ACEP REPORT

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GHANA'S NEW PETROLEUM AGREEMENTS SHOW MAJOR IMPROVEMENTS AS RISKS LEVELS REDUCE – THE CASES OF GHANA-AGM AND GHANA-COLA/MEDEA PETROLEUM AGREEMENTS[1]

With Support From

[1] Whereas the Ghana-AGM Petroleum Agreement is Among Government of the Republic of Ghana, Ghana National Petroleum Corporation, GNPC Exploration and Production Company Limited and AGM Petroleum Ghana Limited in respect of South Deepwater Tano Contract Area (Dated and signed: 10 September 2013), the Ghana-COLA/MEDEA Agreement is Among Government of the Republic of Ghana, Ghana National Petroleum Corporation and COLA

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1.0. INTRODUCTION

Ghana is a lower middle-income country with significant proven reserves of petroleum offshore. Like all countries with significant deposits of extractive natural resources, the West African country has engaged in a rapid move to exploit her potential petroleum basins with the hope of maximizing her ability to achieve present and future economic benefits from developing viable petroleum fields. This has been expressed in the rate of new approvals of Petroleum Agreements.

Petroleum operations are conducted in the shadow of the law and Ghana, like many other jurisdictions, has developed laws[2] to govern petroleum operations. The major legal instrument through which international oil companies (IOCs) or other investors explore for, and exploit petroleum in Ghana is an International Petroleum agreement (IPA) entered into among the Republic and the Ghana National Petroleum Corporation (GNPC) on the one hand and the petroleum investor(s) on the other hand. This is usually through direct negotiations along the lines of a Model Petroleum Agreement[3].

Since 2004, Ghana has entered into several IPA's with IOCs for offshore exploration, development and production. These include the Ghana-Kosmos Agreement[4], the Ghana-Tullow Agreement[5], the Ghana-Ameranda Hess Agreement[6], the Ghana-Vitol Agreement[7], the Ghana-

[2] These include (i) the Petroleum (Exploration and Production) Act, 1984 (PNDCL 84) (Published in the Official Gazette on 29th June 1984) which principally governs all facets of exploration and production, including contractual relations between the State, GNPC and petroleum investors (i.e., IOCs). This was the first direct legislation governing the Petroleum industry in Ghana. Until 1984, the Minerals Act, 1962 (Act 162) which was a broad legislation governed all mineral resources, including petroleum. Ghanaian academics have, however, generally indicated that PNDC Law 84 did not contemplate offshore activities when it was enacted. Yet, although there is an ongoing review process of the law, PNDCL 84 remains the governing instrument for all petroleum agreements including offshore agreements, (ii) the Ghana National Petroleum Corporation Act, 1983 (PNDCL 64) (Published in the Official Gazette on 16th June 1983) which establishes the National Oil Company (NOC), i.e. the GNPC, and (iii) the Petroleum Income Tax Act, 1987 (PNDCL 188) (Published in the Official Gazette on 4th September 1987) which addresses the petroleum tax/fiscal regime. It is instructive to note the importance of the enactment, by Ghana, of a specific tax law for petroleum taking into consideration the fact that the country arguably operates a Royalty-tax system of contracting for exploration, development and production. Others have consistently maintained that the country's Model Petroleum Agreement follows a Production Sharing regime. It is however PNDCL 84 that peculiarly governs petroleum agreements in Ghana. Other laws that govern the sector includes the Internal Revenue Act, the Petroleum Commission Act, among others.

[3] Since 2000, All IPAs in Ghana are drafted along the content of the Model Petroleum Agreement of Ghana of 17th August 2000 (Available at http://www.eisourcebook.org/cms/files/attachments/policy-legal-contractual-regulatory/Ghana%20-%20Model%20Petroleum%20Agreement.pdf) (Last visited: 1st May 2014).

[4] Petroleum Agreement Among Government of the Republic of Ghana, Ghana National Petroleum Corporation and Kosmos Energy and The E.O. Group in Respect of West Cape Three Points Block Offshore Ghana (Dated and Signed: 22 July 2004).

[5] Petroleum Agreement Among Government of the Republic of Ghana, Ghana National Petroleum Corporation and Tullow Ghana Limited & Sabre Oil and Gas Limited in Respect of the Shallow Water Tano Contract Area (Dated and signed: 7 April 2006).

[6] Petroleum Agreement Among the Government of the Republic of Ghana, The GNPC and Ameranda Hess Ghana Limited in respect of Deep Water Tano/Cape Three Points Contract Area Offshore Republic of Ghana (Dated 8th February 2006).

Heliconia Agreement[8], and very recently **the Ghana-AGM and the Ghana-COLA/MEDEA Agreements[9]**, the subject matter of this review. More recent ones have included the Ghana-AMNI and the Ghana-CAMAC/Base Agreements[10].

Essentially, Provisional National Defence Council (PNDC) Law 84 sets out the mandatory statutory terms[11] which must be contained in an operating IPA in Ghana. Because of the mandatory standard terms required by PNDCL 84 to be included in IPAs, the Model Petroleum Agreement and all the Agreements referred to contain virtually similar provisions with necessary peculiar modifications. Pursuant to Section 12(1) of PNDC Law 84, all of these IPAs were entered into for a term of thirty years or less commencing from their effective dates.

Considering that the principal investment objective of an IOC is to maximize long-term earnings from its overall global operations portfolio – a fact which may work against a host country's (HC) ability to maximize future economic benefits from petroleum investment, it is now increasingly a good practice to do critical and comparative reviews of newly signed IPAs against previously signed ones as a way of determining the extent of potential economic returns on investment to a HC as well as assessing the protective character of investors' legal rights by the laws of a HC. The Ghana-AGM and Ghana-COLA/MEDEA Agreements are two such new petroleum agreements that deserve such critical commentary. They are comparatively progressive in many respects and are a major improvement on previous Petroleum Agreements. But there are still major concerns which when reviewed may inform options Ghana could take in negotiating future international petroleum agreements.

