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Gauging the Modus Operandi of Multinational Enterprise Groups: the Case of the European Private Company

Introduction

The existence of multinational enterprise Groups (‘MEGs’) is not a new phenomenon. MEGs are comprised of several independent entities that are integrated under the unitary control of a dominant enterprise, and over time they have become quite prominent in global commerce. In fact, UNCTAD, in its 2011 report, highlighted that MEGs’ production worldwide generated value of approximately $16 trillion in 2010; about a quarter of global GDP. These findings come as no surprise since an MEG’s organization is usually based on endeavors for securing power, optimizing capital management, accessing privileged markets and ultimately, ascertaining fiscal advantages. Nevertheless, despite these laudable advances, whether MEGs are equity or contractually-based, in corporate or insolvency law and in Europe or globally, their operation is not without difficulties. This paper accordingly takes a two-pronged approach toward addressing the various problems associated with the operation of MEGs. Firstly, it tackles the regulation of MEGs in the context of corporate law, critically analyzing important company law notions such as transparency and disclosure, and the implications of corporate mobility, as well as issues relating to group management and creditor protection. Secondly, the paper addresses the concerns of MEGs in the context of insolvency law by critically examining the Universalist versus Territorialist approach to MEGs facing insolvency, the difficulties raised by applying either an entity or enterprise law approach in the vicinity of insolvency, as well as the notion of centre of main interest (‘COMI’) as applied to MEGs. The latter has become the subject of intense criticism. Importantly, the paper highlights the difficulties associated with the approach taken by the “High Level Group of Company Law Experts” in its 2002 report with regard to its rejection of a harmonized approach to corporate law. The paper postulates that a harmonized approach

2 Michel Menjucq, Droit International et européen des sociétés (2nd ed, Domat droit privé, Montchrestien Lextenso editions 2008).
3 I Mevorach, Insolvency within Multinational Enterprise Groups (OUP 2009), 33.
5 Michel Menjucq, (n 2), 25
7 PT Muchlinski, Multinational Enterprises and the Law (Blackwell 2007), 63-65.
will better serve to achieve the goal of providing a stable and uniform legal framework for MEGs’ cross-border activities in Europe. The paper also assesses whether existing provisions and supranational corporate forms, such as the European Economic Interest Grouping (‘EEIG’) and the European Company (‘SE’), sufficiently mitigate against the difficulties faced by MEGs, and argues that the European Private Company (‘EPC’) albeit indirectly, could serve as a pervasive weapon in the armoury of the European Union in addressing some of these difficulties, despite its much publicized limitations.

The Inadequacies of Existing Law Provisions as Applied to MEGs

The “High Level Group of Company Law Experts”, in its 2002 report, decided against the introduction of a comprehensive law on groups of companies, recommending instead that the EU should consider provisions within the existing range of corporate law to address particular problems. It is however submitted that the existing corporate law provisions across EU member states are not sufficiently uniform, flexible, nor extensive enough to adequately address the peculiar concerns raised by the operation of MEGs.

A. TRANSPARENCY AND DISCLOSURE INADEQUACIES

While significant strides have been made in providing a framework\textsuperscript{10} through which MEGs are required to disclose certain information relevant to their day-to-day operations, there still remains significant inadequacies in the existing legal regime\textsuperscript{11}, which have not gone unnoticed. For example, at present there is no European rule requiring an annual report, corporate governance statement, or company website to describe the main features of an MEG’s structure in a clear and investor-friendly manner. Further, in member states where the issue of an interlocking board of directors is not addressed in existing law provisions, there is often difficulty in ascertaining information about which members of an MEG are serving, and


\textsuperscript{11} At the domestic level, see Article L. 233-7 of French “Code de Commerce”, §§ 21 and ff. of German “WpHG”, Article 120 of Italian “Testo Unico della Finanza”; the duty to cover losses of the subsidiary in a yearly basis of § 302 of German “AktG”) or to compensate all disadvantages on a yearly basis in factual groups (§ 311 of German “AktG” e.g. and the dependency report of § 312 of German “AktG”); and the UK Companies Act 2006 section 399.
in what capacity.\textsuperscript{12} As a result of these inadequacies, it has been widely argued that there is need for intervention so as to buttress transparency, particularly with respect to MNEs.\textsuperscript{13} This will, in turn, further legitimize the corporate management of MEGs, alert shareholders and creditors to the risks associated with doing business with particular MEGs, and provide regulators with adequate tools for effectively monitoring and supervising the multi-facetted, \textit{often risk-based} activities of these transnational enterprises.

\textbf{B. INADEQUACIES IN THE PROTECTION OF CREDITORS}

In an effort to ensure the adequate protection of creditors, some EU member states\textsuperscript{14} have taken the initiative to enact wrongful trading and transaction avoidance provisions.\textsuperscript{15} These provisions are aimed at addressing the situation whereby directors are reasonably aware that their company is in difficulty and yet do nothing to protect creditors’ interests, whilst simultaneously attempting to promote a fair and efficient system which treats stakeholders equitably; thereby maximizing wealth and reducing transaction costs.\textsuperscript{16} While laudable, it is submitted that at present there is no uniform regime at the EU level to address these issues, and given the complexities associated with the operation of MEGs, creditors across the EU do not receive the same or even adequate level of protection. For example, while British creditors of an entity which is ultimately controlled by an MEG may enjoy protection against wrongful trading, Irish creditors, lacking wrongful trading provisions and the existence of the notion of separate legal personality, may receive no protection at all since there is no provision in Ireland specifically dealing with this issue.\textsuperscript{17} Further, it has been argued that judges across the different jurisdictions, within which interrelated entities of an MEG operate, may often reach inconsistent solutions to group disputes thus further complicating the protection afforded to creditors.\textsuperscript{18} Nevertheless, it must be noted that while adopting an

\begin{footnotesize}
\textsuperscript{13} It was suggested a number of areas where specific information should be provided, covering the group structure, the managing system and the persons effectively entrusted with the power of direction, intra-group transactions and the procedures and the activities through which the direction is exercised.
\textsuperscript{14} See s.214 of the UK Insolvency Act 1986, which gives liquidators the power to initiate an action against the directors of a company personally where, at some time before the commencement of the winding up of the company, they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. See also Book II of the Commercial Code 2000 of France which requires that directors must make a declaration of insolvency when their company is unable to pay their debts.
\textsuperscript{15} See, for example, s. 239(5) of the UK Insolvency Act 1986.
\textsuperscript{17} Paul Omar, “The European Initiative on Wrongful Trading” [2003] Insolvency Lawyer 239, 245.
\end{footnotesize}
enterprise law approach may help to address the inconsistencies specifically facing creditors of MEGs, where the application of such an approach actually interferes with the notion of limited liability, extreme caution should be exercised. In other cases where limited liability is not at stake, a European framework rule, similar to UNICITRAL’s recommendations, should be adopted to address the elements of transaction avoidance that need to be proven, as well as any possible defences which may be available. The suspect period within which a transaction may be avoided should also be specified.

C. CORPORATE MOBILITY: OBSTACLES FACING COMPANIES WISHING TO TRANSFER SEAT WITHOUT LOSING LEGAL CAPACITY

While significant strides have been made in facilitating cross-border mobility of companies within the EU, there is a gap in the law with respect to entities, incorporated in one member state but wishing to be transferred to another member state, in the absence of a merger, so as to be brought under the effective direction of a controlling member of an MEG in the latter member state. By virtue of Article 220 of the EEC Treaty, Member States oblige themselves to provide a separate agreement on the retention of legal personality where the bond between a company and the national law of its Home State is severed by a transfer.

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19. I Mevorach, (n 16), 244.
22. This is otherwise regarded as the right to freedom of establishment and is guaranteed by Article 49 TFEU.
23. Note that several ECJ cases have clarified the parameters of the right to freedom of establishment. The Home State has a discretion to design the conditions under which a company can be formed (Decision of 16 December 2008 in case C-210/06, Cartesio, at 110); the home State may prevent a company formed under its laws from moving its real seat or conversely, the Home State may allow a company to be formed even though it does not engage in actual pursuit of an economic activity in its territory or have its real seat within its territory (Decision of 9 March 1999 in case C-212/97, Centros.); the Home State may not obstruct a company formed according to its law from seeking to transfer its registered office to a Host State, if that Host State permits such a transfer (Decision of 16 December 2008 in case C-210/06, Cartesio, at 112); the Home State of the continuing company cannot refuse to register a merger, if it accepts mergers among its national companies (Decision of 13 December 2005 in case C-411/03, SEVIC Systems); the Home State is not required to respect a secondary establishment if it is a wholly artificial arrangement aimed at circumventing the application of its laws (Decision of 12 September 2006 in case C-196/04, Cadbury Schweppes); the Host State may not refuse recognition of the company’s formation in the Home State on the grounds that the company does not actually pursue an economic activity in the territory of the Home State (Decision of 9 March 1999 in case C-212/97, Centros.); it cannot refuse such recognition where the company has transferred its real seat outside the Home State’s territory (Decision of 5 November 2002 in case C-208/00, Überseering); the host state cannot deny a company the right to engage in a merger with a company formed in its own territory and with the latter company serving as the continuing company, where national companies enjoy such a right (Decision of 13 December 2005 in case C-411/03, SEVIC Systems).
24. Directive 2005/55/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. While this avenue could, in a practical sense, be considered an effective route for companies that want to transfer from their present Home State to a new Home State without liquidation, this procedure is more complicated and costly compared to the more simple transfer from one regime to another.
of its seat to another Member State.\textsuperscript{25} However, to date no such agreement has been reached. As such, a company wishing to move out of a member state in order to become a facet of an MEG based in another member state, in the absence of a merger, cannot rely on the right to freedom of establishment to avail itself. It is submitted that this is totally unacceptable and thus there is an urgent need for legislative measures aimed at correcting this deficiency.\textsuperscript{26}

\textbf{D. ABSENCE OF A UNIFORM ‘INTEREST OF THE GROUP’ CONCEPT}

The concept of ‘interest of the group’ has made its way into the domestic legal regimes of several European countries, albeit in different forms.\textsuperscript{27} Under this approach, the parent corporation is vested with a duty to manage the group and its constituent companies in accordance with the overall interest of the group. Implicit in the operation of this doctrine is the recognition of a close, though not unitary, relationship between companies in a group, characterized by notions of ‘dominance’\textsuperscript{28} and ‘control’.\textsuperscript{29} Nevertheless, despite the admitted practical utility of this doctrine, the existing legal regime in this area is fundamentally inadequate because, although each member company of an MEG is an independent legal entity, and is insulated from the other member companies as far as liability, risk and performance are concerned, the group as a whole is subject, in the various Member States, to widely divergent legal environments which may negatively affect its liability, risk exposure, financing and performance on various levels.\textsuperscript{30} As such, and in keeping with the objective of creating a viable internal market, it is submitted that the EU should legitimise an EU-wide concept of ‘interest of the group’; thereby ensuring that such groups as a whole and their subsidiaries (parent, subsidiary, sub-subsidiary) operate on a firm legal basis.\textsuperscript{31}

\begin{footnotesize}
\footnote{There is no uniformity of approach with respect to the method by which companies are nationally recognized: some countries recognize an ‘incorporation’ or statutory seat approach, i.e., the place where the company is registered, while others adopt a ‘real’ seat approach, i.e. where the primary functions of the business are executed.}
\footnote{Until that time, the level of practical coordination and control that could be appropriately exercised by one member of an MNE over another where they are located in different member states will be legally restricted. This is a cause for concern.}
\footnote{For example, French "Rozenblum" jurisprudence or the Italian "teoria dei vantaggi compensative" (Article 2497 Codice Civile). For an analysis of these provisions, see, Prentice, in E Wymeersch (ed), Groups of Companies in the EEC (De Gruyter 1993), 297; Guyon, "Das Recht der Gesellschaftsgruppe" (1991) ZGR 218, 219.}
\footnote{Dominance exists when one company is in a position to decisively influence the other, the former usually being a company holding the majority of shares or voting rights in the other (dependent).}
\footnote{European Business Organization Law Review, (n 29), 191.}
\footnote{European Business Organization Law Review, (n 29), 194.}
\end{footnotesize}
It is submitted that if an ‘interest of the group’ approach is adopted, several advantages will accrue. At the outset, this approach will provide clarity to the directors of subsidiaries as to which transaction or operations they can approve. This will have the effect of creating a “safe harbor” for the managers of both EU parent and subsidiary companies against liability (civil and criminal). In addition, it would help parent companies located in EU member states to recognize the interest of the group to manage and enter into transactions with their subsidiaries located in other EU countries, without having to analyse whether or not the legislation in the other country recognizes the interest of the group. Consequently, this uniform approach could reduce the costs for groups involved in EU cross-border business. Furthermore, it may serve to provide the management of the parent company with greater legal certainty and flexibility when managing a foreign subsidiary. Moreover, it might also serve to clarify the duties of the board of EU companies, both at the parent and subsidiary level, as this is usually not very clear in the laws of Member States. Conversely it can be argued that the concept of ‘interest of the group’ is not free from limitations. For example, the adoption of such a doctrine might bring uncertainty with regards to the question of whether a change to the duties of directors of an MEG would improve the standard of decision-making or confuse matters for directors. The issue also arises as to whether it is possible to agree upon an EU-wide rule on the circumstances in which a director can take account of the interests of the group and the effect this will have on existing protections under national law for creditors and other stakeholders. Overall, despite these difficulties it is submitted that recognition at the EU level of the ‘interest of the group’ will act as an incentive for Member States to modify their national company law regimes with a view to harmonization, thereby resulting in enhanced flexibility in the management of MEGs.

**Would Harmonisation Curb Some of the Problems Facing MEGs?**

Some effort at convergence of EU corporate law has been achieved through the operation of several Directives, as well as various ECJ decisions which have sought to clarify the scope of the right to freedom of establishment. Nevertheless, it is submitted that as there is no comprehensive, uniform, or harmonized approach at the supranational level; the regulation of

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33 Report of the Reflection Group on EU Company Law, (n 12), 64.
35 The Seventh Company Law Directive on consolidated annual accounts; the Second Company Law Directive (Art 24(a) regarding a company’s acquisition of its own shares through a subsidiary); the Transparency Directive (Art 7 regarding allocation of voting rights in controlled companies); and the Directive on Works Councils (Art 3 regarding definition of dominant company).
MEGs in the EU remains terribly inadequate, to say the least. As alluded to earlier, MEGs challenge the normal approach taken to regulation because of their often complex and interconnected nature, a phenomenon in which existing provisions have simply been unable to address. Apart from the inadequacies identified above with regards to how the law regulates disclosure, corporate management, the protection of creditors, and the concept of the group’s interest, there also exists major deficiencies in relation to issues such as mandatory offers, exclusion and ‘squeezing out’ of minority shareholders, among others. In light of these deficiencies, it is submitted that a comprehensive law or a harmonised approach should be adopted as it will better serve the interests of MEGs in as much as leveling the playing field between those entities which are similarly placed in a competitive relationship whilst, at the European level, preventing the occurrence of the so-called Delaware-effect.

In relation to the latter point, while it has been argued that the consequence of a free choice of incorporation is a ‘race to the top’ because the market forces the firms' management to choose a regime most beneficial to shareholders, the experience of some European countries, at least with respect to the SE, has shown that those countries which provide the most favorable legislation benefit most from the highest numbers of incorporations. Arguably, a harmonized or comprehensive law approach could militate against these concerns. Specifically, such an approach would serve to promote the trust of creditors, thus fostering greater cross-border lending and trading between MEGs operating in Europe. Suffice it to say, the existence of differing mentalities throughout Europe might rule out a comprehensive harmonisation project and that the various national, economic, social, political and cultural differences might stand in the way of such uniformity. It is, however, submitted that given the fact that a momentum of convergence has already begun at the supranational level through the use of Directives, it naturally makes sense to harmonise

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41 EC Official Memorandum, ‘Review of European Company Statute—Frequently Asked Questions’ 23 March 2010, MEMO/10/97. According to the European Commission, of the 431 SEs registered as of 10 September 2009, the vast majority (around 65%) have been registered in the Czech Republic (170 SEs) and Germany (109 SEs).
provisions on, for example, financial disclosure and accounting, specifically in relation to MEGs since they have an important cross-border dimension wherein even small differences may impair the interests of the credit market. In this regard, it is accordingly submitted that one possible way of ensuring such uniformity across the EU would be to harmonise EU directives or regulations with a specific focus on addressing the peculiar concerns raised (above) by the operation of MEGs.43

**Could the EPC Militate Against Some of the Problems Faced by MEGs?**

The EPC, if formally adopted, can be regarded as the next major step in the development of a framework for the effective regulation of companies within Europe, albeit that it indirectly relates to multinational enterprise groups.44 It is submitted that this mechanism will not only better serve the interests of MEGs across Europe but will also mitigate against some of the problems which MEGs continue to face as a consequence of the ineffectual existence of the EEIG45 and the SE46 frameworks. Apart from the fact that the SE does not explicitly refer to corporate groups,47 it also suffers from the fact that it is not a truly European corporate form because of substantial references to national law in its governing Regulation, which in turn leads to many variations depending on the national company law of the Member State where it is formed.48 Further, the SE cannot be formed by a decision ab initio; it requires the previous incorporation of companies with different Home States that either merge into an SE or form the SE as a subsidiary, and it is only available to national companies of the public type. Also, like the EEIG,49 the SE company’s registered office must be in the Member State where the real seat is located.50 This in turn reduces the flexibility of SEs in the context of cross-border activity; the major interest of MEGs today. In consequence of these deficiencies, it is proposed that the way forward in the regulation of MEGs might very well be through the

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47 Haar, (n 6), 5.
49 The EEIG cannot make profits for itself. The activities of the grouping must not be more than ancillary to the economic activities of its members. It cannot exercise directly or indirectly a power of management or supervision over its members in particular in the fields of personnel, finance and investment; it cannot hold shares in a member undertaking; nor can it employ more than 500 persons. Moreover, the members of a grouping are to have unlimited and several liability for the debts of the EEIG. The EEIG may or may not have legal personality.
50 Art 7 of the proposed SPE Statute.
use of the EPC as this corporate form, while remaining subject to the general rules of Member States regarding accountancy law, tax law, penal law, and bankruptcy law, with a genuine European label and specifically aimed at facilitating greater cross-border activity.

On the point of cross-border activity, it has been argued that the EPC is extremely advantageous because it will provide a cheap and easy reorganisation of an MEG’s corporate governance across Europe, allowing holdings or subsidiaries to be created for the price of just €1. Further, an MEG can use the flexibility which the EPC proposes to shop for the most suitable applicable laws, initially by choosing the member state of the registered office while having its central administration in another member state, or subsequently by transferring its seat. In addition, as MEGs are particularly interested in setting up companies ex nihilo with an EU label, and being able to freely reorganise the group via mergers or transfers to other member states, the EPC offers great competitive leverage. Conversely, it has been argued that Article 28 (1) of the proposed EPC statute does not contain an explicit jurisdiction rule; thus making a shareholder’s right to information nothing more than a mere ‘paper tiger’.

It has also been argued that, in relation to Article 27 (4), there is no ground for annulment of a resolution passed by majority shareholders which has the effect of gravely violating minority shareholders’ interests. In addition, with respect to Article 29(2), which affords a right to request a competent court or administrative authority to appoint an independent expert to investigate any suspicion of a serious breach of the law or of the articles of association of the EPC, related questions arise such as: ‘which court is the competent court?’ ‘How should the wording ‘serious breach of law’ be interpreted?’ And ultimately, ‘who pays?’ Without a clear answer to these questions, a shareholder’s right to request an

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51 Art 4 of the SPE proposal provides a hierarchy of rules applicable to an SPE: (i) the mandatory provisions of the regulation; (ii) the articles of association; and (iii) applicable rules of national law. It has been argued that this legal technique aims to set aside national company law to the greatest extent possible, although, ultimately, disputes will have to be settled before national courts which are influenced by their own national company law backgrounds. See, H.J. de Kluiver & J.Roest, ‘Expulsion and Withdrawal of Shareholders’ in DFMM Zaman, et al. (eds.), The European Private Company (SPE). A Critical Analysis of the EU Draft Statute (Intersentia 2009), 70.


53 See, Article 19(4) SPE Statute. See also H Boschma, L Lennarts & H Schutte-Veenstra, ‘The Reform of Dutch Private Company Law: New Rules for the Protection of Creditors’ (2007) European Business Organization Law Review 8, 573. The authors argue that minimum capital adequacy requirements are arbitrary and thus welcome the enlightened approach taken by the SPE.


55 Note however that several obligations for disclosure purposes must be satisfied. For example, see Art 21 (the solvency certificate of an SPE must be disclosed); Art 24 (capital reduction must be disclosed); Art 36 (a transfer proposal must be disclosed); Art 37 (registrations in the host Member State and removals from the register in the home member State must be disclosed); Art 40 (the dissolution of an SPE must be disclosed).

independent expert is likely to remain unanswered.\(^{57}\) It has been contended that although some member states allow individual shareholders to enforce a company’s claim by way of a derivative action, the EPC Proposal does not give individual shareholders the right to directly sue directors of the EPC who have not acted in the best interests of the company.\(^{58}\) Even further, the EPC proposal does not contain a specific provision with regard to directors who have participated in an unlawful withdrawal coupled with the fact that it does not provide for rules relating to the external liability of its directors.\(^{59}\) With regard to the issue of employee participation, it has been argued that it is unclear which governing body will take this into account as the proposed EPC statute does not provide for mandatory supervisory bodies. This is coupled with the fact that the proposed EPC statute does not create specific employees’ participation rights. Employees’ participation is only envisaged under the applicable law angle which in consequence poses a risk that companies, particular MEGs, will use the EPC corporate form to evade the most protective national legislations, thereby undermining existing participation rights.\(^{60}\)

Nevertheless, despite these wide ranging objections, it is submitted that this mechanism, though indirectly, can serve to better facilitate the multifaceted cross-border activities of MEGs, and, given that the proposal is still subject to possible changes, efforts can be made to modify the existing provisions of the proposed statute so as to correct the deficiencies that have been identified (above).

**MEGs in the Vicinity of Insolvency: Legal Issues and Perspectives**

In assessing the issue of whether the EPC can effectively serve to address some of the peculiar problems faced by MEGs in the vicinity of insolvency, it is important to discuss several overarching notions which, in light of references to national law and the European Insolvency Regulation (EIR)\(^{61}\) in Article 40(3) of the EPC Proposal, have become overly decisive. Admittedly, the issues of whether a Universalist versus territorialist, enterprise law versus entity law approach should be favoured, along with the associated challenge of


identifying an MEG’s centre of main interests (‘COMI’)\textsuperscript{62}, raise some very difficult questions for which there is hardly one right answer. Nevertheless, a succinct discourse hereafter will attempt to shed some light on some of the major issues raised. In the first instance, it is submitted that the EIR\textsuperscript{63} primarily adopts a modified Universalist approach toward the treatment of European companies facing insolvency,\textsuperscript{64} albeit that there are some notable territorialist underpinnings. It has however been argued that, in the context of MEGs, such a Universalist approach interferes with the distinctive domestic policies of states, thereby effectively undermining their territorial sovereignty. However, Professor Mevorach, drawing on extensive research in this field, argues that the fear expressed by territorialists is unwarranted, especially in respect of integrated groups which are centrally controlled.\textsuperscript{65} Here, Mevorach postulates that entity separateness operates outside any territorial boundaries and that it would not violate entity law if an entity’s destiny is determined by another jurisdiction. The entity would still remain a legal person.\textsuperscript{66} Indeed, given the highly integrated nature of MEGs nowadays, it is submitted that when determining jurisdiction there is room for enterprise law to prevail, thereby giving effect to the interconnections between group members.\textsuperscript{67} However, as Professor Mevorach has also recognized, if the MEG is not integrated, then handling insolvency proceedings against its members in a single jurisdiction would in fact undermine state sovereignty. In such circumstances, a territorialist approach would be most fitting.\textsuperscript{68} Nevertheless, territorialists are also apprehensive that, in allowing main proceedings to be concentrated in one jurisdiction as stipulated by Article 3 (1) EIR, local creditors’ expectations would be defeated as insolvency proceedings may be

\textsuperscript{62} Recital 13 EIR does not represent a definition of COMI or an independent criterion for its determination. See however, S Di Sano, ‘COMI: the Sun Around which Cross-border Insolvency Proceedings Revolve – Part I’ (2009) Journal of International Banking Law and Regulation 2, 92. The author describes the debtor’s COMI as “the pivot around which the whole structure of the EC Insolvency Regulation is based.”


\textsuperscript{64} Art 3(1) EIR does not define ‘COMI’. Rather, there is only a presumption that a debtor’s COMI is the place of registration, though this can be rebutted if there is proof that the COMI is located in some other Member State. Art 16(1) stipulates that only one main proceedings may be opened which will have a universal effect (automatically recognised in all Member States without further formalities). Art 3(2), (4) and Art 16(2), provides that, in addition to the main proceedings opened at the COMI forum, any number of “territorial” proceedings or “secondary” proceedings may be opened in other Member States. Art 27 provides that the effects of the territorial proceedings are limited to the local assets situated in the jurisdiction opening the proceedings and, Art 3(3) limits, in the case of “secondary” proceedings, jurisdiction to winding-up proceedings only. Art 31(3) however requires the court of the secondary proceedings to stay these proceedings at the request of the main liquidator subject to possible guarantees by the main liquidator and assuming it is in the interest of the creditors in the main proceedings.


\textsuperscript{66} Art 3(1) EIR, ‘main insolvency’ proceedings are allowed to be opened in an EU member state where the entity’s centre of main interest (COMI) is situated.

\textsuperscript{67} Since jurisdiction is a procedural matter, it does not pose a threat to the economic rationale of limited liability.

\textsuperscript{68} Territorialism is recognized under the EIR to the extent of affording courts in countries within which there is an ‘establishment’ jurisdiction to coordinate secondary proceedings.
automatically transferred from the local jurisdiction of an individual group member to a "group home country." It has been argued that, at least in so far as centralized MEGs are concerned, it would not be problematic for voluntary creditors to make ex ante predictions, since in reality, the majority of corporate group cases have established that creditors should expect insolvency proceedings to be concentrated in the group’s operational head offices, a phenomenon which challenges the proclaimed strength of the registered office presumption which was highly regarded in the earlier ECJ decision of Eurofood. Even further, the majority of corporate group cases which arise are related to entities which are integrated in terms of their business. In such circumstances, it is submitted that a substantive consolidation, as opposed to procedural consolidation approach, might better serve the interests of MEGs, albeit that the EIR does not itself explicitly provide for this mechanism in the course of insolvency.

