Ghana's Upstream Petroleum Legal Regime

ABBREVIATIONS

Companies Act	The Companies Act, 2019 (Act 992)
DWCTP	Deepwater Cape Three Points
DWT	Deepwater Tano
EPA	Environmental Protection Agency
EPA Act	Environmental Protection Agency Act, 1994 (Act 490)
Ghana Petroleum Funds	Collectively the Ghana Heritage Fund and the Ghana Stabilisation Fund
GHF	Ghana Heritage Fund
GIPC	Ghana Investment Promotion Centre
GIPC Act	Ghana Investment Promotion Centre Act, 2013 (Act 865)
GNPC	Ghana National Petroleum Corporation
GNPC Act	Ghana National Petroleum Corporation Act, 1983 (PNDCL 64),
Government	The Government of the Republic of Ghana
GRA	Ghana Revenue Authority
GSF	Ghana Stabilisation Fund
HSE	Health, Safety and Environment
IGC	Indigenous Ghanaian company, being a company incorporated under the Companies Act that has at least 51% of its equity held by a citizen of Ghana; and at least 80% of its executive and senior management positions and 100% of non-managerial and other positions also held by citizens of Ghana.
Income Tax Act	Income Tax Act, 2015 (Act 896)
Insurance Act	Insurance Act, 2006 (Act 724)
Internal Revenue Act	Internal Revenue Act, 2000 (Act 592) (as amended)
Local Content Regulations	Petroleum (Local Content and Local Participation) Regulations, 2013 (LI 2204)
Measurement Regulations	The Petroleum (Exploration and Production) (Measurement Regulations), 2016 (LI 2246)

Minister	Minister of Energy
NIC	National Insurance Commission
OCTP	Offshore Cape Three Points
PA	Petroleum Agreement
PC	Petroleum Commission
PEPA	The Petroleum (Exploration and Production) Act, 2016 (Act 919)
Petroleum Data Management Regulations	Petroleum (Exploration and Production) (Data Management) Regulations, 2017 (LI 2257)
Petroleum Fees and Charges Regulations	Petroleum Commission (Fees and Charges) Regulations, 2015 (LI 2221)
Petroleum General Regulations	Petroleum (Exploration and Production) (General) Regulations, 2018 (L.I. 2359)
Petroleum HSE Regulations	Petroleum (Exploration and Production) (Health, Safety and Environment) Regulations, 2017 (LI 2258)
Petroleum Measurement Regulations	The Petroleum (Exploration and Production) (Measurement) Regulations, 2016 (LI 2246)
Petroleum Commission Act	Petroleum Commission Act, 2011 (Act 821)
PHF	Petroleum Holding Fund
PIAC	Public Interest and Accountability Committee
PITL	Petroleum Income Tax Law 1987 (PNDCL 188)
PNDCL 84	The Petroleum (Exploration and Production) Act, 1984 (PNDCL 84)
PRMA	Petroleum Revenue Management Act, 2011 (Act 815)
RAA	Revenue Administration Act, 2016 (Act 919)
WCTP	West Cape Three Points

HIGHLIGHTS

This section of the report presents the following:

- The legal and regulatory framework of Ghana's upstream petroleum industry. This has been subdivided into pre-commercial discovery and post-commercial discovery;

- The enforcement and dispute resolution functions of the PC;
- The maritime border disputes between Ghana and its French neighbours: Togo and Cote d'Ivoire;
- A case review of Ndebugre v Attorney General, a relevant case in the upstream sector; and
- 2019 legal trends and developments in the upstream sector.

LEGAL REGIME – PRE-COMMERCIAL DISCOVERY

Regulatory Regime

Attempts at establishing a petroleum industry in Ghana go as far back as the late 19th century, with the first wells being drilled in 1896, when exploration for oil and gas started onshore in the Tano basin.[1] In spite of this early start to petroleum exploration activities in Ghana, until the 1980s, there was little petroleum-specific legislation outside of the 1979 Constitution. Petroleum regulation was subsumed under general minerals law such that the definition of minerals, included petroleum.[2]

The Constitution stipulates that "*every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for, the people of Ghana*".[3]

To ensure that resources are exploited and utilised in a manner that inures to the benefit of the country, any transaction, contract, or undertaking involving the grant of a right or concession must be ratified by Parliament unless Parliament by resolution exempts it from

[1] Petroleum Commission, '*Phase 1 (1896-1957)*' (Ghana Petroleum Register, 2017) https://www.ghanapetroleumregister.com/phase-1 accessed 30 April 2020
[2] Concessions Act, section 49
[3] Constitution, article 257(6)

this requirement. The grant of the right must be done by or on behalf of any person including the Government, to any other person or body of persons whatsoever described.[4]

The 1980s marked the beginning of the development of a comprehensive regulatory framework for petroleum. The petroleum legal regime was crafted to attract international oil companies with the technical know-how and financial reserves do undertake petroleum exploration and development operations. The responsibility for petroleum matters was given to the Minister. The Minister was responsible for entering into petroleum agreements (PAs),[5] and for general oversight of the industry including the setting of policy and prescription of regulations for the effective implementation of PNDCL 84.[6]

Initially, the Petroleum Department under the Ministry of Mines and Energy was responsible for petroleum activities and associated regulatory matters.[7] With the objective of ensuring that Ghana obtained the optimum benefits from petroleum resources, the GNPC was later established by PNDCL 64 to take over responsibilities of the Petroleum Department. PNDCL 64, thus, established the first institutional framework for upstream petroleum activities.[8] Subsequently, PNDCL 84 was enacted to govern the upstream petroleum sector. It established the contractual relationship between the Republic, the GNPC and prospective investors in the upstream operations through a PA.[9] Under these enactments, the GNPC was made an automatic partner to all international oil companies that entered into PAs with the Republic. The GNPC also exercised regulatory powers over the industry and, in particular, was the advisor to the Minister on matters pertaining to the petroleum industry.[10] The GNPC's dual role as regulator and commercial actor in the petroleum industry created a conflict-of-interest situation and was contrary to international best practices. This conflict situation has since

[4] id, article 268
[5] PNDCL 84, section 1(2)
[6] Id, section 32(1)
[7] Petroleum Commission, '*Phase 5 (1981-2001)*' (Ghana Petroleum Register, 2017) https://www.ghanapetroleumregister.com/phase-5 accessed on 09 April 2020
[8] GNPC Act, sections 2 and 3
[9] PNDCL 84, sections 2(1) and 5(4)
[10] GNPC Act, sections 2(2) and (3)

been resolved by the establishment of the Petroleum Commission as the regulator of the industry and is discussed briefly in the introduction to the next chapter of this Report.

Fiscal Regime

At the turn of the 20th century, Ghana's focus was on attracting foreign investment to hasten efforts to develop the country's exploration and production of oil and gas.[11] It was therefore of great importance to create an attractive fiscal regime that promoted international participation in the nascent sector. The upstream tax regime was set out in the Petroleum Income Tax Law 1987 (PITL), PNDC Law 188. Under the PITL, unless otherwise agreed in the relevant PA, a person conducting petroleum operations was subject to a chargeable tax of 50% of the chargeable income[12] arising from the operations in respect of a year or period.[13] Whilst the PITL also provided for withholding tax on payments to subcontractors and on gains or profits of expatriate employees, it did not provide for capital gains tax.[14]

In addition to taxes, investors were also required to pay royalties,[15] annual rental charges,[16] participating interest[17] and additional oil entitlements as prescribed by their PAs. Regarding the non-tax fiscal regime, many of the PAs negotiated under the PNDCL 84 contained what are considered, in retrospect, generous fiscal terms and incentives. For example, the State's portion in petroleum operations was a royalty, often below 10% of the crude oil to be produced. The GNPC, as the State's national oil company, also received a 10% participating interest in petroleum operations. This interest was carried for exploration and development operations. Accordingly, the GNPC was not required to pay for costs incurred in exploration and development activities but only for production operations. In addition to the 10% participating interest, GNPC had an option to acquire an additional participating interest upon

[11] Petroleum Commission, *'Phase 5 (1981- 2001)'* (Ghana Petroleum Register, 2017) https://www.ghanapetroleumregister.com/phase-5 accessed on 9 April 2020
[12] Chargeable income of a person for a year of assessment is calculated as the gross income of that person less any allowable deductions
[13] PITL, section 6
[14] id, sections 27 and 28
[15] PNDCL 84, section 20
[16] id, section 18
[17] id, section 17

the achievement of commercial discovery with respect to a block or contract area. This interest was pre-agreed and often did not exceed 5%. GNPC was required to exercise this option within a prescribed period following the declaration of commercial discovery by the contractor. Upon the exercise of this option, GNPC was only required to pay for development and production costs related to the additional interest but not exploration costs.

