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Does the politics matter? Legal and political economy analysis of contracting decisions in Ghana's upstream oil and gas industry

Thomas Kojo Stephens* and Theophilus Acheampong **

ABSTRACT

Ghana is often cited as one of Africa's most stable democracies. Since 2004, the country has awarded 18 petroleum agreements to various international oil companies (IOCs) and their local partners to explore for hydrocarbons in its offshore basins. In 2010, Ghana became an oil-producing country following earlier commercial discoveries in 2007. Nevertheless, the likelihood of the Ghanaian State getting its fair share of petrodollar revenues primarily depends on its ability to negotiate good petroleum contracts and effectively regulate the industry. This article examines the legal and political economy factors that influence contract outcomes in Ghana's oil and gas industry. It sheds light on how the inner workings of the political economy, especially in a competitive clientelist setup involving intense electoral competition between two dominant parties in an emerging oil-producing country, influence contractual outcomes—an area less explored in the literature. We find that the country's emerging oil and gas industry has become deeply intertwined with the pervasive, entrenched and clientelist multi-party politics of the day. As such, entrenched rentier social groups—business and political elites—have sometimes sabotaged institutional reform to create conditions that favour rent capture. This is evident, for example, in the award of oil and gas licensing and other supply chain contracts. Ghana's post-1992 'winner takes all' political mindset and the perceived big financial bonanzas the oil industry offers, resulted in suspicions of impropriety regarding the award of some oil acreages. We argue that if the laws were allowed to work, as they should in practice, Ghana's oil and gas industry would be better regulated, and better outcomes would arise from the contracting process. Discretionary power should be limited as much as possible and, where granted, subject to a high level of scrutiny.

*Thomas Kojo Stephens is a Senior Lecturer at the University of Ghana School of Law, Senior Partner at Stobe Law, and a Specialist Trainer at the International Energy Law Training and Research Company (IELRTRC) and sits on the Advisory Board of the International Energy Law and Advisory Group.

**Theophilus Acheampong is an Associate Lecturer and Honorary Research Fellow at the University of Aberdeen, UK. He is also an Associate Lecturer at the Center for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, UK. Email: theophilus.acheampong@abdn.ac.uk.

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1. INTRODUCTION

Crude oil has provided a critical boost to Ghana's economy since 2010. Oil and gas is a fundamental component of the country's industrial strategy and transition to an upper-middle-income state, acting as a lever to provide revenues, jobs and energy security. However, the likelihood of Ghana getting requisite petrodollar revenues to finance its development primarily depends on its ability to effectively negotiate petroleum contracts (agreements), which reflects the risk–reward balance between the State and international oil companies (IOCs) as well as effectively implement these contracts. Before 2016, Ghana primarily practised an 'open-door' upstream licensing regime, governed by the erstwhile Petroleum (Exploration and Production) Act, 1984 (PNDCL 84). This was changed in 2016 with the passage of the Petroleum (Exploration and Production) Act, 2016 (Act 919) which repealed PNDCL 84. Act 919 introduced an open and competitive bidding process as the default approach in the award of oil blocks. Nonetheless, the new law also made provision for the Minister for Energy to forego the competitive bidding provision under certain stated circumstances.

Since 2004, Ghana has awarded 18 petroleum agreements/contracts (PAs) covering its offshore basins, namely: Accra-Keta cretaceous basin (Eastern), Saltpond (Central) palaeozoic basin and Tano-Cape Three Points cretaceous basin (Western). Ten new PAs were signed under PNDCL 84 between the government and various IOCs between April 2013 and July 2014, while another three signed under Act 919 since 2016. These PAs to explore for offshore hydrocarbon resources have been signed with IOCs such as Tullow Oil, Kosmos Energy, Aker Energy and ENI, among others.

The upstream oil industry (more broadly extractives industry) has features that highly influence the way the political economy of the sector and institutional frameworks evolve.[1] This includes the exhaustibility or non-renewable nature of the resource, the potential large economic rents generated in oil extraction, wide range of technical, commercial, fiscal and political risks throughout the supply chain, large upfront capital requirements and geological uncertainty.[2] Others include asymmetric information; private investors are often better informed than host governments on technical and commercial aspects of a project especially in the early stages, the extensive involvement of multinationals, complex tax issues and transfer pricing. All these features have a bearing on the licensing and contracting decisions made by host governments, and its resultant impact on the sharing of the potential large economic rents between host governments and IOCs—the 'risk–reward' balance.[3]

Thus, at the heart of whether host governments ultimately get a fair share of the economic rents, is the extent to which their organizational and contractual frameworks are effectively structured, coupled with how effective contractual decisions are made, along with minimizing potential rent-seeking and other corruption risks. This article uses legal and political economy analysis to assess governance structures in contracting decisions and outcomes in Ghana's upstream petroleum sector.

2. GHANA'S PETRO-ECONOMY UNDER COMPETITIVE CLIENTELISM

Political economy context: petroleum governance in Ghana's Fourth Republic

The legislative framework for upstream oil and gas activities in Ghana goes back to the 1980s.[4] Ghana discovered oil and gas in commercial quantities in 2007, and since then, there has been a renewed quest to grow

1 O Manzano and F Monaldi, 'The Political Economy of Oil Contract Renegotiation in Venezuela' in WW Hogan and F Sturzenegger (eds), *The Natural Resource Trap: Private Investment Without Public Commitment* (MIT Press 2010); A Sayne, A Gillies and A Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts* (Natural Resource Governance Institute 2017) 6 <https://resourcegovernance.org/analysis-tools/publications/twelve-red-flags-corruption-risks-award-extractive-sector-licenses-and> accessed 23 February 2021

2 P Daniel, M Keen and C McPherson (eds), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (Routledge 2010).

3 C Nakhle and T Acheampong, 'Post-Pandemic Oil and Gas Fiscal Policies: The Impact of Oil Price, Investment and Production Trend', (2020), 100(2), Tax Notes International 265-289.

4 TK Stephens, 'New Beginnings: The Evolution of the Regulatory Body of Ghana's Upstream Petroleum Industry' (2020) 19(3) *Oil, Gas & Energy Law*.

and expand the country's resource base and deepen the linkages to other sectors of the economy. Before this, several legislative, regulatory and policy changes were made to improve the country's petroleum governance architecture, including contracting and licensing of oil blocks. Under PNDCL 84, Ghana operated an 'open door policy' based on direct negotiations for the award of oil blocks.[5] This approach was criticized for awarding blocks to companies that were not technically qualified or financially resourced to undertake the E&P work needed in Ghana's deep-water offshore environment.[6] The process was administratively weak, heavily influenced by ministerial discretion with less serious scrutiny.[7]

The relationship between domestic politics and transnational actors following the discovery and commercial production of oil and gas is often paramount.[8] In Ghana's context, the post-1992 political environment has been characterized as a 'competitive clientelist'[9] regime involving intense electoral competition between the New Patriotic Party (NPP) and National Democratic Congress (NDC), Ghana's two dominant parties. This also includes inter-coalitional rivalry and intra-elite competition as well as strained relations between party elites and lower ranks.[10] Such competition has fostered a 'winner takes all' mentality to governance whereby both parties are ultimately interested in capturing Executive Power (the Presidency) to perpetuate clientelist privileges, which includes the distribution of patronage to reward local elites and other actors. As we argue in our review of various case studies in the rest of this article, the pervasive and deeply entrenched clientelist nature of contemporary Ghanaian politics implies that the country's nascent oil and gas industry has become deeply intertwined with the multiparty democratic politics of the day. The immediate aftermath of the discovery and production of oil and gas in Ghana witnessed an unprecedented political debate about how best to organize the industry to generate enough revenues for the State and the creation of linkages.[11] The former included debates on restructuring Ghana's petroleum licensing regime for the award of oil rights, among others such as revenue management models.[12]

Licensing

Countries employ different approaches to licensing in order to achieve set objectives.[13] However, the gist of it all is that a prudent country will employ licensing arrangements designed to ensure that as much as possible, its acreage is explored in the best possible manner whilst maintaining control over the rate of operations within the industry. The importance of a well-structured licensing system cannot be underestimated. After its

5 K Ainuson, 'Overview of the Institutional Framework for the Management of Oil and Gas Industry in Ghana' (2015) 28 University of Ghana Law Journal 103; RE Van Gyampo, 'Saving Ghana from Its Oil: A Critical Assessment of Preparations so far Made' (2011) 57(4) Africa Today 49–69.