Suffice it to say, as Mevorach cautions, ‘the diversified scene of MEG insolvency should be kept in mind, and a one-size-fits-all solution would be inadequate.’ To illustrate the latter point, Mevorach argues that in the case of integrated groups which are decentralized, instead of ‘concentrating’ all proceedings in one place, the proceedings should be ‘coordinated’ from this venue. In these circumstances, it can be argued that creditors’ expectations would be satisfied even if only secondary proceedings are opened in their local jurisdiction. However, it must be noted that given the often complex nature and operation of MEGs today, it might

69 I Mevorach, ‘Jurisdiction in insolvency - a study of European courts’ decisions’ (2010) 6 Journal of Private International Law 327. According to Mevorach, operational head office on its own was used 46% of the time to justify the court decision and 25% of the time it was used together with business operation factors. Thus, on 71% of the cases investigated here the head-office function served a key role in deciding COMI. In contrast, only 11% of the time courts emphasized business operations factors as key, and 11% of the time courts emphasized various other factors as key. The "mere mailbox" reasoning was only used in 5% of the cases. The author therefore concludes that courts do not tend to rebut the presumption only when the registered office is merely a sham. She argues that these results go against the view that COMI as a real seat standard will generate largely inconsistent and divergent results pointing to different factors in different circumstances. See also, in support of the operational head office factor Crisscross Telecommunications Group, Re (unreported, 20 May 2003) (Ch D); Hettlage-Austria (Amtsgericht (Munich) (Hettlage-Austria) (unreported, 4 May 2004) (Germany); MPOTEC GMBH (Tribunal de Grande Instance, Nanterre [2006] BCC 681 (Fr).

70 Case C- 341/04, Eurofood IFSC Ltd, [2006] ECR I- 3813 210. Here, the ECJ determined the COMI as the place of the business activity of the debtor. Furthermore, it decided that the opening of insolvency proceedings in one Member State would have to be, in principle, accepted in the other Member States without questioning the international jurisdiction again (Art 16 (1)), the only limit being the public policy exception (Art 26 EIR). However, the ECJ did not solve the problem of different interpretations of the COMI, as it did not set any standards for assessing the place of business activity.

71 This mechanism involves a measure for merging the assets and debts of the group in insolvency proceedings. It is considered to significantly interfere with the group’s legal structure, that is, the principle of separate legal personality.

72 This mechanism involves unifying insolvency proceedings of separate entities with respect to combining hearings and meetings; the preparation of a single list of creditors and other interested parties and the establishment of joint deadlines does not pose any problems to entity law, as long as the assets and debts remain attached to the specific entity.

73 GS Moss, et al., The EC Regulation on Insolvency Proceedings (OUP, 2009), 257-258.
very well prove difficult to identify a single home country of these groups, even if they are integrated. For example, peculiar problems arise where, instead of having one “head” and “brain” controlling or coordinating the entire group, they have two (or more) heads of the enterprise.\textsuperscript{74} As such, a possible amendment to the proposed EPC statute might be needed so as to provide for an “ad-hoc contractualism” approach encouraging parties to agree on a chosen venue amongst the possible (equally strong) options.\textsuperscript{75} It is submitted that this approach will not operate to circumvent the court’s jurisdiction, as the court would still be afforded the discretion to defer to the jurisdiction in which the group has many connections, considering a plethora of different factors including any agreements the parties may have reached regarding jurisdiction.\textsuperscript{76} In any event, another concern is that even if creditors could predict that a group insolvency process will be unified in the group home country, such an approach might still work to their disadvantage given that they may not be afforded due process rights (such as direct participation in the proceedings). In light of these criticisms, it has been argued that where the proceedings can be handled jointly,\textsuperscript{77} any apprehension expressed by territorialists in this regard might very well be unwarranted. It is also important to note that given the fact that secondary proceedings can be opened in jurisdictions where MEGs have an ‘establishment’\textsuperscript{78}, the protection of local creditors is, to a large extent, guaranteed.

\textbf{Conclusion}

In conclusion, it is submitted that the High Level Group of Company Law Experts, in its 2002 report, gravely underestimated the need for a comprehensive law/ harmonized approach toward the regulation of MEGs in Europe. Indeed, as has been demonstrated above, the existing legal framework, as it specifically relates to MEGs, is fundamentally flawed and inadequate. In this regard, it is submitted that a harmonized approach should be adopted at the European level as this will provide greater legal certainty and predictability for MEGs operating in Europe. As the EEIG and SE are now corporate forms of the past, the proposed EPC is a much welcomed development as it will facilitate greater cross border business activity within Europe, though not without limitations. However, in the context of

\textsuperscript{74} I Mevorach, (n 64), 405.
\textsuperscript{75} I Mevorach, (n 64), 405.
\textsuperscript{76} I Mevorach, (n 64), 405.
\textsuperscript{77} This would, for example, ensure that adequate notice is given to relevant parties and relevant information is properly disseminated across borders.
\textsuperscript{78} Art 3 (2) EIR.
insolvency, as the EPC statute refers to the EIR, the lack of definition of COMI, the strength of the registered office presumption, and the pervasiveness of respective connecting factors arise in addition to the ongoing debate regarding the role of enterprise versus entity law in the vicinity of insolvency. Overall however, the EPC, with possible future modifications, could certainly be used to circumvent some of the problems associated with the operation of MEGs across Europe.
Voices in the Corridors of Power: How Safe is a Journalist’s Source?

Blom-Cooper says freedom of the press is neither a constitutional nor human right, but instead that it is a ‘human necessity.’ Reinforcing this view, Lord Salmon dissented in *British Steel v Granada* that a free press is ‘one of the pillars of freedom’ in a ‘democratic country.’ It is argued that, inefficient source protection will prevent sources from coming forward with information – thus undermining the ‘public-watchdog role of the press.’ Furthermore, legal commentators such as Caddell argue that protection of a journalist’s source is ‘one of the most fundamental and ethical tenets of the profession,’ and s.10 of the Contempt of Court Act 1981 acknowledges this notion. Historically, courts have interpreted legislation with the tendency of favouring businesses due to the harm caused by leaked information being quantifiable damage; as opposed to nebulous, ‘hypothetical’ harm inflicted on the public by a loss of that information. This examination will show that s.10 has failed to achieve the correct balance between corporate interests, interests of national security and the protection of journalists’ sources, too often ordering the revelation of a source’s identity at the claimant’s behest. To this end, this examination is divided into three sections. Firstly, the evolution of s.10 will be considered. The second section shall involve analysis of relevant case law which supports the view that the common law balancing approach has not been ameliorated by either s.10 Contempt of Court Act or the Human Rights Act 1998. Thirdly, the foregoing analyses are

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2 ibid.
4 ibid [1184] (Salmon LJ);
5 ibid.
6 Goodwin v UK (Case 16/1994/463/544), 1 BHRC 81[100]; In addition, it was recognized in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 [2050] that ‘any disclosure of a journalist’s sources does have a chilling effect on the freedom of the press.’
7 Richard Caddell, ‘Presumed malice and the protection of confidential sources’ [2010] Communications Law 56; Also see Francis Quinn, *Law For Journalists* (2nd ed, Pearson Longman 2009) p. 284 who states that ‘it is a basic rule of journalistic ethics, laid down in the ethical codes of the NUJ, the Press Complaints Commission and Ofcom that a journalist who agrees to keep a source’s identity confidential should honour that promise.’ This concept is reiterated in *British Steel Corporation Respondents v Granada Television Ltd.* (n 3) [1123].
8 Contempt of Court Act, s 10; Hereinafter referred to as “s.10”.
10 ibid.
11 Human Rights Act 1998; Hereafter referred to as “HRA”.
consolidated to show the resulting consequence; that the sharing of information has not been entirely suppressed.

At common law, *Lyle-Samuel v Oldhams*\(^{12}\) as per Bankes LJ confirmed the operation of the “Newspaper Rule”. The rule stated that in absence of ‘special circumstances,’\(^{13}\) a journalist was not obliged to reveal the identity of their source during ‘pre-trial discovery.’\(^{14}\) The reasoning behind this rule was that freedom of the press would be ‘difficult to maintain’\(^{15}\) if source disclosure was always required.\(^{16}\)

In *Granada*, Viscount Dilhorne concluded that there was ‘no satisfactory basis’\(^{17}\) to afford newspapers any ‘exceptional treatment,’\(^{18}\) asserting that disclosure could be ordered on the basis of discretion if it was exercised in the ‘interests of justice.’\(^{19}\) On the contrary, Lord Salmon opined that it was in the source’s ‘public duty to make the contents of the documents available to the public because the immense sums of money were being lost…by the public.’\(^{20}\) Unreasonable weight has been placed on protecting interests of a ‘commercial concern’,\(^{21}\) while ‘only very limited protection to journalistic confidentiality’\(^{22}\) was provided for information of a public concern. Lord Wigoder proclaimed that following *Granada*, ‘the inevitable result will be a slow but steady drying up of much essential information to which the public should have access.’\(^{23}\) This could not be closer to the truth. The right balance was not struck between protecting the source and assisting the claimant, thus counteracting the notion of free flowing information. With regard to *Granada*, Fenwick argues that the

\(^{12}\) [1920] 1 KB 135

\(^{13}\) ibid 140. (Bankes LJ)


\(^{15}\) Lyle-Samuel (n 13) 141.

\(^{16}\) *A.G. v Mulholland* [1963] 1 All ER 767, [1963] 2 QB 477; Journalists were imprisoned for safeguarding the identity of their source.

\(^{17}\) *British Steel* (n 3) 1181. (Viscount Dilhorne).

\(^{18}\) ibid ; Palmer (n 9) 65.

\(^{19}\) ibid.

\(^{20}\) ibid 1185. (Lord Salmon).

\(^{21}\) Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 320; at an early stage it is evident that the courts are very much preoccupied by the conduct of the source. Judicial distaste is illustrated by Viscount Dilhorne in *Granada* at (n 4) 1183 referring to the source as a ‘thief’; See additional comments regarding conduct in *Granada* (n4) 112-1123 as per Lord Denning.

\(^{22}\) Palmer (n 9) 65.

judiciary failed to ‘understand the significance of the media watchdog rule,’ resulting in an ‘inadequate formulation of s.10…mean[ing] that a balancing of interests would continue.’ It is contended that in practice, s.10 did little to ameliorate unfortunate common law attitudes. The courts’ decisions have been potently criticised. Following the ‘outrage’ over Granada, s.10 was implemented to provide journalists with a ‘qualified immunity from compulsory revelation of sources.’ Palmer asserts that this ‘controversial’ privilege can ‘conflict with the administration of justice.’

Pioneering the debate in the House of Lords, Lord Salmon’s dissent was one of Lord Scarman’s ‘weapons of advocacy,’ in arguing that the protection of the journalists’ source was in the public’s interest. Departing from Granada, the incipient form of s.10 initially intended to grant immunity from contempt, only unless disclosure was deemed necessary in the ‘interests of national security or the prevention of disorder or crime.’ However, the ‘interests of justice’ exception was added, enabling the courts to deal with abuse should it ‘raise its head.’ Prima facie, this exception appears to be reasonable, assuming infrequent use. Subsequent case law demonstrates that the judiciary adopted an approach unpropitious to the media. Palmer stresses Lord Hailsham’s assertion, that the interests of justice are ‘as long as the judge’s foot,’ doubtless rings true.

The aim of section.10 essentially was to limit judicial discretionary powers. Through creative translation and bad implementation, a balancing act sprang back via the necessity test and expansive interpretation of the ‘interests of justice.’

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24 Fenwick and Phillipson (n 21) 321.
26 Fenwick and Phillipson (n 21) 324.
28 Palmer (n 9) 65.
29 Palmer ibid explains that controversy is rooted in the fact that the privilege has the potential to give journalists a ‘higher priority than other rules of evidence designed to discover the truth.’
31 ibid 211-212; these concepts were adopted from Article 10 of the European Convention of Human Rights.
33 ibid 157 (Lord Scarman)
34 Palmer (n 9) 66 citing Contempt of Court Bill HL Deb 10 February 1981, vol. 416, col. 162 (Lord Hailsham).
36 Costigan (n 27) 471 states that this has been one of the ‘most problematic issues.’
37 Brabyn (n 14) 916.
exception, which was ‘the greatest flaw in the legislation.’\textsuperscript{39} In \textit{Secretary of State for Defence v Guardian Newspapers}\textsuperscript{40}, Lord Hailsham’s concerns ‘proved prophetic.’\textsuperscript{41} Lord Scarman declared that ‘s.10 has brought about change…of profound significance,’ however Palmer argues that this was not the case. Wide interpretation of when the ‘necessity of disclosure’\textsuperscript{42} could be established meant that the burden of proof to establish that disclosure was necessary in relation to the activated exception rested on the claimant seeking revelation of the source.\textsuperscript{43} The burden of disproving necessity shifted to the journalist or publisher to discharge. The difficulty\textsuperscript{44} in practice of discharging the burden is illustrated by the meaning of necessary, which was ‘somewhere between “indispensable”,’\textsuperscript{45} “expedient”,\textsuperscript{46} “useful”,\textsuperscript{47} “desirable”\textsuperscript{48} and “really needed.”\textsuperscript{49} As a result, according to Lord Bridge in \textit{Morgan Grampian},\textsuperscript{51} the court ‘has to engage in a balancing exercise’\textsuperscript{52} to achieve equilibrium between ‘public importance attached to the preservation of the confidentiality of the source…enshrined in the statutory prohibition and…public importance of the interests of justice in the particular case.’\textsuperscript{53} Source protection and the interests of justice were placed on equal footing, evincing continued influence\textsuperscript{54} of the ‘common law balancing approach.’\textsuperscript{55} The judiciary has repeatedly exploited this flaw in favour of commercial interests, sympathetic to the threat posed by the employee ‘ “ticking away beneath them like a time bomb.” ’\textsuperscript{56}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{38} ibid.
\item \textsuperscript{39} Angel Fahy, ‘Confidential Sources and Contempt of Court: An Argument for change’ (2009) <http://arrow.dit.ie/cgi/viewcontent.cgi?article=1016&amp;context=aaschssldis>
\item \textsuperscript{40} [1985] AC 339
\item \textsuperscript{41} Fahy (n 39) 21.
\item \textsuperscript{42} Costigan (n 27) 466.
\item \textsuperscript{43} Palmer (n 9) 64-65; Costigan ibid.
\item \textsuperscript{44} Palmer (n 9) 66.
\item \textsuperscript{45} ibid.
\item \textsuperscript{46} Re An Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] AC 660 [690] (Lloyd LJ)
\item \textsuperscript{47} ibid.
\item \textsuperscript{48} ibid.
\item \textsuperscript{49} \textit{X Ltd. Respondents v Morgan-Grampian (Publishers) Ltd. And Others Appellants} [1990] 2 WLR 1000, [1991] 1 AC 1 [53] (Lord Oliver).
\item \textsuperscript{50} Palmer (n 9) 66.
\item \textsuperscript{51} \textit{Morgan Grampian} (n 49).
\item \textsuperscript{52} ibid [41] (Lord Bridge).
\item \textsuperscript{53} ibid [53] (Lord Oliver).
\item \textsuperscript{54} Costigan (n 27) 467.
\item \textsuperscript{55} ibid.
\item \textsuperscript{56} \textit{Morgan Grampian} (n 49) [45] (McCowan LJ).
\end{itemize}
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Drawbacks for journalists are apparent when the ‘presumption against disclosure’ is displaced. In *Insider Dealing*, the court’s discretionary powers to find in favour of source protection were severely limited. Costigan highlights that Slade LJ held once necessity had been established, only in ‘exceptional circumstances’ would discretion be allowed to protect the journalist’s source. Combined with Lloyd LJ’s view that ‘there is no room…for weighing one interest against another,’ suggests an approach still easily maneuvered to counteract s.10. From the commercial side of the spectrum, commentators declare that the outcome of *Insider Dealing* was ‘undoubtedly correct,’ arguing, ‘no obstacle should be placed into the conduct of an investigation.’

*Morgan Grampian* demonstrates the breadth with which the interests of justice exception could be applied. Fahy highlights Lord Bridge’s dictum, which emphasized that in the interests of justice, necessity of disclosure could be established ‘to enable someone to “exercise important legal rights and to protect themselves from serious legal wrongs.”’ Certainly, the ease with which ‘the threshold of necessity [could] be reached,’ is inimical to the free flow of information, and ultimately the public interest. Commercial bias is demonstrated by the fact that it was considered in the interests of justice to order disclosure in order to allow an employer to identify a ‘disloyal servant’ simply to ‘terminate his contract of employment.’ This contravenes the spirit of s.10. Further, Lord Donaldson was ‘left in no doubt’

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57 Costigan (n 27) 468.
59 Costigan (n 27) 468; Slade LJ ibid [675] opined that ‘if it is established that disclosure of the source of the information is truly necessary for the prevention of crime, the court will ordinarily order disclosure.’
60 *Insider Dealing* (n 58) [682] (Lloyd LJ).
64 Fahy (n 39) 23; for additional commentary, see Bernard N. Nyman, ‘Case Comment: Contempt of court – disclosure of journalist’s source’ [1990] Entertainment Law Review 103.
65 ibid, citing *Morgan Grampian* (n 49) [43] (Lord Bridge).
66 Costigan (n 27) 468 emphasizing *Morgan Grampian* (n 49) [44].
67 *Morgan Grampian* (n 49) [43] (Lord Bridge).
68 ibid.
69 Susan Nash, ‘Freedom of expression, disclosure of journalists’ sources and the European Court of
that the business was at risk of ‘serious financial damage,’ thus the balance shifted in favour of disclosure. This is curious, as an injunction had already diffused the risk of further publication, disclosure would provide no additional protection. Defence counsel’s argument, that ‘the door had been effectively bolted before the horse had fled from the stable yard,’ is persuasive.

*Goodwin* illustrates the ‘phenomenon of judges coming to different conclusions although applying the same principles to the same facts.’ The journalist in *Morgan Grampian* refused to disclose his source and brought the case before the European Court of Human Rights on the basis that his freedom of expression under Art.10 of the European Convention on Human Rights had been breached. The court, finding in Goodwin’s favour, held that to order disclosure and convict for contempt ‘constituted an unjustifiable interference with Art.10.’ The court supported defence counsel’s argument, finding that the injunction was sufficient in discontinuing the spread of ‘confidential information,’ thus neutralising the threat of damage. The court held the protection of press freedom in considerable esteem. It stated that ‘without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest,’ undermining its ‘public-watchdog role.’ Whilst at first it would appear that Goodwin would pave the way for future case law to capture the spirit of s.10, and to therefore neutralise a chilling effect, it shall become apparent that ‘prior to the HRA,’ the UK judiciary did not readily embrace this sentiment.

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70 ibid.
71 *Morgan Grampian* (n 49) [37] (McCowan LJ).
72 ibid [24] (Lord Donaldson).
73 This point shall be further developed below.
74 *Goodwin v United Kingdom* (1996) 22 EHRR 123, 1 BHRC 81.
75 *Camelot Group Plc. v Centaur Communications Ltd* [1998] 2 WLR 379, [135] (Schiemann LJ)
76 Hereinafter referred to as the “ECtHR”.
77 Hereinafter referred to as the “ECHR”.
79 Above (n 72).
80 *Goodwin* (n 74) [101].
81 ibid.
82 ibid at [100].
83 ibid.
85 Costigan (n 27) 473.
The decisions in *Camelot* 86 and *Saunders* 87 demonstrate the swing of judicial predilection from commercial interests to source protection. The primary problem pre-HRA, was that the ‘factor of proportionality was not given adequate weight,’ 88 and thus was not ‘in harmony’ 89 with Art.10, 90 apparent when *Camelot* and *Saunders* are compared. Pre-HRA, *Goodwin* was not entirely persuasive. 91 *Camelot*’s deviation from *Goodwin*’s ‘weighty presumption’ 92 in favour of the protection of sources, revealed the court’s sympathy towards “obstacles” to business. McD. Bridge posited that the courts interpretation of s.10 was ‘radically wrong.’ 93 *Camelot* held that it was ‘necessary in the interests of justice to override the protection afforded to sources.’ 94 Continued ‘threat of damage’ 95 posed by a disloyal employee, creating ‘unease and suspicion amongst the employees of the company,’ 96 was sufficient to override s.10 protection, despite the fact that the ‘threat [had] been dealt with by injunction.’ 97 Disproportionate weight was accorded to identifying the “wrong-doer” in *Camelot* where it was not truly necessary. Costigan highlights the court’s view: ‘there is a public interest in loyalty and trust between employer and employee.’ 98 McD. Bridge argues that following the aftermath of *Camelot*, s.10 was ‘wholly self-defeating,’ would serve no purpose if it were intended for the courts to interpret ‘“the interests of justice” as being equivalent to “the infraction of any rule or law of equity which would otherwise have applied.” ’ 99

By contrast, Bridge’s sentiment was reflected in *Saunders*. Lindsay J conducted the

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86 *Camelot Group Plc. v Centaur Communications Ltd.* [1999] QB 124, hereinafter referred to as “*Camelot*”.
87 *Saunders v Punch* [1998] 1 WLR 986, hereinafter referred to as “*Saunders*”.
88 Fenwick and Phillipson (n 21) 240.
89 ibid.
90 ibid.
91 Costigan (n 27) 473.
94 ibid.
95 *Camelot* (n 86) [183] (Schiemann LJ).
96 ibid.
97 ibid. In *Goodwin* (above) this was considered to have neutralized the threat.
98 Costigan (n 27) 477.
Goodwin proportionality test\textsuperscript{100} finding that the interests of justice were not substantial enough to override the ‘ban on disclosure,’\textsuperscript{101} considering that an injunction had been granted.\textsuperscript{102} Saunders represents a just approach, and in John,\textsuperscript{103} though Goodwin only received ‘cursory mention’\textsuperscript{104} Lindsay J’s approach was reiterated.\textsuperscript{105} The importance of establishing necessity was restated,\textsuperscript{106} and Pickard highlights that the decision demonstrates the interpretation of the ‘interests of justice’ exception has not entirely eroded press freedom.\textsuperscript{107} The ‘uncertainty’\textsuperscript{108} and subjectivity surrounding the interpretation of the “interests of justice” is unsatisfactory.\textsuperscript{109} Post-HRA, case law shows signs of evolving to endorse Goodwin.\textsuperscript{110} However, the courts’ tendency to support the claimant in unnecessary circumstances, even post-HRA, has not been entirely cured. This observation shall now be analysed.

Second, the HRA, enacted soon after John, brought UK law in line with the ECHR,\textsuperscript{111} meaning human rights principles must be embraced, not ignored, by judges. Caddell advances that although the judiciary has become increasingly ‘receptive’\textsuperscript{112} towards embracing the spirit of s.10 HRA, the flexibility in which disclosure is ordered has not

\textsuperscript{100} Fenwick and Phillipson (n 21) 339.  
\textsuperscript{101} Saunders (n 87) [1002] (Lindsay J).  
\textsuperscript{102} ibid.  
\textsuperscript{103} John and Others v Express Newspapers and Others [2000] 1 WLR 1931, hereinafter referred to as “John”.  
\textsuperscript{104} Costigan (n 27) 473.  
\textsuperscript{105} John (n 103) [1939] (Lord Woolf MR).  
\textsuperscript{106} ibid; Additionally, see ‘Case Comment: Confidentiality: journalists’ sources protected’ [2000] (Aut.) Public Law 519.  
\textsuperscript{108} ibid.  
\textsuperscript{109} ibid.  
\textsuperscript{110} Costigan (n 27) 473.  
\textsuperscript{111} This discussion is most concerned with Article 10, the right to Freedom of Expression: “(1) Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without inference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”  
\textsuperscript{112} Caddell (n 7) 56.
been sufficiently constrained.\textsuperscript{113} This fact has not gone unnoticed. Lord Phillips in \textit{Ashworth Hospital}\textsuperscript{114} observed that greater authority and protection had been accorded to press freedom by the ECHR than the UK,\textsuperscript{115} to the extent that disclosure ‘must be a last resort.’\textsuperscript{116} Acceptance of the ‘pro-free press approach,’\textsuperscript{117} seen in \textit{John}, and the recognition by Lord Woolf of the spirit of \textit{Goodwin} concepts of necessity and proportionality,\textsuperscript{118} are particular strengths of \textit{Ashworth}. Lord Woolf embraced the importance of the free flow of information, declaring that any ‘restriction of freedom of expression must be convincingly established,’\textsuperscript{119} and that all limitations on confidentiality merit ‘careful scrutiny.’\textsuperscript{120} It is positive that the court confirmed the force of the Strasbourg test of necessity,\textsuperscript{121} and confirmed that the application of s.10 should reflect the legitimate aims contained in ECHR Art.10(2).\textsuperscript{122} Previously, the application of the necessity test tended to be fairly lax.

A distinct weakness is the lack of ‘judicial appetite to adopt the narrow construction of “interests of justice.” ’\textsuperscript{123} Unfortunately, Lord Woolf accepted that it was necessary and proportionate to identify and punish the source that disclosed confidential medical records on the basis of deterring ‘similar wrongdoing in the future.’\textsuperscript{124} Additionally, the expansion of the \textit{Norwich Pharmacal}\textsuperscript{125} order from tortious wrongdoing, to encapsulate contractual,\textsuperscript{126} civil,\textsuperscript{127} and criminal\textsuperscript{128} wrongs is problematic. Costigan notes the unfavourable ‘nexus between the \textit{Norwich Pharmacal} jurisdiction and s.10.’\textsuperscript{129} Lord Woolf, without having considered the ‘question of proportionality’\textsuperscript{130}

\begin{thebibliography}{10}
\bibitem{113} ibid.
\bibitem{114} \textit{Ashworth Hospital Authority v MGN Ltd} [2001] 1 WLR 515, hereinafter referred to as “\textit{Ashworth}”.
\bibitem{115} Costigan (n 27) 472; \textit{Ashworth Hospital Authority v MGN Ltd} [2001] 1 WLR 515 [97] (Lord Phillips MR).
\bibitem{116} Costigan (n 27) 486.
\bibitem{117} Foster (n 78) 55.
\bibitem{118} \textit{Ashworth Hospital Authority v MGN Ltd} [2002] 1 WLR 2033 [61] (Lord Woolf).
\bibitem{119} ibid.
\bibitem{120} ibid.
\bibitem{121} (n 114) [90-92] (Lord Phillips MR); Costigan (n 27) 472 & 486.
\bibitem{122} (n 118) [48-49] (Lord Woolf); Costigan (n 27) 472.
\bibitem{123} Costigan (n 27) 483.
\bibitem{124} (n 118) [66] (Lord Woolf).
\bibitem{125} \textit{Norwich Pharmacal Co v Customs and Excise Commissioners} [1974] AC 133.
\bibitem{126} (n 118) [34] (Lord Woolf).
\bibitem{127} (n 118) [53] (Lord Woolf); Lord Woolf disagrees with Sedley LJ’s reasoning in \textit{Interbrew}.
\bibitem{128} ibid.
\bibitem{129} Costigan (n 27) 475; this relationship has been perpetuated, as explained below; for commentary on the relationship between the \textit{Norwich Pharmacal Order} and Article 10 ECHR, see Paul David Mora and Ashley Savage, ‘Case Comment: The protection of journalistic sources, \textit{Norwich Pharmacal} orders
under the Goodwin ‘level of scrutiny’ found that disclosure was an overriding public interest. Costigan contends that to realise the ‘public interest in freedom of information,’ an increasingly ‘rigorous approach to proportionality’ must be undertaken by the courts before ordering disclosure.

