loss of its economic value. Such actions may

[172] Convention Establishing the Inter-Arab Investment Guarantee Corporation (1988), art. 18.

be formal in nature, such as through a regulatory act, or may involve physical intervention. For example, in the 2012 US BIT model, direct expropriation is applied to the situations *"where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."*[173]

Direct expropriation can be identified by certain distinguishing features, such as the direct seizure of protected investments by the state and the presence of a formal transfer of legal title to the protected investments to the state. It is also noted that the state becomes the beneficiary of a substantial component of the right arising from protected investments, which is an act of direct expropriation.

International arbitration practice is unanimous in recognising that the revocation of licenses or concessions by the state also qualifies as a form of direct expropriation.

It is worth noting the case of *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*[174] The company was incorporated under Spanish law and in 1996 acquired buildings and structures intended for the storage of hazardous industrial waste in the state of Sonora following a public tender. Two years later, in November 1988, the authorised body of the federal government of Mexico responsible for the environment refused to renew the company's license to store the waste and recommended that it prepare a project to liquidate the facility.

During the consideration of the case, a decision was made in which the arbitration court established that the 1996 bilateral

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[173] 2012 US Model Bilateral Investment Treaty https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 13 June 2025.

[174] *Técnicas Medioambientales Tecmed SA v United Mexican States* ICSID Case No ARB(AF)/00/2.

agreement between the Kingdom of Spain and the United States of Mexico on the mutual promotion and protection of investments *"[...] does not define the term "expropriation", nor does it establish the measures, actions or behaviors that would be equivalent to an expropriation or that would".*[175] In this case, expropriation was considered in terms of the forced seizure of private property rights by the government through the use of administrative and legislative actions. In making its decision, the court established that the plaintiff was deprived of the opportunity to economically use the investment, and the refusal to renew the license constituted expropriation.

At the same time, the arbitration in the case of *Metalclad Corporation v. The United Mexican States*[176] highlighted the key features of direct expropriation, characterising it as an explicit, targeted, and officially recognized alienation of property, whether through direct seizure or a formal transfer of property rights in favour of the state. The tribunal stated that *"expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."*[177] One typical example is the intervention of military authorities aimed at physically seizing a plant owned by a foreign investor. In literature and practice, this approach is often referred to as *de jure* expropriation.

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[175] *Técnicas Medioambientales Tecmed SA v United Mexican States* ICSID Case No ARB(AF)/00/2, Award (29 May 2003) 42–43.

[176] *Metalclad Corporation v United Mexican States* ICSID Case No ARB(AF)/97/1.

[177] *Metalclad Corporation v United Mexican States* ICSID Case No ARB(AF)/97/1, Award (30 August 2000) 28.

Another telling example of the distinction between expropriation and permissible government regulation was the case of *Marvin Roy Feldman Karpa v. United Mexican States* [178]. It concerned the application of Mexican tax laws to tobacco exports by y Corporación de Exportaciones Mexicanas, S.A. de C.V. ("CEMSA"), a company controlled by a US investor. The plaintiff challenged the Mexican authorities' refusal to grant excise tax breaks on cigarette exports, considering this to be a violation of several provisions of NAFTA: Article 1102 (principle of national treatment), Article 1105 (minimum standards of treatment), and Article 1110 (expropriation and compensation).

The arbitral tribunal drew a clear line between measures that could be qualified as expropriation and government actions within its regulatory powers. It noted that not every restriction on commercial activity automatically amounts to expropriation. In this case, the denial of tax benefits caused by changes in tax regulations was not recognized as a form of expropriation. At the same time, the tribunal stated that *"Recognising direct expropriation is relatively easy: governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control."*[179]

However, the tribunal found that the actions of the Mexican authorities violated the principle of national treatment, as enshrined in Article 1102 of NAFTA. It was proven that the country's legislation granted tax breaks to national companies, while a foreign company in a similar situation was deprived of such a right. On this basis, the claim was partially satisfied.

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[178] *Marvin Roy Feldman Karpa v United Mexican States* ICSID Case No ARB(AF)/99/1.

[179] *Marvin Roy Feldman Karpa v United Mexican States* ICSID Case No ARB(AF)/99/1, Award (16 December 2002) 36.

Although cases of direct expropriation have become rare in modern practice, individual examples still occur, especially in the context of nationalisation campaigns carried out by a number of Latin American countries, such as Venezuela. Thus, in the case of *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela* [180], the government of the country adopted the so-called "Reservation Law", according to which the exploration and production of hydrocarbons became the exclusive competence of the state. On the same day the law was published, the state oil company PDVSA took control of the assets of several companies, including Tidewater, and investor-owned vessels were physically confiscated. After analysing the claim, the tribunal stated that *"the effect of Respondent's measures was the expropriation in fact of the whole of Claimants' investment in its subsidiary in Venezuela, SEMARCA."*[181]

A similar case was recorded in *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela* [182], where the assets of Mobil were automatically transferred to PDVSA structures after negotiations on the creation of joint ventures in which PDVSA was to receive a controlling stake (at least 60%) failed.

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[180] *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe CA and others v Bolivarian Republic of Venezuela* ICSID Case No ARB/10/5.

[181] *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe CA and others v Bolivarian Republic of Venezuela* ICSID Case No ARB/10/5, Award (13 March 2015) 41.

[182] *Venezuela Holdings BV and others (formerly Mobil Corporation and others) v Bolivarian Republic of Venezuela* ICSID Case No ARB/07/27.

In both situations, there was no dispute about the fact of expropriation itself – the parties agreed that it had taken place. The main focus of the arbitration proceedings was on the legal validity of such actions and the right of investors to appropriate compensation.

Another noteworthy case where the direct expropriation was defined is *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* where the tribunal held that "*It is generally understood that a "direct" expropriation occurs where the investor's investment is taken through formal transfer of title or outright seizure"* [183].

According to UNCTAD, *"Expropriation may be either direct or indirect: (a) Direct expropriation occurs where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; (b) Indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."*[184]

At the same time, indirect expropriation can be defined as: *"[…] regulatory measures of the host state that are not intended to deprive a person of assets, but in reality, cause exactly this effect"*.[185]

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[183] *Crystallex International Corporation v Bolivarian Republic of Venezuela* ICSID Case No ARB(AF)/11/2, Award (4 April 2016) 183.
[184] UNCTAD, *Series on International Investment Agreements II* (United Nations, New York and Geneva 2012) 128.
[185] К. Е. Ксенофонтов, 'Экспроприация собственности иностранного инвестора в международном инвестиционном праве' (Abstract of Cand Law Diss, Moscow 2014) 17–18.

An important example of the recognition of indirect expropriation in international arbitration practice was the case of Metalclad Corporation v. The United Mexican States. In this situation, the American company Metalclad, through its participation in the Mexican firm COTERIN, invested in the construction of a hazardous waste landfill in the state of San Luis Potosi. The project received all the necessary permits from the federal authorities, and the construction of the facility was completed in March 1995. However, the local authorities of the municipality of Guadalcazar opposed the commissioning of the facility, citing its potential environmental threat, and refused to issue a construction permit, which had been requested 13 months earlier. They later obtained a judicial injunction blocking the operation of the plant until May 1999.

In response to these actions, the investor filed an arbitration claiming a violation of Article 1110 of the North American Free Trade Agreement (NAFTA), which requires the parties to prevent the direct or indirect expropriation of the investor's investment by the other party, or to take measures that would amount to expropriation.

The arbitral tribunal agreed with Metalclad's arguments and found that indirect expropriation had occurred. This conclusion was based on several factors: (1) the ineffectiveness and lengthiness of the administrative procedures for issuing permits; (2) the absence of similar requirements for other companies that were carrying out construction in the same region; (3) the refusal of local authorities to issue a permit without sufficient justification. Taken together, these actions deprived the investor of the economic benefit of his investment, which served as the basis for classifying the situation as indirect expropriation.

It is important that the tribunal emphasized that a formal seizure of property in favour of the state is not required for

expropriation to be recognised. It is enough to interfere in such a way that the investor loses significant economic advantages, even if the state does not directly benefit from it. [186] As a result of the case, Mexico was ordered to pay Metalclad more than 16 million US dollars in compensation.

It is worth noting that cases in which the effect of a measure or series of measures is decisive in determining the existence of indirect expropriation are referred to as the "sole effects doctrine".

For example, in Spyridon Roussalis v. Romania[187], the tribunal outlined a few ways in which the indirect expropriation can occur. Thus, along with already know doctrine that indirect expropriation may occur when measures result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor, the tribunal stated that *"it could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights. This is frequently characterized as a "creeping" or "constructive" expropriation."* [188]

It is worth noting that while assessing whether direct expropriation has occurred is in most cases fairly straightforward, recognising indirect expropriation is often not easy. Indirect expropriation is often only found when an investor has lost all or almost all of his investment as a result of government action, as a small loss would not satisfy the "substantial deprivation" criterion.

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[186] *Metalclad Corporation v United Mexican States* ICSID Case No ARB(AF)/97/1, Award (30 August 2000) 28.
[187] *Spyridon Roussalis v Romania* ICSID Case No ARB/06/1.
[188] *Spyridon Roussalis v Romania* ICSID Case No ARB/06/1, Award (7 December 2011) 56–57.

When considering whether there has been indirect expropriation, arbitral tribunals, particularly in the context of modern investment protection agreements, increasingly rely not only on precedents from previous cases but also on specifically formulated illustrative criteria. These criteria help to assess the impact of a public measure on an investment, with the understanding that if the taking of property occurs for reasons of public interest – for example, in the area of public health or environmental protection – such measures will generally not qualify as indirect expropriation.

It is important to distinguish between creeping expropriation and d*e facto* expropriation, even though both forms usually fall under the general concept of indirect taking. Both types can manifest themselves as a set of disparate measures or decisions of the state, so the analysis of each specific situation requires a case-by-case approach. In the absence of an international legal act directly defining the content of indirect expropriation, such a situational method remains the only effective way to identify relevant actions and form legal practice.

3. Conclusion

Expropriation can be characterised as the forced seizure of property of foreign investors in the interests of the state, carried out on the basis of an act of authority that lends legitimacy to this process. Such a measure, recognised by international law, must comply with the established procedure and be based on the general principles of international treaties, both bilateral and multilateral. Expropriation reflects the point of contact between international public and private law: on the one hand, international agreements establishing the legal framework for the seizure of property are acts of an interstate nature and are subject to the regulation of public international law; on the other

hand, they regulate the rights of private foreign investors, which gives this institution a private law dimension.

The practice of considering investment disputes, including within the ICSID framework, shows that the central issue in most cases between investors and states is the legality of the expropriation carried out and the existence of an obligation to compensate for losses. This is why provisions on nationalisation and expropriation are almost always included in the text of bilateral and multilateral international agreements regulating the protection of investments.

Despite the lack of precise and universally accepted definitions of the various forms of expropriation, in international practice they are generally understood to refer to actions or behaviour by the state that are not formally aimed at depriving an investor of his rights or assets, but in fact lead to such a result. These forms, including indirect expropriation, can be implemented in different ways and do not always occur gradually.

In conclusion, it should be emphasised that within the framework of modern international investment law, the term "expropriation" covers two key forms. The first is direct expropriation, in which the state takes straightforward actions that directly deprive a foreign investor of the right of ownership of his investment. The second form is indirect, or so-called creeping expropriation, which is expressed in a series of successive measures carried out by the state, as a result of which the investor loses control or the ability to effectively use his property.

A feature of indirect expropriation is that state measures may not provide for the formal seizure of property, but their cumulative effect leads to actual alienation. Such measures are equivalent to expropriation if they significantly limit the

possibility of making a profit, undermine the justified expectations of the investor and by their nature are objectively aimed at an effect similar to deprivation of property.

Both direct and indirect expropriation can manifest themselves as a set of contrasting measures or decisions of the state, so the analysis of each specific situation requires a case-by-case approach. In the absence of an international legal act directly defining the content of indirect expropriation, such a situational method remains the only effective way to identify relevant actions and form legal practice.

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A barrier for foreign investors: the obligation to use Turkish language in business under Turkish law with the related judicial practice

Abstract: Law No. 805 on the Compulsory Use of Turkish in Economic Enterprises was adopted in 1926 and is still in force. It consists of 9 articles in total, including the last two articles on enforcement and implementation. This Law contains mandatory/interventionist provisions. With the acceleration of international trade in Turkey, this Law has become more important in terms of developing international economic and commercial relations, the general indifference of society towards the use of Turkish and the rapid dominance of other foreign languages, especially English, in every field, bring the issue of the application of the provisions of this law in legal relations to the agenda.

According to Article 1 of the Law no. 805, "All kinds of companies and institutions of Turkish nationality are obliged to keep all their transactions, contracts, communications, accounts and commercial register within Turkey in Turkish". Article 2, which is of particular importance for the subject of our study, stipulates that "For foreign companies and institutions, this obligation is limited to their communications, transactions and contacts with Turkish institutions and Turkish subjects, and to the documents and books that they are obliged to submit to one of the State authorities and officials.".

This Law has been on the agenda frequently in recent years and has caused uncertainty, especially in terms of arbitration agreements. In particular, the absence of the word "contract" in the Law no. 805 raises the question of whether the agreements entered into by foreign companies with persons or entities of Turkish nationality are within or

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outside the scope of the Turkish language obligation. When the court decisions are analysed, it can be seen that a uniform attitude has not been adopted.
In this study, the provisions of Law No. 805 will be explained first. Then, the discussions in the doctrine and the relevant judicial decisions will be analysed. Finally, evaluations will be made.

Keywords: Law no. 805, contracts in foreign language, mandatory use

1. Introduction

The Turkish language was not given due importance in the period before the establishment of the Republic of Turkey[189]. During the Ottoman period, it was observed that both foreign and Turkish natural persons and legal entities frequently used foreign languages (*e.g.* German, French) in both their daily and business lives on the territory of the Empire[190].

Law No. 805 on the Compulsory Use of Turkish in Economic Enterprises[191] was adopted in 1926 and is still in force. In the law's preamble, it is stated that although the use of the national language is obligatory in civilised countries, especially in official transactions, the language is neglected in Turkey, that even persons and institutions that are part of the Turkish community, let alone foreign persons and institutions living and working in the country, have the habit of using languages other than Turkish. As a result, Turkish national culture is damaged

[189] Bahtiyar, M., '805 Sayılı İktisadî Müesseselerde Türkçe Kullanılması Hakkında Kanun'un Kapsamı ve Yaptırımı Sorunu' (2007) Prof. Dr. Hüseyin Ülgen'e Armağan- C. 2, p. 1731.
[190] Bahtiyar (2007) 1731.
[191] Turkish Official Gazette 22.04.1926- 353.

and Turkish citizens who are not proficient in foreign languages are excluded from the economic system[192].

In Turkish law, the legal basis for the obligation of state institutions and organizations to use Turkish is Article 3 of the Constitution, which states that *"The language of the State of Turkey is Turkish"*, while the legal basis for the obligation of private law persons to use Turkish in certain business and transactions is Law No. 805[193].

The fundamental regulations on the use of Turkish are contained in Law No. 805. In addition, similar regulations are also included in other laws[194]. For example, pursuant to Article 65/1 of the Turkish Commercial Code (TCC)[195], commercial books and other necessary records are kept in Turkish. According to Article 70 of the Turkish Commercial Code (TCC), year-end financial statements are also prepared in Turkish.

It should be also pointed out that the Law No. 1353 on the Law Regarding Acceptance and Application of Turkish Alphabet[196], adopted in 1928, does not contain any legal regulation on the obligation to use Turkish language at all[197]. Article 1 of the Law

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192 https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d02/c024/tbmm02024085.pdf (last accessed: 24.10.2024).