6 M Adam, 'Licensing Compliance in Ghana's Upstream Petroleum Sector' (Africa Centre for Energy Policy 2015) <http://www.jstor.org/stable/resrep31200.8> accessed 08 February 2021

7 ibid.

8 G Mohan and K Asante, 'Transnational Capital and the Political Settlement of Ghana's Oil Economy'; A Bebbington and others, *Governing Extractive Industries: Politics, Histories, Ideas* (OUP 2018) 304.

9 L Whitfield, 'Competitive Clientelism, Easy Financing and Weak Capitalists: The Contemporary Political Settlement in Ghana', DIIS Working paper No 2011: 27.

10 F Oduro, A Mohammed and M Ashon, 'A Dynamic Mapping of the Political Settlement in Ghana' (2014).

11 J Phillips, E Hailwood and A Brooks, 'Sovereignty, the "Resource Curse" and the Limits of Good Governance: A Political Economy of Oil in Ghana' (2016) 43(147) Review of African Political Economy 26–42; P Siakwah, 'Are Natural Resource Windfalls a Blessing or a Curse in Democratic Settings? Globalised Assemblages and the Problematic Impacts of Oil on Ghana's Development' (2017) 52 Resources Policy 122–33; F Obeng-Odoom, 'Oil, Local Content Laws and Paternalism: Is Economic Paternalism Better Old, New or Democratic?' (2019) 48(3) Forum for Social Economics 281–306; E Graham and others, 'Escaping the "Oil Curse": Is Ghana on the Right Path' (2019) 46(1) African Review 235–63.

12 E Debrah and E Graham, 'Preventing the Oil Curse Situation in Ghana: The Role of Civil Society Organisations' (2015) 7(1) Insight on Africa 21–41; RE Van Gyampo (n 5); I Ackah and others, 'Between Altruism and Self-Aggrandisement: Transparency, Accountability and Politics in Ghana's Oil and Gas Sector' (2020) 68 *Energy Research & Social Science* 101536.

13 This section is largely expanded from Stephens TK. Getting it right: the development of an effective regulatory and policy framework for the management of Ghana's upstream oil industry 2014 (Doctoral dissertation, University of Aberdeen).

large-scale commercial discovery of oil in 2007, Ghana still employed the open-door policy in respect of its system of licensing of its acreage. Though the Minister was empowered under PNDCL 84 to make Regulations for 'competitive bidding procedures for petroleum agreements',[14] this was not done.

This was primarily because Ghana was deemed ill-suited to employ competitive bidding at this time as its prospectivity was deemed as needing further establishment to entice IOCs. Thus, moving to the competitive bidding system was premature. The argument was, however, canvassed that it was imperative that Ghana adopted the competitive bidding process now that some discoveries had been made, in order to increase revenue and promote transparency instead of relying predominantly on the open door/discretionary system.

Process of award of licenses under PNDCL 84

The process for acquiring an oil block under PNDCL 84 involved the following (see Figure 1 and Figure 2):

- Companies interested in acquiring a block expressed their interest to the Ministry of Energy (MoE).
- The applicant was granted access to the data room after paying a prescribed fee.
- An application form was provided to the interested party for the specific block of interest and the application was then submitted to the MoE and copies shared with Ghana National Petroleum Corporation (GNPC).
- A series of negotiations then ensued with the Minister for Energy granting a final approval to proceed.
- The Agreement was submitted to Parliament for final ratification.

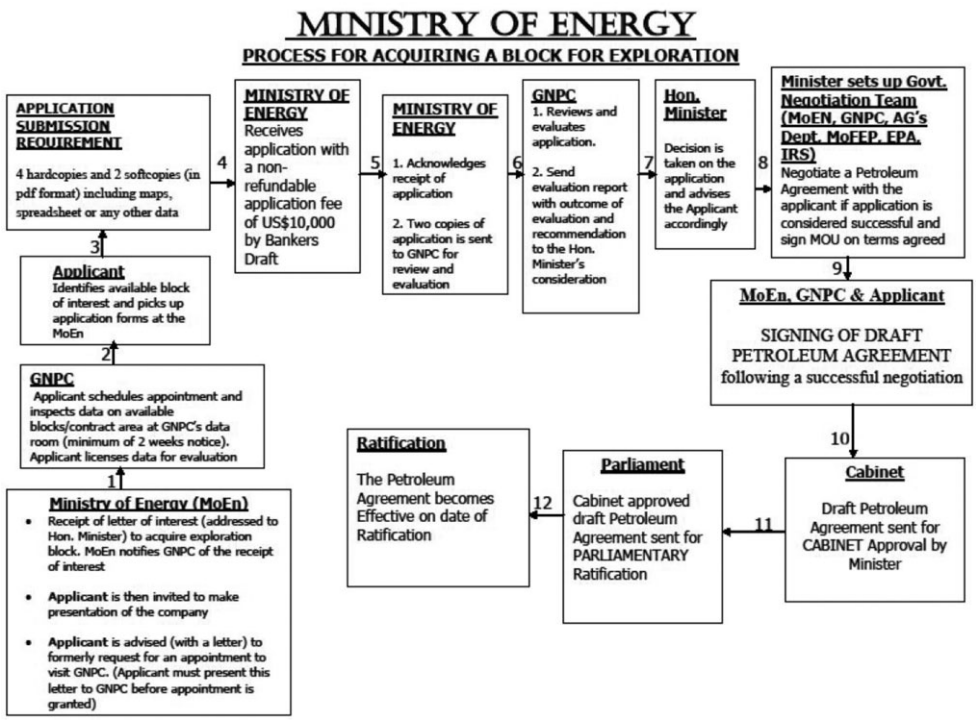

Figure 1. Ghana's award of E&P Blocks under PNDCL 84 (Pre-Petroleum Commission).*Source*: Ministry of Energy.

14 s 32(m).

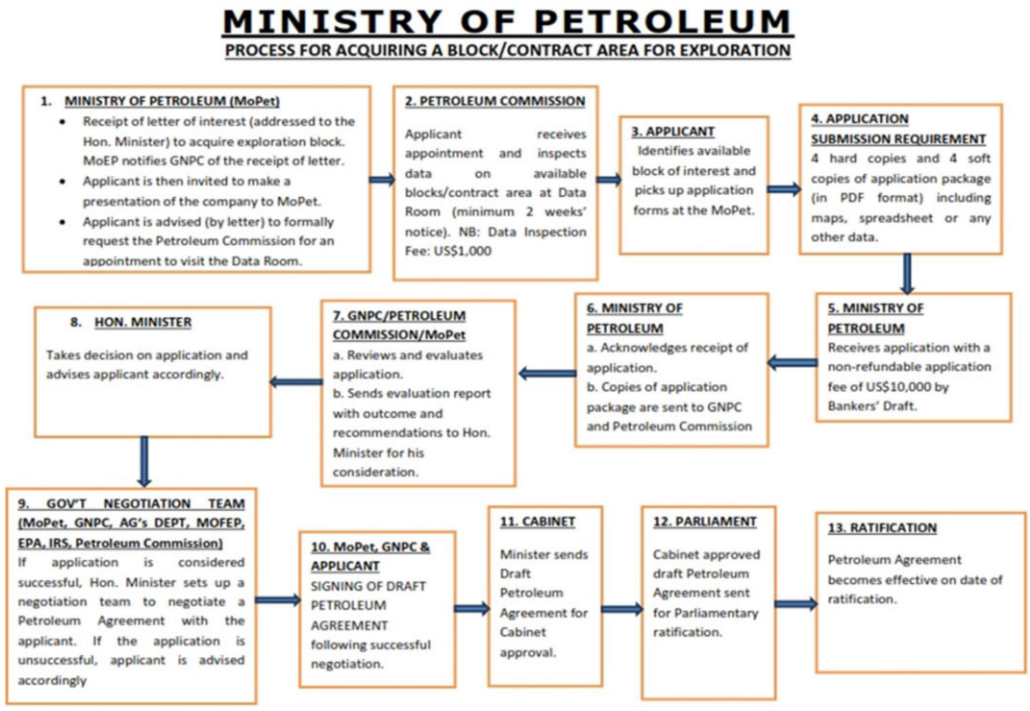

Figure 2. Ghana's award of E&P Blocks under PNDCL 84 (Post-Petroleum Commission). *Source:* Ministry of Energy

As argued earlier in the section, this old open-door process was described by industry players and civil society organizations as being sub-optimal and undesirable as applicants were judged solely on their ability to pay the necessary fees, and not necessarily for their technical or financial competence. Thus, the State was unable to effectively determine the technical and financial capabilities of the winning parties to any significant degree. The effect of this is that Ghana's oil and gas industry attracted smaller, independent entities with little to no technical capacity or the financial muscle to sustain long drawn-out exploration campaigns. In fact, some of these hitherto unknown or small oil companies were awarded petroleum licenses between 2013 and 2015 under parliamentary 'certificates of emergency' with little due diligence done. The work programme commitments on several of these licenses have not been fulfilled several years down the line, despite the 7-year exploration period provided under the law and petroleum agremeents coming to an end.

