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# Act 919 of 2016 and its Contribution to Governance of the Upstream Petroleum Industry in Ghana

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## Abstract:

In August 2016 the Ghanaian Parliament marked the advent of a new era for the country's nascent petroleum industry with the enactment into law of the *Petroleum (Exploration and Production) Act [Act 919]*. *Act 919* is considered to represent a major milestone in the legislative history of the upstream oil and gas industry in Ghana. The main objective of this article is to assess the new statute's fitness for purpose through a critical examination of its regulatory aspirations and its underlying legislative presumptions. The discussion is set against the historical background of petroleum exploration and production in Ghana.

## Keywords:

Ghana; Act 919; petroleum law; contractual and fiscal regime; petroleum exploration and production; Ghana petroleum funds; resource curse thesis.

**Word count: 13,581 words (all inclusive).**

## 1. Introduction

On 4<sup>th</sup> August 2016 the Ghanaian parliament marked the advent of a new era for the country's nascent petroleum industry with the enactment into law of the *Petroleum (Exploration and Production) Act, 2016 [Act 919]*. *Act 919* is considered to represent a major milestone in the legislative history of the upstream oil and gas industry in Ghana. The defining ethos of the new petroleum law is a strategic positioning of the oil and gas sector as the hub of the Ghanaian economy. This is with a view to ensuring for the sector the status of an engine or catalyst for economic growth. The main objective of this article is analyse the key provisions of the new law, and to reflect on the legislative background to the upstream petroleum industry in Ghana. The paper appraises the new statute's fitness for purpose through a critical examination of its regulatory aspirations together with its legislative ambitions. The discussion is set against the historical background of petroleum exploration and production in Ghana.

*Act 919* overlays a substantial *corpus juris* of legislative enactments which together make up the legal framework governing the upstream petroleum industry in Ghana. As such, it could be argued to be in effect a consolidating statute. Evidence of this can be found in its many overlapping provisions, replicating as it does some aspects of the *Ghana Model Petroleum Agreement* (MPA) of 2000, together with aspects of the fiscal regime contained in previous legislation and fiscal instruments. Overlapping provisions in the overall legal framework have, inevitably, led to some inconsistencies. Also identified in the concluding sections of this paper are a number of obsolete provisions from previous legislation and instruments. The final part of the article outlines a number of recommendations, including the need to streamline the legislative framework as a whole with a view to reconciling inconsistent provisions and excising redundant references from current texts.

## 2. Historical Overview of the Petroleum Industry in Ghana

Better known for its gold mining and cocoa industries, Ghana is a relatively newcomer to the international petroleum scene. However, the history of oil exploration and prospecting in Ghana stretches back to 1896. A review of the petroleum industry in Ghana reveals four main historical phases as follows:

## 2.1. Phase 1 - Origins of petroleum in Ghana

This period covers of the early colonial era right up to 1957. Oil exploration activity in Ghana dates back to 1896 in what was then the Gold Coast under British colonial administration. The first shallow onshore wells drilled in Tano Basin, now in the Western Region of Ghana. Exploration took the form of wildcat drilling with no systematic pattern. Prospecting activities focused on areas with the presence of oil and gas seepages which were known to the early explorers.

Despite what appeared to be a favourable geological environment together with the early promising signs and the fact that most of the shallow wells encountered hydrocarbons in shallow horizons, such unsystematic and opportunistic wildcatting activities did not lead to any significant discoveries. Estimates of the number of onshore exploratory wells drilled in the Tano Basin during this initial phase from 1896 to 1957 range from 17 to 21 onshore wells.<sup>1</sup> The Gulf Oil Company, through its acquisition of four onshore exploration licenses and the drilling of four wells, marked the end of this initial 61 year phase in the petroleum exploration history of Ghana. From a legal perspective, the most notable feature of this phase is the absence of a specific legal framework dedicated to the petroleum industry. From 1962 to 1984, petroleum exploration and development licences were issued under the *Minerals Act 1962 (Act 126)*.

## 2.2. Phase 2 - Offshore exploration

The second period of oil exploration in Ghana coincides with the post-independence era from 1957 to 1979. This phase ushered in the onset of offshore exploration with a concentration of interest in the continental shelf. With all of the 22 continental shelf exploration blocks fully licensed by 1968,<sup>2</sup> this period represents the offshore phase of the petroleum industry in Ghana. The early exploration was conducted mainly by Soviet and Romanian teams, with the Industrial Export Company of Romania at the forefront of exploration efforts both onshore in the Kata Basin and also offshore.<sup>3</sup> This phase also marked the introduction of a minimum work obligation for exploration licence holders, with a requirement to drill at least one well to a total depth of 12,000 ft within 18 months of signing the exploration agreement.<sup>4</sup>

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<sup>1</sup> <http://www.petrocom.gov.gh/exploration-history.html>: accessed on 12 November 2016.

<sup>2</sup> *Ibid.*, p.2.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

The period from 1972-1979 witnessed the intensification of exploration efforts with the drilling 17 wells, 15 of which were offshore. However, the only significant discovery was the Saltpond Oil Field which came on-stream in 1978 following the initial discovery by Signal/Amoco Group in 1970. On the whole, the exploration effort during this phase remained rudimentary. The datasets were poor and it is likely that some onshore wells such as Takoradi 11-1 were possibly drilled off-structure.<sup>5</sup>

### 2.3. Phase 3 - Sector-specific legislative and institutional developments

From a legal perspective, the period from 1979-2001 marks the most important phase in the petroleum industry in Ghana, ushering in a raft of petroleum industry statutory instruments aimed at instituting a robust regulatory framework for governance of the sector. The forerunner of these legislative instruments was the *Ghana National Petroleum Corporation Law [PNDC 64]* of 16 June 1983, which established the institutional framework for upstream petroleum activities. This law can truly be considered as constituting the bedrock of petroleum legislation in Ghana. With exploration efforts continuing to yield promising results, there has been a corresponding increase in sector-specific legislative and statutory instruments. Key amongst these are the *Petroleum Exploration and Production Law [PNDC 84]* of 1984; the *Petroleum Revenue Management Act of 2011 [Act 815]*; and the *Petroleum Commission Act of 2011 [Act 821]*,<sup>6</sup> the *Petroleum Income Tax Law [PNDC 188]* of 1987, and the *Petroleum Commission Fees and Charges Regulations*.

The Ghana National Petroleum Corporation (GNPC) was established in 1983 to provide the institutional framework for upstream petroleum operations in Ghana. It was the statutory product of *PNDC 64*. Section 2 outlines the “Objects” of the GNPC. These include undertaking petroleum exploration, development, production and the disposal of petroleum products. The corporation is also tasked with ensuring the maximisation of benefits to the nation from petroleum resources,<sup>7</sup> including technology transfer, capacity building, the training of nationals in the acquisition of petroleum industry skills and technical expertise,<sup>8</sup> and sound environmental practices in petroleum development.<sup>9</sup> As part of its mandate, the GNPC is to engage in petroleum operations and enter into association agreements for

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<sup>5</sup> *Ibid*, p.3.

<sup>6</sup> See further A.J. Banful, “Ghana’s Present Legal Framework for Upstream Petroleum Production”, in K. Appiah-Adu (Ed.), *Governance of the Petroleum Sector in an Emerging Developing Economy (2013)*; pp.145-162; Gower Publishing. ISBN 798-1-3155-8550-5.

<sup>7</sup> Section 2(2)(b) of *PNDC 64*.

<sup>8</sup> Section 2(2)(c) and (d).

<sup>9</sup> Section 2(2)(e).

petroleum development including exploration, production, storage and transportation of petroleum products.<sup>10</sup> Article 2.4 of the Ghana Model Petroleum Agreement (MPA) provides for a minimum of 10% initial carried interest in all petroleum agreements (GNPC's participating interest in fields currently under production such as the TEN oilfield is 15%).<sup>11</sup>

PNDC 64 was closely followed by the *Petroleum Exploration and Production Act* [PNDC 84] of 1984. It was the first piece of legislation to contain substantive provisions regulating petroleum exploration and production. The piece of legislation has now been repealed and superseded by the new *Petroleum (Exploration and Production) Act* of 2016.

The Jubilee Oilfield discovery of 2007 was followed a few years later by a number of legislative and institutional initiatives, prominent amongst which were the enactment of the *Petroleum Revenue Management Act* of 2011 and the establishment of the Petroleum Commission of Ghana as the country sought to capitalise on the gains from the new discoveries. The main objective of the *Petroleum Revenue Management Act* [Act 815] is to provide a legal framework to govern the collection, allocation and management of revenues accruing from upstream and midstream petroleum operations.<sup>12</sup> To this effect *Act 815* confers on the Minister of Finance and the Bank of Ghana the role of 'custodians' of the Petroleum Holding Fund (PHF).<sup>13</sup> They are assisted in this function by the Investment Advisory Committee.<sup>14</sup>

One of the main features of *Act 815* is the establishment of the Ghana Stabilisation Fund (GSF) which functions as a holding account for excess revenue in periods of high oil prices. The objective of the fund is to utilise the excess revenue to stabilise public expenditure in a low oil price market.<sup>15</sup> The other major contribution of the Act is the establishment of the Ghana Heritage Fund (GHF)<sup>16</sup> whose objective is to provide an endowment, through savings and investments, aimed at promoting long term development goals for future generations. Both the GSF and the GHF are funded through allocations from the PHF.<sup>17</sup> *Act 815* aspires to ensure the efficient, diligent and judicious utilisation of

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<sup>10</sup> Section 2(3)(a-f).

<sup>11</sup> <http://www.tulloil.com/operations/west-africa/ghana/ten-field>; accessed on 13 November 2016.

<sup>12</sup> See generally, *Republic of Ghana: 2015 Annual Report on the Petroleum Funds*; <http://www.mofep.gov.gh/sites/default/files/reports/petroleum/2015%20Annual%20Report%20on%20the%20Petroleum%20Funds.pdf> accessed on 17 November 2016.

<sup>13</sup> *Act 815*, Sections 25-26.

