PETROLEUM RESOURCE MANAGEMENT FOR SUSTAINABLE DEVELOPMENT IN GHANA: WILL THE PETROLEUM REVENUE MANAGEMENT LEGAL REGIME AVOID THE RESOURCE CURSE?

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ABSTRACT

This thesis is based on an investigation of the legal aspects of the management of petroleum revenue in Ghana in order to promote sustainability and thereby avoid the replication of the resource curse syndrome. The Parliament passed the laws for the regulation and management of petroleum revenue, the Petroleum Revenue Management Act (PRMA) 2011 and Petroleum (Exploration and Production) Act 2016. The thesis argues that the current state of the law, and regulatory environment have far-reaching impacts on the promotion of transparency, accountability and sustainability in the socially beneficial management of petroleum revenue. Some inherent challenges that may inhibit the management of petroleum revenue include possible non-prosecution of mismanagement of oil revenue because of the powers of the Attorney General to exercise *nolle prosequi*. There have also been considerable infractions such as not fulfilling auditing and reporting requirements, non-remission of revenues into the appropriate funds or accounts, and failure of sufficient engagement in impactful investments in priority areas stipulated in the PRMA.

The research further analyses how the best practices as contained in the Extractive Industry Transparency Initiative standards and Generally Accepted Principles and Practices for Sovereign Wealth Funds can be adapted in implementing the PRMA. It recommends the establishment of the Ghana Extractive Industry Transparency Initiative as a corporate body with powers to promote transparency in petroleum revenue. It further proposes the establishment of the Sovereign Wealth Fund as a specialised corporate entity to manage the funds. It recommends the earmarking of certain percentage of petroleum revenue for the promotion of developmental projects in host communities. It concludes that there is a need to strengthen the legal regime for the management of petroleum revenue through enabling environment for sustainability, transparency and accountability and checking against infractions in the legal regime in order to avoid the resource curse.

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ABBREVIATIONS

DFID	Department for International Development
ECOWAS	Economic Community for West Africa
EITI	Extractive Industry Transparency Initiative
EOCO	Economic and Organised Crime Office
GAPP	Generally Accepted Principles and Practices
GHEITI	Ghana Extractive Industry Transparency Initiative
GHF	Ghana Heritage Fund
GIIF	Ghana Infrastructure Investment Fund
GNPC	Ghana National Petroleum Corporation
GSF	Ghana Stabilisation Fund
ICJ	International Court of Justice
IMF	International Monetary Fund
IWG	International Working Group
MSG	Multi Stakeholders Group
NDDC	Niger Delta Development Commission
NEITI	Extractive Industry Transparency Initiative
NGOs	Non-governmental organisations
NLNG	Nigeria Liquefied Natural Gas
NNPC	Nigerian National Petroleum Corporation
NPP	New Patriotic Party
OECD	Organisation for Economic Co-operation and Development
PRMA	Petroleum Revenue Management Act
PWYP	Publish What You Pay
SWF	Sovereign Wealth Funds
UNCITRAL	United Nation Commission of International Trade Law

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CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF THE RESEARCH

Ghana's petroleum resources should not translate into a resource curse as it has been experienced by many resource rich countries. Ghana is now an oil producing country with the enormous discoveries made at the Jubilee oil fields in 2007.[1] It is a matter of concern that "If not well managed, wealth in oil, gas, diamonds, gold and other minerals may contribute to poor economic performance, weak and unbalanced growth, impoverished populations, aggravated conflict, environmental damage, and ineffective or authoritarian rule."[2] It is believed that the oil sector will in turn impact on other investments that are supportive of the oil and gas sector such as manufacturing, general trading, real estate (including building and construction), banking, insurance and the hospitality sectors.[3]

Such socio-political dislocation is partly indicative of the resource curse syndrome which, over the years, has been the focus of scholars and policy makers. This thesis intends to contribute to this discourse. Countries with resources endowment should ideally utilise revenue from their petro-wealth to promote sustainable development and economic prosperity of the people, thereby reducing poverty levels.[4] As will be shown later in this chapter, there are multiple definitions about what constitutes sustainable development. However, the starting point for the definition and the generally accepted definition is the one offered by the Brundtland Report (*Our Common Future*). According to the Brundtland Report, sustainable development is generally defined as development that 'meets the needs

[1] Felix Kumah-Abiwu, Edward Brenya and James Agbodzakey, 'Oil Wealth, Resource Curse and Development: Any Lessons for Ghana?' (2015) 6(1) Journal of Economics and Sustainable Development 62, 62.

[2] Heikki Holmås and Joe Oteng-Adjei, 'Breaking the Mineral and Fuel Resource Curse in Ghana" in OECD, *Development Cooperation Report 2012: Lessons in Linking Sustainability and Development* (OECD Publishing 2015) 124.

[3] See Emmanuel Ashiedu Codjoe, *Foreign Direct Investment in Ghanaian Manufacturing: Exploring the Extent of Technology Transfer and Exporting Behaviour by FDI Firms* (PhD Thesis School of Oriental and African Studies, University of London 2012) 125.

[4] CP McPherson, 'Necessary but not Sufficient: Anticorruption and Transparency' (2007) 7(3) Journal of World Energy Law and Business 180, 180.

of the present without compromising the future of generations to meet their own needs'.[5] While the concept has been subjected to intense debate, it is generally accepted that integrating the concerns of environmental, economic and social development of the people is in consonance with the principles of sustainable development. These concerns are enshrined in: "the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given" and "the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet both present and future needs".[6]

It may therefore be argued that sustainable development of nonrenewable energy resources can be grouped into extraction and conversion of the resources. This thesis is concerned with the conversion of the resources into wealth creation through taxation, revenue management, and developments that have much impacts on the living standards of the people.

An antithesis to the above proposition is the resource curse, which is explained by the theories of the 'paradox of plenty' and 'resource curse' depicting a situation where countries that are largely dependent on natural resources such as oil and gas become less developed and perform significantly worse than countries which are less endowed with natural resources.[7] With the stride towards economic stability and growth, the citizens of Ghana have expressed 'fear that the new discovery of oil and its attendant revenues may overwhelm the nascent institutions thereby derailing positive reforms and economic growth'.[8] The continued exploitation of the petroleum resources in Ghana should be such

[5] See World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987) 8.

[6] Ibid. 43. See also Peter P Rogers and KF Jalal and JA Boyd, *An Introduction to Sustainable Development* (Earthscan 2008) 20.

[7] TL Karl, The Paradox of Plenty: Oil Booms and Petro-states' (University of California Press 1997); RM Auty, *Industrial Policy Reform in six Large Newly Industrializing Countries: The Resource Curse Thesis* (World Bank 1994) 11-27.

[8] *The Petroleum and Poverty Paradox: Assessing U.S. And International Community efforts to fight the Resource Curse* (Report to the Members of the Committee on Foreign Relations, United States Senate , One Hundred Tenth Congress Second Session, October 16, 2008) 36.

that the resource endowment should not lead to a resource curse but should offer the blessings of sustainable development.

In 2007, before the discovery of commercial quantities of oil and gas in Ghana and commencement of commercial production in 2010, the main resources that have been subjected to exploitation for foreign exchange revenue generation were cocoa, gold and timber.[9] Mineral resources in the mining sector are principally gold, diamond, bauxite and manganese, with gold constituting over 80% of revenue accruing from the mining industry.[10] It was reported that the revenue generated from the exportation of gold in the entire mining sector in 2013 constituted 86% of the total revenue from the mining sector.[11] Ghana is rated as the 2nd largest producer in Africa and 10th gold producing country in the world.[12]

The oil and gas industry now out-performs other sectors and has also overtaken revenue from gold mining. There may be the tendency to rely on the oil and gas industry as the main source of revenue and panacea to economic challenges, without taking into considerations the need to diversify the economy and promote sustainable development. At the point of commencement of commercial operations, it was reported that the Jubilee Field was with a reserve of about 800 million barrels of crude oil and "upside potential of about 3 billion barrels of oil"[13] Other prolific fields are the Sankofa-Gye Nyame (SGN) Fields, Tweneboa-Enyenra-Ntomme (TEN) Fields and more discoveries are still being made.

The turning point with the oil discovery has raised considerable concern in Ghana; there is the need for Ghana not to be entangled in the resource curse which has been the case for

[9] I Gary, 'Ghana's Big Test: Oil's Challenge to Democratic Development' (Integrated Social Development Centre and Oxfam America 2009) 2, <www.oxfamamerica.org/files/ghanas-big -test.pdf> accessed 7 June 2016.
[10] Boas & Associates, *GHEITI Report on the Mining Sector 2014* (2015) 9.
[11] 'Legal and Regulatory Changes in Ghana Address Challenges Facing Mining', available at <http://www.oxfordbusinessgroup.com/overview/breaking-new-ground-legal-and-regulatory-changes-are-works-address-challenges-facing-sector>.
[12] Ibid. 16.
[13] PIAC, *Report on Petroleum Revenue Management for 2011: Annual Report* (2012) 1.

most developing countries.[14] The major concern is the need for sustainable management of this wealth for the benefit of the current and future generations by avoiding the resource curse. Practical examples are seen in countries such as Nigeria and Angola. The situation in Nigeria is one of 'political instability, corruption, inadequate infrastructure, and poor macroeconomic management' in spite of its abundant petroleum resources.[15]

The phenomenon of resource curse has risen to the level of international concern as it is paradoxical that countries rich in natural resources have continuously failed to utilise the revenue from the resource proceeds for the betterment of the life of their citizens. Most of these countries remain in abject poverty, still heavily reliant on foreign aid, and continue to experience political unrest as seen in Nigeria. For example, the Nigerian civil war from 1967 to 1970 reflects the struggle for the control of resources.[16] The situation in Nigeria also shows cases of 'political instability, corruption, inadequate infrastructure, and poor macroeconomic management' in spite of its abundant petroleum resources.[17] Angola, like Nigeria, was characterised by civil unrest which was connected to the struggle for the control of natural resources.[18]

However, some developed countries have different stories; Norway presents a practical and reliable example of a country that has approached its oil and gas prosperity from a different perspective. It has been able to maximise the potential of its oil and gas industry to continue to make life better for its citizens and achieve accelerated national economic development by avoiding the resource curse phenomenon.[19]

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[14] Gary (above).

[15] AA Akinrele, 'Transparency in the Nigerian Oil and Gas Industry' (2014) 7(3) Journal of World Energy Law and Business 220, 222.

[16] Onyemaechi Frederick Onwubiko, Azizan Asmuni, Khairuddin Idris and Jamilah Othman, 'The Causes, Effects and Potential Solutions to the deep rooted Niger Delta Oil Crisis' (2013) 1(6) International Journal of Social and Behavioural Sciences 122, 122.

[17] Adedolapo A Akinrele, 'Transparency in the Nigerian Oil and Gas Industry' (2014) 7 (3) Journal of World Energy Law and Business' 220, 222.

[18] See A Gonzalez, 'Petroleum and it Impact on Three Wars in Africa: Angola, Nigeria and Sudan' (2010) 16 Journal of Peace, Conflict and Development 58-86.

[19] See Tina Hunter, 'Comparative Law as an Instrument in Transnational Law: The Example of Petroleum Regulation' (2009)21(3) Bond Law Review 42, 54-55.

Plausibly and as one author has noted 'the impact of petroleum activities on the economic development of the country will depend on how transparently and efficiently oil revenues are managed'.[20] The PRMA has been developed in response to the need for petroleum revenue management in Ghana. The PRMA is targeted at ensuring the revenue from oil is managed effectively and in a transparent manner. The PRMA is a novel and welcome development as it is designed to ensure the prudent management and utilisation of petroleum resources. The revenues accruing to Ghana from petroleum resources are paid into the Petroleum Holdings Account with the Bank of Ghana for onward distribution into designated accounts provided in the PRMA. It provides for the payment of not more than 70% of the revenue into the Annual Budget Funding Account.[21] The remaining is paid into the Stabilisation Fund (21%) for cushioning the effect of fluctuation in oil prices[22] and into the Heritage Fund (9%) to cater for the future generations.[23] The PRMA also provides for reporting and auditing instruments as well as transparency requirements.[24] The expenditure of oil revenue also has to be publicised in at least two national daily newspapers under the auspices of the Public Interest and Accountability Committee (PIAC) which was created under section 51 of the PRMA.

The PIAC has the power to monitor and evaluate compliance with Petroleum Commission Act, 2011 by government and other relevant institutions in the management and use of the petroleum and investments, [25] provide independent assessments on the management and use of petroleum revenue, [26] and to 'provide space and platform for the public to debate whether spending prospects and management conform to development priorities as provided under section 21(3).'[27] The PIAC reports its activities on a quarterly and annually bases.[28] Such reports must be published on its website and in two national newspapers. The

[20] Kwaku Appiah-Adu, 'Introduction' in Kwaku Appiah-Adu, *Governance of the Petroleum Sector in an Emerging Developing Economy* (Gower Publishing Limited Surrey 2013) 2.
[21] Section 17, 19-21 PRMA 2011.
[22] Section 9 PRMA 2011.
[23] Section 10 (2a) PRMA 2011.
[24] Sections 8 and 42-48 PRMA 2011.
[25] Section 52 (a).
[26] Section 52 (c).
[27] Section 52 (b).
[28] Section 56.

PIAC must also hold public meetings twice a year to report on its mandate to the general public and finally, submit a copy of its semi-annual report to the President and parliament.[29] The legal basis is there for PIAC to play a more proactive and constructive role in the management of petroleum revenue.

The major focus of the government, stakeholders and academics in the wake of the discovery of oil and gas is what Ghana should be doing to effectively avoid the resource curse phenomenon and ensure that it does not replicate the trend in other oil rich developing countries.[30] A considerable body of work has been produced from the perspective that Ghana should avoid the resource curse.[31] This research will take a different approach by arguing for the need to incorporate the tenets of sustainable development in the principal legislations for addressing the resource curse phenomenon in petroleum revenue management in Ghana. It also addresses these legislations to see if they can effectively address the resource curse in the oil and gas industry based on the ethos of sustainable development, making a detailed proposal for the development of legal framework that will integrate the environmental, economic and social factors into petroleum revenue management.

1.2 RESEARCH AIM AND OBJECTIVES

The main aim of this research is to examine how the PRMA can prevent the resource curse in Ghana by promoting sustainable development in the management of petroleum revenue through transparency, accountability and sustainable management of petroleum revenue.

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[29] Section 56.

[30] See JA Bamiduro, 'Nigeria and the Petroleum Resource Curse: What Ghana Can Learn For Improved Management of Oil and Gas Revenues' (2012) XII (1) Global Journal of Human Social Science 8, 16.; Francis Xavier Dery Tuokuu and Elias Danyi Kuusaana, 'Escaping the Oil Curse in Ghana: Lessons from Nigeria' (2015) 6(11) International Journal of Business and Social Science 28, 28-39.

[31] See D Kopinski, A Polus and W Tycholiz, 'Resource Curse or Resource Disease? Oil in Ghana' (2013) 112(449) African Affairs 583, 583–601; Frank L Kwaku Ohemeng and Augustina Adusah-Karikari, 'Avoiding the 'Resource Curse' in Developing Countries: The Need for Social Accountability in the Oil Sector in Ghana' (A paper prepared for the XVIII annual meeting of the International Research Society for Public Management (IRSPM), University of Birmingham, UK. 30 March - 1 April, 2015); Richmond Osei-Hwere, *Conflict of Interest Challenges facing Ghana's Petroleum Commission under the Petroleum Commission Act, 2011 (Act 821): Proposals for Reform* (PhD Thesis, University of Aberdeen 2015) 59-65; Emmanuel Graham, *The Contribution of Civil Society in Avoiding Natural Resource Curse in Ghana: The Case of Oil* (MPhil Thesis, University of Ghana 2013).

Therefore, the aim of the research will be to examine how the three limbs of sustainable development (economic, environmental and social) are articulated in the legislation. The specific objectives of the research are:

1. To analyse the extent to which the law can promote transparency and accountability in the management of petroleum revenue thereby avoiding the resource curse.
2. To examine whether the management of petroleum revenue in Ghana conforms to best practices in transparency, accountability and management of petroleum revenue; and
3. To set out a robust proposal on how the law should be designed towards the realisation of sustainable development in the management of petroleum revenue in Ghana thereby addressing the resource curse.

1.3 RESEARCH QUESTIONS

The principal question sought to be answered in this research is how can the PRMA 2011 assist in the sustainable development of petroleum resources and the management of petroleum revenue in Ghana, thereby preventing resource curse?

From the principal research question other questions follow:

1. To what extent to have the law promoted transparency and accountability in the management of petroleum revenue in Ghana thereby avoiding the resource curse?
2. Does the regime for management of petroleum revenue in Ghana conform to best practices in terms of transparency, accountability and management of petroleum revenue?
3. How should the law be designed towards the realisation of sustainable development in the management of petroleum revenue in Ghana and also address the resource curse?

In answering the research question on extent to which the law has promoted transparency and accountability in the management of petroleum revenue in Ghana thereby avoiding the resource curse, chapter two critically assesses the resource curse phenomenon taking into account the Spanish and Nigerian examples. It found that while there are agreements that

resource rich countries have made appreciable progress in the management of their resources as seen in the case of Norway, a good number have not maximally utilised their resources. The chapter identifies the need for the existence of a robust institutional framework that ensures the state effectively manage and account for its natural resources. In order to establish credible institutions to attain the required positive result, there is the need for the law to ensure the establishment of a credible institutional framework, reform the ailing institutions and establish a credible judicial system to checkmate corruption through credible and timely adjudication of the law. Chapter three sets legal perspectives of petroleum revenue generation and management in Ghana. The chapter examined the management of the resources and other provisions pointing towards the sustainable management of petroleum resources that should address the resource curse. The chapter also identifies the environment in which the law will operate for the avoidance of the resource curse, and chapter seven recommends the promotion of sustainable development as a means of avoiding the resource curse in Ghana.

In answering the second research question as to whether the regime for management of petroleum revenue in Ghana conforms to best practices in transparency, accountability and management of petroleum revenue, chapters four and five clearly set the foundation by respectively identifying the existing legal regime for the revenue generation and management and the context in which the management of petroleum revenue in Ghana operates. In chapter five, the Extractive Industries Transparency Initiative (EITI) standards are examined showing that it is targeted at entrenching transparency and accountability. Findings from the analysis showed that the existing legislative frameworks on transparency in the oil and gas sector in Ghana have loopholes on disclosures and calls for the need to fast track the legislative process in the enactment of the Ghana Extractive Industries Transparency Initiative (GHEITI) specific legislation. Chapter six found that apart from the employment of transparent means of management of petroleum resources, accounting for the revenue is equally crucial. There is the need to give considerations to approaches that foster the increase in the revenue base of the country in a manner that the funds from the proceeds of oil accruing to the state are multiplied through the promotion of socially

responsible investments. One global approach that has emerged has been through the recognition of the Generally Accepted Principles and Practices for Sovereign Wealth Funds (the Santiago Principles). Incorporating the Santiago principles in the law will make fortune from petroleum wealth to be effectively managed for the good of the people of Ghana.

The final question on how the law should be designed towards the realisation of sustainable development in the management of petroleum revenue in Ghana and as well address the resource curse is answered with the key findings drawn in chapter seven. The chapter recommended that for priority to be given to transparency and accountability, there is the need for the setting up of efficient regulatory framework to enhance sustainability through investment. There should be in place sustainable investment of petroleum revenue for the good of the people through the incorporation of best practices. These best practices should ensure effective management of sovereign wealth fund, creation of mechanisms for the oil rich regions to benefit from the proceeds of oil through earmarking of certain amount of the oil revenue for their development. The law can therefore operate as an instrument for the promotion of accountability and transparency and sustainable management of petroleum resources for the good of Ghana if it is well-crafted and implemented to the letter.

1.4 CENTRAL ASSUMPTIONS OF THE RESEARCH

There are some assumptions which underlie this research. First is that utilisation of the PRMA from the perspective of sustainable development will address the likelihood of resource curse in Ghana and promote sustainable development. PRMA may offer an opportunity for sustainable management of petroleum revenue and diversification of Ghana's abundant natural resources to avoid the resource curse if properly implemented taking into consideration the principles of sustainable development.

To ensure sustainable development in Ghana, capacity building in the oil and gas industry should be promoted. This will lead to employment opportunities, economic development as well as effective management of petroleum resources by Ghanaians. If Ghana is able to

develop its own capacity, it would reduce engaging foreign experts and importing facilities, which are expensive for the oil and gas industry.[32] The development in capacity building will also aid Ghana in devising means to thoroughly ensure that its revenues are not siphoned but properly managed for the good of the people. Therefore, the technological and service sectors will be adequately engaged. As Amoako-Tuffour and Owusu-Ayim, rightly observed that the fiscal regime for petroleum revenue in Ghana can be regarded as reasonably competitive when compared to its counterparts in sub-Saharan Africa. However, the risk of revenue delay is high and the degree of progressivity is weakened by the absence of cost recovery limits, weak capitalisation provisions, and capacity for verification and monitoring of contractors' costs and investments. [33] They further warn against 'a superficial revision [of the fiscal regime] that does not respond adequately to these concerns betrays the trust of citizens in the State's capacity to realise the full benefit of resource extraction for the public good'.[34]

1.5 STATEMENT OF THE PROBLEM

The enormous endowments from oil and gas in Ghana were highly welcome and there has been the prevalent view that the oil and gas will translate into economic prosperity in Ghana and create more jobs as well as provide a huge revenue for the government. This situation has given the government an onerous task of having to attract the goodwill of the people and taking steps in keeping with the expectations of the people. The above scenario is aptly captured by Lahn and Kooroshy as follows:

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[32] One of the motivations which make foreign enterprises to migrate to other regions to invest in spite of the high cost involved aside the high potential of profit making is that in the host country they possess the expertise and technology which placed them at a higher comparative advantage than the indigenous companies in the host country. See Keith S Maskus, 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer' (1998) 9(1) Duke Journal of Comparative and International Law 120.

[33] Joe Amoako-Tuffour and Joyce Owusu-Ayim, 'An Evaluation of Ghana's Petroleum Fiscal Regime' (2010) 4 The Ghana Policy Journal 7, 7.

[34] Amoako-Tuffour and Owusu-Ayim, 31.

> Announcements of commercial discoveries of oil, gas and/or minerals inevitably raise expectations among the population. This means that governments are immediately under pressure to deploy revenue quickly. At the same time, governments see the inflow of revenue as a means of solving various macroeconomic problems and thus of helping them to be re-elected. And if the country is a kleptocracy, rapid revenue inflows create a pot of money to be raided as quickly as possible.[35]

As stated by Obeng-Odoom, 'when it was first reported that oil had been struck in commercial quantities in Ghana, John Kufour, then the president of Ghana, gave an impromptu speech about how the economic destiny of Ghana would significantly change because of the benefits of the oil industry'.[36] Also excited was the then Minister of Energy who brought a small quantity of oil as a "physical proof" that Ghana has joined "the club of oil producers" in the ceremony that ensued before parliament.[37] Ghana, upon the discovery of oil and gas, hastily passed the revenue management law. Immediately there was the need for amendment of the law as agitations were raised. This necessitated the amendment of the law. Exploration and production also commenced without the overhaul of the environmental laws of the country which were not conceived to fully reflect the entire value chain or the best practices in the oil and gas industry. It has also been contended generally that Ghana should have first developed the needed capacity before opening the gates for foreign investors. The contenders of this proposition supported their position with what Norway did upon the discovery of oil and gas. No doubt that the prime position of petroleum at both international and domestic configurations of countries could pose problems. Expressing this in melancholic terms, Acosta and Heuty, capture the Ghana mining industry as follows:

> Ironically, the prospect of a future oil bonanza comes at a time when the country still struggles with the management of mining activities. Current challenges in the mining sector include weak existing legislation for the oversight of mining activities, weak capacity of local mining communities

[35] Paul Stevens, Glada Lahn and Jaakko Kooroshy, *The Resource Curse Revisited* (Chatham House 2015) 32.
[36] Franklin Obeng-Odoom, 'Problematising the Resource Curse Thesis' (2012) 41(1) Development and Society 1, 9.
[37] Obeng-Odoom 9.

> to effectively use royalty payments for poverty reduction, and the proliferation of ethnic and regional conflicts of interest.[38]

The observation above raises similar concerns on the need for the Ghana petroleum industry not to be enmeshed in the resource curse controversy. It further tends to demonstrate that the elements of resource curse cannot be said to be new in Ghana in that they already existed in the mining industry. Could these have a domino effect of the petroleum sector having been the situation in the mining industry? There is still some perception that Ghana is prone to the resource curse. For example, in the study of the accountability on the Jubilee Field, it was stated by Brobbey that the Jubilee Field operations are characterised by 'operations coalesced with pervasive patronage politics and hence revenues obtained have been misappropriated or mismanaged in favour of a few Ghanaians at the expense of the majority otherwise known as the 'resource curse''[39] and that "Clearly, Ghana's Supplementary Budget exposed the obsession for spending by Governments of resource producing countries. They do not know 'breaks' even if it means violating the legal frameworks or interpreting them to suit their interests".[40]

Oil companies are shifting to Ghana all in the hope of tapping the favourable investment climate in Ghana. Therefore, most of these companies are moved by the desire to make profit and not by the need to enhance the sustainability of the host communities. Largely, the Ghanaian government will get what it bargains for[41] and the question is whether Ghana is prepared for this through effective and sustainable management of its petroleum revenue in such a manner that it encourage sustainable development. Ghana should also prepare for the future generation. This will be done by ensuring that the resources revenue is not

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[38] Andrés Mejía Acosta and Antoine Heuty, 'Can Ghana avoid the Oil Curse? A Prospective look into Natural Resource Governance', Citing <http://www.revenuewatch.org/our-work/countries/ghana.php>

[39] Collins Adu-Bempah Brobbey, 'Ghana's Jubilee Fields Oil and Gas Extraction: Accountability and Prospects' (2015) 2 European Scientific Journal 249, 250.

[40] Brobbey 265.

[41] There were moves by Kosmos Energy to sell its stake in the Jubilee Field to ExxonMobil for 4 billion dollars in a non-transparent manner but the GNPC opposed to the sale claiming that it has pre-emptive rights to first of all be offered the sale, thereby jointly bidding for the sale with China National Offshore Oil Corporation Limited with 5 billion dollars. Nevertheless, the bid was declined and this met a very stiff opposition from the government which eventually led to the agreement entered with ExxonMobil to be cancelled. See Stephens, 114-115.

depleted, there is efficient utilisation of the natural resources, the environment is protected, and the capacity of the people and communities are built towards the effective management of these resources. It is in light of these that two important legislations are analysed in full for the purpose of showing their relevance in achieving sustainable management of Ghana's resources. Moreover, there appears to be some level of uncertainty and an impression seems to be created that the government is geared towards spending the oil revenue given Section 1 of the PRMA allows the use of the oil revenue for collateral.[42]

The law should set parameters for the management of these resources, local content involves the development of the resource expertise, without which the people will not be able to manage the wealth they derive from the petroleum resources. For example, the traditional concession contract granting exclusive oil and gas rights to multinational oil companies for duration of 70 years and above was rated as not offering sufficient revenue for states that practised them. This was because they lacked the bargaining power owing to the fact that there was no capacity to build the industry at that time. The Nigerian Liquefied Natural gas incentive which was an arrangement between the Nigerian government and multinational oil companies left Nigeria at a huge loss with extremely high incentive just because Nigeria wanted to invest in a sector which lacked expertise. Had Nigeria developed its capacity, between 1958 and 1990 when the NLNG was passed into law, much would have been saved in terms of oil revenue. Unfortunately, in the bid to change and make it more attractive, there are stability provisions in the law that barred government from making any amendment to the law. The assertions reflect that developing countries relying extensively on foreign direct investment will usually lower the cost to be faced by the multinational corporations bringing in their capital and knowhow and the consequence of such is that the citizens may not be well positioned to seek remedies against the corporations.[43]

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[42] Obeng-Odoom 16.

[43] Menno T Kamminga and Saman Zia-Zarifi, 'Liability of Multinational Corporations under International Law: An Introduction' in Menno T Kamminga and Saman Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law (The Hague: Kluwer Law International, 2000) 2.

There is the consensus that petroleum resources will continue to play a lead role in energy security, international trade and investment. However, certain concerns have been raised about the need for the diversification of the economy as well as energy generation. As with oil price volatility, the fall in oil prices and foreign exchange in recent times affirms this assertion. With the oil price shocks and the role played by the OPEC, the International Energy Agency came up as a means of bringing about the development of other energy sources. Countries in the Organization of Economic Cooperation and Development (OECD) have been developing measures to shift from reliance on petroleum resources. Progress is being made in these areas, under the auspices of the EU as most EU countries have developed policies and laws that deemphasise the use of petroleum resources and placed emphasis on renewable energy.

The EU has since 2009 developed framework to ensure that 20% of the domestic energy consumption is derived from fossil fuels[44] and countries such as Germany have exceeded this.[45] Recently, the Saudi Arabian Government reported that it would move away from an oil dependent economy by sourcing 100 percent of its energy from elsewhere.[46] This stark reality is further confirmed by the development of shale gas making waves in the United States of America. More countries are becoming oil producing countries including Ghana and the implication is that Ghana is now less dependent oil purchase from other countries.

There is a strong case for sustainable diversification as proffered in the case of Venezuela that has built its sectors on oil rents as demonstrated by Massabie.[47] Preparing for all this raises critical questions on the need for effective petroleum management and the need for sustainable utilisation of the revenue generated from petroleum for the good of the present

[44] Arnulf Jäger-Waldau, Márta Szabó, Nicolae Scarlat and Fabio Monforti-Ferrario, 'Renewable Electricity in Europe' (2011) 15 Renewable and Sustainable Energy Reviews 3703, 3705.

[45] Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, *Renewable Energy Sources in Figures: National and International Development* (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, 2013) 18.

[46] Fiona Harvey, 'Saudi Arabia reveals plans to be powered entirely by Renewable Energy' (The Guardian 19 October 2012) <https://www.theguardian.com/environment/2012/oct/19/saudi-arabia-renewable-energy-oil> accessed 1 July 2016.

[47] German Massabie, 'Why Would Oil Countries be in Renewables?-The Case of Venezuela' (2011) 1 Renewable Energy Law & Policy Review 39, 39-50.

generation as well as the future generations yet unborn. Ghana must be conscious that its oil and gas resources are exhaustive and may be depleted over time.[48]

The tasks to be confronted in this research will be to investigate the loopholes or areas of leakages in these laws to ensure that Ghana has the most viable law and policy for petroleum revenue management and sustainable utilisation of the proceeds. As the sector develops, it becomes obvious that there are more challenges ahead that will need to be pre-empted and addressed before they become a full-blown problem that could translate into a curse rather than a blessing to the economy.

1.6 RESEARCH METHODOLOGY

This research utilised the doctrinal approach. The purpose of the doctrinal research is to inquire about what the law is and how it is applied in a given situation.[49] The application of the doctrinal approach, for example, may be seen in the judicial exposition of the Ghanaian case of *John Akparibo Ndebugre v The Attorney General and Ors*,[50] where the court decided that in line with the provisions of the Article 268 of the Constitution of Ghana, contracts relating to natural resources require parliamentary approval, holding that the purpose of such provision is 'to ensure transparency, openness and parliamentary consent in the national interest'. In the Nigerian case of *Jonah Gbemre v. Shell Petroleum Development Company Nigeria Limited*[51] where the court held that the provisions of the Associated Gas Reinjection Act 1979 which allows flaring of gas in certain circumstances was in breach of the fundamental human rights and dignity enshrined in the Constitution of

[48] See George Adu, 'On the Theory of Optimal Depletion of an Exhaustible Resource: The Case of Oil in Ghana' (2009) 1 (1) African Review of Economics and Finance 40, 40-50.
[49] See T Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9.
[50] [2016] GHASC 12.
[51] Unreported decision of Federal High Court Benin Division in Suit No FHC/B/CS/53/05 delivered on 14 November 2005, cited in Livinus Ifeanyichukwu Uzoukwu, *Constitutionalism, Human Rights and the Judiciary in Nigeria* (Doctor of Laws Thesis University of South Africa 2010) 195.

the Federal Republic of Nigeria 1999 and African Charter on Human and Peoples'Rights since gas flaring has negative impacts on life.

The *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* reinforces the doctrinal approach employed in this thesis. In *Gabčíkovo-Nagymaros Project* case, the International Court of Justice (ICJ) invoked the principle of sustainable development by balancing the need for environmental protection and the promotion of economic development in the matter concerning the construction of hydroelectric dam project. As Schwartz contends, 'sustainable development can transpose as an element of the process of judicial reasoning in applying the concept to resolve disputes in which environmental objectives and developmental goals conflict. Essentially, this regime allows legal intervention to occur on a variety of levels.[52]

It will evince the theoretical bases underpinning measures addressing the resource curse and the principles established for the promotion of sustainable development, integrating environmental, economic and social concerns in petroleum revenue management in Ghana. Therefore, the methods adopted in this thesis shall be based on legal analyses of the provisions of the law as they pertain to the petroleum revenue management in relation to principles of sustainable development and theories of resource curse. The laws of other countries to be considered in this thesis were thoroughly analysed to see how they have been used to address the issues raised in this research. The secondary sources employed qualitative research drawing from literature (journal articles, textbooks, reports and online sources) on sustainable development and resource curse. There was reliance on relevant documents emanating from the government and non-governmental organisations. Complementing the use of qualitative research methodology was the use of textual analysis of already collected data, documents, reports and scholarly publications of the subject matter.[53] It is mirrored that:

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[52] Priscilla Schwartz, 'Sustainable Energy Infrastructure: Law, Policy and Practice' (2009) 4(1) Journal of International Commercial Law and Technology 107, 114.

[53] See MC Lacity and MA Janson, 'Understanding Qualitative Data: A Framework of Text Analysis Methods' (1994) 11(2) Journal of Management Information Systems 137-155.

> A social scientific text analysis aims to explain the life-world within which the text is embedded; to open up the perspective of the author that is delineated by his/her social and cultural context and to draw attention to the structural aspect of everyday practices and meaning patterns.[54]

Textual analysis requires exposition and interpretation of the contents of texts. For example, understanding of thoughts, ideas and positions on certain aspect of the research was through the distilling of information from PIAC annual reports and the review of scholarly works on resource curse as postulated by scholars. Taking the qualitative approach into account, this research particularly in chapters five and six respectively assesses the Ghana's petroleum revenue management law regime against the EITI standards and the Generally Accepted Principles and Practices for Sovereign Wealth Funds (the Santiago Principles).

The research shall also employ a comparative research methodology for the purpose of teasing out what Ghana should do or avoid by improving its laws. Therefore, the position in Nigeria and Norway will be considered. The comparative analyses will bring these elements to the fore by examining what the countries have done to effectively address the management of petroleum revenue for sustainable development and check the resource curse phenomenon. It will also allow for the understanding of the deliverables from other countries which can comfortably be inspired to review the laws. The comparative research method is also utilise in the research to benchmark the current state of affairs in relation to management of petroleum revenue in accordance with the EITI standards and Santiago Principles, which are notable instruments for accountability and transparency in the management of petroleum revenue. It found it expedient that having been developed overtime through best practices, benchmarking and comparing these principles in the areas of transparency, accountability and prudent management of petroleum revenue could offer

[54] Martin W Bauer, Aude Bicquelet and Ahmet K Suerdem, 'Text Analysis: An Introductory Manifesto' (LSE Research Online, July 2014), http://eprints.lse.ac.uk/57383/1/Bauer_Bicquelet_Suerdem_Text-analysis-an-introductory-manifesto_2014.pdf, accessed 17 May 2021.

a viable options for sustainable management of petroleum revenue in the bid to avoid the resource curse in Ghana.

The use of comparative research has enabled this research to situate examples from other country case studies within the broader spatial and temporal contexts of the research. Whilst Nigeria and Norway are singled out given their importance in looking at the petroleum revenue management from diagonally opposed perspectives of the resource curse (negative lessons vs. positive lessons), there are other countries which relevant lessons may be drawn from or that may offer viable explanation of some points in the research, such countries are mentioned to offer a further wide coverage of the perspectives of appreciating the sustainable management of petroleum revenue. To this end, countries such as Spain, Netherlands, Angola, Sudan, and Botswana among others have been mentioned.

The choice of Nigeria for this research rests on the fact that Nigeria is an oil rich developing country that has not translated its oil revenue into sustainable benefits[55] but has been faced with agitation.[56] Ghana shares the same colonial ties with Nigeria. They were both British colonies in West Africa and had independence within the same period. They are referred to as common law countries that have adopted the English common law as their legal system.[57] They have witnessed their democracy being truncated over a long period of time due to military intervention. Though the commercial discovery of oil in Nigeria dates back to 1956, it was not until 2011 that the sovereign wealth fund was initiated.[58]

Norway, on the other hand, represents an oil-rich country that has uniquely promoted sustainable management of petroleum revenues and avoidance of the resource curse. Norway is worth considering since it takes the debate beyond mere management of the resources to how revenue can be utilised to diversify the economy and achieve sustainability. It operates one of the most robust sovereign wealth funds in the world, now

[55] See PK Oniemola, 'Why Should Oil Rich Nigeria Make A Law for the Promotion of Renewable Energy in the Power Sector?' (2016) 60 (1) Journal of African Law 29, 34-42.
[56] See KSA Ebeku, 'Oil, Niger Delta and the New Development Initiative: Some Reflections from Socio-Legal Perspective' (2007) 19 Sri Lanka Journal of International Law 1, 2-14.
[57] Emmanuel Kwabena Quansah, The Ghana Legal System (Black Mask Ltd 2011) 51.
[58] Sovereign Investment Authority Act 2011.

known as the government pension fund.[59] According to the Norwegian Ministry of Petroleum and Energy in 2006 'Norway has a potential for maintaining profitable oil production from the North Sea for another 50 years and its gas production for another 100 years'.[60]

By and large, the common ground for the three countries is connected to the fact that the countries in question operate a centralised ownership and governance of petroleum resources. Article 257(6) of the 1992 Constitution of Ghana provides that:

> Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.[61]

Section 44(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended):

> '…the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Section 1 of the Petroleum Activities Act 1996 of Norway provides that "The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management". The implication or incidence of such ownership is that it is the central government that has the power to make laws and regulate petroleum resources to the exclusion of other units of government within the states in question. Another striking similarity is that in the countries under contemplation the government participates in the oil and gas industries by acquiring stakes or entering through contractual arrangements through

[59] Kwabena Nyantakyi Boamah, 'The most Important Principle of Governance for Effective Management of Oil Funds' (2013) 16 CEPMLP Annual Review.

[60] See Carole Nakhle, *Petroleum Taxation Sharing the oil wealth: a study of Petroleum Taxation Yesterday, Today and Tomorrow* (Routledge, Oxon 2008) 40.

[61] Section 1(1) of the Petroleum (Exploration and Production) Act, 1984 provides that: 'Without prejudice to any right granted, conferred, acquired, recognised or saved in this Law to explore for or produce petroleum, all petroleum existing in its natural state within the jurisdiction of Ghana is the property of the Republic of Ghana and shall be vested in the President on behalf of the people'.

the government owned corporate entities, which can sue and be sued in their corporate names. These corporate bodies are GNPC (Ghana), Nigerian National Petroleum Corporation (Nigeria), and Equinor (Norway).

Though the research essentially considers the Nigerian and Norwegian jurisdictions as comparators, references shall be made to other countries that offer best practices solutions or examples in so far as they fit into the context of the analyses made in the thesis. In all, the method of this research is summed up in the following phases as follows: First, looking at the theoretical underpinnings of the research and what the law is to determine adequately how petroleum revenue management and promotion of sustainable development can be achieved to avoid the resource curse by analysing sources of the research; second, drawing lessons from other countries for the purposes of learning from best practices and avoiding bad practices. Third, synthesising the findings and offering prescriptions for the amendment of the law to improve them in the actualisation of revenue management for sustainable development in Ghana based on lessons learnt from Norway, Nigeria and other countries.

1.7 SCOPE OF THE RESEARCH

This research is based on examining the management of petroleum revenue for sustainable development with a focus on sustainable conversion of the petroleum resources to revenue yielding ventures, effective management of the revenue and development of human capital. Acknowledging the broad nature of the resource curse debate and sustainable development, the thesis shall specifically focus on two principal legislations to determine how their contents and scope of the laws have promoted the management of petroleum resources in order to realise sustainable development in the petroleum industry. It will also look at the position in Nigeria and Norway for the purpose of discerning how best Ghana can manage its petroleum resources in the pursuit of sustainable development. It will also consider the practices in other countries in order to derive insightful measures that can contribute to a

more transparent, accountable, productive and sustainable ways of managing Ghana's petro-wealth.

1.8 BRINGING THE RESOURCE CURSE IN GHANA INTO CONTEXT

1.8.1 The Resource Curse Phenomenon

The purpose of this section is to put into context the resource curse in Ghana. This is the core of the thesis as it examines literature on the resource curse generally as well as related studies on resource curse in Ghana. Upon the discovery of natural resources in most resource endowed countries, the governments' objective will be the maximisation of the resources to achieve socio-economic goals of the nation. This was the kind of attitude expressed by Ghana upon the discovery of oil.[62]

In the wake of the discovery of oil and gas in Ghana, scholars have expressed their views and fears that Ghana should not replicate the resource curse of other countries.[63] This thesis therefore leans on the views that natural resources should contribute to economic development as well as the attainment of sustainable development.[64] Ntakrah has approached the study of the resources curse from a sustainable development path.[65] Furthermore, Starkey appears to have followed a similar approach.[66] This thesis will, nevertheless, carry out analyses from the generally agreed dimensions to sustainable development in relation to the laws that have been promulgated to address the resource curse in Ghana.

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[62] Obeng-Odoom 9.

[63] See for example, Daniela Kuzu and Danaa Nantogmah, 'The Oil Economy and the Resource Curse Syndrome: Can Ghana make a difference?' (September 2010), http://library.fes.de/pdf-files/bueros/ghana/10492.pdf, accessed 20 March 2017.

[64] Jeffrey D Sachs and Andrew M Warner, 'The Curse of Natural Resources' (2001) 45(4-6) European Economic Review 835, 838.

[65] Jerry Ntakrah, Sustainable Development in Ghana's Petroleum Industry: An Analysis of the Resource Curse (MSc Thesis, Ryerson University 2011).

[66] See Kate Starkey, 'Has Ghana avoided the "Resource Curse" and taken a Path toward Sustainable Development?' (Bachelors Dissertation, University of Nottingham 2015).

The researcher decides to follow the approach because, in most cases, the objective of sustainable development in the oil and gas industry does not appear to be realised. As argued by Barma *et al*, "Resource wealth should translate into collective and sustainable development"; however "many resource dependent developing countries pursue short-sighted and suboptimal policies in relation to both the extraction and capture of resource rents and the spending and savings from their resource endowments".[67] Looking at these expressions it would be seen that Ghana should actually take great care so that this syndrome does not find its way into her oil and gas sector.

On the other hand, the resources should result in the growth of the economy, development of other resources and infrastructural development, and should not become the main reason to neglect other sectors of the economy. On this note scholars from Ghana have responded by examining the operation of the revenue management law in determining whether such laws will in their strict sense protect Ghana from the much-touted resource curse.[68]

Studies have further shown that natural resources may be a source of rent seeking, corruption, violent conflict and a host of other vices that have truncated the stability of most nations. Resources are being mismanaged and corruption is usually common place.[69] Therefore, the bedrock of the theoretical postulations on the resource curse is the 'windfall' nature of revenues and the idea that a new 'booming' sector renders other sectors uncompetitive in the world market".[70]

According to the renowned French political theorist, Jean Bodin: "Men of a fat and fertile soil are most commonly effeminate and cowards whereas … a barren country makes men … careful, vigilant and industrious."[71] This statement captures aptly the resource curse which was popularised by the world through the symbolic Dutch disease of the 1970s. The

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[67] Naazneen H. Barma, et al, 234.

[68] See Olivia Lwabukuna, 'Natural Resources for Socio-Economic Development in Africa: Legal Governance of Extractive Industries in Ghana' (2015) 44(4) Africa Insight 47, 47-60.

[69] Paul Stevens and Evelyn Dietsche, 'Resource Curse, Analysis of Causes, Experiences and Possible ways forward' (2008) 36(1) Energy Policy 56, 57.

[70] Paul Stevens, Glada Lahn and Jaakko Kooroshy, *The Resource Curse Revisited* (Chatham House 2015) 8.

[71] This quotation was obtained from JD Sachs, and A M Warner, *Natural-resource Abundance and Economic Growth* (Center for International Development and Harvard Institute for International Development, Harvard University 1997) 14.

resource curse is considered in the symbolic term as 'paradox of plenty'. This connotation is associated with a situation whereby a country that is rich in natural resources remains economically poor. Therefore, notwithstanding the abundance of resources, the standard of living in such countries is high and the human development indices of such countries are rated as very poor. The resource curse has received extensive attention among scholars. Different views have been put forward since the emergence of the concept. It is a concept that has found its way into the lexicon of natural resources governance offering explanations on why mineral and natural resources rich countries remain poor while others have been able to translate their resources into prosperity for the nation. Countries have been exploring various ways to maximise their resources for the good of the people, however in most resource rich countries, the reverse has always been the case. The petro wealth has not been converted into the needed or expected resource development which was in contemplation at the period when the resources were discovered in the regions.

Wokoro has attempted to describe the resource curse as an "inverse relationship between development and resource abundance".[72] He continued further that the "inverse relationship is demonstrated by the fact that resource-poor nations have significantly outpaced resource-rich nations in development" citing examples from Nigeria, Angola, Equatorial Guinea and Gabon to buttress his point on the level of underdevelopment of these sub-Saharan African countries in spite of the fact that they are endowed with enormous petroleum resources that could have been utilised for economic development.[73]

Capturing the situation with specific examples, he notes that oil constitutes 97.5% of Nigeria foreign earnings and 81% of the revenue of government, and despite the enormous petro-wealth, 54% of the population live on an average of 1 US Dollar daily.[74] On Angola, he observed that the life expectancy is about 42 years and that the oil revenue has been mismanaged leading to poor infrastructural development.[75] On Equatorial Guinea he notes that: "Notwithstanding oil revenue rising to $4.8 billion in 2007, comprising about 82% of

[72] Nna Emeka 'Wokoro, 'Beyond Petroleum Production to Community Development: International Oil Companies as Proxy Governments' 5(2) Texas Journal of Oil, Gas, and Energy Law 323, 328.
[73] Ibid. 328-332.
[74] Ibid. 328.
[75] Ibid. 329.

government revenue, and a GDP of $18.5 billion, a population of approximately 633,000 lives in poverty, while the country's elite squanders the nation's wealth".[76] Similar situation is also found in Gabon where he states that "Despite Gabon's oil wealth, for over 30 years its population of approximately 1.3 million has lived in poverty".[77]

Therefore studies coming from Ghana have expressed scepticism that Ghana could avoid the resource curse in the oil and gas industry given that there is evidence of its manifestation in other sectors such as the gold mining sector.[78] In what may appear to be pessimistic, Kuzu and Danaa Nantogmah state that "100 years of mining gold and other minerals have not translated into significant transformation of the Ghanaian economy".[79] Osei-Hwere has also expressed same while quoting a World Bank Report which maintains that: "Local communities affected by large-scale mining have seen little benefit to date in the form of improved infrastructure or service provision, because much of the rents from mining are used to finance recurrent, not capital, expenditure".[80] In the same token, a World Bank study further confirmed that "As a source of revenue, gold is the main mineral resource for foreign earnings (the highest single foreign exchange earner since 1999), but its actual contribution to development remains limited".[81]

Most resource rich countries have been characterised by poor economic development. The citizens live in abject poverty while there are exploration and production activities ongoing. The revenues that are generated from the resources have not been appropriately channelled towards the development of the society. The rich in such countries continue to get richer

[76] Footnotes omitted. See Ibid. 330.
[77] Footnote omitted. See Ibid. 331.
[78] See G Hilson and R Maconachie, 'Good Governance and the Extractive Industries in Sub-Saharan Africa' (2008) 30(1) Mineral Processing and Extractive Metallurgy Review: An International Journal 52, 54, where they emphatically said that the increase in gold production by 800% in the past 20 years "failed to stimulate marked economic growth and improve quality of life".
[79] Kuzu and Nantogmah 8.
[80] See World Bank Operations Evaluations Department, 'Project performance assessment report, Ghana: Mining Sector Rehabilitation Project (Credit 1921-GH) and Mining Sector Development and Environment Project (Credit 2743-GH)' (World Bank, Washington, DC 2003), cited in Richmond Osei-Hwere, Conflict of Interest Challenges Facing Ghana's Petroleum Commission under the Petroleum Commission Act, 2011 (Act 821): Proposals for Reform (PhD Thesis, University of Aberdeen 2015) 59.
[81] Joseph Ayee, Tina Søreide, G P Shukla and Tuan Minh Le, 'Political Economy of the Mining Sector in Ghana' (World Bank Policy Research Working Paper 5730, July 2011) 11. http://documents.worldbank.org/curated/en/309711468031496273/pdf/WPS5730.pdf, accessed 20 March 2017.

and most of those in governance do not give consideration for the need to diversify the economy. There is a great gap between the haves and the have nots. Whether Ghana will be able to utilise the petroleum revenue management law to address this phenomenon is part of the critical considerations for this doctoral study.

Most scholars have on several occasions taken a more conclusive view that natural resources availability results in economic woes for most nations. For example, Warner maintains that there are three curses inherent in less developed countries that derive their national incomes from natural resources which are that they breed "authoritarian governments, they are at a higher risk for civil conflict, and they exhibit lower rates of growth. Several causal pathways explain these surprising correlations between natural resources and national misery".[82]

The assumptions that underlie the resource curse is that countries that are very rich in natural resources record economic woes as they are economically poorer than countries that have little or no resources. It therefore depicts a circumstance whereby a country that is endowed with natural resources but has not achieved economic prosperity appear to vary with a resource poor country that has progressively developed its economy positively notwithstanding that it is constrained by lack of adequate resources that would have aided it to be more successful. Leonga and Mohaddes observe that: "According to the resource curse paradox, resource rich countries perform poorly when compared to countries which are not endowed with oil, natural gas, minerals and other non-renewable resources".[83] This proposition gains support from the findings of Auty that: "Since the 1960s, the resource-poor countries have outperformed the resource-rich countries compared by a considerable margin".[84] Therefore, "resource abundance is believed to be an important determinant of economic failure".[85]

[82] L Wenar, 'Property Rights and the Resource Curse' 36(1) (2008) Philosophy & Public Affairs 2, 3.
[83] Weishu Leonga and Kamiar Mohaddes, 'Institutions and the Volatility Curse' (Cambridge Working Paper in Economics 1145, 10 July 2011) 2, http://www.econ.cam.ac.uk/dae/repec/cam/pdf/cwpe1145.pdf, accessed 28 January 2017.
[84] Richard M Auty, 'The Political Economy of Resource-Driven Growth' (2001) 45 European Economic Review 839, 840.
[85] Leonga and Mohaddes 2.

In a report to the Members of the Committee on Foreign Relations United States Senate, it was stated that that there are many factors that are linked to the resource curse such as the

1. Dutch disease, depicted by a situation whereby there is an increase in foreign exchange and cheap imports resulting in fall in domestic production and economic growth;
2. a situation whereby there is "crowding out of factors of production (land, labour, capital)" owing to the dominance of exportation;
3. development being centred on a particular area such as the promotion of the mineral resources without cross-sectoral development and, diversification or investment; overdependence on export revenue from the dominant sector;
4. efforts channelled towards developing the domestic sector through inefficient policies that end up being uncompetitive through the use of trade protectionist tools and subsidies;
5. "negative effects of commodity price and revenue volatility on incentive structures related to policy and investment decision-making and consumption patterns";
6. utilising the country's future natural resources as collateral or "often involving the expenditure of disproportionately large amounts of credit to meet short term needs";
7. ineffective growth with "state-centric economic policy-making when there is access to large extractive industry revenues"; and opportunity for corruption and political rent-seeking to thrive because of the abundance of revenue and non-transparent contracting and market processes, particularly in the petroleum industry thereby encouraging corruption and political rent seeking.[86]

[86] *The Petroleum and Poverty Paradox: Assessing U.S. and International Community Efforts to Fight the Resource Curse* (Report to the Members of the Committee on Foreign Relations United States Senate One Hundred Tenth Congress Second Session October 16, 2008) 10-11.

The term was coined to describe the situation in the Netherlands in 1977[87] in the wake of oil extraction in the North Sea and the resultant explosion in foreign exchange receipts in the Netherlands. The development was so enormous that other sectors such as agriculture, manufacturing and other industries were abandoned with emphasis being placed on the proceeds from foreign earnings accruing from oil and gas. The Dutch disease demonstrates a situation of "appreciation of the real exchange rate and the resulting process of de-industrialization induced by the increase in oil exports".[88] In the words of Karl, "Persistent Dutch Disease provokes the rapid, often distorted growth of services, transportation and other non-tradable while simultaneously discouraging industrialisation and agriculture - a dynamic that most policy makers seem incapable of counteracting.[89] Thus, the Dutch disease simply connotes the situation where countries which because of the abundance of a particular mineral resource, abandon other sectors by paying attention to the booming sector, resulting in negative economic development in the other sectors. This can also be taken to mean lack of sustainability and failure to prepare for the scenario where the booming sector turns out not to be able to contribute positively to the growth of the economy.

The paradox as demonstrated by the Dutch Diseases has also been traced to other examples as seen in the new world gold in Spain during the 16th century; "the Australian and Californian gold rushes in the nineteenth century, a coffee production boom in 1970s Colombia, and from rising oil revenues in Nigeria and Venezuela, which may be said in current day to have extended to Russia.[90]

[87] Paul Collier, The Bottom Billion: Why the Poorest Countries are failing and what can be done about It (Oxford University Press 2009) 39.
[88] Frederick van der Ploeg, 'Natural Resources: Curse or Blessing?' (Center for Economic Studies and ifo Institute CESifo) Working Paper No. 3125, 2010).

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[89] TL Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (University of California Press, 1997) 43.
[90] John Burritt McArthur, 'Preserving Public Natural Resources: Value and Sustainability in a World of High Costs and Budget Shortfalls' (2015) 10(2) Texas Journal of Oil, Gas, and Energy Law 267, 297-298.

1.8.2 Environmental Dimensions to the Resource Curse

The environmental degradation in the exploitation of natural resources causes harm particularly from the stage at which seismic exploration is carried out to the time when production, transportation and eventually distribution to consumers occur. There are serious environmental impacts, owing to the pollution. In countries hit by the resource curse, no effort is made to protect the environment. The interest for the government is centred on exploiting the benefits and utilising the proceeds of oil, without factoring in the need to give the environment the optimum protection required in the process.

This pollution from the resources affects the quality of lives of the people. Life expectancy has been affected and even the means of livelihood may also be negatively impacted by the activities of the oil and gas companies engaging in petroleum operations. The government seems to place more premium on the resources it intends to generate than on the environmental wellbeing. Therefore, countries where the resource curse syndrome is prominent will neglect the impact the resources exploitation will have on the environment. The emphasis will be based on what they can gain from the oil companies that they engage.

Usually they are very reluctant in setting high environmental standards because of the fear that they are likely to lose revenue from the multinational oil companies who may prefer to invest in climates where the rules are relaxed. Good environmental practices which ought to be the paramount considerations of these countries may be toyed with by the regulators. That is one of the reasons why most multinational oil companies are considered to have committed serious environmental offences in places where they operate. They exit the industry without punishment as they know that they can thrive in regions where the government will rather prefer to derive the benefits from these companies instead of outright cancelation of the licences of the companies that are involved in the environmental degradation or fining them.

Even with the current development whereby some countries are moving towards the protection of the environment by recognising harm to the environment such as ecocide,

most resource-cursed countries will be reluctant in ensuring that the oil companies pay for the environmental degradation they have caused. There are responsive steps to penalising the degradation of the environment by labelling it as ecocide. In France, the law went heavily against Total SA because its ship known as Erika was sunk in the river. Total SA was made to pay the sum of €375,000 as a fine by the Criminal Court of Paris, being the maximum penalty allowed to be awarded for ecological prejudice.[91]

Kosmos Energy which is involved in the exploration activities within the jubilee field was alleged to have spilled 699 barrels of mud containing poisonous substances that are damaging to the ecosystem.[92] The Ministry of Environment, Science and Technology set up a committee to investigate the complicity of Kosmos Energy and later imposed a fine of $35 million on Kosmos Energy, which on its part maintained that the imposition of the fine was illegal, *ultra vires* and unconstitutional because the ministry was not vested with the power to impose such fines.[93] In the words of Egbefome, 'The posture of KOSMOS frightens all well-meaning Ghanaians as to what awaits us in the near future, in case, God forbid, there is an occurrence of what happened at the Gulf coast'.[94] Therefore, in addition to avoiding the inherent risks, 'something' must be given back to the environment for its exploitation and this could come in the form of environmental restoration from revenues derived from petroleum activities.[95]

[91] Sailesh Mehta and Prisca Merz, 'Ecocide – A New Crime against Peace?' (2015) 17(2) Environmental Law Review 3, 6.
[92] Cephas Egbefome, 'Comment: Oil spills in Ghana and the Kosmos Energy's snub: Averting the Gulf Coast Disaster' <http://opinion.myjoyonline.com/pages/feature/201104/63635.php> accessed 1 July 2016.
[93] Ibid.
[94] Ibid.
[95] See Nonye Opara, 'Broadening Community and Regional Benefits from Energy Development through Environmental Restoration Funds' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resources Activity: Legal Change and Impact on Communities* (Oxford University Press, Oxford 2015).

1.8.3 Economic Dimensions to Resource Curse

Most resource rich countries consider that the resource is capable of enabling them achieve economic prosperity. This is because there are no efforts to link other sectors of the economy with the progress that has been made in the natural resources sector.[96] The focus has been on exploiting the resources for the purpose of boosting foreign exchange earnings. The resource rich countries depend solely on exportation of their resources to advanced countries. Other areas of the economy are neglected as quick money can be easily obtained from oil and gas export with agriculture in particular suffering considerable neglect. Therefore, a recent study by Acheampong, Ashong and Crystal Svanikier looks at Ghana among other countries from the perspective of diversification of the economy utilising the revenue generated from the dominant natural resources will enhance economic development objective, thereby checking the problem of the resource curse.[97]

The oil price shocks of the 1970s marked a major turning point for the advanced nations in addressing the problem of energy security. They considered that since they were deficient in natural resources; they should endeavour to explore other energy sources that will enable them to diversify to other sources as a counter to the price shocks resulting from the activities of OPEC. These countries formed the International Energy Agency (IEA) as a counter to the activities of the OPEC as a virtual cartel with the power to set global oil prices.

Steadily, through the IEA, the advanced countries have been evolving practices and measures that are promoting the diversification of their energy mix to include renewable energy sources such as biomass, solar, wind, hydro, geothermal energy sources to power their economy. They have been able to develop advanced technologies to increase the share of renewable energy in the energy mix. Countries such as Germany have become world

[96] N Torres, O Afonso and I Soares, 'A Survey of Literature on the Resource Curse: Critical Analysis of the Main Explanations, Empirical Tests and Resource Proxies' (CEF.UP Working Papers 1302, Universidade do Porto, Faculdade de Economia do Porto).