Process of award of licenses under Act 919

Under the new licensing regime under Act 919, the competitive bidding process can be outlined as:

- expression of interest;
- invitation to tender;
- submission and opening of bids;
- evaluation of bids, decision on bids; and
- Entry into a PA.

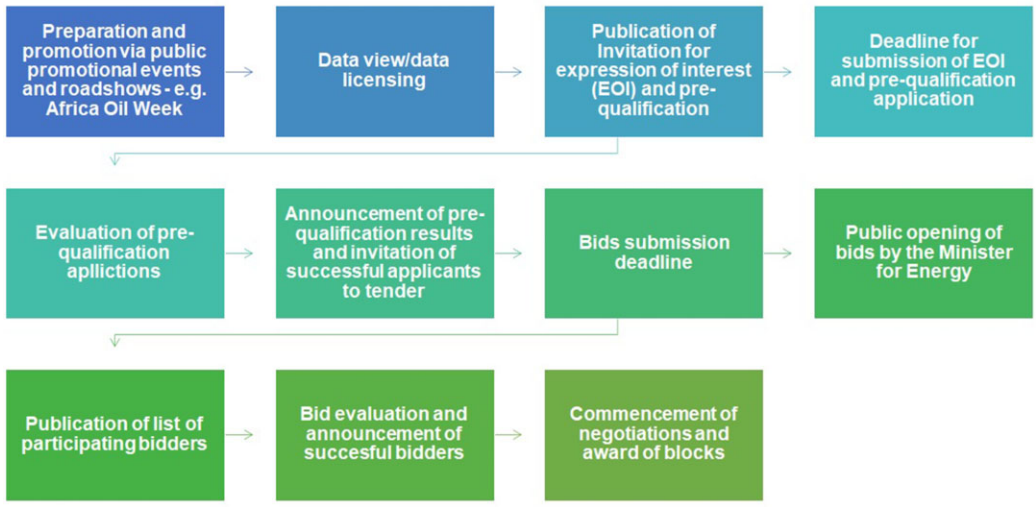

Figure 3. Ghana's award of E&P blocks under Act 919.

Source: Authors' compilation.

The agreement is awarded to the bid with the highest numerical score (see Figure 3). There is then an invitation to the preferred bidder to negotiate the terms of the PA, after which the block is awarded and subsequently ratified by Parliament.

Act 919 brought changes to Ghana's licensing regime. Table 1 shows the key changes in the legal regime for award of blocks between the two regimes.

3. INFLUENCE DYNAMICS AROUND CONTRACTING AND NEGOTIATIONS

Internal and external influencers in Ghana's contracting regime

Figure 4 shows the internal and external influencers in the context of licensing within Ghana's upstream oil and gas sector. At the centre of this is the Licensing Bid Rounds and Negotiation (LBRN) Committee, which was formed to oversee the first open competitive bidding of blocks to prospective oil companies. The LBRN's work includes assessing and packaging all data for the acreages, creating an online data room for prospective bidders; embarking on promotions and roadshows in collaboration with the Petroleum Commission; and making recommendations to the Government on which oil companies should be allocated concessions. The LBRN has membership from Ministry of Energy; GNPC; Attorney General's Department; Ministry of Finance; Petroleum Commission; Environmental Protection Agency (EPA); and Ghana Revenue Authority (GRA). Members of the Committee are expected to rely on their domain knowledge to make informed decisions when scrutinizing bids from IOCs.

The LBRN also engages with the Ministry of Energy and the IOCs. Another important player within the licensing process is the Presidency and Cabinet, which sets the country's overall political and policy direction. Lobbying by private companies to be awarded contracts sometimes starts at the Presidency and finds its way down other institutional structures such as the Ministry of Energy and Parliament's Select Committees. Other players with influence include the donor or development partners —such as the Norwegian Agency for Development Cooperation (NORAD) and Department for International Development (DFID) — who offer technical assistantships and sometimes funding to improve the human resource base through various capacity

Table 1: Key changes in Ghana's legal regime for award of blocks

Item	*PNDCL 84*	*Act 919*
Licensing round objectives	Not published or publicly available	The objective of Ghana's first oil and gas licensing and bidding round was to: '. . .accelerate upstream petroleum activities in order to increase reserves and production of petroleum resources through investment, ensure fair playing field, and also achieve significant government stake in all petroleum agreements'
Blocks award process	Open door policy/direct negotiations via receipt of letter of interested to acquire exploration block	Blocks can be awarded through: open and competitive bidding process; direct negotiations; or solely operated by GNPC, the national oil company
Evaluation criteria	Not published or publicly available	Financial competency Technical competency Fiscal terms Local content
Main actors/key sector agencies involved	**The tendering board (Government Negotiations Team: GNT)** with institutional representation from: Ministry of Energy; GNPC; Attorney General's Department; Ministry of Finance; Petroleum Commission; Environmental Protection Agency (EPA); Ghana Revenue Authority (GRA)/hitherto Internal Revenue Service (IRS)	**Licensing Bid Rounds and Negotiation (LBRN) Committee** with institutional representation from: Ministry of Energy; GNPC; Attorney General's Department; Ministry of Finance; Petroleum Commission; Environmental Protection Agency (EPA); Ghana Revenue Authority (GRA)
Cabinet	Reviews draft PA sent by Minister of Energy for approval Cabinet approved PA sent for Parliamentary ratification	Reviews draft PA sent by Minister of Energy for approval Cabinet approved PA sent for Parliamentary ratification
Parliamentary oversight	Parliamentary Committee on Mines and Energy reviews PA and sends report to plenary for approval or otherwise Ratification of PA by the plenary	Parliamentary Committee on Mines and Energy reviews PA and sends report to plenary for approval or otherwise Ratification of PA by the plenary

Source: Authors' compilation.

building and other governance initiatives. For example, the DFID-funded Ghana Oil and Gas for Inclusive Growth (GOGIG) programme helped improve the capacity of government agencies involved in the licensing process in areas such as fiscal modelling, development of regulations, and marginal fields development strategy, among

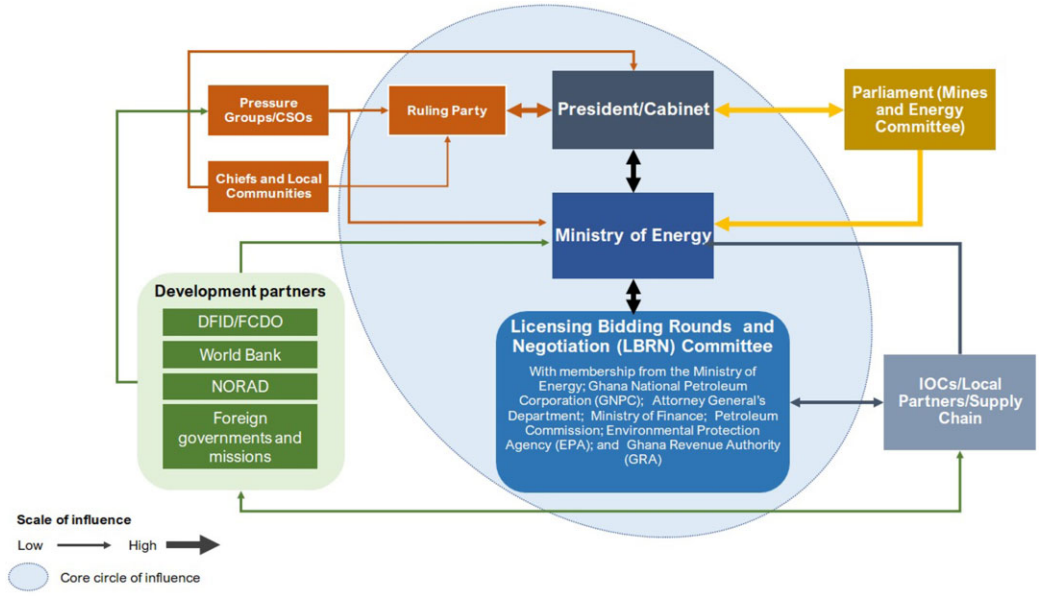

Figure 4. Influence dynamics in upstream licensing in Ghana.