<sup>14</sup> Sections 29-40.

<sup>15</sup> Section 9.

<sup>16</sup> Section 10; see further F.K. Otto, "A Review of Ghana's Heritage Fund under the Ghana Petroleum Revenue Management Act 2011 (Act 815)", 39 *Journal of Law, Policy and Globalisation* (2015), 1-15.

<sup>17</sup> See further F. Ayensu, "Managing Ghana's Oil Revenue: Ghana Petroleum Funds (Gpfs)", 1(2) *Asian Journal of Humanities & Social Sciences* (2013), 148-161.

petroleum revenues for the benefit of all Ghanaian citizens. The guiding principles of *Act 815* can thus be said to include government responsibility and accountability for revenues generated from petroleum development, transparency, sustainability, and inter-generational equity as evidenced by the establishment of the GHF.

On 31 July 2015, the Ghanaian Parliament passed into law the *Petroleum Revenue Management (Amendment) Act [Act 893]* with a view to addressing the acknowledged shortcomings of *Act 815* and the poor financial performance of the heritage fund. Evidence of poor performance can be seen in the fact that the cap or minimum amount to be held in the stabilisation fund has been progressively reduced over the years, with the “excess” amount transferred into the annual budget or used to service the national debt. Section 4 of the new *Act 893* (which amends Section 11 of *Act 815*) stipulates that not more than 70% of benchmark petroleum revenue shall be allocated to the Annual Budget Funding Amount (ABFA). This, in effect, guarantees to the Ghana Petroleum Funds (GSF and GHF) receipts of not less than 30% of benchmark petroleum revenue from the PHF. Under Section 5 of *Act 893* (amending Section 12 of *Act 815*), withdrawals or transfers from the stabilisation fund into the annual budget is restricted to three purposes: (a) alleviating shortfalls in petroleum revenue; (b) transfers into the Contingency Fund; and (c) debt repayment. The amendment further provides that transfers for the purpose of alleviating revenue shortfalls shall not exceed 75% of the outstanding balance in the stabilisation fund. Furthermore, Section 13 of *Act 893* (amending Section 57 of *Act 815*), now provides funding for the thirteen-member Public Interest Accountability Committee (PIAC) from the annual budget fund in a measure aimed at promoting greater oversight, accountability and transparency in the management of oil revenues.

It is hoped that these remedial measures should in the long term address the acknowledged deficiencies which in the past have stalled the growth of the Ghanaian petroleum funds. Initially set at US\$ 250 million at its inception, the threshold minimum amount for the stabilisation fund was reduced to US\$ 150 million in 2015 and currently stands at US\$ 100 million.<sup>18</sup> It may well take another period of sustained growth in oil prices for the funds to be replenished.

As the government embarked on these legislative and regulatory initiatives, developments were also taking place further afield with the modernisation of exploration

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<sup>18</sup> See further “Stabilisation Fund reaches all-time low, faces collapse”, *Business and Financial Times of Ghana*, November 16, 2016: <https://asokoinsight.com/news/stabilisation-fund-reaches-all-time-low-faces-collapse-ghana>; accessed on 18 November 2016.

methods and the increasing use of seismic surveys, first 2D (from 1983-1989) and then 3D (from 1989 onwards) – thus leading to the acquisition of better-quality data sets and much improved prospecting results.<sup>19</sup>

#### 2.4. Phase 4 - Modern era (2001 to present)

Phase 4 marks the modern era of the upstream petroleum industry in Ghana with the onset of commercial oil production, and the acquisition of the status of a net petroleum exporter. This phase was heralded by the coming on-stream of the offshore Jubilee Oilfield, which comprises of the Mahogany 1 (M-1) and Hyedua (H-1) exploration wells drilled into what has been described as “... high quality stacked reservoir sands with large continuous accumulations of light sweet crude oil”.<sup>20</sup> Approximately 5 miles apart, the two wells provide the hub for the Jubilee Oilfield which straddles the West Cape Three Points and Deepwater Tano licence blocks. The field was discovered by Kosmos Energy in 2007 and developed by Tallow Oil Plc in the role of operator, with commercial production commencing in 2010. Participating interests in the field are as follows: Tallow (35.48%), Kosmos (24.08%), Anadarko (24.08%), GNPC (13.64%) and Petro SA (2.72%).<sup>21</sup> Daily production from the field in 2015 was 102,600 bpd.<sup>22</sup> It is expected that this production figure will be boosted following approval of Tallow’s Greater Jubilee Full Field Development Plan.

The Jubilee Oilfield currently occupies the prime position as the jewel in crown of Ghana’s nascent petroleum industry. In second place is the TEN (*Tweneboa, Enyenra and Ntomme*) Oilfield discovery which is located offshore, and west of Jubilee. With Tallow Oil as the operator, when fully developed TEN is expected to yield 76,000 bpd. The field forms part of Ghana’s strategy to double its current oil production by the year 2021.<sup>23</sup> It is worth noting that in 2012 petroleum displaced cocoa as the second export income earner for Ghana after gold.<sup>24</sup> With increasing production, there is a good prospect that oil could one day become the primary export earner, furnishing the income generation and thus the catalyst for economic growth.

There have not been any significant onshore discoveries to date. However, following a 40-year hiatus, a major onshore exploration programme (the Voltaian Basin Project (VBP)),

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<sup>19</sup> *Supra*, note 1.

<sup>20</sup> <http://www.tallowoil.com/operations/west-africa/ghana/jubilee-field>; accessed on 17 November 2016.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> <http://www.bloomberg.com/news/articles/2013-04-24/ghana-oil-output-to-more-than-double-by-2021-with-new-fields>

<sup>24</sup> *Ibid.*



has been launched by the GNPC. Covering the period 2015-2019, VBP is described by the GNPC as a 5-year initial project aimed at 2D seismic data acquisition and processing, establishing prospectivity, enhancing knowledge base of the Voltaian Basin, and increasing the petroleum reserve base of the country.<sup>25</sup>

Legislative initiatives during this phase include the enactment of the *Petroleum Commission Act* in 2011 [Act 821]. Act 821 established the Petroleum Commission of Ghana and conferred on it the regulatory role for the upstream petroleum industry. Section 2 of the Act outlines the mission or objects of the Commission, its main function being “... to regulate and manage the utilisation of petroleum resources and to co-ordinate the policies in relation to them.” Other tasks of the Commission include, *inter alia*: to monitor petroleum activities through inspections; to enforce compliance by upstream petroleum operators with relevant regulations (including compliance with fiscal metering requirements); to promote local content and local participation as prescribed by *PNDC 84*; to ensure optimal utilisation of petroleum infrastructure; and to receive and store petroleum data and manage the national petroleum repository.<sup>26</sup>

Listed amongst the Commission’s most important functions are to receive applications and issue permits for specific petroleum activities (i.e. role of licensor),<sup>27</sup> and to assess and approve appraisal programmes.<sup>28</sup> Section 3(a-c) of Act 821 re-assigns to the Commission the fledgling regulatory role conferred on the GNPC under Section 24(2) of the *Ghana National Petroleum Corporation Law* of 1983 [*PNDC 64*] by requiring the Commission to “... promote planned, well executed, sustainable and cost efficient petroleum activities ... for the overall benefit and welfare of [Ghanaian] citizens,”<sup>29</sup> and to monitor compliance by industry operators with national policies, laws, regulations and agreements relating to petroleum activities.<sup>30</sup> Also re-assigned to the Commission is the advisory role once ascribed to the GNPC under Section 2(3)(a) of *PNDC 64*. Under Act 821, part of the Commission’s role is now to provide recommendations and advice to the relevant Minister on a wide range of issues relating to upstream petroleum development activities and policies.<sup>31</sup> From a regulatory perspective, the Act 821 represents a significant milestone in the legislative

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<sup>25</sup> <http://www.gnpcghana.com/operations.html> accessed on 18 November 2016.

<sup>26</sup> For a full list of the Commission’s functions, see Section 3(a-n) of Act 821.

<sup>27</sup> Act 821 Section 3(h).

<sup>28</sup> Section 3(g).

<sup>29</sup> Section 3(a).

<sup>30</sup> Section 3(c).

<sup>31</sup> Section 3(b) and (j).

framework which marks the evolution, and emergence, of the upstream petroleum industry in Ghana on the international stage.

Also noteworthy during this phase is the *Petroleum Authority Act* of 2005 (*Act 691*), which has been amended by the *Petroleum Authority Act* of March 2016. The Act establishes the National Petroleum Authority which acts as the regulatory agency for the downstream oil industry in Ghana. The scope of this paper is limited to the upstream sector, hence the functions of the NPA will not be considered here in full.

### 3. *Act 919* of 2016 and associated instruments governing the contractual and fiscal regime

The *Petroleum (Exploration and Production) Act, 2016 [Act 919]* represents the anchor and fulcrum of the legal framework governing the upstream petroleum industry in Ghana. The new legislation emanated from the *Petroleum (Exploration and Production) Bill*, after a troubled passage beset by many setbacks and delays following a lengthy period of consultation. Much of the misgivings and opposition to the bill, mainly from civil society organisations but also from legislators, centred on the proposed change from the production sharing contract under the old legislation (*PNDC 64* and *PNDC 84*) to a hybrid system under the new law. The new contractual regime, the Ghana Royalty Tax/ Hybrid system, is a fiscal based system infused with minority state participation (represented by GNPC) on the basis of 10-15% carried interest equity participation.<sup>32</sup> The opposition to the new law, spearheaded by the *Fair-Trade Oil Share-Ghana* campaign, has continued even after the passage of the new law, whose enactment the group perceives to have proceeded with precipitate haste.<sup>33</sup> They also argue that the many amendments at the bill stage (with more than 100 proposed amendments in the draft stage and a further 45 proposed amendments after the first reading of the bill) constitutes evidence of a tacit rejection of the new law by Ghanaian legislators.<sup>34</sup> However, it is important to point out that despite strident opposition in some quarters, many commentators have welcomed the enactment of the new Act.