[97] Theophilus Acheampong, Marcia Ashong and Victoria Crystal Svanikier, 'An Assessment of Local-Content Policies in Oil and Gas Producing Countries' (2016) 9(4) Journal of World Energy Law & Business 282, 286.

leaders today in the use of renewable energy sources for its electricity sector. There are other technological developments that are also upcoming by other countries in devising technologies that will enable them to extract oil from places which have in the past been considered not geologically and economically realistic to harness such resources. Progress is also being recorded in the shale gas extraction in countries such as the United States of America. With this success story recorded, it can be said that lack of abundant natural resources turns out to be a form of blessings as it encourages or spurs these countries to be innovative which in turn translates into blessings for them. In other words, existence of natural resources becomes a curse to the rich countries who have not taken adequate precautionary steps to prepare for the future by not exploring other sources in the event that their oil and gas resources run dry. The significance of lacking abundant natural resources is reflected in developments in Kenya where though the country lacks petroleum resources it has been compelled to embrace renewable energy sources by developing the sector. The significance of this approach is captured in Schubert's warning that "in a not too distant future, oil will disappear. When it does, stability will end. Those countries that have diversified will move forward. Those that do not, however, will collapse economically and politically".[98]

Normally, the oil resource should have been used in developing the other pressing sectors of the economy. However, this is not always the case. More so, where an industry places reliance on exhaustible natural resources, such industry cannot in the long run grow like other industries.[99] The woes recorded are because the high incomes generated by the resource-endowed countries are unsustainable.[100]

[98] Schubert 69-70.
[99] Francisco Rodriguez and Jeffrey D Sachs, 'Why Do Resource-Abundant Economies Grow More Slowly?' (1999) 4 Journal of Economic Growth 277, 278.
[100] Ibid.

1.8.4 Political Dimensions to Resource Curse

Many resource rich countries such as Nigeria, Sudan and Angola are yet to recover from the social and political turbulence occasioned by the existence of natural resources in their domain particularly as endowment in natural resources have complicated political and violent conflicts.[101] The resource rich countries are usually engulfed in conflicts. Violence is usually employed as a means of acquiring political power that will pave way for the control of the resources.[102] Some of these conflicts are influenced by the struggle for natural resources as ethnic, political or other groups fight for resource control on account of the rents they can derive from them. In certain instances of illegal mining the proceeds are used to finance terrorist activities against the state. Proceeds from resources are therefore sources for funding conflict or can influence countries into activities that can degenerate into wars.[103] Also there are other forms of civil unrest that are connected with the resources. Ethnic militias have emerged in the regions rich in oil. Studies from Ghana have started expressing fears that similar crises associated with resource cursed countries may be perceived in Ghana.

Their militancy is for different causes. It may be for the control of the resources or even the need to increase their own share of the resources in their domain. Some are even fighting for the injustice meted to them because of the pollution of their environment, leaving them with no means of livelihood of their own. According to the Natural Resources Governance Institute: "Since 1990, oil-producing countries have been twice as likely to have a civil war compared with non-oil-producing countries. Political scientists point to examples of the Democratic Republic of the Congo, the Niger Delta, Iraq, Libya and Angola to illustrate

[101] Michael L Ross, The Oil Curse: How Petroleum Wealth Shapes the Development of Nations (Princeton University Press, 2012) 1.
[102] Mathieu Couttenier, Pauline Grosjean and Marc Sangnier, 'The Wild West is Wild: The Homicide Resource Curse' (December 2013), TheWildWestIsWildTheHomicideReso_preview.pdf
[103] Philippe Billon, 'Geopolitical Economy of Resource Wars' (2004) 9(1) Geopolitics 1–28

this tendency".[104] The crises in Sierra Leone, leading to civil war was largely in connection to the existence of diamonds, hence the terminology, 'blood diamonds'.

Democratic development in most resource rich countries is very poor. Resource rich countries relying on unearned income from petroleum taxation lack democratic cultures as the government usually buys over interest group that will want to advocate for accountability in the collection and management of the revenue derived from natural resources.[105] Though there is an adage which states that "the more well-to-do a nation, the greater the chances it will sustain democracy";[106] yet only Norway in particular, may be described as democratic state out of the 10 top oil producers.[107] The assertion is therefore far from the truth to the extent that it can be held that "oil and democracy do not mix".[108]

Democratic culture in most of these regions has not been observed to the fullest. The level of regard for the rule of law is very low. Due processes are not observed in the dealings with natural resources. Governance issues are complex with unwarranted bureaucracy built into the system. Nepotism and political patronage are commonplace. Non-compliance with the rule of law and failure to accord due process in the dealings with the government continue to hound stakeholder's interest. There are even many instances whereby the oil companies have been accused of complicity in the breach of the rule of law. Unfortunately, there is an effect on the protection of fundamental human rights as resource rich and resource cursed countries fall short of international human rights standards.

It has been theorised that most resource rich countries tilt towards authoritarian government because they place little or no reliance on taxation generated from the citizens. Such taxation would have made the government more accountable to its people knowing well that it is by cooperating with the people that they will be willing to pay tax. Since there are

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[104] Natural Resources Governance Institute, *The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth* (NRGI Reader March 2015) 2, http://www.resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf, accessed 28 January 2017.
[105] Michael L Ross, 'Does Oil Hinder Democracy' (2001) 53(3) World Politics 325, 333.
[106] Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (Johns Hopkins University Press, Maryland 1981), cited in Samuel R Schubert, 'Revisiting the Oil Curse' (2006) 49(3) Development 64, 64.
[107] Schubert 64.
[108] Martina Ottaway, 'Tyranny's Full Tank' (New York Times, March 31 2005) A27-A27, cited in Schubert 64.

sources which the government may derive revenue from without recourse to the people, it may become more autocratic because there is a perception that it stands to gain or lose nothing from the citizens in respect of revenue generation.

There is usually a political dimension to the resource curse.[109] Most leaders of resource rich countries have the tendency of wanting to remain in office and the abundance of the resources help them in achieving such undemocratic practices.[110] Availability of natural resources and generation of revenue from the resources tend to create a behavioural change in most governments as their attitude toward economic development ventures could change.[111]

However, Ghana has been a good reference point for democracy in Africa having consistently maintained a democratic trend since the return to civilian rule after years of military rule.[112] Research from Ghana shows some forms of indications that there are some elements of political patronage in Ghana. This is shown in relation to the grant of oil licenses and stakes to members of the political class. In the same token, Stephen has warned that "whereas in Norway there is no perceived or actual need to create a strong, independent regulatory body for the petroleum industry to counter-balance Executive power, in Ghana, there is the need to do so as Ghana's history and recent experiences have demonstrated abuse by the Executive, of unfettered power".[113]

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[109] Terry Lynn Karl, 'Ensuring Fairness: The Case for a Transparent Fiscal Social Contract' in Macartan Humphreys, Jeffrey D. Sachs and Joseph E. Stieglitz (ed.), *Escaping the Resource Curse* (New York, Columbia University Press, 2007) 12.

[110] Michael L Ross, 'Will Oil Drawn the Arab Spring?: Democracy and the Resource Curse' (2011) 90 Foreign Affairs 2, 3.

[111] See Paul Stevens, 'Resource Curse and Investment in Energy Industries' in Cutler Cleveland (ed) (2004) 5 Encyclopedia of Energy 451–459.

[112] Holmås and Joe Oteng-Adjei, 128.

[113] Stephen 256.

1.8.5 Institutional Dimension to Resource Curse

The government of Ghana, like that of any other country operates through the regulators in the industry. Likewise, there are usually the state-owned enterprises, the national oil company, who are created to represent the government in the control and management of petroleum resources.[114] These institutions will need to be responsive in addressing the problem of the resource curse. Of relevance to this thesis is the research of Kopiński, Polus and Tycholiz on the resource curse in Ghana; they have argued that Ghana is taking a modest step to strengthen its legal and institutional framework, promotion of accountability in order to "immunize" itself from the resource curse or resource disease.[115] In the same vein, a later study by Osei-Hwere has attempted to analyse the likely need for institutional framework that will address the resource curse calling for regulatory institutions to be positioned so that Ghana does not replicate the resource curse syndrome.[116] According to Osei-Hwere:

> ...the challenge lies in ensuring that the revenues generated are properly managed and utilised in such a way that other sectors of the economy may be developed and the *dependence on primary commodity exports does not simply deepen until Ghana suffers from the "Dutch disease" variety of the resource curse*. The challenge also lies in the taking of important decisions on the establishment of an *appropriate legal and institutional framework* within which the petroleum industry may develop and operate.[117]

The existing institutions and the way they are structured or restructured will be a contributing factor to whether a country will be entangled in the resource curse or not. Karl's work supports this proposition by providing that "[T]he fate of oil-exporting countries must be understood in a context in which economies shape institutions and, in turn, are shaped by them. Specific modes of economic development, adapted in a concrete

[114] Thomas W Waelde, 'International Energy Investment' (1996) 17 Energy Law Journal 191, 195.
[115] Dominik Kopiński , Andrzej Polus and Wojciech Tycholiz, 'Resource Curse or Resource Disease? Oil in Ghana' (2013) 112 (449) African Affairs 583, 583-601.
[116] Osei-Hwere.
[117] Osei-Hwere 2.

institutional setting, gradually transform political and social institutions in a manner that subsequently encourages or discourages productive outcomes."[118] According to Barma et al, "The quality of a country's institutions is central in the resource paradox" and "resource-dependent countries are endowed with poorer institutional quality than they should have."[119] Graham's research which further observed that civil societies are useful in addressing the resource curse in Ghana was quite introspective since institutions could be strengthened through the engagement of civil societies.[120]

Countries that have been able to surmount the resource curse have developed robust institutional framework and capacity to tackle it. Notwithstanding the support for countries with natural resources, based on the principle of permanent sovereignty over natural resources, little effort has been put towards development of managerial capacity and development of expert skills for the management and regulation of the oil and gas sector.[121] In most cases the government through the machinery of the state do little to promote the natural resources sector because it places reliance on unearned income (such as royalties, fees, bonuses and taxes from oil and gas).[122]

It is easier for the revenue of the state to be managed outside the budget process of the state by the private sector, instead of keeping the resources management within the control of few hands, through the use of sovereign wealth fund and creation of national oil companies.[123] The institutions are weak in most countries that experience the resource curse. It is easier for the political class and the government to weaken existing institutions by placing their cronies who they can control in such institutions, thereby exposing the funds of the state to people with selfish interests or some rent seeking individuals in the

[118] Karl, *Paradox of Plenty* 6.
[119] Naazneen H Barma, Kai Kaiser, Tuan Minh Le and Lorena Viñuela, *Rents to Riches? The Political Economy of Natural Resource–Led Development* (The World Bank, Washington DC) 44.
[120] See generally Emmanuel Graham, The Contribution Of Civil Society In Avoiding Natural Resource Curse In Ghana: The Case Of Oil (Msc Dissertation, University of Ghana 2013).
[121] Bede Nwete, 'Legal and Policy Framework for Promoting Petroleum Expertise in Africa', (2006) 4(3) OGEL 1, 4; George Ndi, 'Act 919 of 2016 and its Contribution to Governance of the Upstream Petroleum Industry in Ghana' (2017) 36(1) Journal of Energy & Natural Resources Law 5, 21
[122] Mick Moore, 'Political Underdevelopment: What Causes "Bad Governance"' (2001) 3(3) Public Management Review 385, 389.
[123] Natural Resources Governance Institute 4.

system.[124] Countries that are able to develop their political and legal institutions in such a way that rent seeking is discouraged have exhibited signs of ability to manage the resources for the good of the people.[125]

The existence of weak institutions continues to complicate the situation in these resource rich countries. The expertise that would have been developed over time fails to emerge. The industry is largely left under the influence of the multinational oil corporations who are much concerned with what they will get from the country. The communities therefore rely on corporate social responsibility from the multinational oil companies operating within the community. These oil companies are therefore generally perceived as being equal to the task that they have to produce the required infrastructural development in the areas they operate. These companies end up emerging as what Wokoro in his article described as proxy government, doing "more harm than good" by ultimately perpetuating "corruption and unaccountability, which undergird government failures".[126] More particularly, this proposition is reinforced by the fact that the government is so detached and remote from the people. It is on the basis of the foregoing that this thesis will carry out a detailed review of the petroleum revenue management law to determine the extent that it will be able to address the institutional framework in Ghana to address the resource curse.

1.8.6 The Phenomenon of Corruption

Corruption has been associated widely with countries that are rich in natural resources. The proceeds from oil and gas and other mineral resources do not get to the state coffers without the corrupt officials embezzling part of the proceeds. According to Ross, evidence exists to show that "when a government gets more of its revenue from oil, minerals, and timber, it is more likely to be corrupt" because the wealth from natural resources "often floods

[124] Natural Resources Governance Institute 4.
[125] Barbier 372.
[126] Wokoro 325.

governments with more revenue than they can manage effectively".[127] Ross further supported his assertions that almost 1 billion US dollars were lost in oil rich African countries in 2001.[128]

There are cases of kickbacks in the entire system where the resource curse has manifested. The political class, oil companies and officials of the regulatory agencies usually compromise the system. The resource curse thesis has been faulted by scholars who have shown that there are resource rich countries that have avoided the resource curse; however, the thesis still occupies a position in natural resources governance because it demonstrates how best a country may take measures to avoid this problem of resource governance. Thus, the thesis contributes to the development and search for sustainable ways to utilise petroleum and other mineral resources. Moreover, some countries have exhibited the resource curse traits and it will be of a matter of expediency for the problem to be addressed if Ghana is to make headway economically. Therefore, another study from Ghana has warned that "oil wealth could potentially worsen the country's patronage-fuelled politics and foster stagnation in governance and public management".[129]

1.8.7 The Building Blocks for the Thesis beyond Other Studies/Approach to the Resource Curse Phenomenon in Ghana

Countries have explored the use of various options to address the resource curse phenomenon. A good number have been internationally influenced through non-governmental organisations. Typically, a way to check the resource curse will be through the use of revenue management funds, and transparency initiatives.

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[127] Ian Bannon and Paul Collier (eds.), *Natural Resources and Violent Conflict: Options and Actions* in Michael Ross, 'The Natural Resource Curse: How Wealth Can Make You Poor' (The World Bank 2003) 24.

[128] Ross, *The Natural Resource Curse* 8.

[129] See E Gyimah-Boadi and KH Prempeh, 'Oil, Politics and Ghana's Democracy' (2012) 23(3) Journal of Democracy 98, 107.

1.8.7.1 Capacity Building and Indigenous Participation

At the inception of most oil and gas industries in the resource rich countries, little efforts were channelled towards the promotion of local capacity. The emphasis were on how the multinational oil companies will continue to contribute in governmental takes from the proceeds of oil. Countries at that time granted concession contract to most of the oil and gas companies in particular area for their exclusive operations.[130] The concession was for a long duration with the oil companies paying royalties to the government.[131] Countries continue to desire for more revenue, which led to the development of the service contracts. The contractors under the service contracts engaged in oil and gas exploration and in turn were paid for the services they rendered. The service contract was then of two types, the risk service contract and the pure service contract. [132] Under the pure service contract, the oil company as the contractor carries out the exploration and production for a fee whether there is discovery of commercial quantities or not. However, in the case of the risk service contract, the contractor bears the risk for the exploration and production and will only be entitled to reward upon commercial discovery.[133] These arrangements show that resource rich countries "sit down" and wait for the proceeds of oil rather than making effort to develop indigenous capacity.

States' desire to participate in the oil and gas sector motivated the push for the joint venture agreement and arrangement where the state-owned national oil firms entered into participation agreements with private oil and gas companies for the purpose of oil exploration and production.[134] This system was seen as being a very robust arrangement that should result in participation of the national oil companies and building of capacity. The utilisation of these models by Nigeria for example, clearly shows the resource curse

[130] J Radon, 'How to Negotiate an Oil Agreement', in M Humphreys, JD Sachs and JE Stiglitz (eds.), *Escaping the Resource Curse*, (Columbia University Press, 2007) 100.
[131] T Al-Emadi, 'The Qatari Experience with Gas Joint Venture Contracts' (2005) 1 International Energy Law & Taxation Review 5, 5.
[132] Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Malthouse Press Limited, 2001) 42.
[133] See MS Riberio, 'The New Oil and Gas Industry in Brazil: An Overview of the Main Legal Aspects' (2001) 36 Texas International Law Journal 141, 143–65.
[134] See George Ndi, 'Act 919 of 2016 and its Contribution to Governance of the Upstream Petroleum Industry in Ghana' (2017) 36(1) Journal of Energy & Natural Resources Law 5, 21-23.

syndrome. Nigeria operated joint ventures after abandoning service contracts. It entered into joint ventures with multinational oil companies based on the operations detailed in the joint operating agreements.

The joint ventures regime in Nigeria were marred by irregularities and delays regarding cash calls. In short, Nigeria could not meet its financial obligations under its joint venture regime. As a result, Nigeria opted for the Production Sharing Contracts (PSC) under which it could sit "arms akimbo", waiting for the oil companies "to do the work" and for it to take its own share of the proceeds of oil based on the pre-agreed formulae. This arrangement definitely did not give the government the urge to develop a viable local content law until in 2010, almost 60 years after the first commercial shipment of oil and gas in 1958, following the discovery in commercial quantities at Oloibiri in the present-day Niger Delta.

Improvement in local capacity has been seen as a viable measure to increase domestic participation, and to offer avenue for the diversification of the economy. Local expertise will be employed in developing the oil and gas sector in Ghana, which in turn will have impact in other sectors of the economy such as the legal service and the banking and financial services sectors. Moreover, one of the major challenges linked to the resource curse is the fact that there is lack of institutional capacity. The institutions in countries that are diagnosed with the resource curse syndrome are usually weak giving opportunities for revenue leakages and the lack of expertise to effectively manage the resources of the state. According to Barma, "Targeted sectoral capacity-building that emphasizes coalition building improves intergovernmental coordination and enhances predictability in policy making and implementation".[135]

1.8.7.2 Non-oil Resource and the Move towards Effective Petroleum Resources Management for Judicious Allocation and Utilisation

Ghana is a country located on the west coast of the African continent. Even before the attainment of its independence in 1957 the country was noted for its abundant natural resource endowment. It has substantial deposits of mineral resources such as: gold,

[135] Barma et al, 30.

diamond manganese and bauxite,[136] which are its major mineral resources export. There is also evidence of tin, graphite, titanium, copper, lead and asbestos deposits in Ghanaian soil.[137] Timber is another natural resource with which the country is endowed. After South Africa, Ghana is the second largest producer of gold in Africa which earned the country its former name, Gold Coast.[138] It also ranks as the ninth largest producer of diamonds in the world.[139] Gold production accounts for 95% of the natural resource earnings accruing to the country within the past twenty years.[140] Gold exploration has also attracted more natural resources based commercial going concerns in the country. As at 1993, gold prospecting licensees comprises of 85 indigenous companies and 23 expatriate companies, while mining leases were obtained by 13 companies between 1986 to 1992. Gold has also gulped a greater part of the US$880 million estimated investment made into the mining sector since 1983.[141]

Notwithstanding its contributions to the Ghanaian economy, the mining sector is still said to perform below its potential as a result of undue emphasis on the fiscal benefits while neglecting the need to address allied concerns within the mining value chain.[142] In other words, mining activities focus on economic gains without recourse to social, environmental and human developmental objectives. The rapid rate of tropical forest depletion in the country has put sustainable forest and wild life management at great risk.[143]

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[136]Joseph Ayee, Tina Søreide, G. P. Shukla, & Tuan Minh Le, Political Economy of the Mining Sector in Ghana. The World Bank Africa Region Public Sector Reform and Capacity Building Unit, Policy Research Working Paper 5730, 2011. 8.

[137] Peter Claver Acquah, Natural Resources Management and Sustainable Development: The Case of the Gold Sector in Ghana. United Nations Conference on Trade and Development Report COM/41 1995. 7.

[138] Joseph Ayee, Tina Søreide, G. P. Shukla, & Tuan Minh Le Political Economy of the Mining Sector in Ghana. The World Bank Africa Region Public Sector Reform and Capacity Building Unit, Policy Research Working Paper 5730, 2011. 6.

[139] 'Ensuring Mining Contributes to Sustainable Development', Minerals and Mining Policy of Ghana 2014, 10. <https://www.extractiveshub.org › servefile › getFile> (accessed 11 December, 2019).

[140] Ibid.

[141] Peter Claver Acquah, Natural Resources Management and Sustainable Development: The Case of the Gold Sector in Ghana. United Nations Conference on Trade and Development Report COM/41 1995. 7.

[142]'Ensuring Mining Contributes to Sustainable Development', Minerals and Mining Policy of Ghana 2014, 12. <https://www.extractiveshub.org › servefile › getFile> (accessed 11 December, 2019).

[143]KS Nketiah, A Wieman, & KO Asubonteng, 'Natural resource management in Ghana: Challenges to Professionalism. (Ghana Institute of Professional Foresters, 2004) 9.

Despite Ghana's involvement in mining, it was never considered worthwhile that a law be established for the management of resources accruing from the mining industry until 2016 when the Ghanaian parliament enacted the Minerals Development Fund Act (No. 912) 2016. The Act sought to create the Minerals Development Fund for the purpose of ensuring that financial provisions are reserved out of resources accruing from mining activities for the interest of host mining communities.[144] Other beneficiaries of the fund include: individual land interest holders in mining communities; the local or traditional administrative authorities of mining communities and relevant mining development agencies.[145] The fund was established as a corporate body with artificial legal personality.[146] Apart from parliamentary allocations, twenty percent revenue obtained from mining activities and secured investment returns accrue thereto, are the major sources of the Fund's income.[147] The governing board of the Fund established under Section 6 of the Act is empowered to direct its management of the fund towards-the mitigation of the environmental degrading impact of mining activities on its host communities and inhabitants; commission capital projects which will encourage economic development and create alternative source of livelihood for mining communities. The board is also required to embark on research and development activities to build human capacity for mining agencies; and assist in boosting the policy making, monitoring and evaluation role played by the relevant mining regulating Ministry.[148]

The board also has the power to constitute committees made up of its members and/or non-members[149] in order to perform a specific function or act on its behalf in exercise of any function it could perform on its own. One of such committees is the statutory Local Management Committee which the board is mandatorily required to establish for each mining community.[150] In other words, unlike other committees which may be established on ad hoc basis, for specific duration and at the pleasure of the board, the Local

[144]See Preamble to the Minerals Development Fund Act (No. 912) 2016.
[145]Section 2 Minerals Development Fund Act (No. 912) 2016.
[146]Section 1 Minerals Development Fund Act (No. 912) 2016.
[147]Section 3 Minerals Development Fund Act (No. 912) 2016.
[148]Section 5 Minerals Development Fund Act (No. 912) 2016.
[149] Section 11 (1) Minerals Development Fund Act (No. 912) 2016.
[150] Section 19 (1) Minerals Development Fund Act (No. 912) 2016.

Management Committee has some degree of permanence due its statutory creation and specific function contained in the Act.

Apart from the board and its committees, the Act further established the Mining Community Development Scheme which is required to exercise certain functions in each of the mining communities.[151] The Local Management Committee acts as the management organ for the Scheme.[152] The board disburses the funds to the Local Management Committee in accordance with established formalities,[153] while the Local Management Committee acts as the operation arm of the board to execute developmental projects in their respective communities.[154] The Scheme is established for the purpose of fast-tracking socio-economic deliverables to their respective mining host communities and those communities adversely affected by mining activities.[155]

The foregoing overview of the Act demonstrates that the Ghanaian parliament intends it to make sure that revenue accruable from mining resources is managed to ensure sustainable development. This could be gleaned from Section 5 which states the purpose of the Act, Section 7 which provides the functions of the board; the establishment of Local Management Committee and Mining Community Development Scheme etc. On examination of Sections 5 and 7, one could identify the social, economic and environmental dimensions of sustainable development towards which the Fund is to be directed. However, the shortcoming of the Act is that the Fund is limited in its scope of beneficiaries. While twenty percent is reserved for host community, which is a welcome development, there is no part of the revenue designated for other regions of the country. This is unlike the petroleum fund which reserved a specific percentage of petroleum revenue for the benefit of Ghana. Also, the Fund shows weakness in its attainment of intergenerational consideration of sustainable development as it does not make provision for any part of the fund to be reserved for future generation.

[151]Section 16 (1) Minerals Development Fund Act (No. 912) 2016.
[152] Section 19 (6) Minerals Development Fund Act (No. 912) 2016.
[153] See Section 21 Minerals Development Fund Act (No. 912) 2016 for a disbursement formula.
[154] Section 20 Minerals Development Fund Act (No. 912) 2016.
[155] Section 17 Minerals Development Fund Act (No. 912) 2016.

Taking a critical overview of the Act, Lujala and Narh find that parliament did not take the opportunity the Act presents due to the failure of the house to also address important matters such as: mismanagement of royalties accruing from the mining sector; local content in the mining sector; and promotion of accountability and transparency in mineral revenue management.[156] However, it must be stated that the Act contains some transparency provisions. For instances, Section 25 (1) requires the Board to receive an audit report on the management of the Fund and transmit its annual report to the Minister not later than a month thereafter. Pursuant to Section 7 (e), the board is also to develop formula for the disbursement and utilisation of the fund. The formula must be made public in a national daily newspaper. Thus, the minister helps perform over-sight check on the activities of the board. The downside to this is that an overbearing minister may hamper the independence of the board particularly when Section 13 empowers the minister to direct the board on policy matters which the board is compelled to act in accordance with.

Models have been developed for the management of the resources in most of the resource rich countries. It is important that in order to avoid the resource curse, nations should inevitably contribute to funds from the proceeds of natural resources which will be channelled towards sustainable development measures. This should be based on short term, medium term and long-term utilisation of the fund. It will be of great importance that these funds are not mismanaged in periods where there is existence of windfall profits. Most resource rich countries have continued to spend, forgetting that the boom in resource prices might not be forever and thus they might lose out in infrastructure development when prices collapse.

Prudent management of revenue from resources tends to be through the use of the sovereign wealth fund. The sovereign wealth funds keep a certain portion of the resources for the future generations or periods of harsh economic conditions. Thus, governments use

[156]Päivi Lujala, & John Narh, 'Ghana's Minerals Development Fund Act: Addressing the Needs of Mining Communities' (2019) Journal of Energy & Natural Resources Law, 1 (Online first version) <https://doi.org/10.1080/02646811.2019.1686250>(accessed December 11, 2019).

sovereign wealth funds as insurance against future economic and financial shocks.[157] It may be a source of diversification from oil and gas into other investments such as real estate and agriculture.

There are also funds that may be used for activities such as environmental clean-up after economic activity has degraded the environment. These problems may take the form of pollution, degradation of the environment, health challenges, and negative effect of agriculture. The provision of funds to address the challenges can contribute to avoiding these symptoms of the resource curse. Maximising the rewards derived from high value rents in order to cushion the effect of scarcity of resources, dwindling resources or even volatility in the international oil price should be factored into resource governance.

The Ghanaian Parliament has established the Minerals Income Investment Fund (MIIF). Pursuant to the Section 1 of the Minerals Income Investment Fund Act 2018 (Act 978). The objective of the fund is to ensure efficient and transparent mineral revenue management in the class of the various Funds created under the Petroleum Revenue Management Act 2011 (Act 815). However, mineral resources as defined in Section 45 MIIF Act clearly excludes petroleum resources as contained in the Petroleum (Exploration and Production) Act, 2016 (Act 919). Therefore, it is not within the powers of the MIIF to collect and manage petroleum revenue. Toward the attainment of its objectives, MIIF is statutorily empowered to establish a commercial entity as a Special Purpose Vehicle (SPV) or ensure the enlistment of the SPV into the stock market, or transfer its rights and equities to the SPV.[158] In line with the MIIF Act, Agyapa Royalties Ltd. was established as the official SPV for the fund. Agyapa Royalties Ltd. is also enlisted in Ghana Stock Exchange (GSE) and London Stock Exchange (LSE). The SPV is, thus, placed in pole position to be in

[157] See Perisuo Dema, Structuring of Reserve Based Finance for Petroleum Production in Nigeria: Contractual, Regulatory and Tax Issues (PhD Thesis, University of Aberdeen 2014) 175-176.
[158] Section 3 Minerals Income Investment Fund Act, 2018 (Act 978).

possession of up to $1 billion mineral funds for infrastructural projects financing for the Ghanaian government.[159]

However, several criticisms form opposition party and Civil Society Organizations (CSOs) have trailed the SPV on the basis of its lack of transparency and accountability. [160] The SPV is viewed as an instrument of political patronage, as persons behind the veil of the SPV have been identified as close relatives and associates of political office holders.[161] While the opposition party opposed the royalty deals of the SPV which were not subjected to parliamentary ratification, the CSOs have expressed fears over the lack of accountability in the management of Ghc1.5 billion oil fund as an indication of questionable transactions regarding MIIF.[162]

The controversies which have trailed the implementation of the MIIF Act has been traced to the deficiency in consultation of various stakeholders in the law making process of the substantive and subsequent amendments of the Act in 2018 and 2020 respectively. Since the public was not carried along in the process, the apprehensive response of the public is not unexpected. This situation has clearly stand the petroleum management regime under the PRMA from the mineral management regime of MIIF. Thus, there would be need for legislative clarity in the MIIF Act that would indicate a clear delineation of what fraction of mineral revenue is set out for the purpose of investment, economic stabilisation and reserve for future generations.[163] The citizen should also be carried along in the process.

[159]GNPC cash-strapped now because of govt's PDS deal – Martin Thompson General News, 2 September, 2020. https://www.ghanaweb.com/GhanaHomePage/NewsArchive/GNPC-cash-strapped-now-because-of-govt-s-PDS-deal-Martin-Thompson-1049428, accessed 31 August 2020.

[160] Agyapa: Ofori-Atta agrees to consult CSOs further after Wednesday meeting. General News, 3 Sep 2020 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Agyapa-Ofori-Atta-agrees-to-consult-CSOs-further-after-Wednesday-meeting-1049836

[161]Ibid.

[162]Ibid.

[163]Centre for Extractive & Development Africa, Mining Sector Budget of Ghana: Analysis of Allocations and Performances in 2017 and 2018 Capping of the MDF Undermines Development of Mining Communities Highlights 2018. www.reportoilandgas.org_CEDA.pdf, accessed 31 August 2020.

1.8.7.3 Transparency and Accountability in the Entire Value Chain of the Sector

Transparency in the extractive industry is critical to addressing the challenges of the resource curse. According to Barma et al, "More transparency in sector regulations and management improve government credibility and mitigate the risks faced by both firms and the state".[164] The opacity of natural resource transactions and management of revenue from the resources have accounted for resource curse in many countries. Lack of transparency breeds corruption in the petroleum industry.[165] The government cannot be held accountable most especially where the citizens do not have the information on how the natural resources are being governed and how the resources are being maintained. The move to transparent dealings with multinational oil corporations and the declaration of what the government's take is in the natural resources will enable the people to serve as watch dogs in ensuring the revenue is effectively managed. Disclosure is therefore the key and in line with international best practices the government should be able to publish its dealings in the oil and gas sector.

Another paper on the resource curse in Ghana gives further support to the position to be maintained in the thesis when Arthur notes that "if the management of the revenue derived from oil activities is based on a system that is fair, transparent and accountable, then oil revenue will become a blessing that will facilitate socio-economic development rather than becoming a curse."[166]

Contracts entered with oil and gas companies should be made available in the public domain and it is now viewed internationally that there was no point having confidentiality clauses in most upstream petroleum contracts. There is also the move for nations to consider imbibing the freedom of information, whereby any member of the society can require the government to disclose certain information.

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[164] Barma et al, 30.

[165] See I Kolstad and A Wiig, 'Is Transparency the Key to Reducing Corruption in Resource-rich Countries?' (2009) 37(3) World Development 521, 521–532.

[166] See P Arthur 'Avoiding the resource curse in Ghana: Assessing the options' in MA Schnurr and LA Swatuk (eds.) Natural Resources and Social Conflict: Towards Critical Environmental Security (Palgrave Macmillan 2012) 124.

Most countries currently suffering from the resource curse challenges have their oil or mineral resources sector shrouded in secrecy. A good number of them do not have transparent provisions for the licencing and allocation of petroleum rights, revenue collection and management. Most of the contracts in these countries have confidentiality clauses. However, the trend is changing. A good example can be seen in the case of Liberia which, upon the discovery of oil, has decided to ensure that its oil contracts are made open to the public.

Another approach has been the popularisation of the freedom of information law. Countries are evolving practices whereby the citizens can request that certain information that is kept in the custody of government official should be made available. This has been considered as a way of ensuring probity and accountability.

1.9 CONTRIBUTION TO BODY OF KNOWLEDGE AND ORIGINALITY

This research draws from a body of existing literature on the field of resource curse[167] and sustainable development.[168] The originality and significance of this research lies in its contribution to the body of existing knowledge and literature in the field of Ghana's

[167] TL Karl, The Paradox of Plenty: Oil Booms and Petro-states' (University of California Press 1997); RM Auty, *Industrial Policy Reform in six Large Newly Industrializing Countries: The Resource Curse Thesis* (World Bank 1994) 11-27; M Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Princeton University Press, Princeton 2012); M Humphreys, JD Sachs and JE Stiglitz (eds.), Escaping the Resource Curse (Columbia University Press, 2007).

[168] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987); RM Auty 'The Resource Curse and Sustainable Development' in Atkinson G, Dietz S, Neumayer E and Agarwala M, *Handbook of Sustainable Development* (Edward Elgar Publishing 2014); Priscilla Schwartz, 'Sustainable Energy Infrastructure: Law, Policy and Practice' (2009) 4(1) Journal of International Commercial Law and Technology 107, 107-117; Marie-Claire Cordonier Segger and Ashfaq Khalfan, Sustainable Development Law: Principles, Practices and Prospects (Oxford University Press, Oxford 2004); Lucky Worika, Environmental Law & Policy of Petroleum Development: Strategies & Mechanisms for Sustainable Management in Africa (ANPEZ Centre for Environment and Development, 2002).

petroleum laws as they pertain to the linkage between revenue management for sustainable development and avoidance of the resource curse.[169]

With the commencement of oil and gas exploration and production in Ghana, much has been written on the resource curse, with emphasis on how the resources from oil and gas will be effectively managed. There is a gap on the role that sustainable development will play in the process. The avenue for diversification has not been vigorously engaged in the discourses. The research of Brazilian *et.al* captures the rush to oil which may be at the expense of the agricultural sector in Ghana, when they stated that:

> ...agriculture is seriously exposed to the risk of losing external competitiveness through appreciation in the real exchange rate. In addition, because of the high degree of mobility of the labour force, an increased demand for labour in urban areas could lead to upward pressure on wages in the agricultural sector, further reducing external competitiveness for import-competing as well as export-orientated agricultural sectors.[170]

They admonished that Ghana should "put in place measures to protect the development of its agro-based industries such as oil palm, cassava or cocoa"[171] The consequence of this is that the country will be able to diversify in case oil and gas no longer yield the desired revenue projections made by the government.

This research will interrogate the provisions of the relevant laws in the Ghanaian petroleum industry to see how they can effectively offer options for addressing the resource curse in the oil and gas industry and at the same time, promote sustainable development in the management of petroleum revenue. It examines further how the ethos of sustainable development may be integrated into the PRMA 2011 to address the resource curse in Ghana. Again, previous researches appeared to have only cited examples of giving evidence and instances why the resource curse in other countries should not be replicated in

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[169] O Lwobukuna, 'Natural Resources for Socio-Economic Development in Africa: Legal Governance of Extractive Industries in Ghana' (2015) 44(4) Africa Insight 47, 47-60.

[170] (Footnotes omitted). See Morgan Bazilian, Ijeoma Onyeji, Peri-Khan Aqrawi, Benjamin K Sovacool, Emmanuel Ofori, Daniel M Kammen and Thijs Van de Graaf, 'Oil, Energy Poverty and Resource Dependence in West Africa' (2013) 31(1) Journal of Energy & Natural Resources Law 33, 41.

[171] Bazilian, 41.

Ghana. For instance, Hilson in 2014 notes that, "there is a real danger, therefore, of Ghana following the path of, say, Nigeria, where oil revenues have produced another strain of 'rentier' politics, manifesting as corruption, embezzlement and fortified patronage networks".[172] This thesis will move beyond that by looking critically at the loopholes in the laws of these countries. For example, the provisions of the Nigeria constitution for the mismanagement of the excess crude oil account, where the excess profit of petroleum is to be paid will be examined. This is to explain the mismanagement despite the laudable initiative of such a provision.

Besides, much has been said about the negatives, without looking at some areas which these countries have been able to develop their oil and gas industries towards sustainable management. The research will investigate these laws with a view to deriving lessons for Ghana. More so, the agitation by host communities in Ghana will best be appreciated by looking at the provisions in countries where there has been longstanding agitation over the rents of oil resources. Therefore, preventing the emergence of agitation by the western region may draw practical examples from the steps taken by other developing countries to ameliorate such a menace.

Owing to the nature of extractive industries, exploration, refining, production and transportation of petroleum can lead to serious environmental risks.[173] Host communities where these companies operate are exposed to environmental harm. This possible harm leads to host communities lobbying for a share in revenue and participation in the industry.[174] A look at the 'pollution haven theory' reveals that companies usually prefer to cite their businesses in places where they are likely not to encounter stringent measures of

[172] See AE Hilson, Resource Enclavity and Corporate Social Responsibility in Sub-Saharan Africa: The Case of Oil Production in Ghana (PhD Thesis, Aston University) 17.

[173] See CJ Moreno 'Oil and Gas Exploration and Production in the Gulf of Guinea: Can the New Gulf be Green?' (2008–2009) 31(2) Houston Journal of International Law 419, 425. See also J Drimmer, 'Human Rights and the Extractive Industries: Litigation and Compliance Trends' (2010) 3(2) Journal of World Energy Law & Business 121, 124.

[174] See Y Omorogbe and P Oniemola, 'Property Rights in Oil and Gas under Domanial Regimes' in Aileen McHarg et al (eds.), *Property and the Law in Energy and Natural Resources* (Oxford University Press, Oxford 2010) 131-132.

investments.[175] It has been previously argued by Onwuekwe that to attract foreign direct investments, governments of developing countries have been under pressure to prioritise development projects at the expense of the protection of the environment.[176] In addition to avoiding the inherent risks, 'something' must be given back to the environment for its exploitation and this could come in form of environmental restoration from revenues derived from petroleum activities.[177] Furthermore, should there be a fund for what should be given back to the environment or a specific fund for environmental remediation? What should be the framework for the governance of such a fund in Ghana are issues which this research intends to advance. To arrive at this, the principles of sustainable development will be thoroughly engaged as they connect with intergenerational equity, polluter pays principle, the theory of distributive justice as well as environmental justice.

Moving this research further, there will be investigation into the revenue management law that will promote sustainability. Existing researches have not examined the effectiveness of the laws in promoting environmental sustainability i.e. using a part of the fund in addressing the environmental imprints of oil and gas exploration and production. This thesis will therefore analyse the gap by examining the need or otherwise of utilising the petroleum revenue management legal regime in achieving sustainability. It is the argument of this research that petroleum revenue management will include diversifying to large-scale renewable energies for domestic demand, thereby exporting excess petroleum for foreign exchange.[178]

[175] KR Gray, 'Foreign Direct Investment and Environmental Impacts-Is the Debate over?' (2002) 11(3) Review of European Community & International Environmental Law 306, 307.

[176] See Chika B Onwuekwe, 'Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence: A Developing Country's Nightmare' (2006) 7(1) Journal of World Investment & Trade 115.

[177] See Nonye Opara, 'Broadening Community and Regional Benefits from Energy Development through Environmental Restoration Funds' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resources Activity: Legal Change and Impact on Communities* (Oxford University Press, Oxford 2015).

[178] See similarly argument put forward by S Tagliapietra, 'The Geo-economics of Sovereign Wealth Funds and Renewable Energy: Towards a New Energy Paradigm in the Euro-Mediterranean Region' (2013) 3 (1) European Energy Journal 75, 77.

Due to poor management and lack of equitable distribution of revenue, most oil rich regions are usually entangled in communal clashes in their quest for sustainable development.[179] There is the perception from oil producing communities that they should benefit more from the oil produced within their regions. Their claims are seen as legitimate on grounds that the activities of the oil producing companies expose them to disaster such as displacement of their lands, environmental pollutions, impacts on their farmlands and fishing rights. Countries such as Nigeria and Angola have experienced community clashes, attacks on oil and gas installations, loss of lives and property arising out of community unrest emanating from their struggle to continue to have their fair share of the revenue from the oil and gas resources extracted in their region.[180] It is therefore important that Ghana should take pragmatic measures to forestall the consequences that may arise from the agitation. As noted by Nakhle: '…dispute arises not only as to which parts of 'the State' should share the proceeds but also which different regions and societies within a nation state reckon that they are entitled to keep the largest share'.[181]

Most resource rich developing countries have been exposed to wars owing to abundant natural resources as well documented in the cases of Nigeria (oil), Angola (oil), Côte d'Ivoire (cacao, diamonds), Niger (uranium), Sudan (oil) Sierra Leone (diamonds).[182] According to Tomo: 'what is equally problematic about the legislation on the country's oil revenue allocation is its failure to address the needs of the people directly affected by oil production activities…' which has resulted in the Western Region chiefs demanding that 10 percent of the country's oil revenue should be meant for the region.[183] The Chiefs' request

[179] See L Moller, 'The Governance of Oil and Gas Operations in Hostile but Attractive Region' (2010) 4 International Energy Law Review 110, 110-122.
[180] See Omorogbe and Oniemola 131-132; Gonzalez 58-86.
[181] Nakhle 157.
[182] See Matthias Basedau and Tim C Wegenast, 'Oil and Diamonds as Causes of Civil War in sub-Saharan Africa: Under what Conditions?' (2009) 70 Colombia Internacional 35, 35-59. See also Yinka Omorogbe, 'Alternative Regulation and Governance Reform in Resource-Rich Developing Countries of Africa' in B. Barton, L Barrera-Hernández, A Lucas, and A Rønne (eds.), *Regulating Energy and Natural Resources* (Oxford University Press, Oxford 2006) 39.
[183] B Tomo, 'Sustainable Natural Resource Management: Could Ghana be 'Resource-Cursed'?'<http://www.viamafrica.com/featured-posts/sustainable-natural-resource-management-ghana-resource-cursed/>.accessed 7 June 2016.

to the parliament for 10 percent was rejected on grounds that the natural resources belong to the nation on not to the region.[184]

Therefore how countries such as Norway, Chile and Botswana were able to manage their resource without conflicts is an indication that the manner in which distribution of a county's wealth takes place is very important.[185] Even in the UK which is an advanced country, the tension in respect of the share of the oil wealth is that: 'In the UK North Sea case this debate surfaced in virulent form over Scotland's 'share'. Separatists and nationalists were anyway looking for arguments to support Scotland's retirement from the Union and its return to its ancient independent state'.[186] Sakyi *et.al* in their research envision that:

> …sustainable development of the Jubilee Oil Field has the potential to bring a positive change to Ghana through the preservation of the marine environment and ecosystems, and improvement of the welfare of communities to be impacted by the oil and gas industry, while enhancing the economic prosperity of the nation.[187]

The role of effective benefit sharing of natural resources can be instrumental in promoting a stable polity.[188] How this should be done taking into consideration the established principles of sustainable development are very important points the thesis intends to explore within the context of petroleum revenue management.

Of critical importance at the time of developing the institutions to man the oil and gas industry upon discovery of commercial quantities are issues pertaining to transparency.[189] Mismanagement of oil revenue has been linked to the absence of transparency in the

[184] See Obeng-Odoom 21.
[185] See Basedau and Wegenast 40.
[186] Nakhle 157.
[187] PA Sakyi, JK Efavi, D Atta-Peters and R Asare, 'Ghana's Quest for Oil and Gas: Ecological Risks and Management Frameworks' (2012) 20(1) West African Journal of Applied Ecology 57, 70.
[188] See Yinka Omorogbe, 'Resource Control and Benefit Sharing in Nigeria' in Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (eds.), *Sharing the Costs and Benefits of Energy and Resources Activity: Legal Change and Impact on Communities* (Oxford University Press, Oxford 2015).
[189] See Patrick RP Heller and Antoine Heuty, 'Ghana's Petroleum Industry: The Prospects and Potential Impediments towards Good Governance Standards' (2010) 4 The Ghana Policy Journal 50, 51.

dealings with petroleum resources.[190] However, Ghana has joined the Extractive Industries Transparency Initiative (EITI).[191] This may be said to have injected new meanings and created impetus in Ghana. The extractive industries are nongovernmental initiatives that originate from Norway drawing its members from nation states and civil society organisations. The formation of the EITI was spearheaded in Norway in 2003 and the initiative which has members all over the world, was registered as a nongovernmental organisation in Norway in 2009. The purpose is to ensure that a nation's revenue derived from extractive industries should be managed in a transparent manner for the betterment of the people. The EITI is directed towards attacking and addressing the resource curse phenomena since most of the mismanagement and corruption take place in a very large scale in the petroleum industry.

Therefore, the thesis is further inspired by Principle 1 of the EITI, of which Ghana is a member, which reads: 'We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.'[192]

The thesis will investigate further the relationship of the PRMA 2011 and this initiative to appreciate Ghana's compliance with the measures put in place by the EITI to promote sustainable management of resources. In this regard, the thesis tests Ghana's compliance with the 'three core requirements': disclosure of whatever payment they make to the government; disclosure of receipts into the account of the government by companies; appointment of independent auditors to reconcile payments and receipts and publish a report thereafter.[193] In this vein the originality of this thesis will be on the conversion of petroleum resources into revenue generation, management of the revenue for the future

[190] Andrew Williams, 'Shining a Light on Resource Curse: An Empirical Analysis of the Relationship between Natural Resources, Transparency and Economic Growth' 39(4) World Development 490, 490.
[191] Mohammed Amin Adam, *Between a Blessing and a Curse: The State of Oil Governance in Ghana* (African Centre for Energy Policy Paper Series, Vol. 1, October 2013) 2.
[192] The EITI International Secretariat, *The EITI Standard* (2009) 9.
[193] Bazilian, 51.

generations and the promotion of human capital development in Ghana. This will be done with emphasis on the best practices developed through the Santiago Principles on how best to promote the mineral resources for the good of nations through informal set of precepts or principles for their management.

1.10 STRUCTURE OF THE RESEARCH

This research is made up of eight chapters. The first chapter puts the research in context giving reasons for designing the petroleum revenue management to avoid the resource curse and foster the realisation of sustainable development in the management of petroleum revenue in Ghana.

Chapter 2 discusses the concept of the resource curse generally and relevant theories underlying the research, while Chapter 3 sets out the overview of the natural resources sector in Ghana looking at the development made so far towards the promotion of oil and gas in Ghana. It looks at the discovery of oil in Ghana and steps taken towards harnessing the resources in the petroleum sector; the role of the various players in the industry is also examined. The laws, regulatory and institutional framework put in place for the governance and management of the resources are examined, followed by details of the revenue generation potential in Ghana and the challenges, particularly the traits of the resource curse.

Chapter 4 shall analyse the provisions of the PRMA and how it addresses the resource curse and promotes sustainable development. This will draw essentially from the discourse in previous chapters of the thesis. It will apply the theories and principles to determine the extent to which resource curse can be addressed as well as promote sustainable development in the management of petroleum revenue in Ghana.

Chapter 5 reviews best practices in petroleum revenue management looking at how the EITI Standards have been implemented in Ghana. Chapter 6 examines the Santiago

Principles on the Generally Accepted Principles and Practices (GAPP) of the management of sovereign wealth fund, by looking at the extent to which the practices have been integrated into the legal regime for management of petroleum revenue in Ghana.

Chapter 7 of the thesis will examine case studies from other jurisdictions in order to shed light on the resource curse phenomena and show steps to be taken by Ghana so that it does not fall victim to the resource curse syndrome that has permeated all facets in resource rich countries. The countries for this discourse are Nigeria and Norway. Practical examples of loopholes that have allowed the resource curse to thrive in Nigeria shall be further elucidated while the success story recorded by Norway will be examined in the light of what is obtainable in Ghana so that such measures may be integrated into the law to promote effective and sustainable management of Ghana Oil and Gas resources for the future generation. Chapter 8 of the thesis evaluates the findings in previous chapters, drawing conclusions for the study.

CHAPTER TWO: THEORETECAL PERPECTIVES OF THE RESOURCE CURSE AND THE CASE FOR SUSTAINABLE MANAGEMENT OF PETROLEUM REVENUE IN GHANA

2.0 INTRODUCTION

Natural resources are raw materials obtained from the soil or earth.[1] They could be found in solid, liquid or gaseous state. Even though a good measure of natural resources is deposited in the earth, natural resource could also be found in body of waters, the subsoil, air space and outer space. They exist independently of the effort and creativity of man. They are typically interred in the soil and are exploited and extracted by human beings as suitable for their needs and profitability. The natural resources include mineral resources, agricultural resources, water resources etc. Different countries of the world have natural resource endowment in various measures which enhances their subsistence, economic and social well-being.[2] The focus of this work is on the mineral aspect of natural resources as this is the main setting within which the resource curse is encountered.

Mineral Resources could be defined as 'any substance whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, coal bed gases, bituminous shale, tar sands, any substances that may be extracted from coal, shale or tar sands, mineral water, and mineral components in tailings and waste piles'.[3] These are broadly categorised into the metalliferous and nonmetal deposits which include energy fuels in certain cases.[4] Mineral Resources have a direct or potential link with wealth creation for a country.[5]

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[1]T Okonkwo, 'Ownership and Control of Natural Resources Under the Nigerian Constitution 1999 and its Implications for Environmental Law and Practice, (2017) 6 International Law Research 1, 1.

[2]Lanre Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (2014) 38 Thurgood Marshal Law Review 159, 159.

[3]Section 164 Nigerian Minerals and Mining Act 2007

[4]Olugbenga Akindeji Okunlola, *Riches Beneath Our Feet: Mineral Endowment and Sustainable Development of Nigeria* (Inaugural Lecture, University of Ibadan Press 2017) 10.

[5]*ibid*.

Natural endowments have the potential to weaken a country's institutions and thus its development.[6] This is what has come to be known or expressed in the basic arguments in literature on resource curse. The earth is the repository of natural resources of various types, properties, qualities and value. They are also referred to as mineral resources. Countries are endowed with various natural resources in various measures. Natural Resources include crude oil, bitumen, zinc, coal, gold, diamond, lead, coal, mercury etc.

Nations that are endowed with large deposits of mineral resources have experienced economic fortunes from the utilisation of these resources. The economic fortunes usually come with major challenges. One major challenge is that such nations tend to depend heavily on the natural resources as the main stay of their economy. The over dependence creates an extractive sector focused economy, to the detriment of the other parts of the primary sector and the manufacturing sector. This creates a scramble for natural resource exploration by the citizens, multi-national corporations, government, and other nations. This is because of the huge economic fortunes the industry attracts. The divergent interests such as the interests of the government to make huge revenue and that of the investors to make maximum profits can lead to clash of interest, which may culminate in conflicts of unimaginable proportion if not well handled. Disasters of various kinds usually occur as the hazard of exploration of mineral resources. These disasters may have an impact on the social, political, cultural, economic and environmental makeup of the society. The high incidence of conflicts and hazards arising from the exploration of mineral resources appears to adversely affect resource rich countries. This has created a feeling of melancholy and the assertion that a mineral resource is a curse, rather than a blessing to the people who possess it. This is popularly referred to as the 'resource curse'[7]. It has also been given other expressions such as 'Dutch disease',[8] 'oil spoils'[9] and 'paradox of plenty',[10] 'curse of Moctezuma'.[11]

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[6]T Gylfason, 'Natural Resources, Education and Economic Development' (2001) 45 (4-6) European Economic Review, 847, 850.

[7]Jeffrey D. Sachs, and Andrew M. Warner, 'Natural Resource Abundance and Economic Growth' (1995) NBER Working Paper No. W5398.

[8]Natural Resource Governance Institute, 'The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth'(2015) 3 <http://www.resourcegovernance.org/sites/default/files/nrgi_Resource--

This work shall attempt an exposition of the resource curse phenomenon. As it shall be observed, there are variants and diverse manifestation of the resource curse. These also have various impacts of social, economic, political, institutional and legal dimensions on the society. In this vein this thesis shall focus on the role of state institutions in entrenching the resource curse in resource rich countries. Law, sometime referred to as institutions, is the fundamental instrument by which the society is operated. This chapter argues that a robust legal framework or reform can be formulated to help a society prevent, resolve and break the circle of resource curse.

2.1 THE CONCEPT OF RESOURCE CURSE

The concept 'resource curse' came to light in a study by Richard Auty whose investigation beginning from the 1960s suggests that "not only may resource-rich countries fail to benefit from a favourable endowment; they may actually perform worse than less well-endowed countries".[12]Countries that are highly endowed with adequate natural resources

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-Curse.pdf>accessed 26 May 2018."A Large increase in natural resource revenues can hurt other sectors of the economy, particularly export-based manufacturing, by causing inflation or exchange rate appreciation and shifting labor and capital from the non-resource sector to the resource sector".

[9]Nygmet Ibadildin, Role of the Old and New Institutional Framework in Combating the Resource Curse in Kazakhstan (M.Sc Dissertation, University of Tampere, Finland 2011) 7.

[10]Terry Karl, *The Paradox of Plenty: Oil Booms and Petro-States*.(University of California Press 1997); Natural Resource Governance Institute, 'The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth'(2015) 1 <http://www.resourcegovernance.org/sites/default/files/nrgi_Resource--Curse.pdf>accessed 26 May 2018.Resource curse is herein defined as "…The paradox of plenty, or the failure of resource-rich countries to benefit fully from their natural resource wealth, and for governments in these countries to respond effectively to public welfare needs".

[11]Legend has it that Morteczuma, the Aztec monarch, in his dying declaration, placed a curse on which ever stranger that ravished the natural wealth of his kingdom; that such person shall be inflicted with a severe disease. Many years after, this curse is believed to have spelt doom to the economic fortunes of Spain, which had carted away treasure troves of silver from its Aztec colony in the past. See, Mauricio Drelichman, 'The Curse of Moctezuma, American Silver and the Dutch Disease', (1501-1650 2003). p. 1.accessed 26 May 2018.

[12]Richard M Auty, *Resource-based Industrialization: Sowing the Oil in Eight Developing Countries*, (Oxford University Press 1990); Richard M Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993) 1.

were thought to have an advantage in the quest for greater economic growth until the 1980s when several studies emerged in the 1990s to suggest otherwise.[13]

Auty's work provoked further scholarly investigation in the field of economics into determining the effect of natural resource endowment on the economic fortunes of a country. The study by Sachs and Warner in 1995[14] projected and popularised the view that countries that possess huge deposit of natural resources have the tendency to experience lower economic growth than countries that are not so endowed. The phenomenon was referred to as the 'natural resource curse' and has come to be known as such in academic and political circles.[15]

Several studies concluded that countries which derive huge revenues from the extractive industry find difficulty in implementing sustainable economic policies.[16] Historical evidence supports the resource curse theory in that many developing countries which are endowed with natural resources have the tendency of low economic growth, less human capital development and inequality when compared with their contemporaries.[17] Resource rich countries are economies in which economic growth is not export based but solely depends on the natural resource sector.[18] The argument is that natural resources signifies unearned rent available to governments which has the potential of creating a negative

[13]CN Brunnschweiler and EH Bulte, 'Linking Natural Resources to Slow Growth and More Conflict' *Science Magazine* 3202 (May 2008) 616.
[14]Jeffrey D. Sachs, and Andrew M. Warner, 'Natural Resource Abundance and Economic Growth' (1995) NBER Working Paper No. W5398.
[15]CN Brunnschweiler and EH Bulte, 'Linking Natural Resources to Slow Growth and More Conflict' *Science Magazine* 3202 (May 2008) 616.
[16]Salvatore Monni Andrea Cori, 'The Resource Curse Hypothesis: Evidence from Ecuador'(2014) Sustainability Environmental Economics and Dynamics Studies Working Paper Series 28. 7 accessed 23 May 2018.
[17]Janet Redman, 'Dirty is the New Clean: A Critique of the World Bank's Strategic Framework for Development and Climate Change' (2008) 14. <priceofoil.org>dirtyisnewcleanfinal.pdf> accessed 9 August 2017.
[18]Jelrey D Sachs and Andrew M. Warner, 'Natural Resources and Economic Development: The Curse of Natural Resources' (2001) 45 European Economic Review 827, 837.

impact on the economic, institutional, and developmental trajectory of the country and, the interactions between the government and its citizens.[19]

Further effect of dependence on natural resource rents is the tendency for countries to be wasteful and prodigal in their spending, especially on consumption related activities.[20]In support of this position is the experience of the 1970's and 1980's when commodity prices were predicted to be favourable, thereby inducing huge financial investments in undertakings which turned out to be ineffective when the predictions turned out to be inaccurate.[21]

Despite this pessimism about natural resources, there is a consensus amongst scholars that it is not all-natural resources that have the capacity or are prone to create a resource curse syndrome. The preponderance of opinion in this regard posits that petroleum, gas, and mineral resources are resource curse prone, whereas agricultural resources are found to have less significant resource curse effects.[22] This is because agricultural resources are renewable natural resources and require intense human efforts to recreate it. A developed agricultural sector would require involvement of labour, capital goods from the manufacturing sector, developed infrastructure such as good road network etc.[23] In other words, the development and reliance on agricultural resources has positive interaction and impact with other sectors of the economy.

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[19]Todd Moss, Gunilla Pettersson and Nicolas van de Walle, 'An Aid-Institutions Paradox? A Review' (2006) Essay on Aid Dependency and State Building in Sub-Saharan Africa, Center for Global Development Working Paper 74, 5 <https://www.cgdev.org/files/5646_file_WP_74.pdf> accessed 23 May 2018.

[20]Jeffrey D. Sachs, and Andrew M. Warner, 'Natural Resource Abundance and Economic Growth' (1997) Working Paper, Institute for International Development, Harvard University 10. <https://pdfs.semanticscholar.org/7b14/045909f42117197b82a910782ab68330a3e7.pdf> accessed 23 May 2018.

[21]*ibid*.

[22]G. Frynas, G. Wood and T. Hinks, 'The Resource Curse Without Natural Resources: Expectations of Resource Booms and their Impact' (2017) 116 (463) African Affairs 233, 234.

[23]Tim Harford and Michael Klein, 'Aid and the Resource Curse: How Can Aid Be Designed to Preserve Institutions?' (2005) 291 Public Policy for the Private Sector, 1 <http://rru.worldbank.org/PublicpolicyJournal> accessed 23 May 2018.

The subject matter of natural resource curse has received considerable attention over the years with the result that there are a variety of explanations for it. There are basically three theories that proffer explanation for the natural resource curse. They are the Dutch disease prototype, rent seeking prototype, and the institutional construct.[24] Some authors, for instance, have erroneously used Dutch disease interchangeably with resource curse. Perhaps the confusion arises from the fact that the both terms are a direct result of dependence on income from natural resources. Economists have tried to draw a distinction between Dutch disease and natural resource curse. Dutch disease appears to be an offshoot of market failure, while natural resources curse appears to arise from corrupt practices or rent-seeking attitude of states with weak institutions which are referred to as retrogressive societies.[25]This section shall attempt to draw a distinction between these variants of natural resource curse.

Dutch disease is a term that entered into the vocabulary of economists in 1977 when it was first used to describe the Netherland's experience of a dwindling manufacturing industry after its discovery and exportation of natural gas in the late 1960s.[26]Excess spending followed the huge revenue accruable from gas production and exportation which gave rise to inflation and artificial increase of exchange rate.[27] The manufacturing sector and other non-petroleum traded sector experienced a contraction due to the fact that it became more costly to export than to import goods.[28] The large influx of foreign capital into the country is responsible for the increase of the exchange rate of local currency, decrease in the ability of local goods and industries to compete favourably with their foreign counterparts.[29] This

[24]Tamat Sarmidi, Law Siong Hook and Yaghoob Jafari, 'Resource Curse: New Evidence on the Role of Institutions' (2012) Munich Personal RePEc Archive Paper 37206, 1 <https://mpra.ub.uni-muenchen.de/37206/1/Tamat_law_yaghoob_resourcecurse.pdf> accessed 23 May 2018.