Source: Authors' illustration

others. Lastly, pressure groups and civic organisations[15] and chiefs and local communities also exert influence through the ruling party and to the Presidency/Cabinet, including the Ministry of Energy.

Events that precipitated the need for a change in Ghana's system of licensing

Table 2 summarizes some of the major events that precipitated the need for change in the system of licensing in Ghana upstream industry. These events are then further discussed.

E.O. Group's interest in the Jubilee Field

In respect of the E.O. Group's interest in the Jubilee Field, upon assumption of office by a new government, this was subject to the initiation of criminal charges by the Attorney-General's Department, based upon alleged impropriety in the acquisition of its interest in the block. In a long running saga, the interest was eventually sold to Tullow for a cash and share consideration of about US$305 million. George Owusu, one of the two directors of EO Group, in his book *In Pursuit of Jubilee: A True Story of the First Major Oil Discovery in Ghana* depicts how the combustible nature of politics and greed combined to cause vicious suspicions and persecution due to the non-transparent nature of Ghana's licensing at that time.

Chemu Power Company Limited's interest in the South Deepwater Tano Block

In the case of Chemu Power Company Limited, its interest in the South Deepwater Tano (SDWT) Block also became embroiled in controversy and was eventually extinguished when the agreement with Aker was voided. On 5 February 2008, a PA was entered into between the Government of

15 Oxford Policy Management, 'Ghana Oil and Gas for Inclusive Growth (GOGIG)' https://www.opml.co.uk/projects/ghana-oil-gas-inclusive-growth-gogig accessed 08 February 2021.

Table 2: Summary of events that precipitated need for change in Ghana's upstream licensing system

Event	*Commentary*
E.O. Group's Interest in the Jubilee Field	It was subject to the initiation of criminal charges by the Attorney-General's Department, based upon alleged impropriety in the acquisition of its interest in the block.
Chemu Power Company Limited's Interest in the SDWT	Its interest in the SDWT also became embroiled in controversy and was eventually extinguished when the agreement with Aker was voided[16]
Regulation 4(2) of the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204)	The stipulation that there be at least a 5% equity participation of an indigenous company was perceived by many as creating lacunae for private kills
Agreements ratified under a Certificate of Urgency	AGM Petroleum Ghana Limited in respect of SDWT Cola Natural Resources Ghana Limited and Medea Development Ghana Limited in respect of the East Cape Three Points Block Camac Energy Ghana Limited and Base Energy Ghana Limited in respect of the Expanded Shallow Water Tano Block Amni International Petroleum Development Company Limited in respect of the Central Tano Block.

Ghana and GNPC (10 per cent),[16] Aker ASA[17] (85 per cent) and Chemu Power Company Limited (5 per cent)[18] in respect of the acreage SDWT,[19] and was unanimously ratified by Parliament.[20] After the departure from office of the Kufuor administration in January 2009, the Ministry of Energy contended that contrary to Section 23(15)(a) of the *Petroleum Act* (PNDCL 84)[21] which required as the signatory to every PA a locally incorporated company, the agreement was signed by the parent company—Aker ASA—and hence was ultra vires, null and void. Section 23(15)(a) stated:

> Except for such sub-contractors as may be exempted from the requirements of this subsection by the Regulations, a contractor or sub-contractor which is an incorporated company in Ghana under the Companies Code, 1963 (Act 179) shall –

16 Anadarko International Energy Company. Complaint Letter to The Honourable Minister of Energy of Ghana (Ministry of Energy, 24 February 2009).

17 ASA means 'allmennaksjeselskap' in Norwegian. It is a suffix/abbreviation attached to a company name to indicate that the entity is listed on the stock exchange.

18 Chemu Power Company Limited was incorporated in Ghana on 7 February 2008, and issued with its Certificate to Commence Business on 8 February 2008 (app M1).

19 Aker ASA, 'Aker Wins Deepwater Acreage in Ghana' (Aker ASA 6 November 2008) <www.akerasa.com/News-Media/Stock-exchange-releases/Agreement/Aker-wins-deepwater-acreage-in-Ghana> accessed 25 February 2021 enthusiastically noted in a press release dated 6 November 2008 that, 'Aker ASA has been awarded a major oil and gas deepwater exploration and production license in the Gulf of Guinea. This region, off the coast of West Africa, is widely regarded as one of the world's most promising petroleum provinces. Ghana National Petroleum Corporation (GNPC) and governmental authorities selected Aker as the operator of the offshore exploration area South Deepwater Tano in competition with international oil companies. The award has been sanctioned by the Ghana Parliament. . .Aker will be in the driver's seat regarding exploration and development of South Deepwater Tano.' This was also re-affirmed in Aker ASA 2008 Annual Report, 4 and 41.

20 The Parliament of the Republic of Ghana, Parliamentary Debates (Official Report, Fourth Series) 5 November 2008 61(20) 1469–70.

21 Note that Clause 1.46 of the Definition Section of Ghana's MPA states that, '"Petroleum Law [Act]" means the Petroleum (Exploration and Production Law [Act]), 1984 (PNDCL 84)'.

> (a) Register an incorporated company in Ghana under the provisions of the Companies Code, 1963 (Act 179) to be authorized to carry out solely petroleum operations in respect of which a petroleum agreement or petroleum sub-contract has been entered under this Law and such company ***shall*** be a signatory to any petroleum agreement.

The Ministry notified Aker that it intended to negotiate with other IOCs that had previously been in negotiations with the government but had had their bids curtailed for failure to accede to demands to include a specified local partner. The Minister thus directed GNPC to reimburse Aker with the cost of incurring data, since such data belonged to the Corporation. A termination agreement was signed and Aker's expenses, reimbursed.

There has been the belief that it was politics that motivated the termination of the Agreement. The Agreement was signed on 24 October 2008 and ratified by Parliament on 5 November 2008, a month before the presidential election. The incumbent party, NPP, lost power and the NDC formed the new government. Anadarko then wrote a letter dated 24 February 2009[22] to the new Minister for Energy in which it complained that the acreage granted to Aker AS had been done without due process under the previous administration and further, that as a condition for being granted the South Deepwater Tano Block which they had bid for, they along with fellow American company Hess, were requested by GNPC, to part with 5 per cent of their stake to an 'unknown Ghanaian party' which they refused citing the *US Foreign Corrupt Practices Act* of 1977 and other related legislation. They were subsequently informed that if they did not accept the third party carry of 5 per cent, Aker AS was willing to do so and would be awarded the block.

Anadarko went on to note that it was later informed by the then Minister for Energy (under the Kufuor administration), that the block had been awarded to another IOC, without informing them about the status of their bids. Anadarko later discovered that indeed the Aker bid contained a third party, Chemu Power Company Ltd, which had an interest of 5 per cent. The letter ended with a call by Anadarko on the Minister to review the bid procedures and processes in the award of the block since it believed it was tainted with irregularity. The grant of license to Aker was thus deemed as political and non-transparent, especially in regard to the timing when the Kufuor administrationwas just exiting power. It is believed that it is really because of this that the Aker agreement was terminated.[23]

Regulation 4(2) of the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204)

If there is to be confidence and objectivity in the process, then it is best if politics is minimized. The *Petroleum (Local Content and Local Participation) Regulations*, 2013 (L.I. 2204) was passed on 19 November 2013. It is pertinent to note that under the *Local Content Regulations*, there is a stipulation that there shall be at least a 5 per cent equity participation of an indigenous company other than the Corporation in a PA or license,[24] which requirement may be varied by the Minister in circumstances where the Ghanaian company is unable to satisfy the requirement of 5 per cent equity participation.[25] With Ghana's history thus far in the industry, this provision has been perceived by many as creating lacunae for private kills as IOCs are often directed to partner with local entities that bring virtually nothing to the table but are simply furthering the interests of cabals.

22 Anadarko International Energy Company. Complaint Letter to The Honourable Minister of Energy of Ghana (Ministry of Energy, 24 February 2009).

23 This section is extrapolated from TK Stephens, 'In Their Name and For their Welfare: Rethinking Ghana's Constitutional Provisions for the Natural Resource Sector in the Light of Ghana's Upstream Petroleum Industry' (2016) XXVIII *University of Ghana Law Journal* 159 on 177.

24 reg 4(2).

25 reg 4(3).

