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EDITORS' NOTE

The Academy is the conscience and consciousness of a legal order. It is the organ responsible for its reflective, philosophically sound, holistically just and internally coherent evolution. Judges, lawyers, legislators, political actors are all constrained by the need to act timeously and are, of necessity therefore, myopically focused on the specifics of each current problem. The necessity is legal and philosophical in the case of the judges, and, by extension, lawyers; and political and moral in the case of legislators and other political actors. It is only the Academy that has the liberty, and indeed the honour and responsibility to put bites and chunks, dimensions and aspects, depths and boundaries of the law and the legal order which supports it to microscopic study and painstakingly parse the real victories, growth and justice from the pyrrhic victories, the inadvertent errors, the arrogant misuses, and the well-intentioned overreaches. The Academy must lead the charge to celebrate the manifestations of true moral evolution and fearlessly denounce deviations from our public reason and constitutional ideals. When the Academy fails in this weighty charge, the society's descent into injustice, incoherence and abuse is inevitable.

In answer to our duty as an academic institution that is fully aware of and embraces the tasks of academia, we, in the Department of Law and Public Policy here at Ashesi University have worked assiduously to create a journal that will engage with all aspects of this jurisdiction's legal and constitutional trajectory. It is our pleasure to introduce the inaugural issue of the **Ashesi Law Journal.** This first volume brings together six papers, each engaging critically with an area of Ghanaian law that the authors believe deserves closer scrutiny.

Taken together, the papers in this issue attempt to answer a single question: whether Ghana's legal and institutional frameworks have kept pace with the country's changing economic, political, and social realities. Saeed Nubalaniah Moomin opens the issue with a case for reforming the scope of arbitrability under the Alternative Dispute Resolution Act, 2010, arguing that the statutory exclusion

of environmental disputes and the judicial exclusion of fraud sit uneasily with Ghana's pro-arbitration commitments. Maame Yaa Akyiaa Mensa-Bonsu turns to section 47 of the Land Act, 2020, and shows how a provision designed to protect spousal property rights is likely, in practice, to work against the very women it was meant to protect. Martin Waana-Ang examines the political economy of power purchase agreements in Ghana's energy sector, tracing how legal structures built to attract investment have also had to absorb the country's recurring democratic and fiscal pressures.

The second half of the issue turns to questions of governance and identity. Kweku Attakora Dwomoh revisits the Supreme Court's decision on the status of the chief fisherman, asking whether the Court gave customary law the interrogation the Constitution requires. Emmanuel Amoah looks outward, proposing a protocol to coordinate Africa's external trade engagements under the African Continental Free Trade Area. Maame A.S. Mensa-Bonsu closes the issue with an examination of Ghana's first hung Parliament, asking what the episode reveals about the durability of the country's multiparty democracy.

We are grateful to the authors for their scholarship, to our reviewers for their careful critiques and the generosity of their time, and to the Department of Law and Public Policy for its continued support of legal research at Ashesi. This first issue marks the beginning of a lasting platform for rigorous, independent legal thought at Ashesi University that will become not only a standard for erudition in this jurisdiction, but also an invaluable source of new knowledge, an instigator of thoughtful, impactful public discourse and an initiator of law reform.

Prof. Maame Mensa-Bonsu
Jonathan Abotiwine Alua
Editors-in-Chief
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EXPANDING THE FRONTIERS OF ARBITRABILITY IN GHANA: A CASE FOR THE REFORM OF SECTION 1 OF THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798)

Saeed Nubalaniah Moomin[1*]

Abstract

Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) was enacted to promote arbitration, mediation, and customary arbitration as alternatives to litigation. Section 1 of the Act, however, excludes environmental matters from its scope. The Supreme Court's decision in ***Heiland Resources Ltd v Sinopec International Petroleum Ltd*** *has also, unjustifiably, expanded the scope of non-arbitrable matters to include fraud. This paper argues that* ***Heiland*** *is inconsistent with the text of Act 798 and the Court's own pro-arbitration jurisprudence and that the blanket statutory exclusion of environmental matters is at odds with the arbitration provisions in the Ghana Investment Promotion Centre Act, 2013 (Act 865), the Minerals and Mining Act, 2006 (Act 703), and the Petroleum (Exploration and Production) Act, 2016 (Act 919). I propose that section 1 of Act 798 be amended to ensure that commercial fraud and environmental disputes arising out of investment relationships are arbitrable under Ghanaian law.*

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Introduction

Ghana has sought to position itself as a jurisdiction that welcomes arbitration. The enactment of the Alternative Dispute Resolution Act, 2010 (Act 798), was a major step in this direction.[2] The Act provides the legislative framework for arbitration, mediation, and customary arbitration in Ghana. It also incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as a schedule, signaling Ghana's commitment to international arbitration standards.[3] As Onyema has observed, the Act was one of the most comprehensive arbitration statutes enacted in Africa in the post-2000 period, drawing on the UNCITRAL Model Law while incorporating uniquely Ghanaian features such as customary arbitration.[4] The courts have also affirmed Ghana's pro-arbitration posture in a long line of cases. In *Republic v High Court (Commercial Division, Accra) Ex Parte Ghacem Ltd*, Dotse JSC cautioned that courts "must be very slow and cautious" in interfering with the arbitral process, "unless expressly provided for and in clear instances devoid of any controversy".[5]

Despite this, certain aspects of the law undermine Ghana's pro-arbitration credentials. Section 1 of Act 798 provides that the Act applies to all matters except those relating to (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; and (d) any other matter that by law cannot be settled by an alternative dispute resolution method.[6] Section 1(d) is a residual catch-all that defers to other legislation. The exclusion of environmental matters, in particular, is a blanket exclusion. It does

2 Alternative Dispute Resolution Act, 2010 (Act 798). The Act received Presidential Assent on 31 May 2010 and repealed the earlier Arbitration Act, 1961 (Act 38).

3 Alternative Dispute Resolution Act, 2010 (Act 798), First Schedule.

4 Emilia Onyema, 'The New Ghana ADR Act 2010: A Critical Overview' (2012) 28(1) Arbitration International 101.

5 *Republic v High Court (Commercial Division, Accra) Ex Parte Ghacem Ltd (AJ Fanj Construction & Engineering Ltd Interested Party)*, Civil Motion No J5/29/2018 (Supreme Court, 30 May 2018).

6 Alternative Dispute Resolution Act, 2010 (Act 798), s 1.

not distinguish between disputes arising from purely regulatory or public law matters and those arising from commercial or contractual relationships that happen to have an environmental dimension. In a country whose economy depends significantly on mining, oil, and gas, commercial disputes arising in these sectors will inevitably involve environmental questions.[7] Yet, as the law stands, these disputes cannot benefit from the advantages of arbitration.

To compound this problem, the Supreme Court in *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors* held that the High Court is "better suited" to determine allegations of fraud than an arbitral tribunal.[8] This was despite the fact that fraud is not listed among the exclusions in section 1 of Act 798. The Court did not anchor its decision in any of the specific exclusions under section 1. Instead, it made what appears to be a policy pronouncement without adequate justification. The decision, in effect, judicially expanded the scope of non-arbitrable matters beyond what Parliament had contemplated.

These two issues, the statutory exclusion of environmental matters and the judicial exclusion of fraud, together represent a significant limitation on the scope of arbitrability in Ghana. They undermine party autonomy, create uncertainty for commercial parties, and raise questions about whether Ghana's arbitration regime is as progressive as its legislative framework suggests.

This paper argues that both limitations ought to be addressed through legislative reform. In the case of fraud, Parliament should clarify that allegations of fraud arising in the contractual context do not, by themselves, oust the jurisdiction of an arbitral tribunal. In the case of environmental disputes, Parliament should amend section 1(b) to

7 Ghana is one of Africa's largest gold producers and has significant offshore petroleum production. See Ghana Extractive Industries Transparency Initiative, '2023 Annual Report' (GHEITI 2024).

8 *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors*, Civil Appeal No J4/10/2024 (Supreme Court, 11 November 2024).

permit the arbitration of commercial and investment disputes that involve environmental questions.

The arguments are grounded primarily in Ghanaian law. The text and objects of Act 798, the existing arbitration provisions in the Ghana Investment Promotion Centre Act, 2013 (Act 865),[9] the Minerals and Mining Act, 2006 (Act 703),[10] and the Petroleum (Exploration and Production) Act, 2016 (Act 919)[11] form the core of the argument. Reference is also made to the practice of international arbitral tribunals to demonstrate that environmental disputes are capable of competent adjudication by arbitral tribunals. The 1992 Constitution of Ghana and its provisions on environmental protection and the right of access to justice further support the case for reform.

The paper is structured as follows. Part 1 considers the concept of arbitrability under Ghana's ADR Act, examining section 1 and its implications. Part 2 addresses the arbitrability of fraud, with a critical analysis of the *Heiland* decision and the reasons it should not represent the settled position of the law. Part 3 makes the case for the arbitrability of environmental disputes, drawing on the inherent tension between section 1(b) of Act 798 and the arbitration provisions in Ghana's investment and extractive sector legislation. Part 4 proposes specific reforms to section 1 and considers necessary safeguards.

9 Ghana Investment Promotion Centre Act, 2013 (Act 865), s 33.

10 Minerals and Mining Act, 2006 (Act 703), s 27.

11 Petroleum (Exploration and Production) Act, 2016 (Act 919), s 10. Petroleum agreements under this section, which must be ratified by Parliament in accordance with article 268 of the 1992 Constitution and section 10(13) of the Act, typically contain international arbitration clauses.

PART 1: ARBITRABILITY UNDER GHANA'S ADR ACT

The Concept of Arbitrability

Arbitrability deals with whether a particular type of dispute can be settled by arbitration, or whether it is of a kind that can only be settled by recourse to traditional courts.12 It has also been defined as a concept which "involves determining which types of disputes may be resolved by arbitration and which belong exclusively to the domain of the courts".13 Born identifies arbitrability as one of the fundamental doctrines of international commercial arbitration, noting that its scope has expanded significantly in most developed jurisdictions over the past three decades.14 Despite similar definitions, no single international or transnational standard defines which substantive areas of law are arbitrable.15 Brekoulakis has argued that many of the persisting limitations on arbitrability rest on misconceptions about the nature and function of arbitration, rather than on sound policy considerations.16 Mistelis and Brekoulakis have further demonstrated that the boundaries of arbitrability vary considerably across jurisdictions, influenced by local conceptions of public policy, regulatory sovereignty, and the perceived competence of arbitral tribunals.17 As a result, determining arbitrability is usually left to domestic law. The governing law determines whether a dispute is arbitrable or not.

12 Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Yearbook of International Law 193.

13 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 122.

14 Gary B Born, *International Commercial Arbitration*, vol 1 (3rd edn, Wolters Kluwer 2021) ch 6.

15 Klára Drličková, 'Arbitrability and Public Interest in International Commercial Arbitration' (2017) 17 International and Comparative Law Review 55, 56.

16 Stavros Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern' (2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410285 accessed 3 March 2026.

17 Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).

This makes the provisions of Act 798 central to any discussion on arbitrability in Ghana. The Act sets the boundaries. As Oppong has noted, Ghana's arbitration framework is distinctive in that it imposes statutory arbitration obligations in certain contexts, which raises questions about the scope and constitutionality of arbitrability restrictions.[18]

Section 1 of Act 798

Section 1 of Act 798 provides that the Act applies to matters other than those that relate to: (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; and (d) any other matter that by law cannot be settled by an alternative dispute resolution method.[19]

The structure of section 1 is important. It does not create a general exclusion and then carve out exceptions. Instead, it starts from a position of general applicability and then lists specific exclusions, ending with a general exclusionary clause in section 1(d). The implication is that everything falls within the scope of the Act unless it can be shown to fall within one of the four enumerated categories.

This is consistent with the modern trend towards what has been described as a "presumption in favour of arbitrability".[20] It is also consistent with the object of the Act. The Memorandum to Act 798 indicates that the Act was intended to promote the use of alternative dispute resolution methods in Ghana and to reduce the burden on the courts.[21] A restrictive interpretation of section 1 would be at odds with these objects. Brako-Powers, in his evaluation of Act 798, thirteen years after its enactment, has similarly observed that the

18 Richard Frimpong Oppong, 'The Nature and Constitutionality of Statutorily-Imposed (Non-Contractual) Arbitration in Ghana' (2021) 65(2) Journal of African Law 205.
19 ADR Act (n 1) s 1.
20 Drličková (n 14) 55.
21 ADR Act (n 1), Memorandum.

exclusions under section 1 have created practical difficulties and have not kept pace with the demands of Ghana's commercial landscape.[22]

It is worth noting at the outset that the Memorandum to Act 798 does not explain why environmental matters or any of the other categories were excluded. The Memorandum addresses the broad objectives of the Act but is silent on the rationale for any of the specific exclusions in section 1. International instruments are also silent on the question. Neither the UNCITRAL Model Law on International Commercial Arbitration nor the New York Convention prescribes substantive limits on arbitrability. The Convention leaves the question to domestic law.[23] The exclusions in section 1 are therefore policy choices made by the Ghanaian Parliament without express international guidance and without express domestic justification.

Two of the four exclusions are relatively uncontroversial. The exclusion of matters relating to the enforcement and interpretation of the Constitution under section 1(c) is logical. Constitutional interpretation is a function reserved for the courts under the 1992 Constitution,[24] and there is no compelling reason to subject it to arbitration. Similarly, the residual exclusion under section 1(d), which refers to matters that by law cannot be settled by ADR, is a standard provision that defers to other legislation.

The two exclusions, which are the focus of this Paper, are more problematic. The exclusion of matters relating to "the national or public interest" under section 1(a) is broad and undefined. The exclusion of matters relating to "the environment" under section 1(b) is a blanket exclusion that does not admit of any nuance.

22 Austin Kwabena Brako-Powers, 'An Evaluation of Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) Thirteen Years on' (SSRN, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4529623 accessed 3 March 2026.

23 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38, art II.

24 1992 Constitution of the Republic of Ghana, arts 2 and 130.

The "National or Public Interest" Exclusion

The 1992 Constitution defines public interest as including "any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana".[25] The word "including" is significant. It suggests that the scope of public interest is potentially wider than the specific formulation provided.[26] The Supreme Court has confirmed this in *Nii Kpobi Tetteh Tsuru III v Attorney-General*, where Dotse JSC held that public interest should be given "a wide, broad and expanded interpretation".[27] This creates uncertainty. If public interest is an open-ended concept, then it becomes a tool through which a party can seek to oust the jurisdiction of an arbitral tribunal by arguing that the dispute is in the public interest. The danger is that almost any dispute can be made to touch on the public interest if the argument is framed broadly enough.

That said, *Nii Kpobi Tetteh Tsuru* also confirms the substantive limit of the exclusion. Public interest, on the Court's formulation, must benefit "the entire community" or be "open to members of the public".[28] A purely private dispute between two commercial parties about money owed under a contract does not meet this threshold. The dispute concerns the rights and obligations of the parties.

This does not mean that the public interest exclusion is without merit. There are disputes that, by their nature, pique interests beyond those of the immediate parties. But the current formulation does not provide sufficient guidance as to what falls within this category. This has left the courts to fill the gaps, and, as the discussion on fraud below will demonstrate, they have not always done so consistently.

25 1992 Constitution of the Republic of Ghana, art 295.

26 The word 'including' in the definition implies that what follows is illustrative, not exhaustive. This means the concept of public interest is potentially broader than the specific examples given.

27 *Nii Kpobi Tetteh Tsuru III v Attorney-General* [2010] Civil Suit No 2/2007 (Supreme Court, 23 June 2010).

28 ibid.

The Problem with the Environmental Exclusion

Section 1(b) excludes "the environment" from the scope of Act 798.[29] The provision is brief and unqualified. It does not define what "matters relating to the environment" means. It does not distinguish between regulatory disputes, such as a challenge to an EPA enforcement notice, and commercial disputes that happen to involve an environmental dimension, such as a dispute over environmental indemnification in a mining contract.

The detailed argument against the blanket environmental exclusion appears in Part 3 of this Paper, where it is also placed alongside the arbitration provisions in Ghana's sector-specific legislation. For present purposes, it is sufficient to flag two preliminary points. First, the Memorandum to Act 798 does not explain the basis for the exclusion.[30] Second, no other Ghanaian statute carves environmental disputes out of arbitration; the exclusion is statutory and limited to Act 798. The exclusion is also at odds with the arbitration provisions in the Minerals and Mining Act, 2006 (Act 703),[31] the Petroleum (Exploration and Production) Act, 2016 (Act 919),[32] and the Ghana Investment Promotion Centre Act, 2013 (Act 865).[33] Part 3 develops the legislative incoherence point in detail.

PART 2: THE ARBITRABILITY OF FRAUD IN GHANA

The Nature of Fraud Under Ghanaian Law

Fraud is treated with considerable gravity under Ghanaian law. It is considered a species of dishonesty with criminal connotations. Taylor JSC defined fraud as involving "a false representation, whether exhibited by words or conduct", adding that "a charge of fraud in law

29 ADR Act (n 1) s 1(b).
30 ADR Act (n 1), Memorandum.
31 Minerals and Mining Act, 2006 (Act 703), s 27.
32 Petroleum (Exploration and Production) Act, 2016 (Act 919), s 81.
33 Ghana Investment Promotion Centre Act, 2013 (Act 865), s 33.

can be taken to be properly made against a party who knowingly or recklessly whether by conduct or words uses unfair, wrongful or unlawful means to obtain a material advantage to the detriment of another party."[34] Kpegah JSC has similarly described fraud as a "serious sin against the administration of justice", reinforcing the maxim that "fraud vitiates everything".[35]

Because of this characterisation, Ghanaian law requires that even in civil matters, allegations of fraud must be proved beyond a reasonable doubt, which is the criminal standard of proof.[36] The courts have also held that fraud must be specifically pleaded so that the other party is given sufficient notice to prepare a defence.[37] These requirements reflect the seriousness with which Ghanaian law treats allegations of fraud.

For the avoidance of doubt, the Paper accepts that civil fraud retains certain quasi-criminal features under Ghanaian law. Civil fraud must be pleaded with particularity. It must be proved beyond reasonable doubt. The argument advanced here is not that these features should be disregarded. The argument is that these features speak to how fraud is pleaded and proved, not to the forum in which it can be adjudicated. An arbitral tribunal, applying the governing law, will apply the same pleading rules and the same standard of proof as a court. The forum and the burden of proof are distinct questions.

It is important to distinguish between the different contexts in which fraud arises. Fraud as an element of criminal offences, prosecuted by the State under the Criminal Offences Act, 1960 (Act 29),[38] is a matter of public law. The State has an interest in punishing criminal conduct, and there is no question that criminal prosecution falls outside the scope of arbitration.

34 *SA Turqui & Bros v Dahabieh* [1987-88] 2 GLR 486, 502 (Taylor JSC).
35 *Republic v High Court, Accra ex parte Aryeetey* [2003-2004] SCGLR 398, 406 (Kpegah JSC).
36 *Sasu Bamfo v Sintim* [2012] 1 SCGLR 136.
37 *Edem Afram v Bernard Owusu-Twumasi*, Civil Appeal No J4/47/2021 (Supreme Court) 32.
38 Criminal Offences Act, 1960 (Act 29), ss 131–145.

This is uncontroversial. Fraud also arises in the contractual context. A party to a commercial agreement may allege that the other party made false representations which induced it to enter into the contract. This is fraud in the civil sense, although it retains the quasi-criminal evidentiary features described above. It does not engage the prosecutorial interest of the State. It is a dispute between two private parties about the consequences of alleged dishonesty within their commercial relationship. The remedies sought are civil remedies: rescission, damages, or restitution. It is this type of fraud, fraud within the contractual context, that is the focus of this Paper.

The Decision in Heiland v Sinopec

The facts of *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors* are important.[39] The Ghana National Gas Company contracted Sinopec to build the Western Corridor Gas Infrastructure Development Project. Sinopec sub-contracted Heiland for the Lateral Line Civil Works under an agreement that included an arbitration clause at clause 16.2. A dispute arose over additional civil works performed by Heiland. Heiland alleged that Sinopec had altered the scope of work and refused to pay for the additional works. Heiland pleaded fraud in its Statement of Claim. The particulars were that Sinopec had fraudulently misrepresented the scope of work, had induced Heiland to perform additional work without intending to pay for it, had executed a sham contract with another party to evade payment obligations, and had refused to certify invoices to evade payment.[40] The pleaded fraud was, in substance, fraudulent misrepresentation arising out of a sub-contractor dispute.

Heiland first commenced arbitration but later withdrew it and filed a writ at the High Court. Sinopec applied to stay the proceedings

39 *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors*, Civil Appeal No J4/10/2024 (Supreme Court, 11 November 2024).

40 ibid, [3.2] and [11] (recording the particulars of fraud pleaded at paragraph 57 of the Statement of Claim).

and refer the dispute to arbitration. The High Court granted the application. The Court of Appeal reversed. The Supreme Court affirmed the Court of Appeal.

The Supreme Court's decision addressed three issues: whether the additional works fell within the scope of the arbitration clause; whether Sinopec had waived its right to arbitration; and whether the fraud allegations rendered the dispute non-arbitrable. The fraud issue is addressed in one short paragraph of the majority judgment. Asiedu JSC held that:

> "Indeed, fraud connotes criminality, and the law requires that such allegations, whether made in criminal or civil actions, ought to be proved beyond a reasonable doubt... We are firmly of the view that between a court of law, especially the High Court, and an arbitrator, the High Court has jurisdiction and is better suited to try and determine an allegation of fraud which amounts to an alleged commission of a crime than an arbitrator."[41]

The majority did not anchor this conclusion in any of the specific exclusions in section 1 of Act 798. It did not reference any policy consideration peculiar to fraud. It did not engage with the Court's prior jurisprudence. The pronouncement is best described as a policy assertion.

Adjei-Frimpong JSC dissented.[42] He characterised the pleaded fraud as fraudulent misrepresentation in contract law terms. He held that the usual common law remedies for such conduct (rescission, damages, or both) are remedies that an arbitrator can grant. He invoked *Fiona Trust & Holding Corporation v Privalov* and the broad pro-arbitration approach in that case. He also relied on the Memorandum to Act 798 and on the Court's earlier *dictum* in *Ex*

41 ibid, [11] (Asiedu JSC).
42 ibid (Adjei-Frimpong JSC, dissenting).

Parte Ghacem, favouring a narrow scope for judicial interference with arbitration. He concluded that the dispute was arbitrable under section 1 of Act 798 and that the Court of Appeal had erred in taking a narrow view of the arbitration clause.

Why the *Heiland* Decision is Problematic

The *Heiland* majority decision is problematic for several reasons. First, the majority did not anchor its decision in any of the exclusions listed in section 1 of Act 798. The Court did not explain which limb of section 1 fraud falls under. It did not argue that fraud relates to the national or public interest under section 1(a). It did not argue that fraud is a matter that, by law, cannot be settled by ADR under section 1(d). It simply declared that the High Court is "better suited" to hear allegations of fraud. This is a policy pronouncement, not a legal analysis of the statutory framework. Parliament, when it enacted Act 798, chose specific exclusions. Fraud was not among them. The deliberate omission of fraud from the list of exclusions in section 1 suggests that Parliament did not intend for fraud to be categorically excluded from arbitration.[43]

Second, the Court's reasoning conflates civil and criminal fraud. The assertion that "fraud connotes criminality" is an overgeneralisation. While fraud can be criminal, it is not always criminal. In the commercial context, allegations of fraud are frequently made in connection with contractual dealings. A party that alleges it was induced to enter into a contract by false representations is not alleging a crime. It is alleging a civil wrong with civil consequences. The standard of proof may be higher than the ordinary civil standard, but the nature of the claim remains civil. To treat all allegations of fraud as criminal in character, and to use that characterisation to oust the jurisdiction of arbitral tribunals, is to extend the exclusion beyond what the facts warrant.

