The Hague International Law Review

1ST Quarterly Publication 2022

Rethinking international law: innovation of law in times of globalisation

Corax Foundation (Stichting Corax, NL)

The Hague International .blog

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Introduction

The Hague International Law Journal officially presents the publication of its first quarterly publication for 2022. This is the first quarterly out of the four that are planned for release for the year of 2022. The quarterly contains contributions from various authors trained in International Law and coming from a multitude of backgrounds and areas of expertise. It offers to readers a collection of papers that touch on various areas of International and European law, seeking to provide a legal perspective on recent topics that concern not only legal practitioners and academics, but also a broad range of audience interested in law development.

The quarterly theme: *Rethinking international law: innovation of law in times of globalisation*

The Hague International Law Journal is an innovative publishing platform established in The Hague, the Netherlands by the Corax Foundation. It is developed and run by an enthusiastic team of professionals and law students seeking to contribute to the development and clarification of jurisprudence. Our ultimate aim is to support and enrich the professional discussion regarding International and European law, as well as highlighting up-and-coming areas of International Law.

The objective behind promoting this discussion is to provide a space for law students, young professionals, and early academics to connect with established professionals and academics. We believe that sharing ideas and experiences is a crucial way to encourage the legal community to continue pursuing the notion of justice and spreading awareness on social matters that touch upon everyone.

We offer high-quality contributions and to promote discussions on current, innovative, and traditional topics concerning all fields of law. The Hague International will continue to highlight developments in various fields of law following changes in the international market. Our authors also thematically focus on subjects related to International trade, International Public and International Private Law, Competition Law, Alternative Dispute Resolution, Compliance and International Criminal Law.

Along with the quarterlies The Hague International Law Journal provides for other publication formats. We offer blogs and short articles on a weekly basis, with the purpose of keeping the readers informed on the recent developments. Moreover, we provide the curated Annual Review which comprises of a selection of the best papers in our opinion that are distributed through the quarterlies. The Annual Review is proved in a print version.

For more information you can consult with our website: www.coraxfoundation.com. In case you have any questions, you can contact the Editor in Chief, Deivid Mustafa at:

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Editor in Chief's note

Dear authors, readers, and reviewers of The Hague International Law Review – on behalf of the Editorial Board, it is with great pleasure to officially present you the first quarterly publication of our first volume of the journal for 2022. It is an honor for me to be part of this project and I thank the authors, editors, and members of the Corax Foundation for their unparalleled support and encouragement.

The Hague International Law Review was established in 2021, a time when most of us discovered the importance and the challenge behind the right to be correctly informed. Our team members met in The Hague, the city of peace and justice, with the aspiration to create a platform that would provide the legal community with an opportunity to access high-quality and original contributions from prominent authors who share our passion in delivering an accurate representation of law and facts. Through the past months, we have been working hard to achieve this objective and despite the many challenges, we will continue to do so.

We take note that these times of globalization present an excellent opportunity to enhance large-scale human cooperation in a way that benefits everyone, however, on the other side, we are aware of the many issues that surround our reality such as climate change, socio-economic differences, state conflicts, etc. Undisputedly, while every citizen has its own role in contributing to society's improvement, it is in the hands of the legal community to ensure that the laws targeted at those issues reflect proper solutions. In that sense, the legal community has the great responsibility to ensure that laws are met with high standards of rationality and careful consideration.

By utilizing our right to freedom of information and our responsibility as part of the legal community to contribute to the development of law, we offer you a chance to not only become aware of today's legal challenges but also to actively participate in the discussion. My hope for you as an author, reader, or reviewer of The Hague International is that you also understand our motive and that you decide to eagerly exercise your precious ability as a human being to think critically and be creative.

On behalf of the team, I wish you a pleasant read!

Deivid Mustafa

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Acknowledgements

Firstly, we would like to thank the authors of the papers for their trust, courage, and patience towards the realization of this publication. On behalf of the team, it has been a pleasure and fruitful experience to work each and every author and we are truly grateful for their effort and cooperation.

Many thanks go to the Corax Foundation, the establisher and developer of The Hague International. Corax Foundation is a not-for-profit organisation based in The Hague, the Netherlands focusing on supporting law and international relations students; as well as on connecting individuals, companies and organisations across the globe to promote mutual collaboration and growth. Its goal is to facilitate connections for young as well as established talents, whilst promoting the interaction between individuals, companies and organisations from varying sectors and regions. Corax Foundation's projects center around networking opportunities and the growth of skills and knowledge. It provides virtual skills workshops and lectures, whilst also creating a unique platform that promotes an innovative approach to academic discussion and publishing on policies and legislation. Along with The Hague International, Corax Foundations projects include The Hague Inter-University Law Debate Tournament (English speaking competition) and the Concours Inter-Universitaire de Debat de La Haye (Competition en Francais).

We take this opportunity to express our deep and sincere gratitude to the directors of Corax Foundation, co-founders, and co-organizers of the three main projects, Mr. Aurelien Lorange and Ms. Anna Maria Urbanova for their continuous and generous support towards The Hague International. While possessing high standards of professionalism and team-management skills they have accompanied The Hague International Team in every step of the publication process, provided guidance, as well as helped in shaping the structures and values of the team. We are thankful for their patience, encouragement, and motivation that led to the realization of this endeavor.

We would also like to thank our team members for their relentless and outstanding efforts put towards the publication of the 1st Quarterly 2022. This would have been impossible without their performance, determination, and cooperation. We are grateful for the work of every member including:

- Editor in Chief, Deivid Mustafa – LL.B. Candidate, International and European Law, The Hague University of Applied Sciences.

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EU autonomy and ISDS under Opinion 1/17: implications on the jurisdiction of the CETA investment tribunals

By: Tanvir Rai Singh[*]

Introduction

The European Union (EU) is a complex yet important international actor,[1] which has become increasingly active in its external dimension.[2] In particular, the EU has become a prominent actor in the field of international investment law after obtaining exclusive competence over foreign direct investment (FDI).[3] Although the exact scope of the FDI competence remains ambiguous,[4] the EU has thus far concluded three international investment agreements (IIAs).[5]

IIAs, being mostly interpreted by ad hoc tribunals, provide for, *inter alia*, Investor-State Dispute Settlement (ISDS).[6] While traditional ISDS has been the preferred way to settle investment disputes, it has been subject to critique.[7] Considering this backlash, the EU aimed to set up a permanent multilateral mechanism for the settlement of investment disputes, by first setting up an investment court system (ICS),[8] which has been reflected in the EU-Canada

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[1] Bart van Vooren and Ramses A. Wessels, *EU External relations law: text, cases and materials* (Cambridge University Press 2014) 30; Allan Rosas, 'The European Court of Justice and Public International law' (Meeting of the Council of Europe Committee of Legal Advisors on Public International Law 2018) <https://rm.coe.int/statement-delivered-by-judge-allan-rosas-at-the-55th-cahdi-meeting-55t/16807b3b04 20/7/2020> accessed 20 July 2020.

[2] ibid; 'Investment' (*European Commission*) <https://ec.europa.eu/trade/policy/accessing-markets/investment/> accessed 20 July 2020.

[3] Vooren and Wessels (n 1); Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C202/47, art 3.

[4] Andreas R. Ziegler, 'The New Competence of the European Union in the Area of Foreign Direct Investment (FDI) : A Third Country Perspective' in M. Bungenberg and C. Hermann (eds), Common Commercial Policy after Lisbon, (Springer 2013), 241.

[5] 'Negotiations and agreements' (*European Commission*) <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 20 July 2020.

[6] Stephan W. Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (E15 Initiative. Geneva: International Centre for Trade and Sustainable Development and World Economic Forum (2015) <https://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isds-conceptual-framework-and-options-for-the-way-forward/> accessed 24 March 2022.

[7] ibid 2.

[8] 'The Multilateral Investment Court project' (*European Commission*) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 > accessed 20 July 2020.

Comprehensive Economic Trade Agreement (CETA),[9] as well as the EU-Vietnam Free Trade Agreement.[10]

Whilst this is not the first attempt to provide for a permanent investment court,[11] it has been a major step by the EU to institutionalise ISDS.[12] The reform has been particularly challenging considering the autonomous legal order of the EU, which serves to preserve harmony on the application and interpretation of EU law, as well as reserving the judicial power to the CJEU and national courts of Member States (MS).[13] This order has also led the EU to refrain from acting on an international level where the action stood in contradiction with EU norms, and at the same time has limited the jurisdiction of international courts on dealing with intra-EU matters.[14]

Consequently, these limitations have raised questions also about the compliance of the ICS with the autonomy of the EU.[15] These questions have been answered by the European Court of Justice (CJEU) in Opinion 1/17, which ruled that the CETA ISDS does in fact uphold the EU autonomy.[16] This is because CETA limits the jurisdiction of the tribunals constituted thereof,as they may not apply or interpret other EU law than the CETA,[17] nor issue awards which might adversely affect the operation of the EU institutions.[18] In doing so, the CJEU provided for a so-called 'test' and a number of criteria to limit the jurisdiction of the CETA tribunals. Therefore, this article aims to assess the implications of EU autonomy under Opinion 1/17 on the jurisdiction of the CETA tribunals.[19]

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[9] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23 s F.

[10] E.g.The European Union and the EU party (consisting of all the EU Member States) on the one part and the socialist republic of Vietnam of the other part, settlement, chapter 15: dispute settlement Investment Protection Agreement.

[11] Free Trade Agreement between the government of Australia and the government of the People's Republic of China (entered into force 20 December 2015) (ChAFTA) art 9.23.

[12] Christian Riffel, 'The CETA Opinion of the European Court of Justice and its Implications - Not that Selfish After All' (2019) 22 Journal of International Economic Law 503, 504.

[13] Ágoston Mohay, 'The status of international agreements concluded by the European union in the EU legal order' (2017) 33 Pravni Vjesik.

[14] E.g. the prohibition of outside courts to: (1) interpret EU competences, (2) have jurisdiction on intra-EU disputes, (3) replace Member States courts, (4) allocate responsibilities between the EU and its Member States, (5) have jurisdiction over EU acts not subject to judicial review. Found in: Opinion 1/76 (Draft Agreement establishing a European laying-up for inland waterway vessels, para10; C-459/03 *Commission v Ireland* (*MOX plant*) [2006] ECLI:EU:C:2006:345 para177; Opinion 1/09 (Draft agreement on the creation of a unified patent litigation system) [2011] ECLI:EU:C:2011:123,para 85; Opinion 2/13 (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms) [2014] ECLI:EU:C:2014:2454 paras 224-225.

[15] Laurens Ankersmit, 'Investment Court System in CETA to be judged by the ECJ' (*European Law Blog*, 31 October 2016) <https://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj/> accessed 20 July 2020.

[16] Opinion 1/17 [2019] EU:C:2019:341.

[17] ibid paras 120-136.

[18] ibid paras 136-161.

[19] Prof (dr) Vibhute and Aynalem, 'Teaching Material' (*Legal Research Methods*, 2009) <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 20 July 2020.

1: ISDS and EU autonomy

As briefly discussed above, the CETA contains a 'new' institutionalised form of ISDS.[20] The limitations posed by EU autonomy have resulted in several questions, which have been addressed in Opinion 1/17. However, in order to understand the latter, it is important to have a look at the elements which gave rise to those questions: ISDS under the CETA and EU autonomy. Therefore, this analysis shall be divided into two parts: (1) ICS under CETA (addressing the differences as to 'traditional' ISDS and (2) EU autonomy (focusing on the limitations it poses on courts outside the EU judicial system).

1.1: ISDS under CETA

The CETA ICS is seen as 'a break from the current ISDS system'[21] and shows the determination of the EU and Canada to establish a permanent multilateral investment court.[22] It allows investors to bring claims when the other party (the State) has violated an obligation included in section C[23] or D[24] of Chapter 8.[25] Parties are urged to settle the dispute amicably by consultation[26] or mediation.[27] When such is not possible or does not result in a satisfying outcome, the dispute may be submitted to the ICS, subject to several conditions.[28]

The ICS must apply the CETA in accordance with the Vienna Convention on the Law of Treaties (VCLT) and other rules and principles of international law applicable between the parties, to settle the dispute at hand.[29] It may not determine the legality of a measure of a party under the domestic law of that party, rather it shall consider the domestic law as a matter of fact.[30] In doing

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[20] 'CETA: EU and Canada agree on new approach on investment in trade agreement' (*European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_399> accessed 4 August 2020.
[21] ibid.
[22] ibid.
[23] CETA (n 9), Chapter 8.C, 45-46, poses 3 non-discrimination obligations: National treatment, most favoured nation treatment and the prohibition of nationality requirements.
[24] ibid Chapter 8.D, 46-50, this section addresses a number of investment obligations: (1) the right to regulate, (2) fair and equitable treatment applicable only in a limited number of circumstance, (3) right to compensation, (4) safeguards against direct and indirect expropriation (and exceptions thereof), (5) transfers, and, (6) obligation of recognition and entitlement of national treatment where a party or agency of party makes a payment under indemnity, guarantee or contract of insurance.
[25] ibid. art 8.18.
[26] ibid art 8.19.
[27] ibid art 8.20.
[28] ibid art 8.22; pages 56-57 Including the following: (1) the consent of the respondent to the settlement of the dispute, (2) the obligation to withdraw or discontinue existing proceedings before any other tribunal or national or international court, and (3) giving up the right to submit the same claim before another tribunal or court, whether domestic or international.
[29] ibid art 8.31.
[30] ibid art 8.31.

so, the ICS shall follow the prevailing interpretations given to such by the courts or authorities of that party, and where a meaning is given, shall not be binding.[31]