This review is in two parts. On the first part, it focuses on the financial and economic perspectives of the Agreements; and on the second part, the focus is on the legal perspectives.

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[7] Petroleum Agreement Among the Government of the Republic of Ghana, the GNPC and Vitol Upstream Ghana Limited.

[8] Petroleum Agreement Among the Government of the Republic of Ghana, The GNPC and Heliconia Energy Ghana Limited in respect Blocks Offshore Cape Three Points Basin, Ghana.

[9] *See supra* note 1.

[10] The Ghana-AMNI Agreement is the Petroleum Agreement Among Government of the Republic of Ghana, the National Petroleum Corporation AND AMNI International Petroleum Development Company (Ghana) Limited in respect of the Central Tano Block Offshore the Republic of Ghana. And the Ghana-CAMAC/Base Agreement is the Petroleum Agreement Government of the Republic of Ghana, the Ghana National Petroleum Corporation, GNPC Exploration and Production Company Limited, CAMAC Energy Ghana Limited AND Base Energy Ghana Limited in respect of the Expanded Shallow Water Tano Block Offshore the Republic of Ghana.

[11] For example, among a host of standard terms, the Law stipulates the validity period of every petroleum agreement to be a maximum of thirty years or in any case that the agreement may terminate if no discovery is made within seven years of the effective date of the agreement: s.12(1); so is the mandatory requirement of a review mechanism based upon the principle of significant changes in circumstances: s.13; so is the requirement for field relinquishment after initial exploration: s.14; and so is the provision for minimum work and expenditure obligation to be binding on the investor only during the exploration period and designed to ensure that the investor conducts exploration up to a level sufficient to ensure commercial find as well as serve as an incentive against speculative bidding for oil fields or blocks: s.15. Several other standard terms, including standard fiscal terms have been stipulated by PNDCL 84. The Law has also imposed some obligations on the Investor under s.23.

Considering that petroleum operations are conducted in the shadow of the law, we shall review the ownership, exploration, appraisal and exploitation provisions especially the key governance provisions which balance the potentially divergent interests between Ghana and the participating IOCs in the contracts under review. We shall then interject our discussions with some emphasis on the core legal aspects of these agreements.

2.0 FINANCIAL AND ECONOMIC PERSPECTIVES OF THE AGREEMENTS

2.1 Ownership Rights and Control

The ownership of the two Agreements - Ghana-AGM and Ghana-COLA/MEDEA Agreements; are specified as follows:

1. Ghana-AGM Agreement - GNPC has a commercial participating interest of 32% in the Joint Operating Company whilst AGM holds 68%. AGM is owned by AGR (49.5%), Minexco OGG (48%) and MED Songhai (2.5%).
2. Ghana-COLA/MEDEA Agreement – Cola Natural Resources, subsidiary of Cola Natural Resources Holding Limited with 60% participating interest and Medea Development S A with 40%.

In our view, the Ghana-AGM Petroleum Agreement gives Ghana a higher controlling interest than the Ghana-COLA/MEDEA Agreement.

2.2 Fiscal Provisions

These define the fiscal benefits of the two Agreements to Ghana. In the Ghana-AGM Agreement, the fiscal terms include oil royalty of 10%, gas royalty of 5%, initial participating interest of 10%, and additional participating interest of 15%; and corporate tax of 35%. These terms are not different from the previous Agreement with AKER ASA on the same block but which was abrogated by Government in 2009. They are however major improvements over the pre-discovery contracts including the Jubilee Field Agreements. This is expected because the exploration risk profile of Ghana's hydrocarbon basins where oil discoveries have been made has significantly reduced, hence the justification for higher fiscal terms in post discovery contracts.

On the face of the Agreement, there are other contributions to be made by AGM to GNPC. These include a training allowance of US$1 million, an advance of US$20 million to GNPC for the work done on the block previously. These contributions are petroleum costs and will be offset by revenues from the sale of petroleum during production. AGM is required to advance a further US$15 million for the planning, development and construction of a University in Ghana offering petroleum related courses; and US$8 million for the corporate development needs of GNPC's

subsidiary, Explorco; but these expenditures shall be recovered pursuant to the Joint Operating Agreement (JOA). AGM is also expected to finance GNPC's exploration cost of two wells in the first initial exploration period.

It is important to determine whether these advances and contributions by the Contractor can be classified as fiscal benefits since they are to be recovered as petroleum costs either to the Contractor or the JOA.

The fiscal terms in the Cola Agreement are not different from that of AGM except the additional participating interest which is 17.5%. There is also a training allowance of US$1 million. However, this contract has a technology support contribution of US$1 million and US$2 million during the exploration and Development phases respectively which the AGM contract does not have.

Observation

The differences in the benefits can be attributed to the advantages associated with the amount of work already done in the contract areas. In the case of the AGM area, significant amount of work had been done by Aker ASA for which the GNPC had to pay US$29 million following the abrogation of the Agreement. The block also lies in the same petroleum fairway as the discoveries in Tullow Oil Deepwater Tano Block, Hess Corporation's Block and Vanco's Deepwater Cape Three Points Block. Similarly, in the East Cape Three Points Contract Area of Cola Natural Resources, a lot of work had been done in the area including 2D seismic data; and the area lies adjacent to Vanco's Deepwater Cape Three Point block discovery. The high fiscal benefits of the AGM Agreement are therefore not surprising considering the successful discoveries around the area.