43 This argument follows the principle of *expressio unius est exclusio alterius*. Where the legislature has specified certain exclusions, the omission of others is presumed to be deliberate.

The *Heiland* facts themselves illustrate the point. The fraud pleaded was fraudulent misrepresentation arising out of a subcontractor's payment claims. That is simply civil fraud.

Third, the decision is inconsistent with the Supreme Court's own jurisprudence. In *Ex Parte Ghacem*, Dotse JSC held that courts should be "very slow and cautious" in interfering with the arbitral process, "unless expressly provided for and in clear instances devoid of any controversy".[44] The same case interpreted section 40 of Act 798 narrowly, limiting it to the determination of preliminary legal points arising in the course of arbitration. The court warned against the "unbridled interference of the court into the workings of arbitral tribunals under Act 798". The Supreme Court has also affirmed the importance of party autonomy and the need to uphold dispute resolution clauses in agreements.[45] The *Heiland* majority does the very thing *Ex Parte Ghacem* warned against. It uses a non-textual policy pronouncement to whittle away arbitral jurisdiction.

Fourth, the decision creates a practical problem. In commercial transactions, particularly cross-border investments, allegations of fraud are common. They arise in disputes over misrepresentation, non-disclosure, and breach of warranty. If a mere allegation of fraud is sufficient to defeat an arbitration clause, then any party wishing to avoid arbitration can do so simply by alleging fraud. This opens the door to tactical litigation. A party that has agreed to arbitrate can frustrate the agreement by including a claim for fraud in its statement of case, regardless of whether the allegation has substance. The *Heiland* decision provides no safeguard against this.

Fifth, the powerful dissenting opinion of Adjei-Frimpong JSC. The dissent applied the broad approach set out by the House of Lords in *Fiona Trust & Holding Corporation v Privalov*.[46] In *Fiona Trust*, Lord

44 Ex Parte Ghacem (n 4).
45 *BCM Ghana Ltd v Ashanti Goldfields Ltd* [2005-2006] SCGLR 602, 611.
46 *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40.

Hoffmann held that an arbitration clause should be construed on the assumption that "the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal".[47] Lord Hoffmann expressly noted that this included disputes about fraud, bribery, and misrepresentation, unless the language of the clause clearly excluded them. The dissent in *Heiland* considered this approach consistent with the policy objectives of Act 798 and a "better motivation" for its implementation.

The separability point is statutorily anchored in Ghanaian law. Section 3 of Act 798 codifies the separability doctrine.[48] It provides that "an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement." Allegations of fraud directed at the main contract, therefore, do not, under Ghanaian law, vitiate the arbitration agreement.[49] The arbitral tribunal retains jurisdiction over the dispute, including the fraud allegations concerning the contract.

The Public Policy Argument

One possible justification for the *Heiland* approach is policy: that fraud, even in commercial dealings, is sufficiently serious to be treated as a public matter. This argument is reasonable, but when the actual structure of Act 798 is considered, issues arise.

Parliament addressed the concern of public interest when it enacted section 1(a) of Act 798. That provision excludes matters relating to

47 ibid, [13] (Lord Hoffmann).

48 ADR Act (n 1) s 3.

49 Nicholas Pengelley, 'Separability Revisited: Arbitration Clauses and Bribery – *Fiona Trust & Holding Corporation v Privalov*' (2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311070 accessed 3 March 2026.

"the national or public interest". If Parliament had intended fraud to be treated as a public interest matter and excluded on that basis, the natural drafting choice was either to list fraud expressly or to rely on section 1(a). Parliament did neither. The deliberate omission carries weight.

The public interest exclusion under section 1(a), as discussed in Part 1, is defined by reference to benefit to "the whole of the people of Ghana". A private commercial dispute about money owed under a contract does not meet that threshold. The fact that Ghanaian law treats fraud seriously and requires a higher standard of proof does not transform a private dispute into a public interest matter. Seriousness and public interest are not synonymous.

The State's public interest in punishing fraud is fully protected without excluding civil fraud from arbitration. The State retains the prosecutorial role. The Attorney-General can prosecute fraudulent conduct under the Criminal Offences Act, 1960.50 That power is unaffected by the arbitration of the civil consequences between the contracting parties. Indeed, the criminal and civil dimensions of fraud can run in parallel without conflict, just as they do in tort and contract cases generally.

Section 40 of Act 798 and the Arbitrability of Fraud

Section 40 of Act 798 deserves separate treatment because it is sometimes read as supporting the exclusion of fraud from arbitration. The reading is that since section 40 reserves "any question of law" to the High Court, Parliament must have intended that pure legal questions, including fraud, should be reserved for the courts. The reading does not survive close inspection. Section 40(1) provides that:

50 Criminal Offences Act (n 37) ss 131–145.

> "Unless otherwise agreed by the parties, the High Court may, on an application on notice to the other party by a party to arbitral proceedings, determine any question of law that arises in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party."[51]

Two features of section 40 defeat the broader reading. First, section 40(1) is a default rule, not a mandatory rule. Parties may "otherwise agree". This is the language of opt-out, not jurisdictional carve-out. Second, section 40(3) provides that the arbitrator "may continue the arbitral proceedings and make an award" while a section 40 application is pending.[52] A provision that allows the arbitral tribunal to continue and to render an award while the court considers the legal question is plainly a supervisory power, not a jurisdictional one. The arbitral tribunal retains its primary jurisdiction throughout. The Supreme Court has interpreted section 40 narrowly. In *Ex Parte Ghacem*, the Court held that section 40 is limited to the determination of "preliminary legal points" arising in the course of arbitration.[53] The Court held that the High Court "clearly exceeded its jurisdiction" when it went beyond a preliminary legal point. Dotse JSC stated that "the intervention of the High Court, unless expressly provided for and in clear instances devoid of any controversy, must be very slow and cautious." The Court warned that to read section 40 more broadly would "whittle away the functions of the arbitral tribunals and render nugatory the benefits that are to be derived from these arbitral proceedings as contained and provided for in Act 798."

Section 40 is also analytically distinct from the question of subject-matter arbitrability under section 1. Section 1 addresses, ex ante, which categories of disputes may be referred to arbitration at all.

51 ADR Act (n 1) s 40(1).
52 ADR Act (n 1) s 40(3).
53 Ex Parte Ghacem (n 4).

Section 40 addresses, during arbitration, whether a particular legal question affecting the rights of the parties should be determined by the High Court. They operate at different stages and serve different functions. They cannot be combined to produce a categorical exclusion of fraud.

The combined effect is clear. Section 40 does not exclude fraud from arbitration. It does not support the *Heiland* majority's conclusion. To the contrary, *Ex Parte Ghacem*'s narrow reading of section 40 supports the dissent in *Heiland*.

The Case for Reform on Fraud

The argument for making fraud in the contractual context arbitrable in Ghana does not rest on the fact that other jurisdictions have done so. It rests on the proper interpretation of Ghana's own law. The principle of party autonomy, which Fagbemi has described as the cornerstone of international commercial arbitration, demands that parties who have agreed to arbitrate should not be deprived of that agreement by the mere invocation of fraud.[54]

Section 1 of Act 798 sets out four categories of excluded matters. Fraud does not fall within any of them. It does not relate to the enforcement or interpretation of the Constitution. It does not relate to the environment. As discussed above, it does not relate to the national or public interest. There is no statute that expressly prohibits the arbitration of civil fraud claims in Ghana. The Criminal Offences Act criminalises certain types of fraudulent conduct, but that does not mean that all civil claims involving allegations of fraud are incapable of arbitration. The distinction between the criminal prosecution of fraud, which is the State's prerogative, and the civil adjudication of fraud claims between private parties, which is a matter of private dispute resolution, is a fundamental one.

54 SA Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6(1) Journal of Sustainable Development Law and Policy 202.

The distinction is not unique to Ghana. In India, which has perhaps the most developed jurisprudence on the arbitrability of fraud, the Supreme Court has drawn a clear line between civil and criminal fraud. In *A Ayyasamy v A Paramasivam & Others*, the Court held that "mere allegation of fraud simpliciter may not be a ground to nullify the effect of the arbitration agreement between the parties", reserving the courts' jurisdiction only for cases involving "very serious allegations of fraud which make a virtual case of criminal offence".[55] In *Rashid Raza v Sadaf Akhtar*, the Court refined this into a two-part test, asking whether the fraud alleged permeates the entire contract and the agreement to arbitrate, and whether the allegations have implications in the public domain.[56] Where the fraud touches only upon the internal affairs of the parties and has no public dimension, it is arbitrable. The Indian Supreme Court reaffirmed this approach in *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Limited*.[57]

It is important to address one feature of the Indian comparison. In India, civil fraud is proved on the balance of probabilities; in Ghana, civil fraud is proved beyond reasonable doubt. The difference matters. But it does not defeat the comparison. The *Ayyasamy* test is structural, not evidentiary. It turns on the nature of the fraud (civil character; whether it permeates the contract; whether it has a public dimension), not on the burden of proof. None of the three working criteria from *Ayyasamy* and *Rashid Raza* depends on how fraud is proved. The structural distinction is therefore exportable to Ghana even though the evidentiary threshold is higher.

The Indian position is instructive not because Ghana should follow India, but because it demonstrates that the distinction between civil and criminal fraud, which underpins this Paper's argument, is workable and judicially manageable.

55 *A Ayyasamy v A Paramasivam* (2016) 10 SCC 386, [25].
56 *Rashid Raza v Sadaf Akhtar* (2019) 8 SCC 710, [4]–[5].
57 *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2021) 4 SCC 713.

To be clear about the scope of this argument: this Paper does not contend that all fraud should be arbitrable. The argument is that civil fraud arising in the contractual context should be arbitrable. Criminal fraud, fraud that goes to the validity of the arbitration agreement itself, and fraud whose adjudication has implications in the public domain should remain with the courts. The Paper proposes a structural distinction that mirrors the Indian test in substance while preserving Ghana's evidentiary standard.

The concern that arbitral tribunals are not equipped to handle fraud claims is unjustified.[58] Arbitration is a flexible process. Parties have the autonomy to appoint arbitrators with the expertise and experience necessary to determine the dispute. The governing law, which in the Ghanaian context would be Ghanaian law, would still apply. The same legal principles, the same standard of proof, and the same rules of evidence would govern the determination. The only difference is the forum. There is nothing inherent in the nature of civil fraud that makes it incapable of determination by a competent arbitral tribunal. Born forcefully makes this point, noting that the complexity or seriousness of a claim does not diminish the competence of an arbitral tribunal, particularly when the tribunal is composed of experienced lawyers and applies the same substantive law as a court would.[59]

The economic argument reinforces this position. Ghana seeks to attract foreign investment, particularly in its extractive and financial sectors. The Ghana Investment Promotion Centre Act, 2013 (Act 865) was enacted specifically to promote and encourage investment.[60] Section 33 of the Act provides for arbitration as a mechanism for resolving disputes between investors and the Government. Foreign

58 This point was made by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 633–634 (1985), where the Court observed that 'adaptability and access to expertise are hallmarks of arbitration' and that 'the anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed.'

59 Born (n 13) 945–960.

60 Ghana Investment Promotion Centre Act (n 8), Long Title and s 3.

investors value arbitration because it provides neutrality, efficiency, and enforceability.

A legal regime that allows mere allegations of fraud to defeat arbitration clauses introduces uncertainty. It discourages the very investment that Ghana seeks to attract. The practical consequence of the *Heiland* decision is that an investor who has agreed to arbitrate a dispute with a Ghanaian counterpart cannot rely on that agreement if fraud is alleged. This is a chilling signal for any investor conducting due diligence on Ghana's dispute resolution framework.

PART 3: THE ARBITRABILITY OF ENVIRONMENTAL DISPUTES IN GHANA

The Section 1(b) Exclusion

Section 1(b) of Act 798 excludes matters relating to "the environment" from the scope of the Act. Unlike the exclusion of fraud, which is a judicial creation, this exclusion is statutory. Parliament expressly decided that environmental matters should not be subject to arbitration, mediation, or customary arbitration under the Act. Any argument for reform must therefore contend with the fact that this was a deliberate legislative choice.

The deliberate enactment of the exclusion does not immunise it from criticism. Legislation is enacted in a particular context and to serve particular objectives. When the context changes or the provision creates unintended consequences that undermine the statute's broader objectives, reform becomes necessary. This Part argues that the blanket exclusion of environmental matters from arbitration has become untenable in light of developments in Ghana's investment and extractive sector legislation, the practice of international arbitral tribunals, and the evolving nature of environmental disputes in Ghana.

The Rationale Behind the Exclusion

Act 798 does not explain why environmental matters were excluded. The Memorandum to the Act does not provide specific reasons for the inclusion of section 1(b).[61] In the absence of an express rationale, two possible justifications can be inferred.

The first is that environmental protection is a matter of public interest. Article 36(9) of the 1992 Constitution directs the State to "take appropriate measures needed to protect and safeguard the national environment for posterity".[62] Article 41(k) imposes a duty on every citizen to "protect and safeguard the environment".[63] These provisions suggest that environmental protection is not merely a private concern but a constitutional imperative. On this reasoning, environmental disputes should be determined by the courts, which are public institutions accountable to the broader community, rather than by arbitral tribunals, which are private and consensual in nature.

The second possible justification is that environmental disputes often involve regulatory and public law questions that are unsuitable for arbitration. Enforcement actions by the Environmental Protection Authority, prosecutions for environmental offences, and challenges to environmental permits are all matters that involve the regulatory power of the State. These are not the types of disputes that arise between commercial parties and that arbitration was designed to resolve. Both justifications have some force. But neither supports a blanket exclusion of all matters "relating to the environment" from arbitration.

Why the Blanket Exclusion is Overbroad

The problem with section 1(b) is not that it excludes some environmental matters from arbitration. It is that it excludes all of

61 ADR Act (n 1), Memorandum.
62 1992 Constitution of the Republic of Ghana, art 36(9).
63 1992 Constitution of the Republic of Ghana, art 41(k).

them. The provision makes no distinction between the different types of disputes in which environmental issues arise.

Consider three scenarios that arise regularly in Ghana's commercial landscape. First, a mining company enters into a contract with a service provider for the disposal of mining waste. The contract contains an arbitration clause. A dispute arises over whether the service provider disposed of the waste in compliance with the contractual specifications and applicable environmental standards. The environmental dimension is incidental to a contractual dispute.

Second, a foreign investor enters into a petroleum agreement with the Ghana National Petroleum Corporation under Act 919. The agreement requires the investor to comply with environmental principles and to obtain environmental permits.[64] A dispute arises over the investor's compliance. The petroleum agreement, ratified by Parliament, provides for international arbitration.

Third, a Ghanaian company and a foreign company enter into a joint venture for a renewable energy project. The joint venture agreement contains obligations relating to environmental impact assessments and carbon credit allocation. The agreement provides for arbitration under the rules of an international arbitral institution. A dispute arises over the environmental impact assessment obligations.

In each case, the dispute arises out of a commercial relationship between parties who have agreed to arbitrate. The environmental element is part of the subject matter of the contract, not a free-standing regulatory matter. Section 1(b) appears to exclude all three from arbitration on a literal reading. Excluding these disputes from arbitration deprives the parties of the benefit of their bargain without any corresponding gain to the public interest.

64 Petroleum (Exploration and Production) Act (n 10) s 81.

It is important to be clear about where the boundary should lie. Section 1(b)'s exclusion was, presumably, directed at regulatory and prosecutorial matters. The boundary should rest there. A dispute about whether a mining operator emits toxic substances in breach of statutory standards, prosecuted by the EPA or another State actor, is not arbitrable. The State's regulatory power is exercised in the public interest and is unsuitable for private arbitration. A contractual dispute between a mining operator and its service provider about the performance of an environmental remediation obligation is different. The relationship is contractual, the obligations arise out of the agreement, and the remedies sought are civil. The State is not the prosecutor; it is, at most, a regulator with parallel enforcement options. That dispute should be arbitrable.

The Legislative Incoherence

Several Ghanaian statutes provide for the arbitration of disputes that will inevitably involve environmental questions. This creates a direct tension with section 1(b) of Act 798. Section 27 of the Minerals and Mining Act, 2006 (Act 703) provides for the arbitration of disputes between mineral right holders and the Republic.[65] Mining operations are, by their nature, environmentally sensitive. The Act itself requires mineral right holders to obtain environmental permits and to comply with environmental obligations.[66] Section 27(4) requires that "each agreement granting a mineral right shall contain provisions on the method of resolution of disputes that may arise under the agreement."[67] Section 27(3) provides that disputes between a non-citizen mineral right holder and the Republic may be submitted to arbitration "in accordance with an international machinery for the resolution of investment disputes".[68] A dispute about compliance

65 Minerals and Mining Act (n 9) s 27.
66 Minerals and Mining Act (n 9) ss 17–18.
67 Minerals and Mining Act (n 9) s 27(4).
68 Minerals and Mining Act (n 9) s 27(3).

with environmental obligations arising under a mining agreement is both a mining dispute and an environmental dispute. The Minerals and Mining Act provides for arbitration. Act 798 says it cannot.

Petroleum agreements entered under the Petroleum (Exploration and Production) Act, 2016 (Act 919) routinely provide for international arbitration of disputes arising under them. Section 81 of the same Act requires contractors to "take into account and give effect to environmental principles" prescribed in the environmental protection legislation.[69] A dispute over whether a contractor has met its environmental obligations under a petroleum agreement is both a petroleum and an environmental dispute.

Section 33 of the Ghana Investment Promotion Centre Act, 2013 (Act 865) provides for the arbitration of disputes between foreign investors and the Government.[70] Ghana's bilateral investment treaties also provide for arbitration, typically under ICSID or UNCITRAL rules.[71] Investment disputes in the extractive sector frequently involve environmental issues. Miles has traced how investment law and environmental regulation have become increasingly intertwined, particularly in the extractive sector, such that any attempt to exclude environmental matters from arbitration inevitably undermines the effectiveness of the investment arbitration regime.[72] If an investor alleges that Ghana's environmental regulations have adversely affected its investment, or if the Government raises environmental non-compliance as a defence, the dispute has an environmental dimension. Yet the parties have agreed, and the GIPC Act contemplates, that such disputes should be arbitrated. The incoherence becomes sharper still

69 Petroleum (Exploration and Production) Act (n 10) s 81.

70 Ghana Investment Promotion Centre Act (n 8) s 33.

71 Ghana has entered into bilateral investment treaties with, among others, China, Switzerland, South Africa, the United Kingdom, Germany, and the Netherlands. See UNCTAD, 'International Investment Agreements Navigator: Ghana' https://investmentpolicy.unctad.org/international-investment-agreements/countries/79/ghana accessed 3 March 2026.

72 Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) Ch 7.

when one considers section 33(3) of the GIPC Act, which provides that where there is no arbitration agreement to the contrary, the default method of dispute settlement is mediation under Act 798.[73] The GIPC Act, therefore, expressly directs investment disputes to the very statute that excludes their environmental dimension.

Parliament cannot have intended for these provisions to operate at cross-purposes. The more likely interpretation is that section 1(b) was drafted with purely regulatory environmental disputes in mind and was not intended to override the specific arbitration provisions in sector-specific legislation. But the text of section 1(b) does not reflect this. It is drafted in absolute terms. This legislative incoherence needs to be resolved. Asouzu has observed that African arbitration statutes have frequently suffered from drafting that does not reflect the commercial realities of the jurisdictions they serve, and that periodic statutory reform is necessary to ensure that arbitration frameworks remain fit for purpose.[74]

The New Environmental Protection Act, 2025 (Act 1124)

In January 2025, Ghana enacted the Environmental Protection Act, 2025 (Act 1124), which repealed the Environmental Protection Agency Act, 1994 (Act 490) in its entirety.[75] Act 1124 creates an expanded Environmental Protection Authority with broader regulatory powers, fiscal independence, and an express mandate for climate change governance.[76] The Act introduces provisions on carbon markets, a Ghana Carbon Registry, environmental performance rating systems, and advanced eco-levies.[77]

73 Ghana Investment Promotion Centre Act (n 8) s 33(3).

74 Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press 2001).

75 Environmental Protection Act, 2025 (Act 1124), assented to 30 January 2025.

76 Environmental Protection Act (n 74), Part Five (Climate Change).

77 Environmental Protection Act (n 74). The Act establishes a Ghana Carbon Registry and

The enactment of Act 1124 is significant for this discussion in two respects. First, it demonstrates that Ghana's environmental regulatory framework is evolving. The types of environmental disputes that arise today, including those involving carbon credits, climate finance, and environmental performance obligations, are far more complex and commercially oriented than the disputes that existed when Act 798 was enacted in 2010. The exclusion in section 1(b) was drafted for a different era.

Second, Act 1124 does not contain any provision on arbitration or alternative dispute resolution for environmental disputes. Parliament has therefore modernised the environmental regulatory framework without addressing the question of how commercial and investment disputes with environmental dimensions should be resolved. The silence is informative. It does not endorse the section 1(b) exclusion; nor does it remove it. The gap remains. Whether the silence reflects deliberate legislative inaction or oversight is not clear from the text of Act 1124 alone, and the Memorandum to Act 1124 has not been publicly published in a form that resolves the question. The Paper takes the silence as analytically neutral. The case for amending section 1(b) of Act 798 is not affected.

International Practice: Evidence of Arbitral Competence

The argument for reform does not depend on what other countries do. It depends on what Ghana's own legal framework requires. However, the practice of international arbitral tribunals is relevant for a different reason. It demonstrates that arbitral tribunals are capable of competently adjudicating environmental disputes. Viñuales has comprehensively documented how investment arbitral tribunals

provides for carbon markets, non-market approaches, voluntary carbon market participation, and domestic carbon pricing.

have increasingly engaged with environmental claims, both as part of the primary dispute and through state counterclaims.[78] Sands and others have similarly noted that the institutional architecture of international arbitration has adapted to accommodate environmental disputes, with specialised procedural rules and panels of arbitrators with environmental expertise.[79] This matters because one potential objection to removing the environmental exclusion is that arbitral tribunals lack the institutional capacity or expertise to handle such disputes. The objection does not hold up against the evidence.

In *Burlington Resources Inc v Republic of Ecuador*, the ICSID tribunal heard an investment claim involving oil extraction in the Ecuadorian Amazon, and also adjudicated Ecuador's environmental counterclaim on the merits.[80] In its Decision on Counterclaims dated 7 February 2017, the tribunal ordered Burlington to pay USD 41.7 million in compensation, comprising USD 39.2 million for environmental remediation and USD 2.5 million for infrastructure breaches.[81] This was the first ICSID case in which a tribunal upheld a state's environmental counterclaim and awarded environmental damages. Viñuales has described this as a watershed moment in the relationship between investment arbitration and environmental protection, demonstrating that tribunals can both protect investor rights and hold investors accountable for environmental harm.[82] It demonstrated that arbitral tribunals can assess environmental harm, apply environmental standards, and award appropriate remedies.

In the *South China Sea Arbitration*, the tribunal constituted under Annex VII of the United Nations Convention on the Law of the

78 Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).

79 Philippe Sands and others, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018).

80 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5.

81 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017).

82 Viñuales (n 77) ch 8.

Sea assessed whether China had breached its obligations to protect and preserve the marine environment under articles 192 and 194 of UNCLOS.[83] The tribunal evaluated scientific evidence of coral reef destruction, assessed compliance with environmental protection obligations, and found that China had caused "severe harm to the coral reef environment". This was a complex environmental adjudication conducted within an arbitral framework.

In the *Indus Waters Kishenganga Arbitration*, the Permanent Court of Arbitration tribunal applied customary international environmental law principles to determine that India was required to maintain a minimum environmental flow in the Kishenganga River.[84] The tribunal engaged with the no-harm rule and the concept of environmental due diligence. It also considered the precautionary principle but declined to apply it to the facts, holding that its authority extended only to mitigating significant harm. The tribunal nonetheless demonstrated that arbitral tribunals can interpret and apply international environmental law with the same rigour as traditional courts.