193 Kırca, İ., 'İktisadî Müesseselerde Mecburî Türkçe Kullanılması Hakkında Kanun Üzerine' (2007) Prof. Dr. Hüseyin Ülgen'e Armağan- C. 2, p. 1930.

194 Dinç, İ., 'İktisadî Müesseselerde Mecburî Türkçe Kullanılmasına Dair Kanuna İlişkin Güncel Yargı Kararlarının Değerlendirilmesi' (2020) 11(44) TAAD, p. 130. We consider it more appropriate to mention other laws by name, as this would expand and change the scope of the study.

195 Turkish Official Gazette 14.02.2011-27846.

196 Turkish Official Gazette 03.11.1928-1030.

197 Kırca (2007) 1930.

no. 1353 regulates that instead of the Arabic letters that have been used to write in Turkish until that time, the letters taken from the Latin should be used. According to the article 2 of the Law no. 1353, from the date of the promulgation of this law, it shall be compulsory for all departments and institutions of the State and all companies, societies and private institutions to accept and deal in Turkish letters. Consequently, the obligation imposed by this Law is for the use of the Turkish alphabet based on the Latin alphabet, and not for the obligation for both private and public law persons to use Turkish[198].

Law no. 805 consists of 9 articles in total, including the last two articles on enforcement and implementation[199]. This Law contains mandatory/interventionist provisions[200]. It would not be wrong to say that the scope of application of this law is quite wide[201].

With the acceleration of international trade in Turkey, this Law has become more important. In particular, reasons such as the introduction of foreign capital into the country, developing international economic and commercial relations, the general indifference of society towards the use of Turkish and the rapid dominance of other foreign languages, especially English, in every field, have brought the issue of the application of the provisions of this law in legal relations to the agenda[202].

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[198] Kırca (2007) 1930.
[199] Bahtiyar (2007) 1732.
[200] Bahtiyar (2007) 1732; Kırca (2007) 1929. According to Esen, since this Law is outdated, it cannot be accepted as mandatory. Esen, E., 'İktisadî Müesseselerde Mecburî Türkçe Kullanılması Hakkında Kanun'un Milletlerarası Tahkim Anlaşmaları Üzerindeki Etkisi' (2020) 40(1) Public and Private International Law Bulletin, p. 207.
[201] Dinç (2020) 131.
[202] Bahtiyar (2007) 1732.

This Law has been on the agenda frequently in recent years and has caused uncertainty in relation to contracts, and to arbitration agreements in particular. The absence of the word *"contract"* from Article 2, which regulates foreign companies, often prompts serious discussions about legal doctrine. In other words, the absence of the word *"contract"* in the Law no. 805 raises the question of whether the agreements entered into by foreign companies with persons or entities of Turkish nationality are within the scope of the Turkish language obligation. When the court decisions are analysed, it seems that a uniform attitude has not been adopted.

In this study, the provisions of Law No. 805 are explained first. Next, the legal sanctions for violation of the Law no. 805 are examined. After that, relevant judicial practice in Turkish courts is scrutinised, and finally, the current situation is evaluated.

2. The requirement to use Turkish language in business under Turkish law – the scope of the Law no. 805

According to Article 1 of the Law no. 805, *"All kinds of companies and institutions of Turkish nationality are obliged to keep all their transactions, contracts, communications, accounts and commercial register within Turkey in Turkish"* (Emphasis added by the author).

Based on the text of the Law, the scope of the Law is determined according to a distinction based on the nationality/liegance of companies and institutions[203]. Pursuant to this law, it does not

[203] Dinç (2020) 131. Liegance, which is a root concept that includes citizenship, is the legal and political bond established between a natural person or thing and the state. It is unanimously accepted in the doctrine that the concept of *"thing"* also includes legal persons. The criteria accepted in the doctrine for determining the liegance of legal persons are as follows place of establishment system, place of seat

system, eclectic system, control system, system based on the nationality of the shareholders, place of capital system, cumulative system. The issue of whether legal persons will be subject to Turkish liegance is determined according to Turkish law within the scope of exclusive jurisdiction. Turkish law adopts the place of seat system in determining the liegance of legal persons. In the event that the seat of administration in the statute and the de facto/actual seat of administration are different, the de facto/actual seat of administration should be taken into consideration. What should be understood from the de facto/actual administrative center is the place where the administrative body meets. Further more information please see. Arat, T., *Ticaret Şirketlerinin Tâbiiyeti* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1970), p. 2 ff; Aybay, R./ Özbek, N./ Ersen-Perçin, G., *Vatandaşlık Hukuku* (Siyasal Kitabevi 2019), p. 281 ff; Aygül, M., *Milletlerarası Özel Hukukta Şirketlere Uygulanacak Hukukun Tespiti* (Seçkin Yayınları 2007), p. 19-37; Doğan, V., *Türk Vatandaşlık Hukuku* (14th Edition Savaş Yayınevi 2017), p. 230 ff; Doğanay, İ., 'Sermaye Şirketlerinin ve Özellikle Anonim Şirketlerin Tâbiiyeti' (1985) 13(1) BATİDER, p. 65-78; Donay, S., 'Devletler Hususî Hukukunda Şirketlerin Tâbiiyeti Meselesi' 1969 5(2) BATİDER , p. 208-228; Güngör, G., *Tâbiiyet Hukuku: Gerçek Kişiler- Tüzel Kişiler-Şeyler* (7th Edition, Yetkin Yayınları 2019), p. 239 ff; Kley-Struller, A., 'Die Staatszugehörigkeit juristischer Personen' (1991) 2(91) Schweizerische Zeitschrift für internationales und europäisches Recht, p. 163-202; Moroğlu, E., 'Anonim Ortaklıkların Tâbiiyeti ve Tanınması' (2011) 22(2) MHB 413-420; Niboyet, J. P. (Translated by: Fişek, Hicri), 'Şirketlerin, Hakikaten, Bir Tâbiiyeti Mevcut Mudur?' (1952) 9 (3-4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 97-113; Tekinalp, G., 'Türk Hukukunda Ortaklıkların Vatandaşlığı' (1973) İÜHF 50. Yıl Armağanı- Cumhuriyet Döneminde Hukuk 551-579; Tekinalp, Ü., 'Türk Hukukuna Göre Yabancı Bankalar' (1986) 6(1) MHB 10-20; Tolun, O., 'Türk Hukukunda Sermaye Şirketlerinin Tâbiiyeti' (1964) 3. Ticaret ve Banka Hukuku Haftası: Bildiriler, Tartışmalar 474-501; Uluocak, N., 'Genel Olarak Şirketlerin Tâbiiyeti' (1964) 3. Ticaret ve Banka Hukuku Haftası: Bildiriler, Tartışmalar 458-472; Sargın, B., 'Anonim Şirketlerin Tâbiiyeti Meselesi' (2024) Hukukî Gündem ve Yaklaşımlar- Özel Hukuk, 63-86.

matter who the shareholders of the company are or which citizenship they hold[204].

It is necessary to determine what is included within the scope of *"all kinds of companies and institutions of Turkish nationality"* that are obliged to use Turkish[205]. The Law refers to companies as commercial companies, which are collective, limited partnership, joint stock, limited liability and cooperative companies (Art. 124 TCC). An enterprise, on the other hand, includes public and private legal entities other than commercial companies that operate an enterprise, as well as natural persons who operate an economic enterprise[206]. In addition to private law natural persons and legal entities operating an enterprise, public legal entities such as the State, provinces, municipalities, and public benefit associations and foundations, provided that they operate an enterprise, regardless of whether it is a craftsman enterprise or a commercial enterprise, are also covered by this Law[207].

Pursuant to Article 1 of Law No. 805, the obligation of companies and institutions of Turkish nationality to use Turkish in business life is limited to transactions "*within Turkey*". This means contracts that do not contain a foreign element and all their characteristics are related to Turkey; that is to say, contracts concluded, valid and to be performed in Turkey[208]. For instance, even though two Turkish companies entered into a contract in a foreign country and designated the place of performance as Turkey, it is not obligatory for this contract to

[204] Dinç (2020) 132; Kırca (2007) 1932.
[205] Dinç (2020) 132.
[206] Bahtiyar (2007) 1736; Kırca (2007) 1932.
[207] Dinç (2020) 133.
[208] Esen (2020) 218.

be written in Turkish because it does not satisfy the *"within Turkey"* requirement under this Law[209].

Article 2, which is of particular importance for the subject of our study, stipulates that *"For foreign companies and institutions, this obligation is limited to their communications, transactions and contacts with Turkish institutions and Turkish subjects, and to the documents and books that they are obliged to submit to one of the State authorities and officials."* (Emphasis added by the author).

Based on this text, article 2 regulates the requirement to use Turkish language for foreign companies and enterprises. The Turkish language requirement for foreign companies and institutions applies to their correspondence, transactions and contacts with Turkish institutions and Turkish citizens, as well as to the documents and books that they are obliged to submit to public officers[210].

Although Article 2 of the Law does not include the expression "*within Turkey*", it is beyond doubt that this provision also covers foreign companies and institutions operating in Turkey[211]. If foreign banks or other companies operate through their branches in Turkey, these should also be considered as foreign institutions operating in Turkey and Article 2 of the Law should be applied to them[212]. The relations of foreign companies and institutions with foreign persons in Turkey are outside the scope of this Law[213].

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[209] Alışkan, M., 'İktisadî Müesseselerde Türkçe Kullanma Zorunluluğu' (2005) 9(1-2) Erzincan Üniversitesi Hukuk Fakültesi Dergisi 353-354; Kırca (2007) 1936-1937; Dinç (2020) 133.
[210] Kırca (2007) 1938; Dinç (2020) 133.
[211] Dinç (2020) 133; Kırca (2007) 1937.
[212] Dinç (2020) 133; Bahtiyar (2007) 1737-1738; Kırca (2007) 1937.
[213] Dinç (2020) 133-134; Kırca (2007) 1938.

A controversial issue in the doctrine is whether the use of the Turkish language is mandatory in the contracts to be concluded between Turkish companies and entrepreneurs and foreign companies and entrepreneurs [214]. In other words, the absence of the word *"contract"* in article 2, which regulates foreign companies, causes serious discussions in the doctrine.

According to one opinion, Article 2 of the Law does not contain the term *"contract"* and only states that Turkish language shall be used only in terms of communications, transactions and contacts, as well as the documents and books they are obliged to submit to the governmental authorities[215]. In other words, there is no restriction on the language of the contract in this article. In addition, since the Law stipulates that Turkish companies and institutions shall only conduct their contracts, communications and transactions within Turkey, i.e. local transactions, in Turkish, there is no application of the limitation in the Law with respect to the transactions or contracts to be concluded by Turkish citizen individuals or organizations with foreigners[216]. Due to this exceptional provision, it is possible and valid for Turkish companies and institutions to conclude contracts with foreign companies and institutions in a language other than Turkish. In other words, according to this opinion, it is argued that it is not mandatory for the contracts or annexes of foreign companies with Turkish citizens or Turkish companies to be in Turkish[217].

According to another opinion, the contracts to be concluded by foreign companies and institutions with Turkish companies and

[214] Dinç (2020) 134.
[215] Doğanay (2003) 104; Dinç (2020) 134.
[216] Kırca (2007) 1934, 1938, 1939.
[217] Şanlı (2019) 70; Ekşi (2010) 28; Dinç (2020) 135.

institutions must also be in Turkish[218]. Since a contract is a type of (multilateral) legal transaction and Article 2 of Law No. 805 stipulates that the transactions of foreign companies and institutions with Turkish institutions and citizens must be in Turkish, the contracts of foreign companies and institutions with Turkish companies and institutions must also be in Turkish[219].

This discussion is of particular importance in the context of arbitration agreements. This is because arbitration is an emerging alternative dispute resolution method in Turkey. Regarding whether the Turkish language obligation is applicable to arbitration agreements, the following view is advocated in the doctrine: the arbitration agreement, which is in the nature of a contract governed by procedural law, falls outside the scope of Law No. 805 due to its independence from the main contract and its different nature; therefore, arbitration agreements concluded by Turkish companies and institutions with foreign companies and institutions as well as among themselves, even within Turkey, are not obliged to be in Turkish[220]. Again, the absence of the term *"contract"* in Article 2 is a preference of the legislator in this respect. In addition, Article 2 of Law No. 805 stipulates that the agreements between Turkish citizens shall be in Turkish; in cases where both parties are companies resident in Turkey, if the arbitration agreement is not in Turkish, Law No. 805 shall apply.

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[218] Alışkan (2005) 351-353; Dinç (2020) 137-138.

[219] Bahtiyar (2007) 1738-1739.

[220] Nomer, E., *Devletler Hususî Hukuku* (22nd Edition, Beta Yayıncılık 2017), 569; Nomer, E., *Milletlerarası Usul Hukuku* (2nd Edition, Beta Yayıncılık 2018), p. 251; Akıncı, Z., *Milletlerarası Tahkim* (5th Edition, Vedat Kitapçılık 2020) 173-174; Balkar, S., '805 Sayılı Kanun'un Tahkim Anlaşmaları Üzerine Etkisi' (2021) Tahkim ve Uygulanacak Hukuk: ISTAC Yayınları-4, p. 71-111; Esen (2020) 221; Dinç (2020) 136.

3. Legal sanctions for violation of Law No. 805

Law No. 805 regulates civil and criminal sanctions separately. According to Article 7, which regulates the criminal sanction, *"The person who violates the provisions of this Law shall be punished with a judicial fine of not less than one hundred days"* (Emphasis added by the author).

The civil sanction for non-compliance with this Law is regulated in Article 4. Pursuant to the relevant article, *"Documents and certificates issued in violation of the provisions of Articles 1 and 2 after the entry into force of this Law shall not be taken into consideration in favour of companies and institutions."* (Emphasis added by the author).

The ambiguity of the sanction *"shall not be taken into consideration in favour of companies and institutions"* set forth in Article 4 of the Law has caused controversy in the doctrine. In other words, there are different opinions in the doctrine on the type and nature of the sanction stipulated in the Law. These opinions are as follows: the view of nullity, the view of interpretation against the party using a foreign language, the view that Article 4 of Law No. 805 is a provision of proof, and the view that provisions written in a foreign language are deemed unwritten.

3.1. The view of nullity

According to this view, the sanction set by the legislator in Article 4 of Law No. 805 is nullity. Until this outdated law is repealed, it is necessary to disregard the invalidity defences based on the language of the contract in judicial disputes, if it is clear that the parties signed the contract with knowledge of its

content, by deeming it against the rule of good faith within the framework of Article 2 of the TCC[221].

3.2. The view of Interpretation against the Party Using a Foreign Language

According to this view, the sanction of nullity cannot be inferred from the relevant article of law[222]. The use of a foreign language is not important in terms of the validity of the contract, but only in terms of interpretation and proof according to other features of the concrete case[223]. Again, according to this view, if it was foreseen that the contract concluded in a foreign language would be invalid, this should not have resulted against the drafter of the contract.

According to this view, Article 4 of Law No. 805 is an interpretation provision and in cases where a term written in a foreign language can be interpreted in two different ways, the interpretation that is to the detriment of the foreign language user should be preferred[224]. Again, if it is claimed that the foreign language expression has a specific meaning by the person who made the expression, the person is obliged to prove his claim[225].

3.3. The view that Article 4 of Law no. 805 is a Provision of Proof

According to the opinion, the sanction set forth in Article 4 of Law No. 805 is neither nullity nor interpretation against the

[221] Dinç (2020) 139.
[222] Dinç (2020) 139.
[223] Tandoğan, H., Borçlar Hukuku- Özel Borç İlişkileri, C. 2 (5th Edition, Vedat Kitapçılık 2010), p. 744-746.
[224] Tandoğan (2010) 746.
[225] Tandoğan (2010) 746.

party using a foreign language. The point stated in the article is that documents written in a foreign language cannot be taken into consideration in favour of companies and institutions. According to this view, since the matter specified in the law is essentially a provision of proof, it should be evaluated according to the rules of proof[226]. Thus, the documents written in a foreign language in violation of the Law shall not be taken into consideration as conclusive evidence in favour of the relevant companies and institutions, but the other party may prove its rightfulness based on these documents[227].

