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Editors-In-Chief

Wednesday Eden and Sebastian Kjærnli Aguirre

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Foreword

I am delighted to present the Spring Issue of Volume 9 of the Cambridge Law Review. This Issue includes five articles, each of which exemplifies innovative legal scholarship, and is the culmination of several months of dedicated work by our Editorial Board, comprising students from the University of Cambridge and International Editors from a number of jurisdictions. In preparing this Issue, I am incredibly grateful to the authors and our Editorial Board, without whose contributions this Issue would not have been possible. I would also personally like to thank Professor David Tong in the Department of Applied Mathematics and Theoretical Physics who provided invaluable guidance to our Editors on matters of theoretical physics—a highly unusual and captivating subject area to encounter in a legal publication!

Now in its ninth year, the journal received an unprecedented number of original and thought-provoking submissions from authors who are at different stages in their careers. This is by no means surprising given the journal's ongoing commitment to publishing high-quality scholarship and to being at the forefront of contemporary legal developments.

The articles that have been selected for publication in this Issue each contribute novel insights on different, and in some cases underexplored, legal topics. These topics are the following: the potential (future) implications of the 'time dilation' phenomenon in space travel on foundational legal matters, such as limitation periods and contractual warranties; the effectiveness of regional policies in facilitating, and securing the long-term benefits of, climate migration; how expansive governmental interpretations of the concept of 'national security' in UK law, coupled with judicial deference to the executive in national security matters, risks undermining executive accountability; the European Union's introduction of the MiCA Regulation to regulate stablecoins; and the different 'anti-corruption' clauses that feature in transnational petroleum contracts. Overall, these articles have been chosen for the significant contributions that they make to the existing literature, which we believe will appeal to both UK and international readers.

In the first article, 'A Study of the Legal Implications of Time Dilation in Accordance with Einstein's Theory of Special Relativity', Dr Alexander Simmonds provides a unique insight into the theoretical impact of (future) space travel on a range of legal issues. To begin with, Simmonds envisions a not-too-distant future in which astronauts travelling in outer space experience, to a significant degree, a phenomenon known as 'time dilation' (where, according to Einstein's theory of special relativity, a subject moving close to the speed of light will experience time more slowly than a stationary observer). Building upon this phenomenon, Simmonds proposes a 'hypothetical fact pattern' in which astronauts on a space voyage experience time dilation in such a way that the passage of one year from their perspective is equivalent to the passage of two (or more) years on Earth. He then explores the theoretical impact that such time dilation could have on various legal issues, including, amongst other things, the legal assessment of an astronaut's age, the date on which an Earthly statute may be deemed to come into force, contractual warranties, and the fairness of custodial sentences. Ultimately, Simmonds concludes that one possible way in which courts could resolve time dilation-related complications would mirror the approach that courts adopt to determine the *forum conveniens* when there is a conflict of laws. Here, Simmonds describes this approach as being directed towards determining the '*forum conveniens temporis*', where the central question concerns which 'temporal frame of reference' (that of the astronauts or that on Earth) should apply in disputes involving time dilation.

Moving from outer space to a different global issue (namely, climate change), Divyanshu Sharma's article, 'Protecting Climate Migrants Through Regional Policies: Time to Move Beyond International Treaty Law', centres on the topic of climate migration. Here, Sharma critically examines three main proposals that feature in the literature for how to facilitate such migration and protect the interests of climate migrants. These proposals are the following: first, expanding the 'refugee' classification under the Refugee Convention so that the adverse effects of climate change may be a ground on which individuals may be granted refugee status; second, protecting climate migrants under human rights law; and third, formulating regional policies (as opposed to 'multilateral frameworks') to facilitate climate migration. Of these three proposals, Sharma endorses the third, and he assesses the likely efficacy of such policies by drawing upon selected regional policies and frameworks that have been adopted by Caribbean and African nations to protect climate migrants. Sharma hopes that, by treating these policies as case studies on how certain nations have actively endeavoured to facilitate climate migration, as opposed to preventing it, we can begin to view regional policies as being an effective way to secure the long-term benefits of climate migration for the migrants themselves, their home country, and their host country.

In his article, 'Ambiguity in National Security Powers under the UK's National Security and Investment Act 2021: Implications for Executive Accountability and Judicial Review', Louis Holbrook examines how the interaction between the executive and the judiciary in matters relating to 'national security' risks undermining certain constitutional principles in the UK, most notably executive accountability. Holbrook centres his examination on the UK's National Security and Investment Act 2021, which he describes as being a 'lens' (or 'vignette') through which to explore the impact of this interaction on executive accountability. More specifically, he argues that expansive government interpretations of the concept of 'national security' to encompass 'non-defence-related' matters, such as economic security, has rendered the meaning of this concept ambiguous in UK law. In other words, the concept of 'national security' is capable of bearing potentially unlimited meanings under this Act. Holbrook then argues that this ambiguity is capable of being reinforced by the judiciary given their tendency to defer to the executive when matters of national security are raised. Consequently, this interaction between the executive and the judiciary effectively places limited checks on executive power and thus risks undermining executive accountability.

Turning to the EU, Sarah Cichon's article, 'All That Glitters Is Not Gold: The Regulation of Stablecoins under the MiCA Regulation—Between Innovation and Risk Mitigation', examines the EU's approach to regulating crypto-assets, with particular focus on the MiCA Regulation. Here, Cichon considers the objectives of the Regulation (namely, to promote an efficient and innovative market for crypto-assets and to manage the risks that stablecoins pose to financial stability). She determines that, in theory, the MiCA Regulation is an appropriate framework for promoting market competitiveness, while also providing legal certainty and protecting investors from the significant risks inherent to the crypto market; however, in practice, it is questionable whether the Regulation will be sustainable over a prolonged period. Furthermore, owing to what Cichon describes as the 'decentralised' and 'inherently borderless' nature of stablecoins, she argues for the establishment of common 'minimum standards' and global cooperation to avoid possible regulatory arbitrage and to achieve the objectives of the Regulation more broadly.

In the final article, 'Anti-Corruption Clauses in Transnational Petroleum Contracts: A Taxonomy', Azar Mahmoudi provides a thorough examination of an underexplored issue, namely the anti-corruption clauses that have recently begun to feature in transnational contracts in the petroleum sector. Through a detailed study of 1,164 transnational petroleum

contracts, Mahmoudi proposes a taxonomy of these clauses, categorising them into two primary types: 'direct anti-corruption clauses', which place specific anti-corruption obligations on the parties to the contract; and 'indirect anti-corruption clauses', which, although not originally intended to address corruption, may nevertheless be interpreted to place anti-corruption obligations on the parties. After examining the different sub-categories of clauses that fall within these two categories, Mahmoudi proposes a 'Standard Clause', which is drawn from an existing contract (referred to as the 'Jubilee Agreement'), to serve as an extended representation of the various anti-corruption clauses that she includes in her taxonomy. She ultimately argues that this 'Standard Clause' could be used as an 'industry standard practice' in transnational petroleum contracts to trigger industry-wide compliance with anti-corruption standards.

Having been an Editor with the Cambridge Law Review since 2020, I am incredibly proud of the journal's continued growth in providing a platform for exceptional contributions to legal thought and I have faith that the journal will continue to flourish in the years to come. I look forward to presenting the Autumn Issue with my co editor-in-chief Sebastian Kjærnli Aguirre later this year.

Wednesday Eden
Editor-in-Chief
Darwin College
12 June 2024

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A Study of the Legal Implications of Time Dilation in Accordance with Einstein's Theory of Special Relativity

Dr ALEXANDER SIMMONDS*

ABSTRACT

Albert Einstein's theory of special relativity dictates that, as an object travels close to the speed of light, it experiences time at a slower rate than an inert observer. This is often illustrated with reference to the thought experiment, known as the 'twin paradox', where one twin on Earth ages at a faster rate relative to their twin who is travelling close to the speed of light. The phenomenon, known as 'time dilation', is also observable with respect to gravitational fields. Essentially, the closer a given subject is moving relative to the speed of light or, in the case of strong gravitational fields, the nearer the subject is to the source, the slower they will experience time relative to an inert observer. This article seeks to explore the theoretical impact of this phenomenon on a range of legal issues. For example, could astronauts on a voyage that incurs significant time dilation be bound by an Earthly statute which, by their frame of reference, has been enacted in the future? Would a contractual term guaranteeing the durability of a spacecraft part for a number of years be assessed on the basis of Earth years or years within the frame of reference of the component itself? Would custodial sentences—or detention of any kind—within the vicinity of a supermassive black hole be classified as 'inhuman or degrading treatment' under article 3 of the European Convention on Human Rights because of the potential impact that the time discrepancy would have? To answer these questions, this article examines two matters: first, the legal implications of time dilation across a range of legal areas; and second, whether or not a singular legal framework would provide a significant counterbalance to this phenomenon. Since the time dilation effect is very real, the implications for the operation of law are too. As will be shown, these implications are both practical and, in some cases, as with contract law, doctrinal too in nature. It will ultimately be concluded that time dilation has the potential in theory to disrupt many, if not all, aspects of how the law operates. This article concludes that a unified legal approach to this problem would be difficult and that the most appropriate solution would involve, inter alia, the enactment of instruments so as to enable courts to determine the correct *forum conveniens temporis*.

Keywords: space law, computation of time, special relativity, space exploration, speed of light

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I. INTRODUCTION

On 27 May, 2023, the author gave a talk at the International Space Development Conference ('ISDC') in Frisco, Texas, on the potential impact of the time delay factor on legal proceedings that might arise between crew members on deep space missions.[1] 'Time delay' in this context means the delay in relevant communications brought about by the physical distance between those on Earth and those in 'deep space'—defined for these purposes as any distance whereby the delay in communications owing to the limitations of the speed of light is likely to impact substantive and procedural matters of law. Two basic scenarios were envisaged: first, disputes arising between crew members themselves, the more complex of which may fall outside the remit or authority of the Mission Commander; and second, disputes arising between such personnel and parties based on Earth.

The former scenario could involve a legal dispute of any kind that may be expected to arise as a matter of course between human beings working together in a stressful and unusual setting. There have been numerous studies in this area that suggest that such occurrences would be likely.[2] Whilst routine disciplinary matters, should they arise, would be expected to be actioned by the Mission Commander, this may be undesirable, for reasons of natural justice and/or procedural fairness, where the Mission Commander themselves are a party to such a dispute or where they have been accused of misconduct. In cases of this kind, communication with Earth-based authorities could be necessary.

The second scenario, involving disputes between Earth-based entities and the personnel of any such mission, could arise across as many areas as could arise on Earth. For example, a crew member's spouse may wish to obtain a divorce or a complex probate dispute may unfold following the death of an Earth-based relative.[3] Moreover, a 'galactic paisley snail' dispute may arise between a crew member and the manufacturer of space foodstuffs should harm arise from consumption during the mission.[4] There is also a recent precedent for such a dispute, which arose when astronaut Anne McClain was accused of illegally accessing her former partner's bank account from the International Space Station in what was termed the first criminal investigation in space.[5]

During the author's talk, the setting of Mars was used for the sake of convenience and to reflect current trends in desired human exploration. Proceedings arising between Earth-based entities and those in deep space are likely to involve some form of questioning by or of the other party or parties, as the case may be. In the case of criminal matters, one such party could be the relevant prosecuting or law enforcement authority on Earth. Per the second

[1] Alex Simmonds, 'In Space, the Other Side Should Have the Right to Be Heard' (2023) 28 Coventry Law Journal 23.
[2] For reference to a scientific behavioural study involving a simulated space environment, see Julián Hermida, 'Crimes in Space: A Legal and Criminological Approach to Criminal Acts in Outer Space' (2006) 31 Annals of Air and Space Law 405, 409. See also George S Robinson and Jeanne J Hughes, 'Space Law: The Impact of Synthetic Environments, Malnutrition and Allergies on Civil and Criminal Behavior of Astronauts' (1978) 19 Jurimetrics Journal 59, 65; Hamilton DeSaussure, 'Astronauts and Seamen—A Legal Comparison' (1982) 10 Journal of Space Law 165, 179.
[3] For further examples, see Simmonds, 'In Space, the Other Side Should Have the Right to Be Heard' (n 1) 26.
[4] *Donoghue v Stevenson* [1932] AC 562 (HL).
[5] Robin McKie, 'Nasa Astronaut "Accessed Ex-Partner's Bank Account from Space Station"' *The Guardian* (London, 24 August 2019) <https://www.theguardian.com/us-news/2019/aug/24/nasa-astronaut-allegedly-accessed-ex-partners-bank-account-while-living-on-iss> accessed 26 February 2024.

postulate of Albert Einstein's theory of special relativity,[6] the speed of light is constant and nothing can travel faster than it. Light can, in some cases, take as long as 22 minutes to reach Mars from Earth.[7] Therefore, a question asked during cross-examination could take 22 minutes to reach Mars and the answer could take a further 22 minutes to reach Earth, fundamentally undermining its effectiveness. As Denning LJ stated, 'the very gist of cross-examination lies in the unbroken sequence of question and answer'.[8]

At the close of this talk and in the author's subsequent academic article, it was concluded that some form of dispute resolution, possibly based around an inquisitorial model, would have to be agreed upon before embarking on space sojourns that would be likely to incur such a delay. Cross-examination, as discussed, simply will not operate effectively in such circumstances. Vesting absolute authority in the Mission Commander where this could grossly offend against principles of natural justice or procedural fairness (or where they would simply lack jurisdiction) would not be desirable within an already stressful environment.[9]

The author's second study concluded that the same factor has the potential to impact a range of other legal areas, such as the promulgation of statutes.[10] Would astronauts on Mars, or indeed any distance away from Earth that incurs a significant time delay, for example, be bound by an enactment at the point in time when it came into force? Or would they only be bound when it becomes accessible to them, in this instance between five–20 minutes after its commencement date on Earth? Other specific legal areas where it was concluded that the time delay factor could have a significant impact were contractual formation and certain aspects of tort. It was concluded that, owing to the range of different approaches across jurisdictions on Earth, further comparative study would enable us to establish whether a particular model could be adopted via a multilateral agreement regarding such matters prior to these missions.[11]

The concept for this article arose in an e-mail exchange that took place following the 2023 ISDC in Frisco between the author and Dr Pascal Lee, chairman of the Mars Institute. Dr Lee suggested that it would be a particularly interesting venture to build on aspects of these previous articles and to consider the implications of 'time dilation' as opposed to 'time delay', which was the subject of the author's previous works, as previously discussed. As explained in more detail later, time dilation is the phenomenon whereby time is experienced at a slower rate within the frame of reference of a moving object as compared to an inert one. These effects are only significant at high speeds and within strong gravitational fields. The legal issues that might arise from time dilation are, for the time being, largely theoretical in the light of the current technological state of the art but, nevertheless, make for an interesting legal study.

There are clear legal implications that could arise from time dilation. By way of addressing these implications, this article will first examine the concept of time dilation in further detail before outlining a hypothetical fact pattern to set the scene in which these legal implications can be examined. Jurisdictional dimensions will then be noted before some of what would likely be the most significant legal implications are examined in turn. These legal

[6] A Einstein, 'On the Electrodynamics of Moving Bodies' in HA Lorentz and others, *The Principle of Relativity: A Collection of Original Memoirs on the Special and General Theory of Relativity* (W Perrett and GB Jeffery trs, Dover Publications 1923) 41.

[7] Nola Taylor Tillman and Daisy Dobrijevic, 'How Long Does It Take to Get to Mars?' (*Space.com*) <https://www.space.com/24701-how-long-does-it-take-to-get-to-mars.html> accessed 29 July 2023.

[8] *Jones v National Coal Board* [1957] 2 QB 55 (CA) 65.

[9] Simmonds, 'In Space, the Other Side Should Have the Right to Be Heard' (n 1) 34–37.

[10] Alex Simmonds, 'Is the Speed of Law Faster than the Speed of Light?' (2024) 48 Journal of Space Law (forthcoming).

[11] ibid.

implications relate to the following: time itself; age; the promulgation of statutes; retrospective legislation; employment law; contract law; criminal law and sentencing; limitation periods; and issues that may arise in the context of communications sent at the speed of light between parties. It will then be concluded that the legal implications of time dilation are far-reaching and potentially destructive, although they could be tempered by the legislative and judicial creativity that is already inherent within existing practices.

Whilst this article is concerned with the impact of extreme time dilation, it is of note that the Biden administration in the USA recently directed NASA to explore the prospect of establishing a lunar time zone in the light of the forthcoming Artemis missions.[12] Part of the reason for this is to take account of the time dilation factor associated with the Moon's weaker gravitational field.[13] The White House Memo stated that '[k]nowledge of time in distant operating regimes is fundamental to the scientific discovery, economic development, and international collaboration that form the basis of U.S. leadership in space'.[14] In the coming years it will also be fundamental to legal development.

This article will focus on these matters from the perspective of the legal system of England and Wales, though reference will be made to other jurisdictions as appropriate. It is conceded that a limitation of this study is that it centres on the theoretical experience of only a few legal systems.

This article proceeds on the basis that the legal jurisdiction of Earth extends to those in space, as is confirmed by article 8 of the Outer Space Treaty,[15] which states that '[a] State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body'. Within the literature this idea is relatively uncontroversial.[16]

II. WHAT IS TIME DILATION?

The first postulate of Einstein's theory of special relativity is that '[t]he laws of (non-gravitational) physics assume the same form in all inertial reference frames. All inertial observers are equivalent.'[17] The effect of this, which is born out both theoretically and in numerous experiments, is that 'the time interval between two events depends on the state of motion of the observer'.[18] The 'practical' impact, as such, is that moving objects experience time at a slower rate relative to inert ones. This is what is meant by the expression, 'time is relative': those who move faster experience time moving at a much slower rate within their frame of reference compared to an inert observer. This is referred to in the world of physics as 'time dilation'.

[12] Arati Prabhakar, 'Memorandum for Departments and Agencies Participating in the White House Cislunar Technology Strategy Interagency Working Group' (Executive Office of the President, Office of Science and Technology Policy, 2 April 2024) <https://www.whitehouse.gov/wp-content/uploads/2024/04/Celestial-Time-Standardization-Policy.pdf> accessed 10 May 2024.

[13] ibid 2.

[14] ibid.

[15] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 19 December 1966, opened for signature 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 ('Outer Space Treaty').

[16] See for example Helen Shin, '"Oh, I Have Slipped the Surly Bonds of Earth": Multinational Space Stations and Choice of Law' (1990) 78 California Law Review 1376; Hermida (n 2); Michael Chatzipanagiotis, 'Criminal Issues in International Space Law' (2016) 18 European Journal of Law Reform 105.

[17] Valerio Faraoni, *Special Relativity* (Springer 2013) 13 (emphasis removed).

[18] ibid 19.

The phenomenon of moving objects experiencing time at a slower rate than stationary ones can be traced back to at least as far as the works of the physicist Hendrik Lorentz and his subsequent 'Lorentz factor'.[19] This explains that time, along with other properties, will change along with an object's motion. The implications of special relativity and the resulting time dilation have been expressed in various thought experiments, the most commonly cited being the 'twin paradox'. In this scenario, one of a pair of identical twins leaves Earth travelling close to the speed of light and, upon their return, has aged at a rate much slower than their Earthbound twin.[20]

Although the result of these experiments may seem like science fiction, it has been tested in laboratory conditions at least as far back as 1941, where it was found that 'muons', a type of cosmic ray, effectively 'die' at a slower rate when travelling at higher speeds.[21] This result was replicated by CERN, which confirmed the theory,[22] as did the more famous experiment involving the transportation of atomic clocks on aeroplanes and the comparison of these clocks to a synchronised clock on Earth.[23] In line with the Lorentz factor and Einstein's theory of special relativity, this experiment demonstrated in a clearly observable fashion that a moving object experiences time at a slower rate than an inert one.

Building upon Einstein's theory of special relativity and 'time dilation', his theory of general relativity[24] postulates that the same effect also occurs with gravitational fields. The first significant test of Einstein's predictions in this field came in 1959 when Robert Pound and Glen Rebka conducted successful experiments involving gravitational redshift to prove that time moves slower within certain gravitational fields;[25] they found that time ran slower in the basement of their laboratory than it did in the building's penthouse. This was simply because the penthouse was further away from the Earth's gravitational field than the basement. Robert Vessot and Martin Levine followed this with their 1976 study,[26] which involved placing an atomic clock in a NASA rocket that was sent to a height of 10,000 kilometres. The clock on board the rocket ran at a faster rate than those on the ground. It is worth noting that such effects are not merely the concern of the academic and scientific community. In fact, Global Positioning System ('GPS') satellites routinely experience this effect as they run at a faster rate than clocks on the ground, requiring regular adjustment to counterbalance this effect.[27]

It should be noted for the sake of completeness that the study conducted in this article is based on the accepted proposition that time actually exists. As Sam Baron has pointed out,

[19] HA Lorentz, 'Simplified Theory of Electrical and Optical Phenomena in Moving Systems' (1899) 1 Koninklijke Nederlandsche Akademie van Wetenschappen Proceedings 427 (the Lorentz Factor can be expressed as $\sum m = 1 \infty (J m - 1 2 (m \beta) + J m + 1 2 (m \beta)) = 1 1 - \beta 2$ via the Bunney Identity).

[20] Andrew Zimmerman Jones, 'Understanding Time Dilation Effects in Physics' (*ThoughtCo.*, 24 February 2019) <https://www.thoughtco.com/time-dilation-2699324> accessed 13 November 2023. See also Leo Sartori, *Understanding Relativity: A Simplified Approach to Einstein's Theories* (University of California Press 1996) ch 6.5.

[21] See Bruno Rossi and David B Hall, 'Variation of the Rate of Decay of Mesotrons with Momentum' (1941) 59 Physical Review 223.

[22] J Bailey and others, 'Measurements of Relativistic Time Dilatation for Positive and Negative Muons in a Circular Orbit' (1977) 268 Nature 301.

[23] See JC Hafele and Richard E Keating, 'Around-the-World Atomic Clocks: Observed Relativistic Time Gains' (1972) 177 Science 168.

[24] A Einstein, 'The Field Equations of Gravitation' (1915) in AJ Kox, Martin J Klein and Robert Schulmann (eds), *The Collected Papers of Albert Einstein. The Berlin Years: Writings, 1914–1917*, vol 6 (Princeton University Press 1996) 244.

[25] RV Pound and GA Rebka Jr, 'Gravitational Red-Shift in Nuclear Resonance' (1959) 3 Physical Review Letters 439.

[26] Robert FC Vessot, 'Clocks and Spaceborne Tests of Relativistic Gravitation' (1989) 9 Advances in Space Research 21.

[27] See Neil Ashby, 'Relativity in the Global Positioning System' (2003) 6(1) Living Reviews in Relativity <https://doi.org/10.12942/lrr-2003-1> accessed 13 November 2023.

some theorists suggest that spacetime (the idea that, in addition to the three dimensions we perceive in daily life, time also exists as the fourth dimension) does not exist in reality.[28] The legal implications of this position will not be considered in this article. Firstly, the question of whether spacetime exists does not fundamentally alter the practical and observable effects of time dilation. Secondly, in line with the second postulate of Einstein's theory of special relativity,[29] the speed of light for all intents and purposes remains a constant. The impact of this as regards, for instance, the promulgation of enactments and the transmission of significant communications by either radio or laser will be legally significant regardless of the existence (or not) of time at a quantum level. This being written, the author remains open to further academic discussion of the legal implications of the existence (or not) of spacetime.

In summary, time dilation is a very real phenomenon, both in theory and in practice, as is shown by the studies outlined in this section. The legal implications of time dilation, then, are worthy of academic consideration and will be addressed in the remainder of this article.

III. A Hypothetical Fact Pattern

Although later sections of this article will deal with the implications regarding gravitational fields, most will consider the point of view—or frame of reference—of a group of astronauts travelling away from Earth at a speed where significant time dilation could feasibly occur. This article is concerned with the theoretical implications of time dilation, bearing in mind that current levels of technology do not allow for travel at these speeds, and nor are any travellers likely to experience gravitational fields strong enough to cause legally significant time dilation at any point in the near future. It is important that the reader keep the example of our astronauts in mind whilst reading this article.

Section III.A will examine the legal position as to time generally within the law of England and Wales. Section III.B will examine the law as it applies to age generally, whilst Sections III.F to III.I will look at specific substantive and procedural legal problems. Most of these sections will make reference to our group of astronauts by means of illustration.

While the actual values for time dilation can be calculated manually via a mathematical equation,[30] it is perhaps easier to understand the effects of time dilation by turning to the words of Valerio Faraoni:

> An astronaut on a spacecraft moving at speed *v* with respect to his twin on earth will measure a different time interval between his departure and his return than the time interval measured by his twin. For the astronaut, time 'runs slower' by a factor *y* with respect to the time measured by his twin on earth, but the astronaut would not have any perception of this fact.[31]

To study the legal implications of time dilation, it will be assumed in respect of special relativity—time dilation caused by speed—that the speed at which our astronauts will be travelling away from Earth (technically called their 'velocity') will be 161,325.3 miles per second,

[28] See Sam Baron, 'Eliminating Spacetime' (2023) 88 Erkenntnis 1289.
[29] Einstein, 'On the Electrodynamics of Moving Bodies' (n 6).
[30] Expressed approximately as $\frac{t}{t=\sqrt{1-v2/c2}}$
[31] Faraoni (n 17) 21.

or around 87 per cent of the speed of light.[32] The associated time dilation at this speed will mean that one year to our astronauts (within their frame of reference) will be equivalent to two years on Earth (the frame of reference of the 'inert' observer) at this velocity. This figure has largely been chosen with simplicity in mind when considering the computation of time as it applies to our astronauts and their interactions with the various legal issues discussed. It is easier for both the reader and author to work with whole numbers—working on the assumption of two Earth years to one 'space' year by the frame of reference of our astronauts is simpler than, say, two-and-a-quarter Earth years.

Speed will not be relevant in Section III.G as this is concerned with the dilatory effect of gravitational fields. The equivalent physical law here will be general—rather than special—relativity.[33] The effects of this were previously set out regarding GPS satellites[34] and rocket experiments:[35] time runs slower for those close to an object with a high mass or gravitational 'pull'. The theoretical dimensions of this will be addressed later.

In a previous article, it was asserted that the time delay factor between Earth and Mars could complicate any communication between these planets. This is because the time delay—as opposed to time dilation—factor means that certain legal procedures, such as cross-examination, could be significantly undermined[36] as outlined in the introduction to this article. In a subsequent article,[37] it was asserted that similar disruption owing to the time delay factor could impact more substantive legal matters, such as the promulgation of statutes. For example, where a statute comes into force that makes X illegal at midnight, UK time, would the same statute be said to be in force at this time for all UK subjects, even those who are at a distance of 20 light minutes away, when the UK clock strikes midnight? Could they avail themselves of an 'ignorance' defence?[38]

In such a scenario, the system of cross-examination would be undermined—perhaps even fatally—owing to the fact that the time between a question being asked and the answer being received would be significantly longer than in courtroom proceedings. The efficacy of the process would itself be called into question as any witness would have ample time to contemplate, if not the exact follow-up question, then at least the general direction of travel the questioning would be likely to take. Criminal convictions have been rendered unsafe in circumstances involving excessive judicial intervention which, it could be assumed, would not be as disruptive as the impact of time delay.[39] As Denning LJ reasoned:

> [T]he very gist of cross-examination lies in the unbroken sequence of question and answer... [E]xcessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question.[40]

[32] Expressed as 299,792,458 metres per second, 186,000 miles per second, or 671,000,000 miles per hour.
[33] Einstein, 'The Field Equations of Gravitation' (n 24).
[34] Ashby (n 27).
[35] Vessot (n 26).
[36] Simmonds, 'In Space, the Other Side Should Have the Right to Be Heard' (n 1) 32–33.
[37] Simmonds, 'Is the Speed of Law Faster than the Speed of Light?' (n 10).
[38] ibid.
[39] *Jones* (n 8) 65.
[40] ibid.

John Henry Wigmore wrote that cross-examination is 'the greatest legal engine ever invented for the discovery of truth'.[41] Without interactions in real time, cross-examination would lose much of its effect as a 'legal engine'. Other systems would have to be devised in the light of the time delay factor.

This article will move beyond considerations of time delay and will explore the legal implications of time dilation with frequent reference to the scenario as outlined.

A. LEGAL CONSIDERATIONS AS TO TIME GENERALLY

When considering time dilation, it is important to uncover how time is defined in law. The time of commencement of an Act of Parliament can be found in section 4 of the Interpretation Act 1978, which states that:

> An Act or provision of an Act comes into force—
> (a) where provision is made for it to come into force on a particular day, at the beginning of that day;
> (b) where no provision is made for its coming into force, at the beginning of the day on which the Act receives the Royal Assent.

Furthermore, with respect to time, the Act states that 'whenever an expression of time occurs in an Act, the time referred to shall, unless it is otherwise specifically stated, be held to be Greenwich mean time'.[42] Elsewhere, a 'year' is regarded in law as an 'Earth year', so to speak.[43] This was first established in statute by section 1 of the Calendar (New Style) Act 1750 which, whilst initially brought in to reorder the calendar as it then stood, is still in force today:

> In and throughout all his Majesty's dominions and countries in Europe, Asia, Africa, and America, belonging or subject to the Crown of Great Britain, the said supputation, according to which the year of our Lord beginneth on the twenty-fifth day of March, shall not be made use of from and after the last day of December one thousand seven hundred and fifty-one; and that the first day of January next following the said last day of December shall be reckoned, taken, deemed, and accounted to be the first of the year of our Lord one thousand seven hundred and fifty-two.

This can also be seen in more modern instruments relating to the financial year, as set out in section 4 of the Income Tax Act 2007, which runs from 6 April to 5 April in any given year—a period of (usually) 365 days.[44] Furthermore, the 'time' provisions in the Civil Procedure Rules 1998 ('CPR') are set out in terms of 'days' and 'clear days'.[45]

Consequently, a 'year' when referred to in statute appears, indisputably, to mean a year in Earth terms. Likewise, the term 'day' at common law has been held to mean a period of 24 hours.[46] In astronomical terms, then, these units of Earthly measurements and their

[41] John Henry Wigmore, *Evidence in Trials at Common Law*, vol 5 (rev edn, Little, Brown & Co 1974) 32.
[42] Interpretation Act 1978, s 9.
[43] See for example the Law Reform (Year and a Day Rule) Act 1996, s 1 (abolishing the 'year and a day rule').
[44] Income Tax Act 2007, s 4(3).
[45] CPR 2.8(3). See also CPR 2.9(1)(a), which is expressed in terms of 'calendar date[s]'.
[46] See *Cornfoot v Royal Exchange Assurance Corporation* [1904] 1 KB 40 (CA).

corresponding legal definitions represent the movement of the celestial body known as the Earth as it rotates on its axis and orbits the sun. Therefore, the movement of planet Earth is, for legal purposes, the supreme reference point for matters relating to date and time. Since the law on planet Earth is patently concerned, at least in the vast majority of cases, with Earthly activities, this should not be unexpected. This is very important when considering the law's 'frame of reference' as regards considerations of relativity.

B. Legal considerations as to age

Whilst outlining the likely legal definition of time, it is also important to consider the legal parameters of age and aging. The effects of time dilation on age are a very common theme within science fiction[47] and lie at the heart of the 'twin paradox'. These effects will be revisited within this article. Exploring them at an early juncture, therefore, seems prudent.

Under section 9(1) of the Family Law Reform Act 1969, a person will age one year upon 'the commencement of the relevant anniversary of the date of his birth'. This phrasing is used in a number of other instruments, including the Social Security Contributions and Benefits Act 1992,[48] the Age of Majority Act (Northern Ireland) 1969,[49] along with other, often since-repealed enactments relating to military service, such as the National Service (Armed Forces) Act 1939.[50] The common law rule on age prior to the Family Law Reform Act 1969 was that a person attained a given number of years on the day *preceding* the anniversary of their birth,[51] but section 9 abolished this.

How would this affect our astronauts? On one construction of section 9, it could be argued that 'the relevant anniversary' is one year relative in space time from the perspective of our astronauts. However, there is also a very strong argument that matters of Earthly business—such as salary payments, pension accrual, and retirement dates—would be operating on the basis of Earth's frame of reference, i.e. the 'relevant anniversary' being assessed in terms of Earth years rather than years from the perspective of our astronauts. This point will be discussed further when the article considers contractual matters, but it is clear that the meaning of 'relevant anniversary' within this context would be a litigious point.

As mentioned earlier, this article assumes that time is running at a rate of two Earth years to one year for our astronauts. Therefore, if one of our astronauts were 47 years old when they left Earth, 20 years could have elapsed on Earth, but our astronaut would have only aged ten years on the basis of their frame of reference. Assuming the retirement age to be 67,[52] the effect of this would be that, legally, our astronaut would be entitled to retire even though only ten years would have elapsed from their perspective. Biologically, physically, *and* chronologically (in terms of our astronaut's own onboard clock and calendar), our astronaut would be 57, yet they would be entitled to draw a state pension on the basis of Earth's frame of reference, since, on the basis of Earth years in law they would be 67 years old.

Under current law, however, there is the notion that 'age' could be assessed objectively as opposed to on a purely chronological basis. This can be seen in sentencing in respect

[47] The 2014 Christopher Nolan movie, 'Interstellar', being a prominent example, which will also be referred to later in respect of criminal sentences.
[48] Social Security Contributions and Benefits Act 1992, s 173.
[49] Age of Majority Act (Northern Ireland) 1969, s 5(1).
[50] National Service (Armed Forces) Act 1939, s 21(3).
[51] See *Re Shurey* [1918] 1 Ch 263 (Ch) 266 (Sargant J).
[52] Unlikely by the time that near-light speed travel is a possibility but convenient for the sake of this illustration.

of perjury or otherwise false unsworn evidence given at inquests under schedule 6, paragraph 8 of the Coroners and Justice Act 2009, where 'a person's age is to be taken to be that which it appears to the court to be after considering any available evidence'. This is also a routine matter in asylum cases,[53] where assessing age may be difficult in the absence of relevant paperwork.[54] It may be wise to adopt a similar approach in respect of our astronauts who would be affected by time dilation. The 'available evidence' in such an instance could include evidence of our astronauts' voyage, including any telemetry data from the onboard clocks and computing systems, that would reflect time as actually experienced by the individual concerned as opposed to time experienced on Earth. Such an approach could also be adopted in respect of time in other areas too for the purpose of certain legal disputes. Assessing the passage of time on the basis of its rate of passage on Earth without considering that time may be experienced at a slower rate for those, such as our astronauts, who are travelling close to the speed of light would be to import an unhelpful Earth-centric determination of what is meant in law by 'time' generally.

When assessing the age of people—and, as will be covered later, the age of certain objects—the approach outlined above may present a more sensible legal solution. An Earth-centric approach to time would lead to some undesirable results.

C. TIME DILATION AND THE PROMULGATION OF STATUTES

Having considered the legal definitions of time and aging, we will now investigate the impact of relativity on the promulgation and commencement of statutes. An Earthly example of a case concerning considerations of time displacement in respect of promulgation is ***R v Logan***.[55] British soldiers in Hong Kong were convicted of offences under the Army Act 1955, which was enacted in the UK. The commencement date of the Act was 1 January, 1957. It was found that the soldiers had committed the offences on 1 January, 1957 at 2:30 AM, Hong Kong time. The argument at trial was that the Act was not in force at the time when the 'offences' were committed since, according with the commencement date, it was not yet 1 January in the UK and, therefore, the Act had no effect in Hong Kong. This argument was rejected, with the Lord Chief Justice stating:

> If an Act is said to come into force on January 1, it comes into force on the day which is January 1 in the particular place where the Act has to be applied... [T]he fact that it became January 1 in Hong Kong a few hours before the clock would actually show January 1 in England does not make any difference. As the Act comes into force on January 1, 1957, in Hong Kong, it comes into force on the day which is January 1 in Hong Kong.[56]

How might this authority assist in resolving legal problems arising from time dilation? For the following example, imagine that there is a digital clock on Earth and an identical one on the spaceship carrying our astronauts. The spaceship leaves Earth on 1 January, 2105 and

[53] See UK Visas and Immigration, 'Assessing Age for Asylum Applicants: Caseworker Guidance' (UK Visas and Immigration, 17 June 2011) <https://www.gov.uk/government/publications/assessing-age-instruction/assessing-age-accessible> accessed 9 December 2023.
[54] See *R (B) v Merton LBC* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280.
[55] [1957] 2 QB 589 (CMAC).
[56] ibid 591 (Lord Goddard CJ).

quickly travels close to the speed of light so that one year for our astronauts is equivalent to two years on Earth. An Act comes into force on Earth on 1 January, 2108. From the frame of reference of our astronauts, it may be January, February, or March 2107 (allowing for the time it may have taken for them to accelerate safely to such a speed).

Taking the respective digital clocks on board the spaceship and back on Earth, the clock on Earth will show time passing at the rate experienced by those on Earth and the clock on the spacecraft will show time passing at the rate experienced by our astronauts. Owing to time dilation, the clock on the spacecraft will be running slower than the clock on Earth.

Remember again the Act of 1 January, 2108. This date will come to pass on Earth much quicker than it will for our astronauts. If time is running at the rate of two Earth years to one year for our astronauts, then, under special relativity, if our astronauts were to 'contravene' the 'Act' in 2107, they could be found guilty or liable (depending on what the Act concerns). Why? Because on the basis of the Earth-bound clock, 1 January, 2108 will have already passed on Earth and so the legislation will have come into force even though for our astronauts it is still, for argument's sake, July 2107.

The logic of ***R** v Logan* could provide a defence for our astronauts here. The soldiers in ***R** v Logan* were convicted as a result of being in a place where it was 1 January even though this date had not come to pass in the UK. For legislative purposes, they were 'in the future'—i.e. in a time where the Act *was* in effect. For our astronauts, their problem is not that they are in the future, but that they are in the past, and the past is, categorically, a time at which the relevant legislative enactment has not yet come into force. This case was effectively decided on the basis of the frame of reference of the soldiers rather than that of the statute. This line of reasoning may offer our astronauts a complete defence.

(i) Time as a 'Local' Concept

There is other authority to suggest that time would be regarded as a 'local' concept in such circumstances. *Curtis v March* was decided during a period when not everywhere in England observed Greenwich Mean Time.[57] One such place was Dorchester, where a trial took place at Greenwich Mean Time regardless of the fact that Dorchester did not observe this time zone. This led to the trial being overturned: since time was a 'local' concept, the trial should have taken place at Dorchester time. Taking the scenario of our astronauts who are experiencing time more slowly than people on Earth, would the logical conclusion from this be that legal matters relating to time—insofar as our astronauts would be affected—should be assumed to run on the basis of time as our astronauts are experiencing it?

Other cases have followed similar reasoning. In *Euronav NV v Repsol Trading SA*, in relation to a shipping dispute regarding the breach of a demurrage clause, it was determined that the breach should be assessed on the basis of the time zone where the breach arose and not the time zone where the contract itself was formulated.[58] In other words, the local frame of reference of the material facts in question was the relevant one.[59] In reaching this decision, Henshaw J quoted from *Carver on Charterparties*:[60]

[57] *Curtis v March* (1858) 3 H&N 866, 157 ER 719.
[58] *Euronav NV v Repsol Trading SA (The Maria)* [2021] EWHC 2565, [2022] 2 All ER (Comm) 65.
[59] Thanks to my student, Polina Myroschenko, for suggesting that this authority may be useful regarding time dilation in addition to the time delay context.
[60] Howard Bennett (ed), *Carver on Charterparties* (2nd edn, Sweet & Maxwell 2021) para 7-015.

> The charter may specify the particular time zone by which the relevant time is to be determined, e.g. GMT or UTC. If not, local mean time should be used...
>
> (v) The use of local time at the place of discharge gives rise to a single, clear and easily ascertainable date and time of completion of discharge. It tends to promote certainty and reduce the risk of confusion.
>
> (vi) It is inherent in a date based system that different time zones may apply to the events which define the start and end of the period, if they are in different countries...
>
> (viii) If it were appropriate to determine both dates using a single time zone, it would be more logical for that to be the time zone of the place of discharge. As already noted, the completion of discharge is a significant physical event, with a natural date, usually recorded in contemporaneous documents, and with several consequences under the contracts relating to the voyage.[61]

Instruction can also be taken from the making of payments in shipping contracts. For instance, the seventh edition of *Time Charters* states:

> It is suggested that, again in the absence of express agreement, the last moment for timely payment should be calculated by reference to the place where payment is to be made so that (for example) a payment to be made in New York and due on 30 April is timely if effected late in the afternoon that day in New York even if the ship is then in the Far East so that for her it is 1 May.[62]

Having considered these sources, it is apparent that treating time as a local concept for reasons of practicality has parallels with other legal areas. With this precedent in mind, it could strongly be argued that the frame of reference of our astronauts would be the correct one when determining whether statutes are in effect.

Other interesting situations arise when the problem of communicating new legislative enactments to our astronauts is considered. In the author's previous work, considerations were given to the argument that, owing to the time delay between Earth and Mars, it would be unjust to make someone on Mars liable for contravening an Earthly legislative enactment of which they knew nothing at the time of the alleged contravention. It was accepted that such circumstances might constitute 'justifiable' ignorance of the law.[63]

In circumstances involving time dilation, then, if a message carrying details of the new enactment is sent to our astronauts over the radio waves at the speed of light, the details of the new enactment may still bear its initial commencement date which, as previously outlined, may be in the future from within the frame of reference of our astronauts. An interesting legislative drafting exercise may need to be undertaken. One possible solution may be that legislation communicated via radio to our astronauts would have to be amended prior to communication so as to include an effective commencement date, i.e. one calculated to coincide with the date relative to our astronauts' frame of reference. Using the previous example

[61] *Euronav* (n 58) [35].
[62] Terence Coghlin and others, *Time Charters* (7th edn, Routledge 2014) para 16.22, as cited by Henshaw J: ibid.
[63] Simmonds, 'Is the Speed of Law Faster than the Speed of Light?' (n 10).

of an Act of Parliament that would come into force on January 1, 2108 on the basis of Earth's time, the same Act could have a specific section stating that the Act would not come into effect for our astronauts until this date arises on the basis of time as experienced by our astronauts. This is in contrast to the potentially troubling position of our astronauts being automatically bound by the Act as soon as it comes into effect on the basis of Earth time.

The timing of such a communication would have to be calculated precisely. The consequences of mis-timing such a communication would be undesirable: if the commencement date is too early, the crew may have committed criminal or other unlawful acts without knowing that they were prohibited. As will be discussed in the next section, this situation may draw parallels with arguments against retrospective legislation, where being prosecuted or being found liable under a law that was not in force at the time of the act or omission in question can, in many cases, seem offensive to commonly held notions of justice. Moreover, if the communication were to arrive too late, this might undermine the purpose of the legislation if its purpose is deterrence.

One possible solution to this would be the establishment of a new commencement device for legislation established in such circumstances. This would make plain that the enactment is to take effect as a fully promulgated law either on receipt by our astronauts or, if appropriate, within a set period of time thereafter as with other types of 'phased' legislation.[64]

(ii) Retrospective Legislation

One possible technique to preserve legislative legitimacy could be to frame any enactments retrospectively so that our astronauts would be bound irrespective of the commencement date. For example, the following section could be included in the Act:

> In respect of individuals and subjects experiencing time at a different rate owing to the chronological distortion arising from high-speed travel or proximity to celestial bodies exerting strong gravitational fields that result in the same, this Act will apply retrospectively.

However, such ex post facto lawmaking could prove to be a controversial move. Legislation with retrospective effect is defined in *Craies on Legislation* as that 'which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'.[65] Furthermore, Francis Bennion outlined the sentiment behind any opposition to such enactments: 'If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it.'[66]

Under English law, there is a general presumption against retrospectivity in legislation unless it can be shown that Parliament intended otherwise,[67] and the essential consideration arising in such circumstances is one of fairness to those falling afoul of any such provision.[68] This is not to say that all such provisions will be regarded as unfair per se, but that the greater

[64] For an example of this, see the (since largely repealed) Disability Discrimination Act 1995.
[65] Daniel Greenberg (ed), *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) ch 10, fn 151.
[66] Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2001) 70.
[67] *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 (CA) 724 (Staughton LJ).
[68] ibid.

the potential for unfairness, the stronger the presumption against retrospectivity.[69] As Lord Reid stated, however, 'this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it'.[70] One such example of an Act that did just this was the War Crimes Act 1991, which stated in section 1(1) that:

> [P]roceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence—
> (a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and
> (b) constituted a violation of the laws and customs of war.

As many would agree, there is a clear justification for the retrospectivity of this particular enactment.[71] Such legislation is only permissible when it is deemed to be in the national interest.[72] Whether it would be in the national interest to frame such legislation retrospectively as it applies to our astronauts would likely depend on the aims and objectives of the legislation in question. This course of action in its own right is prohibited in several other jurisdictions, such as the USA, where it is deemed unconstitutional.[73] It also finds disfavour with a raft of international instruments. For example, article 7(1) of the European Convention on Human Rights[74] ('ECHR') states that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This echoes article 11(2) of the Universal Declaration of Human Rights,[75] which states that '[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed'. Furthermore, article 15(1) of the International Covenant on Civil and Political Rights[76] states that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'.

Therefore, should any Parliamentary enactments seek to impose criminal sanctions retrospectively, grounds for challenge could arise under the Human Rights Act 1998, which incorporates article 7 of the ECHR through schedule 1. Moreover, although this article is

[69] ibid.
[70] *Sunshine Porcelain Potteries Pty Ltd v Nash* [1961] AC 927 (PC) [938] (Lord Reid).
[71] Other examples of—possibly more controversial—retrospective legislation include the Caravans (Standard Community Charge and Rating) Act 1991 and the Statutory Instruments (Production and Sale) Act 1996.
[72] See *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v UK* (1998) 25 EHRR 127.
[73] US Constitution, art 1, s 9, cl 3.3.
[74] Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').
[75] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).
[76] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

concerned primarily with English law, similar challenges could arise within the respective home jurisdictions of any of our astronauts should they be nationals of another state.

As previously discussed, any statutes passed on Earth would, owing to time dilation, have been passed in the future from the frame of reference of our astronauts. If our astronauts were to be bound by an Act that came into effect on 1 January, 2108 and, owing to time dilation, their onboard clock read 1 January, 2107, the legislation would be de facto retrospective from their point of view, at least if the Act were *passed* after 1 January, 2107.

A further consideration arises in respect of the meaning of relevant judicial statements and article 7 of the ECHR. Taking the latter, there is no guilt in respect of an act or omission that was not criminal *at the time* when it was committed. In our scenario, our astronauts' clock would show time in the past relative to Earth, whereas the criminalising enactment itself would be in the future by *their* frame of reference. One analogy that could be drawn is that of a draft Bill on the day—or even an hour or less—before it receives royal assent. It exists, it is written down, and it has been passed by both Houses of Parliament. But it is not yet law. It is, in effect, enduring a brief period of legislative limbo and has no legal effect in spite of the fact that it clearly exists. If the Bill had, by some fluke, an incorrect commencement date stamped on it at that time—a day earlier than the commencement date—this still would not make it law until it receives royal assent. As soon as it does, it becomes legitimate, as a legally binding force. Availability of the law is a key factor of legitimacy.[77] How legitimate could any law be that has been given royal assent but has then been hidden completely from public view? It is strongly arguable that such a law would not bind its subjects until it was publicly available and that, when it was made so available, it would be contrary to justice and fairness to enforce it from the date on which it received royal assent.

This would, in effect, be the situation that our astronauts face. Regardless of whether the legislation itself is retrospective or not, our astronauts would not be aware of it. This therefore underscores the need for a specialised legislative promulgation measure as set out previously.

Consideration would need to be given to the effective commencement dates of statutes and the likely impact that these dates would have on our astronauts, with particular care given not to infringe human rights.

D. Employment Law

Moving away from legislative matters, it is interesting to note the potential impact of time dilation on specific types of legal dispute, such as contractual matters and questions relating to criminal law. The computation of time for the purpose of the law was found—unsurprisingly—to be taken on the basis of commonly agreed Earthly measurements, as found in Section III.A of this article. This raises interesting questions as regards contractual matters. Recall the time dilation that arose in the hypothetical fact pattern, where one year within the frame of reference of our astronauts is the equivalent of two years on Earth. If our travellers were due to be paid their salary in monthly instalments, there could be 20 years' worth of wage payments to return home to, even though, within their frame of reference, our astronauts had only worked for ten years.

Let us assume that, in our example, our astronauts are employed by an Earth-based entity who is responsible for paying their salary. Although it is well established that a court will

[77] Simmonds, 'Is the Speed of Law Faster than the Speed of Light?' (n 10).

not inquire into the value of consideration in contractual matters,[78] this would not necessarily stop a resentful employer from weaving a provision into their contract with the astronauts that states that payment is to be made on a schedule relative to, and consummate with, the position of our astronauts in space time. This would have direct financial consequences should our astronauts have, say, a mortgage on Earth or other financial commitments: 20 Earth years would have passed whereas our astronauts would have only been paid for ten of these, which would likely result in mortgage defaults. If such clauses were to become standard practice, it is unlikely that many employees would be willing to work on such terms.

It is worth noting that, for the purpose of establishing minimum levels of payment under employment contracts, section 2(3)(a) of the National Minimum Wage Act 1998 gives a power to the Secretary of State to make regulations regarding 'circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated'. In our scenario, the question for the Secretary of State would be something akin to the following: Do our astronauts and those alongside them work on the basis of Earth hours or hours relative to their individual frame of reference which could, in fact, be half of the time that they are working from the point of view of Earth's frame of reference?

The Working Time Regulations 1998[79] prescribe that '"working time", in relation to a worker, means... any period during which he is working, at his employer's disposal and carrying out his activity or duties'.[80] Echoing previous findings, the units of time within the law are predictably and naturally stated in terms relative to time on Earth: '"day" means a period of 24 hours beginning at midnight'.[81] Maximum weekly working time is also set at 48 hours unless a worker opts out of this.[82] Moreover, a worker is entitled to a rest period of no less than 11 consecutive hours in each 24-hour period spent working[83] and, moreover, an uninterrupted rest period of no less than 24 hours within each seven-day period.[84]

The time dilation factor within our hypothetical fact pattern produces some interesting results against this backdrop. One hour within the frame of reference of our astronauts is two hours on Earth. Once our astronauts have worked a 24-hour week, in relative terms this would be the equivalent of a 48-hour week on Earth. Furthermore, their statutory rest period of 11 hours would be equivalent to 22 hours on Earth. If the hours and days in the Working Time Regulations 1998 are calculated on the basis of Earth time, with no accounting for relativity, in theory our astronauts would be entitled to half the amount of rest as their Earthly brethren. If our astronauts are experiencing time at a rate that is half that of Earth time, should their rest periods be assessed on the basis of Earth time, their rest time would be halved from their perspective.