These are not isolated examples. The Permanent Court of Arbitration adopted its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment in 2001.[85] The Rules provide for the appointment of arbitrators with environmental expertise, and they empower tribunals to order interim measures to "prevent serious harm to the environment falling within the subject-matter of the dispute". The very existence of the Rules is an institutional acknowledgement that environmental disputes are arbitrable and that arbitral tribunals can handle them competently.

83 *The South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case No 2013-19, Award (12 July 2016) [983].

84 *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award (PCA, 18 February 2013) and Final Award (PCA, 20 December 2013).

85 Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (adopted 19 June 2001).

The International Chamber of Commerce has similarly recognised the role of arbitration in resolving environmental disputes. The ICC Commission's Report on Resolving Climate Change Related Disputes through Arbitration and ADR concluded that arbitration and ADR are "well-established in resolving environmental disputes" and provided procedural guidance for tribunals handling such cases.[86]

The proposition that arbitral tribunals cannot competently adjudicate environmental disputes is therefore unsupported by the evidence. Tribunals have done so, repeatedly, in cases of considerable complexity, applying both domestic and international environmental law.

Economic Development

Ghana's economy depends significantly on its extractive sector. Mining, oil, and gas operations are major sources of revenue, employment, and foreign investment.[87] These operations inevitably generate environmental disputes. Disputes arise over compliance with environmental permits, liability for pollution, the allocation of environmental remediation costs, and the environmental consequences of operational decisions.

When these disputes cannot be arbitrated, the parties are left with litigation in the Ghanaian courts. This has practical consequences. Court proceedings in Ghana can be protracted.[88] The commercial courts, while an improvement, still face capacity constraints. Foreign investors, who are often parties to these disputes, may lack confidence in the domestic judicial process, not because of any deficiency in

86 ICC Commission, 'Report on Resolving Climate Change Related Disputes through Arbitration and ADR' (November 2019).

87 K Kamasa, P Amoah, I Bonuedi and P Forson, 'Impact of Mining-FDI on Extractive Sector Growth and its Spillover Effect on Non-Extractive Sector Growth: The Case of Ghana' (2025) 25(1) Ghana Mining Journal 45.

88 Judicial Service of Ghana, *Annual Report 2022-2023* 16–18.

Ghanaian judges, but because of the structural advantages that arbitration offers: party-appointed decision-makers with sector expertise, procedural flexibility, confidentiality, and international enforceability of awards.

The inability to arbitrate environmental disputes in Ghana places the country at a competitive disadvantage relative to other jurisdictions in the region. Countries that permit the arbitration of commercial disputes with environmental dimensions offer a more comprehensive and attractive dispute-resolution framework. Gazzini has observed that modern bilateral investment treaties in Africa, such as the 2016 Morocco-Nigeria BIT, increasingly incorporate provisions on investor environmental obligations alongside arbitration clauses, reflecting the understanding that environmental and investment issues are inseparable in practice.[89] For an investor deciding between two jurisdictions with similar resource endowments, the availability of arbitration for all types of commercial disputes, including those with environmental elements, is a relevant consideration.

Ghana's own investment promotion framework recognises this. The GIPC Act was enacted to attract and promote investment.[90] The arbitration provision in section 33 reflects the understanding that investors value access to arbitration. The promise of arbitration is undermined if a significant category of disputes, those relating to the environment, is categorically excluded.

The Constitution

Article 36(9) of the 1992 Constitution directs the State to protect and safeguard the national environment.[91] This directive principle

89 Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (2017) Investment Treaty News.

90 Ghana Investment Promotion Centre Act (n 8) s 3.

91 1992 Constitution of the Republic of Ghana, art 36(9).

supports environmental protection. It does not follow that environmental disputes must be resolved exclusively by the courts. The Constitution does not prescribe litigation as the only permissible method of resolving environmental disputes. The directive principle speaks to the State's obligation to protect the environment, not to the forum in which disputes about that protection should be resolved.

The right of access to justice, implicit in the constitutional framework, supports the availability of multiple dispute-resolution mechanisms. Arbitration is one such mechanism. Expanding the scope of arbitrability to include commercial environmental disputes does not diminish environmental protection. It provides an additional forum for parties to enforce environmental obligations. An arbitral tribunal that holds an investor liable for environmental damage and awards compensation to the affected party advances environmental protection just as effectively as a court judgment would. The constitution, therefore, supports, rather than undermines, the case for reform.

PART 4: PROPOSALS FOR REFORM

The Need for Legislative Intervention

The preceding Parts have identified two distinct but related problems with Ghana's arbitrability framework. The first is that the Supreme Court in *Heiland* has judicially excluded fraud from arbitration without a statutory basis. The second is that section 1(b) of Act 798 imposes a blanket exclusion on environmental matters that is overbroad and inconsistent with the arbitration provisions in Ghana's investment and extractive sector legislation.

Both problems require legislative intervention. As Onyema has argued, the supervisory function of courts should complement, not supplant, the arbitral process.[92] Where statutory restrictions

92 Emilia Onyema (ed), *Rethinking the Role of African National Courts in Arbitration* (Kluwer Law International 2018).

create unnecessary barriers to arbitration, legislative reform is the appropriate remedy. In the case of fraud, a judicial reversal of *Heiland* is theoretically possible but practically unlikely in the short term. The Supreme Court would need an appropriate case, a willingness to depart from a recent decision, and a bench inclined towards the dissenting view of Adjei-Frimpong JSC. Legislative clarification is more efficient and provides greater certainty. In the case of environmental disputes, the exclusion is statutory. Only Parliament can amend section 1(b).

Proposal One: Clarifying the Arbitrability of Fraud

Parliament should amend Act 798 to include an express provision clarifying that allegations of fraud arising in the context of a contractual or commercial relationship do not, by themselves, render a dispute non-arbitrable. The amendment should track the *Ayyasamy* and *Rashid Raza* test by preserving the State's interest in cases where the fraud is essentially criminal in character, where it permeates the arbitration agreement itself, or where it has implications in the public domain.

A possible formulation would be to insert a new subsection into section 1, as follows:

> "For the avoidance of doubt, a dispute is not excluded from the application of this Act solely because it involves allegations of fraud, where the dispute arises out of or in connection with a contractual or commercial relationship between the parties, provided that the allegations (i) do not amount to a virtual case of criminal offence, (ii) do not permeate the validity of the arbitration agreement itself, and (iii) have no public interest ramifications."[93]

93 This is proposed language for illustrative purposes. The exact formulation would be a matter for

The formulation preserves the existing exclusions. It does not override section 1(a). If a particular fraud claim genuinely engages the national or public interest, the exclusion under section 1(a) would still apply. The three carve-outs in the proposed subsection mirror the *Ayyasamy* and *Rashid Raza* tests and ensure that genuinely criminal fraud, fraud directed at the arbitration agreement itself, and fraud with public implications remain with the courts. Civil fraud arising in commercial dealings between private parties, by contrast, is brought within the scope of the Act.

The Indian Supreme Court's approach, while developed in a different legal context, is instructive on why this distinction matters. In *Ayyasamy*, the Court drew a distinction between "mere allegations of fraud" which touch upon "the internal affairs of the party inter se" and "serious allegations of fraud which make a virtual case of criminal offence".[94] The former category, the Court held, is arbitrable. The latter is not. In *Rashid Raza*, the Court refined this into a two-part test, asking whether the fraud alleged permeates the entire contract and the arbitration agreement, and whether the allegations have implications in the public domain.[95] The practical effect of these decisions is that civil fraud within the contractual context is arbitrable in India, while fraud that is essentially criminal in character remains with the courts.

The distinction drawn by the Indian Supreme Court is consistent with the argument advanced in this Paper. This Paper does not argue that criminal fraud should be arbitrable. The State's prosecutorial prerogative is not in question. The argument is that allegations of fraud made by one commercial party against another, in the context of a contractual dispute, should be capable of determination by the arbitral tribunal the parties have chosen. The proposed amendment to Act 798 achieves this result without disturbing the existing public interest safeguard under section 1(a).

Parliament.

94 Ayyasamy (n 54) [25].

95 Rashid Raza (n 55) [4]–[5].

Proposal Two: Narrowing the Environmental Exclusion

The amendment to section 1(b) requires more care. The current provision excludes all matters "relating to the environment". The proposal is not to delete the exclusion entirely. There are environmental matters that should properly remain within the exclusive jurisdiction of the courts and regulatory bodies. What needs to change is the scope of the exclusion.

The exclusion should be narrowed to apply only to matters of environmental regulation and enforcement that engage the public regulatory power of the State. Disputes arising from contractual or investment relationships, even if they involve environmental obligations, should be arbitrable where the parties have agreed to arbitrate.

A possible formulation would be to amend section 1(b) as follows:

> "This Act applies to matters other than those that relate to ... (b) the enforcement of environmental regulations by a public authority or the prosecution of environmental offences but does not exclude disputes arising out of contractual or investment relationships in which environmental obligations form part of the subject matter of the agreement between the parties."[96]

The formulation achieves several things. First, it preserves the State's regulatory and prosecutorial functions. The Environmental Protection Authority, established under Act 1124, retains its enforcement powers. Prosecutions for environmental offences remain with the courts. Second, it removes the blanket exclusion that currently prevents the arbitration of commercial and investment disputes with environmental dimensions. Third, it aligns section 1(b) with the arbitration provisions already contained in the Minerals

96 As with n 93, this is proposed language for illustrative purposes.

and Mining Act (section 27) and the GIPC Act (section 33). The legislative incoherence identified in Part 3 would be resolved.

Proposal Three: Institutional Safeguards

Expanding the scope of arbitrability should not come at the expense of environmental protection or the public interest. Two safeguards should accompany the proposed amendments.

The first is a mandatory reporting obligation. Where, in the course of arbitral proceedings, evidence emerges of conduct that may constitute an environmental offence or a serious threat to public health or the environment, the arbitral tribunal should be required to notify the Environmental Protection Authority. This does not mean the tribunal must suspend proceedings or decline jurisdiction. It means the regulatory body is informed and can take whatever enforcement action it considers appropriate. The arbitral proceedings and the regulatory process can run in parallel. This safeguard ensures that the public interest in environmental protection is not sacrificed by the private resolution of the commercial dispute.

The second safeguard relates to the capacity of arbitral tribunals. If environmental disputes are to be arbitrated in Ghana, the Alternative Dispute Resolution Centre established under Part IV of Act 798 should develop a specialised panel of arbitrators with expertise in environmental law and the extractive sector.[97] The Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment contemplate the appointment of arbitrators with environmental expertise.[98] Ghana's ADR Centre should adopt a similar approach. This would address any concern about the capacity of arbitral tribunals to handle environmental disputes and would signal institutional readiness.

97 ADR Act (n 1) ss 114–124.
98 PCA Optional Rules (n 84).

Proposal Four: Harmonisation of Dispute Resolution Provisions

Beyond amending section 1, Parliament should consider a broader harmonisation exercise. Brako-Powers has argued that one of the principal weaknesses of Act 798 is the absence of coordination between its provisions and the arbitration provisions in sector-specific legislation, resulting in uncertainty and potential conflicts.[99] The arbitration provisions in the GIPC Act, the Minerals and Mining Act, the Petroleum Act, Act 798, and other legislation should be reviewed together to ensure consistency. At present, each statute contains its own dispute resolution provisions, and the interaction between these provisions and Act 798 is unclear. A harmonisation exercise would clarify which disputes are arbitrable under which framework, reduce the potential for conflicting outcomes, and provide commercial parties with a coherent set of rules.

The exercise should also consider whether Act 798 needs to be updated more broadly. The Act was enacted in 2010. International arbitration practice has evolved significantly since then. The UNCITRAL Model Law on International Commercial Arbitration, on which many modern arbitration statutes are based, has been revised.[100] Ghana's arbitration legislation should keep pace with these developments.

Conclusion

This paper has argued that the scope of arbitrability in Ghana is unduly narrow, both as a result of the statutory exclusions in section 1 of Act 798 and as a result of the Supreme Court's decision in *Heiland*. In the case of fraud, the Supreme Court created a judicial exclusion that finds no basis in the text of Act 798. Parliament

99 Brako-Powers (n 21) 12–15.

100 UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006).

did not include fraud among the excluded categories in section 1. The Court's reasoning, which characterises all fraud as connoting criminality, conflates civil and criminal fraud. It is inconsistent with the Court's own pro-arbitration jurisprudence in *Ex Parte Ghacem*. It is inconsistent with the statutory separability doctrine in section 3. It creates an incentive for tactical litigation by parties seeking to avoid their arbitration obligations. And it sends a discouraging signal to foreign investors who rely on arbitration for dispute resolution.

In environmental disputes, the blanket exclusion under section 1(b) is a relic of an earlier era. When Act 798 was enacted in 2010, Ghana's extractive sector was less developed, and the types of environmental disputes that arose in commercial and investment contexts were less prevalent. Today, the exclusion is at odds with the arbitration provisions in the Minerals and Mining Act, the Petroleum Act, and the GIPC Act. It is also at odds with international practice. Arbitral tribunals have demonstrated, repeatedly and in cases of considerable complexity, that they are capable of adjudicating environmental disputes competently and fairly. The practice of ICSID tribunals, UNCLOS tribunals, and tribunals constituted under the PCA's environmental rules supports this conclusion.

The proposed reforms are modest. They do not seek to remove all limitations on arbitrability. They do not seek to disturb the State's prosecutorial functions or its regulatory authority over environmental matters. They seek only to ensure that civil fraud arising from commercial dealings and commercial and investment disputes involving environmental obligations are capable of being resolved through the arbitral mechanism chosen by the parties. The reforms align Ghana's arbitration framework with the practical realities of its commercial landscape, with the arbitration provisions in its own sector-specific legislation, and with the international standards to which Ghana has committed itself.

A WOLF IN SHEEP'S CLOTHING: SECTION 47 OF GHANA'S LAND ACT, 2020 (ACT 1036)

Maame Yaa Akyiaa Mensa-Bonsu[1*]

Abstract

Section 47 of the Land Act, 2020 (Act 1036) was enacted to protect the rights of spouses by requiring the written consent of one spouse before the other may dispose of land acquired during marriage. This paper argues that the provision transforms a moral expectation of spousal consultation into a legal obligation that puts women at a severe disadvantage within patriarchal social structures characterised by unequal bargaining power, economic dependence, and gendered decision-making. The analysis further shows that section 47 exceeds the judicial principles established in Fynn, conflicts with the constitutional right to individual property ownership, and fails to account for practical realities such as domestic violence, child marriages, customary land practices, and polygamous marriages. Ultimately, the paper argues that section 47 is well-intentioned but flawed and reinforces existing gender inequalities under the guise of empowerment.

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Introduction

The Land Act, 2020 (Act 1036) was enacted to harmonise the different laws (including customary law) on land acquisition, registration, ownership and use. Prior to this Act, the law on land was found in various pieces of legislation and in judicial pronouncements on customary law.

In the face of Parliament's inexplicable inertia in regulating property matters between spouses, as required by article 22 of the Constitution of the Republic of Ghana, 1992,[2] the Supreme Court (SC) has had to fill in the very obvious gaps in determining rights to property claimed to be jointly owned by married parties. In *Boafo v Boafo,*[3] the SC set out its understanding of the "equitable" distribution of the property jointly acquired during marriage, in *Arthur (No 1) v Arthur (No 1)*[4] (hereinafter *Arthur No 1*), it established the rebuttable presumption of joint ownership of property bought during the subsistence of the marriage, and in the landmark case of *Mensah (Gladys) v Mensah (Stephen),*[5] the SC provided that contribution, which would entitle a wife to proprietary rights in property acquired during the subsistence of the marriage, no longer needed to be pecuniary only; it would consider domestic services, including childbearing and raising, among others, as sufficient evidence of contribution to the acquisition of marital property.

2 (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse, whether or not the spouse died having made a will.

(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article—

(a) spouses shall have equal access to property jointly acquired during marriage;

(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

3 *Boafo v Boafo* [2005–06] SCGLR 705.

4 *Arthur (No 1) v Arthur (No 1)* [2013–2014] 1SCGLR 543.

5 *Mensah (Gladys) v Mensah (Stephen)* [2012] 1SCGLR 391.

Of all the cases that have influenced the development of property law in Ghana, the one with perhaps the least expected consequences is *Fynn v Fynn & Osei*[6] (hereinafter *Fynn*). This case is, in large part, the reason for the enactment of section 47 of Act 1036, which mandates the written consent of a spouse to any transaction in respect of the other spouse's self-acquired property. It is this provision that I argue creates challenges for women's property rights in Ghana.

The paper is divided into three parts. In Section One, I discuss the socio-cultural context, highlighting the strict gender roles typically found in the family space and the customary code of conduct regulating the position of wives in the Ghanaian home. This sets the scene for the analysis in Part Three.

In Section Two, I set out the facts of *Fynn*, highlighting the judges' reasoning and the relevant discussions there. I also set out sections 38 and 47 of the Land Act, 2020 (Act 1036), and the discussions in the Memorandum to the Act, regarding the rationale underpinning those sections.

Secion Three is the critique, where I point out the problems of section 47 for women, within Ghana's socio-cultural environment. I discuss the value of the section, highlighting how it may serve a purpose (albeit a limited one). More relevantly, I demonstrate how, in using a single case as the principal factor for making a law, the lawmaker failed to appreciate the challenges it would create for women.

The socio-cultural context

The socio-cultural environment of Ghana is complex and diverse, but there are several key areas of convergence among the different communities that make up the people. For the purposes of this paper, the main areas that will be briefly highlighted are with respect

6 *Fynn v. Fynn and Another* [2013–2014) 1SCGLR 727.

to marriage, the gendered family roles and power dynamics within a marriage, the economic disparities between men and women, and the gendered ownership of property.[7]

Marriage is of fundamental importance in Ghana. In most societies, marriage entails status and respect[8] and provides financial security for the woman by way of land acquisition,[9] and the duty, by custom, of maintenance by the husband, which duty is passed on to his customary successor on his death.[10] There are broadly two types of marriage in Ghana: monogamous marriages and polygamous marriages,[11] specifically polygynous unions. There are three systems under which a person may be married: Customary Law, Islamic Law, and Christian and Civil marriages.[12] Unlike marriages celebrated under Part Three of the Marriages Act,[13] Ghanaian couples do not sign any documents when they get married by custom. Registration of such marriages is not compulsory, so it is very possible for there to be no documentary evidence of a marriage validly celebrated by custom. Customary law marriages (which constitute the majority of marriages in Ghana) are described as "potentially polygamous".[14] There is no limit to how many wives a man may marry by custom.[15] Islamic marriages are also potentially polygamous as a man is allowed to have up to four wives, subject to some conditions.[16]

7 At this time, the Ghanaian legal framework only expressly recognises men and women as the two forms of gender; hence, the paper will only focus on these two categories.

8 B Ahonsi & Others, Child marriage in Ghana: Evidence from a multi-method study. *BMC Women's Health*, 19(126), 1–15 (2019).

9 M Awumbila, "*Gender equality and poverty in Ghana: implications for poverty reduction strategies*". GeoJournal Vol. 67, No. 2 (2006), pp. 149–161.

10 Manu v Kuma [1963] 1 GLR 464.

11 *Appomasuo v Bremawuo* (1980) GLR 278.

12 These are regulated under Part I, Part II and Part III of the Marriages Act 1884–1985 respectively.

13 [1884–1985], formerly referred to as "Ordinance marriages".

14 MYA Mensa-Bonsu, Customary Marriage in Ghana, *JCL 18:1* (2023).

15 *Graham v Graham* [1965] GLR 407 (HC).

16 C Dowuona-Hammond, AB Aziz-Bamba & MA Mahamah, *The Regulation of Islamic Marriage and Divorce in Ghana: An inquiry into the legislative and policy roots of discrimination in an African polity in AF Hammond, FR Adegbite, MYA Mensa-Bonsu & P Batariwah (eds). Comparative Studies in Family Law: Marriage Systems in Selected African Countries*. Talbot Publishers, (2023).

Within the marriage setting, there are specific, gendered roles for the parties to play. There is asexual or gender division of labour,[17] whereby women play a bigger role in the domestic setting. It has been estimated that on average, women spend quadruple the time men spend on domestic care.[18] This has implications for their ability to work outside the home and to be paid for the work,[19] which then directly affects their economic standing relative to their husbands'. Largely, as a result of the financial inequalities, there are equally gendered power dynamics, and research confirms that men have decision-making power, while women generally are required to obey.[20] While these dynamics are generally applicable across the country, some societies have more inequalities than others. Women in patrilineal societies are noted to have less autonomy and decision-making power than their matrilineal counterparts.[21] Men's income is typically higher, therefore directly contributing to the subjugation of many wives in Ghana.

A curious thing about the gender dynamics in Ghana, at least, as observed from the case law, is that it is not only when the man has

17 R Atta-Ankomah, NA Asante-Poku, A Agyei-Holmes A. *"Gender and labour market transitions in a structurally changing economy: Empirical evidence from Ghana"* (2025). STEG Project Policy Brief available at <https://steg.cepr.org/publications/gender-and-labour-market-transitions-structurally-changing-economy-empirical-evidence> accessed 26 May 2025.

18 NS Owoo, MP Lambon-Quayefio. Mixed methods exploration of Ghanaian women's domestic work, childcare and effects on their mental health. PLoS One. 2021 Feb 2;16(2):e0245059. doi: 10.1371/journal.pone.0245059. PMID: 33529183; PMCID: PMC7853525.

19 Atta- Ankomah (n16), JE Yavorsky, CM Dush, SJ Schoppe-Sullivan. The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood. J Marriage Fam. 2015 Jun;77(3):662-679. doi: 10.1111/jomf.12189. Epub 28 April 2015. PMID: 26430282; PMCID: PMC4584401.

20 M Dako-Gyeke, & P Owusu. A Qualitative study exploring factors contributing to gender inequality in rural Ghana. *Mediterranean Journal of Social Sciences*, 4(1), 481–489 (2013).

21 E.g. JK Teye and Others, Negotiating Gender Roles and Power Relations Through the Management of International Migrant Remittances in a Patriarchal Community in Ghana. *Journal of Asian and African Studies*, *60*(1), 36-50 (2023). https://doi.org/10.1177/00219096231160695, JK Ganle and Others, How intra-familial decision-making affects women's access to, and use of maternal healthcare services in Ghana: a qualitative study. BMC Pregnancy & Childbirth, 15, 173. doi:10.1186/s12884-015-0590-4 (2015). BK Takyi, F Nii-Amoo Dodoo, Gender, Lineage, and Fertility-Related Outcomes in Ghana. *Journal of Marriage and Family*, 67(1), 251–257 (2005).

greater financial strength that they have greater decision-making powers about property acquired during the marriage. Culturally, women are socialised to depend on their husbands and to submit to them.[22] The pressures of the Ghanaian society often coerce women into rather unfortunate situations. For instance, it is reported that some women pay their salaries to their husbands for their husbands to determine how much "allowance" the wife can get.[23] As such, many wives, even when they are stronger financially, have registered their properties in the joint names of the couple, even where they are the owners, or worse, in the sole names of their husbands. Similarly, jointly acquired property is often registered in the names of the husbands alone.[24] This has far-reaching consequences as the woman, at the end of the marriage, must establish her entitlement to the property, with far more difficulty than the man typically has.

In respect of access to property, customary law does not know the community of property. By custom, marriage does not entail property.[25] Whether one belongs to a patrilineal society or to a matrilineal one, in neither society does marriage include, as part of the incidents thereof, proprietary interests in real property. In the past, the woman could work with her husband for forty years and, upon his death, be told that all that she did was what a "good wife" would do[26] or that it was her duty, by custom, to work with or for the man in his station in life. All properties that were acquired by the man from the proceeds of the couple's joint work were the man's self-acquired property.[27] Even when the courts were moved to be sympathetic, the

22 S Kyei, B Agorkpa, B Benewaa, NSN Sadique, *Marital power play in patriarchal society, a qualitative study of Ghanaian religious wives' perspectives*. *Discov glob soc* 2, 84 (2024). https://doi.org/10.1007/s44282-024-00110-3.