[25]Luiz Carlos Bresser-Pereira, 'The Dutch Disease and its Neutralization: A Ricardian Approach' Brazilian (2008)28 (1) Journal of Political Economy 47, 52.

[26]Paul Stevens, Glada Lahn and Jaakko Kooroshy, 'The Resource Curse Revisited' (2015) Research Paper Appendix Energy, Environment and Resources 8.<https://www.chathamhouse.org/.../20150804ResourceCurseRevisitedStevensLahnKooroshyAppendix> accessed 23 May 2018.

[27]*ibid*.

[28]*ibid*.

[29]Malebogo Bakwena, Philip Bodman, Thanh Le and Kam Ki Tang, 'Avoiding the Resource Curse: The Role of Institutions' Macroeconomics Research Group.<www.uq.edu.au/economics/mrg/3209.pdf>accessed 26 July 2018.

has the effect of leading to a limited, stagnated or declining manufacturing industry.[30] The slow-paced growth of the extractive industry which has the potential of slowing down the growth rate of other sectors of the economy has been described as the 'resource drag'.[31] The steady influx of external funds causes a comparative increase in prices of non-traded goods such as construction and services provision to the detriment of non-petroleum traded goods such as manufacturing and agriculture, which could lead to the overshadowing of the supply of the latter by the former.[32]

The impact of the Dutch Disease on the economy of the Netherlands could be gleaned from the mass migration of labour from the manufacturing sector to a more lucrative and high-income generating oil and gas sector. The result of this shift was far reaching. First it created scarcity of labour in the manufacturing industry and the eventual decline of the industry. Second, there was a resultant high rate of unemployment due to the fact that the developing oil and gas sector could not absorb the teeming numbers of workers seeking employment in the oil and gas sector.

In trying to explain the Dutch disease and its impact on employment, Larsen has submitted that 'centralized wage formation system' could have helped avoid the curse and the disease.[33] The system requires that most employer/employee wage negotiations are done in a centralised forum which will encompass the representatives of all the employers and employees of the various sectors of the economy in order to negotiate and arrive at a uniform scale for wages in a transparent manner.[34] This would reduce the pressure on workers in the manufacturing industry from venturing into the extractive industry given that they stand to gain little or no advantage by way of wage increment over others. In the Norwegian instance, the manufacturing sector was made the highest wage paying industry

[30]John Svending, 'The Institutional Channels of the Resource Curse: A Case Study of Bolivia' (2011) University of Lund, Minor Field Study Series 213, 17.
[31]G. Davis, 'The Resource Drag' (2011) 8 International Economics and Economic Policy 155, 176.
[32]Jonathan Di John, 'The 'Resource Curse': Theory and Evidence' (2010) ARI 172, 2 < https://www.files.ethz.ch/.../ARI172-2010_DiJohn_Resource_Course_Theory_Evidence_Africa_LatinAmerica> accessed 23 May 2018.
[33]Erling Røed Larsen, 'Escaping the Resource Curse and the Dutch Disease? When and Why Norway Caught up with and Forged ahead of Its Neighbors' (2004) Norway, Statistics Research Department, Discussion Papers 377, 23.
[34]*ibid*.

rather than resource extraction industry.[35] This served as an incentive on the workers to remain in the manufacturing sector instead of scampering to the extractive industry for greener pasture. This is one way of avoiding the issue of labour migration and unemployment occasioned by the Dutch disease.

Although the Dutch disease has been conventionally linked with petroleum exporting countries, some of these countries such as Norway, Saudi Arabia, Qatar etc have tried to avoid being caught up with this disease by refusing to convert a large percentage of petroleum revenue into their local currency.[36] Canada also falls within this category of states. However, a study conducted in 2012 reveals that the Canadian economy has started exhibiting some symptoms of the Dutch disease. The basis for this finding is as follows:

i. The extractive industry, particularly petroleum production, has been on the steady rise; there is a sudden drop in production and employment in the manufacturing sector.[37]

ii. There has been sharp increase of 60 percent in the value of the Canadian dollars as against the U.S. dollars in the preceding ten years;[38]

iii. The income from resource exports is insufficient to balance the deficit from other dwindling sectors of the economy;[39]

iv. Emphasis has generally shifted to the non-tradable sector from the tradable sector of the economy; the foregoing has led to the decade with the lowest level of productivity growth in post-world war Canada;[40]

v. The revenue generation ability of the various provinces has continued to expand considerably between the three oil producing provinces and the others.[41]

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[35] *ibid*. at 27
[36] Federico Inchausti-Sintes, 'Tourism: Economic Growth, Employment and Dutch Disease' (2015) 54 Annals of Tourism Research 172, 173.
[37] Jim Stanford, 'A Cure for Dutch Disease: Active Sector Strategies for Canada's Economy' (2012) Canadian Center for Policy Alternatives Technical Paper, Alternative Federal Budget p. 2
[38] *ibid*.
[39] *ibid*.
[40] *ibid*.
[41] *ibid*.

Countries sometimes experience a deficit in their budgetary allocations due to economic instability. This situation makes it difficult for them to finance their budget. The inability to finance the budget means that the cost of governance cannot be borne by the country. Measures have to be adopted to deal with this situation in order to avoid a breakdown of government. One of such economic solutions is the reliance on external financing, loans, aids and grants from International Financial Institutions (IFI) such as the World Bank Group, International Monetary Fund (IMF), African Development Bank (ADB) etc. During the 1980s most countries whose economies depended largely on petroleum revenue encountered serious financial turmoil due to the sudden drop in the price of oil at the international market. The wide negative difference in the oil returns compared to the 1970s prices meant that their revenue could not bear their expenditure, as it were. Resource dependent countries like Nigeria who were not saving for a rainy day were left with little option than to resort to loans from external sources such as the international financial institutions. The reliance on financial aid did not really solve the economic issues of the debtor countries due to what has been referred to as financial resource curse. This section intends to examine the financial aid curse as a crony of resource curse and its impact on economic growth.

Financial aid from IFI such as World Bank and IMF does not come cheap. There are interest rates and economic conditionalities which must be satisfied by the borrowing nations before they can obtain such financing. The economic conditions could include the imposition of austerity measures and economic liberalisation policies that require the government to remove their presence and influence from economic activities which should be determined by market forces.

Just like revenue from natural resource, foreign aid serves as surplus means of capital injection into the economy to give it a "big push" that will boost economic growth if the funds are properly managed and utilised.[42] However, both could turn out to become incentives for political office holders to shelve taxation as a means of revenue generation.[43]

[42]Ina Minascurta, 'Moldova – Grabbers' Heaven or the Importance of the Quality of Institutions in an Aid Recipient Country' (MSc Thesis, University of Oslo 2015) 13.
[43]*ibid*.

Some governments have lost sight of what role foreign aid should serve. Rather than the ad hoc purpose of curing budgetary deficit or boosting the economy, they easily resort to it as a default mode of acquisition of fund to run the state year in, year out. Financial assistance is like 'lottery winnings' which has the 'manna-from-heaven effect' and the feeling that it is 'other people's money' which would easily fizzle out faster than a country's hard-earned income.[44] On the day of reckoning when the interest continually piles up, the financing of the loan claims a major part of the national budget. Resort would still be made to more loans to finance existing loans, thus spinning the country into the vicious cycle of long-term economic dependence. The huge inflow of financial aid into countries like Zambia, Ghana and Nigeria has led to devaluation of their currencies.[45]

A drop in the interest rate of international financial aid does not even serve the economic interest of borrowing countries. This is because it has the effect of inducing borrowing and an adjustment of factors of production towards sectors of the economy engaged in the production of non-tradables which portends productivity stagnation.[46] This is further compounded by the increasing popular demand for non-tradable goods which has the ability of asphyxiating the factors of production from the tradable goods sector.[47] The implication would be nil production enterprise and increasing national wages, stunted economic growth as seen in example of Greenland.[48]

Resource curse can also manifest itself by way of financial channel which creates a weak financial systems.[49] Links have been established to show how the reliance on external financing by consortiums in the extractive industry has led to lower credit demand in the

[44]Thorvaldur Gylfason and Gylfi Zoega, 'The Dutch Disease in Reverse: Iceland's Natural Experiment' Oxford Centre for the Analysis of Resource Rich Economies Research Paper 138, 3. <https://www.economics.ox.ac.uk/materials/papers/13841/paper147.pdf> accessed 23 May 2018.
[45]*ibid*.
[46]Gianluca Benigno and Luca Fornaro 'The Financial Resource Curse'(2014) 116 (1) The Scandinavian Journal of Economics58, 80.
[47]João Sousa Andrade and António Portugal Duarte, 'Dutch Disease in Central and Eastern European Countries' (2017) Center for Business and Economic Research, University of Coimbra, Working Papers 3, 14.
[48]*ibid*. at 15.
[49]Christian Hattendorff, 'The Resource Curse Revisited: Three Essays on Resource Abundance and Financial Development' (PhD Inaugural-Dissertation, University of Berlin 2014) xvi.

local economy which gives rise to an under-developed financial sector of the economy.[50] The high rate of interest associated with such loans has a spiral effect on production and prices of goods. The overall effect is felt on the economy, as the financial sector goes a long way to determine the growth rate of the economy.[51]

Financial aid on its own may not amount to a curse if the funds are effectively managed to boost the economic development of the borrowing country. This brings to fore the role and quality of institutions. Credible institutions can advance reforms that can drive the country towards economic fortunes and socio-economic development.[52]

2.2 INSTITUTIONAL PERSPECTIVE TO RESOURCE CURSE

Scholars who had made earlier studies on resource curse did not consider it necessary to examine whether there exists any significant connection between institutions of the state and resource curse. This gave rise to the formation of the institutional school of thought on political economy. Scholars in this school have asserted that rather than cast blame on abundant resources for the poor economic performance of resource endowed countries, the focus should be directed at "asking what political and social factors enable some resource abundant countries to utilise their natural resources to promote development and prevent other resource abundant countries from doing the same".[53] In proffering an answer to this question, it has been posited that: "Nations fail today because their extractive economic institutions do not create the incentives needed for people to save, invest, and innovate".[54]

Thus, the political and economic institutions of a state are responsible for the resource curse and not the natural resources per se, because it is the institutions of the state that

[50] *ibid*.
[51] *ibid*.
[52] Ina Minascurta, 'Moldova – Grabbers' Heaven or the Importance of the Quality of Institutions in an Aid Recipient Country' (MSc Thesis, University of Oslo 2015) 47.
[53] Andrew Rosser, 'The Political Economy of the Resource Curse: A Literature Survey' (2006) 268 IDS Working Paper 3.
[54] Daron Acemoglu and James A. Robinson, *Why Nations Fail: the Origin of Power, Prosperity and Poverty*. (Crown Publishing 2012) 396.

control and manage the resource.[55] In other words, it does not necessarily follow that by virtue of the fact that a country is highly endowed with natural resources it is bound to experience the resource curse phenomenon. There are other variables that combine with the resource factor to give rise to a curse. To a large extent, it has a lot to do with the management of the funds accruing from the exploration of the natural resource. Where it is properly managed, it serves benefit the people and the economy of the country.

It must be noted that there are two variants of the institutional approach. The first approach views abundant natural resource curse to be a result of institutional decay and corruption amongst the ruling class, which has negative impact on economic growth and development- "institutional curse."[56]The second approach is "institutionalism," which proposes that resource-rich countries are not doomed to attain defective institutions, rather frail institutions are responsible for the under-utilisation of natural resources to attain economic growth and development.[57]A more balanced institutionalist stance is the recognition that natural resource dependent countries are not bound to stultify, even though they may encounter challenges in actualising policies for the attainment of economic growth.[58]

The role of regulation is to formulate institutional enhancement by reforming individual or organisational conduct to create useful impacts as a solution to socio-economic challenges.[59] Summarily, institutions could be inclusive or extractive: the former projects property rights and market forces controlled trade, while the later extort resources from society.[60] A symbiotic interaction between political institutions and economic institutions

[55]Gavin Wright and Jesse Czelusta, 'Why Economies Slow: The Myth of the Resource Curse' (2004) 47 (2) Challenge 6, 36.
[56]Peter Kaznacheev, 'Curse or Blessing? How Institutions Determine Success in Resource-Rich Economies' (2017) 808 Cato Institute Policy Analysis 6.
[57]*ibid*. 7.
[58]*ibid*.
[59]Cary Coglianese, 'Measuring Regulatory Performance Evaluating: The Impact of Regulation and Regulatory Policy' (2012)1 Organisation for Economic Co-Operation and Development Expert Paper 8.
[60]Katrine Schmidt Kryger, 'A Resource Curse for Renewables? A Case Study of the Indonesian Solar Energy Sector Development and International Relations' (2017) Aalborg University, Denmark 32.

serves the society well; whereas the reverse is the case where the two work at cross purpose.[61]

Mehlum et al became the first researchers to create a theoretical model which established a causal link between the institutions and resource curse. According to them:

> Dysfunctional democracies invite political rent appropriation; low transparency invites bureaucratic corruption; weak protection of property rights invites shady dealings, unfair takeovers and expropriation; weak protection of citizens' rights invites fraud and venal practices; weak rule of law invites crime, extortions and mafia activities; a weak state invites warlordism.[62]

This is the basis for their submission that the quality of growth efficacy in resource endowed countries is basically related to the utilisation of rents obtained from natural resources and how it is distributed within the institutional framework.[63] This is also referred to as resource appropriability.[64] Two kinds of institutions are identified, namely: producer friendly and grabber friendly institutions. The difference between these two is that, in producer friendly institutions, 'rent-seeking and production are complementary activities'; whereas in grabber friendly institutions, 'rent-seeking and production are competing activities'.[65]Petroleum resources, mineral ores and metals arouse rent seeking and corrupt tendencies.[66] Generally, mineral resources have been found to be more prone to mismanagement by countries with poor quality institutions.[67] Producer friendly institutions are appealing to entrepreneurs, while grabber friendly institutions compel entrepreneurs to move from productive to unproductive activities such as rent-seeking from natural

[61]*ibid*.
[62]Halvor Mehlum, Karl Moene, and RagnarTorvik, 'Cursed by Resources or Institutions? (2006) 29 World Economy 1117, 1121.
[63]Halvor Mehlum, Karl Moene and RagnarTorvik, 'Institutions and the Resource Curse' (2006) 116 The Economic Journal 1, 2-3.
[64]John Svending, 'The Institutional Channels of the Resource Curse: A Case Study of Bolivia' (2011) 213 University of Lund Minor Field Study Series 13 <https://liveatlund.lu.se/intranets/LUSEM/NEK/mfs/MFS/213.pdf> accessed 24 May 2018.
[65]Halvor Mehlum, Karl Moene and RagnarTorvik, 'Institutions and the Resource Curse'(2006) 116 The Economic Journal 1, 2-3.
[66]Shannon M. Pendergast, Judith A. Clarke and G. Cornelis Van Kooten, 'Corruption, Development and the Curse of Natural Resources' 37 <web.uvic.ca/~jaclarke/ResourceCurse(CJPS)April2010.pdf> accessed 24 May 2018.
[67]AD Boschini, J. Pettersson and J. Roine, 'Resource Curse or Not: A Question of Appropriability' (2007) 109 Scandinavian Journal of Economics 593–617.

resources.[68] Between producing and grabbing activity, whichever is more profitable would determine the direction entrepreneurs would take as they are naturally motivated by the profitability of a business venture. The profitability of either of them is determined by the institutional quality and the adherence to the rule of law.[69]High quality institution breeds 'producer's equilibrium', whereas low quality institution begets 'grabber equilibrium'.[70] Producer's equilibrium entrepreneurs are producers, while for grabber equilibrium a section of entrepreneurs are rent-seekers which generates minimal state revenue despite abundance of natural resources.[71] In the former case, natural resources is a 'blessing' while in the latter case natural resources would amount to a 'curse'.[72]

This concept is further elaborated thus:

> In the economy with producer friendly institutions rent-seeking and production are complementing activities, since institutional settings such as rule of law, low level of corruption, efficient bureaucracy and low risks of the government repudiating contracts imply that efficient rent-seeking is open for producers only. In competition for natural resources rents, producers still have legal and institutional limits in lobbying for lucrative contracts, subsidies and public support. On the other hand, grabber friendly institutions provoke direct wealth grabbing: corruption, political rent appropriation, shady dealings, expropriation, extortions and others. In this situation, it is disadvantageous to be a producer, and thus production and rent-seeking are competing activities.[73]

It thus implies that resource curses such as low economic growth, environmental degradation, conflicts etc. do not necessarily arise from resource dependence. Rather, the causal link arises from the failings of weak institutions and rivalry in the extractive industry which is primarily responsible for the creation of natural resource dependence as the last

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[68]H Mehlum, K Moene, and R Torvik, 'Institutions and the Resource Curse' (2006) 116 (508) The Economic Journal 1-20. Cited in Tommy Elsgård, Avoiding the Resource Curse: Lessons from Norway and Botswana to Ghana and Venezuela (MSc Thesis, University of Agder 2014) 27.

[69]Ina Minascurta, 'Moldova- Grabbers' Heaven or the Importance of the Quality of Institutions in an Aid Recipient Country' (MSc Thesis, University of Oslo 2015) 8.

[70]*ibid*.

[71]Asghar Mobarak and Ali Karshenasan, 'The Impact of Institutional Quality on Relation between Resource Abundance and Economic Growth' (2012) 16 (32) Iranian Economic Review 97.

[72]Ina Minascurta, 'Moldova- Grabbers' Heaven or the Importance of the Quality of Institutions in an Aid Recipient Country' (MSc Thesis, University of Oslo 2015) 8.

[73]Dina Akylbekova, 'Analyzing the Resource Curse theory: A Comparative Study of Kazakhstan and Norway' (BSc Thesis Lund University) 12.

resort.[74] Institutional structure of high quality would be capable of neutralising the curse by refraining from exhibiting rent-seeking attitude, eradicating or minimising corrupt practices, limiting the chances of civil strife and ensuring equitable distribution of resource distribution.[75] Quality institutions could play a reformative role of revoking negative connections between natural resource endowment and poor aftermath.[76] A formidable and effective institution, whether formal or informal, is also positioned to resolve budding conflicts at the incubating stage before they transform to full scale aggression.[77]

The entrenchment of the rule of law in economic institutions promotes accountability, transparency and efficiency by dismantling roadblocks to business enterprise and formulating policy incentives which makes rent-seeking and corrupt practices unattractive.[78] The underlining ideals behind these policies are to advance transparency initiatives within the extractive industry distribution network beginning from the contracting stage to how the revenue accruing from the industry is managed by the national budgets.[79] Good institutions also allow for active participation of the citizens in determining how the funds obtained from their natural resource are managed and utilised. Citizens engage the institutions and government through civil society groups that monitor the management processes and mount pressures for the due processes to be adhered to.[80]

Resource rent in itself is not bad. However, by history, natural resources do not necessarily amount to prosperity.[81] Rent-seeking, which has to do with the desire for wealth accumulation, is popular with political systems where income from natural resource is not

[74]C. N. Brunnschweiler and E. H. Bulte, 'Linking Natural Resources to Slow Growth and More Conflict' Vol. (2008) 3202 Science Magazine 617.

[75]Tamat Sarmidi, Law Siong Hook and Yaghoob Jafari, 'Resource Curse: New Evidence on the Role of Institutions' (2012) 37206 Munich Personal RePEc Archive Paper 3 <https://mpra.ub.uni-muenchen.de/37206/1/Tamat_law_yaghoob_resourcecurse.pdf> accessed 24 May 2018.

[76]*ibid*. 5.

[77]Stormy-Annika Mildner, GittaLauster and Wiebke Wodni, 'Scarcity and Abundance Revisited: A Literature Review on Natural Resources' (2011) 5 (1) International Journal of Conflict and Violence 155, 161.

[78]Amela Karabegović, 'Institutions, Economic Growth, and the "Curse" of Natural Resources, (2009) Fraser Institute Studies in Mining Policy 2.

[79]Oxfam International, 'Lifting the Resource Curse: How Poor People can and should Benefit from the Revenues of Extractive Industries.(2009) 134 Oxfam Briefing Paper 13.

[80]*ibid*.

[81]Shannon M Pendergast, Judith A Clarke and G. Cornelis Van Kooten, 'Corruption, Development and the Curse of Natural Resources' (2010) 44(2) Canadian Journal of Political Science 411, 411.

determined by the economic forces but centrally managed and distributed amongst the constituent parts of the country.[82] This practice leads to intense competition and a scramble for rents amongst the various stake holders. In this vein, a decentralised political system, fiscal responsibility of governments and proper human capital development are practices governments imbibe to avoid the curse of natural resources.[83]

Though the institutions of a country may have some challenges at the beginning, economic growth can still be harnessed provided the government is committed to establishing mechanisms that would checkmate institutional roadblocks to growth.[84]There is the need for cohesion between the various institutions of the state instead of a situation where departments of government are working at cross purpose by pursuing their individual goals.[85]

Just as public institutions have a major role to play in determining whether natural resources become a blessing or curse, abundant natural resources may also create a negative effect on public institutions. Logically speaking, abundant resources should ordinarily enhance economic prosperity and welfare of citizens, and not the reverse case. Where poverty still prevails despite resource abundance, it could result in decay of the institutions of the state.[86] For instance, poverty may cause corruption amongst public office holders which will continue to affect the effectiveness of the institutions in performance of their duties. For an institution to be effective in liberating a country from the impact of resource curse it has to be impartial in the performance of its function. Weak institutions favour the interests of the political elite to the detriment of the people. The beneficiaries of the partial institutional framework, in turn maintain the status quo by preserving the

[82]Salvatore Monni Andrea Cori, 'The Resource Curse Hypothesis: Evidence from Ecuador' (2014) 28Sustainability Environmental Economics and Dynamics Studies Working Paper Series 8-9.

[83]Teresa Curristine, Zsuzsanna Lontiand Isabelle Joumard, 'Improving Public Sector Efficiency: Challenges and Opportunities' (2007) 7 (1) OECD Journal on Budgeting 1, 2.

[84]Argentino Pessoa, 'Growth Failures and Institutions: The "Natural Resources Curse" Revisited' <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.579.582&rep=rep1&type=pdf> 16-17, accessed 28 March 2020.

[85]Katrine Schmidt Kryger, A Resource Curse for Renewables? A Case Study Of the Indonesian Solar Energy Sector Development and International Relations (Masters Thesis, Aalborg University 2017) 29.

[86]Robert T. Deacon 'Institutions, the Resource Curse and the Collapse Hypothesis' (2012) 7-8. <econ.ucsb.edu/~deacon/Deacon%20Collapse%20and%20the%20resource%20curse.pdf> accessed 24 May 2018.

institutions in their state of defect and resisting any attempt at reforms.[87] Petroleum resources, mineral ores and metals arouse rent seeking and corrupt tendencies.[88] Diamonds are more prone to mismanagement by countries with poor quality institutions.[89]

2.3 CONSEQUENCES OF THE RESOURCE CURSE

Crude oil is one variant of natural resources that is notorious for several negative implications for countries that are endowed with it. It had been stated that "oil creates the illusion of a completely changed life, life without work, life for free. Oil is a resource that anesthetizes thought, blurs visions, and corrupts".[90] It was reported that when King Idris, a Libyan monarch was informed of the supposed good news that the oil prospecting American Consortium in his territory had discovered oil, he replied melancholically: "I wish your people have discovered water. Water makes men work, oil makes men dream".[91] The foregoing sentiment is not associated with crude oil alone. The natural resource curse has several manifestations and implications for nations which possess it if it is not properly managed. This section of the paper shall examine the various implications of the natural resource curse.

2.3.1 Resource Conflict

Two viewpoints have emerged as to whether natural resources is a source of conflict in the society The first view is that the deficiency and uneven distribution of natural resources creates conflict amongst members of the society.[92] There is the opposite view that the

[87]I. Kolstad and A. Wiig, 'It's the Rents, Stupid! The Political Economy of the Resource Curse' (2009) 37 (12) EnergyPolicy5317-5325. Cited in Tommy Elsgård, 'Avoiding the Resource Curse: Lessons from Norway and Botswana to Ghana and Venezuela' (MSc Thesis, University of Agder2014) 28.

[88]Shannon M. Pendergast, Judith A. Clarke and G. Cornelis Van Kooten, 'Corruption, Development and the Curse of Natural Resources' 37.

[89]AD Boschini, J Pettersson and J Roine, 'Resource Curse or Not: A Question of Appropriability' (2007) 109Scandinavian Journal of Economics 593-617.

[90]R. Kapuscinski, *Shah of Shahs* (Vintage Books 1992) Quoted in CO Ikporukpo, *The Mythology of Oil*. (University Lecture, Ibadan University Press 2017) 54.

[91]M. L. Ross, 'Does Oil Hinders Democracy?' (2001) 53 World Politics 325-361. Quoted in C. O. Ikporukpo, *The Mythology of Oil*.(University Lecture, Ibadan University Press 2017) 54.

[92]G Frynas, G Wood, and T Hinks, 'The Resource Curse without Natural Resources: Expectations of Resource Booms and their Impact (2017) 116 (463) African Affairs 233, 234.

availability of abundant natural resources leads to conflict in the society.[93] The latter view is the foundational basis for arriving at the resources curse theory.[94] Both views are rightly held as resource conflict could be triggered by abundance and unequal distribution of natural resources. This point shall be seen in the discussion that unfolds in this section.

Countries that are endowed with and place heavy dependence on abundant natural resources are prone to authoritarian governments.[95] They are also prone to economic instability and resource conflict with other nations of the world.[96] Resource abundance also serves as incentives which arouse the scramble for resultant resource rent.[97] These tendencies are first exhibited by the expropriation of natural resource to exclusive state ownership and control. This is practiced in domanial systems, which recognise absolute state control of resources. With the exception of America, most resource rich countries practice this system. Under international law, the right of permanent sovereignty over natural resources is well recognised and well established.[98] It has been argued that the right to permanent sovereignty over natural resources is reposed in the people and not the state, even though the government is responsible for exerting such powers.[99] If natural resources are said to be owned by the people for their benefit, it becomes nothing but a curse where dictators dispose of such resources to the disadvantage and detriment of the people.[100]

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[93] *ibid*.
[94] *ibid*.
[95] Natural Resource Governance Institute, 'The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth' (2015) NRGI Reader 1 <https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf> accessed 24 May 2018.
[96] Terry Lynn Karl, 'Understanding the Resource Curse' 21 <openoil.net/wp/wp-content/uploads/2011/12/Chapter-2-reading-material.pdf> accessed 24 May, 2018.
[97] Victor Polterovich, Vladimir Popov, and Alexander Tonis, 'Resource Abundance: A Curse or Blessing?' (2010) United Nations Department of Economic and Social Affairs Working Paper 93, 11.
[98] This is reflected in international customary law and Paragraphs 1 and 2 of the famous 1962 UN General Assembly Resolution on the Permanent Sovereignty over Natural Resources.
[99] Emeka Duruigbo, 'Permanent Sovereignty and People's Ownership of Natural Resources in International Law' (2006) 38 George Washington International Law Review 33, 37.
[100] Leif Wenar, 'Property Rights and the Resource Curse' 14. <siteresources.worldbank.org/INTDECINEQ/Resources/PropertyRights.pdf> accessed 24 May 2018.

State legislation and policies toward governmental ownership and control of natural resources have bred civil, political and socio-economic disorder and instability.[101] In Nigeria, for instance, all the mineral resources in the country are owned and controlled by the federal government[102]whereas, the state government retains allodial ownership of land[103] provided it does not have mineral resource content.[104] There is no legal recognition of the right or stake of the host community where petroleum exploration is done. Similarly, in the Democratic Republic of Congo and Zimbabwe, the Constitution and relevant mining codes transfer exclusive ownership and control of mineral resources to the government, which they are supposed to hold in trust for the citizens of the country.[105] The non-recognition of host community rights has given the oil companies the impression that they can carry on their business of oil exploration without consideration of the interest of the people. This has opened a floodgate of litigation and violent struggles against the oil companies by indigenes of the communities.[106]

The struggle to exercise ownership and control over natural resource has been a source of conflict between companies, companies and state, intra-state and inter-state[107] which has resulted in human tragedies.[108] Intra-state resource conflicts have been found to be more prevalent than other variants of resource conflict.[109] The proliferation of international

[101]Olanrewaju Fagbohun, *Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability* (Inaugural Paper, Nigerian Institute of Advanced Legal Studies Press 2012) 13

[102]S. 44 (3) Constitution of Federal Republic of Nigeria 1999;S. 1 Petroleum Act, S. 2 (1) Exclusive Economic Zone Act and S. 1 Nigerian Minerals And Mining Act 2007

[103]S. 1 Land Use Act 1978.

[104]S. 1 (2) Nigerian Minerals and Mining Act 2007.

[105]Paradzai Garufu, 'Operationalizing International Law Principles Governing State Sovereignty over Mineral Resources: The Case of Zimbabwe and the Democratic Republic of the Congo (DRC)' (PhD Thesis, University of the Witwatersrand, 2015) 246.

[106]Scott P Stedjan, 'Land is Not the New Oil: What the Nigerian Oil Experience can Teach South Sudan about Balancing the Risks and Benefits of Large Scale Land Acquisition' (2015) 3 (2) Penn State Journal of Law & International Affairs 168, 213.

[107]Chris O Ikporukpo, *The Mythology of Oil*. University Lecture, Ibadan University Press 2017) 32.

[108]Lanre Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (2013) 38 Thurgood Marshall Law Review 159, 159.

[109]Stormy-Annika Mildner, Gitta Lauster and Wiebke Wodni, 'Scarcity and Abundance Revisited: A Literature Review on Natural Resources' (2011) 5 (1) International Journal of Conflict and Violence 155, 157.

institutions at the global, regional and sub-regional level has happened to avert and also resolve resource conflicts[110] .

It is to be seen that the failure to recognize private property rights over natural resources goes a long way to provoke intra-state natural resource conflict. Weak institutions readily capitalise on the chance to grab huge rental value provided by the boom in natural resources which encourages the rise of militant groups to counter the coercive might state institutions employ to expropriate resource rents.[111] This was and is still the issue at the fore of the Niger Delta crisis.[112] The indigenous oil communities agitate for resource control despite the legal conferment of natural resources on the federal government. State exercise of sole control over natural resources has made indigenous people feel deprived and ostracised from their entitlement. This leads to stiff competition arising from prolonged political, cultural and socio-economic clashes between the state and indigenous people who can resort to intense violence.[113] In extreme cases, the people could revolt against the government insisting on their right to self-determination recognised under international law.[114]The agitation of Southern Sudan to exercise domain rights over land and the natural resources contained therein and the counter position of the central government warranted the civil war that plagued Sudan for several years.[115]

On instances where the control of resource has led to clashes between government and sinister mob groups, natural resources present an easy attraction to both set of actors in order to fund their quest for power. According to Lujala onshore oil production has more

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[110]*ibid*.

[111]Paolo Buonanno, Ruben Durante, Giovanni Prarolo and Paolo Vanin, 'Poor Institutions, Rich Mines: Resource Curse in the Origins of the Sicilian Mafia' (2015) The Economic Journal 175, 200.

[112]Kingsley Ekwere, Sustainable Development of Oil and Gas in the Niger Delta: Legal and Political Issues (PhD Dissertation, University of Hamburg 2010) 10.

[113]United States Institute of Peace, 'Natural Resources, Conflict, and Conflict Resolution: A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors' 3. <https://www.usip.org/sites/default/files/file/08sg.pdf> accessed 24 May 2018.

[114]United Nations Human Rights Office of the High Commissioner, 'Realizing Women's Rights to Land and Other Productive Resources' (2013) 56 <www.un.org/esa/desa/papers/2010/wp93_2010.pdf> accessed 24 May 2018.

[115]Scott P. Stedjan, 'Land is not the New Oil: What the Nigerian Oil Experience can Teach South Sudan about Balancing the Risks and Benefits of Large Scale Land Acquisition' (2015) 3 (2) Penn State Journal of Law & International Affairs 167, 128.

tendencies to promote violence in a country than offshore production.[116] Due to the difficult terrain, offshore oil installations are not easily susceptible to attacks and sabotage by insurgent groups against the government.[117] However, the Niger Delta crisis does not lend support to Lujala' findings. The difficult terrain did not deter the consistent sabotage and destruction of offshore oil pipelines, oil field and other oil installations. The militant Niger Delta groups had the necessary arsenals and understood the terrain well enough to give the Nigeria Navy a run for their money. This proffers some explanation for the prolonged attacks which made the Nigerian government resort to dialogue, initiation of the amnesty programme and rehabilitation of the militant youth before the crisis could be quelled down.

The mining industry is not as highly sophisticated and technical like the crude oil exploration industry; hence it could be taken over by mob groups with ease.[118] This is because products of natural resources are usually in high demand by domestic and foreign sources. Despite mechanisms put in place by the law enforcement agencies, there are always willing and available buyers to acquire these illegal products from the black market. It serves as an easy means of raising finance to fund warfare between the government and insurgent groups who are the actors in this case. In certain cases where the government has lost grip of the security of the state, these mob groups are allowed to coexist peacefully with their allotted areas to have their own piece of the national cake.[119]

It is well settled that civil conflicts based on natural resources are not detachable from developing countries,[120] especially those of the Sub Saharan region of

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[116]P Lujala, 'The Spoils of Nature: Armed Civil Conflict and Rebel Access to Natural Resources' (2009) Journal of Peace Research. Cited in RagnarTorvik, 'Why do Some Resource-abundant Countries Succeed While Others do not?' (2009) 25 (2) Oxford Review of Economic Policy 241, 249.

[117]*ibid*.

[118]Jing Vivian Zhan, 'Natural Resources and Corruption: Empirical Evidence from China' Paper Presentation (2011) Annual Meeting of American Political Science Association 15 <unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047842.pdf>accessed 24 May 2018.

[119]*ibid*.

[120]ML Ross, 'Oil Drugs and Diamonds: How Do Natural Resources Vary in Their Impact on Civil War' (2002) UCLA University Press, Working Paper 1-5; Noah Novogrodsky, 'Redressing Human Rights Violations in Sierra Leone' (2003) Nexus, University of Toronto, Spring/Summer 27.

Africa.[121] Diamond mining has been the source of conflict or sustained conflicts in regions of the world, especially in the Sub-Saharan Africa countries such as Angola, Liberia, Sierra Leone, Ivory Coast, Zimbabwe, Democratic Republic of Congo, as well as Congo Brazzaville.[122] The foremost instance of conflict diamonds which caught the attention of the world was the prolonged civil war in Sierra Leone during the late 1990s up to 2002. A large amount of the diamonds field fell into the hands of the rebel forces. Illegally mined diamonds were traded off to Europe by the insurgent groups in exchange for arms and cash which aided their war campaign against the state.[123]

Another instance of resource conflict arose in Zimbabwe in 2006 after alluvial diamonds were found in the Marange diamond fields.[124] This was followed by illegal mining and trading of the precious stone which provoked coercive government responses.[125] The use of force by the government could not deter the ever determined and growing number of people who felt the impact of the economic difficulties that plagued the country in 2008.[126]

2.3.2 Mismanagement of Natural Resources

The wheels of governance of a state ideally run on taxes imposed on its citizens. It is a role which citizens must play as part of their obligations under the social contract which it has with the government in exchange for the protection of lives and property.[127] The mechanism of government for the actualisation of development of the people is run on the basis of taxes obtained from the people. Revenue accruable from exploration of natural resources is regarded as unearned profits and is generally referred to as "rents".

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[121]Stormy-Annika Mildner, GittaLauster and WiebkeWodni, 'Scarcity and Abundance Revisited: A Literature Review on Natural Resources' (2011) 5 (1) International Journal of Conflict and Violence 155, 157.
[122]John-Andrew McNeish, 'Rethinking Resource Conflict' (2011) World Development Report Background Paper 2.
[123]*ibid*. 3.
[124]Paradzai Garufu, 'Operationalizing International Law Principles Governing State Sovereignty over Mineral Resources: The Case of Zimbabwe and the Democratic Republic of the Congo (DRC)' (PhD Thesis, University of the Witwatersrand 2015) 175.
[125]*ibid*.
[126]*ibid*.
[127]Deborah Bräutigam, 'Building Leviathan: Revenue, State Capacity and Governance' (2002) 33 (3) IDS Bulletin 10, 10.

Based on historical experience, contemporary evidence and recent case studies, research by the Centre for the Future State, finds that states that depend on revenue accruing from natural resource production do not see the need to extract tax from the citizens, hence making them not responsible and answerable to them.[128] Obtaining state revenues from the populace instead of reliance on resource rent or foreign loans is one of the foremost criteria for ensuring state accountability to the society.[129]Where the government depends less on tax payers money to finance its activities, there is the tendency to create disconnect between the people and the government and makes the government less obligated to provide developmental objectives to the benefit of the people. It could also be an elite political strategy not to bother the people with much tax so that they are not inclined to demand for their civil rights and entitlements as citizens. In the same vein, the government would refuse to establish independent political and institutional mechanism that can question the affairs of the government and how the resource rents are managed thereby giving room for arbitrary governance and feeble institutions.[130] Also the surge in the movement of human and capital resources from manufacturing and productive industries towards the natural resource industry limits human capital growth, which has adverse effects on the credibility of institutions.[131]

2.3.3 Environmental Implications

Most natural resources as noted in the earlier part of this work are interred in the earth. Their exploration would require some technical processes that require drilling, excavation, injection of substance into the earth, and the use of heavy vibration machines. In carrying

[128]Institute of Development Studies. 'How Does Taxation Affect the Quality of Governance?' (2007) 34 IDS Policy Briefing 2.
[129]Todd Moss, Gunilla Pettersson and Nicolas van de Walle, 'An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa' (2006) 74 Center for Global Development Working Paper 10.
[130]Institute of Development Studies, 'How Does Taxation Affect the Quality of Governance?' (2007) 34 IDS Policy Briefing 1.
[131]Victor Polterovich, Vladimir Popov and Alexander Tonis, 'Resource Abundance: A Curse or Blessing?' (United Nations Department of Economic and Social Affairs Working Paper 93, June 2010) 11, https://www.un.org/esa/desa/papers/2010/wp93_2010.pdf, accessed 4 April 2020.

out these activities, results which could have an adverse effect on the health of humans and the flora and fauna in the environment could occur. The failure to use environmentally friendly means of exploration and mining of natural resources has adverse health implications. Despite the huge revenues accruing to the Nigerian government from petroleum exploration, there have been several high-level occurrences of environmental degradation which has continued to pose a danger to the health of members of the communities where these activities take place.[132]

In the case of oil exploration in the Niger Delta region of Nigeria, severe environmental pollution occurs as a result of petroleum exploration, the sabotage of oil wells and pipelines, indiscriminate disposal of drilling mud and crude oil waste on farm lands and water ways which are sources of subsistence for members of the community.[133] The adverse effect of oil pollution on the environment is far reaching with a devastating effect on people who engage in fishing and farming activities. In May 2010, a report was issued on air and water borne lead poisoning as a result of illegal mining activities in some parts of Zamfara State of Nigeria which led to the death of not less than 500 children in seven months.[134] Also in the absence of effective institutions to instill global best practice, harmful gases are flared in the course of oil exploration which deplete the ozone layer and cause serious health hazards to local residents. Similar developments have occurred in the Karonga area of northern Malawi where mining corporations have failed to prevent harm to the environment and residents due release of toxic wastes.[135] In addition to this, the mining

[132]Anefiok E Ite, Usenobong F Ufot, Magaret U Ite Idongesit O Isaac and Udo J Ibok, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental' (2016) 4 (1) American Journal of Environmental Protection Law 21, 34.

[133]Uche I Onwuachu, 'Environmental Pollution Challenges In Nigeria: Regulations and Enforcement for Sustainable Development' (2014) 3 (1) Journal of Research in Pure and Applied Sciences 83, 86.

[134]Olufemi Olamide Ajumobi1, Ahmed Tsofo, Matthias Yango, Mabel Kamweli Aworh, Ifeoma Nkiruka Anagbogu, Abdulazeez Mohammed, Nasir Umar-Tsafe, Suleiman Mohammed, Muhammad Abdullahi, Lora Davis, Suleiman Idris, Gabriele Poggensee, Patrick Nguku, Sheba Gitta and Peter Nsubuga, 'High Concentration of Blood Lead Levels among Young Children in Bagega Community, Zamfara – Nigeria and the Potential Risk Factor' (2014) 18 (Supp 1):14 Pan African Medical Journal 1, 7.

[135]Daniella Lindskog, 'The Resource Curse on a Micro Level: A Case Study of Mining in Malawi.' (M.Sc Thesis, Lund University 2012) ii.

corporations and the government have not been forthcoming with their promise to provide basic social amenities that would ameliorate the negative effects of mining activities.[136]

2.3.4 Corruption and Mismanagement of Public Funds

Corruption in resource rich countries often starts from the political process. Resource booms in a country often make political office attractive thereby creating fierce competition amongst politicians for government positions.[137] This is because of the benefits to be derived from managing the resources. The desperation amongst politicians for political offices affects the quality of elections which are anything but free and fair as a result of election rigging, buying of election votes, use of thugs to perpetrate electoral violence, bribing of electoral officials and all forms of electoral malpractices.[138] The failure of the electoral system allows for weak democratic institutions. This kind of system produces political leaders that will do anything to consolidate power including corrupting the system.

In most oil rich economies, huge revenue from oil exportation is often collected by the central government which puts the state in a position to exercise more control and regulation of the economy when compared to most economies that depend less on oil production.[139] Resource dependent states are prone to higher propensity to rent-seeking and corruption than non-resources rich economies.[140] Huge budgetary allocation and revenue availability means more spending, hence, those at the helm of affairs have no incentive to create strong institutions to check state power.[141] The political leaders thus retain huge

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[136]*ibid*.

[137]Jing Vivian Zhan, 'Natural Resources and Corruption: Empirical Evidence from China' Paper Presentation (2011) Annual Meeting of American Political Science Association 5 <unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047842.pdf>accessed 24 May 2018.

[138]*ibid*.

[139]Jonathan Di John, 'The 'Resource Curse': Theory and Evidence' (2010) 172 ARI 2. <https://www.files.ethz.ch/.../ARI172-2010_DiJohn_Resource_Course_Theory_Evidence_Africa_LatinAmerica> accessed 24 May 2018.

[140]*ibid*.

[141]Victor Polterovich, Vladimir Popov, and Alexander Tonis, 'Resource Abundance: A Curse or Blessing?' (2010) 93 United Nations Department of Economic and Social Affairs Working Paper 11.

discretionary powers as they engage in the misappropriation of public funds. This trend has been described as "leadership curse".[142] Nigeria presents several examples of this kind of leadership; the popular example being General Sani Abacha who is alleged to have transferred billions of Nigerian oil dollars into his private accounts in Switzerland and other countries of Europe during his stay in office as a military Head of State.[143]

2.3.5 Monochromic Economy and Economic Instability

The abundance of natural resources and the reliance on it for the sustenance of a nation's economy creates the feeling of rights and entitlements to revenue accruing therefrom rather than engaging in productive means of wealth creation.[144] In economic parlance, this is not real income; it is referred to as 'rent'. In other words, "it is simply the reshuffling of a country's portfolio of assets: exchanging resources below ground for cash above ground".[145] In the 1960s the Nigerian economy was agriculture based. The discovery of oil in commercial quantities and the economic fortunes that came with it made the government divert the direction of the economy from an agro-allied one to a petroleum based one.

The natural resource curse has the tendency to cause extravagant spending on the part of resource dependent states. This is due to the excess inflow of cash from resource rent during the periods of boom.[146] The economic principle that plays out is that where there is more money in circulation, more spending is incurred and which ultimately leads to price inflation. During the period of the oil boom in the early 1970s, the former Head of State of Nigeria, General Yakubu Gowon was reported to have said that there is enough money in

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[142]Emeka Duruigbo, 'Permanent Sovereignty and People's Ownership of Natural Resources in International Law' (2006) 38 George Washington International Review 34.

[143]*ibid*.

[144]J. Stiglitz, *Globalization and its discontent* (Penguin Books 2002) 72.

[145]Paul Stevens, Glada Lahn and Jaakko Kooroshy, 'The Resource Curse Revisited' (2015) Research Paper Appendix Energy, Environment and Resources 4.<https://www.chathamhouse.org/.../20150804ResourceCurseRevisitedStevensLahnKooroshyAppendix.pdf> accessed 23 May 2018.

[146]Tim Harford and Michael Klein, 'Aid and the Resource Curse: How Can Aid be Designed to Preserve Institutions?' (2005) 291 Public Policy for the Private Sector Note 1 <http://rru.worldbank.org/PublicpolicyJournal> accessed 24 May 2018.

Nigeria but the problem is how to spend it.[147] What followed was a burst of spending on unviable capital projects that served little or no good to the development of the country. Beginning from 1980s and subsequent years, Nigeria and other resource-rich countries experienced slow economic growth due to the sharp decline in the price of oil.[148]

Because of the instability of international oil markets, countries that have oil-exportation as their economic base mostly fall victim to a sharp rise and fall in their economic growth and per capita income.[149] During the 1st and 2nd Quarter of 2016, the Nigerian economy suffered a recession following the fall of petroleum prices in the international market. The country's heavy reliance on petroleum exportation for about 95% percent of its foreign exchange was held to be responsible for that development.[150]

For a resource rich economy to record sustainable economic growth, purposive plans must be put in place to link and reshuffle the revenue accruable from the extractive industry and other sectors of the economy.[151] This would require that the other sectors of the economy be developed at the same pace or greater pace than the oil sector. Unfortunately, many resource-trading countries have failed to address these concerns by moving the focus of their economies from the extractive industries or continuous reliance on resource earning to where they have a diversified economy.[152] Instead of economic diversification, political office holders and policy makers are swayed by corrupt practices and extravagant expenditures which create reclining economic activities, poor investments and lack of

[147] Remi Adekoya, 'Time to end the "Nigeria is rich" myth' (Business Day, 16 May 2019), https://businessday.ng/columnist/article/time-to-end-the-nigeria-is-rich-myth/, accessed 28 February 2020.
[148] Alexander James, 'The Resource Curse: A Statistical Mirage?' 147 Oxford Centre for the Analysis of Resource Rich Economies Research Paper 14.
[149] Terry Lynn Karl, Understanding the Resource Curse.21 <openoil.net/wp/wp-content/uploads/2011/12/Chapter-2-reading-material.pdf> accessed 24 May, 2018.
[150] Ministry of Budget & National Planning. 'Federal Republic of NigeriaEconomic Recovery & Growth Plan 2017-2020' (2017) 10 <yourbudgetplan.com>uploads>2017/03>Economic-Recovery-Growth-Plan-2017-2020.pdf> 16 February 2018.
[151] Paul Stevens, Glada Lahn and Jaakko Kooroshy, 'The Resource Curse Revisited' (2015) Research Paper Appendix Energy, Environment and Resources 4.<https://www.chathamhouse.org/.../20150804ResourceCurseRevisitedStevensLahnKooroshyAppendix> accessed 23 May 2018.
[152] *ibid*.

interest in rechanneling excess resource income towards the development of other poorly developed sectors of the economy.[153]

Natural resources also portend a negative impact on human capital development. It hampers the growth of entrepreneurial endeavours, inventions, creativity, and craftsmanship. The tradable industry is the pivot for growth, and economic productivity which continues to rise as the labour pool engaged by corporate bodies in the tradable sector expands.[154] High salaries in the extractive industry are enough incentives to attract manpower from other sectors of the economy. This was one of the symptoms of the Dutch disease which the Netherlands faced when they resorted to crude production and exportation. The natural consequences of the above captured scenario are "lower innovation, lower entrepreneurial activity, poorer governments and lower growth".[155] One distinct quality identified with prosperous and developed nations is the ability to produce goods and services for export.[156] These are mostly industrial goods and services which other nations cannot forego in their quest for development. The underdeveloped nations may only possess the ability to make and distribute simple goods that could as well be produced by any other nations. This does not serve them any comparative economic advantage. This provides an explanation for the assertion that economic development can be attained when a country can manage its production, especially if it addresses the needs of the international community.[157]

[153]Bitrus Nakah Bature,'The Dutch Disease and the Diversification of an Economy: Some Case Studies' IOSR (2013) 15 (5) Journal of Humanities and Social Science 6, 6.
[154]Gianluca Benigno and Luca Fornaro, 'The Financial Resource Curse' (2014) 116 (1) The Scandinavian Journal of Economics 58, 58.
[155]Jelrey D Sachs and Andrew M Warner, 'Natural Resources and Economic Development: The Curse of Natural Resources' (2001) 45 European Economic Review 827, 835.
[156]Jhean Steffan Martines de Camargo and Paulo Gala, 'The Resource Curse Reloaded: Revisiting the Dutch Disease with Economic Complexity Analysis' (2017) 448 Sao Paolo School of Economics Working Paper 26.
[157]Ibid.

3.4 TOWARDS SUSTAINABLE DEVELOPMENT FOR PETROLEUM REVENUE MANAGEMENT

Sustainable development has been described as development that meets the needs of today and also caters for the future generations. [158] It is e central question in the economic development of countries thereby making it a highly contested concept.[159] The World Commission on Environment and Development (or the Brundtland Commission) have resulted in the compelling reasons to look at sustainable development by policy makers.[160] Internationally much responses have been directed at enhancing the concept and mainstreaming it in development issues. This will form part of the assessment of how the PRMA has integrated these into its laws with a view of appreciating are the issues of inter-generational equity, distributive justice, and the questions of justitiability.[161]

Scholars have made pronouncements on the concepts of sustainable development.[162] Even the courts have further agreed that development should be carried along certain considerations that accounts for the needs of the current generation and that of future generations. It is appreciated that in analyzing the management of petroleum revenue in Ghana there is a need to pay more attention to the doctrine of sustainable development as has been developed overtime. Overall, there are underlying principles to sustainable development has been seen largely from three dimensions, namely economic, environmental and social sustainability. In other words, they are referred to as the pillars of sustainable development. They are examined in the context of the research as economic, environmental and social.

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[158] See World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987) 8.

[159] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' 23(2) The European Journal of International Law 377, 377–400.

[160] WCED, 8.

[161] The essence of sustainable development is seen in fairness and justice. See A Ross, 'Modern Interpretations of Sustainable Development' (2009) 36 (1) Journal of Law & Society 32, 38.

[162] Alan Boyle and David Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 16-18; P Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in W Lang, (ed.), *Sustainable Development and International Law* (Oxford University Press, 1999) 53.

Although what amounts to sustainable development may be given different interpretations by countries in the realisation of their economic development, the essence of the extraction of mineral resources is for development purpose. It will be of no benefit if natural resources are exploited for immediate economic gratification without giving considerations to the future.[163] Therefore, taking care of future generations should be part of the concern of natural resources' governance. Embracing the tenets of sustainable development will contribute to preventing or minimising the resource curse. First, there will be room for economic development, as the resources will be channelled towards the realisation of the economic objectives of the state, through effecting revenue maximisation and distribution for creation of jobs, investments and a host of other economic induced developments. In the face of this economic development, future benefits will need to be considered through savings for future generations.

The second important consideration will be that the environment should not be allowed to degenerate because of the bounty from natural resources. The impact of exploitation of petroleum resources is injurious to the environment. Most resource cursed countries do not usually factor in the long-term impact of the obnoxious substances on the environment and future generations. Resources extraction must give considerations to this; the environment should not be subjected to any form of exploitation that will create negative impact on the people.

There is also the socially motivated objective which sustainable development has been considered as being capable of attaining.[164] In fact, the analyses in the article by Lwabukuna captures how the laws related to the petroleum resources in Ghana attempt to promote sustainable management and utilisation of petroleum revenue.[165] Sustainable development can promote social objectives through the promotion of education, infrastructural development and encouraging and eliminating cultural barriers and

[163] T Schrecker, 'Sustainability, Growth and Distributive Justice: Questioning Environmental Absolutism in J Lemons, L Westra and R Goodland (eds), *Ecological sustainability and integrity: Concepts and Approaches* (Kluwer Academic Publishers, 1998) 218-234, 223.
[164] See Ben Purvis, Yong Mao and Darren Robinson, 'Three Pillars of sustainability: In Search of Conceptual Origins' (2019) 14 Sustainability Science 681, 685-687.
[165] See Olivia Lwabukuna 47-60.

enhancing social cohesion in society. It can constitute the bases for research and development in the promotion of petroleum production, exploration as well as diversification of petroleum resources and improving upon the inclusion of other energy sources into the energy mix.

Economic sustainability is an important pillar.[166] A development that is sustainable should be able to translate to the good of the people. Sustainability should bring about economic development and the people should have the impact of such development. Economic development will mean an increase in revenue of the country both in terms of GDP and foreign exchange earnings. There will be room for business and trade. Investment will be felt in the sector of the country and the development indices of such a country will be one to be reckoned with.

Environmental sustainability is the most prominent pillar. The consequence of environmental sustainability tends to support the notion that where there is development, there is bound to be some forms of environmental degradation. The degradation of the environment will lead to harm. This raises the concern on the right of the persons to healthy environment. There is the need to ensure that development does not have negative impact on the people. The environment should be kept healthy without the people adversely affected thereby leading to diseases, loss of lives. Development and the environment are linked because development leads to environmental stress. Thus the ecological carrying capacity of the environmental is affected.

There is the social dimensions to sustainable development also have far-reaching implications. Development should bring about incorporation of social values. Developed should enhance the social cultural aspect of the people. It should also create an avenue of limiting the social gaps between the poor and the rich in the society. Development should enhance civilization within the society. It should be avenue for example for the promotion of education. In the context of petroleum revenue management, it will be important that the proceeds of oil revenue should have positive impact on the people of Ghana. It should be

[166] BJ Brown, ME Hanson, DM Liverman, RW Merideth,'Global Sustainability: Toward Definition' (1987) 11 Environ Management 713, 716-717.

used for the development of schools and other social infrastructure and facets of life.[167] This will foster unity among the people where resources are distributed and the level of poverty is reduced thereby closing the gaps between the rich and the poor in the society.

2.5 FURTHER RELEVANT UNDERPINING THEORIES

2.5.1 Theory of Distributive Justice

The concept of distributive justice has become a very important concept in natural resources governance. Distributive justice as a concept has been well developed by Rawls. Rawls idea of justice connotes that with is just, fair and equitable. The hallmark of the doctrine as theorized by Rawls is that there should be Firstly, equality of rights and liberties of the people; equal opportunities for all; and thirdly economic inequalities should be arranged with a focus maximising benefits of those who are with the least advantaged in the society.[168] This connotes that in resource distribution, all are equal and it will be equitable that resources are channeled to those that cannot afford it or distributed according to needs. There should be fair distribution of the national wealth across the country. This is in line with the antithesis of the resource course which has been put forward to ensure that oil rents do not end in empty hands but a distributed. A major agitation in developing countries is the challenge by a group that they have not been given fair share of the natural resources within their domain. Equitable distribution of petroleum resources or revenue is a way of enhancing the development of a country. This will allow for a spread of development because the benefit of being a resource rich country will be felt by all. If we must take the theory of distributive justice into account as forming the theoretical underpinnings of the research, it means that the PRMA should show that if offers fair utilisation of petroleum revenue for the good of Ghana meeting the needs of the current generation and the future

[167] Philip Lawn, 'Ecological Economics: The Impact of Unsustainable Growth' in Constance Lever-Tracy, *Handbook of Climate Change and Society* (Routledge 2010) 96.
[168] John Rawls, *A Theory of Justice* (Revised Edition, Harvard University Press, 1999) 266–67.

generation. This are central to the questions sough to be answered in the thesis. Thus the basic structure of the society as well as its institutional structure have far-reaching consequences in the determinants of distributive justice in the society. In the same token, there are other approaches to view of distributive justice such as the perspective of utilitarianism as propounded by Bentham. Distributive justice is viewed from the distribution of resources to meet the welfare of the society under a situation whereby the happiness of the society is maximised.[169]

2.5.2 Stakeholders' Theories

The stakeholders are persons that are affected directly or indirectly by the actions in governance. Its development has been popularized in corporate governance through by the works of Freeman, who see corporate governance essential for the success of an organization.[170] Stakeholders involve a broad spectrum of persons such as regulators, the companies, media, host communities and the citizens that will be adversely affected by a venture or a decision in the society.[171] There is a need that the various interests are harnessed and protected in the society is progress is to be achieved. For example in natural recourse governance, it will be expected that the host communities see the governance as being impactful. The companies operating in the natural resources sector should also perceive the governance as impactful. Overall, the citizens and host communities should also come to the terms that the governance is done for the common good of the community and the people. Interest balancing is key in operation in taking account of stakeholders. There are therefore circumstances where the interests may be compatible or incompatible.[172] Realisation of sustainable development therefore may have linkages to the promotion of the interest of the various stakeholders that seek to achieve, economic, social

[169] JW Harris, *Legal Philosophies* (2nd edn, Butterworths, 1997)41.
[170] R E Freeman, Strategic Management: A Stakeholder Approach (Pitman, 1984) 31–42.
[171] Henrique Barros de Cerqueira Paes, 'Investigation into Stakeholders' Influence on the Environmental Strategies of Oil Companies - A Case Study of Petrobras' (2012) 2(3) Online Journal of Communication and Media Technologies 71, 74.
[172] Andrew L Friedman and Samantha Miles, 'Developing Stakeholder Theory' (2002) 39(1) Journal of Management Studies 1, 1–21.

and environmental claims.[173] Stakeholders are crucial to success of a venture and it will be more instructive for legislators to take account of it in lawmaking process.[174]

2.5.3 Stewardship Theory

The stewardship theory can be taken to be "a framework which argues that people are intrinsically motivated to work for others or for organizations to accomplish the tasks and responsibilities with which they have been entrusted".[175] As it implies, there should be stewardship in the management and governance of natural resources. Stewardship therefore is the taking into account a responsibility of behalf of the people. This will mean that there should be a review by the people and the government will need to render account on the use of the resources for the good of the people of Ghana. It has been posited that, "stewardship involves business decision-makers putting the interests of others (including the environment) ahead of their own".[176] Prioritizing the need for sustainable development of Ghana should be the central objectives of ensuring that the resources are appropriately utilised. Therefore, it will be important that there is accountability for the development of the people from oil and gas recourse of the nation. Petroleum revenue management centers on development of fro the common good of the people. This means there should be accountability in the collection of the revenue as well as adequate management and multiplication of the resources. There is therefore a link of accountability and transparency in the management of petroleum revenue with the concept of stewardship.

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[173] See Reinhard Steurer, Markus E Langer, Astrid Konrad, and André Martinuzzi., 'Corporations, Stakeholders and Sustainable Development I: A Theoretical Exploration of Business-Society Relations' (2005) 61(3) Journal of Business Ethics 263, 263-81.

[174] Michael Jay Polonsky and Patrick J Ryan, 'The Implications of Stakeholder Statutes for Socially Responsible Managers' (1996) 15(3) Business & Professional Ethics Journal 3, 3.

[175] K Menyah, 'Stewardship Theory' In SO Idowu, N Capaldi L Zu, AD Gupta (eds), *Encyclopedia of Corporate Social Responsibility* (Springer, 2013) 87.