Ackroyd dealt with the ‘difficult balancing exercise involved in determining the protection of a journalist’s source in the interests of free speech.’ Tugendhat J, on that balance, concluded in favour of the ‘vital public interest in the protection of a journalist’s source.’ Taking a rigorous approach to proportionality, ordering disclosure was not proportionate on the basis of ‘the passage of time’ and the journalist’s responsible conduct. No further leaks could be prevented by disclosure. On appeal, it was held that the existence of a ‘clear public interest’ alone was insufficient to ‘automatically justify’ a disclosure order. Sir Anthony Clarke endorsed Tugendhat J’s approach, which placed Ackroyd’s freedom of expression ‘of a higher order…in the scales’ against the claimant’s aims. It is submitted that Ackroyd has achieved a step towards balancing source protection and identifying wrongdoers. Foster observes that in the ‘post-[HRA] era the courts will insist on the production of pressing evidence and arguments to warrant such orders.’ Arguably, although the law is heading in the right direction, ‘there is some way to go,’ and a number of flaws shall be identified and analysed.

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130 Fenwick and Phillipson (n 21) 348.
131 ibid.
132 Brabyn (n 14) 920.
133 Costigan (n 27) 485.
134 Mersey Care NHS Trust v Ackroyd (No.2) [2007] EWCA Civ 101, [2008] EMLR 1 Hereinafter referred to as “Ackroyd”.
137 ibid [197] (Tugendhat J).
138 ibid.
139 Fehler and Baker (n 135) 252.
140 Foster (n 78) 51.
141 ibid; Fenwick and Phillipson (n 21) 351.
142 Ackroyd (No.2) [32] (n 134) (Sir Anthony Clarke MR).
143 Foster (n 78) 55.
144 Costigan (n 27) 467.
Third, the discussion surrounding the behaviour and conduct of the journalist and source is a worrying aspect of *Ashworth* and *Ackroyd*. Fahy argues the HRA has not been as influential as hoped.\(^{145}\) *Interbrew*\(^{146}\) clearly demonstrates the failure of the HRA to improve journalists’ protection,\(^{147}\) where Sedley LJ, having taken into account s.10\(^{148}\) and the ECHR, still asserted that ‘the consequent chilling effect’\(^{149}\) caused when disclosure is ordered ‘may be no bad thing,’\(^{150}\) and as such, *Interbrew* was permitted to ‘seek justice in the courts against the source.’\(^{151}\) Conduct should not be a persuasive factor, as the chilling effect is not ‘lessened or abrogated’\(^{152}\) by a source who is ‘greedy and disloyal.’\(^{153}\) Subsequently, in 2009 the ECHR held that this disclosure breached Financial Times’ Art.10 right,\(^{154}\) demonstrating the repeated shortcomings of the UK courts to balance interests consistently. Tugendhat J nevertheless reignited the relevance of conduct regarding a *Norwich Pharmacal* order.\(^{155}\) Fenwick argues that in want of a ‘sufficiently pressing social need under Article 10(2)\(^{156}\)\(^{157}\) justifying the ‘extensiveness of the jurisdiction’\(^{158}\) is difficult. Brabyn highlights a compelling flaw: that the significance of the ‘substantial passage of time since the initial leak’\(^{159}\) was such a persuasive point is disturbing. Although it is positive that attitudes are metamorphosing, it is submitted that ‘a news gatherer’s success’\(^{160}\) should not attach to their ‘ability to…stretch out the judicial process.’\(^{161}\) The state of the law following the HRA is in practice, not yet entirely satisfactory.

\(^{145}\) Fahy (n 39) 29.


\(^{147}\) Fenwick and Phillipson (n 21) 342.

\(^{148}\) Human Rights Act


\(^{150}\) ibid [468]; ibid Sandy page 2.

\(^{151}\) Sandy (n 49) page 2.

\(^{152}\) Costigan (n 27) 474, citing *Ashworth* (n 114) [101] (Laws LJ); See Timothy Pinto, ‘How sacred is the rule against the disclosure of journalists’ sources?’ [2003] Entertainment Law Review 170, 172 for general discussion on “the chilling effect”.

\(^{153}\) ibid.

\(^{154}\) No. 821/03 *Financial Times Ltd. And Others v the United Kingdom* [2009] [73] Retrieved from: http://www.5rb.com/docs/Financial%20Times%20v%20UK%20ECHR%2015%20Dec%202009.pdf

\(^{155}\) *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB), [2006] EMLR 12 [77] & [157] (Tugendhat J); Costigan (n 27) 475; Fahy (n 39) 32.

\(^{156}\) Article 10(2) European Convention on Human Rights.

\(^{157}\) Fenwick and Phillipson (n 21) 365.

\(^{158}\) ibid.

\(^{159}\) Brabyn (n 14) 931.

\(^{160}\) ibid.

\(^{161}\) ibid.
In conclusion, it is imperative that ‘the journalistic privilege overcomes its current image as simply a legislative break for a favoured industry,’\textsuperscript{162} and that its place on the ‘pedestal of public empowerment’\textsuperscript{163} is safeguarded. S.10 has placed protection for journalists’ sources on ‘a statutory footing’\textsuperscript{164} in the form of a qualified immunity from contempt. However, excessively broad interpretations of s.10 exceptions from the outset perpetuated the common law balancing approach, thus accommodating commercial interests to the detriment of confidentiality. Steps have been made to align UK law with Strasbourg, although protection remains ‘weak and unclear.’\textsuperscript{165} Common law balancing has persisted despite the HRA, due to the courts’ failure to implement Art.10(2) ECHR aims ‘to a sufficiently demanding standard.’\textsuperscript{166} The focus on conduct in \textit{Ashworth} and \textit{Ackroyd} suggests that a journalist must be “responsible” in order to benefit from protection. This is not encouraging news for a source uncertain whether to come forward. Brabyn argues that both judgments retain chilling common law weaknesses.\textsuperscript{167} Balance may be further effectuated by building on an approach ‘in the style of \textit{Ackroyd}’\textsuperscript{168} in future. In sum, Lord Denning captures the consequences of the absence of free press: ‘Charlatans would not be exposed. Unfairness would go un-remedied. Misdeeds in the corridors of power, in companies or in government departments, would never be known.’\textsuperscript{169}

\textsuperscript{163} ibid.
\textsuperscript{164} Fahy (n 39) 33.
\textsuperscript{165} ibid.
\textsuperscript{166} Costigan (n 27) 487.
\textsuperscript{167} Brabyn (14) 930.
\textsuperscript{168} ibid 929.
\textsuperscript{169} \textit{British Steel Corporation Respondents v Granada Television Ltd} (n 3) [1129] (Lord Denning).
Issues of Stability in Ghana's Model Petroleum Agreement

Abstract

Owing to the news of promising oil and gas discoveries made in Ghana in the year 2007, she has joined the ranks of Africa’s oil producers and received a lot of media attention. Ghana, as a developing country with a liberal investment climate, has chosen the Production Sharing Agreement as the arrangement by which she seeks to attract the requisite foreign investment to develop her petroleum industry while maintaining sovereignty over her resources. This paper identifies the issue of stability in Ghana’s Model Petroleum Agreement and limits the scope of its argument to the stabilisation and renegotiation clause in Article 26 of the Agreement.

This paper argues that the stabilisation clause is well drafted and based on previous cases is fit for the purpose of stabilising the contract. On the other hand, the renegotiation clause contains vague provisions that are susceptible to broad interpretation by the parties on which they may disagree. This leads to conflicts and subsequent instability of the contract. The author suggests that whereas the stabilisation clause is fit for purpose, more detailed guidance is required for the renegotiation process. Better guidance as to what events could trigger renegotiation, the effect they would have on the contract and how they should be revised would contribute to the stability of the contract.

CHAPTER ONE: INTRODUCTION

In June 2007, exploratory activities by oil companies Kosmos Energy and Tullow Oil off the Republic of Ghana’s Atlantic Ocean coast uncovered commercially viable quantities of crude oil and natural gas, the largest find in Africa’s recent history. Ghana’s oil and gas industry has since become a focus of global interest. Dr. Kwabena Duffuor, Minister of Finance and Economic Planning in Ghana, has been reported to have described Ghana’s oil and gas sector as attractive
for foreign investment.\(^1\) In this regard, one of the investors’ major concerns is stability. Given that the principal form of long-term stability is contract-based, the main objective of this paper is to appraise the use of the stabilisation and renegotiation clause under Article 26 of Ghana’s Model Petroleum Agreement (MPA) to attain stability of the contract.\(^2\) It concludes that notwithstanding the stabilisation clause guaranteeing investors stability, the vague provisions contained in the renegotiation clause produce counteraction. It is imperative to register a disclaimer that this argument is not purported to apply to negotiated Production Sharing Agreements. Cognizant of the fact that the provisions of Ghana’s MPA may be modified during negotiations, the object of this paper is to highlight stability as an issue to be addressed during such negotiations.

The MPA is a Production Sharing Agreement (PSA). Such contracts are the oldest form of risk contracts which require the contractor, whose compensation and reward are expressed and paid in deliveries of oil and gas production, to fund the authorised petroleum exploration, development and production operations.\(^3\) Sections 1 and 2 of the Petroleum (Exploration and Production) Law, 1984, P.N.D.C.L. 84, require petroleum exploration or production to be governed by a Petroleum Agreement. The Act provides the basic terms and conditions of every Petroleum Agreement negotiated and executed in Ghana and spells out the rights and obligations of each party to the Agreement, as well as sanctions that may be applied for any breach of obligations assumed under the Petroleum Agreement.\(^4\) Even though there is no specific prescription for it, according to the management of the Ghana National Petroleum Corporation (GNPC), the Model Petroleum Agreement as a standard document to be used, flows from the Act because it employs the provisions of the Act to guide the process of negotiating the terms and


\(^3\) Bernard Taverne, ‘Production Sharing Agreements in Principle and Practice’ in MR David (ed) Upstream Oil and Gas Agreements (Sweet and Maxwell, London 1996) 43-44.

conditions of a Petroleum Agreement among the Government of Ghana, GNPC and foreign oil company.\(^5\)

It is challenging for the drafters of these contracts to anticipate and deal appropriately with the many contingencies which may arise during the course of their trading relationship,\(^6\) such as a change in geology, government and economic fortune of the project and regulatory and environmental risks.\(^7\) The foreign oil company which invests in a host country is exposed to these risks, which may have a detrimental effect on the company’s investment by affecting the profitability of the venture as well as its ability to service debts. Absence of a provision to control the aforesaid risks renders the PSA less attractive to the oil company that performs exploration and production at its sole risk and robs the host state of its opportunity for foreign investment.

In order to remedy this, draftsmen can build into the contract a mechanism for revising the terms of trade as each party receives information about benefits and costs.\(^8\) This mechanism is known as renegotiation. It should be noted that this is not the only scenario that can trigger the need for renegotiation. The need for renegotiation can arise where one party is deemed to ‘suffer’ as a result of the occurrence of certain events not limited to the receiving of information. In addition to renegotiation clauses, stabilisation clauses, Bilateral and Multilateral Investment Treaties, among others are employed in attaining contractual security for the parties.\(^9\) While stabilisation clauses attempt to neutralise the host state’s power to unilaterally change the terms of an already concluded agreement,\(^10\) investment treaties grant the added protection of allowing investors to bring claims against the host state for violations of the treaty directly to legally binding

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\(^5\) GNPC (n 4).
\(^8\) Hart and Moore (n 6) 776.
international arbitration. Consequently, the oil company’s investment is protected and, provided the appropriate safeguards are inbuilt, the host state gains the opportunity for an economic advantage by making its investment climate more competitive and favourable to the foreign investor thereby attracting foreign investment into the petroleum sector.\textsuperscript{11}

Focusing solely on the stabilisation and renegotiation clauses in Ghana’s Model Petroleum Agreement, this dissertation is arranged as follows. Chapter 2 broadly introduces Production Sharing Agreements and why they are chosen with a particular focus on Ghana’s MPA. The author argues that Ghana chose to adopt Production Sharing Agreements in order to uphold and maintain sovereignty and to have the opportunity to set up a domestic petroleum industry by making use of the financial and technical resources of foreign oil companies which she lacks. Chapter 3 briefly describes the background of stabilisation clauses before specifically looking at how the stabilisation clause in Ghana’s Model Petroleum Agreement is drafted and how it provides stability to investors. Chapter 4 looks in depth at the renegotiation clause in Ghana’s MPA and argues that the Agreement is not stable because many disputes may arise in relation to the meaning of its vague provisions. Finally, Chapter 5 provides final remarks and a summary of the author’s argument.

CHAPTER TWO: PRODUCTION SHARING AGREEMENT

2.0. INTRODUCTION

It is established by the Center of Energy Economics that state parties plan to maximise wealth from hydrocarbon resources by encouraging appropriate levels of exploration and development, while the oil companies aim at building equity and maximising wealth by finding and producing oil and gas at the lowest possible cost and highest possible profit margin.\textsuperscript{12} Despite the disparity in objective, both parties can make a range of arrangements to achieve mutual satisfaction. These


\textsuperscript{12} Center for Energy Economics (CEE), \textit{Fiscal Terms for Upstream Projects – An Overview} Case Study <http://www.beg.utexas.edu/energyecon/newera/case\_studies/Fiscal\_Terms\_for\_Upstream\_Projects.pdf> accessed 14/04/12.
would be aimed at maximising returns on investments and resources and include modern concessions, production sharing agreements, joint ventures and service contracts.\textsuperscript{13}

PSAs are distinguished from other types of contracts in that the foreign oil companies carry the entire exploration risk (should no oil be found by the company, it receives no compensation) while the government owns both the resource and the installations\textsuperscript{14} Nonetheless, it has been argued that the above-named arrangements produce the same economic result despite their unique philosophical backgrounds.\textsuperscript{15}

Thus, the importance of the distinction is really a matter of law and politics when it comes to the sensitive issues of title, ownership and sovereignty.\textsuperscript{16} Owing to the fact that PSAs address the important issue of ownership of oil reserves, this contract form is politically acceptable in most developing countries.\textsuperscript{17} Perhaps, this is because of the belief that the oil sector can become integrated into the economy of the country, subsequently contributing to growth and development.

\textbf{2.1. Features of Ghana}

According to the World Bank, overall poverty in Ghana has declined from 52\% in 1992 to 28\% in 2006 and the nation is on course to exceed the 2015 Millennium Development Goal (MDG) of halving poverty.\textsuperscript{18} Despite this progress, 78.5\% of the population lives on less than $2 a day.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{13} Michael Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' (2009) Transnational Corporations \texttt{http://archive.unctad.org/en/docs/diaetia20097a1\_en.pdf} accessed 14/04/12.
\item \textsuperscript{14} Kirsten Bindemann, \textit{Production-sharing Agreements: An Economic Analysis} (Oxford Institute for Energy Studies, Oxford 1999) 1.
\item \textsuperscript{15} Daniel Johnston, \textit{International Petroleum Fiscal Systems and Production Sharing Contracts} (Penwell, Tulsa 1994) 24; Likosky (n13).
\item \textsuperscript{16} Nana Adjoa Hackman, \textit{Was Ghana Right in Choosing Royalty Tax System for the Oil Sector?} \texttt{http://danquahinstitute.org/docs/OilSectorUnderScrutiny.pdf} accessed 14/04/12.
\item \textsuperscript{17} Bindemann (n 14) 85.
\item \textsuperscript{19} Ian Gray, \textit{Ghana’s big test: Oil’s challenge to democratic development} An Oxfam America/ISODEC Report 13 February 2009 \texttt{http://www.oxfamamerica.org/publications/ghanas-big-test} accessed 14/04/12.
\end{itemize}
Therefore, Ghana’s position as a developing country combined with the uncertainty and high expense associated with offshore exploration and production makes PSA an appropriate contracting model for maximum returns.

Ghana also has a liberal investment climate.\(^{20}\) One of the yardsticks of effectiveness of a liberal investment regime is its emphasis on longevity of investment agreements in order to yield expected benefits from such agreements.\(^{21}\) Article 23 of Ghana’s MPA states that on completion of the thirty year term the parties may negotiate a further agreement provided that the Agreement has not been terminated earlier. With exception of assets mentioned in Article 19.1 (b),\(^{22}\) it also states that assets acquired by the Contractor, may only be retained by the GNPC where a reasonable and mutually agreed fee has been paid.\(^{23}\) Additionally, Ghana’s Model Petroleum Agreement stipulates that disputes between investors and the Government may be submitted at the option of the aggrieved party to international arbitration if parties fail to reach an amicable settlement.\(^{24}\)

Agrawal submits that investment climates like that of Ghana provide the impetus for PSAs to succeed as investment protection particularly within the legal framework is associated with improvements in operating performance.\(^{25}\) The Petroleum Law of Ghana, for example, Section 3 of P.N.C.L. 84 and Article 7.1 of the Model Petroleum Agreement of Ghana, also provides the legal framework for monitoring and control of oil companies which is designed to ensure that

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\(^{21}\) Al Faruque (n 11).
\(^{22}\) According to Article 19.1 (b) of the Model Petroleum Agreement of Ghana, GNPC shall be sole and unconditional owner of all assets all physical assets ... which are purchased, installed, constructed or used by Contractor in Petroleum Operations as from the time that full cost is recovered in accordance with the provisions of the Accounting Guide or the Agreement is terminated and Contractor has not disposed of assets prior to such termination, whichever occurs first.
\(^{23}\) Article 19.4 of the Model Petroleum Agreement of Ghana.
\(^{24}\) Article 24.1 of the Model Petroleum Agreement of Ghana.
operators adopt best practices aimed at greater accountability and maximisation of returns to all Contracting Parties.\textsuperscript{26}

As a developing country, it is necessary for the Government of Ghana to create a liberal investment climate, in order to attract foreign investment. The PSA is the means by which Ghana has opted to attract foreign investment in the petroleum sector. The author suggests that Ghana chose to adopt the PSA with a view to uphold and maintain sovereignty and gain the opportunity to set up a domestic petroleum industry.

\subsubsection*{2.2. Benefits of the Production Sharing Agreement}

\subsubsection*{2.2.0. Sovereignty}

As stated by Richard Osei-Hwere,\textsuperscript{27} the state ownership factor which is at the heart of PSAs strengthens the state in control of its hydrocarbon resources. However, according to Asante, ownership,\textsuperscript{28} although of political significance,\textsuperscript{29} has little significance in economic terms unless translated into effective control.\textsuperscript{30} He argues that even where management responsibility is on the National Oil Company (NOC) its practical significance is diminished by the fact that the operational responsibility is entrusted to the contractor.\textsuperscript{31} Where managerial and technological skills are lacking, designating the NOC as manager may still not establish effective control but present an excellent opportunity for learning the operational techniques and skills of the

\begin{itemize}
  \item \textsuperscript{26} Richmond Osei-Hwere, ‘Can a Developing Country like Ghana Control its Oil and Gas Resources through Production sharing agreements?’ OGE 4 (2010) <http://www.ogel.org/article.asp?key=3062> accessed 14/04/12.
  \item \textsuperscript{27} Osei-Hwere (n 25) 3.
  \item \textsuperscript{28} According to page 1 of Ghana’s MPA and section 1(1) of P.N.D.C.L 84, all petroleum existing in its natural state within Ghana is the property of the Republic of Ghana and held in trust by the State.
  \item \textsuperscript{29} Samuel Asante, ‘Restructuring Transnational Mineral Agreements’ (1979) 73 American Journal of International Law 335, 360.
  \item \textsuperscript{30} Asante, ‘Restructuring Transnational Mineral Agreements’ (n29) 369.
  \item \textsuperscript{31} Production Sharing Contract between Pertamina and Phillips Petroleum Co. Indonesia and Tenneco Indonesia Inc., dated 22\textsuperscript{nd} March 1975, as amended 30\textsuperscript{th} June 1975; Asante, Restructuring Transnational Mineral Agreements’ (n 29) 364-365.
\end{itemize}
petroleum companies which will ultimately strengthen the supervisory functions and consequently the control of the NOC.\footnote{Asante, ‘Restructuring Transnational Mineral Agreements’ (n29) 365-367.}

According to the MPA,\footnote{Article 2.2 of the Model Petroleum Agreement of Ghana.} the Contractor is appointed the exclusive entity to conduct Petroleum Operations in the Contract Area, however the GNPC is empowered to participate in the management of Petroleum Operations. Therefore, the management responsibility of the GNPC, although lacking practical significance, presents the National Oil Corporation with the opportunity to develop its operational capability for achieving its vision of a nationally led oil and gas industry which contributes positively to national development.\footnote{Nana Boakye Asafu-Adjaye, \textit{GNPC: Partnering the Best in Class for Continued Exploration Sucess} \url{http://www.gnpcghana.com/home/} accessed 15/04/12.}

It should also be recognised that the exercise of sovereign rights of ownership and control by states under PSAs is limited by stabilisation and international arbitration clauses.\footnote{Greg Muttitt, \textit{Production sharing agreement: oil privatisation by another name?} Paper presented to the General Union of Oil Employees’ Conference on privatisation, Basrah, Iraq, 26 May 2005 \url{http://www.platformlondon.org/carbonweb/documents/PSAs_privatisation.pdf} accessed 14/04/12.} Stabilisation clauses undermine the State’s control by exempting investment contracts from changes in the applicable law while international arbitration clauses undertake to settle disputes between the investor and the state in a neutral forum.\footnote{Paul Comeux and N. Stephan Kinsella, ‘Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance’ (1994) 15 New York Law School Journal of International and Comparative Law 1.} It is often the case that under International investment arbitration, decisions are made on commercial grounds alone, and without considering national interests or the national law of the state party.

For example, in Texaco Overseas Petroleum Company/California Asiatic Oil Co. v The Government of the Libyan Arab Republic which relates to a dispute over Libyan nationalisation of the petroleum concessions, Prof. René-Jean Dupuy applied international law in the arbitral award against Libya although the concessionary agreement was between Libya and two United States companies.\footnote{\textit{(1979) use brackets: [date] instead of (date)} 53 ILR 389.} Although such an agreement should not be regarded as a treaty between
states to warrant the application of international law,\textsuperscript{38} it has been observed that this is an emerging trend in international arbitration.\textsuperscript{39} In view of this, state parties are hardly successful in international investment arbitration against private corporations, particularly multinational corporations, rendering assent to international arbitration clauses a surrender of state sovereignty. Yet these clauses are important in mitigating the additional risk involved with investing in developing countries where political instability and lack of judicial independence are major challenges. They also promote stability of the foreign oil companies’ entitlements under the contract and the necessary incentive to persuade them to undertake actions that will enhance the state’s interest.\textsuperscript{40}

In any case the problems which arise from stabilisation and international arbitration clauses can be dealt with through the insertion of renegotiation clause in the agreement.\textsuperscript{41} This is exactly what Ghana has done in Article 26 of the MPA in order to readjust the contractual relationship to suit changing circumstances and in effect ease the tension between state sovereignty over its natural resources on one hand and sanctity of contractual terms on the other hand.

\textbf{2.2.1. Petroleum Industry and Economic Growth}

An important aspect of the Production Sharing Agreement is the opportunity offered to developing countries to attract foreign investment into the oil and gas sector while maintaining control over the resources.\textsuperscript{42} Governments of less developed countries quite properly regard these agreements as major instruments of public policy—a prominent feature of their development strategies, hardly distinguishable from a development plan. Due to financial and technical inability, developing countries like Ghana normally avoid high risk and cost ventures in petroleum exploration which are even more pronounced in the development of offshore fields.

\begin{flushleft}
\textsuperscript{38}Such an agreement should be governed by the law of the host state and not public international law.’ Samuel Asante, ‘International Law and Foreign Investment: A Reappraisal’ (1988) 37 ICLQ 588, 611-612.
\textsuperscript{42}Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 403; Taverne (n 3) 57-58.
\end{flushleft}
Consequently, they tend to adopt PSAs where the state may not make any significant investment outlay but derives benefit from the revenue generated, technology transfer and infrastructural development opportunities created by the foreign oil company.\textsuperscript{43}

The MPA of Ghana contains provisions about transfer of technology, patronage of locally manufactured goods and local services and training of state party’s personnel in Articles 19, 20 and 21. Furthermore, the state has the right to expropriate the assets of the investor when national interest demands, followed by appropriate compensation.\textsuperscript{44} PSAs are also essential to the state for national economic interest. The oil revenue expected from such deals helps in effective planning and execution of government budgets leading to economic growth. The Petroleum Revenue Management Act, 2011, Act 815 provides for the collection, allocation and management of upstream petroleum revenue in Ghana and to ensure that there is no foul play, the Act requires the publication of receipts and payments in national media and mandates a public oversight committee and auditor general reports.

This growth can be seen as an illusion as critics argue that PSAs are actually a hindrance as they contain stabilisation clauses that lock governments into economic terms that cannot be altered for decades.\textsuperscript{45} On the contrary, the actual aim of a stabilisation clause is to ensure that full compensation is paid to the investor by the host state where it undertakes unilateral action to change the contract.\textsuperscript{46} This divergence of opinion suggests that stabilisation clauses are ambiguous and as such should be subject to the rules of construction of contract in order to ascertain its proper meaning in context.\textsuperscript{47} Thus, the surrounding circumstances of the contract (the long duration coupled with high level of uncertainty and risk associated with the contract)

\textsuperscript{43}Osei-Hwere (n 25) 7-8.
\textsuperscript{44} Article 19.4 of the Model Petroleum Agreement of Ghana.
\textsuperscript{47} In Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 WLR 896, Lord Hoffman sought to re-state the principles by which contractual documents are to be interpreted and came up with five principles basically saying that all the relevant background must be considered before reasonable meaning can be determined.
give meaning to the words of the contract. It is therefore, inconceivable for the host state not to make any legislative changes over decades in accordance with changing times. Consequently, a more acceptable position would be to see stabilisation clauses as a deterrent rather than a ban on unilateral action by the host state to change the contract.

2.3. **CONCLUSION**

Regardless of the fact that it does not matter what arrangement is chosen from a fiscal point of view, from the foregoing argument it is evident that Ghana, as a developing country with a liberal investment climate, chose the PSA in order to exert maximum control over its oil and gas resources. With the opportunity to set up a domestic petroleum industry by making use of the financial and technical resources of foreign oil companies which it lacks in order to generate revenue while maintaining sovereignty, Ghana has made a suitable choice. What remains to be seen is whether the oil companies can also maximise wealth by finding and producing oil and gas at the lowest possible cost and highest possible profit margin in the desired stable conditions the stabilisation clause intends to achieve.

**CHAPTER THREE: STABILISATION CLAUSE**

3.0. **INTRODUCTION**

The discrepancy between the foreign oil company preoccupied with stability and predictability in contractual relations and the host government’s determination towards a more flexible contractual regime is a principal source of conflict. In their quest for certainty and stability of contractual provisions, transnational corporations qualify stabilisation clauses as a species of

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48 Under the second principle in Investors Compensation Scheme (n 46) 912-913, meaning cannot be reasonably ascertained except in context.

49 According to Lord Hoffman’s fourth principle in Investors Compensation Scheme (n 46) 913, the words of a contract do not always mean what they say.

50 Lord Hoffman’s fifth principle in Investors Compensation Scheme (n 46) 913, provides that if the conclusion from the background evidence is that something must have gone wrong with the language, the law does not require the courts to attribute to the parties an intention they did not have.