23 See e.g. *Anyetei v Anyetei* [2023] DLSC 16110, where she paid her salaries and pensions to her husband.

24 E.g. the wife in *Mensah (Gladys) v Mensah (Stephen),* registered all the properties in the joint names of the couple, rather than in her name, although it was she who acquired them.

25 Jeanmarie Fenrich and Tracy E Higgins, 'Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana' (2001) 25(2) *Fordham International Law Journal* 259, 261.

26 *Clerk v Clerk* [1981] GLR 583.

27 *Quartey v Martey* [1959] GLR 377–383, *Owusu v Nyarko* [1980] 1 GLR 428.

most they were willing to do was to give her a life interest,[28] even in her matrimonial home, which, of course, could not be passed down to her children or to her family. The only exception was where the wife could prove that she had contributed money, or something in money's worth by agreement of the parties, to the acquisition of the property.[29] Fortunately, the Supreme Court of Ghana has, in the last 25 years, made progressive strides away from the strict requirement of financial contribution as the basis of a wife's entitlement to a proprietary interest in the disputed property.[30] In the case where the husband predeceases the wife and dies intestate, the Intestate Succession Act, 1985 (PNDCL 111) has made substantial statutory incursions into the customary law framework, providing the spouse and children of the deceased the lion's share of the deceased's estate.

The quick overview shows that the Ghanaian society is not an egalitarian one, in that there is an imbalance of power between men and women, especially within the context of marriage. This disequilibrium is maintained by patriarchal structures that promote dominance by men in the form of gendered roles and the disproportionately held care burden, unequal access to well-remunerated work, and a general positioning of men as superior to women.

Legal framework and judicial analysis

This section sets out the case of *Fynn v Fynn & Osei* (hereinafter *Fynn*), and the statutory provision to be evaluated. A discussion of the case is important to ground the context and the basis for section

28 *In Re Kofi Antubam, (Decd). Quaico v Fosu* [1965] GLR 138–145, *Amissah-Abadoo v Abadoo* [1973] 1 GLR 490.

29 For a deeper and recent discussion of the development of the law on marital property, see MYA Barnes, Equality is Equity...or is it? A Critical Examination of the Equality Principle the Distribution of Marital Property, in C Dowuona-Hammond, A Hammond & R Atuguba, (eds), Ghana @ 60: Mobilising the Law for Ghana's Future, Wildy, Simmonds and Hill, (2020), and MYA Mensa-Bonsu & MAS Mensa-Bonsu, To win the Battle and the War, in J Jarpa Dawuni, *Gender, Judging and the Courts in Africa, Routledge*, (2021).

30 Ibid.

47 of the Land Act, 2020 (Act 1036). In *Fynn*, the 1st defendant (the husband) had been married to the appellant (the wife) for the sum of thirty years. The 1st defendant sold a store to the respondent. A couple of months thereafter, the appellant, claiming to be a joint owner of the store, sued to have the sale set aside and to repossess the property on the grounds that her consent and concurrence had not been secured before the sale. The 1st defendant admitted these facts, but the respondent challenged, among others, the claim of joint ownership and asserted that due diligence searches she had conducted prior to the purchase showed that the property was the exclusive property of the 1st defendant. She therefore pleaded in her defence that she was a bona fide purchaser for value without notice of the appellant's legal interest.

The case travelled from the High Court to the Supreme Court. All three courts held in favour of the respondent due to insufficient proof that the appellant was truly a joint owner, despite her husband, the 1st defendant, admitting as much. The SC held that, under the rules of procedure, having sued her husband, rather than calling him as a witness in proof of her claim of joint ownership, rendered his admission as binding only on him. The admission, however, could not be used as evidence in support of the claim against the respondent. The appellant lost the case due to poor lawyering, rather than judicial determination of her proprietary interest in the subject matter of the dispute, as she failed to adduce evidence in support of her claim of joint ownership to rebut the respondent's plea.

The SC further stated, *obiter,* that during the existence of the marriage, it was "most desirable that the couple pool their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular". However, the SC also reminded itself, that contrary to the assertion of the appellant, the decided cases on marital property "envisage situations where, within the union, parties

may still acquire property in their individual capacities, as indeed is their guaranteed fundamental rights, as clearly enshrined under article 18 of the Constitution of the Republic of Ghana, 1992, in which case they would also have the legal capacity to validly dispose of same by way of sale…"

The Court went on to sound a caution, at the end of the judgment, which appears to be what inspired the lawmakers and led to the creation of section 47.

Since the peace, tranquillity, harmony, stability and indeed the health and general wellbeing of any marriage union thrives best in the environment of mutual affection, trust and respect for each other as well as transparency; we think a spouse in such a case is under a moral obligation at any given time, (indeed it is most expedient and fair) to apprise the other spouse of the intention to acquire and dispose of self-acquired properties at all material times.[31]

In terms of the case itself, the SC stayed within the parameters it set for itself in *Arthur (No 1),* that it was only a presumption that property acquired during the subsistence of the marriage was marital property, which must be distributed equitably between the parties as required by article 22 of the Constitution of the Republic of Ghana, 1992. More relevantly, the SC was very clear that neither *Arthur (No 1)* nor *Fynn* was to be interpreted as having sought to override article 18, which guarantees an individual's right to own property by themselves, or together with others. The SC, aware that marriage did not exclude a person from owning property as an individual and therefore having the right to dispose of the same, only emphasised that this was a moral obligation, in the spirit of fairness. It did not purport to lay down a rule of law requiring spouses to seek the consent of the other for transactions involving properties that are individually owned.

31 Ibid, 10.

The Law

The Memorandum to the Land Act states, as the motivation and justification for sections 38 and 47, thus:

> In pursuance of article 22 of the Constitution of the Republic of Ghana, 1992, and international best practice, the Bill provides that property acquired for valuable consideration by spouses during marriage is presumed to be owned by the spouses as tenants in common, unless a contrary intention is expressed. The Bill also provides that property acquired in marriage is to be registered in the names of the spouses unless a contrary intention is expressed. The Bill further provides for the consent of the spouses in the disposition of such property. These provisions mainly reflect recent decisions of the Supreme Court, including *Boafo v Boafo* [2005–2006] SCGLR 705, *Mensah v Mensah* [2012] 1SCGLR 391, *Quartson v Quartson* [2012] SCGLR 1077; *Arthur (No 1) v Arthur (No 1)* [2013–2014] 1SCGLR 543 and *Fynn v Fynn & Anor* [2013–2014] 1SCGLR 727.

The Memorandum further states:

> Subclause (3) of clause 38 provides for gender empowerment by requiring that a conveyance of property for valuable consideration during marriage should be in the name of the spouses, unless a contrary intention is expressed. Furthermore, subclause (4) of clause 38 provides that where property is conveyed to only one spouse, that spouse should be presumed to be holding it in trust for the spouses, unless a contrary intention is expressed.

> …. The rights of spouses are further enhanced by clause 47, which prohibits the transfer of land or interest in land acquired for valuable consideration during marriage without the written consent of the other spouse, unless a contrary intention is expressed.

The overarching intention of the legislature is thus fairly clear: to ensure that one party to the marriage does not appropriate to themselves alone property that can properly be described as jointly acquired property, to the detriment (and on the blindside) of the other party.

On the back of this, as the Memorandum states, the Legislature framed section 47 of the Land Act, 2020 (Act 1036) as follows:

Restrictions on transfer of land by spouse

> 47. Except as provided in subsections (3) and (4) of section 38, in the absence of a written agreement to the contrary by the spouses in a marriage, a spouse shall not, in respect of land, right or interest in land acquired for valuable consideration during marriage,
>
> (a) sell, exchange, transfer, mortgage or lease the land, right or interest in the land,
>
> (b) enter into a contract for the sale, exchange, transfer, mortgage or lease of the land, right or interest in the land,
>
> (c) give away the land, right or interest in the land *inter vivos*, or
>
> (d) enter into any other transaction in relation to the land, right or interest in the land without

the written consent of the other spouse, which consent shall not be unreasonably withheld.

Section 38 (3) and (4), on which section 47 is built, provide:

(3) In a conveyance for valuable consideration of an interest in land **that is jointly acquired during the marriage**, the spouses shall be deemed to be parties to the conveyance, unless a contrary intention is expressed in the conveyance.

(4) Where, contrary to subsection (3), a conveyance is made to only one spouse, that spouse shall be presumed to be holding the land or interest in the land in trust for the spouses, unless a contrary intention is expressed in the conveyance.

What is wrong with section 47?

It must be stated at this point that the subsequent discussion does not focus on section 38 at all, although it has its own problems, especially as regards how it would operate in polygamous unions. The relevant sections reproduced above are only to show how the case law to which the Memorandum refers has been translated into legislation, and also because section 47 expressly refers to Section 38 (3) and (4) as the exceptions to the rule section 47 establishes.

Although a full discussion on the constitutional implications of section 47 as it engages with article 18 is beyond the scope of this paper, the general objection to section 47 is that it sits ill with article 18, which guarantees the right to own property individually or jointly with others. It is argued that in requiring that a party obtain the consent of the spouse before gifting, conveying, or otherwise

transferring their own self-acquired property, acquired during the subsistence of the marriage, section 47 is difficult to reconcile with the constitutional right of women to own property by themselves. Among the major incidents of ownership is the right to transfer, convey or otherwise dispose of the property as the owner wishes.[32] If one must seek the consent of another before disposing of their property, then one is not the owner of the property.

Section 47 does not reflect the decision in *Fynn*, contrary to the assertion in the Memorandum to the Act but exceeds it with far-reaching consequences. As aforementioned, *Arthur (No 1)* established the presumption that property acquired during the marriage is marital property jointly acquired by both parties, and therefore to be distributed equitably between them. The party asserting individual ownership must provide evidence to show that they are the sole owners of the property. In *Fynn*, the SC was careful to stress that the judicial intention was not to remove the individual right of ownership of property, as indeed it could not have done, being that it would have been in violation of article 18.[33] One of the key ways to rebut the presumption of marital property established by *Arthur (No1)* is to show that one exercised exclusive rights of an owner over the property, and the other party was deliberately excluded from, or participating in matters relating to the property (both in respect of obligations and benefits). Thus, if both parties must now mandatorily participate in the decision-making in respect of the property in such a material way as its disposition, transfer, gifting or other form of conveyance or dealing therein, it makes it nigh impossible to rebut the presumption of joint ownership. The conclusion is that section 47 raises the presumption from rebuttable to irrebuttable, such that once a person is married, they are unable to buy and hold property

32 *Awadali Iv Vrs Ghadawu Iv* [2018] GHASC 1 (24 January 2018), *Amodu Tijani v The Secretary,* Southern Nigeria [1921] 2 AC 399.

33 Constitution of the Republic of Ghana, 1992, art 18 (1): *Every person has the right to own property either alone or in association with others.*

in their own right. Section 47 has therefore unreasonably extended *Fynn*, thereby practically emptying the constitutional guarantee of individual ownership of property of its content, as relates to married persons acquiring property.

A second general observation is that section 47 is inconsistent even with expectations by custom. As aforementioned, one does not acquire an interest in property only because of one's marriage. This creation of joint property by reason of marriage is random and is discordant in those places where this customary law rule governs.[34] It is also problematic because the law is in conflict with the customary intelligence of the people whom this law is meant to govern, and who are intended to be the beneficiaries thereof. This provision is an example of some of the challenges of normative pluralism in Ghana, whereby the statutory framework introduces rules that are not only alien to the territory but also in direct conflict with the traditional norms and practices of the people.[35] The consequences of this conflict are that section 47 is purporting to create rights that do not exist, and encumber rights that should be freely exercised as protected by the Constitution of the Republic of Ghana, 1992. Hampering the full enjoyment of the right to individual ownership of property does not always work to the advantage of women, as the subsequent discussions seek to establish.

Section 47 has turned what the SC said was a moral obligation into a legal one with repercussions for many women. While it would certainly avoid the *Fynn* situation, it also creates complications for women in different ways. Section 47 always assumes that, wives would be the ones who need the protection it purports to offer, and the

34 This is a significant number of places, as most people are largely governed by customary law.

35 For a fuller discussion of the nature of legal pluralism in Ghana and its challenges. See AF Hammond, *Towards an inclusive vision of law reform and legal pluralism in Ghana* (T). University of British Columbia. (2016). Retrieved from <https://open.library.ubc.ca/collections/ubctheses/24/items/1.0308602 > accessed 25 May 2025, AF Hammond, FR Adegbite, MYA Mensa-Bonsu & P Batariwah (eds). *Comparative Studies in Family Law: Marriage Systems in Selected African Countries*. Talbot Publishers, (2023).

husbands would be the ones who would quietly sell their properties to the wife's detriment. It is true that in the Ghanaian environment, more men than women own properties.[36] It is also true that not as many women are represented in the registration of land data, because, as noted in Part 1, it is common practice for husbands to put the property exclusively in their names[37] and sometimes women are pressured to put their properties in the men's names,[38] so it is likely that it would be a husband rather than a wife doing things in secret with their properties. I concede that some women will benefit from section 47. The section is, however, not without its problems.

The rule is premised on the economic parity that would allow both partners to choose whether to give or withhold consent to transactions in respect of landed property acquired during marriage. As the socio-cultural dynamics play out, there is a gender division of labour and household roles[39] by which men provide financially and materially, and women provide care. As noted in Part I, men often have greater participation in the labour market, because of their light to non-existent domestic chore burden in the gendered societies of Ghana. This leads to men often having higher-income jobs, and more women taking more flexible (and often lower-paying) jobs[40] (where they do work outside the home), which allows them to combine that work with their caregiving duties. In this scenario of dependency, the women are unlikely to be able to refuse to sign the documents.

36 CD Deere & Others, "Property Rights and the Gender Distribution of Wealth in Ecuador, Ghana and India" J Econ Inequal (2013).

37 E.g. *Quartson v Quartson* [2012] SCGLR 1077], in *Domfe v Adu,* [1984–86] GLR 653, the woman was obviously the party who had put in the greater effort, but the man registered the business in his name alone.

38 In *Reindorf alias Sacker v Reindorf* [1974] 2 GLR 38–46, the properties were acquired exclusively by the woman, but she had it registered in the joint names of the couple.

39 R Abukari, RO & Odai, Gender and the Labour Market in Ghana: *The Relationship in Terms of the Family, the Market and the State.* Advances in Applied Sociology, 8, 285-294. (2018). https://doi.org/10.4236/aasoci.2018.84015

40 Owoo (n17), M Danquah, AM Iddrisu, EO Boakye, S Owusu, Do gender wage differences within households influence women's empowerment and welfare? Evidence from Ghana, *Journal of Economic Behaviour & Organisation*, Volume 188, 2021,916-932, https://doi.org/10.1016/j.jebo.2021.06.014.

This is because the threat of the husband withdrawing the financial provision is real for many wives who depend on their husbands for survival. Having significantly less finances than the husband directly impacts the decision-making capacity of the wife. The requirement of section 47 leaves women in those situations easily coerced by threats of withdrawing the financial provision both for her and the children. In an environment where fathers often neglect to maintain their families[41] and the larger part of the caseload of the Domestic Violence and Victims Support Unit (DOVVSU) and Department of Social Welfare are maintenance claims,[42] this fear is not fanciful. Men, on the other hand, would have more freedom to refuse consent, and the woman would be unable to do much about that for the same reason of financial inequality between the parties.

Even where there is no economic dependency of the kind and consequence described above, there remain socio-cultural obstacles to a power equilibrium in a marriage. As the socio-cultural milieu is patriarchal, there is an imbalance of power for women, and therefore far less room for autonomy for wives than there is for husbands.[43] The law presumes, contrary to the lived reality, that men and women are equal in marriage, and so each can require the other to consent in writing. This premise is palpably false. Given that decision-making within the marriage space is gendered, a husband can get his wife to consent in writing to the disposal of the property in the way the husband wishes, but this is not the same for a wife seeking her husband's consent for the same purpose. The gross power imbalance means that she cannot get her husband to consent to her dealing in the property she owns by herself, in the way she wishes

41 V Awortwe, H Bentum, E Cudjoe, and A Abdullah, A reason for the unmet needs of children in contact with social services? Non-resident fathers' perspectives on delinquent child maintenance claims, *Children and Youth Services Review, Volume 117*, 2020,105298, ISSN 0190-7409, available at https://doi.org/10.1016/j.childyouth.2020.105298.

42 Government of Ghana, Justice for Children Policy November 2015 at 5, available at <https://www.mogcsp.gov.gh/mdocs-posts/justice-for-children-policy/> accessed 13 May 2025.

43 Kyei (n20).

to.[44] Although some research has shown that wives use other means, like sex, exaggerated demonstrations of humility or submission, to get some power in their marriages, it remains true that culturally, men are positioned more powerfully in marriage than women are, and the efficacy of these inventive approaches is doubted. Ultimately, the imbalance is indelibly etched in Ghanaian society on account of widespread normalisation.

The problem is further exacerbated by the fact of important statistics about child marriages in Ghana. It is estimated that "4.4 and 5.8% of women aged 15–49 were married by exact age 15 in 2006 and 2011, respectively. In addition, among women aged 20–24, the proportion who married before exact age 18 was 22% in 2006 and 21% in 2011."[45] The husbands of these young girls are significantly older, contributing to the imbalance of power and lack of autonomy of women in marriages. Child marriages have been linked to domestic violence,[46] and lack of sexual and physical autonomy,[47] as well as less participation in socio-economic life.[48] The Parliament of Ghana, through section 47, has thus simultaneously provided husbands with an extra level of state-sanctioned participation in the economic assets of marriage, while denying wives that same benefit.

Closely related to this is the issue of the relative levels of education between men and women in Ghana. Statistics show that early

44 . S Kyei, B Agorkpa, B Benewaa, NSN Sadique, Marital power play in patriarchal society, a qualitative study of Ghanaian religious wives' perspectives. *Discov glob soc* 2, 84 (2024). https://doi.org/10.1007/s44282-024-00110-3.

45 Ahonsi (n 13).

46 E Tenkorang, Explaining the links between child marriage and intimate partner violence: Evidence from Ghana *Child Abuse & Neglect* Vol 89, 48-57, March 2019

47 E Budu and Others, Child Marriage and Sexual Autonomy among Women in Sub-Saharan Africa: Evidence from 31 Demographic and Health Surveys. Int J Environ Res Public Health. 2021 Apr 3;18(7):3754. doi: 10.3390/ijerph18073754. PMID: 33916845; PMCID.

48 MN Khan and Others, Exploring the impact of perceived early marriage on women's education and employment in Bangladesh through a mixed-methods study. Sci Rep. 2024 Sep 17;14(1):21683. doi: 10.1038/s41598-024-73137-w. PMID: 39289504; PMCID: PMC11408660.

marriage significantly interferes with the education of females.[49] Additionally, more boys than girls are educated, especially in areas and within families where resources are limited,[50] because boys are given priority over girls in respect of formal education.[51] While this may change with the provision of free education up to senior high school,[52] as it stands now, it is more likely that men will be better able to understand the legal implications of the document they are signing than women are.[53] The consequence of this is that the husband, more than the wife, is likely to understand better the documents evidencing the proposed transaction and the consequences thereof prior to giving consent. This means more women than men will have to go through litigation to prove that they had not understood the document purporting to evidence her consent for the disputed transaction, where, for example, contrary to the law, there had been no interpretation in a language she understood, and the document was written in English.

If one considers that men have more income-disposing power than women, the issue of wives having to engage more frequently in litigation to nullify a purported consent from them is more concerning. The requirement of written consent of a spouse would mean that it would be easier for the husband, who has more money, to hire lawyers and engage in litigation to have the conveyance nullified

49 JG Ampiah, C Adu-Yeboah. Mapping the incidence of school dropouts: a case study of communities in northern Ghana. Comp Educ. 2009; 45:219–32.

50 Ahonsi & Others, (26).

51 J Nordensvard, Gender and education policy in Ghana: The impact of informal citizenship and informal labour markets on the formal education of girls, Women's Studies International Forum, Volume 47, Part B, 2014, 278-286, ISSN 0277-5395, https://doi.org/10.1016/j.wsif.2013.12.010.

52 A study has shown this to be too optimistic, as girl-children's education is still being subordinated to the education boys. See P Nartey, OS Bahar, P Nabunya, A Review of the Cultural Gender Norms Contributing to Gender Inequality in Ghana: An Ecological Systems Perspective. J Int Womens Stud. 2023 Oct;25(7):14. PMID: 38736590; PMCID: PMC11086636.

53 In *Domfe v Adu* for example, due to illiteracy, the wife had no way of knowing the nature of a document her husband brought for her to thumbprint. She believed him when he said it was for a joint account. She also found that he had registered the business for which she solely provided the initial capital, and which they jointly run, in his name only. But for the clear evidence that the husband had been indigent and the woman a successful trader when they first met, he may have succeeded in cheating her out of her rightful share of the property.

(assuming that is the consequence of not obtaining his consent as the spouse), than it would be for a wife to do. The effect of this, then, is to create greater statutory protections for men than for men, contrary to the stated intentions of the legislature in the Memorandum to the Land Act.

Another important issue that the lawmakers failed to consider is the prevalence of domestic violence and how crucial it is that women have the ability to easily access funds with which they can escape an abusive marriage. The statistics about the number of women living in abusive conditions are alarming, with some estimating it to be as high as 1 in 3 Ghanaian women having experienced some form of domestic violence.[54] The socio-cultural structures provide support to and condone domestic violence against women in marriage.[55] For a woman in an abusive marriage, the ability to freely (and secretly) dispose of an asset enables her to be financially capable of removing herself from the abusive home environment. This ability has now become encumbered by this requirement to seek the consent of the spouse, who is the very person from whose clutches she is trying to escape. Where the domestic violence is economic, she should have as many options as possible, to be able to be more financially independent, including the option to sell her property that was acquired during the subsistence of the marriage, without having to request the consent of the abusive husband. A man who deliberately withholds financial support as a means of ensuring control and dominance[56] is not one who is likely to support his wife to become financially independent of him.

54 N Cantalupo, S Shin, K Park, LV Martin, Domestic Violence in Ghana: The Open Secret, *The Georgetown Journal of Gender and the Law* Vol. VII: 531, 535.

55 Research shows that it is not only tolerated that a man beat his wife, but considered a socially acceptable practice, as a way of disciplining the woman. See KS Dickson, EK Ameyaw, EKM Darteh. *Understanding the endorsement of wife beating in Ghana: evidence of the 2014 Ghana demographic and health survey. BMC Women's Health* 20, 25 (2020). https://doi.org/10.1186/s12905-020-00897-8.

56 Some researchers on IPV in Ghana have observed that at the core of domestic violence is power and control. See Owusu DA *Mute in Pain: The power of Silence in triggering Domestic violence in Ghana.* Social Alternatives Vol. 35 No 1, 2016 https://socialalternatives.com/wp-content/uploads/2021/02/Owusu-SOC_ALT_Vol-35_1.pdf

Again, if the woman cannot part with possession of the property by any means without the consent of the husband, while she is alive, can she devise that property in a will? If the woman cannot dispose of the property by way of a gift *inter vivos*, without her husband's written consent, does it not a fortiori apply to gifting it by testamentary disposition? It is inconsistent with the law on wills and ownership of property that before a person can will what they own, they must seek the consent of their husband. This creates more problems for women, as intergenerational wealth creation by women in Ghana has historically been a challenge. As mentioned in Part 1, customary law, as declared by the courts, had the effect of creating a "feudal" system within the marriage whereby the wife laboured all her life, and the husband enjoyed the benefits of said labour exclusively, as she acquired no interest in any property bought by her husband through their combined efforts. This position contributed to the poverty of women, as they acquired nothing by their labour. They were also not able to pass anything down to their children either. This is particularly problematic in the matrilineal societies, as children belong to their mother's line, and can only inherit from their mother and her brothers. If the mother had nothing, then she could also pass nothing on to her children. While things have improved for women, and by extension, their children, Section 47 is an unnecessary fetter on her testamentary right to dispose of her property as she sees fit.

