GHANA UPSTREAM PETROLEUM CHAMBER

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AN OVERVIEW OF KEY ISSUES IN GHANA'S UPSTREAM LEGAL AND REGULATORY ENVIRONMENT:

A position paper on matters arising

The Ghana Upstream Petroleum Chamber is the umbrella organisation for the upstream oil and gas industry in Ghana.

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ABBREVIATIONS

DPA	Development and Production Area
DWT:	Dividend Withholding Tax
EMT:	Economic Management Team
EPA:	Environmental Protection Agency
GDP:	Gross Domestic Product
GMA:	Ghana Maritime Authority
GNPC:	Ghana National Petroleum Corporation
GNGC:	Ghana National Gas Company
GRA:	Ghana Revenue Authority
GUPC:	Ghana Upstream Petroleum Chamber
GoG:	Government of Ghana
IGC:	Indigenous Ghanaian Company
IOC:	International Oil Companies
ITA:	Income Tax Act, 2015 (Act 896) as amended
JMC:	Joint Management Committee
JOA:	Joint Operating Agreement
JV:	Joint Venture
L.I.:	Legislative Instrument
MoE:	Ministry of Energy
PA:	Petroleum Agreement
PC:	Petroleum Commission
PEPL:	Petroleum Exploration and Production Law, 2016 (Act 919)
PITL/PITA:	Petroleum Income Tax Law/Act, 1987 (P.N.D.C.L. 188)
PLCaLPR:	Petroleum Local Content and Local Participation Regulations, 2013 (L.I. 2204)
PNDC:	Provisional National Defense Council
PRMA:	Petroleum Revenue Management Act, 2011 (Act 815)
SWT:	Service Withholding Tax
USD:	United States Dollars
VAT:	Value Added Tax

EXECUTIVE SUMMARY

Ghana has an emerging oil and gas industry with petroleum legislation and agreements designed to govern the roles and responsibilities of both government and oil and gas companies. These legislative and fiscal instruments have been established to determine how the petroleum industry is managed and how potential revenues from commercial oil and gas development is shared between the government and the oil and gas companies (referred to as Contractors).

In this new era where the upstream oil and gas industry is being driven by the transition to greener energy (accelerated by the pandemic) and the recent worldwide investment decline in oil and gas exploration, the value of an enabling environment cannot be overstated. Ghana's ability to demonstrate competitiveness by ensuring a predictable and stable legislative, contractual and fiscal investment climate, will be the most effective way of attracting oil and gas investments.

Questions have arisen as to whether Ghana is ready to demonstrate competitiveness and consider changes to the operational requirements of the legislative and fiscal regime in order to eliminate costs, improve efficiency, attract more investment and better achieve the government's intended objectives.

This high-level study identifies matters arising out of the fiscal and contractual environment and highlights the challenges and how they are adversely impacting the development and growth of Ghana's oil and gas industry.

It should be noted that while some of the issues raised in this paper are shared across the oil and gas industry, the analysis and recommendations may or may not specifically apply to Petroleum Agreements with fiscal, contractual or legislative stabilization clauses, signed before 2010.

Key Findings:

1. Unstable Legal and Regulatory Environment: The disregard for stabilization clauses and arbitrary impositions, undermine the sanctity of respective Petroleum Agreements and are a disincentive to further investment.

2. Overly Complex Exploration and Development Requirements: The current arrangements impede additional investments in existing Development and Production Areas (DPAs) and adversely impacts the realization of the full resource potential and Ghana's ability to manage natural decline in production.

3. Administrative Delays and Overlapping Institutional Roles: These conditions leave contractors and investors with high levels of uncertainty with respect to regulation, leading to operational delays and inefficiency.

4. Unrealistic Local Content Provisions: Identifying suitable and qualified local joint venture partners and suppliers of desired goods and services is a challenge under the current local content provisions.

5. Lack of Industry Consultation in Policy Formulation and Legislation: Where consulted, industry's views are most often not incorporated into legislation.

Recommended Actions:

1. GoG should stabilize the legislative and regulatory environment. Stabilization provisions must be respected and the sanctity of the petroleum agreements it has agreed with contractors must be upheld. A reliable and predictable contracting environment is fundamental to attracting further investment to Ghana.

2. GoG should conduct a strategic review of the country's competitiveness related to oil and gas development to benchmark best practice in order to stimulate investments in exploration as the industry transitions to greener energy. This strategic review should take into consideration the attractiveness of the country's oil and gas resource potential, the current fiscal and regulatory regimes, current operating requirements, and the global transition to green energy.

3. GoG should provide clear guidance on the specific activities and boundaries for the different regulatory agencies especially GNPC, GNGC, PC, EPA, GMA, and the nature of the relationship between them. The challenges arising from these institutional overlaps can have significant detrimental effects on projects, causing delays and increased costs.

4. GoG should review its local content aspirations. Government agencies should work with contractors to align on practical programs to build the capacity of local suppliers and sub-contractors while facilitating skills and knowledge transfer.