51 Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 404.
traditional contract rooted in the free will of the parties, departure from which contradicts the ‘sanctity of contract’.\textsuperscript{52} Some jurists have argued that the peculiar features of an investment agreement between a government and a foreign company make it analogous to an international agreement and therefore subject to such international legal doctrines as pacta sunt servanda—agreements must be kept at all costs.\textsuperscript{53} Some believe that an investment agreement is an independent and self-sufficient system of law regulating the entire range of relations between the host government and the foreign company without reference to any municipal law.\textsuperscript{54} It could also be argued that unilateral modification or abrogation of such agreements constitutes an international delict imposed by international law irrespective of the effect of private international law on the contract.\textsuperscript{55}

However, host governments usually agree to stabilisation clauses to reassure oil companies, who would otherwise be subject to the host government’s unimpeded ability to exploit its power to renegotiate the agreement under some contrived concept and encourage investment and development of their resources.\textsuperscript{56}

\textbf{3.1. Stabilisation Clause Defined}

A stabilisation clause can be defined as a clause seeking to secure the contract against future government action or changes in the law,\textsuperscript{57} without consent of the other contracting party,\textsuperscript{58} by

\textsuperscript{52}Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 404; The concept of sanctity of contract is based on the 19\textsuperscript{th} century classical contract theory founded in the Aristotelian virtue of promise keeping and liberality. James Gordley, \textit{The Philosophical Origins of Modern Contract Doctrine} (Clarendo, Oxford 1991) 162-163; According to the theory, a contract is an expression of the parties’ free will or choice and should be honoured and not interfered with by the court. Kolo and Wälde (n 7).

\textsuperscript{53}Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 405.

\textsuperscript{54} R. Y. Jennings, ‘State Contracts in International Law’ (1961) 37 British Yearbook of International Law 156, 163-166; Jennings quotes on page 181 from page 991 of International Law by Hyde that where a state alters or destroys its contractual obligations to the detriment of the alien party, it also constitutes tortuous conduct that possesses an internationally illegal quality.

\textsuperscript{55} Al Faruque (n11); Joseph Nwaokoro, ‘Enforcing Stabilisation of international energy contracts’ (2010) 3 J World Energy Law Bus 103, 104.


stabilising or freezing the essential provisions.\textsuperscript{59} Stabilisation clauses aim to protect the investor against the risk of financial uncertainty.\textsuperscript{60} Oil companies maintain that such projects cannot be mounted without solid financial backing from banks and other institutions, and that such institutions will not provide financing in the absence of unequivocal guarantees from host governments in respect of the financial package for the entire duration of the agreement. Among the non-financial concerns are that the foreign country would expropriate or nationalise the company’s operation through legislation or interference with the investors’ freedom to control the enterprise and make a profit.\textsuperscript{61} According to Wälde and Ndi, the issue of most concern is the imposition of new environmental obligations,\textsuperscript{62} whereas, Coale believes that they particularly address political risk.\textsuperscript{63}

A stabilisation clause can be an intangibility clause where a government may not unilaterally modify or terminate the contract,\textsuperscript{64} except by mutual consent of contracting parties. It can also be a stabilisation clause stricto sensu where the governing law of the contract shall be that of the contracting state at the time the contract was executed, thereby preventing the application of subsequent changes in the contracting state’s law.\textsuperscript{65} Finally, there can be a provision that the agreement shall be performed consistently with ‘good will’ or in ‘good faith’ thus precluding unilateral modification or termination.\textsuperscript{66} Whether or not an obligation of good faith is contractual or merely moral is a debate which lies beyond the scope of this paper.\textsuperscript{67} However, good faith is defined a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness.

\textsuperscript{59} Asante, ‘Stability of Contractual Relations in the Transnational. Investment Process’ (n 41) 409.
\textsuperscript{62} Wälde & Ndi (n 60) 230-231.
\textsuperscript{63} Coale (n 57) 220.
\textsuperscript{64} Curtis (n 57) 346.
\textsuperscript{65} Curtis (n 57) 346.
\textsuperscript{66} Curtis (n 57) 346-347.
prevailing in the community which are considered appropriate for formulation in new or revised legal rules.

3.2. **Ghana’s Stabilisation Clause**

3.2.0. **Drafting**

According to the stabilisation clause in Ghana’s Model Petroleum Agreement:

‘The State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretations thereof) including, without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto...and...may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties...’

It has a comprehensive scope which attempts to completely insulate contractual undertakings from any change of applicable law by a host state. According to Faruque, it is an intangible clause as it satisfies the following requirements:

1. It restricts the administrative capacity of the host state to change the terms and conditions of a petroleum contract by stating that ‘...the State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework...’

2. It also allows accommodation of changes of contract terms by mutual consent for the greater interest of the parties, ‘This Agreement and the rights and obligations specified

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69 Al Faruque (n 11).
70 Al Faruque (n 11).
herein may not be modified, amended, altered or supplemented except upon the execution
and delivery of a written agreement executed by the Parties’. 72

3. A breach of the clause is to be treated as a breach of contract as follows, ‘Any legislative
or administrative act of the State or any of its agencies or subdivisions which purports to
vary any such right or obligation shall... constitute a breach of this Agreement by the
State’. 73

Accordingly, compensation should be paid by the State to the oil company. 74 Because of the
compensatory nature, the stabilisation clause serves as a deterrent for states against actions that
will violate the agreement.

According to Professor Maniruzzaman, defective drafting causes stabilisation clauses to be
ineffective and the author points out some common pitfalls and how to avoid them. 75 The first
pitfall is restricting unilateral action by both parties rather than just the host state. The second
pitfall is the absence of a procedure by which consent may be given in relation to changing the
terms of the contract. Article 26.2 of the MPA neither falls prey to first nor second pitfall as it
only prevents unilateral action by the host state and requires consent to be evidenced in a written
document.

Another pitfall can be found in Amoco International Finance Corp v Iran where it was held that
there was no stabilisation clause resulting from the absence of express prohibition of any future
inconsistent laws and regulations. 76 Even though it is unclear as to whether Ghana’s stabilisation
clause accounts for this, the author argues that the purposive interpretation of the phrase ‘shall
take no action’ intends to cover such future actions. 77 In Judge Brower’s opinion, it does not make
a difference whether or not the state is mentioned as the adjudicative task is to determine, on the

74 Al Faruque (n11).
75 A.F.M Maniruzzaman, ‘Drafting Stabilisation Clauses in International Energy Contracts: Some Pitfalls for the
76 Amoco International Finance Corp v The Islamic Republic of Iran (1987) 15 Iran US. CTR 189.
77 ‘The State, its departments and agencies, shall support this Agreement and shall take no action which prevents or
impedes the due exercise and performance of rights and obligations of the Parties hereunder’ (Article 26.2 of the
Model Petroleum Agreement of Ghana).
basis of the entire record, whether the sovereign undertook a binding legal obligation. It was also argued in Amoco that where the state is not mentioned, the guarantee provision may be only enforceable against the named body and therefore is not binding on the state. However, it must be noted that Ghana’s stabilisation clause avoids this situation as the Government of Ghana is mentioned as party to the Agreement. Finally, based on the provision that ‘... the State guarantees Contractor stability...without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto’, it can be safely said that the last pitfall-legal and constitutional constraints on the stabilisation clause- may not be a problem. Based on the drafting of the stabilisation clause in Ghana’s MPA, its aim of providing stability seems achievable. It is necessary however to assess how it will achieve this aim.

3.2.1. How Stabilisation Clauses are interpreted

According to Coale, the precise language used in stabilisation clauses has not been particularly significant. Rather, they are generally analysed from a policy-based perspective that considers the limitation on sovereignty expressed by such a clause in light of all the circumstances surrounding the transaction. The effectiveness of a stabilisation clause hinges on its enforceability; therefore it needs to be positioned within the framework of the arbitration clause. Since it has come to be accepted that international law governs PSAs, the foreign company needs to internationalise the contract ensuring that dispute resolution is not under the control of the state party. An express choice of law provision like that in Article 24 of Ghana’s MPA that ‘The arbitration tribunal shall conduct the arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law (“UNCITRAL”) of December 15, 1976, except as provided in this Article’ may settle the question.

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78 Amoco (n76) 295-296.
79 Page 1 of the Model Petroleum Agreement of Ghana.
80 Coale (n 57) 236-237.
81 Nwaokoro (n 56) 103.
However, it should be borne in mind that the subjection of a state contract to a non-municipal law is not by itself a complete guarantee of contractual stability, since international law recognises the host state’s legislative and regulatory competence and to nationalise the private party’s contractual rights, notwithstanding any guarantees contained in the contract.\textsuperscript{84} Although all-out nationalisation or expropriation scenarios are rare now-a-days, the principles established in those cases are still relevant today,\textsuperscript{85} and as such a review of how they were decided will give insight as to how Ghana’s stabilisation clause will provide stability to investors.

In Saudi Arabia v Arabian American Oil Co. (Aramco)\textsuperscript{86} the validity of stabilisation clauses was recognised and the government was held to have violated its agreement with Aramco. In BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic,\textsuperscript{87} nationalisation was held by the arbitrator to be a fundamental breach of the concession as by virtue of the stabilisation clause because Libya had limited its freedom to change or terminate the concession by unilateral act unless it could be shown that the changes was truly in the public interest.\textsuperscript{88} In the National Iranian Oil Company v Sapphire Petroleum case, Judge Cavin took the position that a State cannot rely on its domestic law to nullify subsequently the provisions of a contract it has entered into.\textsuperscript{89} This position was followed in Texaco Overseas Oil Petroleum Co. /California Asiatic Oil Co. v Government of the Libyan Arab Republic (TOPCO)\textsuperscript{90} where it was held that in respect of the international law of contracts, a nationalisation cannot prevail over an internationalised contract containing a stabilisation clause entered into between a State and a private foreign company because the parties act as equals.\textsuperscript{91}

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\textsuperscript{84} Christopher Greenwood, ‘State Contracts in International Law-The Libyan Oil Arbitrations’ (1982) 53 British Yearbook of International Law 27, 53.
\textsuperscript{86} (1963) 27 ILR 117.
\textsuperscript{87} (1979) 53 ILR 297.
\textsuperscript{88} Coale (n 57) 232.
\textsuperscript{89} (1963) 35 ILR 136.
\textsuperscript{90} (1979) 53 ILR 389.
\textsuperscript{91} Coale (n 57) 233-234.
\end{flushleft}
Doubt has been raised however, as to validity of the theory of internationalisation even though support has been shown for it, for example, by a domestic tribunal in the United States. In Revere Copper and Brass Inc. v. Overseas Private Investment Corp, the tribunal found that a contract between the Jamaican Government and a United States company for bauxite mining was basically international in as much as such contracts are entered into as part of a contemporary process of development, particularly in the less developed countries. Yet, in Sornarajah’s criticism, he suggests that the theory of internationalisation which seeks to secure investment protection through contractual means is defective. He further suggests that there ‘does not appear to have been sufficient time for any international law to have grown through traditional methods of custom and treaty which applies to treaties,’ and ‘the attempt to construct such an international law through various means by such a coterie of scholars of the developed countries must be recognised to be a farcical failure which contained too many distortions of principle.’

The case of Serbian Loans and Brazilian Federal Loans also appears to contradict this theory of internationalisation. The Permanent Court of International Justice firmly established that ‘any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to what this law is forms the subject of that branch of law which is at the present day usually described as private international law.’ That being the case, it may be suggested that Dupuy’s assertions has no basis in international law and lacks evidential support.

Furthermore, in Aminoil, the Arbitral Tribunal in its award appeared not to follow the approach adopted by Arbitrator Dupuy in Texaco, which they took not to correspond to reality ‘under any contemporary system of law.’ In the view of the Tribunal, ‘the contract of concession has undergone great changes….of profound and general transformation in the terms….that occurred in the Middle East, and later throughout the world….These changes…brought about a

92 (1978) 56 ILR 257.
94 Sornarajah (n 93).
95 Sornarajah (n 93).
97 Serbia Loans (n 96).
metamorphosis in the whole character of the concession. The contract of concession thus changed its character and became one of the contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.  

Significantly, emerging state practices exemplified by petroleum agreements, appears to be moving toward giving effect to stabilisation clauses through the promulgation of special laws granting supremacy to the contractual provisions of concession agreements over the exercise of any legislative powers. It is further observed that such ‘freezing of the applicable system’ governing the contractual relation, effected by virtue of the promulgated special law, is currently considered by international lawyers as the most effective legal method for securing the stabilisation of the regime created by the provisions of the petroleum agreement. At the same time, by issuing the special empowering law, the State avoids those eventual conflicts which mostly emerge as a result of introducing future legislation increasing taxes or imposing other obligations affecting the financial balance on which the contractual equilibrium had been initially conceived. In this light, the theory developed by arbitral tribunals on stabilisation clauses seems to have influenced this emerging practice. These tribunals have been generally inclined to support the protection of investor interests even significantly beyond the legitimate sovereign prerogatives of States in regulating their relationships with private foreign investors. This, however, begs the question – whether stabilisation clauses can preclude all adversely impacting sovereign powers, in all circumstances, even if exercised in good faith.  

In Libyan American Oil Co. (LIAMCO) v Government of the Libyan Arab Republic, it was held that the stabilisation clause is a guarantee against the possibility not of the exercise of lawful sovereign powers impliedly retained, but of the arbitrary alteration or abrogation by the State of its contractual obligation. Thus, nationalisation that complies with the public policy is non-discriminatory and accompanied by the payment of adequate compensation is not a wrongful

99 (1982) 21 ILM 976 [1023]-[1024].
101 El-Kosheri (n 100) 277.
102 Maniruzzaman (n 85) 140.
103 (1977) 62 ILR 140.
breach of the stabilisation clause. Rather, it constitutes a ‘source of liability to compensate’ the foreign investor.\(^{104}\) Additionally, in AGIP v Popular Republic of Congo,\(^{105}\) it was held that stabilisation clauses freely accepted by the Government do not affect the principles of its sovereign legislative and regulatory powers since it retains both in relations with persons not party to such clauses and as such are valid and enforceable under international law.\(^{106}\) Therefore, on a review of the above cases, it is apparent that stability is almost certainly achieved as the stabilisation clauses are usually upheld unless there is overriding public interest to the contrary. In the LIAMCO case, besides the need for public interest, unilateral acts on the part of the government need to be accompanied with adequate compensation. In light of this, governments can still enforce changes. Therefore, stability is not absolute. However, the author is convinced that a stabilisation clause does not intend to function as complete ban on unilateral government action,\(^{107}\) but serve as a deterrent by guaranteeing compensation will be paid to the disadvantaged investor.

3.3. **Conclusion**

Albeit the stabilisation clause in Ghana’s MPA does not expressly forbid future unilateral action by the state, it is a well drafted provision with an express choice of law provision. It specifically binds the state; avoids the practical problems associated with the absence of a procedure by which consent should be given in case of unilateral action by the state; and guarantees against legal and constitutional constraints on the clause.

It has been argued that, ‘despite the inclusion in original contracts of stabilisation clauses designed to anticipate and counter the risk implicit in the obsolescing bargain, this outcome is inevitable. Stabilisation clauses have been argued to rarely be effective since producer

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\(^{104}\) Maniruzzaman (n 85) 140.

\(^{105}\) (1982) 21 ILM 726.

\(^{106}\) Coale (n 57) 235.

\(^{107}\) This is because the sovereign prerogative to take unilateral action for common welfare and benefit is inalienable. (R. Geiger, ‘The Unilateral Change or Economic Development Agreements’ (1974) 23 ICLQ 73, 103).
governments still enforced changes in contractual terms to reflect their perception of their right to capture additional rent.\textsuperscript{108}

However, the effectiveness of the stabilisation clause is unaffected as the author argues that based on previous cases, stabilisation clauses were never intended to capture any sovereignty from the host country, but rather to make clear that a unilateral change of contract would make the state responsible for full compensation for harm caused to the foreign investor.\textsuperscript{109} Hence, the stabilisation clause is definitely fit for purpose in its role.

**CHAPTER FOUR: RENEGOTIATION CLAUSE**

4.0. **INTRODUCTION**

Contrary to the argument in favour of an agreement between a host state and a foreign company being analogous to an international agreement, it has been argued that on well-settled principles of private international law, such an agreement should be governed by the law of the host state and not public international law.\textsuperscript{110} Therefore, subsequent changes in the law of the host state which modify the agreement cannot be a breach of contract.\textsuperscript{111} However, the preceding chapter proves this not to be the case. Still even when the agreement is subject to public international law, it is argued that international law does not ordain absolute immutability of agreements because the doctrine of pacta sunt servanda would be qualified by the international legal principle, clausula rebus sic stantibus, which sanctions the revision of international agreements on the basis of a fundamental change of circumstances.\textsuperscript{112} Not to mention, the general principles recognised by the representative major legal systems of the world (France, Germany, UK and USA) do not support the doctrine of sanctity of contract treated as an absolute and an unqualified


\textsuperscript{109} Macedo (n 46) 4.


\textsuperscript{111} Mann (n 110).

\textsuperscript{112} Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 406.
principle. Exceptions to the principle include: public policy, terms implied by law, standard of reasonableness and good faith, fairness and equity, as well as filling of gaps by courts through contract interpretation. Hence, where there is a change of circumstances, the government is permitted to call for a renegotiation of the agreement either on its own initiative or in response to overwhelming political pressure. Investors may also call for renegotiation, probably where the project is no longer economically viable on the negotiated terms of the PSA.

4.1. Renegotiation Clause Defined

Renegotiation clauses are provisions that require all parties to return to the bargaining table to renegotiate the terms of their agreements, in response to a certain event or set of events. Some believe that renegotiation clauses aim to protect the investor by making the contractual framework flexible and dynamic throughout the duration of the contract in case the host country changes the economic circumstances by ‘sovereign’ acts. Nevertheless, these clauses are often provided for the benefit of the two parties to the contract, very rarely solely for the benefit of the investor. A renegotiation clause may both protect a state’s sovereign right to change laws that may affect the agreement and provide a measure of protection to the private investor as he would

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114 Kolo and Wälde (n 7).
115 For example, during the negotiations between the Ghana Government and Shell International Ltd. for the On-Shore Petroleum Prospecting and Production Agreements, where the fiscal impositions agreed to early in 1973 were virtually nullified by the energy crisis in the later part of that year. (Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 412).
116 Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 410-411; For example, Shell was persuaded to accept a renegotiation clause to the effect that the terms of the agreement would be reviewed if the fundamental economic bases of the agreement changed, having regard to the world market prices in the petroleum industry and all other relevant economic facts. (Asante, 'Stability of Contractual Relations in the Transnational. Investment Process' (n 41) 412).
117 This was the case between Columbia and BP in 1966 as well as between BHP Petroleum, the Australian-based multinational company, and Petro Vietnam, the Vietnamese state oil company, over the Dai Hung Petroleum Development contract signed in April 1993.
then have the right to renegotiate or adapt the contract with the aim of restoring the original equilibrium between the parties.\textsuperscript{121}

There are two types of renegotiation clauses. The first type provides that if future laws or regulations enacted by the host State affect the foreign investor’s contractual position, negotiations shall be entered into in good faith in order to reach an equitable solution to maintain or restore the economic equilibrium of the agreement.\textsuperscript{122} Some agreements additionally provide that the State shall indemnify the foreign party for any loss or damage ensuing from the change of circumstances.\textsuperscript{123} This renegotiation process is triggered by a pre-defined change of circumstances caused by new legislation negatively affecting the private investor’s interest and is directed to protect only the latter’s interests.\textsuperscript{124}

The other type of renegotiation clause is an adaptation clause of general application, leading to the renegotiation of the agreement upon initiative of either the State (or the State entity) or the investor. The clause is triggered by supervening events which are beyond the control of the parties and which negatively affect the contractual equilibrium to the detriment of either of them.\textsuperscript{125} Some adaptation clauses provide that rather than being implemented on occasion of a change of circumstances, a process of consultation between the parties is to take place at periodic intervals, such as every 3 years, to consider whether modifications to the agreement would be appropriate in the light of a change in the parties’ expectations.\textsuperscript{126} This device was adopted in the renegotiation of the Ghana-Valco Agreement where the fiscal arrangements were stabilised for five years at a time and then reviewed.

4.2. \textit{Ghana’s Renegotiation Clause}

\textsuperscript{121} Berger (n 119) 1349-1351.
\textsuperscript{122} Article 34.12 of the Model Exploration and Production Sharing Agreement of 1994 of Qatar under the heading ‘Equilibrium of the Agreement’.
\textsuperscript{123} Petroleum Production Sharing Agreement concluded on 10 November 1995 between the State Oil Company of the Azerbaijan Republic and a consortium of oil companies.
\textsuperscript{125} Bernardini (n 124) 104.
\textsuperscript{126} Bernardini (n 124) 104.
The renegotiation clause in Article 26 of Ghana’s MPA satisfies the criteria for an adaptation clause as either party can call for renegotiation, and the clause is triggered when ‘a significant change of circumstances’ negatively affects ‘the economic balance of the Agreement’ to the detriment of either party. According to Bernardini, a workable renegotiation clause of this kind presupposes the definition of the change of circumstances triggering the renegotiation; the effect of the change on the contract; the objective of the renegotiation; the procedure for the renegotiation; and the solution in case of failure of the renegotiation process. However, this paper is only concerned with the first four, with brief comments on the solution in case of failure of the renegotiation.

4.2.0. Definition of the Change of Circumstances

Article 26.3 of Ghana’s MPA defines the change of circumstances as ‘a significant change in circumstances’. The difficulty here is what exactly this provision means. Such an open-ended criterion is open to extensive interpretation and may give rise to fears of instability and frequent conflicts. It may be argued that ‘a significant change in circumstances’ may be understood according to the actual industry perspectives and precludes trivial changes in circumstances. Therefore, the parties may not be open to such extensive interpretation as has been anticipated.

Nevertheless, previous cases show that there has been inconsistent interpretation on a case by case basis of what constitutes a ‘change in circumstances’. In the Questech case, Iran successfully invoked the radical political change in the country for a contract involving the sensitive area of national security and it was held that Questech could not expect that the contract

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127 Article 26.3 of the Model Petroleum Agreement.
128 Bernardini (n 124) 104.
129 Bernardini (n 124) 104.
130 These issues have also been identified by Walde, Macedo and Mato as areas of concern to be dealt with in order for a renegotiation clause to work properly (Thomas Wälde, ‘Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development’ (1978) 10 Lawyer of the Americas 265, 283-284; Macedo (n 46); H.T. Mato, ‘The Role of Stability and Renegotiation in Transnational Petroleum Agreements’ (2012) 5 Journal of Politics and Law 33, 35-36).
131 Al Qurashi (n 113) 289.
would remain unaffected by changes in such a highly sensitive military domain.\textsuperscript{133} However, in Gabcikovo-Nagymaros,\textsuperscript{134} political changes were not considered as ‘changed circumstances’. The changed circumstances advanced by Hungary, in the court’s view, were not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the project.\textsuperscript{135} Additionally, it was held that a fundamental change of circumstances must have been unforeseen.\textsuperscript{136}

It is argued that even when the contract is speculative by nature and the parties have contemplated certain risks, good faith prevents a party from insisting on contract performance as originally agreed when such claim would be abusive in the light of the change in circumstances.\textsuperscript{137} This may be the reason why in a case where the discovery turns out to be of lesser value to the company hence not economically viable on the negotiated terms of the PSA,\textsuperscript{138} such a ‘change in circumstances’ may invoke renegotiation. Moreover, the nature of the change would radically transform the extent of the obligations still to be performed in order to accomplish the project since oil companies require financial backing from banks and other institutions, which they cannot pay back if the project is no longer economically viable. However, the standard proposed in Gabcikovo-Nagymaros only acts as guidance and is not to be rigidly followed. To this end, parties may still use such broad clauses as a lever to force changes in provisions that, strictly speaking, are not open to revision.\textsuperscript{139} As such, the more precise the

\begin{itemize}
  \item \textsuperscript{133} Questech (n 132) 123.
  \item \textsuperscript{134} (1998) 37 ILM 162; Although the case involved two states, it provides a perfect analogy: the nature of the project in dispute (a long-term development of natural resources) is typical of the type of agreements between host states and private foreign investors. (Kolo and Wälde (n7)).
  \item \textsuperscript{135} Kolo and Wälde (n7).
  \item \textsuperscript{136} Kolo and Wälde (n7); Arbitrators of the Japan Shipping Exchange similarly stated: ‘In contracts such as the present one, of a commercial base, where the cost may be set arbitrarily and which has a speculative nature to a degree, it is not possible to decide that there existed a situation to which so-called change in situation principle could be applied’. (Arbitration Court of the Japan Shipping Exchange, award September 20, 1975, Volume VIII – 1983 YCA 153, 155).
  \item \textsuperscript{137} Hans van Houtte, ‘Changed Circumstances and Pacta Sunt Servanda’ in Gaillard (ed) \textit{Transnational Rules in International Commercial Arbitration} (ICC Publishing Paris 1993) 119-120.
  \item \textsuperscript{138} This was the case between Columbia and BP in 1996; and Petroleum, the Australian-based multinational company, and Petro Vietnam, the Vietnamese state oil company, over the Dai Hung Petroleum Development contract signed in April 1993.
  \item \textsuperscript{139} Jeswald Salacuse, ‘Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form’ (2001) 35 Int’l L 1507, 1514.
\end{itemize}
drafting of such provisions, the easier it will be to ascertain whether renegotiation is to occur, and how the review process should be carried out.\textsuperscript{140}

According to Walde examples of precise definitions include world market price change, change of ownership and control of the transnational company or change in home country legislation.\textsuperscript{141} This perspective may also be criticised as creating some uncertainty arguing that where, for instance, the change in circumstances is defined as a change in tax laws, it is unclear what category of tax laws are covered. Aware of the fact that it is impossible to anticipate all the future circumstances which might necessitate renegotiation, the author borrows a textual canon from statutory interpretation to show how such uncertainty may be avoided. The eiusdem generis rule states that where specific words are followed by a general expression, the general expression is limited to the shared characteristics of the specific words, even though the general expression may ordinarily have a much broader meaning.\textsuperscript{142} Therefore to avoid the impossible task of enlisting all the possible changes in circumstances, a few examples may be given followed by a more general indicator such as tax laws to provide more certain guidance as to the changes intended to trigger renegotiation.

In the Jamaica/ ALCOA bauxite agreement (1976) the change of circumstances specifically related to the tax regulations of the transnational corporation’s home country:

Subject to the provisions of any Income Tax Treaty between Jamaica and the United States which hereafter may be concluded and which includes provisions for relief from double taxation, in the event of double taxation arising from actions by Jamaica or the United States with respect to any of the matters covered by this Article VIII of this 1976 Agreement then Alcoa may request a review and discussion of the action giving rise to such double taxation and the Government shall take such reasonable action as the parties thereto may deem proper and appropriate in the circumstances to endeavour to avoid or reduce such double taxation.\textsuperscript{143}

\textsuperscript{141} Wälde (n 130).
\textsuperscript{142} This is what Justice Rice of the Court of Appeal wrote of \textit{eiusdem generis} in \textit{Watt v Trail}, a New Brunswick case, (2000) 190 DLR 4th 439.
\textsuperscript{143} Wälde (n 130).
In comparison with the clause in Article 26.3 of Ghana’s MPA, it is clear that ‘a significant change of circumstances’ is not precise enough. This can lead to wide discretion on the part of the parties as to what ‘a significant change of circumstances’ entails, making it susceptible to broad interpretation. This is because the phrase is entirely subjective and what is significant to one party may not be to another; it is a matter of opinion. The extended scope for a range of interpretations makes it more likely for the parties to disagree and such incongruity as to the meaning of the contractual provisions is antithetical to the purpose of drawing up a contract.\footnote{144}

What is needed is a sufficient guidance directing interpretation of the contract to reveal the true meaning of the provisions therein. The author proposes that the example quoted above gives such sufficient guidance.