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<sup>32</sup> As seen above, Article 2.4 of MPA provides that GNPC shall have a 10% initial interest in all petroleum operations on a carried interest basis. Under current petroleum agreements such as the ‘TEN; project, the GNPC’s participating interest is 15% (*supra*, note 11).

<sup>33</sup> <http://www.resourcegovernance.org/blog/ghanas-petroleum-exploration-and-production-bill-steps-forward-room-improvement>; accessed on 2 December 2016.

<sup>34</sup> *Ibid.*

The advent of the new legislation has given rise to official and public optimism founded on the hope that the new Act will presage the advent of a new era for the petroleum industry in Ghana - with the upstream petroleum sector serving as a springboard for economic growth and the catalyst for the transition to an emerging economy. *Act 919* replicates some of the provisions of the MPA which govern the contractual and legal regime, as well as some of the fiscal provisions contained in earlier legislation and instruments which preceded the Act. This overlapping has given rise to some inconsistent provisions which will be highlighted as part of the discussion in a latter section of this paper.

From a structural and organisational point of view, *Act 919* comprises of 13 parts divided into 97 sections. For the purpose of this paper, the pertinent areas of the Act are Parts IV, V and VI <sup>35</sup> (Sections 10-37) which govern the contractual regime for exploration and production) and Part XII (Sections 85-89) which govern the fiscal regime. Also included in the discourse will be other relevant aspects such as environmental provisions and decommissioning. The analysis in this section of the paper will comprise of three main sections: the first part will examine the key principles of the new law; in the second part aspects relating to the contractual regime will be discussed alongside relevant provisions of the MPA, the *JV Guidelines* of 2016, and the *Local Content and Local Participation Regulations, 2013 [L.I. 2204]*. In the third part the fiscal provisions will be discussed together with relevant aspects of the *Petroleum Income Tax Act, 1987 [PNDC 188]*, and the *Petroleum Commission (Fees and Charges) Regulations, 2015 [L.I. 2221]*.

### 3.1 Key principles and defining philosophy of *Act 919*

The stated objective of *Act 919* is to provide a robust legal and regulatory framework capable of meeting the challenges posed by the advent of a new era in the upstream petroleum industry in Ghana – to wit, the era of commercial production. Key amongst these challenges are financial and environmental factors, as well as deriving optimum benefits for the Ghanaian economy through local participation in upstream activities. The Act also seeks to ensure the maximum utilisation of local content/ materials in petroleum exploration and development activities. The guiding philosophy of *Act 919* is thus to ensure the safe, secure, sustainable and efficient development of oil and gas resources, with the aim of achieving optimal long-term exploitation of deposits.<sup>36</sup> The ultimate aspiration of the Act is the use of

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<sup>35</sup> These parts have headings but are not numbered in the Act. The author's numbering here is done for the purposes of analytical convenience.

<sup>36</sup> Section 2: "Object of the Act".

petroleum revenues for the benefit and welfare of Ghanaian citizens, and for the advancement of inter-generational equity.

The key principles informing the conception and the ethos of *Act 919* can be identified as follows:

- **Sustainability:** through the sound, efficient and secure management and exploitation of oil and gas resources, together with the avoidance of waste<sup>37</sup>, in order to ensure long term recovery of deposits in line with international best practice. Concerning the principle of efficiency, the Act mandates the coordination of petroleum development activities and the implementation of unitisation programmes where petroleum deposits straddle the common boundary of contract areas or blocks. This is with a view to ensuring optimum recovery through single unit operations from the common basin.<sup>38</sup> The Act also legislates a minimum work obligation requirement during the exploration period, together with a corresponding minimum expenditure amount during each working period of the exploration phase.<sup>39</sup> The financial penalty for failure to comply with the minimum work requirement is payment by the Contractor to the GNPC of a sum equivalent to the amount required to complete the unfulfilled portion of the work programme for the relevant working period.<sup>40</sup>
- **Principles of good governance and transparency<sup>41</sup>:** the former is aimed at ensuring maximum returns and benefits to the local economy through the judicious utilisation of petroleum revenues. To this effect provisions promoting local participation,<sup>42</sup> local content maximisation under a progressive 10-year plan,<sup>43</sup> and the training and employment of Ghanaian citizens,<sup>44</sup> all feature prominently in the Act. Furthermore, foreign oil companies are required under *Regulation L.I. 2204* to incorporate a local

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<sup>37</sup> To this effect Section 32 includes provisions on the utilisation of associated natural gas. Section 33 complements this by incorporating restrictions on gas flaring. See also Article 14 of the MPA which outlines special provisions for natural gas.

<sup>38</sup> Section 34.

<sup>39</sup> Section 23(1) mirrors the provisions of Article 4 MPA on minimum exploration programme.

<sup>40</sup> Section 23(2).

<sup>41</sup> Section 4. See further K. Appiah-Adu and N.K. Appiah-Adu, "Towards Good governance in Ghana's Petroleum sector", in K. Appiah-Adu (Ed.), *supra*, note 6, 79-88; and P.R.P. Heller, "Civil Society and the evolution of Accountability in the Petroleum sector", in K. Appiah-Adu, *ibid*, 89-108.

<sup>42</sup> For example, through local incorporation and joint venture partnership between foreign companies and indigenous Ghanaian enterprises: Section 70. See also the *JV Guideline*, 2016.

<sup>43</sup> Sections 61-67, and Section 71. Also relevant in this regard are the *Local Content and Local Participation Regulations, 2013 [L.I. 2204]*

<sup>44</sup> Section 60, in line with similar provisions in Article 21 MPA on employment and training of Ghanaian citizens in the upstream petroleum sector.

subsidiary in the form of a joint venture company, with at least 5% participation by an indigenous Ghanaian company.<sup>45</sup> However, the *JV Guidelines* prescribe a minimum of 10% participation for indigenous companies.<sup>46</sup>

The Ghana Petroleum Holding Funds and the Ghana Petroleum Funds concepts (which preceded Act 919) are equally informed by the need to promote good governance and generational equity in the management of petroleum resources.<sup>47</sup> The principle of transparency, on the other hand, requires the Petroleum Commission to establish and maintain a public register of all petroleum agreements, licences, permits and authorisations.<sup>48</sup>

- A conducive and enabling environment for attracting foreign direct invest (FDI): *Act 919* aims to attract private investors into the upstream oil and gas sector by attempting to introduce transparency in the licensing procedure. In furtherance of this objective, an open, competitive and transparent tender process serves as the prelude to entering into the petroleum agreement.<sup>49</sup> Moreover, a new element has been introduced which did not exist under the previous petroleum regime – to wit, the requirement for the Minister to publish in the Gazette, and in at least two other State-owned national newspapers (or other medium of public communication), an invitation to tender or an invitation for direct negotiations.<sup>50</sup>

There are, however, a number of developments associated with the Act which seem to be at odds, or in potential conflict, with the aspiration to attract FDI into the upstream petroleum sector for exploration and development. From an FDI perspective, this could be cause for concern to potential oil and investors from overseas. If incremental improvement is adopted as the yardstick for measuring the attractiveness of the new petroleum regime under *Act 919* over its predecessor, then the change from what was a contractual regime based on negotiated terms and conditions to an administrative licensing model (albeit with elements of transparency and negotiated residual terms) seem a retrogressive step. From a conceptual point of view, the licensing regime raises far more questions concerning security of tenure

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<sup>45</sup> Section 4(2) of the *Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I.2204)*.

<sup>46</sup> See *JV Guidelines*, Article 4.3.

<sup>47</sup> Established under the Petroleum Revenue Management Act 2011 (Act 815)

<sup>48</sup> Section 56.

<sup>49</sup> Section 10(3).

<sup>50</sup> Section 10(6).

than a contractual regime based on fully negotiated terms and conditions, and therefore subject to the sanctity of contract doctrine.

Far from allaying these concerns, the stabilisation clause contained in Article 26.2 of MPA raises the spectre of a potential conflict with Section 20 of *Act 919*. Article 26.2 of MPA guarantees the stability of the terms and conditions of the petroleum agreement as at the effective date, including rights and obligations derived under relevant petroleum laws and regulations. It further provides that such rights acquired under the petroleum agreement shall not be modified, altered, amended or supplemented except on written agreement executed by the parties, and that any unilateral legislative or administrative act of the State or its agencies which purports to vary the terms of the agreement shall constitute a breach by the State party.<sup>51</sup> Section 20 of *Act 919*, on the other hand, provides that a petroleum agreement may be reviewed by the parties where there is a material change in circumstances. Furthermore, any such review will be subject to ratification by Parliament in accordance with Article 268 of the Constitution of Ghana where the review leads to a material change in terms and conditions.<sup>52</sup> Admittedly, the review envisaged under Section 20 is predicated on mutual agreement of the parties. But this still raises the question as to what would transpire if the investor party objects to such a review by invoking the stabilisation clause under Article 26.2 of MPA.

The conception of Ghana's new petroleum regime under Act 919 draws not only on public consultations, but also on a review of international practices and industry lessons from as far afield as Alaska, Alberta, Azerbaijan, Nigeria, Norway, Sao Tome and Principe, and Trinidad and Tobago. The Norwegian model, in particular, appears to have exerted a defining influence on Ghana's policy makers<sup>53</sup>, with collaborative NORAD-Ghana projects aimed at identifying the most effective policies for Ghana's nascent petroleum industry.<sup>54</sup>

From a benchmarking perspective, the Chatham Guidelines provide a set of parameters generally considered by civil society organisations to be the hallmark of aspirations towards best practice in the extractive industries. The key Chatham benchmarks

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<sup>51</sup> Article 26(2) MPA, 2000. See further C. Amankwah, "Issues of Stability in Ghana's Model Petroleum Agreement" (2014) 2:1 *UKLSA Legal Issues Journal*, 1-34.

<sup>52</sup> Section 20(2).

<sup>53</sup> See further A. Mensah, *The Norwegian petroleum Experience: A Model for Ghana?* Masters Thesis, Norwegian University of Life Sciences, (2012).