3.4. The view that Provisions written in a Foreign Language are Deemed Unwritten:

According to this view, the interpretation of Article 4 of the Law that the provisions of contracts drafted in a foreign language that are in favour of the drafter shall be disregarded is appropriate if the contract imposes an obligation on only one party and this party is the party to whom the Law imposes an obligation to use Turkish in contracts[228]. However, if the contract imposes obligations on both parties and the Law obliges both parties to use Turkish, the provisions favourable to both parties should not be taken into account.

According to this view, it is not clear what is meant by the expression "disregard" and the scope of this sanction. Simply put, the terminology in the relevant article is not one of the types of sanctions that we are familiar with in private law[229]. What should be understood from the phrase "not to be taken into account" is that it should not be included in the content of the

[226] Bahtiyar (2007) 1745-1746.
[227] Bahtiyar (2007) 1745-1746; Dinç (2020) 142-147.
[228] Kırca (2007) 1940.
[229] Kırca (2007) 1941-1942.

contract. The problem at hand is the problem of determining the content of the contract[230].

4. Related Judicial Practice in Turkish Courts

When the court decisions on this issue are examined, it is seen that the courts do not have a uniform attitude. We believe it is useful to examine different court decisions to illustrate this.

For instance, in one of its decisions, the 14th Civil Chamber of Istanbul Circuit Courts of Appeal rejected the plaintiff's request for appeal, ruling that the arbitration agreement submitted to the file was drafted in English, one party to the agreement was a foreign company named (C) Trading S.A., and since one party to the agreement containing an arbitration clause was a Foreign company, Article 1 of Law No. 805 was not applicable[231].

The 11th Civil Chamber of the Court of Cassation ruled in one of its decisions that Article 1 of Law No. 805 shall be applied[232]. The case subject to the decision is the claim for portfolio compensation due to the wrongful termination of the agency agreement. There are primary and secondary agency agreements in the case. The parties to the secondary agency agreement are subject to Turkish nationality. The defendant's attorney does not claim that the defendant is a foreign company. The Court ruled that the agency agreement containing the arbitration clause between the parties was drafted in a foreign language, that Law No. 805 would be applied in the concrete case, that the agreement should be written in Turkish according

[230] Kırca (2007) 1942.
[231] İstanbul BAM 14. Hukuk Dairesi, E: 2017/460, K: 2017/509, T: 10.10.2017, www.lexpera.com.tr (last accessed: 30.10.2024).
[232] Yargıtay 11. Hukuk Dairesi, E: 2017/5003, K: 2019/842, T: 05.02.2019, www.lexpera.com.tr (last accessed: 30.10.2024).

to Article 1 of the relevant Law, but that it was invalid in the concrete case because it was written in a foreign language.

In a decision of the 12th Civil Chamber of Istanbul Circuit Courts of Appeal, it was held that pursuant to Article 1 of Law No. 805, it is obligatory to use Turkish language in the contracts concluded by Turkish companies in Turkey, and the contracts concluded without complying with this obligation are invalid pursuant to Article 4 of the same Law; the standard charter party to which reference is made must contain a valid reference in order for the arbitration provisions to be applicable, and the charter party must be in a foreign language even though both parties are of Turkish nationality[233]. Article 4 of the same Law, that the standard charter party to which reference is made must contain a valid reference in order for the arbitration provisions to be applicable, and that the charter party is invalid because it is drawn up in a foreign language, even though both parties to the charter party are of Turkish nationality[234].

In another decision, the 11th Civil Chamber of the Court of Cassation ruled that the pharmaceutical license and distributorship agreement prepared and signed in English between a foreign company of Swiss nationality and a Turkish company is invalid according to Law No. 805 and must be drafted in Turkish[235].

In a decision, the 12th Civil Chamber of Istanbul Circuit Courts of Appeal ruled that the travel agency, which is a Turkish company, is a party to IATA and Foreign airline companies of

[233] İstanbul BAM 12. Hukuk Dairesi, E:2019/2389, K: 2020/189, T: 13.02.2020, www.lexpera.com.tr (last accessed: 30.10.2024).
[234] İstanbul BAM 12. Hukuk Dairesi, E:2019/2389, K: 2020/189, T: 13.02.2020, www.lexpera.com.tr (last accessed: 30.10.2024).
[235] Yargıtay 11. Hukuk Dairesi, E: 2014/1385, K: 2014/3815, T: 28.02.2014, www.lexpera.com.tr (last accessed: 30.10.2024).

different nationalities, the passenger ticket sales agency agreement prepared in English was signed between the parties, there is an arbitration clause in this agreement, and since one party to the agreement containing the arbitration clause is a foreign company, it is not possible to apply Article 1 of Law No. 805[236].

In one of its decisions, the 6th Civil Chamber of Konya Circuit Courts of Appeal ruled that the plaintiff company is not of Turkish nationality, the dispute has a foreign element, the contract signed between the parties on 11.09.2019 stipulates that the disputes arising or that may arise between the parties will be settled in arbitration and in London, the contract is drawn up in English, Article 1 of Law No. 805 cannot be applied due to the fact that the plaintiff company is not of Turkish nationality, and the contract drawn up in English does not constitute a violation of Law No. 805[237].

The 44th Civil Chamber of İstanbul Circuit Courts of Appeal ruled in one of its decisions that a single copy contract in English was signed between the plaintiff, a voice actor, and the defendant Canadian company "...s Montreal" on 13.06.2011, that the plaintiff's voice was recorded in the studio reading the requested texts, that these recordings would be used in public transportation announcements, that these recordings were later sold by the defendant company to Apple Turkey, and that pursuant to Article 2 of Law No. 805, if one of the parties to the contract is a foreigner, there is no obligation to use Turkish in contracts with Turkish companies or Turkish citizens[238].

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[236] İstanbul BAM 12. Hukuk Dairesi, E: 2019/2338, K: 2019/1649, T: 26.12.2019, www.lexpera.com.tr (last accessed: 30.10.2024).
[237] Konya BAM 6. Hukuk Dairesi, E: 2022/647, K: 2023/1787, T: 27.09.2023, www.lexpera.com.tr (last accessed: 30.10.2024).
[238] İstanbul BAM 44. Hukuk Dairesi, E: 2020/919, K: 2022/1027, T: 14.06.2022, www.lexpera.com.tr (last accessed: 30.10.2024).

5. Evaluation and Conclusion

In light of all these explanations given above, my opinion is that it is possible and valid for Turkish companies and institutions to conclude contracts with foreign companies and institutions in a language other than Turkish. In other words, it is not mandatory for the contracts or annexes of foreign companies with Turkish citizens or Turkish companies to be in Turkish. This is because the legislator has clearly regulated the circumstances in which the Turkish language shall be used for foreign companies in the second article. Furthermore, I am of the opinion that the Legislator's omission of the term *"contract"* in the second article is a conscious choice. If the Legislature wanted to include contracts within the scope of the obligation to use the Turkish language, it would have explicitly added to this article.

Arbitration agreements may also be concluded in a foreign language other than Turkish. However, it is obligatory to provide the Turkish text in case of submission to Turkish governmental institutions. In order to avoid any confusion in practice, in my opinion, it is recommended that arbitration agreements be drafted in both Turkish and other foreign languages and that it is clearly regulated that the agreement prepared in both languages is equally valid.

Regarding the discussions on the sanction under Art. 4 of the Law, in my opinion, the obligation to conduct legal transactions in Turkish pursuant to the provisions of Law No. 805 is a matter regarding the form of proof. Namely, as a consequence of non-compliance with Law No. 805, the legislator does not regulate the invalidity of the relevant provision, but regulates that documents that are not drawn up in Turkish cannot be used in favour of the companies and institutions covered by this obligation. Again, if the contract contains a provision in favour

of the party that is obliged to use Turkish, the party that does not comply with this obligation will be deprived of the means of proof in terms of a fact that is in its favour in the contract. For example, in a case where the defendant raises the first objection to arbitration, if the evidence submitted (the contract) proves the material fact on which it relies (the arbitration agreement), the case shall be procedurally dismissed pursuant to Article 413(1) of the CCP. However, if there is an arbitration clause in a foreign language in a contract that must be drafted in Turkish, if the defendant is one of the persons who are obliged to use Turkish in the contract, the defendant party will be deprived of the means of proof (evidence=contract) in order to prove the material fact (arbitration agreement).

In conclusion, I agree with the suggestion that Law No. 805 should be revised by taking into consideration today's conditions, economic requirements, the promotion of foreign capital and the development of international commercial law, and that transactions, contracts and correspondence regarding private law relations that have a foreign element, especially international commercial contracts, should be excluded from the scope of the Law. In this way, it would be more appropriate to limit the scope of the Law to companies and institutions of Turkish nationality to conduct their contracts, correspondence and transactions in Turkish only within Turkey, i.e. local contracts, correspondence and transactions. In terms of a permanent solution, I am of the view that Law No. 805 should be repealed. The Law has already fulfilled its intended purpose. Since we live in a globalised world, it is necessary to adapt to it. Considering that international trade has a common foreign language, the repeal of the Law will eliminate the confusion in both doctrine and practice, and will solve the language problems once and for all.

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The importance of international technology transfer in addressing fintech difficulties

Abstract: The burgeoning landscape of fintech has revolutionized the financial sector, offering unprecedented convenience and efficiency. However, the widespread adoption of fintech solutions has brought forth a host of challenges that demand comprehensive technological solutions. This study delves into the multifaceted problems associated with fintech usage, examining the hurdles that must be overcome to facilitate successful technology transfer.

A pivotal challenge lies in the realm of cybersecurity. As fintech platforms handle sensitive financial data, they become prime targets for cyberattacks. Additionally, the study will examine the role of regulatory compliance in mitigating risks and fostering trust among consumers. The paper will discuss the importance of inclusive fintech solutions, and the challenges associated with reaching underserved populations.

Furthermore, the author will delve into the aspects of a natural person user's issues of data privacy and consumer protection. The study will discuss the regulatory frameworks governing data privacy and the measures that fintech companies can take to build trust with their customers. The study will discuss the opportunities and challenges associated with the adoption of AI and cryptographic technologies.

In conclusion, this study provides a comprehensive overview of the problems associated with fintech usage and the challenges that must be overcome to facilitate successful technology transfer. By examining the key issues facing the fintech industry, the study aims to inform policymakers, industry stakeholders, and researchers about the

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steps that can be taken to harness the full potential of fintech while mitigating risks.

Keywords: fintech challenges, technology transfer, fintechisation, digitalized finances

1. Introduction

The financial technology sector is taking a bigger share of the global financial services and is well known, growing rapidly. The proliferation of smartphones and mobile connectivity has also made it possible for fintech companies to reach a wider audience and provide seamless, mobile fintech services. The expansion of the fintech industry has also been aided by legislative reforms, including applying data protection legislation (GDPR) and the open banking regulations are also a driver for the fintech industry (PSD2-PSD3).

What began as a specialized and not well-known industry, for today has now expanded into a worldwide phenomenon as fintech startups and large financial institutions alike innovate to meet the evolving needs of their clients. In these days, the fintech sector incorporates digital payments, blockchain-based solutions, robo-advisors, and alternative financing tools (BNPL, credits etc.), for indeed B2B and B2C. By these solutions, the payment is simplified and by that the users have faced less obstacles and harsh situations. Hence the digital sphere took steps to make transactions easier in the users' life.
Although the fintech reshaping not the clients' financial possibilities, but the landscape for major companies across finance, technology, and other sectors. While fintech innovation enhances efficiency and creates new growth opportunities, it also exposes established firms to a range of complex challenges – including data security, regulatory compliance, the need for constant technological modernization, talent shortages, and the risk of systemic market disruption.

Fintech and the larger financial sector are likely and forthcomingly undergo substantial upheaval starting from 2025, thanks to developments in artificial intelligence (AI), blockchain, and data aggregation. The global tech sector consents that AI will keep improving operational effectiveness and decision-making, and as blockchain technology develops, new cross-border payment use cases across industries will emerge. It is powered by the compliance regulations under which the fintech sphere must invest in it and form some new methods and processes to avoid regulatory problems.

1.1. Current fintech sphere

Several of the main challenges facing the fintech sector can be effectively mitigated or resolved through technology transfer, i.e. the adoption and application of advanced technologies. Below, I highlight the most important challenges and how technology transfer can help overcome them. First of all, the well-known problem is the stability of the used data protection system – the virtual security.

Traditional banks ensure the safety of the customers' data and funds with physical instruments like bulletproof doors, cameras, security guards, genuine safes, and several other obvious security measures. However, it is far more difficult to understand what the issues regarding virtual security are. Due to consumers' personal information and data being at stake in addition to their money, vulnerabilities are far less obvious and possibly much more damaging. Thus, it is evident that one of the main issues with fintech, mobile banking, and payment systems is virtual security. While biometric identification, two-step customer authentication, data encryption and obfuscation, real-time notifications, and even behavioral analysis have all become commonplace procedures, in parallel of these, cybercrime is also increasing, with a new attack being

discovered every 39 seconds[239]. It is certain that numerosity of attacks is multiplied by nowadays. Fintech organizations are a hot target for hackers because they have more important data (user patterns, multi-services' data, data collected from other bank accounts etc.) to secure than ever before due to the growing use of digital money. Significant data breaches have happened to even big, respectable businesses, like MediSecure, ransomware attack, in July 2024. MediSecure provides electronic prescriptions in Australia, announced that it had a serious data breach hat compromised the records of 12.9 million people According to the Australian Department of Home Affairs[240]. That is nearly half the population of the country. In other case, the significant company, Discord.io announced in August 2023 that it was ceasing operations due to a major hacking event[241]. In that incident the scammers obtained access to the company's main customer database – with 760.000 Discord.io members' data – and offered it for open market sale. It is now evident that fintech businesses must proactively innovate and try to implement new techniques to identify any IT- and security weaknesses. Businesses employ artificial intelligence (AI) to identify any vulnerabilities in their own code and fix them before thieves uncover them, or they utilize cryptograms[242] to track incoming data and confirm that it indeed

[239] Cukier Michel, 'Study: Hackers attack every 39 seconds' (2007) A. James Clark School of Engineering, University of Maryland.

[240] Further information at <https://www.securitymagazine.com/articles/100875-129-million-individuals-affected-by-medisecure-cyber-breach> accessed at 17 July 2025.

[241] Further information at <https://www.infosecurity-magazine.com/news/discordio-halts-operations-data/> accessed at 17 July 2025.

[242] A cryptogram is a word puzzle featuring encrypted text that the user decrypts to reveal a message of some sort. For example, the letter A, might be represented by the letter K, while the letter K is

originated from the intended client. Hackers compete endlessly with their target companies because they employ the same machine learning techniques and artificial intelligence (AI fuzzing) to accomplish their own objectives. Cybersecurity necessitates ongoing work, intricacy, significant financial outlays, and the hiring of security professionals. As a result, the barrier to entry for newly formed companies is high. Especially in the financial sector where the competition is outrageous.

After a short analysis, the author found that in the MENA region[243], fintech growth narrative heavily relies on end consumers. By leveraging the established infrastructure for internet and mobile connectivity, fintechs are able to expand their operations thanks to a mainly youthful user population that prioritizes technology in their financial management. Fintech's growth trajectory in MENA is not without obstacles, though. Some paradigm shifts in user attitudes promote a move away from traditional banking and toward more innovative fintech options is necessary to increase fintech trust. Brand equity, regulatory compliance, clear billing plans, partnerships with reputable financial institutions, financial stability, and data protection are the foundations of trust in fintech. Cybersecurity has always been the most urgent problem[244].

represented by the letter R. Puzzle solvers use several methods to help them decrypt the messages.