Furthermore, the awards are only binding upon the disputing parties in respect of the particular case,[32] and may only consist of monetary damages and any applicable interest and/or restitution.[33] The award must be recognized and complied with without any delay, unless one makes an appeal to the Appellate Tribunal (AT).[34] The AT may uphold, modify or reserve the tribunal's award in a limited number of circumstances.[35] It should be noted, however, that a disputing party may not seek to review, set aside, annul, revise, or initiate similar procedures against an award by the AT.[36] The awards by the AT shall be considered final and subject to the same rules of enforcement as an award by the tribunal.[37]

1.1.2: Comparison to traditional ISDS

As briefly mentioned before, the CETA ISDS differs significantly from *ad hoc* arbitration.[38] This subsection shall elaborate on three significant differences. Firstly, unlike traditional ISDS, the members of the CETA tribunals are not appointed by the parties to the dispute. A key characteristic in traditional ISDS is the ability of the parties to appoint arbitrators to hear and decide upon the case.[39] However, in the reformed CETA ISDS, the members of the tribunal are chosen by the CETA Joint Committee.[40] This has, nevertheless, been subject to concerns as well.[41] Secondly, the CETA provides for an AT,[42] something which is not accepted in traditional ISDS.[43] The CETA mirrors an approach taken in the domestic legal systems of the EU Member States and Canada, making it a more institutionalised system.[44] It should be noted, however, that the scope and procedures of the AT have been subject to critique.[45] Thirdly, the proceedings under the CETA ICS are to be held in a more transparent way,[46] while still protecting confidential

[31] ibid.
[32] ibid art 8.41 para 1.
[33] ibid art 8.31 para 3.
[34] ibid arts 8.41 paras 2 and 3.
[35] ibid art 8.2 para 2.
[36] ibid para 9.
[37] ibid para 9(d).
[38] Stephan W. Schill (n 6); David A Gantz, 'CETA ratification SAGA: the demise of ISDS in EU trade agreement' (2017) Arizona Legal Studies Discussion Paper 17-10.
[39] Gary. B. Born, 'International Arbitration: Cases and Materials' Chapter 2: Legal Framework for International Arbitration Agreements (2nd edn, Kluwer Law International 2015) 107.
[40] CETA (n 9) art 8.27.
[41] Gantz (n 38) 5.
[42] CETA (n 9) art 8.41 paras 2 and 3.
[43] Gantz (n 38) 5.
[44] European Commission (n 20).
[45] Gantz (n 38) 5.
[46] CETA (n 9) art 8.36 para 5.

information.[47] In traditional ISDS, proceedings are mostly held in private and are not open to the public, which has long been a point of critique.[48] These major changes reflect a departure from traditional ISDS and into a 'new' institutionalised form of ISDS by the EU.

1.2: EU autonomy

The EU, as an international actor, has the necessary competence to conclude international agreements, which may create courts to interpret EU law and bind the EU,[49] on the condition that the essential character of the EU legal order is safeguarded and no adverse effect on EU autonomy takes place.[50] EU autonomy has two components: external and internal.[51] External autonomy shall be discussed below and has been briefly reflected on in the introduction.[52]

Broadly, it be defined as the need of the EU to live up to its own set of rules as "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights" [53] and thereby "created its own legal system". [54] This has resulted in a structure of rules, principles and mutually interdependent legal relations which bind the EU and its Member-States, as well as the Member States between themselves.[55] The constitutional framework of the EU is unique to its autonomy, [56] establishing a judicial system which includes preliminary rulings to ensure uniformity and consistency in EU law. [57]

Preliminary rulings may extend to international agreements, when becoming an integral part of EU law. However, this also means that, due to the reciprocal nature and the perseverance of the powers of the EU in international relations, it may also be interpreted by non-EU parties to the agreement.[58] Such interpretations must not be binding upon the dispute settlement mechanism established by the international agreement itself or take any precedent.[59] Thus, the CETA ICS,

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[47] ibid para 6.
[48] M. Wong, & R. Hadgett, 'Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (D. Euler, M. Gehring, & M. Scherer eds, Cambridge University Press 2015).
[49] Opinion 2/13 (n 14) para182; Opinion 1/19 [2021] ECLI:EU:C:2021:198, paras 40 and 70; Opinion 1/09 (n 14) para74.
[50] Opinion 1/100 (n 14) paras 20-21; Opinion 2/13 (n 14) para 183.
[51] The idea that the EU Member States are not highest authority, meaning that certain international/EU treaties have primacy and direct effect in certain circumstances, Case 26/62 *Van Gend en Loos v Nederlandse Administratie Der Belastingen* [1963] ECLI:EU:C:1963:1.
[52] European Court of Justice various opinions (n 14).
[53] C-26/62 *Van Gend en Loos* (n 51).
[54] C-6/64 *Costa v ENEL* [1964] ECR 585, 593.
[55] C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999, para 45.
[56] Opinion 2/13 (n 14) para 158.
[57] ibid paras 174-176; Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 19; TFEU (n 3) art 267.
[58] C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] OJ C100/4, para 39.
[59] Opinion 1/17 (n 16) para 106.

which can be seen as an outside court, is not per se precluded by EU law, however, it must uphold EU autonomy in order to be compatible. It is therefore crucial that the jurisdiction of the CETA tribunals is limited to uphold EU autonomy.

2: Opinion 1/17

This section analyses Opinion 1/17, which addresses the concerns of the Kingdom of Belgium (Belgium) in relation to the CETA ICS, and in particular the compliance of such with EU autonomy. The CJEU ruled that the CETA ISDS is in line with EU autonomy due to the fact that it does not apply other EU law apart from the CETA, and does not have an adverse effect on the operation of EU institutions.[60] In order to understand this ruling and the reasoning behind it, this section shall be divided into two parts followed by an interim conclusion: (1) the request for an opinion, (2) the position of the CJEU.

2.1: The request for an opinion

Belgium raised three concerns regarding the CETA ISDS: (1) the compatibility of such with EU autonomy, (2) compatibility with the general principle of equal treatment and the requirement of effectiveness, and (3) compatibility with the right of access to an independent tribunal.[61] Considering the scope of this article, only the first concern shall be discussed.
Belgium raised its concern in relation to EU autonomy on the basis of article 8.31 of the CETA.[62] Recalling the limits posed by EU case law,[63] Belgium pointed out that the aforementioned article compels the CETA tribunals to interpret the effect of the measure in question and may, in doing so, not be able to rely on prevailing interpretations. This is also true when the measure in question is based upon EU primary law. Noting that there is no possibility of preliminary rulings in the ICS itself, the question arises whether the ICS (which may render awards binding on the EU), is compatible with the exclusive jurisdiction of the CJEU to definitely interpret EU law.[64]

Accordingly, this raises two questions: (1) does the CETA provide the ISDS tribunals with the jurisdiction to interpret EU law other than the CETA, and (2) do the awards by the ISDS have the effect of preventing EU institutions from operating (autonomously) according to the constitutional framework?

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[60] ibid para 245.
[61] ibid 21-24.
[62] CETA (n 9) art 8.31.
[63] European Court of Justice various opinions (n 14).
[64] Opinion 1/17 (n 16) para 50.

2.2: Position of the CJEU

In order to understand why the role of the ICS is in line with autonomy, this subsection shall be divided into two parts. The first part shall look at the jurisdiction of the CETA ICS to interpret or apply other EU rules than the CETA, and the second part shall look into the effect on the operation of the EU institutions. It should be noted that the CJEU started by recalling the principles applicable to autonomy before looking into the questions.[65] This, however, corresponds with section 1.2 above and shall therefore not be discussed.

2.2.1: The jurisdiction to interpret and apply EU law other than CETA

In coming to the conclusion that the CETA tribunals do not have the jurisdiction to interpret or apply other rules than the CETA, the CJEU relied on four arguments: (1) the limited applicable law, (2) the limited powers of the tribunals, (3) no requirement for preliminary rulings, and (4) the definitive awards. Each of these arguments shall be discussed below.

The limited applicable law

As discussed in section 1.1, the ICS only has the authority to hear claims based on violations of section C or D of the CETA,[66] applying the rules of the VCLT,[67] and other rules and principles of international law applicable between the parties, thereby limiting the scope of applicable law.[68] The CJEU also highlighted the limitation to rule on the legality of a measure.[69] Keeping this in mind, the CJEU distinguished the CETA from its case law on EU autonomy: Opinion 1/09[70] and Achmea.[71] The treaty at stake in Opinion 1/09 included a broad scope of applicable law,[72] which altered the essential character of powers conferred on the EU institutions and its Member States, which is indispensable to preserve the nature of EU law.[73] The CETA, on the other hand, limits the scope of applicable law in relation to its ICS and does, therefore, not alter the essential character

[65] ibid paras 28-30
[66] CETA (n 9) art 8.18.
[67] Vienna Convention on the Law of the Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 (VCLT).
[68] CETA (n 9) art 8.31.
[69] ibid.
[70] Opinion 1/09 (n 14).
[71] Case C-284/*16 Slowakische Republik (Slovak Republic) v Achmea BV* [2018] ECLI:EU:C:2018:158.
[72] Opinion 1/09 (n 14). The scope of Opinion 1/09 included directly applicable community law, therefore being able to apply not only to provisions of the agreement itself but also future regulations and other instruments of EU law. Furthermore, such could be determined in the light of fundamental rights and general principles of EU law, as well as the ability to determine the validity of such.
[73] ibid paras 78 and 89.

of the EU's structure and legal order.[74] Secondly, Achmea concerned an intra-EU IIA, due to which the principle of mutual trust[75] must be taken into consideration.[76] The CJEU, however, noticed that since the CETA is an extra-EU IIA,[77] the principle of mutual trust is not applicable.[78]

By limiting the grounds on which disputes can be brought, the CETA limits the risks of the ICS being able to hear disputes on other grounds such as EU law. This preserves the autonomy of the EU and the exclusive competence of the CJEU to interpret EU law and rule on its legality. The judicial system of the EU, which ensures uniformity and consistency of EU law in all its Member States, would be undermined if other disputes could be subject to review by international tribunals or worse, deemed illegal by those tribunals. In light of this, the essential character of powers of the EU is also upheld. Lastly, the extra-EU nature of the CETA, ensures that the ICS cannot consider the compliance of EU law by the EU Member States (mutual trust), upholding the CJEU's exclusive jurisdiction as well.

The limited powers of the CETA tribunals to apply EU law

Secondly, the CJEU notes that the powers of ICS are limited in three ways. Firstly, domestic law of the parties shall be considered as a matter of fact.[79] Secondly, the tribunal shall follow the prevailing interpretations given to the domestic law by the courts or authorities of that party.[80] Lastly, any meaning given to domestic law shall not be binding upon the party in question.[81] These limitations mean that when examining the effect of the measure in question, the tribunal may take the domestic law of the responding party into account, however, such examination is not equivalent to an interpretation of its law.[82] This is also true in relation to the AT,[83] as it was not the intention of the parties to confer on the AT the jurisdiction to interpret domestic law.[84] These power limitations preserve the autonomy of the EU and the exclusive competence of the CJEU to interpret EU law.

[74] Opinion 1/17 (n 16) paras 123-125.
[75] ECJ Opinion 2/13 (n 14) para 191.
[76] *Achmea* (n 71) paras 57-58.
[77] Opinion 1/17 (n 16) para 128.
[78] ibid para 129.
[79] CETA (n 9) art 8.31.
[80] ibid.
[81] ibid.
[82] Opinion 1/17 (n 16) paras 130-133.
[83] CETA (n 9) art 8.28.
[84] Opinion 1/17 (n 16) para 133.

No requirement for preliminary rulings

Preliminary rulings are used as a tool to ensure the uniform and consistent interpretation of EU law in all EU Member States, as well as for questions regarding its interpretations or validity.[85] In the case of the CETA ICS, the CJEU considers that since the scope of applicable law by tribunals is limited, tribunals cannot apply or interpret EU law. Furthermore, the ISDS stands outside the judicial system, therefore, the Court noted that there is no need for preliminary rulings to take place, as the uniformity and consistency of EU law would not be at stake.

Definitive awards

Lastly, the CJEU noticed that the ICS provides for final awards on disputes as it does not establish any procedures for re-examination. Furthermore, it also limits the investor to bring (during or on the conclusion of the ISDS procedure) the same dispute before a court of the party or EU judicial system.[86] This ensures that once the CETA ISDS is chosen as the forum to settle the investment dispute, the limitations of the CETA uphold EU autonomy. By depriving investors of any form of re-examination or choice between different awards and/or interpretations of the CETA or domestic law, the CETA ensures that the limitations provided are sufficient not to call into question EU autonomy.

2.2.2: The effect on the operation of the EU institutions

In coming to the conclusion that the CETA ICS does not adversely affect the operation of EU institutions, the CJEU posed the following arguments: (1) the safeguards provided by section C, and (2) the safeguards provided by section D, which are the only basis on which claims can be brought.[87] This must be understood in the light of the term investment and the limitations sections C and D pose.

Whilst the scope of investments is defined relatively broadly,[88] the EU has the power to determine the respondent,[89] which must also consent to the settlement of dispute through arbitration by the tribunals.[90] The CJEU goes on to note that the requirement of having a real link

[85] Lorna Woods and Philippa Watson, *Steiner & Woods: EU Law* (11th edn, Oxford university press 2012) 217-218.
[86] Opinion 1/17 (n 16) paras 135-136.
[87] CETA (n 9) art 8.18.
[88] ibid.
[89] CETA (n 9) art 8.21.
[90] ibid art 8.25 para 1.

with Canada narrows down the scope of the term investor.[91] Lastly, the CJEU considered the measures which can be challenged.[92] As the measures must be related to a covered investment, the measures can be of general application, or, arise from implementing an act of general application.[93] This narrows down the term of investor, and thereby the (legal) person who may bring a claim, with an additional safeguard as to choice and consent of the respondent. However, the measures which might be challenged are broader, as such could include implementations of (general) EU law.