Flexible provisions on foreign exchange, subject to the foreign exchange laws in force at the time, also permitted investors to transfer the proceeds of their operations out of the country with perfunctory review. For example, international oil companies had retention provisions in their PAs which authorised them to retain the proceeds of their petroleum sold abroad to meet their foreign payment obligations without going through local banks.[18]

Local Content

The local content agenda was modest at best, as Ghana had neither the resources nor know-how to make any meaningful contributions to the industry. PNDCL 64 merely entrusted the GNPC with the function of: (i) ensuring that the Republic obtained the greatest possible benefits from the development of its petroleum resources; (ii) obtaining the effective transfer to the Republic of appropriate technology relating to petroleum operations; and (iii) ensuring the training of citizens and the development of national capabilities in all aspects of petroleum operations.[19]

References to local content and local participation as a strategic national objective also appeared in PNDCL 84. For instance, a contractor or subcontractor was obliged to ensure that, as far as possible, employment opportunities would be given to Ghanaians who had the requisite expertise or qualifications at the various levels of operations.[20] A contractor or subcontractor was also required to prepare and implement plans and programmes for training Ghanaians in petroleum operations. [21]

[18] See articles 13.1 of the WCTP, DWT, OCTP and DWCTP PAs
[19] PNDCL 64, section 2
[20] PNDCL 84, section 23(10)
[21] id, section 23(13)

Environment

The Environmental Protection Agency Act, 1994 (Act 495) was passed some ten years after PNDCL 64 and PNDCL 84. The Act established the EPA and, among other things, made the environmental obligations of persons carrying out petroleum operations clearer. The EPA is responsible for ensuring compliance with the environmental laws of Ghana. The EPA's mandate includes advising the Minister for Environment on environmental policies, issuing environmental permits and prescribing standards and guidelines relating to all forms of environmental pollution.[22] Accordingly, every entity engaged in petroleum operations must register with the EPA and obtain an environmental permit before it commences operations.[23] The EPA Act and the Environmental Assessment Regulations 1999 (LI 1652) set out the registration, permitting and assessment obligations applicable to all undertakings that may have an adverse impact on the environment, including petroleum operations.[24] Any person interested in the exploration and production of petroleum in Ghana was required to firstly register with the EPA, then to submit an environmental impact assessment (EIA) to the EPA in advance of its application for an environmental permit before finally obtaining an environmental permit. In order to monitor and strengthen the environmental management of the upstream petroleum sector, in 2011, the EPA issued Guidelines for Environmental Assessment and Management of Offshore Oil and Gas Development in Ghana. The guidelines were issued to promote the principles of sustainable development, transparency, and international best practices, among others.[25] The guidelines also provide systematic environmental impact assessment procedures, specific to the sector as well as requirements for operators or oil and gas developers to ensure that their activities are conducted in a safe and responsible manner.[26]

[22] EPA Act, section 2(a) and (f)
[23] Ghana Environmental Assessment Regulations 1999, LI 1652, regulation 1
[24] ibid
[25] Offshore Oil and Gas Development in Ghana, Guidelines for Environmental Assessment and Management (2011), Introduction
[26] ibid

LEGAL REGIME – POST COMMERCIAL DISCOVERY

3.1. Introduction

After commercial production of oil began in Ghana in December 2010, a number of legislative and institutional initiatives were promulgated in the upstream sector in a bid to better regulate and manage the sector. The PC was established to regulate and monitor the utilisation of upstream petroleum resources and coordinate the policies in relation to them.[27] In effect, the Petroleum Commission Act removed the GNPC's regulatory powers in relation to the upstream petroleum sector and gave those powers to the PC.[28] The GNPC maintained its commercial functions as Ghana's national oil company tasked with exploration, development, production and disposal of petroleum, either alone or in association with others.[29]

In the area of revenue management, the PRMA was also enacted in 2011 and, as amended by the Petroleum Revenue Management (Amendment) Act, 2015 (Act 893), provides a framework for the management of Ghana's petroleum revenue derived from the upstream sector. Hitherto, the management of such revenue was done under the Consolidated Fund.[30] However, in a bid to avoid the oil curse that has plagued several oil-producing nations, the PRMA established a special regime for the prudent collection, disbursement and utilisation of oil revenue. To help achieve these objects, the PHF and the Ghana Petroleum Funds were established.[31]

Other major changes in the industry included the repeal and replacement of PITL and the PNDCL 84 by the Income Tax Act and the PEPA in 2015 and 2016, respectively. These major changes are further discussed in this chapter.

---

[27] Petroleum Commission Act, section 2
[28] id, section 24(2)
[29] GNPC Act, section 2(1) and (3)(b), (c) and (f)
[30] 1992 Constitution, article 176
[31] PRMA, sections 2, 9 and 10

3.2. The PEPA – An Overview

The PEPA was enacted to replace PNDCL 84 as the principal legislation for the regulation of petroleum activities in the upstream sector. The Minister and the PC are the persons responsible for implementing the PEPA.

The PEPA contains several novel and specific provisions aimed at ensuring optimum and efficient regulation of petroleum activities for the general benefit of Ghanaians in light of Ghana's growing petroleum reserves.[32] The PEPA provides that petroleum activities shall be conducted only in an open area under a licence or Petroleum Agreement and in accordance with applicable enactments.[33] The range of petroleum activities contemplated under the PEPA include reconnaissance (the collection, processing and interpretation of petroleum data, under a licence),[34] exploration, development and production operations all under a PA.[35] Additionally, the PEPA, through licensing, regulates the installation and operation of facilities for the transportation, treatment and storage of petroleum.[36]

The PEPA generally requires that a PA be entered into after an open, transparent and competitive public tender process.[37] However, the Minister, in consultation with the PC, is given discretion to enter into a PA through direct negotiations where it is believed that direct negotiations would be the most efficient manner to exploit petroleum resources in a given area.[38] This discretion has been criticised as being too wide and may potentially be exercised arbitrarily to defeat the PEPA's intention of designating tendering as the primary means of awarding petroleum blocks. This concern has been somewhat justified by events that occurred in Ghana's maiden petroleum licensing round. Though several world class international oil companies initially expressed interest to participate in the competitive bids, some of these companies ultimately withdrew from the bids with the intention of applying

[32] PEPA, section 2
[33] id, section 5
[34] id, section 9
[35] id, section 10(1)
[36] id, section 38
[37] id, section 10(3)
[38] id, section 10(9)

for the other blocks that were on offer for direct negotiations. This move largely undermined the competitiveness of the bids and could lead to reduced benefits to the State from petroleum agreements resulting from direct negotiations. It has, therefore, been suggested that the direct negotiations approach should only be used in exceptional circumstances where the peculiarities of a block necessitate that a specific company with particular, specialized, and proprietary technology and knowhow be approached for an optimised development of the available petroleum resource.[39]

The PEPA mandates the GNPC to hold an initial participating interest of at least 15% for exploration and development with the option to acquire an additional participating interest.[40] As is consistent with the provisions of the existing PAs, the GNPC's initial interest is carried with respect to exploration and development operations.[41] The PEPA further grants the GNPC a right to acquire an unspecified additional interest following declaration of commercial discovery.[42] This additional interest is only paying in respect of development and production operations, also consistent with the practice under existing PAs.[43] These provisions imply that the State directly or indirectly, through the GNPC, does not contribute to exploration cost. This also means that, unlike the contractor, the State does not incur expense where there is no commercial find after conducting exploration operations.