<sup>54</sup> A. Disch, O. Rasmussen and J. Asamoah, "Oil for Development Ghana, 2010-2014: Moving Towards a 'Second Generation' Programme? A Review of Norway's Support to the Petroleum Industry in Ghana", NORAD Collected Reviews, (2015). ISBN: 978-82-7548-763-4. See also, OECD: "Breaking the Mineral and Fuel Resource Curse in Ghana", Development Co-operation Report, (2012).

are transparency in the licensing system, sustainability in the operation of upstream activities, and accountability in the management of petroleum revenues.

Section 20(1) has also attracted criticism on account of the vagueness of the language employed to justify a potential review: to wit, material change of circumstances prevailing either at the time of the execution of the agreement, or at the time of the last review. Critics point out that Section 20 required the use of more explicit language in line with the *Chatham House Guidelines for Good Governance in Emerging Oil and Gas Producers*, which requires revision or renegotiation only in the event of extreme unfairness or destabilizing social or environmental factors.<sup>55</sup> It is in view of this lack of detail in its articulation, together with the potential conflict with Article 26(1) of the MPA, that Section 20 could be said to fall short of the standards associated with international best practice.

The guiding principles of *Act 919* are contained in Part I (Sections 1-5) of the Act under “General Provisions”. Section 3 incorporates a standard provision assigning ownership or property to petroleum *in situ* to the Republic of Ghana - with title vested in the President on behalf of, and in trust for, the citizens of Ghana. Furthermore, the conduct of petroleum activities can only be undertaken under a duly authorised licence or petroleum agreement, and in accordance with applicable laws.<sup>56</sup>

### 3.2 Provisions governing the contractual framework

Section 9 of *Act 919* prefaces the provisions on the contractual framework by outlining the requirements for the granting of a reconnaissance licence. The latter confers on the licensed person a non-exclusive right to undertake seismic surveying, data collection and shallow drilling with a view to processing, interpretation and evaluation of the petroleum data collected from the licensed contract area. Under Section 9(3), the Minister may in special cases grant an exclusive right to undertake reconnaissance activity, but without prejudice to any proprietary rights which the State may have in relation to the data collected. The reconnaissance licence is granted for an initial period of 3 years, renewable for a maximum period of 2 years.<sup>57</sup> It is normally issued for an area which is not already covered by a petroleum agreement or authorisation.<sup>58</sup>

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<sup>55</sup> <https://www.chathamhouse.org/publication/oil-gas-good-governance-guidelines-2015>; accessed on 14 December 2016. Although seemingly vague at first sight, Precept 3 needs to be read in conjunction with other complementary provisions which incorporate the ethos of these benchmarks, as well as other ethical aspects and values considered as pre-requisites for good oil industry practice.

<sup>56</sup> Sections 5 and 11.

<sup>57</sup> Section 9(5).

<sup>58</sup> Section 9(7-8).

Section 10-20 contain provisions governing the petroleum agreement, whose normal duration is 25 years.<sup>59</sup> The petroleum agreement shall only be entered into following an open and transparent process of competitive public tender, except where the Minister decides otherwise.<sup>60</sup> As seen above, as part of the transparency initiative all invitations to tender or for direct negotiations shall be published in the *Gazette* and other communication media.<sup>61</sup> Section 10(13) requires the ratification of all petroleum agreements by the Ghanaian Parliament in line with Section 268 of the Constitution. The contract area covered by the petroleum agreement may consist of a single block, of multiple blocks, or of part(s) of a single block.<sup>62</sup> The remaining sections of Part IV contain standard provisions on involvement in petroleum activities by the Corporation (GNPC);<sup>63</sup> Ministerial approval of operators;<sup>64</sup> change of operator or sub-contractor ownership;<sup>65</sup> assignment of licence rights;<sup>66</sup> sub-contracting;<sup>67</sup> pre-emption;<sup>68</sup> transfers of assets to the Corporation;<sup>69</sup> and stipulations on the review of licence terms and conditions.<sup>70</sup>

Provisions governing the contractual aspects of exploration are outlined in Sections 21-25 of the Act. Under section 21(1) the stipulated exploration period is a maximum of 7 years from the effective date of the petroleum agreement entering in force. This period may be extended in exceptional circumstances, or if a discovery is made in the seventh year, in order to allow sufficient time for an appraisal as to whether the discovery constitutes a commercial deposit.<sup>71</sup> These provisions mirror Article 3 of the MPA, albeit the latter is more detail in providing for an “Initial Exploration Period” of 7 years followed by a “First Extension Period” and a “Second Extension Period”, and where applicable, further extensions. The exploration agreement is automatically terminated at the end of the 7 years period if no commercial discovery is made and no application for an extension of the exploration period has been made by the Contractor.<sup>72</sup> Section 22 prescribes the requirements for relinquishment of part, or of the whole, of the exploration acreage. Article 5.1 of MPA

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<sup>59</sup> Section 14(1).

<sup>60</sup> Section 10(3-4).

<sup>61</sup> Section 10(6)

<sup>62</sup> Section 12.

<sup>63</sup> Section 11.

<sup>64</sup> Section 13

<sup>65</sup> Section 15.

<sup>66</sup> Section 16.

<sup>67</sup> Section 17.

<sup>68</sup> Section 18.

<sup>69</sup> Section 19.

<sup>70</sup> Section 20.

<sup>71</sup> Section 21(5).

<sup>72</sup> Section 21(7).



further prescribes the portions of the contract area to be relinquished: at least 50% of acreage (as at the effective date of the petroleum agreement) at the start of the first extension period and at least 75% (as at the effective date) at the commencement of the second extension period.

Section 23 contain provisions stipulating the minimum work obligations for the exploration period, with a corresponding minimum expenditure amount which shall be specified in the petroleum agreement. In line with Section 23 of *Act 919*, Article 4.1 of the MPA requires that exploration operations should begin expeditiously and no later than 60 days after the effective date. Furthermore, Article 4.2 contains an outline template or draft schedule for the minimum exploration programme for each phase of exploration work. The template includes requirements to specify the description of work (including minimum depth of wells), and the minimum expenditure for the period. Under Article 4.4, the drilling of appraisal wells and seismic surveys conducted as part of appraisal programmes do not count towards fulfilment of minimum work obligations. Section 24 of the Act provides for exploration drilling by the Contractor (pursuant to a drilling permit obtained for the Ghana Petroleum Commission) to be in line with statutory requirements of the *Environmental Protection Agency Act, 1994 (Act 490)*. Section 25 completes the provisions on exploration with stipulations on petroleum discovery and appraisal. Under this section written notification containing all relevant information shall be made by the Contractor to the Minister within 48 hours of the discovery<sup>73</sup>, followed by the submission of a programme and schedule for the effective appraisal of the discovery to determine its commerciality.<sup>74</sup>

Arguably the most significant phase of upstream operations, oilfield development and production are regulated by Sections 26-37 of *Act 919*, in conjunction with relevant provisions of the MPA. Section 26 reinforces the principle of sustainability by prescribing the prudent exploitation of deposits in line with international best practice. The Contractor is thus under an obligation to adopt techniques and strategies aimed at optimising petroleum recovery, including the avoidance of waste or untimely depletion through loss of reservoir energy. In line with these obligations, the Contractor is required to submit to the Minister a plan outlining the proposed development programme prior to commencing production operations.<sup>75</sup> The plan, to which an approved environmental report should be appended, covers a wide range of operational matters including, *inter alia*: information on

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<sup>73</sup> Section 25(2).

<sup>74</sup> Section 25(7-8).

<sup>75</sup> Section 27.

commerciality and proven reserves; technical and safety factors; geological parameters and reservoir engineering methodology; proposed drilling and completion plans; financing plan; long term production schedule; fiscal metering systems, and local content plans.<sup>76</sup>

Further to the GNPC's initial carried interest, Article 6 of MPA provides for the establishment of a Joint Management Committee (JMC) between the GNPC and the Contractor no later than 30 days from the effective date of the petroleum agreement.<sup>77</sup> As a complement to Section 26 of *Act 919*, Article 6.5 of the MPA requires the Contractor to submit an appraisal plan within 60 days of a commercial discovery, followed by the submission (within 90 days of the commencement of each calendar year) of a work programme and budget detailing development and production plans for the forthcoming calendar year. The Contractor is also required to submit to the JMC for approval an annual production schedule within 60 days of the commencement of commercial production.<sup>78</sup>

Section 28 of the Act outlines the grounds on which a development and operations plan may be rejected by the Minister. These grounds include failure by the Contractor to comply with the principle of sustainability (i.e. efficient, beneficial and timely production); insufficient financial resources; lack of technical competence and experience to undertake effective development and production; failure to comply with relevant conditions, such as local content requirements; or inadequate insurance coverage. The Minister also has the power to postpone development, if such postponement is deemed to be in the national interest.<sup>79</sup> The effect of the postponement on the petroleum agreement is to suspend the obligation to pay acreage fees, while extending the term of the agreement to compensate for the period of the postponement. Sections 30 and 31 contain standard provisions governing the issuing of annual permits and approvals for the commencement of petroleum production. Sections 32-35 deal with matters relating to the utilisation of associated natural gas, and cross-border cooperation and unitisation of common deposits. Section 36 makes provision for third party use of facilities, and Section 37 completes stipulations on the contractual framework with standard provisions on the measurement of petroleum produced in the contract area.<sup>80</sup>

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<sup>76</sup> See Section 27(4-14) for full details of what has to be included in the plan for development and operation.

<sup>77</sup> Under Article 6.2(ii) of the MPA, the Chairperson of the JMC shall be designated by the GNPC from amongst the members of the JMC. As stipulated under Article 6.3(viii), the JMC shall further establish sub-committees including, *inter alia*, the technical, the audit, and the accounting sub-committees.

<sup>78</sup> Article 6.5(iii) of MPA.

<sup>79</sup> Section 29(1-3).

<sup>80</sup> See also Article 11 of the MPA; see further *Petroleum (Exploration and Production) (Measurement) Regulations 2016 (L.I.2246)*; and *Guidelines to Petroleum (Exploration and Production) (Measurement) Regulations, 2016* (published February 2017).