For matters of such importance, it is likely that a purposive approach would be taken by the courts should a dispute arise under a statutory instrument like the Working Time Regulations 1998. As Lord Griffiths stated in the seminal House of Lords case of *Pepper v Hart*,[85] a 'purposive approach' is one that 'seeks to give effect to the true purpose of

[78] See the oft-cited example of *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 (HL) 114 (Lord Somervell).
[79] SI 1998/1833.
[80] ibid reg 2(1).
[81] ibid.
[82] ibid reg 4(1).
[83] ibid reg 10(1)
[84] ibid reg 11(1).
[85] [1993] AC 593 (HL).

legislation'.[86] The 'true purpose' of the legislation, in line with the EU Directive,[87] was to ensure that workers are given sufficient rest time outside of their working hours. It is likely that any such dispute arising under these Regulations would look to the time actually experienced by our astronauts for the purpose of rest as opposed to the Earth-based time. The latter approach would have the effect of depriving them of the right to adequate rest that Parliament sought to confer upon them. Alternatively, our astronauts could, like other professions, be excluded from the ambit of the Working Time Regulations 1998.[88]

Another alternative to this would be to include a provision in a contract between our astronauts and their Earth-based employers that could resemble the following:

> All references to time and date within this agreement as regards the payment of wages, rest-breaks, and related matters, are to be assumed to be on the basis of the time and date within the frame of reference of the employee, as displayed on the onboard computer, provided that the time and date displayed accurately reflect the impact of any temporal dilation experienced owing to the speed of travel and/or proximity to significant gravitational fields.

Should one of our astronaut's statutory rights be abrogated as a result of the time dilation factor, a purposive approach may be taken in order to give effect to the legislation. Moreover, litigation could be avoided with the addition of clauses establishing such rights by making plain that the agreement is to operate flexibly and with due regard to time dilation.

E. CONTRACTUAL WARRANTIES

Another interesting consideration arises in contract law. Taking the example of a component of a spacecraft, how would a manufacturer's warranty as to the quality or reliability of the component fare in circumstances that are affected by special relativity? Let us assume that there is a four-year manufacturer's warranty as to the quality or reliability of any given part of the spacecraft. For the sake of clarity, this term could be a condition or a warranty (or even an innominate term)[89]—the classification is not important.[90] The question is whether the stipulated time period means four Earth years or four years relative to the component's frame of reference in spacetime.

Complications arise from the first interpretation. If one year within the component's frame of reference is the equivalent of two Earth years, as previously calculated, and the component malfunctions after 2.5 years relative to its frame of reference, would it still be covered by the term? The term would have guaranteed the part for four years; however, five years on Earth would have lapsed within this period. Importantly, for our purposes, 2.5 years would have lapsed by the frame of reference of the subject matter of the contract. Therefore, would this term have ceased to apply?

[86] ibid 617.
[87] Directive (EU) 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.
[88] See Working Time Regulations 1998, reg 21.
[89] See *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA), in particular the dicta of Diplock LJ at 69–72.
[90] This article is concerned with how time dilation could impact any contractual term that is expressed with reference to a period of time rather than the specific consequences of breaching such a term and the available remedies.

If 'time' is exclusively calculated on the basis of Earth time, as discussed in Section III.A of this article, any contractual term would expire on the basis of Earth time and not on the basis of time as experienced from the perspective of our astronauts. To help us answer our question, it is instructive to observe how commercial agreements are interpreted by the courts. As Lord Hoffman pronounced, when attempting to ascertain the intentions of the parties to a contract, the court will consider 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'.[91] Therefore, building upon Lord Hoffmann's statement, it would appear that, in our example, one party is saying to another, 'I promise that this part will work for X number of years. If it does not, you are entitled to damages (or to treat the contract as repudiated if the term is to be regarded as a condition).'

In our example of a spacecraft component, the person giving any warranty or making a representation capable of attracting binding contractual force is effectively saying: 'I promise that this component and certain of its mechanisms will work for at least 4 years.' For the purposes of mechanical wear and tear, or other engineering considerations, a warranty or representation is presumably given on the basis that the component in question is both fit for purpose and durable enough to withstand reasonable usage over a given period of time. The time period specified, then, should be the period of time within the component's frame of reference. If it were not, then the warranty or representation made would be good for only half the stated time: in our example, Earth time runs at half the speed that time does within the actual component's frame of reference. Surely such a representation as to durability is made on the basis of time experienced by the component in question? Per Lord Hoffman's statement,[92] the effects of time dilation could be said to be within what a reasonable person would assume to have been the background knowledge of both parties—particularly where a contract relates to a spacecraft component.

One might also draw upon the officious bystander test as it was expressed in *Shirlaw v Southern Foundries (1926) Ltd* by MacKinnon LJ on terms implied 'in fact':

> For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said: 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'[93]

It is arguable that, if the officious bystander asked both parties in our case whether the four-year period meant four years of the component's existence relative to its frame of reference, rather than two years of its existence relative to its frame of reference, the answer would be 'of course'. The representation given by the offeror is that the component has been engineered to a standard whereby it can withstand the stress of its intended use for a period of

[91] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 [14].
[92] ibid.
[93] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA) 227.

four years. If the offeror intended it only to cover a period of two years in actual fact, they should have stated this.[94]

If the term is not implied, the purpose of the warranty would be defeated—it would effectively become meaningless in the face of its intended purpose between the parties. In *JN Hipwell & Son v Szurek*[95] it was held that a 'plain and obvious gap... inconsistent with the objective intentions of the parties'[96] necessitated the implication of a term to ensure that the agreement in question did not lack 'commercial or practical coherence' and it was thus implied 'as a matter of business necessity'.[97] Such an approach would also give 'business efficacy' to the contract, i.e. the implication is so obvious that it is needed to make the arrangement work.[98] As Sir Thomas Bingham MR stated in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*, the implication of a term by the courts in such circumstances is an 'extraordinary power' and not one to be used wantonly.[99]

Such an implication as to time periods would be necessary in contracts between our astronauts and parties on Earth. As the Court of Appeal recently held, '[t]he business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment'.[100] Without the implication of such a term regarding the correct frame of reference, any such agreement may lack commercial or practical coherence: four years in this type of commercial context surely means four 'actual' years rather than years running at, in essence, twice their normal speed. Therefore, in line with such reasoning, it could be said that it is 'necessary' to imply such a term and that the court would be justified in exercising this 'extraordinary' power.

Deciding matters in this way, however, could bring disharmony as regards other contractual matters, such as those concerning employment contracts. To recap, if wages were to be paid according to our astronauts' frame of reference in this scenario, substantially they would only receive half of what could be expected if the wages were paid on the basis of Earth time. From the genesis of such contractual arrangements, it could be said that both parties would be acting at cross-purposes and that no *consensus ad idem* would be possible if the contractual subject matter were to be so grossly distorted or certain terms rendered unworkable. Rather than leaving such matters to be decided on the basis of the common law, statutory intervention would be the most sensible course of action to counterbalance these issues.[101]

F. CRIME

If a crime is committed by one of our astronauts during their voyage, some interesting questions arise. On what date did the crime occur? Was it the date within our astronauts' frame of reference or that of Earth?

The most relevant authority we have for such matters is *R v Logan*. This is authority for the proposition that, relating to statutory law at least, the time from which the statute is

[94] The question may then arise as to whether the two-year period meant two years by Earth's frame of reference or that of the component in question. The simplest resolution to this conundrum would surely be to assume that the parties meant the frame of reference of the component, otherwise counter-arguments could run and run 'Hall of Mirrors' style, ad infinitum.

[95] [2018] EWCA Civ 674, [2018] L & TR 15.

[96] ibid [32]–[33] (Hildyard J).

[97] ibid [38].

[98] See *The Moorcock* (1889) 14 PD 64 (CA) 68 (Bowen LJ).

[99] *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) 481.

[100] *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560 [51] (Carr LJ).

[101] Perhaps the Contracts (Time Dilation) Act 2107?

said to take effect is the time on the statute itself, rather than the time when an offence was committed.[102] Other potentially useful precedent was *Curtis v March*. The date on which the crime was said to take place in *R v Logan* was that relative to those convicted of it; in other words, the time when the offences were deemed to have been committed was the time when the offence took place and not the time as it actually stood in the place where the enactment came into effect. *Curtis* suggested that time may be a 'local' concept when determining disputes;[103] in other words, the effective time for the operation of the law should be the time as followed in the specific place in question. On this basis, it could be argued that the time and date of occurrence for any crime—or a civil transgression, for that matter—would be that within the local frame of reference. In the example of our astronauts, the time and date on which any such transgression was perpetrated would be the time and date as observed by our astronauts, as opposed to the time and date as observed on Earth.

Given the time dilation factor, one issue that could impact proceedings is that of 'unreasonable delay'.[104] Indeed, article 6(1) of the ECHR guarantees 'a fair and public hearing within a reasonable time'. It has even been recognised that such a delay need not have prejudiced the defendant's right to a fair hearing[105] and that delay alone can be a sufficient ground for a permanent stay of proceedings. Per the case law in this area, there is also a desire to avoid an accused waiting too long in suspense regarding their fate in these matters.[106] Indeed, John Jackson and Jenny Johnstone have written that this is the main justification for the rule.[107] They have further written that:

> As soon as a person is charged with a criminal offence, a number of constraints are imposed on the defendant which may be major (such as being held in custody and losing one's family and one's job) or more minor. In addition, the uncertainty as to the resolution of the charge can cause harmful psychological effects on both the defendant and victims and witnesses.[108]

In our scenario, the second part of this statement is of particular relevance. The mere factor of time delay owing to radio communication being limited to the speed of light will cause problems as regards the hearing of disputes in deep space.[109] One example is that cross-examination will be rendered extremely difficult or impossible, as previously discussed. This could make the hearing of substantive legal disputes troublesome in deep space.

The charging of our astronauts for a crime committed during the actual mission would be difficult owing to such factors and, indeed, such matters might indeed have to be resolved *in situ* as a matter of convenience. However, where a crime is alleged to have taken place before the astronaut left Earth—for example, where evidence is discovered by law enforcement after the alleged perpetrator has departed—the resulting investigations would be

[102] *R v Logan* (n 55).
[103] *Curtis* (n 57).
[104] *Bell v DPP* [1985] AC 937 (PC).
[105] *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, 509.
[106] *Attorney-General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 [94]: 'The jurisprudence of the European Court tells us that this part of the article seeks to ensure that the fate of those who are accused of crime is determined within a reasonable time. They should not be held too long in a state of uncertainty, with all the consequences for themselves and their families that this involves.' (Lord Hope).
[107] John Jackson and Jenny Johnstone, 'The Reasonable Time Requirement: An Independent and Meaningful Right?' [2005] Criminal Law Review 3, 9.
[108] ibid.
[109] Simmonds, 'In Space, the Other Side Should Have the Right to Be Heard' (n 1) 32.

conducted by Earth-based authorities who, in our example, would be experiencing time at a rate faster than our astronauts, including the suspect. Time dilation would present challenges here and the *in situ* resolution would not offer full redress owing to the fact that principal investigatory matters are being conducted on Earth.

The specific relevance of 'unreasonable delay' in the context of criminal investigations is that, notwithstanding the time that it might take for our accused astronaut to complete their voyage and return home, the time dilation factor could mean that many more years would have elapsed on Earth than for our accused astronaut. This passage of time could be particularly troublesome as regards expediency and fairness, even though our astronaut has themselves not experienced as significant a passage of time. One particularly important justification for trials being held within a reasonable time was put forward by Lord Steyn: '[I]t is recognised that lapse of time may result in the loss of exculpatory evidence or in a deterioration in the quality of evidence generally'.[110]

If our astronaut's accusers were on Earth, then the quality of evidence would indeed deteriorate with the passage of time, in some circumstances possibly rendering a criminal trial next to impossible.[111] If their accusers were with them on the spacecraft itself, this may not present as much of an issue since time, within their frame of reference, would have moved more slowly and the evidential value of eyewitness memory might not be as significantly decreased. Furthermore, and importantly:

> If vital evidence has as a matter of fact been lost to the defendant whether occasioned by the fault of the police or not, the issue is whether that disadvantage can be accommodated at his trial so as to ensure that his trial is fair.[112]

The burden of proving that injustice will arise is on the defendant who has to show, on the balance of probabilities, that 'owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court'.[113] The longer the delay, the more likely it would be that evidence would be lost, which might result in an unfair trial. Moreover, as alluded to, the fallibility and limitations of human memory should always be considered in such circumstances.[114]

Underlying all of the above considerations is the central question of which clock would be the relevant one in any Earth-based investigations or in respect of incidents on board the spacecraft itself. The most fair and rational way of determining any outcomes in such matters would, in line with *R v Logan*, be to assess any case on the basis of 'local' time—any investigations on Earth would run in accordance with the local frame of reference, whereas onboard transgressions would be dealt with according to the astronaut's frame of reference. Another suggestion may simply be to apply the law as it stands on our astronaut's return or, more accurately, as it stood at the first moment when they could be said to have reasonable notice of it (such as when details of the law were received by them over radio waves).

This, of course, does not solve the problem of what would potentially be regarded as retrospective or ex post facto legislation, as has been previously outlined. Any such

[110] *Mills v HM Advocate* [2002] UKPC D2, [2004] 1 AC 441, 449.
[111] See Rebecca K Helm, 'Evaluating Witness Testimony: Juror Knowledge, False Memory, and the Utility of Evidence-Based Directions' (2021) 25 The International Journal of Evidence and Proof 264.
[112] *Clay v South Cambridgeshire Justices* [2014] EWHC 321 (Admin), [2015] RTR 1 [47] (Pitchford LJ).
[113] *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 (CA) 644 (Lord Lane CJ).
[114] Helm (n 111) 266, 268.

prosecutions would still have to be conducted in a manner that is sensitive to the human rights implications of trying an individual on the basis of an offence that was not part of an enactment at the time of its commission, in addition to allowing for the degradation of evidence.

G. PUNISHMENT

Some very interesting considerations come into play when we consider custodial sentences. To appreciate fully the impact of these factors on sentencing, a slight shift in context is required away from the example of near-light speed travel, as was established in the hypothetical fact pattern earlier. Consider the scenario in the 2014 movie, 'Interstellar', wherein the protagonist spends time on a planet close to a black hole, the effect of which radically slows down the rate of time to the point where one hour on the planet's surface is equivalent to seven years on Earth. This is in line with Einstein's theory of general relativity.[115] Consequently, the protagonist in the movie has the highly distressing experience of witnessing his family age at a vastly increased rate which he observes through video messages received from Earth.

Suppose that the circumstances were such that the protagonist had been sentenced to a number of years—or even just one month—in prison on such a planet. Taking 730 as the number of hours in a given month and multiplying this by a factor of seven would result in the passage of 5110 years on Earth. As the prisoner's home planet would be radically different—or perhaps even non-existent—by the end of this one-month period, consideration has to be given to whether or not any custodial sentence in such circumstances would be regarded as unduly harsh in the vast majority of cases.

A detention of just one day—24 Earth hours—would result in the passage of 168 years on our prisoner's home planet. By this time, any immediate family members would likely be long dead. Moreover, such family members, particularly any dependents—or those who would likely become dependents within this time—would also be adversely affected to a significant degree. This aspect of detention was held to engage article 8 of the ECHR (the right to respect for private and family life). Hughes LJ stated the following in *R v Petherick*:

> [T]he sentencing of a defendant who has a family inevitably engages not only her own article 8 right to family life but also that of her family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for whom a male or female defendant is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment interferes with, and often severely, the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially heart rending effects on children or other dependants, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed.[116]

Furthermore, Hughes LJ went on to articulate the correct test to apply in such matters:

[115] Einstein, 'The Field Equations of Gravitation' (n 24). See also Kip Thorne, *The Science of Interstellar* (WW Norton & Company 2014) 57.
[116] [2012] EWCA Crim 2214, [2013] 1 WLR 1102 [17] (Hughes LJ).

> [T]he right approach in all article 8 cases is to ask these questions: Is there an interference with family life? Is it in accordance with law and in pursuit of a legitimate aim within article 8.2? Is the interference proportionate given the balance between the various factors?[117]

In the light of this, custodial sentences would have to be exercised with a very high level of caution. It is indeed questionable whether any period of detention or custody in such circumstances would be considered proportionate save for in cases of the utmost severity.

Moreover, as regards the convict themselves, any such detention would be likely to result in a significant amount of psychological distress owing to, inter alia, the potential levels of inter-generational bereavement in extreme circumstances, in addition to the prisoner's knowledge that they would be returning to a planet that would be unrecognisable from the one they had left. Any length of detention, therefore, could be considered a form of torture or 'inhuman or degrading treatment or punishment' in line with article 3 of the ECHR.

H. LIMITATION PERIODS

Limitation periods within certain classes of litigation are also worthy of consideration. The European Court of Human Rights ('ECtHR') has stated:

> [L]imitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.[118]

Limitation periods would be problematic because they are inherently time-sensitive provisions. Let us suppose that one of our astronauts took a product with them satisfying the definition in section 1 of the Consumer Protection Act 1987, i.e. any type of 'good'. The product causes damage to the spacecraft as a result of an electrical fire (owing to a defect per section 2). This would give rise to liability on the part of the producer of the product. The limitation period would be three years from the date of knowledge.[119] Crucially, no claim could be brought more than ten years after the defective product had been put into circulation.[120]

The same question arises—would this limitation period run at the rate of Earth years or years relative to the frame of reference of our astronauts? Let us suppose that the time dilation effect means that our astronauts are experiencing time at a rate of one year to three years on Earth.[121] If our astronauts waited any time between 3.5 to four years before sending a communication instigating legal action, the limitation period would have expired within the Earthly frame of reference. 3.5 years for our astronauts would be 10.5 years on the basis of

[117] ibid [18].
[118] *Oleksandr Volkov v Ukraine* (2013) 57 EHRR 1 [137].
[119] Limitation Act 1980, s 11A(4)(b).
[120] ibid s 11A(3).
[121] Notwithstanding the time delay effect of communicating with Earth-based legal representatives, which could be significant in and of its own right.

Earth time. This would be even more problematic with shorter time limits, such as the limitation period of three years for damage under the Consumer Protection Act 1987.[122]

In our example, then, if our astronauts were experiencing one year relative to three on Earth, the limitation period by Earth's frame of reference would have expired after one year of time as experienced by our astronauts. Other limitation periods include those for simple contracts, the limit of which is six years.[123] Rent arrears must also be recovered six years from the date that any rent became due.[124] Practical considerations dictate that arrangements in relation to property, where legal complications would be likely to arise from time to time, would have to be dealt with almost exclusively by an Earth-based agent.

The discretion vested in the courts for matters relating to limitation periods must be addressed here. Under section 33 of the Limitation Act 1980, courts retain a discretion to exclude time limits in respect of personal injury or death. Under section 33(3)(a), the court must have regard to 'all the circumstances of the case and in particular to... the length of, and the reasons for, the delay on the part of the plaintiff'.[125] The reasons for the delay would be the effects of general and special relativity, both in respect of the time dilation factor (owing to the speed at which our astronauts are travelling) and the time delay factor (based on the amount of time that instructions to commence any claim would take to reach Earth from our astronauts at the speed of light).

While it is likely that legal complications could arise under a tenancy agreement between one of our astronauts in the position of a landlord and an Earth-based tenant, or in respect of product liability or personal injury should it involve an Earth-based party, legal complications would also be likely to arise in matters of inheritance. Under section 1 of the Inheritance (Provision for Family and Dependants) Act 1975, an application can be made against the estate of a deceased individual by their spouse or civil partner[126] (current or, in some circumstances, former[127]), their child,[128] and a limited range of other individuals.[129] If one of our astronauts wished to make an application to contest a will or testamentary document under this Act, they would need to bring a claim within six months of the representation being made out.[130]

Of assistance would be the court's discretion to extend time limits under the 1976 Inheritance Practice Note.[131] If one year is the equivalent of two Earth years within our astronauts' frame of reference, notwithstanding the aforementioned time delay factor in communications, an application to the court—which must be requested expressly under paragraph 3—could be particularly late in arriving on the basis of an Earthly frame of reference. It is worth noting that extensions have been granted two months after the expiration of the six-month period[132] and sometimes up to five months after this period.[133] But what if such a delay in the case of our astronauts amounted to two or five years owing to time dilation? Would this be fair to the other beneficiaries involved? Surely such equitable considerations would form part

[122] Limitation Act 1980, s 11A(4).
[123] ibid s 5.
[124] ibid s 19.
[125] It should be noted that this does not apply to the ten-year time limit under the Consumer Protection Act 1987.
[126] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(a).
[127] ibid s 1(1)(b).
[128] ibid s 1(1)(c).
[129] ibid ss 1(1)(d)–(e).
[130] ibid s 4.
[131] *Practice Note (Inheritance: Family Provision)* [1976] 1 WLR 418 [3].
[132] *Re Estate of Collier-White* [2022] EWHC 3029 (Ch), [2023] 1 P & CR DG20.
[133] *Kaur v Bolina* [2021] EWHC 2894 (Fam), [2022] 1 FLR 1192.

of the decision-making process. In cases of extreme time dilation, this would not necessarily be resolved in a way deemed favourable to our astronauts.

Time dilation, then, would have a particularly significant impact on the operation of limitation periods across a range of areas. One suggestion here would be for Parliament proactively to amend the Limitation Act 1980 so as to ensure that those experiencing time dilation are not precluded from enforcing their legal rights.

I. COMMMUNICATIONS SENT AT THE SPEED OF LIGHT

Some of the aforementioned effects could be offset by the fact that communications regarding the details of specific laws or those pertinent to imagined legal transactions would travel at the speed of light. Therefore, they would ultimately catch up with our travellers. However, communications sent will still take a long time to reach the intended recipients.

At a speed of 161,325.3 miles per second, our astronauts will travel approximately five trillion miles and the speed of light is around six trillion miles per year.[134] According to Einstein's theory of special relativity, the speed of light is a universal constant.[135] This means that, on the basis of current theory, nothing can move faster than the speed of light, including radio waves and lasers. Let us say that after one year relative to Earth time, a radio or laser communication is sent to our astronauts. In one year, this communication will have travelled six trillion miles, at which point our astronauts will have travelled 9.408 trillion miles. In another year, the communication will have travelled approximately 12 trillion miles and our astronauts will have travelled approximately 14 trillion miles. In yet another year, it will have travelled approximately 18 trillion miles and our astronauts will have travelled 19 trillion miles, and so on. For the sake of argument, we can say that any communications sent more than one year after our astronauts' departure will take roughly three years to catch up with our astronauts, even at the speed of light. Proceedings would still be subject to the effects of time dilation in respect of the two reference frames—that of Earth and that of our astronauts.

On this note, it is worth considering that 'real time' legal disputes between our astronauts and Earth would be very difficult to adjudicate.[136] Relatively straightforward aspects of law, procedure, and practice would be disrupted almost beyond practical utility by the combined factors of time delay and time dilation in our scenario. A situation could feasibly arise whereby the very law that one of our astronauts were being investigated for transgressing could be repealed by the time their answer arrived on Earth following the question being asked. It could even be repealed by the time the question reached them.

IV. TOWARDS A *FORUM CONVENIENS TEMPORIS*

The theoretical impact of time dilation upon legal proceedings is clearly significant. In a broad sense, any decisions regarding the appropriate temporal frame of reference would potentially stand to be resolved in a similar manner to how a court determines the *forum conveniens* in conflict of laws matters. In such matters, where the nature of a dispute potentially falls within two or more jurisdictions, the court may rely on various instruments to determine the

[134] And breaking Einstein's second postulate of special relativity in the process.
[135] Einstein, 'On the Electrodynamics of Moving Bodies' (n 6).
[136] Simmonds, 'In Space, the Other Side Should Have the Right to Be Heard' (n 1) 32–33.

appropriate jurisdiction—known as the *forum conveniens*.[137] Numerous factors are considered in making the appropriate determination, such as the defendant's connection to the jurisdictions in question or the place where, in the case of tort, the damage itself arose.[138] Given the range of permutations arising from the impact of time dilation, the most effective way to resolve such disputes would be for similar instruments to be enacted so as to enable similar hearings. Rather than determining the appropriate jurisdiction—the *forum conveniens*—the judicial question would be aimed at determining the *forum conveniens temporis*[139] (namely, which party's frame of reference should actually apply in the context of the dispute).

Where disputes arise between the astronauts themselves, this could be more difficult to resolve as regards which of Earth's laws actually apply and, importantly, when new laws made on Earth actually take effect within the astronauts' frames of reference. One possible solution would be to vest the commander of the mission with absolute authority, extending already existing rules, such as the ones that the USA enacted in the era of the Space Shuttle.[140] The crucial difference between the scenarios these rules were designed to cover and ours is that, in our scenario, there would be no means to appeal to a higher authority or 'simply' to return to Earth in the event of legal proceedings arising thereon. Instantaneous radio communications would not be possible in our scenario. In all probability, an analogous return to the rules that existed during days gone by of sea-faring, whereby crews would be under the exclusive jurisdiction of the ship's captain during their time at sea, may be likely.[141]

V. Conclusion

The legal implications of this study are that time dilation clearly presents a multitude of challenges for the law. Firstly, regarding legislative enactments, problems arise in respect of their commencement dates—by whose frame of reference would this be calculated? This has wide-ranging implications. As demonstrated in this article, time in a legal sense is presently calculated on a purely 'Earth-centric' basis, with all significant temporal references being made in terms of time as calculated on Earth. Legally, then, the commencement date and time for an enactment are based on the date and time of its promulgation on Earth. In turn, the implication is that an enactment passed on Earth would bind its subjects on the basis of the

[137] See for example Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L251/1; Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L319/9.

[138] See Case 21/76 *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR 1735.

[139] Or '*forum temporis*' or other such Latin designation as deemed appropriate.

[140] 14 CFR § 1214.700 (1981) (USA).

[141] See *Lamb v Burnett* (1831) 1 Cr & J 291, 148 ER 1430. See also DeSaussure (n 2). On the general matter of the rule of law in our scenario, it could be posited that the temporal and spatial dislocation would place our astronauts in the realm of a 'state of nature', as envisaged in the judgment of Justice Foster in Lon L Fuller's seminal work, 'The Case of the Speluncean Explorers' (1949) 62 Harvard Law Review 616, 620–26. This was a fictional account of five cave explorers who become trapped underground and resort to killing and cannibalising one of their party in order to survive. The article sets out five judgments which probe and consider the facts from differing legal perspectives. In Justice Foster's view, the defendants in question were, by virtue of their physical separation from the laws enacted within their jurisdiction—indeed, separated by an impenetrable 'curtain of rock'—removed from the legal jurisdiction entirely in the light of the surrounding circumstances. He advocated a 'purposive' approach to the facts of that case as may be the correct one in our scenario. Justice Foster concluded that the convictions of the men for murder should be set aside as to convict would not be within the purpose of the law in respect of being a deterrence. In our scenario, there are some instances where the object of certain legal instruments would be completely undermined, such as with the law relating to rest breaks under the Working Time Regulations 1998, in addition to the other considerations presented.

commencement date in question and be unconcerned with the frame of reference of those in a different temporal envelope (such as the astronauts in our hypothetical fact pattern).

The realm of conventional contractual transactions, which embody Earthly units of time as a matter of course, would be deeply impacted by time dilation. As noted in this article, if a contract refers to a period of four years, on the basis of the law as it stands, this would prima facie be calculated with reference to Earthly units of time. Additionally, similar implications arise in respect of contracts between individuals occupying two separate frames of reference. The implication for criminal sentencing is likewise drastic in situations involving close proximity to strong gravitational fields.

Regarding the overall implications of time dilation, then, it is clear that Parliament would have to intervene ex ante to counter some of the problems that could arise. Existing instruments would also require updates as to which frame of reference applies in given situations, although it is clear that not every possible issue may be contemplated. In such matters, a system of *forum conveniens temporis* would necessarily need to be invoked so as to ascertain the appropriate reference frame.[142]

One initial solution could be the promulgation of 'horologically sensitive reception statutes' which, in the style of those enacted by former colonies on gaining independence,[143] would implement the jurisdictionally relevant Earthly laws but provide that time periods within such laws are to be calculated with reference to relative time, as opposed to Earth time.

Ultimately, the implications of time dilation are wide and far-reaching, and consideration would need to be given by Parliament to amending and introducing new instruments to counter any possible injustice effectively.

[142] It is noted that other, broader implications may arise with respect to time dilation. Taking the previously outlined situation as regards a planet in close proximity to a black hole, it is interesting to consider what the broader implications would be for an entire city or civilisation on such a planet and how this would impact inter-planetary legal relations. The same implications would arise in respect of a starship with a city-sized population travelling at close to the speed of light. By what legal measure would time be calculated in these scenarios? If it is assumed that such entities still fall within the jurisdiction of a country on Earth—as a 'colony', for example—then, the issue of legitimacy within any such legislation could be dealt with by means of staggered commencement dates within the Earthly enactments as they are received by the entities experiencing time dilation. However, any such legislation would need to be specific as regards the definition of any time periods within. A 'day', for example, would most likely be defined in an interpretation schedule as 'a day relative to the receiving entities'. Assuming that such cities or civilisations have at least some power to make laws—at least of a limited nature (in the style of by-laws, for example)—any such enabling or parent Act conferring this power could also operate in a similar manner as regards the enactment of any such instruments under its auspices. A section to the effect of 'references to time and date within any bylaw made in accordance with section X of this Act, shall be presumed to mean the time and date relative to the lawmaker' could be included. This could be in addition to an amendment to the Interpretation Act 1978 requiring that references to time and date be made in a relative sense.

[143] See for example the Adoption of Laws Act 1843 (SA) (6 & 7 Vict No 2). All states of the USA famously introduced reception statutes following independence from Britain.

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Protecting Climate Migrants Through Regional Policies: Time to Move Beyond International Treaty Law

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ABSTRACT

The accelerated pace of climate change has brought significant attention to its impact on human migration, encompassing both involuntary displacement and voluntary relocation, as an adaptation and mitigation strategy. As cross-border movement increases due to climate change, the imperative for a robust framework to recognise and protect the rights and interests of climate migrants grows. This framework should not only facilitate migrants' entry but should also ensure their effective integration into their new host society. Such policies stand to benefit not only the migrants and their home state but also the host state. The existing literature has proposed three main suggestions towards this end: extending the protective framework of the Refugee Convention to accommodate climate migrants; utilising the existing human rights framework to protect them; or creating regional policies to facilitate their effective resettlement. The former two suggestions are currently improbable due to an absence of political will, an excessively narrow scope for protection within the existing legal frameworks, and a lack of detailed policies. Consequently, regional cooperation emerges as the most viable path for the long term. Fortunately, substantial progress has already been made in this area. This article aims to assess critically the efficacy of some well-known regional frameworks and policies in safeguarding the rights of climate migrants while ensuring that climate migration ultimately yields mutual benefits for the migrants, their home state, and the host state.

Keywords: climate migrants, regional cooperation, refugee law, human rights, integration

I. INTRODUCTION

Environmental factors have long been one of the drivers of human migration.[1] As the pace of climate change accelerates, both states and individuals are increasingly recognising the utility of migration as an adaptation and mitigation strategy.[2] This necessitates a reassessment of existing laws and policy frameworks governing the rights and interests of people on the move,

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[1] Elizabeth Marino, 'The Long History of Environmental Migration: Assessing Vulnerability Construction and Obstacles to Successful Relocation in Shishmaref, Alaska' (2012) 22 Global Environmental Change 374.

[2] Jon Barnett and Michael Webber, 'Accommodating Migration to Promote Adaptation to Climate Change' (2010) World Bank Policy Research Working Paper 5270/2010 <https://ssrn.com/abstract=1589284> accessed 4 April 2024.

as the existing framework is becoming increasingly obsolete. Various proposals have emerged, advocating for either a revision of existing frameworks or the establishment of a new sui generis framework tailored to address the concerns of climate migrants. Some have proposed that the Convention Relating to the Status of Refugees ('Refugee Convention')[3] be amended to include climate change as one of the grounds for the grant of refugee status.[4] Others have advocated for reliance on the existing human rights law framework to protect climate migrants.[5] Refuting the efficacy of these two suggestions, some scholars have proposed the creation of specialised frameworks based on cooperation amongst states to fulfil the needs of climate migrants. While some have suggested the creation of specialised multilateral frameworks,[6] others have supported a more regional approach for protecting climate migrants.[7] This article focuses on the latter proposal, aiming to examine the efficacy and use of regional frameworks in the context of international climate change migration.[8]

For the purposes of this article, the term 'climate migrants' will be used to refer to individuals relocating due to climate change, rather than 'climate refugees'. Climate migrants are people who leave their home state (either voluntarily or involuntarily) due to its uninhabitable state resulting from extreme climate change. This semantic decision is based on three factors. Firstly, the movement induced by climate change is the outcome of several social, economic, and cultural factors along with climatic considerations.[9] Secondly, the term 'refugee' has a fixed legal meaning under the Refugee Convention, wherein refugee status is granted only on the basis of certain recognised grounds.[10] Thirdly, states have shown reluctance to classify climate migrants as refugees to avoid the obligations of non-refoulement

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ('Refugee Convention').

[4] LW Marshall, 'Toward a New Definition of "Refugee": Is the 1951 Convention Out of Date?' (2011) 37 European Journal of Trauma and Emergency Surgery 61; Kujo Elias McDave and Palmer Prince Dagadu, 'Reconsidering the Status and Rights of Climate Refugees Under International Law' (2023) 6 International Journal of Law and Society 168; Steven A Kolmes, Sara K Kolmes and Pei-Hsuan Lin, 'What Lies Ahead: How Aid for Climate Refugees Must Focus on Human Rights and Human Health' (2022) 64 Environment: Science and Policy for Sustainable Development 7.

[5] Dimitra Manou and Anja Mihr, 'Climate Change, Migration and Human Rights' in Dimitra Manou and others (eds), *Climate Change, Migration and Human Rights: Law and Policy Perspectives* (Routledge 2017) 7; Fernanda de Salles Cavedon-Capdeville and Diogo Andreola Serraglio, 'Vidas em Movimento: Os Sistemas de Proteção dos Direitos Humanos como Espaços de Justiça para os Migrantes Climáticos' (2022) 19 Revista de Direito Internacional 104.

[6] Sumudu Atapattu, 'Climate Change and Displacement: Protecting "Climate Refugees" Within a Framework of Justice and Human Rights' (2020) 11 Journal of Human Rights and the Environment 86; Donald A Brown, 'Climate Change Refugees: Law, Human Rights and Ethics' in Laura Westra, Satvinder Juss and Tullio Scovazzi (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge 2015) 68.

[7] Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 Harvard Environmental Law Review 349; Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches' (PPLA/2012/01, UNHCR 2012) <https://www.unhcr.org/fr-fr/en/media/no-24-protecting-people-crossing-borders-context-climate-change-normative-gaps-and-possible> accessed 4 April 2024.

[8] See Maria Waldinger, 'The Effects of Climate Change on Internal and International Migration: Implications for Developing Countries' (2015) Centre for Climate Change Economics and Policy Working Paper 217, 2 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2015/05/Working-Paper-192-Waldinger.pdf> accessed 4 April 2024, wherein the author addresses, respectively, internal (within the borders of a country) and international (across the borders of a country) climate migration. This article will focus on the latter concept.

[9] Diane C Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change' (2002) 23 Population and Environment 465.

[10] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2013) 19; Guy S Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 36.

under international refugee law.[11] By adopting 'climate migrants' for the reasons outlined above, we can bypass unnecessary semantic discussion and instead redirect the global focus towards the policies necessary for protecting those who are displaced.[12]

In aiming to bolster the case for specialised regional frameworks to protect the rights of climate migrants in a mutually beneficial way, this article will assess the extent to which regional policies are better equipped to meet these objectives compared to multilateral legal instruments. With this objective in mind, it will examine the policies adopted by some Caribbean nations and African states, as regional groups, to enhance the ease of movement and settlement for climate migrants. The research is confined to these two regions due to their well-established, detailed policy frameworks and their previous success in offering some level of protection to climate migrants. To that end, Section II will lay the foundations of this analysis by exploring the concept of migration as a climate change mitigation and adaptation strategy. Following this, Section III will evaluate the two main alternative proposals for protection of climate migrants, namely expanding the scope of the term 'refugee' under the Refugee Convention and relying on the existing human rights framework, highlighting the limitations inherent in these proposals. Section IV will then briefly explain why the development of regional frameworks is preferable to creating a new multilateral framework, followed by an overview of some selected regional frameworks aimed at regulating and protecting climate migrants in a group of Caribbean and African states. Finally, Section V will provide a critical assessment of these regional frameworks, identifying their shortcomings and offering suggestions for their improvement.

Before proceeding with the main analysis, it is first helpful to consider what drives climate migration, what it entails, and the forms it takes, which will be addressed in Section II below.

II. THE 'WHAT' AND THE 'HOW' OF CLIMATE-INDUCED MIGRATION

Migration can be an effective strategy for adapting to, and mitigating, climate change.[13] However, the drivers behind these strategies are multifaceted and influenced by various factors. Climate change can affect the economic opportunities available in the climate migrant's home state due to increasing population pressure on depleted natural resources. This increasing pressure not only affects livelihood opportunities but also leads to heightened internal conflicts for control over natural resources.[14] In such situations, families may decide to send their

[11] See Issa Ibrahim Berchin and others, 'Climate Change and Forced Migrations: An Effort Towards Recognizing Climate Refugees' (2017) 84 Geoforum 147, wherein the authors conclude that there is currently a lack of state initiative to address issues related to climate refugees. Therefore, refraining from using the term 'climate refugees' is prudent to ensure that states would be willing actively to protect the rights of affected individuals without being concerned about political matters.

[12] See Walter Kälin, 'The Climate Change – Displacement Nexus' (*Brookings*, 16 July 2008) <https://www.brookings.edu/articles/the-climate-change-displacement-nexus/> accessed 4 April 2024, wherein the author argues that we should not be distracted by semantics, as they have little relevance to the practical effects of climate change on the lives of migrants. Rather, states and policymakers should prioritise these practical effects.

[13] Government Office for Science, 'Foresight: Migration and Global Environmental Change: Final Project Report' (2011) 11–12 <https://assets.publishing.service.gov.uk/media/5a74b18840f0b61df4777b6c/11-1116-migration-and-global-environmental-change.pdf> accessed 4 April 2024; Barnett and Webber (n 2) 5–10; Sabine L Perch-Nielsen, Michèle B Bättig and Dieter Imboden, 'Exploring the Link Between Climate Change and Migration' (2008) 91 Climate Change 375.

[14] Jonathan S Blake, Aaron Clark-Ginsberg and Jay Balagna, 'Addressing Climate Migration: A Review of National Policy Approaches' (*RAND*, 7 December 2021) 5–6 <https://www.rand.org/pubs/perspectives/PEA1085-1.html> accessed 4 April 2024.

working members to states with better economic opportunities and more habitable conditions.[15] This relocation of working members to another state can lead to the generation of remittances back home, aiding family members who remain behind and contributing to the home state's ability to develop climate change resilience.[16] Family members receiving remittances utilise the funds for meeting their basic consumption needs, diversify income streams to reduce their dependence on environmental factors for sustenance, and also invest in infrastructural developments to mitigate the effects of climate change.[17] Moreover, by relocating from the home state, migrants alleviate the pressure on their home state's dwindling pool of natural resources.[18] This can also be done on a circular basis, wherein the working members of a family migrate only during particular seasons when the adverse effects of climate change become unbearable and threaten the family's livelihood. Temporary migration of this nature helps to alleviate the strain on the family's limited resources and allows working family members to earn money which they can remit back home.[19] This practice alleviates the pressure on home states to ensure the sustenance of their citizens, a challenging task exacerbated by increased strain on the state's natural resources. Furthermore, given the temporary nature of such migration, host states might be more inclined to permit the free entry of migrants, as it would not unduly strain their resources.

Climate change can also lead to conditions that render the home state completely uninhabitable. In such circumstances, individuals may be compelled to relocate permanently to states offering more favourable climatic conditions and economic opportunities.[20] This kind of migration is typically observed during periods of severe changes in rainfall patterns, increased frequency of droughts and floods, and the consequent decline in the availability of basic sustenance needs, such as food and potable water.[21] By relocating to a state with more favourable climatic conditions, people both secure better livelihoods for themselves[22] and also

[15] Robert McLeman, 'International Migration and Climate Adaptation in an Era of Hardening Borders' (2019) 9 Nature Climate Change 911, 912.

[16] Kanta Kumari Rigaud and others, 'Groundswell: Preparing for Internal Climate Migration' (World Bank Group 2018) 28–29 <https://openknowledge.worldbank.org/entities/publication/2be91c76-d023-5809-9c94-d41b71c25635> accessed 4 April 2024. See generally Cécile Couharde, Junior Davis and Rémi Generoso, 'Do Remittances Reduce Vulnerability to Climate Variability in West African Countries? Evidence from Panel Vector Autoregression' (Discussion Paper 2, UNCTAD, September 2011) 15–17; Hajer Habib, 'Climate Change, Macroeconomic Sensitivity and the Response of Remittances to the North African Countries: A Panel VAR Analyse' (2022) 29 International Journal of Sustainable Development and World Ecology 401, wherein the authors demonstrate the positive impact of remittances on the home state's GDP, which can enhance its ability to adapt to climate change.

[17] Issah Justice Musah-Surugu and others, 'Migrants' Remittances: A Complementary Source of Financing Adaptation to Climate Change at the Local Level in Ghana' (2018) 10 International Journal of Climate Change Strategies and Management 178.

[18] Brian Opeskin and Therese MacDermott, 'Resources, Population and Migration in the Pacific: Connecting Islands and Rim' (2009) 50 Asia Pacific Viewpoint 353. However, cf Himani Upadhyay and Divya Mohan, *Migration to Adapt? Contesting Dominant Narratives of Migration and Climate Change* (UNESCO 2014), wherein the authors challenge the perception of migration as a climate adaptation strategy and the positive contribution of remittances. Nevertheless, migration can help to alleviate the pressure on local natural resources, and effective migration and integration policies can help to save families from poverty.

[19] Robert A McLeman and Lori M Hunter, 'Migration in the Context of Vulnerability and Adaptation to Climate Change: Insights from Analogues' (2010) 1 Wiley Interdisciplinary Reviews: Climate Change 450, 451; Richard Black and others, 'Migration as Adaptation' (2011) 478 Nature 447.

[20] Sanjula Weerasinghe, 'What We Know About Climate Change and Migration' (Centre for Migration Studies, February 2021) 1 <https://cmsny.org/wp-content/uploads/2021/02/What-We-Know-About-Climate-Change-and-Migration-Final.pdf> accessed 4 April 2024.

[21] International Organization for Migration, *World Migration Report 2022* (PUB2021/032/L, IOM 2021) 53, according to which weather-related disasters have caused the migration of 30 million people globally, surpassing migration due to conflict and violence.

[22] Black and others (n 19).

alleviate the pressures on the depleting natural resources of the home state. This increases the likelihood of rejuvenating their home state in the long run and eventually make it habitable once more. This form of movement of people out of their home state due to climate change, be it temporary or permanent, is collectively referred to in this article as 'migration as an adaptation and mitigation strategy'.

In this context, it is crucial to recognise that climate migration is not solely caused by climate change; it is also based on other socio-political-economic factors. Climate change enhances the pressure of the pre-existing socio-political-economic problems, like unemployment and political strife, thereby speeding up the migration process.[23] For example, the reduction in water levels in local water bodies has accelerated migration from Eastern Africa, which was already witnessing increased migration due to years of conflict and violence.[24] Sometimes, climate change itself leads to the creation of socio-political-economic problems, which subsequently drive population movements. For example, the scarcity of certain crucial natural resources in the Central Sahel area in Africa due to climate change has sparked violent conflicts over control of the limited natural resources, resulting in large-scale migration.[25] This ambiguity surrounding the exact motivation for migrants, whether climatic or socio-political-economic, can lead to states rejecting climate migrants at the border.[26]

Different climate change scenarios can also significantly affect the urgency and temporal scope of migration. Concerning urgency, climate-induced migration can be categorised as either voluntary or involuntary migration. Voluntary migration typically occurs in situations of slow-onset climate change, where the quality of life gradually deteriorates. In such instances, individuals can often freely decide where to relocate and whether to migrate with just the working members of the family or the entire family unit. By contrast, involuntary migration is prompted by cases of extreme weather-induced disasters or when the local ecosystem collapses due to prolonged climate change.[27] In these cases, migration becomes not a choice but a necessity for survival. Both forms of migration can occur across and within borders.[28] However, this article will focus on cross-border migration.

Although there is no rigid pattern, the duration for which affected individuals choose to migrate away from their home state can depend on whether the migration is induced by slow- or sudden-onset climate change. Sudden-onset events, such as hurricanes and floods, are often associated with distress migration before, during, or after the event. Such events may lead to either temporary or permanent relocation, depending on the level of disruption experienced by the migrant due to the event. Conversely, slow-onset changes entail gradual and deteriorating changes in living conditions, such as land degradation and increased occurrences of droughts. These gradual changes typically prompt temporary migration at first, which may be seasonal, although permanent migration may be considered if conditions continue to deteriorate.[29] In either case, the decision to migrate is often made at the household level, which might entail either the full relocation of the entire family or the migration of one or more

[23] Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 16–17.
[24] International Organization for Migration, *World Migration Report 2022* (n 21) 71.
[25] ibid 68.
[26] McLeman (n 15) 914, highlighting the 'hardening of borders' caused by anti-immigrant sentiments in many countries, which suggests that international migration will become more restricted in the future.
[27] It should be noted that the 'voluntariness' of climate migration exists on a spectrum from totally voluntary to totally forced migration: see Graeme Hugo, 'Environmental Concerns and International Migration' (1996) 30 International Migration Review 105, 106–8.
[28] Jane McAdam and Elizabeth Ferris, 'Planned Relocation in the Context of Climate Change: Unpacking the Legal and Conceptual Issues' (2015) 4 Cambridge Journal of International and Comparative Law 137, 159.
[29] McLeman and Hunter (n 19) 451–53.

working individuals, on a seasonal or more permanent basis, to secure income for their families through remittances sent back home.[30] This article will primarily address what will be referred to as 'long-term migration', which involves individuals permanently relocating with or without their families in another state, either because their home state has become uninhabitable or to alleviate the pressure on its natural resources. As a point of distinction, 'short-term migration' will be employed to address migrants who are temporarily displaced by a specific event, with the intention to return home after the calamity subsides and the necessary infrastructure is restored. This distinction holds significant implications for policy formulation, which will be further examined in Section IV.

Climate migration not only impacts the migrants themselves but also the host states. Concerns have been raised that climate migration can exacerbate financial strains on the host state, potentially causing conflicts within it.[31] However, such negative perceptions are contrary to the conflict-free experiences of host communities receiving large groups of climate migrants.[32] Host countries have in fact been able to integrate these migrants economically in the long run.[33] High-skilled and low-skilled migrants are known to contribute to the economy of the host state.[34] Host states, by accepting and integrating migrants, can capitalise on the skills of climate migrants for achieving the climate change transition goals of the host states.[35] Similarly, host states can integrate unskilled migrants by absorbing them into sectors where there are labour shortages internally.[36] Thus, migration as an adaptation and mitigation strategy fosters a symbiotic relationship between the migrant, home state, and the host state. In this dynamic, the migrant receives increased economic opportunities in the host state, while the home state benefits from remittances and decreased pressure on its resources. Simultaneously, the host state's economy is enhanced due to the contribution of the migrant. Facilitating this requires a pre-emptive formulation of policies for the easy entry and effective integration of climate migrants, which will be further explored in Section V. While such policies pose financial challenges for host states, it will be suggested that transnational financing avenues can help to address this issue.

Having explored the multifaceted nature of climate migration and its ramifications for migrants, their home state, and the host state, Section III will proceed with an assessment of the existing multilateral frameworks for human migration. Recalling the distinction between voluntary and involuntary climate-induced migration, it could be argued that climate change-induced movement often involves a high degree of involuntariness, which suggests that climate migrants should be protected under the Refugee Convention.[37] Others have argued for

[30] ibid; Government Office for Science (n 13) 84.

[31] Michael Brzoska and Christiane Fröhlich, 'Climate Change, Migration and Violent Conflict: Vulnerabilities, Pathways and Adaptation Strategies' (2016) 5 Migration and Development 190, 201–4.

[32] Breno Braga and Diana Elliot, 'The Effect of Climate Migrants on the Financial Well-being of Receiving Communities' (Urban Institute, February 2023) 17 <https://www.urban.org/sites/default/files/2023-02/The%20Effect%20of%20Climate%20Migrants%20on%20the%20Financial%20Well-Being%20of%20Receiving%20Communities.pdf> accessed 4 April 2024; Valentina Bosetti, Cristina Cattaneo and Giovanni Peri, 'Should They Stay or Should They Go? Climate Migrants and Local Conflicts' (2021) 21 Journal of Economic Geography 619, 642–43.

[33] Braga and Elliot (n 32) 17.

[34] Jonathan Woetzel and others, 'People on the Move: Global Migration's Impact and Opportunity' (McKinsey Global Institute, December 2016) 61, wherein the authors highlight that migrants contribute to the host state's economy. Although the data pertains to migrants in general, it should equally apply to climate migrants.

[35] Nathaniel Mason and others, 'Migration for Climate Action: How Labour Mobility Can Help the Green Transition' (Working Paper, ODI, May 2022) 17 <https://cdn.odi.org/media/documents/ODI_Working_paper-Migration_for_Climate_Action_cZyCpbB.pdf> accessed 4 April 2024.

[36] Barnett and Webber (n 2) 31.

[37] See n 4.

reliance on the human rights framework to avoid the refugee-migrant debate altogether.[38] The following section will examine these nuances and assess the efficacy of these international legal frameworks in protecting the rights of long-term migrants.

III. Refugee Convention or Human Rights: Unworkable Alternatives

The migration of a person marks the beginning of a struggle for the migrant. Post-migration, migrants may face economic deterioration, conflict with the existing population in the host state, and human rights violations.[39] Migrants who do not qualify for refugee status are not covered by the principle of non-refoulement under the Refugee Convention, which prohibits the host state from returning a refugee to the home state when the refugee is at risk of irreparable harm upon return.[40] If climate migrants are denied admission to the host state and are forced to return to their home state, they are faced with having no legal recourse available to them.