PAs are valid for a period of twenty-five (25) years subject to extension in prescribed instances.[44] This is less than the 30-year term provided under PNDCL 84.[45] In order to safeguard the interest of the Republic in petroleum agreements, the assignment of the interest of a contractor in a PA and the sub-contracting of petroleum contracts, must have the prior written approval of the PC and the Minister.[46] Moreover, a contractor is obliged to apply for further permits from the PC before undertaking certain activities such as exploration

[39] Civil Society Licensing Round Monitoring Group, 'Ghana's First Oil Licensing Round Monitoring Report' (2020) p. 21, recommendation 4
[40] PEPA, section 10(14)(a)
[41] ibid
[42] id, section 10(14)(b)
[43] ibid
[44] id, section 14(1)
[45] id, section 14
[46] id, sections16 & 17

drilling and the production or injection of petroleum.[47] The PC is mandated to establish and maintain a register of PAs, licenses, permits and authorisations, all of which must be open to the public.[48]

The PEPA specifies that petroleum operations in Ghana must be carried out through a company incorporated under the Companies Act. This Ghanaian incorporated company must be the legal entity to whom a licence is granted or the signatory to the PA or the petroleum sub-contract.[49] The company must also open and maintain an account with a bank in Ghana.[50] Any information or data obtained in connection with petroleum activities belongs to the Republic and a licensee, contractor or sub-contractor may use such information only for the duration of their licence or PA.[51]

The PEPA builds on the health, safety and environment standards set out in the EPA Act and the Environmental Regulations.[52] Before the commencement of petroleum activities, a contractor or licensee must submit to the PC a plan and supporting documentation evidencing the safety measures that they propose to implement.[53] Contractors and licensees are also required to identify hazards and evaluate risks associated with their operations and ensure the safety of personnel.[54] Further, they must implement and maintain preventive security measures to protect their facilities and wells from deliberate attacks, and at all times have in place an emergency preparedness plan to prevent, control and minimize accidents and emergencies which may lead to injury or pollution.[55] A licensee, contractor, sub-contractor or the GNPC is liable to reimburse the PC for the cost of measures taken to ensure safety where they fail to ensure the safety in the first place.[56]

[47] id, section 24
[48] PEPA, section 56
[49] id, section 70
[50] id, section 70 (1)(d)
[51] id, section 52
[52] id, section 73
[53] id, section 73(3)
[54] id, section 74
[55] id, section 75 & 76
[56] id, section 79

3.3. Foreign investment

The GIPC Act generally applies to all companies in Ghana irrespective of industry.[57] Particularly, the GIPC imposes a registration and minimum capital requirement on companies having foreign shareholding.[58] For companies fully-owned by a foreign entity, foreign capital of not less than US$500,000 in cash or capital goods or a combination of both must be invested in the business by way of equity. Where the company is jointly owned with a Ghanaian, the foreign shareholder must invest foreign capital of not less than US$200,000 in cash or capital goods relevant to the investment or a combination of both and the Ghanaian joint venture partner must have no less than 10% equity interest in the company.[59] As indicated above, the minimum capital requirements are of general application to foreign investments in all industries in Ghana. This explains why the amounts are relatively low as compared to the capital typically required for upstream petroleum companies.

Registration with the GIPC entitles a company to fiscal benefits and incentives including (i) an immigration quota limited to the amount of the paid-up capital of the company; (ii) personal remittances of wages through authorised dealer banks; (iii) free transferability of dividends and profits; (iv) transferability of fees and charges in respect of technology transfer agreements registered under the Act; and (v) guarantees against expropriation.[60]

3.4. Management of petroleum revenue

The PRMA (as amended), regulates the collection, allocation and management of petroleum revenue derived from upstream and midstream operations. The PRMA makes the GRA responsible for assessing, collecting, and accounting for petroleum revenue due to the State under the PRMA.[61] An entity that makes payment into the PHF must notify the GRA in writing of that payment[62] among other things. The PRMA establishes three public funds, namely, the PHF, the GSF, and the GHF, and indicates how revenue accruing from petroleum operations

[57] GIPC Act, section 1
[58] id, sections 24 and 27
[59] id, section 27
[60] id, section 26
[61] PRMA, section 3(1)
[62] id, section 3(3)

are to be disbursed and utilised.[63] The PHF receives petroleum revenue due to the Republic and then disburses it in accordance with the PRMA.[64] The gross receipts of the PHF include royalties, corporate income taxes, surface rentals, capital gains tax and any amount payable by GNPC as corporate income tax, royalty or dividends.[65]

The GNPC has foremost priority in the disbursement of petroleum revenue from the PHF, followed by the payment into the consolidated fund to support the national budget, and then to the Ghana Petroleum Funds for savings and investments.[66] The PRMA also provides for disbursements from the PHF to meet exceptional purposes.[67] Exceptional purposes have been defined under the PRMA as withdrawals from the PHF necessary to meet tax refunds and the payment of management fees.[68]

Borrowing against the PHF and the assets of the Ghana Petroleum Funds is prohibited.[69] The PRMA further prohibits borrowing against petroleum reserves.[70] The GSF receives the portion of revenue from the PHF to be used for savings and investments for the purpose of creating a reserve fund to supplement public expenditure during periods of unanticipated petroleum revenue shortfalls.[71] Conversely, the GHF receives excess petroleum revenue to create an endowment fund for future generations when petroleum reserves have been depleted.[72] No other disbursements are permitted out of the PHF.

The PRMA establishes the PIAC as an independent statutory body with a mandate to promote transparency and accountability in the management of Ghana's petroleum revenue.[73] This committee monitors stakeholder compliance with the revenue management provisions in the

[63] PRMA, section 2, 9 &10
[64] id, section 2
[65] id, section 6
[66] id, section 16(1) (as amended)
[67] ibid
[68] id, section 24
[69] id, section 5(1) and 41
[70] id, section 5 (as amended)
[71] id, section 9
[72] id, section 1 (2) (as amended)
[73] id, section 51

PRMA. The PIAC also provides a platform for public debate to inform the public on how funds are used in accordance with the development priorities of the country.[74]

3.5. Fiscal regime

Like all others, companies operating in the upstream petroleum industry have an obligation to pay taxes.[75] Contractors in particular have an obligation to pay additional levies including royalties, bonuses, and additional oil entitlement and acreage fees for the blocks they hold.[76] The rates for these levies are often prescribed in the relevant PAs.

With regards to taxes, the Income Tax Act repealed and replaced the PITL as the primary tax law of all sectors in Ghana, including the upstream petroleum sector. Before this, there had been amendments to the previous Internal Revenue Act and passing of regulations in order to apply capital gains tax, thin capitalisation, and transfer pricing to the petroleum operations as the State desired to take more benefit from its petroleum resources. Unfortunately, the amendments to the Internal Revenue Act and the new regulations were passed after the State had already signed PAs containing freezing stabilisation clauses. The effect of the freezing stabilisation clauses was to prevent the State from applying subsequent changes in law to those PAs.[77] Thus, the legislative changes in taxes could not be applied to the existing contractors who enjoy stabilisation rights as doing so would amount to a contractual breach of their PAs thereby opening up the State to law suits under international arbitration.[78] This implies that notwithstanding its repeal, the PITL continues to apply to the contractors who have rights of freezing stabilisation under their PAs.