\textit{4.2.1. Effect of the change on the contract and the objective of renegotiation}

Adaptation clauses should only apply in exceptional circumstances.\footnote{145} In Ghana’s MPA, the change must affect ‘the economic balance of the Agreement’.\footnote{146} According to Bernardini,\footnote{147} the parties’ disagreement may relate to:

(i) The existence of the conditions set by the contract for the renegotiation, namely whether a new law or regulation adversely affects the economic balance of the Agreement as in Ghana’s MPA.\footnote{148}

(ii) The terms and conditions which should be made subject to revision and the extent of such revision in order to re-establish the economic balance of the parties.\footnote{149} The MPA allows parties to ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’.\footnote{150}

\begin{footnotes}
\item[144] According to the author, the purpose of a contract is to express the mutual agreement of parties to a contract. Such common understanding is considered a necessary requirement to the formation of a contract.
\item[145] Bernardini (n 124) 104.
\item[146] Article 26.3 of the Model Petroleum Agreement of Ghana.
\item[147] Bernardini (n 124) 106.
\item[148] Bernardini (n 124) 106.
\item[149] Russi (n 140) 92.
\item[150] Article 26.4 of the Model Petroleum Agreement of Ghana.
\end{footnotes}
Apart from the fact that disputes may arise as to what constitutes ‘a significant change in circumstances’, there may also be misunderstanding as to whether such a change in circumstances affects the economic balance of the Agreement. When can it be argued that the economic balance has been distorted?

A possible response is that the whole object of the agreement is in relation to achieving a balance between an investor who deploys capital to undertake exploration and deserves fair returns on the investment and the State whose resources, when found, are to be exploited over a long period into the uncertain future. Thus in negotiating the fiscal terms of the agreement both the oil company, on the one hand, and the State and its national oil company, on the other, make projections about likely scenarios such as size of discovery, capital requirements and oil prices and project what are likely to be their respective shares of future discoveries. Consequently, a certain economic balance is established from these well known, verifiable factors in the industry. Some assumptions are, of course, involved in the projections, notably about oil prices. Therefore, if in the future there are significant changes in the oil price environment, which affect the ‘economic balance’ that was achieved in the sense that one party now has much more of the benefit or the loss, there is a reasonable basis for renegotiating.

Another reaction is that in order to establish that the economic balance has been distorted, the contract must give express guidance to the factors to be considered rather than assume that all verifiable factors in the industry are relevant. This is because ‘Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say’.\(^\text{151}\) It is argued that where such guidance is given, there is less room for manipulation of the contractual relations and curbs the possibility of disputes over whether or not a trigger event has occurred. The following example is illustrative of what guidance the author deems sufficient in this regard.

In the Supplemental Agreement to the Concession Agreement between the State of Kuwait and Aminoil, Article 9 provides that

\(^{151}\) As per Lord President Dunedin in *Muirhead & Turnbull v Dickson* (1905) 7F 686.
If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties.\footnote{152}

The Agreement between the State of Kuwait and Aminoil gives specific examples of the factors to be taken into account of renegotiation, that is, conditions in which operations are carried out and all payments made. This helps to identify which terms and conditions should be subject to revision whereas the provision in Ghana’s MPA is silent on this. Accordingly, there is room for manipulation according to the parties’ discretion as to which terms and conditions should be revised. Conflict on this matter, contributes to the instability of the Agreement.

Furthermore, Article 26.4 allows parties to ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’. Again, there is a lot of discretion on the part of the parties as to what is ‘necessary’ leading to broad interpretation and subsequent disagreement affecting the stability of the contract. It may be argued that it can be inferred that what is ‘necessary’ is to re-establish the economic balance. However, this leads back to the question as to when the economic balance is affected. Therefore, imprecision of the contract terms makes interpretation subject to a vicious circle.

\textit{4.2.2. The procedure for renegotiation}

Whenever all conditions are met for implementing the adaptation clause, a negotiation phase is open, normally for a specified period of time, in view of restoring the contractual equilibrium.\footnote{153}

\begin{footnotes}
\item[153] Bernardini (n 124) 104.
\end{footnotes}
In Ghana’s MPA this period is thirty days.\textsuperscript{154} According to Bernardini,\textsuperscript{155} the parties’ obligation during this phase should be precisely defined. Berger lists nineteen obligations to which parties to a renegotiation clause are subject which lie beyond the scope of the paper.\textsuperscript{156} There is no provision in Ghana’s MPA that defines the parties’ obligations but even where there is an obligation to use their best endeavours or to do their utmost to reach an agreement, there is no implication that an obligation exists to conclude an agreement on the revised terms.\textsuperscript{157} Failure to agree is not therefore a breach of contract for which either party might be held responsible.\textsuperscript{158} However according to Aminoil,\textsuperscript{159} failed negotiations can be regarded as a breach of contract and thus entail responsibility if such failure can be attributed to one of the parties.

The clause may leave open by its wording whether the objective of restoring the original equilibrium implies, in the parties’ common intent, that full compensation should be paid to the aggrieved party or that some consideration should also be given to the public party’s interest, particularly when the clause sets as a target the reaching of an equitable solution.\textsuperscript{160} The clause in Ghana’s MPA makes no requirement for an equitable solution but provides that after 30 days, the award of the tribunal shall be final and binding upon the Parties.\textsuperscript{161} A common feature of any process of renegotiation is that it should be conducted in good faith as lack of good faith will be taken into consideration by a judge or an arbitrator called upon to settle the dispute resulting from the failure of the renegotiation process.\textsuperscript{162}

It may seem as though the lack of a duty to agree may contribute to instability, however after thirty days, the parties may resort to arbitration.\textsuperscript{163} Therefore, whether or not the parties agree

\textsuperscript{154} Article 24.1 of the Model Petroleum Agreement of Ghana.
\textsuperscript{155} Bernardini (n 124) 104.
\textsuperscript{156} Berger (n 119) 1365-1366.
\textsuperscript{157} In the award of 24 March 1982, settling the dispute between the American Independent Oil Company (Aminoil) and the Government of the State of Kuwait, the Arbitral Tribunal considered the extent of the obligation to negotiate contemplated in Article 9 of the Supplemental Agreement, concluding that ‘an obligation to negotiate is not an obligation to agree’ (the award is published in (1982) 21 ILM 976).
\textsuperscript{158} Bernardini (n 124) 104.
\textsuperscript{159} (1982) 21 ILM 976.
\textsuperscript{160} Bernardini (n 124) 104.
\textsuperscript{161} Article 24.6 of the Model Petroleum Agreement of Ghana.
\textsuperscript{162} Bernardini (n 124) 104; Russi (n 140) 90.
\textsuperscript{163} Again too much discretion is left to the arbitrators to fill in the gaps, review or rewrite the contract with little or no guidance, or criteria (Berger (n 119) 1466). This also leads to instability due to uncertainty of outcome.
becomes irrelevant after that fixed period of time. Per contra, it may be argued that ultimately leaving it up to the tribunal to decide on the various points where the parties cannot agree, leads to the uncertainty of the contract as there is doubt as to whether the arbitrator is able to fill in the gap, review or rewrite the contract for the parties with little or no guidance, or criteria.\textsuperscript{164}

Be that as it may, such a decision may provide a strong incentive towards compromise because both parties may be very unwilling to let a third-party decide the content of a renegotiated agreement.\textsuperscript{165} For example, in the case of Jamaica-Alcoa where the likelihood of an adverse award coupled with the bad publicity, could have weakened the negotiation position of the Jamaican government and strengthened that of the foreign investors; and that probably influenced the government towards a compromise.\textsuperscript{166}

\textbf{4.3. Conclusion}

It is well known that difficulty exists in formulating a renegotiation clause that defines specifically when a change of circumstances and its impact is serious enough to invite renegotiation.\textsuperscript{167} However, the stipulation of precise conditions, procedures, and criteria for renegotiation is preferable to a reliance on controversial and rather vague principles.\textsuperscript{168} This is because a renegotiation clause tends to undermine the expectation of stability of the contractual arrangement as it invites spurious claims for renegotiation at any moment.\textsuperscript{169}

As can be seen from the above examination of the renegotiation clause in Ghana’s MPA, the definition of the change of circumstances as ‘a significant change in circumstances’, effect of change as affecting ‘the economic balance of the Agreement’ and the objective of renegotiation as ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’

\begin{footnotes}
\item[164] In the \textit{Aminoil} Arbitration, when the question of whether an arbitrator has the power to impose the agreement which the parties were unable to reach arose, it was decided that an arbitral tribunal could not, by way of modifying or completing the contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.
\item[165] Wälde (n 130) 284.
\item[166] Kolo and Wälde (n 7).
\item[167] Kolo and Wälde (n 7); Berger (n 119) 1362.
\item[168] Wälde (n 130) 272.
\item[169] Kolo and Wälde (n 7).
\end{footnotes}
as well as the absent definition of the parties’ obligations during the procedure for the renegotiation leads to broad interpretation. Broad interpretation is mainly attributed to the wide discretion on the part of the parties when interpreting such provisions resulting in conflicts. This runs contrary to the investor’s quest for stability despite the assurance given by the host state in the stabilisation clause of contractual stability.

CHAPTER FIVE: CONCLUSION

As a developing country, Ghana made a fitting decision to adopt production sharing agreements for the exploitation of her newly found oil and gas resources. This find has the potential to greatly accelerate Ghana’s trajectory on the development path. Yet she lacks the financial and technical resources to set up a domestic petroleum industry. Therefore, she would need to make use of the financial and technical resources of foreign oil companies. The production sharing agreement allows the state who has not any significant investment outlay to derive benefit from the revenue generated, technology transfer and infrastructural development opportunities created by the foreign oil company while she maintains sovereignty over her resources. Her attraction as a potential for investment may be attributed to her liberal investment climate but this paper solely focuses on the stability of Ghana’s Model Petroleum Agreement. This paper finds that even though the stabilisation clause functions to warrant stability, the renegotiation clause consists of vague provisions whose broad interpretation leads to conflicts resulting in the instability of the contract.

Having a well drafted stabilisation clause with an express choice of law provision, the stabilisation clause is capable of guaranteeing the investor’s stability as it serves as a deterrent against unilateral government action to the detriment of the other contracting party by giving rise to a claim for compensation when there is such breach of Agreement.

Renegotiation clauses, however, are intended to promote flexibility. So from the outset, the flexibility that renders these clauses their main strength is their own Achilles’ heel, that along
with it brings the high price of uncertainty.\textsuperscript{170} Regardless of the fact that the principle rebus sic stantibus can be regarded as a radical exception to the principle of sanctity of contracts,\textsuperscript{171} and as such is generally applied with strict and narrow interpretation, renegotiation clauses limit the stability of contracts.

On construction of the renegotiation clause in Ghana’s MPA, it is concluded that the vagueness of its provisions leaves too much to the discretion of the parties in interpreting the clause. This results in broad interpretations on which the parties may disagree leading to conflicts and subsequent instability of the contract.

The renegotiation clause may benefit from additional guidance as to what exactly is meant by a ‘significant change in circumstances’. Furthermore, the parties should clearly define the conditions which would ‘affect the economic balance’ of the Agreement’. An enhanced renegotiation clause should also make lucid which terms and conditions should be made subject to revision and to what extent such revision should be made to re-establish the economic balance of the parties. Provisions such as ‘effect such changes in, or rectification of, these provisions as they may agree are necessary’ should be avoided because what is regarded as necessary is subject to debate. Instead stating the defined changes that should be made to re-establish the economic balance would suffice. The author does not propose that this is an exhaustive list of things to consider during negotiations. These examples are only intended to illustrate how the renegotiation clause can render the agreement unstable. Therefore it will be prudent for investors to be cautious of such provisions and pay particular attention to how they are drafted in order to achieve the desired result.

The author’s position accords with that of Bede Nwete that where the essence is to protect the investment from the hostile acts of the host government, stabilisation clauses can still be relied upon as a better option in light of the limitations the renegotiation clause imposes.\textsuperscript{172} It should also be noted that the stabilisation clause gives the investor a stronger and more certain right to

\textsuperscript{170} Macedo (n 46).
\textsuperscript{172} Bede Nwete, ‘To what extent can renegotiation clauses achieve stability and flexibility in petroleum development contracts?’ (2006) 2 IELTR 56.
claim compensation for breach of contract. The renegotiation clause, on the other hand, does not guarantee such a right as a failure to agree as a breach of contract and as such, the award of compensation by the tribunal cannot be guaranteed.

Nevertheless, it has also been proposed that in order to dispose of any pretensions of the transnational corporation to a rigid legal enclave fortified by traditional legal and commercial concepts, it may well be that another possibility in regulating the relations between host governments and transnational corporations is to dispense with the investment agreement or its equivalent altogether.\(^{173}\) This would mean that the transnational corporation and its operations would be brought under the normal regime of the municipal law of the host country, subject of course to such concessions as would be appropriate in the circumstances.\(^{174}\) In this regard, it is noteworthy to add that domestic contractual law recognises changes to contractual obligations if they affect the equilibrium of the contract which might be more conducive towards a stable relationship over a period of time.\(^{175}\)

Even though this essay is a good assessment of the stability of Ghana’s Model Petroleum Agreement, the idea that perhaps the way forward is to do away with such agreements all together is one that deserves to explored in greater detail. However it is beyond the scope of this paper to undertake this task. Therefore, having come this far, this paper concludes that where the right to renegotiation is circumscribed by detailed guidance, the renegotiation clause may provide parties with the flexibility to modify their agreement. This will ultimately reduce the likelihood of a dispute between the parties resulting from broad interpretation of the vague provisions contained therein. In this way, the renegotiation clause may be seen as a means of stabilising the relationship between the parties rather than weakening it as is currently the case in the Model Petroleum Agreement of Ghana.

\(^{173}\) Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 420.

\(^{174}\) Asante, ‘Stability of Contractual Relations in the Transnational Investment Process’ (n 41) 420.

A Discussion of the European Court of Human Rights’ ‘Absolutist Approach’ to Article 3 in Relation to Refugees’ Protection from Refoulement

Abstract

Since Chahal v UK it has been claimed that the European Court of Human Rights is taking an ‘absolutist approach’ to Article 3 ECHR, which disrespects national security concerns. This paper seeks to examine the ‘complementary protection’ offered to refuges and asylum seekers by the Court, examine its rulings on Article 3 cases dealing with non-refoulement, examine the challenge posed by the Courts’ acceptance of ‘diplomatic assurances’ in Othman v UK, and consider finally whether states’ national security concerns are in fact ‘disrespected’.

1. Introduction

This essay will examine non-refoulement in a refugee context. It will first situate the European Court of Human Rights’ (‘the Court’) non-refoulement standard-setting in the context of ‘complementary protection’ and its role in strengthening non-refoulement. It will then address the charge that: the Court has taken an ‘absolutist approach’ in the context of national security concerns and will challenge this statement with reference to the allowing of diplomatic assurances in Othman. After considering expert opinions on diplomatic assurances, it will attempt to assess if the Court really still is following the absolutist approach it set out in Chahal, or has it deviated.

2. Complementary Protection

While today there is a level of international protection unknown before the Second World War, the refugee is still very exposed. Despite these advances, “there were and there continues to be persistent attempts by both industrialised and developing States to limit their protection responsibilities.”¹ The refugees most basic and fundamental protection are States’ non-refoulement obligations – i.e., the right of a refugee not to be sent back to their country of origin where they fear persecution. Yet even for those persons recognised as refugees under the 1951

Convention they are still at risk, as the norm of non-refoulement is vulnerable in two ways: Firstly refugees can be excluded from non-refoulement if they have engaged in serious criminal activity and are deemed a national security threat. Secondly non-refoulement is derogable, so in a national emergency a refugee can be deported. This is the case even when facing serious persecution.

Due to the limitations on refugee protection through the Refugee Convention, there has been an increasing importance placed upon ‘complementary protection’ – which “is, in effect, a shorthand term for the widened scope of non-refoulement under international law”. The most important elements of ‘complementary protection’ is the protection afforded under Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Convention against Torture (CAT), and Article 3 of the European Convention on Human Rights (ECHR). These articles offer relief from refoulement, and not only complement but augment refugee protection. Firstly, this ‘complementary protection’ is not only extended to Convention refugees, but also to asylum seekers, failed asylum seekers, de facto refugees, etc, - in fact, to every person in a State party to one or more of the treaties. Secondly, unlike the Refugee Convention, neither times of emergency nor the threat posed by the person concerned allow for derogation of the non-refoulement principle. Despite being a ‘bare-bones entitlement', it is a refugee’s most sacred protection.

It is true that ‘complementary protection’ only covers torture and ill-treatment, and so is technically less expansive than the protection afforded by the Refugee Convention, which covers persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. But as Van Dijk states; those who suffer a real risk of persecution are likely also to suffer from a real risk of ill-treatment. Further, the Refugee Convention is limited to the kinds of persecutions covered in Article 1 (a) (2), while for the ECHR, CAT and ICCPR, the reason for the torture does not have limitations. In terms of derogation, Goodwin-Gill & McAdam wonder whether the “broadened principle of non-refoulement under human rights law...[has] rendered Article 33(2) redundant?”

2 Art 33 (2) of 1951 Refugee Convention.
6 Goodwin-Gill & McAdam (n 3) 243.
2.1 European Court of Human Rights

With some limitations, there is no explicit restriction on deporting refugees in the ECHR, nor is there any right to asylum. Yet it is often claimed that the Court acts as an ‘asylum court’, and indeed Bossuyt shows that the level of severity required for finding an Article 3 violation is lessened “once the applicant is an asylum seeker.”8 “[T]here are indeed many similarities between the asylum and non-refoulement procedures, and a certain overlap cannot be avoided.”9 Since 1961, the European Commission “has recognized that Article 3….could encompass the principle of non-refoulement”.10 In Soering v United Kingdom11, the Court emphasised the absolute nature of Article 3, and that it applied to extradition (and thus outside of the espace juridique of the Convention). The Soering principle states that while the returning State is not directly responsible for the potential Article 3 violation, it is nonetheless a facilitator in denying the person their rights.12 In 1991 in Cruz Varas, the Court expanded the Soering principle to cover expulsion as well as extradition.13

In 1997 the Grand Chamber of the Court ruled on the now infamous Chahal case.14 In its judgment the Court set several important precedents. It ruled that the behaviour of the applicant (in this instance an alleged terrorist) had no bearing on whether or not his deportation would give rise to an Article 3 violation.15 And most importantly it ruled that there could be no balancing test between the threat posed to national security and the risk of torture or ill-treatment.16

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9 Nowak & McArthur (n 5) 209.
10 Goodwin-Gill & McAdam (n 3) 290.
14Chahal v United Kingdom (1996) 23 EHRR 413.
15 Chahal para. 80, cited in Mowbray (n 13) 204; See also Jama Warsame v. Canada CCPR/C/102/D/1959/2010.
16 Chahal para 81, cited in Mowbray (n 13) 204.
2. The Court’s ‘absolutist approach’

Since Chahal, supporters and detractors both claim that the Court has taken an ‘absolutist approach’ to Article 3, and that this approach disrespects national security concerns. The ‘absolutist approach’ part of this assertion at first glance appears correct.

The Chahal principle was reaffirmed in Saadi, where “[a] unanimous Grand Chamber was not prepared to accept that the values underlying the European Convention that were articulated in Article 3 were open to compromise, however compelling the public interest justification.” The UK and other States intervened in this case. While acknowledging that the prohibition on torture was absolute, they claimed any torture inflicted would be the responsibility of the receiving State, not the State that expelled the individual. The UK further argued that non-refoulement was a positive obligation (as compare with a negative obligation not to torture) and so positive obligations must be weighed against interests of the community. Yet the Court, while recognising the threat of terrorism and States’ difficulties in combating it, found that Article 3 was absolute and therefore there could be no balancing test. Further, Article 3 was absolute whether it was the receiving or expelling State that carried out the torture. Finally the threat the applicant poses to national security does not decrease his risk of being tortured. I would further argue that in fact the alleged threat posed by the applicant would make them more likely to be at risk of torture, for once he/she was classified as a terrorist, the receiving State would have an increased interest in them.

This ‘absolutist approach’ was continued until the 2012 Othman case. While it would be incorrect to suggest that the Court had now introduced a balancing test between the risk of torture of the applicant and the expelling State’s national security, it did allow for the use of ‘diplomatic assurances’ to negate the (in this case admittedly real and personal) risk of torture faced by the applicant. While the Court had not previously ruled out the possibility of the

17 Harris et al (n 12) 87 (emphasis added).
19 Saadi v Italy (2009) 49 EHRR 30 para 120, cited in Vandova (n 18) 509-10.
20 Saadi para 137, cited in Vandova (n 18) 509.
21 Saadi para 138, cited in Vandova (n 18) 509.
22 Saadi para 139, cited in Vandova (n 18) 510.
acceptance of a diplomatic assurance to negate the risk of an Article 3 violation, I would argue that by allowing them in Othman, no matter how ‘comprehensive’, it has set a dangerous precedent in compromising the principle of non-refoulement – which is often a refugee’s last line of defence. We will now examine expert’s opinions on diplomatic assurances and weigh the assurance in the Othman case against these observations.

3. Diplomatic assurances – weakening non-refoulement

Due to the ban on non-refoulement “several governments have chosen to seek assurances from the receiving State that the individual will not be subject to ill treatment.” The assurances have been sought “predominantly from States known for their use of torture and ill-treatment.” Vandova claims that diplomatic assurances are “inherently unreliable and unenforceable”. Alston & Goodman claim they “should be given no weight when a refugee who enjoys [Convention] protection…is being refouled, directly or indirectly, to the country of origin or habitual residence.” This is because the receiving State has already declared that the country of origin would persecute the refugee. Therefore “it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for assurance that the refugee will be well-treated upon refoulement.” Louise Arbour, former UN High Commissioner for Human Rights (2004-2008), has said that reliance on such bilateral assurances “threatens to empty international human rights law of its contents.” Furthermore they create a two-tier system, going against “human rights for all”, ‘protecting’ (but not really) the few while in effect condoning the systematic torture of the ‘rest’ (those not covered by such assurances). She doubts whether post-return mechanisms could ever be efficient enough, as torture happens in secret and is hard to detect. A point several commentators make is that it is paradoxical to look to a State which

24 Othman v United Kingdom 55 EHRR 1, para 194.
26 Vandova (n 18) 511.
27 Vandova (n 18) 513.
28 Alston & Goodman (n 25) 447 (emphasis added).
29 UNCHR Note on Diplomatic Assurances 2006, cited in Alston & Goodman (n 25) 447 (emphasis added).
31 ‘In our name and on our behalf’ 55 Intl and Compl Q 511 (2006), cited in Alston & Goodman (n 25) 448; See also Vandova 512.
practices systematic torture (for if this was not the case an assurance would not need to be sought) to protect someone from torture. Nowak adds that the very category of person involved in these assurances (e.g. ‘Islamist terrorist’) is the type most likely to be tortured.\textsuperscript{32}

3.1 Diplomatic assurances in Othman v UK

The diplomatic assurance under scrutiny in \textit{Othman} was a Memorandum of Understanding (MOU) conducted between the United Kingdom and Jordan. Despite being “superior in both its detail and formality to any assurances which the Court had previously examined”\textsuperscript{33}, many of the above general criticisms ring true in regards to this MOU. Firstly, the MOU states that Jordan “will comply with [its] human rights obligations under international law regarding a person returned under this arrangement.”\textsuperscript{34} As pointed out by Nowak, Arbour and others, this simply serves to create a two-tier system. Jordan’s human rights obligations already apply to everyone in its territory. Admittedly the MOU grants many favourable return conditions, which included: the person will be humanly treated once arrested; brought promptly before a judge; informed promptly of charges; fortnightly, private visits by an independent body chosen by the UK and Jordan; fair and public hearing, independent and impartial tribunal, public announcement of verdict; and the applicant will be able to cross-examine the witnesses against him.\textsuperscript{35} In examining this case, the Court acknowledged ‘widespread’, ‘routine’, ‘systematic’ torture in Jordan, and that this torture was carried out with ‘impunity’.\textsuperscript{36} While further recognizing that “the applicant is part of a category of prisoners who are frequently ill-treated in Jordan”\textsuperscript{37}, the Court sought to ascertain whether the MOU “removed any risk of ill treatment of the applicant.”\textsuperscript{38} It found that the MOU was ‘specific’, ‘comprehensive’, and ‘addressed directly the protection of the applicants Convention rights in Jordan’.\textsuperscript{39} The Court stressed the good bilateral relations between Jordan and the UK, and that MOU had the support of the Jordan’s King, and intelligence services (who generally carry out the torture of political

\textsuperscript{32} Cited in Alston & Goodman (n 25) 450-1.
\textsuperscript{33} \textit{Othman} para 194, cited in Alston & Goodman (n25) 462.
\textsuperscript{34} Cited in Alston & Goodman (n 25) 457.
\textsuperscript{35} Cited in Alston & Goodman (n 25) 457-8.
\textsuperscript{36} \textit{Othman} para 191, cited in Alston & Goodman (n 25) 460.
\textsuperscript{37} \textit{Othman} para 192, cited in Alston & Goodman (n 25) 460.
\textsuperscript{38} \textit{Othman} para 192, cited in Alston & Goodman (n 25) 460.
\textsuperscript{39} \textit{Othman} para 194, cited in Alston & Goodman (n 25) 462.
Finally the Court stressed that the high profile case would make Jordan’s more likely to keep to their agreement, for to break it “would cause international outrage.”

We can challenge some aspects of the MOU. As torture is carried out in secret, it would be hard to detect. Even with the support of the authorities, where torture is systematic it is often the case that the rank and file will not heed the orders of their superiors. With regard to post-return monitoring mechanisms, the Court admitted that the head of the Jordanian NGO that was to supervise the applicant’s situation had close family ties to the military. The Court made a point that the NGO would receive “generous funding by the UK government” as if this was supposed to make it more independent. On this matter, Nowak has stated that “where States have identified independent organisations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State.” It is worth bearing in mind the similar case of Agiza before the Committee Against Torture, where the applicant was expelled to Egypt with diplomatic assurances he would be not be tortured. He was in fact tortured, although admittedly the assurances in Agiza were weaker than those in Othman. Yet what is important to take note of in this case was the reaction of the expelling State. Sweden originally tried to deny that any torture had taken place, there was no censure or sanction against Egypt for breaking its bilateral assurances, and in fact “the Swedish Government went so far as to strongly criticize the CAT committee and announce its intention not to implement the decision.” Nowak concludes his observations on the Agiza case by stating that “requesting diplomatic assurances in relation to torture will inevitably put the diplomatic service of the requesting State in the very difficult situation of having to withhold relevant information, make false statements and defend a non-defensible position under international law.” It is not inconceivable that a similar outcome will arise from Othman, no matter what kinds of assurances were given and what level of ‘international scrutiny’ bore down on the case.