Recognising the absence of adequate legal safeguards for climate migrants, two primary proposals have been made to protect the rights and interests of climate migrants. The two proposed alternatives have been either to add climate change as a ground for the allocation of refugee status under the Refugee Convention or to recognise the rights of climate migrants under the existing human rights framework. A combination of the two alternatives has also been proposed.[41] This section will examine these proposals and assess their efficacy in protecting the rights of climate migrants, starting with the Refugee Convention.

A. Expanding the Scope of the Refugee Convention: An Unviable Proposition

Article 1(2) of the Refugee Convention, coupled with the 1967 Protocol to the Convention, provides a three-factor test for classifying an individual as a refugee. These three factors are the following: (i) a well-founded fear of persecution on the basis of one's race, religion, nationality, membership of a particular social group or political opinion; (ii) that the migrant is situated outside the country of their nationality or outside the country of habitual residence (in case of persons not having any nationality); (iii) and that they are unable or unwilling (owing to the fear of persecution) to return to their home country.[42] Among these factors, the criterion requiring a well-founded fear of persecution effectively serves as the main

[38] See n 6.

[39] Shahed Mustafa, Darryl Newport and Clare Rigg, 'Post-Cyclonic Migration in Coastal Areas: An Assessment of Who, Where, Why Migrates, and Barriers to Migration' (2023) 92 International Journal of Disaster Risk Reduction 103726.

[40] Refugee Convention (n 3) art 33; Office of the United Nations Commissioner for Human Rights, 'The Principle of Non-Refoulement Under International Human Rights Law' (5 July 2018) <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHuman-RightsLaw.pdf> accessed 4 April 2024.

[41] Shaindl Keshen and Steven Lazickas, 'Non Refoulement: A Human Rights Perspective on Environmental Migration from Small Island Developing States' (2022) 74 Journal of International Affairs 21; Eliza Pan, 'Reimagining the Climate Migration Paradigm: Bridging Conceptual Barriers to Climate Migration Responses' (2020) 50 Environmental Law 1173, wherein the authors argue for using the human rights framework to bolster the rights provided to refugees under the Refugee Convention and to extend the expanded protection to climate migrants.

[42] Refugee Convention (n 3) art 1.

legal threshold for obtaining refugee status. The remaining two factors are essentially questions of fact.[43]

In the context of climate migrants, there is widespread agreement that the recognised grounds for the fear of persecution are too narrow to include climate migrants.[44] Therefore, a proposal has been made to amend article 1(2) of the Convention to include imminent threat from severe climate change and disasters as a ground for granting refugee status.[45] It is argued that such an amendment would ensure better protection to climate migrants under the principle of non-refoulement.[46] However, the high threshold established by the judiciary for the granting of refugee status, coupled with the absence of favourable political will, renders the Refugee Convention an unfeasible option for protecting climate migrants.

The 'fear of persecution' criterion is qualified by the requirement that the fear should be well-founded. This means that, after establishing the presence of a fear of persecution, the applicant must demonstrate that this fear is objectively reasonable based on the surrounding facts and circumstances.[47] This objective standard has been upheld by national courts of various jurisdictions.[48] Applied to the case of climate migrants, the migrant would necessarily need to establish that climate change qualifies as 'persecution' under the Refugee Convention and that there is an objectively reasonable possibility of such 'persecution' upon return to the home state. This latter point might arguably be supported by scientific reports and data demonstrating the uninhabitable conditions in the home state. However, the challenge remains of establishing that climate change constitutes 'persecution' in the first place.

'Persecution' is not defined within the Refugee Convention. Academically and judicially, it is understood as an oppressive or injurious act related to the violation of certain human rights,[49] which can include socio-economic rights.[50] This violation should be severe and serious, either due to the inherent nature of the act or repeated occurrences.[51] For example, constantly changing ecological factors can affect the right to life and health of residents.[52]

Among the more severe examples could arguably be the situation faced by citizens of sinking island states. They may be subjected to fatal, extreme weather events, and the changing topology of the island can also deprive the residents of basic sustenance and cultural rights, as

[43] Paul Weis, 'The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis' (UNHCR 1990) 7 <https://www.unhcr.org/in/media/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul-weis> accessed 4 April 2024.

[44] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 43–46; Matthew Scott, 'Climate Refugees and the 1951 Convention' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 348.

[45] See n 4.

[46] Refugee Convention (n 3) art 33.

[47] Weis (n 43) 7–8; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 54.

[48] See for example *INS v Cardoza-Fonseca*, 480 US 421 (1987); *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958 (HL); *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680 (CA FCA); *R v Governor of Pentonville Prison, ex p Fernandez* [1971] 1 WLR 987 (HL).

[49] Weis (n 43) 8–9.

[50] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 43; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) ch 3.

[51] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 43.

[52] *Sacchi v Argentina Communication* No 104/2019, UN Doc CRC/C/88/D/104/2019 (CRC, Decision of 8 October 2021), wherein the Committee on the Rights of the Child recognised the threat to children's right of life posed by environmental changes, although ultimately finding the petitioners' communication inadmissible due to their failure to exhaust domestic remedies.

livelihoods, culture, and the local ecosystem are intricately linked.[53] Moreover, frequent overwashes due to rising sea levels can lead to a scarcity of potable fresh water.[54] Nevertheless, even if these factors might initially qualify as a human rights violation that takes the form of 'persecution', the term also implies the presence of a 'persecutor'. In this context, it would be challenging to attribute the negative effects of climate change to the host state governments, unless they deliberately develop policies that exacerbate the adverse impact on the population.[55]

However, even if the impact of climate change were to qualify as 'persecution', article 1(2) of the Refugee Convention also requires such persecution to be based on 'race, religion, nationality, membership of a particular social group or political opinion'. This introduces a discriminatory element, meaning that climate migrants seeking refugee status must effectively demonstrate that the fear of climate change disproportionately affects them compared to other residents of their home state. However, this can be challenging because the impact of climate change is largely indiscriminate.[56] In practice, the applicant must show that the home state has refused to aid affected individuals based on some discriminatory intent.[57] This strict interpretation tends to exclude both voluntary and involuntary climate migrants, since such cases would likely be rare and difficult to prove. Consequently, the Refugee Convention currently offers limited protection to climate migrants.

In response to this limitation of the Refugee Convention, proposals were made by the Government of the Maldives in 2006 and a Bangladeshi minister in 2009 to amend the Convention to include climate change as a ground of persecution.[58] Several academics have also proposed a similar amendment to the Convention.[59] However, there appears to be an absence of the requisite political will to make these amendments. As noted by Jane McAdam, the mere fact that there are millions of displaced persons despite 148 ratifications to the Refugee Convention is testament to the absence of the requisite political will to amend the Convention.[60]

One point to consider is that expanding the scope of the Refugee Convention or even framing a new convention for climate migrants would likely be a very time-consuming

[53] Stephen P Leatherman and Nancy Beller-Simms, 'Sea-Level Rise and Small Island States: An Overview' (1997) 24 Journal of Coastal Research 1, 3–4; *Billy v Australia* Communication No 3624/2019, UN Doc CCPR/C/135/D/3624/2019 (HRC, Views of 18 September 2023), wherein the United Nations Human Rights Committee recognised the threat of unrestrained climate change on the cultural rights of affected communities.

[54] John Connell, 'Losing Ground? Tuvalu, the Greenhouse Effect and the Garbage Can' (2003) 44 Asia Pacific Viewpoint 89, 91.

[55] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 45. However, cf Jessica B Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 New York University Environmental Law Journal 480, 502–21, where it is argued that government action (or inaction) contributing to the degradation of the environment can qualify as 'persecution'.

[56] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 44, 46; *RRT Case No 0907346* [2009] RRTA 1168 (Aus RRT, 10 December 2009); *Mohammed Motahir Ali v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 887 (Aus FCA); *Refugee Appeal No 72186/2000* (NZ RSAA, 10 August 2000); *Refugee Appeal Nos 72189/2000, 72190/2000, 72191/2000, 72192/2000, 72193/2000, 72194/2000 and 72195/2000* (NZ RSAA, 17 August 2000); *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 (Aus HC).

[57] *Refugee Appeal No 76374* (NZ RSAA, 28 October 2009); *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083 [249].

[58] Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50 Environment: Science and Policy for Sustainable Development 8, 11; Harriet Grant, James Randerson and John Vidal, 'UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister' *The Guardian* (Dhaka, 4 December 2009) <https://www.theguardian.com/environment/2009/nov/30/rich-west-climate-change> accessed 4 April 2024.

[59] See n 4.

[60] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 199.

process.[61] This time could be better utilised for creating practical solutions to accommodate the concerns of climate migrants.[62] Lastly, there is also the issue that climate migration is a multi-causal action, as noted in Section II of this article. This can cause practical difficulties when seeking to distinguish climate migrants who relocate due to climatic factors from those who move primarily due to socio-economic-political factors.[63] McAdam even argues that refugee status should not be narrowed down to the factor of climate change, since climate migrants should be offered protection irrespective of the nature of the threat faced back home.[64] However, although states might be responsive to displacements caused by sudden disasters, treaty proposals aimed at providing protection to migrants affected by slow-onset changes are unlikely to gain political traction.[65] While we can hope that states might eventually recognise the severity of threats posed by climate change and accordingly offer a higher level of protection to climate migrants, expecting them not to consider climate change as the primary factor in granting refugee status under the Refugee Convention might be overly optimistic. Therefore, the proposal to amend the Convention to include climate migrants within its scope seems unlikely at present.

Having ruled out the Refugee Convention as a viable option for protecting the rights and interests of climate migrants, the next subsection will explore the effectiveness of the existing human rights framework as an alternative.

B. HUMAN RIGHTS TO THE RESCUE: A NARROW-SCOPED REMEDY

Reliance on the existing human rights framework has been presented as a promising alternative to protecting the interests of climate migrants.[66] The utility of the human rights framework lies in its universality, which applies irrespective of nationality, race, sex, or affiliation.[67] Failing to meet the criteria for protection under the Refugee Convention, climate migrants might instead qualify for protection under the concept of 'complementary protection'.[68] This concept refers to a range of situations under which states offer protection to individuals who are ineligible for refugee status under the Refugee Convention, yet face a significant threat to their human rights, warranting refuge in the host state.[69] It is primarily based on the right to life (recognised under article 3 of the Universal Declaration of Human Rights[70] and article 6 of the International Covenant on Civil and Political Rights ('ICCPR')[71]) and the right against

[61] Dina Ionesco, 'Let's Talk About Climate Migrants, Not Climate Refugees' (*Sustainable Development Goals*, 6 June 2019) <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/> accessed 4 April 2024.

[62] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 189–90.

[63] Marshall (n 4) 64.

[64] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 197.

[65] ibid 194.

[66] Jane McAdam and others, 'International Law and Sea-Level Rise: Forced Migration and Human Rights' (FNI Report 1/2016, Fridtjof Nansen Institute 2016) 43–45 <https://www.fni.no/publications/international-law-and-sea-level-rise-forced-migration-and-human-rights> accessed 4 April 2024; Anja Mihr, 'Climate Justice, Migration and Human Rights' in Manou and others (n 5) 49–54.

[67] McAdam and others (n 66) 43.

[68] See generally Giovanni Sciaccaluga, *International Law and the Protection of 'Climate Refugees'* (Palgrave Macmillan 2020) ch 11.

[69] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 2–3.

[70] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 3.

[71] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR') art 6(1).

cruel, inhuman, or degrading treatment (recognised under article 7 of the ICCPR).[72] In the context of the ICCPR, article 2 provides that state parties undertake to safeguard the rights recognised in the Covenant, which has been interpreted as encompassing a duty not to remove individuals from their territory if doing so creates 'substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant'.[73]

While the broader scope of complementary protection might theoretically protect climate migrants from being sent back to their home states, meeting the conditions for protection would still be challenging. Establishing the violation of a right under the ICCPR requires the applicant to establish an actual or imminent risk of a specific and sufficiently severe harm that personally affects the individual.[74] In practice, this requirement aligns more closely with the circumstances of individuals displaced by sudden environmental disasters than with those induced to migrate by slow-onset climate change.[75]

The *Teitiota* opinion[76] serves as a compelling illustration of these challenges. In this case, a Kiribati national sought refugee status in New Zealand, contending that the living conditions on his home island of Tawara had become untenable due to rising sea levels, resulting in a scarcity of potable water, overcrowding, and increased violence due to land disputes. With his refugee status rejected by New Zealand authorities, the applicant applied to the Human Rights Committee to consider whether sending him back to Kiribati violated his right to life under article 6 of the ICCPR. However, the Committee concluded that the applicant fell short of the high threshold for providing substantial grounds to establish the existence of a real risk of irreparable harm. Firstly, there was no general conflict in Kiribati, and the applicant had only referred to sporadic incidents of violence resulting from land disputes, none of which had involved him directly.[77] Secondly, while the scarcity of potable water, rationed out by local authorities, was recognised as a hardship, there was no indication that the supply was inaccessible, insufficient, or unsafe.[78] Thirdly, although the conditions made it difficult to grow crops, it was not impossible.[79] Lastly, the risk to life due to rising sea levels was not deemed sufficiently imminent. Projections indicated that Kiribati would not be submerged for the next 10–15 years, during which time the state could take affirmative measures to protect or relocate its population.[80] Consequently, although state authorities needed to take into account the ongoing developments in Kiribati in future cases before them, the Committee did not find the applicant's rights under article 6 of the ICCPR to have been violated in this instance.[81]

The Committee's opinion provides valuable insights on the extent to which climate migrants can rely on the right to life to seek protection from being returned home. Firstly, it is notable that the Committee explicitly acknowledged that both slow-onset and sudden-onset processes might qualify as a violation of rights under articles 6 and 7 of the ICCPR, at least

[72] ibid art 7.
[73] *Teitiota v New Zealand* Communication No 2728/2016, UN Doc CCPR/C/127/D/2728/2016 (HRC, Views of 23 September 2020) [9.3], referring to UNHRC, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add,13, para 12.
[74] *Aalbersberg v Netherlands Communication* No 1440/2005, UN Doc CCPR/C/87/D/1440/2005 (HRC, Views of 14 August 2006) [6.3].
[75] McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 84–87.
[76] *Teitiota* (n 73).
[77] ibid [9.7].
[78] ibid [9.8].
[79] ibid [9.9].
[80] ibid [9.12].
[81] ibid [9.14].

'without robust national and international efforts'.[82] However, in this particular case, the fact that there were 10–15 years before the threat would likely materialise was deemed insufficient in the light of the adaptive measures undertaken by the Kiribati Government. In practice, this would seem effectively to exclude most cases of voluntary migration due to slow-onset changes as an adaptation and mitigation strategy, either because the threat to rights under the ICCPR are too distant in time or because the host state is making efforts to adapt. Secondly, the threshold employed by the Committee for finding a violation of article 6 seems unreasonably high. As one of the dissenting members noted, the deteriorating health situation and, especially, the considerable difficulties in accessing potable water of sufficient quality should be sufficient to reach the threshold of risk. The threshold should not be set so high as to require a complete lack of potable water or that deaths have already become very frequent.[83] Lastly, the Committee appears to have relied too heavily on the adaptive policies of the Kiribati Government in a way that seems to emphasise intent over actual results. The second dissenter highlighted that, although there was a national sanitation policy in place, it had yet to be implemented and it should therefore fall to the state party to demonstrate that the family had access to potable water.[84] In sum, the Committee's opinion illustrates the challenging predicament of climate migrants, whose protection not only depends on severe human rights violations caused by climate change but also that the home state practically abandons them.

To conclude, climate migrants face significant challenges in pursuing an international protection claim under human rights law. However, although the *Teitiota* opinion is not binding, the growing awareness of the negative effects of climate change and the two dissenting opinions might pave the way for more inclusive protection in the future. Nevertheless, scepticism regarding the effectiveness of complementary protection for climate migrants appears justified at present.[85] The limited protective scope of the human rights framework highlights the necessity for a specialised regime dedicated to safeguarding the rights of climate migrants, particularly those seeking long-term relocation to enhance adaptability for themselves and their families in response to the changing environment. This alternative will be explored in the next section.

IV. Bilateral and Regional Cooperation: Overcoming Legal Hurdles Through Policy

To overcome the limitations outlined above concerning the Refugee Convention and the human rights framework, proposals have been made for the creation of new sui generis frameworks tailored to the rights and interests of climate migrants. While some advocate for the creation of a new multilateral framework[86] based on principles of climate justice and responsibility sharing, others propose to rely on bilateral and regional agreements to promote the

[82] ibid [9.11].
[83] ibid annex I [3]–[5].
[84] ibid annex II [5].
[85] This scepticism is also shared by other authors. See for example Sciaccaluga (n 68) 167–77; McAdam, *Climate Change, Forced Migration, and International Law* (n 23) 98.
[86] Docherty and Giannini (n 7) 391; John Podesta, 'The Climate Crisis, Migration, and Refugees' (*Brookings*, 25 July 2019) <https://www.brookings.edu/articles/the-climate-crisis-migration-and-refugees/> accessed 4 April 2024.

free movement of climate migrants.[87] Between these two proposals, the latter seems to be more persuasive for several reasons.

Firstly, the impact of climate change and the consequent enhanced scale of human movement is rapidly increasing, demanding urgent attention and resolution.[88] As rightly noted by McAdam, prioritising the formation of a new multilateral framework would divert attention away from protecting climate migrants at present.[89] Secondly, the impact of climate change varies across regions,[90] necessitating tailored strategies and policies to address the specific concerns of each region. Thirdly, there is a notable lack of political will to address the concerns of climate migrants, a crucial element for the success of any multilateral instrument. The deployment of military forces by some states to prevent the entry of climate migrants,[91] alongside negative political rhetoric to subvert the migrants' cause,[92] illustrates the absence of political concern for the welfare of climate migrants. Rather, some states prioritise defending their sovereign right to regulate entry, placing this right above any humanitarian concern for the welfare of migrants.[93]

Hence, bilateral and regional policies seem to be the most viable path forward given the current circumstances. Sections IV.B to IV.C and V will focus only on some selected regional initiatives that address the concerns of climate migrants, specifically focusing on some key instruments and policies from the Caribbean and African regions. The aim is to offer a detailed analysis of best practices for addressing the concerns and interests of climate migrants, providing valuable guidelines for future adoption. First, however, Section IV.A will briefly examine the viability of land purchase agreements as another alternative bilateral solution.

[87] Ama Francis, 'Free Movement Agreements and Climate-Induced Migration: A Caribbean Case Study' (Sabin Center for Climate Change Law 2019) <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1061&context=sabin_climate_change> accessed 4 April 2024; Kamal Amakrane, 'Sinking Out of Sight' (2021) 77(1) The World Today 27 <https://reader.exacteditions.com/issues/91969/page/27?term=kamal> accessed 4 April 2024; Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty Is Not *the* Answer' (2011) 23 International Journal of Refugee Law 2.

[88] Elizabeth Ferris, 'Climate Migrants Can't Wait for Global Frameworks' *The Wilson Quarterly* (Washington DC, Fall 2021) <https://www.wilsonquarterly.com/quarterly/_/climate-migrants-cant-wait-for-global-frameworks> accessed 4 April 2024; Gaia Vince, 'The Century of Climate Migration: Why We Need to Plan for the Great Upheaval' *The Guardian* (London, 18 August 2022) <https://www.theguardian.com/news/2022/aug/18/century-climate-crisis-migration-why-we-need-plan-great-upheaval> accessed 4 April 2024.

[89] McAdam, 'Swimming Against the Tide' (n 87) 5, 26.

[90] See generally Frank Laczko and Etienne Piguet, 'Regional Perspectives on Migration, the Environment and Climate Change' in Etienne Piguet and Frank Laczko (eds), *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (Springer 2014) 9–15, wherein the authors discuss the different climatic issues faced by different regions.

[91] Holly Locke, 'Use of Force in Crisis: A Comparative Look at the Domestic and International Laws Governing the Use of U.S. Military Force to Respond to Mass Climate Refugee Migration' (2020) 26 Hastings Environmental Law Journal 27.

[92] Ingrid Boas and others, 'Climate Migration Myths' (2019) 9 Nature Climate Change 901.

[93] United Nations, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (Press Release, 19 December 2018) <https://press.un.org/en/2018/ga12113.doc.htm> accessed 4 April 2024, wherein five states voted against the Global Compact, citing concerns over its perceived infringement of their sovereign right to regulate the entry of people into their territory.

A. LAND PURCHASE AGREEMENTS: AN UNTESTED BILATERAL OPTION

Climate change poses a significant threat of submersion to small island developing states ('SIDS'), threatening their very existence as sovereign states.[94] For their citizens, territorial submersion can lead to property loss, food and water scarcity, and the erasure of cultural ties.[95] States with substantial agrarian economies may be significantly impacted from recurring natural disasters, water scarcity, erratic rainfall, and extreme temperatures.[96] This impact on agriculture can in turn affect the right to life, employment, food, and sustenance of the citizens.[97] One intriguing solution for affected states in both instances is to purchase land from other states, enabling food production and the relocation of their citizens to safer territories.[98]

There are already some early examples of SIDS procuring or intending to procure land due to climate change concerns. In 2008, the Maldives Government disclosed its plan to approach Sri Lanka and India to purchase land for relocating its citizens whose livelihoods were endangered by rising sea levels.[99] Then, in 2014, the Government of Kiribati attracted significant media attention when it purchased 5,500 acres of land in Fiji, leading Kiribati to be initially perceived as the first SIDS to have purchased land for relocation purposes.[100] However, it was later revealed that the primary purpose of the purchase was to utilise the land for development, cultivation, and food production.[101]

One significant drawback of land purchase agreements is the general unattractiveness of fully ceding land. Ideally, land purchase agreements by submerging SIDS would involve the formal cession of territory, entailing a full transfer of sovereignty to the purchaser, as this would enable them to retain sovereign status if their original territory becomes submerged.[102] However, in practice, states are highly unlikely to cede permanently a portion of their sovereign territory unless it is virtually uninhabitable and devoid of resources or other value whatsoever.[103] Even if submerging SIDS were granted land ownership on humanitarian grounds, the transferring state would likely seek to retain sovereignty over its territory rather than

[94] Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14 Melbourne Journal of International Law 346; Climate Change Secretariat (UNFCCC), *Climate Change: Small Island Developing States* (UNFCCC 2005) 16–23.

[95] Climate Change Secretariat (UNFCCC) (n 94) 16–23; Alex Julca and Oliver Paddison, 'Vulnerabilities and Migration in Small Island Developing States in the Context of Climate Change' (2010) 55 Natural Hazards 717.

[96] International Organization for Migration, 'Climate Change and Migration in Vulnerable Countries: A Snapshot of Least Developed Countries, Landlocked Developing Countries and Small Island Developing States' (2019) <https://publications.iom.int/system/files/pdf/climate_change_and_migration_in_vulnerable_countries.pdf> accessed 4 April 2024.

[97] ICCPR (n 71) art 6; International Covenant on Economic, Social, and Cultural Rights (opened for signature 19 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 11.

[98] Ori Sharon, 'To Be or Not to Be: State Extinction Through Climate Change' (2021) 51 Environmental Law 1041.

[99] Randeep Ramesh, 'Paradise Almost lost: Maldives Seek to Buy a New Homeland' *The Guardian* (Malé, 10 November 2008) <https://www.theguardian.com/environment/2008/nov/10/maldives-climate-change> accessed 4 April 2024.

[100] James Ellsmoor and Zachary Rosen, 'Kiribati's Land Purchase in Fiji: Does It Make Sense?' (*Devpolicy Blog*, 11 January 2016) <https://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111/> accessed 4 April 2024.

[101] Elfriede Hermann and Wolfgang Kempf, 'Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji' (2017) 29 The Contemporary Pacific 231, 238–39.

[102] Emma Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' (2018) Brill Open Law (advance articles) 10–11 <https://doi.org/10.1163/23527072-00101008> accessed 4 April 2024. Some scholars also argue that submerging SIDS have a right to re-establish territorial sovereignty in this way. See for example Kim Angell, 'New Territorial Rights for Sinking Island States' (2021) 20 European Journal of Political Theory 95.

[103] Rosemary G Rayfuse, 'International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma' (2010) UNSW Law Research Paper No 2010-52, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704835> accessed 4 April 2024.

formally ceding it.[104] Formally ceding the land would not only be economically unattractive but also politically and legally challenging.[105] This makes it unsurprising that Fiji retained sovereignty over the land purchased by Kiribati, allowing the Fijian Government effectively to retain control over the potential use of the land for relocation purposes.[106]

The issues involving land purchase agreements could theoretically be resolved through internal political support for the cession of territory and conducive relations between the ceding and purchasing states. However, given the article's focus on regional plurilateral cooperation, the attention will now shift towards some selected regional policies adopted by Caribbean (Subsection B) and African (Subsection C) nations for protecting climate migrants.

B. FREE MOVEMENT AGREEMENTS: USING ECONOMIC FRAMEWORKS FOR PROTECTION

Free Movement Agreements ('FMAs') are regional economic liberalisation instruments that facilitate enhanced movement of persons across the borders of member states party to the agreement. These agreements typically relax entry and exit requirements while granting a plethora of rights to migrants.[107] Although FMAs normally focus on enhancing the mobility of labour and capital across borders, they are slowly being used for extending aid and recognising the rights of climate migrants.[108] This shift is notably observed in the Caribbean Community ('CARICOM') and the Organisation of Eastern Caribbean States ('OECS').

First among the two, the CARICOM Single Market Community was established in 1973 under the Treaty of Chaguaramas.[109] It presently comprises 15 member states and five associate members.[110] The Revised Treaty of Chaguaramas, which was introduced in 2001, commits all member states to achieving the free movement of their citizens within the CARICOM.[111] To this end, CARICOM nationals are granted visa-free stays of up to six months in other CARICOM states.[112] It further mandates preferential treatment for skilled migrants, allowing certain 'approved' categories of workers to access the labour market of

[104] Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Springer 2014) 195–97.

[105] Arthur K Kuhn, 'The Treaty-Making Power and the Reserved Sovereignty of States' (1907) 7 Columbia Law Review 172; Ted Cruz, 'Limits on the Treaty Power' (2014) 127 Harvard Law Review Forum 93; Srinivas Burra, 'Where Does India Stand on the Right to Self-Determination?' (2017) 52 Economic and Political Weekly 21; 'Norway Will Not Give Halti Mount Summit to Finland' *BBC News* (London, 14 October 2016) <https://www.bbc.com/news/world-europe-37662811> accessed 4 April 2024, wherein Norway decided against ceding the mountain due to constitutional restraint on the cession of territory.

[106] Hermann and Kempf (n 101) 239.

[107] Sonja Nita and others, 'Migration, Free Movement and Regional Integration: Introduction' in Sonja Nita and others (eds), *Migration, Free Movement and Regional Integration* (UNESCO Publishing 2017). A well-known example of an entity that facilitates free movement in this manner is the EU, which contains various agreements that facilitate the free movement of goods, services, capital, and people between its member states. For an accessible overview, see Ottavio Marzocchi, 'Free Movement of Persons' (*European Parliament*, April 2023) <https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons> accessed 4 April 2024.

[108] Francis (n 87) 14–19.

[109] Treaty Establishing the Caribbean Community (adopted 4 July 1973, entered into force 1 August 1973).

[110] 'Member States and Associate Members' (*CARICOM Caribbean Community*) <https://caricom.org/member-states-and-associate-members/> accessed 4 April 2024.

[111] Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 1 January 2006) 2259 UNTS 293 ('Revised Treaty of Chaguaramas') art 45.

[112] Francis (n 87) 15.

other member states without a passport or work permit.[113] Notably, the Treaty also mandates the 'harmonisation and transferability of social security benefits',[114] which is achieved through the CARICOM Agreement on Social Security.[115] However, the Agreement only applies for individuals relocating for work or those who have previously worked in two or more CARICOM countries.[116]

The second organisation, the OECS, was established under the Treaty of Basseterre in 1981, currently comprising 11 member states.[117] Like the Revised Treaty of Chaguaramas, the Revised Treaty of Basseterre, through its Protocol of Eastern Caribbean Economic Union, also mandates the removal of all obstacles to the free movement of 'persons, services and capital'.[118] Consequently, all citizens of OECS member states enjoy the freedom of movement, equal employment opportunities, and a right to indefinite stay in other OECS member states.[119] Furthermore, under the OECS Contingent Rights Policy, OECS citizens, along with their spouse and dependents, are granted various rights contingent upon the freedom of movement between states within the OECS. These rights include access to social security, healthcare, as well as primary and secondary education.[120]

While CARICOM and the OECS were established for employment and economic cooperation purposes, they were instrumental in protecting three million people displaced by severe hurricanes in 2017.[121] In particular, Hurricane Maria displaced a significant number of citizens from the Commonwealth of Dominica, which enjoys membership status in both the CARICOM and the OECS.[122] Guided by the CARICOM free movement principles, Trinidad and Tobago—solely a CARICOM member—temporarily admitted Dominican citizens displaced by Hurricane Maria without any visa requirements.[123] The Trinidadian population also opened their homes to the displaced Dominicans, providing them with shelter, and educational services for the displaced children was provided by the Government.[124]

In the same year, Antigua—an OECS member state—also granted affected Dominicans the right of entry with an automatic six-month visa based on any government documentation that they could present. Moreover, special facilities were created for individuals who had lost all of their documentation.[125] Some individuals were also granted indefinite right to

[113] Revised Treaty of Chaguaramas (n 111) art 46(2)(b).
[114] ibid art 46(2)(b)(iv).
[115] CARICOM Agreement on Social Security (adopted 1 March 1996, entered into force 1 April 1997).
[116] ibid art 3.
[117] 'Member States' (*Organisation of Easter Caribbean States*) <https://www.oecs.org/en/who-we-are/member-states> accessed 4 April 2024.
[118] Revised Treaty of Basseterre Establishing the Organisation of Eastern Caribbean States Economic Union (adopted 18 June 2010, entered into force 20 January 2011), Protocol of Eastern Caribbean Economic Union ('OECS Protocol') art 3(c).
[119] ibid art 12. However, member states retain the right to regulate the movement of citizens with the approval of the OECS Authority under art 12(5). See also 'Free Movement of Persons in the Eastern Caribbean' (*Organisation of Eastern Caribbean States*) <https://www.oecs.org/en/free-movement-in-the-eastern-caribbean> accessed 4 April 2024.
[120] Regional Integration Unit (OECS Commission), *OECS Policy on Rights Contingent on the Right to Freedom of Movement Within the Economic Union* (OECS Commission 2015) 6–7.
[121] Francis (n 87) 17–18.
[122] See n 110 and n 117.
[123] 'T&T PM Asks Citizens to Welcome Dominicans Devastated by Hurricane Maria' *Stabroek News* (Georgetown, Guyana, 22 September 2017) <https://www.stabroeknews.com/2017/09/22/news/guyana/tt-pm-asks-citizens-to-welcome-dominicans-devastated-by-hurricane-maria/> accessed 4 April 2024.
[124] Darlisa Ghouralal, '"Generous" T&T Opens Its Doors to Displaced Dominicans' *Loop T&T News* (21 September 2017) <https://tt.loopnews.com/content/generous-tt-opens-its-doors-displaced-dominicans#> accessed 4 April 2024.
[125] 'Antigua Prepares for Influx of Dominicans' *Antigua News Room* (24 September 2017) <https://antiguanewsroom.com/antigua-prepares-for-influx-of-dominicans/> accessed 5 April 2024.

stay based on the free movement of persons obligations within the OECS framework, thus facilitating permanent resettlement.[126] Accordingly, the FMAs in the Caribbean region have demonstrated their effectiveness in addressing the concerns of climate migrants forced to flee their home state due to climate-related calamities.[127]

Presently, both the CARICOM and the OECS are developing policies to regulate and manage climate-induced migration.[128] CARICOM is aiming to achieve free movement of citizens within the Community by 2024, intending to draw upon principles of the Global Compact on Safe, Orderly and Regular Migration—a legally non-binding international agreement on migration negotiated under the auspices of the United Nations.[129] This policy framework strives towards cooperation amongst members, ensuring protection of the human rights of migrants and enhancing sustainable development. Similarly, the OECS is also planning a policy for regulating migration due to climate change in cases of 'disasters, environmental degradation and climate change'.[130] While these policy initiatives aimed at regulating the movement of climate migrants are commendable, any assessment on their efficacy in protecting the rights and interests of climate migrants must await the public release and implementation of these policies. With this, attention will now turn from the Caribbean to the African regions in Subsection C below.

C. CONVENTIONS, DECLARATIONS, AND POLICIES: THE AFRICAN WAY

The African regions have been working towards protecting the rights of climate migrants through binding multilateral instruments and regional policies. A key instrument in this regard is the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ('OAU Refugee Convention'), negotiated under the auspices of the now-defunct Organisation of African Unity ('OAU').[131] Expanding upon the principles established in the Refugee Convention and its 1967 Protocol, the OAU Refugee Convention broadens the scope of protection to include persons compelled to leave their country due to 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality'.[132] In theory, the 'events seriously disturbing public order' criterion might be broad enough to encompass climate change disasters. However, the scope of this provision has been criticised for its lack of clarity, with courts and

[126] Francis (n 87) 27.
[127] ibid.
[128] International Organization for Migration, 'CARICOM Advances in the Roadmap for Developing a Regional Migration Policy' (Press Release, 29 August 2023) <https://rosanjose.iom.int/en/news/caricom-advances-roadmap-developing-regional-migration-policy> accessed 4 April 2024; International Organization for Migration, 'OECS Countries Plan for Management of Cross-border Movements Due to Disasters and Climate Change' (Press Release, 22 March 2023) <https://rosanjose.iom.int/en/news/oecs-countries-plan-management-cross-border-movements-due-disasters-and-climate-change> accessed 4 April 2024.
[129] Maxine Alleyne, 'UN Agencies and CARICOM Collaborate on Regional Migration Policy for the Caribbean' (*United Nations Caribbean*, 10 November 2023) <https://caribbean.un.org/en/252966-un-agencies-and-caricom-collaborate-regional-migration-policy-caribbean> accessed 4 April 2024. See further UNGA, 'Global Compact for Safe, Orderly and Regular Migration' (19 December 2018) UN Doc A/RES/73/195.
[130] 'OECS Countries Plan for Management of Cross-border Movements Due to Disasters and Climate Change' (*Platform on Disaster Displacement*, 30 March 2023) <https://disasterdisplacement.org/blog/2023/03/30/oecs-countries-plan-for-management-of-cross-border-movements-due-to-disasters-and-climate-change/> accessed 4 April 2024.
[131] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1969) 1001 UNTS 45.
[132] ibid art 1(2).

officials sometimes setting the threshold unreasonably high, often limiting its application to cases of virtually complete socio-economic breakdown or state collapse.[133] This effectively renders cases of voluntary migration due to slow-onset climate change outside the scope of the Convention. Unfortunately, it remains unclear whether the provision extends to migration due to climate change disasters, although the 'serious' criterion implies that not all disasters would meet the threshold for protection.[134] This uncertainty has led to a preference for granting refugee status on alternative grounds whenever possible. For example, during the 2011 East Africa drought, Somali migrants were generally granted refugee status based on human factors, such as the ongoing civil war, even when they were alleged to have fled due to the drought's impact.[135]

Apart from the OAU, the Intergovernmental Authority on Development ('IGAD') has formulated numerous regional policies addressing the concerns of climate migrants in the African regions. IGAD was established in 1996 to mitigate the effects of recurrent droughts and famines leading to economic hardships through regional cooperation.[136] In 2008, IGAD initiated a Regional Consultative Process aimed at developing policies to regulate migration.[137] Their last Migration Action Plan, developed in 2014, outlined strategies for admission of climate migrants, but only for climate change natural disaster-induced migrants.[138] Similarly, the IGAD Regional Climate Change Strategy provides for the development of migration policies to address the needs of individuals displaced by climate change-induced disasters.[139]

In 2020, IGAD adopted the Protocol on the Free Movement of Persons in the IGAD Region, which recognises the right of all the citizens of the member states to enter and exit the territories of the member states.[140] To this end, the Protocol affords visa-free entry of citizens into other member states for a minimum initial period of 90 days,[141] and member state citizens are further granted the right to residence, work, self-employment, and social security in accordance with the laws and policies of the host state.[142] Notably, the Protocol explicitly acknowledges how free movement can alleviate the adverse effects of both severe climate-induced disasters and gradual environmental degradation.[143] Therefore, it obligates the member states to allow other member state citizens entry in anticipation of, during, or in the

[133] Tiyanjana Maluwa and Anton Katz, 'Who Is a Refugee? Twenty-Five Years of Domestic Implementation and Judicial Interpretation of the 1969 OAU and 1951 UN Refugee Conventions in Post-Apartheid South Africa' (2020) 27 Indiana Journal of Global Legal Studies 131, 192–97.

[134] ibid 196–97; Sanjula Weerasinghe, 'In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change' (PPLA/2018/05, UNCHR, December 2018) 56–57 <https://www.refworld.org/docid/5c2f54fe4.html> accessed 4 April 2024.

[135] Weerasinghe, 'In Harm's Way' (n 134) 56.

[136] 'About IGAD' (*IGAD*) <https://igad.int/about/> accessed 4 April 2024.

[137] Declaration on the Establishment of Intergovernmental Authority on Development (IGAD) Regional Consultative Process (IGAD-RCP) On Migration (adopted 14 May 2008).

[138] IGAD, 'IGAD-Migration Action Plan (MAP) to Operationalize the IGAG Regional Migration Policy Framework (IGAD-RMPF): 2015–2020' (2014) <https://www.iom.int/sites/g/files/tmzbdl486/files/2018-07/igadmigrationactionplan2015-2020.pdf> accessed 4 April 2023. A revised action plan for 2024–2028 is expected to be published soon, having recently been validated by the IGAD member states: 'IGAD Validated the Second Phase of Migration Action Plan' (*IGAD*, 15 November 2023) <https://igad.int/igad-validated-the-second-phase-of-migration-action-plan/> accessed 4 April 2024.

[139] 'IGAD Regional Climate Change Strategy and Action Plan (2023-2030)' (*ICPAC*, 26 August 2022) <https://www.icpac.net/publications/igad-regional-climate-change-strategy-and-action-plan-2023-2030/> accessed 4 April 2024.

[140] Protocol on the Free Movement of Persons in the IGAD Region (adopted 26 February 2020) ('IGAD Free Movement Protocol') art 3.

[141] ibid art 5.

[142] ibid art 8.

[143] ibid preamble.

aftermath of a disaster, further obligating the host state to facilitate the extension of stays when return to the origin state is either impossible or unreasonable.[144] Addressing the heightened vulnerability of herders and transhumant livestock due to climate change, the IGAD free movement framework is complemented by the IGAD Protocol on Transhumance.[145] This Protocol facilitates safe, seasonal cross-border mobility of livestock and herders as an adaptation and survival mechanism.[146] It also provides access to medical and educational services,[147] establishes a livestock sale system,[148] mandates specified grazing areas,[149] and provides dispute resolution mechanisms.[150] These measures facilitate seasonal mobility, which in turn helps to alleviate pressure on the natural resources of the migrant's home state.

Then, in 2022, the member states of IGAD, along with those of the East African Community and the States of the Horn of Africa, adopted the Kampala Ministerial Declaration on Migration, Environment and Climate Change, acknowledging the rising concern of climate-induced migration.[151] The following year, the declaration underwent significant expansion, increasing its membership to include 48 African member states, thus elevating it from a regional to a continental level.[152] Notably, it commits the signatories to integrating human rights-based approaches into their policies relating to the climate change-migration nexus, to enhancing human mobility, to facilitating the free flow of remittances, to promoting rural-urban collaboration to reduce vulnerability, and to strengthening multinational climate finance.[153]

The regional instruments and policies of the Caribbean and African areas highlight a growing awareness among states at a regional level regarding the impact of climate change on human mobility. Given that the effects of climate change are felt more similarly at the regional level, it appears that states are more willing to cooperate with one another at this level, to regulate climate-induced migration better. A notable aspect of these instruments and policies is their recognition of migration as an effective mitigation and adaptation strategy. They do not actively seek to prevent migration flows but rather to facilitate the process. By providing detailed mechanisms for the socio-economic integration of migrants, they not only pave the way for smoother integration of migrants but also ensure that migrants contribute to the host state's economy in the long run. These instruments and policies will be critically examined in the following section to explore their further improvement.

V. Looking at Regional Cooperation Policies Through a Critical Lens

The policies and trajectory of the aforementioned regional plans are commendable. The unified approach of the member states is driven by the similarities of the impact of climate change

[144] ibid art 16.
[145] IGAD Protocol on Transhumance (adopted 27 February 2020).
[146] ibid art 3.
[147] ibid art 12.
[148] ibid art 16.
[149] ibid art 9.
[150] ibid art 25.
[151] Kampala Ministerial Declaration on Migration, Environment and Climate Change (adopted 29 July 2022) ('Kampala Declaration').
[152] 'Kampala Ministerial Declaration on Migration, Environment and Climate Change' (*International Organization for Migration*) <https://eastandhornofafrica.iom.int/kampala-ministerial-declaration-migration-environment-and-climate-change> accessed 4 April 2024.
[153] Kampala Declaration (n 151) nos 3, 4, 6, 7, 10, 13(b)–(e).

within the regions and the consequent rise of regional climate migration. For example, several African states have witnessed a surge in climate-induced migration due to severe disasters, such as floods and droughts,[154] exacerbated by inefficient climate change adaption strategies.[155] The Caribbean region faces comparable challenges.[156] However, both regions have struggled to secure the requisite funds for implementing effective climate change mitigation and adaptation measures.[157] In the absence of adequate international support,[158] these states have prudently aligned their climate change-related concerns politically and have developed transnational frameworks to leverage migration as an adaptation and mitigation strategy.

Amongst the regional frameworks covered, IGAD's policies can be highlighted for encapsulating the different requirements for long- and short-term migrants. As mentioned in Section II of this article, climate-induced migration can broadly be categorised into two types: long-term migration (with or without the migrants' families); and short-term migration. IGAD's migration policies address both types of migration. Its Free Movement Protocol and the Kampala Declaration urge states to promote the free movement of people and to facilitate the flow of remittances to their home states.[159] This recognition of the utility of climate change-induced migration is progressive. Remittances from climate migrants can enhance the adaptation capabilities of their home state, improve living conditions for both migrants and their families at home, and alleviate pressure on the depleting resources of the migrants' home states. These benefits can potentially decrease the number of migrants to the host state as the home state better adapts to new realities.

Interestingly, while the CARICOM and OECS frameworks do not exclusively focus on climate migrants, their policies for integrating migrants and their families within the host states are more progressive than the African policies. For example, the Caribbean frameworks recognise a broader scope of rights for climate migrants and their dependants than the African instruments.[160] The African and Caribbean policies equally obligate states to recognise the right to employment for both the migrant and their accompanying spouse[161] and to provide educational services for the immigrants' children.[162] However, the OECS framework surpasses this by emphasising full integration of migrants in the host state while ensuring economic and social equality between citizens and migrants.[163] Although the OECS framework does not expressly apply to climate migrants, its socially beneficial policies equally apply to migrants who move in search of employment due to the negative effects of climate change. Such policies can significantly improve effective migrant integration by ensuring a positive migration

[154] International Organization for Migration, *World Migration Report 2022* (n 21) 68–73.
[155] World Meteorological Organization, *State of Climate in Africa 2022* (WMO No 1330, 2023) 18–19.
[156] International Organization for Migration, *World Migration Report 2022* (n 21) 107.
[157] World Meteorological Organization (n 155) 18–21; Daniel Munevar, 'Climate Change and Debt Sustainability in the Caribbean: Trouble in Paradise?' (UNCTAD 2018) 2, 13–19 <https://unctad.org/system/files/non-official-document/tdb_efd2c01_Munevar_en.pdf> accessed 4 April 2024; Alejandro Guerson, James Morsink and Sònia Muñoz, 'Caribbean Climate Crisis Demands Urgent Action by Governments and Investors' (*IMF Blog*, 27 June 2023) <https://www.imf.org/en/Blogs/Articles/2023/06/27/caribbean-climate-crisis-demands-urgent-action-by-governments-and-investors> accessed 4 April 2024.
[158] Guerson, Morsink and Muñoz (n 157) 14.
[159] IGAD Free Movement Protocol (n 140) preamble, arts 5, 25; Kampala Declaration (n 151) nos 3, 13(d).
[160] In this context, 'dependent' is used to refer to the spouse and the children of the main immigrant, as defined under article 1 of the IGAD Free Movement Protocol (n 140).
[161] ibid art 9(5).
[162] ibid art 9(4).
[163] See generally Organization of Eastern Caribbean States, 'Social Inclusion and Social Protection Framework' <https://www.oecs.org/en/our-work/knowledge/library/social-development/social-inclusion-and-social-protection-strategic-framework-july21-2020> (21 July 2020) accessed 4 April 2024.

experience for both working migrants and their families. Moreover, by integrating families, host states can enhance the productivity of employed migrants[164] and prepare the next generation of skilled workers to contribute to the host state's economy.

Furthermore, the CARICOM and OECS frameworks offer more effective solutions for settling climate migrants than the IGAD Free Movement Protocol. While the IGAD Protocol permits only a 90-day right of stay in the host country,[165] the CARICOM and OECS policies provide for a six-month and an indefinite right to stay, respectively.[166] Thus, although the IGAD Protocol progressively recognises climate migrants as a separate category of immigrants, it inadequately supports their resettlement as a mitigation or adaptation strategy.[167] There may be instances where individuals initially relocate for a limited duration but find themselves compelled to stay permanently in the host state due to the unsustainability of living in their home state.[168] In such cases, it is imperative to establish effective mechanisms allowing climate migrants to apply for permanent residency or visa extensions. Therefore, domestic immigration offices should be mandated to prioritise the requests of climate migrants to ensure effective and speedy protection rather than leaving them in an undocumented state.[169] A limited stay duration would only provide limited value for migrants, as they would not have sufficient time to generate any positive value in terms of improved livelihood or sending remittances back home. As for the host state, although it would incur short-term integration costs, it would lose out on any long-term economic benefits of a more prolonged stay and successful integration.[170] In this way, all parties might benefit long-term.

One aspect not addressed by all the frameworks covered above is cultural integration within the host society. The influx and settlement of immigrants from diverse backgrounds can cause conflicts within the host state, potentially resulting in either the marginalisation of the immigrants on a cultural basis or the conditional acceptance of immigrants after cultural adaptation.[171] Lived experiences of migrants have brought to light the positive role that religious institutions, schools, and non-governmental organisations in the host state can play in ensuring effective integration.[172] Communal and religious factors provide comfort and support for migrants, fostering a sense of security and belongingness, ultimately leading to better integration.[173] This aspect can be significant for climate migrants, as the loss of their home state—

[164] See generally George Borjas and Stephen Bronars, 'Immigration and the Family' (1991) 9 Journal of Labour Economics 123.
[165] IGAD Free Movement Protocol (n 140) art 5(2)(b).
[166] Francis (n 87) 15; 'Free Movement of Persons in the Eastern Caribbean' (n 119).
[167] Alex Arnall, 'Resettlement as Climate Change Adaptation: What Can Be Learned from State-Led Relocation in Rural Africa and Asia?' (2019) 11 Climate and Development 253, wherein the author brings to light the fact that resettlement is often a strategy adopted by people as a climate change adaptation strategy.
[168] The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change – Volume I' (December 2015) 30 <https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf> accessed 7 June 2024.
[169] ibid 26–30.
[170] OECD, 'Is Migration Good for the Economy?' (*Migration Policy Debates*, May 2014) <https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf> accessed 4 April 2024.
[171] See generally Yann Algan, Alberto Bisin and Thierry Verdier, 'Introduction: Perspectives on Cultural Integration of Immigrants' in Yann Algan and others (eds), *Cultural Integration of Immigrants in Europe* (OUP 2012).
[172] Mark Trekson and Jorge Morales-Burnett, 'Social, Cultural, and Recreational Institutions and Climate Migration: An Evaluation of Socio-Cultural Practices in Receiving Communities' (Urban Institute, February 2023) 13–15 <https://www.urban.org/sites/default/files/2023-02/Social%2C%20Cultural%2C%20and%20Recreational%20Institutions%20and%20Climate%20Migration.pdf> accessed 4 April 2024.
[173] Alison Heslin, 'Climate Migration and Cultural Preservation: The Case of the Marshallese Diaspora' in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer 2019) 383.

either due to its submergence or because conditions become uninhabitable—entails a loss of cultural ties.[174] For example, cultural festivals celebrating the traditions, arts, and cuisines of migrants facilitate their integration into the host state.[175] The 'Multi Kulti Kitchen' project in Bulgaria exemplifies such events, offering a safe platform for migrants to share their cultures and traditions.[176] Similarly, communal initiatives, such as the 'Grandhotel Cosmopolis' and 'Give Something Back To Berlin' projects, have created safe spaces for immigrants to connect culturally with people from their own backgrounds and to share their culture with the host state.[177] Therefore, in the light of these considerations, while the aforementioned instruments and policies focus on socio-economic initiatives for migrant integration, it is essential that they also address cultural and communal factors to ensure safe and effective integration.

Furthermore, unregulated and unplanned integration of migrants into the host societies can lead to their concentration into small ghettos, worsening poverty and lowering living standards for the immigrants.[178] In such circumstances, merely recognising the right to employment and residence within the host state would prove ineffective at ensuring the equal protection of their rights. Therefore, it is imperative to implement ground-level policies that enable migrants to exercise these rights for efficient integration. These policies may include language training and vocational skill development programmes, which can enhance employment opportunities for migrants.[179] States can also adopt policies to provide adequate housing for migrants[180] or to assist them in arranging private financing for housing facilities.[181] While initially imposing a burden on the host state's financial resources, the associated costs are justified in the long run. As migrants become self-sufficient, they become less dependent on the host state's resources.[182] The consequent flow of remittances to the migrants' home state would ultimately alleviate migration pressures on the host state. Furthermore, as previously mentioned, successful integration of migrants results in their financial contributions to the host state, enhancing its capacity to adapt to, and mitigate, the impact of climate change. Therefore, instead of avoiding holistic policies that recognise the needs of climate migrants, states would benefit in the long run by constructing conducive frameworks for migrants to enhance climate change adaptation and mitigation.

However, providing migrants with the necessary support for effective integration, including socio-cultural aspects and access to social security coverage, would necessitate a substantial amount of financial resources from the host state. Placing the entire financial burden

[174] See generally Hermann and Kempf (n 101), wherein the authors highlight the anxious position of citizens of Kiribati over loss of culture due to the submerging of the island.