The relationship between the licensing system and the JV agreement lies in the fact that the latter provides a vehicle for the actualisation of a key licensing condition, which is the putting in place of the PSC component of the hybrid system in the event of a successful bid. But as the name suggests, the JV guidelines are in effect a form of non-binding ‘soft law’ which are intended to complement the legally binding framework. As stated in its Article 10, the provisions are intended to ‘guide’ upstream industry operators on the formation, structure and activities of JV companies. The main aspiration of the JV guidelines is to create an enabling environment for effective indigenous participation in petroleum operations, thus enhancing ‘local content’ in the upstream industry. In view of its legal status as a ‘guide’, the unavoidable conclusion would be that in the event of a conflict between its provisions and those of a legally binding instrument such as the 2013 Regulations (an addendum to Act 821), the provisions of latter would take precedence over the guidelines. Such would the case therefore, with some of the inconsistencies (identified as part of this discourse) between the JV Guidelines and legally binding statutory instruments.

### 3.3. Provisions relating to the fiscal regime

*Act 919* confers a statutory status on the pre-existing fiscal regime for the upstream petroleum industry in Ghana. It enacts into law the previous regime whose chief hallmarks were flexibility and negotiation, rather than rigid legislative prescriptions. The main components of the fiscal regime comprise of petroleum royalties, petroleum income tax, capital gains tax, participating interest and bonus payments.<sup>81</sup> Sections 85-89 of the Act, which govern the fiscal regime, are in effect consolidating measures which affirm the fiscal arrangements contained in previous legal instruments. Most notable amongst these are the *Petroleum Income Tax Act, 1987 [PNDC 188]* and the *Petroleum Commission (Fees and Charges) Regulations, 2015 [L.I. 2221]*.

The royalty rate, representing a percentage of gross volume of petroleum production, is not fixed (unlike the mining sector which has had a fixed rate of 5% since 2010). For the upstream petroleum sector royalty payments range from 4% - 12.5% for oil production, and 3% - 10% for gas production.<sup>82</sup> A specific royalty rate is negotiated between the Contractor and the State party for each petroleum agreement. It could be argued that this approach represents a double-edged sword; while it provides flexibility in pre-contract negotiations,

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<sup>81</sup> See generally, F.M. Sasraku, “Petroleum Economics – Ghana’s Petroleum Tax Regime and its Strategic Implications”, in K. Appiah-Adu (Ed.), *supra*, note 6, 163-174.

<sup>82</sup> Article 10.1 of MPA prescribes a royalty rate of 12.5%. See also J. Amoaka-Tuffour and J. Owusu-Ayim, “An Evaluation of Ghana’s Petroleum Fiscal Regime”, 4 *Ghana Policy Journal* (2010), 7-34.

there is nonetheless an inherent degree of uncertainty as to the precise fiscal obligations of the Contractor prior to the conclusion of the petroleum agreement.

Section 85 of *Act 919* contains general provisions relating to the payment of petroleum royalties. Under Section 85(3), payment of royalty shall be in kind - unless the Minister makes a written request to the Contractor for payment to be made in cash. Where payment is in kind, the Minister may instruct the Contractor to undertake transportation of royalty petroleum from the contract area, and the subsequent processing and storage thereof, pursuant to Section 85(4) of the Act.

The *Petroleum Income Tax Act (PNDC 188)* sets a default rate of 50% for petroleum income tax, unless the petroleum agreement provides for an alternative rate of income tax.<sup>83</sup> In practice, the petroleum income tax rate has been set at a much lower rate of 35% for petroleum agreements signed for currently producing oilfields such as *Jubilee*, *TEN* and *OCTP*. This rate of 35%, although lower than the 50% rate prescribed by Section 6 of *PNDC 188*, is nonetheless 10% higher than the standard corporation tax rate of 25% under the *Income Tax Act of 2015 [Act 896]*.<sup>84</sup>

Section 3 of *PNDC 188* identifies various deductions from gross petroleum income for the purpose of computing taxable income; these deductions shall comprise of "... all outgoings and expenses wholly, exclusively and necessarily incurred ... for the purpose of petroleum operations during the year of assessment." Included in these deductions are rental charges; royalty payments; interests, fees and charges payable on loans or debts, and on capital employed for petroleum operations; any expenses incurred for repair to plant, machinery, premises or fixtures used in petroleum operations; etc. These petroleum income tax obligations, together with the payment of capital gains tax, are affirmed by Section 87 of *Act 919*.<sup>85</sup>

*Act 919* also makes provision for the payment of annual acreage (or surface rental) fees, whose amount shall be prescribed by the Minister or in the terms of the petroleum agreement.<sup>86</sup> The Contractor's fiscal obligations also extend to bonus payments,<sup>87</sup> withholding tax on sub-contractors, and additional oil entitlement (AOE) by the State party to a portion of the Contractor's share of petroleum production.<sup>88</sup> The AOE is triggered if the

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<sup>83</sup> *PNDC 188*, Section 6.

<sup>84</sup> Act 896 (First Schedule), Section 3(1).

<sup>85</sup> See also Article 12 of the MPA.

<sup>86</sup> Section 86.

<sup>87</sup> Section 88.

<sup>88</sup> Section 89.

Contractor's post-tax rate of return (ROR) exceeds the prescribed target for that year. The trigger points for the AOE are 12.5%, 17.5%, 22.5% and 27.5% ROR.<sup>89</sup>

Details of other fees and charges, such as application fees, bidding and permit fees, permit renewal charges, fees and charges relating to applications for extension of exploration working period or extension of appraisal period, and other sundry levies are all outlined in the *Petroleum Commission (Fees and Charges) Regulations, 2015 [L.I. 2221]*.

#### 3.4. Other noteworthy provisions of Act 919.

It is beyond the remit of this article to examine all the provisions of the new Act. In concluding this part of the discourse, it is therefore proposed to summarise some of the main parts of the Act in order to provide a more comprehensive picture of its contents. Part VII (Sections 38-42) include provisions governing the transportation, treatment and storage of crude petroleum products. Part VIII (Sections 43-49) deals with cessation of petroleum activities in the contract area, decommissioning (including the establishment of the decommissioning fund), plugging and abandonment of disused wells, and the removal of equipment and facilities. Part IX (Sections 50-72) prescribes general requirements for the conduct of petroleum activities in the contract area, in particular operating standards and matters relating to ownership and storage of petroleum data, geological samples and other relevant information.

Part X (Sections 73-80) regulates matters relating to health and safety, as well as security and environmental protection, by outlining safety requirements and standards, and emergency preparedness. Prescribed safety measures include the establishment of safety zones and the suspension of petroleum activities following an emergency.<sup>90</sup> Part XI (Sections 81-84) complements the preceding part by prescribing measures and principles aimed at ensuring environmental protection. These measures include environmental impact assessment, environmental liability, and compensation for pollution damage. Part XIII (Sections 90-97) concludes the Act with miscellaneous provisions, chief among which are stipulations on natural resources other than petroleum found in the contract area, matters relating to insurance, and standard interpretation guidelines.<sup>91</sup>

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<sup>89</sup> See Article 10.1(b) and 10.2 of MPA for further provisions on additional oil entitlement.

<sup>90</sup> See also Article 17 of MPA for further provisions on safety and environmental protection. See further, S. Aning, "Oil and Gas Issues: The Environment, Health and Safety, and Community Engagement", in K. Appiah-Adu (Ed.), *supra*, note 6, 233-250.

<sup>91</sup> Also relevant in this regard are provisions of the MPA such as Article 24 on dispute resolution/arbitration; and Article 25 on assignment of rights under the petroleum agreement.

In the next section, the nature of the hybrid petroleum regime will be examined, together with its historical background influences, rationale and key features.

#### 4. The Ghana royalty Hybrid Petroleum Regime: influences, rationale and main features.

The pre-Act 919 legal framework for petroleum exploration and production in Ghana, put in place by PNDC 84, was an essentially contractual regime based on two elements: royalty payments, and production sharing. The new hybrid regime under Act 919 adds to the old regime a new feature, a pre-contractual bidding system. This brings to the new regime an administrative licensing component which in effect serves the function of pre-qualification for the second phase, which comprises of a contractually negotiated PSA.

##### 4.1. Background to the hybrid regime: twin influences of administrative licensing/ permits and the contractual regime.

The administrative permit licensing system for petroleum or mineral development is closely associated with the concessionary regime, with its roots in the French civil law concept of the *contrat administratif*.<sup>92</sup> Petroleum exploration and production rights under the permit or licensing system, being in the nature of an administrative grant, are subject to the “*clauses exorbitantes de droit commun*”.<sup>93</sup> Under this concept, the petroleum permit or licence is in effect a public law instrument, and is thus in principle subject to the exclusive jurisdiction of national law (including the municipal competences of domestic courts) in the event of a dispute between the between the IOC and the host State. As Riad points out, “... the public power is omnipresent and constitutes a predominant factor ... this reality is clearly reflected in the French terminology of ‘*convention d’établissement*’”.<sup>94</sup>

Compared with the PSC regime which seeks to regulate the legal and fiscal, as well as the commercial aspects of the petroleum development project, the administrative licensing or permit regime has a more limited scope which incorporates the legal and fiscal elements, but

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<sup>92</sup> A. Fatouros, “The Administrative Contract in Transnational Transactions”, in *Reflections on Comparisons, Ius Privatum Gentium: Festschrift für Max Rheinstein* (1969), 259; and P. Leboulanger, *Les Contrats Entre Etats et Entreprises Etrangère*, (1985).

<sup>93</sup> A. de Laubadere, *II Traite Elementine de Droit Administratif*, (1981), p.1156; see also C. Turpin, *Public Contracts*, *Encyclopaedia of Comparative Law*, (1984), 24.

