

LAW AND POWER.

RULES AND NORMS AT THE HEART OF INFLUENCE.

SUMMARY OF CONTRIBUTIONS AND DISCUSSIONS

Speakers (in order of appearance):

- Frédéric Munier, director of the School of Geopolitics and lecturer at SKEMA Business School, holder of the French “agrégation” in history.
- Noëlle Lenoir, lawyer, former minister of European Affairs, Council of State member and Constitutional Council member
- Claude Revel, director of SKEMA PUBLIKA, former interministerial delegate for economic intelligence

Moderated by Stéphane Marchand, editor in chief of [Pour l'Éco](#).

INTRODUCTION

This round table is the first in a series of meetings organised by the [SKEMA PUBLIKA](#) think tank entitled “At the heart of influence”, analysing influence within various fields. This independent think tank is affiliated to SKEMA Business School and was founded in late February 2022. It has an international remit and aims to produce analysis and proposals on societal, geopolitical and sustainable development issues to fuel public debate and provide information to public policymakers.

Law was chosen as the theme of this first event because it lies at the heart of influence. As it governs the very framework for debate in the public and private sectors, on a national and international level, it is an essential element in the way states wield their power, businesses develop and all players spread their influence.

NEW WORLD, NEW FORMS OF POWER

➤ What is the relationship between power and influence?

The war in Ukraine overshadows everything else. It prevents us from seeing that war is increasingly rare on our planet. Civil wars are now the rule and conflict is taking new forms, including wars of influence, which the political scientist Frédéric Charillon defines as “attempting to win others round to your point of view without resorting to obligation”.

In today’s world, we engage more frequently in this form of discreet power than in demonstrations of power which, although spectacular, offer no guarantee of success. Influence is a type of power that can be used by multiple players. It is also less costly. Consequently, influence has become the favoured form for power struggles. Power exists in the context of a relationship; you cannot possess it. Joseph Nye defines it as “the capacity to affect others”. Power, by definition, has two sides. It can be described as a spectrum of behaviour ranging from hard power (ordering, threatening and inciting) to soft power (controlling the agenda, persuading and overseeing).

The power of influence therefore depends on both hard and soft power. The upsurge of interdependence increases the opportunity cost of war and struggles emerge around the legal framework for international trade. Influence is a good fit for new players who do not possess any credible level of military hard power, for example small states such as Qatar. Soft power can be summed up as anything short of military force through which a party can dominate or preserve advantages.

➤ **How is law used in this context?**

Geopoliticians talk about the contrast between hard law, where war has become a weapon, in particular via the economy, especially in the form of extraterritorial sanctions (Alstom), and soft power, the normative power involved in shaping a framework, which is practiced by a whole range of different players, including private-sector players involved in lobbying. States can take one of three paths, represented by three gods from classical mythology, as illustrated by the USA (Ares), China (Hermes) and the European Union (Venus).

The USA engages in economic and trade wars and uses international organisations for this purpose. This is the objective it has given to the WTO where it has, as elsewhere, introduced the principles of the Washington Consensus. Today, conversely, it is blocking the workings of the WTO's Dispute Settlement Body (DSB). Compliance (or conformity) is another of the USA's tools. It can be linked to sanctions and used as a way of destabilising and taking over foreign businesses. For this method to operate, cooperation is required between the state and businesses.

China begins by influencing economic rules and norms. For example, it puts its people in as chairs and secretaries of ISO committees. It is working to change international payment standards (with the e-yuan, and by having the yuan replace the dollar). In another example, as the current chair of the FAO is Chinese, China is working to have food standards relaxed in line with its way of thinking to facilitate exports of Chinese products.

The EU has put more emphasis on influence and soft power. It has now reached a point where it lacks bold power. That said, it did prevent two US businesses (Grail and Illumina) merging to create a monopoly situation that would have benefitted the USA.

SOME LAW-BASED INFLUENCE STRATEGIES

➤ **The power to influence through laws and sanctions (“brandishing the stick”)**

US embargos and sanctions on Russia are part of law-based “diplomacy”.

They also stem from attempts to defend economic interests, ranging from the Foreign Corrupt Practices Act (FCPA) to the OECD Anti-Bribery Convention which aims to maintain a level playing field in international trade. Extraterritoriality is not an exclusively American weapon, but it is rarely used elsewhere, and in particular by the EU, even though the latter has the means to implement such policies (sometimes this is due to actions by certain members, such as Germany blocking anti-dumping measures against China).

Under US strategic thinking, sanctions for breaking embargos are a question not only of national security, but also of policing standards. When it declares an embargo, the USA considers it is policing trade. The same applies to extending the use of extraterritoriality to fight corruption and to widen the scope of its FCPA¹ to encompass the entire world.