2.3 Financing of Development Costs of GNPC's Additional Participation

The Ghana-AGM Agreement provides GNPC the option to take additional participating interest of 15% upon commercial discovery of oil and which shall be responsible for financing the development costs relative to this interest. However, GNPC can elect to have the Contractor advance up to 50% of the total proportionate share of the development cost for financing the additional interest. Contrarily, the Cola Agreement provides for an additional interest of 17.5% but financing advance to the GNPC shall be up to an undivided 10% of the total proportionate share of GNPC's cost of development. This exposes AGM to more pre-production cost than Cola Natural Resources as the cost of development of a deep water block is expectedly higher. However, this depends on the size of the discovery and the program of development.

2.4 Local Content and Local Participation

There is a local Ghanaian firm, MED Songhai, in the Ghana-AGM Agreement subsumed in the Contractor, AGM Petroleum Ghana. MED Songhai owns 2.5% in AGM Gibraltar, the parent

company of AGM Petroleum Ghana which has a participating interest of 68% in the Joint Operating Company. This means that the participating interest of the local Ghanaian firm translates to 1.7% in the JOC. This falls far below the minimum equity of 5% participation for Ghanaians in a petroleum license as prescribed in the Petroleum (Local Content and Local Participation) Regulations (LI2204).

The beneficial owners of Cola Natural Resources Ghana Limited are neither known from the Agreement nor the memoranda that accompanied the Agreements and it is therefore difficult to ascertain the extent of local participation in the Agreement.

2.5 Financial Capability of Applicants

Considering that the AGM block is the deepest in Ghana so far (with water depths of between 2000m to 3500m), the financial requirement will be very significant as demonstrated in the minimum expenditure for the three phases of the exploration period amounting to US$511 million. Even though the applicants have shown that they can raise capital to finance operations, this is only indicative for some of them. Apart from AGR and MED Songhai which have shown internal financial strength relative to their participating interests and can therefore finance their operations from own sources, Minexco, the company supposed to be the financial muscle of the Contractor Group; and GNPC, have not demonstrated their financial capability in clear terms as there are no records of their cash flows attached to the documents presented to Parliament.

In the case of Minexco, it only showed letters of financial support from HSBC and Line Trust Corporation Limited, but these do not constitute guarantees. This is further buttressed by the statement in the memo to Parliament by the Minister of Energy and Petroleum - "AGM and Minexco have made further arrangements to procure from an investment grade financial institution, a guarantee for any outstanding expenditure obligation of the Contractor under the proposed Petroleum Agreement".

Also, the fact that Explorco, a joint operating partner is not required to pay for the exploration of two wells in the initial exploration period further exposes AGM to more financial commitments in the face of financial uncertainty exhibited by the company.

On the other hand, the companies involved in the Cola Agreement – Cola Holdings Limited and Medea Development S A – have posted impressive cash flows indicating their ability to finance operations on their internal resources. Cola Natural Resources further filed two letters of guarantee of performance and financial solvency from PNB Paribas and HSBC Private Bank with PNB Paribas indicating that the Group has at least US$80 million in funds with the Bank.

The financial capability of applicants for oil blocks cannot be overlooked as it constitutes one of the two major requirements for establishing the qualification of an applicant for a block. The other qualification is the technical capability of the applicant. Parliament must therefore evaluate the financial capability of the applicants in the Ghana-AGM and Ghana-COLA/MEDEA Agreements before approval.

2.6 Exploration Period and Performance Bonds

The exploration period is a very important phase of oil operations and the Government must be able to protect Ghana's interest by ensuring that exploration companies have the necessary finances to fulfil their obligations. This is why in most countries, exploration companies are expected to demonstrate their ability through performance bonds.

In the Ghana-AGM Agreement, except for the first exploration period, the Contractor is not required to post a performance bond. The only performance bond required is US$100 million for the initial period of 3 years, less than half the minimum expenditure requirement of US$259 million for the period. The GNPC recognizes that this is potentially problematic by providing for an additional performance bond when it realizes that the contractor is not fulfilling its obligations as expected. This makes the exploration obligations highly volatile especially since the financial backbone of the Contractor Group, Minexco, expects to rely heavily on debt financing. Off course, there are relinquishment provisions that could be triggered when the Contractor fails to fulfil its obligations but the country could have avoided the associated postponement of oil discovery in the area if proper due diligence was done and a more financially stronger company was awarded the block.

In the case of the Ghana-COLA/MEDEA Agreement, the minimum expenditure requirement during the exploration period is not very significant for the three phases, about US$65 million. This is largely due to the fact that the area is in shallow waters with water depths from 30 m to 200m. In spite of this low financial requirement, the conditions for meeting work obligations are more stringent. The Contractor is expected to establish a funded Escrow Account with funds equivalent to minimum expenditure obligations of US$25 million for the initial exploration period. It will further post a performance bond of US$20 million for succeeding periods of explorations.

The implication of these provisions is that the Ghana-AGM Agreement faces greater risks of non-fulfilment of the work program during the exploration phase; hence the performance bond in respect of the contract should be tightened up further.

2.7 Relinquishments

Relinquishments provisions are used to compel accelerated performance of exploration companies. They also prevent speculative exploration in which companies hold on to oil blocks whilst waiting for exploration results of adjacent or nearby blocks to raise the value of their blocks.

The relinquishment provision in the Ghana-AGM Agreement is more punitive than the Ghana-COLA/MEDEA Agreement but less punitive than the pre-discovery contracts. This may be due to the fact that considerable amount of work had been done in the area. In the Ghana-AGM Agreement, the Contractor relinquishes 30% of the original size of the acreage at the beginning of the first extension if it elects to go into the first extension period and at the beginning of the second extension period, the contractor shall hold not more than 45% of the original block. The

Ghana-Cola Agreement has a more relaxed relinquishment with 20% in the first extension and not more than 60% of the original size of the block in the second extension period.

Surprisingly, both Ghana-AGM and Ghana-COLA/MEDEA Agreements, which are supposed to have more strict relinquishments as a result of the improved environment, rather have better relinquishments than the Jubilee contracts. In the Jubilee Contracts, the contractor relinquishes 50% when it enters the first extension period and when it enters the second extension period, the remaining size of the block shall not be more than 25% of the original size.