5. GoG should establish a formal periodic oil and gas stakeholder policy dialogue. Today's environment demands increased collaboration.

1.0 INTRODUCTION

The petroleum legislative, contractual and fiscal instruments are an integral part of a country's oil and gas legal and regulatory framework, and their predictability is considered an important incentive for oil and gas investments. They lay out policies and measures employed by governments to share the economic benefits generated from the development of the country's petroleum resources. The government's share of petroleum revenues can be used to achieve the State's strategic economic and social goals. Most importantly, a fiscal and regulatory regime can either increase or decrease the level of investment within a country.

The attraction for oil and gas investments is not only dependent on the resource potential, above ground conditions and capital availability, but also the investment environment in which the project is to take place. Investments also depend on new and existing legislation, regulations and administrative measures that have been provided for managing the petroleum industry. In Ghana, the various petroleum exploration, production and tax laws provide specific frameworks guiding each petroleum agreement whether old (before 2010) or new (after 2010). Questions have arisen as to what extent the above laws have enabled increased investment in the oil and gas industry and the matters arising from the implementation of these laws.

It is in the light of the above that this paper, through interaction with stakeholders in the upstream petroleum industry, has been developed. The paper is intended to help promote understanding of Ghana's legal, contractual and regulatory framework as applied to the upstream petroleum sector. The paper further identifies the challenges that have arisen following the implementation of the laws and procedures and provide some recommended actions.

Among others, the following key questions were administered to participants in the upstream petroleum industry by means of questionnaires and interviews:

1. What constitutes the Ghana's upstream legal and regulatory framework?
2. What are the key elements of the legislative, contractual and fiscal regime?
3. What are the challenges emanating from the implementation of the legislative and fiscal regime with respect to the oil and gas industry?
4. What are the key matters arising with impact on upstream petroleum investments?
5. How best can these challenges be addressed?

This paper seeks to highlight specific areas that can be a focus for further engagement and advocacy, both collectively by the Ghana Upstream Petroleum Chamber on behalf of the oil and gas contractors, and by the contractors themselves.

2.0 THE OVERVIEW - KEY REGULATORY FRAMEWORK

Ghana's petroleum and regulatory framework refers to a set of laws, regulations and agreements that regulate Ghana's petroleum operations, defining the governments and the contractor's roles and obligations and the sharing of potential economic benefits accruing from petroleum operations. The first law enacted to govern the fiscal commitments for the upstream industry was the Petroleum Exploration and Production Law, 1984 (PNDCL 84). This law provided the foundation for the entry into Petroleum Agreements by the State, GNPC and Contractors, stipulating that such Petroleum Agreements were to contain provisions relating to royalty, rent and income tax, among others.

Over the years, the Government of Ghana has enacted other pieces of legislation with the intention of improving the government's share of economic benefits, and accelerating the transfer of knowledge, and Ghana's technological and industrial supply capabilities.

2.1 Regulatory Framework

The laws applicable to petroleum operations under a Petroleum Agreement vary depending on whether or not the Petroleum Agreement contains stability clauses, and the content of those stability clauses. However, the key laws and regulations governing Ghana's legislative and fiscal regime are as follows:

- Ghana National Petroleum Corporation Law,1983 (PNDCL 64).
- Petroleum Exploration and Production Law,1984, (PNDCL 84).
- Petroleum Income Tax Law, 1987 (PNDCL 188).
- 1992 Constitution of the Republic of Ghana.
- Foreign Exchange Act, 2006 (Act 723).
- Petroleum Revenue Management Act, 2011 (Act 815).
- Petroleum Commission Act, 2011 (Act 821).
- Petroleum (Local Content and Local Participation) Regulations, 2013 (L. I. 2204).
- Income Tax Act, 2015 (Act 896). As amended.
- Petroleum Exploration and Production Act, 2016 (Act 919).
- Petroleum (Exploration and Production) (General) Regulations, 2018. (L.I. 2359).

The Petroleum Exploration and Production Act, 1984 (PNDCL 84) provided for the ownership of petroleum resources as a state asset and as a result, creates the basis for the contractual relationship (as set forth in a Petroleum Agreement) between the state, represented by the GNPC and the license holders. Although the PNDCL 84 was repealed by the Petroleum (Exploration and Production) Act, 2015 (Act 919), PNDCL 84 continues to be the applicable law for activities under Petroleum Agreements entered into prior to 2010 due to their stability provisions.

Similarly, the Petroleum Income Tax Act, 1987 (PNDCL 188) (as supplemented by the tax provisions of Petroleum Agreements) set out the law governing the income tax system in the upstream petroleum industry. The PNDCL 188 was repealed by the Income Tax Act, 2015 (as amended) (Act 896). However, PNDCL 188 continues to be the applicable law for activities under Petroleum Agreements entered into prior to 2010 due to their stability provisions.