[176] Oliver Balch, 'Deconstructing CSR: Stewardship Theory', https://www.reutersevents.com/sustainability/deconstructing-csr-stewardship-theory, accessed 20 May 2021.

2.6 CONCLUSION

This chapter took a look at the resource curse phenomenon which is synonymous with resource rich countries. It used the Spanish and Nigerian experience which are known examples of resource curse to explain the phenomenon. The research also analyses similar terms such as Dutch disease and financial aid curse and their various effects such as environmental degradation, monochromic economic system and civil strife. The resource curse is a theory that resource rich countries are prone to economic decay and underdevelopment compared to their counterparts which are less endowed in natural resources.

The prevalence of contemporary examples such as Norway, Canada, and Botswana support the institutional perspective that natural resources per se does not result in resource curse but is dependent on the institution that is saddled with the responsibility to manage the revenue accruable from the natural resources. Credible institutions are therefore required to prevent or overcome the resource curse. These institutions will check corruption and provide a means for a swift resolution of disputes surrounding the utilisation of resources.

CHAPTER THREE: LEGAL PERSPECTIVES OF PETROLEUM REVENUE GENERATION AND MANAGEMENT IN GHANA

3.0 INTRODUCTION

The issue that this chapter seeks to discuss is the legal provisions on how Ghana has expended its petroleum resources through revenue conversion for future generations in the form of fiscal and tax regime, management of petroleum wealth and investments of proceeds from petroleum wealth. This will form the bases to answer the research question on how Ghana should manage and utilise its petroleum revenues to meet present needs and those of the future generations.

Before 2016, the principal law for upstream petroleum exploration and production in Ghana was the Petroleum (Exploration and Production) Act 1984.[1] Since then Ghana has progressed with its law on petroleum resources extraction as shown in the passage of the Petroleum (Exploration and Production) Act 2016 which replaced the 1984 Act. However, the new law contained saving provisions.[2] With the combined effect of the PRMA 2011 and the above laws, it is the desire of the government of Ghana to enhance the sustainable management of petroleum revenues and allay the fears of the resource curse which, is also referred to as paradox of plenty.

In Ghana, the management of the new windfall petroleum revenue is a major question going by the fact that the management of the revenue from other mineral resources in the

[1] Tsatsu Tsikata, 'Re-Shaping the Framework for Petroleum Exploration and Production – Ghana's Experience' in Einar H Bandlien (ed), *Policy and Management of Petroleum Resources* (Nopec AS 1990) 294.

[2] It is provided in Section 97 of the Petroleum (Exploration and Production) Act 2016 that "(1) The Petroleum (Exploration and Production) Act, 1984 (PNDCL 84) is hereby repealed. (2) Despite the repeal of PNDCL 84, the Regulations, rules by-laws, notices, orders, directions, appointments or any act lawfully made or done under the repealed enactment and in force immediately before the commencement of this Act shall continue to have effect until revoked, cancelled or terminated. In the same token, Section 96 provides "(1) Petroleum agreements entered into before the commencement of this Act remain valid. (2) A licensee, contractor, sub-contractor, the Corporation and any other person engaged in a petroleum activity shall comply with the relevant provisions of this Act".

country was considered as questionable.[3] Therefore if Ghana fails to manage its petroleum revenue effectively it will lead to the resource curse with a negative impact on the livelihood of the citizens.[4] More so, the new oil find is capable of creating an atmosphere of tension in the polity from aggrieved stakeholders with varied expectations on what the benefits of the proceeds of oil should be.[5] Avoiding social dislocation therefore depends on how each country becomes responsive to tackling the problem of its resource wealth so that it does not translate into a curse. Oil and gas resources should be utilised for the good of the state and its citizens. There should be laws that will enhance sustainable utilisation of the resource and not allow it to be squandered or not appropriated for the proper motive of the stated objective.

This chapter has set the context through the legal analyses of the main laws connected to petroleum revenue management. The purpose of this chapter is to examine the legal regime for petroleum revenue generation and management in Ghana. This is to enable the appreciation of the factors to be considered and put in place for successful promotion of petroleum revenue management in order to address the resource curse in Ghana.

3.1 AFRICAN PERSPECTIVES IN SHAPING THE NEED FOR UTILISATION OF NATURAL RESOURCES IN GHANA

Africa is generally seen as a least developed country. Within the Africa regions are initiatives that seeks to promote the development of African countries which should form the bases or at least much commitment for the translation of the petroleum resources revenue for the good of Ghana. For Ghana, it is a member of the Economic Community of West African States (ECOWAS) and it is expected that Ghana should translate the benefits offered by its membership for the economic development of Ghana. The initiatives are endless and it may be essentially too broad for the thesis to take on each of them for extensive analysis. The overall position is that Ghana being a major player in the African

[3] I Gary, 'Ghana's Big Test: Oil's Challenge to Democratic Development' (Oxfam America and ISODEC 2009) 9.
[4] The Institute of Economic Affairs, *Tracking Transparency and Accountability in Ghana's Oil and Gas Industry*, Petroleum Transparency and Accountability Index Report (2012) 1.
[5] Ibid.

international political economy should readily draw inspiration from the practices or at least appreciate the preeminent importance of most of the initiatives in shaping the development in the country.

For example, it can be argued that there is no doubt that the resource governance in Africa through the development of some policy instruments has far reaching implications in shaping the situation in Ghana. The Notable of these instruments are the African Mining Vision, West African Mineral Development Policy in 2009 which has been further updated by the West African Mineral Development Policy of 2012. The African Union through the *Assembly Decision on the Action Plan of the African Mining Vision,* endorsed the *Action Plan for Implementing the Africa Mining Vision*.[6] A notable shared vision relevant to this area of research is the vision for "A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities".

An important consideration that has been put forward is that:

> The key elements to an African Mining Vision, that uses mineral resources to catalyse broad-based growth and development need to be, from looking at successful resource based development strategies elsewhere, the maximisation of the concomitant opportunities offered by a mineral resource endowment, particularly the "deepening" of the resources sector through the optimisation of linkages into the local economy.

The African Mining Vision has certain major tenets such as optimization of knowledge and benefits offered by finite resources; harnessing small scale mining in improving livelihoods into the incorporation into rural and national economy, promotion of principles of sustainability taking into account the environment, socially responsible mining, safety and stakeholders engagement; human and institutional capacity building and promotion of innovation, research and development; diversification of the economy and creation of

[6] African Union through the Assembly Decision on the Action Plan of the African Mining Vision, https://au.int/sites/default/files/documents/30984-doc-assembly_decision_on_mining_0.pdf, accessed 18 May 2021.

competitiveness in mining Africa; promoting transparency and accountability in the resources. Promotion of good governance and enhanced participation of the communities and citizens and equitable distribution of resources.[7]

African Mining Vision should amount to a transformation of the natural resources sectors in African states like Ghana. There is much relevance of the African Mining Vision for African countries such as Ghana if account of the small and artisan mining is taking into consideration.[8] According to Hilson:

> Ghana was an obvious candidate to embrace the AMV, wholesale, given its lengthy history of mining and donor intervention aimed specifically at transforming the sector into a catalyst for economic development. The country seems perfectly positioned to embrace the "Linkages and Diversification" cluster of the AMV because, as explained by the author, its government has enshrined a local content strategy for mining in the *Minerals and Mining (General) Regulations*, 2012.[9]

Pursuant to the African Mining Vision, Ghana developed the Minerals and Mining Policy of Ghana, 2014. The Minerals and Mining Policy has set of underlying policies as follows:

> "1. Ensuring that Ghana's mineral endowment is managed on a sustainable economic, social and environmental basis;
> 2. Extracting and managing Ghana's mineral endowment with due regard to internationally accepted standards of health, mine safety, environmental and human rights protection;
> 3. Fostering the development of a mining sector that is integrated with other sectors of the national economy;
> 4. Promoting the transformation of mining capital into other forms of development capital;
> 5. Contributing to the economic empowerment of Ghanaians by generating opportunities for local entrepreneurship, increasing demand

[7] African Union Commission, *Building a Sustainable Future for Africa's Extractive Industry: From Vision to Action* (African Union Commission, 2011).
[8] K Patel, J Rogan, N Cuba, and A Bebbington, 'Evaluating Conflict Surrounding Mineral Extraction in Ghana: Assessing the Spatial Interactions of Large and Small-scale Mining.' (2016) 3(2) The Extractive Industries and Society 450, 450–463.
[9] Hilson 423

for local goods and services and continuously creating employment opportunities for Ghanaians;
6. Applying modern principles of transparency and accountability to the administration of mining laws and regulations;
7. Ensuring an equitable sharing of the financial and developmental benefits of mining between investors and all Ghanaian stakeholders;
8. Respecting the rights of communities that host mineral resources development;
9. Encouraging local and foreign private sector participation in the exploration for, and commercial exploitation of, mineral resources;
10. Recognising the need to establish and maintain a conducive macro-economic environment for mining investment;
11. Developing a predictable regulatory environment that provides for the transparent and fair treatment of investors;
12. Ensuring availability and accessibility of geo-scientific data necessary for the promotion of minerals sector investment;
13. Incorporating in the licensing system an early focus on mine closure and post closure planning to anticipate and provide ahead for environmental, social and economic consequences;
14. Promoting sustainable livelihoods in mining communities;
15. Supporting the development of Ghanaian mining skills, entrepreneurship and capital by encouraging and facilitating the orderly and sustainable development of small-scale mining in precious and industrial minerals;
16. Maximising opportunities for minerals-related education, training, career development and other support to empower Ghanaians to become owners and managers of mines and other professionals in the mining industry;
17. Respecting employee, gender, children's rights and other human rights in mining, and the removal of obstacles to participation in the mining sector on the basis of gender, marital status or disability;
18. Encouraging mining companies to develop a participatory and collaborative approach with local communities in decision making relating to mine planning, development and decommissioning;
19. Developing streamlined institutional arrangements with adequate capacity for effective promotion and regulation of the mining sector;
20. Acting in harmony with regional and international conventions and other instruments relevant to mining by endorsing and implementing principles that are established in these conventions and instruments".

From the above is well integrated in the minerals and mining sector from a policy perspective. However, these policies does not apply to the petroleum industry, being a nascent sector in Ghana. On the other hand, since Ghana has acceded to the implementation

of the African Mining Vision, to the use of best practices. The African Mining Vision provides that: "the key element in determining whether or not a resource endowment will be a curse or blessing, is the level of governance capacity and the existence of robust institutions". Acknowledging the role of international best practices such as the EITI, the Africa Mining Vision sates that "there are clearly no short cuts out of this conundrum, but it can be argued that the international environment has improved for breaking the resource curse cycle".

It is also within the agenda of the African Mining Vision has as the short term objective within its action plan the Mainstreaming of EITI principles "in national policies, laws, and regulations; encourage establishment of national oversight bodies and implicate parliamentarians and independent committees in the monitoring of mining projects".[10] It is also makes a case for EITI to support "improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas and mining".[11]

The African Mining Vision requires the African Union Commission "to develop codes of conduct for mineral resources development and ensure that international agreed norms and standards are adhered to; popularise and promote the domestication into national policies, laws, and regulations relevant provisions of the EITI, EITI ++..".[12]

Right to development is seen as being imperative for developing countries; particularly in Africa.[13] Right to development has been advocated as a distinct rights which Africans should embrace.[14] It is becoming an important consideration worldwide. The emergence of right to development as a distinct aspect of human rights can be traced to the Senegalese Jurist, Keba Mbaye who propounded the concept calling for recognition of right to

[10] African Union, 31
[11] Ibid. 39-40.
[12] Ibid. 34.
[13] Upendra Baxi, "The development of the right to development", in Human Rights in a Post Human World: Critical Essays (Oxford University Press, 2007) 124.
[14] Carol C Ngang, 'Towards a right-to-development Governance in Africa' (2018) 17(1) Journal of Human Rights, 107, 107-122.

development.[15] Consequently the right to development has been propagated and the United Nations General Assembly made a Declaration on Right to development in 1986.[16] According to the Preamble, the UN calls for "...a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom…"[17]. Article 1(1) provides that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[18]

Development and natural resources have much relevance. This is further recognised in Article 1(1) of the UN declaration which provides that: "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources".[19]

Natural resources should be utilized as a tool for development. The existence of natural resource should therefore promote development and not curse for the people. The right to development should reflect in a way that the resources are channeled to development. The people should also have a say on the use of their resources for development. The engagement of the people and ensuring that the people participate in their development are very important considerations that will need to be brought to bear in enhancing the development of the people. Being impoverished and not having adequate standards of living are considered as the bane to development. These find much relevance with the

[15] See Eunice N Sahle, 'On Kéba M'Baye and the Right to Development at 30' in Eunice N Sahle, *Human Rights in Africa Contemporary Debates and Struggles* (Springer, 2019) 231-257.
[16] UN Declaration on the Right to Development, https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx
[17] Preamble, UN Declaration on Right to Development
[18] Art. 1(1), UN Declaration on Right to Development
[19] Art. 1(2). UN Declaration on Right to Development

provisions of Article 6(3) which provides that: "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels".[20] In the same token, Article 10 expressed in normative terms that "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels".[21] The development of efficient laws that promote prudent and sustainable management of petroleum resources is therefore imperative.

Taking a look at the right to development, which can be seen to be a right that has been much popularized and articulated within the UN Systems and as well guaranteed under the Africa Charter on Human and Peoples Right, there is avenue for Ghana to continue to ask for sustainability in the management of petroleum revenue going by the jurisprudence of the African Commission on Human and Peoples' Rights. A catena of authorities within the African Union setting a quite instructive on the observation of treaty obligations. In *Sudan Human Rights Organisation & Another v Sudan*,[22] the African Commission on Human Rights found that the rights in Articles 1, 2, 4, 5, 6, 7(1), 12(1), 14, 16, 18(1) and 22 of the African Charter have been violated by Sudan and more in particular the right to health of the indigenous people Darfur region because of the poisoning of their farms and livestock. The Commission therefore made a recommendation that the right to Government of Sudan should as of urgency, to protect the people against the violation of their rights and carry out investigations and prosecution of the violations, and put in place rehabilitate and develop education, health, water and agriculture.

In *Centre for Minority Rights Development v Kenya*,[23] the African Commission held that:

> The Respondent State [Kenya] … is obligated to ensure that the Endorois are not left out of the development process or [its] benefits. The African Commission agrees that the failure to provide adequate

[20] Art. 6(3), UN Declaration on Right to Development
[21] Art. 10, UN Declaration on Right to Development
[22] (2009) AHRLR 153.
[23] (2009) AHLLR 75.

> compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter

The Commission reasoned further that:

> A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognizing the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.

In *Kevin Mgwanga Gumne Others v Cameroon*,[24] the allegation was that the government did not provide for economic infrastructure in the Southern Cameroon and that the government relocated the sea port from the region. The African Commission found that the action of the government was in violation of the right to development under provided under the Provisions of Article 22 of the African Charter. According to the African Commission, the state of Cameroon was "under obligation to invest its resources in the best way possible to attain the progressive realization of the right to development…" It is therefore appropriate to argue that the petroleum resources in Ghana should be utilised for its development.

3.2 OWNERSHIP OF PETROLEUM AND ACQUISITION OF RIGHTS IN GHANA

In line with the concept of permanent sovereignty over natural resources where countries have in the past vested the ownership and control of natural resources in themselves, Ghana also provides for a similar trend in its law. This provision gives the government a full control over the petroleum resources in the state. According to the provisions of Article 257(6) of the Constitution of Ghana 1992:

[24] African Commission on Human and Peoples' Rights, Communication No. 266/2003.

> Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.[25]

For the avoidance of doubt, the Petroleum (Exploration and Production) Act 2016 re-emphasises the ownership of the petroleum resources by providing that:

> Petroleum existing in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf, is the property of the Republic of Ghana and is vested in the President on behalf of and in trust for the people of Ghana.[26]

This enables the government to, through laws and regulation, dictate the governance and allocation of petroleum rights across the country. Ghana therefore operates the domanial form of ownership where the management and control of petroleum resources rests with the government. In essence, the principle enshrined in the doctrine of permanent sovereignty over natural resources has practical application in Ghana.

The parliamentary control of the petroleum resources is further enhanced by the provisions of Article 268 (1) of the Constitution of Ghana which further contains that:

> Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.

There is the requirement that the resolution for the ratification of the contract or transaction must be by two-third majority of the parliament.[27] The implication of this provision is that the parliament in Ghana will have to approve any form of contract for exploration and

[25] Section 1(1) of the Petroleum (Exploration and Production) Act, 1984 provides that: 'Without prejudice to any right granted, conferred, acquired, recognised or saved in this Law to explore for or produce petroleum, all petroleum existing in its natural state within the jurisdiction of Ghana is the property of the Republic of Ghana and shall be vested in the President on behalf of the people'.

[26] Section 3, Petroleum (Exploration and Production) Act 2016.

[27] Constitution of Ghana, art. 268 (2).

production entered between the government of Ghana and its agency with any other foreign entity. This provision is of critical importance given the fact that the promotion of exploration and production of Ghana's oil and gas sector, in the absence of indigenous actors, will require the engagement of foreign investors and multinational oil corporations. The Petroleum (Exploration and Production) Act 2016 provides that "A body corporate shall not, unless otherwise provided in this Act, engage in the exploration, development and production of petroleum except in accordance with the terms of a petroleum agreement entered into between that body corporate, the Republic of Ghana and the Corporation".[28] Furthermore it is provided that "The Minister shall represent the Republic of Ghana in the negotiation of the terms of a petroleum agreement and shall enter into a petroleum agreement on behalf of the Republic".[29] To further emphasise the requirements of parliamentary ratification of the agreement it is provided that "A petroleum agreement entered into by the Minister shall not be effective if it is not ratified by Parliament in accordance with article 268 of the Constitution".[30]

In the case of *Attorney General v. Balkan Energy Ghana Limited*,[31] the Ghanaian Supreme Court confirmed the validity of the provisions of Article 268. In this case the Supreme Court held that a power purchase agreement entered by the government of Ghana with a foreign company without obtaining the ratification of Parliament was unenforceable. In the case of *Amidu (No. 1) v. Attorney General*,[32] the Supreme Court of Ghana observed that: an international business transaction requires parliamentary approval and "a contract made in breach of Article 181(5) of the 1992 Constitution was null and void and it would create no rights. It should not be legitimate to evade that nullity by the grant of a restitutionary remedy".

[28] Section 10 (1) of the Petroleum (Exploration and Production) Act 2016.
[29] Section 10 (12) of the Petroleum (Exploration and Production) Act 2016.
[30] Section 10 (13) of the Petroleum (Exploration and Production) Act 2016. The Petroleum (Exploration and Production) Act 2016 though allows for the extension of a petroleum agreement beyond the stipulated 25 years (See Section 14 (1)) but where such extension is granted by the minister, parliamentary approval must be sought (See Section 14 (2) and (3).
[31] [2012] 2 SCGLR 998.
[32] [2013-2014] SCGLR 112.

Basically, the rights that are acquired in the Ghanaian oil and gas industry can be grouped into two. First, acquisition of rights can be through the obtaining of the reconnaissance licence for the conduct of data collection, seismic survey and data interpretation and evaluation; and secondly, participation in Petroleum Agreement. The Ghana National Petroleum Corporation is involved in upstream petroleum transactions through the compulsory acquisition of stakes in the various contractual arrangements in operation with oil companies. This is granted for carrying out studies and the survey for exploration of petroleum resources in a defined area.[33] The law allows for the acquisition of production rights in the oil and gas industry through the participation in petroleum agreements with the Ghana National Petroleum Corporation. It provides for selection of participants to be based on public competitive bidding arrangement. The Ghana National Petroleum Corporation is expected to hold not less than 10% of the interests in the blocks covered by the contract area. There is the Model Petroleum Agreement which is a template provided by the government of Ghana that is adapted based on the negotiation of the parties.

Having looked briefly at the legal regime on ownership and the acquisition of rights in the oil and gas sector in Ghana, the next step the researcher takes is to assess how the law in respect of petroleum revenue management can promote sustainable management of petroleum resources thereby avoiding the resource curse. The proceeds from oil can be used for the betterment of the lives of the people.[34]

Since Ghana has permanent sovereignty over the petroleum resources in its domain, it can provide for ways it chooses to manage the resources. Like other countries, the management of petroleum resources has been achieved through the use of the laws and contractual arrangements. To aid this will usually require the establishment of institutions responsible for management in line with the agenda of the government to extract and optimally utilise the proceeds for the benefits of the state. Therefore, sustainable management of petroleum

[33] See of the Petroleum (Exploration and Production) Act 2016.

[34] Damilola Olawuyi, 'The Increasing Relevance of Rights-Based Approaches to Resource Governance in Africa: Shifting from Regional Aspiration to Local Realization' (2015) 11(2), McGill International Journal Sustainable Development Law & Policy 293, 319.

resources requires that the institutions are well positioned to address the resource curse challenges. It is through the existence of strong institutions that private efficiency and public accountability can be effectively achieved.[35]

Briefly, the key institutions in the oil and gas industry are as follows: The ministry is the executive arm of the government. The Minister has functions in the oil and gas industry. Most oil and gas transactions are subject to the actions taken by the Minster as he negotiates on behalf of the government. The Minister is appointed by the president and it is expected that the Minister will do the bidding of the president. The various laws recognise the powers of the minister in relation to petroleum or operations and the management of petroleum resources (revenue) which is the focus of the thesis. The Petroleum Commission is responsible for the regulation and coordination of petroleum activities in Ghana. The Petroleum Commission is established under the Petroleum Commission Act. It is responsible for overseeing the upstream and midstream oil and gas sector as it affects the various participants in the oil and gas industry. It is practically a major regulator for the industry.

The corporation with the corporate mandate to represent and carry out commercial activities across the value chain of the oil and gas industry in Ghana is the Ghana National Petroleum Corporation (GNPC). Established in 1983 GNPC is a corporate entity. It is the national oil agency. It is responsible for ensuring that the government's interest is protected and well represented in oil and gas transactions. Countries have explored varied options in the exploitation of the petroleum resources through either allowing GNPC to fully take control in exploitation of petroleum resources or to leave the sector in the hands of the private sector or allow a combination of national oil company and the private sector to engage in petroleum exploration and production. Ghana has therefore opted for the participation of the national oil agency and private sector in petroleum exploration and

[35] I Kolstad, A Wigg and A Williams, 'Mission Improbable: Does Petroleum-related Aid Address the Resource Course' (2009) 37 Energy Policy 954, 957.

production.[36] It is the mechanism for the state participation in the oil and gas industry. All petroleum agreements entered into by the government are through GNPC. It holds the interest of the government in these agreements.

3.3 PETROLEUM REVENUE GENERATION

Examining the petroleum revenue sources is an important consideration that this chapter brings on board for some obvious reasons. Firstly, it is the chief source of revenue that accrues to the state. Secondly, it shows the government take from the oil and gas activities can aid in making projections giving room for the need for accountability. For example, even if the government failed to declare what has accrued to it from petroleum revenue of the state, the amount accruing to the government can be obtained through the tax audit of companies or from the balance sheets or the financial statement of companies. It gives an insight into knowing whether the fiscal regime is one that could be sustainable given the revenue accruing to the government and the liabilities of oil companies in the light of other developments in other jurisdictions and international oil prices.[37] The approach adopted in Ghana for it to maximise its revenue in the oil and gas industry is through the use of fees, signature bonus, royalties, equity stake in investments and petroleum income taxation.[38]

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[36] See Kow Kwegya Amissah Abraham, 'Contractual Agreements in Ghana's Oil and Gas Industry: In Whose Interest?' (2017) 8 (2) Afe Babalola University Journal of Sustainable Development Law and Policy 186, 187.

[37] It is appreciated that the oil and gas industries are expanding their operational bases to other frontiers where oil and gas are discovered. This is on the increase more countries in sub-Saharan Africa are becoming oil and gas producers. If the fiscal regime in Ghana is less competitive, there will be the tendency that these new frontiers where oil and gas are discovered will be given more considerations than Ghana which is also relatively young as an oil and gas producer. Furthermore with the volatility of oil and gas in the international energy market, it is important that the regime in Ghana must be responsive and be very flexible to accommodate these changing dynamics. All these are very crucial considerations for sustainable management of oil and gas resources.

[38] See section 6 of the PRMA 2011 that provides that receipt from petroleum include: "(a) royalties from and additional oil entitlements, surface rentals, other receipts from any petroleum operations and the sale or export of petroleum; (b) any amount from direct or indirect participation of government in petroleum operations; (c) corporate income taxes in cash from upstream and midstream petroleum companies; (d) any amount payable by the national oil company as corporate income tax, royalty, dividends, or any other amount due in accordance with the laws of Ghana; and (e) any amount received by government directly or indirectly from petroleum resources not covered by paragraphs (a) to (d) including where applicable,

With the discovery of oil and gas in 2007, Ghana, like most countries, commenced in getting the proceeds from oil through the use of preproduction charges.

3.3.1 Fees

Countries generally will not wait for the proceeds from oil to come from production. The use of fees from the application of licences was utilised by the government. Upon application for a licence for an oil block or blocks, the applicant may be invited to inspect data for a fee of 1,000 United States Dollars, which is non-refundable.[39] The application fee is 10,000 United States Dollars.[40]

3.3.2 Bonuses

Companies are also required to pay signature bonuses upon the signing of the petroleum agreements entered with the Ghana National Petroleum Corporation. According to section 88 of the Petroleum (Exploration and Production) Act 2016, "A contractor shall pay bonus to the Republic as may be prescribed, except that where the type and quantum of the bonus payable is not prescribed, the bonus shall be paid as otherwise provided in accordance with the terms of a petroleum agreement in respect of the area to which the agreement relates".

3.3.3 Additional Entitlements

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capital gains tax derived from the sale of ownership of exploration, development and production rights". See also section 61 of the PRMA which provides that "petroleum revenue" includes (a) royalty in cash or in equivalent barrels of oil or equivalent units of gas, payable by a licensed producer, including the national oil company or a company under a Production Sharing Agreement or other agreement; (b) corporate income taxes payable by licensed upstream and midstream operators; (c) participating interest; (d) additional oil entitlements; (e) dividends from the national oil company for Government's equity interest; (r) the investment income derived from accumulated petroleum funds; (g) surface rentals paid by licensed producers; or (h) any other revenue determined by the Minister to constitute petroleum revenue; derived from upstream and midstream petroleum operations".

[39] CMS Cameron McKenna LLP, Conducting oil and gas activities in Ghana (2016),

[40] Ibid.

There is the provision made to enhance the revenue of the government from the additional oil entitlement in section 89 that provides that "the Republic is entitled to a portion of a contractor's share of petroleum produced from each field on the basis of the after-tax inflation-adjusted rate of return that the contractor achieved with respect to each field".

2.3.4 Royalties

It is a fact that oil companies pay royalties that enable the government to generate revenue. Royalty entails the "entitlement of the Republic to a portion of petroleum produced and saved and not utilized in petroleum activities from each field and which is calculated as a percentage of gross daily production rates without regard to any prior deductions".[41] The contractor has an obligation under the Act to pay royalties for gross volume of petroleum produced and saved.[42] The law provides that "royalty to be paid is as prescribed, except that where the rates of royalty payable are not prescribed, royalty shall be paid as other- wise provided in accordance with the terms of a petroleum agreement in respect of the area to which the agreement relates".[43] The royalty is required to be paid in kind except the minister directs that it should be paid in cash.[44] The rate of royalty is set out in the petroleum agreement to be 12.5 % of gross crude oil production.[45] The royalty for gas production is fixed at 5 %.[46] All payments of royalties in kind are made to the corporation which in turn makes sales and pays the proceeds to the state as required.[47]

3.3.5 Acreage Fees

[41] Section 95 of the Petroleum (Exploration and Production) Act 2016.
[42] Section 85 (1) of the Petroleum (Exploration and Production) Act 2016.
[43] Section 85 (2) of the Petroleum (Exploration and Production) Act 2016.
[44] Section 85 (3) of the Petroleum (Exploration and Production) Act 2016.
[45] Article 10.
[46] Article 14.7 (a).
[47] Section 85 (6) of the Petroleum (Exploration and Production) Act 2016.

Annual acreage fees are also paid for acreages held by companies.[48] The amount for the acreage fees is prescribed by the Minister but in the absence of a prescription of the amount payable, it will be determined by the petroleum agreement. The model petroleum agreement provides for 30 US Dollars per square kilometre for the exploration phase and 50 and 75 US Dollars per square kilometre for the first and second extension periods respectively.[49] The fee for the development and production is put at 100 US Dollars per square kilometre.[50] Thus it is provided in the Act that "The Minister shall prescribe the amount to be paid, except that where the amount is not prescribed, the annual acreage fees shall be as provided in accordance with the terms of a petroleum agreement in respect of the area to which the agreement relates".[51]

3.3.6 Taxation of Petroleum Income

This is followed by the utilisation of the tax regime to also get revenue from the oil companies upon the sales and making of profits by the companies. The above arrangement constitutes the fiscal regime of Ghana. "Every person carrying on petroleum operations shall, subject Charge of to the provision of this law, pay for each year of assessment a tax on his chargeable income calculated in the manner provided".[52] The chargeable income is arrived at for the purpose of taxation upon carrying out deductions allowed under the law.[53] The tax rate is put at 50 % except it is provided for otherwise in the petroleum agreement. Therefore, in the absence of any agreement to the contrary, petroleum income shall be taxed at 50%. By this provision, the government has given a leverage for the negotiation of the government take. To a large extent, it is the agreement of the parties that determines the amount to be charged by the state.

[48] Section 86 (1) of the Petroleum (Exploration and Production) Act 2016.
[49] See Article 12.
[50] See Article 12.
[51] Section 86 (2) of the Petroleum (Exploration and Production) Act 2016.
[52] Section 1.
[53] Section 2. The list of deductions are contained in section 3 of the law to include rentals; royalties; interest, fees or charges, expenses incurred for repair of premises, machineries and plants, debts incurred in the course of petroleum operations; deduction of pension of employees, etc.

A key consideration in the sector is the need for fiscal stability and also the need for the government to be in a position to amend the fiscal regime and meet its development needs. The question for determination will be to what extent has the current fiscal regime been able to ensure that the petroleum resources will bring about maximisation for the people of Ghana. On the one hand, the oil and gas companies will oppose vehemently any alteration in the regime that undercuts their profits. This section will therefore look into the law and consider whether Ghana is likely to make fiscal adjustments in its petroleum arrangements or whether it is locked into the contract it has entered into with investors. Ghana is likely to encounter some difficulties in the management of its petroleum resources through the increase of the government take if measures are not clearly in place to check against that.

According to the Petroleum (Exploration and Production) Act 2016 in section 87, "A licensee, contractor, sub-contractor and the Corporation shall pay taxes, including petroleum income tax and capital gains tax in accordance with applicable enactments". The complications arising from this development is that the petroleum tax law applicable in Ghana is the Petroleum Tax Law of 1987. Ghana did not amend the law even upon commercial discovery. Therefore the tax regime in the country is governed by a pre discovery tax law. There may be challenges for Ghana if it attempts an amendment should investors make a windfall profit or there is a fall in oil prices that necessitates the need to device means to increase government take. Though Ghana could place reliance on its sovereignty over natural resources or petroleum resources as giving her the powers to amend her laws and bring them in tune with the development in the oil and gas industry this may be viewed by the foreign oil and gas companies as a breach of commitments made by Ghana.

There are therefore some international law questions that can be conversed in relation to this development. This will adversely affect the resources of the state, and Ghana will need to defend herself before international investment arbitral tribunals and could even lose the arbitration and be made to pay compensation for the change in its legal regime. To strengthen this argument it will be important to consider whether Ghana can be found liable

internationally for the change in her legal regime for the purpose of increasing the government's take and also guaranteeing proper management of petroleum revenue.

3.4 THE MANAGEMENT OF PETROLEUM REVENUE

The PRMA is the *lex specialis* of the management of petroleum revenue in Ghana.[54] The conception of the petroleum revenue management law was to provide for accountability and foster sustainability in addressing issues such as price volatility.[55] Going by the preamble of the law, it is provided that "to provide the framework for the collection, management of petroleum revenue in a responsible, accountable and sustainable manner for the benefit of Ghana in accordance with Article 36 of the Constitution and for related matters".

The provisions of Article 36 are part of the Directive Principles of State Policy contained in the Constitution. The principles underlie the aspirations of the government. Accordingly, Article 34 (1) of the Constitution provides:

> The Directive Principles of State Policy contained in this Chapter shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

Therefore, the PRMA 2011 specifically sets the application of Article 36 as the core guidance in the application of the provisions of the Act. The provisions of Article 36 of the constitution in the context of petroleum revenue management will be examined here. The preliminary conclusion for this is that these would form part of the benchmark for assessing

[54] This is confirmed by the provisions of Section 1 (a) of the PRMA 2011, which provides that where there is any conflict between the provisions of this Act and (a) any other enactment, or (b) the terms, conditions and stipulations in a petroleum authorisation, on the collection, allocation and management of petroleum revenue, the provisions of this Act shall prevail.

[55] P Heller and A Heuty, 'Accountability Mechanisms in Ghana's 2010 Proposed Oil Legislations' (2009) 4 Ghana Policy Journal 50-67.

the application of the petroleum revenue management law in making a conclusion for the thesis. Article 36 (1) states that:

> The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy.

In essence, petroleum revenue should be used to provide for economic development and meet the needs of the people and offer a range of social security services for the people in the form of infrastructural development and other forms of social amenities.

Article 36 (2) provides: "The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include:

"the guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity"-citizens engaged in employment in the oil and gas sector should ideally have sufficient remuneration for the services they render in the oil and gas industry;

"ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy"-promotion of private investor in the oil and gas industry should be projected and the investment climate should be favourable to investors;

"ensuring that individuals and the private sector bear their fair share of social and national responsibilities including responsibilities to contribute to the overall development of the country"-The stakeholders should be able to contribute to the development of the country through social responsibility initiatives which will include earmarking the oil revenue for the good of the people and the state;

"undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular, improving the conditions of life in the rural areas, and generally, redressing any imbalance in development between the rural and the urban areas"- this

connotes that the petroleum revenue should reflect equitable distribution in the development of the various regions in Ghana;
"the recognition that the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty"-revenue should be utilised to meet the basic necessities of the citizens.

Article 36 (3) requires that "The State shall take appropriate measures to promote the development of agriculture and industry". The implication of this is that the petroleum revenue management should give considerations to diversification. Therefore, revenues from petroleum resources can be utilised to facilitate the growth of the agricultural sector. Agriculture remains a major resources and very vulnerable to the resource curse. It is a sector that can easily be neglected when a country is experiencing an abundance of oil, hence the resource curse and Dutch disease syndrome can easily manifest themselves if care is not taken to address the anomaly.

Article 36 (4) provides that "Foreign investment shall be encouraged within Ghana, subject to any law for the time being in force regulating investment in Ghana". The management of the petroleum revenue should therefore be done in a manner that there is the promotion of foreign investments. In the effort of the state to harness its petroleum revenue to the fullest, it must be borne in mind that attraction of foreign investors is key to the development of the oil and gas sector and promotion of foreign direct investment.

Under Article 36 (6) "The State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana" buttresses the earlier proposition made above on promotion equity. Therefore, women should as a matter of national importance not only benefit but should be involved in the petroleum revenue for the development of the economy.

Under Article 36 (9) "The State shall take appropriate measures needed to protect and safeguard the national environment for posterity; and shall seek co-operation with other states and bodies for purposes of protecting the wider international environment for mankind"-Petroleum revenue management should take into cognisance the promotion of sustainable development and environmental sustainable through the cooperation with other states as well as non-state actors. Article 24(1) provides that "The State shall safeguard the health, safety and welfare of all persons in employment, and shall establish the basis for the full deployment of the creative potential of all Ghanaians" calls for employment and capacity building in the oil and gas industry. Under Article 36 (11) "The State shall encourage the participation of workers in the decision-making process at the work place" is instructive on the participation and decision making in the issues pertaining to the management of petroleum revenue in Ghana.

Bearing this in mind the application of the petroleum revenue management law should give much life to realisation of the goals and aspirations of the state as contained in Article 36. Though the fundamental objectives have been expressed in Ghana as not being justiciable as has been articulated in decisions such as *New Patriotic Party v Attorney General*,[56] the more recent decisiom of the Supreme Court in the case of *Ghana Lotto Operators Association v National Lottery Authority*.[57] The Supreme Court of Ghana held that the provisions of Article 36 (1) & (2) are justiciable and more so the contents may meet other international treaty obligations which Ghana is obliged to observe. There is therefore obligation on the government to improve the welfare of the people.[58] By implication, of the judgment the sustainable development contents such as promotion of welfare, rural development and economic development among others as envisioned in the directive principles can be enforced in so far as the citizens can justify such obligations of the government. The trends appears to be changing most especially where the legislature take steps to make laws in areas that are related to the fundamental objectives and directive

[56] [1996-1997] SCGLR 729.
[57] (2007-2008) SCGLR 1089.
[58] Ama Fowa Hammond, Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana (PhD Thesis, The University of British Columbia, 2016) 257.

principles of state policy or placing reliance on the human rights as enshrined in Chapter 5 of the constitution. Furthermore, the reasoning of the court is viewed from the perspectives of facilitating the realisation of economic social cultural rights or in enhancing the constitutional rights that are guaranteed under the Constitution of Ghana.[59] Therefore, with strategic litigation, there may be avenue to place reliance on the Directive Principles of State Policy to continue to call for prudent and sustainable management of petroleum revenue in Ghana.

Furthermore, life has been given to the Directive Principles through their express incorporation in an Act of the Parliament. A proactive way of creating justiciability will be through the use of the law to compel what would have been justiciable as being justiciable. The Long Title provides for:

> AN ACT to provide the framework for the collection, allocation and management of petroleum revenue m a responsible, transparent, accountable and sustainable manner for the benefit of the citizens of Ghana in accordance with Article 36 of the Constitution and for related matters.

The provision of Article 36 is strengthened by the Long Title to the PRMA 2011. It can be argued that the provisions of the Article 36 have the force of a positive law for being recognised in the PRMA and as well as in judicial decisions.

The Petroleum (Exploration and Production) Act 2016 provides for the management of petroleum resources in accordance with the principles of good governance and transparency and accountability.[60] Thus it is provided that "The management of petroleum resources by the Republic of Ghana shall be conducted in accordance with the principles of good

[59] Raymond Akongburo ATUGUBA, *Contemporary Constitutional Issues in our Multiparty Democracy* (Ghana School of Law / Friedrich-Ebert-Stiftung, 2009) 3.

[60] From a theoretical perspective, good governance constitutes ''the manner in which power is exercised in the management of a country's economic and social resources for development" and has as its core elements transparency and accountability. See Hazel M McFerson, 'Extractive Industries and African Democracy: Can the Resource Curse be Exorcised?' (2010) 11 (4) International Studies Perspectives 335, 338.

governance, including transparency and accountability and the object of this Act".[61] From the perspective of this research good governance will entail allowing democratic processes and following due process in the management of revenue accruing to the state from petroleum resources. It will also encompass transparency and accountability. To be transparent therefore will mean the management of petroleum resources should be done in an open manner. Accountability will require that there exist facts on how the petroleum revenue has been effectively or efficiently utilised for the proper purpose. That is to say, "to be accountable is to be liable to be called to account, or to answer for responsibilities, positions, and conduct."[62]

On the other hand, the objectives of the Petroleum (Exploration and Production) Act 2016 are stated as "to provide for and ensure safe, secure, sustainable and efficient petroleum activities in order to achieve optimal long-term petroleum resource exploitation and utilisation for the benefit and welfare of the people of Ghana". In essence, the management of petroleum resources correlates with the sustainable utilisation of the proceeds of oil and gas for the benefits and welfare of the people of Ghana. The existence of a provision of such may therefore be seen as the overriding objective of petroleum resources management in Ghana. It may form the bases upon which a challenge may be brought against the state where the government or officials of the various institutions are found wanting in discharge of their obligation on petroleum resources management.

Table 1: Allocations from the Petroleum Holding Fund (PHF) for the years 2011 - 2018[63]

	2011	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**TOTAL**
GNPC	207.96	230.95	222.32	180.71	126.86	88.6	182.04	305.27	1,544.71
ABFA	166.96	286.55	273.20	409.7	292.98	98.38	169.46	235.1	1,931.70

[61] Section 4 Petroleum (Exploration and Production) Act 2016.
[62] Craig T Borowiak, Accountability and Democracy: the Pitfalls and Promise of Popular Control (Oxford University Press 2011) 6.
[63] PIAC, *Report on Petroleum Revenue Management for 2017: Annual Report* (2018) 54.

GSF	54.81	16.88	245.73	271.76	15.17	29.51	142.68	305.72	1,082.22
GHF	14.4	7.24	105.31	116.47	6.5	12.65	61.15	131.02	454.74
TOTAL	444.13	541.62	846.56	978.01	441.51	229.14	555.33	977.11	5,013.37

The table above shows the distribution of US$5.013 billion revenue that has been accrued to Ghana from 2011 to 2018 into the respective funds discussed below.

3.4.1 Petroleum Holding Fund

The establishment of the Petroleum Holding Fund is for the purpose of receipt of monies accruing to Ghana into the Fund to be held by the Bank of Ghana, for subsequent disbursement as may be required by the law.[64] The collecting authority for the petroleum revenue is the Ghana Revenue Authority which is responsible for the collection, assessment and accounting for the revenue.[65] The obliged entities that are required to make payment into the fund are to do so within 15 days after the month in which the payment is due and notify the Ghana Revenue Authority in writing.[66] There are instances where the government receives oil in place of cash as earlier demonstrated. In such a situation, the PRMA 2011 requires that a report of the payment in lieu of cash should be made to the Ghana Revenue Authority as payment made into the Petroleum Holding Fund and after sales have been made, the proceeds are required to be credited into the fund within six calendar days.[67] The monies in the Petroleum Fund are to be disbursed as follows: payment into consolidated fund for the support of national budgets, payment into the Ghana Petroleum Fund-The Stabilisation Fund and the Heritage Fund respectively and any other funds as may be exceptionally provided by the Act.[68]

[64] Section 2 (1) and (2) of the PRMA 2011.
[65] Section 3 (1) of the PRMA 2011.
[66] Section 3 (2) and (3) of the PRMA 2011.
[67] Section 4 (1) and (2) of the PRMA 2011.
[68] Section 18 of the PRMA 2011. See for instance, Section 24 (1) provides that "Where a transfer is made from the Petroleum Holding Fund for exceptional purposes to refund tax overpayment and to pay

The law specifically sets out a list of areas that the Petroleum Holding Fund should not be used for. Therefore, it is provided that:

> (1) The amount in the Petroleum Holding Fund earmarked for transfer into the Ghana Petroleum Fund, shall not be used
> (a) to provide credit to the government, public enterprises, private sector entities or any other person or entity, and
> (a) as collateral for guarantees, commitments or other liabilities of any other entity.
> (2) In order to preserve revenue streams from petroleum and ensure object of this Act, shall not be any borrowing against Petroleum Holding Fund.

In essence, utilising the fund to offer credit facilities is prohibited in so far as they are in relation to the amount earmarked for the Ghana Petroleum Fund, which will be discussed later. In the same vein, there should be no form of securitisation from the amount earmarked for the Ghana Petroleum Fund. The question for determination at this point will be what becomes of the part of the fund not earmarked for the Ghana Petroleum Fund? If one follows the rule of statutory interpretation, it can be concluded that in so far as the amount of monies that are ploughed into the Petroleum Holding Fund does not touch on the Ghana Petroleum Fund, they can be utilised for credit facilities and for securitisation. The express mentioning of one thing is to the exclusion of others. On the other hand, the provision of Section 4 (2) is quite explicit that no part of the fund should be borrowed and that does not in any way preclude the Petroleum Holding Fund to be used for securitisation of investments provided it is not from the sum earmarked for the Ghana Petroleum Fund.

Under Section 41 (2) "Any contract, or arrangement, to the extent that it encumbers or purports to encumber the assets of the Petroleum Holding Fund and the Ghana Petroleum Funds whether by way of security, mortgage or any other form of encumbrance is contrary to this Act and is null and void". The Court is prohibited by Section 41 (3) from making an order for the attachment of monies in the Petroleum Funds.

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management fees, the transfer amount shall represent a reduction of the Petroleum Holding Fund receipts and shall not be considered as part of the allowable transfer under the relevant Appropriation Act".

3.4.2 The Consolidated Fund

The amount of petroleum revenue earmarked for the annual budget is paid into the consolidated fund from the Petroleum Holding Fund on a quarterly basis. The law provides for restriction on the amount to be earmarked which shall not be more than 70 per cent. Thus Section 18 (1) provides that "The Annual Budget Funding Amount from petroleum revenue shall not be more than seventy percent of the Benchmark Revenue".[69] This is further reaffirmed by the provisions of Section 19 (2) of the PRMA 2011 to the effect that: "The total amount withdrawn from the Petroleum Holding Fund for budget funding for any financial year shall not exceed the Annual Budget Funding Amount approved by Parliament for that financial year". There is therefore an attempt to link the utilization of petroleum revenue to development plans through the provisions of Section 19 (3) which provides for "The exact percentage of the Benchmark Revenue which shall be allocated annually to be Annual Budget Funding Amount shall be guided by a medium-term development strategy aligned with a long term national development plan, absorptive capacity of the economy and the need for prudent macroeconomic management".[70]

Therefore it is further provided in the law that (2) The use of the annual allocation of the Annual Budget Funding Amount shall be (a) to maximise the rate of economic development; (b) to promote equality of economic opportunity with a view to ensure the well-being of citizens; (c) to undertake even and balanced development of the regions; and (d) guided by a medium term expenditure framework aligned with a national development approved by the Parliament".[71] This provision is quite laudable as it tends to set the guidelines to be followed in the utilization of revenue specifically derived from oil and gas. Interestingly, the PRMA 2011 gives a list of activities which the government is expected to use the petroleum revenue for if there are no plans developed in accordance with the Act. The lists provided in the law include:

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[69] The definition section (Section 61) of the PRMA 2011 defines "Annual Budget Funding Amount" as "the amount of petroleum revenue allocated for spending in the current financial year budget".
[70] Section 18 (2) of the PRMA 2011.
[71] Section 21 (1) and (2) of the PRMA 2011.

(a) agriculture and industry;
(b) physical infrastructure and service delivery in education, science and technology;
(c) potable water delivery and sanitation; infrastructure development in telecommunication, road, rail and port;
(d) physical infrastructure and service delivery in health;
(e) housing delivery;
(f) environmental protection, sustainable utilisation and protection of natural resources; rural development; developing alternative energy sources;
(g) the strengthening of institutions of government concerned with governance and t
(h) maintenance of law and order;
(i) public safety and security;
(j) provision of social welfare and the protection of the physically handicapped and disadvantaged citizens.

An examination of each of the areas will indicate that they are in line with the tenets of actualizing sustainable development. Proper utilization of the revenue along these listed goals will promote sustainability. For example, the development of the agricultural and industrial sectors brings about diversification of the economy which will meet current needs and that of the future generation as the future will not be fully reliant on oil and gas will be a way to promote sustainability in Ghana. Likewise, the provision for the utilization of alternative energy sources also has the advantages of ensuring that the limited petroleum resources are not depleted and that the benefits of alternative energy can offer avenues for job creation and also increase the access of the teaming population in need of energy services.

3.4.3 The Ghana Stabilisation Fund

The PRMA 2011 also makes provision for the establishment of the Ghana Stabilisation Fund.[72] The purpose of the Ghana Stabilisation Fund is to prepare for periods where there is

[72] Section 9 (1) of the PRMA 2011.

shortfall in oil and gas revenue accruing to the government. The Act therefore provides that "The object of the Ghana Stabilisation Fund is to cushion the impact on or sustain public expenditure capacity during periods of unanticipated petroleum revenue shortfalls".[73] The source of funding for the Ghana Stabilisation Fund shall come from payments made from the Petroleum Holding Fund based on percentage determined by the parliament.[74] It is for the purpose of providing stimulus package for the economy in terms of shortage. It is therefore a medium for preparing for a rainy day. Therefore, the law provides that if the petroleum revenue collected for the quarter is lower than the Annual Budget Funding Amount in the first quarter of the financial year, the law permits withdrawal to be made from the Ghana Stabilisation Fund.[75]

On the other hand where the revenue generated at the end of each quarter of every financial year is in excess of the Annual Budget Funding Amount by one-quarter, a minimum of 30 percent of the excess will be paid into the Ghana Heritage Fund, while whatever is left of the amount is paid into the Ghana Stabilisation Fund.[76] There appears to be likelihood of leakages in the monies that are to be kept in the Ghana Stabilisation Fund. This is because the minster can set a benchmark on the amount of moneys to be kept in the Fund, subject to parliamentary approval and review from time to time as may be necessitated by microeconomic situations in the country; any other amount in excess of the benchmark goes into the contingency Fund for debt repayment.[77]

3.4.4 Ghana Heritage Fund

The Ghana Heritage Fund is a fund established under the PRMA 2011 as distinct from the Ghana Stabilisation Fund.[78] The Ghana Heritage Fund is established for the purpose of providing "endowment to support development for future generations when petroleum

[73] Section 9 (2) of the PRMA 2011.
[74] Section 9 (3) of the PRMA 2011.
[75] Section 12 of the PRMA 2011.
[76] Section 23 (1) (a) and (b) of the PRMA 2011.
[77] Section 23 (3) and 4 of the PRMA 2011.
[78] Section 10 (1) of the PRMA 2011.

reserves have been depleted" and for receipt of excess petroleum revenue.[79] Like the Ghana Stabilisation Fund, the disbursement of revenue is from the Petroleum Holding Fund and the excess from the Annual Budget Funding Amount.[80] The percentage of what goes into the Ghana Heritage fund is to be determined by the parliament. Parliament has the opportunity of reviewing the Ghana Heritage Fund after fifteen years to determine whether there should be restrictions on the transfer from it into other funds provided in the Act, where such is agreed by majority of the parliament.

3.4.5 Decommissioning Funds

The conduct of oil and gas operations at an area or allocated oil block has a life span given the fact that petroleum resources are a finite. The arrangement for decommissioning is very important because at that stage, the oil companies have managed to recoup their expenses and may not show much interest in exercising the obligation imposed on them regarding decommissioning of the platforms. More so, the ownership of the installations and facilities is transferred to the national oil company, the GNPC that may not have the capacity or ability to manage the assets. There is therefore a need for Ghana to make such arrangements that will guarantee decommissioning. The petroleum revenue management process can be a way to work out such a solution. Decommissioning of the platforms is a very important aspect and there will be need for the restoration of the environment to its normal position and evacuation of the equipment from the platform where it is necessary for it to be done. There are environmental implications and costs associated with the process. Financial resources need be channelled for that purpose and therefore it is important that there should be sources of finance for such clearly spelt out accordingly.

A progressive development in the legal regime in Ghana is the establishment of decommissioning fund under the Petroleum (Exploration and Production) Act 2016. The Act provides thus "A licensee or contractor shall establish a decommissioning fund as prescribed". The definition section of the Act states that the decommissioning fund is a

[79] Section 10 (2) of the PRMA 2011.
[80] Section 11 (2) of the PRMA 2011.

fund meant "for the purposes of funding decommissioning activities upon termination of petroleum activities in an area under a relevant petroleum agreement".[81] The Act, however, does not go further to prescribe how the fund will be operated. However, there may be an indication that future regulation through ministerial powers will create the avenue for the operation of the decommissioning fund. The minister has powers to make regulation for "decommissioning and decommissioning fund" pursuant to the powers conferred to it to make regulations under section 94 (1) and 2 (bb) of the Petroleum (Exploration and Production) Act 2016.

The proceeds of the Fund can also be managed for the good of the people of Ghana. With the developments in science and technology, the viability of an oil well is known. The depletion of the oil well can be predicted, it is therefore important to invest the proceeds collected for the purpose of decommissioning. Employment of fund managers to utilise the fund is a way that will enhance easy decommissioning.

A further major concern will be how to utilise the surplus for a particular project. What if at the end of the decommissioning there are surpluses? This is another silent provision in the law. Will the monies revert back to the state or the oil companies? These are some of the issues that will need to be addressed in the law. There are questions to be asked as to who should keep the fund for decommissioning. Should it be maintained in an account held by the government or should the Fund be kept in banks under an escrow account arrangement where the payer into such an account does not have the right to withdraw the monies paid into the account. There may also be the consideration on whether the fund should be held by fund managers who are capable of transmitting the funds into other meaningful ventures thereby increasing the proceeds. These are very important steps that should be taken in line with the provisions of the law.

The establishment of the Decommissioning Challenge Fund (DCF) in Scotland in preparation of decommissioning in the North Sea is considered to be a right step taken. The fund is in the tune of five million pounds and "will provide opportunities for the supply

[81] Section 95 of the Petroleum (Exploration and Production) Act 2016.

chain in Scotland to benefit from the decommissioning of North Sea infrastructure"; "support infrastructure upgrades and innovation in salvage and transport methods at Scotland's ports and harbours" and encourage engineering scoping work at key sites to build business cases that will attract further private investment".[82] The need for a decommissioning fund has currently been felt in Ghana. The Saltpond Field which turned out not to be viable could not be decommissioned in good time, leading to the spending of 74,192.57 United Sates Dollars in maintenance of the field.[83]

3.4.6 Local Content Fund

The Petroleum (Exploration and Production) Act 2016 provides for the establishment of the Local Content Fund.[84] According to the Act, the objective of establishing the fund is to "provide financial resources for citizens and indigenous Ghanaian companies engaged in petroleum activities".[85] The actualisation of the objective of the fund will require that the monies from the fund should be applied for some particular activities. The Act makes provision of the activities which the fund can be applied to include: "education, training, research and development in petroleum activities for Ghanaian citizens, indigenous Ghanaian companies and Ghanaian institutions of learning"; and loans for small and medium scale enterprises to enhance their participation in petroleum activities.[86]

The success of the funding for local content can only be actualised if there are resources for meeting the fund. The Act gives a provision of list of sources of funds for the local content fund. The Act particularly provides for the sources to include contributions made by contractors as specified in petroleum agreement; contributions made by subcontractors in

[82] Scottish Government, 'Decommissioning Fund Launched', https://www.scottish-enterprise.com/knowledge-hub/articles/publication/oil-gas-decommissioning-action-plan, accessed 4 January 2018.
[83] 'Over US$74,000 spent on idle Saltpond Oil Field', http://www.businessghana.com/site/news/Business/157049/Over-US$74,000-spent-on-idle-Saltpond-Oil-Field- accessed 6 January 2018.
[84] See section 64 of the Petroleum (Exploration and Production) Act 2016.
[85] Section 65 (1) of the Petroleum (Exploration and Production) Act 2016.
[86] See 65 (2) of the Petroleum (Exploration and Production) Act 2016.

the sum of one per cent of the worth of the contract paid by the contractor or licensee; approvals made by the parliament; and grants.

The Board of the Commission are required to open an account in a bank approved by the Controller and Accountant—General, for the payment of monies meant for the fund.[87] To ensure the protection of the fund for being mismanaged there is a requirement for signatories stipulated in the Act. The signatories to the account in respect of payment made from the fund include the chairperson of the Board and the Chief Executive of the Commission; or (b) the chairperson of the Board and one other member of the Local Content Committee.[88]

There is an arrangement made for the management of the fund. The fund is to be administered by the minister and the local content committee.[89] The Minister and the agency shall be responsible for formulation of policies for generation of monies for the fund, determine the monetary allocation to meet the fund's objectives and setting out annual targets of the fund.[90]

The Petroleum (Exploration and Production) Act 2016 provides that "The Local Content Committee may invest a part of the money of the Fund that it considers appropriate in the manner approved by the Minister and in consultation with the Minister responsible for Finance".[91] This will be a good step and is better than keeping the Fund redundant. Nevertheless, it will be better to have such funds to be kept and managed effectively by fund managers rather than leaving it in the hands of the local content committee which may lack the manpower or resources to enhance such investment.

The accounting and auditing requirements pertaining to the local content funds is another important consideration that can be seen as enhancing the local content fund. It is therefore

[87] Section 66 (1) of the Petroleum (Exploration and Production) Act 2016.
[88] Section 66 (3) (a) and (b) of Petroleum (Exploration and Production) Act 2016.
[89] See Section 67 (1) of the Petroleum (Exploration and Production) Act 2016. Section 8 of the Petroleum Commission Act 2011.
[90] Section 67 (2) of the Petroleum (Exploration and Production) Act 2016.
[91] Section 67 (4) of the Petroleum (Exploration and Production) Act 2016.

required that the commission shall keep books of accounts and proper records as approved by the Auditor-General.[92] There is the requirement for submission of the audit report to the Auditor-General which must be done within three months of the completion of the financial year and the Auditor General also has an obligation to forward the report to the Minister within three months of the receipt of such a report.[93] There is an obligation on the Commission to, within one month of receipt of the report, make a report of the operation of the fund to the minister and it shall also include the report of the Auditor-General.[94] The minister is required to transmit the report to parliament and include a statement, where necessary.[95]

3.4.7 Environmental Fund

One important development in Ghana has been the concern raised about exploitation of resources and their environmental imprints on the environment. The establishment of the environmental fund is required to be a form of environmental protection from activities emanating from the exploitation of petroleum resources in Ghana. This is because the proceeds for the fund forms part of the revenue derived because of the activities of petroleum exploitation. It is therefore important that the fund should be properly managed to ensure that the resource curse does not affect the proceeds and the disbursement of the fund in the event of pollution occurring. Section 24 (3) of the Petroleum Management Act 2011 provides that "Where petroleum operations affect a community, appropriate compensation shall be paid for the benefit of the community in accordance with the relevant laws". Where will the monies for the appropriate compensation come from? This remains unanswered in the law.

Funds of this nature should be kept and managed effectively through the private sector. The establishment of private companies to effectively manage the proceeds of the funds is very

[92] Section 68 (1) of the Petroleum (Exploration and Production) Act 2016.
[93] Section 68 (2) of the Petroleum (Exploration and Production) Act 2016.
[94] Section 69 (1) and (2) Petroleum (Exploration and Production) Act 2016.
[95] Section 69 (3) Petroleum (Exploration and Production) Act 2016.

important than leaving it in the coffers of the government. Fund managers can therefore use the payments made into the fund to improve the capital base of the funds. The investment of the proceeds of the fund will bring about increase in the amount meant for the fund. The growth of the fund is important and thus much will be needed to be done to ensure that its capital base is increased.

Other issues that should be determined will be on the kind of business ventures that the fund's manager can venture into. Such funds can attract varieties of investments in various capital projects, they can be utilised in investment in the international bonds market, and real estate. It is advisable that certain amounts from the funds are kept as reserve funds and can be easily accessed. Private sector driven fund management is very important. Therefore, if Ghana is to make progress in petroleum revenue management, structural adjustment in the fund will be required to accommodate management of funds through private sector engagements that promote sustainable investment in the economy. To buttress the point made here, venturing into real estate will increase housing for the people of Ghana given that there is a housing deficit of about 1.7 million homes in Ghana.[96]

It is argued that an important area which the Fund has failed to consider is the utilisation of its proceeds to promote renewable energy in Ghana. Renewable energy is considered to be environmentally friendly and with the commitments made by Ghana to promote climate change mitigation, it will not be out of place that the renewable energy sector benefits from this. For example, Poland has environmental funds and the proceeds are devoted towards the promotion of renewable energy. In the same vein, the United Kingdom has successfully established the carbon trust as a private company to manage the proceeds of the climate levy scheme which is a scheme that taxes carbon intensive energy companies. The proceeds from this fund can be offered as soft loans to investors who in turn can utilise it for the promotion of clean energy projects in the United Kingdom. In the United States, in the 1980s, the United States Congress passed a law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which provided for the

[96] Ghana has a 1.7million housing deficit – Minister of Works and Housing, https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-has-a-1-7million-housing-deficit-Minister-of-Works-and-Housing-708354, accessed 2 April 2020.

establishment of a superfund to prioritise clean-ups arising from environmental pollution and the sources of the superfund, were drawn from crude oil and petrochemicals among others.[97]

3.4.8 Borrowing and Securitisation

The Petroleum (Exploration and Production) Act 2016 leaves some forms of ambiguity in the effort of parliament to ensure that accountability is guaranteed. The law provides that "Any borrowing exceeding the cedi equivalent of thirty million United States Dollars for the purpose of exploration, development and production shall be approved by Parliament and shall be in consonance with the PRMA, 2011 (Act 815)."[98] One wonders whether the borrowing required here is in respect of dealings connected to the Corporation. The question is should it be necessary where the borrowing does not concern the Corporation? What if the borrowing is needed by the oil and gas company to meet its own obligation? The need to require approval may affect the overall interest of the exploration and production if parliamentary approval would have to be sought by the private sector anytime it intends to borrow money that exceeds the threshold of thirty million United States Dollars.