Agreements ratified under a certificate of emergency

Very shortly after the passage of Regulation 4(2) of the Local Content Regulations on 19th November 2013, two agreements[26] with Ghanaian interests were ratified by Parliament under a certificate of urgency on 4th December 2013. This was in respect of the South Deepwater Tano Block which was awarded to AGM Petroleum Ghana Limited, and the East Cape Three Points Block which was awarded to Cola Natural Resources Ghana Limited and Medea Development Ghana Limited. Shortly thereafter, that is, on 21st March 2014, two more agreements with Ghanaian interests as parties to the Agreement were ratified by Parliament under a certificate of urgency.

The agreement covering the Expanded Shallow Water Tano Block had Base Energy Ghana Limited—a wholly owned independent Ghanaian company[27]—whilst that in respect of the Central Tano Block[28] had WCW International Company Limited. WCW held 300,000 issued shares (30 per cent) in Amni International Petroleum Development Company Limited (Amni Nigeria),[29] with the latter holding 700,000 (70 per cent) issued shares.[30] Commenting after the presentation to the House of the Report on the Amni Agreement by the Chairman of the Select Committee on Mines and Energy, Papa Owusu-Ankomah,[31] though not opposing the motion for ratification of the agreement inquired:

> But apart from just mentioning that it [WCW] is an indigenous Ghanaian company, nothing is said about its track record. When was it incorporated?. . .Before then what was it doing? Was it involved in the downstream sector or the individual shareholders have some expertise that makes them special than just to say, 'Oh we commend local participation with WCW'; it does not really give us much information.[32]

Responding to this, the then Committee Chairman—Dr Kwabena Donkor—stated:

> At the Committee meeting, we did not only ask but we were given copies of the particulars of this Ghanaian company. For the purposes of petroleum exploration, the major entity we are concerned with, is the operator and that is why you often find a lot more information on. . .But at the Committee level, we asked the question the Hon Member has asked and then we were given the particulars of the company – The incorporation of Amni International, the local participants in Amni and we were satisfied, Mr. Speaker.[33]

Dissatisfied with this response, Owusu-Ankomah countered, 'Mr. Speaker, there is no information whatsoever; just to say that the Committee was satisfied, does not mean that we can be satisfied without information'.[34] Going on to comment, he noted, 'Please, the Hon. Chairman cannot say that they were satisfied. Yes, they were satisfied based on information, but they have not given us any information—Nothing'.[35] A ranking member of the Committee, K.T. Hammond, then commented:

26 GoG, GNPC, GNPC Explorco, Camac, Base Energy (Expanded Shallow Water Tano Block); GoG, GNPC, Amni International (Central Tano Block).

27 The Parliament of the Republic of Ghana, Parliamentary Debates (Official Report, Fourth Series) 21 March 2014 86(31) 1999.

28 ibid 2028.

29 This block was relinquished by Tullow in the first extension period under the Deep Tano Petroleum Agreement (ratified by Parliament in July 2006).

30 Amni Nigeria was incorporated in 1993 in Lagos, Nigeria, as an independent, indigenous exploration and production company.

31 The Parliament of the Republic of Ghana (n 26) 2052.

32 NPP—Sekondi.

33 The Parliament of the Republic of Ghana (n 26) 2069–70.

34 ibid 2070.

35 ibid.

> In respect of WCW again, we were given the detailed background of the company and the fact that it is a wholly-owned Ghanaian company and in view of all that was presented to us, we were quite happy. Maybe, the Report does not capture it in the context of how it has been put but we can assure the House that next time, we would incorporate the details of all of it.[36]

Countering again, Owusu-Ankomah noted:

> Mr. Speaker, I do not intend to belabour this point. But the statement also made by the Hon Ranking Member reinforces the point that I made. . .And they said nothing in the Report. And given the opportunity on the floor, they have also said nothing except to say that 'We were satisfied.'[37]

Perhaps in the spirit of camaraderie, Owusu-Ankomah concluded thus:

> So, I, in no way, doubt the diligence of the Committee but certainly, if we require information and long and winding statements are made without any information, it clearly means that probably there may not be any information. But I grant that the Hon Chairman and Hon Ranking Member are vigilant.[38]

Considering the history of local participation in PAs coupled with the fact that it was largely under the aegis of a provision in a recently passed legislation that this arrangement had materialized, one would have assumed that there would have been more information provided on this local company.

Basiru Adam, writing in the *Business and Financial Times*—25 March 2014—under the heading 'Is Ghana Throwing Away its Oil?'[39] noted that even as the draft Petroleum Exploration and Production Bill remained to be passed, four new oil contracts had been awarded under a 'certificate of urgency'. He made reference to the AGM agreement as well as the Cola Natural Resources Agreements which were ratified by Parliament on 4 December 2013, as well as the Camac/Base Energy and Amni International Agreements, which were ratified on 21 March 2014.[40] In respect of these Agreements,[41] Order 80(1)[42] of the *Standing Orders* of Parliament—which requires that no motion shall be debated until at least, 48 hours have elapsed between the date on which the notice of the Motion is given and the date on which the Motion is moved—was suspended under a certificate of urgency. Adam commented that the African Centre for Energy Policy (ACEP) had been raising a red flag about the manner in which these oil deals had been executed. In a press statement issued by ACEP on 21 March 2014, ACEP commented:

> Why Parliament agreed to approve these two new oil contracts under a certificate of urgency defies not only constitutional logic but also has huge implications for our oil wealth. We think that the rush of oil contract ratifications and the secrecy in the award of these contracts are attempts at avoiding the scrutiny of these contracts by citizens, which thereby undermines the democratic rights.[43]

36 ibid 2071.
37 ibid.
38 ibid 2072.
39 ibid.
40 B Adam, 'Is Ghana Throwing Away Its Oil?' *Business and Financial Times* (25 March 2014) 11 <http://bft.ghanaweb.com/content/ghana-throwing-away-its-oil> accessed 4 February 2021.
41 ibid.
42 AGM Petroleum Agreement (South Deepwater Tano Block), Cola Natural Resources Agreement (East Cape Three Points Block), Camac, Base Energy (Expanded Shallow Water Tano Block), Amni International Agreement (Central Tano Block).
43 Length of Notice Required.

ACEP also noted that:

> Unlike the AGM contract from which the Committee disclosed the beneficial owner of MED Songhai, the same has not been done for these new contracts – raising questions as to who the owners are. For instance, the Committee provides that Base Energy – the local Ghanaian company on the Expanded Shallow Water Tano Block – is owned by Energy West Limited (75%) and African Soft Limited (25%). AMNI International Petroleum Development Company (Ghana) Limited is owned by AMNI Nigeria (70%) and an indigenous Ghanaian company, WCW International Company Limited (30%). But this information does not satisfy the disclosure requirement of beneficial owners. . .We recall how two earlier contracts, AGM and Cola Natural Resources, were not debated in Parliament late last year. Now we are approving two new oil contracts under a certificate of urgency.[44]

Adam concludes his Article thus: 'Since it is being presented to us under a certificate of urgency, we would be grateful if we were informed as to the nature of the urgency that has necessitated this decision which looks so threatening to the national purse.'[45] It is Ghana's history of lack of transparency, effective checks and balances, and abuse of discretionary power fraught with allowing for private interests to reap thereof that made the move to the competitive bidding seem so imperative.

The companies awarded oil blocks in this manner with little to no technical capacity or the financial muscle to sustain long drawn-out exploration campaigns have failed to make any inroads whatsoever. It has become increasingly clear that the intention of some was simply to procure these blocks and flip them to make gains. The nature of the changed market, with crude oil prices falling significantly in 2016 after hovering above $100 a barrel a few years before, made it difficult for some of these speculative companies to sell their interests in the blocks, as originally intended. Others have amply demonstrated that they should not have been granted licenses, such as Oranto Petroleum for instance, which failed to meet basic obligations such as paying its surface rentals and left the jurisdiction without paying monies owed to the State despite several demands made on it. Even with the companies producing such as Tullow, many technical mistakes have been made arising from lack of experience and it is imperative that applicants granted acreage are subjected to a higher level of scrutiny.