Post 2010, the government of Ghana enacted a new set of legislation to address perceived 'gaps' in the regulatory and fiscal framework with the aim of maximizing the state's benefit from oil and gas resources. Laws such as the Petroleum (Exploration and Production) Act, 2016 (Act 919), Income Tax Act, 2015 (Act 896), the Petroleum (Exploration and Production) Regulations, 2018 (L.I. 2359) were introduced. The Petroleum Revenue Management Act, 2011 (Act 815) was enacted to provide the legal framework for the collection, allocation, and management of petroleum revenues in a responsible, transparent, accountable, and sustainable manner for the benefit of the citizens of Ghana in accordance with Article 36 of the 1992 Constitution of Ghana.

Per the stability provisions of the pre-2010 Petroleum Agreements, these new pieces of legislation must not negatively impact the fiscal arrangements agreed in Petroleum Agreements; these Petroleum Agreement are intended to be insulated and stabilized against subsequent changes in legislation that would negatively impact contractors' economic outcomes. This issue has generated heated debate in recent years. Nonetheless, the importance of respecting stabilization clauses cannot be overemphasized. They are indeed intended as a safeguard against "creeping nationalization" of international energy investments.

2.2 Elements of the Fiscal Regime

Several types of petroleum contracts are in use throughout the world, and they are applied under various fiscal regimes:

- Production Sharing Agreements (PSA) – These are agreements that provide for a contractor to extract oil on behalf of the government and also own a share of oil once it is out of the ground (About 81 countries use PSAs).

- Concessions – These are agreements where the contractor owns the oil in the ground and government benefits come in the form of royalty and taxes. Some have "Additional Mark-up" in "Government Take" calculations. (About 92 countries use concessions and some have both concessions and PSAs).

- Service Contracts - These are agreements where the contractor receives a fee for extracting the oil from the ground.

Ghana adopted a fiscal system which mixes some elements of Concession, Production Sharing Agreement (PSA) and State Participation, and can best be described as a hybrid or blended royalty/tax system. The key elements are as follows:

1. Royalty:

This is the payment by the Contractors to the State for the right to take oil or gas from the land or sea. It is levied as a percentage of the gross volume of oil or gas produced, irrespective of profitability. With few exceptions, the rates applicable range from 4% to 12.5% (Oil production ranging from 5% - 12.5% of gross production and gas production ranging from 3% - 10% of gross volume regardless of the water depths or size of concession). The State may either take the oil or gas in kind or elect to receive cash in lieu of oil or gas.

2. Carried Interest

The State, whose participation is through the national oil company, GNPC, is 'carried' by the paying partners in the sense that it does not pay anything when it comes to costs incurred during exploration and development. GNPC, however, pays for its share of the production costs when oil production starts. Petroleum agreements that existed prior to the enactment of the Petroleum Act of 2016 provided for a minimum of 10% carried interest to GNPC. This has been increased to a minimum of 15% carried interest under the Petroleum Act of 2016.

3. Additional Interest:

In the event of a commercial discovery, Ghana has the option of increasing its stake in the field within a specified period following the date of commercial discovery, again through the vehicle of the national oil company, GNPC. The maximum percentage should Ghana decide to exercise that option is contractually agreed in the petroleum agreement between the parties. If GNPC elects to acquire the Additional interest, then GNPC's production interest (including both its entitlement to petroleum and its share of production costs) increases to the sum of the original carried interest plus the additional interest. GNPC is also required to pay development costs associated with the additional interest, but it continues to be carried for development costs on its original carried interest. If the State does not notify the contractor of its intention to acquire additional interest within ninety (90) days of date of commercial discovery, then it waives its right to additional interest. Based on current Petroleum Agreements, additional interest has been no more than 35%, though considerably lower in older Petroleum Agreements.

4. Petroleum Income Tax:

This is a tax on the income of oil and gas companies. The repealed Petroleum Income Tax Law, 1987 (PNDCL 188) (PITL) provided for a tax rate of 50% but also contains a provision to the effect that a Petroleum Agreement can provide for some other tax rate other than that which is provided in the PITL. Despite having been repealed, the PITL continues to apply to older Petroleum Agreements; however, the more recent Income Tax Act, 2015 (which repealed the PITL) provides for a tax rate of 35%.

5. Additional Oil Entitlement (AOE):

The State becomes entitled to an additional percentage of the contractors share of crude oil on each separate field once profitability passes an agreed rate of return threshold. AOE is calculated on the contractor's post-royalty share of crude oil, depending on the after-tax inflation adjusted rate of return (RoR) which a contractor has achieved. Once a trigger point RoR threshold has been passed, the State becomes entitled to a percentage of profits for that RoR band, with the State's percentage to which it is entitled increasing with each higher RoR band. For Contractors with stability rights in their Petroleum Agreements, the RoR trigger points and government take percentages are set out in the agreements.

6. Surface Rentals

Contractors are required to make rental payments to the Government of Ghana for the use of government property, public lands, and specific services provided. Surface rentals are annual rents paid by the contractor to the State for leasing the surface of the sea or land to explore for oil and gas resources. These are paid per square kilometer of acreage operated by the licensees of the area. Rental payments may vary depending on the PA of the Contractor. During the initial exploration period, these have ranged between $20 to $50 per sq.km, however the rates increase as area is relinquished.