Under the Income Tax Act, provisions exclusive to petroleum operations are provided under Part VI. The rate of corporate income tax applicable to a contractor is 35% or as otherwise stipulated in the PA.[79] Conditions for assessing a contractor's chargeable income for a year

---

[74] ibid
[75] PEPA, section 87
[76] id, section 85 to 89
[77] See article 26(2) of the WCTP, OCTP, DWT and DWCTP PAs
[78] All the PAs presently in force provide for international arbitration as the means for resolving disputes with the State
[79] Income Tax Act, section 63 & section 5 of the First Schedule

of assessment include: (a) the market value of petroleum disposed of; (b) compensation derived, whether under a policy of insurance or otherwise, in respect of a loss or destruction of petroleum; (c) amount derived from the sale of information pertaining to the operations; (d) a gain from the assignment or disposal of an interest in the petroleum right; (e) surplus in a decommissioning fund; (f) an amount received after production commenced as reimbursement of cost and premium to a sole risk party under the sole risk terms of a joint operating agreement; and (g) any other amount derived during the year from or incidental to the operations.[80] Specific deductions which are allowed to be made from the assessable income include the annual rental charges and royalties, interest on fees and loans, contributions to pensions and provident funds approved by the PC, capital allowances, and any other amount incurred directly in the course of the petroleum operation.[81] Expenses that are not allowed to be deducted from the assessable income include research and development expenditure, bonus payments made in respect of the grant of the petroleum licence and expenditure incurred as a consequence of a breach of the PA.[82]

Employees of petroleum companies are subject to personal income tax and the rates vary depending on their residency status and in accordance with the PAYE graduated scale for ordinary employees.[83] Subject to the terms of a PA, the gains or profit of an expatriate employee who is employed by a contractor or subcontractor, who conducts petroleum operations exclusively is liable to both income tax and withholding tax.[84]

It is noteworthy that the Income Tax Act finally addresses the longstanding issue of ringfencing of petroleum operations. Where a contractor has multiple petroleum agreements, the operations under each block are considered to be separate operations and are to be taxed separately.[85] Further, where an area within a block is delineated as a development and production area (DPA), following the approval of a plan of development

[80] id, section 66
[81] id, section 67(1)
[82] id, section 67 (2)
[83] Id, First Schedule
[84] id, section 71 (3)
[85] id, section 64(1)

and operation, that area shall constitute a separate petroleum operation.[86] Any other operation carried outside the DPA is deemed a separate operation.[87]

3.6. Local Content

The Petroleum Local Content Regulations was the first detailed local content law to be passed in Ghana. They were enacted in 2013 to ensure the promotion of local content and participation in petroleum activities.[88] The purpose of the regulation is to increase the participation of Ghanaians in petroleum operations by requiring that contractors, licensees, and other participants in the petroleum sector ensure that local content is a core component of their petroleum activities.[89]

In the area of equity and ownership, an Indigenous Ghanaian Company (IGC) is to be given first preference in the grant of a PA or a licence.[90] It is also a condition that there must be at least a 5% equity participation of an IGC subject to variation by the Minister in certain circumstances, to qualify to enter into petroleum license or PA.[91] This 5% IGC equity participation requirement does not include the GNPC's equity participation in the petroleum license or PA,[92] and is not transferrable to a non-indigenous Ghanaian company.[93]

For service companies, a foreign company which intends to provide petroleum goods and services to a contractor, subcontractor, licensee, GNPC or other allied entities is required to incorporate a Ghanaian joint venture company (JVCo) with an IGC and afford that IGC an equity participation of at least 10%.[94] The implementation of this requirement is governed by the PC's published Guidelines for the Formation of Joint Venture Companies in the Upstream Petroleum Industry of Ghana, 2016. The guidelines state that the JVCo is the only lawful vehicle through which the foreign company can transact its petroleum operations in Ghana. In

[86] id, section 64(2)(a)
[87] id, section 64(2)(b)
[88] Petroleum Local Content Regulations, regulation 2
[89] id, regulation 3
[90] id, regulation 4 (1)
[91] id, regulation 4(2) and 4(3)
[92] id, regulation 4 (2)
[93] id, regulation 4 (3) and 4 (5)
[94] id, regulation 4 (6)

addition, the guidelines recommend that the JVCo must have, as part of its purpose, a detailed plan for the transfer of technology and know-how to the IGC, which must be submitted to the PC for approval.

In its operational activities, a contractor or other entity operating in the upstream industry must establish and implement a bidding process that gives preference to IGCs in the procurement of goods and services.[95] The evaluation of contract must not be based on the lowest bidder alone – a contract must be awarded to an IGC where the IGC's bid is not more expensive than the lowest bidder by more than 10%.[96] A contractor or licensee of the petroleum sector may only retain the services of indigenous companies in respect of legal, financial and insurance services.[97] The insurance requirements are discussed in paragraph 3.7 below (Liability and Insurance).

To oversee and enforce the engagement of IGCs in petroleum operations, the Petroleum Local Content Regulations requires a contractor and other entities to submit a local content plan to the PC before commencement of petroleum activities.[98] A local content plan must, among other things, specify sub-plans on employment and training, research and development and technology transfer.[99] The local content plan must also contain detailed provisions to ensure that first consideration is given to services provided and goods manufactured in the country. Qualified Ghanaians must also be given first consideration with respect to employment and adequate provision must be made for on-the-job training of Ghanaians in the plan.[100]

The Petroleum Local Content Regulations imposes very punitive sanctions for breaches, for example, a fine ranging from GHS1,200,000 to GHS3,000,000 or a term of imprisonment of not less than two years and not more than five years or both for knowingly making false

[95] id, regulation 11
[96] id, regulation 12(3)
[97] id, regulation 33 & 29
[98] id, regulation 7
[99] id, regulation 9(3)
[100] Petroleum Local Content Regulations, regulation 9

statements in submissions to the PC.[101] A foreigner and a citizen who front to the PC to misrepresent that an entity is an IGC will be liable to a fine between GHS1,200,000 to GHS3,000,000.[102] Where a person fails to conform to the minimum local content requirements under the regulations, that person will be liable to pay an administrative penalty to the PC of GHC2,400,000.[103]

3.7. Liability and Insurance

Petroleum activities conducted under a PA or under a transportation, treatment or storage license must be insured at all times in accordance with the Insurance Act.[104] The insurance must cover protection against damage to petroleum activities, pollution damage and other liability towards third parties, wreckage removal and clean-up resulting from accidents and any additional insurance cover that the PC may determine.[105] Employees of the contractor, licensee or sub-contractor engaged in these petroleum activities must also be covered by insurance.[106]

The Petroleum Local Content Regulations specifically requires all participants in the petroleum industry to comply with the Insurance Act.[107] Thus, all insurable risks and activities in the petroleum industry must be insured by an indigenous insurance or reinsurance company.[108] A person may only enter into an insurance contract with an offshore insurer where the insurance capacity of indigenous companies has been exhausted and the National Insurance Commission (NIC) has authorised the engagement of a foreign insurer.[109]

In order to efficiently optimise the participation advantages given to indigenous Ghanaian insurance companies in the upstream petroleum sector under the Insurance Act and the Local Content Regulations, the PC and the NIC, collaboratively developed a Protocol on the Oil and

[101] id regulation 46 (1)
[102] id, regulation 46 (2) and 46 (3)
[103] id, regulation 46 (5)
[104] PEPA, section 92
[105] id, section 92(2) & (7)
[106] id., section 92(2)(d)
[107] Petroleum Local Content Regulations, regulation 27
[108] ibid
[109] Insurance Act, sections 37 and 38; Petroleum Local Content Regulations, regulation 28

Gas Insurance Placement for the Upstream Sector. The protocol, which came into force on 17 October 2014, is meant to ensure compliance with the provision of insurance in the upstream petroleum sector.[110] It sets out the procedure for obtaining insurance in the upstream petroleum sector. [111]