<sup>94</sup> T. Riad, *The Applicable Law Governing Transnational Development Agreements*, SJD Dissertation, Harvard Law School (1985), p.6. See also M. Hammerson and A. Martinez, “Royalty and Tax Regime”, in E. Pereira (Ed.), *The Encyclopaedia of Oil and Gas Law*, Vol. 1: Upstream, (2014), 7-32.

not the commercial dimension of the project. It could thus be argued that the permit system affords the international oil company (IOC) more scope and liberty in the conduct of oil operations through minimal involvement by the host State, except for standard regulatory matters such as collection of royalty payments, acreage rental fees and other taxes - as well as environmental protection measures. Nonetheless, the '*pouvoirs exorbitantes*' (public powers) concept of administrative law implies that the State could intervene (by way of administrative *fiat*) to unilaterally amend terms and conditions. This is by virtue of the non-contractual nature of the relationship between the host State and the licensee, a prospect which in turn raises questions concerning the stability of the fiscal regime.<sup>95</sup> It is for this reason that hybrid systems, such as the current Ghanaian model, seek to provide some measure of assurance to the IOC partner by complementing the licensing regime with contractually negotiated terms and conditions.

As a legal framework governing the relationship between petroleum or mineral investors and host States, the petroleum sharing contract or agreement (PSC/ PSA) represents the epitome of the contractual model. Originating in Indonesia where it was first introduced in 1966, the PSC has since become the most commonly used type of petroleum regime in the world.<sup>96</sup> From the perspective of an oil producing country such as Ghana, the PSC is intended to achieve three main objectives:

- a) Politically, to serve as an acceptable and convenient vehicle for promoting the concept of national sovereignty over oil resources through the active participation of indigenous enterprises, including State-owned enterprises (SOEs), in the exploitation of petroleum resources in partnership with foreign capital (represented by IOCs). To serve this function, a JV agreement is usually grafted on to the platform of the PSC. In doing this, the PSC model seeks to address one of the perceived shortcomings of the old concession and permit/ licensing systems, under which production rights are the exclusive preserve of the concession or permit holder, with no avenue for local participation. The PSC thus affords to the host country the opportunity to exercise a greater degree of authority and control over the management of oil operations within the framework of the associated JV agreement.

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<sup>95</sup> See further T. Wälde and G. Ndi, "Fiscal regime Stability and Issues of State Sovereignty", in J. Otto (Ed.), *The Taxation of Mineral Enterprises*, (1995), 63-89, Graham & Trotman/ M. Nijhoff, London.

<sup>96</sup> See T. Machmud, "Production Sharing Contracts in Indonesia: 25 Years' History", 11 *Journal of Energy & Natural Resources Law*, (1993), 179; see also K. Bindemen, *Production Sharing Agreements: An Economic Analysis*, Oxford Institute for Energy Studies (1999), p.1. ISBN:1-901795-15-2.

- b) From a legal perspective, the PSC serves the function of a contractual vehicle for the JV partnership between the State party (SOE) and the IOC. It is to be observed in this regard that the JV model used for the upstream petroleum industry in Ghana is a combination of ‘carried interest’ (contractual) and ‘sole risk account’ (equity) joint venture.<sup>97</sup> The sole risk account of Ghana’s SOE (GNPC) is activated when the contractor (IOC) declines to pursue an interest in a particular oil project which the GNPC wishes to embark on.
- c) From an economic perspective, the PSC is intended to maximise host state benefits through its share of oil production from the joint venture, an additional benefit not available under a royalty and tax-based concession, licensing or permit system.

At first sight the PSC appears to be a basic partnership or production sharing arrangement between the host State and a private sector company. However, as argued by Bindeman, in its operational aspects it is often a highly complex legal relationship, incorporating components such as risk-reward allocation mechanisms, principal-agent relationships, and even what may be regarded as elements of sharecropping.<sup>98</sup> The acquisition of contractual or equity interests by the host State is often in exchange for contractually negotiated incentives offered to the IOC investor.<sup>99</sup> These may include internationalisation of the dispute settlement mechanism through choice of forum and applicable law provisions<sup>100</sup>, as well as the inclusion of stabilisation clauses.<sup>101</sup> From a theoretical and conceptual point of view, the PSC can be said to be much more amenable to a renegotiation of terms than the permit or licence by virtue of its contractual character.

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<sup>97</sup> Article 9, MPA.

<sup>98</sup> Bindeman, *supra*, note 96, pp.13-46; see also A. Blake and C. Roberts, *Comparing Petroleum Regimes under Oil price Uncertainty*, 31(2) *Resources Policy*, (2006), 95-105; see further A. Ovcharova, “Production Sharing Agreements”, in E. Pereira (Ed.), *supra*, note 94, 33-50.

<sup>99</sup> N. Mustafayer, “Production-Sharing Agreements in the Petroleum industry of Azerbaijan”, 8(4) *Journal of World Energy Law & Business*, (2015), 362-384.

<sup>100</sup> See further R. Brown, “Choice of Law Provisions in Concessions and Related Contracts”, 39 *Modern Law Review*, (1976), 625; E. Paasivirta, “Internationalization and Stabilization of Contracts versus State Sovereignty”, *LX Brit. Y. B. Int’l Law* (1989), 31.

<sup>101</sup> There is vast body of literature on the internationalisation of petroleum and mineral development agreements and the use of stabilisation clauses to ensure long term contractual stability, of which, see, for example, T. Wälde and G. Ndi, “Stabilizing International Investment Commitments: International Law versus Contract Interpretation”, 31(2) *Texas International Law Journal* (1996), 215-269; see further G. Delaume, “Contractual Waivers of Sovereign Immunity: Some Practical Considerations”, 5 *ICSID-Rev-FILJ*. (1990), 232; and S. Sagar, “Waiver of Sovereign Immunity Clauses in Contracts: An Examination of their Legal Standing and Practical Value in Enforcement of International Arbitral Awards”, 31(5) *Journal of International Arbitration* (2014), 609-649.



## 4.2. Rationale for the Hybrid System

Bespoke hybrid petroleum regimes are representative of efforts by oil producers to manage some of the inherent tensions and potential conflicts associated with the design of upstream petroleum projects. As observed by Tordo, despite the common goal of generating high levels of income which is the shared aspiration both host States and IOCs, there is often a misalignment of objectives between the two parties. This is because host States tend to aim for a maximisation of rental income and the pursuit of other socio-economic goals, including long term sustainability in the exploitation of finite resources.<sup>102</sup> The IOCs' main aim, on the other hand, is to ensure an appropriate return on investment commensurate with project-associated risks and other strategic commercial objectives. However, project revenues under a licensing/ permit based system usually tend to fall short of satisfying the host country's aspirations. It is for this reason that novel and innovative forms of contractual, fiscal and institutional arrangements have been sought by countries for upstream petroleum development, hence the emergence of hybrid petroleum regimes.<sup>103</sup>

Considering the foundational principles and ethos of Act 919, it could be argued that the statute places Ghana's petroleum regime within the group of countries seeking such innovative arrangements. In the case of Ghana's hybrid system, a combination of licensing and production sharing ensures that the publicity surrounding the initial bidding process attracts a wider audience of potential bidders through a transparent process than would be the case with a purely contract-based system founded on discreet (individual) enquires or private negotiations. It also ensures the maximisation of revenues through associated fees and charges in the licensing round.<sup>104</sup> In the case of Ghana, the PSC-JV agreements complement the licensing process with a contractual component. This ostensibly introduces to the hybrid regime a greater degree of efficacy and robustness - with State control exercised through the licensing system, while the contractual phase ensures for the IOC partner an effective contribution to project design through negotiated terms and conditions.

The increasing diversity of petroleum regimes worldwide, coupled with the necessity for each country to tailor its legal framework for petroleum exploration and production to suit its particular geological conditions, political circumstances and economic strategy, provides a

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<sup>102</sup> S. Tordo, *Fiscal Systems for Hydrocarbons: Design Issues*, World Bank Working Paper No. 123 (2007). DOI:10.1596/978-0-8213-7266-1. See also K. Blinn *et al*, *International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects*, 2<sup>nd</sup> Edition, (2009), Barrows, New York.

<sup>103</sup> For a discussion of the some of the key characteristics of hybrid petroleum regimes, see H. Sullivan, *Hybrid Agreements*, in E. Pereira (Ed.), *supra*, note 94, 63-70.

<sup>104</sup> D. Kankam and I. Ackah, "The Optimal Petroleum Fiscal System for Ghana: An Analysis of Available Alternatives", 4(3) *International Journal of Energy Economics* (2014), 400-410.

sound rationale for a bespoke Ghanaian model with its emphasis on accountability, transparency and participation by indigenous enterprises in upstream petroleum activities through the JV platform. However, the Ghanaian approach is not without its associated risks. For whereas the hybrid system may afford Ghana income generation opportunities on a number of fronts (royalties, acreage fees, AOE, etc.), it also exposes Ghanaian petroleum agreements to the twin risks of both fiscal and contractual instability; it may also lead to a weakening of bargaining power in any ensuing contractual negotiations following a relatively poor or failed licensing/ bidding round. It is perhaps by dint of these multiple risks that internationally, the hybrid system and its variants continue to lag behind the number of concession agreement, PSCs, and JVs as the preferred form of oil regime.<sup>105</sup>

#### 4.3. The Ghanaian Model: A bespoke regime?

The Ghanaian hybrid regime this represents a blend of licencing procedures, royalty payments, and production sharing. This particular version of the hybrid system has previously been used in a number of countries including Gabon, Malaysia, Pakistan and Vietnam.<sup>106</sup> A derivative of the original Indonesian PSA, Ghana's hybrid system seeks to maximise national benefits through a combination of royalty payments, acreage fees and a share of oil production. From a conceptual point of view, it represents a mix of features from the concession regime (acreage fees), administrative licence/ permit regime (through the bidding process), and the PSC regime (post bidding negotiated terms and conditions specific to each oil agreement).

The authorisation of upstream activities commences with a bidding process similar to the permit/ licensing procedure under the concession system. Relevant industry experience, technical expertise and financial resources serve as key criteria for pre-selection. The royalty component, together with acreage rental fees, are the principal fiscal features of the licensing process, with successful bids subsequently serving as the platform for a contractually negotiated PSC. It is thus this second stage in licensing process which introduces a contractual element to Ghana's hybrid regime. The PSC itself is constructed on the foundation of a JV agreement, with the MPA and JV Guidelines providing both guidance and key parameters for any ensuing petroleum agreement.