[175] See generally Elaine McGregor and Nora Ragab, 'The Role of Culture and the Arts in the Integration of Refugees and Migrants' (European Expert Network on Culture and Audiovisual, 15 February 2016).

[176] Zvezda Vankova, 'Multi Kulti Kitchen' (*European Website on Integration*) <https://migrant-integration.ec.europa.eu/integration-practice/multi-kulti-kitchen_en> accessed 4 April 2024.

[177] Anna Frech, 'The Grandhotel Cosmopolis Augsburg (Germany)' (*Oncurating*) <https://www.on-curating.org/issue-25-reader/the-grandhotel-cosmopolis-augsburg-germany.html> accessed 4 April 2024; 'History and Impact' (*Give Something Back To Berlin*) <https://gsbtb.org/about/history-and-impact/> accessed 4 April 2024.

[178] Dominika Krupocin and Jesse Krupocin, 'The Impact of Climate Change on Cultural Security' (2020) 13 Journal of Strategic Security 1, 14.

[179] Council of Europe, 'Integration of Migrants and Refugees: Benefits for All Parties Involved' (Doc 15785, 5 June 2023) 17 <https://rm.coe.int/integration-of-migrants-and-refugees-benefits-for-all-parties-involved/1680aa9038> accessed 4 April 2024, discussing the integration policies adopted by Norway.

[180] ibid 15.

[181] Organization for Security and Co-operation in Europe, *Good Practices in Migrant Integration: Trainee's Manual* (ODIHR 2018) 133–34.

[182] Woetzel and others (n 34) 69–70, wherein the authors explain the long-term benefits of migrants to the recipient state as they ultimately contribute to the host state's economy instead of solely relying on it. Although the data pertains to migrants in general, it should equally apply to climate migrants.

on the host state would not only be inequitable (considering that the host state would also be grappling with climate change-related issues) but also impractical due to the limited financial capacity of some states (especially in the African and Caribbean regions).[183] Climate change is an international problem, and the necessary adaptation and mitigation measures will necessitate funding from domestic, international, and private sources.[184] For example, the aforementioned regional bodies could approach multilateral development banks to secure funding for their regional plans, as these institutions are increasingly recognising the utility of migration as a mitigation and adaptation strategy.[185] States can utilise sovereign-backed bonds, such as green bonds and impact bonds, to raise finance from the private sector[186] and can even dedicate resources from their respective domestic budgets to relocation funds.[187] Furthermore, institutional arrangements, such as climate land banks, can pre-emptively arrange the land resources required for the reallocation and integration of climate migrants.[188] States can also incentivise private sector players to introduce accessible micro-credit policies, enabling migrants to establish their own businesses in the host state.[189] Policymakers should consider the viability of these options for arranging the finance necessary to ensure effective socio-economic integration of climate migrants.

VI. CONCLUSION

The accelerated rate of climate change is increasingly driving people to migrate in search of better lives. This necessitates a shift in the attitude of states towards migration, moving from providing aid in cases of climate-related disasters to a strategy for climate change adaptation and mitigation. While enhanced migration is bound to incur greater short-term costs for the host state, the proper integration of migrants can transform them into self-sustainable contributors to the host state's economy. This calls for states to formulate policies that facilitate cross-border movement and ensure that migration benefits migrants, their home state, and the host state.

International multilateral frameworks, including the Refugee Convention and the human rights framework, are not well-equipped to address the concerns of climate migrants. Therefore, regional cooperation emerges as a viable option, given that the states within a region tend to face similar climate change threats. This makes bolstering regional capabilities to deal with climate change, facilitating the movement of people, a politically prudent choice.

The case studies on the African and Caribbean regions demonstrate that efficient climate change migration policies can be most effectively built upon regional economic

[183] World Meteorological Organization (n 155) 18–19; Guerson, Morsink and Muñoz (n 157).
[184] Aimée-Noël Mbiyozo and Margaret Monyani, *Climate Linked Mobility – A Key to Development* (Institute for Security Services, July 2023) 5.
[185] See generally Lawrence Huang, Ravenna Sohst and Camille Le Coz, 'Financing Responses to Climate Migration: The Unique Role of Multilateral Development Banks' (*Migration Policy Institute*, November 2022) <https://www.migrationpolicy.org/research/financing-responses-climate-migration> accessed 4 April 2024.
[186] Augusto Lopez-Claros, 'Financing Instruments for Climate Change Mitigation and Adaptation' (Global Challenges Foundation 2021) 22–27 <https://globalgovernanceforum.org/wp-content/uploads/2023/07/Financing-Instruments-for-Climate-Change-Mitigation-and-Adaptation.pdf> accessed 4 April 2024.
[187] OECD, 'Financing Climate Future: Rethinking Infrastructure Policy Highlights' (28 November 2018) 10–11 <https://doi.org/10.1787/9789264308114-en> accessed 4 April 2024.
[188] Displacement Solutions and ECODEV, 'The Urgent Need to Prepare for Climate Displacement in Myanmar: Establishing a Myanmar National Climate Land Bank' (May 2018) <https://reliefweb.int/report/myanmar/urgent-need-prepare-climate-displacement-myanmar-establishing-myanmar-national> accessed 4 April 2024.
[189] Mbiyozo and Monyani (n 184) 7.

integration policies, highlighting their significant potential for addressing the concerns of climate migrants. By recognising the rights of employment and livelihood of migrants, these frameworks not only make migration beneficial for the migrant but also ensure that their long-term integration will be conducive for the host state. However, to maximise the potential benefits of climate migration, these regional policies must incorporate a robust integration strategy, ensuring that socio-cultural aspects are not overshadowed in favour of short-term economic considerations. While implementing such measures will require significant financial resources, there are numerous avenues to explore in effectively utilising migration as a climate change mitigation and adaptation strategy. Therefore, regional economic and political cooperation holds the key to unlocking the full potential of migration as an effective adaptation and mitigation strategy for all parties involved.

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Ambiguity in National Security Powers under the UK's National Security and Investment Act 2021: Implications for Executive Accountability and Judicial Review

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ABSTRACT

Academic literature often asserts that, in recent years, governments have expanded the concept of 'national security' to include considerations that reach beyond traditional military and defence concerns. This process has coincided with a global proliferation in legislative regimes for the national security review of investment, particularly mergers and acquisitions. Given that these regimes leave the concept of 'national security' undefined, concerns have been raised that a potentially wide range of policy objectives may fall within the scope of national security review, narrowing the range of decisions for which governments can be held accountable and, as a result, undermining the liberal democratic principle that government power should be constrained by checks and balances. Focusing on the UK's investment review regime under the National Security and Investment Act 2021 ('NSIA'), this article assesses ambiguity in national security powers from a public law perspective. It argues that the ambiguity of national security under the NSIA, coupled with the courts' tendency to grant the executive broad powers over national security matters, permits non-defence-related concerns to be included within the ambit of national security. The result of this is that national security could mean anything at any time, creating the risk that ambiguous national security legislation, both in the investment context and beyond, will confer extensive powers to the executive, undermining the legal accountability of government. This article is divided into three sections. The first examines the executive's interpretation of national security under the NSIA, the second assesses the courts' approaches to traditional national security matters, and the third explores the practical implications of this article's findings for national security adjudication and executive accountability. Finally, this article concludes by offering suggestions for future research and reform.

Keywords: public law, national security, investment law, investment screening

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I. INTRODUCTION

It has often been asserted that national security is a source of executive power[1] and that '[n]o social science concept has been more abused and misused'.[2] Indeed, scholarly literature has emphasised that, although a *traditional* narrower view of national security has centred around military and defence concerns,[3] governments have increasingly used the concept to incorporate a far broader range of objectives.[4] A prominent example of this in recent years has been the incorporation of economic security within the scope of national security.[5] Although definitions abound, economic security has been used to encapsulate concerns ranging from economic prosperity,[6] the resilience of supply chains and critical infrastructure, to protection against 'nonmarket policies and practices', as well as the maintenance of technological prowess.[7] Broadly speaking, economic security refers to the upholding or furthering of economic power as a means of fulfilling state objectives, such as maintaining or improving standards of living to prevent societal unrest and disintegration and creating wealth to maximise tax revenues.[8] Today, shifts in the meaning of national security are especially relevant given the changing geopolitical context that has ensured that national security currently sits high on the agendas of governments across the globe.

The intersection between traditional national security and novel security concerns can be seen through legislation for the review of both domestic and foreign investment, in particular mergers and acquisitions, on national security grounds. These regimes grant governments across the world far-reaching powers to call-in, block, and amend transactions involving entities deemed sensitive to national security. They are said to have economic concerns at their

[1] David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate 2007) 187; Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (OUP 1994) ch 1; Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 Harvard Law Review 2673; Andrew P Napolitano, 'A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of Executive Power' (2014) 8 New York University Journal of Law & Liberty 396.

[2] David A Baldwin, 'The Concept of Security' (1997) 23 Review of International Studies 5, 26.

[3] Helga Haftendorn, 'The Security Puzzle: Theory-Building and Discipline-Building in International Security' (1991) 35 International Studies Quarterly 3, 4; Baldwin (n 2) 5; Marc A Levy, 'Is the Environment a National Security Issue?' (1995) 20 International Security 35, 39.

[4] Laura K Donohue, 'The Limits of National Security' (2011) 48 American Criminal Law Review 1573; Vivienne Bath, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China' (2012) 34 Sydney Law Review 5, 22; Baban Hasnat, 'US National Security and Foreign Direct Investment' (2015) 57 Thunderbird International Business Review 185; Sarah Bauerle Danzman and Sophie Meunier, 'Naïve No More: Foreign Direct Investment Screening in the European Union' (2023) 14 Global Policy 40, 41.

[5] James K Jackson, 'Foreign Investment and National Security: Economic Considerations' (Congressional Research Service RL34561, 2013); Kana Inagaki and Leo Lewis, 'Japan's Economic Security Minister Warns on Chip Industry Survival' *Financial Times* (Tokyo, 19 October 2021) <https://www.ft.com/content/f59173b6-211c-4446-aa57-5c9b78d602c2> accessed 10 May 2024.

[6] Lucia Retter and others, 'Relationships between the Economy and National Security: Analysis and Considerations for Economic Security Policy in the Netherlands' (RAND Corporation 2020) <https://www.rand.org/pubs/research_reports/RR4287.html> accessed 10 May 2024.

[7] Matthew P Goodman, 'G7 Gives First Definition to "Economic Security"' (*Center for Strategic and International Studies*, 31 May 2023) <https://www.csis.org/analysis/g7-gives-first-definition-economic-security> accessed 10 May 2024.

[8] Sheila R Ronis (ed), *Economic Security: Neglected Dimension of National Security?* (National Defense University Press 2011) viii; Simon Dalby, 'Security, Intelligence, the National Interest and the Global Environment' (1995) 10 Intelligence and National Security 175, 176.

heart, typifying the way in which national security has come to mean far more than merely military defence.[9]

National security has long been described as an 'ambiguous symbol'.[10] Although each country's review regime differs subtly from one another, a common feature of each is that national security is left undefined.[11] The extent of the powers granted by these regimes hinges upon the precise meaning of national security, raising concerns that the ambiguity inherent in a minimal or non-existent definition permits a wide range of policy objectives to fall within the ambit of national security.[12] This potentially narrows the range of decisions for which governments could be held legally accountable. Although the competition, trade, and investment law aspects of these legislative regimes have been well-trodden,[13] there has been comparatively little attention given to their public law dimension.[14]

Accordingly, this article will assess, from a public law perspective, national security ambiguity (or the ability of 'national security' to carry a broad range of meanings) and its relationship to executive power. In so doing, it will focus on the UK's review regime under the National Security and Investment Act 2021 ('NSIA'). It will be argued that national security under the NSIA is indeed an 'ambiguous symbol' and that this ambiguity permits governments to incorporate potentially far-reaching concerns within the confines of national security, thereby creating the risk of vast, unchecked executive power. Although it is the executive that seeks to expand the bounds of national security in pursuit of its policy objectives, ambiguity can only lead to executive power through an interaction between the executive and judicial branches. The courts have typically given the executive a free hand over matters of national security, placing few constraints on executive action where national security is concerned. This potential expansion of executive national security power under the NSIA is problematic given that it stands at odds with the liberal democratic view that government power should be constrained by a set of legal and political checks and balances.[15] The normative analysis in this article therefore proceeds upon the basis that any such expansion of unchecked executive power in the UK would undermine core constitutional values, such as the rule of law, government accountability, and the separation of powers, and should therefore be avoided.

By analysing government policy papers and related source material, Section I of this article will discuss how the executive has interpreted national security under the NSIA, how far economic security concerns fall within its scope, and what this can tell us about the potential breadth of national security. It will conclude that the executive, through the NSIA, has blurred the lines between economic and national security, stretching the concept of national security in pursuit of non-defence-related security objectives. In Section II, the discussion will

[9] Hasnat (n 4); Jackson (n 5); Bauerle Danzman and Meunier (n 4).

[10] Arnold Wolfers, '"National Security" as an Ambiguous Symbol' (1952) 67 Political Science Quarterly 481.

[11] Kiran S Desai, 'The National Security and Investment Act 2021' (2021) 5 European Competition and Regulatory Law Review 416.

[12] Ibid. See also Keyan Lai, 'National Security and FDI Policy Ambiguity: A Commentary' (2021) 4 Journal of International Business Policy 496.

[13] Hasnat (n 4); Bath (n 4); Jason Jacobs, 'Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union' (2019) 47 International Journal of Legal Information 105; Cheng Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity' (2021) 22 Journal of World Investment & Trade 561.

[14] For a rare example in the US context, see Kristen E Eichensehr and Cathy Hwang, 'National Security Creep in Corporate Transactions' (2023) 123 Columbia Law Review 549.

[15] Gavin Drewry, 'The Executive: Towards Accountable Government and Effective Governance?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th ed, OUP 2011) 189.

turn to the courts' role in conferring national security power on the executive. Given that the courts have yet to decide a case under the NSIA, Section II will focus on traditional national security contexts, assessing how the courts have applied interpretations of national security and deference to the executive and how this process may inform the extent of executive power under the NSIA. Here, we will find that the courts place few constraints on the UK Government in relation to national security and that this is the result of national security secrecy involving secretive evidence and closed judgments. Section III will bring these two strands together, exploring the practical implications of this article's findings for the role of the courts in national security adjudication and for executive accountability, both under the NSIA and beyond. These implications include the risks that legal certainty is undermined, that there is an ever-expanding executive power, and that there is a potential chilling effect on the investment flows that the NSIA purports to protect.[16] This article will conclude that national security ambiguity, constructed by the executive and reinforced by the courts, allows national security to mean anything at any given time, rendering ambiguous national security legislation as a tool of executive power and thus undermining the core values that the UK constitution rests upon. These conclusions will, in turn, prompt areas for future research and reform.

II. The Executive: National Security, Public Interest, and Economic Security

A. Contextualising National Security

In order to determine the likelihood that the NSIA, as well as future national security legislation, could be used to incorporate non-defence-related objectives within their scope, we must first assess how the national security ground for the review of investment in the UK has been applied and, therefore, what national security has meant in relation to investment control. Therefore, this subsection will outline the background context to the national security review of investment into the UK and how the executive's power to intervene in transactions on national security grounds has evolved.

(i) Pre-NSIA

National security and public interest considerations have always overlapped to some extent. Prior to 2002, the 'public interest test' under the Fair Trading Act 1973 gave the relevant Secretary of State ('SoS') broad powers to review transactions on the ground of public interest. This applied not only to those considerations that are today regarded as distinct public interest grounds, but also to transactions that the SoS believed raised competition concerns.[17] Later, the Enterprise Act 2002 passed responsibility for competition review to the

[16] Cabinet Office, 'National Security and Investment Act 2021: Call for Evidence Response' (Cabinet Office, last updated 18 April 2024) <https://www.gov.uk/government/calls-for-evidence/call-for-evidence-national-security-and-investment-act/outcome/national-security-and-investment-act-2021-call-for-evidence-response> accessed 10 May 2024.

[17] David Reader, 'Extending "National Security" in Merger Control and Investment: A Good Deal for the UK?' (2018) 14 Competition Law International 35; Ioannis Kokkoris, 'National Security as a Public Interest Consideration in UK Merger Control' (2021) 14 Journal of Strategic Security 47, 49.

Competition and Markets Authority ('CMA'), while also providing for limited specified considerations where the executive could intervene on public interest grounds, including national security.[18]

In practice, this regime limited ministerial intervention to those transactions that passed high thresholds relating to share of supply or UK turnover.[19] As a competition body, the CMA's responsibility for flagging national security concerns inevitably raised competency questions, with the CMA admitting in the 'Hytera-Sepura' merger that it 'is not expert in national security matters'.[20] Given that the CMA was formed to transfer responsibility for executive decision-making to arm's length bodies[21]—in a process that also saw the creation of the Office for Standards in Education, Children's Services and Skills ('Ofsted') and the Environment Agency[22]—its role also engendered uncertainty over the exact locus of accountability for national security decisions.[23] These challenges, combined with a perception that the old regime was 'no longer sufficient' in the wake of 'significant national security, technological and economic changes',[24] prompted reform to the national security review of investment in the UK.

(ii) NSIA

By placing national security review onto its own statutory footing, the NSIA affords sole responsibility to the relevant minister, ending the CMA's role in national security review. The NSIA gives the executive the power to 'call-in' a transaction for review if the transaction relates to a particular qualifying entity or asset,[25] as well as providing for mandatory notifications to Government for those acquiring entities in 17 named sectors.[26] Once a transaction is reviewed and a national security risk identified, the Government can order remedies, including blocking the transaction or imposing other conditions.[27]

In line with this, the Government expected the number of interventions under the new regime to increase substantially. Although the previous screening regime was used just

[18] Enterprise Act 2002, s 58.

[19] 'UK Mergers Regime – The UK Is Moving Towards Reform of National Security and Infrastructure Investment Review in the UK' (*Court Uncourt (Blog)*, 30 May 2019) <https://www.stalawfirm.com/en/blogs/view/uk-mergers-regime.html> accessed 10 May 2024.

[20] 'Hytera-Sepura: A Report to the Secretary of State for Business, Energy and Industrial Strategy on the Anticipated Acquisition by Hytera Communications Corporation Limited of Sepura PLC' (Competition and Markets Authority, 4 May 2017) para 97 <https://assets.publishing.service.gov.uk/media/5a820650ed915d74e340152e/sepura-hytera-cma-report-redacted.pdf> accessed 10 May 2024.

[21] Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (CUP 2007) 35–37.

[22] Cabinet Office, 'The Arms Length Body (ALB) Landscape at a Glance' (Cabinet Office, 2020) <https://assets.publishing.service.gov.uk/media/60eddaaad3bf7f5688e5d966/Public_Bodies_2020.pdf> accessed 10 May 2024.

[23] Jill Rutter, 'The Strange Case of Non-Ministerial Departments' (Institute for Government, October 2013) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/NMDs%20-%20final.pdf> accessed 10 May 2024.

[24] Department for Business, Energy and Industrial Strategy, *National Security and Investment: A Consultation on Proposed Legislative Reforms* (White Paper, Cm 9637, 2018) ('White Paper') para 1.09.

[25] NSIA 2021, s 5(1).

[26] The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021, SI 2021/1264, reg 2.

[27] Kiran Desai, 'National Security and Investment Act 2021: Eight Months Review' (2022) 6 European Competition and Regulatory Law Review 271, 272–73.

seven times since 2002,[28] the Government estimated the imposition of remedies under the new regime in 10 cases per year.[29] In its latest 'Annual Report' on the NSIA, released in July 2023, a little over a year after the Act's commencement, the Government announced that it had called in 65 deals for closer review, intervening in 15 of them.[30] As of 18 April 2024, the Government had reviewed more than 1,700 notifications and, by 10 May 2024, it had issued 21 final orders under the NSIA.[31]

As we saw in this article's introduction, the absence of a statutory definition creates challenges when locating the precise meaning of national security.[32] What is important to assess, given that the NSIA removed national security from the ambit of the Enterprise Act's public interest considerations, is the extent to which national security under the NSIA is framed as distinct from the public interest. This should move us closer to understanding how broadly the concept of national security is capable of being cast and, thus, how far the executive can use national security in pursuit of its policy objectives. Only by understanding this can we explore the potential risks to executive accountability and the rule of law posed by both the NSIA and, by extension, the ambiguity surrounding the meaning of national security in UK law.

B. NATIONAL SECURITY AND PUBLIC INTEREST

In justifying the creation of a distinct national security review regime, the NSIA's White Paper stressed that '[n]ational security is not the same as the public interest or the national interest'.[33] This approach contrasts starkly with the preceding Green Paper, which acknowledged that, although national security is a form of public interest, it is merely one narrow and exceptional subset of the public interest.[34] This latter approach was reiterated in the Government's response to its White Paper consultation, which distinguished between review powers for national security and those for 'other areas of public interest'.[35]

Further areas of overlap between these two concepts can be found within the 2015 Strategic Defence and Security Review ('SDSR'), which forms the basis of national security policies, including the NSIA. The SDSR's repeated references to the UK's 'interests' ensure

[28] Department for Business, Energy and Industrial Strategy, *National Security and Infrastructure Investment Review: The Government's Review of the National Security Implications of Foreign Ownership or Control* (Green Paper, October 2017) ('Green Paper') para 21.

[29] Department for Business, Energy and Industrial Strategy, *NSI Impact Assessment* (RPC-4173(4)-BEIS, Impact Assessment (IA), 9 November 2020) paras 81, 83, 134.

[30] Cabinet Office, 'National Security and Investment Act 2021: Annual Report 2022–2023' (Cabinet Office, July 2023) 4 <https://assets.publishing.service.gov.uk/media/65c21672688c39000d334c12/National_Security_and_Investment_Act_2021_annual_report_2022-23__PDF_.pdf> accessed 10 May 2024.

[31] Cabinet Office, 'Notices of Final Orders Under the National Security and Investment Act 2021' (Cabinet Office, 15 July 2022, last updated 9 May 2024) <https://www.gov.uk/government/collections/notice-of-final-orders-made-under-the-national-security-and-investment-act-2021> accessed 10 May 2024; Cabinet Office, 'National Security and Investment Act 2021: Call for Evidence Response' (n 16).

[32] Desai, 'The National Security and Investment Act 2021' (n 11).

[33] White Paper, Cm 9637 (n 24) para 1.10.

[34] Green Paper (n 28) paras 100, 138.

[35] Department for Business, Energy and Industrial Strategy, *National Security and Investment White Paper: Government Response to the Consultation* (White Paper Consultation Response, CP 323, 2020) para 195.

that the public or national interest is placed at the heart of its national security strategy.[36] This in turn suggests that, although not as conceptually broad as the public or national interest, national security can nevertheless be a means of furthering those interests. Therefore, the White Paper's suggestion that national security is entirely distinct from the public interest is inconsistent with the NSIA's other policy documents.

One SDSR objective is 'project[ing] our global influence'.[37] Gerhard Colm has argued that such aims demonstrate that national security is an intrinsic part of the public interest by going beyond individuals' self-interest to be concerned more with 'supranational groupings and with humanity as such'.[38] This is reflected by the SDSR's aim of projecting the UK's global influence, along with its emphasis on securing the interests of 'allies and partners' and 'fragile states and regions'.[39] This again suggests a closer relationship between national security and the public interest than that found in the White Paper.

As well as coming into tension with the Act's other policy documents, the White Paper's downplaying of the relationship between national security and the public interest ignores the extent to which meanings of national security hinge upon those national interests that are deemed worthy of securing. In this sense, national security and the public interest remain distinct, though closely intertwined, concepts—national security concerns the protection of public interests, rather than constituting the public interest per se. When viewed as a whole, the NSIA's policy documents have demonstrated that the White Paper is an outlier in rejecting any association between the two concepts.

Nevertheless, there remain problems with conflating national security with the public interest, as seen through cases of national security whistleblowing that are argued to be in the overriding public interest.[40] Therefore, it is helpful that the NSIA's policy documents, taken as a whole, do not entirely conflate national security with the public interest, but instead frame national security as one form of public interest. The policy documents' narrowing of what national security is intended to mean may in turn suggest that the meaning of national security under the NSIA is itself intended to take a narrow, more traditional form relating exclusively to military defence. However, the following subsection will demonstrate that, although the NSIA's policy documents present national security as a narrow form of public interest, the executive's incorporation of non-defence-related security objectives within the NSIA creates the risk that governments may use national security to bypass legal accountability mechanisms and the rule of law, thus undermining core constitutional values.

C. NATIONAL SECURITY AND ECONOMIC SECURITY

Scholars have often asserted that investment review regimes have economic security concerns at their heart[41] and that this is part of a wider expansion of national security.[42]

[36] Cabinet Office and others, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom* (Policy Paper, Cm 9161, 2015).
[37] ibid ch 5.
[38] Gerhard Colm, 'In Defense of the Public Interest' (1960) 27 Social Research 295, 298.
[39] Policy Paper, Cm 9161 (n 36) ch 5.
[40] Jason Zenor, 'Damming the Leaks: Balancing National Security, Whistleblowing and the Public Interest' (2015) 3 Lincoln Memorial University Law Review 61.
[41] Donohue (n 4); Bath (n 4), 22; Hasnat (n 4).
[42] Jackson (n 5); Chad P Bown, 'Export Controls: America's Other National Security Threat' (2020) 30 Duke Journal of Comparative & International Law 283, 287; Rana Foroohar, 'The US-China Decoupling Story Is Not Over' *Financial Times* (London, 14 August 2023) <https://www.ft.com/content/f07921e7-c334-427f-bc50-bda9e0530eb4> accessed 10 May 2024; Inagaki and Lewis (n 5).

In the absence of a statutory definition, we can once again turn to the NSIA's policy documents to determine not only the extent to which the NSIA incorporates economic security within national security, but also how far the concept of national security is capable of being morphed by executive policy objectives. Such an assessment helps us to understand how ambiguous national security powers, such as those within the NSIA, are capable of undermining executive accountability and the rule of law.

The NSIA's Green Paper provides that the regulation of investment into the UK is underpinned by the need to mitigate the risk of 'severe economic or social consequences'.[43] The idea that non-defence-related concerns can be caught within the ambit of national security was reiterated in the NSIA's Draft Statement of Policy Intent, which provides that national security 'goes beyond "defence of the realm"', encompassing 'all genuine and serious threats to a fundamental interest in society'.[44] In assessing the extent to which the NSIA distinguishes economic security from national security, this reference to a 'fundamental interest' warrants further exploration.

A clue as to the nature of a 'fundamental interest' can be found in the SDSR's three national security objectives: 'protecting our people'; 'projecting our global influence'; and 'promoting our prosperity'.[45] That the NSIA was designed to complement the SDSR's wider strategy suggests that these objectives are crucial to understanding the NSIA's economic underpinnings.[46] Although the first objective, 'protecting our people', appears to promote a narrower view of national security centred around defence, the SDSR also provides that protecting the UK's 'economic security' and 'way of life' are integral components of this objective. The second objective, 'projecting our global influence', gives a more tacit indication that economic concerns are interwoven with national security. Specifically, this objective's references to 'the rules-based international order' and 'building stability overseas' demonstrate a commitment to associating economic security with national security.[47] Although the 'rules-based international order' comprises non-economic components, it equally relates to the 'Global Economic Architecture', including the World Trade Organisation, the International Monetary Fund, and the World Bank.[48] Similarly, references to 'stability overseas' emphasise the potential for development programmes to 'drive economic development and prosperity' and to help create 'markets for future British business'.[49] The third objective, 'promoting our prosperity', most explicitly incorporates economic security into the sphere of national security. The SDSR specifies that 'economic and national security go hand-in-hand',[50] although also tacitly acknowledging that all of its objectives are possible only through the protection of economic security, given that a 'strong economy provides the foundation to invest in our security and enables us to project our influence across the world'.[51] This suggests that economic

[43] Green Paper (n 28) para 45.
[44] Department for Business, Energy and Industrial Strategy, *National Security and Investment: Draft Statutory Statement of Policy Intent* (Policy Paper, July 2018) para 1.03 ('*Draft Statutory Statement of Policy Intent*').
[45] Policy Paper, Cm 9161 (n 36) paras 1.10–1.21.
[46] Green Paper (n 28) para 43.
[47] Policy Paper, Cm 9161 (n 36) para 5.2.
[48] ibid paras 5.87–5.94.
[49] ibid para 5.10.
[50] ibid para 6.1.
[51] ibid para 6.7.

security concerns and traditional, defence-related security concerns are tightly interwoven both within the SDSR and the NSIA.

An association between economic and national security concerns is certainly nothing new. Theodore H Moran has explored three ways in which neglecting economic policy threatens national security: by contributing to national decline relative to geopolitical rivals; by causing losses of vital domestic capabilities; and by prompting increased dependence on other states.[52] However, by associating the perceived negative consequences of particular policy outcomes with threats to national security, Moran's argument that economic policy and national security are inherently interconnected could be applied to any policy objective. In turn, this argument tacitly suggests that anything can be national security, further confirming that the concept of national security is ambiguous and could be used by governments to pursue a wide range of objectives unrelated to military defence. Although it is one thing for defence-related security to depend on economic policy, the NSIA's policy documents go further still, by directly incorporating economic prosperity within national security. The SDSR's emphasis on economic prosperity reinforces Baban Hasnat's view that national security is increasingly used to encapsulate economic concerns. However, Hasnat, writing in the US context, argued that these concerns are intertwined because of the US Government's protection of critical infrastructure and technologies deemed essential to national defence.[53] In so doing, Hasnat only brings limited economic elements within the purview of national security, elements that are already associated with the traditional or narrow view of national security relating to military defence. Although the NSIA policy documents also refer to 'Critical National Infrastructure' that permits the basic functioning of government,[54] 'promoting our prosperity' goes one step further. It explicitly broadens national security by including economic prosperity, rather than simply entailing those economic elements, such as 'Critical National Infrastructure', that align with a traditional, defence-related view of national security. This suggests that the NSIA rejects the narrower view of national security that relates exclusively to military defence, providing support for the scholarly view that national security is increasingly used to incorporate a wider range of policy goals.[55]

The NSIA's White Paper makes no direct reference to economic security. Nevertheless, remarks by the then Business Secretary during the White Paper's House of Commons debate emphasised a desire to protect businesses 'at the very forefront of technological breakthroughs'.[56] Although protecting technology companies might reasonably serve defence-related objectives, the Government's willingness to use the NSIA to exert control over successful British technology companies as a means of attracting investment demonstrates that the NSIA can also be used to achieve non-defence-related objectives.[57] Technological discoveries have long been linked to national security. The internet and GPS, both of which have widespread

[52] Theodore H Moran, *American Economic Policy and National Security* (Council on Foreign Relations Press 1993) 2.
[53] Hasnat (n 4).
[54] Department for Business, Energy and Industrial Strategy, *National Security and Investment: Sectors in Scope of the Mandatory Regime* (Government Response, March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965784/nsi-scope-of-mandatory-regime-gov-response.pdf> accessed 10 May 2024; 'Case Study: Securing the UK's Critical National Infrastructure' (*National Cyber Security Centre*, 14 November 2023) <https://www.ncsc.gov.uk/collection/annual-review-2023/resilience/case-study-securing-cni> accessed 10 May 2024.
[55] Hasnat (n 4); Donohue (n 4); Bath (n 4).
[56] HC Deb 11 November 2020, vol 683, col 35WS.
[57] Antoni Slodkowski and others, 'UK Officials Weigh National Security Grounds to Force London IPO for Arm' *Financial Times* (Tokyo, 22 June 2022) <https://www.ft.com/content/074940e5-b435-45b2-9144-d246354602f3> accessed 10 May 2024.

civilian applications, emerged from the race to develop the next generation of military technology.[58] However, there is a distinction between breakthroughs that result from defence-related security policy and using such breakthroughs to promote an economic agenda. The former is more closely linked to military defence, whereas the latter relates to matters that have not traditionally been included within the scope of national security. Therefore, the executive's willingness to use the NSIA to promote technology investment suggests that economic concerns, as well as defence-related ones, underpin the Act.

Moreover, during the Bill's House of Lords debate, another minister went further still, arguing that 'national prosperity is inextricably and rightly linked with our national security',[59] supporting the scholarly view that economic and national security concerns have grown increasingly interlinked. Such rhetoric also follows a common pattern seen around the globe, most notably in the US, where successive administrations have stressed that 'economic security is national security' and that the distinctions between different forms of security are 'less meaningful than ever before'.[60] Although the UK Government noted that 'foreign policy rests on strong domestic foundations', in particular a strong economy,[61] conflation of the economy's ability to deliver for defence interests with its overall industrial capacity demonstrates how far national security has spilled over into the economic domain. Far from occurring spontaneously, the association of economic security with national security is the product of conscious political desires to widen the scope of national security.[62] Indeed, security policies are being used by governments to cover 'an increasingly wide array of risks and vulnerabilities'.[63]

Attempts to incorporate economic concerns within the scope of national security under the NSIA demonstrate the willingness of executive branches to use national security to cover far-reaching objectives, beyond simply the defence context. Consequently, although the NSIA's policy documents appear to cast national security narrowly as simply one aspect of the public interest, national security is capable of far broader application, extending to public health, culture, the environment, and, as we have seen in this section, the economy.[64]

D. Conclusion

Each subsection explored in this section has served a distinct purpose. Section II.A contextualised the national security review of investment, exploring how the powers now contained within the NSIA have evolved over time. Section II.B examined the distinctions between national security and the public interest under the NSIA, while Section II.C explored

[58] Michael A Peters, '"Global Britain": The China Challenge and Post-Brexit Britain as a "Science Superpower"' (2023) 55 Educational Philosophy and Theory 871, 871.

[59] HL Deb 4 February 2021, vol 809, col 2374.

[60] Ana Swanson and Paul Mozur, 'Trump Mixes Economic and National Security, Plunging the U.S. Into Multiple Fights' *The New York Times* (Washington DC, 8 June 2019) <https://www.nytimes.com/2019/06/08/business/trump-economy-national-security.html> accessed 10 May 2024; The White House, 'Interim National Security Strategic Guidance' (*The White House*, 3 March 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/03/interim-national-security-strategic-guidance/> accessed 10 May 2024.

[61] Cabinet Office, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (Policy Paper, CP 403, 2021) 12.

[62] Jackson (n 5) 18.

[63] J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 Yale Law Journal 1020, 1020.

[64] Donohue (n 4) 1575.

economic security in relation to the NSIA. From these subsections, and from the NSIA policy papers explored within them, we can glean that the executive simultaneously casts national security as one narrow subset of the public interest while interpreting the concept sufficiently broadly to encompass non-traditional conceptions of security. This in turn highlights the executive's ability to apply the ambiguity inherent in national security in pursuit of potentially far-reaching objectives.

However, although the executive may seek to benefit from the ambiguous nature of national security, the task of applying the legal meaning of national security in cases brought under the NSIA will fall to the courts. This, as well as the normal questions of statutory interpretation and grounds for judicial review, means that the extent of executive national security power under the Act will depend in large part on the judiciary.[65] This in turn will have significant ramifications for the executive's ability to shape the meaning of national security in the future. Given that there has yet to be a judicial review challenge decided under the NSIA, we must turn to traditional national security contexts to understand both how the concept stands to be interpreted and the relationship between executive national security power and the judicial process. A discussion of the courts' role in national security adjudication will therefore be the focus of the next section of this article.

III. The Courts: Interpretations, Deference, and Secrecy

In *Secretary of State for the Home Department v Rehman*, Lord Hoffmann remarked that 'there is no difficulty about what "national security" means'.[66] This section will demonstrate that such a statement is misplaced and that, far from being clear, judicial interpretations of national security are entirely ambiguous. Although national security constitutes a source of executive power,[67] this power stems not from national security per se, but from the courts' ambiguous interpretations of national security, along with a wide degree of judicial deference.[68] Despite courts justifying executive national security power in both competence and democratic legitimacy terms, these justifications obfuscate the significant extent to which executive power results from the secrecy inherent in national security adjudication as a result of classified evidence and closed hearings. Once again, the unchecked executive power that emerges from questions of national security is problematic through its undermining of fundamental norms of Western systems of government.

This section will first discuss how the courts have interpreted national security and how this interacts with the degree of deference shown to the executive over decisions purported to be 'in the interests of' national security. Given that there has yet to be a judicial review challenge decided under the NSIA, this section will rely on traditional, defence-related national security case law. Next, the discussion will turn to the relationship between national security secrecy and executive power. By better understanding these issues, we can gain a deeper comprehension of the executive-judiciary dynamic and how these matters may operate under the NSIA. We will see that judicial interpretations of national security and deference to the executive are inextricably linked and that the courts' tendency to place few meaningful demands on the executive poses challenges for national security adjudication and executive

[65] Bonner (n 1) 14.
[66] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 ('*Rehman* (HL)') [50].
[67] Bonner (n 1) 187.
[68] Stephen Cody, 'Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security' (2021) 6 University of Pennsylvania Journal of Law & Public Affairs 643.

accountability, both under the NSIA and beyond. In matters of national security, the courts are therefore complicit, however unwittingly, in undermining the constitutional norms that permit them to exist independently of the executive.

Although recent national security case law has been coloured by the post-9/11 security context and the 'war on terror',[69] the sources discussed in this section nevertheless represent, within this geopolitical backdrop, a variety of factual contexts, ranging from deportation and citizenship to detention and control orders. What will emerge is the remarkable consistency of the courts' deferent approach to executive power whenever national security is invoked. This consistency suggests that national security is a powerful tool for the executive, capable of being invoked to free governments of the ordinary checks, balances, and constraints that are central to liberal democratic systems of public law.

A. Interpretations of National Security and Deference

Although the academic literature often emphasises the significant degree of national security deference that is shown to the executive and its subsequent effect on executive power,[70] an often-neglected aspect of the courts' role is the interpretation of national security. Therefore, this section will focus on the interpretation of national security in some of the cases most commonly discussed by scholars. These key judgments, assessed in turn, will highlight the relationship between national security interpretations, deference, and executive power. They will also highlight how the courts' interpretations perpetuate the ambiguity or lack of certainty over the meaning of national security, thus placing few meaningful demands on the executive and contributing to a wide degree of deference over decisions purported to be in the interests of national security.

(i) Rehman

In *Rehman*, which concerned the deportation of a terror suspect, the Special Immigration Appeals Commission ('SIAC') (the judicial body formed to decide immigration and citizenship appeals) had interpreted a danger to national security in the terrorism context as being that which 'promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people'.[71] The SIAC also held that national security includes 'situations where United Kingdom citizens are targeted, wherever they may be'.[72] The

[69] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 International Journal of Constitutional Law 172, 174; Mercedes Masters and Salvador Santino F Regilme Jr, 'Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to *Homo Sacer*' (2020) 12 Journal of Human Rights Practice 341.

[70] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006) 161–62; Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP 2007) ch 1; Cody (n 68); Alan DP Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012) 140; David Rudenstine, *The Age of Deference: The Supreme Court, National Security, and the Constitutional Order* (OUP 2016).

[71] *Secretary of State for the Home Department v Rehman* [2000] 3 WLR 1240 (CA) ('*Rehman* (CA)') [28].

[72] ibid (emphasis removed).

definition provided by the SIAC is problematic as it is insufficiently narrow to place any meaningful constraints on the executive. It includes any and all violent activity within the scope of 'danger to national security'.

In the Court of Appeal case, the *amicus curiae* provided their own definition of terrorist activities that would be contrary to national security: the promotion or encouragement of 'violent activity which has, or is likely to have, adverse repercussions on the security of the United Kingdom, its system of government or its people'.[73] Favouring this more expansive approach, the Court held that the SIAC's definition 'was flawed in so far as it required the conduct relied on by the Secretary of State to be targeted on this country or its citizens'.[74] However, beyond establishing that national security concerns can be extraterritorial, this leaves us no closer to identifying the exact meaning of national security. Here, the Court of Appeal did not narrow down the meaning of national security, but instead conflated a definition of terrorist activity that would breach national security with a definition of national security itself. Given that the meaning of national security is markedly different from identifying the conditions under which security may be attained,[75] we again face uncertainty over the meaning of national security.

Aileen Kavanagh argues that the deference shown by the courts to the executive where national security is concerned is 'a rational response to uncertainty'.[76] However, *Rehman* suggests that this process takes place in reverse and that uncertainty can in fact result from the deference shown by the courts. More specifically, by affirming the SIAC's interpretation of national security, the Court of Appeal, rather than simply responding to uncertainty with deference, instead created more uncertainty through an open-ended definition of national security. This paved the way for a broad degree of deference by widening the scope of that which could be held to be in the interests of national security, thus demonstrating that judicial deference over questions of national security can increase uncertainty over what national security means. On appeal to the House of Lords, Lord Hoffmann, arguing that 'there is no difficulty about what "national security" means', provided another ambiguous and circular definition of national security: 'the security of the United Kingdom and its people'.[77] This definition merely rephrased, rather than clarified, the meaning of UK national security.

We have so far seen that the ambiguous national security interpretations in *Rehman* allowed for a wide degree of executive power. Notwithstanding this ambiguity, counsel in the House of Lords appeal attempted to provide a clearer definition of national security. Citing Lord Diplock in the *GCHQ* case, the claimant argued that national security is merely another term for 'defence of the realm'.[78] However, this only compounded the uncertainty over the meaning of national security, with Lord Slynn in *Rehman* asserting that, although national security and the defence of the realm 'may cover the same ground... the latter is capable of a wider meaning'.[79]

Although the courts failed to offer a clear and unambiguous definition of national security, the terrorism context of the case and the Lords' affirmation of the dicta of Lord Radcliffe in *Chandler v DPP*, which emphasised that 'the methods of arming the defence forces' and 'the instruments of the state's defence' are 'not within the competence of a court

[73] ibid [38].
[74] ibid [41].
[75] Baldwin (n 2) 8.
[76] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 177.
[77] *Rehman* (HL) (n 66) [50].
[78] ibid [14]; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) ('the *GCHQ* case') 410.
[79] *Rehman* (HL) (n 66) [18].

of law',[80] might suggest that the courts favoured a strictly defence-related interpretation. Such narrow interpretations of national security, when exclusively construed in military terms, may 'convey[] a profoundly false image of reality'.[81] However, they are appropriate in the terrorism context, given that terrorism closely relates to defence-related interpretations of national security. Nevertheless, despite Lord Slynn ruling that 'defence of the realm' was wider than 'national security', he also saw national security as comprising 'the interests of the state, including not merely military defence but democracy' and its 'legal and constitutional systems'.[82] At first glance, this might appear to be in line with the executive's interpretation of national security in the NSIA's *Draft Statutory Statement of Policy Intent*.[83] However, Lord Slynn's judgment, by simultaneously framing national security as a concept that is narrower than the military defence-related concept of defence of the realm and also as something akin to the public or national interest, highlights not only the courts' failure to expound a consistent meaning of national security, but also that individual judges themselves can offer ambiguous and contradictory interpretations. Consequently, and contrary to Lord Hoffmann's assertion,[84] the exact meaning of national security remains ambiguous.

Lord Hoffmann noted that national security decisions 'may involve delicate questions of foreign policy' and that 'it is artificial to try to segregate' the two,[85] suggesting that the legal dimension of the meaning of national security and the political dimension of national security deference can influence one another in a reciprocal manner. Although ambiguous and undemanding interpretations of national security do not preclude a high degree of scrutiny, they nevertheless broaden the range of areas which, in the courts' view, ought to be left to politicians. By linking national security to foreign policy, and vice versa, Lord Hoffmann acknowledged that any foreign policy concern could fall within the scope of national security. Perhaps this only appears to affirm the idea that courts will rarely intervene in matters of national security. However, when viewed from the interpretative perspective, the bounds of national security appear to be obfuscated again. Given the association between international trade and foreign policies, it is not unforeseeable that foreign policy could include the regulation of investment by foreign entities,[86] demonstrating how the courts' interpretations of national security can further expand executive power. The expansion of that which could be held to be in the interests of national security, combined with the courts' tendency to defer decisions made in the interests of national security,[87] demonstrates that national security interpretations and the degree of deference shown to the executive go hand-in-hand.

On limited aspects, however, the Court of Appeal in *Rehman* provided a measure of clarity over the meaning of national security. It ruled that national security could be affected indirectly through activities conducted abroad, such as undermining anti-terrorism cooperation between the UK and other states.[88] Despite keeping its overall meaning ambiguous, this

[80] *Chandler v DPP* [1964] AC 763 (HL) 798.
[81] Richard H Ullman, 'Redefining Security' (1983) 8 International Security 129, 129.
[82] *Rehman* (HL) (n 66) [16]–[18].
[83] *Draft Statutory Statement of Policy Intent* (n 44) paras 1.02–1.03.
[84] *Rehman* (HL) (n 66) [50].
[85] ibid [53].
[86] Robert T Kudrle and Davis B Bobrow, 'U.S. Policy toward Foreign Direct Investment' (1982) 34 World Politics 353, 353.
[87] Stevie Martin, 'Deference, "Fairness" and Accountability in the National Security Context' [2021] Cambridge Law Journal 209, 210.
[88] *Rehman* (CA) (n 71) [40].

extraterritorial component represents a rare clarification of what national security could encompass. Crucially, however, this undemanding interpretation did not narrow the bounds of national security sufficiently to constrain executive action. As a result, although the Court partially clarified the meaning of national security, the Court's interpretation also gave effect to the executive's decision.

Perhaps it is fitting, given the terrorism context in *Rehman*, that the courts were willing to endorse an extraterritorial meaning of national security that encompassed 'the reciprocal co-operation between the United Kingdom and other states in combating international terrorism'.[89] Indeed, Lord Hoffmann, in his postscript comments written following the 9/11 terrorist attacks, wrote that the events were 'a reminder that in matters of national security, the cost of failure can be high', underscoring the need for the courts to 'respect' executive national security decisions.[90] Although this is unsurprising, what is noteworthy is the Court's willingness to stretch the bounds of national security to permit 'appropriate deference' over whether a decision was 'in the interests' of national security.[91] Equally noteworthy is the fact that the House of Lords held, on separation of powers and institutional competence grounds, that whether something is 'in the interests' of national security is 'a matter of judgment and policy'.[92] This demands that the ordinary *Wednesbury* threshold, whereby a decision must be found to have been 'so unreasonable that no reasonable authority could ever have come to it', must be met before overturning a decision.[93] By interpreting national security just broadly enough to uphold the executive's decision, while simultaneously keeping the actual meaning of national security ambiguous so as to widen the scope of that which could reasonably be held to be in the interests of national security, the Court in *Rehman* demonstrated that executive national security power hinges significantly on judicial interpretation. The Court's specific and focused clarification of the extraterritorial component of national security contrasts starkly with their ambiguous and undemanding interpretation of what national security actually means. Yet, both aspects highlight a willingness to adopt interpretations of national security that favour the executive, thus permitting a wide degree of deference.

Although Lord Hoffmann made it clear that the meaning of national security was 'a question of law', this legal interpretation has a material impact on the political question of whether an executive decision was 'in the interests' of national security.[94] Arnold Wolfers has argued that ambiguous national security definitions are of little use for 'sound political counsel' and ought to be clarified and narrowed down.[95] However, as David A Baldwin demonstrates, focusing the meaning of national security is an inherently political process.[96] The discussion in this article thus far lends credence to Baldwin's argument. In Section II, we saw how the executive shapes the meaning of national security to suit its policy objectives, whereas the courts have justified interpreting national security ambiguously on the ground that they are not active participants in the political process. The problem with the courts providing an open-ended interpretation of national security is that, if defining national security is a political issue, the decision to leave its meaning unclear and ambiguous is equally political. This tells us that not only can the lines between the political and legal aspects of national security easily

[89] *Rehman* (HL) (n 66) [17] (Lord Slynn).
[90] ibid [62].
[91] ibid [31] (Lord Steyn).
[92] ibid [50] (Lord Hoffmann).
[93] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) 234 (Lord Greene MR).
[94] *Rehman* (HL) (n 66) [50].
[95] Wolfers (n 10) 483.
[96] Baldwin (n 2).

become blurred, but also that the courts' interpretations of national security can impact executive power, as has been explored in this section thus far.

What emerges from *Rehman*, therefore, is the ambiguity in the courts' interpretations of national security. Furthermore, the adoption of national security interpretations that align neatly with executive decisions also demonstrates that the legal meaning of national security can greatly impact the political determination of whether something is 'in the interests' of national security. Although the precise boundaries between the two are unclear, it is evident that judicial deference, and thus executive power, can be a direct consequence of how the courts interpret national security.

(ii) Begum

Scholars often emphasise that the post-9/11 security context greatly impacted attitudes towards national security.[97] However, an analysis of *R (Begum) v Special Immigration Appeals Commission*, which centred around the citizenship revocation of an individual who had joined a terrorist organisation overseas,[98] will reveal that ambiguous interpretations of national security, and therefore of executive power, scarcely differed from *Rehman* 20 years earlier.

When interpreting the executive's statutory powers, the Supreme Court in *Begum* found that the 'public good', contained within section 40(2) of the British Nationality Act 1981, meant 'public interest', encompassing 'considerations of national security and public safety'.[99] The association of national security with public safety might suggest a view of national security that, when applied to the terrorism context, focuses exclusively on the military and defence. Beyond this, however, the Court offered no clarification on national security and simply affirmed Lord Hoffmann's interpretation in *Rehman*, namely that national security comprises 'the security of the United Kingdom and its people'.[100] Once again, this keeps the meaning of national security ambiguous, making the executive's decision as to whether something is 'in the interests of national security' less capable of challenge.

This highlights how, despite the almost two decades between *Rehman* and *Begum*, the courts' ambiguous and undemanding approach to national security remained remarkably consistent over time.

(iii) Belmarsh

In addition to deportation and citizenship cases, the 'war on terror' has influenced the factual matrices of national security cases surrounding detention and control orders. *A v Secretary of State for the Home Department* ('*Belmarsh*'), which concerned individuals detained without trial on national security grounds, is perhaps the most well-known example of such cases,[101] having been described as 'the most dramatic recent example of the constitutional shift away from nonjusticiability on matters concerning national security'.[102]

[97] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 174; Masters and Regilme (n 69) 342.
[98] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765.
[99] ibid [70].
[100] ibid [56].
[101] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 ('*Belmarsh*').
[102] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 174.