Also, in 2013, the Non-Life (General) Insurance Members of the Ghana Insurers Association formed a consortium known as the Ghana Oil and Gas Insurance Pool (GOGIP). GOGIP was to serve as a means for members of the association to pool their resources to assist with the underwriting of oil and gas risks in Ghana.[112] GOGIP was formed to resolve the fragmentation of the Ghanaian insurance sector which rendered the insurance companies ineffective and uncompetitive in underwriting petroleum insurance businesses. As a result of the fragmentation, foreign insurance companies had, taken a commanding lead in the insurance activities in the petroleum sector.[113]

GOGIP is an exclusive body mandated by the NIC to be the representative of all the licensed insurance companies in Ghana and to overcome the challenge of low participation by Ghanaian insurance companies in the upstream petroleum sector.[114] With its formation, all insurance risks for the petroleum sector are insured locally through GOGIP. Any person who wishes to obtain offshore insurance services must ensure that the Ghanaian insurance companies have been granted the right of first refusal and the written approval of the NIC has been obtained.[115] GOGIP has also been charged with the mandate of growing the country's expertise in the underwriting of complex insurable risks in the upstream petroleum sector.[116]

---

[110] Protocol for Oil and Gas Insurance Placement for the Upstream Sector, pg. 13
[111] ibid
[112] Ghana Insurers Association, 'History of GIA' (ghanainsureres.org) http://ghanainsurers.org.gh/history-of-gia/ accessed on 19 May 2020
[113] ibid
[114] Protocol for Oil and Gas Insurance Placement for the Upstream Sector, Guideline No. 3
[115] id, pg. 4
[116] Ghana Insurers Association, 'History of GIA' (ghanainsureres.org) http://ghanainsurers.org.gh/history-of-gia/ accessed on 19 May 2020

3.8. Subsidiary legislation

Other significant regulations passed in the upstream exploration, development and production of oil and gas post discovery include:

- The Petroleum Measurement Regulations – this is to ensure that there is accurate measurement of petroleum resources which will be used as a basis for the efficient determination and disbursement of petroleum revenue accruing to the stakeholders.[117] It applies to the planning, design, operation and maintenance of the technology and methods used for measuring and determining allocated quantities of petroleum produced, transported, or sold.

- The Petroleum Data Management Regulations – this specifies the format, contents and standards required for the preparation and submission of geophysical, geological and production data for petroleum activities, to support the efficient exploitation of Ghana's petroleum resources.[118] All such petroleum data is the property of the Republic.[119] The regulations apply to the reporting and management of petroleum data obtained from the conduct of petroleum activity within the Ghanaian jurisdiction.[120] It further imposes reporting obligations on a licensee in respect of reconnaissance activity and exploration drilling.[121]

- The Petroleum HSE regulations – these regulations promote high standards of health and safety by providing comprehensive basic health and safety requirements with which companies operating in the upstream petroleum sector must comply.[122] These standards include the requirements to prepare and update a comprehensive health and safety plan as well as an emergency preparedness plan for efficiently handling hazard, pollution and accident situations in the upstream sector.[123] Adherence to

[117] Petroleum Measurement Regulations, regulation 2
[118] Petroleum Data Management Regulations, regulation 2
[119] id, regulation 3
[120] id, regulation 1
[121] id, regulation 21 & 26
[122] Petroleum HSE Regulations, regulation 1
[123] id, regulation 9

these regulations is intended to facilitate the prevention of the adverse effects of petroleum activities on health, safety and the environment.[124]

- The Petroleum General Regulations – these provide the procedure, terms, and conditions for the grant of PAs and licences in all upstream petroleum activities. These include the tender process or direct negotiation process for the grant of a PA; the qualification requirements for operators; licence application processes; requirements for the various phases of exploitation and production; and the petroleum activities of the GNPC[125]. It also sets out the criteria for the grant of a license for the installation and operation of a facility for transportation, treatment, or storage of petroleum.

- The Petroleum Fees and Charges Regulations –these regulations prescribe the fees and charges that are payable by contractors and subcontractors in order to obtain the permits and approvals imposed by the regulations. These include fees for registration with the PC as a contractor or subcontractor,[126] fees for permits to install and operate facilities for transportation, treatment, and storage of crude oil,[127] fees for permits to lift crude oil,[128] and fees for the registration of assignments of interests in a petroleum agreements or transfer of shares.[129]

Enforcement and dispute resolution

One of the PC's functions as the sector regulator is ensuring compliance with national policies, laws, regulations, and agreements related to petroleum activities and promoting local content and local participation in petroleum activities.[130] In furtherance of this function, the PC is empowered to impose sanctions on persons who violate the relevant laws in the manner prescribed by those laws.

[124] id, regulation 1
[125] Petroleum General Regulations, regulations 9, 15, 5 & 34
[126] Petroleum Fees and Charges Regulations, regulations 1, 2 and 3
[127] id, regulation 5
[128] id, regulation 6
[129] id, regulation 13
[130] Petroleum Commission Act, section 3(c) and (f)

The upstream petroleum laws impose a range of potential sanctions for various infractions of the law, such as criminal convictions potentially leading to imprisonment or the imposition of fines, administrative penalties, cancellation of contracts, withholding approvals and permits of contractors, and expunging the names of subcontractors from the petroleum register. It is widely accepted that sanctions are intended to be punitive and to serve as a deterrent to others from violating the law. Thus, in our view, the PC cannot be perceived to be lenient in its application of the petroleum laws and the imposition of sanctions, as such a perception is likely to result in a disregard for the law by persons operating in the upstream petroleum sector.

The PC often cautions against committing offences, particularly the offence of deliberately concealing the fact that a company is not an IGC ("fronting"). A person who fronts is liable on summary conviction to a fine of between GHS1.2 million and GHS3 million or to term of imprisonment between one and two years, or both a fine and imprisonment.[131] Although there have been rumours/allegations of individuals fronting, to date, we are not aware of any convictions for fronting or other breaches of the petroleum laws.

Notwithstanding the above, the PC has imposed various sanctions by way of administrative penalties in respect of other offences. Where a person awards a subcontract without informing the PC in contravention of the Local Content Regulations,[132] the PC may apply one of two prescribed penalties – cancellation of the offending contract or the imposition of a financial penalty.[133] The exercise of any discretion by the PC is limited by the language of the regulation, under which a sanction is to be imposed. So, where the PC does not cancel a contract, for instance, because the contract has already been performed, the PC must impose the financial penalty. In this circumstance, the financial penalty is fixed at 5% of the value of the proceeds obtained from the petroleum activity in respect of which there was a breach, capped at the Ghana Cedi equivalent of US$5 million.

[131] Petroleum Local Content Regulations, regulation 46(2)
[132] id, regulation 13
[133] id, regulation 46(7)

Two opinions have emerged regarding the interpretation of the term 'proceeds' in this context. One is that 'proceeds' means the total contract value, that is, the total amount paid under the contract or revenue, and the other is that 'proceeds' refer to "profit" and consequently cannot include the costs incurred in performing the contract. The PC has taken the position that 'proceeds' mean revenue.

It is our view that the PC may have taken this position because of its punitive effect, since calculating the penalty on revenue rather than profit would yield a higher amount, and would, therefore, be more effective as a sanction.