3.4.9 Investment of Petroleum Revenue

There is requirement for the investments to be made in respect of the proceeds of the funds. Section 27 (1) provides that "The resources of the Ghana Petroleum Funds and subsequently the Ghana Petroleum Wealth Fund shall be invested in qualifying instruments prescribed by Executive Instrument. (2) The range of instruments designated as qualifying instruments shall be reviewed every three years or sooner by the Minister on the advice of the Investment Advisory Committee". Investment Advisory Committee is established to

[97] See Anna Rita Germani, Essays on Discretionary Enforcement and Environmental Justice (PhD Thesis, 2011) 29.
[98] Section 10 (15) of the Petroleum (Exploration and Production) Act 2016.

advise the Minister on the Management of Petroleum Funds.[99] It will make proposals and develop policies for the management of the Stabilisation Fund and the Heritage Fund meeting bearing in mind that the resources from which the funds are derived are utilized giving considerations to the future generations. The Minister therefore is to enter into Operations Management Agreement with Bank of Ghana under which there are avenues for investing the resources in the funds.[100] The operation of investment will definitely involve the utilisation of the private sector. This therefore will require further investigation in the next chapter in order to consider whether the legal environment, the corporate law and practice in particular, is supportive of international best practices in corporate governance.

3.4.10 Transparency Considerations in the Management of Petroleum Revenue

Certain transparency principles have been set out in the Act. Accordingly, Section 49 (1) and (2) of the PRMA 2011 requires the management of petroleum revenue and savings, duties discharged under the law required to be executed giving regards to "the highest internationally accepted standards of transparency and good governance". On the other hand if the information is to be such that it will prejudice the functioning of duties regarding the management of the petroleum funds, the Minister may, subject to parliamentary approval, declare the information as confidential.[101] However, such declaration must give reasons and take "into account the principles of transparency and the right of the public to information".[102] The Minister is generally duty-bound to make sure information regarding the management of the various petroleum funds is publicized. This is further tightened by the provisions of section 8 which provides that:

"(1) For the purpose of transparency and accountability, the records of petroleum receipts in whatever form, shall simultaneously be published by the: Minister in the Gazette and at least two state owned daily newspapers, within thirty calendar days after the end of the

[99] Section 29 and 30 of the PRMA 2011.
[100] Section 25 and 26 of the PRMA 2011.
[101] Section 49 (4) of the PRMA 2011.
[102] PRMA 2011.

applicable quarter. (2) The information required to be made public shall also be published online on the website of the Ministry and presented to Parliament on the date of the Gazette publication. (3) The Minister shall publish the total petroleum output lifted and the reference price in the same manner as provided in subsections (1) and (2)".

There is a risk that a provision in the PRMA 2011 that seeks to penalize the unlawful disclosure of information pertaining to the petroleum funds may promote opacity. It is provided that: "A person who unlawfully discloses the content document or information pertaining to operations of the Funds commits an offence and is liable on summary conviction leading to payment of not less than two hundred and fifty thousand penalty units or to a term of imprisonment of not less than seven years or to both".[103] This is further complicated by the fact that the PRMA 2011 does not seem to provide for what constitutes unlawful disclosure of information.

In connection with the resource curse is the need for transparency and accountability in petroleum revenues. The PRMA 2011 gives detailed consideration for transparency and accountability. The Act requires proper books of account should be kept of the various Funds.[104] Therefore there are provisions for internal and external audit of the account of these funds. The internal audit is carried out by the Internal Audit Department of the Bank of Ghana, while the Governor of the Bank makes a report to the Minister or any other person required by the law to receive such reports.[105] On the other hand, the Auditor General has the responsibility of conducting an external audit either directly or by way of delegation.[106] There is an obligation on the Bank of Ghana to submit to the Auditor General within a period of three months after the end of the financial year, financial statements and other documents which are relevant to the petroleum sector for audit.[107] The Auditor General shall thereafter within three months of receipt of the financial statements and relevant documents submit an audit report to Parliament.[108] The Auditor General is required

[103] Section 58 (3) of the PRMA 2011.
[104] Section 43 of the PRMA 2011.
[105] Section 44 (1) and (1) of the PRMA 2011.
[106] Section 45 of the of the PRMA 2011.
[107] Section 46 (1) of the PRMA 2011.
[108] Section 46 (2) of the PRMA 2011.

to determine whether the accounts were properly kept; payments due and disbursements from the Petroleum Funds were duly made; and the management of the funds are according to the Act and shall also bring to the notice of the parliament irregularities discovered.[109] A publication of the report within thirty days of submission of the report to the Parliament must be made.[110] There is provision for special audit as recommended by Section 47 of the Act which provides that: "the Auditor General may carry out special audits or reviews of the Petroleum Funds in the public interest and shall submit reports on audit or review undertaken". There is also the obligation that requires the minister to prepare annual reports on the fund as part of presentation to parliament during presentation of budget statements and economic policies to parliament.[111] The reports should contain relevant documents and information on the funds which should be prepared in a manner that it can be easily disseminated to the public.[112]

The PIAC monitors and evaluates compliance with PRMA. It provides the platform for the engagement of the public in the management of petroleum revenue and independently assesses the use of petroleum revenue. It assists the executive and parliament in the discharge of their oversight functions in relations to the various funds established under the PRMA 2011.[113] It is required to carry out wide consultations on the management of petroleum revenue in line with best practices.[114] The reporting requirement of the committee is explicitly provided in Section 56 which provides that "The Accountability Committee shall (a) publish a semi-annual report and an annual report in at least two state owned national daily newspapers by the 15th of September and 15th of March each year; (b) publish the reports on the Accountability Committee's website; (c) hold public meetings twice each year to report on its mandate to the general public, and (d) submit a copy of its semi-annual report and annual report to the President and to Parliament".

[109] Section 46 (3) and (5) of the PRMA 2011.
[110] Section 46 (4) of the PRMA 2011.
[111] Section 48 (1) of the PRMA 2011.
[112] Section 48 (2) and (3) of the PRMA 2011.
[113] Section 52 of the PRMA 2011.
[114] Section 53 of the PRMA 2011.

The absence of public scrutiny will always give room for poor allocation of the resources.[115] The PIAC is responsible for the promotion of revenue transparency in the oil and gas industry. It is required to bring to the attention of the public and government activities that are connected to revenue generation and management. There is a duty to produce periodic reports and also publish findings in national dailies.

The PIAC recently had to intervene to request that the Corporation should cease spending monies on the nonviable Saltpond Field that already gulped US$74,192.57 between January and June 2017.[116] Situations like these can be seen as undermining the need for judicious use of petroleum revenue. There is therefore no justification to support a waste of such a huge amount by the corporation. Accordingly the PIAC maintained that "the continuous use of oil revenues in the payment of emoluments of redundant staff, coupled with maintenance-related costs of the facilities offshore, is a drain which must not be allowed to continue, and that "the continued use of oil revenues to cater for an idle field did not reflect judicious use of the resources and has, therefore, recommended to the GNPC to speed up efforts to completely decommission the plant".[117] This situation practically demonstrates that supervisory agencies should always be vigilant in ensuring that the actions of the officials in the public and private sectors are conducted with the interest of the preservation of the petroleum revenue of the state.

3.4.11 Sanctions Promoting Revenue Management

The breach of a legal duty may attract punishment. The law in Ghana attempts to create some forms of punishment that can be used to checkmate the leakages of revenue that accrues to the government from petroleum operations. The PRMA also provides for penalties for defaulting entities that are required to make payment into the fund. It provides that "Where the liability of an entity to make a payment is not discharged on or before the

[115] See Peter Arthur, 'Governance of Natural Resources Management in Africa: Contemporary Perspectives' in in K T Hanson, C D'Alessandro, F Owusu, *Managing Africa's Natural Resources: Capacities for Development* (Palgrave Macmillan 2014)

[116] 'Over US$74,000 spent on idle Saltpond Oil Field', http://www.businessghana.com/site/news/Business/157049/Over-US$74,000-spent-on-idle-Saltpond-Oil-Field- accessed 6 January 2018.

[117] Ibid.

due date, the entity shall pay as a penalty, an additional five percent of the original amount for each day of default or the default rate established under any other law, whichever is higher".[118] Section 58 (1) provides for a fine of not less than five hundred penalty units or imprisonment of not less than fifteen years or both, for misappropriation of the petroleum Funds, defrauding, and attempt to defraud or conspiracy in defrauding in relation to the Petroleum Funds or "uses, attempts to use or conspires with another person to use information on the Petroleum Funds or documents relating to the Petroleum Funds for personal benefit or advantage or for the personal advantage or benefit of another person".[119] A person who is convicted of abetting the commission of the offence will be fined not less than fifty thousand penalty units or minimum of imprisoned for a period of 7 years or both.[120]

The Petroleum (Exploration and Production) Act 2016 provides that a person who obstructs the corporation, contractors and subcontractors or their agent and employees in the discharge of their obligations under the Act will be liable upon summary conviction to pay a fine "not less than one thousand penalty units and not more than ten thousand penalty units and, where the offence continues, to a fine of not more than one thousand penalty units for each day during which the offence continues or to a term of imprisonment of not less than one year and not more than three years or to both".[121]

Where petroleum activities are carried out in a manner that contravenes the law, a "fine of not less than ten thousand penalty units and not more than fifty thousand penalty units and, where the offence continues, to a fine of not more than one thousand penalty units for each day during which the offence continues or to a term of imprisonment of not less than one year and not more than three years or to both" upon a summary conviction of such a person.[122] A look at these provisions will reveal that they apply to activities touching on the accrual of revenue to the state for petroleum operations. However, there appears to be

[118] Section 3 (4) of the PRMA 2011.
[119] Section 58 (1) (a) and (b) of the PRMA 2011.
[120] Section 58 (2) of the PRMA 2011.
[121] Section 93 (1) of the Petroleum (Exploration and Production) Act 2016.
[122] Section 93 (2) of the Petroleum (Exploration and Production) Act 2016.

provisions that tend to exculpate the company from corporate criminal liability. This is seen in Section 93(2) of the Petroleum (Exploration and Production) Act 2016 that provides that where there are breaches in respect of the above offences by a corporate entity or partnership, the "director or officer of that corporate body or partnership or any person concerned with the management of the firm shall be deemed to have committed the offence".[123] This concept negates the established and growing notion of corporate liability in criminal matters.

In addition to such penalties, the corporation should also be made to bear some form of penalty. This will project corporate governance and will cause shareholders to ensure that their investments are not exposed to risks owing to the activities of the officers of the companies. Developed countries have successfully demonstrated that firms can be made to be criminally liable for corporate complicities. The United States imposed a fine of 500 million United States Dollars on GlaxoSmithKline upon conviction for corruption committed in China.[124] Siemens was made to make a settlement of 800 United States Dollars because the managers were implicated in bribery scandals.[125]

Other forms of penalties for offences also exist such as engaging in petroleum exploration and production without the existence of a petroleum agreement will attract a fine of "not less than four hundred thousand penalty units and not more than five hundred thousand penalty units".[126] The assignment of a petroleum agreement without approval of the minister will attract a "fine of not less than one hundred thousand penalty units and not more than two hundred thousand penalty units".[127] Even in respect of payment of annual fees, penalties are imposed for the delay. It is provided in the Petroleum (Exploration and Production) Act 2016 that failure to pay "annual fees in respect of the acreage to which the petroleum agreement relates" will attract an "administrative penalty of five per cent of the

[123] Section 93 (2) of the Petroleum (Exploration and Production) Act 2016.
[124] Cindy A Schipani, Junhai Liu and Haiyan Xu, 'A Proactive Approach to Compliance: How MNCs can Eliminate International Commercial Corruption' (2016) Company Lawyer 159, 160.
[125] Ibid.
[126] Section 93 (5) (a) of the Petroleum (Exploration and Production) Act 2016.
[127] Section 93 (5) (b) of the Petroleum (Exploration and Production) Act 2016.

annual fee for each day of the first thirty days after the annual fee becomes due in addition to the outstanding annual fee" and if it persists after the thirty day period, a pay of administrative penalty of one hundred thousand penalty units in addition to the outstanding annual fee must be made to the Commission.[128] These provisions, if effectively implemented can be said to be capable of ensuring that there are no revenue leakages in the oil and gas industry and those found wanting are penalised accordingly. The provision of the need to supply information required to the commission can have a far-reaching implication of enhancing that there is compliance with information that should ideally guarantee the transparent management of revenues that are to accrue to the state. It is provided that noncompliance of an oil company "with a request to provide information under this Act within the period specified in the request, shall pay to the Commission an administrative penalty of ten thousand penalty units in the first instance and a further penalty of ten per cent of the penalty for each day that the information is not provided".[129] Criminality pertaining to the natural resources value chain touches on different stakeholders which could even be public officers, private sector, individuals, and civil societies and can also transcend national boundaries.[130]

Infractions can be validly challenged and corrected if the above provisions are taken into account. Infractions have been observed in the operation of the PRMA. Despite the provisions, there are still some considerable infractions. For example, for the year 2011, there was infractions on the function of the Auditor General regarding audit and report to parliament within a period of three months upon receipt of financial statement in accordance with Section 45 (1) of the Act which requires the Auditor General to audit and to submit to Parliament a report not later than three months after the receipt of the financial statements and other relevant documents from the Bank of Ghana.[131] In 2014, it was found that ABFA funds covered very wide areas thereby not giving room for effective impacts of

[128] Section 93 (5) (f) of the Petroleum (Exploration and Production) Act 2016.
[129] Section 93 (5) (g) of the Petroleum (Exploration and Production) Act 2016.
[130] Olawale Ismail and Jide Martyns Okeke, 'Criminality in the Natural Resources Management Value/Supply Chain' in K T Hanson, C D'Alessandro, F Owusu, *Managing Africa's Natural Resources: Capacities for Development* (Palgrave Macmillan 2014) 66.
[131] PIAC, *Report on Petroleum Revenue Management for 2011: Annual Report* (2012) 33.

the developmental projects on the economy.[132] It was observed that there was no utilisation of 55% of the total ABFA allocation, and the monies were mopped up by the Bank of Ghana by the end of 2015.[133] The percentage earmarked for Agriculture from the ABFA was 11% of for the years 2011-2015.[134] For 2016 only few projects benefited from ABFA allocations, thereby covering limited priority areas.[135]

It was reported that the since February 2013, Oranto/Stone Energy has not taken steps in honouring payment of surface rental standing to the tune of US$67,438.36 as at the time of the preparation of 2016 report by PIAC.[136] It is reported that "only 36.73% of the total ABFA spent in 2017 went into capital expenditure. This is less than the 70% prescribed by the PRMA and is in violation" of the PRMA, while 63.27% was used for goods and services in contravention of Section 21 of the PRMA.[137] Similar contravention was recorded in 2018 report where 50.87 percent was spent on goods and services violating the requirements for capital expenditure for 70%.[138] There was no payment made for gas receipts into the Petroleum Holding Fund thereby breaching Section 3 of the PRMA.[139] Surface rentals due to be paid by Brittania-U, Sahara Energy and Swiss African Oil Company Ltd remained outstanding as reported in 2018 PIAC annual report.[140] No allocation was also made for GIIF in 2018 thereby violating the PRMA that requires that "a maximum of 25 percent of the amount allocated for Public Investment Expenditure under the ABFA shall be allocated to the Fund for the purpose of infrastructure development".[141] For the year 2018, "50.9 percent of the actual ABFA was spent on recurrent expenditure, while 49.1 percent was on public investment". There was also no payment made into the Ghana Infrastructure Investment Fund (GIIF).

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[132] PIAC, *Report on Petroleum Revenue Management for 2014: Annual Report* (2015) 8.
[133] PIAC, *Report on Petroleum Revenue Management for 2015: Annual Report* (2016) 8.
[134] PIAC, *Report on Petroleum Revenue Management for 2016: Annual Report* (2017) 6.
[135] Ibid. 5.
[136] Ibid. 4.
[137] PIAC, *Report on Petroleum Revenue Management for 2017: Annual Report* (2018) 52.
[138] PIAC, *Report on Petroleum Revenue Management for 2018: Annual Report* (2019), 91.
[139] Ibid. 51.
[140] Ibid.
[141] Ibid. 64.

3.5 CONCLUSION

The focus of this research is on petroleum resources conversion for sustainable management of petroleum revenue in Ghana. There are provisions of the law in Ghana that are geared towards harnessing of the revenue from petroleum exploration and production. The law has set out parameters for the management of the resources through the creation of transparency and accountability measures and other provisions pointing towards the sustainable management of petroleum resources. The conclusion of this chapter is that extractive-led development of the oil and gas industry in Ghana must be balanced by sustainability that takes into account how best the revenues are also managed after extraction. It has been posited that "the operation and management of O&G [oil and gas] resources in a company or government organization is no doubt a difficult and sophisticated undertaking. It usually entails a myriad of factors, uncertainties and risks. Decision-makers' options are contingent on the various conditions and limitations covering local–global, technical, commercial and social issues".[142] It follows that there are series of variables that will come into play to determine how law on sustainable management of petroleum revenue and the overall goal of the government to ensure that there is the enabling environment for such. Bearing in mind the argument offered in this chapter the next chapter will examine the environment and context in which the management of petroleum revenue is carried out in Ghana.

[142] Kwaku Appiah-Adu, 'Introduction' in Kwaku Appiah-Adu (ed), *Governance of the Petroleum Sector in an Emerging Developing Economy* (Gower Publishing Limited and Ashgate Publishing Company, 2013) 2.

CHAPTER FOUR: THE ENVIRONMENT FOR THE IMPLEMENTATION OF PETROLEUM REVENUE MANAGEMENT LAW FOR SUSTAINABLE DEVELOPMENT IN GHANA

4.1 INTRODUCTION

The purpose of this chapter is to further contextualise the petroleum revenue management law in view of the legal environment within which the law operates. It seeks to answer the question on the enabling environment that should be in place for promotion of transparency, accountability and sustainability in the management of petroleum revenue in Ghana. More so, the discourse on the resource curse thesis has been developed from different dimensional perspectives which are as follows: economic, political, social and environmental dimensions. Many factors will therefore demonstrate whether a country will be able to combat the resource course syndrome. Studies have been conducted to demonstrate that the resource curse phenomenon occurs in different facets. It has been found that in most cases, the existence of abundant mineral resources in states does not translate into wealth that will result in economic transformation of the states. This presumption about the resource curse is rebuttable, depending on the legal context and the best practices in a country.

In the earlier part of the research, it was demonstrated that the democratic culture of a country affects the way the natural resources are managed. In a dictatorial regime, there is the tendency that the rule of law may not be observed and the resources of the state will be controlled by the few. Democratic governances are not much usually attributes of petroleum producing states.[1] It is therefore relevant here to examine the democratic context that supports the natural resources management in Ghana.

Like most African countries, Ghana which was formerly known as Gold Coast was colonised. Ghana was a British Colony until it gained independence in 1957. Ghana has

[1] Paul Stevens and Evelyn Dietsche, 'Resource curse: An analysis of causes, experiences and possible ways forwards' (2007) 36 Energy Policy 56, 57.

experienced military intervention with the ousting of President Kwame Nkrumah. The incursion of the military into politics further adversely affected full participation of the people in governance. Ghana, however, returned to civilian rule between 1969 and 1972 and from 1979 to 1981, the military took over power again. The year 1992 marked a turnaround with political reform.[2] The constitution currently in operation in Ghana is the 1992 Constitution. Ghana has now evolved into a democratic state which saw the then military regime under J. J. Rawlings metamorphosing into a civilian government in 1993.

Till date the democratic culture in Ghana has developed and what made Ghana unique among other African countries is that oil discovery in Ghana was made in the era of democracy. Therefore, there was room for democracy to play a lead role in the development of the oil and gas sector by ensuring that there is a proper management of the petroleum resources to avoid the resource curse in Ghana. This position has support in what Kan-Dapaah described as while observing that the reform in the late eighties and early nineties was that of good governance agitation and which emphasised "human rights, media freedom, law and order, personal liberties and parliamentary democracy", the trend now presents new forms of challenges that are reflected in the need to firstly curb government's excesses; secondly, ensuring transparency; thirdly enhancing participation and inclusion in governance and finally financial accountability in the public sector.[3] How well this is achieved in Ghana as far as the oil and gas industry is concerned will depend on the national legal architecture. Therefore, the law making process in Ghana should afford opportunity for the oil revenue management to be reactive democratic support and that the voice of the people or the majority is taken care of whilst the needs of the minorities are not ignored. The law-making process in Ghana may be by legislative or executive initiative and may even be canvassed by civil liberty organisations.

The operation of democratic principles in Ghana is rooted in the observance of the rule of law and following due process in the law. The Supreme Court of Ghana was quite assertive

[2] Emmanuel Ashiedu Codjoe, Foreign Direct Investment in Ghanaian Manufacturing: Exploring the Extent of Technology Transfer and Exporting Behaviour by FDI Firms (PhD Thesis, School of Oriental and African Studies, University of London, 2012) 37.

[3] Albert Kan-Dapaah, *Parliament's Role In The Fight Against Corruption* (Institute of Economic Affairs, Ghana, 2015)

on this point where in the case of *Amidu v President Kufuor*,[4] Justice Adjabeng held that: "The Constitution makes it clear that everybody in this country, including His Excellency, the President, is under the Constitution and the law. This clearly is what we mean by the rule of law. It is heartening that governance by the rule of law is one of the cornerstones of the policies of the present government. And I have no doubt that adherence to this policy will indeed bring about real democracy in this country and therefore real freedom, justice and prosperity." Therefore, it is imperative that the orders laid down by the courts are complied with and enforced accordingly owing to a clear democratic culture. In *Republic v High Court, Accra; Ex parte Afoda*,[5] Adzoe JSC held that "Compliance with the orders of the courts is the only sure route to public order and peace which we need to sustain a stable democratic social order." Broadly speaking, a democratic governance system will be such that there is "exercise of the powers of government under conditions where there is the existence and observance of freedom of speech and expression; freedom of association and movement; rule of law; free flow of information, citizen's uninhibited involvement in politics; fair and objective administration of the law; as well as favourable conditions for private enterprise".[6] Good governance will require set of laid down rules embedded in the laws to create the transparency and accountability required.[7]

In the light of the current democratic practices in Ghana, this chapter seeks to examine the environment in which the relevant laws on petroleum revenue management for sustainable development and avoidance of the resource curse will be implemented. Therefore it assesses the interaction of the petroleum laws in the legal context of Ghana. The selected parameters of this are examined to include right to information; enabling environment for civil societies; judicial review; anticorruption laws; prosecution of corruption; corporate governance practices; and fiscal stability regime in petroleum revenue management.

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[4] [2001-2002] SCGLR 595.
[5] [2001-2002] SCGLR 786 at 774.
[6] See Institute of Economic Affairs, *Democratic Governance in Ghana under the 1992 Constitution* (Institute of Economic Affairs, 1996) 3.
[7] See Rabiu Ado, Accounting, Accountability and Governance in Upstream Petroleum Contracts: The case of local Content Sustainability in the Nigerian Oil and Gas Sector (PhD Thesis, Robert Gordon University 2016); P R P Heller And A Heuty, 'Accountability Mechanisms in Ghana's 2010 Proposed Oil Legislation' (2010) 4 The Ghana Policy Journal 50, 53.

4.2 RIGHT TO INFORMATION AND PETROLEUM REVENUE MANAGEMENT

Unless there is free flow of information, the chances of promotion of transparency in oil and gas revenue management will be slim. There should be adequate information on receipt and distribution of oil revenue of the state. The well-informed citizens can deter the government from mismanagement of resources.[8] The Constitution of Ghana 1992 provides for right to information. It is contained in the constitution under Article 21 (1) (f) that "All persons shall have the right to information subject to such qualifications and laws as are necessary in a democratic society".

The promulgation of freedom of information law in Ghana has been a major concern until its passage in 2019, after about 20 years. No doubt as demonstrated in chapter two of the thesis, there are avenues for Ghana to benefit from the promotion of information dissemination pertaining to petroleum revenue management. There are the requirements to publish information and reports on petroleum revenue management in Ghana but there may be challenges if the government failed to carry out such a task. The people want to know what their stake is in the natural resources they own as being managed for them by the government.[9] The question will be how the government can be compelled to do so within the framework of the legal system of the country. It will ordinarily be expected that administrative remedies may be sought in Ghana relying on reliefs such as the order of mandamus and certiorari. The implication is that that the usual court system would have to be approached to enforce the obligation. This is usually required through the order of mandamus. The key concern will be that it becomes difficult for one to enforce such rights when one cannot directly demonstrate that there is a legal right or the person will be affected by the rights sought to be demonstrated. The Right to Information Act 2019 is a welcome development. Under the Act in Section 1, it is provided that "a person has a right of access to information". This is the reinforcement of the provisions of the constitution but it is necessary that the machineries be put in place to create an avenue for the citizens to

[8] Marisa B. Van Saanen, 'Paul Collier, 'Laws and Codes for the Resource Curse' (2008) 11 Yale Human Rights & Development Law Journal 29, 33.
[9] Leif Wenar, 'Property Rights and the Resource Curse' (2008) 36(1) Philosophy & Public Affairs 2, 9.

access the information following laid down procedures. For example, in Section 18(1) of the Act it is provided that:

"An application to access information held by a public institution shall (a) be made in writing to the public institution; (b) contain sufficient description or particulars to enable the information to be identified, (c) indicate the form and manner of access required, (d) state the capacity of the applicant to the satisfaction of the information officer to whom the application is made, if the application is made on behalf of another person, (e) state the name of the applicant, an address to which a communication or notice can be sent (f) provide identification of the applicant; and (g) be signed by the applicant."

Lack of information on receipt and on fund management is the bane of corruption.[10] Timely implementation of the Act will set in motion how the citizens can request for information on petroleum revenue management or on the amount of revenue under the watch of the agencies of the government. Passage of the Act is expected to have positive impact on transparency in petroleum revenue collection and management in Ghana.

4.3 ENABLING ENVIRONMENT FOR CIVIL SOCIETIES AND POLITICAL ACTIVISM

In a democratic set up, diverse interests will need to be accommodated. The governance of the state must take into cognizance that civil societies and other forms of NGO should have a say in matters that touch on the socio-political and economic circumstances of the state. The role of civil societies cannot be overemphasized as most of them are engaged in the task of serving as watch dogs, ensuring accountability and transparency. Activities of civil society will be to ensure that the government account for the revenue it is generating from oil and gas. The demands for information on receipts and disbursement of petroleum revenue are brought to the notice of the public through the civil societies. In a democratic setting, civil societies should be given latitude of freedom to operate. Their ability to

[10] Terry Lynn Karl. 'Ensuring Fairness: The Case for a Transparent Fiscal Social Contract' in Macartan Humphreys, Jeffrey D Sachs and Joseph E. Stiglitz, *Escaping the Resource Curse* (Columbia University Press, 2007) 266.

effectively operate will definitely have an impact on the way the government allocates and manages the revenue from oil. The bases for the existence of the civil societies in Ghana are rooted in the constitution which creates the enabling environment for them to operate.

Human rights under the constitution of Ghana provides for the establishment of civil societies organisations and gives room for them to make protest or create public enlightenment on the activities of the government on the management of petroleum revenue. These rights, some of which may be relevant to the environment and petroleum revenue management in Ghana are as follows: "freedom of speech and expression, which shall include freedom of the press and other media" "freedom of thought, conscience and belief, which shall include academic freedom" ; "freedom of assembly including freedom to take part in processions and demonstrations"; "freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest"; "information, subject to such qualifications and laws as are necessary in a democratic, society".[11] It provided that "All citizens shall have the right and freedom to form or join political parties and to participate in political activities subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with this Constitution".[12] "Every worker has a right to form or join a trade union of his choice for the promotion and protection of his economic and social interests".[13] The rights of civil societies appear to have been guaranteed under these provisions. This should give rise to the participation of the people in the decision making process regarding revenue allocation and management for sustainable development.

Developing my assertion further, the right of association has been judicially tested in Ghana in the case of *Mensima v Attorney-General*[14] and *New Patriotic Party v Inspector General of Police*.[15] In *New Patriotic Party*, a registered political party obtained a permit from the police to stage a rally but the permit was withdrawn. The party carried out a peaceful

[11] See Article 21(1).
[12] See Article 21(3).
[13] See Article 24(3).
[14] [1996-97] SCGLR 676.
[15] [1993-94] 2 GLR 459. See also *Civil and local Government Staff Association of Ghana v Attorney General and Others* (J1/16/2016)[2017] GHASC 18.

demonstration protesting against the budget of the government without obtaining permit. The protesters were eventually dispersed and those arrested were charged before the court for protesting without validly obtaining police permit contrary to the Public Order Decree, 1972.[16] The next day was meant to mark the rally for commemoration of the death of J. B. Danquah-Adu, a leading politician in Ghana, and the permit which was previously granted by the police was withdrawn. There was a challenge before the court to the effect that the withdrawal and the provisions of the Public Order granting unfettered powers to the minister of interior and the police to restrict demonstrations and rallies were inconsistent with the provisions of the constitution guaranteeing freedom of assembly under Article 21(1)(d). The defence counsel on the other hand quoting Article 21(4) of the constitution stated that:

> Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision – (c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or…

However, the Supreme Court upheld plaintiff's argument in this case and held that the provisions of the Public Order Decree were in violation of Article 21(1)(d) of the Constitution. This decision therefore creates an avenue for civil society organisations to continue to act as watchdogs in the management of petroleum revenue to promote accountability and transparency. In the words of the court as enunciated by Hayfron-Benjamin JSC:

> It will be noted that for the first time in the history of our constitutional development, article 21 (1) (d) of the Constitution, 1992 provides for the right of the citizen to demonstrate...Once again, whereas in the former Constitutions the citizen was not to be 'hindered' in the enjoyment of his fundamental freedoms, in the Constitution, 1992 there is a 'right' conferred on the citizen in the enjoyment of his freedoms. This positive attitude towards the enjoyment of the freedoms cannot be abridged by a

[16] NRCD 68.

> law which prevents the citizen from delivering his protest even to the seat of government.[17]

The PRMA 2011 accommodates the civil societies and some specific associations through their appointment as members of the Public Interest Accountability Committee. According to the provisions of the Act the following are listed as members:[18]

(a) a member to represent independent policy research think tanks nominated by the think-tanks

(b) a member to represent civil-society organisations and community-based organisations nominated by civil society,

(c) a member each nominated by the

(i) Trade Union Congress,

(ii) National House of Chiefs,

(iii) Association of Queen Mothers,

(iv) Association of Ghana Industries and Chamber of Commerce,

(v) Ghana Journalists Association,

(vi) Ghana Bar Association,

(vii) Institute of Chartered Accountants,

(viii) Ghana Extractive Industries Transparency Initiative; and

(ix) Christian groups namely the National Catholic Secretariat, the Christian Council and the Ghana Pentecostal Council on a rotational basis,

(x) the Federation of Muslim Councils and Ahmadiyya Mission on a rotational basis, and

(xi) Ghana Academy of Arts and Sciences.

Looking at the object for the establishment of the Accountability Committee, it is expected that it will "provide space and platform for the public to debate whether spending prospects and management use of revenues conform to development priorities..." There is room for public engagement in that regard, and the civil society can mobilize to achieve their

[17] *New Patriotic Party v Inspector General of Police*, 500-501
[18] Section 54, PRMA 2011.

mandate which could be in relation to transparency and accountability in the management of petroleum revenue.

The law also gives the Accountability Committee the power to engage in consultations which could include the engaging with civil society and other non-state actors. It is provided in the Act that "To achieve its objects, the Accountability Committee shall (a) consult widely on best practice related to management and use of petroleum revenues…"[19]

Connected to this as shown above is that citizens and civil society organisations should be free to express their minds on the management and governance of their resources. The Supreme Court has on many occasions expressed the important role of the freedom of expression. Recently, it lent its voice when it held in the case of *Ghana Independent Broadcasters Association v Attorney General and Another*[20] that: "The Constitution is thus a moribund document without the freedom of expression which enables people to talk about infractions thereof and to go to court to seek redress. Thus, for democracy to thrive and survive, nothing should be done to stifle this freedom except where the person is said to have gone beyond legitimate boundaries prescribed by the Constitution itself or any other law which is not inconsistent with the Constitution". With the freedom of expression, the people are able to express their views on whether a party in power has been able to make meaningful contribution to the economy by pointing out their strength or weaknesses.[21]

In *New Patriotic Party v Ghana Broadcasting Corporation*,[22] the failure of the Ghana Broadcasting Corporation to grant broadcasting rights to the political party to give an opinion on the national budget was considered to be in breach of article 55 of the Constitution that made provisions for "fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media".

[19] Section 53(1) PRMA 2011.
[20] (J1/4/2016)[2017] GHASC 10.
[21] Anthony Mason, 'Relationship between Freedom of Expression and Freedom of Information' in Jack Beatson and Yvonne Cripps (eds.), Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams (Oxford University Press, 2000) 225.
[22] 14 [1993-94] 2 GLR 354.

A look at the fundamental rights provisions as they pertain to civil societies will indicate that the civil societies in Ghana, political parties and the media have a role to play in the management of petroleum revenue in Ghana by ensuring that there is compliance with the law and also making a case for revenue management in a sustainable manner. Even when the law is complied with, civil societies can continue to canvass for a more efficient management in line with international best practices. The next section which is on judicial review of administrative and legislative actions further shows their relevance.

4.4 JUDICIAL REVIEW IN GHANA AND PETROLEUM REVENUE MANAGEMENT

The role of the courts is important for the sustainable management of oil revenue. The courts may be approached by litigants to assert that they have a right against the state or even compel the state to discharge their duties according to the dictates of the law. The executive arm of the government has responsibility for the management of the petroleum resources of the state. The basis for this is in Article 58(1) of the Constitution which provides that "The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution".

It provides further in Article 58(2) that: "The executive authority of Ghana shall extend to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution". The exercise of the functions is either directly by the president or through his subordinate officers as provided for in Article 58(3). By implication, ministers, public officers in the civil or public service form the executive arm, the Bank of Ghana, Ghana Revenue Authority, Ghana Petroleum Commission and other appointees of the president in relation to revenue management in Ghana are deemed as public officers who are to act within the confines of the constitution of Ghana and other laws that are not in contravention of the constitution.

The management of petroleum revenue in Ghana will benefit from the courts most especially as there is democracy in the land and the court will be carrying out the task for interpretation of the law and ensuring that the rights of persons or the discharge of duties by the officers of the respective agencies are well in line with the law. Article 2(1) is very apt

on the need for constitutionalism in Ghana. It is provided that: "A person who alleges that – (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect".

Furthermore, under Article 33(1) "Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress".

According to Article 33 (2) "The High Court may, under clause (1) of this article, issue such directions or orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and *quo warranto* as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person, concerned is entitled".

Furthermore, it is provided in Article 23 that "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal". Acts of administrative bodies are subject to review by the courts of the land. Their actions must conform to fairness and justice. The Supreme Court of Ghana clearly emphasises these elements in the case of *Aboagye v Ghana Commercial Bank Ltd*.[23]

The activities of the officers may therefore be subjected to judicial scrutiny. The instruments for review will be through the following: Mandamus-A government agency is mandated to carry out a duty imposed on it by law. What the order of mandamus does is to ensure that the officers of the various government agencies are compelled to carry out a legal duty. Where a public officer declines or refuses to carry out a legal duty, an action can

[23] [2001-2002] SCGLR 797.

be brought by an aggrieved party to compel him/her to carry out the duty. Certiorari-It is used in quashing an order of the court which is considered to have been breached without following the law. In orders reached that are *ultra vires* an officer or the agency are brought before the court to quash them.[24] The attempt to utilize petroleum revenue for a purpose which the law has not earmarked it for will fall under such an example where a person or even civil society organizations may seek action to quash the action. There may also be an injunctive remedy. An injunction can be sought to forestall the carrying out of an act.

The doctrine of *locus standi* is premised on the proposition that only persons who have an interest in a matter or the capacity to bring an action can approach the court. By the existence of such doctrine the court operates as a gate keeper against frivolous actions. In essence, the court should not be bothered by unnecessary proceedings that lead to congestion of dockets. The doctrine is a well-founded doctrine established under the common law and has been widely applied to stop litigants. Ghana is a common law country, and *locus standi* therefore is an applicable legal principle in Ghana. The major contention is that application of the doctrine may operate as a bar to the effective petroleum revenue management in Ghana because the promotion of rule of law, good governance in the oil and gas sector in Ghana may require the citizens' vigilance to ensure transparency and accountability in the management of the country's oil wealth. The powers of judicial review enable the court to arrive at a decision and even mandate enforcement.[25]

Ghanaian cases such as *Tuffour v Attorney General*[26] and *Sam (No 2) v Attorney General*[27] are illustrative of the application of the doctrine of *locus standi* in Ghana. Thus, citizens may approach the court for accountability of the oil revenue. They may approach the court to challenge the way and manner in which the revenue is being managed. The question then is to what extent can a citizen of Ghana, for example, bring an action to restrict the Bank of Ghana from investing the government funds into a certain portfolio? This can only be possible if it can be accommodated under the doctrine of *locus standi*, which largely

[24] See *Republic v Commission on Human Rights and Administrative Justice; Ex parte Richard Anane* [2007-2008] SCGLR 340.
[25] See *Republic v Court of Appeal; Ex parte Agyekum* [1982-83] 1 GLR 688.
[26] (1980) GLR 637.
[27] [2000] SCGLR 305.

depends on the attitude of the court. The first consideration here will be to look into the relevant provisions of the law to see if this can be possible.

In *Sam (No 2) v Attorney General*[28] the court was of the view that in fundamental rights cases, the citizens of Ghana are handicapped in bringing an action until they can show that their interest will be affected.[29] There should rather be much of a liberal approach to the doctrine of *locus standi*. The trend now is to support a liberal approach to the doctrine as seen in common law countries. The decision of the Kenyan High Court in *Albert Ruturi & Another v. Minister for Finance and Others*[30] is quite instructive here:

> We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi. Accordingly, in constitutional questions, human rights cases, and public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented.

A more liberal approach to standing will contribute to the role of civil society organisations approaching the courts to make a case for the people on matters that border on revenue from oil. For example, residents in the Western Region are advocating a share in the petroleum revenue, and there is possibility that in future the courts may be approached to define the rights of these locals to more benefits relying on international instruments or even making a case for sustainable development as being a customary international law.[31] In Chapter One of this thesis, the case of *Jonah Gbemre v Shell Petroleum Development*

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[28] [2000] SCGLR 305.

[29] It is worthy to note that if it is in the case of fundamental rights enforcement, the appropriate court to approach is the High Court and not the Supreme Court. See *Edusei (No 2) v Attorney-General* [1998-99] SCGLR 753.

[30] (2002) 1 K.L.R. 61, citing with approval El Busaidy v. Commissioner of Lands & 2 Others (2006) 1 K.L.R. 479-501. See Patricia Kameri-Mbote and Collins Odote, 'Courts as Champions of Sustainable Development: Lesson from East Africa' (2009) 10(1) Sustainable Development Law & Policy 31, 36.

[31] Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in W Lang, (ed.), *Sustainable Development and International Law* (Oxford University Press, 1999) 53.

Company[32] was mentioned to the effect that the Federal High Court in Nigeria found that laws permitting the flaring of gas amounts to a breach of right to life and healthy environment guaranteed under the Nigerian constitution and African Charter on Human and Peoples Rights.

In the same vein, the case of *Socio-Economic Rights Accountability Project (SERAP) v Federal Republic of Nigeria*[33] that was brought before the Economic Community for West Africa (ECOWAS) Court further confirms that civil society actors can bring an action against the government to hold it accountable to the wrong done to the citizens in oil producing states living in abject poverty. The Nigerian government and its national oil company, the Nigerian National Petroleum Corporation (NNPC) and Shell Petroleum Development Company (a subsidiary of Royal Dutch Shell) and other multinational oil companies were brought before the ECOWAS Community Court of Justice for "violation of the right to adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment; and to economic and social development". The case has received much international recognition. It may therefore not be out of place to see a situation where it may be argued that the regions where exploration and production is taking place should have a fair share of the petroleum revenue allocated specifically for their development.

Therefore, a case for right to healthy environment and right to life can be made as basis for the support for allocation of petroleum revenues for environmental remediation and for the benefits of the locals where exploration and production is taking place in Ghana. The support for the development of renewable energy from oil proceeds to achieve sustainable development in Ghana may be justified by relying on right to life. Interestingly, the Supreme Court of India in the case of *Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission*[34] recently made a pronouncement supporting a law which provides

[32] Unreported decision of Federal High Court Benin Division in Suit No FHC/B/CS/53/05 delivered on 14 November 2005.
[33] Suit No: ECW/CCJ/APP/08/09; Rul. No: ECW/CCJ/APP/07/10.
[34] Suit No. 4417.

that electricity companies should utilise a specified percentage of renewable energy as part of their energy supply mix. The court grounded its reasons in the right to life and the right to healthy environment.

4.5 GHANA ANTICORRUPTION LAWS AND INTERACTION WITH PETROLEUM REVENUE MANAGEMENT

At this point of the research, it is important to give a consideration to the general anticorruption regime in Ghana because it is within the framework of such environment that official corruption in relation to petroleum revenue management can be assessed. In chapter two of the thesis, the penal sanctions contained in the relevant provisions of the petroleum laws were discussed. It is contended here that the offences defined and penalized under the laws as indicated in chapter two of the thesis may not act in isolation as some actions inimical to the management of petroleum revenue can be punished as well under other laws that may not have a direct connection with the petroleum industry.

The first consideration for corrupt practices in Ghana has been set out in the Constitution of Ghana 1992 as contained in the Directive Principles of State Policy under Article 35(8) which states that "The State shall take steps to eradicate corrupt practices and abuse of power". Whilst there is the contentious issues regarding the justifiability or otherwise of the directive principles, it cannot be ruled out completely as it forms part of the aspiration of any civilized government that will want to address the problem of corruption which is inherent in countries infected by the Dutch disease of resource curse syndrome. Private sector may influence officials to be corrupt.[35]

A series of laws have been passed in Ghana for checking corrupt practices. It is opined that these laws will have an impact on the petroleum revenue management and promote sustainability in so far as they are accommodated in the framework for petroleum revenue governance in Ghana. There is the Code of Conduct for Public Officers as provided under the constitution of Ghana. This Code, if effectively implemented, will have a far-reaching effect on petroleum revenue management. Accordingly, the officers to which the code of

[35] Michael L Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Princeton University Press, 2012) 59-62.

conduct applies to include; the President, Vice-President; Speaker; Deputy Speaker, members of Parliament; Ministers of State or Deputy Ministers; the Chief Justice, Justices of the Superior Court of Judicature, Chairmen of Regional Tribunals, the Commissioner for Human Rights and Administrative Justice and his Deputies and all judicial officers; Ambassadors or High Commissioners; the Secretary to the Cabinet; the Head of a Ministry or government department or equivalent office in the Civil Service; a chairman, managing director, general manager and departmental head of a public corporation or company in which the State has a controlling interest; and "such officers in the public service and any other public institution as Parliament may prescribe".[36]

The inclusion of "such officers in the public service and any other public institution as Parliament may prescribe" obviously sets out that the list is not exhaustive and the legislative arm of government can from time to time expand the list. The key officials involved in petroleum revenue management in Ghana fall under this heading. For example, the Minister for Finance, the Minister for Energy, the Heads of the respective agencies such as the Petroleum Commission, the Ghana National Petroleum Company etc. are public officers within the scope of the Act.

On conflict of interest, it is provided that: "A public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office".[37] This implies that officers that have a role to play in petroleum revenue management should do so in such a way that there is no conflict of interest in the discharge of their duties.

There is an obligation imposed on all public officers to declare their assets. Therefore they are required by the constitution to "submit to the Auditor-General a written declaration of all property or assets owned by, or liabilities owed by" them directly or indirectly before assumption of office, also at the end of every four years and by the end of their tenure in office.[38] Where the public officer fails to disclose his assets or knowingly makes false

[36] See Constitution of Ghana, art. 286(5).
[37] Constitution of Ghana, art. 284.
[38] Constitution of Ghana, art. 286(1).

declaration, it shall amount to a contravention of the provisions of the Constitution.[39] Where assets and liabilities have been declared accordingly and subsequent assets acquired by the public officer cannot be attributed to "income, gift, loan, inheritance or any other reasonable source' it would be taken to be in contravention to the constitution".[40]

The provisions of Article 287(1) of the Constitution provides that "An allegation that a public officer has contravened or has not complied with a provision of this Chapter shall be made to the Commissioner for Human Rights and Administrative Justice and, in the case of the Commissioner of Human Rights and Administrative Justice, to the Chief Justice who shall, unless the person concerned makes a written admission of the contravention or non-compliance, cause the matter to be investigated". There appears to be a lacuna in that Article 287(2) "The Commissioner for Human Rights and Administrative Justice or the Chief Justice as the case may be, *may take such action as he considers appropriate* in respect of the results of the investigation or the admission".[41] The use of the clause "*may take such action as he considers appropriate"*, leaves the Commissioner for Human Rights and Administrative with wide discretion. What he considers appropriate may not be in the interest of petroleum revenue management. A better approach would have been for the constitution to provide for, once a prima facie case is established from the investigation that the Commission shall recommend for appropriate measures such as a further forensic audit or even prosecution of the officer implicated. This, however, appeared to have been saved by the Commission on Human Rights and Administrative Justice Act 1993[42] which places on the Commission on Human Rights and Administrative Justice the duty to investigate corruption, "allegations that a public officer has contravened or has not complied with a provision of Chapter Twenty-four (Code of Conduct for Public Officers) of the Constitution"; to investigate "instances of alleged or suspected corruption, and the misappropriation of public moneys by an official and to take appropriate steps, including

[39] Constitution of Ghana, art. 286(2).
[40] Constitution of Ghana, art. 286(4).
[41] Italics provided for emphasis.
[42] Act 456.

reports to the Attorney- General and the Auditor-General, resulting from that investigation".[43]

Having set the scene it is the contention of this thesis that there is a body of laws that is geared towards addressing corrupt practices in Ghana which may impact on petroleum revenue. Whilst it is not the focus of this thesis to embark on an in-depth analyses of every law on corruption in terms of their content and scope, it will be apposite at this section to demonstrate that beyond the checks on petroleum revenue as examined in Chapter two of the research, there are other laws that may be invoked and they have implications to revenue management.

There is the Criminal Offences Act, 1960: This law provides for a wide range of offences and has taken steps to check fraud and corrupt practices. Therefore a public officer who receives gratification to act or commits an omission because of gratification is considered to have committed corruption; and likewise the person offering the gratification.[44] Section 260 makes withholding of public money to be a crime of misdemeanour by providing that: "Where a public officer who is bound in that capacity to pay or account for money or valuable things, or to produce or give up documents or any other things, fails as in duty bound to pay or account for, or to produce or give up, to any other officer or person lawfully demanding the same, commits a misdemeanour."[45]

The Act further criminalises the use of public office to make profit by a public officer or a private person in collaboration with the public officer. Thus "A person commits a criminal offence who (a) while holding a public office corruptly or dishonestly abuses the office for private profit or benefit; or (b) not being a holder of a public office acts or is found to have acted in collaboration with a person holding a public office for the latter to corruptly or dishonestly abuse the public office for private profit or benefit."[46]

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[43] See Commission on Human Rights and Administrative Justice Act 1993, s. 7.
[44] Criminal Offences Act 1960 ss. 240-245.
[45] Criminal Offences Act 1960, s. 260.
[46] Criminal Offences Act 1960, s. 179c.

It is also an offence for a clerk or public officer to conceal information or fail to make entries in account, books and records entrusted to him.[47] Section 252 provides that:

> (1) A person who accepts, or agrees or offers to accept, a valuable consideration under pretence or colour of having unduly influenced or of agreeing or being able so to influence, any other person in respect of functions as a public officer or juror commits a misdemeanour.
> (2) A person who gives, or agrees or offers to give, to a public officer a valuable consideration for the grant to that person or to any other person of benefit or an advantage, or for the exercise of influence in favour of that person or any other person commits a misdemeanour.

The provisions of Section 239 of the Criminal and Other Offences (Procedure) Act, 1960[48] provide for the penalty by stating that Public Officers found guilty of corruption under the Criminal Offences Act 1960 can be sentenced to a maximum imprisonment term of 25 years.

The Economic and Organised Crime Office (EOCO), is established by the Economic and Organised Crime Office Act 2010. The body is responsible for investigating economic and organised crime. Therefore, they can investigate economic and organised crime perpetuated in the course of petroleum revenue management in Ghana. The Act repealed the Serious Fraud Office Act 1993 established as an agency for the investigation and prosecution of serious fraud as the Attorney General may require from time to time.[49] A wide range of powers have been given to the EOCO to carry out investigations and prosecution.

Another Act is the Public Procurement Act 2003: The Public Procurement Act 2003 [50] provides for the establishment of a Public Procurement Authority to make rules for and

[47] Criminal Offences Act 1960, s. 140.
[48] Act 30
[49] It is provided in the Serious Fraud Office Act 1993 that: (a) to investigate a suspected offence provided for by law which appears to the director on reasonable grounds to involve serious financial or economic loss to the Republic or a State organisation or any other institution in which the Republic has financial interest; (b) to monitor the economic activities which the Director considers necessary with a view to detecting criminal offences likely to cause financial or economic loss to the Republic; (c) to take any other reasonable measures that the director considers necessary to prevent the commission of a criminal offence which may cause financial or economic loss to the Republic.
[50] Act 663

manage public procurement and bidding processes. It is to ensure that there is transparency in the process and that government contracts and services are carried out by the most qualified persons or companies. The operating agreement which the Bank of Ghana enters with other funds administrators is required to comply with the procurement laws.

There is also the Whistleblower Act 2006 which provides for the protection of whistleblowers and shields them from civil and criminal liabilities.[51] It also provides for compensation to whistleblowers by establishing a whistleblowers fund.

The Financial Administration Act 2003 regulates the management and control of public funds and places such responsibility on the Minister of Finance.[52] Section 62(1) provides that: "An officer or a person acting in an office or employment connected with the collection, management or disbursement of public or trust moneys or with the control of government stores who (a) accepts or receives money or valuable consideration for the performance of official duties; (b) conspires with another person to defraud the Government, or makes opportunity for another person to defraud the Government; or… (f) demands or accepts or attempts to collect, directly or indirectly, as payments or gifts or otherwise, a sum of money, or any other thing of value, for the compromise, adjustment or settlement of a charge or complaint for a contravention or alleged contravention of legislation relating to public finance commits an offence…"

Section 66 establishes the Financial Administration Tribunal that is vested with the power to: (d) make any orders as it considers appropriate for the recovery of moneys, assets or any other property due to the Republic;… (e) prohibit an individual whether a public officer or not from managing public accounts or funds if the individual is unqualified professionally or has been persistently negligent in the management of public funds; and (f) prohibit a

[51] However, it is provided for in section that where the whistle blower knowingly and falsely gives information, there is a liability against him. Section 18 provides that: "A whistleblower is not liable to civil or criminal proceedings in respect of the disclosure unless it is proved that that whistleblower knew that the information contained in the disclosure is false and the disclosure was made with a malicious intent".

[52] See section 2 of the Act.

person from participating as a bidder in a government procurement or contract where that person has a record of defrauding the Republic".

Public Office Holders (Declaration of Assets and Disqualification) Act 1998: Public Office Holders (Declaration of Assets and Disqualification) Act 1998[53] provides for the disqualification of persons from holding public offices if found to have "(a) acquired assets unlawfully, or (b) defrauded the Republic, or (c) wilfully and dishonestly or corruptly acted in a manner prejudicial to the interests of the Republic, or (d) knowingly made a false declaration of the assets, properties or liabilities of that person."

Anti-Money Laundering Act, 2007: Anti-Money Laundering Act, 2007[54] is established to ensure that proceeds of crime are not concealed and that they are properly investigated in accordance with the law.

An examination of other laws further shows that apart from the punishment provided for in revenue management, there are instances where other laws provide for penal sanctions that are related to revenue management. Therefore, actions of public officers either by way of corrupt or fraudulent practices can be prosecuted under other laws. The laws on revenue management, on the other hand, do not clearly provide for how this may be reconciled. It therefore creates two scenarios where the prosecuting agencies may choose to prosecute either under a particular anticorruption law or the relevant petroleum laws that are breached. Some interpretation questions are bound to occur, whether to follow the *lex specialis* rule (the subject matter rule) or to follow the *lex posterior* rule (recent law rule). There is also the concern as to which of the agencies should carry out a particular task regarding the investigation of the corruption and thus clarity is required if the fight of corruption is to be addressed.

[53] Act 550.
[54] Act 749.

4.6 PROSECUTION OF CORRUPTION OR FRAUD LINKED TO PETROLEUM REVENUE MANAGEMENT

The next step in this chapter is to consider the circumstances for prosecution of cases relating to breach of the provisions of the laws under the petroleum revenue management laws or other enactment in which an offender can be prosecuted. In Ghana the Attorney General is the chief law officer of the state. Accordingly, Section 88(1) of the Constitution of Ghana provides that "There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government". One of the roles accorded to the Attorney General is the prosecution of criminal cases on behalf of the state. Thus, it is provided further in Section 88(3) that: "The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences". In the same token, the powers of the Attorney General are not only limited to criminal prosecution but extend to civil case for and against the Republic of Ghana. Thus Section 88(5) provides that "The Attorney-General shall be responsible for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings against the State shall be instituted against the Attorney-General as defendant". The Court in *New Patriotic Party v President Rawlings*[55] citing the case of *Tuffuor v Attorney-General*[56] held that: "President Limann was not made a party to the suit, even though it was his acts which were called in question in that suit. It was the Attorney General, as the principal legal adviser of the government, who was made a defendant. That was the right procedure...The plaintiff, in the present case, did the right thing by suing the Attorney General. But it was improper to join President Rawlings as a defendant. This is one of the situations where it can be said that the President had procedural immunity."

It will therefore be expected that the commission of any criminal offence emanating from the mismanagement of petroleum revenue will be ideally prosecuted by the Attorney General. The powers of the Attorney General as enshrined in the constitution of Ghana appear to have some limitations. The office of the Attorney General as it stands may be

[55] [1993-94] 2 GLR 193 at 210.
[56] [1980] GLR 637.

used to truncate prosecution in respect of revenue management. In Ghana, there is express power given to the Attorney General to enter *nolle prosequi* in criminal cases.[57] That is the Attorney general can validly discontinue a criminal action.[58] The Attorney General moved by political motive can exercise his powers most especially if supported by the president who appoints him. The court therefore becomes handicapped where the Attorney General in the exercise of his powers of *nolle prosequi* decides to withdraw a case where public officers have engaged in the depletion of petroleum revenue. The case of *Tsatsu Tsikata v Chief Justice and Attorney General*[59] is quite illustrative of the argument offered here. The former Chief Executive of the Ghana National Petroleum Corporation, Mr Tsatsu Tsikata, was arraigned under section 179A(3)(a) of the Criminal Code 1960 (as amended)[60] for causing economic loss to the state but the Attorney General of Ghana filed an application for *nolle prosequi* to withdraw the action. This case therefore supports the argument in this chapter that the legal environment in which the petroleum revenue management laws operate must be a determinant on the extent to which the problems of the resource curse can be effectively addressed.

The Attorney General can choose to delegate the powers to prosecute mismanagement or misappropriation of petroleum revenue in Ghana. The bases for this are contained in Section 88(4) of the constitution which provides that "All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law". The Attorney General therefore has wide discretionary powers on matters relating to the prosecution of crimes and given that it is argued here that the Attorney General's *nolle prosequi* power may deter criminal prosecutions in the petroleum industry, there may be the need to restrict such discretion.

The Government of Ghana recently established the office of the Special Prosecutor for the purpose of prosecuting corrupt officers. Mr Martin Amidu, a former Attorney General

[57] See section 54, Criminal and Other Offences (Procedure) Act 1960; Kwadwo Boateng Mensah, 'Discretion, Nolle Prosequi and the 1992 Ghanaian Constitution' (2006) 50(1) Journal of African Law 47, 47-58.
[58] John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar Publishing Ltd., 2014) 158.
[59] [2001-2002] SCGLR 437.
[60] Act 29.

under the regime of late President Atta Mills has been appointed. The creation of this office has been greeted with mixed feelings. To some it is a welcome development whereby the corrupt officials will be subjected to criminal trial to serve as deterrent; to others there is the perception that the creation of the office is geared towards witch hunting political opponents.

Given the current situation, one could wonder if it was even necessary at all to create another office to prosecute corruption while the provisions of the constitution have given such powers to the Attorney General. The existence of the Office amounts to a duplication of offices and may not create an avenue for the smooth dispensation of justice. Furthermore, there is the likelihood that the special prosecutor will go after serious and intricate corruption cases while the cases of little significance are left unattended to. In such a situation, the Attorney General's office may perceive that the special prosecutor is saddled with the responsibility of prosecuting similar cases. This loophole may make it easy for relatively smaller cases of corruption to go unpunished. There is therefore another duplicity that will deplete the revenue of the state. It is the opinion of this researcher that such duplications are not necessary and will amount to depleting of the resources of the state.

4.7 CORPORATE GOVERNANCE PRACTICES AND PETROLEUM REVENUE MANAGEMENT

In chapter three, it was discussed that the crux of the petroleum revenue management law is to promote accountability and transparency. The promotion of accountability and transparency are part of the key discourse in the field of corporate governance. This has a direct relevance to this thesis as they are applied in corporations to ensure that they meet the standards that have been set to avoid petroleum revenue leakages. Corporate governance is used to describe the corporate management of organizations. It has become a well-articulated concept that has built on company law practice. The idea of corporate governance is to develop practices that promote governance of corporations and offer codes that will guide the activities of the corporations with stakeholders. The tenets of corporate

governance have largely been extended to apply more robustly to non-governmental organisations.

Before going into this discourse, however, it will be more appropriate to first of all appreciate the nature of corporations in Ghana in order to note the laws which will govern them generally. In the case of corporations, the government enterprises will largely be guided by public law, whereas the non-governmental enterprises are governed largely by the Companies Act and the provisions of the memorandum and articles of association of the companies.

Therefore, a company within the context of Ghana fulfils the conditions of the common law rules laid down in the case of *Salomon v Salomon*[61] which is to the effect that a corporation is a distinct entity from its members and officers. A corporation can therefore sue and be sued in its corporate name. It can therefore exercise all the powers of a natural person upon incorporation.