Although no attempt was made to elucidate the precise bounds of national security, *Belmarsh* involved a derogation of the UK's obligations under article 15 of the European Convention on Human Rights ('ECHR'), which regards national security as the security of 'the life of the nation'.[103] In this case, the Lords interpreted 'national security' as akin to '[p]rotecting the life of the nation' under the Convention.[104] For the purposes of the ECHR, a 'public emergency threatening the life of the nation' is regarded as an 'exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life' of the state.[105] However, as we saw in *Rehman*, identifying that which is contrary to national security is of little use without national security first being given a clear meaning. Without placing meaningful demands on the executive, and by being sufficiently ambiguous and flexible as to permit executive power, the ECHR interpretation offers few meaningful distinctions from the *Rehman* interpretation. Then again, perhaps it is expected that the Strasbourg Court would lay down a flexible definition of national security, given the wide 'margin of appreciation' conferred on governments over national security matters.[106] This reiterates what we have already seen: ambiguous interpretations of national security can further the executive's power over national security matters by broadening the range of decisions that can be made 'in the interests of' national security.

Yet, the House of Lords in *Belmarsh* did not grant the executive the 'margin of discretion' that it wanted,[107] instead famously issuing a declaration of incompatibility against the UK Government's legislation. At first glance, this might appear to suggest that the courts' interpretations of national security do not necessarily confer power on the executive branch. However, the *Belmarsh* outcome has less to do with the Court's interpretation of national security, and more to do with the fact that the executive had implicitly conceded that its detention of foreign terror suspects was not necessary.[108]

The effect that the courts' interpretations of national security have on the constraints placed on the Government demonstrates that executive national security power does not arise automatically but instead depends on an interaction between the executive and the judiciary. Despite its outcome, *Belmarsh* again demonstrates how the courts' interpretations of national security are largely undemanding, widening the range of lawful decisions that the executive could make and placing few constraints on government power.

(iv) Conclusion

This subsection has demonstrated that, despite Lord Hoffmann's belief that its meaning is clear, the legal meaning given to national security by the courts is largely ambiguous. The courts' tendency to confer power on the executive through undemanding and ambiguous interpretations, together with their tendency to defer decisions made 'in the interests of' na-

[103] Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') art 15. See also Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 180–84.
[104] *Belmarsh* (n 101) [226] (Baroness Hale).
[105] *Lawless v Ireland (No 3)* App No 332/57 (ECtHR, 14 November 1960) [28].
[106] For a detailed discussion on the margin of appreciation in European Court of Human Rights ('ECtHR') case law, see Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current Legal Problems 49.
[107] *Belmarsh* (n 101) [175]–[176] (Lord Rodger).
[108] Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' [2013] University of Cambridge Faculty of Law Research Paper No 32/2013, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326987> accessed 10 May 2024.

tional security, ensures that the executive has vast influence over both the legal and the political dimensions of national security adjudication. Although the courts undoubtedly wield the power to scrutinise strictly executive decisions that are based on ambiguous and ill-defined national security threats, this inevitably relies upon their ability to exercise that power fully.[109] The next subsection will explore why the courts are too often unable fully to exercise their role in reviewing executive national security decisions.

B. NATIONAL SECURITY SECRECY

In *Rehman*, Lord Hoffmann emphasised the need for 'the judicial arm of government to respect the decisions of ministers', not only due to the executive's 'special information and expertise', but also because such decisions 'require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process'.[110] These comments encapsulate two sets of justifications for national security deference. The first centres around expertise and competence, which is the idea that the executive's knowledge, resources, and legal authority make it best placed to make national security determinations.[111] The second centres around democratic legitimacy and the separation of powers, which is the idea that, in a liberal democracy, national security determinations ought to be made by those who are democratically accountable.[112] Yet, these justifications obscure the practical significance of national security secrecy in determining how much freedom the courts give to the executive to define and apply national security. We will find that secrecy (the result of classified evidence and closed hearings) is an essential feature of national security proceedings that underpins the courts' application of deference, having profound implications for executive national security power both under the NSIA and beyond.

In *Rehman*, Lord Slynn noted that the executive 'is undoubtedly in the best position to judge what national security requires'. Ostensibly justifying national security deference on expertise and competence grounds, Lord Slynn also noted that the evidence upon which the executive's decision was made was not made available to them.[113] In *Belmarsh*, the Government made use of a 'closed material' procedure ('CMP'), determining which evidence was to be seen by the SIAC only and thus withheld from the appellate courts.[114] The 'need to preserve the confidentiality' of national security material necessarily limits the courts' review function, thereby tending towards more limited legal accountability and a consequent increase in executive power.[115] Although Lord Slynn couched deference in terms of executive expertise, there is a clear distinction between the ability to make determinations based on national security evidence and the ability to access such evidence in the first place.

The special advocate system, whereby relevant closed material is served on a lawyer permitted to represent the affected party, goes some way towards mitigating the deleterious

[109] Cody (n 68) 681.
[110] *Rehman* (HL) (n 66) [62].
[111] Cora Chan, 'Deference, Expertise and Information-Gathering Powers' (2013) 33 Legal Studies 598, 600.
[112] TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 University of Toronto Law Journal 41, 53.
[113] *Rehman* (HL) (n 66) [26].
[114] *Belmarsh* (n 101) [117] (Lord Hope).
[115] *Rehman* (HL) (n 66) [35] (Lord Hoffmann).

effects of CMPs on procedural fairness and a party's right to a fair trial.[116] However, the advocate is allowed no contact with the affected party once the closed material has been accessed. In the words of Lord Hope in *Bank Mellat v Her Majesty's Treasury (No 2)*, this creates an imbalance between 'the party who invokes the procedure and will always have access to that material, and the other party against whom the State has taken action and to whom access to that material is always denied'.[117] These challenges risk being particularly pronounced under the NSIA. Although the courts have circumscribed the absolute power of CMPs in imprisonment and deprivation of liberty cases concerning individuals' ECHR rights enshrined by the Human Rights Act 1998,[118] it is unlikely that such rights would apply to corporate entities under the NSIA.[119]

The issue of the executive's exclusive access to classified security intelligence reared its head once again in *Begum*. Here, the SoS certified that their 'decision had been taken wholly or partly in reliance on information which in his opinion should not be made public in the interests of national security'.[120] The Supreme Court highlighted that there is likely to be deference to the executive where the SoS exercises their discretion in the light of 'national security and public safety' considerations because these decisions and the evidence upon which they are made are 'incapable of objectively verifiable assessment'.[121]

Arguing that this secrecy creates uncertainty that paralyses the courts, Kavanagh has noted that the courts often have no choice but to give the executive 'the benefit of any doubts they may have'.[122] This was the case in *Belmarsh*, where the majority felt it necessary to defer to the executive's assessment of whether there was a 'threat to the life of the nation' because they were not in possession of all the relevant facts and so could not be certain that the decision was incorrect.[123] Although Lord Scott expressed 'very great doubt' about the executive's assessment of the security threat, he too was willing to give 'the benefit of the doubt'.[124] The executive's ability to exclude evidence from judicial review, and thus gain the benefit of the doubt over national security decisions, demonstrates the significance of secrecy to executive national security power. When it came to the ultimate outcome in *Belmarsh*, the Court was able to rule against the executive only because the proportionality question could be decided without recourse to classified material.[125]

Lord Walker, however, adopted a different justification for deference, stating that national security is the policy area where the courts are most inclined to defer, with the exception of 'some questions of macro-economic policy and allocation of resources'.[126] Ostensibly, Lord Walker simply argued that deference arises from the executive's expertise and their ability to make determinations on polycentric issues (i.e. those that relate to several different

[116] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 Current Legal Problems 215, 216–18; Lewis Graham, '*Tariq v. United Kingdom*: Out with a Whimper? The Final Word on the Closed Material Procedure at the European Court of Human Rights' (2019) 25 European Public Law 43, 44.

[117] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 [96].

[118] *A v UK* [GC] App No 3455/05 (ECtHR, 19 February 2009); *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269; *Gulamhussein v UK* [Committee] App Nos 46538/11 and 3960/12 (ECtHR, 3 April 2018).

[119] However, it has been asserted that, in certain narrow circumstances, corporations could be found to have human rights. See Andreas Kulick, 'Corporate Human Rights?' (2021) 32 European Journal of International Law 537.

[120] *Begum* (n 98) [5].

[121] ibid [70].

[122] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 69) 177.

[123] *Belmarsh* (n 101) [27] (Lord Bingham).

[124] ibid [154].

[125] Elliott (n 108) 6–7.

[126] *Belmarsh* (n 101) [192].

and often competing policy areas).[127] Polycentricity has been used to justify deference to executive expertise,[128] and the concept remains an important tool of analysis when determining the degree of deference in a variety of areas.[129] Yet, in areas such as tax law, courts often adjudicate polycentric disputes without a second thought, in the name of protecting individuals' rights against executive power.[130] Conversely, in the national security context, even where rights are at stake, we have seen that the courts are by no means guaranteed to wade into these similarly polycentric disputes. Therefore, any suggestion that the courts defer to the executive over national security matters because the latter's expertise makes them better placed to tackle polycentric issues would overstate the importance of this aspect of their reasoning. In fact, despite noting the secrecy inherent in national security proceedings, Lord Walker ignores a crucial distinction between cases involving national security and those involving resource allocation or macroeconomic policy.[131] That is, unlike other polycentric issues, the courts in national security matters are not only poorly placed to review such decisions but may also lack the same access to evidence as the executive, suggesting that secrecy remains the central factor underpinning executive national security power.

It has also been argued that deference is better explained by a fear of life and death consequences and the desire to avoid complex risk assessments that require information that judges do not have access to.[132] A closer inspection of each of these factors reveals that, even here, national security secrecy plays a significant role. Firstly, the courts' desire to avoid life and death consequences is a desire to avoid getting the relevant national security assessment wrong. It is true that, irrespective of national security secrecy, such assessments are inherently political and so would never fall directly within the courts' role. However, given the often-secretive nature of these assessments, the courts' ability to make informed security judgments is necessarily limited. Secondly, when it comes to national security cases, determining 'the extent of future risk' can often be decisive.[133] Lord Hoffmann in *Rehman* described such assessments as 'a question of evaluation and judgment' involving not only 'the probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences' faced by terror suspects.[134] The issue is that these assessments are impossible where the courts are not in possession of all the facts. Lord Hoffmann noted the resulting imbalance when he decided that a 'considerable margin' was to be afforded to the executive, resulting from their 'advantage of a wide range of [security] advice' and contributing to differences in executive and judicial 'decision-making processes'.[135] As a risk assessment is only possible where all relevant information is available, the demands of such analysis will necessarily tend towards deference, thus affirming executive power.

[127] Martin Chamberlain, 'Democracy and Deference in Resource Allocation Cases: A Riposte to Lord Hoffmann' (2003) 8 Judicial Review 12; Cora Chan, 'Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences' (2011) 41 Hong Kong Law Journal 7, 14. See generally Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 394.

[128] Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 45; Chan, 'Deference and the Separation of Powers' (n 127) 14–17.

[129] Jeff A King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101, 109–11.

[130] ibid 111–13.

[131] Jeff A King, 'The Justiciability of Resource Allocation' (2007) 70 Modern Law Review 197.

[132] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 213.

[133] *Rehman* (HL) (n 66) [56] (Lord Hoffmann), [65] (Lord Hutton).

[134] ibid [56].

[135] ibid [56]–[58].

Nevertheless, it has been noted that, in *Belmarsh*, the Lords did not push back against the Government's decision to withhold evidence, thus suggesting that other concerns are the predominant factors in deference to the executive.[136] Then again, it is perhaps not surprising that courts acquiesce in executive desires not to share secret intelligence, given the latter's tendency to insist that such material be withheld from the courts.[137] Moreover, Chris Monaghan has emphasised that separation of powers and democratic legitimacy justifications do not tell the whole story and that deference instead follows a far more 'nuanced approach'. He argues that the particular facts of a case, the relevant statutory wordings, and the powers and jurisdiction of bodies such as the SIAC, together with the specific security context, will combine to determine the level of deference.[138] This nuanced approach is valid, given that executive judgments often involve 'an evaluation of complex facts'.[139] However, the problem with this is that the factual matrices are not only complex but are also often hidden, comprising evidence to which the courts have no access. Furthermore, the ambiguous interpretations of national security, as well as the secretive approach taken by the executive to determine whether something is 'in the interests of national security', mean that all of the factors identified by Monaghan would likely create uncertainty, likely leading the courts' approach to national security cases to tend towards executive power. Monaghan's approach is helpful insofar as it highlights that separation of powers and democratic accountability concerns are no guarantee that the courts will interpret national security in a way that favours the executive. However, such an approach takes insufficient account of the importance of secrecy in determining the extent of executive national security power.

The implications of this subsection for national security adjudication in UK law are profound. The NSIA includes provisions for the use of CMPs in judicial review actions brought against the executive. If used, CMPs would allow the courts to decide cases based on sensitive national security evidence. However, CMPs rely upon the executive making such information available to appellate courts.[140] In any case, CMPs necessarily limit the scrutiny of executive decision-making through the inability of the other party to view and therefore challenge evidence gathered by the executive branch.[141] The secrecy that is likely to persist under the NSIA, combined with the courts' tendency to defer both over what national security means and what is needed to uphold it, risks granting the executive far-reaching powers. It is now necessary to assess in detail the wider effects that this may have, both under the NSIA and beyond. This will be the focus of the next section.

IV. Implications: Adjudication and Accountability

This section will explore the implications of this article's findings for both the judiciary and the executive. It will demonstrate that, by incorporating economic security concerns within the scope of national security, the NSIA risks becoming a powerful tool of unchecked executive power. This, in turn, creates uncertainty regarding the traditional role of the courts in

[136] David Dyzenhaus and Murray Hunt, 'Deference, Security and Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 146.
[137] *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307.
[138] Chris Monaghan, '"The Court of Appeal ... Appears to Have Overlooked the Limitations to Its Competence, Both Institutional and Constitutional, to Decide Questions of National Security": Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive' (2021) 26 Judicial Review 134, 144, para 31.
[139] *Bank Mellat* (n 117) [93] (Dissenting Opinion of Lord Hope).
[140] Explanatory Notes to the National Security and Investment Act 2021, para 41.
[141] Tomkins, 'National Security and the Due Process of Law' (n 116) 217.

national security matters. Therefore, this section delves into the heart of the normative analysis underpinning this article, as we will see how ambiguity under the NSIA risks undermining the values that are central to the UK constitutional settlement.

A. THE ROLE OF THE COURTS IN NATIONAL SECURITY ADJUDICATION

We have already seen how, under the NSIA, national security is left undefined, meaning that the task of giving shape to the meaning of national security in this context falls to the courts.

It has been suggested that there is unlikely to be much uncertainty over the interpretation of national security, as this will be determined by the contextual meaning of those 'national security risks arising from the acquisition of control over certain types of entities and assets'.[142] However, although the UK Government has issued a statement seeking to clarify the relevant risk factors and asset types that will likely prompt national security review, that same statement stresses that '[t]he government intentionally does not set out the exhaustive circumstances' where national security may be at risk.[143] Additionally, the executive has refused to rule out a further widening of the scope of national security in future.[144] Although some flexibility is needed to help governments respond to 'an increasingly wide array of risks and vulnerabilities',[145] it remains true that flexibility is in constant tension with legal certainty and that the requisite degree of flexibility is context-dependent.[146] The failure to elucidate the precise bounds of the context relevant for executive control over 'entities and assets' means that the courts' ability to interpret national security within that context, and thus to provide legal certainty, is necessarily weakened. We have already seen how adjustments to the meaning of national security tend to take place only where needed to give effect to executive decisions. Therefore, even if the context is clear, there is no guarantee of legal constraints on executive power. Moreover, the inclusion of economic security within national security means that investment review cases would represent a relatively novel context when compared with the traditional national security cases discussed in the previous section. This, alongside the courts' tendency to provide ambiguous and thus favourable interpretations of national security, means that the NSIA will present entirely novel challenges for national security adjudication.

The operation of precedent and the hierarchy of the courts pose a further problem for the interpretation of national security under the NSIA. We have already seen that the legal meaning of national security in traditional contexts comes from Lord Hoffmann in *Rehman*,

[142] Desai, 'The National Security and Investment Act 2021' (n 11) 422.
[143] Cabinet Office, 'National Security and Investment Act 2021: Statement for the Purposes of Section 3 – 2021 Version' (Cabinet Office, 2 November 2021) para 16 <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3> accessed 10 May 2024.
[144] Helen Thomas and Daniel Thomas, 'UK Pledges Greater Transparency of How It Scrutinises Deals' *Financial Times* (London, 3 April 2023) <https://www.ft.com/content/a00281bc-0f8e-48c6-b6d8-dec66b2a12d0> accessed 10 May 2024.
[145] Heath (n 63).
[146] Magdalena Pfeiffer, 'Legal Certainty and Predictability in International Succession Law' (2016) 12 Journal of Private International Law 566, 569; PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Clarendon Press 1987) 415; Lutz-Christian Wolff, 'Flexible Choice-of-Law Rules: Panacea or Oxymoron?' (2014) 10 Journal of Private International Law 431, 438.

comprising 'the security of the United Kingdom and its people'.[147] In non-investment contexts, the lower courts have applied Lord Hoffmann's definition with few difficulties.[148] However, the NSIA's incorporation of economic security into the sphere of national security means that there are no guarantees as to whether such a broad interpretation will be applied in the economic context. Furthermore, given that challenges to decisions made under the NSIA will begin in the High Court, it may be some time before the appellate courts provide clarity over whether economic security concerns can legitimately fall within the scope of national security.

This creates a further problem, given the impact of national security interpretations on judicial deference. In the US context, Kristen Eichensehr and Cathy Hwang have identified three broad approaches to deference that courts might take when faced with cases involving a national security review of transactions.[149] The first, so-called 'expansive' approach, entails applying the same degree of deference seen in traditional national security cases. The second, 'constriction' approach, involves limiting deference across the board, even in cases concerning strictly defence-related interpretations of national security. The third approach, known as 'bifurcation', is a curtailed deference for economic security matters, with defence-related national security issues shown a wider degree of deference. However, this tripartite division of approaches appears artificial. Even if the courts sought to adjust their approach to national security deference, the main challenge that they would face would be determining how far a case falls within economic security and how far it relates to a strictly defence-related interpretation of national security. It is foreseeable that appeals could involve overlaps between these two security concepts. Any simplistic categorisation of possible approaches to deference would overlook the inevitable complexities in the factual matrices of national security cases.

When it comes to determining factual matrices, further complications are raised by the prospect of secret evidence. Given the NSIA's provision for CMPs, the use of secretive evidence and closed judgments would undoubtedly make it more difficult for the courts to establish a clear precedent over the correct approach to deference, further compounding the uncertainty faced by the courts, litigants, and the Government. Furthermore, given that CMPs were devised to enhance the protection of fundamental rights in the terrorism context,[150] questions remain over the courts' willingness to grant such procedures in the investment context. The alternative would see vast swathes of material kept out of the courts' reach, signalling further uncertainty as to how the review role of the courts will proceed under the NSIA.

All of these factors suggest that courts will face a largely novel situation when reviewing decisions made under the NSIA. Although national security review, CMPs, and executive branch deference are certainly nothing new, the NSIA's combining of national security and economic concerns creates widespread uncertainty. Despite arguments that the courts' role in national security matters 'evolves constantly' in line with how courts seek to straddle the divide between their constitutional bounds and the protection of individual rights and executive accountability,[151] the NSIA's incorporation of economic security into the realm of national security makes it impossible to know where those bounds now lie. What is clear, however, is

[147] *Rehman* (HL) (n 66) [50].
[148] *Foreign, Commonwealth and Development Office v Information Commissioner* [2021] UKUT 248 (AAC), [2022] 1 WLR 1132; *R (Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin), [2021] ACD 66; *Begum* (n 98).
[149] Eichensehr and Hwang (n 14) 584.
[150] Lorna Woods, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) 84 Modern Law Review 553, 568.
[151] Robert M Chesney, 'National Security Fact Deference' (2009) 95 Virginia Law Review 1361, 1434.

that the courts' approach to judicial review claims under the NSIA will have a significant impact on how executive power evolves in future.

B. EXECUTIVE ACCOUNTABILITY

The inclusion of economic security within the NSIA poses challenges not only for the role of the courts in national security review but also for executive accountability.

It has been argued that the NSIA risks becoming a tool of government economic and industrial policy.[152] We have already seen in Section II.C how the executive has incorporated economic concerns within national security.[153] Indeed, in the orders made under the Act thus far, the Government has ordered companies to increase UK-based jobs, research and development spending, and the use of UK supply chains, all of which better fall under the umbrella of industrial policy.[154] The Government has nonetheless pledged 'transparency', 'a very high bar for intervention' based exclusively on national security considerations, and that the Act will 'not be used as a backdoor for industrial strategy'.[155] Yet, the adoption of economic security rhetoric necessarily undermines these aims.

We saw in Section II.C that the executive sought to use the NSIA to protect UK businesses at the 'forefront of technological breakthroughs'.[156] Indeed, the Government's mooted use of the NSIA to help in its subsequently failed attempt to persuade semiconductor designer, ARM Holdings, to list on the London Stock Exchange suggests a willingness to use the NSIA in the pursuit of economic aims.[157] It is argued that, given that the NSIA does not name economic or industrial considerations as purposes of the legislation, the executive's ability to make interventions is limited to traditional security concerns.[158] However, this ignores the extent to which economic security has been brought within national security's purview. As it stands, only the courts can prevent the executive's freedom to interpret national security as they see fit and, given the courts' tendency to confer a wide degree of executive power, the prospects for legal accountability under the NSIA appear far from promising. Once again, this strikes at the fundamental principles of liberal democratic systems of government, which seek to place limits on executive power.

The role of executive national security competence, discussed in the previous sections, also poses a danger to government accountability. If national security now encompasses more than military defence, questions remain as to whether the relevant ministerial department has sufficient competence to make determinations under the Act. Despite ultimate responsibility for the NSIA lying with the Cabinet Office, the expertise required to make

[152] Desai, 'The National Security and Investment Act 2021' (n 11) 422; Helen Thomas, 'The Long, Long Reach of the UK's National Security Laws' *Financial Times* (London, 21 December 2022) <https://www.ft.com/content/f3c4c25d-bbf9-422a-b0aa-97070b0b0c88> accessed 10 May 2024.
[153] See also Thomas and Thomas (n 144).
[154] Thomas (n 152).
[155] Thomas and Thomas (n 144); Cabinet Office, 'Annual Report 2022–2023' (n 30).
[156] HC Deb 11 November 2020 (n 56).
[157] Slodkowski and others (n 57).
[158] Desai, 'The National Security and Investment Act 2021' (n 11) 422.

informed decisions may be dispersed throughout government, entailing a commensurate dispersal of accountability.[159]

The accountability question becomes more difficult in the light of secrecy and CMPs. Even where individual courts have access to closed evidence, closed judgments mean that they can only provide non-public forms of accountability limited to the legal sphere. Beyond CMPs, concerns have been raised that the NSIA is 'something of an information vacuum', typified by an opaque review process that places few obligations on the executive to give reasons for its determinations.[160] In traditional national security matters, 'the imperative of secrecy' has been regarded as 'an essential prerequisite of self-governance'.[161] However, the adoption of economic security concerns risks expanding government secrecy, and thus unaccountability, beyond the defence context. The opacity of the review process concerning Parliament, the media, and the public means that the NSIA prevents meaningful political accountability, demanding a significant degree of trust in both the judicial and executive branches.[162] Trust in leaders is essential in national security matters, as only when governments are trustworthy can they be presumed to be making decisions in the public interest.[163] The executive's ability to expand the range of policy areas that fall within the scope of national security therefore risks undermining not only scrutiny and trust in government, but also the assumption that national security decisions are made in the public interest. In addition to the public interest in national security, liberal democratic systems of government entail a public interest in accountability, open justice, and the rule of law, which also risks being watered down by an expansion of national security powers.[164] Therefore, the public interest per se cannot be a reason to permit the NSIA's far-reaching powers to go unchallenged. The NSIA's incorporation of economic concerns thus poses grave challenges for executive accountability.

Furthermore, given that research has often emphasised that high rates of business investment are dependent on a firm foundation of the rule of law and government accountability,[165] the NSIA risks endangering the balance between protecting national security and maintaining the UK's position as a major investment destination, which the Act alleges to uphold.[166] Although it may be true that the opacity of the NSIA's decision-making process also risks a 'chilling effect' on investment in the UK,[167] this opacity is, at least in part, due to the ambiguity surrounding the meaning of national security. Governments may seek to impart their preferred meaning on national security to give themselves flexibility, but this flexibility would necessarily defeat the policy underpinnings of the NSIA. This mismatch between the

[159] Sean Gailmard and John W Patty, *Learning While Governing: Expertise and Accountability in the Executive Branch* (University of Chicago Press 2013) ch 2.

[160] Marc Israel and Kate Kelliher, 'UK FDI Year in Review: A Look at the First Year of the National Security and Investment Act' (*White & Case*, 30 January 2023) <https://www.whitecase.com/insight-alert/uk-fdi-year-review-look-first-year-national-security-and-investment-act> accessed 10 May 2024.

[161] Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (WW Norton & Company 2010) 21.

[162] Woods, McNamara and Townend (n 150) 569.

[163] Cody (n 68) 669–70.

[164] Karl Laird, 'Closed Material Procedures – Should They Be Expanded to Protect Sensitive Interests Other Than National Security?' (2023) 28 Judicial Review 61; Tomkins, 'National Security and the Due Process of Law' (n 116) 247.

[165] Joseph L Staats and Glen Biglaiser, 'Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law' (2012) 56 International Studies Quarterly 193; John Hewko, 'Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?' (2002) 11 East European Constitutional Review 71, 73.

[166] Cabinet Office, 'National Security and Investment Act 2021: Call for Evidence Response' (n 16).

[167] Michael O'Dwyer, 'UK Ministers Intervene in 8 Deals Involving China-Linked Investment' *Financial Times* (London, 11 July 2023) <https://www.ft.com/content/3ae6098f-8b71-4551-af69-e0be3cebaa73> accessed 10 May 2024; Thomas and Thomas (n 144).

NSIA's aim of protecting investment and its potential practical effect of undermining investment seems to resonate with Wolfers's interpretation of the normative proposition underpinning national security, namely that nations 'consent to any sacrifice of value which will provide an additional increment of security'.[168] This is affirmed by the risk under the NSIA that the desire for enhanced national security undermines the commitment to investment that governments purport to uphold. The NSIA creates a risk of undermining the values it alleges to uphold, highlighting a certain irony within the Act. Including economic concerns within national security also risks the concept becoming all-consuming. Rather than securing the values that the nation holds dear, the steps taken to protect a nation's acquired values, in the form of the NSIA, create a risk that those values themselves, whether it be the rule of law, government accountability, the separation of powers, or the UK's openness to trade and investment, become diluted.

As well as accountability under the NSIA specifically, the Act also raises questions regarding which policy areas could fall within the scope of national security in the future. If the Government is free to shape the bounds of national security, a danger arises that future governments could abuse this by incorporating novel policy concerns. Such an occurrence would suggest that national security is capable of removing whole areas from the scope of judicial review. Indeed, it has long been argued that 'security' itself is so broad as to include a 'highly divergent' range of policies.[169] However, this suggests a theoretical possibility arising from the ambiguous nature of national security. The NSIA risks going further still, revealing a practical danger of national security powers expanding in the future. This article has demonstrated how the problems of government accountability resulting from the NSIA's inclusion of economic security concerns may extend beyond simply the investment review sphere to engulf all areas of public law. The problem, therefore, is not simply that the NSIA itself 'wields a big stick'[170] but that future national security legislation risks freeing the executive branch of legal accountability.

V. Concluding Remarks

Throughout this article, the NSIA itself has served merely as a vignette, a lens through which to assess national security ambiguity, the interaction between the judicial and executive branches, and the resulting implications for judicial review and government accountability. The NSIA demonstrates that national security ambiguity, constructed by the executive and given effect to by the courts, renders national security a tool of executive power. It is capable of expanding to other areas of policy, such as public sector technology investment and industrial strategy, as explored in Sections II and IV respectively. Thus, the issues considered and the conclusions raised in this article reach far beyond the NSIA's confines.

When it comes to power and accountability, although this article has focused on the executive branch, there remains the question of accountability for private entities. Legislation for the national security review of investment undoubtedly shifts the balance of power between the state and business interests. Given what we have seen, namely that these regimes risk

[168] Wolfers (n 10) 492.
[169] ibid 484.
[170] Desai, 'The National Security and Investment Act 2021' (n 11) 416.

excess government power, future research might explore means of checking the power of non-state actors without compromising executive accountability.

In Section III, we saw that the spectre of secrecy is likely to lurk in future national security cases and that the use of CMPs does not guarantee judicial access to secretive evidence. Beyond executive scrutiny, there remain the questions of procedural fairness, or ensuring fair trials, and open justice, with the operations of the justice system not obscured to affected parties and the wider public. Much has been written about how CMPs affect the ability of litigants to argue their case, and the NSIA is simply one part of a wider expansion of the use of these procedures.[171] Although perhaps it is high time for a review of CMPs in cases concerning business and industry, their abolition would only exacerbate the problems caused by national security secrecy. Further research is therefore needed on how CMPs can be reformed to strengthen both executive accountability and litigants' rights to due process.

Section IV brought together the discussions of executive and judicial interpretations of national security explored in the previous sections. It demonstrated that the ambiguity of national security under the NSIA has practical implications, rather than simply theoretical ones surrounding abstract constitutional principles such as the rule of law. We explored that the threats posed by the NSIA risk upsetting the delicate constitutional balance between the courts and the executive and undermining the NSIA's aim of balancing national security with the UK's position as an investment destination.

Lastly, the overarching theme of this article has been the role played by national security ambiguity in executive power. This conceptual ambiguity would undoubtedly be remedied by an unambiguous statutory definition of national security. This would entail a clear delineation of the policy areas that fall within the scope of national security, which would undoubtedly be hard to achieve given that few governments would seek to constrain themselves by narrowing the range of decisions that might fall within the scope of national security. Moreover, it is unclear whether the electorate, when faced with a party campaigning on such a platform, would wish to limit the ability of government to act in the interests of 'the safety of [its] citizens'.[172] Given the UK executive's dominance over the legislature and the advantage of national security ambiguity to governments, it remains unlikely that an unambiguous definition will be given a statutory footing anytime soon.

[171] John Jackson, 'Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?' [2013] Public Law 720; Adam Tomkins, 'Justice and Security in the United Kingdom' (2014) 47 Israel Law Review 305.
[172] White Paper Consultation Response, CP 323 (n 35) para 3.

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All That Glitters Is Not Gold: The Regulation of Stablecoins under the MiCA Regulation—Between Innovation and Risk Mitigation

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ABSTRACT

This article examines the regulation of stablecoins under the EU's MiCA Regulation. It assesses the balance that the MiCA Regulation aims to strike between promoting innovation and market competitiveness in disruptive financial technologies, on the one hand, and effectively managing the risks inherent to the financial sector, on the other hand. After a review of the development of stablecoin regulation, this article examines both the broader regulatory model and specific provisions of the MiCA Regulation through two lenses: (i) the promotion of financial innovation by providing legal certainty through a sector-specific legal regime; and (ii) a risk-based approach leveraging existing tools to ensure financial stability and investor protection in the light of past turbulence in the crypto sector. Lastly, this article addresses the long-term global competitiveness of the EU single market with regard to stablecoins and suggests that the adoption of a set of global common standards as well as international cooperation are necessary effectively to ensure the objectives of the MiCA Regulation.

Keywords: stablecoins, MiCAR, MiCA Regulation, crypto, EU law, EU financial regulation

I. INTRODUCTION

In scientific terms, 'mica' refers to a group of silicate minerals known for their glittering characteristics. The term derives from the Latin word *micare*, meaning 'to glitter'. Since the European Union ('EU') announced its Regulation on Markets in Crypto-Assets[1] (the 'MiCA Regulation'), the word has gained a further meaning. Fittingly, crypto-assets commonly find themselves caught between glamour and high risk in the public's perception due to their inherent volatility.[2] Events such as Bitcoin's value plummeting by 50 per cent within only a few hours in 2015 and a performance of over 300 per cent over the course of 2020[3] demonstrate the volatility of these financial assets. This volatility spurred a notable demand for crypto-

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[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40 ('MiCAR').

[2] ESMA, *Crypto-Assets and Their Risks for Financial Stability* (Publications Office of the European Union 2022) 4.

[3] 'Bitcoin Price History: 2009 – 2024' (*Bitcoin Magazine*, 2 March 2023) <https://bitcoinmagazine.com/guides/bitcoin-price-history> accessed 9 June 2024.

assets offering a steady value. A crypto-asset with a steadier value increases the number of use cases in decentralised finance ('DeFi'), which builds on distributed ledger technologies ('DLTs'),[4] such as blockchain, to offer services such as trading, lending, and investing without using a traditional centralised intermediary.[5] This facilitates the trading of digital assets, peer-to-peer and cross-border payments, as well as other financial services on decentralised markets in a fashion that seeks to avoid price fluctuations.[6] In response to this demand, stablecoins were created.[7]

Stablecoins are defined by the Financial Stability Board ('FSB') as privately issued 'crypto-asset[s] designed to maintain a stable value relative to another asset', such as one or more official government-issued currencies ('fiat currencies'), other assets, and/or commodities.[8] In contrast to central bank digital currencies, stablecoins may also be issued by private entities and not only by central banks.[9] As stablecoins seek to maintain a stable value by reference to another form of asset—be that a currency or a commodity—they are also to be distinguished from other common forms of crypto-assets, such as cryptocurrencies (e.g. Bitcoin or Ethereum), as cryptocurrencies are not pegged to an external reference value.

Stablecoins take on a variety of different forms and are typically categorised according to their collateral and stabilisation mechanisms, distinguishing between tokenised funds, off-(block)chain collateralised, on-(block)chain collateralised, and algorithmic stablecoins.[10] Tokenised funds are pegged to the value of a single fiat currency,[11] whereas the value of other stablecoins can in principle be linked to any (crypto-)asset.[12] Algorithmic stablecoins, in contrast, are not backed by a reserve of assets, but 'aim to maintain a stable value' in relation to a fiat currency or other assets via protocols that 'provide for the increase or decrease in the supply of such crypto-assets in response to changes in demand'.[13] They are therefore often perceived as less stable and riskier.[14] The MiCA Regulation does not expressly recognise stablecoins as a standalone category, but creates two new regulatory categories of tokens that aim to maintain a stable value: (i) asset-referenced tokens; and (ii) e-money tokens. Asset-referenced tokens are defined in the MiCA Regulation as crypto-assets that aim to maintain a stable

[4] Under the MiCA Regulation, 'DLT' means a technology that enables the operation and use of distributed ledgers (an information repository that keeps records of transactions and is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism): MiCAR, arts 3(1)(1)–(2).

[5] Raphael Auer and others, 'The Technology of Decentralized Finance (DeFi)' (2023) BIS Working Papers No 1066, 2 <https://www.bis.org/publ/work1066.htm> accessed 9 June 2024.

[6] Gordon Y Liao and John Caramichael, 'Stablecoins: Growth Potential and Impact on Banking' (2022) International Finance Discussion Paper No 1334, 6 <https://doi.org/10.17016/IFDP.2022.1334> accessed 23 February 2024.

[7] Rachel Wolfson, 'An Explanation for the Rise of "Stable Coins" as a Low-Volatility Cryptocurrency' (*Forbes*, 29 March 2018) <https://www.forbes.com/sites/rachelwolfson/2018/03/29/an-explanation-for-the-rise-of-stable-coins-as-a-low-volatility-cryptocurrency/> accessed 23 February 2024.

[8] FSB, 'Decentralised Financial Technologies: Report on Financial Stability, Regulatory and Governance Implications' (6 June 2019) 27 <https://www.fsb.org/2019/06/decentralised-financial-technologies-report-on-financial-stability-regulatory-and-governance-implications/> accessed 23 February 2024.

[9] Oriol Caudevilla and others, 'Stablecoins: An Introduction and Recommendations for the European Union' (Private Digital Euro Working Group, August 2022) 7 <https://7869715.fs1.hubspotusercontent-na1.net/hubfs/7869715/Private%20Working%20Group%20paper.pdf> accessed 23 February 2024.

[10] Dirk Bullmann, Jonas Klemm and Andrea Pinna, 'In Search for Stability in Crypto-Assets: Are Stablecoins the Solution?' (2019) ECB Occasional Paper Series No 230, 9–10 <https://data.europa.eu/doi/10.2866/969389> accessed 23 February 2024.

[11] Probably the most well-known example is Tether, which is pegged to the US dollar ('USDT'): see 'Tether token' (*tether*) <https://tether.to/en/> accessed 23 February 2024.

[12] For example, gold (e.g. Paxos), government bonds, or other crypto-assets (e.g. DAI).

[13] MiCAR, recital 41. An example of this is the oldest algorithmic stablecoin, NuBits.

[14] Christian Catalini, Alonso de Gortari and Nihar Shah, 'Some Simple Economics of Stablecoins' (2021) MIT Sloan Research Paper No 6610-21, 13 <https://ssrn.com/abstract=3985699> accessed 9 June 2024.

value by reference to another value or right, including one or more official currencies,[15] whereas e-money tokens are defined as crypto-assets that aim to maintain a stable value by reference to the value of one official currency.[16] The MiCA Regulation explicitly clarifies that algorithmic stablecoins, which are based on protocols that provide for an increase or decrease in supply in response to changes in demand and also aim to achieve a stable value, are to be included in these definitions.[17] Consequently, these new EU regulatory categories target the broad category of assets commonly known as stablecoins without explicitly defining them by reference to this term. When referring to the regulation of stablecoins within the context of the MiCA Regulation, this article adopts the EU's regulatory parlance and therefore refers to both asset-referenced tokens and e-money tokens as stablecoins.

Stablecoins are typically issued in two steps. First, an equivalent value is transferred to a stablecoin issuer. Secondly, by means of a 'smart contract', code deployed and run in a blockchain or other DLT environment,[18] stablecoins are automatically issued to the recipient on the distributed ledger when coded, pre-defined conditions are met, such as the transfer of the corresponding monetary value for the stablecoins.[19]

By introducing the MiCA Regulation, the EU has taken a significant step to establish an attractive regulatory framework and market for crypto-assets with provisions relating to stablecoins entering into force on 30 June, 2024. Using the example of the regulation of stablecoins under the MiCA Regulation, this article analyses the extent to which regulatory measures can strike a balance between fostering a globally competitive environment for the innovation of disruptive technologies and effectively limiting the inherent risks in and for the financial sector.

After a brief review of the development of stablecoin regulation (Section II), this article argues that the prerequisites for innovation in the financial sector include, on one hand, a legally certain regulatory framework (Section III) and, on the other, a nuanced and tailored approach to mitigate risks (Section IV). The article then addresses concerns about the framework's sustainability regarding the long-term global competitiveness of the EU single market. Ultimately, this article contends that there is a need for a comprehensive global approach to the regulation of stablecoins. The analysis is limited to regulatory aspects of stablecoins within the scope of the MiCA Regulation. International perspectives are used selectively to provide additional comparative insights. Private law issues are not explored in detail.

II. The Announcement of a Global Stablecoin as a Wake-Up Call for Regulatory Action

When stablecoins first emerged in around 2014,[20] they initially attracted minimal regulatory attention. The landscape shifted dramatically with the unveiling of Facebook/Meta's ambitious global stablecoin project, initially named Libra and later rebranded as Diem, in June

[15] MiCAR, art 3(1)(6).
[16] ibid art 3(1)(7).
[17] ibid recital 41.
[18] Primavera De Filippi, Chris Wray and Giovanni Sileno, 'Smart Contracts' (2021) 10(2) Internet Policy Review <https://doi.org/10.14763/2021.2.1549> accessed 23 February 2024.
[19] Weimin Sun, Xun (Brian) Wu and Angela Kwok, *Security Tokens and Stablecoins Quick Start Guide* (Packt Publishing 2019) 180.
[20] The first stablecoin released in July 2014 was BitUSD. Shortly thereafter, NuBits, another crypto-collateralised stablecoin, was released in September of the same year. See further BitMEX Research, 'A Brief History of Stablecoins (Part 1)' (*BitMEX*, 2 July 2018) <https://blog.bitmex.com/a-brief-history-of-stablecoins-part-1/> accessed 23 February 2024.

2019. This initiative aimed to provide a more cost-effective alternative to traditional payment systems.[21] Through its potential to evolve into a systemically relevant payment system with global reach, Libra distinguished itself from previous stablecoin projects.[22]

In response to this development, the G7 promptly established a dedicated Working Group to tackle the challenges and risks stemming from the advent of global, and potentially systematically important, stablecoins.[23] The G7 Working Group concluded that stablecoins have a number of benefits, including the potential to make transactions faster, reduce costs, bolster security, and improve cross-border payments and their resilience.[24] However, it also identified a spectrum of challenges and risks associated with stablecoins, including issues relating to consumer protection, data privacy, taxation, cybersecurity, operational resilience, money laundering, terrorist financing, market integrity, governance, and legal certainty.[25] On a global scale, concerns were raised with regard to the risks posed by stablecoins to monetary sovereignty and policy, the security and efficiency of payment systems, financial stability, and fair competition.[26] This evaluation was mirrored by the Council of the European Union and the European Commission in a joint declaration in December 2019. In this declaration, the Council and the Commission underscored that no global stablecoin should commence operations within the EU until the legal and regulatory challenges and risks associated with such stablecoins had been thoroughly identified and appropriately addressed.[27]

About a year later, the European Commission unveiled the Digital Finance Package as a strategic response, which aimed to address emerging challenges and risks linked to the digital transformation of the single market whilst promoting digital innovation.[28] A key component of this package was the proposal for a comprehensive regulatory framework regulating stablecoins and other crypto-assets: the MiCA Regulation. The MiCA Regulation was designed to achieve a dual objective of both establishing a regulatory environment within the EU that encourages the growth of the crypto economy whilst also safeguarding the stability of financial markets and protecting investors from risks and ensuring legal certainty.[29]

This highlights the inherent tension within the EU's objectives. The EU seeks to create an internationally competitive, digitised internal market through the introduction of regulatory frameworks (such as the MiCA Regulation) that stimulate innovation, whilst preventing excessive risks that could adversely impact the functioning of the single market and other EU objectives. It is to these issues that this article now turns.

[21] Dirk A Zetzsche, Ross P Buckley and Douglas W Arner, 'Regulating Libra' (2021) 41 OJLS 80.

[22] Taylor Telford, 'Why Governments Around the World Are Afraid of Libra, Facebook's Cryptocurrency' *The Washington Post* (Washington, DC, 12 July 2019) <https://www.washingtonpost.com/business/2019/07/12/why-governments-around-world-are-afraid-libra-facebooks-cryptocurrency/> accessed 23 February 2024.

[23] Benoît Cœuré, 'Update from the Chair of the G7 Working Group on Stablecoins' (*BIS*, 18 July 2019) <https://www.bis.org/cpmi/speeches/sp190718.htm> accessed 23 February 2024.

[24] ibid.

[25] ibid.

[26] G7 Working Group on Stablecoins, 'Investigating the Impact of Global Stablecoins' (BIS, October 2019) 5 <https://www.bis.org/cpmi/publ/d187.pdf > accessed 23 February 2024.

[27] Council of the EU, 'Joint Statement by the Council and the Commission on "Stablecoins"' (*European Council*, 5 December 2019) para 6 <https://www.consilium.europa.eu/en/press/press-releases/2019/12/05/joint-statement-by-the-council-and-the-commission-on-stablecoins/> accessed 23 February 2024.

[28] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU' (Communication) COM (2020) 591 final.

[29] Commission, 'Digital Finance Package: Commission Sets Out New, Ambitious Approach to Encourage Responsible Innovation to Benefit Consumers and Businesses' (*European Commission*, 30 September 2020) <https://ec.europa.eu/newsroom/representations/items/688865/default> accessed 23 February 2024.

III. Legal Certainty as a Foundation for Innovation in the Crypto Sector

Since the 2007–2008 global financial crisis, governments and regulators have increasingly sought to regulate financial services to prevent the build-up of systemic risk and, in so doing, have transformed the financial services sector into one of the most highly regulated economic sectors. Consequently, this highly regulated environment reverses the traditional binary paradigm that often opposes regulation and innovation, the latter of which is believed to be impeded by regulation through requirements and prohibitions, thereby restricting certain paths of innovation.[30] However, in the financial services sector, regulation is often seen by academics and regulators alike as essential to ensuring 'systemic stability', maintaining 'the safety and soundness of financial institutions', and protecting investors.[31] Accordingly, innovation in highly regulated markets, such as the financial sector, is only possible with sufficient legal certainty as to the applicable legal regime. The principle of legal certainty requires that the law be clear, precise and unambiguous, and that its legal implications be foreseeable.[32] This is because vague legal frameworks bear the risk of arbitrary decisions which in turn impact investor confidence and, in so doing, may inhibit investment. In the US, for example, crypto service providers, such as Coinbase, are seeking clarity through commencing legal action against the Securities and Exchange Commission ('SEC').[33] At the same time, providers like Circle and Coinbase[34] have announced their relocation to the EU, citing the new MiCA Regulation.

The MiCA Regulation itself stresses the EU's policy interest of 'developing and promoting the uptake of transformative technologies in the financial sector', so as to 'contribute to a future-proof economy'.[35] In this sense, the EU admits that any legislative act adopted in the field of crypto-assets should be specific, 'future-proof', and 'be able to keep pace with innovation and technological developments' whilst being 'founded on an incentive-based approach'.[36] This approach will be examined with regard to legal certainty. In navigating the challenge of balancing legal certainty as to the applicable legal regime with fostering innovation within regulatory frameworks, it will be argued that sector-specific regulations can strike a balance between sector-specific risks and legal certainty (Section III.A). Additionally, the regulatory landscape must adapt to cover innovative and evolving regulatory objects in a manner that is both effective and sustainable (Section III.B).

[30] See for example Jacques Pelkmans and Andrea Renda, *Does EU Regulation Hinder or Stimulate Innovation?* (Centre for European Policy Studies 2014); Pablo D'Este and others, 'What Hampers Innovation? Revealed Barriers Versus Deterring Barriers' (2012) 41 Research Policy 482.

[31] David Llewellyn, *The Economic Rationale for Financial Regulation* (Financial Services Authority 1999) 9.

[32] See for example the principle of legal certainty in the settled case law of the CJEU: Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR I-0000, para 74.

[33] Paul Grewal, 'Coinbase Takes Another Formal Step to Seek Regulatory Clarity from SEC for the Crypto Industry' (*Coinbase*, 24 April 2023) <https://www.coinbase.com/blog/coinbase-takes-another-formal-step-to-seek-regulatory-clarity-from-sec-for> accessed 23 February 2024.

[34] Benoit Berthelot and Emily Nicolle, 'Circle Picks Crypto-Friendly France for European Headquarters' (*Bloomberg*, 21 March 2023) <https://www.bloomberg.com/news/articles/2023-03-21/circle-picks-crypto-friendly-france-for-european-headquarters?leadSource=uverify%20wall> accessed 9 June 2024; Adrian Weckler, '"America's Loss Can Be Europe's Gain" – Coinbase Chief Legal Officer Paul Grewal on Its Big Move to Ireland and an Anti-Crypto Campaign in the US' (*Irish Independent*, 26 October 2023) <https://www.independent.ie/business/technology/americas-loss-can-be-europes-gain-coinbase-chief-legal-officer-paul-grewal-on-its-big-move-to-ireland-and-an-anti-crypto-campaign-in-the-us/a1125071433.html> accessed 23 February 2024.

[35] MiCAR, recital 1.

[36] ibid recital 16.

A. A REGULATORY GAP REQUIRING COMPREHENSIVE SECTOR-SPECIFIC REGULATION

Without a specific legal framework that regulates stablecoins, various overlapping, existing regulatory frameworks (which often pre-date the advent of stablecoins) can form an obscure and potentially confusing patchwork of regulation and may lead to market participants incurring superfluous compliance costs. In the EU, for example, while various regulatory frameworks, such as the E-Money Directive,[37] the Payment Services Directive,[38] the Fifth Anti-Money Laundering Directive,[39] and the Markets in Financial Instruments Directive ('MiFID II'),[40] exist, many uncertainties have prevailed in relation to the applicability of these frameworks to stablecoins.

Although some stablecoins may qualify as 'financial instruments' within the meaning of MiFID II, some may qualify as 'electronic money' (e-money) within the meaning of the E-Money Directive or as 'virtual currencies' under the Fifth Anti-Money Laundering Directive. Their diversity left a considerable number of stablecoins unregulated, resulting in an unclear patchwork of terms and regulatory regimes.[41] This can be attributed, in part, to definitions within the existing laws that originate from the respective context and objective of their adoption. Understandably, these definitions did not anticipate the relevance of stablecoins, resulting in inconsistencies and incompatibilities. Hence, a (partially) applicable mosaic of terms emerged, encompassing crypto-assets, virtual currencies, electronic money, financial instruments, payment orders, and transferable securities.

Until 2018, neither stablecoins nor other crypto-assets appeared as a distinct category of regulated assets in any EU legal framework. They were first included in 2018 with the introduction of the Fifth Anti-Money Laundering Directive. This Directive introduced terms like 'virtual currencies',[42] 'custodian wallet providers',[43] and 'providers engaged in exchange services between virtual currencies and fiat currencies'.[44] As a result, payment tokens and certain crypto-asset service providers were made subject to EU regulation for the first time. Member States were thus instructed to oversee the licensing of service providers to ensure anti-money laundering compliance. However, the exchange and issuance of crypto-assets, including stablecoins, remained mostly unregulated at the pan-EU level. An exception applied to

[37] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L267/7 ('E-Money Directive').
[38] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35 ('Payment Services Directive').
[39] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43 ('Fifth Anti-Money Laundering Directive').
[40] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 ('MiFID II').
[41] Commission, 'Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets and Amending Directive (EU) 2019/1937' COM (2020) 593 final, 10.
[42] Fifth Anti-Money Laundering Directive, art 1(2)(d).
[43] ibid.
[44] ibid art 1(1)(c).

crypto-assets meeting the criteria of 'financial instrument[s]' under MiFID II,[45] which are subject to comprehensive EU regulation under MiFID II.[46] This had previously been confirmed as administrative practice[47] and was later codified as part of the Digital Finance Package. Nevertheless, these sources of regulation, especially the qualification of certain stablecoins as a 'financial instrument' subject to MiFID II, only encompass a limited subset of stablecoins, presenting significant challenges for those stablecoins that do not qualify under existing regulatory frameworks.[48]

Similar challenges arose with regard to the applicability of the E-Money Directive. Under the E-Money Directive, e-money is defined as 'electronically... stored monetary value'. This value is 'represented by a claim on the issuer' which is issued against 'receipt of funds' for payment transactions and accepted by parties other than the issuer.[49] Whether stablecoins are functionally comparable to e-money and, therefore, subject to similar regulation depends on their characteristics, including legal title, redemption terms, and stabilisation mechanisms.[50]

This led to significant uncertainty in the market and highlighted the potentially limited regulatory coverage of stablecoins under existing EU regulatory frameworks, posing risks for investors and market integrity alike.[51] In response, some Member States introduced national rules for certain crypto-assets not covered by the existing legal framework in the EU, resulting in regulatory fragmentation.[52]

The MiCA Regulation aims to address this fragmentation and uncertainty by establishing a harmonised, comprehensive pan-European legal framework to cover previously unregulated or uncertainly regulated stablecoins comprehensively.[53] In so doing, it is imperative that the MiCA Regulation ensures coherence with existing legal frameworks to avoid creating additional regulatory uncertainty and unnecessary compliance costs, and thus potentially restricting market efficiency. In this sense, the MiCA Regulation states that 'crypto-assets that already fall under existing [EU] legislative acts on financial services should remain under the existing regulatory frameworks regardless of the technology used for their issuance or their transfer'.[54] In excluding a number of instruments from its scope, the subsidiary and particular

[45] MiFID II, art 4(1)(15).