Except as indicated above, the PC does not have any discretion on the range of financial penalties to impose with respect to the administrative penalties prescribed by the Local Content Regulations. This is because the administrative penalties prescribed under the Local Content Regulations are expressed as absolute amounts and not in ranges. Thus, the PC does not have the power to be lenient, and must, in imposing administrative penalties, enforce the law as stated.[134]

Right of appeal

A person aggrieved by a decision of the PC is afforded a right of appeal under the Local Content Regulations. The first step is to lodge a complaint with the Minister within 30 days of receipt of the PC's decision.[135] The Minister similarly has 30 days to consider and take a decision on the complaint.[136] The aggrieved person may commence legal action if the Minister fails to respond to the complaint after 30 days, or if he is dissatisfied with the decision of the Minister.[137]

[134] id, regulation 46 (4) to (7)
[135] Petroleum Commission Act, section 20(1)
[136] id, section 20(2)
[137] id, section 20(3)

MARITIME BORDER DISPUTES

Ghana and Côte d'Ivoire

A year after Ghana's discovery of commercially viable quantities of oil and gas in 2007, the Republic of Côte d'Ivoire staked claim to parts of the area covered by the discovery, alleging that Ghana's exploration activities in the disputed area were infringing on its maritime boundary and consequently its sovereign rights.

Ghana instituted arbitration proceedings under Annex VII to the United Nations Convention on the Law of the Sea after the parties failed to settle the matter by amicable negotiation. On 3 December 2014, the Parties entered into a Special Agreement to submit the maritime border dispute to a Special Chamber of the International Tribunal for the Law of the Sea (the Special Chamber). Whilst the Parties agreed that the land boundary and starting point for the maritime boundary was at Boundary Pillar 55 (BP 55), the Parties disagreed on the points along their coasts from which the boundary was to be measured, the so-called base points.

On 27 February 2015, Côte d'Ivoire requested that the Special Chamber grant certain temporary measures which would remain in force until judgment in the substantive case was given in 2017. The temporary provisional measures were in effect a moratorium on new drilling activities in the disputed area. The Special Chamber granted Côte d'Ivoire's request for temporary provisional measures on 25 April 2015. The temporary measures affected Ghana and operators such as Tullow, Kosmos, and Hess.

Ultimately, the Special Chamber rejected Côte d'Ivoire's claim and accepted Ghana's arguments that delineation in this instance was properly done using the equidistance/relevant circumstances methodology. This is the concept that a nation's maritime boundary should conform to a median line which is equidistant from the shores of its neighbouring nation-states. The Special Chamber held that the equidistance/relevant circumstances methodology would achieve the most equitable result and there were no compelling reasons making it impossible or inappropriate to draw a provisional equidistance line. The Special Chamber ruled that Côte d'Ivoire's arguments in support of its claim were not strong enough, rejecting their argument that the most appropriate approach for delimiting the maritime border was the

angle bisector methodology, which would be based on the general direction of the coastal geography of the two countries, taking irregular coastline features into account.

Notwithstanding its ruling, the Special Chamber did find that the geographic coordinates used by both Ghana and Côte d'Ivoire in plotting the land terminus point were inaccurate. The Special Chamber plotted new geographic coordinates for that point and then, using the equidistance/relevant circumstances methodology, delineated the maritime boundary between the countries, both within and beyond 200 nautical miles from the respective coastlines. The resulting boundary will occasion some adjustment to blocks on both sides of the boundary and may give Ghana more territory than it initially argued for.

The ruling of the Special Chamber, which is final and binding, and cannot be appealed on any grounds, has brought closure to the maritime dispute between Ghana and Cote d'Ivoire, which had lasted over seven years. The decision provided clarity and certainty of the delimitation of the maritime boundary between Ghana and Côte d'Ivoire and created a sense of stability for prospective investors. With the decision came the lifting of the moratorium that had been put in place, so Ghana could continue with its petroleum operations. The contractors could therefore move into the area and commence petroleum operations in compliance with their amended work programmes.

Ghana and Togo

It has been reported that the Republic of Togo informed Ghana that it does not recognise the maritime border between the two countries. Between December 2017 and May 2018,[138] Togolese authorities prevented two seismic vessels from Ghana from undertaking seismic activities in the deep sea in the territory that approaches Togo.[139] Arrangements were put in place for the parties to meet and resolve the issue amicably.[140]

[138]Graphic Online, 'Maritime Border Dispute Brews between Ghana, Togo' (graphic.com.gh, 01 June 2018) https://www.graphic.com.gh/news/general-news/maritime-border-dispute-brews-between-ghana-togo.html accessed 18 May 2020
[139] ibid
[140] ibid

Survey teams from both countries met in July 2019 to adopt a common methodology for the conduct of field work to establish the Land Boundary Terminus (LBT) or Border Pillar 1 as a prerequisite for drawing the maritime boundary between the two countries.[141] Both survey teams presented a report of the 1929 Boundary Commission signed by the French and the British commissioners and related maps and agreed to use the report as their working document.[142] The fifth meeting of the Technical Committee on the Ghana/Togo maritime boundary negotiations was held in Accra, Ghana, in 2019 and it furthered the exchange on technical data and transitory measures to resolve the issue of maritime border delineation.[143]

Case Review: Ndebugre v Attorney General & OTHERS

John Akparibo Ndebugre v The Attorney-General and 2 others [20/04/2016] Writ No. J1/5/2013

Introduction

Given the substantial nature of investments that international oil companies make in order to carry out their obligations under the terms of a PA, litigation of disputes in the courts are often rare in the industry, even on a global scale. The primary aim of these companies is to protect their investments by ensuring that the government and the State is not made an adversary. The situation is not any different in Ghana. A reason for the low number of actions is the fact that international arbitration is a customary provision in all the PAs as the means of dispute resolution. Usually, the international arbitration will be preceded by negotiation and consultation among the senior personnel of the companies and the State. This often leads to the amicable resolution of disputes between the State and the international oil companies.

The case in review was a constitutional case brought to the Supreme Court by a lawyer and former member of Parliament, Mr. John Akparibo Ndebugre. In this case, the Supreme Court interpreted ratification as used under Article 268(1) of the Constitution to mean approval

[141]All Africa, 'Ghana, Togo Meet Over Maritime Boundary Dispute' (allafrica.com, 23 August 2019) https://allafrica.com/stories/201908230539.html accessed18 May 2020
[142] ibid
[143]Togo First, 'Togo-Ghana Maritime Border Dispute: Could an amicable resolution be nearing**?'** (togofirst.com, 29 August 2019) https://www.togofirst.com/en/economy/2908-3756-togo-ghana-maritime-border-dispute-could-an-amicable-resolution-be-nearing accessed 18 May 2020

relying on the language of article 269(2) of the Constitution. The Supreme Court further made the major determination that natural resource exploitation agreements ratified by Parliament in accordance with Article 268(1) required further parliamentary approval in order to be terminated. The Supreme Court, however, refused to invalidate the termination of a PA that had been done without Parliament's approval based on some interesting observations which are discussed further below.

Facts of the Case

On 24th October 2008, the Government of the Republic of Ghana, the GNPC, Aker ASA and Chemu Power Company Limited (together the "Parties") entered into a PA in respect of the South Deepwater Tano contract area (the "SDWT PA"). The SDWT PA was ratified by Parliament in accordance with article 268(1) of the Constitution on 5 November 2008. Aker ASA, a Norwegian company was notified by the GNPC of the need to register a subsidiary locally and assign its interest in the SDWT PA to the local subsidiary pursuant to section 23(15) of the PNDCL 84, the then applicable law. Section 23(15) of PNDCL 84 required a contractor who was incorporated outside the country to register a company in Ghana, and for the locally registered company to be the relevant party to the PA. Thus, Aker ASA having failed to register a subsidiary in Ghana and make that subsidiary a party to the SDWT PA was in breach of this requirement.

Aker ASA, initially in disagreement with the GNPC's view, eventually incorporated a local company and sought to assign its interest in the SDWT PA to the local company. When Aker ASA applied to the Minister and the GNPC for the respective approval and consent to the assignment, the Minister refused to approve the assignment. The Minister informed Aker ASA of his intention to terminate the SDWT PA on grounds of Aker ASA's non-compliance with section 23(15) of the PNDCL 84.

In December 2011, the Parties concluded a termination agreement under which the Government agreed to pay US$29,000,000 to Aker ASA for the transfer of seismic data that Aker ASA had acquired while carrying out its obligation under the SDWT PA.