Considering this, an adverse effect on EU autonomy would occur if the CETA ICS, rather than determining a violation of section C or D of the agreement, would call into question the level of protection of the public interest with respect to the foreign investors, in the event of harmonisation of law by parties to the CETA (e.g. the EU Member States). The latter would have as a result that achievement of the level of protection needs to be abandoned by the EU in order to avoid paying damages. Thus, if the EU or its Member States have to amend or withdraw legislation due to an outside tribunal calling into question the level of protection of public interests, it would undermine the capacity of the EU to operate autonomously.[94] In relation to the latter, it should be recalled that EU legislation is adopted following a democratic process, in which the legislation is not only appropriate but also necessary to achieve a legitimate objective of the EU, and subject to review with the founding treaties, the charter and general principles of EU law.[95]

Safeguards by section C

Section C provides that the obligations in this section cannot be interpreted as to prevent a party from adopting and applying measures necessary to protect a number of public policy grounds.[96] This, however, is on the condition that such would not constitute arbitrary or unjustifiable discrimination in like conditions or a disguised restriction on trade.[97] As a result, the ICS has no jurisdiction to declare a level of protection of a public interest incompatible with the CETA.[98]

[91] ibid art 8.1; Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L 11, para 6.D.
[92] CETA (n 9) art 8.18.
[93] ibid art 8.1; Opinion 1/17 (n 16) paras 137-151.
[94] ibid.
[95] TEU (n 57) arts 5 and 19.
[96] CETA (n 9) art 28.3 para 2.
[97] ibid.
[98] Opinion 1/17 (n 16) para 153.

Safeguards by section D

Section D stipulates that parties have the right to regulate within their territories to achieve legitimate policy objectives.[99] Furthermore, section D states modifications to the laws, in a manner which negatively affects an investment or an investor's expectations, does not amount to a breach of obligations under the section.[100] This is also reflected in the joint interpretative instrument and annex 8A.[101] Secondly, fair and equitable treatment (FET) under section D is also limited in its application, as such it is only applicable to a limited number of circumstances.[102] This shows that even where abusive treatment, manifest arbitrariness and targeted discrimination involves public interest, the jurisdiction of the CETA tribunals shall be limited. Therefore, by restricting the scope of section C and D, the jurisdiction of the CETA tribunals is narrowed down, as it cannot call into question the level of protection of the public interest, due to which the EU and its Member States do not have to amend or abandon the level of protection, ensuring that the EU can operate autonomously.

2.3: Interim conclusion

Thus, the CETA ICS is compatible with EU autonomy as it does not interpret other EU law than CETA and does not have an adverse effect on the operation of EU institutions. The arguments posed in section 2.2 give an overview of the criteria of compatibility with respect to the jurisdiction of the CETA tribunals, as well as indications of criteria leading to non-compliance. Graph 1 below summarises both criteria for compatibility and non-compatibility, illustrating that the presence of any of the criteria of non-compliance could result in the non-compliance with EU autonomy.

[99] CETA (n 9) art 8.9 para 1.
[100] ibid art 8.9 para 2.
[101] Joint Interpretative Instrument (n 91) para 1(d); CETA (n 9) Annex 8A, para 3.
[102] CETA (n 9) art 8.10 para 2.

Criteria for compatibility (cumulative)	Indications for non-compatibility
Interpretation of EU law other than CETA	
1. Limited applicable law - No other EU law than CETA - No mutual trust 2. Limited powers of tribunals - No power to interpret domestic law - (1) matter of fact - (2) follow prevailing interpretations - (3) not binding 3. Preservation of EU powers - No need for prior involvement - EU power to decide respondent 4. Finality of awards - No re-examination	1. Broader applicable law - EU law other than CETA - Applicable mutual trust 2. Broader powers of the tribunals - Power to interpret or equivalent to interpret domestic law - Not taken into account as a matter of fact - Disregarding prevailing interpretations - Binding interpretations 3. No preservation of EU powers - Need for prior involvement - No power to decide respondent 4. No Finality of awards
Effect on operation of EU institutions/public protection	
1. Safeguards section C - No interpretations to prevent adoption of public measures - No jurisdiction rule on level of public protection 2. Safeguards section D - Right to regulate and no violation when negative effect on investors - limited FET	1. No/limited safeguards in section C - interpretations which might prevent adoption of public measures - jurisdiction to rule of level of public protection 2. No/limited safeguards in section D - limited right to regulate - violation when investors are negatively affected - broader application of FET

Graph 1

3: Implications on the jurisdiction of the CETA investment tribunals

Opinion 1/17 raises several questions as to the effect on the EU's future IIAs[103] and has been subject to critique on several aspects, such as coherence[104] and its ability to safeguard the level of public protection.[105] However, this section aims to answer the question: what are the implications of EU autonomy and ISDS under opinion 1/17 on the jurisdiction of the CETA tribunals?

As seen in the sections above, EU autonomy limits the jurisdiction of courts and tribunals outside the EU judicial system. The CJEU, in Opinion 1/17, clarifies the scope of the CETA tribunals by emphasising four significant limitations: (1) considering EU/domestic law as a matter of fact (thus not interpreting or applying such), (2) following prevailing interpretations given to domestic/EU law by the courts or authorities of the respondent, (3) the lack of binding effect, and (4) limitations to rule on EU public policy grounds.

The first three requirements limit the jurisdiction of the CETA tribunals to interpret and apply EU law and aim to ensure that where a meaning is given, such is not equivalent to an interpretation. The last requirement limits the jurisdiction in relation to public policy grounds,

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[103] Marc Bungenberg and Catharine Titi, 'CETA Opinion – Setting Conditions for the Future of ISDS' (*EJIL: Talk!, Blog of the European Journal of International Law*, 5 June 2019) <https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/> accessed 24 March 2022.

[104] Francisco de Abreu Duarte, 'Autonomy and Opinion 1/17 – a matter of coherence?' (*European Law Blog,* 31 May 2019) <https://europeanlawblog.eu/2019/05/31/autonomy-and-opinion-1-17-a-matter-of-coherence/> accessed 24 March 2022.

[105] Giulia Claudia Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' (2020) 47(1) Legal Issues of Economic Integration 43.

aiming to ensure the autonomous operation of EU institutions by protecting the ability of the EU to adopt legislation and set standards of protection, without being restrained by potential investment law violations. This section shall assess the implication of the aforementioned limitations on the jurisdiction of the CETA tribunals.

3.1: EU/domestic law as a matter of fact

The applicable law to dispute settlement is of major importance,[106] however, there is no single approach adopted in IIAs.[107] As discussed above, the CETA ICS cannot interpret or apply domestic or EU law (other than the CETA) and may (inter alia) only consider such as a matter of fact. Nonetheless, separating the term 'interpretation' from considering law as a matter of fact may be conceived as complex[108] and blurred.[109] It has been argued that when considering domestic or EU law as a matter of fact, an interpretive component is inherent. An (indirect) interpretation as to the scope, context, meaning and rationale must be made in considering the relevant law as a matter of fact.[110] Thus, in order to assess infringement of CETA provisions, domestic/EU law must be precisely defined, after which the effect on the investor/investment can be assessed in light of the CETA.[111] This illustrates how the lines between interpreting domestic/EU law and considering such a matter of fact are blurred.[112] This 'blurriness' has also been seen in the way traditional ISDS tribunals operate,[113] and in ISDS cases.[114]

Opinion 1/17 does not further explain the scope, limitations or criteria for considering law as a matter of fact, causing the difference between interpreting and considering law as a matter of fact to remain unclear. Furthermore, as there is no means for preliminary rulings (as the CETA ICS is, amongst others, not intended to interpret EU law), the CJEU cannot provide for guidance without a Member State initiating the preliminary ruling procedure.[115] The CETA, however, provides for a joint committee and specialised committees, consisting of both Canada and the EU

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[106] ibid; *Libananco v. Turkey*, ICSID Case No. ARB/06/8, Award - 2 September 2011 paras 133-173.
[107] United Nations Conference on Trade and Development, 'Investor-State dispute settlement: UNCTAD Series on Issues in International Investment Agreements II' (United Nations, 2014) 127.
[108] ibid 55.
[109] Mads Andenas and Cristina Contartese, 'EU autonomy and investor-state dispute settlement under agreements between EU Member States Achmea' [2019] 56(1) Common Market Law Review 157.
[110] Leonelli (n 105) 56.
[111] Simas Grigonis 'Investment Court System of CETA: Adverse effects on the autonomy of EU law and possible solutions' (2019) 5(2) International Comparative Jurisprudence 127.
[112] ibid.
[113] Slizárd Gáspár-Szilágyi, 'A Standing Investment Court Under TTIP From The Perspective Of The Court Of Justice Of The European Union' (2016) 17(5) The Journal of World Investment & Trade 728.
[114] Jarrod Hepburn, 'CETA's New Domestic Law Claus' (*EJIL:Talk! Blog of the European Journal of International Law*, 17 March 2016) <https://www.ejiltalk.org/cetas-new-domestic-law-clause/> accessed 24 March 2022; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID ARB/08/18, Award - 7 February 2011.
[115] TFEU (n 3) art 267.

(excluding the Member States) which may adopt interpretations of CETA provisions binding upon the tribunals and parties.[116] Nevertheless, it is unlikely that any such committee will be able to identify the limitations of what does and does not amount to an interpretation under EU law, as this would be a direct infringement of the CJEU's exclusive jurisdiction.

Thus, the CJEU left the scope, limitations, and criteria for considering law as a matter of fact ambiguous. The CETA ICS cannot opt for preliminary rulings to the CJEU to seek clarification, as only an EU Member-State can do so, and the CETA joint committee, or its specialised bodies, are unlikely to define the limitations, as it could lead to an infringement of the CJEU's jurisdiction. The risk of this ambiguity is that where the CETA tribunals do interpret EU law, it could interfere with the exclusive competence of the CJEU, disrupting the uniformity and consistency of EU law.

3.2: Following prevailing interpretations

The second limitation on the CETA tribunals is that these must follow prevailing interpretations as provided for by the courts and authorities of the respondent party. This is particularly important for the EU, as this ensures that no interpretation of EU law takes place as the prevailing interpretations of the EU and its EU Member States must be in line with EU law. However, this is also subject to ambiguities.

Firstly, the meaning of 'prevailing interpretation' is not defined by the CJEU, making it subject to several questions such as: what can be considered prevailing, what the criteria applicable to it, and who decides what is prevailing?[117] While the CETA committee may be able to provide a meaning and interpretation for the term prevailing, it would be overstepping its boundaries when setting criteria or limitations as to what EU interpretations are prevailing and which are not, as it would be interpreting (the meaning of prevailing under) EU law. It should also be recalled that, as discussed above, the CETA ICS cannot ask for the CJEU to clarify the latter by virtue of prior involvement or preliminary rulings.

Secondly, the case law of the CJEU is, apart from the being complicated to interpret,[118] progressive in nature, which further adds to the complication.[119] This would result in the CETA having to interpret the judgements or opinions of the CJEU, in order to consider such as a matter

[116] ibid; *CETA* (n 9) arts 26.1.1 and 26.1.(e).
[117] Grigonis (n 111).
[118] Eva Kassoti, 'Between Sollen and Sein: The CJEU's reliance on international law in the interpretation of economic agreements covering occupied territories' (2020) 33 Leiden Journal of International Law 371.
[119] Case C-283/8 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] EU:C:1982:335, para 20.

of fact or to follow prevailing interpretations. Consequently, this could result in indirect interpretations as discussed in section 3.1.

Lastly, in the event there is no prevailing (or any) interpretation available, the CETA tribunals might not be able to consider it as a matter of fact without indirectly interpreting it, as the meaning of the law is unclear. An illustration of this would be the indirect interpretation of EU directives,[120] which could result in two diverging interpretations until interpreted by the CJEU and the CETA ICS aligns with it.[121] In this case, the tribunals might indirectly interpret when considering law as a matter of fact, resulting in variable and inconsistent interpretation of EU law. It is, therefore, a very complicated task for the CETA tribunals to refrain from affecting EU autonomy with such ambiguous rules in place. The implications of this on the jurisdiction of the CETA tribunals is, therefore, that whilst the CETA clearly states that its tribunals cannot disregard prevailing interpretations, it might still face serious difficulties in deciding, defining and following prevailing interpretations due to ambiguous definitions, which may lead to an adverse effect on EU autonomy.

3.3: Lack of binding effect

The third limitation posed is the lack of binding effect for the meaning given to the EU/domestic law by the ICS tribunals. If an interpretation would have a binding effect on the EU and its Member States, it would adversely affect EU autonomy as only the CJEU has the power to issue binding interpretations of EU law. As discussed above, the CETA ICS may indirectly interpret EU and domestic law, which would be reflected in an award. The interpretation may be considered as an integral part of the award,[122] which could end up being binding on the EU,[123] as the respondent (the EU) must comply with the award. This may result in adversely affecting EU autonomy,[124] this is however subject to discussion.[125]

Secondly, where the EU (as the respondent) is ruled to have violated an obligation enshrined in the CETA, other investors in alike or comparable situations would be likely to initiate

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120 ibid para 105, hypothetical scenario on p.57-61, based on the preliminary ruling given in Case C-528/16 *Confédération Paysanne and Others v Premier Ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt* [2018] EU:C:2018:583.

121 ibid.

122 Grigonis (n 111).

123 Opinion 1/9 (n 14) para 39.

124 Imgolf Pernice, 'Study on international investment protection agreement and EU law' (European Parliament, Directorate- General for External Policies of the Union, Volume 2 - Studies Investor-State dispute settlement (ISDS) provisions in the EU's international investment agreements, 2014).