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<sup>105</sup> Bindeman, *supra*, note 96.

<sup>106</sup> Z. Ghadas and S. Karimsharif, "Types and Features of International Petroleum Contracts", 4(3) S.E Asia Journal of Contemporary Business, Economics & Law, (2014), 33-41.

In the event that no successful bids are received (or if no bids are received), the Minister may resort to the statutory authority conferred under Section 10.5 of Act 919 to enter into direct negotiations with suitably qualified potential contractors. This contractual ‘safety net’ thus serves as a ‘reserve’ position which can be deployed to complement the bidding. It offers some measure of flexibility, and reassurance, in the event of an unproductive licensing round. However, the authorisation process confers far too much power and discretion in the person of the Minister for Petroleum. There is a danger that the process could become hostage to the personal whims and caprices of a particular individual. There is therefore an argument to be made for a more institutionalised approach which would remove the mandate of direct negotiations (devoid of licensing) from the office of the Minister and place it under the remit of a relevant institution such as the Ghana Petroleum Commission, complemented by parliamentary oversight.

The new petroleum regime of Ghana can more appropriately be described as a ‘hybrid system with special provisions for natural gas’.<sup>107</sup> This is in view of the stipulations contained in Section 32 of Act 919 and Article 14 of MPA regarding the production and disposal of associated natural gas. Other variants of the hybrid regime used in countries such as Angola, Bangladesh and Nigeria do not include specific obligations relating to the production and disposal of associated natural gas, leading to the practice of natural gas flaring and its associated environmental problems.

#### 4.4. A Comparative Perspective

Under the current system, the State-owned GNPC plays a pivotal role as the local JV partner in major upstream projects such as the Jubilee and TEN projects (the absence of any significant involvement by Ghanaian private sector in upstream petroleum activities raises questions regarding the effectiveness of Ghana’s much lauded aspirations towards enhancing local content through indigenous participation). GNPC’s carried interest in the majority of projects introduces an element of risk service contracting to the JV arrangement, a view supported by the designation of the IOC as ‘contractor’ under both the MPA and JV Guidelines. Viewed from this perspective, the Ghanaian model shares some similarities with China’s hybrid system of the 1990s. Under the Chinese model, IOCs were required to enter into partnerships with a select number of Chinese SOEs (popularly known as the “three

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<sup>107</sup> Ibid.

barrels”) utilising the PSC platform. Under the Chinese system exclusive rights to exploration and production were assigned to the local Chinese partner, with the IOC in the role of contractor – in effect a risk service contract with payment to the contract in cash or kind.<sup>108</sup> On closer examination, Ghana’s hybrid system can be said to differ from the Chinese model. Under the Ghanaian regime, although title to oil and gas in situ is vested in the State, Article 10.1 MPA provides for produced crude oil to be distributed amongst the parties in line with their “participating interests” – hence ruling out a risk service contract model.

#### 4.5. Allocation of Production under the Ghana Hybrid Regime.

By combining references to participating oil (contractual) with provisions on equity oil entitlement or AOE by GNPC by virtue of its sole risk account, Article 10.1(a-c) MPA is reflection of the mix of contractual and equity JV features of the Ghanaian regime. The allocation of production is based on the following sequencing: 12.5% as royalty oil from gross production; recovery of ‘cost oil’ by contractor (as opposed to a service fee under the risk service regime); AOE out of contractor’s share of profit oil; and corporation tax on profit oil.<sup>109</sup>

#### 4.6. An Appraisal of Ghana’s Royalty-Hybrid Petroleum Regime.

What distinguishes Ghana from other developing and emerging petroleum economies is the enhanced level of transparency through public engagement and citizen participation in the both the formulation of upstream industry policies, including the monitoring of exploration and production activities by civil society organisations.<sup>110</sup> This fact is most evident in the wide ranging public consultations and the pro-active involvement of civil society organisations in the legislative process which preceded the adoption of Act 919. This is remarkable for an industry which, in a developing country, usually serves as the exclusive fiefdom of the political classes - with the population excluded from participation in industry matters and from gaining access to its benefits.

In summing up this section, it can be argued that Act 919 represents a key stage in the evolution of Ghana’s legal framework for the upstream petroleum industry. Its main strength

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<sup>108</sup> J. Xiong, Y. Zhao and G. Zhao, *Oil and Gas Regulation in China: Overview*. (2014), Thompson Reuters. The royalty hybrid regime in China was replaced in November 2011 by a new resource tax system.

<sup>109</sup> See Article 10.2 MPA for detail sharing formula.

<sup>110</sup> See, for example, Ghana Extractive Industry Transparency Initiative: <https://eiti.org/ghana>; accessed on 12 June 2017.

lies in its attempts to embed aspects of good governance such as the principles of accountability, transparency and citizen participation in the shaping of oil industry policies through what appears to be a robust system of public consultation. Despite some of its perceived shortcomings (for example, it could be argued that too much authority and discretion is conferred on the Minister under Act 919), the new regime, together with its complementary instruments, can be said to represent a reasonably robust legal framework. It is thus submitted that Act 919 represents a progressive step in the petroleum policies and energy ambitions of Ghana.

## 5. Flexibility at the expense of certainty? An appraisal of Act 919 and future prospects.

To an outside observer, Ghana's current legal framework for upstream petroleum operations presents a seemingly bewildering maze of interlocking legislative and regulatory instruments. It can be a cumbersome and difficult regulatory environment to navigate. There are many overlapping provisions, giving rise to seemingly inconsistent stipulations. An illustrative example such inconsistency are the various provisions on local participation: Article 4.3 of the *JV Guidelines* of 2016 stipulates a minimum of 10% local equity participation, whereas Section 4.2 of the *Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I.2004)* requires a minimum of 5% local equity participation. There are also redundant provisions in some of the instruments, including references to the previous (now repealed) petroleum law *PNDC 84* in the following statutes: *Act 821* of 2011, refers to *PNDC 84* in Section 3(f) and Section 23; same with *Act 815* of 2011, (in Section 61(a) and (b)); and *PNDC 188* of 1987: in Section 38(1) and (2).<sup>111</sup> There is, therefore, a need for streamlining and tidying up of the old the legal framework in line with Section 97 of *Act 919* which repeals *PNDC 84*.

Flexibility seems to be the hallmark not only of *Act 919*, but of the Ghanaian legal framework as a whole. This evidenced in particular in the flexible approach to fiscal terms (royalty rate, taxation), and in provisions relating to GNPC's participating interests. All of these aspects are outlined in legislation only in generic terms, with the specific details left to the negotiated terms of each petroleum agreement. This flexibility does have its advantages. However, it could also be to the detriment of clarity, predictability and certainty. It could even be argued that the approach falls short of the principles of international best practice, to which Ghana aspires. In line with international best practice, *Precept 4* of the *Natural*

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<sup>111</sup> In Section 38(2), under "contractor" and "rentals".

*Resources Charter* states that detail fiscal rules should be established in law and be readily available to investors and to the public.<sup>112</sup> It further posits that bespoke fiscal arrangements based on contractual negotiations may place an onerous administrative burden on officials and negotiators. It could also lead to competition amongst investor with a view to securing the best or most preferential fiscal terms. *Precept 3* of the *Natural Resources Charter* also recommends a pre-qualification criterion as a pre-requisite to granting a reconnaissance licence. This is in order to ensure that potential bidders have the required technical and financial capacity. However, Section 9 of *Act 919* makes no provision for pre-qualification as a criterion for the reconnaissance licence. The provision could thus be argued to fall of international best practice.

Section 56 of *Act 919* requires the maintenance of a public register of petroleum agreements, licences, permits and authorisations. However, it does not provide details as to what type of information should be included in the register. Will the exercise, for instance, be restricted to just a simple list of agreements, or full text copies of agreements (including terms and conditions, and any subsequent amendments to such terms)? The principles of accountability and transparency would require the latter in line with international best practice.

On the positive side, it could be argued that the legislative framework as a whole provides a viable platform for Ghana's nascent petroleum industry. A key concern has now been addressed though the reassignment of the putative regulatory role previously earmarked for the GNPC, which had raised questions of a potential conflict *vis-à-vis* its role as regulatory and participant. The regulatory role now comes under the remit of the Ghana Petroleum Commission. There are also been a great deal of disenchantment and criticism amongst civil society organisations in Ghana concerning the hybrid system, together with a seeming preference for the PSA form of agreement. However, it could be argued that the PSA, or any other form of agreement, does not *per se* guarantee the success of a petroleum regime. Rather, it is the substantive provisions of the particular agreement, combined with the judicious and conscientious management of oil revenues, which hold the key to a successful oil economy. Substance, rather than form, should be the overriding concern. At this relatively early stage in its development, the hybrid system could well provide the required scope for attracting FDI into Ghana's upstream petroleum industry. The PSA could be a model to

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<sup>112</sup> Natural Resources Charter, (2014), Natural Resources Governance Institute: <http://resourcegovernance.org>; see also the *Chatham House Guidelines for Good Governance in Emerging Oil and Gas Producers, 2015*; <https://www.chathamhouse.org/oil-gas/>

consider when Ghana attains a higher level of production, together with enhanced bargaining power.