2.8 Approval of budgets

In both the AGM and Cola Agreements, provisions have been made for the constitution of a Joint Management Committee (JMC) with responsibility to review and approve budgets and other decisions during exploration, development and production phases. In this respect, Article 6.3d of the AGM Agreement provides that where the contractor makes expenditure, outlays or advances for which Contractor will be required to make on a 100% basis, it shall require the approval of the Contractor's representative only. This is dangerous as costs approved by the Contractor only could provide room for cost inflation usually through transfer pricing or through hidden costs. Thus the AGM Agreement has loose ends on budget control which must be reviewed.

This problem has already been addressed in the Ghana-COLA/MEDEA Agreement because it provides for all budgets to be approved by the JMC.

2.9 Amendments of Work Program or Budget

As is required in most contracts, variations may occur in the work program or budget. To accommodate this, Article 6.4b of the Ghana-AGM Agreement requires that any amendment to any work program or budget shall be submitted to the JMC for review and approval provided that the amendment leads to increase in excess of 5% of the total budget of a line item or of the total budget of the project. In this case, the increase is said to be of material significance. However, in this industry an increase of less than 5% in repeated amendments could amount to more than the prescribed material significance in the contract budget. This is another loose end on budget control which should not be allowed in the contract.

This has been addressed in the Ghana-COLA/MEDEA Agreement which requires all amendments whether material or not to be subject to review and approval of the JMC, an improvement over the Ghana-AGM Agreement.

2.10. Important Common Provisions

The following common provisions in the two Agreements are very important to take note of.

1. Introduction of capital gains tax (Article 12.1b). This is the first time, Ghana is applying capital gain tax in a petroleum contract largely due to the fact that the Petroleum Income

Tax Law (PNDC Law 188), the industry specific law, does not sanction it. This is however consistent with the Internal Revenue Act 2000 (Act 592) in Section 95(1).

2. Conditions under which confidential data can be disclosed include the need for Government agencies to have access to this data for the purpose of issuing relevant permits and authorizations (Article 16.5). This allows the Petroleum Commission to access confidential data and can facilitate the fulfillment of Section 3k of Act 821 which mandates the Commission to issue annual report on all petroleum resources and activities.
3. The cost of cleaning pollution or repairing damage as a resulting from petroleum operations shall be declared as petroleum cost unless it is done by negligence or willful misconduct by contractor or affiliates or subcontractor (Article 17.5). This should be re-examined against the background of Ghana's low level of capacity which may make it difficult to prove the claim of negligence on the part of the contractor.

3.0 LEGAL ASPECTS OF THE AGREEMENTS

Ghana is very much aware of the nature of the risks involved in petroleum operations and have included specific legal provisions in petroleum agreements to mitigate the negative impact of those risks. These legal provisions include the stabilization and/or adaptation and force majeure regimes. Others include the choices of law and forum, sovereign immunity, dispute settlement and enforcement of awards, indemnities, right of first refusal and the standard of liability.

3.1 The Stabilization, Choice-of-Law, Dispute Settlement, Sovereign Immunity and Force Majeure Regimes

To begin with, Stabilization Clauses are one[12] of a category of clauses usually enshrined in long-term petroleum contracts to address the potential abuse of mutually agreed rights and obligations by parties to the contract, most specially the HCs. They can be either "freezing" or "economic-equilibrium clauses". They are 'freezing provisions' where they essentially preserve at all times the respective rights and obligations of the contracting parties, particularly the investors, from any state action adverse to the terms of the applicable IPA. Conversely, 'economic-equilibrium clauses' are those provisions which envisage a possible change in host state laws and accordingly provides for adjustments, in such circumstances, of the fiscal terms of the IPA commensurate with the IOCs economic benefit thereto.

[12] Other clauses that can be introduced in long-term petroleum agreements include "force majeure clauses" resulting from the contract law doctrine of "Hardship", and "Adaptation Clauses" which are discussed briefly in the present work. For a general discussion of these legal provisions, *See* Claude Duval et al., International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects (2nd ed.) (New York, USA: Barrows Inc., 2009).

Article 26 respectively of the Ghana-AGM and the Ghana-COLA/MEDEA agreements provides for uniform stabilization clauses under miscellaneous provisions. Except with changes in names of the IOC's in the respective IPAs or in some cases merger of certain provisions, both the Ghana-AGM and the Ghana-COLA/MEDEA agreements provide for the same stabilization regime, i.e., economic-equilibrium provisions which envisage a possible change in the laws of Ghana and accordingly provides for adjustments, in such circumstances, of the fiscal terms of the IPAs commensurate with AGM and COLA/MEDEA's economic benefits thereto. This is in contradistinction from previous petroleum agreements such as the Ghana-Tullow and Ghana-Kosmos Agreements which establishes a stabilization regime that combined both economic equilibrium and freezing clauses.

For the avoidance of doubt, Article 26 of the Ghana-Kosmos Agreement provides, in relevant part:

> *'26.2: The State, its departments and agencies, shall support this Agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the parties hereunder. As of the Effective Date of this Agreement and throughout its term, the State guarantees Contractor the stability of the terms and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretations thereto) including, without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law…that are applicable hereto. The State further represent and guarantees that the Contract Area is wholly within Ghana's territorial waters and is not subject to any dispute'.*
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> *'26.3: This Agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the parties. Any legislation or administrative act of the State or any of its agencies or subdivisions which purport to vary any such right or obligation shall, to the extent sought to be applied to this Agreement, constitute a breach of this Agreement by the State; provided, however, if the Petroleum (Exploration and Production) Law, 1984 (PNDCL 84) is amended or replaced (superseded), Contractor shall be entitled to enjoy and this Agreement (and any new petroleum agreement referred to herein) shall be deemed to include (or include – as applicable) the terms and conditions in such amendment or replacement Law that favouably affect the rights and/or the Contractor under this Agreement'.*
>
> *'26.4: Where a party considers that a significant change in the circumstances prevailing at the time the Agreement was entered into, has occurred affecting the economic balance of the Agreement, the Party adversely affected thereby shall notify the other Parties in writing of the claimed change with a statement of how the claimed change has affected such*

economic balance or has otherwise affected relations between the parties….' [our emphasis].