7. Other Fiscal Instruments

Other elements of the fiscal regime include local content obligations, other tax obligations such as withholding tax, annual training and other fees, and technological allowances which are indirect value elements of the fiscal regime.

2.2 Government and Contractor Take

Government and Contractor Take is the undiscounted revenues that accrue to government or contractor from all sources as a percent of total undiscounted gross or net revenues of a project. It is often taken as a measure of the fairness or attractiveness of a fiscal regime.

Table 1: *An Example of a Typical Fiscal Regime System Flow Arithmetic showing both Government and Contractor Take.*

CONTRACTOR SHARE	FISCAL REGIME	GOVERNMENT SHARE
	Gross Revenue @ $60	
	Royalty @5%	$3.00
$49.23	Revenue Post-Royalty $57	CAPI $7.77 (GNPC)
$18.37)	Cost $20 ($11 Dev't, $9 Prod)	-($1.63)
$30.86 (49.23-18.37)	Taxable Income	
-($10.8)	Corporate Income Tax @35%	$10.8
20.06 (30.86 -10.8)	Cash Flow After Tax	
-$3	AOE (trigger point 15%)	$3
$17.06	Net Revenue (@ Net Cash Flow)	$22.94
43% (17.06/(60-20))	Take	57% (22.94/(60-20))

Source: Author's Construct

To help understand how the fiscal regime is governed, Table 1 above is provided as a hypothetical fiscal system flow showing how the price of a barrel of crude is shared between government and the contractor at a gross revenue per barrel of US$60.00. The contractor pays a royalty of 5% amounting to US$3.00 which goes to government. This leaves the joint venture with a post-royalty revenue of US$57.00 which is then shared amongst government and the contractor based on the participating interest. In this case government gets $7.77 representing 13.63% interest for capital investment allowance and the contractor gets US$49.23. Out of this, deductions are made for cost proportionally of about US$20 with the contractor and government paying eighteen US$18.37 and US$1.63 respectively. This leaves the contractor with a net taxable income of $30.86.

With a corporate income tax rate of thirty-five (35) percent, the contractor pays a corporate income tax of US$10.08 to government. Assuming profit oil further attracts a pre-agreed additional oil entitlement (AOE) (RoR @15%) then government gain a percentage of profits for that RoR band. For this scenario, government could gain an additional US$3 which increases with each higher RoR band. This gives the contractor a net revenue of about US$17.06 whilst government also takes US$22.94. This represents a take of 43% for the contractor against a take of 57% by government.

Additionally, while the above table assumes a single "Contractor," "Contractor" actually often consists of a joint venture of individual oil companies who further divide the 43% among themselves in pre-agreed shares.

2.4 Petroleum Agreements in Ghana

Since 2004, a total of eighteen (18) Petroleum Agreements (PAs) have been signed with Contractors for respective contract areas (see Table 2 below). These agreements are signed between the GNPC, Government of Ghana and the Contractor(s) of the contract areas and ratified by the Parliament of Ghana before they become effective. The PAs specified:

- The applicable income tax rate and applicable local tax acts;
- The definition for exploration, development and production periods;
- Benefits to be derived by the State in the form of royalties and,
- Accounting methods and foreign exchange control rules.

Table 2: *Fiscal terms for oil and gas blocks since 2004*

	BLOCK	OPERATOR	DATE	C. INT	TERM LIMIT	CORP TAX	R (OIL)	R (GAS)	Initial Rentals	WHT
PETROLEUM AGREEMENTS SIGNED BEFORE 2010										
1	West Cape Three Points	TGL	2004	10%	30yrs	35%	7.5%	5%	20$	5%
2	Deep Water Tano	TGL	2006	10%	30yrs	35%	5%	3%	30$	5%
3	Deep Tano Cape Three Points	AKER	2006	10%	30yrs	35%	4%	3%	30$	5%
4	ENI	ENI	2008	14%	30yrs	35%	10%	6%	30$	5%
PETROLEUM AGREEMENTS SIGNED AFTER 2010										
5	East Cape Three Points	MEDEA	2013	10%	25yrs	35%	10%	5%	50$	5%
6	Central Tano Block	AMNI	2014	10%	25yrs	35%	12.5%	5%	50$	5%
7	Offshore Cape Three Points South	UB Resources	2014	13%	25yrs	35%	12.5%	5%	50$	-
8	Southwest Saltpond	Britannia-U	2014	20%	25yrs	35%	10%	5%	50$	-
9	South Deepwater Tano	AGM	2014	15%	25yrs	35%	10%	5%	50$	-
10	Shallow Water Cape Three Points	Sahara	2014	10%	25yrs	35%	12.5%	5%	50$	-
11	Expanded Shallow Water Tano	ERIN	2015	13%	25yrs	35%	12.5%	7.5%	50$	-
12	East Keta Offshore	GOSCO	2015	11%	25yrs	35%	10%	6%	50$	5%
13	DWCTP West Offshore	Eco-Atlantic	2015	13%	25yrs	35%	12.5%	10%	50$	5%
14	Offshore Southwest Tano	GOSCO	2015	12%	25yrs	35%	12.5%	10%	50$	5%
15	Cape Three Points Block 4	ENI	2016	10%	25yrs	35%	10%	7.5%	50$	5%
16	Onshore/Offshore Keta Delta	SwissAfrican	2016	12%	25yrs	35%	12 -13%	6%	50$	15%
17	West Cape Three Points 2	SPRINGFIELD	2016	11%	25yrs	35%	12.5%	-	50$	8%
18	**Deep Water Cape Three Points	EXXON	2018	15%	25yrs	35%	10%	5%	50$	5%