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40 Ibid.
41 Ibid.
42 Cited in Alston & Goodman (n 25) 451.
44 Nowak & McArther (n 5) 217.
45 Ibid.
4. National security concerns

When detractors argue that the Court disrespects the national security concerns they are misconstruing the situation. Firstly, the Court frequently acknowledges the grave impact that international terrorism has on States’ security, and makes mention of the difficulties States face in combating this phenomenon. Yet, as explained above, the Court only seeks to assess whether the removal of an individual would violate a States Convention obligations. The alleged threat posed by these individuals is separate matter and so the Court cannot enact a balancing test. States like the UK, which often intervene in cases similar to Chahal, seeking to get that precedent overturned fully acknowledge that for a State party to the Convention to torture someone, even in a ‘ticking bomb scenario’, is inexcusable. Following the Courts rulings (Soering, Cruz) that this extends to cases of removal, rationally the same logic applies.

More important is the assumption that removing individuals to face the risk of torture is a way to enhance State security. I think this is a false and dangerous assumption. States often claim non-refoulement weakens counter-terrorism actions, “however, interfering with the prohibition of refoulement is not a practical solution to the terrorist threat”. “Deportation, expulsion and extradition are not the only conceivable tools the State has at its disposal.” “Some States have adopted alternative measures such as assigning individuals to compulsory residence, surveillance, periodic reporting to the police, and other non-criminal sanctions”.

For recent cases such as those concerning Abu Hamza and Abu Qatada, men who were allegedly great threats and had committed terrorist acts, is it inconceivable for them to be tried in the UK? It is not possible to ensure “that those alleged to have engaged in serious criminal conduct…not avoid trail on such charges” by trying them here? Are human rights and justice mutually exclusive? On a similar issue, Lord Hoffman stated that “the real threat to the life of the nation…comes not from terrorism” but when we allow terrorism to make us renegade on our

46 Chahal, Saadi, etc See also, Askoy v Turkey (1997) 23 EHRR 553 para 62, cited in Mowbray 162.
47 This is not to say that courts haven’t, see Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3
48 Vandova (n 18) 513.
49 Vandova (n 18) 513.
50 Vandova (n 18) 513.
51 Jacobs et al (n 7)103.
human rights commitments. Dauvergne states that while “domestic trails of those suspected of international terrorism or planning offences…cannot guarantee prevention of all future attacks” neither can the anti-terror measures currently employed. Yet at least with her approach, we have not sold out our human rights obligations.

5. Conclusion

In Othman, the Court said that it accepts that “there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security. However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so.” Is this really true? As a standard setter, and a Court of human rights, it seems that the Court, in the interest of minimising future Article 3 violations, should consider “the long term consequences” of essentially allowing States to derogate from their non-refoulement obligations. For asylum seekers and refugees, non-refoulement is often their last line of defence in avoiding persecution. It would be indefensible for the Court to start to chip away at this.

53 Dauvergne (n 52) 545.
54 Othman para 186.
Money for Nothing and Cheques for Free?: Negligence and the Perceived 'Compensation Culture'

Abstract

The notion that some people may use and abuse the law as a means to the end of financial advancement, and have a particular predilection towards procuring compensation through the tort of negligence, has gained traction in recent decades, fuelling the belief that Britain is currently blighted by an endemic 'compensation culture.' Societal stakeholders ranging across the media, judiciary, and legislature have become embroiled in the debate, such that the existence of said culture is now presented as an incontestable fait accompli. However, while anecdotal evidence exists in abundance, this claim is not borne out by either statistics or case law. Arguing against the proposition that Britain is currently beset by a 'compensation culture,' this article will examine the origins of the 'compensation culture' theory, contending that such a notion is a dangerous ‘urban myth’\(^1\) which must be debunked. It will posit, in concurrence with leading academics and even the government itself, that the media have stoked fears, indignation, and outrage to cause a ‘moral panic’\(^2\) about the decline of modern society, allowing perception to overshadow reality. It will further contend that the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is an indirect attempt to curb the 'compensation culture' and worthy of closer inspection by tort scholars.

Introduction

No evil is without its compensation. The less money, the less trouble; the less favour, the less envy. Even in those cases which put us out of wits, it is not the loss itself, but the estimate of the loss that troubles us.

Seneca

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The issue of compensation has preoccupied philosophers, legislatures, judiciaries, lobbyists, and the media since time immemorial and ad nauseum. In common law jurisdictions, torts law is the umbrella moniker used to describe that corpus of cases concerned with civil wrong and civil liability. Considerable effort has been expended attempting to delineate the aims and justification of torts law: proponents of the ‘deterrence’ theory see torts as a system designed to reduce the frequency and severity of civil wrongdoing; while advocates of ‘corrective justice’ theory propose that tort is a legal process of making amends. This latter theory relies heavily on notions of individual responsibility, and demands that where a defendant has acted in a blameworthy manner, causing loss to a claimant, he should attempt to make good of this loss. Both theories are heavily predicated on the belief that compensation is the best medium of achieving these ends, and this is perhaps nowhere truer than in the tort of negligence.

Negligence is the ascription of fault for harm caused. Successful claims in negligence must demonstrate that the defendant owed, and breached, a duty of care towards the claimant; causing, both in-law and in-fact, the claimant to suffer loss or damage. Yet there is more to negligence than this recital of elements belies, for successful claims will attract the award of compensation. The meteoric widening of the scope of negligence since the advent of the twentieth century, particularly in the realm of personal injury, has led commentators to decry the evolution of a ‘compensation’ or ‘blame’ culture in modern society.

This ‘amorphous’ concept is used in a variety of contexts to encompass disparate issues including, inter alia, the amount of compensation awarded through the tort system; the expansive categories of liability within tort law; and, most frequently, the ‘increased

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8 See inter alia the works of Tony Weir, Frank Furedi, Patrick Atiyah.
9 Morris (n 2) 350.
10 Morris (n 2) 350; Kennedy LJ, 'Is this the way we want to go?' [2005] 2 JPIL 117.
propensity to claim accident compensation.'

According to this view, developments in the tort of negligence have allowed avaricious and individualistic claimants to ‘have a go’ at seeking compensation, whilst simultaneously increasing the fear of liability. The term ‘compensation culture’ is thus not used to describe a society where people are able to seek compensation. Rather a ‘compensation culture’ implies that a decision to seek compensation is wrong.

Yet for all its powerful governmental, judicial, and media proponents, there exists an equally convincing cohort of academics who ‘hotly dispute’ the existence of a ‘compensation culture.’ On their analysis, statistical and anecdotal evidence have been skewed to suggest that society has become claim-happy and aided the perception that a ‘compensation culture’ exists; but they argue that in actuality increased access to justice through tort law is meritorious.

This article will examine whether Britain is currently beset by a ‘compensation culture.’ It will examine developments in the tort of negligence, arguing that such evolution is to be lauded rather than lambasted, before delving into the concept of the ‘compensation culture’. It will constitute a spirited defence of the tort of negligence, arguing that the notion of a ‘compensation culture’ is a dangerous ‘urban myth’ which must be debunked. It will posit, in concurrence with leading academics and even the government, that the media have stoked fears, and outrage to cause a ‘moral panic’ about the decline of modern society, allowing perception to overshadow reality.

I – The ‘rise and rise of negligence’?: The Development of Torts Law

During the beginning of the nineteenth century, torts law ‘was still recognisably medieval.’ When devised, it was ‘shaped to meet the need of primitive society ... in the Middle Ages

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12 Morris (n 2) 350.
13 BRTF Report (n 1) 3.
14 BRTF Report (n 1) 5.
15 E.g. Annette Morris, Kevin Williams, Basil Markenesis.
17 Cohen (n 2) in toto; Morris (n 2) 365.
18 Cohen (n 2) in toto; Morris (n 2) 365.
19 Carol Harlow, Understanding Tort Law (3rd edn, Thompson Sweet & Maxwell 2005) 47.
civil liability for nervous shock received no attention in a world accustomed to unbelievable physical suffering.\textsuperscript{21} The advent of the twentieth century witnessed an unrivalled evolution of the scope of negligence. However, this evolution has not been untrammelled. A review of key cases, particularly in establishing duty of care, reveals that the judiciary have not been besieged by a zeal for compensation, leading to the promulgation of a ‘compensation culture.’ Rather, they have developed nuanced and rigid tests to balance the rights of claimants and defendants in the context of the specific facts of a case, to determine whether negligence is present and liability should ensue.

A trend towards liberalisation is certainly discernible. The formulation of a single test for establishing duty of care was attempted in \textit{Heaven v Pinder}.\textsuperscript{22} However, it was the ratio of Lord Atkin in the landmark case of \textit{Donoghue v Stevenson},\textsuperscript{23} noteworthy for its esoteric subject matter - the infamous snail in bottle - which became the ‘cornerstone of modern tort law:\textsuperscript{24}

\begin{quote}
negligence ... is based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.\textsuperscript{25}
\end{quote}

This demonstrates early judicial cognisance of the need to delimit the number of potential claimants. He then opined the famous ‘neighbour test’ which established the test for duty of care thusly:

\begin{quote}
You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected...\textsuperscript{26}
\end{quote}

\begin{thebibliography}{9}
\bibitem{21} Simon Deakin, Angus Johnston and Basil Markenesis, \textit{Markenesis & Deakin’s Torts Law} (7\textsuperscript{th} edn, OUP 2013)
\bibitem{22} (1883) 11 QBD 503.
\bibitem{23} [1932] AC 562.
\bibitem{24} Harlow (n 19) 47.
\bibitem{25} \textit{Donoghue} (n 23) 580.
\bibitem{26} \textit{Donoghue} (n 23) 580.
\end{thebibliography}
The test of duty of care established by Lord Atkin allowed for rapid expansion of the tort of negligence. In subsequent years, the test was used to found a duty of care in employment relationships; to extend the doctrine of vicarious liability; to extend negligence to economic loss and negligent advice; and to ‘demolish the virtual immunity of the Home Office.’ Negligence, seemingly, ‘had come of age.’

Lord Wilberforce took the process a stage further, (many would argue a step too far) in *Ann v Merton LBC*, modifying *Donoghue* into a 2-step, more expansive test. This would determine duty of care by reference to a ‘proximity test’ and ‘policy considerations.’ This was extensively critiqued, however, as ‘putting the floodgates on the jar’ and for allowing novel claims to flourish. *Ann* was posited as an ‘engine for blame culture’ and subsequent cases reveal that adoption of that test did lead to the expansion of the concept of negligence, notably in the domain of ‘nervous shock’ and the type of person who could be held to have a duty of care. However, it is equally clear that the judiciary sought to retrench the tort of negligence to the pre-*Ann* ‘neighbour test’ espoused in *Donoghue*, fearing that the legal system could be confronted by a large volume of claimants seeking to advance spurious or trivial claims. This is starkly evident in *John Munroe (Acrylics) v London Fire and Civil Defence Authorities*, in which Rougier J despaired and lamented of the growing belief that every misfortune must ... be laid at someone else's door ... after every mishap, every tragedy, the cupped palms are outstretched for the solace...

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28 Gold v Essex CC [1942] 2 KB 293.  
31 Harlow (n 19) 52.  
32 CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013, 1059 (Lord Templeman)  
35 CBS Songs (n 32).  
37 Mullender (n 36) 5.  
39 Emeh v Kensington, Chelsea and Westminster Area Health Authority [1985] All ER 1012.  
of monetary compensation ... claims that would have been unheard of thirty years ago are now entertained.\textsuperscript{42}

Thus, there has been a hasty judicial effort to ‘resile from Ann\textsuperscript{s}\textsuperscript{43}’ culminating in Lord Oliver’s three-tiered test for duty of care in \textit{Caparo Industries Ltd v Dickman}.\textsuperscript{44} Under this test, \textbf{the harm occurred must be a reasonably foreseeable result of the defendant's conduct; a sufficient relationship of proximity or neighbourhood exists between the accused and the victim; and it must be fair, just, and reasonable to impose liability.} Arguably, this gives the judiciary a broad discretion in determining negligence, and they have admittedly done so in a wide array of situations.\textsuperscript{45} Steele argues that potential liability is virtually limitless.\textsuperscript{46} Referees may now be liable for dangerous activity on a field of play;\textsuperscript{47} participants in even the most extreme sports may be compensated despite being fully cognisant of the risks;\textsuperscript{48} and holiday expectations may attract liability,\textsuperscript{49} even where the disruption was caused by the unexpected, arguably unforeseeable, eruption of a dormant volcano which closed European airspace.\textsuperscript{50}

Accusations that the judiciary, in their fervour to supply compensation, have crossed the boundary into judicial activism are unfounded. It ignores the hurdles judges have erected which must be overcome in order to successfully claim in negligence. Britain has a conservative judiciary; they do not favour broad strokes reform, rather preferring piecemeal

\begin{footnotes}
\item[42] Munroe (n 41) [322].
\item[43] Kidner (n 34) \textit{in toto}.
\item[44] [1990] 2 AC 605.
\item[45] Harlow (n 19) 56: cites many cases which have attracted liability.
\item[46] Steele (n 7) 113; for a comprehensive, though not exhaustive, list of cases and classes of cases which have established negligence see Williams (n 16) 513.
\item[48] Parker \textit{v TUI UK Ltd} [2009] EWCA Civ 1261; \textit{Pinchbeck v Craggy Island Ltd} [2012] EWHC 2745 (QB); A recent interesting case concerns an explorer who sustained several injuries while trekking. The claimant received compensation for \textit{some} of her injuries, but was unsuccessful in her application for other injuries in which she was held to be \textit{volenti non fit injuria} ('to the willing no injury is done'): \textit{Harrison v Jagged Globe (Alpine) Ltd}. [2012] EWCA Civ 835; Patrick Limb, 'Between a rock and a court case: tortious liability in 'adventure sports cases,' [2013] 1 JPIL 7.
\item[49] Ichard \textit{v Frangoulis} [1977] 1 WLR 556; Jackson \textit{v Horizon Holidays Ltd} [1975] 1 WLR 1468.
\item[50] Marshall \textit{v Iberia Lineas Aéreas De España} SA, Mayor's & City of London Court, 13 December 2010, unreported; Graham \textit{v Thomas Cook Ltd} [2012] EWCA Civ 1355; though note, these cases upheld that costs borne by the claimant while stranded should be refunded but further claims seeking damages for distress or for making alternative travel arrangements were unsuccessful. The European Court of Justice has upheld this approach, opining that there is no limit (in time or money) to an airline's duty to look after its stranded passengers, subject to the amounts proving necessary, appropriate and reasonable to make up for the airline’s shortcomings: Case C-12/11 \textit{McDonogh \textit{v Ryanair}} (not yet published); available at http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-12/11&td=ALL sourced on 28 May 2013.
\end{footnotes}
changes.\textsuperscript{51} While this may lead down the ‘slippery slope’\textsuperscript{52} to expansion by the back door, there has been a marked retraction in their approach since the 1990 \textit{Caparo} decision.\textsuperscript{53} It is possible to discern the creeping of policy into the judicial process, with palpable judicial reticence evident in some certain classes of case.\textsuperscript{54} This is particularly evident in the realm of public authority liability. Though there is no general rule, judges ‘have established vast areas of immunity for a variety of defendants such as local authorities, statutory bodies, the police, the fire brigade ...’\textsuperscript{55} The courts have been equally loathe to extend liability in other areas, particularly with regard to psychiatric harm and secondary victims.\textsuperscript{56} They have also been slow to adduce blame in cases involving recreational activity.\textsuperscript{57}

Behind every claim for negligence is a real person; the judiciary are mindful of the difficult and often tragic plight of the victim.\textsuperscript{58} The cases which do not attract liability are as informative about ‘compensation culture’ as those which do. The real hardship and even injustice is evident in many.\textsuperscript{59} The present law admittedly represents a very advanced stage in the development of the tort of negligence, ‘which not everyone would regard as “progress.”’\textsuperscript{60} It is submitted that the evolution of negligence in the last century constitutes ‘organic growth of the law.’\textsuperscript{61} The last decades have witnessed unprecedented judicial grappling with the concept of negligence, and its’ interaction with principles of fairness and

\textsuperscript{51} Mullender (n 36) 7.  
\textsuperscript{53} Mullender (n 36) 7.  
\textsuperscript{54} For instance they have modified the standard of care to ensure fairness; increasing the standard for medical professionals (e.g. Bolam v Friern Hospital Management Committee [1957] 1 WLR 582; Bolitho v City and Hackney Health Authority [1997] 4 All ER 771; Wilsher v Essex Area Health Authority [1988] AC 1074; and decreasing the standard for children: Mullins v Richards [1998] 1 All ER 920; Orchard v Lee [2009] EWCA Civ 295.  
\textsuperscript{55} Deakin (n 21) 8.  
\textsuperscript{56} McLoughlin (n 38); Bourhill v Young [1943] AC 92.  
\textsuperscript{57} e.g. Bolton v Stone [1951] AC 850; Perry v Harris [2008] EWCA Civ 907; Blake v Galloway [2004] 3 All ER 315; Wooldridge and Sumner [1963] 2 QB 43.  
\textsuperscript{58} Harlow (n 19) 55.  
\textsuperscript{59} e.g. the Hillsborough case Alcock v Chief Constable South Yorkshire Police [1992] 1 AC 310, which defined ‘proximal relationships’ as ‘close and loving ties’ to the exclusion of siblings, and held that watching an event unfold on television could not constitute sufficient proximity, even when aware that family or loved ones were in attendance. The case has been repeatedly described as 'notorious' in, inter alia, Phil Scraton, \textit{Hillsborough: The Truth} (Mainstream Publishing 1999); Jonathan Morgan, 'The Rise and Fall of the General Duty of Care,' [2006] 22(4) PN 206, 212. The decision in Gregg v Scott [2005] UKHL 2 also seems unjust. Conversely, the stance of the judiciary towards progressive disease, especially mesothelioma, is laudable e.g. Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; Barker v Corus [2006] UKHL 20.  
\textsuperscript{60} Deakin (n 21) 9.  
\textsuperscript{61} Deakin (n 21) 9.
justice. They have attempted to establish and enshrine a balanced and nuanced approach, recognising that:

[t]he law of tort must not interfere with activities just because they carry some risk. Of course the law of tort must not stamp out socially desirable activities. But whether the social benefit of an activity is such that the degree of risk it entails is acceptable is a question of act, degree and judgement, which must be decided on an individual basis and not by broad brush approach.\(^{62}\)

To summarise the thesis at this juncture: if there is a ‘compensation culture’ in modern society, it has not stemmed from the judiciary, nor has it been cogently evinced by the case law.

II – Is there a compensation culture in modern day Britain?

Inevitably, critical discussion of ‘compensation cultures’ departs from the safe haven of the courtroom, for the fact is that the vast majority of claims in negligence never bloom: ‘litigating is not easy. Many claims never reach court. Some will, of course, be settled out-of-court; others disappear because the claim had little chance of succeeding in the first place.’\(^{63}\) Accusations of a thriving blame culture are levied not at the judiciary, or lawmakers: they are directed primarily at the ‘greedy,’ ‘swingeing,’ ‘malingering’ claimants, and their lawyers.

There is a paucity of sufficient and unequivocal evidence to back up the claim that there is a ‘compensation culture’ afflicting modern Britain.\(^{64}\) Rather, the evidence is largely anecdotal, which is problematic.\(^{65}\) The statistics available for analysis are not independently sourced, nor sufficiently unbiased.\(^{66}\) A report by the Institute of Actuaries, concluded that there is a growing compensation culture. The institute which estimated the total cost of claims in 2002

\(^{62}\) Scout Association v Barnes [2010] EWCA Civ 1476 (Smith LJ) [49].

\(^{63}\) BRTF Report (n 1) 5.


\(^{65}\) Morris (n 2) 366

\(^{66}\) McIlwaine (n 64) 243; Excepting the Compensation Recovery Unit.
at approximately £10 billion,\textsuperscript{67} has been scrutinised and found wanting, not merely because of that body's necessarily close relationship to the insurance industry.\textsuperscript{68}

Two government-commissioned reports in the last decade have confirmed, and concluded on the basis of statistical evidence, that no compensation culture exists in actuality.\textsuperscript{69} Negligence claims are not spiralling but stabilising.\textsuperscript{70} Rather:

It is \textbf{perception} that causes the real problem: the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims. The judicial process is very good at sorting the wheat from the chaff, but all claims must still be assessed in the early stages. Redress for a genuine claimant is hampered by the spurious claims arising from the \textbf{perception} of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real.\textsuperscript{71}

Furthermore, it adduced:

exaggerated fear of litigation, regardless of fault, can be debilitating. The fear of litigation can make organisations over cautious in their behaviour. Local communities and local authorities unnecessarily cancel events and ban activities which until recently would have been considered routine. Businesses may be in danger of becoming less innovative – and without innovation there will be no progress.\textsuperscript{72}

The government responded with \textit{Tackling the ‘Compensation Culture’}\textsuperscript{73} which accepted the findings of the Better Regulation Task Force (BRTF), yet asserted that while the trend for claiming was ‘relatively static:’\textsuperscript{74}


\textsuperscript{68} Williams (n 16) 501; D. Marshall, ‘Compensation Culture,’ [2003] JPIL 79.


\textsuperscript{70} Morris (n 7) 349 - 378.

\textsuperscript{71} BRTF Report (n 1) 3 (emphasis added).

\textsuperscript{72} BRTF Report (n 1) 3.


\textsuperscript{74} \textit{Tackling} (n 73) 1.
The Government is determined to scotch any suggestion of a developing ‘compensation culture’ where people believe that they can seek compensation for any misfortune that befalls them, even if no-one else is to blame. This misperception undermines personal responsibility and respect for the law and creates unnecessary burdens through an exaggerated fear of litigation.\textsuperscript{75} (emphasis yours?)

There are statistical contraindications between various governmental committees.\textsuperscript{76} In 2006, the House of Commons Constitutional Affairs Committee concluded that there was ‘plenty of evidence of excessive risk aversion.’\textsuperscript{77} Conversely, the House of Lords Select Committee on Economic Affairs, found ‘no clear evidence to justify the widely-held view that the public are excessively risk averse or that Britain has become an excessively risk-averse society.’\textsuperscript{78} Furthermore, there is no way of measuring how many claims initiated are bogus or vexatious. Thus the ‘real problem’ is perception rather than reality. To hold steadfastly to the notion that a ‘compensation culture’ exists is to ignore the evidential dissonance between these concepts. This perception has led successive inter-party governments by the nose towards increased regulation, including legislation,\textsuperscript{79} of a ‘crisis’ which, by their own admission, is non-existent. What can explain this remarkable deduction?

III - What has propagated the myth? ‘Compensation culture’ as ‘Moral Panic’

Morris\textsuperscript{80} and Williams\textsuperscript{81} have separately surmised that the sociological theory of the moral panic\textsuperscript{82} underlies the emergence of the perception of a ‘compensation culture.’ The life-cycle of an alleged moral panic can be succinctly summarised thusly:

1. Something ... is defined as a threat to values or interests
2. This threat is depicted in ... recognisable form by media

\textsuperscript{75} Tackling (n 73) 1.
\textsuperscript{76} Annette Morris, ‘“Common Sense Common Safety”: the compensation culture perspective,’ [2011] 27(2) PN 82, 86.
\textsuperscript{79} Compensation Act 2006; more recently and contentiously, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter LASPO 2012).
\textsuperscript{80} Morris (n 2) 365.
\textsuperscript{81} Kevin Williams, ‘Politics, media and the refining notion of fault: section 1 of the Compensation Act 2006,’ [2006] 4 JPL 347, 349.
\textsuperscript{82} Cohen (n 2) in toto.
3. There is a rapid build up of social concern
4. There is a response from authorities ... 
5. The panic recedes or results in social change.\footnote{83}

Certainly, on this analysis, the ‘compensation culture’ bears the hallmarks of a quintessential moral panic, but this requires further scrutiny. Arguably, the perception that the ‘compensation culture’ is a reality, has gained credence from the pronouncements of prominent societal stakeholders including the judiciary, the government, and, perhaps most importantly for its power to infiltrate mass markets and distribute information, the media. Advocates of ‘blame culture’ theory attribute the rise of Claims Management Companies and the emergence of conditional fee structures and ‘no win-no fee’ advertising to changes to the legal structure, encouraging the advent of the dual ethos’ of ‘have a go.’\footnote{84} These ethoses are precursors to societal and moral deterioration, signalling the ‘decline in stoicism and personal responsibility’\footnote{85} which ‘stand at the root of civilised society.’\footnote{86} The whittling away of the British stiff-upper-lip is evidenced in two ways: firstly, an increased number of claims, finding inventive ways to sue, and secondly an increase in risk-aversion, where potential defendants reduce exposure to activities attracting liability, which is detrimental to society as a whole.\footnote{87}

There is a certain chicken-and-egg quality to the moral panic theory, such that it is impossible to say which came first: the media’s introduction of the ‘compensation culture’, prompted by the government, or the government’s introduction of measures to rectify the perception of a ‘compensation culture’ due to pressures from the media. To avoid getting bogged down in this convoluted mire, it is sufficient in the context of this article to deal with each stakeholder separately.

\textit{Judiciary}

Judges have repeatedly been some of the most vocal proponents of the theory that there \textit{is} a ‘compensation culture’ and have fought to eliminate it. Lord Templeman, anticipating the

\footnote{83} Kenneth Thompson, \textit{Moral Panics} (Routledge 1998) 8.  
\footnote{84} BRTF Report (n 1) 3.  
\footnote{85} Morris (n 2) 351.  
\footnote{86} M Hastings, ‘We are destroying the very concept of personal responsibility – the root of any civilised society’ \textit{Daily Mail}, 24 July 2003, 12.  
\footnote{87} Williams (n 81) 348.
debate in the eighties, lamented the assumption that ‘for every mischance in an accident-prone world someone solvent must be liable in damages.’

This was echoed by Lord Steyn: ‘the courts must not contribute to the creation of a society bent on litigation.’ At around the same time, Lord Hobhouse made his now famous proclamation in *Tomlinson v Congleton Borough Council*: ‘the pursuit of an unrestrained culture of blame and compensation has many evil consequences ... one is certainly the interference with the liberty of the citizen.’ This was further echoed by Baroness Hale: ‘the fear is that instead of learning to cope with the inevitable irritations and misfortunes of life, people will look to others to compensate them for all their woes, and those others will then become unduly defensive or protective.’

In a powerful and unequivocal recent speech, Lord Dyson argued that the perceived 'compensation culture' is but 'mere fantasy' and advocated 'a substantive educative effort on the part of government, the courts and the legal profession to counteract the media-created perception that we are in the grips of a compensation culture.' Whether this suggestion will be heeded, or is indicative of a creeping change of stance within the judiciary, remains to be seen.

**Academia**

Leading academics have also espoused the theory that a damaging ‘compensation culture’ has pervaded modern society. Weir ‘identifies doctrinal developments in the tort of negligence as having played an enormous part’ in the emergence of blame culture labelling it ‘pure plaintiff’s law.’ Judicial embracing of undeserving claims has turned Britain into a ‘wondrously unstoical and whingeing society.’