[243] Middle East and North Africa.

[244] PwC, 'Beyond the cloud: Navigating FinTech cyber threats and fortifying defences' (2024) <https://www.pwc.in/assets/pdfs/consulting/beyond-the-cloud-navigating-fintech-cyber-threats-and-fortifying-defences-v3.pdf> accessed at 17 July 2025.

2. Challenges

2.1. Users

From the viewpoint of the users, the challenges are not arising from the fintech providers, nor the apps or services, but the users and their excess circumstances themselves. With regard to their physical limitations, low levels of digital literacy, and worries about data security, older adults have a difficult time using digital tools. These obstacles frequently make it more difficult for them to efficiently access and make use of the for example, fintech or other digital service providers' solutions[245]. According to Deloitte's 2023 market estimate[246], integrated financial services are in great demand from a wide range of clients who want to make their lives easier. As customer expectations evolve, especially in the digital space, fintech companies should increasingly focus on user experience (UX) and user interface (UI) design. Today's consumers demand seamless, intuitive digital experiences for financial products, from mobile payments to budgeting apps. UX/UI designers are now essential to ensuring that fintech products are easy to use and align with consumer preferences. Additionally, the complexity of fintech offerings demands specialized roles in

[245] Prabhakar, D., Okta, S. L., 'Elderly Perceptions and Barriers in Accessing Digital Health Services: A Case Study in Tanjung Jaya Village, Panimbang District' (2024) 2(4), International Journal of Health, Medicine and Sports, 98. <https://doi.org/10.46336/ijhms.v2i4.149> accessed 17 July 2025.

[246] Monica O'Reilly, Anna Celner, Deron Weston, Val Srinivas, 'Deloiette Insights: 2023 banking and capital markets outlook, 2023.' (2023) <https://www.deloitte.com/content/dam/insights/articles/2024/us175544_cfs-fsi-outlook-banking/di-cfs-fsi-outlook-banking> accessed 17 July 2025.

product management, where professionals act as the bridge between technical teams and business stakeholders. These professionals must understand both the technical intricacies of fintech solutions and the needs of consumers, making them crucial to driving the future of fintech products.

Fintech developers could remove the obstacles to complex financial systems by simplifying them and making the financial services easy-to-use. An obvious way to make fun of using financial services is gamification. By integrating game-like elements and rewards (daily, milestones or actions) can make managing finances more engaging and encourage to form positive financial habits. Overall, gamified information presentation promotes consumer innovation adoption[247]. According to the results of their survey, some authors discovered that financial well-being was predicted by financial literacy, subjective knowledge, and proficiency with money-saving and financial applications. Customers' choices for specific aspects of financial game apps also differed depending on their prior financial app experience. While individuals who have never used a financial app are more driven by economic considerations, those who have tend to have greater subjective (but not objective) knowledge and desire both "social" and "economic" features[248]. Studies showed that[249] by incorporating

[247] Müller-Stewens, J., Schlager, T., Häubl, G. and Hermann, A. 'Gamified information presentation and consumer adoption of product innovations' (2017) Vol. 81. No. 2, Journal of Marketing 8.

[248] Bayuk, Julia, Altobello, Suzanne, 'Can gamification improve financial behavior? The moderating role of app expertise' (2019) International Journal of Bank Marketing DOI: 37. 10.1108/IJBM-04-2018-0086.

[249] N. Kaur, S. Saha, L. Jindal, V. Patil, S. Gupta, P. S. Kumar, 'Gamifying Finance: Enhancing User Engagement and Financial Literacy through Digital Gamification' (2024) International

video game elements into applications instead of traditional games, fintech economies are developing. First, by emphasizing proficiency in fields like behavioral science, digital marketing, and UX/UI design – all of which are becoming increasingly crucial for fintech intermediation – gamification plays a significant role in integrating the social and technological sides of FinTech. Hence, it can assess that, for example a new mobile personal finance budgeting application could help users – with embedded gamification strategies – improve their financial habits and behaviors and to increase the availability and accessibility of financial literacy information[250].

In nowadays, can not process this issue without drawing in the AI-revolution. For complex financial decisions (e.g., loan approvals, credit scoring), Explainable AI (XAI) can provide transparency and understandability to users, by explaining why a particular decision was or could be made, building trust and joint understanding. Some papers[251] imply that enhancing AI's thinking transparency might greatly boost user confidence and inclination to follow the system's recommendations. XAI's approach and strategy makes use of multimodal explanations,

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Conference on Intelligent & Innovative Practices in Engineering & Management (IIPEM), Singapore, Singapore, 1. DOI: 10.1109/IIPEM62726.2024.10925761.

[250] Hayes, Carrie, 'Using Gamification To Influence User Success In Personal Finance Applications' (2024) Toronto Metropolitan University <https://doi.org/10.32920/25164623> accessed 21 July 2025.

[251] Abu-Rasheed, H., Weber, C., Fathi, M., 'Tell Me Why I Should "Not" Follow Your Recommendation: On the Role of Explainable AI in Collaborative Human-AI Decision Making' (2025) <https://doi.org/10.31219/osf.io/x867z> accessed 21 July 2025.

can greatly improve human-AI cooperation in learning personalization by boosting the acceptability of (financial) recommendations before deciding.

However, despite the energetic digital revolution, a significant portion of the global population remains underserved by traditional financial institutions. We note that this problem is not just its own of the developmental regions, although only 56% of the EU population had basic or above basic digital skills[252]. This exclusion results in the fact that some population of the world cannot have any access to modern financial services. Factors like limited access to smartphones, internet infrastructure, and digital literacy hinder fintech adoption in some regions.

There is a base for future fintech users in this situation so the fintech sector can broaden its horizon by providing some basic digital financing services. Here comes the mobile-first solution: Focusing on robust and efficient mobile applications, as modern cellphones are often the primary means of any internet access in underserved areas. Fintech innovations such as mobile wallets, peer-to-peer (P2P) lending platforms, and crowdfunding are emerging as powerful tools to address the barriers faced by underserved populations, particularly in low-income communities. Among addition to improving access to financial services, these strategies encourage resilience and economic growth among small enterprises that have historically had difficulty obtaining capital[253]. In addition, by enabling

[252] Eurostat, 'Digitalisation in Europe – 2025 edition' (2025) https://ec.europa.eu/eurostat/web/interactive-publications/digitalisation-2025> accessed 21 July 2025.

[253] Omowole, B. M., Urefe, O., Mokogwu, C., Ewim, S. E., 'Integrating fintech and innovation in a microfinance: Transforming

third-party fintech companies to offer integrated financial services via APIs, open banking signifies a substantial change in the financial services industry. Nevertheless, open banking prevalence does not belong to the users, but also to the regulators, to the states, and attention should also be paid to expanding internet infrastructure that can broaden access to fintech services.

2.2. Companies

The paper provided some key aspects in the problem of cybersecurity and data privacy risks in detail. Fintech companies need to implement stronger security measures besides increasing the number of digital transactions mentioned before to protect sensitive financial data, because cybersecurity threats are on the rise.

The paper has also made it clear before that the integrated financial services are in great demand from a wide range of clients who wish for easier financing. Fintech software developers must integrate their apps with other systems that improve the customer's journey in order to meet this customer's needs. Apps for financial services need to be able to communicate with governmental systems, banks, payment gateways, chat programs, and CRM platforms not to detail the further systems.

It could be assessed that one of the biggest difficulties facing the companies of the fintech sector is interoperability. There are no uniform standards for data interchange in the banking systems of today, excluding the APIs. Although third-party connectors provide customers with seamless cross-system

credit accessibility for small businesses' (2024) International Journal of Frontline Research and Reviews, 3(1), 090-100.

experience. To solve this issue, the technological experts and the financial IT sector shall develop coherent tech-solutions. This could be managed through technology-transfer as well. Hence, significant investments are required for technology, compliance, and customer acquisition. However, securing funding is becoming more challenging, especially for smaller fintech startups.

With regard to some authors, by 2025, financial services robotic process automation (RPA) will (and probably already went) go beyond simple job automation, with AI-enhanced bots managing increasingly intricate decision-making procedures in credit evaluation and claims processing[254]. These technologies are driving the shift from traditional, manual financial operations to highly automated, intelligent, and adaptive digital ecosystems[255]. The financial industry, historically reliant on rule-bound workflows and legacy software, now faces increasing pressure to adopt scalable automation for competitiveness, accuracy, and compliance.

The accuracy of data extraction and validation from unstructured financial documents will increase with intelligent document processing. The RPA is just one side of the developed processing, but the other aspect is the business approach. The paper shall mention in this relation three front-line companies: Automation Anywhere (AA), Blus Prism and UiPath. While Blue Prism expands its offering in cloud-native intelligent

[254] Nikhil Saini, 'How RPA and AI Are Transforming the Future of Financial Services' (20249 <https://shorturl.at/7bfhv> accessed 19 July 2025.

[255] Vepanambattu Subramanyam, Sasikiran, 'Transforming financial systems through robotic process automation and AIi: The future of smart finance' (2024) International journal of artificial intelligence research and development. DOI: 2. 203-223. 10.34218/ijaird_02_01_017.

automation, UiPath holds its position thanks to its sophisticated cognitive automation capabilities. Automation anywhere is perfect for businesses aiming to grow rapidly because of its strong cloud-based solutions and user-friendly interface. For businesses looking to smoothly incorporate RPA into their current operations, UiPath stands out for its robust training materials and broad community support. In contrast, Blue Prism is renowned for emphasizing security and compliance, which makes it a popular option for sectors with strict legal requirements[256]. Pressure to lower operating expenses and speed up processing in the face of rising transaction volumes is what propels growth. The above three RPA systems each have special advantages and features that meet various business requirements.

Fintech companies must also navigate an increasingly complex regulatory landscape. Ensuring compliance with varying regulations and data protection laws in different countries can be a significant challenge. The financial sector is one of the most heavily regulated industries globally, and this trend is accelerating. Governments around the world – especially the U.S. and in the EU – have implemented stricter regulations regarding data protection, consumer rights, and financial transactions. The General Data Protection Regulation (GDPR) in the EU has set a global standard for data privacy and security, necessitating specialized roles like compliance officers, risk managers, and cybersecurity analysts. In the U.S., the Dodd-Frank Wall Street Reform and Consumer Protection Act[257] and Sarbanes-Oxley Act (SOX) which are focused on financial

[256] Further information available at <https://savemyleads.com/blog/other/aa-vs-uipath-vs-blue-prism#conclusion> accessed 01 August 2025.

[257] Full text of the legislation <https://www.congress.gov/111/statute/STATUTE-124/STATUTE-124-Pg1376.pdf> accessed 01 August 2025.

accountability and transparency, shaping roles within corporate governance and risk management, moreover, protect investors by preventing fraudulent accounting and financial practices at publicly traded companies. The Dodd-Frank Act included provisions that affected every financial market and that amended existing or granted new authority and responsibility to nearly every federal financial regulatory agency[258]. The Sarbanes-Oxley Act is a product of a series of scandals that took place around the turn of the millennium[259]. To stop such violations of law from occurring in the future again, the SOX placed a significant regulatory burden on privately held businesses. By ensuring that companies generate and maintain correct financial data and can provide them to investors and authorities instantaneously, the act seeks to enhance corporate conduct. For instance, under its Section 302., the public companies need to file regular reports with the Security and Exchange Commission (SEC). For IT, this means that vast volumes of company data must be kept immaculately accurate, completely safe from internal and external threats, and readily available to investors and auditors. As cybersecurity threats grow, professionals specializing in cybersecurity analyst jobs will become increasingly essential to protect sensitive data from breaches and fraud, especially as financial services move to digital-first platforms. As these mentioned requirements are burdening the fintechs, they need to form a strong consumer trust system and demolish privacy concerns. While fintech makes financial services more accessible, many people still have trust issues with digital platforms. Overall, fintech companies need to ensure transparent data policies and stronger encryption to build consumer trust.

[258] Further information available at <https://www.congress.gov/crs-product/R41350> accessed 01 August 2025.

[259] These scandals were related to major accounting companies, such as Enron and WorldCom.

The number of fintechs in Europe reached the number of 9.200 in 2024[260], contributing to a global ecosystem that continues to grow steadily. In the market, the intense competition and market saturation is natural and ubiquitous. The growing number of fintech startups, along with established banks and tech giants, are all competing for the same market, for the same users. In this heated sphere, fintech companies must innovate and provide exceptional user experiences to stay ahead.

While fintech makes financial services more accessible, many people still have trust issues with digital platforms[261]. A lot of users are still averse to the advent of financial novation, so fintech companies need to ensure transparent data policies and stronger encryption to build consumer trust. The companies, although actively build trust by using preferential periods or methods, benefit when a user benefits from calling in a friend to use the given fintech service.

Considering the material challenges, a substantial amount of money is needed by fintech firms in order to create and maintain innovative technology, pay for costs associated with regulatory compliance, and finance client acquisition campaigns. Growth and user experience depend on investing in the correct tech stack, such as scalable cloud computing or AI solutions, but doing so requires a significant initial and continuing financial outlay. Since startups must set up internal teams and processes to comply with complicated rules like AML, KYC, and other jurisdiction-specific mandates, compliance is a large and growing expense that frequently accounts for a significant

[260] Statista Research Department, 'Fintech in Europe - statistics & facts, 2025.' (2025) <https://www.statista.com/topics/3397/fintech-market-in-europe/#topicOverview> accessed 01 August 2025.
[261] Beck Thorsten, 'Fintech and financial inclusion: Opportunities and pitfalls' (2020) ADBI Working Paper Series No. 1165 Asian Development Bank Institute (ADBI) Tokyo.

percentage of early-stage companies' overall operating expenses[262]. According to recent estimates[263], the typical customer acquisition cost (CAC) for B2C financial businesses ranges from $100 to $300 per user[264], making customer acquisition very costly in the fintech industry.

3. Occurring solutions

As this paper overviewed the main problems that are occurring before or during the use of a fintech solution, service, there must be a remedy available to them. First, RegTech is offering a suitable solution. Regulatory technology (RegTech) enables fintech companies to use advanced technologies such as artificial intelligence, automation, and big data to comply with regulatory requirements more efficiently, quickly, and transparently. With RegTech, fintech companies are able to scale faster and meet their obligations without needing an extensive and costly compliance operations infrastructure[265]. From the onboarding phase to continuous customer monitoring, RegTech may assist companies with a more uniform approach to data quality if it is properly implemented. Proper implementation of a RegTech system could facilitate KYC checks in order to adhere to anti-money laundering

[262] Further information available at <https://softwaremill.com/business-insights/top-fintech-challenges-key-barriers-and-solutions-for-startups-scaleups-and-mature-firms/> accessed 02 August 2025.

[263] Further information available at <https://dojobusiness.com/blogs/news/fintech-ideal-cac> accessed 02 August 2025.

[264] Further information available at <https://firstpagesage.com/seo-blog/fintech-cac-benchmarks-report/> accessed 02 August 2025

[265] Larsen, K., Gilani, S., 'RegTech is the new black-the growth of RegTech demand and investment' (2017) Journal of financial transformation, 45, 22-29.

regulations[266]. Additionally, more structured client touchpoints are made possible by RegTech technology like risk assessment and integration tools. Customer complaints about information updates are greatly reduced as a result of more qualitative analysis of the data. RegTech has been an essential element to manage the increased compliance burden and mitigate risks[267]. These systems are also capable of monitoring transactions in real time, automatically reporting to regulators, and reducing the risk of human error.