Clearly, Article 26.2 and 26.3 provides for freezing stabilization clauses whereas Article 26.4 provides for an economic-equilibrium clause, respectively of the Ghana-Kosmos and Ghana-Tullow Agreements. The combined effect of these provisions is that pre-oil production IPAs in Ghana such as the Kosmos and Tullow Agreements not only guarantees IOCs of strict compliance of the terms of the IPAs by Ghana and its administrative sub-divisions but also promises the potency of a meaningful dialogue where the said terms turns out to be unenforceable, as the case may be. These provisions aim at preventing a unilateral change in law by Ghana. Thus the hybrid effect of both freezing and economic-equilibrium clauses in previous IPAs in Ghana are shown to have the effect of insulating IOCs from adverse actions of the state and its administrative subdivisions as well as afford the IOC the opportunity of a favorable review of the terms of the IPA where a significant change in circumstances affect its economic balance. Although it could be argued that the future of pre-oil production IPAs in Ghana does not admit of untold consequences on the balance of the IOCs rights pertaining to the contract – a fact which can attract more IOCs to invest in Ghana's upstream petroleum sector, it is equally arguable that by introducing freezing stabilization clauses Ghana contracted to at all times maintain the status quo of the IPAs and the may not act to the contrary unless that would benefit the IOC. This can have negative implications for the sovereignty of Ghana as well as detract from the legislative powers of Parliament. And although Ghana has so far not breached its obligations under those contracts, the stabilization clauses therein could commit our government to costs every time Parliament makes laws that affect the economic balance of the agreement to the disadvantage of the investor even if the laws were made in the public interest.

As if that is not enough, a significant variation of the 'provided however clause' in Article 26.3 of the Ghana-Tullow Agreement is instructive to note:

'26.3: ...provided, however, where a new income tax rate comes into force as a result of the promulgation of the new Petroleum Income Tax law currently before Cabinet, Contractor shall have the option of either applying the new income tax rate to this Petroleum Agreement or remaining under the Petroleum Income Tax Law, 1987, PNDC Law 188' [our emphasis].

The general tenor of Article 26.3 of the Ghana-Kosmos Agreement, except for difference in the superseding law, is in tandem with Article 26.3 of the Ghana-Tullow Agreement. Here, it would seem that Tullow is given the option of either continuing in the income tax regime under PNDC Law 188 or any superseding law which may come into force at a later date. In our opinion, this gives too much leverage to the IOC to the disadvantage of Ghana and can affect Government's revenue even when the IOC enjoys a windfall. It also detracts from Ghana's sovereign right to benefit from its oil through legitimate legislative revisions of legal instruments. It is in this light

that we consider the stabilization regimes of the Ghana-AGM and Ghana-COLA/MEDEA Agreements progressive. For example, the Ghana-AGM Agreement provides:

> *"…26.3: Without prejudice to the rights and obligations of the parties under the Agreement, in the event that after the Effective Date any applicable Law, Rule, Decree, or Regulation of the Republic of Ghana is made or amended, that makes further observance of the original terms and conditions of this Agreement impossible or that has a material adverse effect on the rights, obligations and benefits arising from the economic, fiscal and financial provisions of this Agreement (a* ***"Material Change of Law"****), the Parties shall, if a Party so requests, meet as soon as possible to negotiate possible modifications to the Agreement as provided under Article 26.4 and 26.5.*
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> *26.4 Where a Party considers that a Material Change of law or a significant change in the circumstances prevailing at the time the Agreement was entered into, has occurred affecting the economic balance of the Agreement, the Party affected hereby shall notify the other Parties in writing of the claimed change, with a statement of how the claimed change has affected the relationship between the Parties.*
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> *26.5 Within a period of three (3) months of receipt of notification under Article 26.4, the other Parties shall indicate in writing their reaction to such notification and shall meet to engage in negotiations with a view to amending, or rectifying, the provisions of this Agreement as they agree is necessary to restore the relative economic position of the Parties at the date of the Agreement. …".*

The Ghana-COLA/MEDEA Agreement has similar provisions under its Article 26.2(b) and (c). It is easy to see the sharp departure from freezing stabilization clauses in these agreements. It is equally a discernible fact that whilst the Ghana-Kosmos and Ghana-Tullow Agreements placed so much importance on balancing the economic position of the IOCs, the Ghana-AGM and Ghana-COLA/MEDEA Agreements gives credence to the importance of all parties including Government. This better positions Government and the GNPC to demand future changes in the fiscal structure of the Agreements in a way that will bring enhanced benefits to Ghanaians, the ultimate owners of the oil and gas resource.

It is important to state however that this improvement may have been the result of the fact that Ghana's petroleum basins, especially those related to the Ghana-AGM and Ghana-COLA/MEDEA Agreements have been significantly de-risked following Ghana's first oil production in 2010. The fact that the Ghana-Tullow and Ghana-Kosmos Agreements were also entered into in pre-production years when the petroleum basins of Ghana were relatively unknown may have explained why freezing stabilization provisions were inserted into those Agreements probably as an investment incentive to IOCs. Be that as it may, it is observed that the Ghana-AGM and Ghana-COLA/MEDEA Agreements are a significant improvement over their pre-production counterparts in terms of their stabilization regimes.