Atiyah posits largely the same thesis. He identifies the judiciary as having fostered a blame culture by developing existing doctrines in ways that have enabled more claimants to sue

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88 *CBS Songs* (n 32).
89 *Gorringe v Calderdame Metropolitan Borough Council* [2004] 1 WLR 1057 [2].
90 [2004] 1 AC 46 [81].
91 *Majrowski v Guys and St. Thomas’ NHS Trust* [2007] 1 AC 224 [69].
93 Dyson (n 92) [48].
94 Mullender (n 36) 7 providing a précis of Tony Weir, *Casebook on Tort* (10th edn, Thompson, Sweet & Maxwell 2004).
96 Weir (n 95) 54.
successfully.\textsuperscript{97} He cites the case of \textit{Barrett v Ministry of Defence},\textsuperscript{98} in which a heavily intoxicated naval airman, choked on his own vomit but attracted £70,000 compensation for his widow,\textsuperscript{99} as evidence of the crisis level of the compensation culture. On his view, the tort of negligence, particularly in relation to causation, has ‘stretched’ beyond an acceptable (yet unquantifiable) boundary.\textsuperscript{100} Furthermore, he believes that judges have a proclivity towards compensation because they know that the modern reality of tort law is that ‘damages will in almost every case be paid for by an insurance company, an employer, or a public body.’\textsuperscript{101} This is disingenuous and gives little credit to the judiciary.

Furedi has also had an impact on the debate. In \textit{Courting Mistrust: The hidden growth of a culture of litigation in Britain},\textsuperscript{102} one of the first academic research papers on the topic, he posits, \textit{inter alia}, that:

\begin{quote}
The culture of compensation is increasingly becoming separated from legal principles. It is interested mainly in finding someone who can be held liable and who can pay – and not in the issue of responsibility.\textsuperscript{103}
\end{quote}

Furedi’s account is the one most open to the critique of hyperbole: he claims that the ordinary experience of modern society is perceived as being fraught with risk and danger.\textsuperscript{104} Consequently, the ‘future is seen as a terrain which bears little relationship to the geography of the present,’\textsuperscript{105} has encouraged the emergence of the ‘victim’ as a ‘distinct identity.’\textsuperscript{106} This is couched in the language of panic.

\textbf{Media}

Even the most cursory Google search reveals the pervasive nature of the perception that a ‘compensation culture’ exists.\textsuperscript{107} Both conservative and liberal mainstream print media have

\begin{footnotesize}
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\item[\textsuperscript{97}] Patrick Atiyah, \textit{The Damages Lottery}, (Hart Publishing 1997) chaps 2 - 3.
\item[\textsuperscript{98}] [1995] 1 WLR 1217.
\item[\textsuperscript{99}] Mullender (n 36) 8.
\item[\textsuperscript{100}] Atiyah (n 97) 45.
\item[\textsuperscript{101}] Atiyah (n 97) 47.
\item[\textsuperscript{102}] Furedi \textit{Courting} (n 11); Frank Furedi, \textit{The Culture of Fear Risk-Taking and the Morality of Low Expectations} (Continuum Publishing 2002).
\item[\textsuperscript{103}] \textit{Courting} (n 11) 2.
\item[\textsuperscript{104}] Furedi \textit{Culture of Fear} (n 102) 113.
\item[\textsuperscript{105}] Furedi \textit{Culture of Fear} (n 102) 61.
\item[\textsuperscript{106}] Furedi \textit{Culture of Fear} (n 102) 100.
\item[\textsuperscript{107}] One such search ‘compensation culture UK’, carried out on 27 May 2013, returned 27.5 million hits – I’m unsure if this is correct or not.
\end{itemize}
\end{footnotesize}
written voluminous and sensational damning indictments of the ‘compensation culture.’\textsuperscript{108} The proliferation of this theory is aided by the advent of the internet, especially in the era of the 24-hour rolling news cycle. The print media were singled out in the 2004 BRTF Report, leading its drafters to implore the old adage ‘don't believe everything you read;’\textsuperscript{109}

Regardless of perception, the truth behind the ‘compensation culture’ is somewhat different to how it is portrayed by the media ... Many of the stories we read and hear either are simply not true or only have a grain of truth about them.\textsuperscript{110}

Part of the problem lies in the media’s conflation of genuine newsworthiness and entertainment, in addition to a mass readership that demands ‘infotainment.’\textsuperscript{111} Stories about individual and allegedly outlandish claims are easily sensationalised. Furthermore, the media have the unfortunate tendency of reporting the instigation of ‘trivial claims,’ sparking moral indignation and righteousness, but then failing to follow cases to logical ends.

Lunney and Oliphant\textsuperscript{113} provide a thorough recounting of the (in)famous ‘McDonalds Coffee Case,’\textsuperscript{114} the inaugural case of ‘compensation culture,’ as evidence of a sensationalised, and not even remotely accurate, media portrayal of a negligence case. Stella Liebeck bought a cup of coffee from a McDonalds drive-through, and wedged the cup between her legs to add cream. Contrary to reports, the car was stationary; nevertheless, the coffee spilled and a vascular surgeon determined that Liebeck suffered third-degree burns over 6% of her body, including her inner thighs, perineum, buttocks, genital, and groin areas. She was hospitalised for eight days, during which time she underwent skin grafting and debridement.\textsuperscript{115} Pre-trial discovery revealed that more than 700 similar claims were made against McDonalds in the decade preceding the claim instant. Moreover, McDonalds’ own quality assurance manager admitted that McDonalds’ coffee was served approximately 50°F hotter than other restaurants to optimise taste. At trial, a jury awarded the sum of $200,000 compensation plus $2.7m

\textsuperscript{108} See e.g. Rowena Mason and David Millward, ‘David Cameron to 'end compensation culture' for whiplash’ \textit{The Telegraph} 14 Feb 2012; Press Association, ‘Warning over compensation culture,’ \textit{The Guardian} 10 September 2010.

\textsuperscript{109} BRTF Report (n 1) 12.

\textsuperscript{110} BRTF Report (n 1) 12.

\textsuperscript{111} Morris (n 2) 634.

\textsuperscript{112} Mark Lunney and Ken Oliphant, \textit{Tort Law: Text and Materials} (4\textsuperscript{th} edn, OUP 2010) 37-8.

\textsuperscript{113} Liebeck v McDonald’s Restaurants (No. CV 93 02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994); also cited in the BRTF Report (n 1) 13.

\textsuperscript{114} Information as to injuries sustained are gleaned from the excellent documentary on the case, \textit{Hot Coffee}, HBO, premiered 27 June 2011.
punitive damages – the equivalent to two days of McDonald’s sales in coffee alone.\textsuperscript{116} This was reduced by the judge to a total of $640,000; and, in the end, Liebeck settled for an undisclosed sum, likely to be less than this amount.\textsuperscript{117}

The case has been used to imply that, the ‘excessive damages’ ascribed to US tort cases will take root in the UK. Such claims overlook the differences between the tort systems of these two nations\textsuperscript{118} and ignore the fact that similar cases against McDonalds in the UK have failed.\textsuperscript{119} Yet the popular rhetoric of the ‘compensation culture’ continues unabated:

\begin{quote}
We live in a compensation culture. Everyone's running scared of litigation. Terror of being sued means it's only minutes until pavements are painted with gigantic government warnings in case we catch our stilettos in a crack and sue the local council. And overpaid café lattes will carry huge labels lest you burn your tongue and slap a writ on them like the American plonker who gulped her McDonald’s coffee and took Ronald McD to the cleaners.\textsuperscript{120}
\end{quote}

Closer to home, Williams details the amusing anecdote of the Bury St. Edmonds hanging baskets.\textsuperscript{121} \textit{The Sun} reported that the local authority had voted to remove baskets for fear that the council would be sued in the event that one should fall. The story was reprinted in several forms across the spectrum of print media, from the \textit{Daily Mail} to \textit{The Guardian} thirty times in as many months.\textsuperscript{122} Yet ‘hardly any journalist seemed to notice that throughout the spring and summer the town’s traditional floral displays were hanging as usual, or that Bury won an “Anglia in Bloom” award.’\textsuperscript{123} Further evidence of ‘compensation culture’ has prescribed that curbing recreational activities, especially in the school environment, betrays a wilful ignorance of the evolution of practice rules which encompass thorough risk-assessment guidelines.\textsuperscript{124}

\begin{footnotes}
\item[116] Lunney (n 113) 38.
\item[117] Lunney (n 113) 38.
\item[118] Deakin (n 21) 6.
\item[119] \textit{Bogle v McDonalds Restaurants Ltd} [2002] EWHC 490.
\item[121] Williams (n 81) 349.
\item[122] Data from Williams (n 81) 349.
\item[123] Williams (n 81) 349.
\item[124] e.g. Leon Watson, ' Schools ripping out playground equipment to avoid being sued after millions of pounds paid out to hurt pupils' \textit{Daily Mail} 15 April 2013; 'Compensation Claims Involving School Staff Top £4m As 'no win no fee' Lawyers Cash In,' \textit{Daily Mail on Sunday} 11 November 2012 available at \url{http://www.dailymail.co.uk/news/article-2231196/Compensation-claims-4m-schools.html} sourced on 27 May 2013.
\end{footnotes}
Instead, attention-grabbing and salacious headlines prefer to suggest that there is a crisis in modern British society, due to its preoccupation with and predilection for claiming compensation, of seeking money for nothing at a time of unparalleled economic adversity and austerity. No section of society is immune to this accusation; a very recent *Daily Mail* article alleged that the armed forces are the latest to succumb to 'Britain's rampant compensation culture.' It reported the fact that over £340 million has been paid out to injured servicemen since 2005; that claims have risen from 365 in 2005 to 8815 in 2012. Despite the government’s additional rejection of over 11,000 claims, the author contends that this constitutes *prima facie* evidence that 'spurious and exaggerated claims' are rising, and that servicemen are trying to 'milk the system.' Citing a 'senior officer' at the Ministry of Defence, who suggests that the rise in claims 'is all part of the "me-first culture"' and that 'the old and bold veterans of the past would be turning in their graves', the article levies the blame squarely at the door of 'ambulance chasing lawyers.' Yet, it fails to mention that British armed forces have been engaged in hostile operations since 2005, that these operations have caused catastrophic injury to soldiers, and that many soldiers will require life-long care in order to reintegrate into civilian life.

The police have also been targeted recently for their litigiousness, with a surge of headlines like ‘Compensation Culture gone mad: police officer awarded £10,000 payout after falling off chair.' There are more general samples in recent articles fanning the flames of moral panic, such as this headline from the *Daily Mail*: 'The compensation culture is poisoning our society: fear of litigation is preventing teachers and health workers from doing their jobs.'

The articles cited herein are merely a select few, but they demonstrate the pervading ethos of the media on the subject of the compensation culture.

**Politicians**

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While collusion of Leveson-esque proportions between media and government is not evident, it is clear that the media have a strong influence on government policy and practice. Additionally, the notion of a ‘compensation culture’ has been exploited in the media by interest groups, particularly the insurance lobby, to promote their political and commercial interests.128 Pronouncements and lamentations, usually through the press, by prominent Members of Parliament, including, *inter alia*, David Davis, Stephen Byers, and Boris Johnson, combined with Prime Ministers Blair and Cameron, reveal that the perception of the ‘compensation culture’ crosses party lines. Agitation for tort reform led directly to the enactment of the Compensation Act 2006, which the ‘cynical observer’ might sum up thusly: ‘it provides nothing new in the law, to address a problem that doesn’t actually exist.’129 This view has the tacit approval of the courts:

> it does not seem ... that [section 1 of the Act] adds anything to the common law... [it] appears to have been introduced as a response to the perception of the growth of a 'compensation culture.' The draft bill was produced by the Department of Constitutional Affairs, and was accompanied by explanatory notes that asserted that [section 1] did no more 'than reflect the current law.' In that case it is somewhat difficult to see why it was felt necessary to enact it ...130

Despite the deluge of assertions that the ‘compensation culture’ does not exist, the perpetuation of this myth encouraged the government to commission a further report, *Common Sense Common Safety*, published in 2010, which is plagued by methodological issues and other problems,131 and reached largely the same conclusion as its earlier incarnation.132 While it made a raft of recommendations for confronting the claims crisis, it is unlikely any of these will be adopted.133

Instead, the current government has chosen to further expand the plethora of legislative provisions on the 'compensation culture' with the enactment of the Legal Aid, Sentencing and

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128 A remarkable recent case, *Simmons v Castle* [2013] 1 WLR 1239, raised the general damages threshold in negligence cases by 10%, as recommended by governmental report. The Association of British Insurers petitioned the Court of Appeal to 'rethink' their decision (source for this?). A full analysis of the facts and decision of the case are beyond the confines of this article, but are interesting for the interaction demonstrated between the courts and interested third parties when it comes to compensation.


130 *Wilkin-Show v Fuller* [2012] EWHC 1777 (Q8) (Owen J) at [41] - [42].


132 Morris (n 76) 95.

133 Morris (n 76) 95.
Punishment of Offenders Act 2012. This Act received Royal Assent on 1st May 2012, and the provisions relating to tort came into force on 1st April 2013. Part 2 of the Act (ss.44 to 48) was enacted for the purpose of facilitating reforms following from the publication of *Review of Civil Litigation Costs: Final Report (2009).* In this report, Lord Jackson propounded the adoption of 109 recommendations for reform. The major propositions, now enshrined, included the abolition of the recoverability of the success fee on conditional fees, the abolition of After the Event (ATE) insurance premiums as part of the costs of litigation, and the abolition of referral fees. This will have a major practical impact on the way in which negligence lawyers do their business, and has already lead to the restructuring of several leading negligence firms into Alternative Business Structures. What is most striking for the purposes of this thesis is not necessarily what the provisions say, but rather what they do not. The Act was ostensibly enacted with the aim of 'slashing £350 million from the £2.2 billion Legal Aid' annual bill, most controversially through the removal of entire legal swathes, such as family law, from the legal aid remit. However, the passage of the Bill through parliament reveals that the Act also promulgates a contentious moral agenda.

The comments of Parliamentary Under-Secretary for Justice, Jonathan Djangoly, during the Public Bill Committee hearing stage are especially revelatory of the current government's intentions in enshrining this Act:

> Our intention is to discourage unnecessary or frivolous claims ... we will be implementing ... through [primary legislation], amendments to the civil procedure rules, and secondary legislation, ... a package of measures aimed at reducing the volume of unworthy claims and reducing the high cost of litigation by evening out the position between claimants and defendants. In effect, access to justice must

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134 (TSO 2010) – not sure what this refers to
136 LASPO 2012 s. 44(4).
137 LASPO 2012 s. 46(2).
138 LASPO 2012 ss. 56 - 60.
139 For example, Irwin Mitchell has already secured ABS status; the Solicitor's Regulation Authority had issued 108 ABS licenses as of March 2013, with 300 further applications pending: [http://www.legalfutures.co.uk/latest-news/private-investor-backs-two-solicitors-abs-start-up](http://www.legalfutures.co.uk/latest-news/private-investor-backs-two-solicitors-abs-start-up) sourced on 27 May 2013.
140 Under the Legal Services Act 2007.
apply to defendants as well as to claimants.  

This suggests that the aim of the Act, as well as cutting costs, is to implement an indirect curb on the perceived ‘compensation culture.’ The reality is that access to justice will now be statutorily denied to many claimants across wide legal spheres, including many thousands claiming in negligence. The Act intends to level the playing field between claimants and defendants; to reapportion the risk to the claimant by ensuring that any legal costs they incur will be deducted from any quantum they receive; and, in so doing, ultimately discourage claimants from making claims. This was further demonstrated in comments at the House of Lords reading of the Bill: 'at the moment, a claimant has no interest at all in tackling mounting levels of costs ... without [the Act] high and disproportionate costs in civil litigation will continue. Access to justice will not become more meaningful for all parties.'

Yet, there was no discussion prior to enactment of the relative merits of compensation, or the theoretical underpinnings of the tort regime. Though recognising that very specific clinical negligence cases were undoubtedly 'meritorious' and deserving of legal aid, the legislature has wilfully ignored the needs of other cases. Though providing that there should be a general 10% increase in the level of damages awarded, this 'windfall' cannot shroud the fact that many thousands of claimants will now be deterred from 'chancing their arm' on a negligence claim, even when such an arm has been severely injured through no fault of their own.

The absence of factual data indicating the existence of a 'compensation culture,' and the concurrent presence of successive governmental acknowledgements that no such culture exists, begs the question of why governments remain tied to the post of legislating for change and reform. The true cynic may wonder if it could be argued that politicians, straddling the political divide, have latched on to the mass popularity of the ‘soundbite’ of ‘compensation culture’ in order to score electoral kudos. The popular perception of, and reaction to, alleged 'compensation cowboys' bears striking similarities to the vitriol aimed at 'benefit cheats' and 'welfare swindlers': there seems to be real conviction, evidenced across media to both the

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142 Hansard, HC Public Bill Committee, 13th Sitting, Col. 549 - 552 (13 September 2011).
144 Jonathan Djangoly (n 142) Col 553.
145 Recommended by the Jackson Report and given effect in Simmons v Castle (n 128).
146 Lord Jackson (n 134) ch 10, para 5.6.
147 Morris (n 2) 377.
right and left of the political continuum, that certain cohorts within modern British society will do anything to receive money gratis, including fraudulently claiming benefits or lodging spurious compensation claims. However, the irony of allocating valuable governmental resources towards legislating for a mythical problem, the perceived aim of which is to squander valuable governmental resources, abounds.

IV – Is there a need for reform?

The interplay between the societal stakeholders outlined and the general public indicate the advancement of a general proposition; the ‘compensation culture’ in modern society does not exist. However, it would be disingenuous to counsel that the tort of negligence is a doctrine of perfection, and it is submitted that aspects of negligence could be reformed to assuage fears of the ‘compensation culture.’ Commentators, even those who remain unconvinced about the ‘compensation culture’ agree that something has gone awry, with spiralling costs within the negligence sector particularly problematic.\textsuperscript{148} Proposals for tort reform have vacillated between ‘the idealistic, the utopian, the opportunistic and the patchy; rarely, however, does it nowadays embody really new thinking.’\textsuperscript{149} While academics theorise as to the possibilities of echoing the tort reform of other jurisdictions in the US,\textsuperscript{150} Australia,\textsuperscript{151} and Ireland,\textsuperscript{152} which have variably sought to cap compensation limits, or delimit the type of claim which will attract liability, others propound a universal system of self-insurance to combat the burden placed on the state’s budget.\textsuperscript{153} Nevertheless, it is submitted that further foundational inquiry is required.

It is posited that if we are to engage with tort reform it must aim to address more than the question of ‘compensation culture’: it must seek a substantive analysis of the purpose of negligence and the value of compensation. Increased rights awareness\textsuperscript{154} has borne a ‘society more willing than ever to look sympathetically at a wider spectrum of complaints, many of which would have been unimaginable fifty years ago.’\textsuperscript{155} But increased access to justice, and

\textsuperscript{148} Deakin (n 21) 13.
\textsuperscript{149} Deakin (n 21) 5.
\textsuperscript{150} Lunney (n 113) 40-2.
\textsuperscript{151} Lunney (n 113) 40-2; Goudkamp (n 131); Williams (n 16) 513.
\textsuperscript{152} Lunney (n 113) 40-2.
\textsuperscript{153} Cane (n 5); Steele (n 7) 17.
\textsuperscript{154} Lewis (n 64) 10.
\textsuperscript{155} Deakin (n 21) 5.
utilisation of the system through which justice is served, is not a moral wrong. It has inherent value. This message is often completely absent from the ‘compensation culture’ debate.

**Conclusion: ‘compensation culture’? : It’s all in the mind**

‘Compensation culture’ is a **pejorative term** and suggests that those that seek to ‘blame and claim’ should be criticised. It suggests greed; rather than people legitimately enforcing their rights. While tort may be ‘so fluid that one could find support, both judicial and academic, for almost any proposition one might wish to put forward,’ the judicial assertion that ‘we live in the age of compensation’ is wrong. This article has sought to demonstrate that the existence of a ‘compensation culture’ is a myth. It has analysed the evidence of case-law and statistics, as well as the theories of academics, to put forward the thesis that the so-called ‘compensation culture’ is actually a form of moral panic. Constant media portrayals and credence leant by powerful societal stakeholders mean that this moral panic ebbs and flows, but never wanes. As a result the tort of negligence is placed in a precarious position, such that negligence cases are now:

not mythical like the unicorn, not extinct like the dodo, but certainly an endangered species at the very least—and will become even more so once the combined impact of the funding changes in LASPO come into force in April 2013.

Whether negligence is entering another phase in its development and evolution, or is facing its demise, remains to be seen.

Corrective justice essentially identifies notions of individual responsibility, but attitudinal changes have shifted emphasis of the burden of such responsibility, seeking to reapportion blame from the defendant to the claimant. Thus, there is certainly a ‘blame culture’ in modern society, though not the sort envisaged by those societal stakeholders who have joined the debate. Rather, it refers to the blame levelled against the victim, the judiciary and the Shylock lawyers, for uncritically and selfishly seeking their pound of flesh for trivial harm.

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156 BRTF Report (n 1) 11.
157 BRTF Report (n 1) 5.
158 Deakin (n 21) 14.
159 Munroe (n 41) (Rougier J).
161 Jules Coleman (n 5) in toto; Steele (n 7) 16.
Victim-blaming, in which the individual who has suffered harm is rendered entirely or partially responsible for the transgressions committed against them, regardless of whether the victim actually had any responsibility for the incident, is rife and topical. It traditionally forms along race, gender and class lines; one may note again the parallels between the ‘compensation culture’ debate and current political and media debates about ‘chavs’ and ‘scroungers.’ That the explosion of 'compensation culture' theory has a class dimension to it is seemingly indubitable. There seems to be an issue not with a British society that is excessively litigious or endowed with compensation-zeal, but with a modern cultural mindset that seeks to blame claimants for the wrongs that befall them. There is real scope for interdisciplinary research into the interrelation between these tangential issues and the perception of the ‘compensation culture.’ Furthermore, there is scope for research into the role of the welfare state and, perhaps more interestingly, the impact of recession on the alleged ‘compensation culture.’

Homogenising all claimants, real and genuine, and holding them as guilty until proven innocent is damaging and unjust. It belittles the plight of those genuinely wronged. Not all claimants are avaricious, impecunious malingerers only interested in a payout. But the law is ‘currently in conservative mode ... and seems to be striking at the little guy, not the rich corporation.’ This is lamentable for it fails to recognise that compensation, if used appropriately, offers value to society.

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163 Deakin (n 21) 12.
A. Introduction

The character of space programmes has changed fundamentally. earlier/previous these programmes were oriented towards public purposes like exploration and experimentation, whereas now they focus on profitable commercial ventures, such as satellite telecommunications and intellectual property rights. As the scope and players in space exploration and use have expanded, the protection of outer space has become increasingly important. One of the perils to the environment of outer space is seemingly harmless space debris, which is usually defunct and discarded fragments of space objects. The space debris phenomenon is a human-made disaster, not only because it results in congestion of outer space, but also because it poses serious risks of collision with spacecraft and of transboundary harm to life and property. In fact, the International Law Association was compelled to frame the “International Instrument on the Protection of the Environment from Damage Caused by Space Debris” in order to highlight the growing threat of space debris.¹ These guidelines have also been acknowledged by the Scientific and Technical Sub-Committee of the United Nations Committee on the Peaceful Use of Outer Space (UNCOPUOS).² The Sub-Committee prescribe precautions against the creation of space debris, measures for debris mitigation, and strictures for assigning liability to the generators of such debris. Unfortunately, most spacefaring nations have not yet accepted the idea of binding third party settlement procedures, not in the least because the injury-causing debris are difficult to track and monitor. This (p)aper elaborates on these critical aspects of space debris pollution.

B. Defining & Identifying ‘Space Debris’

In order to find a consensus about the issue of space debris, it is of prime importance to define and understand the subject matter in terms of its formation and characteristics. While there is no internationally accepted definition of space debris, there are three ingredient factors which have been scrutinized in the light of the space law treaties to link space debris to state responsibility. These factors are: (a) the inclusion of space debris as a type of ‘space object’; (b) the question of liability arising as a consequence of space debris; and (c) the control and jurisdiction over such ‘space object’ as envisaged in the legal instruments.\(^3\)

The layperson definition of space debris would be any fragment or garbage that orbits around the earth in outer space.\(^4\) Debris is of two kinds, vis-à-vis ‘naturally occurring debris’ and ‘man-made debris’. Naturally occurring debris include meteoroids, while man-made debris are the ones generated by manned and unmanned space programmes of the world’s space-faring nations and international organizations. Since space debris are largely confined to earth orbits, they occupy a much smaller volume than do interplanetary natural materials.\(^5\) The reason why man-made space debris are more dangerous than naturally occurring debris is because they are permanently scattered in the orbital zones during their entire lifetime, thereby posing a risk over a greater period of time, whereas the meteoroids are transient and exist only in the near-Earth environment.\(^6\)

For the naturally-occurring debris, the decay period, i.e., the length of time an item of space debris will remain in outer space, is much shorter. These meteoroids are decomposed by natural decay mechanisms (such as atmospheric drag in the near-Earth environment) in a relatively short period of time. The man-made debris, with

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\(^3\) Esquivel de Cocca, “International Liability for Damages Caused by Persons or Space Objects in Outer Space or on Celestial Bodies to Persons, Properties or Environment in Outer Space or Celestial Bodies”, (1999) 42\textsuperscript{nd} Proc. Colloq. L. Outer Space, 50-58.


orbital periods more than ninety-five minutes, persist for longer periods in the orbits, and can cause an ‘essentially permanent threat’ to space navigation.\(^7\)

The International Academy on Aeronautics (IAA) in its “Position Paper on Space Debris,” states that only artificial objects can become space debris, thus excluding the meteoroid, which has been categorised as a ‘natural object’ based on its origin and velocity in the atmosphere.\(^8\) The IAA chooses to define space debris on the basis of its non-functional character. Ironically, non-functional satellites are not generally seen as space debris, thus the IAA definition has caused some concern. The Position Paper also identifies ‘orbital debris’ as special kinds of space debris, which are the fragments orbiting around the Earth.

Article I(d) of the Convention on International Liability for Damage Caused by Space Objects\(^9\) defines ‘space object’ to include component parts of the object and the launch vehicle thereof, and this definition has been reiterated in Article I(c) of the Convention on the Registration of Objects Launched into Outer Space\(^10\). However, this definition only shifts the issue rather than clarifying it. This is because although the Liability Convention provides an all-encompassing definition through the use of the words “component parts”, the term ‘component parts’ itself has not been defined. It is unclear whether inactive payloads, which are man-made debris, would qualify as ‘component parts’ or not, thus leading to a complex debate.

The problem before space-faring nations does not stop at the definition of debris, but spills into its identification. In the event that a given piece of debris is not defined as a ‘space object’, then it prevents attention by the Liability Convention. For instance, an object which has ceased functioning will not be identified as such by the owner State ‘as soon as practicable’\(^11\), because it is not a space object. This loophole in the treaty system has turned into an ‘escape clause’ for many States which would otherwise

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\(^10\) The Convention on the Registration of Objects Launched into Outer Space, 15 September 1976, 28 UST 695/ 1023 UNTS 15 [hereinafter, the ‘Registration Convention’].