The importance of cybersecurity awareness was mentioned before. RegTech has its potential to solve these issues, aligning businesses must use safe and secure procedures in order to prevent a potential cyber-attack. To gain and sustain the trust of their customer base, businesses who implemented RegTech must thus continuously stay abreast of changes in these practices and make software or cyber-strategic modifications, as necessary. If security is inadequate, businesses will experience more data breaches, which can range from minor instances to catastrophic ones[268].

The other occurring solution is the operation of regulatory sandboxes, supported by technology transfer. In this environment, fintech companies can evaluate their new services

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[266] Butler, T., O'Brien, L., 'Understanding RegTech for digital regulatory compliance' (2019) Disrupting Finance, 85.

[267] Fabian Teichmann, Sonia Boticiu, Bruno S. Sergi, 'RegTech – Potential benefits and challenges for businesses' (2023) Vol. 72, Technology in Society, <https://doi.org/10.1016/j.techsoc.2022.102150> accessed 01 August 2025.

[268] Mohamed, H., Ali, H., 'Finding solutions to cybersecurity challenges in the digital economy' (2021) Fostering Innovation and Competitiveness with FinTech, RegTech, and SupTech IGI Global Scientific Publishing.

in a real-world environment but under regulatory supervision. This allows regulators to better understand how innovative technologies work and respond more flexibly and quickly to regulatory needs.

One of the most important aspects to highlight is the essence of technology transfer. International technology transfer can be described more precisely as a proprietary process, technology, know-how, or other business knowledge owned by a company that uses it for its own production activities. Precisely because the fintech market is so vibrant and has such promising prospects, technology transfer offers certain opportunities that fintech companies can exploit. However, it raises some concerns. The first concern is the technological transfers taking place with no specific financial flow[269]. Although, the technological transfer includes balances of payments, which is a form a subset of balance of payments data. If this technology transfer happened and organized by the fintech, the origo must be that the fintech sphere shall use technology transfers in its processes. With its two components – technological transfers and technical services – the technological balance of payments utilized by fintech companies, would have serve as a partial gauge of the global spread of technology. Through technology transfer, the fintech sector can quickly adopt regulatory and technological solutions that have already been proven in international markets, thereby reducing regulatory fragmentation and promoting the development of a more uniform and efficient regulatory environment.

[269] Bernadette Madeuf, 'International technology transfers and international technology payments: Definitions, measurement and firms' behaviour' (1984) Volume 13, Issue 3 Research Policy <https://doi.org/10.1016/0048-7333(84)90021-0.> accessed 01 August 2025.

Overall, the applied technology transfer could lead to faster adaptation, more transparent operations, greater regulatory confidence, and more effective risk management in the fintech sector, while also supporting innovation and the fulfillment of consumer protection expectations. Several of the main challenges facing the fintech sector can be effectively mitigated or resolved through technology transfer, i.e. the adoption and application of advanced technologies.

In the table below, the paper highlights the most important aspects of how technology transfer can help overcome the challenges:

Challenges	**Role of technological transfer solutions**
Data security, Cybersecurity	AI-based security systems, zero trust IT-architecture, quantum-resistant encryption, blockchain-based transactions.
Legal compliance	Machine learning and applying AI to automate and analyze compliance processes, fraud detection, profiling (if possible).
Innovation, competitiveness	Rapid adoption of blockchain, Web3, Big Data (detailed user profiling (if possible)), and cloud services.

Scalability, cost-effectiveness	Cloud services (SaaS[270]), automation, use of data centers.
User experience	AI-powered chatbots, personalized offers using big data and machine learning.

Therefore, technology transfer therefore enables the fintech sector to respond quickly to challenges relating to regulation, security, innovation, and customer experience, while increasing efficiency and competitiveness.

4. Conclusion

The dynamic evolution of fintech shall be accompanied the effective management of technology transfer, a process defined not merely by technical migration but also by legal, regulatory, and socio-economic dimensions. The risks inherent in handling sensitive financial and personal data have rendered cybersecurity the foremost legal and operational priority. The increasing frequency and severity of cyberattacks, such as the MediSecure and Discord.io breaches cited in this paper, spotlight the imperative for robust, technologically advanced security frameworks Fintech firms, in order to comply with international standards and local regulatory requirements, must implement layered security protocols – including biometric identification, encrypted data storage, and real-time fraud monitoring – which are not only technical imperatives but also

[270] Software as a service.

legal obligations under statutes like the GDPR and emerging AI regulations[271].

Compliance remains a substantial operational burden. Stringent anti-money laundering and know your customer (KYC) protocols, necessitate dedicated teams and advanced RegTech solutions to automate and document adherence. This study has also explained that legal requirements, consuming a significant amount of fintech startups' operating expenses, and have direct implications for organizational structure and growth strategies. The rise of regulatory sandboxes enables firms to test innovative solutions under regulatory supervision, fostering a climate where technological and legal experimentation co-exist, but only within clearly delineated boundaries[272].

However, the innovative potential of fintech – especially in enhancing financial inclusion and consumer-centric services – can only be realized if foundational legal and infrastructural prerequisites are satisfied. Notably, the digital divide and disparities in digital literacy remain substantial barriers to adoption, so there is a further role of fintech-adoption. User experience (UX/UI) and clear data transparency policies, as recommended by Deloitte and other market analysts as cited, are not only market differentiators but also form an implicit part of legal risk mitigation concerning consumer rights and data handling.

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[271] Hoofnagle, C., van der Sloot, B., Zuiderveen Borgesius, F., 'The European Union General Data Protection Regulation: What it is and what it means' (2019) Information & Communications Technology Law.

[272] Zetzsche, D., Buckley, R., Arner, D., Barberis, J., 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) Fordham Journal of Corporate & Financial Law.

Interoperability continues to impede fintech efficiency due to the absence of uniform data interchange standards in global financial systems. As a legal and technical matter, harmonization efforts – whether through international memoranda of understanding, technical standards, or cross-border regulatory compacts – are essential for streamlining technology transfer and maintaining systemic stability. Technology transfer, in this context, is not a one-off transaction but an ongoing, iterative process involving licensing, collaborative development, and knowledge diffusion across the fintech industry.

Finally, the dual role of technology transfer – as both an enabler of rapid innovation and a tool for regulatory and operational harmonization – emerges as critical. Comprehensively, this study advocates that a proactive, risk-aware approach to importing and adapting global best practices through technology transfer can substantially mitigate many sectoral vulnerabilities, from cyber threats to compliance challenges for the fintech companies.

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Mehmet Cemil Türk*

Status of no-challenge clauses in patent licences under Turkish law

Abstract: Licence agreements are among the most important instruments of modern technology transfer. As the use of such agreements becomes increasingly widespread, a growing number of complex and often controversial contractual provisions have emerged. One such provision is the no-challenge clause, which prohibits the licensee from challenging the validity of the licensed right. Although these clauses are frequently encountered in international licensing practice, their legal status under Turkish law has not yet been subject to comprehensive academic scrutiny.

This study examines the legal nature, enforceability, and implications of no-challenge clauses in patent licence agreements under Turkish law. Drawing on the general rules of the law of obligations, commercial law, and competition law, it evaluates the conditions under which such clauses may be considered valid. The relationship between no-challenge clauses and personality rights, good faith, penalty clauses, and the merchant's duty to act as a prudent businessperson is analysed in detail. Moreover, the study discusses the 2019 Vestel v. Philips decision of the Turkish Competition Board – the first and only precedent in Türkiye to address the competitive effects of a no-challenge clause. This decision offers a framework for assessing whether such clauses may lead to significant consumer harm or create barriers to accessing essential technologies.

The study aims to fill a gap in Turkish legal doctrine and provide practical guidance for future licensing practices. By adopting an interdisciplinary legal approach, it also lays the groundwork for future academic and legislative developments in this field.

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Keywords: no-challenge clause, patent licence agreement, technology transfer, competition law, intellectual property law

1. Introduction

Technology transfer – the process of transferring technological knowledge and innovations from one country to another for production and application – remains one of the most significant issues in the international arena[273]. Today, licensing is one of the most important methods of technology transfer[274]. Developing countries, especially in the field of industrial and consumer products, overcome their deficiencies in technology production by transferring technology through licensing. Licensing also establishes a direct link between investment and exportation[275]. In addition, countries with political resistance to imports increase their local production through licensing[276]. Today, licensing is quite common, especially in areas where high technology is used.

These developments have also changed licence agreements. New clauses have been added to licence agreements and new disputes have arisen. One such clause is the no-challenge clause, which aims to prevent the licensee from claiming the invalidity of the licensed right. This clause bars the licensee from objecting to the validity of the right. The issue has gained contemporary relevance in Turkish law, after the Turkish

[273] Deniz Topcu, *Patent Lisans Sözleşmeleri* (2nd edn, Seçkin 2021) 55.
[274] B Bahadır Erdem, *Patent Hakkının Korunmasına ve Patent Hakkına İlişkin Sözleşmelere Uygulanacak Hukuk* (2nd edn, Beta 2002) 128.
[275] Fügen Sargın, *Milletlerarası Unsurlu Patent ve Ticarî Marka Lisansı Sözleşmelerine Uygulanacak Hukuk* (1st edn, Turhan 2002) 1.
[276] Topcu (2021) 57.

Competition Board examined in the context of competition law in its Vestel v. Philips decision in 2019.

As far as we can determine, there is only one monographic study[277] on the no-challenge clause in Turkish law. In this study, the no-challenge clause is analysed within the framework of competition law. Although there are some studies[278] on licence agreements that touch on the clause, no comprehensive monograph has been dedicated to the issue within the framework of Turkish private law. In this respect, the present study aims to provide an early and original contribution to Turkish legal literature.

It should also be explained why the no-challenge clause is discussed in the context of patent licence agreements. As patent licence agreements are the oldest and most widely used licence agreements, the general theory and legal rules on licence agreements were first established for patent licence agreements and then became a source for other licence agreements[279]. Moreover, technology transfer through patent licence agreements is one of the most common methods that enable the effective dissemination of technical information[280]. For these

[277] Merve Biroğlu, *Teknoloji Transferi Anlaşmalarında Yer Alan Hükümsüzlük Şartlarının Rekabet Hukuku Kapsamında Değerlendirilmesi* (1st edn, Rekabet Kurumu 2022).
[278] Ali Necip Ortan, *Patent Lisansı Sözleşmesi* (1st edn, Doğan Basımevi 1979) 260-266; Saibe Oktay Özdemir, *Sınaî Haklara İlişkin Lisans Sözleşmeleri ve Rekabet Hukuku Düzenlemelerinin Lisans Sözleşmelerine Uygulanması* (1st edn, Beta 2002) 121-122, 216-220; Saadet Hande Özsoy, *Türk Hukukunda Patent Lisansı Sözleşmesi* (1st edn, Turhan 2011) 150-151; Topcu (2021) 163-164.
[279] Oktay Özdemir (2002) 34; Erdinç Filiz, '*Patent Lisans Sözleşmesi*' (LLM thesis, Gazi University 2007) 29; Özsoy (2011) 15.
[280] Biroğlu (2022) 5.

reasons, in this study, the subject is examined in the context of patent licence agreements.

2. General overview of licence agreements

The recognition and protection of the ownership of intangible assets with economic value, such as intellectual property rights, has led to the need to transfer the right to use them to third parties, and thus the concept of licence has emerged[281]. The term '*licence*', derived from the Latin word '*licere*', means to authorise or to permit[282]. In contemporary legal and commercial practice, '*licence'* is a collective term used to express the totality of the rights of the licensee[283]. Furthermore, '*licence*' is also an umbrella term encompassing the term of '*licence right*' and the term of '*licence agreement*'[284]. The licence right refers to the licensee's authority to use of the licence[285]. The source of the licensee's licence right may be a licence agreement, a statutory provision, a court decision, or an administrative act[286]. Among these, the licence agreement is the most common source.

A licence agreement is a contract whereby the use of intangible assets or a factual situation is granted to another party[287]. In this

[281] Oktay Özdemir (2002) 1-2; Filiz (2007) 27; Özsoy (2011) 14.
[282] Oktay Özdemir (2002) 9; Filiz (2007) 28; Tuğçe Kılıç, '*Patent Lisansı Sözleşmesinde Tarafların Hukuki Durumu*' (LLM thesis, Dokuz Eylül University 2008) 3; Özsoy (2011) 21; Topcu (2021) 29.
[283] Oktay Özdemir (2002) 9; Kılıç (2008) 3; Özsoy (2011) 21.
[284] Özsoy (2011) 21.
[285] ibid 21.
[286] Özsoy (2011) 21-22; Topcu (2021) 29-30.
[287] Ortan (1979) 36; Ali Sait Yüksel, *Patent ve Lisans (Patent, Marka, Know-How) Sözleşmesi Hukuku* (1st edn, Marmara University 1989) 75; Oktay Özdemir (2002) 30; Ünal Tekinalp, *Fikrî Mülkiyet Hukuku* (5th edn, Vedat 2012) 467; Filiz (2007) 28; Kılıç (2008) 3-4; Özsoy (2011) 23-24; Cahit Suluk, Rauf Karasu and Temel Nal, *Fikri Mülkiyet Hukuku* (8th edn, Seçkin 2024) 407; Hilal Erçal,

agreement, the licensee acquires only a right of use, while ownership of the licensed right remains with the licensor[288]. In this respect, licence agreements differ from the agreements that create an obligation to transfer ownership and are more like lease agreements[289].

The parties to a licence agreement are the '*licensor*' and the '*licensee*'. Typically, the licensor is the owner of the licensed right. Licensee is the holder of the right of use. However, in sub-licence agreements, the licensee of the initial licence agreement is the licensor. Both licensors and licensees may be either natural or legal persons[290]. Either party may be more than one person[291]. In this agreement, the licensor's primary obligation is to ensure that licensee uses the licensed right or fact. This obligation is the main obligation that determines the characteristic of the licence agreement and represents the '*essentialia negotii*' of the licence agreement[292].

Licence agreements are generally reciprocal and '*synallagmatic*'[293]. However, although uncommon in practice,

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'*Genişletilmiş Toplu Lisanslama*' (PhD thesis, Ankara Yıldırım Beyazıt University 2024) 42.

[288] Filiz (2007) 29; Kılıç (2008) 4; Özsoy (2011) 22; Suluk, Karasu and Nal (2024) 407; Erçal (2024) 43.

[289] Suluk, Karasu and Nal (2024) 407.

[290] Fikret Eren, *Borçlar Hukuku – Özel Hükümler* (4th edn, Yetkin 2017) 928; Ortan (1979) 104; Oktay Özdemir (2002) 61; Filiz (2007) 48; Onur Sabri Durak, '*Patent Lisans Sözleşmesi*' (LLM thesis, Istanbul University 2007) 96-97; Kılıç (2008) 54; Topcu (2021) 71-77.

[291] Eren (2017) 928; Ortan (1979) 104; Oktay Özdemir (2002) 61; Filiz (2007) 48; Durak (2007) 96-97; Kılıç (2008) 55; Topcu (2021) 75.

[292] Oktay Özdemir (2002) 64, 69; Şirin Aydıncık, *Fikri Haklara İlişkin Lisans Sözleşmeleri* (1st edn, Arıkan 2006) 75; Kılıç (2008) 4.

[293] Emin Cem Kahyaoğlu, 'Patent Lisans Sözleşmesinde Tarafların Hakları ve Borçları' in A Kendigelen (ed), *Prof. Dr. Ömer Teoman'a*

non-reciprocal licence agreements also exist[294]. This is because the main obligation that determines the characteristic of the licence agreement is the obligation of the licensor, not the obligation of the licensee. In reciprocal licence agreements, the obligation of the licensee is generally the payment of a monetary fee[295]. Nevertheless, alternative forms of consideration other than money are possible, such as sharing the products manufactured under the licence[296].