In discussing stabilization regimes, one cannot be oblivious of some additional provisions enshrined in the IPAs which together with stabilization clauses measures the relative rights and obligations of the Parties to an IPA. These include the nature of the choice of law provision, the dispute settlement mechanism and the nature of Arbitration if it exist, and the "Force Majeure" provisions.

3.2 Internationalized Choice-of-law

Although the stabilization provisions in the Ghana-AGM and Ghana-COLA/MEDEA Agreements discussed above will seem to favour Ghana more than the participating IOCs, the choice of law provisions in the same Agreements will seem to remedy the effect of any future imbalances in the rights of the IOCs appertaining to those IPAs. Inherent in the Ghana-AGM and Ghana-COLA/MEDEA Agreements are internationalized choice of law provisions. For the avoidance of doubt, Article 26.1 and 26.2 of the Ghana-AGM Agreement provides:

> *"26.1 This Agreement and the relationship between the State and GNPC on one hand and Contractor on the other shall be governed by and construed in accordance with the laws of Ghana in effect from time to time.*
>
> *26.2 The State confirms that it will accord to each Contractor Party treatment consistent with the minimum standard of treatment required to be accorded to foreign investors under customary international law".*

The same regime is provided under Article 26.1 and 26.2(a) of the Ghana-COLA/MEDEA Agreement. Similar provisions are provided in pre-production Agreements such as the Ghana-Kosmos and Ghana-Tullow Agreements, although there exist relative differences in phraseology. Article 26.1 respectively of the Ghana-Kosmos and Ghana-Tullow Agreements internationalized the choice of law provisions:

> *'26.1: This Agreement and the relationship between the State and GNPC on one hand and Contractor on the other shall be governed by and construed in accordance with the laws of the Republic of Ghana consistent with such rules of international law as may be applicable, including rules and principles as have been applied by international tribunals'*[13].

[13] *See* Ghana-Tullow Agreement, *supra* note 17, Article 26.1.

Either group of contracts affords the participating IOCs greater chances of enforcing stabilization provisions contained in the Agreements against Ghana, subject however to Ghana's right to nationalize its own natural resources[14] in the future. By insisting on consistency of Ghanaian law with applicable rules and principles of international law, including arbitral awards, these provisions promises to enhance some level of comfort to IOCs and may prove effective to participating IOCs in enforcing awards favourable to them against the Ghanaian State[15]. This inherent reality may also operate to induce the Ghanaian State to renege from any unilateral state action which will unduly affect the economic balance of the bargain, at least from the perspective of the investor.

3.3 International Arbitration

Additionally, by providing, that on failure of consultation and negotiation, the Contractor and the State should have recourse to international arbitration for the resolution of *"any dispute arising out of or in connection with…"*[16] the Agreements, the Ghana-AGM and Ghana-COLA/MEDEA Agreements promises to enhance enforceability of stabilization clauses enshrined in them[17]. Similar provisions are contained in Article 24 respectively of the Ghana-Kosmos and Ghana-Tullow Agreements, which provides in relevant part that on failure of consultation and negotiation, all disputes *'…in relation to or in connection with or arising out of the terms and conditions…'*[18] of petroleum contracts should have recourse to international arbitration for resolution.

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[14] *See* UNGA Res. 1803 (XVII), 'Permanent Sovereignty over Natural Resources', (dated 14th December 1962) which guarantees the right of a sovereign state to treat its natural resources as it deem fit in accordance with its economic development agenda. This would seem to suggest that the stabilization clauses contained in Ghanaian IPAs do not have the effect of insulating the participating IOCs from expropriation of their investments by Ghana in such a way as to warrant specific performance by Ghana in case of breach but merely to re-affirm the participating IOCs right to compensation by Ghana in any such occurence. Note, however, the opinion of the sole arbitrator in Texaco Overseas Petroleum Company (TOPCO) v. Libya, Award (merits), 19 January 1977, 53 ILR 389 & 17 ILM 3 (1978), where arbitrator Dupuy purported to hold Libya to specific performance. This has engendered a lot of controversial debates.

[15] On this, *see* Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, Vol. 30, Denv. J. Int'l L. & Pol'y (2002) at 217.

[16] *See* generally, Article 24 respectively of the Ghana-AGM and the Ghana-COLA/MEDEA Agreements.

[17] *See* Claude Duval et al., International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects (2nd ed.) (New York, USA: Barrows Inc., 2009) at 341 where the learned authors argued that a provision for settlement of all disputes by international arbitration can enhance enforceability of stabilization clauses in IPAs.

[18] *See* generally, Ghana-Kosmos Agreeent, *supra* note 16, Article 24; Ghana-Tullow Agreement, *supra* note 17, Article 24.

These provisions in the Ghana-AGM and Ghana-COLA/MEDEA Agreements and the similar such provisions in other IPAs in Ghana recognizes the importance of a neutral forum for such international arbitrations and accordingly provide for all such arbitrations to be conducted either in London or any other location agreed upon unanimously by the arbitrators provided the location is in a State which is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[19]. All arbitrations are to be conducted under the auspices and adopting the Rules of the International Chamber of Commerce (ICC), whose award shall not only be final and binding upon the parties but enforceable against the losing party[20]. In fact, each of the Republic of Ghana and GNPC have agreed in express terms to irrevocably waive any form of immunity they are entitled to whatsoever in relation to legal proceedings against them and arising out of IPAs whether in Ghana, England or elsewhere, as the case may be, subject however to Ghana's sovereign right as well as GNPC's right under any *"applicable law to claim immunity for itself or any of its assets in respect of any effort to confirm, enforce or execute any Pre-Award Attachment"*[21].