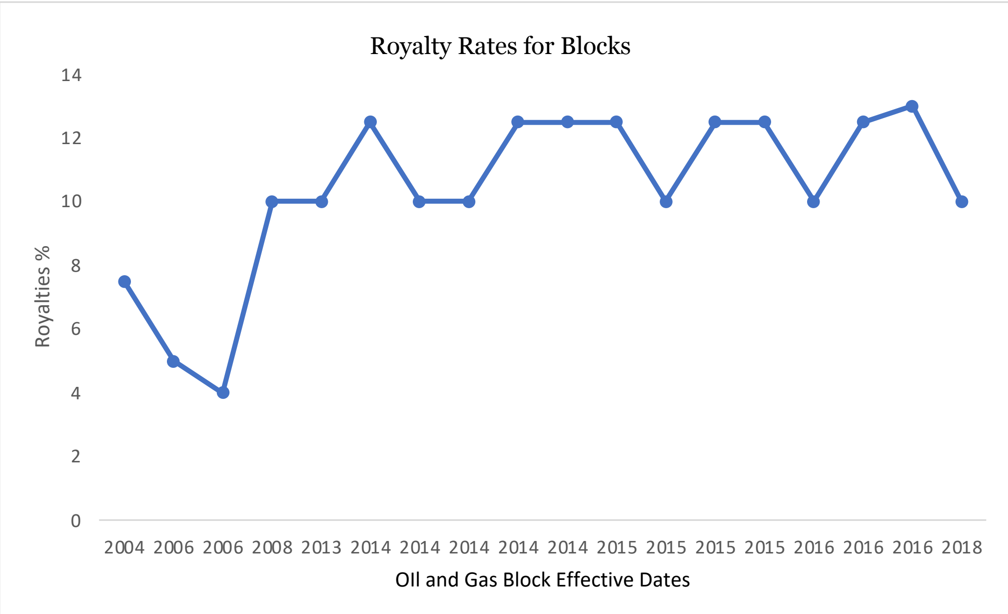
Source: Petroleum Commission, 2021. **Exited May 2021

Fiscal terms for the various PAs have not been the same. Oil royalty rates between 2004 and 2018 have ranged between 5% to 13%. PAs signed after 2010 have royalty rates of 10% or more. The Onshore Keta Delta Basin PA currently has the highest royalty rate of 13% with Deep Tano Cape Three Points Block having the lowest rate of 4%. Term limits have also not been the same. However, after 2010, all PAs have a term limit of 25 years (supported by Article 14 of the Petroleum Exploration and Production Act,2016) instead of the 30 years for PAs entered into prior to 2010.

Corporate tax has remained at 35% over the years while the government carried interests have ranged between 10% to 20%. Rates for surface rentals have also ranged between $20 to $50 per square kilometer (as an initial surface rental). Withholding tax has generally been set at 5% for most Agreements. However, for the onshore/ Offshore Keta Delta Contract the rate was set at 15% while that of West Cape Three Points 2 was set at 8%.

It seems the geography of the block (water depth, size of area) and other factors such as viscosity of the oil, had little or no effect on royalty charges (see fig.1 below).

Figure 1: *Uneven Trend for Royalty Rates (2004-2018)*



Source: Author's Construct.

Government could consider reducing and graduating royalty rates to encourage exploration in deep water and ultra-deep water and to commercialise marginal discoveries.

3.0 LEGAL AND REGULATORY CHALLENGES

3.1 Disregard for Stabilization Provisions in Petroleum Agreements

Stability clauses in PAs are intended to mitigate adverse fiscal risks, stimulate higher investment by Contractors and ensure certainty in the investment environment. They are those clauses in a contract between an investor and a host state that addresses changes in law in the host state during the life of the project. The purpose of a stabilization clause is to offer investors – and their lenders – some assurance that their investment will not be subject to unpredictable and costly changes in law.

Table 3 below shows the list of newly introduced charges and fees ("creeping charges") outside the PAs with reference to PA's signed before and after 2010. Stabilization rights are being disregarded with government's attempts to introduce fees and charges in various new pieces of legislation or by numerous government agencies.