¹ Foreign Corrupt Practices Act

➤ **The power of influence through “stakeholders” (“advancing by stealth”)**

A few observations: the drawing up of standards by professionals, the introduction of ratings and certifications of all kinds (IFRS², ratings agencies, proxy firms, ISO auditors, etc.) and the appearance on the scene of representatives of civil society: EFRAG³ European Commission delegated acts, NGOs and colloquia, etc. take us from influencing strategies to influencers. The CSRD⁴ and CSDD⁵ directives.

➤ **The power of influence through a barrage of claims (“accuse to dominate more effectively”)**

We can observe “claim strategies”. These are increasingly used between NGOs, political parties and unions, and in respect of businesses.

France is losing its influence in the world. It is falling at a significant rate in Africa, and even within the institutions of the European Union. Through its language, the Court of Justice of the European Union (CJEU) remains one of the last bastions of French influence. French continues to be used as one of the languages in which deliberations are conducted and judgments written. The country has a longstanding capital of influence, however.

THE MOST COMMON INFLUENCE STRATEGIES

Influence is at the heart of competition. As François-Bernard Huyghe said, “to influence is to convince without contract or obligation”. Law codifies balances of power. This is nothing new of course, but the multipolarisation of power and the development of the digital world and networks have brought important changes.

➤ **How influence strategies are changing**

The Consensus of Washington is increasingly contested. Its main challenger is China, which in 2004 produced the Consensus of Beijing. This takes an opposing position and is garnering growing support among non-Western states. However, laws typical of the English-speaking world and the methods of developing them, associated with the Washington Consensus, are more effective now than ever, as lobbying has spread out from the US to become common in every lawmaking institution. A role for non-public-sector players in defining the rule of law has been imported.

States themselves therefore have to enter the battle to influence. This is even more the case now given the rising importance of public opinion. Consequently, states must also consider the importance of their own diplomacy and tailor it accordingly. This is embodied in the “public diplomacy” conceptualised by the British during the Blair years. It is all about using images and storytelling to convince opinion, before any rules or international agreements are written. Opinions must be shaped first.

➤ **The law as a tool of influence**

No form escapes, with positive law, acts, regulations, international agreements and also soft law, which has mushroomed with recommendations, professional norms, standards, guiding principles, codes of conduct, good practice, charters, etc., which although they may not be legally binding, in fact, become binding because of their power to name and shame those who do not use them. And this soft

² International Financial Reporting Standards

³ European Financial Reporting Advisory Group

⁴ Corporate Sustainability Reporting Directive

⁵ Corporate Sustainability Due Diligence

law often makes its way into positive law, especially in the fields of CSR, ethics and finance. Claims can be used as a destabilising strategy.

Whoever sets the standards has power in the markets. But it is important to understand that there is a whole industry underpinning them: private bodies, firms and NGOs create standards and provide training, certification, audits and ratings. And sometimes, the same player does all these things.

Direct and indirect sources of law, both positive and soft, are very diverse today: international organisations, European institutions and standards bodies such as ISO (which we must not assume to be limited to the technical sphere, as there are ISO standards for CSR, management, innovation, sports events and more). To these we must add private creators of standards for example for the digital arena and fair trade, expert institutes (such as the IASB⁶ for accounting and finance standards, Europe's EFRAG for CSR and ESG, etc.), and private international organisations such as the International Chamber of Commerce (ICC) which makes rules in many different fields, stretching beyond its arbitration role. And of course there are NGOs, some of which have highly developed legal and lobbying branches (WWF, Greenpeace, Oxfam, etc.), and organisations for businesses such as the World Economic Forum and the WBSCD⁷, and last but not least US and other think tanks. One problem is that these players themselves do not disclose whether their own practices are virtuous, and with the exception of a few NGOs, particularly French ones, their accounts are not public or transparent.

Rules and standards can be imposed in more subtle ways, for example through rankings, which are in fact standards in disguise because they oblige the states or other organisations that they rank to reform to move up a few places. One example of this is the World Bank's Doing Business report (discontinued in 2021 after a government pressure scandal), which led to numerous legislative reforms in the states it ranked, all to move countries closer to the overtly liberal criteria laid down by the Bank. The World Bank has been working on a new ranking, the Business Enabling Environment project, since the end of 2022. It is up to the French authorities and experts concerned to take part and/or work towards more diverse representation in approaches.

➤ **The law as an object of influence**

Legal systems vehicle a way for a society to function, a business environment, working relationships and a role for courts and magistrates. Although laws today are interconnected and have evolved in practice, Civil Law (or Roman law), takes a different view of the public interest to Common Law, and of course Islamic Law. All this is linked to ways of thinking and their attractiveness for international elites. From a perspective of power, and also business development, it is therefore crucial for players to promote their law, and if possible, to export their model to be used for the formation of international rules, or to developing countries and those being rebuilt. One model of this type, several decades old now, was the American CEELI (Central and East European Law Initiative) after the fall of the Berlin Wall. The OHADA⁸ also established elements of French law in Africa.