It is important to state Ghana and GNPC's right to claim immunity for themselves or any of their assets during pre-award stages of disputes arising out of the Agreements places Ghana and GNPC in good position to avoid final arbitral awards that could cripple the progress of government or GNPCs business. What is significant for the investor community is that Ghana is undoubtedly willing to be bound by final arbitral awards as clearly expressed in the Agreements under review.

An additional advantage in this provision is the initial consultation and/or negotiation between the participating IOCs and the Ghanaian State, a standard *'cooling-off'* provision that seeks to respect and preserve the long-term relationship established by the parties pursuant to the terms of the IPAs. The provision for settlement of disputes by international arbitration will be particularly useful to AGM, COLA and MEDEA, and of course, all other participating IOCs whose interests are better protected in a neutral environment than can reasonably be predicted in Ghana. In the unlikely event that the State unilaterally terminates an IPA, the IOCs right to initiate arbitration proceedings against the state stands protected[22].

[19] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.
[20] *See* Article 24.4, 24.7 and 24.11 of the Ghana-AGM Agreement.
[21] *Id, particularly Article 24.11 of the Ghana-AGM Agreement.* .
[22] *See* generally Article 24 respectively of all IPAs referred to herein. See particularly, Article 24.6 of the Ghana-Tullow Agreement.

3.4 Force Majeure

Moreover, Ghanaian IPAs make provisions for *'Force Majeure'*[23], a specific hardship provision which excuse either party to the contract from performance on proof of the occurrence of specified reasonably unforeseeable events for which the claiming Party has taken all appropriate precautions and conscious alternative measures to fulfill its obligations but failed. In both the Ghana-AGM and Ghana-COLA/MEDEA Agreements, *'Force Majeure'* is defined to mean:

> *"...any event beyond the reasonable control of the Party claiming to be affected by such event which has not been brought about directly or indirectly at the instance of an Affiliate; provided that the State shall not be considered for this purpose an Affiliate of GNPC or* ***Explorco****. Force Majeure events may include, but are not limited to. Earthquake, storm, flood, lightening or other adverse weather conditions, war, terrorism, embargo, blockade, riot or civil disorder"*[24] *[our emphasis]*.

There is a substantial variation in the definition of Force Majeure in the Ghana-AGM and Ghana-COLA/MEDEA Agreements from that in pre-production contracts such as the Ghana-Kosmos and Ghana-Tullow Agreements. Under Article 1.35 of the Ghana-Tullow Agreement, for instance, Force Majeure is defined to mean:

> *'...any event beyond the reasonable control of the Party claiming to be affected by such event which has not been brought about at its instance, including, but not limited to, earthquakes, storm, flood, lightning or other adverse weather conditions, war, embargo, blockade, riot or civil disorder'*.

In the Ghana-AGM and Ghana-COLA/MEDEA Agreements, direct and/or indirect actions of the State which adversely affects performance of either GNPC or Explorco can neither disentitle GNPC nor Explorco from invoking the Force Majeure provisions to their benefit, even though

[23] *See* for example, the Ghana-Kosmos Agreement, *supra* note 16, Article 22.

[24] *See* Article 1.46 and 1.48 respectively of the Ghana-AGM and Ghana-COLA/MEDEA Agreements. The only difference in the definition of *"Force Majeure"* in the two Agreements is in the definition of *"Force Majeure"* in the Ghana-AGM Agreement which excluded the State from being an Affiliate of Explorco, a subsidiary company of the GNPC which is not a Party to the Ghana-COLA/MEDEA Agreement. Absent this *"Explorco"* addition, the definition of *"Force Majeure"* in the two Agreements is repeated verbatim. For a complete appreciation of the Force Majeure regimes in these Agreements, see generally the Force Majeure clauses contained in Article 22 respectively of the Ghana-AGM and Ghana-COLA/MEDEA Agreements.

both of them are in reality agents of the State. This distinction is not in pre-production contracts such as the Ghana-AGM and the Ghana-Tullow Agreements as shown above. The significance is that the Ghana-AGM and Ghana-COLA/MEDEA Agreements clarifies a potential point of dispute that existed in pre-production contracts such as the Ghana-Kosmos and Ghana-Tullow Agreements. This is particularly the case because the events contemplated in the Agreements under review are often viewed as risks. When therefore they occur together with stabilization provisions in the same Agreements, they forecast a secure future for long-term IPAs in Ghana because they allocate *'the risk of misprediction'*[25].

But there are other factors outside the IPAs under consideration that could help promote good relations between Ghana as a host country and foreign investors in the petroleum industry which deserve to be highlighted. For instance, if we pause for a while and assumed that there were no provisions for settlement of disputes by international arbitration in Ghanaian IPAs, it is still arguable that IOCs hailing from home countries that have operating Bilateral Investment Treaties (BITs) with Ghana have protection under international arbitration. As of 5th June 2014, Ghana has twenty-one operating BITs with the rest of the world[26]. In all of these BITs, provisions are made for *"Standing Offers"* to international arbitration. And even though the stabilization provisions in the Ghana-AGM and Ghana-COLA/MEDEA Agreements and, indeed, all other IPAs in Ghana are not expressly drafted to take account of BITs, it is arguable that, in the absence of international arbitration provisions, the existence of these BITs, ipso facto, entitles an aggrieved investor of a contracting State to initiate arbitration proceedings against a contracting host State under ICSID Convention[27].