The subject matter of a licence agreement is the transfer of rights to use intellectual property or other economically valuable intangible assets[297]. Because of the diversity of such rights and assets, licence agreements do not have a limited subject matter. The content of each agreement may vary depending on the type of right being licensed[298]. Due to this variability, there is no single type of licence agreement applicable to all rights[299]. Instead, a wide range of agreements are gathered under the name of licence agreements[300].

Under Turkish law, licence agreements are not governed by a single legal instrument. There are provisions on licence agreements in the Code on Intellectual and Artistic Works (No.

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55 Yaş Günü Armağanı, vol I (1st edn, Beta 2002) 435; Oktay Özdemir (2002) 63; Aydıncık (2006) 75; Filiz (2007) 31; Kılıç (2008) 25; Topcu (2021) 106.

[294] Kahyaoğlu (2002) 437; Oktay Özdemir (2002) 63, 70; Aydıncık (2006) 75; Filiz (2007) 31; Kılıç (2008) 25; Topcu (2021) 106.

[295] Yüksel (1989) 96; Oktay Özdemir (2002) 64; Aydıncık (2006) 75; Filiz (2007) 32.

[296] Oktay Özdemir (2002) 64; Kılıç (2008) 25.

[297] Eren (2017) 929; Mustafa Baş, *Teknik Bilgi (Know-How) Lisans Sözleşmesi* (1st edn, Yetkin 2000) 69; Oktay Özdemir (2002) 50; Filiz (2007) 29; Özsoy (2011) 22; Topcu (2021) 30.

[298] Oktay Özdemir (2002) 14; Özsoy (2011) 23.

[299] Oktay Özdemir (2002) 15; Özsoy (2011) 23.

[300] Özsoy (2011) 23.

5846 of 1951) and the Industrial Property Code (InPC, No. 6769 of 2016). The Code on Intellectual and Artistic Works, in its simplest form, deals with the copyright of intellectual and artistic works. The Industrial Property Code, on the other hand, deals with trademarks, geographical indications, designs, patents, utility models and traditional product names. Since this study focuses on patent licence agreements, the provisions of the Code on Intellectual and Artistic Works will not be addressed and examined.

The Industrial Property Code contains general provisions concerning licence agreements. Among these provisions, Article 148 of the InPC regulates legal transactions. Article 148/1 states that trademarks, designs, patents, and utility models may be subject to licence. In addition, Article 148/4 stipulates that legal transactions must be in written form, so that the written form is required for licence agreements. According to Article 12/2 of the Turkish Code of Obligations (TCO, No. 6098 of 2011), this requirement is a condition of validity.

Additionally, according to Article 148/5 of the InPC, the licence may be registered in the registry upon the request of any party. In terms of its legal nature, this registration is '*declatory*', not '*constitutive*'[301]. Under Turkish law, the registration of a licence agreement is not a prerequisite for its validity. However, the registration serves an important function. An unregistered licence cannot be enforced against *bona fide* third parties.

3. Patent licence agreements

Article 125/1 of the InPC clearly states that a patent may be the subject of a licence agreement. In this context, a patent licence agreement may be defined as a licence agreement whose subject is a patent. Under this agreement, the licensor authorises the licensee to use the patent, while the licensor retains legal

[301] Suluk, Karasu and Nal (2024) 410.

ownership of the patent right[302]. The general principles discussed above in relation to licence agreements apply equally to patent licence agreements.

A patent licence may be granted as an '*exclusive'* licence or as a '*non-exclusive*' licence (Art. 125/2 of the InPC). Unless otherwise provided in the agreement, it is presumed that the licence is non-exclusive (Art. 125/2 of the InPC). In a non-exclusive licence, the licensor retains the right to use the patented invention and may also grant further licences to third parties (Art. 125/2 of the InPC). Conversely, in an exclusive licence, the licensor is prohibited from granting further licences to third parties and from using the patented invention, unless such rights are expressly reserved in the agreement (Art. 125/2 of the InPC).

4. No-challenge clause

A no-challenge clause is a clause included in patent licence agreements to prevent the licensee from challenging the validity of the licensed patent[303]. These clauses prevent the licensee from challenging the patent's validity in court or administrative proceedings, and often also prevent them from assisting others in doing so[304]. Such clauses may be categorised into two groups. The first group comprises clauses in which the licensee expressly undertakes not to challenge the validity of the

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[302] Ortan (1979) 16; M Haluk Arı, *Patent Lisansı Anlaşmalarında Münhasırlık ve Bölgesel Sınırlamalar* (1st edn, Rekabet Kurumu 2003) 16; Özsoy (2011) 29; Topcu (2021) 45.

[303] Thomas K Cheng, 'Antitrust Treatment of the No Challenge Clause' (2016) 5 *New York University Journal of Intellectual Property and Entertainment Law* 440; Biroğlu (2022) 7; John Kappos and Bo Moon, 'From License to Restraint: Challenging the No-Challenge Clause in Patent Licenses – Part I' (2023) 35 *Intellectual Property & Technology Law Journal* 9.

[304] Kappos and Moon (2023) 9.

patent[305]. To be clear, this group of clauses includes the obligation of the licensee not to challenge the validity of the patent. In the event of a breach, the licensor may seek compensation for any resulting damages[306].

The second group of clauses consists of clauses that impose contractual sanctions in response to a validity challenge[307]. While their aim remains the same – to prevent the licensee from challenging the validity of the patent – they additionally include punitive consequences. Common examples are liquidated damages clauses, termination-upon-challenge clauses, royalty escalation clauses triggered by an invalidity claim, or clauses shifting litigation costs to the licensee[308]. However, such provisions do not necessarily have to be punitive in nature. Instead of penalising the licensee for bringing a challenge, the licensor may even choose to reward them for refraining from doing so[309]. For instance, the licensor may agree to return a portion of the royalties at the end of the contract term if no challenges have been raised[310].

Under the Turkish law of obligations, these two groups of clauses are different in their legal nature, although they serve the same function. The first group of no-challenge clauses is based on a contractual obligation, whereas the second group – particularly those requiring the licensee to pay a contractual penalty – based on an imposition of contractual sanctions. Articles 179 to 182 of the TCO govern penalty clauses. In this

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[305] Cheng (2016) 441; Biroğlu (2022) 6.
[306] Cheng (2016) 441.
[307] Alan D Miller and Michal S Gal, 'Licensee Patent Challenges' (2015) 32 *Yale Journal on Regulation* 131; Cheng (2016) 441; Biroğlu (2022) 6.
[308] Miller and Gal (2015) 131; Cheng (2016) 441-442; Biroğlu (2022) 6.
[309] Miller and Gal (2015) 131.
[310] ibid 131.

context, contractual sanctions such as those requiring the payment of a fixed sum fall under the scope of penalty clauses within the meaning of Article 179/1 of TCO. In this framework, it can be concluded that no-challenge clauses are not homogeneous. The key distinguishing feature is the '*objective'* of preventing the licensee from challenging validity. However, how they seek to deter challenges is different.

Licensees are generally the parties with the strongest economic incentive to challenge a patent's validity[311]. This is because, unlike third parties, licensees are financially bound to the agreement and must pay royalties[312]. In addition, their close familiarity with the patented technology makes them more capable of identifying potential grounds for invalidity. Therefore, licensees are more likely to challenge a patent's validity than third parties. Considering this, licensors often include no-challenge clauses in their agreements to protect themselves from such risks and to strengthen the legal protection afforded by intellectual property law[313]. However, these clauses do not provide absolute protection against the licensee. The principle of the relativity of contracts in the law of obligations dictates that contractual obligations are binding only between the contracting parties[314]. This principle also applies to no-challenge clauses, too. Therefore, these clauses have no legal effect on third parties, who remain free to challenge validity. Nevertheless, licensors may avoid this risk

[311] Cheng (2016) 441.
[312] Biroğlu (2022) 7.
[313] ibid 7.
[314] Selâhattin Sulhi Tekinay and others, *Borçlar Hukuku – Genel Hükümler* (7th edn, Filiz 1993) 60; Fikret Eren, *Borçlar Hukuku – Genel Hükümler* (29th edn, Legem 2024) 18-19; M Kemal Oğuzman and M Turgut Öz, *Borçlar Hukuku – Genel Hükümler* vol I (16th edn, Vedat 2018) 27.

by incorporating potential challengers as licensees in agreements containing a no-challenge clause[315].

5. Evaluation from the perspective of the Turkish law of obligations

5.1. Validity of no-challenge clauses under Turkish law

The first issue to be addressed under Turkish law of obligations is the validity of no-challenge clauses in patent licence agreements. This should be evaluated within the framework of the fundamental principles of contract law. One of the fundamental principles is the '*freedom of contract*', which refers to the right of parties to freely regulate their private legal relations within the limits of the legal order[316]. Article 48 of the Constitution of the Republic of Türkiye guarantees this principle by recognising everyone's freedom to conclude contracts. Similarly, Article 26 of the TCO, titled '*Freedom of contract*', allows parties to determine the content of a contract freely, within the limits set by the law. However, under Article 27 of TCO, contracts that are contrary to the mandatory provisions of law, morality, public order, or personality rights, or whose subject matter is impossible, are deemed *absolutely null and void*. In this regard, there is no express legal prohibition of no-challenge clauses, nor are such clauses inherently immoral, contrary to public order, or impossible in subject matter. However, their compatibility with the protection of personality rights may be questioned.

Under Turkish law, contracts that violate personality rights are deemed absolutely null and void according to Article 27/1 of the TCO. A similar principle is found in Article 23/2 of the Turkish Civil Code (No. 4721 of 2001), which provides that no one may waive or restrict their personality rights in a manner contrary to

[315] Cheng (2016) 441.
[316] Tekinay and others (1993) 362; Eren (2024) 344.

law or morality. In Turkish law, violations of personality rights may be categorised into two groups, both of which are deemed absolutely null and void. The first group includes obligations that conflict with core personal values that are inseparable from human dignity[317]. Examples include agreements that include a promise never to marry, to commit suicide, or to sell body organs[318]. In these scenarios, the contract directly affects fundamental human freedoms and core personal values.

The second group concerns excessive restrictions on freedoms[319]. If a contractual obligation is excessively burdensome – either in its intensity or duration – it may also be deemed to violate personality rights[320]. In such cases, even if the contractual obligation does not directly relate to core personal values, the disproportionate burden it imposes may render it void. So-called '*handcuffing agreements*', which excessively restrict an individual's economic freedom and make them economically dependent on the other party, are often assessed in this context[321]. For instance, the Turkish Court of Cassation has held that a three-year non-compete clause preventing a former employee from working in a similar role constituted such an excessive restriction and was invalid[322].

No-challenge clauses should be analysed considering both groups of personality rights violations. Firstly, the licensee's waiver of the right to challenge the validity of a patent does not pertain to fundamental values such as the right to life, health, bodily integrity, privacy, honour, or dignity. It is more

[317] Eren (2024) 375.
[318] Eren (2024) 376; Oğuzman and Öz (2018) 84.
[319] Eren (2024) 376.
[320] Tekinay and others (1993) 391; Eren (2024) 375; Oğuzman and Öz (2018) 84.
[321] Eren (2024) 377.
[322] The Turkish Court of Cassation, 11th Civil Chamber, 1 July 2014, Case No 2014/6520, Decision No 2014/12577.

appropriately classified as a restriction on economic freedoms. Recognising this waiver as a violation of core personality rights would result in an undue limitation on the principle of freedom of contract. Therefore, no-challenge clauses do not constitute violations of personality rights in this respect.

Secondly, regarding the issue of excessive restriction, the intensity and duration of the clause should be considered. In principle, a licensee's obligation not to challenge a patent's validity – while continuing to pay royalties – does not appear to unduly burden their economic freedom. However, if such a clause remains in force for an unusually long period after the termination or expiration of the contract, it may constitute a violation of personality rights. It does not seem possible to set a specific time limit for an unusually long period. The definition of what constitutes an '*unusually long period*' cannot be determined in abstract terms and should be assessed on a case-by-case basis.

This analysis should also consider the relationship between no-challenge clauses and penalty clauses. Under Turkish law, contractual penalties cannot be enforced if the principal obligation is invalid or becomes impossible due to reasons not attributable to the obligor, unless otherwise agreed (Art. 182/2 of TCO). Accordingly, if a no-challenge clause includes a contractual penalty – such as a fixed monetary sanction – this penalty cannot be enforced if the licence agreement becomes invalid or impossible for reasons not attributable to the licensee. Furthermore, Article 182(3) TCO allows the judge to reduce an excessive penalty clause at their own discretion. As a result, no-challenge clauses that include penalties may also be subject to judicial moderation.

5.2. Assertion of patent invalidity by the licensee despite the no-challenge clause

Another key issue under Turkish law of obligations concerns whether a licensee may assert the invalidity of a patent despite the presence of a no-challenge clause in the licence agreement. The invalidity of patent is expressly regulated in Article 138 of the InPC. According to Article 138/6 of the InPC, any interested parties, public prosecutors, or relevant public institutions and organisations may request the invalidation of a patent. This provision does not exclude licensees from the category of interested parties, which makes the issue particularly significant.

According to a view in Turkish doctrine[323], a licensee may initiate an invalidity action despite the presence of a no-challenge clause. This view is based on the purpose of patent invalidity provision, which is to ensure that patent protection is granted solely to inventions that meet the statutory requirements of patentability, as set out in Art. 82 et seq. of the InPC. If these conditions are not met, the resulting patent constitutes '*a sham patent*'. The invalidation of such patents serves a broader public interest, ensuring the integrity of the patent system. Therefore, even if the licensee was aware of the ground for invalidity at the time of the concluding the agreement, the action should not be rejected on that basis[324]. Moreover, denying the licensee a right which is available even to third parties – solely on account of a contractual clause – would constitute an excessive restriction on their economic freedom[325].

In contrast, a second view[326] argues that if there is a no-challenge clause, the licensee is barred from asserting invalidity.

[323] Ortan (1979) 260-266.
[324] ibid 261.
[325] Oktay Özdemir (2002) 217.
[326] Topcu (2021) 163-164.

This opinion is based on the principle that one should not be allowed to benefit from a contractual relationship while simultaneously placing the other party in a legally disadvantageous position – particularly by attempting to escape from the contractual relationship through an invalidity claim, which might not be possible under general contract law. Furthermore, since licence agreements typically involve a relationship of trust and loyalty, this principle should preclude the licensee from challenging the patent[327].

In our view, these two approaches offer valuable perspectives that should be synthesised for a more balanced and legally sound conclusion. As a rule, we support the position that a licensee may bring an invalidity action despite the presence of a no-challenge clause. This is because such clauses cannot override mandatory statutory provisions enacted to protect the public interest, such as Article 138/6 of InPC. In this respect, we agree with the first opinion. However, a licensee's attempt to escape from the licence agreement through an invalidity action – especially when the termination of the agreement is not otherwise available – may constitute an abuse of rights and violate the principle of '*good faith*' as codified in Article 2 of the Turkish Civil Code. This provision states that all parties must act in accordance with good faith in the exercise of their rights and fulfilment of their obligations; manifest abuses of rights are not protected by law. Therefore, an invalidity action brought in bad faith by the licensee may be considered legally impermissible. In this respect, we also agree with the second opinion. In conclusion, we submit that a licensee may assert the invalidity of the patent despite the presence of a no-challenge clause, provided that such action does not constitute a breach of good faith under Article 2 of the Turkish Civil Code.

[327] ibid 163, n 592.

This, in turn, raises the question of the legal consequences of a breach of the no-challenge clause. As a contractual provision, the clause should be enforced in accordance with general principles of contract law. If the licensee challenges the validity of the patent in breach of the clause, they shall be liable to the licensor for breach of contract under Article 112 of the TCO[328]. According to this provision, if an obligation is not performed at all or is improperly performed, the debtor is liable to compensate the creditor for the resulting damages. Breach of the clause may occur either directly or indirectly – for instance, where the licensee incites or manipulates a third party to bring an invalidity claim. If the is found to have used the third party as an agent or instrument, the licensee shall be liable for breach of contract under Article 112 of the TCO[329].