Furthermore, as with PNDCL 84,[46] Act 919[47] and the PAs,[48] provide for economic equilibrium balancing stabilization clauses, which permit the parties to the PA to renegotiate the agreements in the case of material changes in circumstances. Ordinarily, this clause would not have been problematic. However, the non-transparent nature of Ghana's upstream industry coupled with the propensity to abuse discretionary power has resulted in situations where agreements have been re-negotiated under questionable circumstances, and new terms agreed upon. For example, on 23rd December 2019, Ghana made significant amendments to its petroleum agreement with Norwegian-based company Aker Energy in respect of the Deepwater Tano/Cape Three Points (DWT-CTP) area; this was after amendments were made to the *Petroleum (Exploration and Production) (General) Regulations*, 2018, by the *Petroleum (Exploration and Production)(General)(Amendment) Regulations*, 2019 (L.I. 2390) despite many protestations by civil society and technocrats alike.[49]

44 Africa Centre for Energy Policy, 'Government of Ghana Gives Away Juicy Oil Blocks Ahead of High Transparency Standards in the Pending Petroleum Law' (*ghanaweb*, 2014) <www.ghanaweb.com/GhanaHomePage/pressreleases/artikel.php?ID=304049> accessed 10 February 2021.

45 ibid.

46 Adam (n 38) 11.

47 s 13—Review of Terms and Conditions.

48 s 20—Review of Terms and Conditions.

49 art 26 of the 2000 Model Petroleum Agreement, art 24 of the Revised/Modified Model Petroleum Agreement, 2019.

The amendment to the 8th February 2006 DWT-CTP petroleum agreement also followed the adoption of the Report of the Joint Committee on Finance and Mines & Energy agreeing same. Aker Energy cited material changes in circumstances that has affected the economic balance of the petroleum agreement it inherited when it bought the DWTCTP asset from Hess Corporation. However, the demonstration of the economic balance of the agreement negatively impacting them were not convincing to civic groups and some technocrats.A similar situation played out in respect of AGM Petroleum Ghana Limited in respect of the South Deepwater Tano block, where there were marked variations to the fiscal regime, against protestations by civil society and technocrats. The initial terms of the agreement in terms of the participating interest (which brings in the biggest share of the revenue) were AGM with 66 per cent interest, GNPC with 10 per cent, and the newly formed Explorco, the exploration arm of GNPC, with 24 per cent. After the agreement was re-negotiated, the fiscal terms were revised to AGM with 80 per cent, GNPC with 15 per cent and a local entity, Quad Energy, with 5 per cent. Explorco's 24 per cent interest was taken away from it without any consideration in terms of monetary payment of this interest by AGM. Thus, one could have a situation where very good fiscal arrangements can be obtained at the stage of licensing only for it to be changed later down the road in a way and manner that makes nonsense mockery of the licensing regime.

The relationship between domestic politics and transnational actors following the discovery and commercial production of oil and gas is often paramount. Interconnecting these two actors is the political economy dimension which drives the interests of the various players and institutional entities—the so-called political settlements framework. Political settlements academics, practitioners and policymakers broadly characterize this as 'how the balance of power between different groups in a geographic setting shapes the types of institutions that arise, and how such institutions function in practice.'[50] At the core of the concept is the interconnections between institutions and policies, resource allocation and organizational power. Thus, understanding how organizational power is distributed can 'determine the institutions and policies that are likely to persist as well as the ones most likely to be developmental in that context.'[51]

In Ghana's context, the post-1992 political environment has been characterized as a 'competitive clientelist'[52] regime involving intense electoral competition between the NPP and NDC, Ghana's two dominant parties. This also includes inter-coalitional rivalry, and intra-elite competition as well as strained relations between party elites and lower ranks.[53] Such competition has fostered a 'winner takes all' mentality to governance whereby both parties are ultimately interested in capturing Executive Power (the Presidency) to perpetuate clientelist privileges, which includes the distribution of patronage to reward local elites and other actors.

The pervasive and deeply entrenched clientelist nature of contemporary Ghanaian politics implies that the country's nascent oil and gas industry has become deeply intertwined with the multiparty democratic politics of the day. Some researchers have argued that this integration of the oil industry with the politics has led to sub-optimal governance and resource management outcomes in the country—e.g. resulting in politics of

50 TK Stephens 'Of Stabilization Clauses, Legal Gymnastics, Variations and Everything in Between: Amendments to the Petroleum Agreement in respect of Deepwater Tano/Cape Three Points Contract Area (Offshore Ghana)' (2017–2019) University of Ghana Law Journal XXX 65.

51 MH Khan, 'Political Settlements and the Analysis of Institutions' (2018) 117(469) African Affairs 636–55; 'Rising China and Africa's Development: Oil' (2021) <https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=84717&section=5> accessed 15 February 2021.

52 Mohan (n 8).

53 Whitfield (n 9).

resource-patronage, high corruption and perception of corruption, among others.[54] Others argue that oil discovery and production in Ghana is advancing rather than obstructing democratization by creating pro-democratic effects or a democratic feedback, e.g. evidenced by increased civil society and citizen participation in the sector, among others.[55] Nevertheless, the link between oil and democratization in Ghana is not a settled debate. What is beyond doubt is that such political settlement analysis is useful in helping to understand the nature of ruling coalitions vis-à-vis the governance of natural resources.

Petroleum licensing under the Petroleum (Exploration and Production) Act, 2016

As noted earlier, under Act 919, which repealed PNDC Law 84, Ghana's previous 'open-door policy' based on direct negotiations shifted to an 'open, transparent and competitive public tender process'. The new licensing provisions under Act 919 were tested for the first time in 2018–19 with the launch of Ghana's first licensing round. Ghana launched its maiden oil and gas licensing round in October 2018 with six blocks being placed on offer, and one block reserved for GNPC. On 27 June 2019, the government announced the winners of Blocks 2 and 3 as First E & P Ltd/Elandel Energy Ghana Ltd. and Eni/Vitol respectively.

What these cases illustrate is that the relationship between domestic politics and transnational actors following the discovery and commercial production of oil and gas is often paramount. Interconnecting these two, is the political economy dimension which drives the interests of the various players and institutional players - in essence, the country's oil and gas industry has become intertwined with the multiparty democratic politics.

Structural and organizational challenges that impact the sanctity of Ghana's Licensing Regime

Act 919 is based on transparency, accountability and equitable principles. These underpin the whole document and one of the key ways to ensure transparency in the award process. Section 10 of Act 919 puts licensing in the domain of the Minister. In practice, any support given to the Minister by the Commission is at the behest of the Ministry. In the maiden and last licensing round, the role played by the Petroleum Commission was to provide data to all companies that came in. The Petroleum Commission was not much involved in the rest of the process. The submission of applications was to the Ministry. The Ministry took the lead in the licensing process and the Petroleum Commission, largely relegated to the background.

The law provides for competitive bidding under Section 10(3) and at the same time, direct negotiations, under Section 10(5). Competitive bidding is the default position with exception made for open door policy based upon the discretion of the Minister. It is worded as: 'Where all or part of the area offered for tender in a public tender process has not become the subject of a petroleum agreement, but the Minister determines that it is in the public interest for that area to be subjected to a petroleum agreement, the Minister may initiate direct negotiations with a qualified body corporate for a petroleum agreement.'

It has been argued that this provision provides too much discretion to the Minister, provides an avenue for corruption and rent seeking, and that the discretion of the Minister should be restricted. Officials from the Ministry of Energy argue that if Ghana operated strictly according to law, there is no imperfection in the law as is drafted. It is argued that the issue lies with the practical implementation of the law and that the law will work so long as state actors do not keep trying to circumvent Section 10(1)(2) and (3) of Act 919. The

54 F Oduro(n 10).

55 E Graham, RE Van Gyampo and FXD Tuokuu, 'A Decade of Oil Discovery in Ghana: Implications for Politics and Democracy' (2020); G Mohan, KP Asante and AG Abdulai, 'Party Politics and the Political Economy of Ghana's Oil' (2018) 23(3) New Political Economy 274–89; G Mohan (n 8); S Hickey and others, 'The Politics of Governing Oil Effectively: A Comparative Study of Two New Oil-Rich States in Africa', Effective States and Inclusive Development (ESID) Working Paper series No. 54, 2015.

default provision should be allowed to work and the reasoning when drafting the provisions was that direct negotiations would be used only in special circumstances.

Article 257(6) of the Constitution stipulates that natural resources are held in trust by the President for and on behalf of the people of Ghana. It is thus argued that the Minister, who is the representative, the chief sector agent of the President, should engage in the licensing on behalf of the Republic. It is the case that the Ministry engages in the licensing, but the issue is that there is little capacity in this regard at the Ministry. The Petroleum Commission and GNGC have more expertise and personnel than the Ministry. It must be noted that the Petroleum Commission is not only a regulatory body but also a technocratic one. It is tasked with the management of the natural resource. Article 269(1) states:

> Subject to the provisions of this Constitution, Parliament shall, by or under an Act of Parliament, provide for the establishment, within six months after Parliament first meets after the coming into force of this Constitution, of a Minerals Commission, a Forestry Commission, Fisheries Commission, and such other Commissions as Parliament may determine, which shall be responsible for the regulation and management of the utilization of the natural resources concerned and the co-ordination of the policies in relation to them.