Table 3: *"Creeping charges" for the Upstream Petroleum Industry*

	CHARGES	RECEIVING AGENCIES
1	Crude Lifting Fees	PC
2	Local Content Levy	PC
3	Drilling and Well Designation Permit	PC
4	Operational License	PC
5	Bidding Permit	PC
6	Exploration and Development Permit	PC
7	Supervision, Inspection and Safety Measures	PC
8	Production Permit	PC
9	Port/Shore Base Costs	PC
10	Installation and operation of transportation, treatment and storage facility	PC
11	Gas Injection Permit	PC, EPA
12	Vessel Fees	GMA, PC
13	Business Operating Permit	MMDA
14	Annual Business Registration renewal	R-G Dept, PC
15	Customs Levies (processing fees, EXIM etc.)	GRA
16	Fire Permit	GNFS
17	Occupational Safety Permit	Factories Inspectorate Dept
18	Property Rates	MMDA
19	National Health Insurance Levy	GRA
20	Ghana Education Trust Fund Levy	GRA
21	COVID-19 Recovery Levy	GRA

Source: Author

These ‘creeping’ charges and fees are likely to deter new investor interests in exploration and production activities. Dealing with and contesting these charges creates a heavy administrative burden on operations. There is the need for a clear and predictable framework for maintaining stability rights in PA’s (such as an agreed definition to the provision “imposts of a minor nature” as contained in the PA’s). Clear administrative guidance notes or directives to all government agencies to respect stability provisions in existing PA’s would be useful since the State has agreed that any legislative or administrative act of the State or any of its agencies which purports to vary any rights or obligations of the PAs would constitute a breach of agreement by the State.

3.2 Overly Complex Exploration and Development Requirements

In most PAs, Contractors are required to relinquish between 20-100% of their blocks after staggered years of exploration unless there is a commercial discovery. This provision in Article 5 (relinquishment) of the model petroleum agreement is intended to encourage investors to monetize the block with a commercial discovery within a limited period of time but can be a disincentive to investment if the required work program is unreasonable, or if the execution of the work program is hindered by government approval delays. The period of exploration within Development and Production Areas should be extended to enable the full resource potential near existing production infrastructure to be realized for the mutual benefit of the parties. This will help to extend the life of producing fields by arresting natural decline in production to reduce production cost. Furthermore, such near field resources could be left stranded until the end of life of existing producing assets and their economic value could be negatively impacted by the transition to cleaner energy.

Government could encourage the utilization of a larger part of awarded areas for exploration and consider adjusting fiscal PA terms to match risks particularly for deep water frontier areas.

3.3 Unrealistic Local Content Provisions

The local content provisions and timelines currently being implemented are unrealistic and impractical. There is the need to build actual capacity of Ghanaians over a reasonable period of 20 years or more and not within the short period 5-10 years or less, mostly preferred by the Petroleum Commission as a precondition to approving contractor’s local content plans. Building competencies of Ghanaians with a longer-term horizon provides grounded requisite maturity for critical roles.

A number of provisions in the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204) create challenges (noting however that these regulations post-date certain Petroleum Agreements whose stability provisions would prevent their application) for many companies. For example, the provisions in clause 13 of the Petroleum Local Content and Local Participation Regulations, 2013 (L.I. 2204) require regulatory approval by the PC for any contract exceeding one hundred thousand USD $100,000. Given that most transactions in the petroleum industry exceed the $100,000 threshold, this approval requirement causes operational delays for Contractors and delays the implementation of projects. Generally, PC's involvement scope and thresholds in procurement processes may be too wide. The contract size threshold seems not to have been adjusted to reflect peculiar nature of the petroleum industry.

Additionally, pursuant to Regulation 4 of the Local Content Regulations (L.I. 2204), an indigenous Ghanaian company is required to hold at least a five percent (5%) equity participation interest in a petroleum license (subject to variation by the Minister). Besides entitling the indigenous company to a 5% interest in petroleum produced, this requirement also requires the indigenous company to pay 5% of the costs of the venture. Co-venturers may therefore require the indigenous company to provide security for its share of costs in the form of an irrevocable standby letter of credit from a qualifying, creditable financial institution, which can be difficult for a smaller, or new company to procure. Also, local joint venture companies and their owners, directors, officers, and employees need to maintain robust compliance programs under both Ghanaian laws and international anti-corruption laws and principles. Given the general lack of capacity in some of these key requirements, there are a limited number of indigenous Ghanaian companies that may be qualified to fill this role.

3.4 Administrative Delays and Regulatory Overlaps

State institutions with oversight over Contractors tend to be bureaucratic and not proactive in creating an enabling or supportive environment in their dealings with the Contractors. The general administrative practice is cumbersome and time-consuming which adversely impacts regulatory compliance. Contractors usually have no choice but to 'oblige under protest' to maintain safe operations and the business relationship.

Tax state audits are usually behind schedule with literally no feedback several months or years after the tax auditors have completed their audits. This leaves Contractors in an uncomfortable position with potential pending issues and often differing interpretations of governing laws or PA provisions.

The suboptimal distribution and duplication of roles and responsibility (particularly between GNPC and PC; EPA and PC; GNPC and Contractor; MMDA's, GMA and EPA) cannot be overemphasized. Dealing with multiple government agencies makes engagements rather lengthy resulting in operational delays in project execution and creates unbudgeted costs.