Relatedly, patrilineal women generally must have a male reference before they can access land—that is, they can access land only through either a male relation or through a husband.[57] Even among matrilineal societies, land is still heavily concentrated in the hands of the males.[58] Discriminatory practices in respect of land acquisition in Ghana are well-documented.[59] For this reason, the Land Act expressly prohibits discriminatory attitudes and practices in respect

57 Fenrich and Higgins (n 123) 261.
58 Ibid
59 Ibid

of women's ownership of land.[60] It is argued that the requirement for a spouse's consent is a subtle way of reinforcing and perpetuating the fact that men are constantly in control of women's access to land. Section 47 puts yet another male referent to women's right of control of their land. In effect, there are male-referent barriers to women's participation at every point in the process of ownership, access to, and disposition of land.

Another observation is with respect to polygamous unions, which, as stated above, are legal in Ghana. As the society is polygynous, it is clear that it is the man whose consent is required when it is a wife seeking to undertake one of the stated transactions in respect of her property. It is, however, not clear when it is a husband who is selling or in some way conveying his property, whether each wife has to consent before he can dispose of the property, whether one wife's consent suffices, and if so, which wife would have the priority in this regard. The rules on the place of wives in polygamous unions differ from society to society. If each wife must consent to the conveyance of the property, what are the implications, if, for example, the property is being sold to care for one wife's children or her cancer treatment? Given the amount of competition (often unhealthy) and rivalry that exists in polygamous unions, among the wives, there is no reason not to imagine that some wives may not be willing to consent to such a transaction.

Further, Customary law does not know writing.[61] The law's requirement for consent to be in writing is yet another consequence

60 Land Act, 2020 (Act 1036), s 11 provides as follows:

A decision or practice in respect of land under customary tenure, whether the land is individually or communally held shall be in accordance with the customs, traditions and practices of the community concerned but a decision or practice which discriminates on grounds of:

(a) place of origin, ethnic origin, political opinions, colour, gender, occupation, religion or creed,

(b) disability, or

(c) social or economic status, is void.

61 *FKA Company Ltd v. Effah Sarkodie* [2008] DLSC2457.

of legal pluralism, which conflicts with the realities of the people. More crucially, the courts have consistently held that the ordinary incidents of commerce do not apply to marriage.[62] As a result, wives have been able to successfully maintain an action for equitable distribution of property, and prove, in the absence of documentary evidence or evidence of mathematical exactness, that the disputed property was jointly acquired.[63] It is thus hard to see, assuming (without admitting) that it was not objectionable to require consent by the husband, for the wife to transact in respect of her own property, why such consent must be in writing. In the absence of written consent, it should be possible to establish that the woman's interest was not catered for in the disposition of the property, or that the consent was not given at all. It is unusual for couples to keep written records of transactions and agreements between them, as the courts have repeatedly acknowledged.[64] As outlined in Part 1, customary marriages are not evidenced by any form of writing. Even for such an important event, with a complex framework like marriage, writing is not required. Why should a couple be able to enter into a marriage union, with all its implications and complexities, orally, but not be able to agree to sell property orally?

Finally, although the consent for the sale or other form of conveyance is not to be unreasonably withheld, there is no guidance as to what amounts to consent being "unreasonably withheld" within the meaning of the Land Act.[65] There is also no indication as to what must be done if the consent is, in fact, unreasonably withheld. Many questions arise from this lack of clarity. Can a wife go ahead and override her husband's disapproval to dispose of the property? If she does, what are the consequences for her as regards the proceeds

62 *Abebreseh v Kaah* [1976]2 GLR 46–62, *Mensah v Mensah*, [1998–99] SCGLR 350.

63 Ibid.

64 See e.g. *Quartson v Quartson*.

65 In the Children's Act, 1998 (Act 560), s 68(3), consent to adoption is deemed unreasonably withheld if the consent is withdrawn only on the grounds that the intended adopter's identity is not known.

of the sale or other benefit of the transaction? If the consent is not found to be unreasonably withheld, does it entitle the husband to any part of the profits from the transaction? Does the absence of consent make the sale void or voidable? Will she require a court declaration that the consent being withheld is unreasonable?[66] If so, what would the implications be for her marriage if she were to sue for such a declaration? These are questions that the law does not answer, but which are likely to weigh on the woman's mind and dissuade her from pursuing a transaction over which her husband has denied consent. This inevitably leads to men dominating decision-making in this area even more.

Conclusion

Section 47 does not solve the problem it purported to; it actually complicates the situation more. By enacting a law based on a heavy reliance on one case, the law has developed a framework that identifies only one kind of woman, excluding others to their detriment. Section 47 does not consider the broader implications of restricting the right to dispose of one's self-acquired property, as it does, looking only very narrowly at the particular case on which it was built. It did not consider how many women would be excluded by the writing requirement, or how more men than women would get the benefit of the provision. Section 47 proceeds from the very false premise of an egalitarian society, which Ghana is not. It therefore ignores the very real challenges of the average wife, privileging highly educated, financially well-positioned women over the average woman in decision-making over the woman's own properties.

Section 47 presents a challenge to the constitutional guarantee in article 18 of the Constitution of the Republic of Ghana, 1992. It

66 In the Matrimonial Causes Act, 1971 (Act 367), the Court can override a spouse's refusal to consent to divorce where they have lived apart and not in amity for a continuous period of two years.

does not even accurately reflect the cases on which the legislature purportedly based the law. It gives statutory backing to male dominance in decision-making within the family in respect of property, a dominance which hitherto existed only by reason of the socio-cultural norms.

All the above point to the fact that section 47 of the Land Act, 2020 (Act 1036) is a patriarchy-supporting structure that is masked under the rhetoric of gender empowerment. Had the language of section 47 been limited to jointly acquired property, as registration of property under section 38 is so limited, there would be no problem with requiring the other party's consent before disposing of the property. Such a requirement is in line with all rules on jointly acquired property. However, as it is not so narrow, section 47 impinges on women's rights, allowing the dominance of men in property matters (even in respect of properties the men do not own), yet is disguised in justifications that purport to be in support of women's rights.

BANKABLE POWER, UNBANKABLE POLITICS: POWER PURCHASE AGREEMENTS, DEMOCRATIC RISK, AND THE POLITICAL ECONOMY OF ENERGY FINANCE IN GHANA

Martin Waana-Ang[1*]

Abstract

This paper contends that in Ghana, Power purchase agreements (PPAs) operate as quasi-constitutional governance documents that allocate political risk, shape tariff trajectories, and bind future governments in legitimacy eroding ways. I argue that because bankability is achieved by shifting currency, offtake, and demand risk from private capital to the public through tariffs, guarantees, and termination payments, PPAs have not only created debt level crises that constrain government, they have also created a mismatch between our generation capacity and transmission infrastructure. I draw on Grossman and Hart's incomplete contract theory and, connecting it to Guasch et al's model of concession renegotiation, show that the frequent renegotiations of PPAs across Latin America and Africa is a quintessential and inherent part of the nature of project finance itself. Renegotiations of PPAs should thus be considered and expressly provided for in PPAs. Ghana ought to rethink her mechanisms for developing her electricity infrastructure.

1 * LLB (Ghana), LLM, (Yale), Doctoral student, Yale Law School. This paper was originally submitted in fulfilment of the requirements of the International Business Transactions Course. I am grateful to Professor Amy Chua for her invaluable guidance and delivery during the course of the semester. Nevertheless, all mistakes or errors remain solely my responsibility.

Introduction

Access to electricity, coupled with sustained industrialisation, constitutes a foundational pillar of modern economic development.[2] Reliable power underwrites not only the production of goods and services, but also the functioning of essential state institutions, including the maintenance of law and order, public security, and broader social stability.[3] From a developmental perspective, electricity serves as both a critical input and enabling infrastructure: it drives industrial activity, supports the expansion of economic systems, and facilitates the effective delivery of public services.[4] For this reason, universal access to reliable and affordable energy is embedded in the core of the United Nations Sustainable Development Goals.[5]

For Ghana, however, the aspiration to attain reliable electricity supply has remained, somewhat, elusive over the years despite moderate efforts by governments to increase generation capacity. Power instability has, over the years, constrained productive sectors, undermined industrial output, and imposed measurable costs on economic

2 Paul A David and Gavin Wright, 'General Purpose Technologies and Surges in Productivity: Historical Reflections on the Future of the ICT Revolution' in Paul A David and Mark Thomas (eds), *The Economic Future in Historical Perspective* (OUP 2003); Vivien Foster and Cecilia Briceño-Garmendia, *Africa's Infrastructure: A Time for Transformation* (World Bank 2010) 6–9, 177–82; World Bank, *World Development Report 1994: Infrastructure for Development* (World Bank 1994) 14–24.

3 World Bank, *Linking Up: Public-Private Partnerships in Power Transmission in Africa* (World Bank 2017) 1–3 (linking electricity reliability to the functioning of public services and institutional performance); UNDP, *Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (UNDP 2014) 8, 17–19, 117 (tracing the relationship between energy access, human security, and institutional resilience). For the connection between energy reliability and the operation of basic state functions in low- and middle-income jurisdictions, see Akshay Mathur and Vivien Foster, *Rethinking Power Sector Reform in the Developing World* (World Bank 2019) 1–4.

4 Mary Esi Eshun and Joe Amoako-Tuffour, 'A Review of the Trends in Ghana's Power Sector' (2016) 6 Energy, Sustainability & Society art 9, 2–3.

5 UNGA Res 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) para 7 and Goal 7 (establishing Sustainable Development Goal 7, 'Ensure access to affordable, reliable, sustainable and modern energy for all', and, in Target 7.1, committing States, by 2030, to 'ensure universal access to affordable, reliable and modern energy services'). For the indicator framework operationalising SDG 7, see UN ECOSOC, *Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development* UN Doc A/RES/71/313, Annex (6 July 2017) (as subsequently revised).

growth and national productivity.[6] Importantly, the persistence of these challenges is not a recent phenomenon.[7] Ghana's power sector difficulties are historically rooted, reflecting longstanding structural constraints in generation capacity, transmission infrastructure, and sectoral governance.[8]

This power sector crisis *became* pronounced between 2012 and 2016. During this period, Ghana experienced what came to be christened *dumsor*, meaning "off and on."[9] The phrase captured a condition of chronic electricity instability, marked by rolling blackouts that paralysed industrial production, shuttered factories, and forced millions of households to organise their daily lives around an unreliable grid.

Confronted with this crisis, successive governments turned urgently to private capital. Driven mostly by the imperative of political survival, an impulse that resonates with *Mushtaq Khan's* theory of political settlements,[10] governments across the partisan divide

6 Eshun and Amoako-Tuffour (n 3) 4 (citing Institute of Statistical, Social and Economic Research (ISSER) estimates that Ghana lost between US$320 million and US$924 million per annum in productivity and economic growth as a result of the energy crisis); Ama Baafra Abeberese, Charles Godfred Ackah and Patrick Opoku Asuming, 'Productivity Losses and Firm Responses to Electricity Shortages: Evidence from Ghana' (2021) 35 World Bank Economic Review 1; World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (World Bank 2020) 31.

7 Ghana experienced its first power crisis in 1983. This was mainly caused by drought due to unpredictable rainfall patterns. This resulted in low levels of water that hampered the generation of hydroelectric power from the Akosombo Dam. In response, power supply to consumers was curtailed. This crisis reoccurred in 1997–1998 and in 2007–2008, all driven by droughts. The latest electricity crisis started in 2012 and lasted until 2015. It resurfaced in 2022 and has persisted until present.

8 Eshun and Amoako-Tuffour (n 3) 5–9.

9 For accounts of the dumsor crisis and its periodisation, see Ishmael Ackah, Katie Auth, John Kwakye and Todd Moss, *A Case Study of Ghana's Power Purchase Agreements* (Energy for Growth Hub 2021) 1, 4 <https://energyforgrowth.org/wp-content/uploads/2021/03/A-Case-Study-of-Ghanas-Power-Purchase-Agreements.pdf> accessed 1 May 2026; Samuel Asumadu Sarkodie, 'Lessons to Be Learnt from Ghana's Excess Electricity Shambles' *GhanaWeb* (5 August 2019).

10 Mushtaq H Khan, *Political Settlements and the Governance of Growth-Enhancing Institutions* (SOAS Research Online, Working Paper 2010) 4–6 <https://eprints.soas.ac.uk/9968/> accessed 1 May 2026; see also Mushtaq H Khan, 'Political Settlements and the Analysis of Institutions' (2018) 117 African Affairs 636. Briefly, Khan's theory holds that the durability of institutions depends less on their formal design than on whether they are compatible with the

entered into a proliferation of power purchase agreements (PPAs) with independent power producers (IPPs), emergency power providers, and floating power-plant operators.[11] These arrangements were animated, at least in their immediate conception, by the urgent need to restore electricity supply, stabilise economic activity, and reestablish public confidence in the state's capacity to govern the energy sector.[12][13]

But what emerged from this rapid resort to private contracting was economically disastrous. Ghana accumulated a dense portfolio of thirty-two PPAs; many negotiated through unsolicited proposals rather than competitive procurement and structured predominantly on take-or-pay terms that insulated investors from demand risk.[14]

By 2019, the fiscal consequences of Ghana's contracting approach had already begun to crystallise at the highest levels of government. Presenting the mid-year budget review, the then Minister of Finance, Mr. Ken Ofori-Atta, lamented the mounting legacy debt in the energy sector, attributing a substantial portion, then estimated at approximately US$1 billion, to obligations arising from unsolicited PPAs executed during the *dumsor* era.[15] The Minister outlined a series

underlying distribution of power among contending elites and organised groups (the 'political settlement'). On this account, governments facing a fragile settlement adopt policies that secure short-term political survival—here, the rapid contracting of emergency generation capacity—even where such policies impose substantial long-term fiscal costs, because the immediate imperative of maintaining the ruling coalition's hold on power dominates the calculus.

11 Ackah and others (n 8).

12 ibid.

13 The urgency of the *dumsor* crisis operated as a species of economic duress on the public side of the bargain: confronted with rolling blackouts and the attendant political and economic costs, government negotiators bargained from a position of acute weakness, with little time for due diligence, competitive tendering, or value-for-money scrutiny. This asymmetry of urgency predictably skewed the resulting contracts in the investors' favor, through inflated capacity charges, take-or-pay terms, and sovereign-backed guarantees, and helps explain why emergency PPAs concluded under crisis conditions tend to embed terms that successor governments later find intolerable. The point is not that such contracts are voidable for duress in the doctrinal sense, but that the conditions of their formation systematically degrade the quality of the bargain the state is able to strike.

14 ibid.

15 Ministry of Finance, *2019 Mid-Year Fiscal Policy Review and Supplementary Estimates* (29 July

of corrective measures aimed at stabilising the sector's finances.[16] Yet, notwithstanding these interventions, the trajectory of indebtedness has proven persistently upward rather than corrective.

By 2023, the scale of the problem had become even more pronounced. The Electricity Company of Ghana had accumulated approximately US$1.4 billion in arrears to IPPs.[17] In the same year, under the conditionalities attached to a US$3 billion Extended Credit Facility with the International Monetary Fund, the government committed to implementing quarterly cost-reflective tariff adjustments.[18] This policy shift revealed, in immediate and distributive terms, the cumulative burden of these contractual arrangements, effectively transmitting the costs of past procurement decisions to ordinary consumers.

In 2025, the Minister of Finance, Dr. Cassiel Ato Forson, presenting the 2025 budget to parliament, noted that the current legacy debt in the energy sector stands at about $1.73 billion.[19] While the minister announced that about $1.47 billion had been paid, recent research indicates that about $707 million of the legacy debt remains outstanding.[20] This is in addition to a projected shortfall in the energy sector, estimated at $12.5 billion for the period of 2023–2026.[21]

The current energy crisis did not, however, arise in a vacuum. Ghana's power sector has long been shaped by structural fragilities. While the

2019) 31–35 <https://www.mofep.gov.gh> accessed 1 May 2026.

16 Some of these measures included the introduction of the energy sector levy, renegotiation of existing PPAs, and the issuance of energy sector bonds, among others.

17 World Bank, *Implementation Completion and Results Report: Ghana Energy Sector Transformation Initiative Project* (Report No ICR00091, 2025) 15 (reporting US$1,624 million in legacy energy-sector debt as of end-2022).

18 IMF, 'IMF Executive Board Approves US$3 Billion Extended Credit Facility Arrangement for Ghana' (Press Release No 23/151, 17 May 2023) <https://www.imf.org/en/news/articles/2023/05/17/pr23151-ghana-imf-executive-board-approves-extended-credit-facility-arrangement-for-ghana> accessed 1 May 2026.

19 Ministry of Finance (Ghana), *The Budget Statement and Economic Policy of the Government of Ghana for the 2025 Financial Year* (11 March 2025) 20.

20 ibid.

21 ibid.

Akosombo hydropower system, commissioned in 1965, provided the backbone for early electrification,[22] generation and transmission infrastructure have not expanded in tandem with rapid demographic growth and industrialisation. For instance, electricity demand grew sharply, averaging over ten percent annually between 2007 and 2014, yet investment in grid capacity remained insufficient.[23] The 2012–2016 crisis, and subsequent episodes of instability, were thus not merely the product of exogenous shocks, such as fuel supply disruptions or hydrological variability, but reflected deeper patterns of institutional underinvestment and reactive policymaking.[24]

Indeed, the crisis-response dynamic itself has proven central to the problem. Periods of acute shortage have propelled governments into emergency procurement, often bypassing competitive processes and long-term planning considerations.[25] The result has been a contracting model that prioritises speed and investor assurance over systemic coherence.[26] In this respect, PPAs in Ghana have functioned less as instruments of coordinated sectoral development and more as mechanisms for crisis containment; mechanisms that, paradoxically, generate new forms of long-term vulnerability and constraints for the government.[27]

This vulnerability is compounded by a broader structural feature of Ghana's electricity markets: the imbalance between investment in generation and investment in transmission infrastructure. Research

22 Stephan F Miescher, 'Ghana's Akosombo Dam, Volta Lake Fisheries & Climate Change' (2021) 150 Daedalus 124, 124–25; *see also* Stephan F Miescher, *A Dam for Africa: Akosombo Stories from Ghana* (Indiana UP 2022).

23 Eshun and Amoako-Tuffour (n 3).

24 Foster and Briceño-Garmendia (n 1) 5–7.

25 See Barnaby Joseph Dye, 'How Costly Political Realities Undercut Ghana's Electricity Reforms' *The Conversation* (25 July 2022) <https://theconversation.com/how-costly-political-realities-undercut-ghanas-electricity-reforms-186148> accessed 1 May 2026 (analysing how electoral pressures in 2016 propelled the signing of thirty-two private generation contracts in disregard of expert and regulatory planning).

26 ibid.

27 Samuel Asumadu Sarkodie, 'Lessons to Be Learnt from Ghana's Excess Electricity Shambles' *The Conversation* (5 August 2019) <https://theconversation.com/lessons-to-be-learnt-from-ghanas-excess-electricity-shambles-121257> accessed 1 May 2026.

has shown that private capital has often flowed into generation assets, which can be contractually ring-fenced, while transmission networks, less amenable to project finance structures, remain underdeveloped.[28] What follows from this, then, is a misalignment in Ghana's energy sector: capacity is built but cannot be fully dispatched; governments incur payment obligations for unused electricity; and contractual provisions such as take-or-pay clauses[29] reduce incentives to address the underlying infrastructural constraint.[30]

PPAs have, accordingly, become the legal avenue through which private investment is rendered indifferent to public system fragility. Yet, even as the economic and distributive consequences of these arrangements have become increasingly salient, the contracts themselves remain largely insulated from meaningful public scrutiny.[31]

Accordingly, in this paper, I will advance three principal claims. First, I argue that PPAs in Ghana function not merely as commercial contracts, but as *quasi-constitutional* instruments of economic governance (I use *quasi-constitutional* to mean contractual arrangements that bind successor governments, allocate residual control rights over politically salient policy domains, and operate as institutionally entrenched constraints on democratic revision). Second, the tension between bankability and democratic legitimacy, I will argue, is not uniquely Ghanaian but reflects a broader structural feature of infrastructure finance in developing contexts.[32]

28 World Bank (n 2) 1–7, 12–18; Anton Eberhard, Katharine Gratwick, Elvira Morella and Pedro Antmann, *Independent Power Projects in Sub-Saharan Africa: Lessons from Five Key Countries* (World Bank 2016) xxiii–xxv.

29 A take-or-pay clause is a contractual provision under which the offtaker undertakes to pay for a specified quantity of contracted output (or capacity) whether or not it actually takes delivery, so that the obligation to pay is detached from actual consumption. Its function is to shift demand risk from the project company to the offtaker, thereby securing the stable revenue stream on which the project's lenders rely. The clause is discussed in detail in Part I.B.1 below.

30 Asumadu Sarkodie (n 25).

31 Ackah and others (n 8).

32 *See, generally,* Scott L Hoffman, *The Law and Business of International Project Finance* (3rd edn, CUP 2008); ER Yescombe, *Principles of Project Finance* (2nd edn, Academic Press 2014).

Third, I will argue that, to address these concerns, there is a need to rethink the legal architecture of PPAs and, more fundamentally, the regulatory policy of Ghana's electricity sector. Drawing on incomplete contracts theory[33] and the empirical literature on infrastructure concession renegotiation,[34] I propose a framework for PPA design that incorporates transparency, disciplined procurement, structured renegotiation, and more effective management of contingent liabilities. I also make the case for an epistemic shift towards an industrial policy framework regarding Ghana's electricity infrastructure development.

The paper proceeds in six Parts. Part I examines the architecture of bankability in project finance, focusing on take-or-pay commitments, limited recourse financing, and sovereign support mechanisms. Part II discusses the history of Ghana's PPA regime and the regulatory regime governing the sector. I also discuss the Ameri Energy and Karpowership arrangements, the dynamics of overcapacity, and the politics of tariff adjustment. Part III develops the theoretical framework of the paper, drawing on incomplete contracts' theory and the Guasch–Laffont–Straub literature on renegotiation.[35] Part IV suggests some solutions to addressing the current electricity crisis in Ghana. The last part concludes the paper.

33 *See* Oliver Hart, *Firms, Contracts, and Financial Structure* (OUP 1995); Sanford J Grossman and Oliver D Hart, 'The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration' (1986) 94 Journal of Political Economy 691; Oliver Hart and John Moore, 'Foundations of Incomplete Contracts' (1999) 66 Review of Economic Studies 115; see also Oliver Hart, 'Incomplete Contracts and Control' (2017) 107 American Economic Review 1731.

34 *See* J Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing It Right* (World Bank 2004) 11–32, 81–100; J Luis Guasch, Daniel Benitez, Irene Portabales and Lincoln Flor, *The Renegotiation of PPP Contracts: An Overview of Its Recent Evolution in Latin America* (OECD Discussion Paper No 2014-18, 2014).

35 J Luis Guasch, Jean-Jacques Laffont and Stéphane Straub, 'Renegotiation of Concession Contracts in Latin America: Evidence from the Water and Transport Sectors' (2008) 26 International Journal of Industrial Organization 421; J Luis Guasch, Jean-Jacques Laffont and Stéphane Straub, 'Renegotiation of Concession Contracts: A Theoretical Approach' (2006) 29 Review of Industrial Organization 55; see also Eduardo Engel, Ronald Fischer and Alexander Galetovic, *The Economics of Public-Private Partnerships: A Basic Guide* (CUP 2014) 121–58.