Further, a key thing to emphasize is that the Commission is a manager of the resource. This, in many respects, has been lost in practice in the management of Ghana's petroleum industry. The body is also a technocratic body that must perform managerial functions. The argument is frequently made that the resource is owned by the Republic and vested in the President and as such, any management and regulatory architecture that attempts in any way to rival the claim of vesting in the President would be illegal and unconstitutional. Under the law, the grant of the award of the contract is the Minister's prerogative. The argument is further made that as the Constitution[56] vests the resource in the President to hold in trust for the people, it is the President—through the Ministry—and not a statutory body that must exercise the power to license the mineral wealth of the country.

It is counter-argued that the fact that the resource is vested in the President of the Republic does not necessarily mean that at all cost, it must be the Ministry that must be in charge of licensing. The Ministry can delegate it to the Petroleum Commission to do it on its behalf. The Petroleum Commission manages the resource and should be doing work to see the risks and prospects and therefore the value of the work. The Petroleum Commission manages data over all the blocks on behalf of the Minister. It is argued that if the Petroleum Commission has the data, and evaluates blocks, it is better placed to know its value so why should the Ministry which has less technical capacity do the licensing? Definitely, there is bound to be some failure somewhere along the line. It is argued that though the Minister is the licensor, there is nothing untoward if the Petroleum Commission spearheads this process. It is the Commission that has the technical capacity and is the technocratic body of the industry and so must be spearheading this activity. It is further argued that in any case, at the end of the day, the Minister's signature will be on the PA as having awarded the block. The question that begs asking is: if the Commission is put at the forefront of this licensing process, is the country going to get better outcomes/results?

The maiden licensing round was not deemed an overwhelming success by any measure but if the institutional arrangements are different, would there be better outcomes? Will putting the Petroleum Commission largely in charge of licensing ensure that things are done strictly according to expertise and not other considerations, especially, interference from politicians? It is the case that even if the Commission is tasked largely with licensing, the Minister can indeed and in fact interfere with the work of the Commission. There have

56 EM Odijie, 'Oil and Democratisation in Ghana' (2017) 44(153) Review of African Political Economy 476–86.

been instances where even before advice from the Petroleum Commission has reached the Minister, decisions would have been taken already, often to the detriment of the State. As Baldwin et al. note in generality:

> The politician is, in turn, seen as a politician-regulator who is largely interested in re-election. When faced with the choice of courting electoral support from voters and increasing the potential campaign contributions of a powerful (concentrated) industry that seeks regulatory protections, this politician-regulator will err on the side of industry and will take comfort in the (at most) low number of votes that are likely to be lost from this decision.[57]

The architectural framework where the Commission is largely an agency of the Ministry, as with other Commissions in the natural resource sector, results even in a statutory framework that largely subordinates in no small measure, the Commission to the Ministry. Thus, under the *Petroleum Commission Act*, 2011 (Act 821) for instance, under Article 20 titled *Review of Decision*, decisions of the Commission are appealable to the Minister, who can reverse such decisions. When the law was being drafted, the Petroleum Commission should have been given a higher level of autonomy in terms of the regulatory and technocratic issues.

It bears noting that even if authority is devolved to the Petroleum Commission, its Chief Executive Officer (CEO) is appointed by the President and thus, will still be subject to some control and influence by the Executive. It boils down to looking at the institutional arrangement and defining the remit of the three organizations: GNPC, the Ministry and the Petroleum Commission. It also boils down to the power and autonomy that is given to the Minister under the law, particularly under Act 919. The Minister can still control the industry in a more transparent manner without undue discretion. It bears noting for instance that under Section 20 of the *Petroleum Commission Act*, 2011 (Act 821), for instance, the Minister can give directives to the Board of the Commission on matters of policy and the Board must comply. So, the Ministry would only make the policy and the Petroleum Commission would operate within the regulations to ensure that the right thing is done.

It is argued that ideally, the appointing authority of the CEO should be the Board. Members of the Board should be nominated from relevant institutions as opposed to being directly appointed by the President. There is the need for a Board, able to scrutinize the decisions of the CEO. The framework, as it is now, has all members appointed by the President with no security of tenure. Where tough decisions have to be made, these appointees seek the opinion of the Minister/Executive to see which direction to toe. So far as the government has the ability to dissolve the Board and dismiss the CEO without providing any reason, Executive interference will continue to persist. There is the need to go to the fundamentals, go to the constitution, which vests the resource in the people. How do the people form a body that will manage the resource?

In the development of petroleum operations in Ghana, how is the country exerting control over the whole process in order to make operations flow in a well-planned and productive manner? The primary answer given to this question posed to numerous government officials is that GNPC is always a partner to every PA and as such, the necessary controls are in place in each operation. However, the reality of the matter is that state participation in and of itself does not necessarily translate into proper national steering or regulation. Paying careful attention to the way and manner in which licensing is done is especially important in the case of Ghana—a developing country buffeted by external influence—because unlike Norway, for instance, it is simply poorly positioned to correct errors and to reposition itself once dislocations arise.

The institutional arrangements as to who plays which role in this whole process should be looked at. Article 269 largely renders the Commission as subordinate to the Executive. Under the 1979 Constitution, there was a

57 art 257(6)—Public Lands and other Public Property.

very concerted effort to have effective checks and balances in the overall governmental framework. Thus, it was stipulated that in respect of the Lands Commission, which was then in charge of the natural resources sector, its Chairman should not be a Minister of State or a Deputy. Further, the Constitution stipulated that in the performance of its functions, the Commission should not be subject to the direction or control of any other person or authority.[58] The Commission was also tasked to '. . .hold and manage, to the exclusion of any other person or authority, any land or minerals vested in the President by this Constitution or any other law. . .' [59] The Lands Commission, however, was perceived as lacking the expertise and competence necessary to manage the various natural resource sectors. As such, Article 191 mandated the formation of natural resource commissions within 6 months after the coming into force of the Constitution. After the 1981 coup d'état by the Provisional National Defence Council (PNDC), and thereafter the suspension and abrogation of the 1979 Constitution,[60] the *Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law*, 1982 (PNDCL 42) created a Minerals as well as a Forestry Commission.[61] Naturally, created under a military regime, these natural resource commissions were intended to be agencies assisting the Secretary (Minister) as opposed to independent regulatory bodies. In the epoch in which the Commission was going to operate, the Commission structured in this manner seemed most practical.[62]

The *Committee of Experts for the Drafting of the 1992 Constitution* drew heavily from the preceding Constitution, the 1979 Constitution. Further, the framers thought it prudent to transpose from the 1979 Constitution into the 1992 constitution as Article 269, the provision mandating the formation of natural resource commissions.[63] However, the framers, when commenting on the Lands Commission under the 1979 Constitution, provide insight into their expectation of how the bodies operating under Article 269 had to be organized. They noted that the drafters of the 1979 Constitution sought to have complete autonomy of the Commission from the Executive. Interpreted in this manner, they rightly pointed out that in respect of an agency with such significant economic importance, it would be impractical to completely sever it from the governmental apparatus, hence the need for some linkage to the Executive.[64] They stated, 'The 1979 Constitution proclaimed that the Lands Commission was subject to no authority other than the Constitution. Whatever the merits of autonomy in the abstract sense, it would seem unrealistic to insulate a vital economic agency from the entire apparatus of Government concerned with the management of the economy.'[65] They thus recommended that the Commission be responsible to the sector Minister as opposed to having absolute autonomy from the Executive. The bodies under Article 269 are referred to as 'agencies of government', but like the 1979 Constitution, there is no stipulation as to how they ought to be structured. Granted the impracticability of full autonomy, however, the question becomes: what is the level of independence if any that a body formed under Article 269 should have, and what should its relationship with the Ministry be?

If Ghana is extrapolating from the Norwegians, it bears noting that it is not the Ministry that does the licensing rounds but the regulatory body, the Norwegian Petroleum Directorate. As Farouk Al-Kasim who is largely credited with the development of Norway's petroleum industry notes, 'The licensing, regulatory and monitoring functions of the government may then be organized directly under the responsible ministry in a "petroleum administration."'[66] Though the NPD is directly under the supervision of the Ministry, as Alvik

58 R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2012) 44.

59 art 189(7).

60 art 189(5).

61 s 66—Abrogation of 1979 Constitution.