Simplifying some of the regulatory and administrative systems would help to improve the efficiency of oversight and lead to speedy decision making.

3.5 Lack of Industry Consultations in Policy Formulation and Legislation

Given the numerous unbalanced provisions in the Income Tax Act, 2015, the Local Content Law, 2013 and the Petroleum Exploration and Production Law, 2016 it is evident that Contractors are not adequately consulted on policy issues that they are required to comply with. When they are consulted, their views are hardly considered in crafting policies and regulations for the industry which culminate into laws. This approach to regulatory practice does not promote Ghana as an attractive destination for petroleum investments among the oil producing countries in Sub-Saharan Africa. The current situation increases the risk of perceived compliance default and increases the cost of implementation of these laws for both government and contractors.

3.6 Restrictions on Foreign Currency Repatriation

For companies for whom the issue is not stabilized under their Petroleum Agreements, the requirement to maintain cash onshore in Ghana and the restrictions on the ability to transfer cash freely out of the country, is highly problematic, because they lose direct control of their share of the cash earned from investing in a development project.

The upstream business requires taking significant risks associated with any oil and gas investment. Once cash is generated from that investment, companies should have the right to deposit the cash in a country and account of their choice and to return cash to shareholders and financing entities who funded the investment. Requiring sales proceeds to be brought onshore in Ghana makes these funds subject to potential future restrictions and additional banking costs. Any restriction on the ability to transfer and deposit cash freely increases the risk of the investment to a very high level. In addition, such restrictions are barriers to project financing, which would significantly and adversely affect all co-venturers, including GNPC and any Indigenous Ghanaian Company ("IGC").

Government could consider issuing foreign exchange exemption certificates to contractors and vendors to avert government's risk and exposure to the cedi depreciation if cedis are converted to dollars for repatriation.

4.0 RECOMMENDED ACTIONS

4.1 Stabilization Clauses Must Be Respected to Protect the Sanctity of Petroleum Agreements.

To ensure sanctity of contract and a predictable investment environment, it is important for all parties to respect the provisions of stability clauses. Compliance with stability clauses provides investors with the comfort that their economic analysis of the fiscal terms will be reliable, as those terms formed the basis for their decision to invest in Ghana. Failure to adhere to the terms of stability clauses, creates a situation of mistrust between the Contractors and the government, and ultimately may hinder future investments.

Customs duties and VAT exemptions should be enforced to the letter for all Contractors in respect of any equipment, material, and related services supplied in Ghana that are to be used in the conduct of petroleum operations. Legal and other administrative barriers should be lifted to facilitate the implementation of VAT exemptions granted under a petroleum agreement and related enactments.

4.2 The Ghana Income Tax Act Needs Revision

The Income Tax Act, 2015 (Act 896) ("ITA") sets out a fiscal regime, which imposes significantly higher tax costs for petroleum operations than its predecessor, Petroleum Income Tax Act, 1987 (P.N.D.C.L. 188) ("PITA"). Below is a list of the ITA provisions with the most significant negative impacts:

i. **Loss Carry forwards** – a loss carry forward is necessary for capital intensive projects with long development periods, such as deep-water oil and gas exploration and production projects, which typically take more than ten years to reach production, and longer to reach profitability. Sections 17 and 68 of the ITA limit the loss carry forward period to 5 years whereas the PITA provided for an unlimited loss carry forward period.

ii. **Dividend Withholding Tax (DWT)** – Section 71 of the ITA provides for an 8% DWT on dividends paid to a shareholder. Given that companies repatriate profits from petroleum operations in the form of dividends, this tax increases the aggregate Ghana income tax rate for a company from 35% under the PITA to 43% under the ITA.

iii. **Services Withholding Tax (SWT)** – Section 27 of the PITA provided for a SWT, as specified in the petroleum agreements. All petroleum agreements executed prior to the enactment of the ITA provided for a 5% SWT. Further, the PITA provided that the SWT could be waived for inter affiliate service charges if the service charge is the actual cost without any element of mark-up, and in fact most prior petroleum agreements contained a waiver of SWT on inter affiliate service charges. The SWT rate under the ITA has been tripled to 15% for non-residents and applies to affiliates and non-affiliates without exception.

Any incremental tax incurred by oil and gas service providers (whether third parties or affiliates of the IOC) will ultimately be passed on to the IOC, thus increasing the Contractors' project costs.

iv. **Capital Allowance** – Under Section 14(3) of the ITA, a company claiming capital allowance in a particular year must take that allowance in that year and cannot defer that capital allowance. Capital allowance that cannot be used in a particular year due to the absence of chargeable profit creates a tax loss. Tax losses have a sunset clause of 5 years. Effectively, at best, tax loss can only be carried forward for 5 years after which the right to use the loss is lost. Given that the capital allowance is equal to 20% of the capital costs incurred in Ghana each year, the loss of this amount will have a significant negative impact on the economic viability of any project, especially capital-intensive deep-water projects.

v. **Capital Gains** – Pursuant to the Internal Revenue (Amendment) (No.2) Act, 2013 (Act 871), (now repealed) capital gains tax applied only to direct sales of petroleum operations and assets. Under the ITA, capital gains tax now applies to unrealized gains arising from internal reorganizations of affiliate shareholders that directly hold the petroleum rights in Ghana. For international companies with worldwide operations and complex shareholding structures, this tax could severely limit such a company's ability to optimize its structure for reasons unrelated to Ghana. Any restructuring of such a company, even one that has no direct relation to the petroleum rights in Ghana, could potentially result in the requirement to pay capital-gains tax in Ghana on indirect transfers.