125 ibid; Angelos Dimopoulos, 'Achmea: The principle of autonomy and its implications for intra and extra-EU BITs' (*EJIL:Talk! Blog of the European Journal of International Law* 27 March 2018) <https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/> accessed 24 March 2022.

ISDS proceedings as well. The tribunals, in like events, might rule in favour of the investors. This would result in the EU being practically bound by the awards as a flood of ISDS proceedings will be headed its way.[126]

Thus, the binding nature of the awards and the corresponding effect as to whether it does or does not violate EU autonomy remains ambiguous as the CJEU did not engage with these questions. The CJEU, furthermore, did not touch upon the extent of the non-binding awards, leaving the question of whether or not the latter includes the EU being practically bound. From the latter reasoning it can be concluded that the CETA tribunals in exercising jurisdiction may not issue interpretations which will bind either the EU or its Member States, whilst the scope, extent and criteria of the non-binding obligation remain ambiguous.

3.4: EU public protection

The fourth limitation on the jurisdiction of the CETA tribunals is the restriction to call into question the level of protection of public interest with the consequence that the EU and its Member States need to amend or abandon their level of protection. As discussed above, the CETA ICS does not have the power to rule on the legality of measures and cannot render awards which might result in the parties to the CETA (Canada, the EU and its Member States) lowering their public interest standards. However, this is subject to certain ambiguities.

Firstly, as discussed above, in the event EU law is deemed by a tribunal to be in violation to the CETA, investors in comparable situations would be likely to initiate proceedings against the EU as well. Whilst the award is only binding upon the parties to the dispute, the EU, being the respondent and therefore bound, would have to be careful in weighing potential claims with its power to legislate. An award could therefore affect the power of legislation of EU institutions to set standards of public protection which might affect investors rights.[127] Secondly, there have been concerns as to the involvement of an arbitral tribunal in matters of public protection, without the proper guidance of the CJEU (see sections 3.1-3.3 above).[128]Lastly, it should be noted that the CJEU, in clarifying the jurisdiction of the CETA tribunals, puts forward three limitations: (1) calling into question the level of protection of the public interest, (2) with the result that achievement of the level of protection needs to be abandoned by the EU, and, (3) to avoid paying damages. The CJEU does not explain these criteria any further, leaving the questions in relation to

[126] Grigonis (n 111) 136.
[127] Leonelli (n 105); Grigonis (n 111) 135-136.
[128] Laurens Ankersmit, 'Case C 142/16 Commission v Germany: The Habitats Directive meets ISDS?' (*EUROPEAN LAW BLOG*, 6 September 2017). <https://europeanlawblog.eu/2017/09/06/case-c-14216-commission-v-germany-the-habitats-directive-meets-isds/> accessed 24 March 2022.

nature (cumulative or not) and scope (meaning and threshold of 'needs' to be abandoned) open. As discussed above, this might be subject to interpretations by the CETA committees, however, could prove difficult as the questions include interpretations of standards (such as 'need to abandon') under EU law etc.

Thus, whilst the CETA prohibits its tribunals to call into question the level of public protection, the EU might be less willing to set high standards due to the potential ISDS cases. The CJEU also leaves open questions surrounding the nature and scope of the criteria provided. In any event, the CETA tribunals are prohibited from (1) giving interpretations which might prevent the adoption of public measures, (2) rule on the level of public protection, (3) limit the right to regulate, (4) establish violations of CETA when such involves any of the aforementioned, and (5) broaden the scope of FET, whilst the scope, interpretation and requirements of the latter limitation remain ambiguous.

4: Conclusion

To conclude with, the CJEU considered the CETA ISDS to be compatible with EU autonomy as the tribunals did not have the power to interpret or apply EU law other than the CETA (as it could only consider EU/domestic law as a matter of fact, following prevailing interpretation and lacked binding effect) and due to the fact that the tribunals could not call into question the level of public protection by the EU or its Member States (due to guarantees in section C and D of the CETA), as summarised in *Graph 1*.

This resulted in four significant limitations on the jurisdiction of the CETA tribunals: (1) considering EU/domestic law as a matter of fact (thus not interpreting or applying it), (2) following prevailing interpretations given to domestic/EU law the courts or authorities of the respondent, (3) the lack of binding effect to the interpretation given, and (4) the limitation to rule on EU public policy.

The implications and ambiguities in relation to these four limitations have been summarised in *Graph 2* below.

Implications on the jurisdiction of the CETA tribunals		
Limitation:	**Implication:**	**Ambiguity:**
Matter of fact	Cannot interpret domestic or EU law	The jurisdiction of the CETA tribunals to consider EU/domestic law as a matter of fact remains ambiguous, with the potential risk of affecting EU autonomy
Following prevailing interpretations	Cannot disregard prevailing interpretations	In deciding, defining and following prevailing interpretations the tribunals may face serious difficulties due to ambiguous definitions, which may lead adversely affecting EU autonomy
Binding effect	Cannot issue interpretations which will bind the EU or its Member-States	Scope, extent and criteria of violation of the non-binding obligation remains ambiguous.
Public protection	Prohibited from: (1) giving interpretations which might prevent the adoption of public measures, (2) rule on the level of public protection, (3) limit the right to regulate, (4) establish violations of CETA when such involves any of the aforementioned, and, (5) broaden the scope of FET	The scope, interpretation and requirements remain ambiguous.

Graph 2

Thus, as seen above, the CETA provides a number of limitations on the jurisdiction of its tribunals in order to be compatible with EU autonomy as enshrined in Opinion 1/17. However, despite these limitations, a number of important questions remain unanswered. What the answers to these questions will be is yet to be seen when the CETA ICS hears its cases.

IOC's new Framework on Transgender and Intersex Athletes: An Accurate Representation of the Socio-political Zeitgeist of Modern Society

By Annie Rydén[*]

Introduction

Ever since antiquity, professional sport has been designated by the binary classification of male and female.[1] While there are sound grounds for this classification - to promote competitive fairness, equity, and safety - it conflicts with the socio-political zeitgeist of modern society.[2] As society shifts to recognise a broader range of sex and gender, sport governing bodies face the ever-increasing challenge of striking a balance between said interests and inclusion.[3] An illustrative example is the controversial debate concerning the integration of transwomen and intersex athletes into elite female competition, which ever so often ends in deadlock. Notably, however, the International Olympic Committee ('IOC') recently took a historic step forward by introducing a new framework for the participation of such athletes in Olympic sports.[4] This article explores the question of whether the IOC's initiative could turn an unmoored debate into a constructive conversation. It is established that the new framework includes three developments that alone represent a turning point for the fundamental rights of athletes and a boost for women's inclusion in sport worldwide.

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[1] Blair R. Hamilton and others, 'Integrating Transwomen and Female Athletes with Differences of Sex Development (DSD) into Elite Competition: The FIMS 2021 Consensus Statement' (2021) 51 Sports Medicine <https://link.springer.com/article/10.1007/s40279-021-01451-8> accessed 5 January 2022.

[2] ibid.

[3] Vikki Krane, *Sex, Gender, and Sexuality in Sport: Queer Inquiries* (Routledge 2018).

[4] IOC, 'IOC Framework on Fairness, Inclusion, and Non-discrimination on the Basis of Gender Identity and Sex Variations' (*IOC*, November 2021) <https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?_ga=2.150732979.440171679.1641845934-182776744.1641845934> accessed 8 January 2022.

1: IOC's new framework on transgender and intersex athletes in the Olympic Games

This section will provide an overview of the new IOC Framework while contrasting it with previous conceptions on female sport.

1.1: From a one-size-fits-all approach to discretion in setting eligibility rules

On 16th November 2021, the IOC announced the 'IOC Framework on Fairness, Inclusion, and Non-discrimination on the Basis of Gender Identity and Sex Variations', aiming to reshape transgender and intersex regulations.[5] This document was issued as part of the IOC's increased commitment to respecting human rights, as expressed in the Olympic Agenda 2020+5, and as part of its action taken to foster gender equality and inclusion.[6]

Transgender refers to a person whose gender identity differs from the sex he or she was identified as having at birth[7], whereas intersex is used to describe a variety conditions in which a person is born with reproductive or sexual anatomy that neither fits the box of female nor male.[8] An example of persons that fall within the latter category is women with naturally high testosterone levels, more often referred to as women with differences in sex development ('DSD').

Traditionally, high testosterone levels have been considered to confer female athletes with an advantage in elite female competitive sport.[9] This stance was reflected in sporting regulations and previous IOC statements on the matter, including the 2015 Consensus Statement which the new framework replaced. The 2015 Consensus Statement imposed a blanket testosterone suppression requirement across international federations in determining eligibility.[10] More specifically, in regards to eligibility for the elite female competition, it required transgender athletes to demonstrate that their testosterone levels were below 10 nanomoles for a minimum of 12 months prior to competition and maintain those levels throughout the duration of their desired

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5 ibid.

6 IOC, 'IOC releases Framework on Fairness, Inclusion and Non-discrimination on the basis of gender identity and sex variations' (*IOC*, 16 November 2021) <https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations> accessed 21 March 2022.

7 'Transgender' (Merrian-Webster) <https://www.merriam-webster.com/dictionary/transgender> accessed 19 March 2022.

8 'Intersex' (National Library of Medicine) <https://medlineplus.gov/ency/article/001669.htm> accessed 20 March 2022.

9 Emma Hilton and Tommy Lundberg, 'Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage' (2021) 51(199) Sprots Medicine <https://link.springer.com/article/10.1007/s40279-020-01389-3> accessed 20 March 2022.

10 IOC, 'IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015' (*IOC*, November 2015) <https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf> accessed 8 January 2022.

eligibility to compete.[11] At the time, the relationship between high testosterone levels and improved performance was considered causal.[12] This is no longer the case across all sports.[13] For instance, just days after the Tokyo Games 2021 concluded, the study that was the basis for World Athletics' testosterone regulations issued a correction saying that the relationship between high testosterone levels and improved performance should no longer be considered causal.[14] Accordingly, the IOC has declared that it shall ultimately be the responsibility of each international federation to determine what weight to place on testosterone levels.[15]

1.2: 10 Guiding Principles

While the new framework is not legally binding, it provides ten guiding principles to be taken into consideration when international federations create or update their eligibility criteria: (1) inclusion, (2) prevention of harm, (3) non-discrimination, (4) fairness, (5) no presumption of advantage, (6) evidence-based approach, (7) primacy of health and bodily autonomy, (8) stakeholder-centred approach, (9) right to privacy, and (10) periodic reviews.[16] Crucially, international federations are instructed to consider these principles holistically rather than to pick and choose some over others.[17]

2: Three reasons why the framework represents a shift

Three aspects of the IOC's framework are noteworthy to the author, namely that the IOC acknowledged that its previous activities sometimes resulted in severe harm, that the burden of proof shifted from the individual athlete to the international federation in proving a competitive advantage, and that the positive effects of the Framework are expected to trickle down to grassroots sport. These aspects will be elaborated upon below.

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[11] ibid.
[12] Stéphane Bermon and Pierre-Yves Garnier, 'Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes' (2017) 15(17) Br J Sports Med <https://bjsm.bmj.com/content/51/17/1309> accessed 10 January 2022.
[13] Stéphane Bermon and Pierre-Yves Garnier, "Correction: Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes" (2021) 15(17) Br J Sports Med <https://bjsm.bmj.com/content/55/17/e7> accessed 10 January 2022.
[14] ibid.
[15] IOC Framework (n 4).
[16] ibid.
[17] IOC (n 6).

2.1: Acknowledgement of previous harmful activity

As per the Olympic Charter and the Fundamental Principles of Olympism, 'the practice of sport is a human right [...]' which should be available without discrimination of any kind.[18] Notwithstanding, the IOC has historically targeted female athletes with previously high testosterone concentrations ('transwomen') and female athletes with DSD through harmful eligibility criteria, invasive testing, and medical procedures.[19] Human Rights Watch claims that such targeting - for instance used to exclude females such as Caster Semenya from athletic events at the 2020 Tokyo Summer Olympics - violate fundamental rights to privacy, health, and non-discrimination.[20]

A ground-breaking aspect of the IOC's recent announcement is thus its acknowledgement that previous actions '[...] sometimes resulted in severe harm', leading to principle two: prevention of harm.[21] In this regard, it should be stressed that the new framework explicitly stipulates that criteria to compete in a certain gender category 'should not include gynaecological examinations or similar forms of invasive physical examinations', nor should athletes be subjected to targeted testing aimed at determining their sex, gender identity, and/or sex variations.[22] While the IOC's acknowledgement may seem like a small drop in a large ocean, it nevertheless constitutes an important first step.

2.2: Inclusion as default

Another remarkable aspect of the IOC's guidance is that the burden of proof has shifted from the individual athlete to the international federation. Inclusion shall now be the default unless 'robust and peer reviewed research' demonstrates that an athlete is gaining 'a consistent, unfair, disproportionate competitive advantage in performance and/or an unpreventable risk to the physical safety of other athletes'[23]. Given that sex and gender differences not only form the essence

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[18] International Olympic Committee, *Olympic Charter* (entered in force 8 August 2021), Fundamental Principle of Olympism 4 <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> accessed 24 March 2022.

[19] Seema Patel, 'Gaps in the protection of athletes gender rights in sport—a regulatory riddle' (2021) 21(257) International Sports Law Journal <https://doi.org/10.1007/s40318-021-00182-2> accessed 12 January 2022.

[20] HRW, 'New Olympic Framework Backs Inclusion: New Guidelines Push Back on Discriminatory 'Sex Testing' Practices' (*Human Rights Watch*, 16 November 2021) <https://www.hrw.org/node/380420/printable/print> accessed 11 January 2022.

[21] Sydney Bauer and Rachel Savage, 'ANALYSIS-IOC's new transgender and intersex guidelines divide sport' (*Reuters*, 18 November 2021) <https://www.reuters.com/article/sport-lgbt-olympics-idUSL8N2S82W> accessed 11 January 2022.