62 s 34—Forestry Commission.

63 This Paragraph and the one thereafter, culled from Stephens (n 21) 159–212.

64 Unlike the provision contained in the 1979 Constitution, that contained in the 1992 Constitution—art 269—expressly mandated for the formation of a Minerals Commission.

65 Committee of Experts, Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana (Tema Press 1991) 139, para 305.

66 ibid.

rightly notes, 'It exercises delegated powers from the ministry, and has significant functions especially in relation to the management of petroleum resources.'[67] As the main depository of data from the licensees and often their sub-contractors,[68] the NPD also compiles data on all hydrocarbon activities on the Norwegian Continental Shelf,[69] prepares areas for licensing, as well as advises the Ministry on areas to be opened in individual license rounds. In respect of the licensing, the institutional arrangements should be more clarified to spell out who plays which role, and the Minister's discretion should be accompanied by some guidelines.

The Petroleum Commission was severely marginalized in the last licensing round and there is the need for it to play a big enough role particularly because of rent seeking. There is the need for clear regulation about how/when new blocks should be licensed, from which areas, and at what time. What should be the country's optimum production level? What should be Ghana's long-term goals—replacing reserves, maintaining production? When these goals are clearly outlined, then the State knows what to put on the market at any particular time. Licensing is a process that demands a concerted and microscopic approach and this is largely lacking under Ghana's dispensation. It is the case that in Ghana's dispensation, it is an effective technocratic body that can afford that microscopic focus for the regulation of the rate of activity in the industry as opposed to the bureaucratic and less technocratic Ministry. The Executive must exercise that power to order developments through carefully circumscribed directives, and these directives must not in any way usurp the work of the Commission.

4. CONCLUSIONS AND RECOMMENDATIONS

As noted, the inherent problem is not so much what system of licensing is in place as to what structures are in place to regulate the licensing of the acreage. What structures are in place to ensure that licensing is done in a manner that achieves the twin objectives of maximizing revenue whilst putting in the necessary checks and balances to serve as a powerful tool for regulation of the industry? Within the context of Ghana as a rentier-state,[70,71] some concerns have been raised on the role of oil and gas wealth on the influence and evolution of institutional linkages and quality. Intense politicization within the country, including in the oil and gas sector in Ghana, means that many citizens often believe that 'politicians are in for themselves and their cronies' and not necessarily to improve the welfare of citizens. Some authors have argued that political systems that exercise control over the oil and gas sector are inherently bedevilled with opacity, lack of accountability and bureaucracy. This is often times deliberately perpetrated to manipulate contracts to favour the political class or their cronies.

In Ghana's context, institutional weakening in the natural resource sector has entrenched rentier social groups, that is, business or political elites have sometimes sabotaged the process to create conditions that favour rent-capture. For example, during oil and gas licensing rounds and award of other supply chain contracts, local content rules are sometimes used to secure contracts in favour of politically connected businesses. It must also be noted that the discretion given to government actors, particularly politicians, has consistently been the bane of Ghana's petroleum industry. It is for this reason that perceived infractions outlined earlier under the open-door system coupled with a belief that the competitive bidding would provide more competition and transparency saw to the migration to this system. Abuse of discretionary power leading to exploitation for parochial interests continues to be the bane of the industry. If the laws were allowed to work as they should in practice, the industry would be better regulated, and better outcomes

67 F Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a Broad Perspective* (Alden Press 2006) 176.

68 I Alvik, 'Norway' in E Pereira and K Talus (eds), *Upstream Law and Regulation: A Global Guide* (Globe Law and Business 2013) 367, 370–71.

69 ibid 195.

70 M Thurber, D Hults and P Heller, *The Limits of Institutional Design in Oil Sector Governance: Exporting the Norwegian Model* (ISA Annual Convention 14 February 2010) 7 <http://iis-db.stanford.edu/pubs/22836/Thurber_Hults_and_Heller_ISA2010_paper_14Feb10.pdf> accessed 28 June 2020.

71 This is based on rentier-state theory in political science.

would arise from the contracting process. It is precisely because of the abuse of discretionary power that it has become necessary that discretionary power be limited as much as possible and where granted, subject to a high level of scrutiny.

It bears noting that within the competitive bidding system, negotiations take place. As noted, after the contractor[s] is selected, there is negotiation on certain aspects of the Agreement such as the fiscal regime before parliamentary ratification. Thus, this negotiation, which civil societies and the like sought to make more transparent and open in order to safeguard against deals being made to suit parochial interests, still has a semblance within the competitive bidding system. It must also be noted that many companies that were awarded oil blocks earlier have failed to make any inroads whatsoever. It has become increasingly clear that the intention of some contractors was to simply procure these blocks and flip them to make gains. However, this became difficult for some contractors following the decline in crude prices fell in 2015 to 2016 after hovering above $100 a barrel a few years earlier. Further, other companies, gave reason to question why licenses were awarded them in the first place. Oranto Petroleum, for instance, failed to meet basic obligations such as paying its surface rentals and left the jurisdiction without paying monies owed to the State despite several demands. Even in respect of companies with producing assets, many technical mistakes have been made arising from a lack of experience. It is imperative that applicants granted acreage are subjected to a higher level of scrutiny.

Finally, legislation has often been reviewed to suit the interests of the government of the day as evidenced in amendments made to the *Petroleum (Exploration and General) Regulations*, 2018 (L.I. 2359) by the *Petroleum (Exploration and Production)(General)(Amendment) Regulations*, 2019 (L.I. 2390). Political expediency and short-term gains have been sacrificed at the expense of long-term maximising economic recovery objectives even against the advice of technocrats - for example, from both GNPC and the Petroleum Commission. The variations made to the PA in respect of the Deepwater Tano/Cape Three Points area, which resulted in amendments being made to the law, in order to make that legally possible is a classic example of a situation where there appears to be state capture, where a lack of control on the Executive has resulted in contractual outcomes that have seen the goal posts being shifted.

Based on the foregoing, we make the following policy recommendations:

1. There is the need for a deconstruction and analysis of the organizational framework in respect of licensing to ensure that the country has a framework that ensures that the principal actor in charge of licensing has the technocratic expertise and microscopic focus to ensure the best outcomes for the country.
2. Considering that the competitive bidding system remains the default means of licensing in Ghana, there is the need to have clear and focused objectives for each licensing round and a sustained and concerted effort made right from the start to meet these specific objectives. Ghana's petroleum industry is at a stage where there must be a concerted effort to make more discoveries and commercialise existing ones to stem long term production decline. This recommendation is premised on there being no change of the default competitive bidding licensing regime back to an 'open door' one. The latter would be driven, for example, by concerns around the energy transition and the need to attract risk-tolerant buyers and the need to attract investors not as constrained by environmental, social and governance (ESG) pressures, unlike the traditional IOCs.
3. Companies granted petroleum acreage must be subjected to a much higher level of scrutiny to ensure that the experience of the past where some companies were granted acreage but woefully failed to execute any meaningful operation, will be a thing of the past. The litmus test for the grant of a PA, which is stated in Section 10(10) of Act 919 as 'requisite technical competence and financial capacity to fulfil the obligations of the petroleum agreement. . .' must be scrupulously adhered to.

4. There is the need to limit the discretionary power of political actors as much as possible and where the power is to be exercised, exposed to a very high level of transparency and scrutiny. Section 4 of Act 919 states in relation to the management of petroleum resources that it must be 'conducted in accordance with the principles of good governance, including transparency and accountability. . ..' Political actors must be strenuously held to this standard in respect of their management of the petroleum resources with emphasis on the fact that they are managing a finite resource on behalf of generations both present and future.
5. To ensure that there are good contractual outcomes in favour of the State, minimum thresholds should be fixed for other important fiscal elements - as with the Carried Interest which is fixed at a minimum of 15 per cent - in the contractual regime to safeguard aspects of the state take at the bare minimum. For instance, following extensive fiscal benchamarking to other jurisdictions, a threshold below which royalty rates cannot go below can be specified, in respect of shallow, as well as deep, and ultra-deep waters.
6. To the greatest extent possible, the principle of sanctity of contracts must be respected and neither contracts nor the law must be amended in order to suit parochial interests. Equilibrium economic balancing clauses, which were enshrined in Section 13 of PNDCL 84 and currently in Section 20 of Act 919, must be able to be triggered by the IOC only where there is demonstrable proof that material changes in circumstances have indeed occurred that adversely affects the economic balance of the agreement and must not be used as a backdoor to re-negotiate terms already agreed upon, thus bastardizing the licensing process.