China has borrowed components of its law from several countries, but so far does not appear to be attempting to promote its law as a vector of power, being more inclined to take control of the spheres in which it is formed. This may yet come.

⁶ International Accounting Standards Board

⁷ World Business Council for Sustainable Development

⁸ Organization for the Harmonization of Business Law in Africa

➤ Engineering influence

To support the chosen strategy, influence, whether legal or otherwise, is based on engineering, a set of techniques whose watchword is advance action and which is based on harnessing business intelligence to, on the defensive front, identify incipient influences (weak signals from colloquia, publications, etc.), and on the offensive front, spot opportunities for action. It is multidimensional. For example, the UK chose sport as a form of soft power fifteen years ago, and alongside this used the London Olympics in 2012 as an opportunity to create in advance an ISO standard for sustainable event management and then put it in place for the games. British businesses rely on the standard to promote their expertise when answering tenders in this field, as sport is a particularly vibrant and competitive market. Qatar uses both sport and finance as modes of influence, and Saudi Arabia will soon follow suit with the former.

Another watchword is taking a long-term approach, alongside partners and allies (never work alone), in carefully selected fora, delivering well-prepared messages and storytelling, attractively packaged, and demonstrating how they serve the public interest. Of course, the substance of what is to be promoted has to be agreed and defined in advance. A good dose of entryism to the fora in question is recommended – patiently placing people who support its interests within it is even better.

Sustainable development is an example of a well-thought-out operational concept. It was conceived by US think tanks in the 1970s and launched at the UN Conference in Johannesburg in 2002. Today, along with its offshoots: CSR, ESG, environmental and social criteria and indicators, etc., it reigns supreme in all regulations.

It is a very rich and unifying concept, and today is often assumed to be western. It could be interesting for France to return to working with non-western states on a new concept that is more suited to the diversity of countries.

What impact will digital systems have on law-based influence? Today, data is covered by a range of legislation (when it is covered at all), mainly governing privacy. Another aspect is safeguarding national ownership of data, given that it is a new type of raw material. The algorithms used by artificial intelligence are also worthy of scrutiny by national and above all multilateral regulators, in particular when they relate to law (predictive justice, settlement of small claims as is already in place in some countries, etc.). These algorithms are written by humans and convey a vision of the world and ethics from the point when they are written. In France, we could work within European and international institutions on upstream rules governing their purposes, suitability for the objective and other criteria. The Council of State began this process in a study published in August 2022.

CONTRIBUTIONS FROM THE AUDIENCE

- *French IT security standards for businesses*

The ISO has recently produced a standard, which originated in France, on IT security for businesses.

- *A lack of awareness among public policymakers?*

Some people feel there is a lack of awareness of this subject among French and European policymakers. This could leave them vulnerable to a form of cynicism that could influence them. It raises the question of training for leaders.

- ***How can algorithms that have not yet been considered be brought within the various angles of the law?***

To regulate effectively, it is important to consider two different aspects:

- data protection (international agreements),
- national and economic security

- ***What should be the role of American consulting firms?***

A prime example of this is the meetings of the B20, a forum which brings together big business to make recommendations to the G20 leaders. The agendas are set and the reports written by American consulting firms. It is in fact these firms that present the standards to the leaders.

Often, the firms are supported by states, but we are not aware of all their interests, and their thinking fits a mould.

- ***First interministerial committee on law-based influence strategy***

An interministerial committee meeting on [law-based influence strategy](#) was held involving the Ministry for Europe and Foreign Affairs, the Ministry of Justice and legal professionals on 21 March, to define an initial strategy in this area to cover the next five years.

- ***The weakness of the EU***

The EU is often caricatured as an easily influenced useful idiot. It is important to note, however, that our influence is also based on the importance and strength of law, and the fundamental belief that we need to act within the law. This also creates a form of attractiveness, including for investments.

- ***Why doesn't France make sufficient use of its international network?***

France doesn't make sufficient use of its networks abroad (embassies and consulates, of course, but also French elected Officials abroad, foreign trade advisors (CCE) and other French people and Francophile networks outside the country). Specific training could be provided for diplomats. This is even more necessary now given that France is growing poorer (ranking 25th in the world in terms of GDP per capita) and is less able to finance its influence.

It would also no doubt be useful to remind our senior civil servants of our objectives in promoting our influence, such as raising France's profile in Europe and across the world, in particular to promote the French model. All agreed that this is only possible if France is exemplary.

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