PART 1: THE ARCHITECTURE OF BANKABILITY IN POWER GENERATION PROJECTS

Project finance, limited recourse, and the single-purpose vehicle

Electricity projects, given their capital-intensive nature, require special forms of financing typical of those applicable to highways, railways, tunnels, airports, or telecommunications grid equipment.[36] Accordingly, for most power generation projects, project finance is the dominant mode of development.[37] But it is worth noting that the term is not amenable to a simple definition.[38] Be that as it may, project finance may be said to involves a complex web of relationships and actors, all of which are designed to ensure the project's success.[39] The project is normally operated through a special or single-purpose vehicle(SPV), although, of course, the project sponsor is responsible for the development of the project to make it attractive to investors and lenders.[40]

Therefore, project finance is, in its technical description, a mode of investment organisation under which an SPV owns a single productive asset, borrows against the cash flows that the asset will generate, and provides recourse to its lenders limited to the asset itself and the revenue it produces.[41] The SPV is incorporated solely for the project and all contracts, transactions among others, related to the project are fronted through the SPV. The SPV does not, mostly, own any previous assets nor is it previously creditworthy. The assets of the SPV, for example, in energy infrastructure is the PPA with the

36 Farid Mohamadi, *Introduction to Project Finance in Renewable Energy Infrastructure: Including Public-Private Investments and Non-Mature Markets* (Springer Nature Switzerland AG 2021) 35.
37 ibid.
38 See Scott L Hoffman, 'A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations' (1989) 45 The Business Lawyer 181, 181–83.
39 ibid; Andrew Fight (ed), *Introduction to Project Finance* (Butterworth-Heinemann 2006) 8–10.
40 ER Yescombe, *Principles of Project Finance* (Academic Press 2002) 1.
41 John Dewar and others, *International Project Finance: Law and Practice* (2nd edn, OUP 2015) 3–4; see also Phillip Fletcher, 'Rules for Negotiating Project Finance Deals' (2005) IFLR 1.

offtaker.[42] It also includes licenses and other concession agreements executed to ensure the smooth execution of the project.

Projects invariably face risks; and like all commercial endeavors, are exposed to a wide range of political, social, environmental, and other regulatory challenges that potentially impact the viability of the project.[43] This is mostly because the project sponsor has no direct obligation to repay the debt if the cash flows fall short. Thus, the contractual framework allocating risks among participants becomes the foundation of the entire transaction.[44] While some risks can be insured, structured, or contracted away, others are inherent in the nature of the project itself, since the project company is mostly new, thinly capitalised, and has no creditworthiness.[45] Indeed, Hoffman posits that 82% of project financings encounter trouble, making risk allocation essential.[46] Given the wide range of risks often considered, the nature of which differ depending on the nature of each project, it will be impossible to dovetail all here. The most important consideration, for present purposes, is the extent to which the project would be able to cover its fixed cost (i.e., debt service, equity return, and fixed operations and maintenance).[47]

The project's future cash flows serve as the basis and security for lenders to invest or otherwise lend money for the project's construction.[48] This is because the sponsors of the project would normally write the project off their balance sheet, which implies that the sponsors cannot be held liable for the debts of the project company.[49] This

42 Evangelos Gavriil, 'The Risks in Power Purchase Agreements (PPAs) for Utilities & Corporate Offtakers' (MSc thesis, University of Piraeus, Department of International and European Studies 2022) 43.

43 Dewar and others (n 38) 5.

44 Hoffman (n 35) 204–11.

45 Dewar and others (n 38) 5.

46 Hoffman (n 35) 193–203.

47 World Bank, 'Power Purchase Agreements (PPAs) and Energy Purchase Agreements (EPAs)' (Public-Private Partnership Legal Resource Center) <https://ppp.worldbank.org> accessed 1 May 2026.

48 ibid.

49 See, for example, Matt Bull, *Bankability in Highway PPP Projects* (Public-Private Infrastructure

kind of arrangement is usually designed through non-recourse or limited recourse agreements.[50] Whereas non-recourse agreements protects the project sponsor's assets for the debts and liabilities of the individual project, limited recourse allows some assets of the project sponsor to be used as security for the debts of the individual project.[51]

Investors and lenders will naturally be interested in the assets of the individual project, especially without any previous knowledge or records of the creditworthiness of the SPV. In this case, they are normally limited to the contracts the project company has signed, or the licenses, concessions, or other regulatory approvals for the individual projects.[52] In regulated industries, and particularly in the African context, the setting of consumer tariffs and the granting of regulatory approvals for electricity generation are highly politically salient and frequently subject to political manipulation.[53] Because of this volatility, project companies and their lenders rationally insist on contractual and institutional safeguards—sovereign guarantees, escrow arrangements, indexed tariff formulas, and stabilisation provisions—designed to preserve revenue certainty and sustain capital flows across political cycles, and resist the temptation of institutional intervention.[54]

Advisory Facility (PPIAF), World Bank Group 2015) <https://ppiaf.org> accessed 1 May 2026.

50 Dewar and others (n 38) 3–4.

51 ibid. That is, in non-recourse agreements, the project sponsor's assets are insulated or immune from liability and lenders cannot put a claim or charge on them as guarantee for repayment of their debts. Limited recourse, however, allows, in a limited sense, some assets of the project sponsor to be used as guarantee in this regard.

52 See, for example, Benjamin C Esty, *When Do Foreign Banks Finance Domestic Investment? New Evidence on the Importance of Legal and Financial Systems* (Harvard Business School, Working Paper, 19 December 2002) 2.

53 See Chris Trimble and others, *Financial Viability of Electricity Sectors in Sub-Saharan Africa: Quasi-Fiscal Deficits and Hidden Costs* (World Bank Policy Research Working Paper No 7788, 2016) 24–37 (documenting persistent below-cost-recovery tariff-setting across sub-Saharan Africa and tracing the pattern to the political costs of upward adjustment); Brian Levy and Pablo T Spiller, 'The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation' (1994) 10 Journal of Law, Economics & Organization 201, 202–05; see also Cyrille Ndayishimiye and others, 'Power Generation Overcapacity in Selected Sub-Saharan African Countries: Political-Economic Drivers and Grid Infrastructure Challenges' (2025) 2–3 Frontiers in Energy Research art 1549844.

54 On the architecture of bankability and the role of sovereign and quasi-sovereign credit support,

Project finance has, despite the risks, emerged as the preferred structure for energy-sector investment in developing economies for reasons that are not difficult to elaborate. It enables host governments to avoid mobilising the substantial up-front capital that conventional public investment in generation infrastructure would require and, through the use of an SPV and limited-recourse lending, permits the resulting liabilities to remain off the sovereign balance sheet, at least under conventional public accounting conventions.[55] Although host governments are, in principle, capable of financing such projects directly, the scale of capital required, combined with sovereign debt constraints and the conditionalities attached to multilateral lending, has typically made direct public investment politically and fiscally unattractive.[56]

These technical preferences, however, did not emerge in a neutral policy environment. Following the end of the Cold War and the consolidation of what came to be known as the Washington Consensus, privatisation, deregulation, and private-sector participation in infrastructure became prescriptive components of development orthodoxy, propagated through the conditionalities of the International Monetary Fund, the World Bank, and bilateral development assistance.[57] For the energy sector, specifically, this shift translated into a sustained wave of unbundling, corporatisation, and private participation: between 1990 and 1999 alone, some 700

see Yescombe (n 29) 7–14, 173–96, 296–308; Hoffman (n 29) 4–9, 213–48.

55 See Nagla Nassar, 'Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective' (2000) 23 Fordham International Law Journal 60.

56 See Antonio Estache and Marianne Fay, *Current Debates on Infrastructure Policy* (World Bank Policy Research Working Paper No 4410, 2007) 20–22.

57 The canonical formulation of the Washington Consensus appears in John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990) 7. For the Consensus's evolution and its critics, *see* John Williamson, 'A Short History of the Washington Consensus' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (OUP 2008) 14; Joseph E Stiglitz, *Globalization and Its Discontents* (WW Norton 2002); Dani Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"' (2006) 44 Journal of Economic Literature 973.

energy projects involving private participation reached financial closure in developing countries, attracting close to US$190 billion in investment commitments.[58] Power generation, which in most developing economies had previously been the exclusive province of vertically integrated state utilities, was in this period progressively reconstituted as a domain of private contractual ordering.[59]

The governance character of project finance, in this regard, can be likened to Katharina Pistor's analysis in *The Code of Capital,* where she identifies the modular legal structures through which private-law instruments do constitutional-type work.[60] They are spearheaded by international organisations, institutions, or companies; protected by international economic law, and designed to withstand political pressure, while constraining or otherwise maneuvering against regulatory discretion.[61] Tim Büthe and Walter Mattli's work on private regulation addresses related dynamics in transnational contexts.[62] They argue that the privatisation of regulation generates serious legitimacy and distributive concerns. As I will show, the structure of project finance agreements within the African energy sector, particularly in Ghana, confirms this claim.

B. The PPA as a linchpin: take-or-pay, capacity charges, and hell-or-high-water

Hoffman describes PPAs as the linchpin of project finance in the energy sector.[63] This can also be classified as the off-take contract,

58 Ada Karina Izaguirre, *Private Participation in Energy* (World Bank, Public Policy for the Private Sector, Note No 208, May 2000) 1–4.

59 World Bank, *Reforming Power Markets in Developing Countries: What Have We Learned?* (World Bank 2006); Stephen Karekezi and John Kimani, 'Status of Power Sector Reform in Africa: Impact on the Poor' (2002) 30 Energy Policy 923.

60 See generally Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton UP 2019).

61 ibid.

62 Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton UP 2011).

63 Hoffman (n 29) 345–46.

which Yescombe describes as a contract under which the project company produces a product and sells it to the offtaker.[64] In the electricity sector, one of the principal mechanisms used to induce equity investors and lenders to support a power-generation project is a long-term commitment from the off-taker to purchase the project's output on terms designed to ensure revenue stability over the life of the financing.[65] While the project's contractual architecture typically comprises several interlocking instruments, including engineering, procurement, and construction (EPC) contracts, operations and maintenance (O&M) agreements, fuel-supply agreements, and direct agreements with lenders, for present purposes, the instrument of central interest is the power purchase agreement (PPA).[66]

A PPA is a long-term contract between the project company (as seller) and an off-taker, typically a state-owned utility enterprise, in jurisdictions where the electricity sector remains predominantly publicly owned, under which the offtaker undertakes to purchase the electricity generated by the project company at a pre-negotiated price.[67] Hoffman states that it is from the PPA that funds to defray the debts of operating costs and an equity return of the project

64 *See* Yescombe (n 29) 69. For some standard forms of Project Agreements and their legal framework, cf UNIDO, *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects* (UNIDO, Vienna 1996); UNECE, *Negotiation Platform for Public-Private Partnerships in Infrastructure Projects* (UNECE, Geneva 2000); UNCITRAL, *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (United Nations, New York 2001); UK Treasury Taskforce, *Standardisation of PFI Contracts* (Butterworths, London 1999).

65 *See* Yescombe (n 29); Hoffman (n 29) 323–26; Jeffrey Delmon, *Private Sector Investment in Infrastructure: Project Finance, PPP Projects and PPP Frameworks* (3rd edn, Wolters Kluwer 2015) 277–303.

66 On the typical project-finance contractual matrix, see Yescombe (n 28) 173–238 (cataloguing the EPC contract, O&M agreement, fuel-supply agreement, offtake contract, and direct agreement as the standard project-document suite); Hoffman (n 28) 213–48; Delmon (n 63) 21.

67 For a working definition of the PPA in the project-finance context, see World Bank (n 41) (defining the PPA as the primary contract between a typically state-owned offtaker and a privately-owned power producer, providing 'the primary revenue stream which underwrites the PPP project'); Yescombe (n 28) 538, 568; Eberhard and others (n 25) 47; see also Africa Legal Support Facility (ALSF), *Understanding Power Purchase Agreements* (African Legal Support Facility (ALSF) and US Department of Commerce, Commercial Law Development Program (CLDP), Version 1.3).

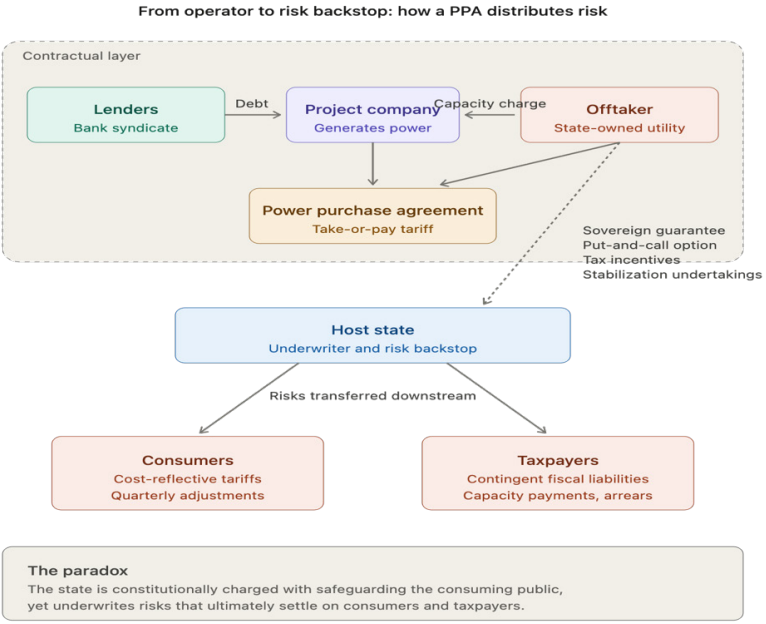
company are derived.[68] For this reason, the World Bank Group states that 'the structure and risk allocation regime under the PPA is central to the private sector participant's ability to raise finance for the project, recover its capital costs and earn a return on equity.'[69] This presupposes that the offtaker must be creditworthy to purchase the product and, correspondingly, pay the contract sum under the agreement.[70] If the offtaker is not creditworthy, the project company and lenders would want a sovereign guarantee from the government or multilateral entity before committing to sponsoring the project.[71]

In Ghana, while PPAs are either signed by the Electricity Company of Ghana (ECG) or the Volta River Authority (VRA), sovereign guarantees are normally provided by the government, including governmental institutions (such as the Ghana National Petroleum Authority), with implications for the state's fiscal coverage. These guarantees bind future governments who must commit to honor them. Accordingly, while PPAs are framed as contractual or private, they often depend heavily on state support, including sovereign guarantees, tax incentives, and regulatory commitments.[72] It follows, on this account, that the state does not withdraw; rather, it reconfigures its role from operator to risk backstop.[73] The paradox is that the state, as the constitutional representative of the consuming public, is formally charged with safeguarding the interests of the citizenry; yet PPAs and their associated sovereign-support instruments are calibrated, by the logic of bankability, to insulate private investors and their lenders from the very categories of risk that, in a publicly owned system, the state would otherwise absorb in its capacity as service provider. The consequence is that the risks

68 Hoffman (n 29) 345.
69 World Bank (n 44).
70 Hoffman (n 29) 346.
71 ibid.
72 *See* William M Stelwagon, 'Financing Private Energy Projects in the Third World' (1996) 37 Catholic Lawyer 45.
73 ibid; *see also* John G Manuel, 'Common Contractual Risk Allocations in International Power Projects' (1996) Columbia Business Law Review 37.

do not disappear; they are re-allocated, ultimately, to consumers (through cost-reflective tariffs) and to taxpayers.

Fig 1. Shows the operation of PPAs[74]



The most common clauses that characterise PPAs include *take-or-pay clauses*, limited recourse, and the logic of contractual risk transfer, hell-or-high-water obligations, force majeure, change in law, and the sovereign guarantee edifice, among others.

Take-or-pay obligations

The central revenue-certainty mechanism in PPAs is the take-or-pay provision.[75] Under a take-or-pay PPA, the offtaker commits to pay

74 Author's illustration.

75 Patrick J Ryan and Brian K Fife, 'Take-Or-Pay Contracts: Alive and Well in California' (1987)

for a specified quantity of electricity capacity (known as the tariff) whether or not it actually takes delivery of the electricity produced. The tariff is the most important component of the take-or-pay PPA.[76] In its conventional take-or-pay form, the offtaker's payment obligation is structured as a two-part tariff: a capacity charge, paid for the availability of the plant regardless of whether electricity is actually dispatched, and an energy charge, paid for kilowatt-hours actually delivered.[77]

The capacity charge enables the project company to service its debt and recover fixed costs even where, for reasons unrelated to the plant's performance, the offtaker does not in fact draw on the contracted output.[78] The energy charge relates to the production of the fuel generated that is actually delivered and utilised by the offtaker.[79] Thus, the base capacity charges components comprise (the project loan, interest on the loan, redemption and returns on equity, Fixed Operation and Management Cost, corporate taxes etc).[80] The energy charge, on the other hand, comprises (fuel, variable operation and management costs, cost for ancillary services, and cost for any force majeure event that the offtaker has agreed to take responsibility under the PPA).[81]

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19 Urban Lawyer 233; John R Nolan, '"Take-Or-Pay" Contracts: Are They Necessary for Municipal Project Financing?' (1983) 4 Municipal Finance Journal 111.

76 ALSF (n 64) 50.

77 On the two-part-tariff structure characteristic of capacity-based PPAs, *see* US Department of Energy, Office of Energy Efficiency & Renewable Energy, *Sample: 10 Important Features of Bankable Power Purchase Agreements for Renewable Energy Projects* (US DoE, n.d.) (defining take-or-pay as a tariff 'comprising a capacity charge (a fixed amount that is paid for available capacity, no dispatch required) and an output charge (an amount paid in respect of energy actually delivered)'); Stefano Gatti, *Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects* (3rd edn, Academic Press 2018) 66–70.

78 *See* Yescombe (n 29) 74–77; Hoffman (n 29) 325; *see also* Cyrille Ndayishimiye and others, 'Power Generation Overcapacity in Selected Sub-Saharan African Countries: Political-Economic Drivers and Grid Infrastructure Challenges' (2025) 13 Frontiers in Energy Research art 1549844.

79 ALSF (n 64) 54–55.

80 ibid.

81 ibid.

The logic behind take-or-pay clauses seems to be, as is the case with most project finance deals, that it allocates demand risk to the party better positioned to bear it. The SPA, it is assumed, cannot efficiently bear demand risk in a project-finance context because its debt-service obligations are fixed (principal and interest on dollar-denominated loans), and because it has no control over demand. The state, by contrast, can bear demand risk because it can adjust consumption patterns through tariff policy; it has access to multiple sources of revenue; and its obligations are expressed in a currency (the local currency) that the state itself can, at the margin, create. The premise is that the state's capacity to bear demand risk is greater than the SPA's even though this assumption is not a universal truth. For many African countries, the government is mostly already in debt, and so is the offtaker. With already huge debt burdens, the underlying effect is that these contractual obligations operate to add more to the public debt than alleviate it.

Hell-or-high-water clauses

The mechanics of revenue certainty are reinforced by what project-finance practice calls 'hell-or-high-water' clauses. These are provisions that obligate the offtaker to pay for capacity charges even if performance under the contract becomes materially more expensive or the purpose of the contract is substantially frustrated.[82] These clauses systematically exclude the defences that commercial contract law ordinarily makes available to a party facing unforeseen circumstances: frustration of purpose, commercial impracticability, force majeure (except where narrowly specified), and change-in-law (except where the change-in-law clause itself provides compensation).[83] The clauses' effect is to convert the contract into something closer to an unconditional payment obligation than to a conventional bilateral exchange.

82 *See* Yescombe (n 29) 28; Fight (n 36) 187.
83 Delmon (n 62) 603; Dewar and others (n 38) 491.

In ordinary commercial contract law, a party facing unforeseeable and fundamental changes in the circumstances of performance may invoke doctrines of frustration or impracticability to excuse performance.[84] The project-finance PPA drafting practice excludes those doctrines through clear contractual language.

The sovereign-guarantee backstop

Take-or-pay capacity charges and hell-or-high-water clauses produce revenue certainty at the contractual level, but they do not, necessarily, produce revenue certainty at the project-finance level. As noted earlier, the project's lenders require assurance that the capacity charges will actually be paid—that is, that the offtaker utility has the fiscal capacity to honor the commitments the contract specifies.

In the African context, the offtaker utility is mostly a state-owned distribution or single-buyer entity whose creditworthiness is marginal at best. Kenya Power and Lighting Company (KPLC), Nigeria's Nigerian Bulk Electricity Trading Plc (NBET), and Ghana's Electricity Company of Ghana (ECG) all operate with chronic revenue-collection challenges, heavy subsidy dependence, and accumulated arrears.[85] KPLC has reported sustained net losses and a negative working capital position for seven consecutive years, with customer-side arrears reaching approximately KSh 35 billion by mid-2023 and IPP arrears of comparable scale accruing in dollar-denominated obligations under foreign-currency-indexed PPAs.[86]

84 *See,* e.g, *Restatement (Second) of Contracts* ss 261, 265 (1981); UCC s 2-615 (1977); *Transatlantic Financing Corp v United States* 363 F 2d 312 (DC Cir 1966) (Wright J). For comparative treatment, see Larry A DiMatteo and Lucia Ostapenko, *International Sales Law: A Global Challenge* (CUP 2014).

85 Trimble (n 50); Eberhard (n 26).

86 On KPLC's financial position and IPP arrears, see Office of the Auditor-General of Kenya, *Report of the Auditor-General on the Kenya Power and Lighting Company PLC for the Year Ended 30 June 2023* (2024) (recording a seventh consecutive year of negative working capital, totalling approximately KSh 51 billion, and noting 'material uncertainty on the company's ability to meet its obligations as they fall due'); John Mutua, 'Kenya Power Customer Defaults Hit Sh35bn' *Business Daily Africa* (8 January 2024).

NBET, although established as a credit-enhanced bulk trader and capitalised through a partial risk guarantee from the World Bank, has never been adequately capitalised in practice; its monthly remittances to GenCos have rarely settled invoiced amounts in full, and aggregate technical, commercial, and collection losses across the Nigerian distribution segment have remained at approximately 40 percent.[87] The ECG, as discussed, had accumulated approximately US$1.4 billion in arrears to IPPs by 2023. The common structural feature underlying all three cases is that PPAs and gas-supply contracts are typically denominated in U.S. dollars, while consumer tariffs are collected in local currency at politically constrained levels. This, in essence, produces a structural mismatch that, absent sovereign credit support, renders the offtaker unbankable as a standalone counterparty. Given this scenario, without something more, project-finance lenders would not accept utility credit as the ultimate guarantor of capacity-charge payment. The "something more" is the sovereign backstop. It takes several forms.

Sovereign guarantee is a commitment by the central government that if the offtaker utility defaults on its payment obligations under the PPA, the central government will stand in its place. The guarantee is typically express, drafted into a separate "Government Consent and Support Agreement" or similar instrument, and includes specific provisions about notice, cure periods, and currency.[88]

A more sophisticated variant of a sovereign guarantee is the Put and Call Option Agreement (PCOA). Under a PCOA, the sovereign does not merely guarantee payment; it commits to a formula-based termination payment that accelerates decades of unpaid capacity charges into an immediate lump-sum obligation, in exchange for which the sovereign acquires ownership of the project. The

87 On NBET's structural under-capitalisation and the broader Nigerian distribution-side losses, see Odion Omonfoman, 'An Analysis of the Nigerian Bulk Electricity Trading Plc (NBET) Trading License' *BusinessDay* (17 September 2021).

88 For typical drafting, see ALSF (n 64).

termination formula is designed to make the lender whole on its outstanding debt and, depending on the specific drafting, to provide varying levels of return to the equity investor.

In some jurisdictions, particularly those with constitutional or statutory constraints on the issuance of formal sovereign guarantees, the sovereign backstop takes the form of a "letter of support" that expresses the government's commitment to stand behind the offtaker's obligations without formally assuming them. While the letter's legal status is contested in the literature; some tribunals and courts have treated such letters as binding, others as merely declaratory.[89] In any case, letters of support function economically as guarantees, even if their legal status is more ambiguous.

The cumulative effect of these instruments, as already noted, is to convert ordinary commercial-contract risks into fully backed sovereign obligations, with the fiscal consequences that follow.