[46] MiCAR, recital 3.

[47] See for example the German Financial regulator (BaFin): BaFin, 'Initial Coin Offerings: BaFin Publishes Advisory Letter on the Classification of Tokens as Financial Instruments' (*BaFin*, 29 March 2018) <https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2018/fa_bj_1803_ICOs_en.html> accessed 23 February 2024; Securities and Markets Stakeholder Group, 'Advice to ESMA: Own Initiative Report on Initial Coin Offerings and Crypto-Assets' (ESMA22-106-1338, 19 October 2018) <https://www.esma.europa.eu/sites/default/files/library/esma22-106-1338_smsg_advice_-_report_on_icos_and_crypto-assets.pdf> accessed 23 February 2024.

[48] Colleen Baker and Kevin Werbach, 'Blockchain in Financial Services' in Jelena Madir (ed), *FinTech: Law and Regulation* (Edward Elgar 2019) 172.

[49] E-Money Directive, art 2(2).

[50] Johannes Ehrentraud and others, *Fintech and Payments: Regulating Digital Payment Services and E-Money* (Bank for International Settlements 2021) 11. For example, among nine major stablecoins, only USDT issued by Tether has been considered e-money, as the others were either not issued upon receipt of funds, had a variable redemption value, or did not grant rights to token holders. See Mykyta Sokolov, 'Are Libra, Tether, MakerDAO and Paxos Issuing E-Money? Analysis of 9 Stablecoin Types under the EU and UK E-Money Frameworks' (2020) <https://papers.ssrn.com/abstract=3746250> accessed 23 February 2024.

[51] Tina van der Linden and Tina Shirazi, 'Markets in Crypto-Assets Regulation: Does It Provide Legal Certainty and Increase Adoption of Crypto-Assets?' (2023) 9(22) Financial Innovation <https://doi.org/10.1186/s40854-022-00432-8> accessed 9 June 2024.

[52] See MiCAR, recital 5. For example, Germany introduced a licensing regime for custody of crypto-assets: see 'Crypto Custody Business' (*BaFin*) <https://www.bafin.de/EN/Aufsicht/BankenFinanzdienstleister/Markteintritt/Kryptoverwahrgeschaeft/kryptoverwahrgeschaeft_node_en.html> accessed 23 February 2024.

[53] MiCAR, recitals 5, 6; Commission, 'Commission Staff Working Document' (n 41) 17.

[54] MiCAR, recital 9.

character of the MiCA Regulation is evident.[55] For example, the MiCA Regulation does not apply if a stablecoin qualifies as a 'financial instrument' within the meaning of MiFID II.[56] For the purpose of ensuring clarity and demarcating the boundary between MiFID II and the MiCA Regulation, the European Securities and Markets Authority ('ESMA') is specifically mandated to issue guidelines on the conditions and criteria for the qualification of a stablecoin as a financial instrument.[57] Within the scope of the MiCA Regulation, the E-Money Directive is exclusively applicable to e-money tokens.[58]

The MiCA Regulation recognises and seeks to remedy other sources of uncertainty as to the applicable legal regime. As a preliminary solution, the authorisation for the issuance of asset-referenced tokens requires a legal opinion that these do not qualify as e-money tokens or are otherwise excluded from the scope of the MiCA Regulation (e.g. because the asset-referenced token qualifies as a financial instrument under MiFID II).[59] To ensure convergence and certainty in this regard, the European Supervisory Authorities ('ESAs')—comprising the European Banking Authority ('EBA'), the European Insurance and Occupational Pensions Authority ('EIOPA'), and the ESMA—are specifically tasked with jointly issuing guidelines, a template, and 'a standardised test for the classification of crypto-assets' by 30 December, 2024.[60]

In summary, while some uncertainty remains to be addressed through implementing measures and the publication of additional guidelines, the MiCA Regulation seeks to introduce a comprehensive sectoral legal framework, fulfilling the requirement for legal certainty with regard to the applicable legal regime within the MiCA Regulation whilst ensuring tessellation with existing legal frameworks for stablecoins. Therefore, in the author's view, the MiCA Regulation honours its objectives by attracting innovation to the EU single market through the incentive of a comprehensive legal framework that seeks to provide legal certainty to market participants.

B. THE ADOPTION OF NEW REGULATORY CATEGORIES TO DEFINE STABLECOINS SUSTAINABLY

Fostering legal certainty as to the regulatory perimeter for participants in markets in crypto-assets is a key objective of the MiCA Regulation[61] and is necessary for appropriate regulatory treatment and (judicial) review. However, as mentioned above, the MiCA Regulation itself does not define stablecoins, but instead creates two new discrete regulatory categories to cover the assets that are commonly defined as 'stablecoins', namely (i) asset-referenced tokens and (ii) e-money-tokens. These regulatory categories are distinguished by the external value that the asset is referenced to, hinting at the EU's attempt to regulate stablecoins through a nuanced and differentiated approach that is based on the risks posed by the relevant type of stablecoins. In this sense, two key challenges need to be considered further with regard to defining stablecoins within the scope of the MiCA Regulation.

First, establishing an exhaustive definition of 'stablecoins' under the regulatory purview of the MiCA Regulation within the definitions of asset-referenced tokens and e-money

[55] See ibid art 2(4).
[56] ibid recital 9. Financial instruments are defined in MiFID II, art 4(1)(15).
[57] MiCAR, art 2(5).
[58] ibid recital 66.
[59] ibid arts 17(1)(b)(ii), 18(2)(e).
[60] ibid art 97(1).
[61] ibid recitals 5 and 96.

tokens is challenging due to the complexity and constant ongoing technological evolution of their structure and mechanisms, making attempts to regulate such assets akin to seeking to regulate a constantly moving target. This challenge extends beyond stablecoins and applies to all innovative regulatory objects in general. A possible solution to this includes defining regulatory categories using a technology-neutral approach that relies on characteristics that are independent of technology. This would provide certainty for some time.[62]

The MiCA Regulation adopts this approach by itself stressing the importance of 'technological neutrality'.[63] At the same time, the definition of crypto-assets that forms the basis of the definitions of asset-referenced and e-money tokens requires them to be able to be transferred and stored electronically using DLT or similar technologies. Hence, the understanding of technological neutrality under the MiCA Regulation is a wider one,[64] given that the MiCA Regulation only targets innovation based on DLT. In fact, the MiCA Regulation's understanding of technological neutrality with regard to stablecoins relates to the design and mechanism for maintaining a stable value, aimed at ensuring that all forms of 'stablecoins' are covered by the MiCA Regulation. The MiCA Regulation explicitly stresses this by designating the rules for asset-referenced tokens or e-money tokens as applicable, irrespective of how the issuer intends to design the crypto-asset, including the mechanism for maintaining a stable value, insofar as a crypto-asset falls within the definition of an asset-referenced token or e-money token.[65]

In addition to technological neutrality, expert bodies can be authorised to specify technical criteria, which thereby avoids the need for lengthy legislative processes to adapt definitions in an evolving context. Nonetheless, in such cases, a sufficient legal basis and legislative framework are essential for preserving the rule of law and democratic legitimacy.[66]

With regard to the regulation of 'stablecoins' under the MiCA Regulation, the regulation seeks to deal with the innovative nature of such assets by incorporating elements of technological neutrality and empowering the European Commission to adopt delegated acts.[67] This mechanism allows for the MiCA Regulation's framework to be adapted to market and technological developments, offering a balance between flexibility and a required legal basis.

A second challenge with regard to defining stablecoins relates to the more general attribution of the concept of 'stability'. In the EU, the perceived stability of stablecoins is treated cautiously, recognising that, while they may be more stable compared to other more volatile crypto-assets, this perception may be misleading.[68] The European Central Bank ('ECB') has since advocated for a change in terminology to shift the focus away from the issuer's promise of stability.[69] In fact, as noted above, the MiCA Regulation almost entirely

[62] See the 'Howey test' developed by the US Supreme Court, defining the requirements to determine whether an 'investment contract' exists: *SEC v WJ Howey Co*, 328 US 293 (1946).

[63] MiCAR, recital 9.

[64] See similarly Philipp Maume, 'The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?' (2023) 20 European Company and Financial Law Review 243, 255.

[65] Recital 41 of the MiCA Regulation states that, should an algorithmic crypto-asset 'not aim to stabilise the value of the crypto-assets by referencing one or several assets', it nevertheless must comply with Title II of the MiCA Regulation.

[66] See the principles of democracy, in article 10 of the Treaty on European Union, and the rule of law, recognised in Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339.

[67] In accordance with article 3(2) of the MiCA Regulation, '[t]he Commission shall adopt delegated acts in accordance with [a]rticle 139 to supplement this Regulation by further specifying technical elements of the definitions laid down in [article 3(1)], and to adjust those definitions to market developments and technological developments'.

[68] Lai T Hoang and Dirk G Baur, 'How Stable Are Stablecoins?' (2021) The European Journal of Finance <https://doi.org/10.1080/1351847X.2021.1949369> accessed 9 June 2024.

[69] ECB, *Stablecoins: Implications for Monetary Policy, Financial Stability, Market Infrastructure and Payments, and Banking Supervision in the Euro Area* (European Central Bank 2020) 31.

moves away from the concept of 'stablecoins' and regulates such assets by reference to new discrete regulatory categories of assets that do not reference any concept of 'stability'. In line with this, the MiCA Regulation mentions (algorithmic) stablecoins only once in a recital,[70] notably distancing itself from the term while acknowledging its existence. In the interest of more stringent investor protection, the labelling and marketing of assets as a 'stablecoin' could arguably undermine the requirement that marketing materials and the white paper relating to such assets be 'fair, clear and not misleading' and not contain any assertions as regards the future value of the stablecoin and its underlying value except for those prescribed by the MiCA Regulation itself.[71] Should the labelling of an asset as a 'stablecoin' and not as an asset-referenced or e-money token contravene these principles, the issuer may be held liable.[72]

Through these categories, the MiCA Regulation establishes a delineated regulatory perimeter for 'stablecoins', whilst refraining from recognising them as a standalone regulatory category or referencing their 'stable' nature. In the author's view, this highlights the MiCA Regulation's caution as to their actual stability and its risk-based approach relating to the referenced value in a broadly technological-neutral setting. Nevertheless, it is possible that the introduction of these new categories and definitions, which do not reference the term 'stablecoin', may potentially mislead non-expert investors. However, in the author's view, this seems to be unlikely, due to the descriptive nature of the definitions and additional guidance. Also, it is not improbable that the terms and categories chosen by the MiCA Regulation will be adopted widely and alter market practice. This is due to the so-called 'Brussels effect', the phenomenon that EU policy influences standards and terminology beyond its borders.[73]

IV. Regulatory Mitigation of Financial Stability Risks as a Prerequisite for an Innovative Market

The highly regulated nature of the financial sector stems from the lessons learnt as a result of successive financial crises.[74] The task of financial regulation is thus to prevent and correct market failures and crises. To this end, financial regulation traditionally pursues three key objectives: (i) maintaining financial stability; (ii) advancing investor protection; and (iii) ensuring market efficiency.[75] Despite the emphasis on fostering innovation and an internationally-competitive, digital single market, it is crucial not to overlook these general objectives. This is because maintaining financial stability is undoubtedly a fundamental prerequisite to creating an innovative and sustainable market, in particular due to the fact that (global) stablecoins may pose risks to financial stability.[76]

Considering the promotion of innovation and market efficiency, the risk-based regulatory approach proposed by the MiCA Regulation appears to be an appropriate means of achieving this (Section IV.A). This approach employs tried and tested methods from other pieces of EU financial regulation to instil confidence in the market, particularly in the light of past turbulence in the crypto sector (Section IV.B).

[70] MiCAR, recital 41.
[71] For asset-referenced tokens, see ibid arts 19(2)–(5), 26, 29(1)(b). For e-money tokens, see arts 51(2)–(5), 53(1)(b).
[72] ibid arts 26, 52.
[73] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).
[74] Lucia Quaglia, 'Financial Regulation and Supervision in the European Union after the Crisis' (2013) 16 Journal of Economic Policy Reform 17.
[75] John Armour and others, *Principles of Financial Regulation* (OUP 2016) 116.
[76] Steven L Schwarcz, 'Regulating Digital Currencies: Towards an Analytical Framework' (2021) 102 Boston University Law Review 1037, 1062.

A. A RISK-BASED APPROACH IN VIEW OF MULTI-LEVEL SYSTEMIC RISK

Libra initially garnered attention, not due to posing an immediate threat to financial market stability, but rather due to concerns about monetary sovereignty, which is often deemed to be within the legislative prerogative of nation-states and the supervisory purview of central banks. France and Germany emphasised that no private company could 'claim [the] monetary power' inherent to state sovereignty.[77] In their view, the sovereign state has sole power to issue and regulate the money in circulation on its territory.[78] In the EU, countries using the Euro as their official currency have delegated this monetary sovereignty to the EU.[79] The G7 Working Group also extensively examined the monetary policy implications arising from the advent of global stablecoins issued by private non-state actors. Among the concerns raised by the G7 were the potential weakening of domestic monetary policy, uncontrollable substitution effects, capital outflows, and the potential adverse impacts on real economic activity.[80]

Although monetary policy risks and risks to financial stability cannot be strictly separated, regulatory attention has primarily focused on the latter. Although regulatory responses suggest an imminent threat, the EU legislator still considers stablecoins a marginal phenomenon with limited actual impact on financial stability. However, there are exceptions, especially for stablecoins backed by real assets or fiat currencies, which could potentially cause vulnerabilities with regard to financial stability.[81] This observation holds true even when considering the turmoil in the crypto-asset market, such as in the cases of FTX[82] or Terra-Luna,[83] with the risk of contagion arising from failures within the crypto sector.[84]

Considering the potential impact of stablecoins through their continuously growing market capitalisation, the rise of decentralised finance applications and their critical nature in crypto-asset trading in general,[85] there is a recognised risk of the knock-on effects of any failure of a global stablecoin on financial markets and monetary policy.[86]

[77] Ministry of Economics and Finance (France) and Federal Ministry of Finance (Germany), 'Joint Statement on Libra' (13 September 2019) <https://www.politico.eu/wp-content/uploads/2019/09/Joint-statement-on-Libra-final.pdf> accessed 23 February 2024.

[78] See for example Charles Proctor, *Mann on the Legal Aspect of Money* (7th edn, OUP 2012) 525.

[79] See Treaty on the Functioning of the European Union ('TFEU'), art 133.

[80] G7 Working Group on Stablecoins (n 26) 11.

[81] Commission, 'Commission Staff Working Document' (n 41) 19, 20.

[82] Darreonna Davis, 'What Happened To FTX? The Crypto Exchange Fund's Collapse Explained.' (*Forbes*, 2 June 2023) <https://www.forbes.com/sites/darreonnadavis/2023/06/02/what-happened-to-ftx-the-crypto-exchange-funds-collapse-explained/> accessed 23 February 2024.

[83] Antonio Briola and others, 'Anatomy of a Stablecoin's Failure: The Terra-Luna Case' (2023) 51 Finance Research Letters <https://doi.org/10.1016/j.frl.2022.103358> accessed 9 June 2024.

[84] David Evans, 'Don't Let Crypto Hype Deter Tough Stablecoins Regs' (*Oxford Business Law Blog*, 18 October 2022) <https://blogs.law.ox.ac.uk/oblb/blog-post/2022/10/dont-let-crypto-hype-deter-tough-stablecoins-regs> accessed 23 February 2024.

[85] Their market capitalisation has risen to a market capitalisation of more than USD 125 billion: Cristina Polizu and others, 'Stablecoins: A Deep Dive into Valuation and Depegging' (*S&P Global*, 7 September 2023) <https://www.spglobal.com/en/research-insights/featured/special-editorial/stablecoins-a-deep-dive-into-valuation-and-depegging> accessed 23 February 2024. See further Mitsu Adachi and others, 'Stablecoins' Role in Crypto and Beyond: Functions, Risks and Policy' (*ECB Macroprudential Bulletin*, 2022) <https://www.ecb.europa.eu/pub/financial-stability/macroprudential-bulletin/html/ecb.mpbu202207_2~836f682ed7.en.html> accessed 23 February 2024.

[86] Elizabeth McCaul, 'Mind the Gap: We Need Better Oversight of Crypto Activities' (*ECB The Supervision Blog*, 5 April 2023) <https://www.bankingsupervision.europa.eu/press/blog/2023/html/ssm.blog230405~03fd3d664f.en.html> accessed 23 February 2024.

A global stablecoin poses a unique risk to financial stability with regard to liquidity if such a stablecoin loses its peg to the referenced value[87] and this in turn triggers large-scale redemption requests by investors. The MiCA Regulation provides such redemption rights,[88] which generate market confidence, but may trigger runs in cases of distress—a risk that increases, the stronger the redemption rights are.[89] Although issuers of stablecoins need to manage reserves of fiat currency,[90] widespread redemption requests could lead to a 'liquidation of [the] reserve assets' and have a negative effect on the broader financial system.[91]

Further potential for systemic risk stems from the perceived stability of stablecoins, which draw money out of the centralised financial systems and into decentralised structures. This in turn limits the influence of monetary policy and other measures to ensure financial stability. The increasing risk of this can be seen through the emergence of stablecoins as a store of value, which the MiCA Regulation explicitly tries to prevent, by prohibiting issuers and service providers from granting interest to stablecoin holders.[92] Moreover, stablecoins are increasingly seen as a means to mitigate the volatility of other crypto-assets. However, 'issuers may face a shortfall of high-quality reserves' and a 'liquidity mismatch' when facing high demand.[93]

In addition, growing interest by traditional financial market participants in stablecoins[94] is likely to increase exposure and interconnections between such assets and the traditional financial system.[95] These concerns have been recognised by the Basel Committee on Banking Supervision ('BCBS'), which recently issued a standard on capital requirements for banks' direct exposures to crypto-assets.[96] This standard is to be transposed into EU law by 1 January, 2025; however, the ECB has expressed its expectation that the standard will be taken into account prior to this date.[97] Under this framework, stablecoins with effective stabilisation mechanisms, as defined by the standard, are subject to capital requirements based on the risk weights of the underlying referenced assets, as set out in the Basel Framework. By contrast, other stablecoins are subject to a capital treatment with a risk weight of 1250 per cent with minimal exceptions and an exposure limit.

[87] On the risk of de-pegging and for an analysis of such events, see n 85.
[88] MiCAR, arts 39, 49.
[89] Edoardo D Martino, 'Monetary Sovereignty in the Digital Era. The Law & Macroeconomics of Digital Private Money' (2024) 52 Computer Law & Security Review <https://doi.org/10.1016/j.clsr.2023.105909> accessed 9 June 2024.
[90] MiCAR, art 36 (applicable to e-money tokens in accordance with article 58(1)(a)).
[91] Adachi and others, 'Stablecoins' Role in Crypto and Beyond' (n 85).
[92] See MiCAR, arts 40, 50; recitals 58, 68.
[93] Martino, 'Monetary Sovereignty in the Digital Era' (n 89).
[94] The use of DLT by banks has so far been quite limited: see ECB Banking Supervision, 'Take-Aways from the Horizontal Assessment of the Survey on Digital Transformation and the Use of Fintech' (15 February 2023) <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/Takeaways_horizontal_assessment~de65261ad0.en.pdf> accessed 9 June 2024. However Société Générale and Deutsche Bank have recently launched their own stablecoin projects: see Nikou Asgari, 'Société Générale to Become First Big Bank to List a Stablecoin' *Financial Times* (London, 6 December 2023) <https://www.ft.com/content/cd733a7c-2e74-412f-b234-6f495c118cc6> accessed 23 February 2024; Wahid Pessarlay, 'Deutsche Bank's DWS Launches EUR Stablecoin Launch via AllUnity' (*CoinGeek*, 23 December 2023) <https://coingeek.com/deutsche-bank-dws-launches-eur-stablecoin-launch-via-allunity/> accessed 23 February 2024.
[95] Adachi and others, 'Stablecoins' Role in Crypto and Beyond' (n 85); Martino, 'Monetary Sovereignty in the Digital Era' (n 89).
[96] BCBS, *Prudential Treatment of Cryptoasset Exposures* (BIS 2022).
[97] ECB, 'Crypto-Assets: A New Standard for Banks' (*ECB Supervision Newsletter*, 15 February 2023) <https://www.bankingsupervision.europa.eu/press/publications/newsletter/2023/html/ssm.nl230215_1.en.html> accessed 23 February 2024.

The MiCA Regulation itself reacts to these challenges with a risk- and activity-based approach, where activities associated with higher risks are subjected to stricter regulatory requirements.[98] In this sense, the MiCA Regulation incorporates different requirements for issuers of e-money tokens and asset-referenced tokens and introduces further rules for so-called significant stablecoins in line with their respective risks.

Risk-based financial regulation is favoured by some for its ability to prioritise regulatory resources, allowing for a nuanced and proportionate response to specific risks.[99] From the standpoint of protecting fundamental freedoms and rights, this approach may naturally be considered less intrusive compared to blanket prohibitions.[100] Given the dual objectives of creating an attractive market and carefully managing risks, this appears to be a suitable approach.[101]

First, there is stratification concerning the authorisation required to issue stablecoins. Whereas asset-referenced tokens can be issued by any legal entity established in the EU following authorisation under the MiCA Regulation, e-money tokens can only be issued by authorised credit or e-money institutions.[102] This significantly reduces the number of potential issuers and, especially, smaller market participants who may have issued e-money tokens in the past, but lack and do not strive to obtain authorisation as credit or e-money institutions and so cannot issue e-money tokens under the MiCA Regulation.[103] Nevertheless, this differentiated approach is, in the author's view, driven by the need for coherent requirements within the scope of application of the E-Money Directive and also, correspondingly, by the varying implications associated with the issuance of asset-referenced tokens, on the one hand, and e-money tokens, on the other.

For asset-referenced tokens, the MiCA Regulation's authorisation requirement seeks to introduce minimum standards as a prerequisite for approval to issue such tokens and reduces monitoring costs with more targeted supervision. It nevertheless imposes a regulatory burden through ongoing reporting, governance, and conduct requirements.[104] To alleviate this burden, the EU model exempts entities from the authorisation requirement for the issuance of asset-referenced tokens if the average outstanding amount of stablecoins over 12 months is less than EUR five million or if the stablecoins are exclusively intended for qualified investors.[105] However, even when no authorisation is required, a white paper must still be notified.[106]

In cases where these exemptions do not apply, the national competent authority ('NCA') of the home Member State must check compliance with suitability and governance requirements.[107] The NCA then issues a draft decision, subject to non-binding opinions from

[98] See recital 9 of the MiCA Regulation, which refers to activity-based regulation under the principle 'same activities, same risks, same rules'. The Regulation hints at the choice of a risk-based approach in recitals 18, 20, 59, and 71.

[99] OECD, 'Recommendation of the Council on Regulatory Policy and Governance' (2012) 16 <https://www.oecd.org/governance/regulatory-policy/2012-recommendation.htm#> accessed 23 February 2024.

[100] Compare the initial reactions to Libra or the demand by the New York Prosecutor General, Letitia James, after a long investigation that Tether cease all commercial activity: Office of the New York State Attorney General, 'Attorney General James Secures Settlement Worth $2 Billion from Crypto Firm Genesis Global Capital for Defrauded Victims' (Letitia James, Press Release, 20 May 2024) <https://ag.ny.gov/press-release/2024/attorney-general-james-secures-settlement-worth-2-billion-crypto-firm-genesis> accessed 9 June 2024.

[101] Agata Ferreira, 'The Curious Case of Stablecoins—Balancing Risks and Rewards?' (2021) 24 Journal of International Economic Law 755, 774.

[102] MiCAR, art 48(1)(a).

[103] Maume (n 64) 268.

[104] See for example MiCAR, arts 22, 27, 34.

[105] ibid art 16(2).

[106] ibid.

[107] ibid arts 18, 20.

the EBA, the ESMA, the ECB, and, where applicable, the central banks of non-Euro Member States. The NCA can then approve or reject the application, considering these opinions.[108] Importantly however, the NCA is obligated to reject the application if the ECB or the relevant central bank of a non-Euro Member State issues a 'negative opinion' due to their perception that a particular stablecoin poses risks to the smooth functioning of 'payment systems, monetary policy transmission, or monetary sovereignty'.[109] This once again highlights the origin of the regulation as a tool to regulate and manage such risks, although it is questionable whether there is a loophole for administrative arbitrage due to the vague rejection criterion.[110] It also remains to be seen how this composite administrative procedure will play out in practice within the European multi-level system.

Secondly, the MiCA Regulation introduces a risk-based distinction between 'significant' and non-significant tokens, justified on the basis that, where such assets are 'used by a large number of holders', 'their use could raise specific challenges in terms of financial stability, monetary policy transmission or monetary sovereignty'.[111] The significance of an asset is determined by the EBA based on criteria prescribed in the MiCA Regulation.[112] These include inter alia, more than ten million holders, a market capitalisation of more than EUR five billion, a daily transaction volume of EUR 500 million or 2.5 million transactions. Some criteria, such as thresholds for the value of issued tokens, market capitalisation, or the number and value of transactions, are objective and measurable. However, criticism has been raised regarding their measurement at an individual company level rather than also at a consolidated group level.[113] Other criteria for categorising significant tokens are less clear and objective, such as integration within the financial system. Also, it has been argued that the fact that the relevant thresholds are set out in the MiCA Regulation, instead of delegated legislation, complicates future adjustment, should the thresholds prove to be inadequate or otherwise become outdated.[114]

Stablecoins that are categorised as 'significant' under these criteria are subject to stricter requirements. These include requiring issuers of 'significant' stablecoins to hold a higher amount of own funds, to adopt a remuneration and liquidity management policy, and to conduct regular liquidity stress tests.[115] In contrast to issuers of non-significant stablecoins, issuers of significant stablecoins are not supervised by NCAs, but rather are directly supervised by the EBA and other members of a supervisory college. These stricter rules are justified, given the specific challenges posed by significant stablecoins 'in terms of financial stability, monetary policy transmission or monetary sovereignty'.[116]

In any case, a functional and proportionate, risk-based approach requires accurate foresight to anticipate risks and their scope resulting from certain activities.[117] This requires data on, and an analysis of, risks beforehand to ensure appropriate regulatory decisions, but

[108] For the assessment procedure, see ibid art 20.
[109] ibid art 21(4).
[110] Zetzsche, Buckley and Arner (n 21).
[111] MiCAR, recitals 59, 102.
[112] See ibid arts 43(1), 44, 56.
[113] McCaul (n 86).
[114] Maume (n 64) 267.
[115] See MiCAR, art 45 (applicable to e-money tokens in accordance with article 58(1)(a)).
[116] ibid recital 59.
[117] Sofia Ranchordás and Mattis van 't Schip, 'Future-Proofing Legislation for the Digital Age' (2019) University of Groningen Faculty of Law Research Paper 36/2019, 13 <https://papers.ssrn.com/abstract=3466161> accessed 23 February 2024.

also monitoring to supervise and adapt frameworks in the light of ensuring regulatory objectives in an effective and proportionate manner.

In this sense, the MiCA Regulation contains a mechanism to address market and technological developments. It mandates the European Commission, in close cooperation with the ESMA and the EBA, to prepare a report on crypto-asset market developments. This report shall be based on data collected by the ESMA and the EBA, incorporating input by the NCAs from authorised issuers and service providers.[118]

Still, the 'anticipatory' or 'predictive capacity' of the MiCA Regulation has been criticised,[119] as this mechanism will largely be based on 'input obtained from the market', in particular 'accumulated reporting data'.[120] Tools that enable real-time flow of information—for example, using regulatory technology ('RegTech'),[121] innovation hubs,[122] or regulatory sandboxes,[123] which could facilitate more anticipative, rather than reactive, regulation and supervision—are, however, not provided by the MiCA Regulation.[124]

B. THE ADAPTATION OF PRE-EXISTING MECHANISMS TO PROTECT MARKET CONFIDENCE

Risks to market confidence and market stability are not new. Lessons learnt in previous financial crises can be employed by leveraging tried and tested mechanisms from EU financial regulation, such as requirements for liquidity, governance, investor protection, and market integrity.[125] At the same time, for this approach to be effective, recent experiences with market turbulence, such as those observed with FTX or Terra-Luna in the US, must be taken into account, in order for these mechanisms to accommodate the specificities of stablecoins. This approach allows for a nuanced and adaptive regulatory response, which integrates the evolving nature of the market and the unique challenges posed by stablecoins.

[118] MiCAR, arts 141, 142.

[119] Nikita Divissenko, 'Regulation of Crypto-Assets in the EU: Future-Proofing the Regulation of Innovation in Digital Finance' (2023) 8 European Papers 665, 683.

[120] ibid.

[121] 'RegTech' means 'any range of applications of technology-enabled innovation for regulatory, compliance and reporting requirements implemented by a regulated institution': EBA, 'EBA Analysis of RegTech in the EU Financial Sector' (EBA/REP/2021/17, June 2021) 5 <https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf> accessed 23 February 2024. See for example RegTech solutions for white paper compliance: Carolina Camassa, 'Legal NLP Meets MiCAR: Advancing the Analysis of Crypto White Papers' (2023) <http://arxiv.org/abs/2310.10333> accessed 23 February 2024.

[122] 'Innovation hubs' are institutional arrangements allowing regulated or unregulated entities to engage with the NCA in the discussion of FinTech-related issues or to 'seek clarification on the conformity of business models with the regulatory framework or on regulatory/licensing requirements': EBA, 'Discussion Paper on the EBA's Approach to Financial Technology (FinTech)' (EBA/DP/2017/02, 4 August 2017) 7, fn 7 <https://extranet.eba.europa.eu/sites/default/documents/files/documents/10180/1919160/7a1b9cda-10ad-4315-91ce-d798230ebd84/EBA%20Discussion%20Paper%20on%20Fintech%20%28EBA-DP-2017-02%29.pdf?retry=1> accessed 23 February 2024.

[123] 'Regulatory sandboxes' are 'a controlled space in which [financial institutions and non-financial firms] can test innovative FinTech solutions with the support of an authority for a limited period of time, allowing them to validate and test their business model in a safe environment': ibid fn 8.

[124] For a more detailed discussion, see Divissenko (n 119) 682.

[125] ECB, *Stablecoins* (n 69) 17.

Traditionally, market failures carry the risk of a loss of trust, leading to bank runs and liquidity shortages.[126] The liquidity risk, highlighted in the section above, materialised after the collapse of Luna, a relatively small algorithmic stablecoin, when the largest stablecoin issuer, Tether, faced a run and USDT lost its peg to the US dollar.[127] The MiCA Regulation aims to mitigate this risk through obligations related to reserves and redemption rights. It grants holders of e-money and asset-referenced tokens the right to redemption at all times and requires issuers to define conditions for exercising this right.[128] Reserve requirements are essential to mitigate the risk resulting from these redemption rights, as highlighted above.[129] Issuers of asset-referenced tokens and e-money tokens must hold at least 30 per cent of reserves in the form of the reference currency,[130] which must correspond to the 'aggregate value' of the claims of stablecoin holders against the issuer.[131] These reserve assets must be held in custody by a third party.[132] The size and composition of reserve assets will be determined by the Commission, based on draft regulatory standards developed by the EBA.[133] The substantial reserve ratio incentivises providers to invest reserves for higher yields to maintain a profitable margin. This is counterbalanced by own funds requirements that can be adjusted by authorities.[134]

Nevertheless, issuers are granted a certain degree of flexibility concerning the quality and use of reserves, as well as the structure of redemption rights. Issuers may, for example, invest their reserves in liquid assets,[135] which permits some qualitative asset transformation. Despite this flexibility, there remains a question of whether these requirements are adequate to prevent a run in the event of 'a liquidity shock'.[136] For such cases, issuers must prepare a recovery plan as well as a redemption plan, in advance.[137] Additionally, the supervising authority can also impose measures to aid stability, for example by barring redemption claims.[138]

To avert crises, governance standards play a crucial role in minimising operational risks, covering aspects such as organisational structures, procedures, and strategies for dealing with these risks. The collapse of the crypto trading platform, FTX, in the US underscored the importance of governance standards for risk management, as FTX violated fundamental practices of corporate governance and risk management. For instance, issues related to the 'segregation of [client] funds' and 'requirements for external audits' were apparent.[139] The MiCA Regulation addresses these by

[126] Mitsutoshi Adachi and others, 'A Regulatory and Financial Stability Perspective on Global Stablecoins' (*ECB Macroprudential Bulletin*, 2020) <https://www.ecb.europa.eu/pub/financial-stability/macroprudential-bulletin/html/ecb.mpbu202005_1~3e9ac10eb1.en.html> accessed 23 February 2024.
[127] Briola and others (n 83).
[128] MiCAR, arts 39, 49.
[129] On the substantial nature of reliable reserves, see IOSCO Board, 'Policy Recommendations for Crypto and Digital Asset Markets' (FR11/2023, 16 November 2023) 24, 70 <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD747.pdf> accessed 9 June 2024.
[130] MiCAR, art 36(4)(d) (applicable to e-money tokens in accordance with article 58(1)(a)).
[131] ibid art 36(7) (applicable to e-money tokens in accordance with article 58(1)(a)).
[132] ibid art 37 (applicable to e-money tokens in accordance with article 58(1)(a)).
[133] ibid art 36(4).
[134] See ibid art 35. Articles 35(2), (3) and (5) of the MiCA Regulation are applicable to e-money tokens in accordance with article 58(1)(b).
[135] ibid art 38 (applicable to e-money tokens in accordance with article 58(1)(a)).
[136] Edoardo D Martino, 'Regulating Stablecoins as Private Money Between Liquidity and Safety: The Case of the EU "Market in Crypto Asset" (MiCA) Regulation' (2022) Amsterdam Law School Research Paper No 2022-27, 43 <https://papers.ssrn.com/abstract=4203885> accessed 23 February 2024.
[137] MiCAR, arts 46, 47, 55.
[138] ibid art 46(4) (applicable, *mutatis mutandis*, to e-money tokens in accordance with article 55).
[139] McCaul (n 86).

imposing governance obligations on issuers of asset-referenced tokens[140] and service providers,[141] emphasising the essential nature of internal control mechanisms and effective procedures for risk management. Additionally, the MiCA Regulation stipulates further rules regarding information, transparency, and the conduct of business, which largely correspond to the provisions of MiFID II.[142]

Similarly, the rules for crypto-asset service providers reflect those provided by MiFID II. Crypto-asset service providers are defined as 'a legal person or other undertaking whose occupation or business is the provision of one or more crypto-asset services to clients on a professional basis' and who is authorised to provide crypto-asset services under the MiCA Regulation.[143] Due to the similarity of the activities of crypto-asset service providers under the MiCA Regulation and those of investment firms under MiFID II,[144] the principle of equivalence applies. Under this principle, an investment firm authorised under MiFID II in respect of a specific investment service or an authorised credit institution can perform the equivalent crypto-asset services,[145] requiring only a notification and not full authorisation under the MiCA Regulation.[146]

Analogous to financial instruments regulated by MiFID II, a market abuse regime has been introduced for crypto-assets to prevent mispricing and market disruption, thereby safeguarding market integrity and averting actions that could undermine investor confidence.[147] These rules closely reflect those contained in the Market Abuse Regulation.[148]

Another crucial aspect for maintaining confidence in the market is investor protection and market integrity.[149] The European regulatory model employs both traditional administrative law[150] and regulatory private law.[151] Concerning stablecoins, a key element of investor protection is the obligation to prepare a white paper.[152] White papers, similar to the prospectus for publicly offered securities under the Prospectus Regulation,[153] serve as an essential tool for reducing information asymmetries between issuers and investors. While white papers of asset-referenced token issuers must be authorised by the competent authority of their home Member State, white papers of e-

[140] MiCAR, art 34.
[141] ibid art 68.
[142] See, in particular, MiCAR, arts 27 (which introduces certain rules of conduct), 29, 30 (which regulate marketing communication and the provision of information), 31 (which obliges the issuer to put in place a procedure for dealing with complaints), 32 (which lays down requirements for the prevention, identification, management, and settlement of conflicts of interest).
[143] ibid art 3(1)(15).
[144] The activities listed in articles 76–82 of the MiCA Regulation mirror the activities regulated under MiFID II, with the exception of the new activity of 'providing custody and administration of crypto-assets on behalf of clients' (i.e. crypto-custody or wallet-as-a-service) under article 75 of the MiCA Regulation.
[145] Explicitly listed in MiCAR, art 60(3).
[146] ibid art 60.
[147] ibid Title VI.
[148] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1 ('Market Abuse Regulation').
[149] Marnix Wallinga, *EU Investor Protection Regulation and Liability for Investment Losses: A Comparative Analysis of the Interplay between MiFID & MiFID II and Private Law* (Springer 2020).
[150] Hans-W Micklitz, 'Administrative Enforcement of European Private Law' in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart Publishing 2011) 564.
[151] See Hans-W Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) 28 Yearbook of European Law 3.
[152] On the importance of white papers, see MiCAR, recitals 43, 69.
[153] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12 ('Prospectus Regulation'), art 1.

money token issuers only need to be notified.[154] The European Commission estimates that the total costs for issuers range from EUR 35,000 to 75,000 per white paper,[155] which seems proportionate to the issuer's risks and responsibilities, avoiding an insurmountable barrier to market entry.

Investor protection and market integrity are further guarded by express provisions on private enforcement in addition to administrative penalties. As mentioned above, in the event of incomplete, dishonest, or misleading information in white papers, the issuer may be held liable.[156] This is an important means of enforcing and sustaining confidence in the market, through shifting power to investors themselves. In this sense, it is advantageous that the MiCA Regulation provides for such a legal basis in addition to Member State provisions on civil liability. The necessity of effective regulation and enforcement in this regard is demonstrated by the case of Tether, the issuer of the stablecoin, USDT, which misrepresented the status of its reserves by falsely claiming that USDT was 100 per cent backed by US dollars.[157]

By drawing on provisions contained within existing EU regulation, the MiCA Regulation strives to provide clarity for a sector in relation to a category of assets that were understandably not anticipated during the adoption of these existing acts. In the interest of creating the first comprehensive framework to regulate stablecoins and creating a competitive market, the EU has also been aided by copying from these established pieces of EU financial regulation instead of developing an entirely new regulatory model from scratch.[158] The choice of creating comprehensive legislation instead of amending each of these pieces of legislation, although likely feasible from a regulatory perspective,[159] aligns with the EU's policy interest to promote innovation through incentives as a clear policy signal towards issuers and providers to conduct their business in the EU, thus promoting the competitiveness of the single market.

The MiCA Regulation tries to ensure effective supervision and the success of claims by excluding fully decentralised constructs without an identifiable issuer or intermediary from its scope. In cases of partial decentralisation, however, issuers and service providers remain subject to the rules of the MiCA Regulation.[160] Still, concerns have been raised by some as to the 'delineation' between 'fully decentralised' and 'partially decentralised' crypto-asset services in practice.[161]

Correspondingly, effective supervision and the success of any potential claims are aided by the MiCA Regulation's requirement that an issuer of asset-money tokens must be established in an EU Member State,[162] whereas for e-money tokens, similar rules for authorised credit and e-money institutions apply. Crypto-asset service providers are required to have a registered office in an EU Member State in which they carry out substantive business activities, to 'have their place of effective management' in the EU, and to have at least one director be an EU resident.[163]

[154] See MiCAR, arts 20(1), 17(1)(a), 48(1)(b).
[155] Commission, 'Commission Staff Working Document' (n 41) 62.
[156] MiCAR, arts 26, 52.
[157] Office of the New York State Attorney General, 'Attorney General James Directs Unregistered Crypto Lending Platforms to Cease Operations in New York, Announces Additional Investigations' (Letitia James, Press Release, 18 October 2021) <https://ag.ny.gov/press-release/2021/attorney-general-james-directs-unregistered-crypto-lending-platforms-cease> accessed 23 February 2024.
[158] See in this sense Maume (n 64) 250.
[159] See Karel Lannoo, 'Regulating Crypto and Cyberware in the EU' (2021) ECMI Policy Brief no 31, 11 <https://www.ecmi.eu/sites/default/files/ecmi_pb_no_31_kl_regulating_crypto_and_cyberware_in_the_eu.pdf> accessed 23 February 2024.
[160] MiCAR, recital 22.
[161] Maume (n 64) 253.
[162] MiCAR, art 16(1)(a).
[163] ibid art 59(2). See also recital 74, which states that 'effective management' of activities in the Union is essential 'in order to avoid undermining effective prudential supervision and to ensure the enforcement of requirements under this

Still driven by investor protection concerns, the territorial scope of the MiCA Regulation extends to all persons 'engaged in the issuance, [the] offer to the public [or the] admission to trading of crypto-assets' or 'services related to crypto-assets in the Union'.[164] This mirrors the territorial scope stipulated in MiFID II[165] and the Prospectus Regulation.[166] Also, similar to other legal regimes, crypto-asset services from providers in third countries are only permitted at the 'exclusive initiative' of the client.[167]

Due to their inherently borderless nature and potential reach, the supervision of stablecoins remains a significant challenge, demanding supervisory cooperation and a coherent regulatory approach to avoid fragmentation and regulatory arbitrage. This is especially important due to the global nature of risks to financial stability as well as to investors.

Instances like the case of FTX underscore the consequences of the lack of consolidated supervision for vertically integrated and globally active entities in different jurisdictions. Consequently, alongside the MiCA Regulation, the establishment of an effective framework for cross-border cooperation is essential.[168] It is to be welcomed that supervisory colleges for major stablecoins include authorities from non-Member State countries, fostering collaboration.[169]

Furthermore, the decentralised nature of stablecoins allows for high cross-market and cross-border dynamism with limited associated costs. Consequently, to avoid regulatory-driven fragmentation incentivising regulatory arbitrage, and to ensure high standards and the competitiveness of the EU single market, the EU must follow through on its promise to support international efforts to establish common standards. The MiCA Regulation highlights the EU's mandate to support international efforts to promote policy 'convergence' on the treatment of stablecoins and other crypto-assets 'through international organisations or bodies', such as the FSB, the BCBS, and the Financial Action Task Force ('FATF').[170] Most recently, policy recommendations have been issued by the FSB on the regulation, supervision, and oversight of global stablecoin arrangements,[171] as well as by the International Organization of Securities Commissions ('IOSCO') on crypto and digital asset markets, with specific recommendations dedicated to stablecoins.[172]

Moreover, the MiCA Regulation itself promotes the conclusion of 'administrative agreements on the exchange of information' between the EBA and third countries,[173] as well as on other forms of cooperation with authorities, including those in third countries where an issuer of significant stablecoins 'engages in activities' not covered by the MiCA Regulation.[174] These provisions convey a mandate to promote a convergence of standards and to strive for cross-jurisdictional enforcement. However, this requires a common understanding of minimum standards, which will be

Regulation'. Recital 74 also states that '[r]egular close direct contact between supervisors and the responsible management of crypto-asset service providers should be an essential element of such supervision'.

[164] ibid art 2(1).

[165] MiFID II, art 1(1).

[166] Prospectus Regulation, art 1(1).

[167] MiCAR, art 61.

[168] See, in this sense, ibid art 98.

[169] ibid art 119(2)(m).

[170] ibid recital 8.

[171] FSB, 'High-Level Recommendations for the Regulation, Supervision and Oversight of Global Stablecoin Arrangements' (17 July 2023) <https://www.fsb.org/2023/07/high-level-recommendations-for-the-regulation-supervision-and-oversight-of-global-stablecoin-arrangements-final-report/> accessed 23 February 2024.

[172] IOSCO Board (n 129) 8, 23, 36, 68.

[173] MiCAR, art 126.

[174] ibid art 128.

influenced by other jurisdictions' regulatory models to attract issuers and service providers. Recently, movements in the direction of regulatory regimes for stablecoins have occurred in the UK[175] and in the US.[176] Consequently, time will tell how these regimes will compare to the MiCA Regulation and how they will influence regulatory standards in the light of regulatory market competition.[177]

V. CONCLUSION

From a theoretical perspective, the EU regulatory approach to addressing the risks and challenges associated with stablecoins, in the author's view, establishes a legally certain framework that appropriately tackles potential threats to financial stability and investors. The EU's response also conveys a political message, highlighting the EU's intention to foster innovation and to enhance the competitiveness of the EU single market in the crypto sector. In this sense, the design of the MiCA Regulation builds on past experiences of risks and crises by adapting existing regulatory tools to encompass stablecoins and other crypto-assets in a comprehensive legal framework.

From a practical point of view, the long-term sustainability of the EU's regulatory model and market competitiveness in the global crypto sector may be questioned. Although the MiCA Regulation has successfully convinced crypto service providers to engage in innovative activities from within the EU single market, even before entering into force, its long-term ability to do so is unclear. In the author's view, it is uncertain whether these recent market movements stem solely from the lack of comprehensive legal frameworks in other jurisdictions, or whether the MiCA Regulation has the genuine potential to serve as a long-term, attractive regulatory environment.

While the MiCA Regulation has garnered support, it remains to be seen whether other countries will adopt similar regulatory frameworks, in the light of the 'Brussels effect'. Alternatively, it is conceivable that other jurisdictions may respond with more attractive regulatory measures, including favourable tax policies not covered by the MiCA Regulation. Due to the decentralised nature of the crypto industry, the risk of regulatory arbitrage is considerable. This makes international cooperation and common standards essential to ensure the effectiveness of the MiCA Regulation's objectives. As a consequence, this preserves the global competitiveness of the single market by promoting innovation whilst maintaining high standards in the interest of financial stability and investor protection.

A specific concern that remains, especially with regard to the trustworthiness and attractiveness of the stablecoin and crypto-asset market, is the link between these assets and money laundering or terrorist financing.[178] EU regulators and supervisors are increasingly fo-

[175] HM Treasury set out a phased approach requiring firms conducting relevant activities to obtain FCA authorisation under the Financial Services and Markets Act 2000, first introducing fiat-backed stablecoins 'into the regulatory perimeter' and later a broader set of cryptoassets: see HM Treasury, *Future Financial Services Regulatory Regime for Cryptoassets: Response to the Consultation and Call for Evidence* (HM Treasury 2023) 27.

[176] The House Financial Services Committee reported multiple pieces of cryptocurrency legislation to the House of Representatives for consideration that would establish a stablecoin regulatory framework: see Financial Services Committee, 'House Financial Services Committee Reports Digital Asset, ESG Legislation to Full House for Consideration' (Press Release, 27 July 2023) <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408944> accessed 23 February 2024.

[177] Iris HY Chiu, 'Decrypting the Signs of Regulatory Competition in Regulating Cryptoassets' (2020) 7 European Journal of Comparative Law and Governance 297; Lannoo (n 159).

[178] MiCAR recognises this risk in recital 77.

cusing on this issue. For instance, the EBA extended its Anti-Money Laundering and Countering the Financing of Terrorism supervision guidelines to crypto-asset service providers[179] and published guidelines aimed at service providers on preventing such risks.[180] At the same time, further issues pertain, such as with regard to taxation and aspects of environmental sustainability, the latter only having been briefly addressed towards the end of the legislative process.[181] It thus remains to be seen how the implementation of the MiCA Regulation by competent authorities will be handled and how the market will develop in practice.

To remain effective in the light of developments, the MiCA Regulation contains a built-in revision mechanism, requiring the Commission to present a report on the 'latest developments' in crypto-assets within the 18-month period after the MiCA Regulation enters into force,[182] as well as an interim report on the application of the MiCA Regulation within 24 months, and a final report within 48 months.[183] Both must be accompanied, where appropriate, by a legislative proposal. This built-in overhaul mechanism mitigates the risks stemming from the swift adoption of the MiCA Regulation by enabling the Commission to react to developments in an innovative market and to adapt the legal framework accordingly.

Together with necessary clarifications through outstanding implementing measures and guidelines, this mechanism is crucial to ensure that the MiCA Regulation, as the pioneer framework on stablecoins, fulfils its promised objectives in a sustainable manner and is truly worth its weight in gold.

[179] EBA, 'Final Report on Amending Guidelines on the Risk-Based Supervision under Article 48(10) of Directive (EU) 2015/849' (EBA/GL/2023/07, 27 November 2023) <https://www.eba.europa.eu/sites/default/files/2023-11/c0a72a30-19c6-4fbb-96cd-e2486ff0c8ec/Final%20report%20on%20guidelines%20amending%20the%20Risk%20Based%20Supervision%20Guidelines.pdf> accessed 23 February 2024.

[180] EBA, 'Guidelines Amending the ML/TF Risk Factors Guidelines' (EBA/GL/2024/01, 16 January 2024) <https://www.eba.europa.eu/sites/default/files/2024-01/a3e89f4f-fbf3-4bd6-9e07-35f3243555b3/Final%20Amending%20%20Guidelines%20on%20MLTF%20Risk%20Factors.pdf> accessed 23 February 2024.

[181] See for example MiCAR, recital 7; arts 19(1)(h), 19(11), 51(1)(g), 51(15), 66(5)–(6).

[182] ibid art 142.

[183] ibid art 140.