\(^11\) See Registration Convention, Art. IV(1).
have been held liable.\textsuperscript{12} In the event that the piece of debris does prove to be a ‘space object’, it might be difficult to locate it or trace its origin. The problem therefore is two-fold: defining the subject matter and then identifying it. A strict interpretation of the origin-based definition in treaties does not seem to be favourable, and the debate has shifted towards adopting a functional approach instead, where the function of the object is used to categorise the damage-causing material.\textsuperscript{13} The function test could prove to be the optimal solution in defining and identifying space debris.

\begin{itemize}
\item[] \textbf{C. Space Debris Pollution: Causes and Consequences}
\end{itemize}

Human space activities are mainly concentrated in three orbits above the earth: low earth orbit (LEO), which is 200 to 2,000 km above earth; the semi-synchronous orbit, which is 10,000 to 20,000 km high; and the geosynchronous Earth orbit (GEO) which is about 36,000 km high, into which the various satellites and crewed or un-crewed spacecraft are released by the spacefaring nations.\textsuperscript{14}

Generally, the higher above Earth’s atmosphere a satellite orbits, the longer it will persist in the orbit. At LEO level, atmospheric drag causes the satellites to decay eventually, such as the first satellite, the Soviet Union’s Sputnik 1, which decayed from its low orbit in less than three months after its launch. On the other hand, a GEO satellite is likely to orbit for millions of years, as atmospheric drag is absent, which is why USA’s Vanguard 1 Satellite is still orbiting the GEO since 17 March 1958.\textsuperscript{15}

It is no wonder then that of the approximately 25,000 orbiting artificial objects catalogued in the past four decades, more than 8,500 still remain aloft. Most of these are now defunct or non-functional and have no business orbiting there. Moreover, they continuously shed fragments like lens caps, booster upper stages, nuts, bolts, paint chips, motor sprays of aluminium particles, glass splinters, waste water, and bits


\textsuperscript{15} Portree and Loftus.
of foil. Sometimes, solar heating can cause a debris-producing rupture in the propellant tanks, or explosion of anti-satellite (ASAT) weapons. These fragments may be of any size, from 1000 cm across to 1 micron, and may number in the trillions. Most of them cannot be tracked because of their minute sizes and because they move through space at very high velocities.¹⁶

All of these moving artificial objects have the potential to collide with other objects in space.⁵ The average speed of collision being 10 km/second, even the smallest collision can pack a massive kinetic energy and serious damage to the target. For instance, even a paint chip as small as a grain of salt can dent a 3mm pit in a space shuttle. With every collision, more fragments are produced, and the cycle continues.¹⁷ The table below shows the ever-growing volume of debris in outer space.¹⁸

[Table showing data on space debris]

Tracking and monitoring space debris has thus proved to be extremely difficult. A recent report by the National Research Council’s scientists in the U.S. has warned NASA that the amount of space junk orbiting the Earth is now actually at its ‘tipping point’, that is, the point where debris would be generated at a much faster rate than it

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¹⁶ Portree and Loftus.
¹⁷ Portree and Loftus.
¹⁸ “Inter-Agency Space Debris Coordination Committee Space Debris Mitigation Guidelines Update”, 45th Session of the Scientific and Technical Subcommittee United Nations Committee on the Peaceful Uses of Outer Space, 2008 (Presentation) [hereinafter, the “IADC Update”].
would be removable by natural forces.\textsuperscript{19} If the debris population continues to grow, it will soon threaten \textit{all} operational space vehicles.

The risk of collision lies not only to functional space vehicles, but also to the territory and life on earth itself. Case in point, in 1978, Cosmos 954, a Soviet nuclear-powered satellite, fell from orbit, re-entered the earth’s atmosphere, and broke up over Canada. Resulting in scattered radioactive debris across the Northwest Territories, putting the Canadian population at serious risk.

The problem does not end there. Orbital slots and radio spectrum, which are provided by the ITU, have now become scarce resources, because advancements in technology and demand for high-speed data communications have caused the skies to become congested with new satellites. When these satellites go defunct, yet continue to orbit the earth, they become useless (\textit{paper}) satellites. New-comers have to expend enormous amounts of labour, time and money to fit their satellites into the crowded skies\textsuperscript{20}, and all this violates the Recommendations of the International Telecommunication Union [hereinafter, the ‘ITU’]\textsuperscript{21}(ITU). For example, Article 29 of the World Administrative Radio Conference (WARC)\textsuperscript{22} prohibits disturbances and interference in radiofrequencies by satellites, which are in an inoperative state, and Article 35 of the International Telecommunication Union Convention, 1982\textsuperscript{23} obliges States from causing harmful interference with their stations to the activities carried out by other States.

Apart from the risks of collision and overcrowding of ITU slots, the very existence of space debris is illegal internationally. The Outer Space Treaty of 1967\textsuperscript{24}, which has
arguably become customary international space law states that all activities must be carried on for the ‘benefit and interests of all countries’, and that outer space shall never be subject to national appropriation. Indeed, the concept that ‘sic utere tuo ut alienum non laedus’, i.e., States may exercise their rights, but only without prejudice to other States’ interests, is also envisaged under Principle 21 of the 1972 Stockholm Declaration which allows States to exploit their resources pursuant to their own environmental policies, provided that their activities do not cause damage to areas beyond their national jurisdiction. Thus, a defunct satellite or space debris left behind in any orbit violates the Outer Space Treaty because: (a) it does not produce a benefit for mankind; (b) its use is not in the interest of all countries; and (c) it occupies a portion of space, causing national appropriation.

Space debris is, therefore, a cause of outer space pollution. Article IX of the Outer Space Treaty provides for a general rule on prohibition of contamination to the environment, which would include prohibition of space debris pollution as well. Article IX also talks of prohibiting ‘potentially harmful interference’ with the activities of other States, which would include the risks of collision and congestion of outer space posed to spacefaring nations. However, Article IX is often seen as an extremely generic and a non-coercive provision, which may not be binding on most countries.

There is, albeit, some debate as to whether the risks posed by space debris in outer space would fall within the ambit of ‘damage’ as defined under various legal

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30 See Outer Space Treaty, Art. I.

31 See Outer Space Treaty, Art. I.

32 See Outer Space Treaty, Art. II.

instruments. Damage has been defined under Article I of the Liability Convention to include loss of human lives, personal damage or other prejudices to health or property, but it omits any reference to damage caused to the environment by harmful contamination and dangerous interference, thereby posing a difficulty in identifying damage caused by space debris.\textsuperscript{34}

In the past, the environment of outer space has received protection mainly against use of nuclear weapons\textsuperscript{35}, changes to environment due to military or hostile purposes\textsuperscript{36}, radioactive substances\textsuperscript{37} and ‘sci-lab perception’ activities\textsuperscript{38}. Extending the protection against space debris in an express manner would go a long way in protecting the outer space for posterity.

Indeed, the prohibition of space debris pollution is mired in international customary customary norms of precautionary principle\textsuperscript{39} and sustainable development\textsuperscript{40}. Principle 15 of the Rio Declaration explains the precautionary principle: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” The precautionary principle is applicable to outer space\textsuperscript{41}, because the danger of its overcrowding and pollution by space debris is dire\textsuperscript{42}, all spacefaring countries must take feasible preventive measures against it. Similarly, the sustainable development principle envisions that space use should balance human needs of both

\textsuperscript{35} For example, see The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 1963, 480 UNTS 43 / [1963] ATS 26 / 2 ILM 889 (1963) [hereinafter, the Partial Nuclear Test Ban Treaty, or the ‘PTBT’].
\textsuperscript{36} For example, see The Environmental Modification Convention, formerly the Convention on the Prohibition of Changes to the Environment for Military or other Hostile Purposes of 1977, 1108 UNTS 151 / [1984] ATS 22 [hereinafter, the ‘ENMOD’].
\textsuperscript{37} For example, see The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, G.A. Res. 34/68, U.N. Doc. A/RES/34/68 (Dec. 5, 1979), reprinted in 18 I.L.M. 1434 (1979) [hereinafter, the ‘Moon Agreement’], Art. VII.
\textsuperscript{38} Baker, (n 34) 89; Sgroso, (n 26) 82.
present and future generations\textsuperscript{43} and respect the limits of nature.\textsuperscript{44} Both these norms impose a duty of due diligence\textsuperscript{45} on every nation seeking to launch space objects\textsuperscript{46} to ensure that space debris is not allowed to proliferate in an already crowded environment. The breach of such duty would amount to negligence.\textsuperscript{47}

It was indeed in negligence of this duty when China performed its anti-satellite test in January 2007, which involved an intentional collision with its own weather satellite, and then again in February 2009 by the accidental collision between the Russian Cosmos 2251 and US-owned Iridium 33 satellites. These two collisions were enough to negate the consequences of more than 20 years of international compliance to mitigation guidelines, and since then, the amount of cataloged debris in orbit has more than doubled.\textsuperscript{48} It is clear that this long-lived problem of growth in the space debris population, as a result of debris self-collision and propagation requires (due to the self-collision and propagation of debris), forces the international community to take a strong long-term stance to safeguard the space environment for future generations.

D. Assigning Liability for Space Debris Pollution

When it comes to assigning liability for space debris pollution, the scenario becomes extremely difficult. Article VI of the Outer Space Treaty provides that States shall bear international responsibility for all their national activities carried out in outer space.\textsuperscript{49} If a particular national activity involves the creation or propagation of space debris, then the launching State is identified as the appropriate jurisdiction and should bear responsibility.\textsuperscript{50} However, this is possible only when the object causing such a

\textsuperscript{43} See the Stockholm Declaration, 5.
\textsuperscript{44} J Scheffran, “Peaceful and Sustainable Use of Space: Principles and Criteria for Evaluation”, in R. Bender et al. (eds.) Space Use and Ethics (Agenda Verlag 2001), 49-80.
\textsuperscript{45} Corfu Channel Case (United Kingdom v. Albania), Preliminary Objections, ICJ (5 March, 1948), 22; Trail Smelter Arbitration (United States of America v. Canada), (1941) 3 RIAA 1911, repr. in 35 Am J Int’l L 684, 713.
\textsuperscript{47} Baker (n 33) 89; Lamperitus, 18; Ian Brownlie, Principles of Public International Law (7th ed., OUP, 2004), 134-153.
\textsuperscript{48} See 2011 NASA Report (n 19).
\textsuperscript{49} See Outer Space Treaty, Art. VI.
\textsuperscript{50} See Outer Space Treaty, Art. VIII.
situation is capable of being tracked, catalogued, and constantly monitored; the technology to do so is extremely sensitive and expensive.\(^{51}\)

Similarly, the definition in the Liability Convention does not prove to be of much help to the international community in allocating liability for harms caused by space debris. The Liability Convention relies on the origin-based definition for space debris, and would be in effect whenever a ‘space object’ of one country causes damage. However, this leaves room for doubt in a situation where the component part of the space object is supplied by another country. The confusion in this situation may be alleviated if the space object and its additional related information were registered with the Secretary General of the United Nations under Article IV of the Registration Convention, thereby ensuring transparency. However, the registration of the ‘details’ of the space object—including its ‘component parts’—is only optional. Therefore, making disclosures mandatory would prove useful in allocation of liability, as has been prescribed under Article VIII of the Outer Space Treaty.

The Registration Convention also poses a hindrance in the form of jurisdictional issues. The Registration Convention clearly allows the registered State to establish jurisdiction and control over the concerned space object\(^ {52}\). This might have a negative impact, however, on the country which faces a threat from the object but is restricted by the registered nation from taking necessary actions.\(^ {53}\)

Moreover, even though Article III\(^ {54}\) of the Liability Convention assigns liability for damage caused elsewhere than on the surface of the Earth, including damage to a space object of another State, the question of burden of proof remains a difficult nut to crack. While debris in space are self-propagating, the tracking, detecting and monitoring of them are sensitive processes and nearly impossible. When the origin of the debris is unidentifiable, liability too becomes difficult to assign.

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\(^{51}\) Perek, (n 41); Christol, (n 41).
\(^{52}\) See also Outer Space Treaty, Art. VIII.
\(^{53}\) Von der Dunk (n 12).
\(^{54}\) See Liability Convention, Art. III.
Another view is that a distinction should be drawn between the ‘responsibility’ mentioned under the Outer Space Treaty\(^55\) and the ‘liability’ mentioned under the Liability Convention.\(^56\) The Outer Space Treaty speaks about absolute liability, where accountability arises immediately when a breach of an international obligation is produced, even if the State had unintentionally failed in its duty to prevent or repress such breach. On the other hand, the Liability Convention adopts the traditional fault-based liability principle, requiring wrongful intent to be established on part of the launching State.\(^57\) Professor Bin Cheng, however, adopted the median view that the Outer Space Treaty is the starting point of absolute liability, while the Liability Convention only takes it a step forward.\(^58\)

It is a glaring lacuna in both these visionary legal instruments that in case the damage-causing object is unidentified and application of jurisdiction becomes impossible, then they do not prescribe what manner of assigning liability should be adopted to meet the interests of justice.\(^59\) Consequently, some scholars like Mark J. Sundahl, have suggested the ‘market-share liability’ principle.

This new doctrine of market-share liability has been propounded in space law\(^60\) to remedy ‘indeterminate defendant’ situations, wherein a plaintiff unable to identify the defendant that actually caused his injury, can recover damages on a proportional basis from each of the group of likely actors engaged in such harmful activity.\(^61\) The market-share liability principle requires that: (a) there must be a significantly compelling need for a remedy, such as compensation for damage (b) the product must be fungible in respect of risk uniformity, i.e., the risk posed to the space object by each actor must be identical, and (c) determination of the product market share of

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\(^55\) See Outer Space Treaty, Art. VII.
\(^56\) See Liability Convention, Art. III.
\(^59\) Lampertius, (n 46) 455-459.
Each actor at the point of launching the suspect space object.\textsuperscript{62} The Market Share Liability principle allows for the apportionment of the compensation received for the loss caused, amongst all the shareholders as per their respective shareholding.\textsuperscript{63} Each actor involved would then \textit{pro rata} share the risks of in-orbit accidents brought into motion by their actions at \textit{that} point of time.\textsuperscript{64} Thus, by applying the market-share liability principle\textsuperscript{65}, the liability is allocated in proportion to the risk contributed, and not the harm caused.\textsuperscript{66} The burden of proof would be shared among the various actors to prove causation and consequence.\textsuperscript{67} The market share liability principle has been mainly applied by domestic courts in cases where the symptoms appeared so late that the manufacturer of the harmful product proved to be unidentifiable, such as cases of asbestos exposure to workers.\textsuperscript{68}

There have been criticisms against the market-share liability principle, mainly because it departs radically from the tortious principle of causation, and has not found universal consensus.\textsuperscript{69} Even the Liability Convention is not based on market-share liability principle, but joint-and-several-liability principle instead.\textsuperscript{70} A strong plurality of courts has rejected that doctrine for a variety of reasons\textsuperscript{71}. Some of these reasons include its impracticability to space law\textsuperscript{72}; difficulties in determining ‘market share’

\textsuperscript{63} Geistfeldt, 144.
\textsuperscript{65} See Articles on State Responsibility, Art. 42(b) and Art. 47.
\textsuperscript{67} Sundahl, (n 62).
\textsuperscript{70} Lampertius (n 46) 459; Sundahl (n 62).
in orbital debris\textsuperscript{73}; its inherent inequality\textsuperscript{74} and imprecision\textsuperscript{75}; and ignorance of several other variables\textsuperscript{76}.

In any case, it is regrettable that though the dangers posed by space debris are many, the jurisprudence for allocating liability for the damage caused by them is yet unclear.

As Judge Guido Calabresi once observed about tort litigation:

“In cases that are dramatic and involve ‘hot’ issues, there is a tendency for the parties to describe themselves as raising new issues that are remarkable in their legal context. But in fact, such cases are usually best looked at in the most traditional of ways. Courts must see how these cases fit into old categories before considering whether it is either necessary or proper to expand those old categories or to create new ones.”\textsuperscript{77}

Perhaps the time has not yet come to adopt a radical market share liability principle, but the time has indeed come to take a firm legal stance on assigning liability for space debris pollution and damage.

E. Space Debris Mitigation

Debris mitigation techniques have been the subject of debate for a long time now. In May of 1977, INTELSAT was the first body to propose debris clearing by transferring defunct geostationary satellites into a separate disposal orbit. Mission-related debris-reduction was discussed in 1979 at the International Astronautical Federation (IAF) Congress in Munich.\textsuperscript{78} Finally, under an interdisciplinary approach of debris mitigation\textsuperscript{79}, two kinds of space debris mitigation measures were envisaged: (a) debris-prevention i.e. measures which curtail the generation of potentially harmful

\textsuperscript{73} Beck.
\textsuperscript{75} Rostron, (n 61), 205-212.
\textsuperscript{77} McCarthy v. Olin Corp., n 71.
space debris in the near term; and (b) debris-removal, i.e., measures which limit generation of potentially harmful space debris over the longer term.\footnote{UN Commission on Peaceful Uses of Outer Space, Inter Agency Space Debris Coordination Committee Space Debris Mitigation Guidelines, U.N. Doc. A/AC.105/C.1/L.260 (Nov. 29, 2002) [hereinafter, the ‘IADC Guidelines’].}

Debris-prevention focuses on the curtailment of the production of mission-related debris and the avoidance of break-ups. Debris-prevention is mainly practiced at the designing and launching stages, and though debris-creation cannot be prevented absolutely, it can certainly be minimized. Debris-removal refers to end-of-life procedures that remove a decommissioned spacecraft from the orbital regions populated by operational spacecraft.\footnote{IADC Guidelines.} It may be in several forms, the most commonly cited ones being: controlled or uncontrolled atmospheric reentry, transfer to a disposal orbit above LEO, and direct retrieval, \textit{e.g.}, the U.S. Space Shuttle.\footnote{Nicholas L Johnson, “The Disposal Of Spacecraft And Launch Vehicle Stages In Low Earth Orbit”, Publication for the NASA Johnson Space Center, Houston (USA.), 1-9.} Uncontrolled de-orbiting, or ‘atmospheric re-entry’, involves maneuvering of the spacecraft to a lower orbit for which atmospheric drag will decay the structure within a given time frame, \textit{e.g.} 25 years; whereas controlled de-orbiting refers to the direct retrieval and de-orbiting of the defunct spacecraft.\footnote{Holger Burkhardt, \textit{et al.}, “Evaluation Of Propulsion Systems For Satellite End-Of-Life De-Orbiting”, Publication for the American Institute Of Aeronautics And Astronautics, Doc No AIAA 2002-4208 (2002). See also L. Perek, “Legal Aspects of Space Debris: A View from Outside the Legal Profession”, (1995) Proc. 38th Colloq. L. Outer Space, 53-55.}

Several mitigation-standards for defunct satellites and space debris have been set forth in international instruments on de-orbiting defunct satellites, primarily, the Space Debris Mitigation Guidelines framed by the Inter-Agency Space Debris Coordination Committee\footnote{The Inter-Agency Space Debris Coordination Committee [hereinafter, the ‘IADC’] is the international forum for the coordination of activities related to the issues of man-made and natural debris in space (11 governmental space agencies vis-à-vis ASI, BNSC, CNES, CNSA, DLR, ESA, ISRO,JAXA, NASA, NSAU, ROSCOSMOS). For more information, see \url{http://www.iadc-online.org/index.cgi}.}, which were later also adopted by the UNCOPUOS,\footnote{See IADC Guidelines, ¶5.3.2.} and the Recommendations of the International Telecommunication Union\footnote{See ITU Recommendations, (n 21).}. These debris mitigation guidelines contain requirements which include limiting debris during normal operations, suppressing deliberate break-up of rockets or payloads, and
properly disposing of spacecraft and upper stages, typically by moving them to “graveyard” orbits or by de-orbiting them into the atmosphere, where most burn up.\textsuperscript{87} These requirements may be summed up as the following\textsuperscript{88}:

- Space systems should be designed in a way to not release debris during normal operations, or the release should have minimal effect on the outer space environment.
- Spacecraft and launch vehicle orbital stages should be designed to avoid failure modes, which may lead to accidental break-ups during operational phases.
- The design and mission profile of spacecraft should also be such that the probability of accidental collision in orbit can be estimated and limited.
- Spacecraft owners should avoid intentional destruction and other harmful activities, so as to limit the orbital lifetime of resulting fragments.
- Spacecraft owners should minimize the spacecraft’s potential for post-mission break-ups resulting from unused stored energy, which is the prime source of debris-creation.
- There must be limitation of the long-term presence of spacecraft in the LEO region after the end of its mission; they must be removed from the LEO in a controlled or uncontrolled manner, or they should be disposed of in other non-functional orbits.
- Spacecraft in the GEO region that have become defunct should be left in other orbits that avoid their long-term interference with the GEO region.
- Spacecraft operators must also ensure that debris from the LEO that survives to reach the surface of the Earth does not pose an undue risk to people or property, including through environmental pollution caused by hazardous substances.\textsuperscript{89}

\textsuperscript{87}“Space Debris Spotlight”, Focus On Feature (European Space Agency Portal, September 28, 2007) <http://www.esa.int/esaCP/SEMHDJXJD1E_FeatureWeek_0.html> accessed 28 Jan 2012.
\textsuperscript{88}See generally, IADC Guidelines.
\textsuperscript{89}See generally, IADC Guidelines.
Unfortunately, there are several complications with the debris-removal proposals. In fact, the general belief is that post-mission space clean up is neither technically feasible nor economically viable.  

This is mainly because de-orbiting maneuvers require the spacecraft to be equipped with extremely sophisticated technology, including special shields and alternative propulsion devices. These, in turn, would add to the mass of the craft. To compensate for the latter, the amount of fuel load would have to be reduced. This automatically implies a shorter lifespan for such a spacecraft, and hence, less returns for the investors. Moreover, as the mass of the spacecraft increases, the launching and de-orbiting costs would also proportionately increase. These expenditures would include costs for the development of the enabling technologies, for possible adaptation, qualification, manufacturing, testing, and integration of de-orbiting system’s hardware & software; increased launch cost due to increased mass and complexity of satellite; and de-orbiting ground control station operation costs.  

Adopting the disposal guidelines would impose real and substantial costs on the spacecraft industry and its customers. If the regulations took the form of fixed standards, they would also deprive most spacecraft owners and operators of their precious flexibility to evaluate relevant factors on a case-by-case basis. Thus, de-orbiting a decommissioned spacecraft would not be a cost-effective or feasible venture; the space powers would therefore have to rely on preventive measures to mitigate the contamination, yet even those are costly.

Apart from the feasibility of debris mitigation measures, the most glaring drawback to these guidelines is that none of these form international customary law, and are

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92 Burkhardt, (n 83).
therefore not legally binding on the spacefaring nations. Some scholars have stated that they cannot even be said to represent the precautionary approach. According to them, the precise import of the precautionary principle is unclear in a *lex specialis* such as outer space. The International Court of Justice and other tribunals, have often refrained from recognizing the precautionary principle as custom. The risks of space debris are not 'reason (enough) to believe' that grave, *irreversible* damage has been caused, which could have been mitigated by *practicable* measures.

Additionally, the debris-mitigation norms mentioned above came into being much after in time to the point of injury i.e. satellite decommissioning. It would be unreasonable to impose a duty of care retrospectively on the States, which already have defunct spacecrafts in orbit. Moreover, the guidelines allow for up to twenty-five years to de-orbit defunct satellites. This seemingly safe limitation period may not be enough for debris mitigation.

The quandary before us is that debris-creation is inevitable. It can only be reduced, not prevented absolutely. It cannot be cleaned up, and even its reduction is not a binding obligation. It falls to the international community to develop consensus regarding the application of jurisdiction, allocation of liability, compliance of international guidelines, and the enforcement of penalties. The danger, however, is

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95 Progress Report, 136-42.
101 *Gabčíkovo*, (n 98); *Nuclear Tests*, (n 98), 253; *Bluefin Tuna*, (n 99); *Beef Hormones*, (n 99); *MOX Plant Case*, (n 99). See also Gray & M Bewers, “Towards a Scientific Definition of the Precautionary Principle” (1996) 32 Mar Poll Bull, 768-71; Patricia Birnie & Alan Boyle, *International Law And The Environment* (2nd ed, OUP 2004), 117.
104 Holger Burkhardt, (n 83).
that the search for such consensus is such a prolonged process that it might take too much time—time that the Earth does not have.105

F. Need for a Legislative Framework: Conclusion & Suggestions

Since mankind’s first small step into outer space, the world has changed greatly. The space treaty regime must change with it. The foremost debate between nation States revolves around the definition of term ‘space debris’. The technical nature of the subject has been a cause for countries’ indecisiveness to arrive at a comprehensive decision. Most nations in recent times have argued in favour of a definition that (a) includes “all objects likely to give rise to liability”106, (b) provides clear definitions of space debris and ‘space objects’, (c) that allows for allocation of liability to the culpable State(s).107 International consensus must be generated for a major revamping of the existing legal instruments in order to incorporate a definition of space debris similar to that in the 1994 ILA Draft Instrument.108

The reluctance to identify space ‘debris’, compounded with the Liability Convention’s failure to hold culpable actors accountable, poses serious problems to future space developments.109 Even the measures of mitigation are uncertain and economically inaccessible for most spacefaring nations. Overcoming the problem of space debris pollution is an even bigger challenge in the face of the national security interest of countries, which intentionally generate space debris and refuse to ratify international rules. The most recent example is that of China, which deliberately did not incorporate certain guidelines with reference to space debris mitigation within its domestic laws110, and openly disobeyed international laws by destroying its own...

106 Gupta, (n 13).
109 Gupta, (n 13).
satellite in a ‘test operation’, producing space debris. The worst-case scenario with respect to space debris has come to be referred to as the Kessler syndrome, where the volume of space debris in the LEO is so high that the risk of further collisions increases to the point where launches become nearly impossible.\textsuperscript{111}

To mitigate the threats posed by space debris, active steps must be taken by the legal regime, including harmonized licensing of space activities; pre-launching cost-benefit analyses to be carried out by nations to leave scope for future mitigation measures; development of more cost-effective debris mitigation mechanisms; and increased cooperation of intergovernmental organizations (like INTELSAT, ESA and IMSO). There are also repeated clamours for a World Space Organization that could become the platform for all legislation, enforcement, and dispute-settlement in relation to space activities. A global instrument like the 1994 ILA Instrument must be adopted by the international community, which not only incorporates clear definitions, but also equally clear rules on application of jurisdiction, examination of national security interests, assignment of liability, imposition of penalties, and rules regarding abandonment and salvage-like rights in relation to space debris.\textsuperscript{112}.

Some time ago, NASA proposed\textsuperscript{113} the ORION Project, which would utilize laser and earth sensors for the uncontrolled re-entry of various-sized debris into the earth’s atmosphere to effect harmless burn up.\textsuperscript{114} Once proper funding becomes available, NASA claims that the system could be operational in two years.\textsuperscript{115} This is a hopeful note for the future of space debris mitigation endeavours.

\textsuperscript{112} Frans Von der Dunk, (n 12).
\textsuperscript{113} Peter R de Selding, “Experts Take Steps to Solve Debris Problem”, \textit{Space News} (March 24-30, 1997), 3.