[22] ibid.

[23] HRW (n 20).

of inclusion and exclusion in sports activity but also go to the core of human rights, this is a remarkable shift.[24] That said, there is no abundance of robust and peer-reviewed research on this topic at the time of writing[25]. However, the IOC has announced that broadening the evidence base for transgender and intersex eligibility is henceforth one of the priorities for its medical research fund.[26]

A noteworthy observation concerning the inclusion of non-conforming identities is that few if any contend that Michael Phelps - born with the anthropometrics of a perfect swimmer - had an unfair advantage over his competitors whereas many claim that DSD athletes such as Caster Semenya and Margaret Wambui - born with XY chromosomes and naturally elevated testosterone levels - have a performance advantage compared to their peers. In the absence of adequate scientific research, how is it that the biological attributes of one athlete could be praised when the biological attributes of another are frowned upon?[27]

A controversial yet plausible contention is that the current scepticism toward including DSD athletes in Olympic sport partly emanates from the legacy of eurocentrism and the centring of Western bodies. Most sports governing bodies ('SGBs') are founded and based in the West, with the IOC in Switzerland[28], World Athletics in Monaco[29], and the International Paralympic Committee ('IPC') in Germany.[30] Should the history of modern sport federations instead have been shaped by its geographical foundation in the southern hemisphere, for instance in sub-Saharan Africa, chances are that the notion of what is a 'woman' would reflect the modal woman of such a society.[31] It is noteworthy in this regard that the incidence of DSD varies among ethnic groups with the highest incidence in the sub-Saharan population.[32] While DSD is not an

[24] ibid; the IOC has announced that the new framework is part of its commitment to respecting human rights, as expressed in the Olympic Agenda 2020+5.
[25] Patel (n 19).
[26] Michael Houston, 'IOC releases framework for transgender and DSD athletes for 2022 implementation' (Inside the Games, 16 November 2021) <https://www.insidethegames.biz/articles/1115561/ioc-olympics-transgender-sport> accessed 11 January 2022.
[27] A distinction shall be made in this regard between transgender and intersex athletes because the former category has made an active decision to change their biological attributes.
[28] 'Lausanne, Olympic Capital' (*International Olympic Committee*) <https://olympics.com/ioc/history/lausanne> accessed 21 March 2022.
[29] 'About World Athletics' (*World Athletics*) <https://worldathletics.org/about-iaaf> accessed 21 March 2022.
[30] 'About the International Paralympic Committee' (*International Paralympic Committee*) <https://www.paralympic.org/ipc/who-we-are> accessed 21 March 2022.
[31] Yasmeen Ganie, 'Disorders of sex development in children in KwaZulu-Natal Durban South Africa: 20-year experience in a tertiary centre' (2017) 30(1) J Pediatr Endocrinol Metab <file:///home/chronos/u-e1e209c98a116e4662bb1bbd6715166141d6e10e/MyFiles/Downloads/10.1515_jpem-2016-0152%20(1).pdf> accessed 14 January 2022.
[32] Selma Feldman Witchel, 'Disorders of Sex Development' (2018) 48 Best Practices & Research Clinical Obstetrics & Gynaecology <https://www.sciencedirect.com/science/article/abs/pii/S1521693417301955?via%3Dihub> accessed 20 March 2022.

uncommon diagnosis in African women in sub-Saharan countries, it is rare in women in Western countries.[33]

The above is, furthermore, similar if not analogous to the centring of Western bodies in the debate surrounding prosthetic limbs and the contested Maximum Allowable Standing Height ('MASH') rule - used in Olympic and Paralympic competition to calculate the maximum allowable standing height in amputees.[34] The MASH rule was recently claimed to be racially discriminatory in *CAS 2020/A/6807 Blake Leeper v. International Association of Athletics Federations* because the studies used to create the latest MASH formula, implemented in 2018, only included Caucasians from Australia and Spain, and Asians from Japan.[35] Neither study included any African-born, African-American, or Black representation of any kind.[36]

2.3: Impact at the grass-root level

While the IOC's new framework was written with elite sport as the central focus, the organization also emphasized in its announcement that the principles of inclusion and non-discrimination 'should be promoted and defended at all levels of sport, especially for recreational and grass-roots sport'.[37] This is significant considering the current onslaught of anti-trans sentiment and ensuing legislation that recently has been adopted across the globe.[38] Perhaps most notably, numerous U.S. states have enacted anti-trans sports bans, impacting children of all ages beginning as early as elementary or middle school.[39] Given that said developments are both exclusionary and discriminatory, it is hoped that the IOC's guidance will act as a counterweight.

3: Conclusion

As repeatedly emphasized by IOC President Thomas Bach, the Olympic spirit is about building bridges.[40] It is evident that the IOC is far from finalizing its bridge between the fairness and inclusion of non-conforming identities in sport. Nevertheless, the above demonstrates that a promising foundation has been laid with the IOC's new framework on transgender and intersex

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[33] ibid.
[34] T.M.C. Asser Institute, 'Zoom In on transnational sports law: Blake Leeper v. IAAF' (*T.M.C. Asser Institute*, 4 December 2020) <https://www.youtube.com/watch?v=2aahhaplCf4> accessed 13 January 2022.
[35] *Blake Leeper v. International Association of Athletics Federations* (23 October 2020) CAS 2020/A/6807.
[36] ibid.
[37] IOC (n 6).
[38] David W. Chen, 'Transgender Athletes Face Bans From Girls' Sports in 10 U.S. States' (*The New York Times*, 28 October 2021) <https://www.nytimes.com/article/transgender-athlete-ban.html> accessed 13 January 2021.
[39] ibid.
[40] Shannon L. Blanton and Charles W. Kegley, *World Politics: Trend and Transformation* (Cengage Learning 2016) 319.

athletes. As relevant scientific research progress and human rights provisions in sport are afforded unprecedented attention, said foundation will become increasingly solid.[41] However, this may take time. In the meanwhile, we ought to celebrate that sex testing is about to be relegated to history books, inclusion is the default, and that measures are being actively pursued to promote these ideals at the grassroots-level. These developments alone represent a turning point for the fundamental rights of athletes and a boost for women's inclusion in sport worldwide.

[41] Patel (n 19); At the same time as the social parameters of sex and gender are shifting, the regulation of human rights in sport is increasingly being scrutinized.

Blockchain: The Next Big Hit for Effective Protection and Management of Artists' Intellectual Property Rights

By: Stefanie Stefanova[*]

Introduction

In the current business model, over 75% of the music industry's revenue comes from streaming and only 10% from physical sales. In the past when CDs were still in wide use, labels would leave artists with up to 15% of profits, whilst they would keep the rest reaching up to 92% of the royalties.[1] Despite the music industry's shift from a product-based to a service-centred one, record labels have not changed their ways of business. Even though most people nowadays listen to music through streaming platforms such as Spotify, labels still offer the same percentage of royalties to content creators. According to a Citigroup report, of the $43 billion made by the music industry, artists are only getting 12%.[2] With the success of streaming platforms being much less lucrative than the CD production, record labels are offering artists a "360 deal" which allows the former to earn profits from all of the artists' revenue streams (tours, performances, sale of merchandise etc.), rather than just from the sale of their music as was the case back in the day.[3] This leaves artists with a small sum to work with, especially since they do not receive any royalties until the record label recovers the money invested in the artist.[4]

Apart from the big cut to their pay checks, artists are unaware of the exact way their money is used by third-party intermediaries, creating a significant information access asymmetry, which compromises the relationship between the two. They also have to pay transactional fees to

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[1] Citi, 'Putting The Band Back Together: Remastering the World of Music' (August 2018) <https://ir.citi.com/QnhL09FARMDbvMhnCWFtjkqYOlPmgXqWS5Wrjts%2B6usU7suR9o7uUEFwZNjmUfyrAn10iZxCkYc%3D> accessed on 2nd July 2020.

[2] ibid.

[3] Heather McDonald, 'How 360 Record Deals Work in the Music Industry' (*the balance careers,* 18 August 2019) <https://www.thebalancecareers.com/how-360-deals-in-the-music-industry-work-2460343> accessed on 23 March 2022.

[4] Dmitry Pastukhov, 'A Hard Look at How Record Companies Make Money: Royalty Splits, Types of Record Deals, and the Label Business Model' (*Soundcharts,* 10 February 2020) <https://soundcharts.com/blog/splits-and-profits-record-deals-analysis> accessed on 7 July 2020.

middlemen at an unjustified rate for today's standards.[5] Moreover, royalty payments are often delayed or worse, distributed to the wrong persons.[6] All these years, the music industry has stuck to its traditional methods, without taking into account the changing society and the emergence of new technologies which can have a beneficial effect on the current way music business is done.[7] There has been a mass outcry by artists and music experts regarding the lack of transparency and clarity on ownership rights.[8] This article will discuss how blockchain technology coupled with the use of smart contracts is the key to bringing about positive change for the suffering of the music industry. It argues that the combination of the two would create an all-encompassing global copyright database. This would result in increased royalty payments for artists, transparency within the music industry, automated payments, and the removal of any unwanted third-party intermediaries. The first part of the article addressed the current problems in the music industry. The second part provides an overview of blockchain technology and smart contracts. The last part offers a discussion on how blockchain can revolutionise the music industry and benefit the artists.

1: The Music Industry's inequitable treatment of artists

This part will focus on the current state of copyright management in today's music industry, pointing out the inefficiencies and gaps which result in the unfair treatment of artists.

1.1: Current state of music industry

Prior to the 19th century, artists exercised their copyright and related rights in an individual management form.[9] However, since this proved to be impractical and commercially ineffective, they switched to the collective management form. Artists mandate their rights' management to Collective Management Organisations who then grant licences to users wanting to exploit the musical works, monitor their use, as well as collect and distribute revenue to rights holders.[10]

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[5] Mark Savage, 'Mps Call For Complete Reset Of Music Streaming To Ensure Fair Pay For Artists' (*BBC News*, 2021) <https://www.bbc.com/news/entertainment-arts-57838473> accessed 24 March 2022.
[6] Benji Rogers, 'How the Blockchain and VR Can Change the Music Industry (Part I)' (*Cuepoint,* November 23, 2015) <https://medium.com/cuepoint/bc-a-fair-trade-music-format-virtual-reality-the-blockchain-76fc47699733> accessed 23 March 2022.
[7] ibid.
[8] Marc Hogan, 'Is Transparency The Music Industry's Next Battle?' (*npr,* 14 July 2015) The Record <https://www.npr.org/sections/therecord/2015/07/14/422707429/is-transparency-the-music-industrys-next-battle?t=1597071318604> accessed 23 March 2020.
[9] Romana Matanovac Vuckovic, 'Remuneration for Authors and Other Creators in Collective Management of Copyright and Related Rights' (2016) 66 Zbornik PFZ 35.
[10] Mihaly Fiscor, *Collective Management of Copyright and Related Rights* (World Intellectual Property Organization 2002).

In order to fully grasp the complexity of the current system, let us examine the music value chain landscape and the copyright laws in place. Copyright and related rights protect two kinds of rights: moral and economic. The former entitle creators to preserve and protect their work,[11] whilst the latter allow rights holders to derive financial reward from the use of their work.[12] Typically, the transfer of moral rights is forbidden, but economic rights are easily transferable.[13] According to most copyright laws, rights holders have the right to either authorise or prevent certain acts in connection to the work, such as reproduction, distribution, public performance, broadcasting or other communication to the public, translation, and adaptation of the work.[14]

Each recorded musical piece comprises two sets of copyright and related rights, that is the composition (the song) and the recording itself (sound recording of the song).[15] It is common practice that musicians enter into agreements with publishers where the latter are given the ability to monetise the compositions. Regarding the release of the recording itself, another set of agreements between the content creator and the label that comes into play. The labels typically choose to use the services of a CMO to administrate the rights in the musical works. The CMO then grants licences for the pieces' exploitation and receives payments from commercial users on platforms (such as Apple Music, Spotify, and YouTube) which then sends royalties to the rights holders after it deduces operating expenses.[16]

To add to the complexity, it is important to note that songs are often the end-product of the combined effort of multiple writers, performers, and publishers, many of whom are based in different jurisdictions and are likely to rely on different CMOs.[17] Thus, the process of paying all these parties becomes even more intricate. The lack of a central copyright database creates further obstacles to the effective distribution of profits. Currently, the commercial users' consumption of artists' music benefits first and foremost labels and CMOs, whilst only a minimal amount of the profits goes to the musicians. Even though CMOs seem to play an important role in the successful operation of the music industry, there are a number of issues which point to the opposite.

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[11] Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221 art 6*bis*.

[12] World Intellectual Property Organisation, 'Understanding Copyright and Related Rights' (2nd edn 2016) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf> accessed on 23 March 2022.

[13] ibid.

[14] Berne Convention (n 11) arts. 8, 9, 11, 11*bis*, 11*ter*, 12, 14, and 14*ter*.

[15] U.S. Copyright Office, 'Copyright Registration of Musical Compositions and Sound Recordings' (2012) <https://www.copyright.gov/circs/circ56a.pdf> accessed on 21 March 2022.

[16] ibid.

[17] Robert Hooijer and J. Joel Baloyi, 'Collective Management Organisations - Tool Kit: Musical Works and Audio-Visual Works' (World Intellectual Property Organisation 2016) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2016_1.pdf> accessed 23 March 2022.

2.1: Absence of a global copyright database

The International Musical Work Code and the International Standard Recording were attempts to solve the ownership confusion arising from the presence of multiple individuals involved in the production process.[18] These standards demanded that copyright information be embedded in musical works and recordings to simplify the process of finding the relevant composers, performers, and lyricists.