6. Evaluation from the perspective of the Turkish commercial law

Under Turkish law, the concept and obligations of a merchant are generally governed by Articles 12 to 17 of the Turkish Commercial Code (TCC, No. 6102 of 2011). A natural person merchant is defined in Article 12/1. Accordingly, a person who operates a commercial enterprise, even partially, on their own behalf is a merchant. A legal person merchant is defined in Article 16/1. Accordingly, commercial companies, foundations and associations that operate a commercial enterprise in pursuit of their objectives, public institutions and organisations established by public legal persons to be administered according to private law or operated on a commercial basis are deemed to be merchants.

According to Article 18/2 of the TCC, every merchant must act as a '*prudent businessperson*' in all their commercial activities. The obligation to act as a prudent businessperson introduces an

[328] Ortan (1979) 262; Özsoy (2011) 151.
[329] Ortan (1979) 264-265; Topcu (2021) 164.

objective standard of care, requiring the merchant to demonstrate the level of diligence expected from a prudent, experienced, and foresighted person engaged in the same field of commerce[330]. This duty applies especially when conducting contracts related to the merchant's commercial enterprise and when performing the obligations arising from such contracts.

The obligation to act as a prudent businessperson also affects the assessment of the validity of a no-challenge clause. As stated earlier, if such a clause remains in effect for an unusually long period after the termination or expiration of the contract, it is deemed absolutely null and void on the grounds of violation of personality rights. The determination of what constitutes an '*unusually long period*' shall be made on a case-by-case basis. However, where the licensee is a merchant, the expectation of greater experience and foresight should be considered. The merchant, by virtue of their legal status and the heightened standard of diligence imposed on them, is expected to assess and understand the long-term implications of accepting such a clause to a greater extent than a non-merchant.

Moreover, Article 22 of the TCC provides an important exception regarding penalty clauses. While Article 182/3 of the TCO allows a judge to reduce an excessive contractual penalty, Article 22 of the TCC expressly stipulates that a merchant debtor cannot request such a reduction on the grounds that the penalty is excessive. This provision introduces a special rule for merchants, limiting judicial intervention in freely agreed contractual penalties. Therefore, where a no-challenge clause is accompanied by a penalty clause – such as a fixed monetary sanction – the merchant licensee may not seek judicial

[330] Sabih Arkan, *Ticarî İşletme Hukuku* (30th edn, Banka ve Ticaret Hukuku Araştırma Enstitüsü 2024) 155; Hüseyin Ülgen and others, *Ticari İşletme Hukuku* (6th edn, Vedat 2019) 269; Oruç Hami Şener, *Ticari İşletme Hukuku – Ders Kitabı* (3rd edn, Seçkin 2025) 151.

moderation of the penalty, even if it appears disproportionate. This underlines the stricter expectations and responsibilities of merchants under Turkish commercial law, particularly in terms of contractual self-discipline and risk assessment.

7. Evaluation from the perspective of Turkish competition law

Licence agreements, as one of the most significant means of technology transfer, may not only facilitate the dissemination of innovation but may also have anti-competitive effects. Therefore, such agreements are closely scrutinising competition authorities[331]. In this context, the no-challenge clause should also be evaluated from the standpoint of competition law.

A no-challenge clause is neither an obligation necessary to achieve the objective of the licence agreement nor does it derive from the inherent nature of the intellectual property right[332]. Moreover, it is not covered by Communiqué No. 2008/2 of the Turkish Competition Authority on block exemptions. In this regard, the clause should be assessed under the general prohibition of restrictive agreements and practices.

In Turkish law, the only case in which a no-challenge clause has been directly evaluated by the Turkish Competition Authority is

[331] Biroğlu (2022) 1.

[332] Mustafa Berkay İnce, *Patent Lisans Sözleşmesinin Rekabet Hukuku Boyutuyla Değerlendirilmesi* (1st edn, Platon 2024) 115; Oktay Özdemir 217.

the Vestel v. Philips decision of 2019[333]. In this case, Vestel[334], a television manufacturer, filed an application against Philips[335] for infringement of competition rules. In its complaint, Vestel alleged that:

- Philips held patents essential for determining the location and colour of subtitles in television products, which had been designated as standard essential patents (SEPs) by the European Telecommunications Standards Institute (ETSI),

- Philips had committed to licensing these SEPs on fair, reasonable, and non-discriminatory (FRAND) terms,

- Philips held a dominant position in the relevant technology market due to the SEP status of its subtitling patents,

- and Philips had breached its FRAND commitment and abused its dominant position.

As a result of its investigation, the Turkish Competition Board found that Koninklijke Philips N.V. held a dominant position and had abused this position in the market for digital video broadcast subtitling technology during the relevant period. However, it found that Türk Philips Ticaret A.Ş. had not violated the Code on the Protection of Competition (No. 4054 of 1994). The decision is noteworthy for the purposes of this

[333] The Turkish Competition Board, 26 December 2019, File No 2018-2-5, Decision No 19-46/790-344. This decision was annulled by the Ankara 11th Administrative Court's ruling dated 3 June 2021, Case No 2020/1525, Decision No 2021/1121. The Turkish Competition Authority appealed this decision. The Ankara Regional Administrative Court rejected the appeal on 29 April 2022, Case No 2021/1111, Decision No 2022/554.
[334] Vestel Elektronik Sanayi ve Ticaret A.Ş.
[335] Koninklijke Philips N.V. and Türk Philips Ticaret A.Ş.

study, as it includes explicit findings on the implications of no-challenge clauses.

In its decision, the Turkish Competition Board noted that a no-challenge clause may attract competition law scrutiny under two circumstances. First, where the clause results in significant consumer harm; and second, where it creates a competitive disadvantage for undertakings that are either entirely prevented from accessing the licensed technology or can only do so under burdensome royalty obligations[336]. The Board stated that significant consumer harm may arise where a legally invalid patent unjustly grants market power to its holder, which in turn may lead to higher prices and reduced output, thereby distorting competition[337].

In this framework, the Turkish Competition Board has established a precedent in terms of Turkish competition law by setting out two criteria for the assessment of no-challenge clauses. Firstly, when analysing the no-challenge clause in the context of Turkish competition law, it is necessary to examine whether it may cause significant consumer harm. Secondly, it is necessary to examine whether the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are prevented from using it or that can only use it in exchange for a royalty. If either of these situations exist, the no-challenge clause is considered unlawful.

8. Conclusion

This study has examined the legal validity and implications of no-challenge clauses in patent licence agreements under Turkish law, particularly from the perspectives of the law of obligations, commercial law, and competition law. A no-

[336] The Turkish Competition Board, 26 December 2019, File No 2018-2-5, Decision No 19-46/790-344, para 58.
[337] ibid para 59.

challenge clause typically prohibits the licensee from bringing a nullity action challenging the validity of the licensed patent.

Under Turkish law, it is in principle possible to include such a clause in a patent licence agreement. However, for it to be valid, the clause must not violate personality rights. In this context, if the no-challenge clause remains in force for an unusually long period after the termination or expiration of the agreement, it may unduly interfere with the licensee's freedom of economic activity. In such a case, the clause will be absolutely null and void. The assessment of whether the duration is '*unusually long period*' should be made on a case-by-case basis. Furthermore, where the licensee is a merchant, their obligation to act as a prudent businessperson requires a higher level of diligence in accepting such clauses. This factor should also be considered when assessing the reasonableness of the clause's duration.

Where the no-challenge clause includes a penalty provision, such as an obligation to pay a contractual penalty, it must be treated as a penalty clause under Turkish law. Accordingly, if the licence agreement is invalid or performance becomes impossible due to a reason for which the obligor is not responsible, the penalty cannot be claimed. In addition, according to Article 182/3 of the TCO, the judge may reduce a manifestly excessive penalty. Therefore, a no-challenge clause that imposes an excessive penalty may be reduced by judge at their own discretion. However, if the licensee is a merchant, Article 22 of the TCC prevents them from requesting such a reduction.

As a rule, the licensee may assert the invalidity of the patent despite the presence of a no-challenge clause, if this does not constitute a breach of good faith. A no-challenge clause is a contractual provision, and its breach must be assessed within the framework of contract law. If the licensee challenges the patent in breach of the clause, they may be held liable under

Article 112 of the TCO for non-performance of contractual obligations and may be required to compensate the licensor's damage. A breach of the no-challenge clause may occur either directly or indirectly through a third party. For instance, the licensee may incite or manipulate a third party to bring an invalidity claim. If the licensee found to have used the third party as an agent or instrument, the licensee will still be liable for breach of contract under Article 112 of the TCO, provided this can be proven.

In addition to the private law implications, the competition law dimension of no-challenge clauses is equally important. In its Vestel v. Philips decision of 2019, the Turkish Competition Board established two criteria for assessing these clauses. First, whether the clause may cause significant consumer harm; and second, whether it creates a competitive disadvantage by preventing access to valuable licensed technology or making it accessible only in exchange for a royalty. If either of these situations exists, the no-challenge clause is unlawful under Turkish competition law.

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Examining the regulation of Non-Fungible Tokens (NFTs) in Mauritius

Abstract: Advancement in technology has revolutionised the creation and ownership of assets. One example of such a revolution are Non-Fungible Tokens (NFTs). NFTs are digital assets such as: paintings, videos or any other digital creation, which are given an identification code that makes them unique. Using blockchain technology to keep record of transactions of the NFTs and thus proving their originality, NFTs offer various advantages for owners of digital assets. This research explains the concept of NFTs and assesses their benefits and costs. The research also demonstrates the steps taken by Mauritius to regulate NFTs.

Keywords: virtual assets, non-fungible tokens, blockchain, Mauritius, VAITOS Act 2021

1. Introduction

Technology has revolutionised the way business is conducted today. From possessing tangible assets to virtual ones and changing the mode of payment from FIAT currency to cryptocurrency, advances in technology are changing the business landscape.

Since the creation and use of bitcoin (a form of cryptocurrency) for the first time in 2009 by Satoshi Nakamoto, cryptocurrency has gained popularity since then and is considered to be a replacement for traditional banking systems and payment

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methods.[338] Cryptocurrency can be defined as a digital/virtual currency which can be used for commercial transactions and which are not dependent on banks or other financial institutions to verify or record the transactions.[339] This is the reason why one of the main characteristics of cryptocurrency is decentralisation. The use of cryptocurrency is considered to be decentralised as it does not require any bank or central authority to verify or record transactions. It is based on a peer-to-peer system and relies on a blockchain system to operate.

A blockchain can be defined as an open and distributed ledger where transactions between parties are recorded in 'blocks' and then linked to one another.[340] For example, when a transaction between A and B has been done, a block is created which contains the details of the transaction. When B and C conduct another transaction, a new block is created which is then connected to the first block. All the blocks which have been created are hence connected to form a chain.

As a peer-to-peer system, cryptocurrencies on blockchains are secured as they use a cryptography system. This system uses encryption algorithms which secure the transaction and makes it difficult for any transaction to be altered on the blockchain.

Due to the advantages that the use cryptocurrency offer, such as: lower transaction costs as no intermediaries are used during transactions, increased transparency as all transactions are

[338] Izwan Amysar and others, 'The Challenge of Cryptocurrency in the Era of Digital Revolution: A Review of Systemic Literature' (2020) 2(2) Aptisi Transactions on Technopreneurship 153.

[339] Bahman Zohuri, Hang Thanh Nguyen and Masoud Moghaddam, 'What is the Cryptocurrency? Is it a Threat to Our National Security, Domestically and Globally?' (2022) 3(1) IJTC Physics 1.

[340] Marco Iansiti and Karim R Lakhani, 'The Truth about blockchain' (2017) 95(1) Harvard Business Review 118.

secured and recorded on the blockchain and time efficiency because within a click all information about the transaction is available on the blockchain, some countries have already made cryptocurrency a national official legal tender. These countries are: El Salvador and the Central African Republic.[341]
Along with cryptocurrencies, another popular digital asset gaining importance are Non-Fungible Tokens (NFTs). NFTs are digital assets such as: paintings, videos or any other digital creation, which are given an identification code that makes them unique. Using blockchain technology to ensure the uniqueness of the work, NFTs offer various advantages for owners of digital assets. The advantages of NFTs are that: as the asset has a unique identification code, it cannot be tampered with. Furthermore, the creator of the asset can sell the NFT but retains copyright and other reproductive rights over the asset. Thus, the buyer of the NFT becomes the owner of the work but copyright and reproductive rights remain for the original creator of the work.

As NFTs and other digital assets such as cryptocurrency are becoming popular and attracting investors, many countries are enacting legislation to regulate them. In 2023, the Virtual Asset and Initial Token Offering Services (VAITOS) Act was enacted in Mauritius. The purpose of this law is to regulate the activities of service providers and issuers of initial token offerings (ITO). ITOs, as defined by the Act, is the offer for sale of virtual tokens and digital assets to the public. The law provides for the mechanisms and guidelines to be followed for trading of tokens and digital assets in Mauritius.

[341] Nupura Ughade, 'A Brief Report on Law & Cryptocurrency Regulations around the World' (hypeverge.co, 6 February 2025) <https://hyperverge.co/blog/cryptocurrency-law-and-regulations-around-the-world/ > last accessed 15 May 2025.

The purpose of this research is to examine the regulation of NFTs and other digital assets in Mauritius. Using a black letter research method, the paper will analyse the VAITOS Act 2023. The paper is divided into three parts. Part I provides for a thorough analysis of NFTs and digital assets. In Part II, an analysis of the Mauritian VAITOS Act 2023 is carried out to understand how digital assets are regulated in Mauritius. The paper will conclude with best practices for regulating NFTs and digital assets.

2. Non-Fungible Tokens

A non-fungible token can be described as a digital certificate of ownership given to the owner of a digital or even physical asset and this digital certificate cannot be replicated[342]. This certificate of ownership contains unique authentication information about the asset and the purchase transaction. Hence, owning a NFT makes the ownership unique as each time the NFT is transacted, a new authentication number is given to it.

NFT transactions are stored on a blockchain. Blockchains, which are public ledgers, record all the NFT transactions.[343] The advantages of using blockchain technology to store NFTs

[342] Andrei-Dragos Popescu, 'Non-Fungible Tokens (NFT) - Innovation beyond the craze' (5 th International Conference on Innovation in Business, Economics & Marketing research Proceedings of Engineering & Technology – PET - Vol 66, 2016) <https://www.researchgate.net/publication/353973149_Non-Fungible_Tokens_NFT_-_Innovation_beyond_the_craze> 17 May 2025.

[343] Robyn Conti and John Schmidt, 'What You Need to Know About Non-Fungible Tokens (NFTs)' (*Forbes,* 14 May 2021) <Forbes: https://www.forbes.com/advisor/investing/nft-non-fungible-token/Erişim> accessed 17 May 2025.

transactions are that: blockchain provides a transparent, secure and unchangeable platform where information about the NFT cannot be tampered with. For instance, via the blockchain, the history and information about every transaction such as the owner or specific codes given to each token are stored and protected. This feature makes the ownership of the NFT transparent and immutable. Furthermore, since no one can tamper with the blockchain, it makes ownership of the NFT secure.

Another feature of NFTs is their non-fungible nature. Non-fungible means that the token, or digital certificate, is unique and cannot be changed or replaced with another token or certificate of equal value.[344] For example, an original painting or song cannot be replaced by another painting or song. The same principle is applicable for NFTs. One NFT cannot be replaced or substituted by another NFT.