## 6. Optimism underneath the Ever-present Shadow of the Resource Curse Thesis?

Ghanaians live with the knowledge that their newly found wealth could in the long term turn out to be either a blessing, or a curse. There has already been a great deal of soul-searching discourse on the susceptibility of Ghana's oil and mineral economy to the resource curse thesis,<sup>113</sup> or its counterpart, the 'Dutch disease'. Such discourse has included the identification of possible strategies for avoiding the syndrome.<sup>114</sup> The resource curse thesis itself, which seek to diagnose, explain and understand the paradox of 'poverty in the midst of plenty' (i.e. why some countries with an abundance of renewable natural resources tend to experience poor economic growth and resource-based conflict) has been widely hypothesised in economic literature.<sup>115</sup> However, there are dissenting scholars who, in the absence of irrefutable proof or compelling evidence, are not convinced about the existence or presence of the resource curse as a factual in explaining poor economic performance.<sup>116</sup> As a hypothesis, the thesis nonetheless provides a persuasive paradigm for understanding the contradiction of intractable conflicts and dire economic situations of many developing countries which are endowed with abundant natural resources. Furthermore, this counter-intuitive process of growth in resource-rich countries has to some extent been supported by empirical studies conducted by Sachs and Warner, whose findings revealed a strong correlation between abundant natural resources endowment and poor economic growth.<sup>117</sup>

From the perspective of Ghana and its newly found oil wealth, interest in the resource curse thesis should lie not so much in its foreboding, as in seeking to fully understand its

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<sup>113</sup> See, for example, I. Amundsen, "Can Ghana Avoid the Resource Curse?", in K. Appiah-Adu (Ed.), *supra*, note 6, 109-144.

<sup>114</sup> See P. Arthur, "Avoiding the Resource Curse in Ghana: Assessing the Options", in M. Schnurr and L. Swatuk (Eds.), *Natural Resources and Social Conflict: Towards Critical Environmental Security*, (2012), 108-127. Palgrave Macmillan, UK. ISBN-981-1-137-00246-4.

<sup>115</sup> R. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis*, (1993), Routledge. ISBN-978-0415094825. See also A. Venables, "Using Natural Resources for Development: Why Has It Proven So Difficult?", 30(1) *Journal of Economic Perspectives* (2016), 161-184; and M. Ross, "The Political Economy of the Resource Curse", 51(2) *World Politics* (1999), 297-322.

<sup>116</sup> Among studies which have found weak empirical support for the resource curse thesis, see T. Havranek, R. Horvath and A. Zeynalov, "Natural Resources and Economic Growth: A Meta-Analysis", 88 *World Development* (2016), 134-151; see also R. Torvik, "Why do some resource-abundant countries succeed while some do not?", 25(2) *Oxford Review of Economic Policy* (2009), 241-256.

<sup>117</sup> J. Sachs and A. Warner, "Natural Resources and Economic Development: The Curse of Natural Resources", 45 *European Economic Review* (2001), 827-838.

causes, symptoms and manifestations. This requires learning from the economic literature and drawing lessons from the revealing experiences of other countries. This process of informed engagement and acute awareness should permit Ghana to gradually formulate adequate responses and policies which, in the long term, can be effective in shielding the country from the debilitating effects of the resource curse syndrome.<sup>118</sup>

As for the perceived causes, the first sign to watch out for is conflict between the State and foreign oil contractors or multinational corporations over control and management of resources. At the macro-economic level, an over-reliance or extreme dependence on resource revenues should be avoided. This is in view of the volatility and vicissitudes of global oil markets. Equally to be monitored, and controlled, is a policy of over-reliance on imported goods and services - which can have economically debilitating impacts. A sustainable policy of diversification of the economic base, and capacity building of human resources, is required to counter a tendency towards oil dependency. Rather worryingly for Ghana, a low savings rate (one of the chief symptoms of the resource curse hypothesis) is already being experienced despite its new found oil wealth. This is evidenced in the systematic drawdowns which are becoming a familiar feature of the operation of the funds. This symptom, together with its underlying cause, will need addressing as a matter of urgency.

The most virulent symptoms of the resource curse syndrome manifest themselves in the form of endemic political corruption, entrenched economic deprivation of the masses and environmental degradation.<sup>119</sup> This is often accompanied by poor governance, democratic disenfranchisement and political instability - leading to increasingly authoritarian and dictatorial tendencies on the part of the governing class.<sup>120</sup> The consequences, as in the Democratic Republic of Congo and in Nigeria, can be resource conflict in the form of civil or sectarian armed violence. This in turn could ultimately lead to a breakdown in law and order, collapse of national institutions, and an erosion of state authority – to wit, a failed state.<sup>121</sup>

Policies aimed at increasing average incomes, and providing economic opportunities for all sections of Ghanaian society, thus provide the key to unlocking the illogical puzzle

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<sup>118</sup> Cf. K. Attafuaah, “Managing the Political and Social Expectations of Ghana’s Oil and Gas resources”, 4 Ghana Policy Journal (2010), 110-118; see also J. Asafu-Adjaye, “Oil Production and Ghana’s Economy: What can We Expect?”, 4 Ghana Policy Journal (2010), 35-49.

<sup>119</sup> Cf. J. Useem, “The Devil’s Excrement”, Fortune Magazine (February 2003), 1-3.

<sup>120</sup> See S. Brooks and M. Kurtz, “Oil and Democracy: Endogenous Natural Resources and the Political ‘Resource Curse’”, 70 International Organization (2016), 1-33; see also T. Caselli, “Resource Windfalls, Political Regimes and Political Stability”, 98 Review of Economics and Statistics (2015), 573-590; M. Ross, “Does Oil Hinder Democracy?”, 53(3) World Politics (2011) 325-361; and N. Jensen and L. Wantchekon, “Resource Wealth and Political Regimes in Africa”, 37(7) Comparative Political Studies (2004), 816-841.

<sup>121</sup> See generally, C. Bell and S. Wolford, “Oil Discoveries, Shifting Power, and Civil Conflict” 59(3) International Studies Quarterly (2015), 517-530.



posed by the conundrum which represents the paradox of ‘poverty in the midst of plenty’.<sup>122</sup> The principles of good governance, accountability and transparency, which have all been embedded in *Act 919*, provide a good foundation for addressing some of the causes of the hypothesis. Democratic institutions and processes will need to be further strengthened. Critical to this process will be the role of civil society organisations and NGOs particularly in ensuring accountability, transparency and dispute resolution *vis-à-vis* environmental or other resources-related conflicts.

Ghana is endowed with seemingly favourable geological prospects.<sup>123</sup> However, the exploration history to date is yet to live up to industry expectations of a prolific oil producing province. New discoveries such as the Jubilee oilfield could well signal a turn-around in Ghana’s fortunes. *Act 919* heralds a future filled with much hope and promise, but also with potential pitfalls and dangers, amongst which are the revenue instability caused by oil price fluctuations. There also seems to be an expectation, or presumption, on the part of officials that the advent of *Act 919* will automatically lead to an inflow of FDI into the oil sector. Further progress on the exploration and production front will thus depend on substantial investments, not just from small or medium sized companies, but also from some of the major oil multinationals.

Whether or not the country will one day be able to match the production capacity of some of the more established oil producers in the region such as the Republic of Congo (239,000 bpd), Gabon (240,000 bpd) and Equatorial Guinea (242,000 bpd) – or even major producers such as Angola (1.7 million bpd) and Nigeria (2.4 million bpd)<sup>124</sup> – remains to be seen. What is certain is that an enabling legal environment, together with an efficient and judicious regulatory framework, will continue to play a pivotal role in promoting economically sound and environmentally sustainable petroleum development. Informing this process will be lessons drawn from mature oil provinces and international best practices.

Ghana’s optimism is neither ill-conceived nor misplaced. Its policy makers and citizens have every reason to nurture positive hopes and expectations from increased oil production. Given the right policies, Ghana has good prospects of emerging from underneath the shadow of the oil curse syndrome. In this regard, the country can perhaps draw some measure of comfort (but devoid of complacency) from the knowledge that the resource curse

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<sup>122</sup> Cf. T. Palley, “Lifting the Natural Resources Curse”, *Foreign Services Journal* (2003), p.1 *et seq.*

<sup>123</sup> Cf. O. Bermúdez-Lugo, “The Mineral Industry of Ghana”, 2013 *Minerals Yearbook*, US Geological Survey.

<sup>124</sup> See further <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2241rank.html>

syndrome is neither ubiquitous nor universal;<sup>125</sup> nor is it an inevitable by-product of an abundance in natural resources endowment.<sup>126</sup> Like a parasitic infection, it requires an acquiescent and compliant host country with an accommodating environment defined by permissive conditions. The first step towards combating the scourge will be an awareness (and acceptance) of its existence, followed by the formulation and implementation of effective avoidance strategies. Ghana has the added advantage of its own experiences from the gold mining industry, from which it can draw historic lessons.

## 7. Conclusion

*Act 919* is in essence a consolidating statute. Most of the principles it encapsulates are concepts which had already been enshrined in previous legislative and regulatory instruments, or otherwise existed in contracting and licensing practice (as is the case with the hybrid system which pre-dates the Act). It could thus be argued that the importance of *Act 919* lies more in its historical significance - coming as it does at a particularly defining moment in the history of Ghanaian oil production – than in any substantive contribution which it has brought to the legal framework for upstream petroleum sector governance.

The most pertinent challenge facing Ghana and its nascent oil industry is clearly that of defying the odds, and reversing the regional trend, by confounding the resource curse syndrome which has become such an endemic feature of natural resources endowment in Sub-Saharan Africa. For therein lies the true test of success as an emerging oil economy. Will Ghana finally emerge from underneath the ominous shadow of this historical syndrome? Overcoming this challenge will require effective implementation of the key principles of sustainability, good governance and utilization of oil revenues for the benefit of all Ghanaians, which are all embedded in the current legal framework. A robust, effective and efficient legal, regulatory and institutional framework is undoubtedly a fundamental requirement in this regard. *Act 919* thus now needs to be transformed from a static into a living document – to wit, one that is responsive to every new challenge and to the changing national and global environment of the international petroleum industry. Industry practice will need to reflect the aspirations, ethos and legislative ambitions of *Act 919*. Relevant provisions may also require adjusting through a process of regular review and legislative

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<sup>125</sup> M. Ross, “What Have We Learned about the Resource Curse?”, 18 Annual Review of Political Science (2015), 239-259.

<sup>126</sup> Cf. J-P Stijns, “Natural Resources Abundance and Human Capital Accumulation”, 34 World Development (2006), 1060-1083.

amendments to reflect realities on the ground - for example, possible excision from Act 919 of the contractual licence-free option in the future, if bidding rounds become regularly successful.