However, the creation of those international standards has not improved the interoperability between the different stakeholders. The lack of a completely authoritative source of information bundles all the relevant material in one place, allowing anyone to find out the correct data regarding the rights holders in each musical work.[19] Furthermore, it is currently impossible to verify the accuracy of the information on copyright and related rights uploaded on the system, giving the opportunity to maliciously claim false ownership.[20]Attempts at the creation of such a database have proved unsuccessful due to the inability of the different parties to settle the control over such a creation.[21]

Presently, all existing databases contain inaccurate information and lack comprehension since they do not collaborate, but in fact work independently.[22] What is more important is that the assignment of copyright and related rights is not a one-off event, meaning that often rights holders change and the information in the databases needs to be updated regularly. This results in CMOs being unable to present accurate information regarding the repertoire they offer.[23]

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[18] 'Fair Music: Transparency and Payment Flows in the Music Industry' (*Rethink Music,* 2015) <http://www.rethink-music.com/research/fair-music-transparency-and-payment-flows-in-the-music-industry> accessed 23 March 2022.

[19] Jeremy Silver, 'Blockchain or the Chaingang? Challenges, Opportunities and Hype: The Music Industry and Blockchain Technologies' CREATe Paper 5/2916 <https://www.create.ac.uk/publications/blockchain-or-the-chaingang-challenges-opportunities-and-hype-the-music-industry-and-blockchain-technologies/> accessed 23 March 2016.

[20] Anjanette Raymond, 'Heavyweight Bots in the Clouds: The Wrong Incentives and Poorly Crafted Balances that Lead to the Blocking of Information Online' [2013] 11 Nw. J. Tech. & Intell. Prop. <https://scholarlycommons.law.northwestern.edu/njtip/vol11/iss6/1/> accessed 23 March 2022.

[21] Examples include the 1998 International Music Joint Venture between CMOs in the Netherlands, the United Kingdom and the United States; the 2008 Global Database Repertoire Working Group initiated by the EU Commissioner Neelie Kroes; and the 2011 launch of the International Music Registry by the World Intellectual Property Organisation; Bill Rosenblatt, 'Watermarking Technology and Blockchain in the Music Industry (Digimarc 2018).

[22] Richard Hooper and Ros Lynch, 'Copyright Works- Streamlining Copyright Licensing for the Digital Age' (Intellectual Property Office 2012).

[23] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customised Management' [2011] 34 Colombia Journal of law & The Arts <https://journals.library.columbia.edu/index.php/lawandarts/article/view/2195> accessed 23 March 2022.

2.2: Delayed and unfair payments

Royalties' distribution is a lengthy process which takes years to finalise, leaving rights holders unsure when they will receive their income. The delay is caused by the fact that all stakeholders pick their own CMOs,[24]each of which has different rules and procedures surrounding their accounting system and database.[25] As noted above, many right holders reside in different countries, thus creating the need for compliance with numerous domestic laws surrounding auditing and withholding tax.[26] Added to the fact each of CMO's require payments, rights holders are then left with vastly reduced profits.[27] Statistics show that for an artist to receive their first penny, there must be at least 120 Spotify streams of their work.[28] What is worse is that upcoming artists who do not have the backing of a label and no bargaining power in negotiating the terms of their licence agreements with the major distributors are left with inadequately low profits.[29]

2.3: Data transparency: game of hide and seek

The issue of lack of transparency in the music industry and more specifically in the actions of CMOs have been a long-standing topic of discussion. This, however, has not resulted in the materialisation of a better-working system. Rights holders struggle in obtaining full data and annual reports regarding the use of their works.[30] This may be blamed on the fact that each intermediary works differently with diverse reporting standards and payment systems, which makes the summarization of the data challenging.[31] Despite living in a modern technologically-led society, none of the CMOs makes use of technology to process information in a fast and effective manner,

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[24] Ignacio De Leon and Ravi Gupta, 'The Impact of Digital Innovation and Blockchain on the Music Industry' (Inter-American Development Bank 2017) <https://publications.iadb.org/en/impact-digital-innovation-and-blockchain-music-industry> accessed 23 March 2022 .

[25] Marcus O'Dair and Zuleika Beaven, 'The Networked Record Industry: How Blockchain Technology Could Transform the Record Industry' [2017] Strategic Change 26 <https://onlinelibrary.wiley.com/doi/abs/10.1002/jsc.2147> accessed 23 March 2022.

[26] Rethink Music (n 18).

[27] Bokang Jia et al, 'Opus- Decentralised Music Distribution Using Interplanetary File Systems (IPFS) On The Ethereum Blockchain' (Opus Foundation 2016) <https://cryptorating.eu/whitepapers/Opus/whitepaper.pdf> accessed 23 March 2022.

[28] Savelyev, 'Copyright in the Blockchain Era: Promises and Challenges' [2018] 34 Computer Law & Security Review <https://www.sciencedirect.com/science/article/abs/pii/S0267364917303783> accessed 23 March 2022.

[29] Ryo Takahashi, 'How Can Creative Industries Benefit From Blockchain?', (*World Economic Forum,* 18 July 2017) <https://www.weforum.org/agenda/2017/07/how-can-creative-industries-benefit-from-blockchain/> accessed 23 March 2022.

[30] Sebastian Felix Schwemer, 'Emerging Models for Cross-Border Online Licensing' in Thomas Riis (ed) *User-Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (2016).

[31] Claudio Lucena, *Collective Rights and Digital Content: The Legal Framework For Competition, Transparency and Multi-Territorial Licensing of the New European Directive on Collective Rights Management* (SpringerBriefs in Law 2015).

resulting in the provision of generic, badly structured and not up to standard reports.[32] Furthermore, the usage of non-disclosure agreements also proves detrimental to the transparency expected from the intermediaries. Non-disclosure agreements between record labels, publishers, CMOs and service providers leave rights' holders in the dark when it comes to how their rights are managed and how their royalties are being processed.[33]

2.3: A practical example of artists' current place at the bottom of the Music Industry's profit chain

In order to present how artists are currently treated in the music industry let us study an example of the actual revenue from a hypothetical record's sales. An album sells 500,000 copies, each of which has a wholesale price of £12.[34] The artist usually has a royalty rate of 14% on the sale of the records. However, when taking into account the deductions from the costs of recording, touring, and the record company's reserve (usually between 35% and 50%) against the gross royalties against returns, the artist is left with nothing.[35] Although the number of sales would typically mean that the record has sold very well according to industry standards, that does not mean that the artist is getting all the profit.[36] Back in the 90s for instance, The Backstreet Boys sold millions of records, but reportedly received no royalties whatsoever.[37] In this harsh environment, both fans and content creators alike are at a loss. Fans pay large amounts of money in order to purchase the albums of their favourite artists, which in reality does not reach the musicians.

Even in recent years, with the development of technologies where most of the sales of musical recordings happen online, artists have not been fairly compensated for their work. Surprisingly, archaic practices such as artists receiving reduced royalty payments for foreign sales continue to be implemented despite the fact that with digital distribution, record companies incur no additional expenses.[38]

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[32] ibid.
[33] Chris Cooke, 'Dissecting The Digital Dollar - Part One: How Streaming Services Are Licensed And The Challenges Artists Now Face' (Music Managers Forum 2015).
[34] Ilan Bielas, 'The Rise and Fall of Record Labels' (2013) (CMC Senior thesis, Claremont Mckenna College 2013).
[35] ibid.
[36] Marco A. Santori, Craig A. DeRidder and James M. Grosser, 'How Blockchain Will Revolutionise Commercial Transactions' (*Law 360,* 12 May 2016*)* Law360 <https://www.law360.com/articles/794611/how-blockchain-will-revolutionize-commercial-transactions> accessed 23 March 2022.
[37] Neil Strauss, 'The lost Boys: How a Pop Sensation Came Undone' ((*The New York Times, 18 August 2002*)<https://www.nytimes.com/2002/08/18/arts/music-the-lost-boys-how-a-pop-sensation-came-undone.html> accessed 23 March 2022.
[38] Antonio Madeira, 'Blockchain to Disrupt Music Industry and Make It Change Tune' (*CoinTelegraph 6 June 2020*) <https://cointelegraph.com/news/blockchain-to-disrupt-music-industry-and-make-it-change-tune> accessed 23 March 2022.

2: The solution: The Blockchain Technology: Overview

This part will provide insight into the blockchain technology as well as outline the characteristics that make this technology attractive. It shows how these characteristics can be useful for the music industry as well.

2:1 What is a Blockchain Ledger?

The blockchain technology was introduced in the famous "White Paper" written by the pseudonymous Satoshi Nakamoto who described the system as a 'progressively increasing list of records or "blocks", which are each linked to the previous block and secured using cryptography'.[39] It is often referred to as "distributed ledger" due to the ability to distribute and manage the records through a peer-to-peer network.[40]

All blocks are time-stamped and include a bot transaction data from the given block as well as the entire history of the chain. The blockchain ledger allows for the storage of information in a way that diminishes the possibility of adding, removing or changing data without any of these actions being detected from other users.[41] Thus, experts qualify the ledger as "impossible to corrupt".[42] The system works through the implementation of a Proof-of-Work ("PoW") structure in which thousands of computers have to authorise, back, and reach agreements on every transaction. This means that there is no single entity that owns the blockchain and thus, there is no way to penetrate the security of the system.[43] The system proves to be a safe and reliable way of transferring digital ownership in a decentralised manner.[44] Blockchain is presented as a ledger since it incorporates all the information regarding every transaction that has ever been made on it. Every time a user transacts on the system, the data he/she provides is encrypted and then verified by other participating computers.

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[39] Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System', (*bitcoin,* 16 November 2018) <https://bitcoin.org/bitcoin.pdf> accessed 23 March 2022.
[40] Matt Lucas, "The Difference Between Bitcoin and Blockchain for Businesses" (*IMB*, 9 May 2017) <https://www.ibm.com/blogs/blockchain/2017/05/the-difference-between-bitcoin-and-blockchain-for-business/> accessed on 2nd August 2020.
[41] Nakamoto (n 40).
[42] ibid.
[43] Melanie Swan, *Blockchain for a New Economy* (O'Reilly 2015) 39.
[44] Bob Wigely and Nicolas Cary, 'The Future is Decentralised: Blockchains, Distributed Ledgers & The Future of Sustainable Development' (UNDP 2018).

However, the transaction validation process depends on whether the blockchain is public or private.[45] A public blockchain is a permissionless platform which allows anybody to add and validate transactions, whereas a private blockchain is a permissioned platform, in which every transaction and validation is only accessible by the pre-registered participants.[46] The permissionless blockchain requires no third-party regulation due to the fact that the system relies solely on the public consensus regarding which transactions are to be considered true and authentic.[47] The permissioned blockchain, on the other hand, allows contributions on the platform subject to the owner's permission, which in turn can validate the transaction information .[48] For the purpose of creating a public global database for the artists' ownership rights, this option would not be preferable because it would place the authority of the information over one person. In the following section, the article will explore the ways in which a permissionless blockchain can be used instead.

2.2: Examples of the successful implementation of the blockchain network

Bitcoin and Ethereum are examples of permissionless blockchains which have gathered significant public attention and substantial investments.[49] The Bitcoin blockchain made Bitcoin a form of decentralised and unregulated currency which has no central authority, bank, or administrator and can be circulated directly from peer-to-peer without having to rely on intermediaries[50] [51]. Ethereum, on the other hand, introduced 'smart contracts', a technology which has the power to automate the execution of a transaction between parties as soon as a set of specific predetermined conditions are met.[52]

In the light of the success these systems have had in the finance industry, this article proposes the creation of a blockchain ledger which combines the features of those two systems: a decentralised ledger which connects artists and users through the creation of smart contracts and

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[45] Marco Iansiti and Karim R. Lakhani, 'The Truth About Blockchain', (*Harvard Business Review*, 2017) <https://hbr.org/2017/01/the-truth-about-blockchain> accessed 23 March 2022.
[46] ibid.
[47] Toshendra Sharma, 'Permissioned and Permissionless Blockchains: A Comprehensive Guide' (*Blockchain Council,* 13 November 2019) <https://www.blockchain-council.org/blockchain/permissioned-and-permissionless-blockchains-a-comprehensive-guide/> accessed 23 March 2022.
[48] ibid.
[49] Jason Wu, 'Basics of First Generation Blockchains and Applications in the Financial Payment System' (Data Driven Investor, 18 November 2018) <https://medium.com/datadriveninvestor/basics-of-1st-generation-blockchain-and-its-applications-in-financial-payment-system-6bcca0d36976> accessed 23 March 2022. .
[50] ibid.
[51] ibid.
[52] Michael Crosby et al., 'Blockchain Technology Beyond Bitcoin' [2016] Applied Innovation Rev. <http://scet.berkeley.edu/wp-content/uploads/AIR-2016-Blockchain.pdf> accessed 23 March 2022; James Rinaldi, 'Peer to Peer Digital Rights Management Using Blockchain' (Ms thesis, University of The Pacific (2018).

facilitates a quicker and fairer payment system using its own cryptocurrency. In this way the music industry can function through an easily accessible information platform without a central authority.

It is certain that the blockchain ledger would disrupt traditional industries, as it creates the opportunity to enter contracts that are fully transparent and allows for transactions to be executed safely and quickly without the need to rely on third-party intermediaries. This would mean that artists would no longer have to pay for the services of publishers, managers, and distributors. The removal of intermediaries would, however, prove to be a difficult task as their place is deeply rooted in the music industry chain and consequently would leave all CMOs out of jobs.