In order to create or obtain NFTs, a process known as 'minting' has to be undertaken. Minting refers to the process where the creator of a NFT assigns a unique identifier code to a digital file/certificate on the blockchain. This unique identifier, which is also known as metadata, contains information about the creator's identity, signature or any other pertinent information about the digital asset. NFTs also contain smart contracts which define their rules and functions. For example, some artists include royalty clauses in the smart contract of their NFTs so that they get royalty payment each time their NFT is sold.[345]

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[344] Wajiha Rehman and others, 'NFTs: Applications and Challenges' (22nd International Arab Conference on Information Technology (ACIT) 2021, December 2021) <DOI: 10.1109/ACIT53391.2021.9677260 > accessed 17 May 2025.

[345] Ellie Farrier, 'What is NFT?' (*AVG Signal Blog*, 4 August 2025) <https://www.avg.com/en/signal/nfts-explained#:~:text=NFT%20minting%20and%20tokenization%3A%

NFTs are associated with digital assets such as artwork, music, videos, tickets and even physical assets. It has to be noted that NFTs relate to the ownership of the digital certificate and not the ownership of any intellectual property rights or the physical asset itself. NFTs are said to give 'digital bragging rights' to their owners.[346]

The benefits of NFTs can be categorised as: (i) providing proof of ownership and origin of the work (ii) monetisation through royalties for content creators and (iii) ensures market efficiency and a new business model.

(i) Providing proof of ownership and origin of the work
The main advantage of NFTs is their ability to track all transactions involved since their creation until the moment they are purchased by their final owners. When an NFT is created, a unique hash or code is attached to it. Each time this particular NFT is purchased and has a new owner, a new hash or code is given to it. This new hash or code facilitates the identification and proof of the ownership of the NFTs at any given moment. Furthermore, as all NFTs transactions are stored on a blockchain, retrieving information about the various owners and original creators becomes possible. Hence, one benefit of NFTs is that the transaction records are transparent, easy to verify and ensures the originality and authenticity of the asset being transacted.

(ii) Monetisation through royalties for content creators
Payment of royalties and tracking the ownership of physical assets have proven to be quite complicated and challenging. NFTs have revolutionised the way assets are owned and how

20To,its%20creator%20and%20creation%20date> accessed 07 August 2025.

[346] Conti and Schmidt (2021).

royalties are paid. Through the use of smart contracts within the NFT, artists and content creators can add a royalty clause within their smart contracts. This means that each time the NFT is purchased, its original creator will receive a royalty payment. The monetary advantages of NFTs for artists and content creators are that: firstly, it allows them to sell their work directly to the purchaser without any third-party involvement such as an art gallery or a retailer. This allows the artist to receive the full payment of the transaction without having to share the cost with any third party. Secondly, via the royalty clause in the smart contract, the artist or content creator is certain to receive a royalty payment each time their work is transacted.

(iii) Ensures market efficiency and a new business model
With the use of a blockchain technology to record all transactions, NFTs provide the benefit of being time efficient. In traditional business models, record keeping, retrieving and updating could be time consuming. With the blockchain technology, each time an NFT is being transacted, the information about the NFT is automatically updated. This has the benefit of improving records keeping and administrative operations.[347] Furthermore, NFTs stored on the blockchain are protected from any form of alteration thus reducing the possibility of having fraudulent documentations.

Despite the new possibilities and benefits that NFTs can bring, some challenges still remain. The challenges can be identified: (i) security risks and market volatility (ii) environmental concerns and (iii) lack of regulations

(i) Security risks and market volatility
Even though NFTs are growing in popularity, the potential for cybersecurity issues and fraud are also present. NFT fraud can

[347] Rehman and others (2021) 3.

happen when hackers imitate real-life artists/content creators' NFTs and sell these fraudulent NFTs. An example of such an incident is the Nifty Gateway case.[348] Nifty Gateway is an online platform where NFTs are bought and sold. In 2021, users of the platform reported that their accounts had been hacked and that artwork and money were stolen from their accounts.
Additionally, the price of NFTs depends on demand and supply. This makes the NFTs a highly volatile transaction. NFTs can therefore be considered as high risk investments which can result in significant losses if trade is not done at the right time.

(ii) Environmental concerns
Several platforms which offer crypto-technology or blockchain services are linked to the storage and trade of NFTs. When there is the mining of bitcoins to purchase NFTs or for other purposes, studies have shown that there is a high level of electricity and energy consumption.[349] This is a threat to the environment as this energy intensive activity can have several environmental costs such as an increase in greenhouse gases emission which can lead to a rise in global temperature.[350]

(iii) Lack of regulation
In many countries, blockchain and NFTs are still unregulated. Hence, it makes it difficult for users of these platforms to get the adequate form of legal protection that will protect them against any fraudulent activity. In addition to this, the tax implications and tax regimes for NFTs as a trading and

[348] John Sakellariadis, 'Hackers target NFT craze by stealing from Nifty Gateway users' (*https://therecord.media/,* 15 March 2021) <https://therecord.media/hackers-target-nft-craze-by-stealing-from-nifty-gateway-users> accessed 21 May 2025.
[349] Jon Truby, 'Decarbonizing Bitcoin: Law and policy choices for reducing the energy consumption of Blockchain technologies and digital currencies' (2018) 44 Energy research & social science, 399.
[350] Rehman and others (2021) 5.

commercial activity is still widely unregulated, which can make them become a mechanism for tax avoidance or tax evasion.
NFTs are slowly gaining popularity worldwide as it presents some intrinsic advantages. Through the blockchain technology, records of each transaction are saved and it is difficult to amend them. Hence, NFTs stored on a blockchain remain secured and transparent as they outline all details of every owner. However, despite the advantages mentioned above, the regulation and operations of NFTs are still prone to challenges such as their energy consumption impacts and costs, their security risks and market volatility and the lack of regulation in various jurisdictions.

3. The regulation of virtual assets in Mauritius

Digital assets, whether they are crypto assets or NFTs, are gaining market access in Mauritius. Currently, the regulation of virtual assets in the country is carried out under the Virtual Asset and Initial Token Offerings (VAITOS) Act 2021. Before 2021, the regulation of virtual assets in Mauritius was done under the Financial Services Act 2007 or through a Regulatory Sandbox Licence for fintech projects.

Enacted in 2021, the VAITOS Act of Mauritius represents a significant legislative step towards the regulation of virtual assets, not only in Mauritius but in the African region as well. The Act provides for a comprehensive legislative framework within which virtual assets service providers must operate and also ensures the adequate monitoring and supervision of their activities.

Divided into XI parts, the VAITOS Act regulates and supervises activities of virtual asset service providers (VASPs) and issuers of initial token offerings (ITOs) which carry out

business activities in or from Mauritius (Section 3(1)). As per Section 2, a virtual asset under the Act is defined as:
"virtual asset" means –
(a) a digital representation of value that may be digitally traded or transferred, and may be used for payment or investment purposes;
(b) but does not include a digital representation of fiat currencies, securities and other financial assets that fall under the purview of the Securities Act.

This definition includes the regulation of cryptocurrencies as well as non-fungible tokens in the country.

Under section 5 of the Act, the Financial Services Commission (FSC) is the authority which is mandated to regulate and supervise virtual asset service providers and issuers of initial token offerings. Activities linked to the regulation and management of virtual assets are: exchanging virtual assets for fiat currencies or other virtual assets; transferring virtual assets; providing safekeeping and administration services for virtual assets and participating in and providing financial services related to an ITO.

The functions and powers of the FSC are listed at Section 6. The FSC is the sole issuer of licences for VASPs and shall register all issuers of initial token offerings. Furthermore, in line with the recommendations of the Financial Action Task Force (FATF) and in order to combat money laundering and the financing of terrorism, under section 6 (1) (d), the FSC is mandated to issue and publish, *inter alia,* notices and guidelines in order to assist VASPs and issuers of initial token offerings in detecting and reporting suspicious transactions.

In addition to the functions and powers of the FSC, the VAITOS Act 2021 imposes responsibilities on VASPs and issuers of

initial token offerings. Under section 17, the VASPs have the duty of custody and protection of the clients' assets. They also have the duty of preventing market abuse by ensuring that the systems and controls applied to their business activities are adequate and appropriate for the scale and nature of their business activities (section 18).

The law also provides for purchaser's rights against virtual token purchased. Under section 32, the purchaser has a right to rescission or can claim damages if the issuer of the initial token offering has made a material misrepresentation in their white paper. It has to be highlighted that as per section 27 of the Act, a white paper is a document which is made by the issuers of the initial token offering and they shall provide full and accurate information about the token they are selling. This will thus allow the purchaser to make an informed decision prior to the purchase.

Additionally, section 33 allows the purchaser of a virtual token to withdraw his purchase at any time by giving a written notice to the issuer. Finally, under section 43, the FSC, based on reasonable grounds, can suspend the licence and registration of a virtual asset service provider or issuer of initial token offering. The VAITOS Act 2021 has some positive impacts on the regulation of virtual assets in Mauritius. For example, if a VASP is not satisfied with a decision of the FSC, the VASP can make recommendations to the Commission based on the decision. The VASP can further appeal the decision of the FSC to the Financial Services Review Panel (Section 54 of the Financial Services Act 2007). The third legal recourse would be to seek a judicial review at the level of the Supreme Court.[351]

[351] Bhavna Mahadew and Saravanen Anben Mauree, 'Cryptocurrencies and Virtual Assets in Mauritius: A Critical Assessment of the Legal Framework' (2024) 37 Africa Focus, 123.

This demonstrates the existence of appeal mechanisms and a form of check and balances with regards to the decision taken by the FSC concerning the regulation and supervision of VASPs.

Through the VAITOS Act 2021, Mauritius showed its international commitment towards addressing issues of money laundering and terrorism financing. As stated in the Financial Action Task Force Recommendations:
'To manage and mitigate the risks emerging from virtual assets, countries should ensure that virtual asset service providers are regulated for AML/CFT purposes, and licensed or registered and subject to effective systems for monitoring and ensuring compliance with the relevant measures called for in the FATF Recommendations.'[352] Hence, to be compliant with this international requirement, Section 6 of the VAITOS Act ensures that the FSC regulates, supervises and monitors virtual assets transactions in order to address any case of money laundering or terrorism financing.[353]

This particular law also addresses issues of consumer protection. The Financial Services Commission is mandated to apply rules on client disclosure, risk management, cybersecurity, and the custody of client assets in order to ensure client's data protection and restrict any manipulation of client's data and assets. This regulatory framework protects virtual asset holders from fraud and other illicit activities.

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[352] FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' (*https://www.fatf-gafi.org/* June 2025) <www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html> accessed 09 August 2025.

[353] Neisa Van Staden and others, 'A comparative dive into virtual assets legislation in South-Africa, Mauritius, Namibia and the UK' (2025) 28 (7) Journal of Money Laundering Control 50.

Since 2024, the Finance (Miscellaneous Provisions) Act provides that income obtained from the sale of virtual assets and tokens are exempted from taxation.[354] This is beneficial to the financial image of Mauritius as it presents the country as an attractive jurisdiction for virtual assets investment.

Parallel to the benefits that the VAITOS Act 2021 present for the regulation of virtual assets in Mauritius, there are some regulatory challenges that remain to be addressed.

The main challenge concerning transactions of virtual assets in Mauritius is the absence of banking transactions recognition and facilities for these assets. According to Mahadew and Mauree, virtual assets are not considered as cash or legal tender in Mauritius as it is the case in countries like El Salvador and Central African Republic. The Bank of Mauritius does not recognise virtual assets as legal cash in the country and hence virtual asset owners are not protected, from a banking law perspective, in case of financial loss.[355] It has been highlighted that there is currently no specific or statutory compensation fund available in Mauritius for virtual asset holders who have incurred a loss.[356]

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[354] UNCTAD, 'Mauritius - Expands tax incentives for AI, IP, and virtual assets' (*https://investmentpolicy.unctad.org/* 27 July 2024) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4961/mauritius-expands-tax-incentives-for-ai-ip-and-virtual-assets#:~:text=Income%20from%20the%20sale%20of,securities%2C%20effective%201%20July%202024> 25 June 2025.

[355] Mahadew and Mauree (2024) 135.

[356] Financial Services Commission, 'Virtual Assets and Initial Token Offering (VAITOS) Act' <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fscmaur

Concerning the regulation of NFTs in Mauritius, the VAITOS Act 2021 is the relevant legislation. The Financial Services Commission, as the main regulatory body for virtual assets, is also responsible for regulating NFTs in Mauritius. Under the FSC Guidance notes on Regulatory Treatment of Non-Fungible Tokens, NFTs are divided into three categories, each having their intrinsic form of regulation.[357]

The first category of NFT considers NFTs as digital collectibles which are not used for payment or investment purposes. Examples of such NFTs are artwork, music, videos or any other item that are collected for personal usage. Such NFTs are not regulated by the VAITOS Act nor are under the supervision of the FSC.
The second category of NFTs embraces features of investment and securities. In this category of NFTs, a token is considered as a financial asset because it is split into smaller tokens allowing multiple persons to own part of the smaller token. This process is known as fractional NFTs. Owners of fractional non-fungible tokens can buy and sell these types of token for investment purposes. Due to the tradability of fractional NFTs, they are considered as securities. In Mauritius, such NFTs are also regulated by the Securities Act and any person engaged in

itius.org/media/130455/fsc-guide-on-vaitos-act.pdf> accessed 20 June 2025.

[357] Financial Services Commission, 'Guidance notes on Regulatory Treatment of Non-Fungible Tokens' (*www.fscmauritius.org/media/131504/guidance-notes-on-regulatory-treatment-of-nfts.pdf* 30 November 2022) <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fscmauritius.org/media/131504/guidance-notes-on-regulatory-treatment-of-nfts.pdf > accessed 20 June 2025.

trading those NFTs shall be licensed by the FSC as a securities dealer or securities exchange.[358]

NFTs which do not fall into the categories of digital collectibles and/or securities shall fall under a third category known as virtual asset. Section 2 of the VAITOS Act 2021 has defined a virtual asset as a digital representation of value that may be digitally traded or transferred, and may be used for payment or investment purposes. Hence, any organisation which trades NFTs as virtual assets in Mauritius shall be licensed by the FSC as a Virtual Asset Service Provider (Section 6) and must comply with the standard and regulatory obligations imposed by the VAITOS Act and the FSC.

The Mauritian regulatory framework for NFTs is diverse and pragmatic. Instead of applying a uniformed and harmonised rule in regulating NFTs, it adopts a functional approach. Through this fractional approach, a tailor-made regulation is made for each type of NFT. For instance, for NFTs which are purely artistic and collectibles, it may create a new trading platform for individuals. For NFTs which are considered as securities or investment, these are subject to the robust regulations of the Securities Act as it is a mechanism to regulate investment and monitor money laundering practices. Finally, to ensure market integrity by requiring virtual asset service providers to be licensed by the Financial Services Commission and adhere to the strict compliance and security standards of the VAITOS Act.

4. Conclusion

The digitalisation of business activities is happening at a rapid pace. New technologies such as blockchain technology,

[358] ibid.

cryptocurrencies and virtual assets are changing the business landscape. Blockchain technology is facilitating the record keeping of information and transactions while cryptocurrency, slowly but surely, is paving the way for new methods of payment and financial transactions. Virtual assets, such as non-fungible tokens, are changing the way that property is owned and how investment is done.

To ensure the effective monitoring and application of these new technologies, countries must adapt the appropriate legal frameworks. In Mauritius, the Virtual Asset and Initial Token Offerings (VAITOS) Act was enacted in 2021 to provide for the legal framework to regulate virtual assets, including NFTs, in Mauritius. The Act provides the legal framework within which virtual assets service providers shall operate. It is mandatory for VASPs to be registered and licensed by the Financial Services Commission in order to operate in Mauritius. This allows for an extensive degree of supervision and acts as a deterrent against fraudulent or illicit transactions. Since the virtual asset realm is always evolving, the regulatory body as well as legal framework has to be updated in order to keep pace with the changes.

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