The corporate scandals and failures have made countries reconsider the role of corporations and the impact of their activities. The global trend is that "large companies must make precise, prompt and sincere reports on their activity, not only to their shareholders, but to all stakeholders and to the public in general" and must be accountable since good governance should provide for verified financial and non-financial information that inspires confidence in all of the company's stakeholders".[62] The development of corporate governance achieved much relevance internationally with the Enron crises in the United States of America. The fictitious accounting statements saw some auditing organisations being implicated when the economic crises saw series of cases of corporate failures. This resulted in the passage of the Sarbanes Oxley Act 2002 to build in the corporate governance and reporting standards in the United States. Other advanced countries have followed suit.

[61] [1897] AC 22.
[62] Patrick-Hubert Petit and David Chekroun, 'Governance of transnational Groups: What are the Stakes? What are the Challenges?' (2016) 6 International Business Law Journal 617, 623.

The United Kingdom has the Corporate Governance Code and has required that companies should "comply or explain".[63]

It is a matter of expediency that the corporate governance practices should be taken seriously in Ghana as an aftermath effect on the oil and gas industry. As part of the promotion of corporate governance, companies should make reports on their audits and should do so with the highest level of precision. These have implications on the transparency in the oil and gas industry. Where companies present robust reports, the citizen will be able to reconcile these with what the government say it has made from petroleum revenue for a given tax year. For example, revenue accruing from petroleum exploration and production can be easily compared with the deductions shown in the financial statements of the oil and gas companies. If for a given financial year, the cumulative number of outgoings from oil companies to the respective government agencies shows a sharp discrepancy with what the government claims has accrued to the state, this will constitute a ground to call for a detailed audit of the sector to determine the leakages. Therefore, from these analysis, it can be seen that the corporate governance of companies has a great impact on the petroleum sector and should not be taken lightly. This leads to a question on what is the status of the relevant government agencies that have roles to play in petroleum revenue management in Ghana? This can be decoded through an examination of relevant laws for their establishment. Besides, the Ghana National Petroleum Company is also a government owned company. The Petroleum Commission Act, which established the Petroleum Commission, provides that: "There is established in this Act a body corporate with perpetual succession to be known as Petroleum Commission."[64] Other relevant government agencies that will be directly affected in the management of the petroleum revenue and have been established as corporate entity include the Ghana Revenue Authority and the Bank of Ghana. State owned corporations are better off if corporate governance is imbibed. In a study conducted by Amankwah-Amoah and Debrah on why

[63] Financial Reporting Council, The UK Corporate Governance Code (2016). According to the Code, "The "comply or explain" approach is the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings and is the foundation of its flexibility". Financial Reporting Council, The UK Corporate Governance Code (2016).

[64] Petroleum Commission Act 2011, s. 1 (1).

state corporations fail, the researchers used the example of corporate failures in Ghana Airways to show that it is attributed mainly to lack of good corporate governance.[65]

Another crucial point for the promotion of the practices of corporate governance would be seen in the management of the proceeds from the petroleum fund. The Second Schedule to the PRMA 2011 provides for a model agreement between government, represented by the Minister of Finance and Economic Planning, and the Bank of Ghana for the management of the Ghana Petroleum Funds. It is provided that "The Bank of Ghana shall undertake the daily operational management of the Ghana Petroleum Funds and shall be accountable for operational management of the Ghana Petroleum Funds and shall be accountable for its operational management to the minister".[66]

"The Bank of Ghana shall be responsible for the operational management of the Ghana Petroleum Funds, which shall include the following functions: (a) the investment of the capital of the Ghana Petroleum Funds in financial instruments as set out in this Agreement, including exercising all the rights and complying with all obligations associated with the ownership of the Ghana Petroleum Funds' assets".[67] The Bank of Ghana therefore can appoint and enter into a contract with portfolio managers.[68] This underscores the importance of giving considerations to corporate governance for those to be engaged by the Bank of Ghana in whatever investment line it chooses. Besides the effect that corporate governance can have in the areas of investment where the bank of Ghana may choose to invest the fund, it also has an impact on the oil and gas industries as companies that engage in petroleum exploration and production should continue to operate as a going concern and need the corporate health for the nation to continue to derive revenue from them. Lack of corporate governance reduces their competitiveness and may lead to corporate distress which, in turn, affects the oil and gas sector. A company operating at a loss will not be in a position to pay the maximum tax required under the Petroleum Tax Law or as agreed under the Petroleum Agreement. Ensuring good corporate governance from this perspective is as

[65] Joseph Amankwah-Amoah and Yaw A Debrah, 'The Protracted Collapse of Ghana Airways: Lessons in Organizational Failure' (2010) 35(5) Group & Organization Management 636, 636-665.
[66] Article 1 of the Operation Agreement.
[67] Article 3 of the Operation Agreement.
[68] Article 8 of the Operation Agreement.

good as ensuring that the company continues to produce income for the government to increase its revenue take from petroleum resources. Operating good corporate governance will also offer avenue for the management of risks thereby allowing for optimal performance of organisations.[69] Therefore there is a need for the promotion of corporate governance culture not only in the private sector but also in government corporations. The Ghana National Petroleum Company being a state-owned company must operate a detailed structure of corporate governance as that will contribute to the revenue take of the government and there will be plugs against loopholes that may lead to leakages in the revenue of the government. The words of Bantekas are very illustrative of the argument why there should be an excellent corporate governance practice. According to Bantekas,

> It was logical to assume that companies themselves were best suited to allocating salary levels, appointing appropriate board members, etc., as well as having the expertise and know-how to invest accumulated funds for profit….missing from the picture were the social impacts of corporate misgovernance, as in the cases of Enron and WorldCom – corporations reporting losses while their CEOs [Chief Executive Officers] were receiving extravagant salary raises, the subsequent loss of jobs and pensions because pension funds were invested in these deflated corporations.[70]

The dangers inherent in the failure to imbibe robust corporate governance can translate into losses. Take for example the Bank of Ghana investing Petroleum Funds in companies that lack the corporate governance culture or even the Ghana National Petroleum Corporation going into such investments. It will have an adverse effect on the petroleum revenue of the country. In the same token, it is expected that the Ghana National Petroleum Corporation should continue to grow and have strong capital base like other state-owned corporations that have distinguished themselves to the extent that they have the status of multinational corporations. Typical examples of such corporations are the Petronas of Malaysia, Petrobras of Brazil, Equinor of Norway and the Chinese Offshore Petroleum Corporation.

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[69] Andrew Chambers, *Corporate Governance Handbook* (4th Ed, Tottel Publishing, 2008) 719.

[70] Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal 309, 325.

These national oil companies have a huge capital base and have been shaping the geopolitics of the oil and gas market and investments.

The Companies Code contains a series of corporate governance provisions and which are reflected in the duties of directors such as the duty of care and skills, fiduciary duties, duties to avoid conflict of interests[71] as well as on the role of auditors that are required to provide for audit the account of the companies.[72] The US corporate governance mechanisms have been advancing corporate governance requirements where matters on disclosures are considered as key and are even backed up by statutes as contained in the Sarbanes-Oxley Act 2002 and the Dodd Frank Act 2010. Promotion of corporate disclosure both by private and public owned corporation should continue to be enhanced. Besides, investors are the ones who suffer loss when there is a corporate failure.[73] In the context of this research, the government is an investor of the oil wealth on behalf of the people of Ghana and thus there will be serious consequences in the event of a corporate failure in ventures entered into by the government.

4.8 FISCAL STABILITY VS. PETROLEUM REVENUE TAKE AND MANAGEMENT

Presumably, the energy policy objective of states is to see how they can maximise the proceeds of oil for their economic development, while the petroleum companies are moved by their desire to expand their profit margin and increase their capital and earnings for their shareholders.[74] The host states employ fiscal and tax regimes as one of the main instruments for determining the government take and earnings that would accrue to the oil and gas companies among other considerations.[75] As demonstrated in chapter two, the Petroleum Income Tax Law 1987 (PNDCL 188), Petroleum (Exploration and Production) Act 2015 and the PRMA 2011 and the Petroleum Agreement are instrumental to the

[71] See Companies Code 1963, ss. 203-205.
[72] See Companies Code 1963, ss. 131, 136.
[73] Kingsley Opoku Appiah, Corporate Governance and Corporate Failure: Evidence from Listed UK Firms (PhD Thesis, Loughborough University, 2013) 15.
[74] See Peter Roberts, 'NOC, IOC - Living in Perfect Harmony?' (2007) 5(4) Oil, Gas and Energy Law < www.ogel.org>, accessed 20 February 2018.
[75] CO Garcı´a-Castrillo´n, 'Reflections on the Law Applicable to International Oil Contracts' (2013) 6(2) Journal of World Energy Law and Business 129, 133-34.

determination of this in line with the economic objectives of the government. It is not the intention of this research or this chapter to go into the entire gamut of fiscal stability and international investment law but it will be necessary to state how the fiscal environment within which the oil and gas industry and regulation in Ghana operates should be such that it does not truncate the goals of maximum benefits from petroleum revenue. Otherwise there may be two scenarios that may occur which can become counterproductive to the accrual of revenue from petroleum resources. First it can have a chilling effect on investors who would rather explore new frontiers instead of investing in Ghana thereby reducing the take in the share of revenue. Second, where damages are levied on Ghana for a breach of international investment law commitment, this will have an impact on government revenue. For example, the Balkan gas arbitration left Ghana with an award debt of USD 11 Million.[76] Such an amount would have been used to transform the lives of the people. One point to appreciate is that funds of the nation are depleted in prosecuting the investor-state arbitration,[77] and the state may turn out to lose the proceeding thereby occasioning further losses to the state.

The Ghana Investment Promotion Centre Act 2013 guarantees the promotion and protection of foreign investors in Ghana.[78] Ghana is a party to a number of bilateral investment treaties.[79] Good examples are the Bilateral Interment Treaty between United Kingdom and Ghana[80] and between Netherlands and Ghana.[81] The United Kingdom-Ghana Bilateral Investment Treaty provides that there should be no expropriation without compensation. Similar provisions are contained in the Netherlands-Ghana bilateral investment treaty. Expropriation has been considered to be part of measures that denies the

[76] *Balkan Energy (Ghana) Limited v The Republic of Ghana*, PCA Case No. 2010-7.
[77] See Julie Lee, 'UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investment-State Arbitrations' (2013) 33 Northwestern Journal of International Law and Business 439, 447.
[78] Section 31 provides for the avoidance of expropriation except on grounds of public interest. Section 33 on the other hand provides for dispute settlement mechanisms through investor-state arbitration.
[79] http://investmentpolicyhub.unctad.org/IIA/CountryBits/79
[80] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments (entered into force on 25 October 1991).
[81] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana (entered into force on 1 July 1991)

investors of the economic viability of their investments. Tax increase or cuts on available incentives for the purpose of promotion of sustainable petroleum revenue management if not done in accordance with the established principles of international investment law on expropriation can be a ground for the challenge before an international investment tribunal.

There are a number of international investment law cases that suggest Ghana exercise caution and introspection in carving out its laws in relation to revenue management as they so far affect the investors. Investment promotion provisions in bilateral investment treaties can be used to protect investors in a way that the property rights of the investors are not adversely affected.[82] The requirement of the observance of fair and equitable treatment in the bilateral investment treaties can also be used to call into question a regulatory change to accommodate more revenues for the government. Actions can be considered not to have been done in a manner that is fair and equitable to do them.

As noted earlier, the Ghana Investment Promotion Act 2013 can be rightly said to further crystallise the provisions of the bilateral investment treaties that Ghana has entered with other nations. Therefore, it is provided in the Ghana Investment Promotion Act 2013 that:

> (a) no enterprise shall be nationalized or expropriated by Government; and (b) no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to cede his interest in the capital to any other person. (2) There shall not be any acquisition of an enterprise to which this Act applies by the State unless the acquisition is in the national interest for a public purpose and under a law which makes provision for - (a) payment of fair and adequate compensation; and (b) a right of access to the High Court for the determination of the investor's interest or right and the amount of compensation to which he is entitled. (3) Any compensation payable under this section shall be paid without undue delay and authorization for its repatriation in convertible currency, where applicable, shall be issued.[83]

This provision can operate as a check against changes to the tax and fiscal regime or expropriation of assets of foreign oil companies without adequate compensation. The Ghana Investment Promotion Act 2013 provides for mutual discussions in resolving such

[82] See Joseph A Tolorunse, *Protection of Property Rights in Discovered Petroleum Reservoirs* (Kluwer Law International, 2014) 263.
[83] Section 28 of the Ghana Investment Promotion Act 2013.

disputes or through the use of investor-state arbitration under the auspices of the rules of procedure for arbitration of the United Nation Commission of International Trade Law (UNCITRAL) or "in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties" or "any other national or international machinery for the settlement of investment dispute agreed to by the parties".[84] In the same token, the Model Petroleum Agreement provides for the settlement of dispute through the use of international arbitration conducted under the auspices of the Arbitration Institute of the Stockholm International Chamber of Commerce.[85]

Looking at the nature of claims that are made nowadays through investor-state arbitration, they are capable of affecting a country's budget. Nowadays, very huge and complex claims are brought before international investment tribunals. International investment law which is currently backed by the BITs and Ghana Investment Protection Act 2013 include:

- Protection against expropriation in the course of petroleum revenue accrual and management;
- Fair and equitable treatment of investors in the course of petroleum revenue management
- Full protection and security for investors in the bid to ensure that the state of Ghana maximises its petroleum revenue; [86] and
- Observation of the *pacta sunc servanda* clause in the course of management of petroleum revenue.[87]

[84] See Section 29 of the Ghana Investment Promotion Act 1993. Both bilateral treaties with the United Kingdom and Netherlands make provision for investor-state arbitration through International Centre for the Settlement of Investment Disputes and United Nations Commission on International Trade Law. See Articles 10 of the United Kingdom-Ghana and Netherlands-Ghana Bilateral Investment Treaties.

[85] See Article 24.1 Model Petroleum Agreement.

[86] C Schreuer, 'Full Protection and Security' (2010) Journal of International Dispute Settlement 353, 354-362.

[87] J Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason Law Review 135, 144. M Feit, 'Attribution and the Umbrella Clause - Is there a way out of the Deadlock?' (2012) 21 Minnesota Journal of International Law 21, 22.

Usually actions of host states are such that they reduce the revenue that accrues and affects the economic or pecuniary interest of the investors and therefore may be termed as expropriation. In effect, if there are changes in the regulatory regime the income base of the investor sharply reduces and that may be a ground for alleging expropriation. International investment law goes against practices that affect the pecuniary interest of the foreign investor without compensation being accorded to the foreign investor. In the same vein, such actions may be referred to as breaching the fair and equitable treatment rule. This becomes a strong ground where the host states do so without adequate notice. It is also the case where investors have made investments without contemplating the laws may change or there will be amendment to the fiscal regime. The doctrine of legitimate expectation requires that changes will not just occur at random.[88] Regulatory changes should be systematic and done with adequate notice. Full protection and security will support that the regulatory set up for changes in the legal regime for petroleum revenue are such that the government of Ghana should ensure that investors are protected.

For example, it will be necessary that there is protection for foreign investors by the government when they are being victimised by officers of the various agencies or when it becomes obvious that an agency is acting out of its bounds in a way that the business of the investor will be adversely affected. For example, victimisation by an anticorruption agency, the Bank of Ghana or the Ghana Revenue Authority will amount to a breach of the duty of full protection and security if Ghana fails to act. In the case of full protection and security, there is the requirement that the host states must observe in good faith all commitments made with the foreign investor.[89]

The matter of stability is worth examining because of the fact that the sector in Ghana cannot be said to have taken a full shape and the fact that Ghana gives a leeway for flexibility in its Petroleum Income Tax Law 1987 (PNDCL 188), where it provides for tax rates to be negotiated. Tax law can be subjected to amendment given that there is emphasis

[88] Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21(1) ICSID Review – Foreign Investment Law Journal 1, 36.

[89] See Jarrod Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14(1) George Mason Law Review 137.

on the fact that Ghana should get it right in the development of the country's petroleum revenue base and ensure that there are no leakages in the sector. An example from Nigeria can be used to demonstrate this as seen in the work of Adaralegbe[90] on fiscal stability under the Nigerian law, giving an account of the case of *Niger Delta Development Commission (NDDC) v Nigeria Liquefied Natural Gas (NLNG), Ltd*.[91] In the case, Nigerian government passed legislation (the NLNG (Fiscal Incentives, Guarantees and Assurances) Act 1990) to grant tax waivers to the NLNG project for a period of 10 years. It was provided in the law that "Without prejudice to any other provision contained herein, neither the company nor its shareholders in their capacity as shareholders in the company shall in any way be subject to new laws, regulations, taxes duties imposts, or charges of whatever nature which are not applicable generally to companies incorporated in Nigeria or to shareholders in the companies incorporated in Nigeria respectively".[92]

It was further provided that: "The Government shall take such executive, legislative and other actions as may be necessary so as to effectively grant, fulfil, and perfect the guarantees, assurances and undertakings contained herein. In order to afford the degrees of security required to enable the company's investment to be made, the Government further agrees to ensure that the said guarantees, assurances and undertakings shall not be suspended, modified or revoked during the life of the venture except with the mutual agreement of the government and the shareholders of the company".[93]

In 2010, the NDDC Act was passed into law with the objective of improving the development in the oil rich Niger Delta region. It was required that the programs of NDDC will be funded by requiring all oil companies in Nigeria to pay 3% of their annual budget into the NDDC fund. This development did not auger well with the NLNG partners that include foreign investors such Shell, Total, and ENi. They approached the court to challenge the provisions of such a law on ground that there was a commitment not to change the law. The Federal High Court of Nigeria ruled in favour of the NNLG but the

[90] See Bayo Adaralegbe, 'Stabilizing Fiscal Regimes in Long-term Contracts: Recent Developments from Nigeria' (2008) 1(3) Journal of World Energy Law & Business 239, 239–246.
[91] (2011) 4 TLRN 1.
[92] S 3 of the Second Schedule.
[93] S. 6.

decision was overturned upon appeal to the Court of Appeal on ground that the NLNG Act fettered the discretion of the National Assembly (the legislative arm of government) to make law.

It is contended in this thesis that this case would have resulted in a different decision if it was brought before investor-state arbitration within the framework of the bilateral or multilateral arrangement which Nigeria has with the government of the foreign investors. Kolo's work can further buttress the argument here where he examines the windfall tax phenomenon which made states change the rules of the game by making changes to the fiscal regime to increase the take of the state from petroleum revenue.[94] In the arbitral case of *Burlington Resources Inc. v. Ecuador*,[95] the president of Ecuador submitted a Bill to the parliament for an increase in the government take through participatory interests because to the government there was a "so-called extraordinary profit" which was occasioned by excessive price in the oil and gas market. The Bill was passed into law but in the arbitration that ensued, it was decided against the government of Ecuador on the basis that there was modification of the tax system contained in the production sharing contract.

> Participation of the State over non agreed or unforeseen surpluses from oil selling contracts. Contracting companies having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of execution of the agreement expressed at constant rates for the month of payment, shall grant the Ecuadorian State a participation of at least 50%.[96]

This situation raises concern about why Ghana should be more forward looking in the development of the petroleum revenue base and ensure that the laws are reflected in a way that there is flexibility and at the same time stability is promoted. Though there is the general argument that a country by virtue of the established principle of sovereignty in

[94] Abba Kolo, 'Fat Cats and 'Windfall' Taxes in the Natural Resources Industry: Legal and Policy Analysis in the Light of Modern Investment Treaties' in Jacques Werner and Arif Hyder Ali (eds.), *A Liber Amicorum: Thomas Wälde – Law Beyond Conventional Thought* (CMP Publishing Ltd, 2009) 110.
[95] ICSID Case No. ARB/08/5 (14 December 2012).
[96] Para. 30.

international law it can direct the affairs of its petroleum resource and revenue there are limitations to such an exercise. The fact that a country has committed itself to international instruments or treaties is an indication that it must obey such and the country may derogate from it.[97] Nevertheless one of the adverse consequences of derogation will be that the investor may bring a claim under investor-state arbitration for damages.

The fiscal regime in Ghana is largely governed by the laws identified in the PRMA 2011, Petroleum Income Tax Law 1987 (PNDCL 188) and Petroleum (Exploration and Production) Act 2016. As shown in chapter two of the thesis, the negotiated petroleum agreement dictates the fiscal regime. Nevertheless, the provision of the law will prevail in the normal course of things if there are no changes. The Petroleum Agreement appears to limit opportunities for flexibility and possible renegotiation of the terms. The Ghana Model Agreement operates a very strict form of stability that leaves the state with no option but to be locked in an agreement it enters with foreign oil corporations. Article 26.2 of the Agreement provides that the state guarantees the stability of the agreement on its terms and conditions and no laws such as the petroleum and the tax laws shall amend the agreement. Accordingly, Article 26.2 provides that any of such amendment would amount to a breach.

Whilst change in circumstances may be grounds for change in an agreement in international law, the law gives room for the parties to only negotiate for significant changes. This appears to be limited and may be difficult to establish that circumstances have actually changed to warrant the parties going back to the negotiation table.

The approach employed under the Production Sharing Agreement of Tanzania is very apt in addressing the changes in law. It is provided that in Article 30 that:

> If at any time or from time to time there should be a change in legislation or regulations which materially affects the commercial and fiscal benefits afforded by the Contractor under this contract, the Parties will consult each other and shall agree to such amendments to this Contract as are necessary to restore as near as practicable such commercial benefits which existed under the Contract as of the Effective Date.

[97] Mustafa Erkan, *International Energy Investment Law: Stability through Contractual Clauses* (Kluwer Law International, 2011) 131.

Whatever approach that Ghana decides to take for the eventual review of its laws to accommodate current realities, it must be done bearing in mind the various commitments it has made with the foreign investors in the business of exploration and production of petroleum. It is apt to note here the proposition of the tribunal in the case of *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*[98] where it reasoned that:

> …the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.

Ghana will need to be wary of finding itself in a situation where the resources of the state will be depleted in fighting claims before investment tribunals as well as on the costs that are capable of crippling the purse of the state. The case of *Balkan Energy (Ghana) Limited v The Republic of Ghana*,[99] which was an investor-state arbitration instituted against Ghana before the Permanent Court of Arbitration typifies how wasteful it may be for a country to engage in dispute with foreign investors most especially where there are no strong justification to back the country's action. In this case a contract entered into by Ghana was challenged because it fell short of the requirement for parliamentary approval as provided for under the constitution. It was found that the action of the Ghanaian government in the entire process breached the investor protection under the BITs. The tribunal awarded USD 11 Million against Ghana. Unfortunately, Ghana could not pay the judgment debt as ordered and Balkan Energy has also been making efforts to seek recognition and enforcement of the judgment beyond the shores of Ghana.

Notable among the actions taken so far are the fillings of application for recognition and enforcement in the United States and the seeking of attachment of the "six million shares in

[98] ICSID Case No. ARB/03/16 (2 October 2006).
[99] PCA Case No. 2010-7.

AngloGold worth US$57million to pay for the judgment debt"[100]. Certainly, this has economic impact on the state of Ghana as resources have been spent in pursuing the case. In essence, if the matters on fiscal stability and the need to increase the government take in the petro wealth are not appropriately addressed, Ghana risks expending two costs; the first being the cost of defence of arbitral claims before international investment tribunals and damages against the state if found wanting to be in breach of stability commitment.

4.9 CONCLUSION

The basis of this chapter is that the socioeconomic context within which the society operates plays an important role in determining the extent of implementation of the law. Therefore, the focus of the chapter was to examine other social and legal context in which the relevant laws on revenue management will operate since they will not be implemented in isolation. They have to fit into the legal configurations of the country for them to fully operate. Appreciating how these laws operate in a context of the country is very important otherwise efforts made through policy and regulation may turn out to be counterproductive.

Much will have to also be done in terms of corporate governance, in particular oil and gas companies operating in Ghana should reflect a robust corporate governance model and likewise the Ghana National Petroleum Company. Other government-based corporations should also, to a large extent, employ the corporate governance trends in their management of their affairs and provide for effective managerial control and promotion of transparency in the sector. Generally, the laws for the management of petroleum revenue in Ghana cannot operate in isolation; their operation depends on the extent to which they fit into the socio-legal context.

Corruption will need to be revisited and there should be clear distinction between corruptions committed in the course of petroleum revenue management and those not

[100] 'Balkan Energy chases Ghana's $57m shares in AngloGold Ashanti', https://www.ghanaweb.com/GhanaHomePage/business/Balkan-Energy-chases-Ghana-s-57m-shares-in-AngloGold-Ashanti-557020, accessed 28 February 2018.

associated with the petroleum revenue. Such should not be penalized under other laws. There will be a need for the various laws bordering on official corruption to operate in harmony. The power of the Attorney General to discontinue trial for criminal cases may fetter the anticorruption laws relevant to the oil and gas industry. As the state of affairs stand, the Attorney General can choose to prosecute or not to prosecute cases of fraud. Furthermore, the establishment of the Office of the special Prosecutor to try corruption of politicians may not square well as there may be an avenue that the office is used only against the opposition.

The provision for judicial review can be an avenue that can be utilized to compel the government agencies to continue to exercise their functions regarding petroleum revenue management for sustainable development. It can also be utilized to stop illegal actions or even declare null and void actions that have been already carried out on petroleum revenue management that are not in accordance with the constitution or the law. The requirement of *locus standi* if care is not taken may be applied to forestall these powers given to the citizens by the law and constitution. The courts will have to be proactive to ensure that the doctrine does not operate as a bar to the citizens desirous of challenging actions of the government that are inimical to petroleum revenue management for sustainable development. Finally, the stability of the legal regime is still an issue as Ghana still being a new producer may be pushed to amend its laws to increase its revenue take when windfall occurs. It is argued that though Ghanaian sovereignty over petroleum resources is guaranteed internationally and provided for in the constitution, it owes investors the obligation of fiscal stability or risks challenges before investor-state arbitral tribunals.

Therefore, from the foregoing, the relevant petroleum laws cannot work in isolation as they need to interact with other laws in Ghana as has been demonstrated in this chapter. The next chapter will examine critically revenue management in Ghana based on international best practices. To achieve this, the approach employed will be to look at how Ghana has fared in oil revenue management as measured against the established principles of sustainable development, the practices of the Extractive Industry Transparency Initiative

(EITI), which Ghana is currently a member, and the Generally Accepted Principles and Practices for Sovereign Wealth Funds (the Santiago Principles).

CHAPTER FIVE: THE EITI STANDARDS AND PETROLEUM REVENUE MANAGEMENT FOR SUSTAINABLE DEVELOPMENT IN GHANA

5.1 INTRODUCTION

The essence of this chapter is to seek to answer questions on promotion of transparency in the sustainable management of petroleum revenue in Ghana. Historically, natural resources, especially mineral resources, have given rise to the widely held view that they are a curse rather than a blessing to countries that are endowed with them. Countries which are endowed with abundant mineral resources wealth are noted for the paradoxically high rate of poverty, monochromic economy, mismanagement of mineral resources, resource propelled conflict, corruption etc. Sachs and Warner have observed that: "one of the surprising features of modern economic growth is that economies abundant in natural resources have tended to grow slower than economies without substantial natural resources."[1] This has been the foundational basis of the resource curse theory that has been propounded and popularised by scholars in the discipline of economics and political science. Richard Auty[2] was the first scholar to coin the phrase, 'resource curse' as a description of this phenomenon.

However, further research in this field of study supported by exceptional resource rich countries like Norway, Canada, USA, Botswana etc. are testimony to the fact that resource curse does not arise merely by the possession of abundant natural resources *per se*. Scholars such as Mehlum,[3] Acemoglu,[4] Boschini et al,[5] Wright and Czeluster[6] among others have propounded the view that it is not the natural resources that is responsible for the dwindling consequences on the economy of resource rich countries, but it is the institutions that

[1]Jeffrey Sachs and Andrew Warner, *Natural Resource Abundance and Economic Growth* (Cambridge MA: Center for International Development and Harvard Institute for International Development, 1997) 1.

[2]Richard M Auty, *Resource-based Industrialization: Sowing the Oil in Eight Developing Countries*, (Oxford University Press 1990); Richard M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis*, (Routledge 1993) 1.

[3]Halvor Mehlum, Karl Moene, and Ragnar Torvik, 'Cursed by Resources or Institutions?' (2006) 29 World Economy 1117, 1121.

[4]Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origin of Power, Prosperity and Poverty* (Crown Publishing 2012) 396.

[5]AD Boschini, J Pettersson and J Roine, 'Resource Curse or Not: A Question of Appropriability' (2007) 109 Scandinavian Journal of Economics 593–617.

[6]Gavin Wright and Jesse Czelusta, 'Why Economies Slow: The Myth of the Resource Curse' (2004) 47 (2) Challenge 6, 36.

determine whether the resources would amount to a curse or blessing. Institutions have emerged to be used as a tool for effective management of natural resource as long as the necessary governance measures are put in place.[7] The institutional view point is to the effect that if the natural resources of a country are properly managed by the relevant institutions, there is likely to be economic prosperity for the state. Conversely, where the resources are not properly managed the resource curse syndrome would set in.

The institutionalist viewpoint has raised awareness about how corrupt practices may affect institutions that are responsible for the management of natural mineral resources. For example, most countries, which mainly depend on petroleum and have weak institutions have tendency towards low economic development.[8] There are cases of bribery of government officials by multi-national companies.[9]

Confronting corruption requires transparency as a counter measure. This is because corruption thrives in an atmosphere of secrecy. A transparent system exposes corrupt practices and makes it unattractive. The manner by which resource-rich countries manage their natural resources has given cause for global concern. This has led to efforts towards a collective attempt to establish principles, which have gradually culminated in a universally accepted governance model for natural resource management. One of such instances is the effort made in 2008 by International Monetary Fund (IMF) in collaboration with the International Working Group (IWG) of Sovereign Wealth Funds.[10] The result of the collaborative effort is the arrival at some commonly held management principles and structure[11] of sovereign wealth funds (SWF) which is commonly referred to as the Santiago Principles.[12] The principles were drafted and concluded at the third conference of the

[7]Yvonne Rydin, 'Institutions and networks: The search for conceptual research tools' in Yvonne Rydin & Eva Falleth (eds.) *Networks and Institutions in Natural Resource Management* (Edward Elgar Publishing 2006) 26.

[8]Scott P. Stedjan, 'Land is Not the New Oil: What the Nigerian Oil Experience Can Teach South Sudan about Balancing the Risks and Benefits of Large Scale Land Acquisition' (2015) 3 (2) Penn State Journal of Law & International Affairs 168, 171.

[9]*ibid*. 188.

[10]The IWG is made up of 21 IMF member countries which operate SWF in their countries.

[11]This is formally referred to as Generally Accepted Principles and Practices (GAPP).

[12]Marianne Sinquin, 'Good Governance of Sovereign Wealth Funds: The Case of the Australia Future Fund' (LLM, University of London 2012) 20.

IWG[13], which took place in Santiago, Chile.[14] Amongst other objectives, the Santiago Principles is targeted at ensuring transparency, good governance institution and accountability in the management of these funds.[15]

In the same vein, the Extractive Industries Transparency Initiative (EITI) represents another attempt toward regulatory principles for the extractive industries. Even though the EITI has a point of convergence with the IWG's Santiago Principles, they are markedly different from each other. The Santiago Principles are primarily targeted at investment practices and risk management of the SWFs, with transparency and accountability as incidental matters to the effective investment of the fund. It does not include extractive countries who do not maintain a SWF. On the other hand, EITI focuses primarily on transparency and accountability issues in the extractive industry. The implication is that it is not only concerned about the conduct of state parties but also other stakeholders involved in the extractive industry of these countries, which includes multinational corporations, state owned corporations, public institutions, host communities etc.

The EITI has recorded some success since its creation. Apart from just establishing principles that ends up as soft laws instruments like the fate that has befallen the Santiago principles, efforts have been made to compel state parties to the agreement to domesticate the EITI principle into their national laws. For instance, Nigeria enacted the Nigerian Extractive Industry Transparency Initiatives (NEITI), Act in 2007. Even though there is room for improvement, for regular reporting, it has been seen that since the adoption of the initiative by the Nigerian government, there has been a marked improvement in the level of transparency in the Nigerian extractive industry than previous occasion due to more public awareness in the going ins in the oil and gas section courtesy of the initiative.[16]

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[13]The first and second conferences took place in Washington, D.C. and Singapore respectively.

[14]A Wong 'Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations' (2009) 34 (3) Brook Journal of International Law 1081, 1103.

[15]International Working Group of Sovereign Wealth Funds, 'Sovereign Wealth Funds Generally Accepted Principles and Practices "Santiago Principle"' 4 (2008). <santiagoprinciples_0_0.pdf> accessed 9 May 2018.

[16]Jesumiseun O Adewumi, 'Governance in the Nigerian extractive industries: From a human development perspective' (LLM, Loyola University Chicago 2013) 14.

In the case of Ghana, this country is a late comer in respect of oil and gas exploration having discovered oil in commercial measures just in 2007. The Ghanaian government has not shied away from its intention of tying its developmental agenda along the fortunes of oil and gas exploration. Hence, the Ghana Shared Growth and Development Agenda (GSGDA), is the organisation which the national development plan of the country has directed its vision towards a "modern economy based on science and technology" to.[17] Like most other developing countries, this discovery has been seen as an opportunity to advance the economic fortunes of the country. This led to a scramble towards the petroleum exploration even before adequate preparedness and a legal framework has been put in place to regulate the complex and highly specialised oil and gas industry.[18] Also, like most other natural resource rich countries which fell prey to the resource curse syndrome, one would expect that the Ghanaian government would learn from those experiences.[19] Ghana is not immune to the disease, hence, serious precautionary and preventive measure should be put in place to ensure that they are not caught up with the disease.

If the institutional perspective of the resource curse is anything to go by, this would require that the Ghanaian government establish effective institutional framework to deal with the impending doom that would make Ghana one of those exceptional countries that are immune to the curse. On the theoretical level, this would just go on to prove the institutionalist school of thought right. One way of realising a formidable institution that would effectively manage the natural resources of the country is by injecting transparency into the system. Ghana has created an institution fashioned after the EITI model, which is GHEITI. While this is a step in the right direction, it is imperative that same effort is put in place for effective implement of the principles to make it work. It is in this regard that this study shall examine how well the Ghanaian government has implemented the EITI

[17]John Kwadwo Osei-Tutu, 'A Study of Ghana's Oil and Gas Industry Local (Ghanaian) Content Policy Process' (2013) 8 <https://www.researchgate.net/publication/321184435_NKOSOO2015__A_STUDY_OF_GHANA%27S_OIL_AND_GAS_INDUSTRY_LOCAL_GHANAIAN_CONTENT_POLICY_PROCESS?Pdf> Accessed 20 October 2018.

[18]*ibid*.

[19]See JA Bamiduro, 'Nigeria and the Petroleum Resource Curse: What Ghana can Learn for Improved Management of Oil and Gas Revenues' (2012) 12 (1) Global Journal of Human Social Science 8, 16.

principles in the oil and gas sector towards effective management of revenue accruing from their oil and natural gas endowment. Also, it would seek to examine how the transparent management of the Petroleum resources can result in sustainable development in Ghana.

5.2 THE ORIGIN AND FORMATION OF EITI

The activities in the extractive industry are usually shrouded in mystery due to its technicality and its close circuit operations. Most oil and gas contracts involving governments and companies are not within the public domain, thus, leaving citizens in the dark about the affairs in the industry, thereby making it difficult to make their government account for how the resources are managed.[20] This gives room for practices that do not augur well for the management of resources for the collective interest of the people for whose benefit the natural resources are held in trust. This gave rise to series of campaigns by civil society groups creating awareness about the need for transparency in the workings in the extractive industry.

Foremost of this peer pressure was the Publish What You Pay (PWYP) campaign borne out of a collaborative effort by more than 300 non-governmental organisations (NGOs) across the globe. The PWYP campaign started after the ground-breaking study on Angola was carried out by Global Witness', a London-based NGO. The NGO's report on diamond exploration, captioned 'A Rough Trade' (1998) and its 1999 report titled 'A Crude Awakening' served as eye openers on how the minority cartel of elites have used petroleum revenue to shield themselves from accountability and the vast consequences which this portends to the society.[21] Their demand was a compulsory full disclosure of payments made by companies to governments for petroleum and mineral extraction. They also demanded a full disclosure of the resource earnings of resource-rich countries.[22]

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[20]Patricia I Vasquez, 'Four Policy Actions to Improve Local Governance of the Oil and Gas Sector, International development policy' (2016) 7 <https://journals.openedition.org/poldev/2227> Accessed 20 October 2018.

[21]Nicholas Shaxson, *Nigeria's Extractive Industries Transparency Initiative Just a Glorious Audit?* (Royal Institute of International Affairs 2009) 1.

[22]United Nations Conference on Trade and Development World Investment Report, *Transnational Corporations, Extractive Industries and Development* (United Nations Publishers 2007) 179.

EITI is claimed to have been proposed by Tony Blair, the then British Prime Minister, in 2002 at the World Summit on Sustainable Development, Johannesburg. However, it was formally launched and became operative in 2003 courtesy of the UK Department for International Development (DFID) which gathered various stakeholders involved in the extractive industry, including governments of resource endowed states, multi-national companies, civil society groups, international financial organisations etc. The conference urged interested stakeholders in the extractive industry to formulate a framework towards encouraging transparency in the payments made and the revenues derived in the course of natural resource exploration.[23] Thus, the EITI is credited to be "a policy mechanism marketed by donors and Western governments as a key to facilitating economic improvement in resource-rich developing countries- in sub-Saharan Africa"[24] It is an international organisation which flourishes on voluntary membership as it is established towards the promotion of transparency on the basis of disclosure by the companies and government of what they pay and receive respectively.[25]

The outcome of the June 2003 London Conference was the formulation of 12 EITI Principles. Azerbaijan, Ghana, Kyrgyz Republic and Nigeria served as the first four countries where the implementations of the EITI principles were first test run. Peru, São Tomé and Príncipe, Timor Leste, Republic of Congo and Trinidad and Tobago were the next set of countries. It was in the course of these test runs programmes that measures such as EITI Validation Guide and pointers for EITI compliance were formulated.[26]

The governance structure of EITI was established three years after its formation at the EITI Conference which took place in 2006 at Oslo, Norway after series of consultative forums had been initiated by the International Advisory Group. Thereafter, the EITI Board was formulated to bear the responsibility to administer the collective development, strategic

[23] Adewumi, 14.

[24] G Hilsonand & R Maconachie 'The extractive industries transparency initiative: Panacea or white elephant for Sub-Saharan Africa?' in JP Richards (ed.) *Mining, Society, and a Sustainable World* (Springer 2009) 52

[25] Bashir Bature, 'Transparency and Accountability: Adaptation and Implementation of Extractive Industries Transparency Initiative (EITI) Principles in Nigeria' (2014) 3 (8) The Macrotheme Review 107, 107.

[26] Volker Lehmann, *Natural Resources, the Extractive Industries Transparency Initiative, and Global Governance* (The Hague Institute for Global Justice Background Paper 2005) 6.

plan, sensitisation, advocacy, and ensure that states conform to the process of putting EITI into effect. The Board also organises the EITI Conference on a bi-annual basis, wherein it must present its reports. The board works hand in hand with the International EITI headquarter secretariat domiciled in Oslo, to achieve its goals.[27] The Board is made up of 20 members who are chosen from representatives of governments of state members, corporations in the extractive industry and the civil society groups, which constitute the three basic constituencies of EITI. A neutral person is appointed to head the board.[28] The Secretariat performs the everyday activities of EITI subject to the guidance of the Board under the leadership of its Chairperson.[29] EITI also has another channel of authority known as the Members' Meetings. This body is made up of all states, extractive companies and civil society group who identify themselves as EITI members. The members' meeting is convened in the bi-annual EITI conference. Part of its function is to appoint the EITI Board Members.[30]

As at 2017, there were 56 States, which partook in the EITI scheme. EITI Member States generally comprise of supporting States and implementing States. Supporting States encourage the idea of creation and implementation of global transparency initiative for the benefit of mineral extracting States even though the supporting States need not be resource-rich countries.[31] On the other hand, the implementing States expressly pledge their commitment to the adoption and implementation of the EITI standards and requirements.[32] They are mostly extractive rich countries. When a state elects to implement EITI standards, it is duty bound to establish Multi Stakeholders Group (MSG) which is responsible for the supervision of the implementation process at the State level. The MSG as the name implies is a conglomeration of several interest groups such as the resource rich countries either of supporting or implementing governments, international mineral extractive corporations,

[27]World Bank Independent Evaluation Group, *Multi-Donor Trust Fund for the Extractive Industries Transparency Initiative* (Global Program Review 5 (1), 2011) 3.
[28]*ibid*. 7.
[29]*ibid*.
[30]Ibid.
[31]Maya Schmaljohann, 'Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI' (University of Heidelberg Discussion Paper Series No. 538 2013) 4.
[32]Ibid.

International Non-Governmental Organisations and civil society organisations.[33] Majority of States have established a national secretariat with full time personnel responsible for the administrative process of the program.[34] The implementing States also have the duty to publish annually reports wherein the States' governments proffer public disclosure of income derived from the enterprise of mineral resource extraction. This further surpasses the rigours of independent external audit and verification when placed side by side with the records proffered by the resource extractive companies.[35]

The EITI has been criticised based on certain limitations which it is faced with. The basic limitation is the voluntary nature of the scheme as it largely depends on the co-operation of multinational companies to expose their records to the public glare. The target of the EITI is to work out a means of dealing with the resource curse syndrome that afflicts resource-rich countries. Also, it is mainly concerned with putting a close tab on the revenue accruing from the extractive industry without giving a care as to how well the resources are put to use by the government for the benefit of the people.[36] However, as multi-dimensional as the causality of resource curse appears to be, EITI chose to narrow down its focus on revenues using the tool of transparency while ignoring other approaches.[37] It is apt that corruption, which transparency intends to tackle, is not the only cause of resource curse; the rent seeking tendencies of institutions, the focus on resource extractive industry as the sole means of economic subsistence, reckless recurrent government spending etc. are other issues which must be tackled also.

EITI further set out goals, which it sought to achieve in the long and short term. These goals are basically eleven in all and are set out in three categories comprising institutional,

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[33]Bashir Bature, 'Transparency and Accountability: Adaptation and Implementation of Extractive Industries Transparency Initiative (EITI) Principles in Nigeria' (2014) 3 (8) The Macrotheme Review 107, 107.

[34] Office of Inspector General, U.S. Department of the Interior, 'Implementation of the Extractive Industries Transparency Initiative' (2017) 3. <https://www.doioig.gov/sites/doioig.gov/.../AIE_EITI_FinalInspectionReport_Public.pdf> Accessed 10 October 2018.

[35]Ibid.

[36]Abiodun Alao, *Natural resources and conflict in Africa the tragedy of endowment* (University of Rochester Press 2007) 275.

[37]Benjamin K Sovacoola, Gootz Walterb, Thijs Van De Graafc & Nathan Andrews, 'Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)' (2016) 83 World Development 179, 189.

organisational and developmental goals. The Institutional goals of EITI are aimed at moulding the EITI into a recognised institution and strengthen its position, approach and function.[38] This category of EITI goals appear to have been more successfully attained compared to the others, by virtue of having successfully entrenched itself as a brand of global reckoning, in addition to making states embrace the idea of transparency.[39] The targets are as follows:

i. "to ensure EITI becomes a brand of nationally and globally reckoning";

ii. "to ensure that through EITI transparency is entrenched as a domestic and globally norm";

iii. "to make sure that governments boost their EITI level of participation, support, and compliance";

iv. "drive towards the creation and promotion of multi-stakeholder groups which will continue to act as the managerial basis and form of governance".

The operational goals are the set results, which EITI sought to achieve, and the means through which it is to achieve them. These goals entail midway means considered essential for EITI to realise the wider developmental goals in connection with the portion within the area of direct EITI influence.[40] The targets of these goals constitute the following:[41]

i. "creation of plain and reliable EITI standards";

ii. "ensure the rise in the ability of states to realise the EITI standard and release apt and all-encompassing report as and when due";

iii. "ensure a rise in public awareness, discussion and pressure on issues pertaining to the management of natural resource";

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[38] Päivi Lujala, Trondheim Siri Aas Rustad and Philippe Le Billon, *Has the EITI been successful? Reviewing Evaluations of the Extractive Industries Transparency Initiative* (5 U4 Brief, 2017) 2.
[39]Ibid. 3.
[40]Ibid.
[41]Ibid. 2

iv. “ensure increased effectual and fervent participation of civil society groups in the multi-stakeholder groups”.

The developmental goals are wider in scope and are concerned about the ultimate future outcomes of realising the society’s needs. This is targeted at achieving the original intention for the creation of EITI. These goals fall into the category of:[42]

i. “ensure increasing income from the extractive industry for the benefit of the society as a result of decrease in corrupt practices”;

ii. “ensure attractive investment ambience, increase in the flow of financial and material aid and encourage equitable distribution of government revenues”;

iii. “support good governance, advance sustainable development, and advocate for progressive living standards for citizens”.

The developmental goals are the tangibly expected outcomes in the long run. This implies that the result may not be immediately obvious but would eventually arise from the effective attainment of the combined institutional and organisational goals. They are the transformation, which is the expected effect of transparency, and good governance, which EITI canvasses for. This set of goals is beyond the sole province of EITI to achieve; the role of state parties, civil society, members of the public and other stakeholders will also go a long way to ensure its realisation.[43] Studies suggest that EITI has succeeded in attaining its institutional goals and certain operational goals.[44] The foremost goal of intensifying revenue transparency by means of ensuring the regular availability of public reports has been satisfied; whereas the major goal of public involvement is regarded as having been partially fruitful, with a qualified involvement of civil society groups in the MSG but falls

[42]Ibid.
[43]Ibid. 5.
[44]Siri Aas Rustada, Philippe Le Billon, Päivi Lujalac, ‘Has the Extractive Industries Transparency Initiative been a success? Identifying and evaluating EITI goals’ (2017) 51 Resources Policy 151, 160.

short in the aspect of public empowerment to put the governments and companies to public accountability.[45]

5.3 THE EITI STANDARDS

The EITI standards is a combination of the EITI Principles, criteria and requirements which forms guidelines that must be implemented by States and other stakeholders. Also, the EITI validation guide serves as an essential part of the EITI scheme even though it relates more to the compliance assessment procedures.[46] There are twelve EITI principles, six criteria and twenty-one requirements. The requirements are arranged into six categories. The standards integrate progressive time frames and deadlines for implementation, which must be based on the periodic publication of EITI Reports and constant supervision of the process by the MSG. The Standards goes as far as specifying the kind of information that must be published and the basic requirements for member States.[47] The latest version of the Standard has gone on to require the inclusion of contentious issues such as proffering information on who are the beneficial owners of extractive companies and the need for transparency and specificity in the extractive contract between extractive companies and their host states.[48]

5.3.1 EITI Principles

The end of the first EITI Conference in 2003 in London culminated in the creation of the 12 EITI Principles. These principles are solemn declaration of the convictions of the member parties of the conference and they provide as follows:

1. "We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and

[45]Ibid.
[46]Anna Stetter & Bernhard Zangl, 'Certifying Natural Resources- A Comparative Study on Global Standards and Certification Schemes for Sustainability Part II – Empirical Assessment of Case Studies' (DERA Rohstoffinformationen 2012) 124.
[47]Christoffer Borchgrevink Claussen, 'A Cure for the Curse? Effects of the Extractive Industries Transparency Initiative' (Master's Thesis, University of Oslo 2016) 5.
[48]Ibid.

poverty reduction, but if not managed properly, can create negative economic and social impacts".

2. "We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development".

3. "We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent".

4. "We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development".

5. "We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability".

6. "We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws".

7. "We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring".

8. "We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure".

9. "We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business".

10. "We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.

11. We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country".

12. "In seeking solutions, we believe that all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations".

5.3.2 EITI Criteria

In the EITI London Conference of 2005, the six EITI Criteria were adopted as bench mark standards which participating countries must be careful to comply with. The criteria include the following:

i. Constant publication for public access of each record of payments made by companies to governments and income governments receive from companies pursuant to petroleum, gas and mining exploration activities.[49]

ii. Subjection of the records of revenue paid or received to independent and reliable audit standards in line with international best practices.[50]

iii. The records of payments and revenues by companies and governments are examined for consistency or discrepancies by independent and trustworthy auditors in line with international best practices after which the auditor shall publish opinion of the evaluation and findings.[51]

iv. Similar standards are applicable to private, public and state-owned companies.[52]

[49]EITI Rules including the Validation Guide 24 February 2010, 10. <https://eiti.org/sites/default/files/documents/EITI_Rules_Validations_April2011_1.pdf> Accessed 10 October 2018
[50]Ibid.
[51]Ibid.
[52]Ibid.

v. Prominent involvement of civil society groups in the creation, monitoring of the process and evaluation of outcome which will also give room for involvement of public discussion.[53]

vi. Responsibility of the host state, with the support of international financial organisations, to create work plan with economic sustainability, quantifiable targets, implementation timelines and anticipated capacity limitations.[54]

All countries involved in natural resource extraction are encouraged to implement EITI Standards. Any of such countries has to first be admitted as a candidate by the international EITI Board upon application.[55] Some of the conditions which it must fulfil include a public announcement of its commitment in that regard; formulate a plan of action on their its objectives and how it intends to attain EITI Compliance level and create a Multi-Stakeholder Group (MSG) which involves the multinational companies and civil society groups.[56] A country, which has attained candidature status, is expected to attain compliance level with EITI standard within three years thereafter.[57]

Under the 2011 edition of EITI rules, twenty-one requirements are provided for implementation by states. These rules are as follows:

1. The State is expected to make an affirmative public proclamation of its desires to implement and be committed to EITI.[58]

2. The State is also expected to sound its commitment and willingness to work in co-operation with civil society groups and corporations towards giving effect to EITI.[59]

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[53]Ibid.
[54]Ibid.
[55]Extractive Industries Transparency Initiative, 'EITI Factsheet' <https://eiti.org/sites/default/files/documents/.../2014-08-14_EITI_Factsheet_English.pdf> Accessed 10 October 2018.
[56]Ibid.
[57]Ethiopia Oil and Gas Sector Development, 'Support for Review and Update of Policy and Regulatory Framework' (Final Report) <documents.worldbank.org/.../en/.../pdf/106190-WP-P151025-PUBLIC-Oil-and-Gas.pdf> Accessed 10 October 2018.
[58]Extractive Industry Transparency Initiative, EITI Rules, 2011 Edition including the Validation Guide. <https://eiti.org/sites/default/files/documents/EITI_Rules_Validations_April2011_1.pdf> Accessed 10 October 2018.

3. The State is called upon to assign a high-ranking officer to direct the implementation process of EITI.[60]

4. The State is requisitioned to create a MSG, which will supervise the implementation process of EITI.[61]

5. The MSG, after consultation with relevant EITI stakeholders, shall have a consensus and publish a work plan with financial projections, which include quantifiable goals and implementation timelines and possible restraining.[62]

6. The State is expected to guarantee the independence and efficiency of civil society groups in the process.[63]

7. The State is enjoined to involve extractive companies in the process of EITI implementation.[64]

8. The State is expected to eradicate every barrier that would stand on the path of EITI implementation.[65]

9. The MSG is required to reach an accepted understanding of substantiality and reporting model.[66]

10. The establishment assigned with the duty of formulating the EITI harmonisation report must possess the reputation that is perceived to be reliable, trustworthy and their professional competence must not be in doubt by the MSG.[67]

11. The State is saddled with the responsibility of ensuring that every pertinent company and public institution hand in their periodic report.[68]

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[59]Ibid.
[60]Ibid.
[61]Ibid.
[62]Ibid.
[63]Ibid.
[64]Ibid.
[65]Ibid.
[66]Ibid.
[67]Ibid.

12. The government has a duty to ensure that the reports produced by extractive companies are founded on audited accounts based on international best practices.[69]

13. The government is also to certify that the reports made by government are founded on audited accounts on the basis of international best practices.[70]

14. Extractive companies are to exhaustively disclose every substantial payment made to the government in compliance with acceptable reporting guideline.[71]

15. Government agencies are to exhaustively disclose each substantial revenues obtained from the extractive companies in compliance with acceptable reporting guideline.[72]

16. The MSG must be satisfied that the organisation engaged to harmonise the figures in the government and company reports adequately carry out that function.[73]

17. The organisation which is to carry out the function in requirement 16 above must ensure that a robust EITI Report is produced which will identify every inconsistency, or explain them and make possible recommendations for necessary corrective course of actions.[74]

18. The State and the MSG have the task of ensuring succinct and open access of the EITI Reports to members of the public so as to generate public discussion on the findings.[75]

19 Extractive companies are to give their full support to EITI implementation.[76]

20. The government and MSG are enjoined to take up measures lay to bare lessons gained, deal with discrepancies and make sure that the execution process of EITI is sustainable.

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[68]Ibid.
[69]Ibid.
[70]Ibid.
[71]Ibid.
[72]Ibid.
[73]Ibid.
[74]Ibid.
[75]Ibid.
[76]Ibid.

Implementing countries must make certain of are required to hand in their validation reports to the EITI Board as and when they are due.[77]

21. The previous twenty requirements must be strictly complied with by relevant parties. For State parties, it is a prerequisite and a post requisite to obtain and retain their implementing and compliant status.[78]

The EITI Standard of 2016 further provides eight requirements expected of countries that want to attain or maintain the compliant status. These requirements include:

1. Oversight functions to be carried out by the MSG;

2. Adequate legal and institutional framework for the allotment of contracts and obtaining licenses in the extractive industry;

3. Natural resource exploration and production;

4. Revenue collection;

5. Revenue distribution;

6. Social and economic expenditure;

7. Results and impact;

8. Compliance timelines within which implementing countries are to give effect to the 2016 global EITI Standard.[79]

The latest EITI Standards of 2016 also amended the Validation procedure. The current procedure commences with the preliminary stage of validation, which is followed with data gathering, the EITI International Secretariat confer with stakeholders and finally a re-evaluation is carried out by the independent validator appointed by the EITI Board.[80] The

[77]Ibid.
[78]Ibid.
[79]Ibid.
[80]Ibid.

Board makes the final decision regarding the Validation process.[81] The requirements are applicable to the EITI Implementing States. The Validation process is a fundamental requirement under the EITI Standard for the purpose of gauging State performance.[82] It encourages dialogue and knowledge dissemination at the State level and preserves the credibility of EITI due to the uniform standard which it requires of every EITI implementing countries.[83]

Even though EITI standards are said to be voluntary, the failure of State parties to comply with the requirements of the EITI standards, especially after having expressed their commitment to do so, are not without consequences. There are various circumstances and various consequences which follow thereto. A State party must attain a certain benchmark level of progress in order to avoid certain consequences.

(i) Where a state party is deemed to have made no progress, this would warrant automatic delisting of that country from the membership of EITI.

(ii) In the event that the country is found to have made inadequate progress, the country risks suspension. However, the country still has a lifeline until the second validation process within which it may carry out corrective measures that would guarantee its restoration.

(iii) If the country is found to have made meaningful progress, it would be regarded as an EITI Candidate and required to undertake corrective measures pending the period of second validation.[84]

It is apparent that the EITI standards focus more on state parties than resource extractive countries and civil society groups. States are subjected to periodic assessment and so a

[81]Ibid.

[82]Tamar Nadibaidze & Davit Maisuradze, *Extractive Industries Transparency Initiative (EITI)* (Institute for Development of Freedom of Information, 2016) 12 <https://idfi.ge/.../Davit/The%20Extractive%20Industries%20Transparency%20Initiative.pdf> Accessed 10 October 2018.

[83]*ibid*.

[84]Extractive Industry Transparency Initiative, The EITI Standard 2016. EITI International Secretariat 15 February 2016 34 <https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf> Accessed 10 October 2018.

considerable buren is placed on state parties such that they face likely sanctions for default in compliance with the EITI Standards. However, similar measures are not applied to resource extractive countries and civil society groups. EITI Standards would serve far reaching purpose if similar resource extractive countries and civil society groups are also placed on similar assessment to determine their level of compliance with their obligations under the EITI Standards and face possible sanctions where they are found to have defaulted.

5.3 EITI STANDARDS AND SUSTAINABLE DEVELOPMENT

As noted previously in this thesis, states have recognised rights under international law to exercise sovereign authority over their natural resources in accordance with their social, economic, environmental and developmental objectives. This right confers on the institutions of the states the duty to administer natural resources within their own geographical space in such a manner as to ensure a judicious, sustainable, and stability of the ecosystem in such a way that will lead to the attainment of developmental strides for the benefit of their people.[85] This standard is not just limited to the present generation. The global drive towards sustainable development has drafted future generations into the picture and states must acknowledge this in their natural resource management. By implication, relevant stakeholders must ensure necessary actions are put in place to curb profligate utilisation of natural resources and the revenue accruing thereof in such a manner as to encourage minimisation of economic sabotage and waste.

An empirical study carried out in 2016 shows that there is no significant improvement in the governance and economic development index and compliance of EITI member countries between the Pre-EITI and Post-EITI candidacy period.[86] EITI has a paramount role of transforming critical governance and development pointers. However, the non-binding nature of EITI principle limits its effect. It is common occurrence to see private and

[85]Alexandre Kiss, 'Public Lectures on International Environmental Law' in Adrian J Bradbrook, Rosemary Lyster, Richard L Ottinger & Wang Xi (eds.) *The Law of Energy for Sustainable Development*. (Cambridge University Press 2005) 6, 16.

[86]Benjamin K Sovacool, Gotz Walter, Thijs Van De Graaf & Nathan Andrews, 'Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)'. (2016) 83 World Development 179, 188.

public stakeholders defy EITI standards.[87] EITI focuses on public disclosure of the revenue accruing from the extractive industry, whereas it shows little concern on how the revenue is spent by governments.[88] Less short term impact is expected of EITI implementation in poor developing countries due to low domestic capability which will guarantee significant implementation.[89] The implementation process is estimated to take an average of 5 to 10 years given the challenges encountered by implementing countries. The length of time in implementing the EITI standards automatically translates to mean that the positive result will only manifest after a long period of time, especially after full implementation of the EITI Standards.[90]

Stakeholders, especially the civil society groups have constantly advocated the extension of the EITI Standards towards incorporation of social and environmental reflections on matters bordering on utilisation of revenue obtained from resource exploration, corporate social responsibility etc.[91] An assessment of the initial decade of EITI implementation demonstrates that the initiative fell short of attaining its premier principle of promoting "the prudent use of natural resource wealth… for sustainable economic growth that contributes to sustainable development and poverty reduction".[92] However, the EITI Standard of 2013 and 2016 is more forward looking and does not only concentrate on revenue transparency like the previous EITI rules. Hence, other issues of concern such as how revenue accruing from the extractive industry is expended have been included under the new EITI Standard. Since this standard has only been recently formulated, it is yet to be seen how well it would be implemented to reflect sustainable deliverables to the people.

[87]Ibid. 186.
[88]Ibid. 187.
[89]Päivi Lujala, 'An analysis of the Extractive Industry Transparency Initiative Implementation Process', (2018) 107 World Development 358, 369.
[90]Ibid. 370.
[91]Anthony Bebbington, Elisa Around & Juan Luis Dammert, 'Scalar politics and transnational governance innovations: A political settlements lens on the Extractive Industries Transparency Initiative in the Andes' (66 Effective States and Inclusive Development Working Paper 2016) 31.
[92]Revenue Watch Institute, 'Using EITI for Policy Reform: Revenue Watch Institute Guide to the EITI Standard' (2014) 2 <www.revenuewatch.org/eitiguide/guide.pdf> accessed 10 October 2018.