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Anti-Corruption Clauses in Transnational Petroleum Contracts: A Taxonomy

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ABSTRACT

In a world where corruption persists despite global anti-corruption efforts and legal frameworks, this article looks at how Transnational Corporations ('TNCs') can lead the fight against corrupt practices. With growing operations in different territories, TNCs can establish internal governance frameworks that align with anti-corruption standards, while demonstrating their commitment to combatting corruption across borders through their employees, agents, and projects. The holistic anti-corruption approach employed by TNCs encompasses both traditional and innovative mechanisms. This article specifically focuses on a recent corporate innovation: contractual anti-corruption clauses designed as an additional due diligence tool for contracting parties. The main purpose of these clauses is to mitigate the potential risks of corruption that are likely to arise among contractors, third parties, intermediaries, and subagents. Despite the increasing prevalence and endorsement of anti-corruption clauses in different jurisdictions, such as the UK and the US, their in-depth examination remains limited. Through an analysis of 1,164 transnational petroleum contracts, this article proposes the categorisation of anti-corruption clauses into two general types: (i) direct clauses, specifically intended for anti-corruption purposes; and (ii) indirect clauses, not originally designed for anti-corruption purposes. The article further describes their distinct characteristics and proposes sub-categories for each type. It will be argued that, while direct clauses clearly commit parties to anti-corruption standards, indirect anti-corruption clauses enable parties to enforce anti-corruption commitments in the absence of direct clauses. Recognising their potential to drive normative shifts towards enhanced anti-corruption measures, this article introduces a Standard Clause, encompassing both direct and indirect types, to be adopted as an industry standard practice in contracts.

Keywords: anti-corruption clauses, petroleum contracts, transnational law, anti-corruption laws, anti-corruption compliance

I. INTRODUCTION

Despite the rise of global anti-corruption movements and the strong emergence of international and national anti-corruption laws, corrupt practices remain prevalent in most places,

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and countries still struggle to translate these laws into practice.[1] On the other hand, in most countries, political and economic elites resist anti-corruption reforms that could jeopardise their interests and disrupt the existing status quo.[2] In situations where internal actors lack the motivation for such initiatives, external actors, such as other states, international organisations, and transnational actors, enter the scene by offering incentives and disincentives to mitigate the allure of corrupt practices for internal actors. Among these external actors, Transnational Corporations ('TNCs') can develop their own regime-like framework to govern their internal activities. Through this, they can contribute to the standards established by state actors to solve transnational issues. Among various standards, TNCs may choose to comply with the transnational anti-corruption legal regime to avoid the cost of non-compliance with anti-corruption laws.[3] As a result, TNCs decide to strengthen their anti-corruption compliance as they expand into new overseas markets. Such a decision extends anti-corruption standards among their employees and third-party agents and within their projects across countries.

TNCs have embraced a comprehensive anti-corruption toolkit to better address the challenges posed by corruption, including substantial fines, imprisonment, and civil or administrative penalties that impact their reputation and future eligibility for public contracts. This toolkit consists of a set of mechanisms, such as codes of conduct, anti-corruption training, whistleblowing mechanisms, and audits, designed to assist companies in preventing and detecting corrupt behaviour among their employees and third-party agents.[4] In addition to the traditional anti-corruption toolkit, this article explores a more recent and innovative corporate mechanism that companies can embrace to mitigate the risk of corrupt practices in their business relationships: contractual anti-corruption clauses. These clauses function as an additional due diligence tool for the contracting parties to reduce potential risks associated with corrupt conduct involving the other parties, third-party intermediaries, and sub-contractors. Significantly, the incorporation of such clauses is endorsed by several jurisdictions and anti-corruption enforcement agencies, such as the Serious Fraud Office in the UK, which is responsible for enforcing the UK Bribery Act 2010 ('UKBA 2010'), and both the US Department of Justice ('DOJ') and the US Securities and Exchange Commission, which are entrusted with enforcing the Foreign Corrupt Practices Act 1977 ('FCPA 1977').[5]

Despite the increasing prevalence of anti-corruption clauses in contracts, there have been few attempts to study them.[6] This article seeks to address this gap by examining anti-corruption clauses in the specific context of transnational petroleum contracts. The article recognises that each sector and country have their own unique types and norms of corruption, making it untenable for one-size-fits-all anti-corruption remedies to be universally successful

[1] In the Corruption Perception Index 2023, conducted by Transparency International to assess the perceived level of corruption on a scale from 0 to 100, the average score among 180 countries was 43, and the majority of states showed minimal or no progress in their efforts to combat corruption over the past few years. See 'Corruption Perceptions Index 2023' (*Transparency International*) <www.transparency.org/en/cpi/2023> accessed 25 May 2024.

[2] Anna Persson, Bo Rothstein and Jan Teorell, 'Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem' (2013) 26 Governance 449, 462.

[3] Heiko Pleines and Ronja Wöstheinrich, 'The International–Domestic Nexus in Anti-Corruption Policy Making: The Case of Caspian Oil and Gas States' (2016) 68 Europe-Asia Studies 291, 292.

[4] See for example OECD, 'Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change' (OECD Publishing 2020) <www.oecd.org/corruption/Corporate-anti-corruption-compliance-drivers-mechanisms-and-ideas-for-change.pdf> accessed 25 May 2024.

[5] Foreign Corrupt Practices Act, 15 USC § 78dd–1 *et seq* (1977) ('FCPA 1977').

[6] See generally Jeffrey R Boles, 'The Contract as Anti-Corruption Platform for the Global Corporate Sector' (2019) 21 University of Pennsylvania Journal of Business Law 807.

across all sectors and countries. Therefore, adopting a sector-based or country-based approach can help to select and adopt appropriate anti-corruption remedies. Corruption risks persist across different business sectors. However, the extractive sector stands out as one of the largest contributors to transnational bribery, with almost one in five bribery cases occurring in this sector.[7] The oil and gas sector poses the highest risk in terms of FCPA matters,[8] with companies within this sector frequently being expected to engage in bribery, closely trailing those in construction, utilities, and real estate.[9] The complexity of projects and substantial investments within this sector create opportunities for individuals to exploit public funds for private gains through different forms of corruption across different stages of the industry. Moreover, the presence of numerous TNCs in the petroleum sector adds another layer of complexity. For example, reports reveal that major oil companies have made significant financial investments in misleading climate-related branding and lobbying strategies.[10] Collectively, these factors transform the petroleum sector into a fertile ground for various types of corrupt practices, making it an appropriate subject for research on corruption and anti-corruption measures.

Therefore, this article aims to examine anti-corruption clauses in the petroleum sector and to propose a taxonomy of such clauses based on the review of actual contracts within the sector. The aim of this investigation and the proposed taxonomy is to provide a comprehensive understanding of how anti-corruption commitments are integrated into contractual clauses within the petroleum industry, which further allows for the identification of patterns, trends, and variations in the language and structure of these clauses in real-word practices.

This article refrains from providing a specific definition of corruption in the petroleum sector, as there is no universal definition that can cover all types and forms across regions and countries. When using the term 'corruption', this article specifically refers to its most prevalent types in the petroleum sector, including bribery, embezzlement, conflicts of interest, different types of favouritism, fraud, and money laundering.[11]

The investigation leading to a proposed taxonomy will be split into four sections. First, the methodology will be outlined in Section II. Following this, Section III will provide an overview of anti-corruption clauses by exploring their origins and dynamics, citing their endorsement in key domestic anti-corruption laws and international anti-corruption standards. Subsequently, Section IV will propose a classification system for these clauses according to their level of commitment, derived from the review of actual petroleum contracts. It primarily categorises anti-corruption clauses into two broad groups: direct and indirect anti-corruption clauses. Within each category, it specifies further subcategories along with their distinct characteristics, while providing examples of existing clauses discovered within petroleum contracts. Upon reviewing the number of anti-corruption clauses in 1,164 contracts, the results of which are detailed in Annex I, this article concludes in Section V that parties have indeed begun to incorporate such clauses into their contracts. However, it will be suggested that there is a need for a more extensive inclusion and adoption of anti-corruption clauses in contracts.

[7] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing 2014) 21.

[8] 'Industry Classifications of FCPA Matters' (*Foreign Corrupt Practices Act Clearinghouse*) <fcpa.stanford.edu/statistics-analytics.html?tab=9> accessed 25 May 2024.

[9] Deborah Hardoon and Finn Heinrich, *Bribe Payers Index 2011* (Transparency International 2011) 18.

[10] 'Big Oil's Real Agenda on Climate Change 2022' (*InfluenceMap*, September 2022) 3 <https://influencemap.org/report/Big-Oil-s-Agenda-on-Climate-Change-2022-19585> accessed 25 May 2024.

[11] See generally OECD, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives* (OECD Publishing 2016).

To address this need, a Standard Clause—which is a comprehensive anti-corruption clause found in an actual contract[12]—will be proposed to serve as a model that covers almost all types of anti-corruption clauses that are discussed in this article. This Standard Clause is attached in Annex II.

II. METHODOLOGY

Examining actual petroleum contracts helps to document the prevalence, adoption, and variation of anti-corruption clauses. The inclusion or absence of these clauses can act as indicators of adherence to legal and ethical standards. Moreover, the diversity in petroleum contracts across different jurisdictions may result in the implementation of different types of anti-corruption clauses. Hence, this article, which is part of a larger thesis project at McGill University's Faculty of Law, employs an empirical methodology not only to identify the existence of these clauses in petroleum contracts but also to categorise them systematically.

A major challenge encountered was the confidentiality clauses present in many petroleum contracts that restrict public access to terms and conditions. However, in line with the Extractive International Transparency Initiative, certain companies and states have initiated the publication of contracts in an online repository, the Resource Contracts Portal. As of April 2023, this portal has published 1,807 petroleum contracts categorised as 'hydrocarbons'.[13] From this pool, 1,000 original contracts were selected for examination, comprising 81 model contracts and 919 actual contracts, along with their 164 amendments. Thus, a total of 1,164 petroleum contracts underwent study. The selection process involved studying hydrocarbon contracts from all countries, except those from Tunisia (totalling 258) and approximately one-third of Colombian contracts (113 contracts). This decision was made because of their disproportionately large number compared to contracts published from other countries, which could potentially impact result accuracy. Regarding contract language, 640 contracts were in English (either in the original version or with an English translation), 375 contracts were in Spanish, 136 contracts were in French, 11 contracts were in Portuguese, and two contracts were in Polish. For contracts not in English or French, relevant provisions and clauses were reviewed using Google Translate.

Another challenge arose due to the extensive length of petroleum contracts, with some exceeding 100 pages. To address this issue, a Python code was used. Python is a computer programming language often used to build websites and software, but it has also proven to be useful for data analysis. A specific list of keywords, including terms like corruption, bribery, gift, and ethics, alongside their equivalents in other languages, was compiled for the code.[14] The code scanned the text of the contracts for these keywords and, if any were found,

[12] Unitization and Unit Operating Agreement covering the Jubilee Field Unit located offshore the Republic of Ghana (13 July 2009) ('Jubilee Agreement') 99–102, arts 21.1–21.4 <https://resourcecontracts.org/contract/ocds-591adf-0771447862/view#/> accessed 25 May 2024.

[13] See 'Contracts for Hydrocarbons' (*Resource Contracts*) <https://resourcecontracts.org/resource/Hydrocarbons> accessed 25 May 2024.

[14] The following keywords were used in the code: corrupt, bribe, fraud, misrepresent, misuse, conflict, prohibit, false, illicit, illegal, abuse, fault, launder, facilitat(e/tion), transparency, donat(e/tion), contribution, gift, social responsibility, ethics, economic order, culpa, suborn, *soudoyer*, *dolo*, *éticos*, *responsabilidad social*, *détournement*, *blanchiment*, *cadeau*, train, formation, *formação*, *entrenamiento*, *capacitación*, *formación*, audit, inspect, account, *contabilidad*, surveil, verification, third party, assign, transfer, cession, *sous-traitant*, sub-contract, breach, termination, cancel, material breach, *défaillance*, penalty, *terminación*, *résiliation*, applicable law, laws and regulations, compl(y/iance), diligen(ce/t), governing law, industry practice, *cumpla*, *buenas prácticas*, *eis aplicável*, *loi/ley applicable*, and *droit applicable*.

it displayed their repetition numbers. Upon identification of any specified keyword, a detailed review of relevant clauses was conducted. In addition to keywords, specific clauses in all contracts covering aspects such as compliance, assignment, guarantees, audits, training, terminations, and breaches, were thoroughly examined. All identified clauses were compiled into an Excel sheet and initially categorised. A second review was undertaken to ensure the accuracy and consistency in categorisation across all 1,164 contracts. Once all identified clauses were double-checked, an analysis was conducted on these clauses, and a proposed classification of anti-corruption clauses was developed based on their types of commitment.

It should be noted that the findings and classifications proposed in this article are based on the examination of a limited sample of 1,164 petroleum contracts, which may impact the generalisability of the results to the entire petroleum industry. Moreover, the uneven availability of contracts in the database results in a disproportionate representation of certain countries with more published contracts. Therefore, further research is required to investigate thoroughly the realm of anti-corruption clauses and their efficacy, particularly within a broader spectrum of sectors and countries.

Having outlined the methodology, this article will proceed to introduce anti-corruption clauses and their origins and dynamics in Section III, followed by a proposal for a classification system in Section IV.

III. Using Contract Law for Due Diligence in Anti-Corruption Compliance

The large presence of third parties in the operations and business activities of TNCs increases the liability risks associated with compliance with anti-corruption laws.[15] These third-party affiliates usually serve a TNC's business partners, including consultants, sales and marketing agents, lawyers, suppliers, distributors, brokers, as well as contractors and sub-contractors. Statistics from reported FCPA cases as of May 2024 show that approximately 90 per cent of FCPA-related enforcement actions (296 out of 332 cases) were connected to the involvement of third parties and intermediaries.[16]

Given the widespread occurrence of corruption among third-party agents, the FCPA 1977, the UKBA 2010,[17] and the Corruption of Foreign Public Officials Act 1998 (Canada)[18] all mandate that companies establish internal control policies to prevent corruption among their agents and intermediaries. For example, the 'FCPA Resource Guide' specifies that a company bears responsibility 'when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company'.[19] The UKBA 2010 further introduces a new form of corporate liability for

[15] David Hess and Thomas W Dunfee, 'Fighting Corruption: A Principled Approach; The C Principles (Combating Corruption)' (2000) 33 Cornell International Law Journal 593, 622, stating that '[a]gents, particularly those assisting with sales and marketing, often have been the conduits through which firms have made payments. In some circumstances, firms may not have known whether the marketing agents have used part of their commissions and fees to make improper payments to public officials.'

[16] 'Third-Party Intermediaries Disclosed in FCPA-Related Enforcement Actions' (*Foreign Corrupt Practices Act Clearinghouse*) <https://fcpa.stanford.edu/statistics-analytics.html?tab=4> accessed 25 May 2024.

[17] UKBA 2010, ss 7(1), 8(1).

[18] Corruption of Foreign Public Officials Act, SC 1998, c 34, s 3(1).

[19] Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, 'A Resource Guide to the US Foreign Corrupt Practices Act' (2nd edn, US Department of Justice, July 2020) ('FCPA Resource Guide') 28 <https://www.justice.gov/criminal/criminal-fraud/file/1292051/dl> accessed 25 May 2024.

commercial organisations regarding their failure to prevent bribery of 'associated' individuals, including their employees and third-party agents.[20] In addition to these domestic regulations, several international and transnational organisations recommend that companies establish effective anti-corruption compliance programmes to oversee the activities of their third-party agents.[21] Consequently, TNCs may conduct due diligence when engaging third parties and may regularly conduct thorough examinations of their business partners to mitigate the risks associated with third-party corruption.[22]

Although codes of conduct and other anti-corruption compliance tools can help TNCs to hold their employees to anti-corruption standards, these tools cannot guarantee that contracting partners and third-party agents will conduct their business activities without engaging in corrupt practices. As a result, TNCs are consistently exposed to liability risks regarding the corrupt behaviour of other individuals or businesses with whom they enter into contracts, as well as the corrupt behaviour of their third-party agents when conducting activities on their behalf abroad. In such situations, contract law offers a viable solution as a risk reduction strategy, in the form of a 'contractual anti-corruption clause'.[23] In other words, TNCs can ensure that anti-corruption safeguards govern their contractual relationships by incorporating anti-corruption commitments into their contract terms with business partners and third-party agents.

Anti-corruption clauses, functioning as due diligence tools, offer protection to TNCs against the involvement of business partners and third-party agents in corrupt practices and further promote global anti-corruption standards among businesses. These clauses allow parties to establish a contractual commitment to exclude corrupt practices throughout the agreement, including all phases from negotiation to post-conclusion.[24] As a result, such clauses equip companies with a mechanism to minimise the risk of potential corruption in their interactions with other parties, while also acting as a shield against civil and administrative penalties.[25] This section will briefly discuss the identified anti-corruption clauses proposed by different initiatives and will also highlight key jurisdictions that endorse their incorporation in contracts.

The inclusion of anti-corruption clauses in contracts is a recent, yet important, development in the anti-corruption toolkit.[26] International law lacks a standardised approach to such clauses. However, the International Chamber of Commerce ('ICC') introduced a model

[20] UKBA 2010, s 8. For further information on the corporate liability for commercial organisations, see F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Texas International Law Journal 1, 27–28.

[21] For a non-exhaustive list of these instruments, see Asia-Pacific Economic Cooperation, 'APEC Code of Conduct for Business' (September 2007) <www.apec.org/Publications/2007/09/APEC-Anticorruption-Code-of-Conduct-for-Business-September-2007> accessed 25 May 2024.

[22] OECD, 'Good Practice Guidance on Internal Controls, Ethics, and Compliance' (18 February 2010) ('OECD Good Practice Guidance') para 6 <https://www.oecd.org/daf/anti-bribery/44884389.pdf> accessed 25 May 2024.

[23] See generally Boles (n 6).

[24] David Hess and Thomas W Dunfee's C2 principles include that companies need '[t]o require all agents of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party' and '[t]o require all suppliers of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party': Hess and Dunfee (n 15) 621.

[25] Boles (n 6) 810.

[26] Nicola Bonucci, Philippe Bouchez El Ghozi and Nicolas Faguer, 'Anti-Corruption and Contractual Relations: Beyond Words, Legal Consequences' (*Paul Hastings*, 22 May 2020) <www.paulhastings.com/insights/client-alerts/anti-corruption-and-contractual-relations-beyond-words-legal-consequences> accessed 25 May 2024.

anti-corruption clause in 2012, which is available for adoption by companies of all sizes.[27] This model provides parties with three options for incorporating the clause into their contracts:

1. Referring to Part I of the ICC Rules on Combating Corruption ('ICC Rules') in the contract;
2. Incorporating the text of Part I of the ICC Rules into the contract; or
3. Referring to a corporate anti-corruption compliance programme, as described in article 10 of the ICC Rules.[28]

The first two options require a commitment from the parties, their employees, and third parties under their control or influence to refrain from participating in any corrupt practices detailed in Part I of the ICC Rules,[29] both during the contract term and after. Part I of the ICC Rules advises companies to prohibit unconditionally corrupt practices in all circumstances and types and further defines these practices to 'include Bribery, Extortion or Solicitation, Trading in Influence and Laundering the proceeds of these practices'.[30] Alternatively, the third option obliges parties to implement a corporate anti-corruption compliance programme, as outlined in article 11 of the ICC Rules,[31] throughout the contract's term. These proposed clauses also address instances of non-compliance: should one party become aware of the other party's failure to comply with Part I of the ICC Rules or identify material deficiencies in their compliance anti-corruption programme, they are required to notify the non-compliant party promptly. This notification provides the party accused of violating the clause with an opportunity to remedy the situation.[32] Failure to take the necessary remedial measures in all three scenarios provides the other party with the right to suspend or terminate the contract.[33]

In addition to the ICC's model anti-corruption clause, the 2004 'Partnering Against Corruption: Principles for Countering Bribery' suggest that 'the agent, advisor or other intermediary should contractually agree in writing to comply with the enterprise's [anti-corruption compliance] Programme',[34] with non-compliance granting the company the 'right of termination'.[35] Similarly, the OECD 'Good Practice Guidance' recommends that companies inform other parties of their commitments to comply with anti-corruption standards and request 'reciprocal commitment[s]' from third parties.[36] Moreover, in its 'Anti-Corruption Programme

[27] ICC Commission on Corporate Responsibility and Anti-Corruption and the Commission on Commercial Law and Practice, *ICC Anti-Corruption Clause* (ICC Publication No 740E, ICC 2012) ('*ICC Anti-Corruption Clause*').
[28] ibid options I–III.
[29] ICC Corporate Responsibility and Anti-Corruption, 'ICC Rules on Combating Corruption' (first published 1977, ICC 2011) <www.edc.ca/content/dam/edc/en/non-premium/ICC-Rules-on-Combating-Corruption-2011.pdf> accessed 25 May 2024 ('ICC Rules'). The ICC Rules were recently revised in 2023: see ICC, 'ICC Rules on Combating Corruption: 2023 Edition' (ICC, 11 December 2023) <https://iccwbo.org/wp-content/uploads/sites/3/2023/12/2023-ICC-Rules-on-Combating-Corruption-1.pdf> accessed 25 May 2024.
[30] ICC Rules (n 29) 5.
[31] Article 11 further provides a list of measures that a company can take against corruption in its specific circumstances: see ibid 9–11.
[32] *ICC Anti-Corruption Clause* (n 27) options I(3), II(3), III(2).
[33] ibid.
[34] World Economic Forum, Transparency International and the Basel Institute on Governance, 'Partnering Against Corruption: Principles for Countering Bribery' (World Economic Forum, October 2004) 10 <https://media.corporate-ir.net/media_files/irol/70/70435/PACI.pdf> accessed 25 May 2024.
[35] ibid.
[36] OECD, 'Good Practice Guidance' (n 22) para 6.

for Organisations', the Global Infrastructure Anti-Corruption Centre ('GIACC') advises companies to include anti-corruption policies in their contract terms.[37] The GIACC offers two contractual options: a 'simple anti-corruption prohibition' or a 'more comprehensive' set of anti-corruption provisions. The former suggests that, 'as far as is reasonable, all contracts between the organisation and the business associate should contain a prohibition of corruption'.[38] On the other hand, the latter option allows companies to integrate more inclusive anti-corruption terms, such as training, audit, investigation, and indemnification, into their contracts.[39] Moreover, Transparency International has introduced a distinct, yet conceptually related, tool for preventing corruption in public contracting since the 1990s. This instrument, known as an Integrity Pact, 'is both a signed document and [an] approach to public contracting which commits a contracting authority and bidders to comply with best practice and maximum transparency'.[40] Usually, a third party, often a civil society organisation, oversees the entire process and the commitments made by all involved parties.

Beyond these voluntary initiatives, this article has identified only one state that mandates anti-corruption clauses in its petroleum sector, which is Indonesia. The Indonesian Government enforces an audit clause in procurement contracts that requires subcontractors to adhere to international anti-corruption laws. The origin of this approach dates back to 2014 when SKK Migas, the Special Task Force for Upstream Oil and Gas Business Activities, took steps to rebuild its reputation following the arrest of its chairman on corruption charges.[41] The new chairman introduced measures to enhance transparency and accountability, including granting SKK Migas and contractors the authority to conduct audits on vendors to ensure compliance with the FCPA 1977, the UKBA 2010, and the Corruption Eradication Act (Indonesia).[42] In other words, rights-holders are given the right to audit their subcontractors to ensure compliance with transnational anti-corruption norms.[43]

Several jurisdictions endorse the inclusion of anti-corruption clauses in contracts. In the US, for example, the 'FCPA Resource Guide', which provides guidance on successor liability, recommends measures such as requiring third-party distributors and agents to 'complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights'.[44] In another section, when addressing risk management in the context of hiring consultants, the Guide suggests that companies should ensure, amongst other measures, 'training Consultant on the FCPA and other anti-corruption laws; requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights)'.[45] Furthermore, the

[37] 'Anti-Corruption Programme for Organisations' (*GIACC*, 10 April 2020) <https://giaccentre.org/programme-organisations/> accessed 25 May 2024.
[38] 'Contract Terms' (*GIACC*, 10 April 2020) <https://giaccentre.org/contract-terms/> accessed 25 May 2024.
[39] These obligations will be elaborated on in greater detail later. For a complete list of suggested provisions, see ibid.
[40] 'Integrity Pacts' (*Integrity Pacts*) <https://www.transparency.org/en/tool-integrity-pacts> accessed 25 May 2024.
[41] Michael Buehler, '"Try to Be More Like Norway on a Sunny Day!" Regulatory Capitalism and the Challenges of Combatting Corruption in Indonesia's Upstream Oil and Gas Sector Supply Chains' (2020) Oil, Gas and Energy Law 15–16 <https://www.ogel.org/article.asp?key=3904> accessed 25 May 2024.
[42] Law No 31 of 1999 on Corruption Eradication.
[43] Buehler (n 41) 16.
[44] 'FCPA Resource Guide' (n 19) 32, 34.
[45] ibid 63.

DOJ, in its Opinion Procedure Releases[46] and Deferred Prosecution Agreements,[47] calls upon companies to incorporate anti-corruption provisions into third-party contracts as part of their anti-corruption compliance programme.

Moreover, the incorporation of anti-corruption clauses into contracts represents a crucial step in mitigating the risks associated with third-party liability, provided that these clauses are properly inserted, enforced, and compliant with relevant regulations and guidelines. While an anti-corruption clause cannot absolve TNCs of criminal liability, it may shift the liability risk to third parties if TNCs can demonstrate the proper integration and enforcement of these clauses in their respective contracts with third parties, in harmony with their anti-corruption compliance programmes.[48]

For example, in the US, the 'Principles of Federal Prosecution of Business Organizations' in the 'Justice Manual' provide prosecutors with guidelines for investigating corporations, considering charges, and negotiating agreements.[49] These principles emphasise the importance of the adequacy and effectiveness of the corporation's compliance programme at the time of the offence and charging decision, as well as the corporation's remedial efforts to enhance their compliance programme.[50] The US 'Sentencing Guidelines' also consider the presence of an effective compliance programme when determining organisational criminal fines.[51] Moreover, as part of third-party management in the DOJ's 'Evaluation of Corporate Compliance Programs', designed to assist prosecutors in assessing the effectiveness of a corporation's compliance programme at the time of the offence, the document advises prosecutors to evaluate the company's 'Appropriate Controls' and 'Management of Relationships'.[52] Accordingly, policies are deemed necessary to document the company's effective management of third parties. Contractual anti-corruption clauses, as a documented commitment, serve as crucial evidence in case of inquiries from a DOJ officer. Having these clauses readily available can significantly influence the DOJ's decision when prosecuting corrupt actions.

[46] See for example US Department of Justice, *FCPA Opinion Procedure Release 2008-02* (13 June 2008) <www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf> accessed 25 May 2024. The first reference of the DOJ to anti-corruption clauses is related to the 'Consent and Undertaking of Metcalf & Eddy, Inc' in *United States v Metcalf & Eddy, Inc*, No 99-CV-12566-NG (D Mass 1999) para 4(i), stating that the compliance programme shall include 'in all contracts and contract renewals... with agents, consultants, and other representatives... that no payments of money or anything of value will be offered, promised or paid'.

[47] See for example the Deferred Prosecution Agreement in *United States of America v Panalpina World Transport (Holding) Ltd*, No 4:10-CR-00769 (SD Tex 2010) para 12, stating that, '[w]here necessary and appropriate, Panalpina will include standard provisions in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws'.

[48] Gordon Kaiser, 'Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations' (2013) 34 Energy Law Journal 193, 209, stating that, '[a]ccording to the [US Department of Justice] and the [US Securities and Exchange Commission], contractual provisions that are reasonably calculated to prevent anti-corruption violations may be important in assessing the company's liability'.

[49] US Department of Justice, 'Justice Manual' (2024) s 9-28.000 <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> accessed 25 May 2024.

[50] ibid.

[51] United States Sentencing Commission, 'Guidelines Manual' (2018) §§ 8B2.1, 8C2.5(f), 8C2.8(a)(11).

[52] US Department of Justice, 'Evaluation of Corporate Compliance Programs' (March 2023) 6–7 <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl?inline> accessed 25 May 2024.

In the UK, the UKBA 2010 imposes strict liability on companies for bribery committed by their 'associated' persons,[53] which may include third parties.[54] However, the Act provides a full defence to companies if they can demonstrate that they 'had in place *adequate procedures* designed to prevent persons associated with [the company] from undertaking such conduct'.[55] The UKBA Guidance offers insights into the procedures that commercial organisations can implement to prevent individuals associated with them from engaging in bribery.[56] In supply chains and projects involving a prime contractor and multiple sub-contractors, commercial organisations are advised to address bribery risks 'by employing the types of anti-bribery... (e.g. risk-based due diligence and *the use of anti-bribery terms and conditions*) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain'.[57] The adoption of an anti-corruption clause can be seen as a step towards fulfilling these requirements for adequate anti-corruption procedures.

This article has so far established the role of anti-corruption clauses in contracts as due diligence tools, which are endorsed in international anti-corruption standards, such as the ICC's model anti-corruption clause, and recognised in key domestic anti-corruption laws, notably in the US and the UK. This global and domestic recognition signifies the incorporation of anti-corruption commitments into contractual agreements. The next section will introduce the various types of such clauses that are incorporated in petroleum contracts.

IV. From Verbiage to Action: Exploring Different Types of Anti-Corruption Clauses

Contractual anti-corruption clauses may vary in the degree to which they commit the contracting party to specific anti-corruption measures. This offers the parties a broad range of options to select from when integrating preferred clauses into their contracts.[58] Depending on their due diligence policies, the parties may choose to incorporate these clauses into all contracts, into contracts exceeding a specific value threshold, or into contracts involving businesses and individuals categorised into distinct risk levels.[59] Tailoring clauses for different parties requires risk assessment procedures to classify business partners into low, medium, and high potential corruption risk groups, with each group having its own customised anti-corruption clauses, ranging from minimal to comprehensive, based on their risk categorisation.[60] Some parties

[53] UKBA 2010, s 7(1).

[54] See generally Ejike Ekwueme, 'Decelerating Corruption and Money Laundering: Distilling the Positive Impact of UKBA 2010 from a Holistic Perspective' (2022) 29 Journal of Financial Crime 128, 132–33.

[55] UKBA 2010, s 7(2) (emphasis added).

[56] UK Ministry of Justice, 'The Bribery Act 2010: Guidance' (UK Ministry of Justice, March 2011) ('UKBA Guidance') <https://www.gov.uk/government/publications/bribery-act-2010-guidance> accessed 25 May 2024.

[57] ibid 16, para 39 (emphasis added).

[58] Boles (n 6) 823.

[59] ibid 835, explaining that, through a specific model of risk assessment, companies categorise 'agents into risk bands by reference to specific objective criteria and [apply] different levels of due diligence and internal controls to such agents according to the criteria'.

[60] Examples of low-risk partners include individuals and companies that have adopted anti-corruption compliance programmes. On the other hand, long-term contracts, complex contracts, acquisition contracts, or companies with operational activities in countries with high levels of corruption are usually identified as high-risk partners: Neil McInnes, 'Addressing the Bribery Act in Your Contracts: A Tiered Approach' (*Practical Law Construction Blog*, 13 June 2012) <constructionblog.practicallaw.com/addressing-the-bribery-act-in-your-contracts-a-tiered-approach/> accessed 25 May 2024.

prefer to adopt anti-corruption clauses following a risk-based approach, as it can prevent unnecessary costs and potential burdens in relationships with partners categorised as having low corruption risks.[61] On the other hand, others advocate including anti-corruption clauses 'wherever possible' as a universal standard of behaviour, recognising that corruption risks might not always align with a straightforward risk assessment.[62]

Furthermore, anti-corruption clauses can refer to different phases in the life of a contract: the pre-contractual phase, the execution phase, the post-implementation phase, or all three stages. For example, in a Production Sharing Agreement ('PSA') concluded between the Agência Nacional do Petróleo de São Tomé e Príncipe and ERHC Energy EEZ, Lda, clause 29 extends the anti-corruption commitment to the period preceding the contract conclusion:

> 29.1 The Contractor represents and warrants that *it did not engage* any person, firm or company as a commission agent for purposes of this Contract and that *it has not given or offered to give* (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of significant value...
>
> 29.2 The Contractor further represents and warrants that *no loan, reward, offer, advantage or benefit of any kind has been given* to any [public] Official or any person for the benefit of such [public] Official or person or third parties...[63]

This clause extends the anti-corruption commitment to the pre-contract phase with the goal of preventing corruption during the contract negotiation period, including the bidding or proposal process. Such requirements generally call for the disclosure of any past or present relationships that could result in conflicts of interest or jeopardise the fairness and ethical standards of the contract negotiations. However, most anti-corruption clauses, aiming to prevent ambiguity by delineating the boundaries of the parties' contractual obligations, restrict the prohibition of corrupt practices to the contract period to ensure that all contracting parties are aware of their obligations to comply with anti-corruption laws and regulations. For example, a PSA between the Government of the Republic of Mozambique, ExxonMobil Moçambique Exploration and Production, Lda, RN Zambezi South PTE Ltd, and Empresa Nacional de Hidrocarbonetos, EP ('Z5C EPCC Agreement'), states that:

> 32.2 No offer, gift, payments or benefit of any kind, which constitutes an illegal or corrupt practice pursuant to applicable law of the Republic of Mozambique, shall be given or accepted, either directly or indirectly, as an inducement or reward *for the execution of this EPCC* or for doing or not doing any action or making any decision in relation to this EPCC.[64]

[61] ibid; see also Boles (n 6) 836.
[62] Boles (n 6) 836, fn 154, citing Colin R Jennings, 'Avoiding Criminal Liability for Corrupt Practices Abroad Through Effective Corporate Compliance' in *International White Collar Enforcement: Leading Lawyers on Cooperating With Enforcement Agencies, Understanding New Laws, and Constructing Compliance Programs* (12th edn, Aspatore 2011).
[63] Production Sharing Contract for Block '11', concluded between the Democratic Republic of São Tomé and Príncipe, represented by Agência Nacional do Petróleo de São Tomé e Príncipe and ERHC Energy EEZ, Lda (23 July 2014) 38 <https://resourcecontracts.org/contract/ocds-591adf-3122094392/view#/> accessed 25 May 2024 (emphasis added).
[64] Exploration and Production of Petroleum Concession Contract, concluded between the Government of the Republic of Mozambique, ExxonMobil Moçambique Exploration and Production, Limitada, RN Zambezi South PTE Ltd, and

Finally, certain clauses further extend the commitment to the post-contract period. For example, in a concession agreement between the Republic of the Congo and Congo Iron SA, article 34.8 states that '[t]he obligations resulting from this Article *shall continue to have effect upon the expiry of this Agreement*'.[65] This post-contract requirement obliges the parties to maintain compliance with anti-corruption standards even after the contract has concluded to ensure the timely identification and resolution of any issues or concerns. In summary, parties can include anti-corruption clauses at various stages of a contract, including before, during, and after the contract, to prevent corrupt practices.

Furthermore, when it comes to incorporating anti-corruption clauses into contracts, parties have a wide range of options regarding the types of anti-corruption commitments. Although there is no universally accepted standardised anti-corruption clause tailored specifically for the petroleum sector, some states and relevant stakeholders have introduced template anti-corruption clauses in their publicly available contract templates. For example, Offshore Energies UK developed a series of industry-standard contracts, known as LOGIC (Leading Oil and Gas Industry Competitiveness), to streamline contract negotiations in the UK. In LOGIC's Onshore Offshore Contracts Template, dated 2019, the anti-corruption clause is as follows:

> 28. Anti-Bribery and Corruption
> 28.1 Each PARTY warrants and represents that in negotiating and concluding the CONTRACT it has complied, and in performing its obligations under the CONTRACT it has complied and shall comply, with all APPLICABLE ANTI-BRIBERY LAWS.
>
> 28.2 The CONTRACTOR warrants that it has an ABC PROGRAMME setting out adequate procedures to comply with APPLICABLE ANTI-BRIBERY LAWS and that it will comply with such ABC PROGRAMME in respect of the CONTRACT.[66]

The LOGIC anti-corruption clause falls short of the comprehensive coverage expected for a standard, as it may not address various types of corruption and potential scenarios where they could occur. On the other hand, in the analysis of 1,164 petroleum contracts conducted for this article, a joint venture ('JV') agreement between Tullow Ghana Limited, Kosmos Energy Ghana HC, Anadarko WCTP Company, Sabre Oil & Gas Holdings Limited, and EO Group Limited (the 'Jubilee Agreement'),[67] has stood out for its exceptionally comprehensive anti-corruption clause, detailed in Annex II. This article designates the clause as the 'Standard Clause' and will refer to it as a model throughout.

Sections IV.A and IV.B aim to present how contractual anti-corruption commitments and obligations are integrated and vary from one contract to another, based on the findings

Empresa Nacional de Hidrocarbonetos, EP (October 2018) ('Z5C EPCC Agreement') 40–41, art 32.2 <https://resourcecontracts.org/contract/ocds-591adf-3738262397/view#/> accessed 25 May 2024 (emphasis added).

[65] Convention d'Exploitation Minière Relative au Gisement de Fer du Mont Entre, concluded between the Republic of the Congo and Congo Iron SA (29 April 2016) 47–48, art 34.8 <https://resourcecontracts.org/contract/ocds-591adf-2949159236/view#/> accessed 25 May 2024 (translated by author) (emphasis added).

[66] LOGIC, 'General Conditions of Contract (Including Guidance Notes) for Services On-and Off-Shore' (4th edn, LOGIC 2019) 22.

[67] Jubilee Agreement (n 12).

derived from the review of 1,164 petroleum contracts. These subsections will present a proposed taxonomy that categorises anti-corruption clauses into two primary groups: 'direct anti-corruption clauses' and 'indirect anti-corruption clauses'. The comprehensive scale of this taxonomy is depicted in Figure 1 below, with each of its subdivisions being explored in corresponding subsections. Overall, this study argues that, although direct anti-corruption clauses impose a direct commitment on parties to adhere to anti-corruption standards, indirect anti-corruption clauses enable parties to enforce anti-corruption commitments in the absence of direct clauses.

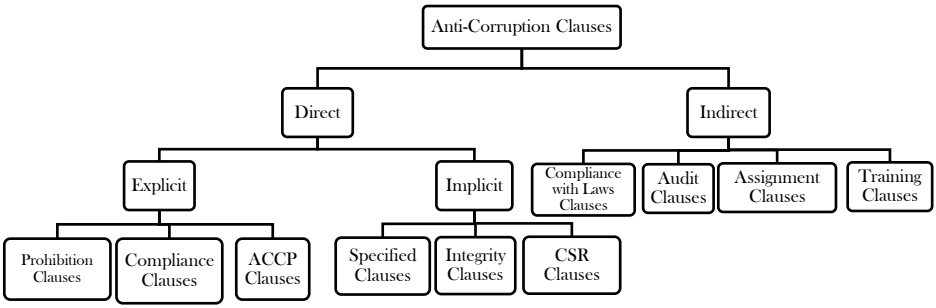

Figure 1: Classification of anti-corruption clauses in petroleum contracts

A. DIRECT ANTI-CORRUPTION CLAUSES

Direct anti-corruption clauses are contractual clauses that establish specific anti-corruption obligations or conditions for one or both parties involved. These clauses can either clearly refer to (anti-)corruption matters or leave room for interpretation by the parties. This article further categorises these direct clauses into two types: 'explicit direct clauses' and 'implicit direct clauses'. The distinction serves to provide a more nuanced understanding of how these clauses operate within contracts and the different ways in which anti-corruption obligations are established or addressed in contractual agreements. Explicit direct clauses impose clear anti-corruption obligations on parties by either prohibiting corruption in a broad sense, mandating compliance with specific anti-corruption laws, or requiring the implementation of anti-corruption measures. By contrast, implicit direct anti-corruption clauses may address specific forms of corruption, encourage the adoption of measures to prevent corrupt practices, or emphasise corporate social responsibilities. The extensive study of petroleum contracts underpinning the findings of this article suggests that explicit anti-corruption clauses have a more pronounced role in imposing anti-corruption commitments. This is because they consistently require a clearer anti-corruption commitment when compared with implicit clauses, which may not always be subject to consistent interpretation by the parties for anti-corruption purposes.

(i) Explicit Anti-Corruption Clauses

Explicit direct anti-corruption clauses are contractual clauses that straightforwardly mention '(anti-)corruption' within their language when imposing anti-corruption commitments on one or both parties. These explicit clauses can be further categorised into three main types: prohibition clauses, compliance clauses, and clauses requiring the adoption of anti-corruption compliance programmes ('ACCP clauses'). The following subsections will describe each of these types.

(a) Clauses with a ban on corruption ('Prohibition Clauses')

The first type of explicit direct clause is a standalone anti-corruption clause that visibly prohibits corrupt practices and imposes direct obligations on one or both parties not to engage in corrupt practices in general. In these clauses, the parties request guaranties from each other, certifying either or both that they themselves or their associated individuals have not been involved in corrupt practices and that they will not engage in such practices in the future. These clauses serve the purpose of creating a corruption-free environment in matters related to the contract. These clauses can be drafted in various formats.

At a basic level, parties may incorporate a straightforward clause that prohibits corruption between the parties, their employees, and third parties. For example, in a PSA between the Government of the Republic of Mozambique, Sasol Petroleum Sofala, Lda, and Empresa Nacional de Hidrocarbonetos, EP, article 36 states that '[t]he Government of the Republic of Mozambique and the Concessionaire agree to cooperate in *preventing acts of corruption*'.[68] This clause broadly requires the parties to take effective measures against corruption while outlining a general obligation to fulfil this commitment. Some prohibition clauses may go a step further by providing a precise definition or scope of corruption or by describing acts that could be considered corruption. For example, in a service contract between Petrobell Inc and Grantmining SA, article 34.6 states:

> 34.6 Commitment Against Corruption
> The Contractor declares and assures that it has not made or offered and that it undertakes not to make or offer payments, loans or gifts of money or valuables, directly or indirectly to (i) an official of authority any competent public or employees of the Secretariat or the Ministry; (ii) a political movement or party or member thereof; (iii) any other person, when the Party knows or has had reason to know that any part of said payment, loan or gift will be delivered or paid directly or indirectly to any public official or employee, candidate, political party or member thereof; or (iv) to any other Person or entity, when such payment would violate the laws of any relevant jurisdiction.[69]

[68] Contrato de Concessão Para Pesquisa e Produção Para OS Blocos 16 & 19, concluded between the Government of the Republic of Mozambique, Sasol Petroleum Sofala, Limitada, and Empresa Nacional de Hidrocarbonetos, EP (1 June 2005) 107, art 36 <https://resourcecontracts.org/contract/ocds-591adf-1495612293/view#/> accessed 25 May 2024 (translated by author) (emphasis added).

[69] Contrato Modificatorio a Contrato de Prestación de Servicios para la Exploración y Explotación de Hidrocarburos (Petroleo Crudo), en el Bloque Tivacuno de la Región Amazónica Ecuatoriana, concluded between the Republic of Ecuador, Repsol YPF Ecuador SA, Overseas Petroleum and Investment Corporation, Amodaimi Oil Company Ltd, and CRS Resources (Ecuador) LDC (22 February 2011) 127, art 34.6 <https://resourcecontracts.org/contract/ocds-591adf-9671561394/view#/> accessed 25 May 2024 (translated by author).

By defining corrupt practices, these clauses aim to provide clarity in understanding, and consistency in interpreting, what constitutes corrupt behaviour. This clarification can be crucial for transnational contracts, where the definition of corruption may differ among the jurisdictions of the contracting parties.

Lastly, prohibition clauses may also specifically prohibit the act of bribery rather than addressing corruption in general. Although often used interchangeably, corruption and bribery are distinct concepts.[70] This interchangeability arises because bribery probably constitutes the most common form of corruption[71] and is the most frequently cited corrupt practice in international and regional anti-corruption conventions, as well as in national anti-corruption regulations.[72] For example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions primarily focuses on the criminalisation of bribery and considers corruption in relation to the act of bribery.[73] Accordingly, some companies incorporate clauses into their contracts that forbid employees or contractors from offering, soliciting, or accepting bribes. An example of this can be found in a PSA between the Government of the United Republic of Tanzania, Songas Limited, PAE PanAfrican Energy Corporation, and CDC Group PLC:

> CDCPLC represents that *it has not paid or received, or undertaken to pay or receive, any bribe, pay-off, kick-back, or unlawful commission and has not in any other way or manner paid any sums,* whether in Tanzanian Shillings or foreign currency and whether in Tanzania or abroad, given or offered to pay any gifts and presents in Tanzania or abroad, to any Person to procure this Agreement.[74]

This clause contains a warranty from one party to the other that it has not been involved in any acts related to bribery.

[70] Some international conventions, when defining the term 'corruption', limit it to the act of bribery: see for example Civil Law Convention on Corruption (signed 4 November 1999, entered into force 1 November 2003) ETS No 174, art 2: '[f]or the purpose of this Convention, "corruption" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof'.

[71] See for example UN Office on Drugs and Crime (UNODC), 'The Anti-Corruption Toolkit' (UNODC) 13–14 <https://www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_foreword.pdf> accessed 25 May 2024.

[72] See for example Convention drawn up on the basis of Article K.3 (2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [1997] OJ C195/2, arts 2–3; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed 17 December 1997, entered into force 15 February 1999) ('OECD Convention'), art 1; Criminal Law Convention on Corruption (signed 27 January 1999, entered into force 1 July 2002) ETS No 173, arts 2–11; Civil Law Convention on Corruption (n 70) art 2; SADC Protocol Against Corruption (signed 14 August 2001, entered into force 6 July 2005), art 1; ECOWAS Protocol on the Fight Against Corruption (signed 21 December 2001, not yet in force), art 6; Additional Protocol to the Criminal Law Convention on Corruption (signed 15 May 2003, entered into force 1 February 2005) ETS No 191, arts 2–6; African Union Convention on Preventing and Combating Corruption (signed 11 July 2003, entered into force 5 August 2006), art 1; United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 ('UNCAC') arts 15, 16, 21; Arab Anti-Corruption Convention (signed 21 December 2010, entered into force June 2013) art 4.

[73] OECD Convention (n 72).

[74] Amended and Restated Implementation Agreement Relating to the Songo Songo Gas-To-Electricity Project, Dares Salaam, Tanzania, concluded between the Government of the United Republic of Tanzania, Songas Limited, PAE PanAfrican Energy Corporation, and CDC Group PLC (30 April 2003) 21, art 4.3(g) <https://resourcecontracts.org/contract/ocds-591adf-3212507685/view#/> accessed 25 May 2024 (emphasis added).

In the Standard Clause, article 21.1(A) on Public Anti-Corruption Provisions outlines the expected conduct of the parties involved in the agreement, with a primary focus on anti-corruption measures when dealing with government officials (see Annex II). However, the clause does not stop here; article 21.3 on Private Anti-Corruption Provisions goes further, establishing a commitment from each party and its affiliates to refrain from participating in any corrupt behaviour between the contracting parties and their affiliates (see Annex II). Thus, the clause prohibits both public and private corruption by providing a comprehensive definition of corruption, including its various types and purposes. It further requires parties to warrant that they have not engaged in, and will abstain from, any form of corrupt behaviour.

(b) Clauses requiring compliance with anti-corruption laws ('Compliance Clauses')

The second type of explicit direct anti-corruption clause requires parties to respect and comply with anti-corruption standards by specifically referring to particular anti-corruption laws. Some clauses demand that parties comply with certain regional or international anti-corruption laws. For example, in a service agreement between Yacimientos Petrolíferos Fiscales Bolivianos, Total E&P Bolivie, and Tecpetrol de Bolivia SA, the parties are obligated to comply with the United Nations Convention Against Corruption ('UNCAC')[75] and the Inter-American Convention Against Corruption.[76] Integrating international anti-corruption laws into the contract framework provides a foundation for addressing cross-border corruption, which ensures that companies and individuals operating across different jurisdictions adhere to consistent anti-corruption standards.

Anti-corruption clauses may also reference specific national anti-corruption laws, including those of the host state, the home state, or the anti-corruption laws of other countries, often the FCPA 1977 and the UKBA 2010. An example of clauses mandating compliance with the host and home states' laws can be found in a PSA concluded between the Government of the Republic of Mozambique, Eni East Africa SPA, and Empresa Nacional de Hidrocarbonetos, EP, in which the parties are required to prevent corruption that violates:

(i) the applicable laws of the Republic of Mozambique;
(ii) the laws of the country of formation of the Concessionaire or of its ultimate parent company (or its principal place of business); or,
(iii) the principles described in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions... and the Convention's Commentaries.[77]

In this example, the first item relates to the anti-corruption laws of the host state, whereas the second item refers to the anti-corruption regulations of the home state. An example of anti-corruption clauses that necessitate parties to adhere to domestic laws extending beyond their

[75] UNCAC (n 72).
[76] Inter-American Convention Against Corruption (adopted 29 March 1996, entered into force 6 March 1997) OAS Treaty Series B-58; Republica de Bolivia Contrato de Operacion, concluded between Yacimientos Petrolíferos Fiscales Bolivianos, Total E&P Bolivie (Sucursal Bolivia), and Tecpetrol de Bolivia SA (2006) 34, cl 27.2 <https://resourcecontracts.org/contract/ocds-591adf-5978990122/view#/> accessed 25 May 2024.
[77] Exploration and Production Concession Contract for Area 4 Offshore of the Rovuma Block, concluded between the Government of the Republic of Mozambique, Eni East Africa SPA, and Empresa Nacional de Hidrocarbonetos, EP (2006) 96, art 31.2(c) <https://resourcecontracts.org/contract/ocds-591adf-2561344209/view#/> accessed 25 May 2024.

respective jurisdictions is found in a PSA between the Kurdistan Regional Government of Iraq and WesternZagros Limited (the 'Garmian Agreement'), where corrupt practices laws are defined as:

> (a) the Kurdistan Region Laws and the Laws of Iraq in respect of bribery, kickbacks, and corrupt business practices;
> (b) the *Foreign Corrupt Practices Act of 1997 of the United States of America* (Pub. L. No. 95–213 §§ 101–104 *et seq*), as amended;
> (c) the *Corruption of Foreign Public Officials Act of Canada*;
> (d) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, which entered into force on 15 February 1999, and the Convention's Commentaries;
> (e) the *Bribery Act 2010*; and
> (f) any other Law of general applicability relating to bribery, kickbacks, and corrupt business practices.[78]

Here, the clause requires the parties to comply with US, UK, and Canadian anti-corruption laws, regardless of whether these laws are 'actually applicable or in effect' for the contracting party, which, in this case, is a Cypriot company operating in Iraq.[79]

Finally, some clauses go further by mandating parties to comply with *all applicable anti-corruption laws*. For example, in the Z5C EPCC Agreement, in addition to requiring parties to adhere to the host state's applicable laws, the laws of the country of incorporation or principal location of the parent company and subcontractors, and the OECD Convention, the anti-corruption clause also obliges the parties to adhere to 'any other applicable anti-corruption laws'.[80] Such a requirement is intended to reinforce compliance with all relevant national, regional, or international laws.