2.3 What are Smart Contracts?

Smart contracts give parties the opportunity to implement their own terms and conditions into a binding digital ledger.[53] Smart contracts differ from regular ones as they automatically enforce obligations on the parties to the contract once the terms and conditions are met.[54] Contractual drafting and intermediation by courts would become redundant once commerce starts happening exclusively through the use of smart contracts, which would save parties both time and money.[55]

Let us examine the sample situation of wanting to sell your laptop. Currently, you would visit a third-party website which would serve as an intermediary, such as Amazon or eBay, between you (the seller) and the buyer. This procedure costs both parties a transactional fee since banks process the payments through these platforms.[56] However, if smart contracts were to be implemented, there would be no need for intermediaries for the successful exchange of commercial goods and services between parties and thus no transactional fee would be paid.

Smart contracts are certainly troublesome to the current order, but in a way, they bring profits back to where they truly belong - the content creators. The widespread implementation of smart contracts and other blockchain-based mechanisms can revolutionise the music industry and improve the balance between the interests of content creators and fans alike.

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[53] Maher Alharby and Aad van Moorsel, 'Blockchain-Based Smart Contracts: A Systematic Mapping Study' [2017] Fourth International Conference on Computer Science And Information Technology <https://arxiv.org/pdf/1710.06372.pdf> accessed 23 March 2022.

[54] ibid.

[55] Accenture Consulting, 'Blockchain Reengineering the Media Value Chain' (accenture consulting 2017) <https://www.accenture.com/_acnmedia/pdf-59/accenture-blockchain-pov.pdf> accessed 23 March 2022.

[56] Justin Evans, 'Curb Your Enthusiasm: The Real Implications of Blockchain in the Legal Industry' [2018] 11 J Bus Entrepreneurship & L 273 <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1178&context=jbel> accessed 23 March 2022.

3: How will Blockchain technology revolutionise and improve the Music Industry?

This part delves into a concrete analysis on how the characteristics of the blockchain technology could be implemented into the copyright management system of the music industry. It also outlines barriers to this implementation along with possible solutions

3:1 Blockchain: a tool to deal with the issues posed by multi-territorial licensing

As explained above, blockchain is a decentralised network which is not subject to any territorial limitations and thus, allows for rights holders to grant the licences of their works directly to any user of the blockchain globally.[57] This would successfully remove the oversaturation with intermediaries as well as the inherent barriers to the obtainment of licences for online use by commercial users. The blockchain technology would also make illegal use of music less likely, since there would be a clear and easy to use system in place.[58] In addition, Blockchain is the modern solution to a no borders kind of society since it would successfully remove the practice of geo-blocking, which often leaves users frustrated as they pay for unavailable services. Moreover, rights holders would upload their works on the ledger regardless of territorial barriers. The global usage of the network would aid in the creation of a universal music database, benefitting both rights holders and commercial users alike.[59] Furthermore, cultural diversity would no longer be an issue, as the artists who have small fan bases would be able to popularise their music on the worldwide blockchain ledger reaching far bigger audiences.[60]

3.2: Use of Smart Contracts in the Music Industry: quick and secure facilitation of payments

Smart contracts carry the potential of becoming facilitators of the modernisation of the music industry as they are the missing link to launching an all-encompassing worldwide blockchain

[57] Emanuela Arezzo, 'Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works - Lights and Shadows of the New European Directive 2014/26/EU 46 IITC', (2015) International Review of Intellectual Property Competition Law 549.
[58] Lucena (n 32).
[59] Bruno Guez, 'Creating Transparency in the Music Industry' (*Hypebot)* <https://www.hypebot.com/hypebot/2015/08/transparency-in-the-music-industry.html> accessed 23 March 2022.
[60] ibid.

platform.[61] Currently, smart contracts do not include artificial intelligence (AI), which means that they, as of the date of this article, do not change their behaviour based on unpredicted circumstances.[62] The author, however, envisions their use in the blockchain network with the involvement of AI so that the system would be able to 'learn' from its experience and match its performances to the circumstances in order to always execute appropriate actions.

No matter whether it is inclusive of AI or not, a smart contract must always meet the conditions of a contract. Therefore, a legally enforceable smart contract must include the following attributes: 1) offer; 2) acceptance; 3) consideration; 4) intent; 5) parties' legal capacity to enter into a contract; and 6) agreement on a lawful subject matter.[63] In its current state, smart contracts are simple in form and not used to govern complex contractual relationships. They comprise of 'if/then' statements which tie the release of funds to the fulfilment of an "if" condition.[64] Even in their current form, smart contracts are suitable for use in the music industry since they allow for immutability and measurability. Due to their inflexible nature and lack of built-in mechanisms for amendments, modifications, and varying standards of performance, smart contracts introduce the option of simplified and streamlined commercial transactions.[65]

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[61] Mahdi Shams, 'Ethereum, Ether and Smart Contracts' MLT Aikins LLP (*Lexology,* 2018) <https://www.lexology.com/library/detail.aspx?g=9682d744-22f4-480b-8189-86619fc40182> accessed 23 March 2022.

[62] Huu Nguyen, 'Use of Artificial Intelligence for Smart Contracts and Blockchains' (*Squire Patton Blogs,* 2018) <https://www.squirepattonboggs.com/~/media/files/insights/publications/2018/04/use-of-artificial-intelligence-for-smart-contracts-and-blockchains/huu-bailey-fintech-law-report-article-2018.pdf> accessed 23 March 2022.

[63] Robert Braucher and E. Allan Farnsworth, 'US Restatement (Second) of Contracts' ss 12-95 (*Am. Law Inst. 1979*), s 12-95; Allen & Overy, 'At a glance guide to: Basic Principles of English Contract Law' (Advocates for International Development) <http://www.a4id.org/wp-content/uploads/2016/10/A4ID-english-contract-law-at-a-glance.pdf> accessed 23 March 2022.

[64] Scott McKinney, Rachel Landy, and Rachel Wilka, 'Smart Contracts, Blockchain, and the Next Frontier of Transactional Law' (2018) 13 Wash J L Tech & Arts 313.

[65] ibid.

3.3: Barriers to the implementation of Smart Contracts in the Music Industry

Smart contracts are difficult to enforce if the identity of the parties is not clear, as is the case in public blockchains where parties do not know each other beyond usernames.[66] However, this could be resolved with the introduction of a built-in verification tool which would ensure that information provided by the respective parties is correct.[67] Users would only be able to create accounts on the platform upon the presentation of documents such as ID or passport which verify the identity as well as track locations and amount of funds in crypto wallets, and upon agreeing that the information is stored on the blockchain platform. However, this leads to the issue of how sensitive data is going to be handled according to the data privacy rules, such as the EU GDPR.[68] Nevertheless, requiring personal information from users would be a necessary step in creating a reliable platform on ownership rights.[69] The data would count as the Digital Passport of each user and would allow for safe and secure transactions to occur on the platform without the need of any external intermediaries.[70]

3.4: Blockchain and Smart Contracts: a solution to the delayed or incorrect payment issues

Smart contracts would also be an appropriate solution to royalty payments as they automate transactions as soon as all conditions are met. This would mean that middlemen would no longer be required, and rights holders would be able to get royalties directly and instantaneously each time their work is used.[71]

Furthermore, the blockchain network would prove useful for splitting payments which would automatically reach all the connected parties in the creation of a musical work for the

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[66] Jeffrey Neuburger, Wai Choy, and Kevin Milewski 'Smart Contracts: Best Practices' (*Proskauer,* 2019) <https://blockchainandthelaw.proskauerroseblogs.com/wp-content/uploads/sites/9/2019/11/Smart-Contracts-Best-Practices-w-022-2968.pdf> accessed 23 March 2022; Mark Verstraete, 'The Stakes of Smart Contracts' (2019) 50 Loy U Chi LJ 743.

[67] Arya Taghdiri, 'How Blockchain Technology Can Revolutionize the Music Industry' (2019) 10 Harv J Sports & Ent L 173.

[68] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119.

[69] McKinney (n 67) ,

[70] The Creative Passport, 'Mycelia Creative Passport' (The Creative Passport) <http://myceliaformusic.org/mycelia-creative-passport.pdf> accessed 23 March 2022.

[71] PriceWaterhouseCoopers LLP, 'Blockchain: recording the Music industry: How Blockchain Technology Could Save the Music Industry Billions' (*PriceWaterhouseCoopers LLP*) <https://www.pwc.co.uk/industries/entertainment-media/insights/blockchain-recording-music-industry.html> accessed 23 March 2022.

amount specified by the smart contract.[72] Due to the fact that parties decide the terms of their smart contracts, it would be possible for rights holders to decide how much to charge for the usage of their songs as well as for the details surrounding the licensing terms and conditions .[73] Moreover, fans would be able to pick what type of licence they would like to purchase from the platform, that is to download, stream, remix or sync the song.[74]

A real-life example of how blockchain technology would work is Imogen Heap's song "Tiny Humans" whose price and terms of use were decided directly by the artist herself. On the 2nd of October 2015, when the song was uploaded on Ujo Music blockchain platform, the contributors of the track were almost instantaneously paid their royalties each time a user bought and used the song, taking a maximum of 10 minutes to reach their recipients.[75] This example illustrates that Blockchain saves rights holders transaction costs since they do not have to use the services of an intermediary to licence their creation and collect payments on their behalf. Commercial users would also benefit, as they will pay a smaller sum expressing the desired consumption without having to additionally pay for the services of numerous intermediaries.[76] Thus, consumers' awareness of the real cost of tracks would create more transparency and assurance that the money reaches the artists.[77]

The usage of smart contracts leaves content creators with discretion regarding the price point at which consumers can purchase and use their music. [78] By signing the smart contracts, parties automatically bind themselves to the terms and conditions of the underlying code also known as 'lex cryptographica'. Lex cryptographica is the natural development of lex mercatoria into the realm of a modern society which implements the newest technologies in order to ease different types of processes which do not require any sophisticated methods of work, but are very time-consuming, thereby allowing people to focus only on the most important matters at hand.

Despite the *de facto* elimination of intermediaries their practical role would not be extinguished, but rather lead to an eased workload as well as more job opportunities for

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[72] Yessi Bello Perez, 'Imogen Heap: Decentralising the Music Industry with Blockchain' (*Mycelia for Music,* 2016) <http://myceliaformusic.org/2016/05/14/imogen-heap-decentralising-the-music-industry-with-blockchain/> accessed 23 March 2022.
[73] ibid.
[74] ibid.
[75] ibid.
[76] ibid.
[77] Music Ally, 'Citi report claims US music industry generated $43 billion in 2017' (*Music Ally,* 8 August 2018) <https://musically.com/2018/08/08/citi-report-claims-us-music-industry-generated-43bn-in-2017/> accessed 23 March 2022.
[78] Camilia Sitonio & Alberto Nucciarelli, 'The Impact of Blockchain on the Music Industry' (29th European Regional ITS Conference, Trento, 8 July 2018).

technologically competent professionals.[79] The cost cut-down would also aid amateur musicians to enter the market by utilising the blockchain platform, rather than relying on the backing of a major label. Thus, users would be able to find out about fresh new talents without having to wait for a label to recognise the artist's talent and give them a path to fame which is largely shaped by the label's vision and understanding of what would be a "hit". There would be an influx in music production which would benefit both creators and fans, as artists would have greater creative freedom and would be allowed to experiment more, thereby exposing fans to a wider variety of music to choose from.

3.5: Possible barriers to the implementation of Blockchain technology in the Music Industry

Even though blockchain technology provides greater clarity and transparency when it comes to payment of royalties to rights holders, it is not proven that this would lead to an increase in the rights holders' income. Whilst Blockchain would have the ability to bring rights holders higher revenue shares in each track, the technology does not offer the brand and marketing support which intermediaries do.[80] This could lead to shortage of marketing and thereby reduce the overall profits of the rights holders.

Moreover, the fluctuations of virtual currency also seem to be an issue[81]. Going back to the previous example of "Tiny Human", when users wanted to purchase the song, they had to go through the lengthy and difficult process of converting actual money into Ether, the cryptocurrency of the Ujo Music platform.[82] The lack of universal cryptocurrency which can be used solely for the purposes of the music industry complicates the process of purchasing a song.[83] In contrast, the present system of using a bank card seems like an easier way to pay for the downloading or streaming. Thus, in order for the blockchain platform to be implemented in the music industry, it must be ensured that there is a simple way to obtain cryptocurrency which can be employed on all blockchain platforms. Despite its growing use, cryptocurrency is still not

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[79] Aaron Wright and Primavera De Filippi, 'Decentralised Blockchain Technology and the Rise of Lex Cryptographia' (*Social Research Network*, 15 March 2015) <https://www.intgovforum.org/cms/wks2015/uploads/proposal_background_paper/SSRN-id2580664.pdf> accessed 23 March 2022.

[80] Sadia Sharmin, 'Music Copyright Management on Blockchain: Is It Legally Viable?' (Ms thesis, Uppsala University 2018).

[81] Hatching Amazing, 'Part 1: How We Tried to Buy Imogen Heap's Song on Ethereum' (*Hatching Amazing, 24 January 2016*) <https://medium.com/hatching-amazing/part-1-how-my-ssn-prevented-me-from-buying-music-on-the-blockchain-and-why-blockchain-for-music-a85eaeaca7ad> accessed 23 March 2022. .

[82] ibid.

[83] William Luther, 'Cryptocurrencies, Network Effects, and Switching Costs' Mercatus Center Research Paper 13-17/2013 (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295134> accessed 23 March 2022..

deemed safe enough for the general public due to risks associated with it, such as fraud, security, legal uncertainty, and money laundering.[84] [85] Furthermore, some commentators such as Robert Levine, argue that artists would not be the ones benefiting from the blockchain network, as they are obliged to transfer their rights to record labels in return for fixed upfront money and investment for the recording and distribution of their music.[86] The bright future that blockchain portrays for artists of a direct rights holder-to-fan sale would be unlikely to accomplish in practice as musicians need funds in order to record and publish their songs.