Following the termination agreement, the plaintiff invoked the original jurisdiction of the Supreme Court under Article 2(1) of the Constitution for a declaration that the termination of the SDWT PA without recourse to Parliament for approval contravened the letter and spirit of Article 268(1) of the Constitution and, therefore, null and void. The plaintiff, thus, sought an order for the recovery of the US$29,000,000 paid to Aker ASA as compensation for the transfer of the seismic data to the State flowing from the alleged unconstitutional termination agreement.

The 1st defendant opposed the plaintiff's argument and claimed that parliamentary approval was not required for the termination of a ratified PA. Accordingly, the Supreme Court set down the following issues for determination:

(a) whether or not the SDWT PA was contrary to section 23(15) of PNDCL 84;

(b) whether parliamentary approval was required for the termination of the SDWT PA; and

(c) whether the US$29,000,000 payment made to Aker ASA was recoverable.

The Supreme Court's Decision

Compliance with section 23(15) of PNDCL 84

With respect to section 23(15) of PNDCL 84, the Supreme Court established that a foreign company which seeks to take advantage of the law to undertake petroleum operations in Ghana must register a subsidiary company in Ghana with full powers of management. The court continued that the local subsidiary is required to be a signatory to the PA. In the court's opinion, it was a logical conclusion that an agreement entered into without a local subsidiary in place and without the signature of the local subsidiary as party is invalid.

The Supreme Court concluded that since the SDWT PA was signed on 24 October 2008 and the Aker ASA's local company was incorporated thereafter on 29 October 2008, the SDWT PA was invalid for breach of section 23(15) of PNDCL 84. The Minister was, thus, justified in terminating the SDWT PA for breach of the law.

Parliamentary approval of termination

The Supreme Court noted that article 268(1) of the Constitution did not specify the role of Parliament with regards to the termination or even variation of an agreement that has been ratified by Parliament. It was, however, reasonable and in accord with common sense for all the parties that were involved in bringing the agreement into force to have a role to play in its termination.

On a purposive interpretation of Article 268(1) of the Constitution and in the spirit of good governance, the Supreme Court held that the approval of Parliament is required for a variation or termination of an agreement that has been previously ratified by Parliament. This is especially so where the funds that are appropriated by the executive to satisfy any penalty payments or other compensation that may arise from the termination of the agreement must be approved by Parliament. The only exception may be where Parliament has delegated the right to approve the termination of such agreements to the executive as per law or by the terms of the ratified agreement.

The Supreme Court found that Parliament, in this case, had ceded its right to approve a termination of the SDWT PA by unreservedly ratifying the SDWT PA which authorized the Minister and/or the GNPC to terminate the SDWT PA without recourse to Parliament under article 23. In the court's view, nothing prevented Parliament from requiring that its approval be sought in the case of a termination. In the absence of such a provision, the Minister acted within his mandate under article 23 when he terminated the SDWT PA without recourse to Parliament.

Validity of the US$29,000,000 payment to Aker ASA

The Supreme Court held that the US$29,000,000 to Aker ASA for transfer of the acquired seismic data to the GNPC was lawful. The court distinguished the circumstances of this case from its holdings in the Amidu (No. 3) v Attorney-General, Waterville Holdings (BVI) Ltd & Woyome (No. 2) (2013-2014) SCGLR 606; Amidu (No.2) v Attorney-General & Isofoton SA & Forson (No.1) (2013-2014) 1 SCGLR 581 (together the "Amidu Cases"). In the Amidu cases, the Supreme Court held that restitution (restoration of parties to their pre-contractual positions)

was not available to persons who were parties to an agreement which violated the Constitution. The court took the view that the US$29,000,000 was not a restitution payment or payment for termination of the agreement per se. The payment was to enable the GNPC acquire the data gained by Aker ASA from undertaking exploration activities in the SDWT block and, therefore, constituted a separate business deal from the invalid SDWT PA.

Conclusions and Remarks

Implications of the Decision

The Supreme Court's decision in this case is of critical importance in understanding the watchdog role of Parliament in ensuring accountability and probity in the execution and general implementation of natural resources contracts (and in fact other international business transactions by parity of reasoning). The decision suggests that where Parliament rubberstamps agreements presented to it by the executive, Parliament would be deemed to have authorised the executive to perform all the acts contemplated by the agreement without further recourse to it. Such acts may include the right to renegotiate or vary the contract, extend, or renew the term, assign the rights, and/or terminate the agreement (as was the case herein) and other usual rights conferred on parties under a contract. Thus, it is very important for Parliament to properly scrutinise all contracts presented to it for ratification so as to ensure that it is not blindly authorising the executive to unilaterally perform a contract that may be of such national importance and, thus, requires a minimum level of parliamentary oversight to ensure that the interests of country are generally protected.

Parliamentary Approval not Conferring Legislative Status

As noted in the minority opinion by His Lordship, Atuguba JSC, the mere ratification by Parliament of an agreement does not give the agreement the status of law. Agreements entered into by the executive only required parliamentary approval in the interest of checks and balances. These checks were not to be considered as undue interference by Parliament in the performance of the executive's role of governance as that would defeat the principle of separation of powers. The learned Justice further cautioned against undue interference with

the operation of contract by Parliament as that could lead to damaging the commercial image of the government to the detriment of the public interest.

The above view, though by the minority of the Supreme Court, confirms the position that no amount of ratification by Parliament of a commercial contract will give the contract the status of law. Often times the question is asked whether a contract entered into by Government that has been ratified by Parliament could contravene or amend a provision of existing law. The decision of the court in this case settles that issue. A provision of law may only be overridden by another law of equal or higher hierarchy. An agreement by Government, being an executive act, does not become a legislative act merely by parliamentary ratification.

Validity of the US$29,000,000 Payment

While we concede that this case, unlike the Amidu Cases, related to a breach of a mere statute and not the Constitution, we disagree with the reasoning of the Supreme Court majority in holding that the payment was valid and not arising from the invalid SDWT PA. The majority, led by His Lordship Benin JSC's characterisation of the payment as a separate business deal necessary to give the GNPC access to the seismic data acquired through exploration activities by Aker ASA, disregarded the fact that all data acquired by a contractor while undertaking exploration or other petroleum operations automatically belong to the GNPC.[144] There is, therefore, no justification for the GNPC to pay for the value of that data which, by operation of law, is the property of the GNPC.

However, although there was no obligation on the GNPC to pay for the value of the seismic data, as the default owner, due to the peculiar circumstance of the case, the US$29,000,000 should have been construed as a restitution payment or compensation for the work done in acquiring the seismic data, and not as a separate business deal. Thus, the validity of the payment should have been examined with the lens of the holdings in the Amidu Cases, being a restitution payment made on the basis of an illegal contract.

[144] PNDCL 84, section 23(2); PEPA, section 52(1)

For the above reason, we agree instead with Justice Atuguba's views expressed on the matter. Atuguba JSC did not attempt to distinguish the payment from a restitution payment. Rather, His Lordship explained that, unlike the Amidu Cases which involved a breach of the Constitution, this case bordered on the breach of a mere statute. The learned Justice then quickly clarified that the availability of the equitable remedy of restitution was not conclusively dependent on whether the breach was constitutional or statutory. Rather, the determination was to be made flexibly, considering the facts of each case. In this case, the learned Justice was of the view that considering the controversy surrounding the proper interpretation of section 23(15) of PNDCL 84 and the fact that Parliament itself had ratified the SDWT PA, it would be unjust to deny Aker ASA a refund of the US$29,000,000 spent on exploration activities on the block.