On account of the foregoing, I argue that bankability in the contemporary African articulation is designed to achieve the systematic absorption of political and fiscal risk by the host state, its utility, and its taxpayers. This mechanism converts what would otherwise be commercial risks, borne by the investor and priced into the return, into public risks, borne by the state and paid for through tariffs, taxes, or (when those prove inadequate) sovereign debt.

PART 2: GHANA'S PPA REGIME AND THE POLITICAL ECONOMY OF CRISIS

Ghana's PPA experience, from 2012 to the present, is not a recent phenomenon. This Part examines the Ghanaian record in six sections. Section A situates the 2012–2016 *dumsor* crisis within a four-decade pattern of recurrent supply crises dating to the construction of the

89 *Kleinwort Benson Ltd v Malaysia Mining Corp Berhad* [1989] 1 WLR 379 (CA); *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502 (SC NSW).

Akosombo Dam. Section B discusses the legal regime of Ghana's electricity sector. Section C analyses the Ameri Energy contract as an illustration of sole-source procurement pathologies. Section D examines the Karpowership arrangement as an illustration of emergency-contracting pathologies. Section E addresses the system-level effects of the resulting PPAs. Section F examines the system level effects of the emergency contracting pathologies and traces its implications for the framework the subsequent Parts develop.

Crisis as recurrence: from Akosombo to dumsor

The 2012–2016 *dumsor* crisis was not, in any meaningful historical sense, novel. Ghana's electricity sector has cycled through major supply crises at roughly 10-to-15-year intervals since the construction of the Akosombo Dam, and the architecture of the contractual response that this paper examines can be understood only against that recurrent pattern. A brief reconstruction, in this regard, is necessary.

The foundation of Ghana's modern electricity sector was the Akosombo hydroelectric scheme, conceived in colonial planning of the 1920s but reshaped by Kwame Nkrumah after independence into the centrepiece of his Pan-African industrial vision.[90] The idea of a dam construction was first conceived in 1915 by Albert Kitson, during a canoe ride down the Volta.[91] Albert, a geologist, considered damming the Akosombo to generate electricity for processing the country's bauxite.[92] But it was not until 1952, when a British white paper rallied support for the project. Nationalist leaders, with Nkrumah at the forefront, immediately took an interest in the

90 For the foundational historical scholarship on Akosombo's place in Nkrumah's industrial vision, *see* Stephan F Miescher, *A Dam for Africa: Akosombo Stories from Ghana* (Indiana UP 2022); *see also* Stephan F Miescher and Dzodzi Tsikata, 'Hydro-Power and the Promise of Modernity and Development in Ghana: Comparing the Akosombo and Bui Dam Projects' (2009/10) 12 Ghana Studies 15.

91 ibid 18.

92 ibid.

project.[93] In 1952, a preparatory Commission established by the British administration to explore the project's viability laid out the detailed plan for its implementation. But due to funding constraints, the project was to be delayed until after independence.[94]

Construction proceeded between 1961 and 1965; the dam was formally inaugurated on 22 January 1966, four weeks before Nkrumah's overthrow.[95] Akosombo's installed capacity of 912 megawatts was, at completion, expected to provide Ghana's electricity needs through at least the mid-1970s and to supply a regional aluminium-smelting industry with surplus available for export.[96] The Kpong Dam (160 megawatts) added incremental capacity in 1982; the Bui Dam (400 megawatts), *Chinese-financed*, completed in 2013, completed the country's hydroelectric architecture. The three dams together account for approximately fifty-four percent of contemporary installed capacity and remain the foundation of the system.[97]

The pattern of recurrent crisis began in 1983–1984. A severe drought reduced Lake Volta's level to its operational floor, forcing the Volta River Authority to suspend power deliveries to VALCO, the country's principal aluminium smelter, and to ration supply to ordinary consumers.[98] Similar episodes followed in 1997–1998[99] and in 2006–2007, each precipitated by drought conditions affecting

93 ibid 19.

94 ibid 19.

95 Miescher, *A Dam for Africa* (n 86) 92–95; Volta River Authority, *The Volta River Project: A Brief History* (VRA 2003) 8–14.

96 Miescher (n 86) 297.

97 Energy Commission of Ghana, *2017 Energy Outlook for Ghana* (Energy Commission 2017) 1. On Bui specifically, *see* Robert Gocking, 'Ghana's Bui Dam and the Contestation Over Hydro Power in Africa' (2021) 64 African Studies Review 339.

98 Miescher and Tsikata (n 86) 31–35. The 1983–84 crisis coincided with broader economic distress under the Provisional National Defence Council government and contributed to Ghana's adoption of the IMF Economic Recovery Programme. This led to a devaluation of the cedi and the adoption of IMF-directed policies.

99 Theo Acheampong, 'The Implications of Changing Power Generation Mix on Energy Pricing and Security in Ghana' (2016) SSRN 3.

hydroelectric output, each compounded by demand growth that had outpaced the addition of new capacity, and each producing legislative inquiries, donor engagement, and emergency-procurement initiatives whose details vary but whose structure has remained substantially constant.[100] President John Mahama, addressing Parliament in February 2015 during the height of the *dumsor* crisis, noted, with remarkable precision, the reason for the recurrent crisis: prior episodes in 1983, 1998, 2002, and 2006–2007 had been managed rather than resolved, and what was required was a structural fix rather than continued management.[101]

The 2012–2016 *dumsor* was, in this perspective, the fourth iteration of a four-decade-old pattern. Its precipitating causes were not novel but had been with us since the 1980s: drought and demand growth outpacing capacity additions.[102] Besides drought, however, which reduced Akosombo's output, the disruption of the West African Gas Pipeline was another major factor for the 2012 *dumsor* crisis.[103]

Desirous of ending the power crisis, and anxious to mitigate its remarkable impact on his government, several emergency contracts were signed to increase power generation capacity. Over thirty-two (32) PPAs were concluded between 2012 and 2016, many of which were sole-sourced without competitive bidding. The contracts converted a recurrent supply crisis, one that the historical record

100 For the sequence and its economic costs, *see* World Bank, *Energy Crisis and Economic Loss in Ghana* (World Bank 2007) (estimating losses of approximately 1.8 per cent of GDP in the 2007 crisis); Miescher (n 86) 31–35; Theo Acheampong, 'The Implications of Changing Power Generation Mix on Energy Pricing and Security in Ghana' (2016, unpublished manuscript) <https://ssrn.com/abstract=2763284> accessed 1 May 2026.

101 'SONA 2015: Past Gov'ts Managed "Dumsor" but I Will Fix It: President Mahama' *MyJoyOnline* (26 February 2015) <https://www.myjoyonline.com/news/politics/sona-2015-past-govts-managed-dumsor-but-i-will-fix-it-president-mahama/> accessed 1 May 2026.

102 During the 1983 crisis, some commentators questioned why the VRA had failed to anticipate the power crisis given the unreliability of rainfall patterns during the period. This raises legitimate questions about the proactiveness of government institutions in taking measures to address social issues affecting the country.

103 Ama Achiaa Amankwah-Amoah, 'The Technopolitics of Infrastructure Breakdowns: A Historical Overview of Dumsor' (2024) 24 Africa Studies Quarterly 17.

made entirely foreseeable, into a series of binding fiscal commitments extending across decades and across political administrations. In other words, the crisis was solved by creating another crisis (in this case, long-term PPAs without proper sectoral planning; these contracts have turned out to impose immense fiscal constraints on the state) that would haunt successive governments in years to come.

A return of *dumsor* in 2023–2024, and now in 2026, confirms the recurrence of the pattern.[104] What this iteration demonstrates, beyond the empirical point that supply crises continue to recur, is that the contractual response of 2012–2016 did not, despite committed payment obligations exceeding US$11 billion across the contracts' twenty-year tenor, secure electricity supply through the next cycle. The architecture had instead embedded a fiscal obligation that survived the supply crisis it was nominally designed to address. The historical record suggests that the recurrence will continue: the conditions that have produced supply crises across four decades have not been resolved by any iteration of contractual response. It has rather created fiscal obligations that have plunged the state into cyclical debts for years to come.

The legal regime of Ghana's electricity sector

I must state at the outset that Ghana's electricity sector is regulated by a patchwork of laws that govern it. I will attempt to provide a brief overview of how the sector works, albeit this might not. Ghana's electricity sector operates in an unbundled framework. The Volta River Authority (VRA) and the Northern Development Corporation (NEDCo), alongside Independent Power Producers (IPPs), are responsible for power generation. VRA was established

104 'Ghana's Electricity Crisis Is Holding the Country Back: How It Got Here' *The Conversation* (22 October 2023); see also Public Utilities Regulatory Commission (Ghana), *Quarterly Tariff Review Determinations* (2023–2025) (documenting tariff-pass-through pressures associated with the renewed crisis).

in 1961, with the mandate to generate, transmit, and distribute electricity.[105] Accordingly, until 1987, VRA generated, transmitted, and distributed power to the whole country. However, with the establishment of the Northern Electricity Department (NED) in 1987, VRA's role was limited to the southern part of the country, while NED remained responsible for generating power for the northern parts of the country. NED has now been replaced with NEDCo with the construction of the Bui dam in 2007.[106] Currently, generation is shared among VRA, NEDCo, and IPPs.

Transmission of power is done under the exclusive authority of Ghana Grid Company Ltd. (GRIDCo). GRIDCo was established as a private limited liability company owned wholly by the state pursuant to the Energy Commission Act, 1997 (Act 740) and the Volta River Development Authority (Amendment) Act.[107] GRIDCo's establishment was intended to develop and promote competition in Ghana's wholesale power market.[108] Thus, GRIDCo is mandated to provide transparent, non-discriminatory, and open access to the National Interconnected Transmission System (NITS) for all the participants in the power market, including power generators and bulk consumers and thus bring about efficiency in power delivery.[109] The Energy Commission Act also established the Energy Commission as the technical regulator and licensing authority for generation, transmission, wholesale supply, distribution, and sale.

On distribution, ECG in the south and NEDCo in the north, the latter a subsidiary of VRA distribute power from power substations to consumers, whether industrial, commercial, or residential. The two companies operate under distribution licences issued by the

105 Volta River Development Act 1961, Act 46.
106 Bui Power Authority Act 2007, Act 740.
107 Volta River Development Authority (Amendment) Act 2005, Act 692.
108 GRIDCo, 'Overview – Ghana Grid Company Ltd' (Ghana Grid Company (GRIDCo)) <https://gridcogh.com/about-us/> accessed 1 May 2026.
109 ibid.

Energy Commission under Act 541 and the Electricity Regulations, 2008 (LI 1937).[110] Quality of service obligations are prescribed by the Electricity Supply and Distribution (Standards of Performance) Regulations, 2008 (LI 1935), and end-user tariffs are approved by the Public Utilities Regulatory Commission (PURC).[111] Technical interconnection at the distribution level is governed by the Distribution Code, supplemented by the Renewable Energy Sub-Code for the Distribution Network and the Net Metering Sub-Code of 2015, which together regulate the integration of distributed renewable generation.

The distribution segment has historically been the financial weak link of the value chain. High commercial and technical losses at ECG have driven much of the sector's debt accumulation. ECG was initially established as a state corporation, but in 1997, in the wake of mismanagement and mounting losses, combined with a wave of market liberalisation, it was converted into a private company limited by shares, wholly owned by the state. ECG continues to incur losses to date, owing mostly to administrative inefficiencies, political interference, illegal connections, and transmission loss.[112] Recent attempts have been made to privatise the sector, but an initial agreement which was executed in 2019 was subsequently terminated by the government.[113]

110 Energy Commission Act 1997, Act 541, s 2; Electricity Regulations 2008, LI 1937.

111 Public Utilities Regulatory Commission Act 1997, Act 538, long title and s 18 (providing for the establishment of a Commission charged with the determination of rates and tariffs charged or proposed to be charged by utilities for services rendered to consumers).

112 Franklin Asare-Donkoh, 'ECG: An Albatross on National Development, or Can It Contribute More Resources?' *Modern Ghana* (26 June 2025) <https://www.modernghana.com/news/1408382/ecg-an-albatross-on-national-development-or.html> accessed 1 May 2026.

113 'Ghana: Government Terminates PDS Contract with ECG' *Africa Energy Portal* (22 October 2019) <https://africa-energy-portal.org/news/ghana-government-terminates-pds-contract-ecg> accessed 1 May 2026.

Figure 2. The Structure of Ghana's Electricity Sector

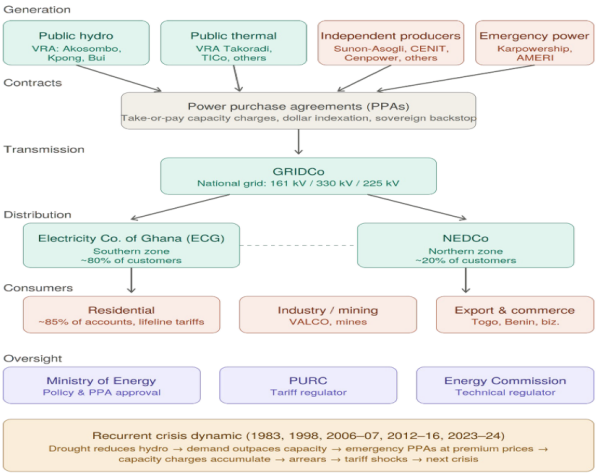


Figure 2. *The figure depicts Ghana's electricity sector as it has operated since the post-1997 unbundling. Generation is divided between public assets (Volta River Authority's hydroelectric and thermal capacity) and private assets (independent power producers and emergency-power providers including Karpowership and AMERI). The contractual layer is the focus of this Article: power purchase agreements with take-or-pay capacity charges, dollar indexation, and sovereign-guarantee architecture. GRIDCo operates the national transmission grid; the Electricity*

Emergency procurement and institutional weakness

Ghana's PPA regime is difficult to understand without attention to the procurement mechanism through which most of the portfolio was assembled. Three features of the mechanism warrant attention.

(i) Unsolicited proposals. In the wake of the power crisis of 2012, a substantial majority of the thirty-two PPAs in Ghana's portfolio were concluded on the basis of unsolicited proposals submitted by prospective investors rather than through government-initiated procurement processes, even

though this is required by the Public Procurement Act.[114] The unsolicited-proposal model is quite antithetical to public procurement in general, and project finance specifically. The model of unsolicited contracting tends to stifle competition, compromise quality, and, above all, inflate the price of the service rendered. Moreover, it tends to produce negotiated outcomes favourable to the proposing investor and makes it difficult to reproduce the price discovery that competitive bidding would generate.[115]

In Ghana, for instance, the unsolicited-proposal model resulted in the execution of contracts that have had disastrous consequences for the country. Proposals were typically submitted under classifications of urgency.[116] But then, the political impetus to respond to the *dumsor* crisis generated pressure to accept proposals on terms favourable to the investor.[117]

(ii) Absence of competitive tendering. Since most of the PPAs signed were unsolicited, there was no competitive tendering.[118] Many of the contracts were also signed on a closed-book basis, which meant that project companies were not under an obligation to disclose to the government the expected expenses or profits the project company stood to make under the contract. As a matter of principle, competitive tender

114 Ackah and others (n 8); *see also* Public Procurement Act 2003, Act 663 (as amended), s 14.

115 *See* OECD, *Principles for Private Sector Participation in Infrastructure* (OECD 2007) 1–26; John T Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency* (World Bank 2007).

116 Barnaby Joseph Dye, 'How Costly Political Realities Undercut Ghana's Electricity Reforms' *The Conversation* (25 July 2022); see also Africa Centre for Energy Policy, 'ACEP Demands More Explanation on Emergency Power Contract' *News Ghana* (3 March 2015) (criticising, contemporaneously, the procurement and value-for-money characteristics of the AMERI, Karpowership, and General Electric emergency-power transactions).

117 Ackah and others (n 8).

118 It is important to state that under section 41 of the Public Procurement Act 2003, Act 663, single sourcing or procurement is permitted under certain exceptional circumstances, including when goods or services are in urgent demand.

generates price discovery: the procurement process reveals what the market will accept, and the resulting contract prices reflect market pressure rather than negotiated positions. Sole-source procurement, by contrast, yields prices that reflect the parties' negotiating leverage and the information asymmetries the procurement process creates.[119] Consequently, it came as a little surprise when the PPAs incurred capacity charges that, upon subsequent review, were substantially above the levels at which comparable generation could have been procured through competitive tender.[120]

(iii) Executive dominance and parliamentary acquiescence. Ghana's constitutional structure requires parliamentary ratification for international commercial agreements exceeding specified thresholds, and PPAs typically require such ratification as established by the Supreme Court.[121] In theory, this ratification mechanism is intended to operate as a democratic safeguard: even where agreements are negotiated outside competitive procurement processes, parliamentary scrutiny is expected to ensure that the terms of such arrangements serve the public interest and do not unduly compromise the state's fiscal or regulatory autonomy.

In practice, however, parliamentary approval has functioned less as a meaningful mechanism of oversight than as a formalistic rubber stamp. The parliamentary consideration of the Ameri Energy agreement (discussed below), for instance, was notably cursory, with limited interrogation of the commercial terms, pricing structure, contingent liabilities, or long-term fiscal

119 The argument is developed at length in Guasch (n 32) 42–78, with detailed Latin American evidence.

120 Ackah and others (n 8).

121 Constitution of the Republic of Ghana 1992, art 181(5); *Balkan Energy (Ghana) Ltd v Attorney-General* [1997] DLSC 17828.

implications of the transaction.[122] Parliament's failure to discharge its constitutional responsibility with the requisite diligence represents not merely an institutional deficiency in democratic representation, but a deeper governance failure with significant constitutional implications. By approving opaque and financially burdensome agreements without rigorous scrutiny, parliament effectively enabled the entrenchment of contractual arrangements that bind successive governments while constraining the state's fiscal capacity to undertake broader social and developmental obligations.[123]

Indeed, the weaknesses of this oversight process became even more troubling in light of subsequent revelations concerning the Ameri transaction itself, including allegations that the individual who purportedly represented the Ameri Group was, at the material time, wanted in connection with fraud-related matters.[124]

The AMERI energy deal

In February 2015, the Government of Ghana concluded a Build-Own-Operate-Transfer agreement with Africa and Middle East Resources Investment Group ("AMERI"), a Dubai-registered entity, for the provision of ten General Electric TM2500+ aeroderivative gas turbines totaling 250 megawatts of emergency power capacity.[125] The agreement was to run for five years, after which the assets would transfer to the Government. The total cost was US$510 million.[126]

122 Marian Ansah, 'Addison C'ttee Should've Rejected AMERI's Offer – Vitus Azeem' *CitiFMOnline* (20 April 2017), reproduced in *GhHeadlines* <https://ghheadlines.com> accessed 1 May 2026.

123 ibid.

124 'Ghana's Minister of Power Signed a US$510 Million Deal With an Alleged International Criminal Wanted By Interpol' *Accra Report* reprinted in *AllAfrica* (12 December 2015) <https://allafrica.com> accessed 1 May 2026.

125 'How Parliament Discussed and Approved the AMERI Deal: Transcript' *Ghana Business News* (16 December 2015) <https://www.ghanabusinessnews.com/2015/12/16/how-parliament-discussed-and-approved-the-ameri-deal-transcript/> accessed 1 May 2026.

126 ibid.

The procurement was conducted on a sole-source basis. Investigative reporting in Norway, published in late 2015, revealed that AMERI's principals included individuals subsequently convicted of unrelated fraud in Norway, that AMERI itself appeared to be a thinly-capitalised intermediary, and that the substantive work of the project had been subcontracted to a Turkish firm, METKA, for approximately US$360 million.[127] The structure generated a substantial intermediation markup, approximately US$150 million on a US$360 million underlying project, or approximately 42 percent, which AMERI retained.

A subsequent government, taking office in January 2017, commissioned a review of the arrangement.[128] The Addison Committee report, released in April 2017, confirmed the intermediation markup and concluded that the original contract had been overpriced. In 2018, the Government proposed a renegotiation of the arrangement through a Novation and Amendment Agreement that would have extended the term to fifteen years and replaced AMERI as operator with a different entity, Mytilineos International Trading Company AG. Civil-society analysis by the Africa Centre for Energy Policy demonstrated that the proposed renegotiation was worse than the original: the novation would have required additional payments of approximately US$1.3 billion, against an existing post-payments obligation of approximately US$339 million.[129] The novation was withdrawn after public criticism; the energy minister responsible was subsequently dismissed.[130]

Three analytical observations follow from the Ameri sequence. First, the intermediation markup illustrates a specific form of

127 Kjetil Magne Sørenes and Gøran Skaalmo, 'Ghana's Power Minister Signed a $510 Million Deal With a Norwegian Fraud Suspect' *Verdens Gang* (Oslo, 13 December 2015).

128 Government of Ghana, *Report of the AMERI Energy Project Review Committee* (2017) (Addison Report).

129 Africa Centre for Energy Policy, *ACEP's Comments on the Ameri Renegotiated Contract* (ACEP 2018).

130 'Ghanaian President Sacks Energy Minister' *The Punch* (21 February 2019).

sole-source-procurement pathology: the extraction of rents by politically connected intermediaries who add no substantive value to the transaction. The markup was not compensation for project development risk (the project was executed entirely by METKA), for engineering, procurement, and construction expertise (AMERI lacked the capacity), or for financing (AMERI provided none). It was compensation for access—for facilitating the transaction's political passage in Ghana. The international project-finance literature has documented similar patterns elsewhere;[131] what Ameri supplies is a particularly well-documented instance.

Second, the proposed 2018 renegotiation illustrates that emergency-procurement arrangements tend to become permanent through subsequent renegotiation. The reason is simple: governments in most African countries, for instance, will default. With this default turning into debt burdens, they will then request a renegotiation of the initial agreement. Take the Ameri case, for instance: the original Ameri contract ran for five years and contemplated the transfer of assets to the Government upon completion. However, when the government ran into debt and attempted to renegotiate the agreement, the proposed renegotiation would have extended the arrangement to 15 years and correspondingly delayed the asset transfer to the government.[132] The renegotiation's purpose, as the ACEP analysis demonstrated, was not to reduce the Government's obligation but to restructure it (even if unintentionally) in ways favourable to the incoming operator. The dynamic is that renegotiations of emergency PPAs tend to extend rather than terminate them, a recurring feature of the African PPA record. The implications of renegotiating PPAs are examined further in Part III's treatment of the Guasch-Laffont-Straub model.

131 For general treatment, see Fredrik Galtung, 'Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices' in Charles Sampford and others (eds), *Measuring Corruption* (Ashgate 2006) 101; Paolo Mauro, 'Corruption and Growth' (1995) 110 Quarterly Journal of Economics 681.

132 Africa Centre for Energy Policy (n 125).

Third, the Ameri sequence illustrates the limits of ordinary contract-law analysis in the PPA context. If the original 2015 contract was procured through corruption—through the intermediation markup, inadequate due diligence, and the emergency-procurement bypass—then it may be voidable on grounds recognised in international investment arbitration through the *World Duty Free v. Kenya* and *Metal-Tech Ltd. v. Uzbekistan line of authority*.[133] Accordingly, if the government was convinced, especially from the investigative report submitted by the Committee set up by the Minister of Energy, the contract ought to have been avoided rather than renegotiated on terms worse than the previous contracts. In any event, if termination was too drastic an action to take, the government, having discovered the wrongdoing, could use it as leverage to negotiate favourable terms for its benefit and that of the Ghanaian people.

The Karpowership deal

In June 2014, during the acute phase of the *dumsor* crisis, the government again concluded a ten-year PPA with Karpowership Ghana Co. Ltd., a Turkish subsidiary of Karadeniz Holding, for the supply of 450 megawatts of capacity from a floating gas-fired powership.[134] The agreement was concluded under emergency procurement classification, without a competitive tender process. The first powership vessel, the Aysegul Sultan, arrived in December 2015. In August 2017, it was replaced by the larger Osman Khan, a 470 MW vessel, then the world's largest of its kind.[135] The agreement was executed without parliamentary approval as required by the Constitution. This prompted the Minority caucus in parliament at the time to invoke the Supreme Court's original jurisdiction to declare

133 *World Duty Free Co v Republic of Kenya* ICSID Case No ARB/00/7, Award (4 October 2006); *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, Award (4 October 2013).