Moreover, **Ghana's past record at avoiding unilateral action in the extractive industries is unquestionable**. Admittedly, the mining sector, especially gold mining, underwent tumultuous

[25] *See* E. A. Farnsworth, Alleviating Mistakes: Reversal and Forgiveness of Flawed Perceptions, (Oxford, UK: Oxford University Press, 2004) at 151.
[26] *See* List of countries with BITs with Ghana, available at http://icsid.worldbank.org/ICSID/FrontServlet , ICSID Official Website (Last visited: 5th June 2014).
[27] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (submitted for signatures on 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

State interruptions in the period between 1966 and 1983[28]. Even then, State interruptions only led to successful renegotiations with attendant benefits to investors[29]. However, since 1986 when the repealed Minerals and Mining Law[30] was enacted, the mineral sector in the country has been stable with favorable investment climate for attracting foreign investors into the country[31]. Since 1992 when Ghana started its Fourth Republic under a new era of democracy, the situation has improved even better. There is yet to be recorded a single incident of unilateral action by the Ghanaian State in the extractive industries since the beginning of the Fourth Republic. This coupled with the **relative peace and political stability as well as greater respect for international law** makes Ghana an ideal destination for foreign investment, generally.

The result is that long-term petroleum contracts in Ghana largely forecasts stability. Ghana has through IPAs promised IOCs beyond the blessings of mere stabilization clauses and this has reflected in the Ghana-AGM and Ghana-COLA/MEDEA Agreements. The internationalization of the choice-of-law provision, the inclusion of an international arbitration clause for settlement of disputes, and the additional provision on Force majeure are illustrative of this thesis. All these coupled with an established democracy[32] where the rule of law reigns supreme as well as the respect for international legal rules and principles makes Ghana an ideal HC for investment in the Petroleum industry.

[28] Fui S. Tsikata, *The Vicissitudes of Mineral Policy in Ghana*, Vol. 23, No. 1/2, Resources Policy, pp. 9-14 at 11 (1997).

[29] *See* Peter, W., Arbitration and Renegotiation of International Investment Agreements (The Hague, The Netherlands: Kluwer Law International, 1995) at 108-118, where the respected author reported of the successful Ghana-Valco renegotiations in the early 1980s.

[30] Minerals and Mining Act, 1986 (PNDCL 153) (Published on the official Gazette on 18th July 1986). This Law was subsequently amended by two other Laws: (i) the Minerals and Mining (Amendment) Act, 1994 (Act 475), and (ii) the Internal Revenue Act, 2000 (Act592). Whilst Act 592 is still in force (although amended by six other Acts), both PNDCL 153 and Act 475 have been repealed by the current Minerals and Mining Act, 2006 (Act 703) (Assented to by the President on 22nd March 2006).

[31] *See* for example, Samuel N. Addy, *Ghana: Revival of the Mineral Sector*, Vol. 24, No. 4, Resources Policy, pp. 229-239 (1998).

[32] *See* Jackson R.J., and Jackson D., Comparative Government: An Introduction to Political Science, (2nd ed.) (Scarborough Ontario, Canada: Prentice Hall Ally and Bacon, 1997). They argued that three successful free and fair elections qualify a country into the fold of established democracies. Ghana has successfully held six free and fair general elections since 1992.

4.0 KEY CONCLUSIONS

From the analysis, we draw the following conclusions.

1. Both the Ghana-AGM and Ghana-COLA/MEDEA Agreements are significant improvements over previous Agreements signed before the discovery of oil in the Jubilee Fields. This was expected considering that the commercial discovery and production of oil reduced the risk profile of most of Ghana's hydrocarbon basins.
2. Both Petroleum Agreements present Ghana with improved fiscal benefits, but the AGM Agreement gives Ghana more ownership control, more local participation and other contributions in financial advances to the GNPC that could improve on the capacity of the GNPC to improve on its strategic development and position itself as future Operator.
3. The Ghana-AGM Agreement is potentially more risky than the Ghana-COLA/MEDEA Agreement as a result of its non-comprehensive financial cover and the significant exposure to risks associated with the dispute between Ghana and Ivory Coast over the western part of the contract area.
4. The Ghana-AGM Agreement appears more flexible than the Ghana-COLA/MEDEA Agreement because it has several loose ends in the contract particularly in the areas of budget control and financial requirement for work obligations; which provides room for potential abuse of Ghana's interest.
5. We also strongly believe that in both cases, Ghana could have negotiated better terms if an open and competitive bidding process was applied in the licensing for the two blocks. The need to reactivate the process of reviewing Ghana's Petroleum (Exploration and Production) law cannot be delayed any further. There should be a moratorium on further licensing of oil blocks until a new Petroleum law with progressive provisions backed with a strong governance framework is passed by Parliament.
6. The Ghana-AGM and Ghana-COLA/MEDEA Agreements are a significant improvement over their pre-production counterparts in terms of their stabilization regimes due primarily to their sharp departure from freezing Stabilization clauses contained in pre-production petroleum agreements. In the event that any new law or regulations which affect the original terms and conditions of the agreement and which has a material adverse effect on the rights, obligations and benefits arising from the economic, fiscal and financial provisions, any party to the agreement may request to negotiate possible modifications to restore the economic equilibrium.
7. Notwithstanding that Ghana is undoubtedly willing to be bound by final arbitral awards as clearly expressed in the Ghana-AGM and Ghana-COLA/MEDEA Agreements, Ghana, GNPC and Explorco has the right to claim immunity for themselves or any of their assets during pre-award stages of disputes arising out of the Agreements. This places Ghana and GNPC in good position to avoid final arbitral awards that could cripple the progress of government or GNPCs business.
8. By providing that the State is not an affiliate of the GNPC and Explorco and further that direct and/or indirect actions of the State which adversely affects performance of either

GNPC or Explorco can neither disentitle GNPC nor Explorco from invoking the Force Majeure provisions to their benefit (even though both of them are in reality agents of the State), the Ghana-AGM and Ghana-COLA/MEDEA Agreements clarifies a potential point of dispute that existed in pre-production contracts such as the Ghana-Kosmos and Ghana-Tullow Agreements. Together with stabilization provisions in the same Agreements, the force majeure provisions in the Ghana-AGM and Ghana-COLA/MEDEA Agreements forecasts a secure future for the agreements and protects the competing rights of the State, GNPC and the participating IOCs because they allocate *'the risk of misprediction'*.