Further, even if it is assumed that the Supreme Court were right in holding that the US$29,000,000 payment was a separate business deal to give GNPC the benefit of the seismic data and, therefore, not arising from the illegal SDWT PA, then this separate deal constitutes an international business transaction which requires parliamentary approval pursuant to article 181(5) of the Constitution. This is because the Government, through the Minister, was a party to this deal which had a significant foreign element.[145] The contract was with Aker ASA, a foreign company having its central management and control exercised in Norway. Accordingly, the termination agreement ought to have been submitted to Parliament for approval as an international business transaction.

TRENDS AND DEVELOPMENTS

Exploration within producing fields

Following calls by contractors, the Petroleum General Regulations have been recently amended to allow for the drilling of more wells within existing producing fields where the

[145] In the renowned Balkan Energy case, the Supreme Court noted that a contract having a significant foreign element to which the Government was a party was subject to approval by Parliament under article 181(5) of the Constitution

contractors identify prospects of outlying petroleum reserves.[146] This amendment is expected to be a game changer to increase oil production at minimum additional cost, and make existing PAs more attractive while incentivising other international oil companies considering investment opportunities to choose Ghana, as the economics of exploring in Ghana may be more compelling.[147] Contractors seeking to take advantage of this amendment would have to apply to the Minister to that effect.[148]

The amendment is also expected to result in increased revenue for the State from petroleum activities in the short-term through increased GNPC participation with respect to the prospect and/or additional bonus payments.[149]

The risk with the amendment is, however, that the nation's reserves may be depleted at a faster rate.

There were concerns that authorising contractors to continue exploration operations in a producing field would diminish the Government's revenue from taxes and its participating interests in the producing fields as the contractors would seek to offset the costs of the exploration operations from the receipts from petroleum sales. This concern is however addressed in the amendment which prohibits the charging of exploration costs to the receipts of the existing discoveries.[150] The contractor may only get a reimbursement of those exploration costs where it makes a commercial discovery in respect of the exploration.[151]

Proposed amendments to local content law

The Deputy Minister of Energy with responsibility for the petroleum sector, Dr Mohamed Amin Adam, indicated at a local content conference in Takoradi that the Ministry was

---

[146] Petroleum (Exploration and Production) (General) (Amendment) Regulations, 2019 (LI 2390), regulation 5
[147] GH Headlines, 'Petroleum Laws to be Amended; Higher Oil Production Targeted' (ghheadlines.com, 01 November 2019) http://ghheadlines.com/agency/ghana-web-/20191101/132304717/petroleum-laws-to-be-amended-higher-oil-production-targeted. accessed on 03 June 2020
[148] Petroleum General Regulations (as amended), regulation 29(3)
[149] id, regulation 29(7)
[150] id, regulation 29(5)
[151] id., regulation 29(6)

considering amendments to the Petroleum Local Content Regulations as a means of ensuring real local participation in the upstream sector.[152] The objective of the amendments would be to ensure real capacity building amongst indigenous Ghanaian companies (IGCs) and to make it more difficult for IGCs to front for international oil companies. Whilst no details have been given as to how this objective would be achieved, the Deputy Minister did indicate that a multi-agency approach would be adopted for the enforcement of local content laws and the approach would include the PC and, among others, the Registrar-General's Department, and the Ghana Revenue Authority.

Proposal to access GHF monies in emergency situations

In light of the COVID-19 pandemic, the Minister of Finance Mr. Ken Ofori-Atta indicated that Government was considering amending the PRMA to permit withdrawals from the GHF in instances of national emergency. It was unclear what expenditures would trigger such a withdrawal from the GHF. This was met with strong resistance from the opposition party and from public interest groups who raised as a compelling argument the intended purpose of the GHF, being the protection of petroleum revenue for future generations of Ghanaians. Indeed, PIAC has suggested that in order to provide any amounts required for COVID-19 related expenses the Government could make savings in its planned ABFA expenditure or apply monies from the GSF.

Further guidelines from the Petroleum Commission

The PC is developing guidelines on technology transfer, HSE, data management, among others. The Chief Executive of the PC, Mr Egbert Faibille, announced this at the 6th Local Content Conference and Exhibition in November 2019. It is expected that these new

[152] Reporting Oil and Gas, 'Energy Ministry Plans Review of Petroleum Laws to Protect Local Content in Upstream Sector' (reportingoilandgas.org, 03 October 2019) http://www.reportingoilandgas.org/energy-ministry-plans-review-of-petroleum-laws-to-protect-local-content-in-upstream-sector/ accessed on 15 April 2020; Modern Ghana, 'Government Moves to Review Oil and Gas Local Content Laws' (modernghana.com, 21 November 2019) https://www.modernghana.com/news/968881/government-moves-to-review-oil-gas-local-content.html accessed on 15 April 2020

guidelines would go a long way to aid the effective implementation of the laws and regulations governing upstream petroleum operations.

Monetisation of oil revenue

An area of concern continues to be the utilization of oil revenues for the development of the country and particularly in the areas where upstream operations are carried out. Ghana's extractive history has many examples of the local communities feeling insufficiently recompensed for their contribution to national coffers by way of economic development. In a bid to provide a lasting legacy, gold royalties from 2020 onwards are being monetised by way of creation of a royalties company and the sale of some of the shares in that company through a dual listing of the company on the London Stock Exchange and the Ghana Stock Exchange. The monetisation is expected to raise approximately US$500 million for the nation through the share sale and provide a regular income stream by way of dividends payable to the Government by virtue of its shareholding in the company. It has been proposed that the PRMA be amended so that the oil revenue allocation to the ABFA be revised, and part of the allocation be monetised in the manner of the gold royalties. It remains to be seen whether the funds raised through monetizing the gold assets are employed in increasing investment in education, healthcare, and critical infrastructure and whether the idea to monetise petroleum revenue gains any traction.

CONCLUSIONS

Whilst there has been substantial actual and proposed development in the upstream petroleum sector as discussed in this report, particularly at Parts 3 and 7, there are some specific steps that must be taken in order to develop a very viable and robust Ghanaian upstream sector that would ensure that our petroleum resources are translated into tangible national development. For instance, revenue distributions to the GNPC, the ABFA and the Ghana Petroleum Funds must be in accordance with the PRMA. Especially, the Government must commit not to allocate revenues to the ABFA exceeding the upper limits prescribed by the PRMA i.e., not more than 70% of the projected benchmark revenue for any given year and

must provide accurate and reliable information to PIAC that shall inform the PIAC's credible reporting on the use of petroleum revenue. Also, in exercising the Minister's discretions in relevant matters, fair and adequate consideration must be given to the advice of the PC in instances where the law requires such consultation. This would ensure that the Energy Minister makes informed decisions devoid of political connotations that would advance the objects of the industry laws.

Further, while we laud the Government's mooted amendment of the Petroleum Local Content Regulations to guarantee real local participation in the industry, we also urge the Government and other stakeholders to ensure the creation of a fair environment for all Ghanaians to take advantage of the opportunities in the sector. Incidents of politicians and other politically exposed persons who, by virtue of their positions, seize available opportunities in the sector for their selfish interests have become too rampant. Foreign companies are pressured to select politically exposed/affiliated companies that are only created for such purposes and have no demonstrable technical expertise and financial muscle to meet industry requirements. It is troubling that foreign companies are unduly influenced to sideline their preferred choices of capable local partners who satisfy the detailed due diligence processes informing the foreign companies' selection. The effect is that local participation in the sector is assumed by a select minority whereas the independent companies are deprived of the opportunity to gather more experience and grow into strong and reputable local companies that can eventually take over control of the sector from foreign companies.

Nevertheless, we consider the present legal framework of the upstream industry to be a tremendous improvement as compared to the pre-commercial discovery regime. For instance, the PEPA makes some very important strides in providing a framework to improve transparency in relation to the award of oil blocks and in relation to oil industry activities in general. This framework has culminated in the establishment of the petroleum register[153] and the conduct of Ghana's maiden petroleum licensing round.

[153] The register may be assessed online at https://www.ghanapetroleumregister.com. accessed on 02 June 2020