However, the aforementioned issues can all be solved once the major technology companies invest more in the development of the platform. This article proposes that a special blockchain ledger be created solely for the purposes of the music industry including a cryptocurrency which would be used only for transactions happening on the platform. Users would be equipped with detailed instructions as to how to make their crypto wallet and how to use their accounts on the network. As with all new technologies, consumers need to be open-minded and willing to learn in order to grasp how to work with the blockchain system. That being said, the opportunities which the blockchain ledger offers far outweigh the difficulties it currently poses. Consequently, this gives content creators valuable information regarding how and where their work is being used, as well as the consumers' age range and which regions bring them the most revenue. Furthermore, the system provides information regarding the transactions, including the type of licences, the number of the transaction block and the amount of the payment.[87] All information can be used by content creators to plan and identify music trends. Blockchain could also allow musicians to create a stronger fan base by offering the option of giving out rewards to those users who promote the songs and contribute to the contents of the network. An actual materialisation of this idea is the platform Peertracks which gives musicians the opportunity to receive certain privileges such as discounts on tickets and merchandise decided by the rights holders in exchange for the promotion of their songs.[88]

Furthermore, in terms of sensitive information and non-disclosure agreements, blockchain also offers a suitable solution. The system allows for different levels of disclosure as demonstrated

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[84] Federal Trade Commission, 'What to Know About Cryptocurrency' (*Federal Trade Commission Consumer Advice*) <https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrency> accessed on 15th July 2020.
[85] Mike Orcutt, 'Coronavirus is forcing fans of Bitcoin to realise it's not a "safe haven" after all' (*MIT Technology Review,* 19 March 2020) (March 19, 2020) <https://www.technologyreview.com/2020/03/19/905207/coronavirus-is-forcing-fans-of-bitcoin-to-realize-its-not-a-safe-haven-after-all/> accessed on 7th July 2020.
[86] Robert Levine, 'Will Tech Start-ups Finally Make Record Labels Obsolete? Not So Fast', (*Billboard*, 21 November 2017) <https://www.billboard.com/index.php/articles/business/8046123/unitedmasters-tech-startups-record-labels-obsolete-not-so-fast> accessed 23 March 2022.
[87] The Creative Passport (n 75).
[88] Jamie Redman, 'PeerTracks & 'Blockchain 3.0' Platform MUSE Set to Transform the Music Industry' (*bitcoin.com,* 27 January 2016) <https://news.bitcoin.com/peertracks-blockchain-3-0-platform-muse-set-transform-music-industry/> accessed 6 July 2020.

by Imogen Heap's project called 'Creative Passport'.[89] This essentially stands for a digital folder containing verified information regarding the identification, works, business partners, achievements, and payment mechanisms for music makers. The holders of such passports would be able to give permission to individual users to access the data for free whilst also making the information easily reachable by commercial users for a fee. If the features of all the current blockchain networks connected to the music industry are gathered into one finished all-inclusive project, the platform would be all-encompassing and able to deal efficiently with all the matters which are currently considered problematic.

4. Reflections and findings

As pointed out by the issues discussed above regarding the rights management system currently in place, it is evident that there needs to be a change in the music industry, since CMOs no longer represent a suitable way for ensuring rights holders' interests. Intermediaries seem to be at the bottom of the problem of delayed and often unfair distribution of royalties. This article proposed the removal of the intermediary layer in the licensing process. There have been attempts by Spotify to phase out the middlemen by encouraging its content creators to licence their works directly on the online music distributor,[90] nevertheless, Spotify being a successful and internationally used intermediary itself means that the distribution of the profits is still likely to be done unfairly. Thus, the music industry needs an independent platform to solve the issue. Blockchain is the way forward. Not only would it facilitate the online use of works by creating a global copyright database, but it would also make sure that royalty payments are distributed in a fast and fair manner based on the use of the works thereby increasing the transparency of the system.

The arguments which opponents to blockchain technology's implementation raise seem premature, as the system is still being developed and perfected for use. Hence, due to the early stage of its application in the music industry, the details are not yet clear and there is a need for further development concerning the specifications of such a system. More and more companies are starting to recognise its potential and are investing in it leading to future versions of the Blockchain for the music industry being more sophisticated.[91] The inclusion of AI will provide the

[89] The Creative Passport (n 75).
[90] Lucas Shaw, 'Spotify Gives Artists Another Way to Circumvent Record Labels' (*Bloomberg,* 20 September 2018) <https://www.bloomberg.com/news/articles/2018-09-20/spotify-gives-artists-another-way-to-circumvent-record-labels> accessed on 16th July 2020.
[91] Mappo, 'Top 10 Tech Giants are Diving into Blockchain' (Medium, 4 December 2019) (December 4, 2019) <https://medium.com/aelfblockchain/top-10-tech-giants-are-diving-into-blockchain-a2e7d9b44697> accessed 1 August 2020.

system with the ability to learn as it goes and become more refined with time. The combined work of making an all-encompassing final version of the music industry blockchain by the biggest technology players, music companies and existing music Blockchain platforms, would solve all current limitations and would ensure that the network is up to standard and is an appropriate solution to the problems the industry is currently facing.[92] The artists and music companies would provide the details whilst the technology companies would dress those requirements in technological attire.

4.1: Conclusion

There is a sense of urgency to solve the issues that the music industry, and more specifically the rights holders, have been dealing with for years, such as pirating of the works of the content creators, lack of credit to the rights holders, scarcity of any statistics and annual reports by CMOs, delayed and/or unreceived payments etc. Blockchain technology holds the key to solving these problems by putting the power back in the hands of content creators and limiting the amount of money spent on middlemen, the exact nature of whose work is unclear. Whilst there are opposing views to the blockchain technology's use in the music industry, arguments posed seem premature as the system is still in its early stages of development and is expected to become more sophisticated over time and through the investments of technology companies. Thus, the system can only be properly analysed after a final version has been created to incorporate the needs of the music industry in a technical form. However, Blockchain should not be feared. The technology simply eases the work of artists and gives them the credit they deserve whilst also creating job opportunities and aiding in the movement of all sectors of the economy towards a more technology-driven environment, where basic tasks and time-consuming work is done by such systems for employees to deal with more sophisticated matters.

[92] ibid.

Ethical Fashion: A breakdown of the New York Sustainability and Social Accountability Act

By: Ashleigh Mulder[*]

Introduction

At the United Nations Climate Change Conference (COP26) last year, over a hundred countries pledged to an urgent cut of greenhouse gas emissions to stay within a global temperature rise of 1.5°C and to reach net-zero overall by the year 2050.[1] However, are such aims possible with the fashion industry contributing to 10% of global CO2 emissions?

Media and those responsible for the negative impacts of fast fashion have always placed the burden of such impacts on the consumer, making the individual person feel accountable. However, accountability should be placed on big corporations because it is their continuous actions that have greatly contributed to our current reality of the environmental crisis. New York States' drastic new fashion act (formally known as New York Fashion Sustainability and Social Accountability Act) aims to shift this responsibility and hold some of the world's largest fashion brands accountable for their environmental impact. The New York Fashion Sustainability and Social Accountability Act (hereinafter The Act) will impact all apparel and footwear companies that conduct business within the state of New York and are generating over $100 million in global revenue, brands from Prada to Shein.[2]

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[1] Dr. Alan Hudd, 'Dyeing for Fashion: Why Our Clothes Are So Bad for The Environment' (*Euro News Green*, 2022) <https://www.euronews.com/green/2022/02/26/dyeing-for-fashion-why-the-fashion-industry-is-causing-20-of-water-pollution> accessed 12 March 2022.

[2] Jessica Krava, 'New York Proposes Significant Regulation for Fashion Industry: The 'Fashion Sustainability and Social Accountability Act' (2022) XII The National Law Review <https://www.natlawreview.com/article/new-york-proposes-significant-regulation-fashion-industry-fashion-sustainability-and> accessed 12 March 2022.

1: Framework

This act is a step up from the Uyghur Forced Labour Prevention Act (herein The Uyghur Act), a US legislative act enacted in 2021.[3] The Uyghur Act ensures that goods made with forced labour in the Xinjiang Uyghur Autonomous Region of China do not enter the market of the United States.[4] The purpose of The Uyghur Act is to ensure that forced labour of ethnic minorities in the region is not supported or funded by American companies.[5]

1:2 The Act

Under The Act, the environmental protection within the fashion industry, as well as the social and human rights aspects, will be further solidified. The Act is currently in deliberation before the New York State Assembly.[6] Should it be passed, impacted companies would be given an implementation period varying on the several requirements, which will be further elaborated on below and fined should they fail to comply. The fine will equate up to 2% of the company's annual global revenue.[7]

The fine is charged for every year the company fails to meet the requirements. However, companies that choose not to comply may either pay the fine annually or opt not to conduct business in New York. However, the latter is unlikely due to New York State being one out of the four fashion capitals of the world.[8]

The Act consists of four requirements which are grouped by two implementation periods that run alongside. The first requirement within the proposed Act is that of the mapping obligation. Which grants an implementation period of 12 months and will entail the respective companies to map at least half of their end-to-end supply chains (from farm to factory to shipping provider).[9]

The remaining three requirements are sustainability-related disclosures. They grant an implementation period of 18 months and concern the following:(i) an impact and due diligence

[3] SJ STAFF, 'Navigating the Impending 'Tsunami' Of The New York Fashion Act' (*Sourcing Journal*, 2022) <https://sourcingjournal.com/topics/sustainability/new-york-fashion-act-logility-mark-burstein-traceability-sustainability-333473/> accessed 13 March 2022.
[4] Jeffrey Margulies, Christopher Pelham and Stefan Reisinger, 'The Uyghur Forced Labor Prevention Act and What It Means for Retailers And Product Manufacturers' (*Nortonrosefulbright.com*, 2022) <https://www.nortonrosefulbright.com/en/knowledge/publications/9b3e7940/the-uyghur-forced-labor-prevention-act-and-what-it-means-for-retailers-and-product-manufacturers> accessed 13 March 2022.
[5] ibid.
[6] Hogan Lovells, 'Proposed New York Fashion Sustainability and Social Accountability Act Would Require Sustainable Fashion | JD Supra' (*JD Supra*, 2022) <https://www.jdsupra.com/legalnews/proposed-new-york-fashion-4836139/> accessed 14 March 2022.
[7] Krava (n 7).
[8] 'Why Are Paris, Milan, New York, And London the Fashion Capitals Of The World' (*The Fashion Narrative*, 2016) <https://www.fashion-schools.org/articles/top-10-global-fashion-capitals> accessed 20 March 2022.
[9] SJ STAFF (n 3).

disclosure, (ii) prioritised social and environmental disclosure, and (iii) impact reduction targets disclosed by the companies.[10] Each of the requirements shall be briefly elaborated below

The second requirement of publishing an impact and sustainability disclosure entails companies to include in their disclosure a social and sustainability report including externally relevant information regarding the due diligence policies, as well as the processes and activities conducted to recognise, prevent, mitigate, and report on potential adverse impacts.[11]

The third requirement regarding disclosure of a social and sustainability report must include the reduction targets (to meet the carbon emission requirements laid out in the Paris Climate Accord), the annual volume of material produced (broken down according to material type), amount of production displaced by recycled materials, labour standards (including fair wage), and company's approach for incentivising supplier performance regarding priorities, such as worker rights.[12]

The last requirement regarding disclosure of companies' impact reduction targets includes the company strategy for tracking its own due diligence, implementation efforts, and results.[13]

2: Steppingstone

As previously mentioned, failure to comply with The Act would result in an annual fine of 2% of the company's global revenue. In addition to this fine, an annual list of non-complying companies will be published by the New York Attorney General.[14] The list will also include the Attorney General's monitoring of the compliance. This Act will prove influential in both causing a ripple effect within the fashion industry as well as encouraging other pioneering countries and states to follow in the proactive footsteps of the New York State.

Companies that The Act will impact are aiming to show a more ethical foundation – this is due to consumers slowly switching to a more ethical way of shopping.[15] Prior to this act, there has been considerable secrecy within the industry regarding its impact on the environment and the treatment of workers. Disallowing such secrecy, companies will feel the growing pressure to meet consumer desires. The Act will cause a ripple effect due to industries within the fashion industry being influenced by each other. For example, due to the demand for transparency, companies will

[10] Krava (n 7).
[11] ibid.
[12] ibid.
[13] ibid.
[14] ibid.
[15] 'OUR IMPACT - Fashion Revolution' (Fashion Revolution, 2021) <https://www.fashionrevolution.org/impact/> accessed 15 March 2022.

outsource materials and factories that are more ethical. This would impact unethical farming as well as encourage countries and companies without worker protection rights to change and adapt to generate income.

Should this Act pass, it would make New York a global leader in sustainability. Countries wishing to also claim such a title may become influenced by such a radical form of legislation. Many countries evolve their domestic legislation by looking at those of other nations. Countries wishing to make their own fashion industry more sustainable, ethical, and meet their Paris Climate Accord obligations may look to the New York Fashion Act for ideas and inspiration due to its rigid requirements and encouragement of transparency within the industry.

3: The Ultimatum

Mark Burstein, executive vice president and industry principal for Logility, describes the Act as being a Tsunami situation.[16] Smart countries as well as companies are seeing the warning signs and are seeking higher ground. However, many are watching the tide pull back and by the time they realise the situation they are in, it may be too late. This correlates to countries and companies that are seeing the need for change and are adapting to a more sustainable and ethical form of fashion. However, too many big organisations and countries are not doing enough, sitting by the side-lines watching the change happen. There is still hope that the bystanders will realise the urgency before it is too late, and with the help of acts similar to that of the New York Fashion Act, the number of bystanders may reduce, as responsibility shifts to those who should be held accountable.

[16] SJ STAFF (n 3).

The Hague International Law Review

1ST Quarterly Publication 2022

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