The Standard Clause incorporates a compliance clause by making a number of references to 'Anti-Corruption Legislation' and the 'OECD Anti-bribery Principles' within the clause itself. Additionally, it provides detailed definitions for these terms in its article 1 Definitions (See Annex II). The clause not only covers the national laws of both the host and the home states but also references international and foreign laws, such as the OECD Convention, the UKBA 2010, and the FCPA 1977, as well as any other implementing legislation.

> (c) Clauses requiring the adoption of anti-corruption compliance programmes ('ACCP Clauses')

When adopting a more rigorous approach, the anti-corruption clause, in addition to prohibiting acts of corruption, can include more comprehensive contractual terms that mandate the parties to implement additional anti-corruption measures, thereby consolidating their commitment to anti-corruption efforts. An example of ACCP clauses can be found in a JV

[78] Production Sharing Contract on the Garmian Block, Kurdistan Region, concluded between the Kurdistan Regional Government of Iraq and WesternZagros Limited (2011) ('Garmian Agreement') 12, art 1.1 <https://resourcecontracts.org/contract/ocds-591adf-9205170350/view#/> accessed 25 May 2024 (emphasis added).
[79] ibid.
[80] Z5C EPCC Agreement (n 64) 41.

agreement between the National Hydrocarbons Commission, Pemex Exploración y Producción, and Cepsa EP México. Within this agreement, the clause not only prohibits corruption and mandates compliance with any applicable anti-corruption laws but also requires the parties to 'create and maintain adequate internal controls for compliance with the provisions of this Clause'.[81] This type of explicit clause specifically calls for the implementation of a corporate anti-corruption compliance programme to ensure the company's adherence to applicable anti-corruption laws.[82]

With respect to ACCP clauses, the Standard Clause prompts parties to adopt further measures to reinforce their anti-corruption commitments (see Annex II). Articles 21.1(D) and 21.1(F) require the implementation of control and audit procedures regarding the actions of the parties, their affiliates, and their subcontractors. Paragraph (E) further mandates the completion of annual certifications in which the parties, on a regular basis, affirm their dedication to anti-corruption, confirm that they have not engaged in corrupt practices, and verify that they have no knowledge of any corrupt practices conducted by their employees.

(d) Overview: explicit anti-corruption clauses

Table 1 summarises different types of explicit anti-corruption clauses and their various forms identified in the studied contracts. Among the three types of explicit clauses, the ACCP clause imposes more extensive anti-corruption commitments on the parties, as it requests the adoption of measures in practice, in addition to anti-corruption commitments. On the other hand, there is no fixed order of priority between prohibition clauses and compliance clauses, as both types of clauses impose anti-corruption commitments on the parties.

Prohibition Clauses	Basic: Straightforward prohibition of corruption Enhanced: Include precise definitions and scope Bribery-Specific: Focus on prohibiting bribery
Compliance Clauses	Regional/International Laws: Require compliance with specific anti-corruption conventions National Laws: Reference to host/home state laws and other regimes, such as the FCPA 1977 and the UKBA 2010 Comprehensive Laws: Mandate compliance with all applicable anti-corruption laws

[81] Contrato para la Exploración y Extracción de Hidrocarburos Bajo la Modalidad de Producción Compartida en Aguas Someras, Área Contractual G–Tmv–04, concluded between Comisión Nacional de Hidrocarburos, Pemex Exploración y Producción, and Cepsa EP México, S de RL de CV (27 June 2018) 80, cl 33.2 <https://resourcecontracts.org/contract/ocds-591adf-5375757628/view#/> accessed 25 May 2024 (translated by author).

[82] See for example *ICC Anti-Corruption Clause* (n 27) option III.

ACCP Clauses	Comprehensive Commitment: Require additional anti-corruption measures

Table 1: Classification of explicit direct anti-corruption clauses in petroleum contracts

(ii) Implicit Anti-Corruption Clauses

Implicit direct anti-corruption clauses are those that establish an anti-corruption obligation for one or both parties without explicitly mentioning the term '(anti-)corruption' in the exact wording of the clause. Indeed, while anti-corruption commitments are not explicitly stated in such clauses, they are implied by the expectations of the parties involved. Based on its review of the studied contracts, this article proposes to categorise further three types of clauses that include implicit contractual obligations in a contract: Integrity Clauses; Specified Clauses; and Corporate Social Responsibility Clauses.

(a) Clauses enforcing ethical standards ('Integrity Clauses')

Implicit clauses with integrity requirements aim to discourage corrupt practices in contractual relationships while promoting ethical business conduct, which includes moral principles and values governing business activities.[83] One type of such clauses prohibits improper payments in business dealings to prevent bribery or other unethical practices that could confer a business advantage. For example, in a PSA between Myanma Oil and Gas Enterprise and Total Myanmar Exploration and Production, section 27.4 states that '[t]he CONTRACTOR warrants that no gift or reward has been made, nor will be made, to any officials or employees of the Government of the Union of Myanmar'.[84] These restrictions on the exchange of gifts, donations, commissions, and similar payments are intended to deter potential corrupt behaviour, such as bribery, conflicts of interest, and undue influence, in contractual relationships.

Another category of integrity clauses includes clauses that prohibit the inclusion of false statements in contracts. Although distinct from corruption, false statements or misrepresentation could serve as a means for parties to involve themselves in corrupt practices. Thus, these clauses are incorporated to ensure the accuracy and truthfulness of information exchanged between parties in the course of business and to prevent deceptive practices that could potentially lead to corrupt behaviour. For example, a PSA executed among Sociedade Nacional de Combustíveis de Angola, Empresa Pública, Vaalco Angola, Inc, Sonangol Pesquisa e Produção, SA, and Interoil Exploration and Production ASA states that 'Sonangol may terminate this Contract if Contractor Group:... (c) intentionally submits false information to the [Executive Power] or to Sonangol'.[85] In most cases, deliberate misrepresentation in a

[83] For more details on business ethics, see for example John Nkeobuna Nnah Ugoani, 'Business Ethics' in Robert Brinkmann (ed), *The Palgrave Handbook of Global Sustainability* (Springer 2023) 1763.

[84] Production Sharing Contract for Appraisal Development and Production of Petroleum in the Moattama Area, concluded between Myanma Oil and Gas Enterprise and Total Myanmar Exploration and Production (1992) 67, s 27.4 <https://resourcecontracts.org/contract/ocds-591adf-6716589315/view#/> accessed 25 May 2024.

[85] Production Sharing Agreement in the Area of Block 5/06, concluded between Sociedade Nacional de Combustíveis de Angola, Empresa Pública (Sonangol, EP), Vaalco Angola (Kwanza), Inc, Sonangol Pesquisa e Produção, SA, and Interoil Exploration and Production ASA (2006) 31–32, art 39.1 <https://resourcecontracts.org/contract/ocds-591adf-3664745125/view#/> accessed 25 May 2024.

contract constitutes a material breach of the agreement, giving the aggrieved party the right to terminate the contract.[86]

Finally, specific integrity clauses mandate parties to uphold transparency requirements within the contract. These requirements guarantee that parties disclose all relevant information and that there is no hidden or undisclosed influence, favouritism, or conflict of interest. For example, a PSA between the National Oil Company of Liberia and Anadarko Liberia Block 10 Company stipulates that '[t]he Parties agree that all payments made under this Contract shall be made in accordance with protocols laid down by the Extractive Industries Transparency Initiative ("EITI")'.[87] The disclosure of payments under the EITI—a global standard promoting transparency and accountability in the extractive sector—not only facilitates the detection and deterrence of corruption but also establishes clear decision-making and monitoring processes, ultimately promoting integrity, accountability, and trust in contractual relations.

Articles 21.1(A) and 21.3 of the Standard Clause includes integrity clauses multiple times by forbidding parties to 'pay, make, offer, give, promise or authorise, either directly or indirectly, by it or any of its Affiliates, of any... gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of anything of value' (see Annex II). By prohibiting improper payments and other transfers of value, the clause sets clear boundaries and expectations for the parties involved, aiming to prevent behaviours that could lead to corruption.

(b) Clauses prohibiting a form of corruption ('Specified Clauses')

The second category of implicit clauses includes those that describe corrupt practice without explicitly employing the terms 'corruption' and 'bribery' or that specify another specific type of corruption, such as conflicts of interest or fraud. An illustrative example of clauses specifying a form of corruption can be found in clause 27.2 of a service contract between Yacimientos Petrolíferos Fiscales Bolivianos and Empresa Petrolera Andina SA, which states:

> Parties declare and guarantee to the other Parties that neither it nor any of its employees, agents or representatives, directly or indirectly, have offered, promised, authorised, paid or given money or anything of value to any public official for the purpose of influencing their actions or decisions, or gaining undue advantage, in connection with this Agreement or any of the activities to be carried out under it and for the term of the Agreement undertakes not to offer, promise, authorise, pay or give money or anything of value to any public official in order to influence their acts or decisions, or to gain undue

[86] See for example Model Gas Service Development and Production Contract for gas field, concluded between North Oil Company of the Republic of Iraq (2009) 16, art 8.1(a) <https://resourcecontracts.org/contract/ocds-591adf-4049230261/view#/> accessed 25 May 2024, stating that 'NOC may terminate this Contract... if Contractor commits a breach of a material obligation of this Contract, including but not limited to: (i) Contractor knowingly submits a false statement to NOC which is of material consideration for the execution of this Contract'.

[87] Production Sharing Contract for Block LB-10, concluded between the National Oil Company of Liberia (NOCAL) on Behalf of the Republic of Liberia and Anadarko Liberia Block 10 Company (23 July 2009) 40, art 19.5 <https://resourcecontracts.org/contract/ocds-591adf-3001376476/view#/> accessed 25 May 2024.

> advantages, in connection with this Contract or with any of the activities that will be carried out according to it.[88]

In this example, the clause describes the act of bribery without explicitly using the term 'bribery'. Using broader language instead of precise terms such as 'corruption' or 'bribery' can be an effective strategy to ensure that the clause covers a wide range of potentially corrupt or unethical behaviour. Such an approach proves particularly advantageous in situations where different cultural or linguistic interpretations may affect the understanding or usage of these terms. For example, the aforementioned clause could also be interpreted to prohibit facilitation payments, in addition to bribery, even in jurisdictions where such payments are permitted, such as the US.

Among the clauses that prohibit specific types of corrupt practices, reference can be made to those addressing conflicts of interest in contracts. An example is a JV agreement signed between Perenco Oil and Gas (Cameroon) Ltd, Kosmos Energy Cameroon HC, and Société Nationale des Hydrocarbures, which prohibits conflicts of interest in clause 19.2.[89] A conflict of interest occurs when an individual or company has competing interests that could impact their decisions or actions in a specific situation. Conflicts of interest are considered to be a form of corruption if they are not properly disclosed and managed.[90] Incorporating clauses that address the disclosure and management of conflicts of interest into contracts can help companies prevent these situations from leading to other unethical behaviours, ensure that transactions are conducted fairly and transparently, and ensure that all parties act in the best interests of the contractual relationship.

The other types of clauses that prohibit certain types of corrupt practices are those that bar parties from engaging in fraudulent behaviour. For example, in a farmout agreement[91] between ERHC Energy Kenya Limited and Cepsa Kenya Limited, both farmor and farmee are held liable for losses 'as a direct result of or arising out of, resulting from, attributable to, or connected with... any event of fraud by [either the farmor or farmee] in connection with the transaction'.[92] Likewise, a PSA signed between the State Oil Company of the Republic of Azerbaijan, SOCAR Oil Affiliate, and BP Exploration (Azerbaijan) Limited prohibits tax fraud, which it defines as 'any illegitimate and repeated action or omission of the Contractor Party expressed in deliberate, intended and premeditated cases of failures for the purpose of

[88] República de Bolivia Contrato de Operación, concluded between Yacimientos Petrolíferos Fiscales Bolivianos and Empresa Petrolera Andina SA (28 October 2006) 40, cl 27.2 <https://resourcecontracts.org/contract/ocds-591adf-39677590096/view#/> accessed 25 May 2024 (translated by author).

[89] Agreement on the Management of Petroleum Operations (JOA) Covering the Kombe-Nsepe Permit, concluded between Perenco Oil and Gas (Cameroon) Ltd, Kosmos Energy Cameroon HC, and Société Nationale des Hydrocarbures (March 2008) 56, cl 19.2 <https://resourcecontracts.org/contract/ocds-591adf-5424836511/view#/> accessed 25 May 2024.

[90] World Bank, OECD and the UNODC, 'Preventing and Managing Conflicts of Interest in the Public Sector: Good Practices Guide' (July 2020) 3 <https://www.unodc.org/documents/corruption/Publications/2020/Preventing-and-Managing-Conflicts-of-Interest-in-the-Public-Sector-Good-Practices-Guide.pdf> accessed 25 May 2024.

[91] A 'farmout agreement' is the assignment of natural resources, such as minerals mining, oil, and gas, to a third party, also known as 'the farmee', for exploration, extraction, and development. In exchange for the outsourced activities, the farmee pays royalties to the property owner, also known as 'the farmor'. For more information on oil and gas farmout agreements, see Kendor P Jones, 'Something Old, Something New: The Evolving Farmout Agreement' (2010) 49 Washburn Law Journal 477.

[92] Farmout Agreement Relating to Block 11A, Kenya, concluded between ERHC Energy Kenya Limited and Cepsa Kenya Limited (7 October 2013) 31–32, cl 6.7 <https://resourcecontracts.org/contract/ocds-591adf-1934720031/view#/> accessed 25 May 2024.

evasion from Taxes by means of concealing information on Taxes or prevention of submission or collection thereof'.[93] These anti-fraud clauses are designed to ensure that parties act in good faith and to prevent them from engaging in deceitful actions, particularly considering that corruption often thrives in environments where practices such as falsifying financial statements to conceal bribes or securing contracts through deceptive means go unchecked.

As the Standard Clause explicitly names 'corruption' and 'bribery' within its text, it does not include a specified clause that describes a type of corruption. However, it does contain a specified clause that names a specific type of corruption: conflicts of interest. Article 23.4 establishes the obligation of each party to avoid conflicts of interest in dealings with suppliers, customers, and other entities, with specified exceptions for compliance with local laws and transactions with affiliates (see Annex II).

(c) Clauses referring to corporate social responsibility ('CSR Clauses')

The final category of implicit anti-corruption clauses is linked to clauses within the framework of corporate social responsibility ('CSR'). CSR includes activities that internalise costs for externalities resulting directly or indirectly from corporate actions, or processes and actions to consider and address the impact of corporate actions on affected stakeholders, driven by a recognised moral or ethical duty to society beyond the corporation's owner or shareholders.[94] CSR standards have a range of public objectives and address different social issues, including human rights, labour rights, public health, environmental protection, and the fight against corruption. Today, the rejection of corruption is integral to any company's CSR, as corruption is seen as incompatible with sustainable development due to the social, economic, and environmental damages associated with corrupt practices.[95] Studies show that a company with strong CSR commitments is more likely to implement robust anti-corruption measures.[96]

Through a CSR clause, the parties obligate or encourage each other to adhere to CSR standards, including anti-corruption measures. These clauses can either broadly refer to CSR as a general term or delineate responsibilities within its purview. For example, a concession agreement between the Colombian National Hydrocarbons Agency and Unión Temporal Repsol Ecopetrol states that 'the Contractor undertakes to maintain during the execution of this contract, the legal, financial, economic, technical, operational, environmental and *corporate social responsibility* capacities, accredited for the signing of this Contract'.[97] By contrast,

[93] Agreement on the Exploration, Development and Production Sharing for the Shafag-Asiman Offshore Block in the Azerbaijan Sector of the Caspian Sea, concluded between the State Oil Company of the Republic of Azerbaijan, BP Exploration (Azerbaijan) Limited, and SOCAR Oil Affiliate (7 October 2010) 50, art 12.1(c) <https://resourcecontracts.org/contract/ocds-591adf-1835848694/view#/> accessed 25 May 2024.

[94] Gerlinde Berger-Walliser and Inara Scott, 'Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening' (2018) 55 American Business Law Journal 167, 214–15.

[95] Manuel Castelo Branco and Catarina Delgado, 'Business, Social Responsibility, and Corruption' (2012) 12 Journal of Public Affairs 357, 357.

[96] See for example Indira Carr and Opi Outhwaite, 'Controlling Corruption through Corporate Social Responsibility and Corporate Governance: Theory and Practice' (2011) 11 Journal of Corporate Law Studies 299.

[97] Contrato de Exploración y Producción de Hidrocarburos No 05, Área Costa Afuera Gua Off–1, concluded between Agencia Nacional de Hidrocarburos and Unión Temporal Repsol Ecopetrol (2 April 2019) 3 <https://resourcecontracts.org/contract/ocds-591adf-1092840377/view#/> accessed 25 May 2024 (translated by author) (emphasis added).

a PSA between the Government of the Republic of Malawi and RAK Gas MB45 Limited provides detailed information on the content and implementation of the CSR plan.[98]

In addition, certain CSR clauses require companies to establish CSR standards, while others impose an obligation to adopt such standards voluntarily. In the latter case, the clause acts as a non-binding standard, relying heavily on company self-regulation.[99] An example of such a clause is found in the Malawi Block 4 Agreement,[100] which uses the term 'shall'—an ambiguous term indicating a future intention—in its language.[101] On the other hand, an example of the former is clause 21.7 of Brazil's 2018 Model Concession Contract, which stipulates that '[t]he Concessionaire must have a Social Responsibility and sustainability management system in line with the Best Practices in the Oil Industry'.[102] Through the use of 'must have', the contract directly imposes an obligation on the party concerning its CSR requirements.

Some CSR clauses may also invoke the principles of good corporate citizenship ('PGCC') and request the parties to adhere to these principles. PGCC entails a company's overall responsibility to act ethically and in the best interests of society, which also includes compliance with CSR. An example is the Garmian Agreement, which states that '[t]he CONTRACTOR has:... represented that it has a record of compliance with *the principles of good corporate citizenship*'.[103] Here, the term 'record' refers to a company's documented history of ethical and socially responsible business practices adopted to promote social and environmental responsibility, including anti-corruption measures.

Finally, some contracts include ethics clauses, which oblige the parties to act in accordance with certain ethical standards or principles.[104] Although these ethics clauses may not specifically address corrupt practices, they can be interpreted to require parties to refrain from engaging in such practices as bribery, conflicts of interest, and other forms of corruption. An example of an ethics clause is included in the Lebanon Block 9 Agreement, where article 41 begins by stating that '[t]he Right Holders, their Affiliates and their respective personnel shall act, at all times, in a manner which is consistent with the highest *ethical standards*'[105] and then proceeds to list other anti-corruption commitments.

(d) Overview: implicit anti-corruption clauses

Table 2 provides an overview of implicit direct anti-corruption clauses and their different types as explained thus far. The inclusion of these clauses in contracts demonstrates a commitment to preventing corruption and promoting responsible business conduct, without a specific order between them.

[98] Production Sharing Agreement, Republic of Malawi, Block 4, concluded between the Government of the Republic of Malawi and RAK Gas MB45 Limited (12 May 2014) ('Malawi Block 4 Agreement') 56–57, cl 35 <https://resourcecontracts.org/contract/ocds-591adf-6422560237/view#/> accessed 25 May 2024.

[99] Carr and Outhwaite (n 96) 315–16.

[100] Malawi Block 4 Agreement (n 98).

[101] See for example *PM Law Ltd v Motorplus Ltd* [2018] EWCA Civ 1730.

[102] Contrato de Concessão Para Exploração e Produção de Petróleo e Gás Natural (2018) 48, cl 21.7 <https://resourcecontracts.org/contract/ocds-591adf-1309539708/view#/> accessed 25 May 2024 (translated by author) (emphasis added).

[103] Garmian Agreement (n 78) 6 (emphasis added).

[104] See for example Louise Vytopil, 'Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices' (2012) 8 Utrecht Law Review 155, 167.

[105] Exploration and Production Agreement for Petroleum Activities in Block 9, concluded between the Republic of Lebanon, Total E&P Liban SAL, Eni Lebanon BV, and NOVATEK Lebanon SAL (29 January 2018) 119, art 41 <https://resourcecontracts.org/contract/ocds-591adf-1121032259/view#/pdf> accessed 25 May 2024 (emphasis added).

Specified Clauses	Description of Corrupt Practices Naming specific types of corruption
Integrity Clauses	Prohibition of Improper Payments Prohibition of False Statements Transparency Mandates
CSR Clauses	CSR Standards Principles of Corporate Citizenship Ethics Obligations

Table 2: Overview of implicit direct anti-corruption clauses in petroleum contracts

B. INDIRECT ANTI-CORRUPTION CLAUSES

There is a possibility that contracts, especially those predating contemporary anti-corruption awareness, may lack clauses specifically addressing corruption. In such instances, parties might resort to alternative clauses in contracts to impose anti-corruption commitments, even if these commitments are not explicitly stated in the contract's language or are implicit in its wording. This article argues that, in the absence of direct anti-corruption clauses, parties can use clauses related to audit rights, assignment or sub-contracting requirements, training programmes, and compliance with certain laws to impose anti-corruption commitments on each other. These clauses, which will be referred to as 'indirect anti-corruption clauses', differ from direct anti-corrupt clauses in that they were not originally intended for anti-corruption commitments or designed to target corrupt practices. Nevertheless, the parties can interpret and apply them to enforce anti-corruption requirements on each other. The use of these indirect anti-corruption clauses allows parties to exercise additional due diligence with respect to the other party and their associated persons. Accordingly, the subsections in Section IV.B introduce and provide examples of compliance with certain laws clauses, audit clauses, assignment or sub-contracting clauses, and training clauses, all within the context of anti-corruption goals.

(i) Compliance With Laws Clauses

Many contracts include 'compliance with laws clauses' that oblige parties to be bound by the laws of the jurisdiction specified in the clause and to carry out their operations in accordance with such laws, whether they are national or international. For example, in an Indonesian model PSA, it is stipulated that the contractor must '[c]omply with all applicable laws of Indonesia. It is also understood that the execution of the Work Program shall be exercised so as not to conflict with obligations imposed on the Government of the Republic of Indonesia by international laws.'[106] This broad obligation to comply with both domestic and international laws can be interpreted to include anti-corruption laws. Today, almost all states have anti-

[106] Indonesian Model PSC Bilingual: Production Sharing Contract General Terms (2013) 22–23, art 5.2.19 <https://resourcecontracts.org/contract/ocds-591adf-4388317328/view#/> accessed 25 May 2024.

corruption regulations in place, criminalising common types of corrupt practices in their domestic laws.[107] Given that anti-corruption laws are considered integral to the legal framework of many countries and jurisdictions, clauses requiring compliance with applicable domestic laws can generally be understood to encompass anti-corruption laws. Furthermore, anti-corruption standards form part of an international legal framework through the emergence of conventions and treaties to address corruption on a global scale.[108]

Compliance with laws clauses are sometimes drafted within a broader 'applicable law clause'.[109] For example, a PSA for Blocks LB 11 and 12, between the National Oil Company of Liberia and Oranto Petroleum Limited, in its Applicable Law article, states that '[t]he laws and regulations in force in the Republic of Liberia and the provisions of international law as may be applicable to International oil and gas activities shall apply to the Contractor, to this Contract and to the Operations which are the purpose thereof, unless otherwise provided by the Contract'.[110] In their own right, applicable law clauses determine the law applicable to the parties' contractual obligations, which can impact the parties' rights and obligations in relation to corrupt practices depending on the legal regime chosen.[111] If the parties opt for arbitration, they might even refer directly to transnational legal regimes and any encompassing anti-corruption obligations thereof, such as the *lex petrolea*, as the governing law.[112]

Finally, many contracts include clauses requiring parties to align their operations with 'universally accepted practices in the petroleum industry', also commonly referred to as good oil field practices or best international petroleum industry practices.[113] For example, a PSA between National Oil Corporation, Verenex Energy Area 47 Libya Limited, and Medco International Ventures Limited specifies that, '[i]n addition to all other obligations of Operator set forth elsewhere in this Agreement, Operator shall have the following obligations: (a) to conduct Petroleum Operations in the Contract Area in a manner consistent with Good Oilfield Practices'.[114] These practices represent widely recognised standards that advocate for the safe and efficient exploration, production, and transportation of petroleum resources. Through such clauses, parties can introduce anti-corruption commitments into their agreements, as anti-corruption measures are integral components of good oil field practices. This

[107] Rachel Brewster, 'Interesting Legal Spaces: International Trade Law and Anticorruption Law' in Carol J Greenhouse and Christina L Davis (eds), *Landscapes of Law: Practicing Sovereignty in Transnational Terrain* (University of Pennsylvania Press 2020) 55, explaining that '[a]lmost all states have agreed—in principle—to adopt domestic anticorruption rules (from the UNCAC), and several states have a binding obligation to adopt these rules (from the OECD Anti-Bribery Convention)'.

[108] See the conventions cited in n 72.

[109] For further details on governing law or choice of law clauses in petroleum contracts, see Carmen Otero García-Castrillón, 'Reflections on the Law Applicable to International Oil Contracts' (2013) 6 Journal of World Energy Law & Business 129.

[110] Production Sharing Contract for Blocks LB 11 and 12, concluded between the National Oil Company of Liberia (NOCAL) on Behalf of the Republic of Liberia and Oranto Petroleum Limited (2006) 49, art 23 <https://resourcecontracts.org/contract/ocds-591adf-3922793692/view#/> accessed 25 May 2024.

[111] For example, if the parties have elected that the contract is governed by English law, the contract is voidable if it was procured through an act of corruption by the election of the innocent party. See for example *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC), [2014] BLR 401.

[112] See further Otero García-Castrillón (n 109) 135–40; Deeksha Malik and Geetanjali Kamat, 'Corruption in International Commercial Arbitration: Arbitrability, Admissibility and Adjudication' (2018) 5 The Arbitration Brief 1, 14–15.

[113] See generally Alex Wawryk, 'Petroleum Regulation in an International Context: The Universality of Petroleum Regulation and the Concept of *Lex Petrolea*' in Tina Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (Edward Elgar Publishing 2015) 20.

[114] Exploration and Production Sharing Agreement, Contract Area 47, concluded between National Oil Corporation, Verenex Energy Area 47 Libya Limited, and Medco International Ventures Limited (12 March 2005) 14, art 5.5 <https://resourcecontracts.org/contract/ocds-591adf-5545997817/view#/> accessed 25 May 2024.

connection is substantiated by industry standards and regulations requiring petroleum companies to establish effective anti-corruption policies and procedures. For example, the EITI mandates participating countries and companies to disclose information on payments within the petroleum industry. These reporting requirements specifically target high-risk areas of the petroleum sector, positioning the EITI as a key contributor to anti-corruption efforts in this sector.[115] Likewise, the International Petroleum Industry Environmental Conservation Association, a global industry association for the petroleum sector, has formulated guidelines to address corruption risks in the industry. These guidelines offer practical counsel to petroleum companies on creating effective anti-corruption policies and procedures, including conducting risk assessments, training employees and contractors, and monitoring compliance.[116]

In the Jubilee Agreement, alongside the Standard Clause, there are additional provisions mandating compliance with laws. The Agreement includes a compliance with laws clause,[117] an applicable law clause,[118] and a clause on universally accepted practices in the petroleum industry.[119] Therefore, the Agreement indirectly addresses anti-corruption matters by emphasising legal compliance, providing mechanisms for dispute resolution, and aligning with industry best practices that inherently include ethical considerations.

(ii) Audit Rights Clauses

The inclusion of 'audit rights clauses', also referred to as 'monitoring clauses', serves as a potent anti-corruption tool that allows parties to monitor each other's compliance with anti-corruption measures.[120] Through these contractual clauses, parties establish a framework to ensure that their counterparts keep accurate financial records and books and maintain an effective internal control mechanism.[121] According to the 'FCPA Resource Guide', audit rights are identified as a form of 'ongoing monitoring of third-party relationships'.[122] While general audit rights clauses are standard in most contracts, parties can incorporate audit rights that explicitly address corruption issues. For example, the GIACC, in its 'Sample Anti-Corruption Contract Commitments', provides a template for audit rights clauses specifically tailored to address corruption matters.[123] The Standard Clause also includes an audit rights clause specifically addressing corruption. Article 21.1(C) requires the parties to maintain a 'system of internal controls and record keeping' accessible to all parties, while paragraph (D) grants the

[115] For further details on the role of EITI in fighting corruption, see Alexandra Gillies, 'The EITI's Role in Addressing Corruption' (Discussion Paper, Extractive Industries Transparency Initiative, October 2019) <https://eiti.org/sites/default/files/attachments/eitis_role_in_addressing_corruption_en.pdf> accessed 25 May 2024.

[116] 'Preventing Corruption: Promoting Transparent Business Practices' (*IPIECA*, 23 April 2012) <www.ipieca.org/resources/preventing-corruption-promoting-transparent-business-practices#> accessed 25 May 2024.

[117] Jubilee Agreement (n 12) 95, art 20.1.

[118] ibid 95, art 20.2.

[119] ibid 38, art 7.2(B).

[120] See generally Boles (n 6) 829, 830.

[121] Daniel J Grimm, 'Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act' (2014) 9 Virginia Law & Business Review 91, 147.

[122] 'FCPA Resource Guide' (n 19) 62. See also *FCPA Opinion Procedure Release 2004*-02 (US Department of Justice, 12 June 2004), acknowledging '[t]he inclusion in all agreements, contracts, and renewals thereof with all Agents and Business Partners of provisions:... allowing for internal and independent audits of the books and records of the Agent or Business Partner to ensure compliance with the foregoing; and... [i]ndependent audits by outside counsel and auditors... to ensure that the Compliance Code, including its anti-corruption provisions, are implemented in an effective manner'.

[123] GIACC, 'Sample Anti-Corruption Contract Commitments' (10 April 2020) arts 4–8 <giaccentre.org/chess_info/uploads/2019/10/GIACC.WEBSITE.CONTRACTTERMS.SAMPLE.docx> accessed 25 May 2024.

parties the right to audit those records and transactions (see Annex II). The review and verification of financial records and transactions facilitate the identification of potential instances of corruption or financial impropriety.

(iii) Sub-Contracting and Assignment Clauses

Another category of clauses through which parties can impose anti-corruption clauses on each other pertains to sub-contracting and assignment requirements. Sub-contracting clauses outline the conditions for delegating parties' obligations to third parties, while assignment clauses allow parties to transfer their contractual rights, obligations, or ownership to another contracting party, specifying the conditions for such transfers.[124] These clauses may contain contractual restrictions on the use of sub-contractors or the delegation of obligations to third parties.[125] Within these clauses, parties can stipulate the need for the other party's approval when hiring a third-party agent or entity, ensuring that the other party verifies the third party's compliance with anti-corruption matters. While many contracts include general sub-contracting or assignment clauses, parties can explicitly refer to compliance with anti-corruption laws in such clauses. For example, in a PSA between the Kurdistan Regional Government of Iraq and Repsol YPF Oriente Medio SA, 'Procurement Procedures', clause 22.3.1 states that '[e]ach contract with Subcontractors must include a provision that obligates such Subcontractor to comply with Corrupt Practices Laws in the Subcontractor's performance at the contract'.[126] The PSA imposes additional obligations in its assignment clauses:

> 39.7 A Contractor Entity proposing to Assign all or any part of its rights, obligations, and interests under this Contract shall request the consent of the Government and the other Contractor Entities, and accompany such request with:
>
> (a) evidence of the technical and financial capability of the proposed third party assignee and its controlling (directly or indirectly) shareholders;
>
> (b) a letter of representations and warranties from the proposed assignee in form and content acceptable to the Government including a representation that the proposed assignment will not to the knowledge of such Contractor Entity after reasonably diligent investigation violate any Corrupt Practices Laws applicable to the Contractor Entity; and
>
> (c) a letter of representations from the assignor in form and content satisfactory to the Government, including a representation that the proposed assignment will not to the knowledge of such Contractor Entity after reasonably diligent investigation violate any Corrupt Practices Laws applicable to the Contractor Entity.[127]

[124] See for example 'Subcontracting Clauses (Delegation of Contractual Obligations to Third Parties)' (*Hall Ellis Solicitors*) <https://hallellis.co.uk/subcontracting-clause-delegation/> accessed 25 May 2024.

[125] Michael Volkov, 'Contracts and Anti-Corruption Compliance' (*Volkov Law Group*, 17 July 2011) <blog.volkovlaw.com/2011/07/contracts-and-anti-corruption-compliance/> accessed 25 May 2024, providing a template clause for use of sub-contractors: 'No Sub-Vendors (without approval): The foreign business partner must agree that it will not hire an agent, subcontractor or consultant without the company's prior written consent (to be based on adequate due diligence)'.

[126] Production Sharing Contract, concluded between the Kurdistan Regional Government of Iraq and Repsol YPF Oriente Medio SA (2011) 65, cl 22.3.1 <https://resourcecontracts.org/contract/ocds-591adf-6998213818/view#/> accessed 25 May 2024.

[127] ibid 99–100.

By including additional requirements in sub-contracting and assignment clauses, the contract ensures that all parties involved in the contract exercise due diligence in selecting third parties and comply with anti-corruption laws.

The Standard Clause also explicitly addresses the compliance of sub-contractors with anti-corruption matters in article 21.1(F) (see Annex II). Furthermore, article 21.6 of the Jubilee Agreement mandates the contract's obligations on successors and assigns, stating that '[s]ubject to the limitations on Transfer and Encumbrances contained in Article 14, this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties'.[128]

(iv) Training Clauses

Lastly, anti-corruption commitments can also be incorporated into personnel training clauses. Such clauses may obligate parties to implement training programmes for their staff, aiming to improve their knowledge and professional qualifications in relevant aspects of the industry.[129] Anti-corruption training can equip personnel to understand what constitutes corruption and the consequences of engaging in corrupt practices. It also offers employees the opportunity to develop skills to recognise and respond appropriately to corrupt requests. Contracts can explicitly address anti-corruption in these clauses. For example, the GIACC, in its 'Sample Commitments', offers a template for anti-corruption training clauses: 'The [business associate] will be required to undertake any relevant anti-corruption training which [organisation] reasonably requires. [Business associate] [Organisation] will be responsible for the costs of any such training'.[130] Although not specifically designed for anti-corruption, most contracts incorporate training clauses, providing the parties with an opportunity to integrate anti-corruption elements into their training programmes. For example, a PSA signed between Staatsolie Maatschappij Suriname NV and Kosmos Energy Suriname provides that:

> 32.1.1 During each phase of the Exploration Period... Contractor shall allocate... per Calendar Year to train representatives of Staatsolie or to provide programs of social responsibility. During each Calendar Year after the Exploration Period, Contractor shall allocate... per Calendar Year to train representatives of Staatsolie or to provide programs of corporate social responsibility... The programs of corporate social responsibility shall support community-based development in areas like environment, health, education, culture and sports.[131]

Through this clause, the parties may include anti-corruption training as part of their social responsibility training programme.

[128] Jubilee Agreement (n 12) 103, art 21.6.
[129] See generally Boles (n 6) 833.
[130] GIACC, 'Sample Anti-Corruption Contract Commitments' (n 123) art 3.
[131] Production Sharing Contract for Petroleum Exploration, Development and Production Relating to Block 45 Offshore Suriname, concluded between Staatsolie Maatschappij Suriname NV and Kosmos Energy Suriname (13 December 2011) 88, art 32.1.1 <https://resourcecontracts.org/contract/ocds-591adf-6931392961/view#/> accessed 25 May 2024.

(v) Overview: Indirect Anti-Corruption Clauses

Figure 2 presents an overview of the types of indirect anti-corruption clauses described above:

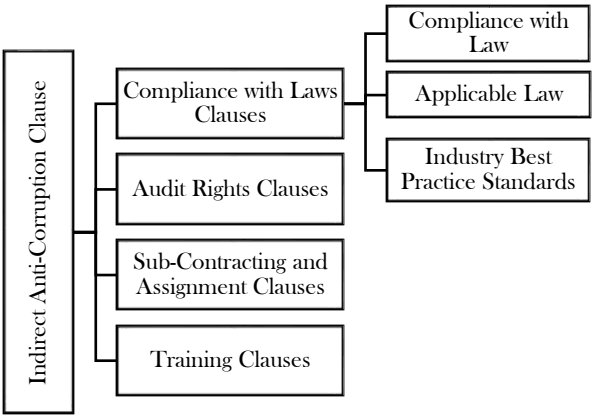

Figure 2: Indirect anti-corruption clauses in petroleum contracts and their order of capability in imposing anti-corruption commitments (from top to bottom)

In Figure 2, the arrangement of the indirect clauses reflects their respective capacity to uphold anti-corruption commitments. This article argues that compliance with laws clauses, which form the core legal framework of the contract, can be interpreted to integrate anti-corruption commitments into the contract, considering that corruption is prohibited in almost all states. Moving to the next tier, audit rights clauses are perceived as more powerful tools than assignment clauses and training clauses for enforcing anti-corruption commitments because audit rights can provide a legally enforceable and objective mechanism for verifying compliance, allowing parties to take immediate action in the case of non-compliance by the other party.[132] Lastly, the article suggests that, although training clauses play a key role in creating a culture of compliance and increasing awareness, their influence is limited when compared with other indirect clauses that impose compliance with anti-corruption laws.

V. Concluding Remarks: Moving Towards the Adoption of Anti-Corruption Clauses as an Industry Standard Practice

Among the different instruments available to TNCs, anti-corruption clauses have emerged as a recent addition to international commercial agreements to fight corruption. Despite their growing usage, there have been few attempts to examine their role and influence. To fill this

[132] Nick Cooper and Kate McNally, 'I Want It All: The Contractual Effect of Audit Clauses' (2016) 68 Governance Directions 288, 289: 'An audit clause can impose a significant compliance burden. Its scope may also be much broader than it initially appears.'

gap, this article has examined anti-corruption clauses in a specific sector where corrupt practices are widespread and endemic—the petroleum industry. By analysing 1,164 actual petroleum contracts, the article has identified and categorised different types of anti-corruption clauses into two major groups: direct and indirect. It has further explored sub-categories and characteristics associated with each type. Annex I provides a summary of the identified direct and indirect clauses in these contracts along with their different subcategories. Considering the data-driven insights obtained during the contracts review, this article concludes that, although parties have initiated the incorporation of these clauses into their contracts, there is a need for their more widespread adoption as a standard industry practice. The article advocates parties, when entering into contracts, to include direct clauses, committing each other directly to anti-corruption measures. Among direct clauses, parties should prioritise explicit clauses—prohibition clauses, compliance clauses, and ACCP clauses—which expressly prohibit corruption, over implicit clauses, that is, integrity clauses, specified clauses, and CSR clauses. Direct anti-corruption clauses commit parties to adhere to anti-corruption standards. Indirect anti-corruption clauses, on the other hand, provide a means for parties to enforce anti-corruption commitments in the absence of direct clauses, especially in older contracts where direct clauses are absent. This article suggests that, when direct clauses are absent in a contract, parties can interpret compliance with laws clauses, audit rights clauses, sub-contracting or assignment clauses, or training clauses to impose anti-corruption commitments upon each other.

The article has also introduced a Standard Clause, detailed in Annex II, as a model that includes nearly all types of anti-corruption clauses. This comprehensive anti-corruption clause, spanning five lengthy pages, goes beyond standard definitions in article 1.16 and prohibitions of corruption under national and international laws. As well as requiring parties to provide warranties against corrupt practices in section (A) of article 21.1 and article 21.3, the clause calls upon parties to adopt further measures to strengthen their anti-corruption commitments in the following sections of article 21.1. These supplementary measures include the implementation of internal control in section (C), audit procedures in section (D), annual certification in section (E), and subcontracting requirements in section (F). Article 23.4 also addresses conflicts of interest, with operators being obliged to avoid situations where their interests conflict with those of other parties. Most importantly, all of these requirements extend to subcontractors. Therefore, this anti-corruption clause includes nearly all of the explicit and implicit clauses. The article introduces this standard anti-corruption clause as a best practice for drafting an anti-corruption clause. It also serves as useful guidance on the key elements that should be included, such as anti-corruption commitments, compliance with anti-corruption laws, addressing different types of corrupt practices, and supplementary measures.

Upon examining petroleum contracts, it becomes evident that contracts within a specific country often employ a uniform anti-corruption clause with identical language for different parties. However, this article suggests that a more effective approach involves initially adopting a standard anti-corruption clause that is sufficiently comprehensive and inclusive in contract templates. Subsequently, after the compliance department conducts due diligence procedures on a specific party and creates a risk profile, they can recommend additional details and commitments if needed.

By incorporating anti-corruption clauses into their contracts, TNCs can contribute to making anti-corruption standards widely recognised. Anti-corruption clauses have the potential to influence the behavioural standards of individuals and entities and to facilitate a normative shift in how corruption is perceived and addressed. Most importantly, anti-corruption

clauses can act as a constraint on corruption in countries with established corruption risks, as well as in countries that may not be strictly obliged to comply with transnational anti-corruption norms. However, the mere incorporation of such clauses is insufficient; companies must fully enforce these clauses and integrate them into their anti-corruption compliance programmes. While this article serves as a starting point, future research is necessary to investigate thoroughly the realm of anti-corruption clauses and their efficacy.

ANNEX I: IDENTIFIED DIRECT AND INDIRECT CLAUSES IN THE REVIEW OF 1,164 CONTRACTS

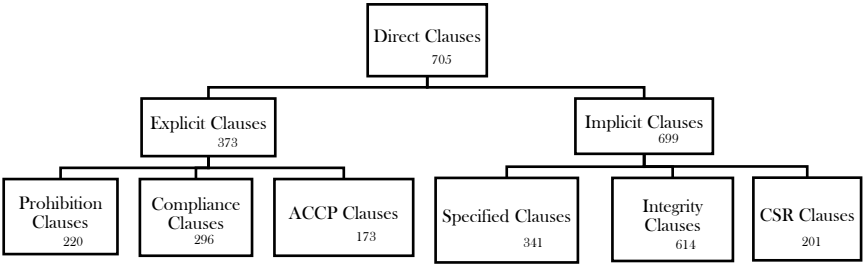

Figure 3: Identified direct anti-corruption clauses in studied petroleum contracts

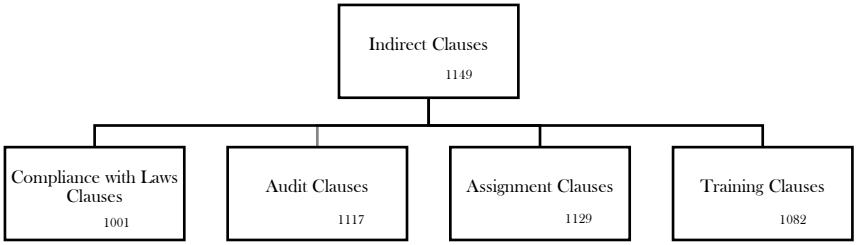

Figure 4: Identified indirect anti-corruption clauses in studied petroleum contracts

ANNEX II: STANDARD CLAUSE

Article 1 Definitions

1.16 *Anticorruption Legislation* means (1) the applicable laws of Ghana; (2) with respect to each Party, the anti-corruption laws of any Home Country Governmental Authority with respect to such Party or any Affiliate of such Party including, as applicable to such Party or its Affiliates, the United Kingdom's anti-corruption legislation, including the Anti-Terrorism, Crime & Security Act 2001, and the U.S. Foreign Corrupt Practices Act; (3) the OECD Anti-bribery Principles; or (4) with respect to each Party, any other implementing legislation with respect to (1), (2) and (3) above.

1.116 *OECD Anti-bribery Principles* means the following principles, which are based on the principles set forth in Article 1.1 and 1.2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, and entered into force on 15 February 1999, and the Convention's Commentaries, namely, that:

(a) It is unlawful for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

(b) Complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be unlawful. Furthermore, attempt and conspiracy to bribe a foreign public official of a country that is not a Party's Home Country Governmental Authority shall be unlawful to the same extent as attempt and conspiracy to bribe a public official of a country that is a Party's Home Country Governmental Authority.

Article 21 General Provisions

21.1 *Conduct of the parties*

(A) Public Anti-Corruption Provisions

(1) No Party to this Agreement shall knowingly permit or allow, by act or omission, the paying, making, offering, promising, authorizing or causing to pay, make, offer, give, promise or authorize, either directly or indirectly, by it or any of its Affiliates, of any bribe, commission, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of

anything of value, to or for the use or benefit of any Official, of a nature and cost which is not permitted under the Anticorruption Legislation, in connection with this Agreement or the operations associated therewith.

(2) Furthermore and without prejudice to the above, each Party, in recognition of the OECD Anti-bribery Principles represents and warrants that it and its Affiliates have not knowingly, either directly or indirectly, paid, made, offered, given, promised, or authorized and will not knowingly pay, make, offer, give, promise or authorize, in connection with this Agreement or the operations associated therewith, any commissions, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer anything of value, to or for the use or benefit of any Official for the purposes of:

(a) influencing any act, omission or decision on the part of any such Official, in his or her official capacity;

(b) securing any improper advantage from such Official; or

(c) inducing any such Official to use his or her influence with another Official or Governmental Authority to affect or influence any official act or to direct business to any Person, or to obtain or retain business related to this Agreement;

where such commission, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of anything of value would violate the Anticorruption Legislation applicable to it.

(3) Each Party further represents and warrants that it and its Affiliates have not either directly or indirectly paid, made, offered, given, promised or authorized, and will not pay, make, offer, give, promise or authorize, in connection with this Agreement or the operations associated therewith, to or for the use or benefit of any other Person, any commissions, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or anything of value, if the Party or Affiliate knows, has a firm belief or is aware that there is a high probability that the other Person would use the commissions, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or anything of value for any of the purposes prohibited by article 21.1(A)(2).

(4) Each Party further represents and warrants that it and its Affiliates have not either directly or indirectly taken or authorized, and will not

> take or authorize, any act in connection with this Agreement or the operations associated therewith that could give rise to either civil or criminal liability for any Original Party under any Anticorruption Legislation applicable to such Original Party.

(B) Indemnity. Each Party shall defend, indemnify and hold the other Parties harmless from and against any and all claims, damages, losses, penalties, costs and expenses arising from or related to, any breach by such first Party of such warranties or covenants under Article 21.1(A) (excluding any Consequential Loss or punitive, multiple or other exemplary damages in accordance with Article 20.3(C)(14)). Such indemnity obligation shall survive termination or expiration of this Agreement.

(C) Internal Controls. Each Party agrees, in connection with this Agreement or the operations associated therewith, to (1) maintain adequate internal controls; (2) properly record and report all transactions; and (3) comply with the Anticorruption Legislation applicable to it. Each Party shall be entitled to rely on the other Parties' system of internal controls and record keeping, and on the adequacy of full disclosure of the facts, and transactions and of financial and other data regarding Unit Operations and any other activity undertaken under this Agreement. No Party is in any way authorized to take any action on behalf of another Party that would result in an inadequate or inaccurate recording and reporting of assets, liabilities or any other transaction, or which would put such Party in violation of its obligations under the Anticorruption Legislation or any other laws applicable in connection with this Agreement or the operations associated therewith.

(D) Audit Rights. During the term of this Agreement and for a period of five (5) years thereafter, each Party shall in a timely manner:

> (1) respond in reasonable detail as to itself and its Affiliates after reasonable inquiry and investigation to any notice from any other Party reasonably connected with the representations, warranties and covenants set forth in Article 21.1(A) and Article 21.3;
>
> (2) furnish relevant documentary support for such response upon request from such other Party; and
>
> (3) in general, cooperate in good faith with such other Party in determining whether a breach of the representations and warranties has occurred.

(E) Annual Certification. Each Party shall complete an annual certification attesting that, to its knowledge after reasonable inquiry and investigation, neither such Party nor its Affiliates has breached the terms of Article 21.1(A) or Article 21.3 or committed to any act prohibited by the Anti-

corruption Legislation in connection with this Agreement or the matters which are the subject of this Agreement.

(F) Subcontractors. Unit Operator and each Technical Operator, shall obtain express anticorruption provisions, including where appropriate in the contracting party's opinion, applicable anticorruption legislation provisions, audit rights, termination provisions, and requirements that each Subcontractor obtain similar provisions in any contracts with its subcontractors, in a written agreement with each of its respective Subcontractors retained for the Unit Account.

21.3 *Private Anti-Corruption Provisions*

Each Party agrees that neither it, nor its Affiliates nor their respective directors, officers and employees or individual contractors or consultants (natural persons) fulfilling a staff role in such Party's organization, will knowingly, whether directly or indirectly, pay, make, offer, give, promise or authorize, or accept, in connection with this Agreement or the operations associated herewith, any bribe, commission, money, payment, gift (other than promotional and marketing gifts of nominal value), loan, fee, reward, travel, entertainment or transfer of anything of value, to or for the use of any directors, officers and employees or individual contractors or consultants (natural persons) fulfilling a staff role, of any other Party, or any of its Affiliates, or any subcontractor of any tier, for the purpose of:

(A) improperly influencing any act, omission or decision on the part of any such other Party, or its Affiliates, or any such subcontractor of any tier, in connection with this Agreement and the operations associated herewith; or

(B) securing any improper advantage from such other Party, or its Affiliates, or any subcontractor of any tier, in connection with this Agreement or the operations associated herewith.

23.4 *Conflicts of Interest*

(A) Each Operator undertakes that it shall avoid any conflict of interest between its own interests (including the interests of Affiliates) and the interests of the other Parties in dealing with suppliers, customers and all other organizations or individuals seeking to provide goods or services to the Parties in connection with Unit Operations.

(B) The provisions of the preceding paragraph regarding each Operator shall not apply to: (1) such Operator's performance which is in accordance with the written local preference laws or policies of the Government; (2) such Operator's acquisition of products or services from an Affiliate, or the sale thereof to an Affiliate, made in accordance with the terms of this

Agreement; or (3) such Operator's acquisition of goods and services for the benefit of any Tract for which it is Tract Operator.

(C) Unless otherwise agreed by the Parties in writing, the Parties and their Affiliates are free to engage or invest (directly or indirectly) in an unlimited number of activities or businesses, any one or more of which may be related to or in competition with the business activities contemplated under this Agreement, without having or incurring any obligation to the other Parties, including any obligation to offer any interest in such business activities to any Party.