5.4 GHANA'S IMPLEMENTATION OF THE EITI STANDARDS

Attaining the status of an EITI implementing and compliant country is a laudable achievement for resource rich countries. This shows their intention to ensure effective management of their natural resources in order to avoid the natural resources curse. It is imperative that states do not lose their status as EITI implementing and compliant country by way of dismissal or suspension. This is because of the benefit and credibility which the said status confers on such state in the eyes of the international community. Also, international financial organisations such as World Bank and International Monetary Fund (IMF) would easily consider it as a factor that will determine whether to render financial assistance to such country especially if it is a developing country like Ghana that would easily run to them to finance their budget and developmental projects when there is a down turn in their economy. Even though Ghana has attained the status of EITI compliant country, it is still imperative to examine how well it has implemented the EITI standards, most importantly towards the avoidance of natural resource curse and provide developmental deliverables for the benefit of her citizens.

The rundown of Ghana's walk with the EITI is as follows: it entered its commitment to EITI in May 2003, established Multi-Stakeholders Group in January 2005; became an EITI Candidate in September 2007; created its first Report in September 2007; made its Validation Report in June 2010 and attained Compliant Status in October 2010.[93] Ghana has the reputation of being the first country to survey its mining industry under its EITI reporting.[94] Ghana had focused the implementation of the EITI standard on its mining sector until April 2010 when it was broadened to include the oil and gas sector. It would be recalled that it was about that time Ghana began serious business in petroleum exploration. Apart from the requirements of the EITI standards, there are no clearly defined procedures

[93] Päivi Lujala, 'An analysis of the Extractive Industry Transparency Initiative Implementation Process', (2018) 107 World Development 358, 369.

[94] Extractive Industries Transparency Initiative, 'Validation of Ghana Report on Initial Data Collection and Stakeholder Consultation by the EITI International Secretariat' (2016) 5. <https://eiti.org/.../ghana_-_initial_data_collection_and_stakeholder_consultations_0.pdf>

for its implementation.[95] According to the IMF, the four components of revenue transparency include clearly defined role and duties of institutions, open budgetary procedure, accessibility of information in the public domain and guarantee of integrity.[96] It is essential to understudy the path towed by Ghana and how well it has implemented the EITI Standards in the oil and gas sector, especially with regard to petroleum resources revenue management. Hence, this section of this work shall focus on the Ghanaian implementation of the EITI Standards under the GHEITI framework and other legislative and institutional mechanisms.

5.4 IMPLEMENTATION OF EITI STANDARDS UNDER GHEITI FRAMEWORK

In the early part of the year 2007, the Ghanaian government set up a website for the purpose of transmitting information on the extractive industry to members of the public.[97] Civil society groups are of the view that Ghana's reporting practice on EITI ought to entail the social as well as the environmental consequences of mining activities.[98] Discontent over the limitations of EITI on issues of revenue paid by oil companies to governments without concerning itself with issues of how the revenue is managed thereafter, led to the formulation of the "EITI++". The initiative seeks to builds on the foundation set up by EITI. The "EITI++" is a transparency initiative by the World Bank which is devised to address entire value chain of resource revenue management ranging from revenue processing, management and deployment of resource revenue to attain sustainable development.[99] The initiative relates transparency back to the aspects of licensing and

[95]Luis MM Molano, 'Implementing the Extractive Industries Transparency Initiative (EITI): Stakeholders' Perspectives in the Case of Colombia' (Master Thesis, University of Gothenburg 2012) 42.

[96]Emmanuel Graham, 'The Contribution of Civil Society in Avoiding Natural Resource Curse in Ghana: The Case of Oil' (MSc, University of Ghana, 2013) 56.

[97]Shari Bryan & Barrie Hofmann, 'Transparency and Accountability in Africa's Extractive Industries: The Role of the Legislature' (National Democratic Institute for International Affairs) 69 <https://www.ndi.org/files/2191_extractive_080807.pdf> Accessed 10 October 2018.

[98]Ibid.

[99]Committee on Foreign Relations, *The Petroleum and Poverty Paradox: Assessing U.S. and International Community Efforts to Fight the Resource Curse* (Report to the Members of the Committee on Foreign Relations United States Senate 110th Congress 2nd Session October 16, 2008) 21.

moving forward to the aspect of revenue expenditure.[100] This portrays the World Bank's desire to support governments of developing countries to implement good governance mechanisms all through the various stages of resource exploitation.[101]

With regard to the implementation of EITI, the Ghanaian government created the Ghanaian version of the EITI which is known as the Ghana Extractive Industry Transparency Initiative (GHEITI). The GHEITI is saddled with the responsibility of seeing to the implementation of the principles of EITI at the national level. GHEITI acts as an inter-phase between the government, petroleum companies and civil society groups who are all stakeholders in the industry.[102] Unlike its Nigerian counterpart which is created pursuant to the Nigerian Extractive Industry Act 2007, the GHEITI does not enjoy a legal personality pursuant to a statute. Although the EITI standard does not make any requirement for the reproduction of EITI at the local level based on any statute, the creation of a national legislation can give a tremendous assistance and effectiveness to the implementation of EITI.[103] National legislation serves the opportunity to enhance the implementation EITI Standards. For instance, under the Nigerian Extractive Industry Transparency Initiative Act 2007, compliance with the EITI standards is mandatory. The Act goes on to provide various offences for breach of the Act such as failure or refusal to give false information or report, rendering false account etc. These offences are punishable with various penalties such as fines and penalties.[104]

Since 2003 when Ghana signed on to the EITI initiative, it has been operating the EITI without a specific local legislative framework. The country faced a lot of challenges in the implementation stage due to the existing gap as a result of lack of legislative mechanism to

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[100]Daniela Kuzu and Danaa Nantogmah, *The Oil Economy and the Resource Curse Syndrome: Can Ghana make a difference?* (Friedrich Ebert Stiftung Ghana, 2010). 14 <library.fes.de/pdf-files/bueros/ghana/10492.pdf> Accessed 10 October 2018.

[101]Committee on Foreign Relations, *The Petroleum and Poverty Paradox: Assessing U.S. and International Community Efforts to Fight the Resource Curse* (Report to the Members of the Committee on Foreign Relations United States Senate 110th Congress 2nd Session October 16, 2008) 21.

[102]Extractive Industries Transparency Initiative, (n. 135)

[103]Saule Ospanova & Lorenzo Cotula, *Transparency in extractive industry legislation Recommendations for Kazakhstan's Code on Subsurface Use* (International Institute for Environment and Development Issue Paper, 2015) 12.

[104]See, Section 16 Nigerian Extractive Industry Transparency Initiative 2007.

regulate resource governance. It was not until 2015 that a Bill was made as an attempt towards filling this gap. Amongst other things, the Bill sought to confer legal personality on Ghana EITI (GHEITI); creation of penalties for default by government, the composition of the Multi Stakeholders Group, easy information accessibility, establishment of timelines for Government agencies to make disclosures and the Ghana Revenue Authority to make their report available.[105]

Based on the requirements of the EITI Standards, civil society groups are entitled to a beneficial environment that would enable them participate and express their freedom of speech on matters concerning the transparent management of the petroleum resources.[106] Civil society groups also need to exercise high level of accountability and transparency on their own part. Where the credibility and interest of their funding source have become a serious cause of questioning, they are unlikely to be taken seriously.[107] Apart from the issue of funding and access to information, the fundamental issue of capacity to understand the intricacies of the highly technical petroleum sector is also a question to be resolved. A respondent adequately captured this challenge when he was quoted as saying:

> Seriously, we are here making all the noise about getting contracts released, but how many has the capacity to understand how oil recites are used, and the implications of all the agreements that are being made in respect to Oil and Gas? […]I don't think more than organizations really have the capacity to do Oil and Gas analysis. That really needs to be built up if we are going to have a real, meaningful role in the monitoring of the legal framework."[108]

Despite the relative success achieved by Ghana in the implementation of the EITI standard, the 2017 validation report of Ghana's level of compliance has shown a deficit in certain areas of implementation. In the aspects of distributing revenues accruing from the

[105]GHEITI, 2015 Annual Activity Report (2016) GHEITI Secretariat, 8. <https://eiti.org/sites/default/files/.../2015_annual_activity_report_-_final_1_0.pdf> Accessed 10 October 2018.

[106]Natural Resource Governance Institute, *The Extractive Industries Transparency Initiative (EITI): Using EITI to Promote Policy Reform* (NRGI Reader, 2015) 3.

[107]Mohammed Amin Adam, *Between a Blessing and a Curse: the State of Oil Governance in Ghana* (African Center for Energy Policy Paper Series 16, 2013) 1.

[108]Henrik Rundquist, 'Oil Management and the Resource Curse in Ghana: The Role of Civil Society' (Master Thesis, Lund University 2014) 25.

extractive industry, legal framework and fiscal regime, the report shows that Ghana has made meaningful progress.[109] Even though the aspect of social expenditures is recommended but not a requirement, the report finds that Ghana has not made satisfactory progress in that regard.[110] The aspect of revenue management and expenditures is yet to be considered as a basis of assessment of the compliance level of states.

EITI has received criticism on the basis that it lacks guidelines for the organisation. This leaves Ghana with the discretionary option as to how to implement EITI, giving room for the kid gloves approach used in implementing the EITI standard in the mining sector.[111] There have been concerns that GHEITI operates largely on "goodwill" of its "stakeholders" and needs to institutionalised, particularly through legislation. These calls have led to various commitments to promulgate an EITI law.[112] Although there are provisions of petroleum laws relating to transparency and accountability in petroleum resource management, there is no specific legislative framework, which provides for the realisation of the EITI standards. Countries, which have enacted legislative framework on EITI, have been seen to quickly implement the initiative in contrast to countries like Ghana who are yet to encapsulate EITI into a legislative framework.[113]

5.5 LEGISLATIVE FRAMEWORK FOR TRANSPARENCY IN GHANAIAN PETROLEUM SECTOR

The PRMA 2011 paid particular attention to issues of transparency and accountability of returns obtained from the petroleum industry. Hence, the Act has mandated the Minister to ensure a concurrent publication of records of petroleum output, the price and revenue

[109]Sustainable Development Strategies Group, *Validation of Ghana* (Validation Report 7, 2017) 5.
[110]Ibid.
[111]Thomas Kastning, *Basic Overview of Ghana's Emerging Oil Industry* (Friedrich Ebert Stiftung) <https://library.fes.de/pdf-files/bueros/ghana/10490.pdf > accessed 18 May 2029, 16.
[112]Nelson Oppong, 'Transparency as Transformation? Ghana and the Extractive Industries Transparency Initiative' (Trade & Industrial Policy Strategies (TIPS) Forum on Industrialisation and the Mining Economy, June 2016) 2 <http://www.tips.org.za/research-archive/annual-forum-papers/2016/item/3165-transparency-as-transformation-ghana-and-the-extractive-industries-transparency-initiative> 13, accessed 30 October 2018.
[113]The International Bank for Reconstruction and Development, 'Implementing the Extractive Industries Transparency Initiative Applying Early Lessons from the Field' (2008) 51. <siteresources.worldbank.org/INTOGMC/Resources/implementing_eiti_final.pdf> Accessed 10 October 2018.

received thereto in the national gazette and in not less than two daily newspapers owned by state in not more than thirty days after the end of each quarter.[114] The information must also be hosted in the official website of the Ministry of Petroleum and presented before the Ghanaian parliament on the date of publication of the national gazette.[115] The PRMA also obliges the Minister of Finance and Economic Planning to infuse reports on the various petroleum funds, including audited financial statements for the previous year highlighting transfers into and out of the PHF, GSF and GHF, into the annual appropriation statement and economic plan the Minister will tender before Parliament.[116] The reports must be apt, concise and comprehensible in a public friendly manner. The failure of the minister in this regard bears severe consequences as the minister may be criminally culpable and liable to a fine of up to two hundred and fifty penalty units.[117]

Section 49 of the PRMA establishes transparency as a fundamental principle that must be observed in the administration of revenue obtained from petroleum resources. Amongst other things, the said section provides that international best practice transparency and governance be applied in the management and savings of petroleum revenue and connected matters. It commands the Ghanaian Parliament, the Minister, Bank of Ghana and the Investment Advisory Committee to take necessary steps in the course of their functions under the law to ensure that transparency measures and open public access to information is guaranteed. The minister is further charged with the duty to ensure that concerns related to the Petroleum Funds created under the Act, the Operations Management Contracts and yearly reports are put up in the public domain for easy access to the people.

Even though the PRMA has extensively made provisions on the need for transparency in the petroleum industry, these provisions are not couched in the context of particularity for the application of EITI.[118] The inadequacies in the PRMA is seen in the various

[114]Section 8 (1) PRMA 2011.
[115]Section 8 (2) PRMA 2011.
[116]Daniel Armah-Attoh, *Ghana's Oil Revenue Management: Convergence of Popular Opinion, the Law, and Practice* (Afrobarometer Policy Paper 19, 2015) 12.
[117]Section 50 PRMA 2011.
[118]Saule Ospanova & Lorenzo Cotula, *Transparency in extractive industry legislation Recommendations for Kazakhstan's Code on Subsurface Use* (International Institute for Environment and Development Issue Paper 2015) 13.

impediments which it has placed on information gathering and giving room for the classification of certain information as confidential. Section 49 (3) of the PRMA provides that "information or data, the disclosure of which could in particular prejudice significantly the performance of the Ghana Petroleum Funds may be declared by the Minister as confidential, subject to the approval of Parliament". This provision has the tendency to blur the gains of transparency which the Act intends to project. This provision can give room for ministerial abuse of power and cover up instances which would have exposed certain malpractices in the sector that could lead to mismanagement of petroleum revenue.

The PRMA was enacted on the understanding that by virtue of Article 257 (6) of the Ghanaian Constitution, the ownership of petroleum resources is vested on the President who holds it in trust for the people, the beneficiary. Consequently, actions taken by the government with regard to the management of the said resources must accrue benefits and the paramount interest of the people must be taken into consideration. This underscores the need for the PRMA creation of the Public Interest Accountability Committee (PIAC) which places the body with the responsibility of ensuring that persons in charge of petroleum resource management perform their duties in accordance with the provisions of the law.[119]

The PIAC was created by the PRMA[120] as a citizens-based statutory body which performs independent supervisory services over the collection, allotment and utilisation of petroleum resources revenue in Ghana.[121] The PIAC is created for the purpose of: monitoring and appraising the level of compliance with the Act by government, petroleum companies and other concerned institutions as regards the management and utilisation of petroleum revenue and investments; create avenue that will generate public discussion on contentious issues of petroleum revenue management and expenditure's compliance with developmental strides and objectives; and engage in independent assessment of Executive

[119] Public Interest & Accountability Committee, 'Simplified Guide to the Petroleum Revenue Management Law in Ghana' (2017) 12 <www.piacghana.org/portal/files/.../simplified_guide_to_ghana's_petroleum.pdf>Accessed October 30, 2018.

[120]Section 51 PRMA 2011.

[121]Public Interest & Accountability Committee, 'Simplified Guide to the Petroleum Revenue Management Law in Ghana' (2017) 12 <www.piacghana.org/portal/files/.../simplified_guide_to_ghana's_petroleum.pdf> Accessed October 30, 2018.

managements of petroleum revenues on the one hand, and the Parliament's performance of their oversight function thereto.[122]

The membership of the PIAC comprises of thirteen persons who include: a member nominated by the civil-society and community-based organisations to represent their interest and a member each to be nominated by various stakeholder groups including GHEITI.[123] On the authority of Section 54 (2) PRMA the members of the Accountability Committee are to be appointed by the Minister. The provision of Section 54 (2) is quite disturbing. Why would the appointment of the Minister still be necessary, for a Committee which should ordinarily be civil society driven, after the nominations of the organisation whose interest should be protected by the representatives of their choice. The implication of the appointing power of the Minister implies that the Minister may elect to disregard a particular nomination made by the relevant organisation. In order to guarantee the independence of the committee, it would have been more appropriate to remove the overbearing influence of the Minister. Thus, ideally, the provision should provide that the nomination of a person by the relevant group is sufficient to make such person a member of the Committee.

The PIAC has a prominent role to play in ensuring transparency in the petroleum resource management. That is why parliament has provided that the ministerial declaration of confidentiality as a ground for withholding information from public consumption shall not apply to the PIAC.[124] Hence, any factor, which will stand on the way of Committee from creditably performing its function, must be curbed.

Another challenge that stands on the path of the PIAC is the issue of funding. Transparency issues have continued to plague the process of grant of petroleum contracts and rights. Contract disclosures are currently left at the disposition and pleasure of the government and companies without any legislative compulsion for disclosures. The National Petroleum Corporation of Ghana has made certain public disclosure of its affairs but has remained

[122]Section 52 PRMA 2011.
[123]Section 54 (1) PRMA 2011.
[124]Section 49 (5) PRMA 2011.

discreet on certain issues mostly related to the award of petroleum contacts and development chart about the Jubilee field.[125] On the few occasions where those contracts terms have been brought to the public glare, the criteria for contract awards have been problematic.[126] Despite the competitive bidding process as required by the PEP Act, petroleum contracts have continued to be entered pursuant to direct negotiations with varying terms, contrary to the provision of the Act.[127] Of late, there has been an infusion of anti-corruption certification clause which commits parties to ensure compliance with the tenure of anti-graft laws of Ghana, the home country of the company and provisions of other anti-graft conventions.[128]

In line with the EITI requirement, the MSG is to collaborate with relevant bodies to make a publication of its whole cost estimated work plan. The GHEITI Secretariat and the MSG jointly created a work plan of GHEITI activities for the year 2017, paying particular attention on issues of "responsibilities, timelines, budget and expected output and outcomes".[129] The disclosure requirement of the EITI standards has not been, altogether, unrewarding in Ghana. Due to the disclosure and reporting requirement, in 2012 and 2013 reporting an inconsistency in figures amounting up to US$55 million was discovered from the payment made to the GRA by Anadarko WCTP Ltd.[130] GHEITI has continued to canvass that, other than payments given to the government, petroleum companies should make detailed disclosure on certain activities of theirs comprising of overhead cost, capital allowance assessment, petroleum sales and haulages of petroleum products by GNPC.[131] Multinational companies such as Kosmos Energy and Tullow Oil have often defaulted in

[125] Daniela Kuzu and Danaa Nantogmah, *The Oil Economy and the Resource Curse Syndrome: Can Ghana make a difference?* (Friedrich Ebert Stiftung Ghana, 2010). 14 <library.fes.de/pdf-files/bueros/ghana/10492.pdf> Accessed 10 October 2018.

[126] Olivia Lwobukuna, 'Natural Resources for Socio-Economic Development in Africa: Legal Governance of Extractive Industry in Ghana' (2015) 44 (4) Africa Institute 47, 57.

[127] Ferdinand Adadzi and Nana Serwah Godson-Amamoo, 'Ghana' in Christopher B Strong (ed.) *The Oil & Gas Law Review Law Business Research* 4th edn. (Law Business Research 2016) 85, 97.

[128] *ibid*.

[129] Ghana Extractive Industries Transparency Initiative, 2017 GHEITI Work Plan <https://eiti.org/sites/default/files/documents/gheiti_2017_workplan.pdf> Accessed 30 October 2018.

[130] Roberto Martinez B Kukutschka & Andrew McDevitt, *The potential Role of EITI in Fighting Corruption and IFFs* (Anti-corruption Resource Center 16, 2016) 4.

[131] Francis Xavier Dery Tuokuu & Elias Danyi Kuusaana, 'Escaping the Oil Curse in Ghana: Lessons from Nigeria' (2015) 6 (11) 1 International Journal of Business and Social Science 28, 31.

this regard. They would rather prefer to supply the information only to establishments of their home countries in total disregard for Ghanaian institutions.[132]

GHEITI faces a serious crisis of representation, as it has not been forthcoming in instituting useful connections with other national and community representatives. Apart from the MSG, GHEITI lacks formal connection with any state institutions mechanism of enforceable such as the Parliament legislature or Auditor-General. On no occasion has the report of GHEITI been a subject of discussion at the Ghanaian Parliament.[133] In their 2017 Annual Progress Report, the GHEITI have listed the various challenges which they encountered that otherwise, limited them from fulfilling their objectives for the year. These challenges include: limited funds to produce its 2015 mining and petroleum industry reports; failed promises by development partners in rendering financial support towards the fulfilment of budgetary permutation and scheme of work for 2017; and the failure in having the GHEITI Bill enacted into law.[134]

According to Oppong, EITI has eased the adaptation of market-based practices and nominal policy access, but has proffered minimal impact on transforming the institutional landscape.[135] The NRGI Report of 2015 pronounced a verdict on the level of implementation of EITI in Ghana when it stated thus:

> …there are important issues that remain in terms of legislation, institutional capacity building, revenue management, contract disclosures and accountability. The same report indicates that despite the existence of references in the constitution, legislation and other key documents to an overall strategy, the government does not have a coordinated long-term strategy that links the decision-making process of extracting natural resources and the investments in social, economic and human development objectives (NRGI 2015).[136]

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[132]*ibid*.

[133]Nelson Oppong, (n. 153) 14

[134]Ghana Extractive Industry Transparency Initiative, '2017 Ghana EITI Annual Progress Report' (GHEITI Secretariat 2018) 7 <2017_gheiti_annual_progress_report.pdf> Accessed October 30, 2018.

[135]Nelson Oppong, (n. 153) 14

[136]Zoila Sofía Lorena Mazariegos Samayoa, 'Is Transparency the Answer? A Study of the Impacts of Transparency in the Extractive Sector in Ghana' (Master Thesis, Norges milijo- og biovitenskapelige universitet 2016) 41.

5.6 CONCLUSION

Transparency and accountability are the twin pillars that forestall against corruption and mismanagement of natural resource revenue. Transparency allows every action of government to manifest in the eyes and mind of the public. Accountability ensures that private and public entities are subjected to responsibility for their actions. For, what good does it serve the public to understanding the workings of government without having the means of making them responsible for their actions?

Transparency *per se* is disabled in the absence of accountability as the application of both variables reduces the chances of corruption and misappropriation of public funds.[137] Transparency and accountability initiatives such as the EITI Standards is essential in the business transactions between host States and multinational companies as it aids in reducing inconsistency in information dissemination and accrues greater revenue returns for host countries; it also lessens the likelihood of misgivings and ill feelings amidst the aristocratic class of host states.[138]

Transparency helps host countries find themselves in a position of strength in the negotiation table and confer them with strong bargaining power against multi-national companies which are mostly more informed.[139] When it is introduced into the domestic affairs of a state, it sheds light on bargains reached by the elites on behalf of the people and encourages elites of developing country to set asidesome portion of revenue for developmental project.[140] The thought that the citizens of host countries are monitoring and appraising the negotiation process encourages the leadership of these countries to strike deals that best meet the interest of the people.

The EITI Standards is targeted at entrenching transparency and accountability and the gains which it portends. Ghana had long subscribed to the implementation of the EITI standards.

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[137]Kwabena Nyantakyi Boamah, 'The Most Important Principle of Governance for Effective Management of Oil Funds' (2013) 16 CEPMLP Annual Review 1, 5.
[138]Ghana Extractive Industry Transparency Initiative, (n. 175) 9.
[139]Deutsche Gesellschaft für Internationale Zusammenarbeit, 'The Political Economy of Extractive Resources' (Discussion Paper, 2016) 49.
[140]Ghana Extractive Industry Transparency Initiative, (n. 175) 9.

By virtue of being an oil producing country, it is regarded as one of the implementing countries of EITI. The country has gained the status of an EITI compliant country. That notwithstanding, it is pertinent to examine how well it has implemented the standards of EITI regarding revenue management. There are pertinent reasons for Ghana to continue to maintain its status as an EITI compliant country and above that, ensure that the impact of its compliance is manifest in sustainable socio-economic and human-capital development growth in the country. Where there is no physical manifestation of the impact of EITI on the lives of the common citizens, it would make little meaning and the whole essence of EITI would be defeated.

Findings from the analysis in this work show that the existing legislative frameworks on transparency in the oil and gas sector in Ghana have loopholes on disclosures. It is recommended that a proper implementation of the freedom of information should be promoted in order to allow citizens free access to information regarding the dealings in the oil and gas sector.[141] Thus, the adoption of the Freedom of Information Act 2019 (Act 989) would ensure open access to petroleum revenue and its utilisation; disclosure of the identity of bidders and bidding paper works. However, even if the Freedom for Information Act is enacted, there would still be the need to amend the relevant sections of the PRMA, especially that which obstructs freedom to information in the pretext of 'classified information'. The reason being that by virtue of Section 1 of the PRMA, the Act has been placed on a higher pedestal than any other laws apart from the Ghanaian Constitution. It therefore means that the persons could still find cover under the classified information as contained in the law to perpetrate opacity, which encourages mismanagement and corruption in the extractive industry.

Also, there is the need to fast track the legislative process in the enactment of the GHEITI specific legislation. The creation of specific legislation on transparency is essential to guarantee the effectiveness of revenue management.[142] There are many advantages in so doing. It would, first of all, confer GHEITI with the necessary legal personality to sue and

[141]Anwar Ravat & Sridar P. Kannan, *Extractive Industries Transparency Initiative (EITI): Implementing EITI for Impact* (World Bank Handbook for Policy Makers and Stakeholders) 56.
[142]Zoila Sofía Lorena Mazariegos Samayoa, (n. 177) 42.

be sued. That way GHEITI would possess the necessary legal clout as a proper party to approach the court to enforce compliance with the EITI Standards. The law would also create adequate means of funding for EITI and other relevant transparency driven institutions. The provision of adequate funding for these bodies would guarantee their independence and commitment to effectively play their role as the watch dog in the Ghanaian oil and gas industry. On another note, the act would give the EITI Standards an imperative undertone; create offences and penalties for breach of the standards.

Significant improvement in resource governance is crucial in putting together the massive revenues estimated to attain the sustainable development in developing countries in Africa and Ghana in particular. EITI still holds the pole position as the most feasible multilateral governance initiative on petroleum for oil producing countries to adopt. In order to continue to uphold its relevance, EITI must take further steps to be concerned with issues of transparency as it affects revenue management and expenditure by government officials.[143] This issue has been addressed in the 2016 version of the EITI Standards. However, EITI is yet to start considering these factors in the assessment of a state's compliance with the standards. EITI must begin to operative this now.

[143]Bamiduro 14.

CHAPTER SIX: SUSTAINABLE MANAGEMENT OF PETROLEUM REVENUE IN GHANA AND THE SANTIAGO PRINCIPLES

6.1 INTRODUCTION

Accounting for and management of petroleum revenue in Ghana in line with best practices is a major question the research seeks to answer. Apart from the employment of transparent means of management of petroleum resources, there is the need to give consideration to approaches that foster the increase in the revenue base of the country in a manner that the funds from the proceeds of oil accruing to the state are multiplied through the promotion of socially responsible investments. One global approach that has emerged has been through the recognition of the Santiago Principles on the management of sovereign wealth funds. The Santiago principles have a global appeal; demonstrating how countries that have made fortune from petro-wealth effectively managed it for the good of the people.

The management of natural resources and petroleum resources of countries in particular, has been a major concern. Most countries with oil and gas discoveries see the resources as an important source for economic prosperity.[1] However, the resources rather than turning into a blessing may eventually become a curse to the country because of the failure to manage the resources. It may become an opportunity for the political class to engage in rent seeking and reward their allies. There is the tendency that the focus will be on exploration and production while other critical sectors such as agriculture, mining and real estate are abandoned. The implications of this could be economic woes and even the rise of political unrest and agitation by groups feeling short-changed by the actions of the political class.

In response to the situation, countries have developed petroleum revenue management laws to ensure that the proceeds from oil and gas are managed effectively for the betterment of the people. The ideal situation therefore is to ensure that the resources are not wasted and that the sectors of the economy needing development are effectively supported. One of such considerations in the development of the principles is the management of petroleum

[1] Thus, the revenue should meet the country's economic and social needs. See S Scott Gaille, 'Allocation of International Petroleum Licenses to National Oil Companies: Insights from the Coase Theorem' (2010) 32 Energy Law Journal 111, 114.

revenue through the use of the sovereign wealth fund (SWF). Under the SWF arrangement, the proceeds are invested in certain areas as specified by the law and policy establishing the fund. Over the years, the development and implementation of the SWF has been taken as being questionable and it became imperative that measures are developed and put in place for the proper implementation and management of the fund. Therefore, the SWF management model was developed under the framework of the Generally Accepted Principles and Practices for Sovereign Wealth Funds (GAPP).[2] The GAPP could offer a template for the new countries seeking to develop and implement the GAPP. This chapter, therefore, makes a case for the development and implementation of the GAPP in oil and gas sector in Ghana examining how the current law meets the standards set.

6.2 SOVEREIGN WEALTH FUNDS

The question for determination here is: what does a sovereign wealth fund entail? According to the International Working Group (IWG) of Sovereign Wealth Funds, "Sovereign wealth funds (SWFs) are special-purpose investment funds or arrangements that are owned by the government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies that include investing in foreign financial assets."[3] "SWFs as state-held investment funds that are financed by the proceeds of commodity exports, fiscal or trade surpluses and privatizations, with their main objective being investment in real or financial assets".[4]

It had been argued that SWFs must satisfy three cardinal criteria such as: government ownership; investment in foreign financial assets and it must be macroeconomic oriented.[5] The International Monetary Fund (IMF), proposes that SWF seek to achieve five varying

[2] Meg Lippincott, 'Depoliticizing Sovereign Wealth Funds Through International Arbitration' (2013) 13 (2) Chicago Journal of International Law 649, 559.

[3]IWG, "Sovereign Wealth Funds – Generally Accepted Principles and Practices – 'Santiago Principles'," October 2008, page 3. <www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 13 November 2018.

[4]The Royal Institute of International Affairs, 2016 Africa's Sovereign Wealth Funds Demand, Development and Delivery Africa Programme Conference Summary September 2014 8. <https://www.chathamhouse.org/sites/.../20140905africa-sovereign-wealth-funds.pdf> accessed 13 November 2018.

[5]ibid.

objectives which are the (1) stabilization of the economy through provision of revenue for use in times of price and exchange rate fluctuation; (2) investment in the asset of the state for the needs of the state and for future generations as natural resources may become depleted due to exploitation; (3) to increase the countries revenue reserve base through returns on investment (4) provision of funding for infrastructural projects; and (5) sources for provision of pension for retirement benefits of the citizens.[6]

The development of SWF dates back to 1953 when the Kuwait Investment Authority was formed to manage its oil revenue as a commodity funded SWF. Since then, there has been the growth in sovereign wealth funds with many countries establishing different funds for the management of the revenues accruing from natural resources. The global growth of SWF has placed them in a position of prime importance in the international financial market. These funds now offer different ranges of financial products in the capital market, thus making them play lead roles. As at March, 2018, there were 78 functional sovereign wealth funds in the world and the assets of investment in sovereign wealth stands at US $7.45tn.[7]

In the Middle East, Russia and China, concerns were raised regarding the issues of transparency and motives behind the operation of the sovereign wealth funds.[8] Therefore with the strain and relationship of some of these countries operating SWF, it became more expedient to ensure clarity and possibly obviate the fears and suspicions. This development saw the emergence of the G8 group of industrialised nations giving a directive to the IMF to develop a set of codes and standards for the operation of sovereign wealth funds. The International Working Group (IWG) of Sovereign Wealth Funds through the instrumentalities of the IMF was put in place with the purpose of: establishing "a

[6]International Monetary Fund, Sovereign Wealth Funds – A Work Agenda, 29 February 2008 at page 5. <https://www.imf.org/external/np/pp/eng/2008/022908.pdf> accessed 13 November 2018.

[7]Sovereign Wealth Fund Assets Surge in 2018.Prequin Press Release, April 18, 2018, docs.preqin.com/press/SWF-Review-Apr-18.pdf;Sovereign Wealth Fund Assets 'could reach $15tn in Two Years'. Financial Times April 21, 2018, <https://www.ft.com/content/1c127116-43ef-11e8-93cf-67ac3a6482fd> accessed 13 November 2018.

[8]See Joseph J Norton, The "Santiago Prinailes" and the International Forum of Sovereign Wealth Funds: Evolving Components of the New Bretton Woods II Post-Global Financial Crisis Architecture and Another Example of Ad Hoc Global Administrative Networking and Related "Soft" Rulemaking?, 29 Review of Banking & Financial Law 465, 465-466.

framework of generally accepted principles and practices that properly reflect appropriate governance and accountability arrangements as well as the conduct of investment practices by SWFs on a prudent and sound basis".[9]

6.3 RESTATEMENT OF THE GAPP PRINCIPLES

The GAPP contains 24 principles on the management and implementation of the SWF.[10] This set of principles is regarded as global best practices. Their implementation and incorporation are expected to create a sound environment and enhance the promotion of the SWF schemes, most especially in countries that have not been able to create a SWF that has been structured and operated to achieve its proposed objectives.

6.3.1 Principle 1: Sound Legal Framework

Principle 1 provides that "The legal framework for the SWF should be sound and support its effective operation and the achievement of its stated objective(s)". There are other sub principles contained in principle 1, which are to ensure that there is soundness in the legal framework and transactions carried out by the fund. The next sub principle further provides for disclosure of the legal basis of the fund, its structure and relationship with other government entities. The GAPP therefore appears to support the operation of the SWF under a well-established legal framework.

6.3.2 Principle 2: Policy Disclosure

Principle 2 provides that "The policy purpose of the SWF should be clearly defined and publicly disclosed". The second GAPP principle requires that there should be transparency in the policy. Transparency, as has been shown, is very relevant in the management of petroleum revenue. With transparency rules in place, the people are able to question the nature of the investment policy and practices involved.

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[9] IWG 4.

[10] Larry Cata Bakcer, 'Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience' (2008) 19 Transnational Law & Contemporary Problems 101, 108.

6.3.3 Principle 3: Compatibility with Macro Economic Policies

Principle 3 provides that "Where the SWF's activities have significant direct domestic macroeconomic implications, those activities should be closely coordinated with the domestic fiscal and monetary authorities, so as to ensure consistency with the overall macroeconomic policies". The goal of SWFs will be the promotion of sustainable economic development of the state. Looking closely at the objective of SWFs in promoting fiscal stability or stimulus as well as the use of the proceeds to bring about infrastructural development, it may be apt to conclude that the SWF should be directed in a manner that they meet the country's economic aspirations.

6.3.4 Principle 4: Public Disclosure of Investment Rules and Arrangements

Principle 4 suggests that "there should be clear and publicly disclosed policies, rules, procedures, or arrangements in relation to the SWF's general approach to funding, withdrawal, and spending operations". The first sub principle requires that there should be a public disclosure of the source of fund for the sovereign wealth fund, while the second sub principle requires disclosure of the approaches to spending and withdrawals from the fund.

6.3.5 Principle 5: Timely Reporting and Inclusion of Statistics in Data Base

Principle 5 is to the effect that "the relevant statistical data pertaining to the SWF should be reported on a timely basis to the owner, or as otherwise required, for inclusion where appropriate in macroeconomic data sets". This principle showcases the importance of data and statistics on the functioning of the SWF. It is appreciated that they may be needed from time to time for the macroeconomic planning of the state.

6.3.6 Principle 6: Clarity of Roles and Independence

Principle 6 requires that "the governance framework for the SWF should be sound and establish a clear and effective division of roles and responsibilities in order to facilitate accountability and operational independence in the management of the SWF to pursue its objectives". For the functioning of the SWF, it will be important that accountability framework gives cognizance to allocation of roles and that there should be independence. The managers are to be given the leeway to operate the funds with only supervisory roles in

place by a governmental agency. In such a situation, the management is not kept within the whims and caprices of the political class, which may turn out to lead to counterproductive recommendations, or motives that will not be in the best interest of the fund.

6.3.7 Principle 7: Formulation of Clear Objectives

Principle 7 states out that "the owner should set the objectives of the SWF, appoint the members of its governing body(ies) in accordance with clearly defined procedures, and exercise oversight over the SWF's operations". Therefore, the question as to what should be the procedure for appointment of fund managers should be clearly defined and there should be the power in the owner to exercise oversight functions on how the fund should be implemented. It, however, provides for the need to enhance independence even though the government, who is the owner of the fund, makes appointment.

6.3.8 Principle 8: Acting in the Interest of the SWF

Principle 8 requires that "the governing body(ies) should act in the best interests of the SWF, and have a clear mandate and adequate authority and competency to carry out its functions". The essence of this is that, the objectives of establishment of the fund should be met; the authority administering the fund should possess the requisite expertise to act and carry out the functions. The government should, therefore, not create a situation whereby the appointment of the fund managers are done in a manner that is aimed to score political points. The fund should therefore be divorced from political considerations in the appointment of the fund managers. Rather, there should be emphasis on professional expertise and not political patronage.

6.3.9 Principle 9: Independent Implementation of Strategies

Principle 9 requires that "the operational management of the SWF should implement the SWF's strategies in an independent manner and in accordance with clearly defined responsibilities". This GAPP Principle places emphasis on strategic implementation in an independent manner. What this entails is that the operation of the fund should enjoy relative independence without the undue interference of the government.

6.3.10 Principle 10: Clear Definition for Accountability Framework

Principle 10 provides that "the accountability framework for the SWF's operations should be clearly defined in the relevant legislation, charter, other constitutive documents, or management agreement". One way that the loopholes or financial leakages can be blocked to ensure that the funds for the sovereign wealth are well accounted for is that the law and implementation mechanism of the funds should be expressed in clear terms.

6.3.11 Principle 11: Timely preparation of annual reports in line with best practices

Principle 11 states that "An annual report and accompanying financial statements on the SWF's operations and performance should be prepared in a timely fashion and in accordance with recognised international or national accounting standards in a consistent manner". The essence of having an annual report is to provide information on the progress made with the funds and enables the managers, the government and the people to question its operation. Another reason is to determine whether the result for which the fund is put in place is being realised. Corporate governance practices require that there should be framework for financial reporting. Disclosure of financial activities remains one of the hallmarks of the development and implementation of an effective corporate governance code.

6.3.12 Principle 12: Annual Audit of Financial Statements in line with Best Practices

Building on corporate governance for the fund is the requirement of annual audit on financial statements in accordance with the codes of best practices. Principle 12 recommends that "the SWF's operations and financial statements should be audited annually in accordance with recognised international or national auditing standards in a consistent manner". Auditing is crucial to the operation of the SWF. Auditors' report is very useful in deciding whether the financial conduct in respect of the funds is carried out based on regulatory or best practices requirements. It is also a useful feedback mechanism in knowing whether the funds are mismanaged and whether the handling of the finances of the fund is good or not. Verification of the soundness of the financial statement is the very

essence of ensuring that there are auditors to verify the authenticity of the outgoings and incomings in the management of the SWF.

6.3.13 Principle 13: Clearly Defined Professional and Ethical Standards

Principle 13 requires that "professional and ethical standards should be clearly defined and made known to the members of the SWF's governing body(ies), management, and staff". Professional and ethical standards in the operation of the fund should be well known. There are certain ethical practices that should be employed by the funds. For example, it will be expected that SWF should not invest in areas that will result in damaging the reputation of the fund or that of the government; thus, making SWF investment prioritise ethics in its operation. It will be expected that SWF should not be an instrument for the investment in business ventures that are in flagrant violation of the best practices that frowns against environmental degradation. Sovereign wealth should therefore promote green investment. The path of investment should favour investing in companies that promote climate change mitigation or at least that employs the best available technologies to check against gas flaring or promoting energy efficiency. It will also be expected that the SWF should not engage in investment in the shares or securities of companies that lack good human rights practices or engage in unfair labour practices, child labour or labour practices falling short of the standards recommended by the International Labour Organisation (ILO) Guidelines and Conventions.

6.3.14 Principle 14: Operational Management Be Based on Economic and Financial Grounds

Principle 14 enjoins that "dealing with third parties for the purpose of the SWF's operational management should be based on economic and financial grounds, and follow clear rules and procedures". Principle 14 provides that "SWF operations and activities in host countries should be conducted in compliance with all applicable regulatory and disclosure requirements of the countries in which they operate". Sovereign wealth investments transcend national boundaries and thus it is incumbent on the fund to comply with the laws of the government of the place of operation. It will be the usual practice of countries to ensure that they control foreign investment and will require that certain

formalities in registration and even in the nature of the investment which they can venture into are regulated.

6.3.15 Principle 15: Compliance with regulatory and disclosure requirements of host states

Principle 15, building on principle 14, requires that "SWF operations and activities in host countries should be conducted in compliance with all applicable regulatory and disclosure requirements of the countries in which they operate". Every country has its investment regulatory requirement and rules for disclosure. It is expected that these are complied with by the fund managers. Thus, a fund with an investment presence in the UK will have to comply with the Listing Rules if its shares are listed on the London Stock Exchange.

6.3.16 Principle 16: Public disclosure of government objectives and independence of managing entity

The 16th principle requires that "The governance framework and objectives, as well as the manner in which the SWF's management is operationally independent from the owner, should be publicly disclosed". Other emphasis is on independent operation of the fund from the ownership and there is also the requirement that this should be disclosed publicly. The extent of the control of the fund should be a common knowledge.

6.3.17 Principle 17: Public disclosure of financial information

Principle 17 states that the "relevant financial information regarding the SWF should be publicly disclosed to demonstrate its economic and financial orientation, so as to contribute to stability in international financial markets and enhance trust in recipient countries".

6.3.18 Principle 18: Policy embracing sound principles of risk management

The 18th principle sates that "the SWF's investment policy should be clear and consistent with its defined objectives, risk tolerance, and investment strategy, as set by the owner or the governing body(ies), and be based on sound portfolio management principles". The first sub principle requires that policy on investment should be such that it will guard against financial risk exposures using leverage. On the other hand, the second sub principle states that such policy should address activities and authority of managers on investment and the

process of selection and performance are monitored. The third sub principle requires a public disclosure to be made on such policies. It is appreciated that different levels of risks are associated with investments. These could include political risks which may take the form of challenges in the law and regulatory environment, civil unrest or adjustment by the government of the regulatory environment regarding investments and the changes in the tax and fiscal regime of the state. Risks could take the form of market risks that are seen in exchange rate risks, inflation risk and changes in interest rate. These risks call for the need for adequate risk management mechanism and portfolio. The SWF should, therefore, identify these risks and find a means of ameliorating them or not investing in them, giving consideration to the governmental choice or nature of investment allowed in the law or the management agreement on the funds. For instance, 82% of SWFs in the world are invested in public equities while 78% are placed on fixed income.[11]

6.3.19 Principle 19: Risk reduction on sound economic and financial grounds

"The SWF's investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds". Sub principle 1 requires that where the decision of investment is not based on economic and financial considerations, this should be disclosed publicly. The second sub principle requires that assets to be managed should be "consistent with what is generally accepted as sound asset management principles".

6.3.20 Principle 20: Avoiding using privilege information for inappropriate competition with the private sector

"The SWF should not seek or take advantage of privileged information or inappropriate influence by the broader government in competing with private entities". Since it is a government owned investment, the fund managers who could be privy to certain information should not make use of it for ulterior motives through unhealthy competitive

[11]Sovereign Wealth Fund Assets Surge in 2018.Prequin Press Release, April 18, 2018, docs.preqin.com/press/SWF-Review-Apr-18.pdf;Sovereign Wealth Fund Assets 'could reach $15tn in Two Years'. Financial Times April 21, 2018, <https://www.ft.com/content/1c127116-43ef-11e8-93cf-67ac3a6482fd> accessed 13 November 2018.

practices. This calls for the need for the fund to observe strictly practices that are not inimical to the promotion of competition in the area or field where they invest.

6.3.21 Principle 21: Exercise of Ownership of SWF in Accordance with Investment Policies

SWFs view shareholder ownership rights as a fundamental element of their equity investments' value. If an SWF chooses to exercise its ownership rights, it should do so in a manner that is consistent with its investment policy and protects the financial value of its investments. The SWF should publicly disclose its general approach to voting securities of listed entities, including the key factors guiding its exercise of ownership rights.

6.3.22 Principle 22: Framework for Identification and Management of Risks

Principle 22 recommends that "the SWF should have a framework that identifies, assesses, and manages the risks of its operations". The first sub principle calls for incorporation of "reliable information and timely reporting systems, which should enable the adequate monitoring and management of relevant risks within acceptable parameters and levels, control and incentive mechanisms, codes of conduct, business continuity planning, and an independent audit function". The second sub principle, on the other hand, requires that the general approach should be publicly disclosed.

6.3.23 Principle 23: Reportage on assets should be clearly defined

"The assets and investment performance (absolute and relative to benchmarks, if any) of the SWF should be measured and reported to the owner according to clearly defined principles or standards". The essence of investment in sovereign wealth is that there should be a possible increase in the revenue yield of the state. Therefore, it is of critical importance that assets of the fund are periodically reviewed with a view of making necessary adjustment or improvement in investment decisions regarding the fund.

6.3.24 Principle 24: Regular review of the implementation of GAPP

Principle 24 provides that "A process of regular review of the implementation of the GAPP should be engaged in by or on behalf of the SWF". This principle therefore calls for a

feedback system. It is important that a review is carried out to know the extent to which the managers or any person dealing with the operations of the SWF have been able to apply the GAPP accordingly. Whilst the GAPP, as earlier pointed out, is not enforceable but a set of guidelines, a country choosing to follow it could make it obligatory for the fund managers and staff to follow and apply the GAPP to the letter.

6.4 RELEVANCE OF THE GAPP TO GHANA

The above principles are very relevant for effective development of the SWF in emerging petroleum producing countries of Africa. The legal codification of these laid down principles will have far-reaching consequences. It is therefore recommended that employing them will go a long way in ensuring that there is transparency and accountability in the entire process of development and implementation of the SWF. The level of corruption leading to siphoning of the fund will be reduced if the rules of engagement are followed to the letter as articulated in the above principles. Generally, the principle will therefore meet the standards of a democratic society as it keeps the people informed and engaged in the management of their SWF.

The ideal legal status of the SWF is an area to further take note in conceptualising the legal framework. The Santiago principles call for the use of two broad approaches for investment in the proceeds of petroleum revenue. A country can choose to manage the revenue through SWF through its central bank, which is the government bank or it can create a separate entity as the sovereign wealth fund to manage the revenue.[12] There are pros and cons for the approaches. In the first option, where the management of the sovereign wealth fund is through the central bank, the country may well manage the resources without having to set up a new legal entity which will mean an additional overhead cost. The country's bank can manage the revenue.

There is, however, the challenge in such an arrangement. The already existing traditional approaches known by the central bank may not be in tandem with what should be reflected in a new agency. Traditional institutions are usually prone to resistance to institutional

[12] See Evaristus Oshionebo, 'Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries' (2015) XV Asper Review 217, 226-233.

reforms. These could be a critical issue to be contended with. There is also the fact that being a government bank, it may not be well positioned with the expertise of management of the revenue for the purpose of exploring other forms of investment. The traditional role of functioning as a government bank, as the safe keeper of government funds or revenue could be distracting by belabouring it with other activities outside its traditional role. In the case of the approach in creating a new legal entity as the sovereign wealth fund, the entity manages the fund and can, therefore, sue and be sued in its corporate name. This approach favours clarity as the accounting system for the fund is not congested with unrelated activities. This offers more of specialty in the management of the fund unlike in the case of the central bank which carries out multiple tasks alongside the enormous responsibility of being involved in management of the resources.

6.5 APPRAISAL OF GHANAIAN SOVEREIGN WEALTH FUND BASED ON THE SANTIAGO PRINCIPLES

The Santiago principles have generally assumed the status of internationally accepted standards on the management of SWF. The Santiago principles are international soft law and do not portend any mandatory obligation on state operators of SWF. However, states strive to apply the Santiago principles in the management of the SWF. In the same vein, it is necessary to examine the SWF of Ghana to examine its level of compliance with the Santiago Principles. This can be determined by examining the relevant statutory provisions which create and determine the modalities for the operation of the SWF in Ghana.

On the Santiago Principle 1: States are required to develop a legal framework that regulates the operation of the Fund towards the achievement of the set objectives. In line with this principle, the government of Ghana enacted the PRMA in 2011 which established the various SWFs sourced from the proceeds of their petroleum resources. The Act creates Ghana Petroleum Funds (GPF) which is a combination of Ghana Stabilisation Fund (GSF)

and Ghana Heritage Fund (GHF).[13] From the take off funding of $69.2 million for the GPF in 2011, the fund rose to $450 million at the end of year 2013.[14]

The double impact of the GPF is that it gives support to the Ghanaian economy in the short run and provides assurance for future earnings.[15] The Petroleum Revenue Management (Amendment) Act 2015 created a third fund known as the Ghana Infrastructure Investment Fund (GIIF).[16] The GIIF has a total of assets worth up to US$540 million under its control.[17] The essence of this fund is to provide means to remedy the infrastructural deficit, increase employment creation and boost the economic fortunes of the country.[18] This is a measure taken by the Ghanaian government to double and permanently sustain expenses on infrastructure via oil revenue.[19] The operation of the Ghana Petroleum Wealth Fund (GPWF) shall herald the winding up of the GHF and GSF after the petroleum resources of the country have dried up.[20] The Act further sets out the modalities for the operation of these various funds. Based on the foregoing, it is obvious that Ghana complies with the Santiago Principle 1.

On the Santiago Principle 2: States are required to clearly lay out the policy purpose of the Fund and ensure its accessibility to the public. The essence of the Act is effectively captured in its long title thus: "An Act to provide the framework for the collection, allocation and management of petroleum revenue in a responsible, transparent, accountable and sustainable manner for the benefit of the citizens of Ghana in accordance with Article

[13]Section 11 (1) PRMA 2011.

[14]Centre for Applied Research on International Markets, Banking, Finance and Regulation. Sovereign Investment Lab The Sky Did Not Fall Sovereign Wealth Fund Annual Report 2015 11 <www.ifswf.org/sites/default/files/Bocconi%20SIL%202016%20Report.pdf> accessed 15 November 2018

[15]Javier Santiso & Javier Capapé, Sovereign Wealth Funds 2016 44. <docs.ie.edu/centros/SWF2016.pdf> accessed 15 November 2018

[16] Section 8 (4) (c) Petroleum Revenue Management (Amendment) Act 2015. This Section amended Section 21 of the principal Act.

[17]Quantum Global, Sovereign Wealth Funds as a Driver of African Development 10. <https://www.swfinstitute.org/.../Sovereign-Wealth-Funds-as-a-driver-of-African-development> accessed 15 November 2018.

[18] The Royal Institute of International Affairs, 2016 Africa's Sovereign Wealth Funds Demand, Development and Delivery Africa Programme Conference Summary | September 2014 10. <https://www.chathamhouse.org/sites/.../20140905africa-sovereign-wealth-funds.pdf> accessed 13 November 2018.

[19]Amos Cheptoo and Michelle Mutinda, Leveraging Sovereign Wealth Funds as a Tool for Economic Stabilisation 27 June 2015 Report on the 2015 MEMFI Region Governors' Forum 19.

[20]Section 20 PRMA 2011.

36 of the Constitution and for related matters". The GSF is targeted at balancing the budgetary deficit and reducing the hardship of economic crunch.[21] In 2015 when the prices of crude oil dwindled in the international oil market, the Ghanaian government had to resort to the GSF to enable it finance the 2015 budget.[22] The GHF is created as a future generation endowment maintained via excess crude earnings. The (GPWF) is a fund which shall come into operation contingent upon the event of depleted petroleum reserves of the country. The Act further empowers the designated Minister[23] to develop policy towards the investment of the GPF. These provisions of the PRMA are in consonant with the second Santiago principles.[24]

On the Santiago Principle 3: States are to ensure that in the event where the activities of the Funds have direct macroeconomic impact on the country, there should be harmony between the activities of the fund and the local financial and monetary authorities, in order to guarantee regularity in accordance with the entire macroeconomic policies. The PRMA establishes a public account known as the Petroleum Holding Fund (PHF) at the Bank of Ghana. The PHF serves as a temporary account wherein all petroleum earnings of the state are first lodged.[25] The revenue is subsequently allocated to the various designated funds created under the Act in accordance with the provision of the Act.[26] The Bank of Ghana is also in charge of the daily management of all the funds created under the Act based on the Operations Management Agreement and strategy laid down by the Minister.[27] In doing this, the Bank must take note of the investment guidelines regulating similar kind of investments and the need to protect the Ghanaian currency against factors that would weaken its value in line with local and foreign exchange policies.[28] This shows compliance with the third Santiago principle.

[21]Section 9 (1) and (2) PRMA 2011.
[22]Adam D. Dixon, The Rise, Politics, and Governance of African Sovereign Wealth Funds (2016) The Brown Capital Management Africa Forum Paper No. 3, 9.
[23]Minister as contained in the Act means the Minister of Finance and Economic Planning. See, Section 61 and 2nd Schedule of the PRMA 2011.
[24]Section 25 (a) PRMA 2011.
[25]Section 2 (1) PRMA 2011.
[26]Section 2 (2) PRMA 2011.
[27]Section 26 (1) PRMA 2011.
[28]Section 26 (2) a. c. PRMA 2011.

On the Santiago Principle 4: States are expected to create and make available in the public domain, their policies, principles and procedures regarding the funding, withdrawal, and expenditure of the Funds. To a large extent, these have been complied with by the PRMA. The Act allows the Ghanaian Parliament the leverage to determine the ratio at which the petroleum revenue should be disbursed and transferred to the various funds as it deems fit.[29] Pursuant to this provision, the credit in the GHF is to be dispersed in the following order: 50-70% is to be allocated into the annual national budget; at least 30% should be deposited into the GHF whereas the residue will be credited into the GSF.[30] The requirement placed on the withdrawal from the GHF is very strict. Withdrawals can be made from the GSF when total petroleum revenue obtained within a quarter is less than one fourth of the Annual Budget Funding Amount for the stated financial year.[31] Notwithstanding this, it is within the discretion of the parliament to reach a resolution that a particular fraction of the GHF or the interest accruing from its investment should be used for a particular purpose at fifteen years interval.[32] In other words, in 2026 the Parliament may, by a simple majority of its members, alter the ceiling restraint placed on transfers from the fund.[33] Part of the objective of the PIAC under Section 52 (b) of the Act is to create a platform to disseminate and encourage public reaction regarding the management of the petroleum revenue to ascertain its conformity with the development objectives of the state.

On the Santiago Principle 5: Relevant macroeconomic statistical analysis and figures regarding the Fund must be timeously reported to the people who are the beneficiaries of the fund. There are two ways whereby the facts and figures related to the funds are conveyed to the public. The first approach is a direct relay of the information to the people, while the other approach is by relaying of the information to the parliament which is a representation of the various constituencies of the Ghanaian federation. Thus the Minister is

[29]Section 10 (1), (2) and (3) PRMA 2011.
[30]Henrik Rundquist, 'Oil Management and the Resource Curse in Ghana: The role of civil society' (Masters Thesis, Lund University 2014) 12.
[31]Francis Ayensu, Managing Ghana's Oil Revenue: Ghana Petroleum Funds (GPFs). 2013 1 (2) Asian Journal of Humanities and Social Sciences 148, 158.
[32]Section 10 (4) PRMA 2011.
[33]Johanna Rapp, The Challenge of Governing Natural Resources: A Social Network Analysis of Actors' Collaboration in Ghana's Petroleum Sector (PhD Thesis, Friedrich-Wilhelms-Universitat 2017) 90

charged with the responsibility of ensuring that every issue connected to the funds, including the law, annual reports and the Operations Management Agreement are made accessible to the public.[34] The Minister is also mandated to settle the actual sum of petroleum receipts and Annual Budget Funding Amount (ABFA) of the previous year and tender its written report to that effect before the Parliament before the end of the first quarter per year.[35]

On the Santiago Principle 6: This relates to the governance structure of the SWF which must be of sound quality and must establish an unambiguous and efficient distribution of duties and responsibilities amongst persons so as to encourage accountability and autonomy in the administration of the Fund in order to achieve its purpose. One of the priority areas which expenditure from petroleum revenue is to be embarked upon is the strengthening of the institutional framework of the state that is responsible for the governance and preservation of law and order.[36]

Consequently, the Bank of Ghana is mandated to manage the GPF in such a manner that is compliant with well-established and reputable internationally principles of good governance which will serve the ultimate interest of Ghanaians.[37] The Bank, the Minister, parliament, and the fund managers all have specific and designated roles to play in the realisation of the objectives of the fund. The Act enjoins all parties involved to discharge the various duties assigned to them with regard to matters connected to petroleum revenue management in a manner consistent with transparency and governance standards of utmost international regard.[38] The Investment Advisory Committee and the Public Interest Accountability Committee (PIAC) play oversight function to ensure the various bodies and agencies play their role creditably well.

On the Santiago Principle 7: According to this Principle, the objectives of the Fund should be well laid out; the method of appointment of members into the various governing

[34] Section 49 (8) PRMA 2011
[35] Section 15 (I) PRMA 2011.
[36] Section 21 (3) (j) PRMA 2011.
[37] Section 26 (2) (b.) PRMA 2011.
[38] Section 49 (2) PRMA 2011.

councils should be plainly stated and oversight mechanisms for the operations of the Fund should be provided for. The PRMA have clearly stated the purpose for the establishment of the various funds which have been examined earlier. As for the governing body of the funds, the existing institutional structure of the Bank of Ghana also doubles as the body responsible for the management of the funds. The procedures for the appointment of the various officers that are involved in the process are regulated by the relevant statutes that create and regulate the operation of the Bank of Ghana. The Act creates the PIAC to play an oversight function regarding its implementation, management and achievement of the objectives of the funds.[39] The PIAC is to also ensure that members of the public are fully abreast of the operations of the fund and provide fora for members of the public to air their opinion on matters pertaining to the fund. These can be achieved through the effective use of mass media medium such as internet websites, periodic reports and newspaper publications.[40]

On the Santiago Principle 8: By virtue of this principle, the relevant principal body(ies) carry the obligation of acting in the paramount interests of the Fund, and must possess the specific and ample authority and capability to perform its functions. The explanatory memorandum of the PRMA captures the underlining essence of the Act which is to ensure that the revenue obtained from petroleum resources is managed in a manner to ensure the benefit and sustainable development of the Ghanaian citizens. In giving their counsel on the investment undertaken and into which the fund may be put, Investment Advisory Committee is obliged to give consideration to the underlining objective of the fund which is focused on the benefit which the present and future generations of country stand to gain from.[41]

However, apart from the case of the Investment Advisory Committee, the Act does not make any specific provision in this regard in the case of other bodies like the Bank of Ghana and the Minister who have more decisive roles to play with regard to the management of the fund. It is to be noted that the Investment Advisory Committee only has

[39] Section 51 PRMA 2011.
[40] Section 56 PRMA 2011.
[41] Section 30 (2) a. PRMA 2011.

advisory role to play with respect to the investment decisions of the fund and it is in the discretion of the minister to determine whether to accept or decline the counsel offered by the committee. Even though it could be inferred from the language of the Act that the interest of the citizens is of paramount consideration in decision making, it would be more appropriate to make an express provision in the law in that regard similar to that required of the Investment Advisory Committee.

On the Santiago Principle 9: The operational administration of the Fund should execute the strategies of the Fund in a manner that is free from external influence and interference from other authorities in line with their clearly stated duties. Part of the objectives of the PIAC is to proffer independent appraisal of the management and utilization of petroleum earnings thereby providing Parliament and the executive with the requisite information needed to play their supervisory role in the petroleum sector of the economy.[42] The PRMA provides that the forecasts and determination of the amounts of the Annual Benchmark Revenue obtainable from petroleum operations are to be independently conducted and certified by highly regarded experts who are appointed pursuant to the provisions of the Public Procurement Act, 2003.[43] Generally, the PRMA grants major decision making powers on the Minister. Amongst other things, the minister determines the kind of investment wherein the Fund should be channelled to. The minister also has the sole power to appoint members to the PIAC.[44] These excessive powers exercised by the minister are capable of affecting the independence of the relevant bodies in charge of the administration of the Funds.