The ITA, with respect to the above-mentioned issues, significantly increases the IOC's tax burden in Ghana. It is recommended that the ITA be amended to address the practical challenges that have been highlighted above.

4.3 The Implementation of Local Content Provisions should be Practical and Gradual.

Local content provisions in L.I. 2204 should be implemented strategically and gradually. Implementation of local content provisions should be graduated to build solid local capacity over time since industry cannot compromise on quality, expertise and safety. The PC should work constructively with Contractors to come up with practical programs which facilitate the transfer of knowledge, skills and project know how to Ghanaians to ensure that they are in a position to take up key roles and functions within the industry.

The cost of local content expenditures that contribute to local capacity building and supplier development should be recoverable.

4.4 Regulatory Fees and Charges Committee Needed

Given that almost all state agencies with relevant jurisdiction over the petroleum industry would want to assert their authority, there is the potential for duplication of roles and a conflict with each other that adversely impacts Contractors. It is recommended that an effort is made amongst all relevant regulators and representatives from the Contractors to harmonize or set annual fees and charges (where necessary) and also have them published for ease of reference. This proactive measure will prevent surprises and uncertainties for the Contractors. Furthermore, this predictability will ensure that Contractors can plan for these fees and charges. The fees and charges must be consistent with any stability clauses in the PAs, or must be otherwise agreed to by the Contractors, in order to ensure sanctity of contract.

Given the numerous "creeping" impositions by state agencies on Contractors as against stability clauses in the PAs, the Ministry of Energy and the Petroleum Commission should undertake adequate consultations with the Contractors and other relevant state actors with the authority to fix fees and enact relevant laws. This ensures clarity and transparency in the application of laws and procedures regulating the industry and does away with the perception that the industry is exploited and fleeced at every opportunity.

4.5 Clear Guidance and Boundaries Needed for Regulatory Agencies

The GNPC, PC, EPA and GNGC, on behalf of the state, have similar but differentiated roles in the operations of the upstream petroleum sector. It is important for the Ministry of Energy to set clear guidelines or regulations to avoid overlap where possible. Further, there should be an improvement in coordination and cooperation amongst all other relevant regulatory/state agencies to create an enabling business environment. A clear and practical framework to administer laws, regulations, and agreements provides the greatest opportunity for an investing operator to focus its time and efforts in creating value for the resource owner and itself as well as provide an optimal distribution of roles and responsibilities amongst governmental agencies that leads to the efficient execution of projects.

4.6 GRA Should Ensure Proper Audit Planning and Feedback Mechanism

The GRA should ensure its Petroleum Tax Unit is proactive and thorough in its dealings with Contractors. They should ensure that audits are well planned and not conducted out of schedule. They must also avoid the duplication of audit of years that have already been audited, minimize loss of data and extended audit periods. Audits, when started, should be concluded with related tax audit reports issued to the Contractors. VAT refunds and withholding tax exemptions are also areas of contention requiring clarity from the GRA and compliance by the government with Petroleum Agreement provisions. The notion that Contractors should 'pay under protest' or 'pay and come for refund' does not work well for Contractors since these are large sums of money which negatively affect their working capital cycle and does not create confidence that the tax system is fair and transparent.

4.7 The Need for a Periodic Stakeholder Policy Dialogue

The Ghana Upstream Petroleum Chamber (GUPC) could collaborate more closely with the PC and Ministry of Energy to organize bi-annual or annual national policy dialogue sessions on the upstream industry to discuss pertinent issues affecting the industry and propose solutions to address them. Communiques from these engagements can then be forwarded to the Ministry of Energy, Ministry of Finance and the Economic Management Team (EMT) at the Presidency for further consideration and action. This way the relationship between the oil companies, the regulators, and the government will be improved for the mutual benefit of all. This forum will also be the appropriate place to highlight and project the importance and benefit of the industry to the national economy, encourage intellectual contribution to the growth of the industry and position it as a model of excellence.

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NOTES

GHANA UPSTREAM PETROLEUM CHAMBER

AGM Petroleum Ltd
Aker Energy Ghana Ltd
AI Energy Ltd
Anardarko WTCP Ltd
ENI Ghana Ltd
ExxonMobil Exploration & Production Ghana (Deepwater) Ltd
Heritage E&P Ghana Ltd
Kosmos Energy Ltd
MODEC Production Services Ltd
Tullow Ghana Ltd
Vitol Upstream Ghana Ltd

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