On the Santiago Principle 10: it deals with the need for an accountability mechanism for the operations of the Fund which must be clearly laid out in the applicable statutes and management agreement. The PRMA recognised the need to create accountability mechanism to ensure effective management of the fund. Apart from the assessment and collection of revenue obtained from petroleum exploration, the Ghana Revenue Authority

[42] Section 30 (2) a. PRMA 2011.
[43] First Schedule (11) PRMA 2011.
[44] See Section 54 (2) PRMA 2011.

also has the duty to account for such revenue collected.[45] The Act does not take lightly the need for transparency and accountability in the petroleum industry, thus the combined provisions of Section 8 (1) (2) and (3) make it mandatory for the Minister to cause a comprehensive record of petroleum proceeds and hauled up output to be conjunctively published in the National Gazette, not less than two daily Newspapers published by the state and the official website of the Ministry within a period of thirty days following the end of each quarter. These publications are to be presented before the Ghanaian Parliament. The PRMA provides that the management, savings and other matters connected to petroleum revenue must be performed in a manner that is consistent with international practices of foremost regard which borders on transparency and good governance.[46] The implication of this provision of the Act is that the Santiago principles do not just have persuasive effect, but must be given compelling consideration when dealing with issues bordering on the management of the Ghana SWFs. The Act created the Public Interest Accountability Committee[47] to *inter alia* see towards the implementation of the provisions of the Act especially with regard to the issues of transparency and accountability in the Act.

On the Santiago Principle 11: It requires the timely preparation of annual reports and additional financial declarations on the operations and performance of the Funds in line with foremost acclaim national and international accounting norms. The PRMA made requirements for various lines of reporting on annual and quarterly basis by various bodies involved in the management of the funds. The Bank of Ghana has the duty to provide relevant information to the Minister and the Investment Advisory Committee to enable them prepare all the reports and statements in relation to the management of funds as required by the Act. The information is expected to be sent to the relevant bodies in not less than fifteen working days to the publication.[48] The Bank of Ghana shall present to the Minister and to the Investment Advisory Committee, quarterly reports on the performance and activities of the Ghana Stabilisation Fund and the Ghana Heritage Fund not later than

[45] Section 3. (1) PRMA 2011.
[46] Section 49 (1) and (2) PRMA 2011.
[47] Section 51 PRMA 2011.
[48] Schedule 2 Section 3 (h) PRMA 2011.

the end of the month following the end of each quarter.[49] In the same vein, the Bank of Ghana is to issue two publications[50] of its semi-annual reports on the Ghanaian SWFs on a date not later than 15th of February and August yearly and tender the reports before Parliament.[51] The Investment Advisory Committee also supplies technical reports on the performance of the Ghana SWFs to the Minister not more than thirty working days after obtaining quarterly reports from the Bank of Ghana.[52] The report also serves the purpose of preparing the annual budget and financial statements.[53]

On the incumbent's part, the Minister is required to settle the definite sum petroleum receipts and the Annual Budget Funding Amount of the previous year and make an onward transmission of the written report to the Ghanaian Parliament on a date not exceeding the last day of the first quarter of every year.[54] The bulk of submitting annual reports on the SWFs to Parliament forms part of the yearly budgetary and economic policies presentation to be performed by the Minister.[55] In line with its oversight function, the Accountability Committee is to cause a semi-annual report and annual report to be published in not less than two daily newspapers published by the state on the 15th day of September and March of each year respectively.[56] The report is also to be transmitted to the Ghanaian President and Parliament.[57]

On the Santiago Principle 12: It proclaims the need for proper audit of the operations and financial declarations of the fund on a yearly interval in compliance with well-established national and international auditing standards. The national auditing standard is as contained in the PRMA. The Act creates internal and external auditing mechanisms. As such, Section 43 of the Act mandates the Bank of Ghana to keep accurate books of accounts of the SWFs created under the Act. The books of accounts and every other record of the Funds are

[49] Section 28 (1) PRMA 2011.
[50] The publication is to be done in two national dailies owned by the state and on the official online platform of the Bank.
[51] Section 28 (2) PRMA 2011.
[52] Section 40 (1) PRMA 2011.
[53] Section 40 (2) PRMA 2011.
[54] Section 15 (I) PRMA 2011.
[55] Section 48 (1) PRMA 2011.
[56] Section 5 (a) PRMA 2011.
[57] Section 5 (d) PRMA 2011.

subject to the auditing rigours of Internal Audit Department of the Bank of Ghana.[58] Thereafter, the Bank of Ghana shall make an onward transmission of the financial records of the bank to the Auditor-General for it to be subjected to auditing not exceeding three months from the end of its financial year.[59]

The Auditor-General is required by law to act as the external auditor of the Funds on a yearly basis.[60] However, the Auditor-General may elect to outsource this responsibility to an external auditor,[61] in which case the appointment shall not exceed a non-renewable period of three years.[62] The Auditor-General has up to three months within which to make its external audit and submit the report to the Ghanaian Parliament.[63] In his report, the Auditor-General shall confirm the accuracy of the accounts; whether payments and disbursements from the Funds have been properly made and whether the management of the Funds are in compliance with the Act.[64] Any inconsistency or irregularity discovered in the accounts by the Auditor-General must be brought to the attention of Parliament.[65] Apart from the external audit, the Auditor General may embark on special audit of the funds as deemed suitable. As such, the Bank of Ghana is duty bound to make accessible all the books and records connected with the operational management of the Funds as and when requested by the Minister, and auditors of the Funds.[66]

On the Santiago Principle 13: The professional and ethical code of conduct expected of the members, officers and management of the governing body(ies) of the Fund must be clearly stipulated and brought to their awareness. Under the Operations Management Agreement, the Bank of Ghana is under obligation to ensure the conduct of its members saddled with the management responsibility of the GPF are regulated by ethical code of conduct and rules to help them stay away from conflicts of interest situation.[67] Also, any

[58] Section 44 (1) PRMA 2011.
[59] Section 46 (1) PRMA 2011.
[60] Section 45 (1) PRMA 2011.
[61] Section 45 (2) PRMA 2011.
[62] Section 45 (3) PRMA 2011.
[63] Section 46 (2) PRMA 2011.
[64] Section 46 (3) PRMA 2011.
[65] Section 46 (5) PRMA 2011.
[66] See the Second Schedule (4) (c.) PRMA 2011
[67] See the Second Schedule (4) (d.) PRMA 2011.

person, whether substantive or co-opted member of the Investment Advisory Committee, who being an interested party in any issue under deliberation by the investment Advisory Committee is under duty to divulge the nature of whatever interest the person has, which disclosure must be minuted in the record of proceedings where the matter was considered. The person is also required to refrain from taking part in the discussion leading up to the decision of Committee on the subject matter.[68] The foregoing requirement of the Act is strict such that persons who are in default of this provision of the Act stand the chance of losing their membership of the committee.

On the Santiago Principle 14: This borders on the relationship with third parties regarding the operational management of the fund which must be conducted on economic and financial basis pursuant to plainly defined procedures and regulations. The PRMA provides the need for the funds to be regulated by the Operational Management Agreement. This agreement is to be entered between the Minister and the Bank of Ghana pursuant to Section 25 of the Act. The Agreement is to be entered in accordance with the provision of the Act as contained in the Second Schedule. Therein, the obligations of the Minister and the Bank of Ghana are created. The only provision of the Act regarding third party relationship with the fund is as regards the procurement of the services of portfolio managers for the fund which is to be carried out by the Bank of Ghana. The requirement of the law is that the process must be fair, transparent and comply with its internal and statutory procedure, especially the Public Procurement Act, 2003. Every information regarding the appointment of portfolio managers including issues of remuneration must be communicated to the Minister.[69]

On the Santiago Principle 15: This concerns a situation where the SWF is operated in other countries. This principle enjoins that the activities and operations of the fund must also be regulated in accordance with the relevant regulatory and disclosure standards of the host countries. This principle is applicable when the fund is invested in a country other than Ghana. In such a case, the management of the investment must also be in tandem with the applicable *lex situ* and disclosure requirement. The Act specified that the funds could only

[68] Section 34. (1) (a.) and (b.) PRMA 2011.
[69] Second Schedule (9) PRMA 2011.

be invested in qualifying instruments.[70] The definition of qualifying instruments as provided for in the interpretation section of the Act[71] suggests that the fund can be invested in instrument issued or guaranteed by an international financial institution or a sovereign country apart from Ghana. However, the Act did not state that such investment would also be regulated by the regulations or disclosure standards of the state where the fund is invested. This notwithstanding, it is implied that any investment in another country must conform to the regulations of the host country due to the internationally recognised principle of sovereignty which an independent state enjoys across its territory.[72]

On the Santiago Principle 16: This principle calls for the severance of the objectives, governance framework and management of the fund from the influence of the ownership of the fund to secure its operational independence. These differences must be a subject of public disclosure. In an attempt to ensure the independence of the funds, the Act provides that the assets of the funds are to be kept in the name of the Bank of Ghana but must maintain a distinct identity from the assets of the Bank.[73] The owner of the fund is the government of Ghana, while the citizens of Ghana are the beneficiaries of the fund. This is similar to the trust relationship established under the equitable principles of English law. The Bank of Ghana which is saddled with the responsibility of performing the operational management of the Funds on a day to day basis and the Minister who exercises supervisory management of the fund[74] are both representatives of the government in varying degrees.[75] There is no way both entities would not be influenced by the dictates of their principal. The parliament is another arm of government which exercises major determination of how the fund is to be ran. Pursuance to Section 10 (4) of the Act, parliament can approve the transfer of any portion of interest accruing to the GHF to other funds created under the Act.

[70] Section 27 (1) PRMA 2011.
[71] Section 61 PRMA 2011.
[72] Article 1 of the Monte Video Convention on the Rights and Duties of States 1933 recognizes the right of an independent state "to legislate upon its interest". Article 9 further recognises the right of states to exercise jurisdiction over nationals and foreigners within its territory.
[73] Second Schedule 4 (a) PRMA 2011.
[74] Second Schedule 1 and 2 PRMA 2011.
[75] The second schedule of the Act expressly acknowledges the Minister as a representative of the Government.

Also, the accumulated resources of the GSF must be approved by the parliament.[76] Parliament has enormous influence over the management of the funds. It may also be argued that Parliament is a representation of the citizens of Ghana, who are not the legal owner but beneficiaries of the fund. This is not to say that it is unnecessary for parliament to exercise supervisory powers over the workings of the fund. However, where such supervision becomes overbearing, it runs counterproductive to the essence of having an independent management of the fund which Principle 16 seeks to achieve. Bestowing distinct legal personality on the SWFs serves the purpose of severing the government from controlling the fund, thus shielding it from undue political meddling from the ruling class.[77] In as much as this may not entirely be an assurance of operational independence for the Fund, it gives the managers the freedom to exercise their discretion in the decision making process of the Funds.[78]

On the Santiago Principle 17: The necessary financial data related to the Fund must be publicly disclosed to reveal its economic and financial drive towards stability in the international financial industry in order to create the confidence of recipient countries. The PRMA demonstrated its commitment towards a stable international financial market by its expression of the requirement that the fund be invested in instruments of international financial institutions such as IMF, World Bank, Bank for International Settlements, European Central Bank and the Central Banks of other countries.[79] It is common practice for countries to invest their SWF in financial assets.[80] The GPFs have been invested insecurities with guarantee of fixed income.[81] The funds have been channelled into investment in Euroclear bonds[82] but never in assets in the Ghanaian economy.[83] At this

[76] Section 23 (3) PRMA 2011.
[77] Evaristus Oshionebo, 'Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries' (2015) 15 Asper Review 217, 235.
[78] Evaristus Oshionebo, Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries (2015) 15 Asper Review 217, 234.
[79] See the meaning of qualifying instruments under Section 61 PRMA 2011.
[80] Omosalewa Oluyinka Olawoye, Commodity Based Sovereign Wealth Funds: An Alternative Path to Economic Development (PhD Thesis University of Missouri 2016) 62.
[81] Centre for Applied Research on International Markets, Banking, Finance and Regulation. Sovereign Investment Lab The Sky Did Not Fall Sovereign Wealth Fund Annual Report 2015 11 <www.ifswf.org/sites/default/files/Bocconi%20SIL%202016%20Report.pdf>
[82] Omosalewa Oluyinka Olawoye, Commodity Based Sovereign Wealth Funds: An Alternative Path to Economic Development (PhD Thesis University of Missouri 2016) 32.

early stage of the operation of the Ghanaian SWFs, it could be regarded as 'development funds'. As a result of the lack of assimilative capacity of the local economy, development funds aim at stashing the assets of the funds abroad pending when the domestic market would attain commercial viability.[84]

Even though the Act called for transparency and open public access to information and data relating to the management of the funds, clear details of the asset allotments have not been brought to public knowledge.[85] This is compounded by the provision of the Act which reposes the Minister with the power to label certain information or data as classified and inaccessible to the public.[86] This provision of the Act certainly defeats the essence of Santiago Principle 17.

On the Santiago Principle 18: The investment policy of the Fund must be lucid and must comply with the objectives, risk management and investment plan laid down by the proprietor or governing body(ies) which must be based on solid portfolio management standards.

On the Santiago Principle 19: The investment resolutions of the Fund should be targeted at optimizing risk-reduced financial earnings in such a way that conforms to its investment policy based on economic and financial viewpoints. Principles 18 and 19 could be conveniently and jointly addressed together here. The Act places the duty of general and investment policy development of the fund on the Minister,[87] as proposed and formulated by the Investment Advisory Committee.[88] Meanwhile, the Bank of Ghana has the duty of formulating and implementing risk management strategies to minimize operational loss of the Funds.[89] The object of the GSF and the GHF are respectively captured in Section 9 and

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[83]Christoph Stückelberger, Deon Rossouw, Sofie Geerts, Pascale Chavaz and Namhla Xinwa, Sovereign Wealth Funds: An Ethical Perspective Globethics.net Global No. 15 2016 16

[84]Adam D. Dixon and Ashby H. B. Monk What Role for Sovereign Wealth Funds in Africa's Development? Oil-to-Cash Initiative Background Paper (The Center for Global Development) October 2011, 9.

[85]Omosalewa Oluyinka Olawoye, Commodity Based Sovereign Wealth Funds: An Alternative Path to Economic Development (PhD Thesis University of Missouri 2016) 32.

[86] Section 49 (3) PRMA 2011.

[87] Section 25 and 2nd Schedule 2 (a) PRMA 2011.

[88] Section 30. (1) (a) PRMA 2011.

[89] Second Schedule 3 (j) PRMA 2011.

10 of the Act. How these aforementioned management bodies have been able to perform their roles in this regard is still subject to further examination to determine its conformity with the requirement of Santiago Principle 18. Also, the Act does not state any portfolio management standards which must be maintained. It, however, gives the Bank of Ghana the leeway to appoint and assess the performance of portfolio managers of the fund.[90]

On the Santiago Principle 20: By virtue of its vantage position of being connected with the government, SWFs stand the chance of having certain information within its disposal. This principle enjoins SWFs to refrain from abusing the privileged information and influence within its grip to asphyxiate competition from the private sector. The governing body(ies) responsible for management of the Funds created under the Act are the Bank of Ghana and the Minister. These are all agents of the government, the former being the apex financial institution in the country while the latter being the Minister in charge of finance and economic planning in the country. By virtue of their position, they play a cardinal role in government. Their roles in the government put them in the position of having certain privileged investment position which would certainly give them advantage over entities in the private sector which could serve as potential competitors to the investment endeavour of the fund. It would have been a slightly different case if the SWFs of Ghana are managed by an external entity distinct from the government. The PRMA does not address this fear which Santiago Principle 20 intends to safeguard against.

On the Santiago Principle 21: Shareholder ownership rights are herein viewed as a cardinal component of the portfolio investments' value which must be upheld at all time. The ownership rights of the fund must be exercised with due respect on the need to protect the investment policy and financial values of the funds. The minister is in charge of making decisions regarding the investment policies of the fund. In making these decisions, the minister is expected to take cognisance of the financial interest of entities who may have invested in the interest of the fund. The PRMA did not make any requirement for the minister to consider the investment interest of the shareholders of the fund. The Act only

[90] Second Schedule 9 PRMA 2011.

requires that the citizens of Ghana, for whose benefit the funds were created, should be given paramount consideration in the investment decision making.

On the Santiago Principle 22: It proposes that the Fund should create a framework that recognises, provides, and appraises risks management for its operations. This point has already been addressed on principle 18 and 19 above. It has to be emphasised that the PRMA did not create any risk management framework apart from the requirement that the Bank of Ghana should formulate, implement and appraise the risk management strategy of the funds. The rolling up of these various risk management functions on the Bank of Ghana may not produce a very fantastic result. While the Bank may formulate and implement the risk management plan, there is need to create an external body that would evaluate and appraise the implementation strategy of the risk management policies of the fund.

On the Santiago Principle 23: It calls for regular assessment of the assets and investment feat of the Fund which are measured by available benchmarks and same being reported to the beneficiaries of the fund in line with stipulated rules and standards. Part of the duties of the Investment Advisory Committee is to assist the Minister develop investment guidelines, benchmark portfolio, and anticipated investment returns and risk of the GPF. In doing this, the Committee is to take note of model investment templates which the Bank of Ghana used in similar investments.[91] Apart from the fact that the Act requires the Annual report to be prepared in such a manner that would guarantee its easy circulation to the public, the Annual Report is expected to contain certain information including comparing the investment income of the GSF and GHF, on one hand, with the "benchmark performance indices provided to the Minister", on the other hand.[92]

Pursuant to the powers reposed on the minister by the Act, the Minister may create investment mandates, benchmarks and qualifying instruments which the Funds may be invested in by the Bank of Ghana.[93] The Minister has the power to review what constitutes a qualifying instrument for which the fund may be invested within three years interval or

[91]Section 30 (1) (c) PRMA 2011.
[92] Section 48 (2) (e) PRMA 2011.
[93]Evaristus Oshionebo, 'Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries' (2015) 15 Asper Review 217, 232.

less.[94] It is, however, submitted that, this cannot be interpreted as granting the minister the power to remove any of the items referred to as qualifying instruments under Section 61 of the Act. The minister can only add to the list. If the review would require the removal of any item in the list, the minister must ensure that a legislative process in that regard is conducted by the Ghanaian Parliament which is constitutionally saddled with the law-making powers of the State. The general performance of GPF is to be examined against the benchmark prescribed by the Investment Advisory Committee from time to time. The outcome of such examination will also be made available in periodic reports.[95]

On the Santiago Principle 24: This principle calls for the engagement in constant review of the implementation of the Santiago Principles to be carried out by the Fund or such persons procured to do so in the stead of the SWF. The PRMA does not expressly adopt the Santiago Principles or expresses the need for its implementation in Ghana. However, most other recommendations of the Santiago Principles are reflected in the Act. The Act also requires the performance of certain functions in accordance with internationally recognised standards. These put the Santiago principles in contemplation. However, Bagnall and Truman hold the view that the Santiago Principles can only boast of little influence in Ghana.[96]

6.6 CONCLUSION

This study has examined the law on petroleum revenue management in Ghana. It found that the development of the oil and gas industry saw the country adopting new laws to rise to the occasion of the new situation. A critical area that will require that effort be channelled into it is the development of an effective legal framework for revenue management. The SWF is part of the options in the development of the framework. Globally, the use of soft laws such as the Santiago Principles in the oil and gas industry has been appreciated as instruments that will enhance good governance. Soft laws, however, are not binding. From

[94] Section 27 (2) PRMA 2011.
[95]Second Schedule 6 PRMA 2011.
[96] Allie E Bagnall and Edwin M Truman, 'Progress on Sovereign Wealth Fund Transparency and Accountability: An updated SWF scorecard', Peterson Institute for International Economics, Policy Brief (2013)13-19, <http://www.iie.com/publications/interstitial.cfm?ResearchID=2454> accessed 15 November 2018.

an international perspective, they are not strictly normative in character as countries can choose not to follow them but they serve as a form of caution and project the goodwill of countries that observe them. A country seeking to develop its petroleum revenue in line with best practices, can take some legal steps by translating these best practices into law. Ghana has, to a reasonable extent, purposely or unwittingly reflected this in its PRMA. However, much still has to be done.

CHAPTER SEVEN: REPOSITIONING THE LAW AS AN INSTRUMENT OF PETROLEUM REVENUE MANAGEMENT

The factors which have militated against effective management of petroleum revenue has been examined. The law is generally referred to as an instrument of social control by the sociological school of jurisprudence.[851] This is not limited to the control of human beings alone, but includes the social institutions established by the law.[852] On the other hand, there are other jurists who have viewed law as an economic tool.[853] In the latter regard, specific aspects of law are designed to give direction to economic activities in the society.[854] Thus, economic efficiency ought to be the primary concern of the law.[855] Natural resources are means of economic empowerment for states that are endowed with natural resources. Also, in the course of the exploitation of the natural resource to create economic benefits, different categories of persons are engaged in one form of social relationship or the other. Every officer of the state in charge of the tool of economic management of the state is under duty to act in accordance with the legal requirement of the law. Such officers also bear the responsibility for acting otherwise.[856] It has been suggested that law is an instrument for occasioning social and economic change which ultimately leads to the development of the society.[857] In view of this fact, the postulations as conceived by both schools of thought on the function of law are relevant for the purpose of natural resource management.

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[851]See, Roscoe Pound, *Social Control through Law* (Yale University Press, 1942) 20; Lon L Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' (1975) 1 Brigham Young University Law Review 89, 89; Malcolm M. Feeley, 'The Concept of Laws in Social Science: A Critique and Notes on an Expanded View', (1976) 10 (501). Law & Society Review 497, 511.

[852]Chigozie Nwagbara, 'The Efficacy of the Law as an Instrument of Social Control in Nigeria'. (2015) 3 (1) International Journal of Business & Law Research 44, 44.

[853] See, Ronald H. Coase, 'The Problem of Social Cost'. (1960) 3 Journal of Law and Economics 1, 27; Sophie Harnay and Alain Marciano, 'Posner, Economics and the Law: From ''Law and Economics'' to an Economic Analysis of Law' (2009) 31 (2) Journal of the History of Economic Thought 215, 216.

[854] Eli M. Salzberger, 'The Economic Analysis of Law: The Dominant Methodology for Legal Research?' *Haifa Law Review* 207, 216

[855]Tomasz Famulski, 'Economic Efficiency in Economic Analysis of Law', (2017) 3 (15) Journal of Finance and Financial Law 27, 28.

[856]Paul S. Anuye, Akombo E. Ityavkasa. and Abdulsalami M. Deji. 2017. The Doctrine of the Rule of Law; a Necessity to Democratic Governance. *Global Journal of Human Social Science* 17.4: 29-39, 33.

[857] Tom Ginsburg, Does Law Matter for Economic Development? Evidence from East Asia', (2000) 34 (3) Law & Society Review 829, 833.

Law has been identified as an instrument that influences development and at the same time has the capacity to be influenced by development.[858] In the course of ensuring economic efficiency through the instrumentality of the law, the relevant regulation put in place thereto must be targeted at specific objectives. This is what is referred to as regulation by objectives, otherwise known as goal-based regulation. Regulation by objective is derived from the term management by objective which was first conceptualised by Peter Drucker in his 1954 work titled 'The Practice of Management'.[859] The concept demands that managers put in place precise goals and targets to be attained in the future, allowing for probity, creativity and viability in the organisation.[860] It is mainly concerned with the procedure or arrangement whereby supervisory managers, in conjunction with their subordinate put timelines in place within which definite goals are to be realised by the subordinates.[861] Management by objectives is end result focused, directs the commitment of members of the organisation towards precise goals and drives them to reflect on the future needs of the organization and devise means to achieve those needs.[862]

Conversely, regulation by objective is a form of regulation aimed at integrating an array of essential and achievable institutional goals into a whole.[863] It seeks to provide a yardstick and standards for which a system undergoing the process of transition can deal with the intricate economic governance issues.[864] The objectives of law and its effectiveness have to be taken into account.[865] In this wise the regulatory bodies are to exercise their functions within the dictates of the strategic and operational objectives of the regulation.[866] The idea underlining regulation by objectives is that regulatory authorities should concern

[858] S Lubman, *China's Legal Reforms* (Oxford University Press, 1996) 839.

[859]Peter C. Obutte, 'Law and development: Bridging the breaches in the circle of development within the context of particularities', (2011) 1 (2) University of Ibadan Law Journal 245, 264.

[860] Thomas M. Thomson, Management by Objectives in J. William Pfeiffer and John E. Jones (Eds.), The 1972 Annual Handbook for Group Facilitators San Diego, CA: Pfeiffer & Company. 1-2

[861] Ibid.

[862] Ibid. 3.

[863]Peter C. Obutte, 'Law and development: Bridging the breaches in the circle of development within the context of particularities', (2011) 1 (2) University of Ibadan Law Journal 245, 264.

[864] Ibid.

[865] Alexandra George, Pedro Machedo and Jacques Ziller, Law and Public Management: Start to Talk. European University Institute Working Paper Law 2001/12 36. <cadmus.eui.eu/bitstream/id/961/law01-12.pdf/>
(Accessed October 5, 2018)

[866]Philip Rawlings, Andromachi Georgosouli and Costanza Russo, Regulation of Financial Services: Aims and methods Queen Mary University of London Report, 2014, 25. <https://www.qmul.ac.uk/ccls/media/ccls/docs/research/020-Report.pdf> Accessed January 11, 2019.

themselves with the essence for which the law was created rather than merely holding on to rules with dogmatic tenacity. The application of regulation by objectives signifies the regulatory body has attained maturity such that it can function based on laid down principles instead of adopting a prescriptive bureaucratic approach.[867] Regulatory objectives put forth the rationale, the ambit and the category of items or persons affected by the regulation which will give direction to the regulator and the regulated.[868] The regulatory body can easily fall back on the purpose of the regulation to justify steps and actions taken pursuant to the regulation.[869]

The objectives of the regulation are set at divers scale of specificity which usually include broad principles, standards and end result which regulators must strive to attain.[870] The major concern of the regulator is to achieve the regulatory goal going by the fore-sighted approach applied in accordance with their discretion towards the attainment of the regulatory goal.[871] The regulators are expected to apply well informed best judgement decisions in compliance with the regulation.[872] The actions and inactions of the regulators must be in tandem with the goals of the regulation.[873] There are several advantages of applying this form of regulation: it makes room for flexibility; it encourages testing and trying out different routes to compliance;[874] encourages regulators to be futuristic in their thoughts and decision;[875] it is open-textured and could be easily amenable to alternating

[867]Christopher Decker, Goals-Based and Rules-Based Approaches to Regulation. (2018) 8 Department of Business Energy and Industrial Strategy Research Paper, 10. <https://assets.publishing.service.gov.uk/.../regulation-goals-rules-based-approaches.pdf> (Accessed October 5, 2018).
[868]L. Terry, Mark S. and T. Gordon, 'Adopting Regulatory Objectives for the Legal Profession', (2012) 80 Fordham Law Review 2685, 2686.
[869]Ibid.
[870]Christopher Decker, 'Goals-Based and Rules-Based Approaches to Regulation', (2018) 8 Department of Business Energy and Industrial Strategy Research Paper, 17. <https://assets.publishing.service.gov.uk/.../regulation-goals-rules-based-approaches.pdf> (Accessed October 5, 2018)
[871]Ibid.
[872]Ibid.
[873]Ibid.
[874]Ibid. 27.
[875]ibid.

circumstances, situations and environment;[876] and gives room for the application of regulatory discretion.[877]

The two major legislative regimes regulating the petroleum sector in Ghana are the PRMA and Petroleum (Exploration and Production) Act 2016. The objectives of the PRMA can be gleaned from its long title which is described as a "framework for the collection, management of petroleum revenue in a responsible, accountable and sustainable manner for the benefit of Ghana". Section 1 further makes the Act responsible for regulating the collection, allocation and management of petroleum revenue derived from petroleum exploration both in the upstream and midstream sector of the industry.[878] In the same vein, Section 4 Petroleum (Exploration and Production) Act 2016 requires that petroleum resources be managed in line with the objective of the Act. The objective as contained in Section 2 of the Act is to "ensure safe, secure, sustainable and efficient petroleum activities in order to achieve optimal long-term petroleum resource exploitation and utilisation for the benefit and welfare of the people of Ghana".

However, the downside of regulation by objectives is its potentiality of creating a breach in accountability and can either lead to excessive or insufficient level of compliance depending on the level of regulation precision and regulatory body's risk profile.[879] Inordinate exercise of discretionary powers is a foremost precursor to corruption practices. This would call for an introduction of regulatory instrumentality to guard against the excessive exercise of discretion powers by regulatory agencies.[880]

The institution involved in the management of the petroleum resource proceeds of Ghana under the PRMA 2011 is the Bank of Ghana. Going by the principles of regulation by objectives, the Bank of Ghana is expected to independently manage the petroleum revenue

[876]Ibid.
[877]Ibid.
[878]Section 1 (1) PRMA 2011
[879]Christopher Decker, Goals-Based and Rules-Based Approaches to Regulation. (2018) 8 Department of Business Energy and Industrial Strategy Research Paper, 27. <https://assets.publishing.service.gov.uk/.../regulation-goals-rules-based-approaches.pdf> (Accessed October 5, 2018)
[880]OECD. 2011. Public governance. Policy Framework for Investment User's Toolkit. 5. <www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf> (Accessed October 5, 2018)

resources without extraneous interference. This does not give the Bank the leverage to exercise arbitrary powers thereto. The Bank of Ghana is to be guided by the provisions of the Act and exercise such powers within the allowable limit of the objectives of the Act. In order to guard against the abuse of discretionary powers, the Ghanaian parliament has certain supervisory roles to play. Parliament has the powers to determine the distribution ratio of petroleum revenue for various purposes.[881] Parliament may also stipulate a certain fraction that may be withdrawn from the Ghana Heritage Fund or interest accruing therefrom within a fifteen years period.[882] It is also to receive annual and periodic reports from the Bank of Ghana.[883]

Under the Sovereign Wealth Fund of Norway, known as the Government Pensions Fund Global (GPFG), the pension managers are given a free hand to manage the fund as they think fit. However, there are certain ethical considerations set out by regulations of the Council on Ethics, which the GPFG managers must abide by in their management of the fund. For instance, assets of the GPFG must not be invested in corporate organisations that engage in environmentally unfriendly activities, violations of labour and human rights, manufacturing of arms and ammunition etc. From time to time, the Ethics Committee makes a black list of companies which must not have the benefit of having the fund invested in shortlisted companies. This therefore shows an area where capacity will need to be enhanced to promote the management of petroleum revenue. The sustainable management of Ghana's petroleum revenue from the perspective of capacity building could have far-reaching consequences in the management of petroleum revenue: first, where there is low institutional capacity and political competition as in the case of Angola, there should be consolidation of functions; second, where institutional capacity is low while political competition is high as in the case of Nigeria, the emphasis should be on development of technical and institutional capacity; third, where there is high institutional capacity and low political competition as depicted in the situation in Malaysia consolidation and separation of functions will be ideal since politics is more pluralistic; and last, as shown in Norway

[881]Section 10 (1), (2) and (3) PRMA 2011.
[882]Section 10 (4) PRMA 2011.
[883] Section 28 (2) PRMA 2011.

and Brazil where the variables of institutional and political competition are high, separation of functions will be recommended.[884]

Scholars like A. V. Dicey have touted the idea that conferment of discretional powers on state actors leads to arbitrariness. While it is correct that excessive use of discretionary powers may lead to arbitrariness, it is submitted that the exercise of some discretionary powers is necessary for flexibility in public administration to handle unanticipated eventualities in governance. The current drift is that there are laid down principles and guidelines for implementation of such discretionary powers.[885] As often stated by the courts, discretionary powers must be exercised judicially and judiciously by administrative bodies.[886] Otherwise put, it must be based on evidence and reason. In a clime where there is respect and compliance with the rule of law, the low points of exercise of discretionary powers by regulatory bodies which is an incident of regulation by objective would be largely taken care of. The basic condiment of the rule of law is that "government officials and citizens are bound by and abide by the law".[887] According to the United Nations,[888] the rule of law entails:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated... It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers... legal certainty, avoidance of arbitrariness and procedural and legal transparency.

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[884] Mark Thurber, David Hults and Patrick Heller, 'The Limits of Institutional Design in Oil Sector Governance: Exporting the Norwegian Model' ISA Annual Convention (New Orleans, 14 February 2010), 203 <http://iis-db.stanford.edu/pubs/22836/Thurber_Hults_and_Heller_ISA2010_paper_14Feb10.pdf>
accessed 28 June 2013. Cited in Thomas Kojo Stephens, Getting It Right: The Development of an Effective Regulatory and Policy Framework for the Management of Ghana's Upstream Oil Industry (PhD Thesis, University of Aberdeen 2014) 186.

[885]Alok K. Yadav, 'Rule of Law' 4 (3) International Journal of Law and Legal Jurisprudence Studies 205, 211.

[886] See the case of *Duro Ajayi and Ors v*. *State*, (1977) FCA 1, 6.

[887]B. Z. Tamanaha, 'The history and Elements of the Rule of Law'. (2012) Singapore Journal of Legal Studies 232, 233.

[888]The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN SC, UN Doc. S/2004/616 at 4 <https://digitallibrary.un.org/record/527647> (Accessed October 8, 2018).

The rising need for regulators to take up the rising functions associated with arriving at the economic objectives of regulations has put regulators in the position of placing their primary focus on the objectives and outcomes which the regulation is poised to attain instead of giving priority to procedural issues under the regulation.[889] It then becomes the duty of the regulator to recognise those goals set out by the regulation which they must achieve under the authority of the relevant laws. Expressly laying down objectives of regulation creates credibility and transparency which booster the faith of members of the public on the regulators.[890]

Most regulations have more than one objective. On instances where the objectives of the regulation conflicts with one another, the regulatory body usually faces a dilemma as to which of the objectives to give priority to in its implementation.[891] The Ghanaian regime on petroleum resource management as has been stated above has been shown to have more than one objective. Uncertainties over the objectives of a regulation poses greater dangers than the otherwise situation as it becomes unclear how to strike a balance between the conflicting objectives.[892] This becomes a huge burden on the various regulators of the Ghanaian petroleum resources to exercise due caution in the determination of priority on the issue of conflict of objectives. On the whole, the regulatory bodies must consider the overall interest of the citizens of Ghana who are the beneficiaries of these funds. According to Alex Mould, the former CEO of GNPC, and National Petroleum Authority (NPA), the objective of the PRMA is to "establish the legal framework to ensure transparency and accountability in the management of Ghana's oil and gas sector".[893]

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[889]Michael J. Ileo and David C. Parcell, 'Economic Objectives of Regulation - The Trend in Virginia', (1973) 14 (3) William & Mary Law Review 547, 551.

[890]American Bar Association Commission on the Future of Legal Services Standing Committee on Professional Discipline Criminal Justice Section Law Practice Division Standing Committee on Legal Aid and Indigent Defendants, Standing Committee on Client Protection Report to the House of Delegates. 3. <https://www.americanbar.org/.../final_regulatory_objectives_resolution_november_2015.pdf> (Accessed October 5, 2018).

[891]Legal Services Board, The Regulatory Objectives: Legal Services Act 2007 3 <https://www.legalservicesboard.org.uk/about_us/Regulatory_Objectives.pdf> (Accessed October 5, 2018).

[892]Philip Rawlings, Andromachi Georgosouli & Costanza Russo, Regulation of Financial Services: Aims and Methods, Queen Mary University of London Report, 2014, 26. <https://www.qmul.ac.uk/ccls/media/ccls/docs/research/020-Report.pdf> Accessed January 11, 2019.

[893] Alex Mould, 'Ghana's Oil & Gas Resources for Socio-Economic Development', a Presentation at the Minerals and Natural Resources Conference held at The University of East Landon on 29 to 30 October 2019.

Petroleum resources revenues are distributed in the ratio of 9% for the Ghana Heritage Fund, 21% for the Stabilisation Fund and 70% is allocated for the Annual Budget Funding Amount.[894] Some portion of the revenue is also to be allocated to the Ghana Infrastructure Investment Fund (GIIF).[895] It could be seen that the Act gives priority to the budget funding purpose of the petroleum proceeds than saving for future generation purpose. Even the monies allocated for the GHF can still be tampered with if the Parliament so directs. This does not show serious commitment towards saving for the future generation. The Ghanaian economy is drifting towards high level dependence on petroleum resource revenue. If this trend continues, it has the potential of leading to the neglect of other sectors of the Ghana economy which could swiftly lead Ghana into the resource curse trap.

The COVID-19 pandemic has occasioned hardship for both developed and developing countries. Ghana being a developed country has been impacted by the effect of the pandemic on the economy with a shortfall in petroleum revenue.[896] As part of proposed measures in place in Ghana, the Coronavirus Alleviation Programme (CAP) has been put in place by the government to aid economic recovery. It proposed the reduction of the cap on Stabilisation Fund (GSF) from US$300 million to US$100 million so that the excess is used for funding the CAP by amending section 23(3) of the PRMA.[897] It is also proposed that the PRMA be amended to allow funds in the Ghana Heritage Fund (GHF) to be withdrawn to be used in fidgeting COVID-19.[898] The pandemic further underscores the need to prepare for the periods of scarcity. Thus, the importance of the GSF for the purpose of cushioning the effect of the pandemic will be appreciated in the long run. However, it is too early for Ghana to start utilising the revenue in the GHF does not appear to be economical and politically viable. It is therefore a further lesson for Ghana to continue to

[894]Olivia Lwabukuna, 'Natural Resources for Socio Economic Development in Africa', Africa Insight (2015) 44 (4) Africa Institute of South Africa 47, 54.
[895]Section 8 (4) (c) Petroleum Revenue Management (Amendment) Act 2015. This Section amended Section 21 of the principal Act.
[896] Minister for Finance, *Statement to Parliament on Economic Impact of the Covid-19 Pandemic on the Economy of Ghana Monday, 30th March, 2020 Submitted by Ken Ofori-Atta Minister for Finance*.
[897] Deloitte, 'Economic Impact of The Covid-19 Pandemic on the Economy of Ghana', https://www2.deloitte.com/content/dam/Deloitte/gh/Documents/about-deloitte/gh-economic-Impact-of-the-Covid-19-Pandemic-on-the-Economy-of-Ghana_06042020.pdf, accessed 31 August 2020.
[898] Ibid.

ensure that even after the pandemic is over, much should be done to ensure that there is a boost in the GHF for the future generations.

The Norwegian model presents a better approach which Ghana may take a cue from. The Norwegian economy is vastly diversified. Its annual budget is funded almost independent from petroleum proceeds. All the petroleum resources are pumped into the Government Pensions Fund Global (GPFG), which is the sovereign wealth fund of the country. The SWF spending rule is that only 4% of interest accruing from the GPFG can be used to fund the Norwegian economy.[899] The approach has resulted in Norway gaining the reputation of the country with the SWF with highest capital base of over $1.1 trillion as at January 2018.[900] This feat has given economic and social security to the needs of the future generation of the country.

It must be noted that the Ghanaian economy is not viable and versatile enough to take a drastic step as the Norwegian position. This is because the country had not taken time to develop its non-resource-based sectors of her economy from the outset. The country had always depended on resource-based earnings to fund her economy. Before the discovery and exploration of petroleum in 2007 and 2012 respectively,[901] the country had depended on cocoa and gold exploration. The economy of the country had passed through difficult times and the country has viewed petroleum resources as a means of bouncing the economy back to viability. However, the country must not be only concerned with settling their immediate needs. Even if the country cannot match up with the Norwegian standard, 9% is far below the standard for the benefit of future generations. The country may consider at least 20 to 25 percent savings into the GHF. This figure can be progressively increased as time goes on when more effort has been put in place to make the non-resource-based aspect of the economy improve. In the same token, Alex Mould identified the need to continue to promote sustainability through putting in place policies that prepare Ghana "for the

[899]Dah Frederick Kwasi & Khadijah Mwinibuobu Sulemana, The Contribution of Oil to the Economic Development of Ghana: The Role of Foreign Direct Investments (FDI) and Government Policies. (MSc thesis, University West 2010) 61.

[900]D. Reid, More firms banned as the world's biggest sovereign wealth fund tries to go ethical. The Consumer News and Business Channel, January 16, 2018. <https://www.cnbc.com/2018/01/16/norways-sovereign-wealth-goes-ethical-with-nuclear-firms-banned.html> (Accessed May 9, 2018).

[901]Francis Ayensu, 'Managing Ghana's Oil Revenue: Ghana Petroleum Funds (GPFs)' (2013) 1 (2) Asian Journal of Humanities and Social Sciences 148, 152.

transition to a low carbon economy by implementing appropriate policies to ensure sustainable investment in fossil fuels even in the midst of transition".[902] He continued that "Revenue from oil resources should be re-invested in other sectors and industries for development and diversification of economy".[903]

Another shortcoming of the petroleum resource management approach of Ghana is the lack of consideration for host community interest. Petroleum is solely owned by the state.[904] Thus the state is empowered by law to hold and manage the fund accruing from the petroleum exploration for the general interest of the entire people of Ghana.[905] This is similar to the domainial ownership approach practiced in Nigerian where the legal instruments such as the Constitution of the Federal Republic of Nigeria 1999 (as amended),[906] the Land Use Act 1978,[907] Petroleum Act of 1969[908] and the Exclusive Economic Zone Act 1978[909] have been used to appropriate an allodial interest in petroleum resources on the Federal Government of Nigeria.

The legal regime for petroleum resource management in Ghana does not make provision for certain percentage to be specifically dedicated towards the development of the oil producing regions or host communities for that matter. This has been reinforced by the belief that petroleum resources belongs to the entire citizens of Ghana notwithstanding the several inconveniencies and environmental hazards which host communities stand the risk of facing as a result of petroleum exploration.[910]

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[902] Alex Mould, 'Ghana's Oil & Gas Resources for Socio-Economic Development', a Presentation at the Minerals and Natural Resources Conference held at The University of East Landon on 29 to 30 October 2019.

[903] Ibid.

[904] A. A. Fatouros, 'Permanent Sovereignty Over Oil Resources, a Study of Middle East Oil Concessions and Legal

Change, by Muhamad A. Mughraby; The Law of Oil Concessions in the Middle East and North Africa, by Henry Catton; The Evolution of Oil Concession in the Middle East and Africa, by Henry Catton'. (1968) 43 (4) Indiana Law Journal, 953, 965.

[905] Section 3 Petroleum (Exploration and Production) Act 2016.

[906] See Section 44 (3) and item 39 Schedule II of the Exclusive Legislative List.

[907] Section 1.

[908] Section 1 (1).

[909] Section 2.

[910] Amewu Attah, The Impact of Oil Exploitation on a Ghanaian Fishing Community, (PhD Thesis Cardiff University 2018) 212-213

In the case of Nigeria, the historical neglect of its Niger Delta region has led to agitation and violent unrest in the host communities in a bid to have control of petroleum resources within their communities.[911] To ameliorate this situation, the constitution created the derivation principle which is to the effect that at least thirteen percent of the revenue obtainable to the Federal Government from natural resources exploration shall be given to constituent state from which the resources are derived.[912] The Oil Mineral Producing Area Development Commission (OMPADEC) had been created which was later succeeded by the Niger Delta Development Commission (NDDC)[913] pursuant to the Niger-Delta Development Commission (Establishment Etc.) Act 2000. The NDDC is charged with the responsibility of ensuring the attainment of developmental in the host communities[914] with the aid of 15% monthly allocations disbursed to the nine Niger Delta States from the Federation Account, contribution of 3% from the gross annual budget of oil companies operating within the region etc.[915] The Petroleum Industry Bill which is yet to be enacted into law has provision that creates the host community fund which would be directly applied towards the development of the host communities where oil exploration is ongoing.

Despite these efforts the unrest in the Niger Delta region has not abated. If this is the case, one wonders what may become of Ghana where none of these measures has been put in place. While at the moment Ghana may not be experiencing civil unrest arising from dissatisfaction following the disregard of concerns of host communities, there are signals that similar challenges which Nigeria experienced in this regard may soon occur in Ghana. To prevent this, it is imperative for the Ghanaian legislature to set aside certain sum from the revenue derived from oil exploration to meet the specific development needs of the host communities. This is reflective of the principles of equity which is to the effect that certain group of persons should not be laden with weightier environmental yoke than others due to

[911] Lanre Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy', (2013) 38 Thurgood Marshall Law Review 159, 188.
[912] Section 162 (2) Constitution of the Federal Republic of Nigeria 1999.
[913] Shola J. Omotola, 'From the OMPADEC to the NDDC: An Assessment of State Responses to Environmental Insecurity in the Niger Delta, Nigeria', (2007) 54, (1) African Today 73-89.
[914] See Section 7 NDDC Act 2000.
[915] Section 14 NDDC Act 2000.

government policies. Thus, the burden or reward system should be proportional to contributions of the various communities in the Ghanaian federation.[916]

[916] Ekwere, K. Sustainable Development of Oil and Gas in the Niger Delta: Legal and Political Issues, (PhD Thesis, University of Hamburg 2010) 142-143.

CHAPTER EIGHT: SUMMARY OF THE FINDINGS AND CONCLUSION

8.1 INTRODUCTION

The previous chapter set out the recommendations for the study in line with the best ways to avoid the resource curse in Ghana through the sustainable management of petroleum revenue by using law. It also makes a conclusion to the study. The essence of this research is to analyse the petroleum revenue management regime in Ghana with a view of avoiding the resource curse through the promotion of sustainable management of petroleum revenue in Ghana. The fact that resource rich countries have been found wanting over the years given their inability to maximise the benefits of their natural resources has been the motivation to review the legal regime in Ghana with a view of ensuring that the law has been able to address the challenges which will enhance sustainable management of natural resources in Ghana. To achieve this the research examined the legal regime in the light of the institutional development and the relevant laws as well as in the context which the laws have operated. Therefore, the regulatory and structural environment of the law was examined, drawing from best practices and focusing primarily on three main areas:

1. How the law on petroleum revenue management can be utilised in promoting sustainable development;
2. The extent to which the laws provide for transparency and accountability in petroleum revenue management in Ghana and how best the law can achieve them; and
3. The management of petroleum revenue in a sustainable manner leading to revenue conversion (multiplication of the revenue rather than depletion).

Given this background, the research has been conducted from both desktops relying on a variety of primary sources of law and other relevant secondary sources. In furtherance of the objectives, the research made reference to other countries to support varied arguments made in the thesis. This was followed by effort aimed at examining international best practices that have been recommended over time for the realisation of effective management of petroleum revenue. Principally, two of these best practices that have

informed the research include: EITI Standards in the context of the petroleum revenue management in Ghana; and Generally Accepted Practices in the Management of Sovereign Wealth Funds (The Santiago Principles) in the context of petroleum revenue management in Ghana.

8.2 THEORETECAL AND POLICY IMPLICATIONS OF THE FINDINGS

The underlying theories of the resource curse further confirms the need to ensure that there is transparency, accountability and prudent management of petroleum resources. The review of the PRMA to reflect best ways to avoid the replication of the resource curse syndrome is instructive in Ghana. In the same context, sustainability of the management of petroleum revenue should meet the needs of the current generations without jeopardising that of the future generation. These will be realised through mainstreaming the economic, environmental and social pillars of sustainable development in the governance and management of petroleum revenue. The theory of distributive justice finding relevance to the research requires that there should be equitable distribution in the revenue. For instance host communities where the resources is exploited should be accorded with much revenue for the development. Overall, there should be benefits accruing to the people of Ghana from the petroleum resources, which should be adequately managed and not allowed to end in the hands of the few. The stakeholder's theory finds relevance in the fact that the configurations of the oil and gas industry means that the vast stakeholders must be taken care of and carried along in the management of petroleum resources. Thus, the role of the companies, government, institutions, regulators, civil societies, host communities and the citizens cannot be overemphasised and will need to be accounted for a reviews of the regulatory environment that will enhance sustainable management of petroleum resources. The stewardship theories have a link with ensuring that there is accountability in the sustainable management of petroleum revenue. Therefore that all persons involve in accounting for their stewardship in their roles in the oil and gas sector in relation to petroleum revenue management.

There are policy implications coming out from the research conducted. Firstly, the research as shown that there are implications for Government of Ghana to ensure that the oil revenue are channelled for the appropriate purpose in realisation of the fundamental objectives of promoting sustainability of resources for the good of the people of Ghana. The proposed study makes recommendations that will ensure that there is transparency and accountability in receipt and management of revenue accruing to the coffers of the government as a result of petroleum operations. Thus, the fiscal and tax regime aimed at maximising the revenue of the government will be directed for the betterment of the people of Ghana.

There are also a wider implications of the study on host communities. Countries that have not been able to manage host communities agitations have exhibited the resource curse, which is seen in the form of civil unrest. This development should be more worrisome for a new producing country such as Ghana so that it should not escalate into agitation or even arms struggle by some groups in their bid to fight for a fair share of the resources for their development. The study therefore offers the options on addressing such through inclusion of host communities by allocating to them potion of revenue accruing from petroleum operations in the host communities.

The implementation of the recommendations in the study will have positive impact on host communities who will not feel short-changed by the activities of petroleum exploration and production. This will consequently not lead to a situation where host communities may engage in protests that are likely to stall petroleum operations and will affect the revenue which ought to accrue to the government.

It is also equally important that the supervisory ministries that are connected to oil and gas resources continue to exercise their functions taking into consideration the commitment that there are no leakages and the laws are implemented effectively. Therefore having examined the sustainable management of petroleum resources in Ghana, the various officers and institutions involved in the management of petroleum revenue and resources such as the offices of Auditor General, and Accountant General, Bank of Ghana, Ghana Revenue Authority, Public Interest Accountability Committee, have obligations to continue to

implemented the law for the realisation of accountability, transparency and sustainability in the management of petroleum revenue in Ghana. The proposed reform in the study will have positive impact on their services delivery.

Finally, there is implications on the parliament to ensure that law reform are put in place to address shortcomings in the law that can lead to leakages in petroleum revenues or check against situations leading to resource curse in Ghana. It is therefore the duties of the parliament to create the law that creates enabling environment that will allow for best practices in the management of petroleum revenue.

8.4 CONCLUSIONS

This research commenced with the general study of the legal and structural framework of petroleum revenue management in Ghana and the factors leading to the resource curse phenomenon that has adversely affected nations. To this end, the research on the resource curse was brought into the context of the study with a further narrative of the origin and then an analysis of the context of Ghana and the need to effectively address the resource curse. The relevant laws and institutions were studied and examined in the context of the environment in which the petroleum revenue management laws will operate. The field study was conducted to complement the doctrinal analyses employed in this research.

The general notion is that states have the sovereign rights to regulate their natural resources. Most of these states have no capacity to exploit these resources. There is an obligation on the part of the government to exploit these resources for the benefit of the people based on public trust. The government in turn enters into series of contractual arrangement with multinational oil companies with the aim of participating in the oil and gas sector. There are arrangements in such a way that certain revenue will accrue to the government as a result of its participation in the sector. In another way, the fiscal regime aimed at maximising the revenue of the government will be directed at the companies so that taxes are being used for the government coffers. Overall, it behoves the government to ensure that the rules of the games are intact, the participants in the industry follow the

required transparency and due process and there is sustainable exploitation of resources. The resources should be used for the entire benefits of the state. Attaining the scenario painted above will require the right laws and policies to be in place in Ghana, as well as robust implementation mechanism. Whether this is actually attained or can be attainable are the key investigations the thesis carried out.

The thesis in chapter two took a cursory look at the resource curse phenomenon which is found to be prevalent in resource rich countries. The experience of Spain was used for demonstrating the resource curse. The research also examined the Dutch disease and financial aid curse and how together they have negatively contributed to the degradation of the environment, creation of monochromic economic system and political and civil unrest which are seen to be prevalent in developing countries. It found that whilst there are arguments showing that countries rich in natural resources would exhibit high level of resource curse, evidence abound to displace such arguments with notable progress made by the use of natural resources to actualise developmental benefits for the citizens as recorded in the case of Norway and Botswana. These demonstrated the existence of a robust institutional framework and will which together are instrumental in ensuring that resources accruing to the state are effectively managed and accounted for by the government. It therefore found that institutional perspective that natural resources per se does not lead to resource curse but is dependent on the institution that is saddled with the responsibility to manage the revenue accruable from the natural resources. In order to establish credible institutions to attain the required positive result, there is the need for the law to ensure the establishment of credible institutional framework, reform the ailing institutions and establish credible judicial system to checkmate corruption through credible and timely adjudication of the law.

Predicated on the above findings, chapter three focused on petroleum resources conversion for sustainable management of petroleum revenue in Ghana. This study has examined the law on petroleum revenue management in Ghana following its emerging potential upon the discovery of petroleum. It found that the development of the oil and gas industry saw the country developing new laws to rise to the occasion of the new situation. There are

provisions of the law in Ghana that are geared towards harnessing of the revenue from petroleum exploration and production.

The law has set out parameters for the management of the resources through the creation of transparency and accountability measures and other provisions pointing towards the sustainable management of petroleum resources. The conclusion of this study is that extractive-led development of the oil and gas industry in Ghana must be balanced by sustainability that takes into account how best the revenues are also managed after extraction. It has been posited that "the operation and management of O G [oil and gas] resources in a company or government organization is no doubt a difficult and sophisticated undertaking. It usually entails a myriad of factors, uncertainties and risks. Decision-makers' options are contingent on the various conditions and limitations covering local–global, technical, commercial and social issues". There are series of variables that will come to play when it comes to determining how the law on sustainable management of petroleum revenue and the overall goal of the government in ensuring there is the enabling environment for such are executed.

The bases for formulation of chapter four is to examine the socioeconomic and regulatory context within which the society operates plays an important role in determining the extent of implementation of the law. Therefore, the focus of the chapter is to examine other social and legal context in which the relevant laws on revenue management will operate since they will not be implemented in isolation. They have to fit into the legal configurations of the country for them to fully operate. Appreciating how these laws operate in a context of the country is very important otherwise efforts made through policy and regulation may turn out to be counterproductive. Therefore, from the study, it is discovered that Ghana has considerably made progress in terms of the role of civil society in the oil and gas industry but there are still no clear indications that they directly have a say in the decision-making process beyond the participation in the PIAC. Much will have to also be done in terms of corporate governance, in particular oil and gas companies operating in Ghana should reflect a robust corporate governance model and likewise the GNPC. Other state-owned corporations should also, to a large extent, employ the corporate governance trends in their management of their affairs and which are provided for effective managerial control and promotion of transparency in the sector. Generally, the laws for the management of

petroleum revenue in Ghana cannot operate in isolation; their operation depends on the extent to which they fit into the socio legal context.

Corruption will need to be revisited and there should be a clear distinction between corruptions committed in the course of petroleum revenue management. Such should not be penalized under other laws. There will be need for the various laws bothering on official corruption to operate in harmony. The power of the Attorney General to discontinue trials for criminal cases may fetter the anticorruption laws relevant to the oil and gas industry. As the state of affairs stand, the Attorney General as the chief law officer of the state can choose to prosecute or not to prosecute cases of fraud. The powers are not with qualification however. Furthermore, the establishment of the Office of the Special Prosecutor to try corrupt politicians may not square well as there may be an avenue that the office is used only against the opposition.

The provision for judicial review can be an avenue that can be utilised by the citizens to compel the government agencies to continue to exercise its functions regarding petroleum revenue management for sustainable development. It can also be utilised to stop illegal actions or even declare null and void actions that have been already carried out on petroleum revenue management that are not in accordance with the constitution or the law. The requirement of *locus standi* if care is not taken, may be applied to forestall these powers given to the citizens by the law and constitution of the land. The courts will have to be proactive to ensure that the doctrine does not operate as a bar to the citizens desirous of challenging actions of the government that are inimical to petroleum revenue management for sustainable development. Finally, the stability of the legal regime is still an issue as Ghana still being a new producer may be pushed to amend its laws to increase its revenue take when windfall occurs. It is argued that though Ghana's sovereignty over petroleum resources is guaranteed internationally and provided for in the constitution, it owes investors the obligation of fiscal stability or risks challenges before investor-state arbitral tribunals.

The EITI Standards are targeted at entrenching transparency and accountability and the gains which they portend. Ghana had long subscribed to the implementation of the EITI standards. By virtue of being an oil producing country, it is regarded as one of the

implementing countries of EITI. The country has gained the status of an EITI compliant country. That notwithstanding, it is pertinent to examine how well it has implemented the standards of EITI regarding revenue management. There are pertinent reasons for Ghana to continue to maintain its status as an EITI compliant country and above that ensure that the impact of its compliance is manifest in sustainable socio-economic and human-capital development growth in the country. Where there is no physical manifestation of the impact of EITI on the lives of the common citizens, it would make little meaning and the whole essence of EITI would be defeated.

Findings from the analysis showed that the existing legislative frameworks on transparency in the oil and gas sector in Ghana have loopholes on disclosures. There would still be the need to amend the relevant sections of the PRMA, especially that which obstructs freedom of information in the pretext of 'classified information'. The reason being that by virtue of Section 1 of the PRMA, the Act has been placed on a higher pedestal than any other law apart from the Ghanaian Constitution. It therefore means that the persons could still find cover under the classified information as contained in the law to perpetrate opacity which encourages mismanagement and corruption in the extractive industry.

There is also the need to fast track the legislative process in the enactment of the Ghana Extractive Industries Transparency Initiative (GHEITI) specific legislation. It was found that there are advantages in such an approach. It would, first of all, confer GHEITI with the necessary legal personality to sue and be sued. That way GHEITI would possess the necessary legal clout as a proper party to approach the court to enforce compliance with the EITI Standards. The law would also create adequate means of funding for EITI and other relevant transparency driven institutions. The provision of adequate funding for these bodies would guarantee their independence and commitment to effectively play their role as the watch dog in the Ghanaian oil and gas industry. On another note, the Act would give the EITI Standards an imperative undertone; create offences and penalties for breach of the standards.

Chapter six found that apart from the employment of transparent means of management of petroleum resources, accounting for the revenue is crucial. There is the need to give considerations to approaches that foster the increase in the revenue base of the country in a

manner that the funds from the proceeds of oil accruing to the state are multiplied through the promotion of socially responsible investments. One global approach that has emerged has been through the recognition of the Santiago Principles on the management of sovereign wealth funds. The Santiago principles have a global appeal; demonstrating how countries that have made fortune from Petro wealth effectively managed it for the good of their people.

The emphasis in chapter seven is on the recommendation as to how best the law can be conceived or reviewed to avoid the resource curse. The chapter calls for priority to be given to transparency and accountability, setting up of efficient regulatory framework for enhancement of sustainability through investment, put in place sustainable investment of petroleum revenue for the good of the people through the incorporation of best practices that ensure effective management of sovereign wealth fund, creation of mechanisms for ensuring the oil rich regions benefit from the proceeds of oil through earmarking of certain amount of the oil revenue for their development.

Much will be done by creating an enabling environment that enhances the promotion of sustainable development through the management of petroleum revenue in Ghana; facilitation of transparency and accountability in petroleum revenue management in Ghana; and management of petroleum revenue in a sustainable manner which are essential to the development of a viable utilisation of petroleum revenue in a way that the resource curse syndrome can be avoided in Ghana. Effective implementation of the measures articulated will have a far-reaching consequence in realisation of sustainable development in the management of petroleum revenue in Ghana.

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