134 Umaru Sanda Amadu, 'Turkish Power Ships to Generate 21% of Ghana's Electricity' *Anadolu Agency* (10 October 2014) <https://www.aa.com.tr> accessed 1 May 2026.

135 Sonal Patel, 'The 470-MW Floating Powership That Buoyed Ghana' *Power Magazine* (1 October 2020).

that the transaction was unconstitutional.[136] The Supreme Court, however, in an uncharacteristic analysis, dismissed the claims on the ground that the agreement was not executed directly with the central government.[137] The Court, referencing its earlier decisions, concluded that the parties to the agreement (ECG and the Ghana National Petroleum Authority (GNPC) were limited liability companies and thus, were not the *alter ego* of the government.[138] A simple study of the enabling Acts of these institutions, however, would reveal that their boards are appointed by the President upon the Minister's advice.[139] This implies that the board, acting as agents of ECG, at the same time owes allegiance to the appointing authority—the President. While, in theory, the board can be expected to demonstrate good faith and act in the best interests of ECG, in practice, they tend to act at the pleasure of the appointing authority. In any event, debt incurred by ECG becomes the responsibility of the central government when ECG is unable to defray those debts, which has been the case over the years. These debts are sometimes charged on the consolidated fund. The passage of the Energy Sector Levy Act to raise revenue to defray the sector's debts is but an illustration of this.[140]

Since the signing of the Agreement, it has been restructured twice. In December 2019, Ghana and Karpowership agreed to convert the vessel's fuel from heavy fuel oil to natural gas supplied from Ghana's domestic Sankofa field. It has been claimed that the conversion reduced take-or-pay fuel costs by an estimated US$170 million annually.[141] The conversion did not, however, modify the capacity-charge structure; it reduced one dimension of cost without modifying the dimension that produced the underlying fiscal pressure. Indeed,

136 *Yeboah v Electricity Company of Ghana* [2016] GHASC 42 (28 July 2016).
137 ibid.
138 ibid.
139 *See* Ghana National Petroleum Corporation Act 1983, PNDCL 64, s 5.
140 Energy Sector Levies Act 2015 (as amended).
141 Government of Ghana, 'President Akufo-Addo Commissions First Gas for Karpowership' (Press Release, 7 December 2019).

as of May 2025, government debt obligation to the company stood at $400 million.[142] In view of that, Karpowership threatened to halt operations if the debts were not settled, proposing terms that would not only require ECG's involvement, but that of the central government. This consequently led to negotiations that have now restructured and extended the debt well beyond 2027.

Two observations follow from the above discussions: First, the Karpowership arrangement illustrates the conversion of temporary instruments into permanent fiscal fixtures. In other words, it demonstrates that the government did not have any long-term structural plans to address the systemic structural issues confronting Ghana's electricity sector, other than improvising a temporary solution to the sector's current crisis, perhaps for immediate and expedient political gains. The 2014 contract was conceived as a ten-year arrangement to address a specific electricity crisis. A decade later, the crisis that prompted the contract is far from over and is still very much in place, but the contractual obligation persists in modified form, through the 2024–2026 restructuring that effectively extends the arrangement further. The temporary-to-permanent conversion demonstrates that emergency procurement produces contractual structures that, once established, are difficult to terminate, because termination generates contractual-penalty exposure and potentially treaty-claims exposure that the state cannot afford. This reinforces my central claim that PPAs, while technically contractual in nature, have, at least in Ghana, proven to impose sovereign burdens on successive governments, with the cost consequently borne by the citizenry. What's more, these sovereign debts hinder the government's efficient executive performance. At the same time, it serves as a flashpoint for political contestation between the two main political parties (the National Democratic Congress and the New Patriotic Party), while citizens ultimately bear the cost of these political decisions.

142 'Karpowership Reverses Shutdown Decision After Reaching Debt Settlement Deal – Jinapor' *MyJoyOnline* <https://www.myjoyonline.com> accessed 1 May 2026.

Second, the Karpowership financial record illustrates the *ex post* surplus that emergency contracting often produces. Whatever the contract's terms were designed to achieve, they produced operational returns substantially above what competitive procurement would plausibly have yielded: in 2019 alone, Karpowership's Ghanaian operation generated approximately US$197 million in gross profit, accounting for roughly half of the parent group's total gross profit and approximately 24 percent of its global rental income.[143] Returns of that magnitude, sustained year-over-year, are difficult to defend as a risk-adjusted return on capital. They are better understood, I argue, as a rent generated by the absence of competitive pressure in the procurement process and by the structural insulation of the project's revenue stream behind take-or-pay obligations and sovereign credit support. Similar patterns of post-award contractual surplus have been documented in Latin American infrastructure concessions by Guasch and his collaborators,[144] and in African PPAs specifically by Eberhard and Gratwick.[145]

System-level effects

The system-level effects of the Ghanaian PPA portfolio, examined in aggregate, illustrate the broader political-economy consequences of the contracting architecture.

By 2018, Ghana had contracted generation capacity of approximately 6,932 megawatts against peak demand of approximately 2,400

143 Stefaans Brümmer and Susan Comrie, 'Powerships: Inside the Karadeniz Money-Spinning Global Empire' *Daily Maverick* (11 July 2021) <https://www.dailymaverick.co.za/article/2021-07-11-powerships-inside-the-karadeniz-money-spinning-global-empire/> accessed 1 May 2026; see also AmaBhungane Team, 'Powerships: Inside the Karadeniz Money-Spinning Global Empire' *AmaBhungane Centre for Investigative Journalism* (12 July 2021) <https://amabhungane.org> accessed 1 May 2026.

144 J Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing It Right* (World Bank 2004); J Luis Guasch, Daniel Benitez, Irene Portabales and Lincoln Flor, *The Renegotiation of PPP Contracts: An Overview of Its Recent Evolution in Latin America* (OECD Discussion Paper No 2014-18, 2014).

145 Eberhard (n 25).

megawatts. This meant the contracted-to-peak ratio was approximately 2.9:1. This was twice the international adequate reserve margin of approximately 1.2 to 1.[146] The implication of this is that the government was obliged to continue paying capacity charges, more than twice what was actually needed to meet peak demand. During this same period, aggregate capacity-charge obligations totaled approximately US$320 million annually.[147] In 2019, the figure rose to approximately US$620 million.[148] By 2025, aggregate sectoral arrears exceeded US$1.4 billion.[149] These are figures comparable in scale to the annual debt-service obligations on Ghana's conventional sovereign borrowing. Under current circumstances, and with these agreements still in place, government debt is doomed to continue to increase in successive years. But ultimately, the burden of this debt crisis is borne by citizens, either through tariff increases or the imposition of taxes on petroleum products, as seen with the introduction of the Energy Sector Levy.

For instance, from January 2023 through *Q3* 2025, aggregate residential tariffs roughly doubled in nominal terms.[150] The increases, according to the PURC, were necessary to close the gap between the costs the sector was incurring (including capacity charges to generators) and the revenues the sector was collecting from consumers. Among the reasons cited by the regulator for the increase in tariffs were, the depreciation of the Ghana cedi, exchange rate volatility, inflation, and rising fuel costs.[151]

146 On the adequate reserve margin, see North American Electric Reliability Corporation, *2022 Long-Term Reliability Assessment* (NERC 2022); 'Reserve Margins: By ISO and Over Time?' *Thunder Said Energy* (26 March 2026) <https://thundersaidenergy.com> accessed 1 May 2026.

147 Ackah and others (n 8) 3.

148 ibid.

149 'How Parliament Discussed and Approved the AMERI Deal: Transcript' *Ghana Business News* (16 December 2015) <https://www.ghanabusinessnews.com> accessed 1 May 2026.

150 Public Utilities Regulatory Commission (Ghana), *Quarterly Tariff Review Determinations* (2023–2025).

151 ibid.

These increases impose substantial welfare costs on households, particularly those at the lower end of the income distribution, whose electricity expenditures consume a higher proportion of their incomes. This precarious situation motivates most households to resort to illegal connections to escape the rising cost of electricity. This is one reason: accounting for annual commercial transmission losses, a factor that continues to contribute to the revenue losses incurred by ECG.

Thus, from the foregoing, I argue that the PPA architecture, especially the emergency PPAs successive governments signed in the wake of the power crisis, given their design, the manner of procurement, execution, and their structural obligations, were bound to favour project companies, without fully addressing the crisis of the power sector.

The cumulative effect of these developments has been a legitimacy crisis that extends beyond specific PPA renegotiations to the broader question of whether long-tenor sovereign commitments, negotiated under conditions of institutional weakness and political pressure, can be legitimate commitments of the polity across the decades they govern. If the PPA architecture is structurally productive of fiscal distress, political instability, and distributive injustice, its legitimacy as a mode of governing economic policy over two-decade horizons is, at minimum, contestable. The contestation has been implicit in the Ghanaian politics of the last decade; the subsequent Parts of this Article argue that it should be made doctrinally explicit.

PART 3: TOWARD A PRINCIPLED FRAMEWORK OF RISK ALLOCATION

In this Part, I attempt to develop a theoretical framework for understanding how long-term PPAs in Ghana constrain sovereign power and undermine state interests. The framework draws on

four bodies of scholarship: the classical theory of efficient risk allocation; the incomplete-contracts theory developed by Oliver Hart and Sanford Grossman; and the empirical theory of concession renegotiation developed by J. Luis Guasch, Jean-Jacques Laffont, and Stéphane Straub.

A. Efficient risk allocation revisited

As discussed above, the basic premise of every project theory, in contemporary times, is the principle of efficient risk allocation. That is, risks should be borne by the party best positioned to bear them.[152] Under the principle, demand risk is allocated to the offtaker because the offtaker has more information about and influence over demand; currency risk is allocated between the parties according to whose costs and revenues are in which currencies; political risk is allocated to the state because the state controls the political environment; construction risk is allocated to the generator (typically through EPC contracting) because the generator has expertise in construction management; and so on.

The principle is internally coherent but depends on assumptions that may or may not hold in any particular contracting environment. Three assumptions are particularly relevant for the analysis that follows.

First, the principle assumes that the parties have adequate information about the risks at the time of contracting, but this, of course, is not always the case.[153] If the offtaker underestimates its demand or overestimates its capacity to adjust tariffs, the allocation of demand

152 The canonical statement is Oliver Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Free Press 1975) 20–40; Oliver Williamson, *The Economic Institutions of Capitalism* (Free Press 1985) 79–114. For application to infrastructure contracting, see Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT Press 1993) 56–98; Eduardo Engel and others, *The Economics of Public-Private Partnerships* (CUP 2014).

153 Guasch (n 141) 71.

risk will be *ex ante* rational but *ex post* suboptimal. Information asymmetries, biases in forecasting, and political-economy pressures on governmental parties can produce systematic departures from the assumption.[154] Even if information about all future events surrounding the contract could be anticipated, it could not reasonably be supposed that market actors would always act rationally, even though conventional law and economics assume as much.

Second, the principle assumes that the parties' capacity to bear the risks they agree to bear remains stable over the contract's term. For a twenty-year contract, this assumption is demanding and specifically unrealistic. Parties may become more or less capable of bearing risk over time: the offtaker's fiscal capacity may deteriorate; the generator's balance sheet may strengthen or weaken; currencies may depreciate more than anticipated; political environments may change. *Ex ante* risk allocation, in these circumstances, becomes *ex post* misallocation when conditions change materially. In principle, therefore, this complicates clauses such as hell or high water in PPA agreements, which impose unconditional obligations on the offtaker even where future circumstances make it impossible to perform or otherwise execute the agreement.

Third, the principle assumes that the allocations are enforceable on the terms agreed. In jurisdictions with weak institutional capacity, enforceability is problematic. The domestic legal system may not produce rulings that reliably enforce allocations against powerful local parties. At the same time, the international legal system may enforce allocations in ways that are politically unsustainable; renegotiation under duress may unwind allocations that were well specified on the original terms.

154 See Bent Flyvbjerg and others, 'How (In)Accurate Are Demand Forecasts in Public Works Projects?' (2005) 71 Journal of the American Planning Association 131; Atif Ansar and others, 'Big Is Fragile: An Attempt at Theorizing Scale' in Bent Flyvbjerg (ed), *The Oxford Handbook of Megaproject Management* (OUP 2017) 60.

It follows, on this account, that contracts, in themselves, are never complete and therefore, risk allocation should not be considered immutable for all purposes. The theoretical implication is that efficient risk allocation, as a foundation for long-tenor contracting in institutionally weak environments, is an inadequate framework. It explains contracting behavior *ex ante* but does not explain, or accommodate, the renegotiation behavior that predictably follows *ex post*. A more complete framework must incorporate both.

Incomplete-contracts theory

The inadequacy of efficient-risk-allocation theory in explaining long-tenor infrastructure contracts necessitates engagement with theories that account for parties' conduct under conditions of future uncertainty and contractual incompleteness. In this regard, I will draw on the incomplete-contracts literature, particularly the foundational work of Oliver Hart and Sanford Grossman on ownership and vertical integration. Grossman and Hart argue that, in complex economic and political environments, contracts are necessarily incomplete because parties cannot anticipate, specify, or verify every future contingency *ex ante*.[155] The costs of identifying and drafting contractual provisions for all possible future states of the world are often prohibitively high.[156] As a consequence, contracts inevitably leave gaps, requiring an allocation of what Hart and Grossman describe as "residual rights of control". This basically entails the authority to determine outcomes in circumstances not expressly governed by the contract.

Their theory may be understood, in part, as a response to the limitations of the Coasean framework on transaction costs.[157] On their account, while the Coase theorem assumes that parties will

155 See Grossman and Hart (n 30).
156 See Guasch (n 141) 71–73.
157 Ronald H Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.

bargain efficiently toward optimal outcomes irrespective of the initial allocation of rights, Hart and Grossman demonstrate that such bargaining is constrained by transaction costs, uncertainty, and the impossibility of complete foresight.[158] In long-term contractual relationships, particularly those involving complex infrastructure assets, future contingencies cannot be exhaustively anticipated or efficiently renegotiated. More fundamentally, in government-led infrastructural projects, the government might have multiple, sometimes incompatible, objectives, given that governments change over time during the life of the project.[159] Consequently, the initial allocation of control rights is critical, as it shapes bargaining power, investment incentives, and the distribution of risks *ex post*.

Viewed through this lens, PPAs, particularly those containing take-or-pay clauses, hell-or-high-water provisions, tariff adjustment mechanisms, fuel-supply commitments, and stringent termination clauses, can be understood as legal instruments for allocating residual control rights between private investors and the constitutional state. These provisions, I argue, do not merely allocate commercial risk. Instead, they structure authority over future political and economic contingencies by constraining the state's capacity to revise policy or respond flexibly to changing fiscal and democratic conditions. This is not to say that the state is thereby, in theory, restrained from undertaking its legitimate policy objectives; in practice, however, any action taken by the state (say, for example, tariff adjustment downwards) will have dire consequences since such actions will affect the state's ability to perform its obligations under the PPA.

In this sense, such clauses operate as mechanisms through which investors secure a degree of residual control over the energy sector and insulate their investments from future political intervention.

158 Grossman and Hart (n 30).
159 ibid.

The significance of this allocation of control rights lies not simply in its commercial consequences, but in its constitutional and democratic implications. Because future contingencies are inherently uncertain and often incapable of precise *ex ante* quantification, host states may assume obligations whose eventual fiscal and political costs substantially exceed original expectations. The very logic of bankability, therefore, requires states to commit themselves to long-term obligations under conditions in which neither the magnitude nor the distribution of future risks can be fully known.

Accordingly, while project finance is conventionally justified on the basis that large-scale infrastructure projects exceed the immediate fiscal and technical capacities of developing states, the present analysis suggests that such arrangements may, paradoxically, constrain rather than expand state capacity over time. This is done by transferring substantial demand, currency, and political risks onto the state. Thus, PPAs can generate long-term fiscal rigidities that undermine the state's future regulatory autonomy and developmental flexibility.

Against this background, when unforeseen contingencies materialise (for example, currency depreciation, energy oversupply, shifts in demand, fuel price volatility, or fiscal crisis), the host state bears the residual burden of adjustment. In some cases, the resulting obligations may exceed the state's *ex ante* capacity to absorb them, rendering continued performance politically, economically, or fiscally unsustainable. At that stage, renegotiation becomes unavoidable. The dynamics of such renegotiation and the structural asymmetries that shape it are examined using the Guasch-Laffont-Straub framework in the following section.

The Guasch–Laffont–Straub model

J. Luis Guasch, in a series of World Bank studies beginning in the late 1990s, and obviously concerned about the frequency of contract renegotiations in Latin America, documented the empirical regularities of concession renegotiation.[160] Guasch sought to understand why renegotiations occur with predictable frequency and on predictable terms, even though such agreements are initially designed to last for long periods. He found that between 1985 and 2000, 78% of long-term concession contracts were renegotiated within the space of 3 years.[161] Surprisingly, this figure is strikingly high for arrangements notionally designed to bind parties over twenty- to thirty-year horizons. This rate of renegotiation is difficult to reconcile with conventional theories of contractual stability. Rather than representing exceptional contractual breakdowns, renegotiation appeared to constitute a predictable phase in the life cycle of long-term infrastructure agreements. On this account, renegotiation is not pathological to the concession model; it is structurally embedded within it. Guasch therefore identified renegotiation as one of the central challenges confronting long-tenor infrastructure contracting. Subsequent work by Guasch, Jean-Jacques Laffont, and Stéphane Straub further developed this insight by demonstrating that the recurrence of renegotiation reflects the underlying logic of infrastructure contracts executed under conditions of incomplete information, political instability, and institutional fragility.[162]

Many of these contingencies arise from weak institutional environments and the inherently unstable character of democratic politics in developing states. What emerges from this literature is a profound tension between the temporal demands of infrastructure finance and the cyclical dynamics of democratic governance.

160 Guasch (n 31); J Luis Guasch and others, 'Concessions of Infrastructure in Latin America: Government-Led Renegotiation' (2007) 22 Journal of Applied Econometrics 1267.

161 Guasch (n 31).

162 Guasch, Laffont and Straub (n 157); Guasch and others (n 31).

Infrastructure concessions and PPAs are typically structured for longer durations, whereas electoral cycles operate over four- or five-year horizons. Governments change, policy priorities shift, fiscal pressures emerge, and geopolitical conditions evolve. Under such circumstances, long-term contractual commitments inevitably confront pressures for revision.[163]

The Guasch-Laffont-Straub framework further demonstrates that renegotiation is normatively ambiguous. In some cases, renegotiation may be socially desirable because it permits contractual adjustment in response to unforeseen contingencies. Renegotiation may also be deployed opportunistically for political purposes, particularly where governments seek short-term electoral gains through tariff suppression or contract revision. Moreover, renegotiation is itself costly.[164] At times, it extends concession durations, alters the original allocation of risks and returns, and may ultimately produce outcomes less favourable than the original bargain.[165]

Importantly, renegotiation does not guarantee that governments will secure more advantageous terms. Because concession contracts remain legally binding agreements between private and public actors, renegotiation ordinarily requires mutual consent. A private investor unwilling to reopen negotiations generally cannot be compelled to do so absent express contractual authority or a governmental willingness to incur the costs of termination, arbitration, or breach. The Ghanaian experience, particularly the Ameri renegotiation discussed above, illustrates this point clearly. Attempts to restructure politically contentious agreements may fail to produce fiscally or commercially superior outcomes and may, in some instances, deepen the state's financial exposure

163 J Luis Guasch, Jean-Jacques Laffont and Stéphane Straub, 'Renegotiation of Concession Contracts: A Theoretical Approach' (2006) 29 Review of Industrial Organization 55.
164 ibid.
165 ibid.

The broader implication is that orthodox claims concerning the efficiency of project finance in long-term infrastructure development are overstated. The Ghanaian PPA experience reveals that such arrangements may generate substantial long-term fiscal burdens, particularly where contracts are negotiated under conditions of informational asymmetry, political urgency, and weak institutional oversight. Moreover, successive governments often attempt renegotiation not solely because of genuine economic necessity, but also because long-term infrastructure commitments become politically unsustainable over time.

Accordingly, I argue that optimal PPA design in African contracting environments should treat renegotiation not as a pathological deviation from contractual performance, but as a structural feature of long-tenor sovereign-counterparty agreements. The question is therefore not whether renegotiation will occur, but how contractual design can channel renegotiation through predictable and institutionally disciplined mechanisms.

To be sure, some scholars or investors might object to my suggested framework. For instance, one concern may be that formal renegotiation clauses may undermine the predictability required for project bankability. On this view, if a PPA contains *ex ante* renegotiation triggers, the investor's revenue stream becomes uncertain, thereby weakening the financial stability upon which project finance depends. While this concern carries some force, it rests on an unrealistic comparison between perfectly stable contracts and those with explicit adjustment mechanisms. The more appropriate comparison is between contracts with transparent renegotiation procedures and those in which renegotiation occurs implicitly and informally under political pressure. Explicit renegotiation mechanisms may, in fact, enhance predictability by specifying in advance the circumstances, procedures, and limits under which contractual adjustments may occur.

A second objection is that formal renegotiation mechanisms may create moral hazard by enabling governments to invoke renegotiation opportunistically whenever contractual performance becomes politically inconvenient. This concern is also significant. Yet carefully drafted mechanisms can constrain governmental discretion by limiting renegotiation to objectively verifiable triggers. Such triggers might include, for instance, a movement in the local-currency exchange rate beyond a defined band; a change in law or in the fiscal or regulatory regime materially affecting project costs; a sustained deviation of actual demand from contractually forecast levels beyond a specified percentage; or a published macroeconomic index (such as the rate of inflation or a benchmark fuel price) crossing a pre-agreed threshold. Because each of these is independently measurable against a public benchmark rather than a matter of governmental assertion, tying the right to renegotiate to their occurrence narrows the space for opportunistic invocation while still allowing adjustment in the face of genuine and quantifiable shocks. Narrow, quantitatively measurable thresholds reduce the scope for arbitrary invocation while preserving the flexibility needed to respond to genuinely unforeseen contingencies.

A further objection may be that many African states lack the regulatory and administrative capacity necessary to operate structured renegotiation systems effectively. However, the relevant inquiry is not whether institutional constraints exist, but whether explicit renegotiation frameworks produce superior outcomes relative to the available alternatives. The Guasch-Laffont-Straub literature strongly suggests that implicit and politically improvised renegotiation processes generate greater inefficiency, opportunism, and fiscal instability than structured *ex ante* adjustment mechanisms. The Ghanaian experience similarly indicates that the absence of clearly defined renegotiation procedures often exacerbates uncertainty and weakens the state's bargaining position. On this account, explicit

renegotiation provisions should not be understood as invitations to opportunism, but as institutional devices for disciplining an otherwise inevitable process.

Notwithstanding this argument, I remain less confident that the current institutional structure through which PPAs are procured in Ghana provides an adequate framework for addressing the deeper structural problems identified above. Indeed, the difficulties associated with Ghana's PPA regime raise broader questions concerning the continued reliance on Independent Power Producers (IPPs) as the dominant model for electricity generation procurement. This question is particularly salient at a moment when institutions such as the World Bank, long associated with privatisation and market liberalisation,[166] appear increasingly receptive to forms of industrial policy and state-led developmental coordination.[167] Given this concern, I suggest that a serious reassessment of Ghana's energy procurement strategy may be warranted. Such an assessment would require a comparative evaluation of:

(i) the long-term fiscal and developmental costs of existing PPAs;

(ii) the relative costs and benefits of alternative public-private partnership structures; and

(iii) the feasibility of direct state-led infrastructure development in selected sectors.

Only through such a comparative institutional analysis can the long-term constitutional, fiscal, and developmental implications of Ghana's current energy-finance architecture be properly understood.

166 Ana Margarida Fernandes and Tristan Reed, *Industrial Policy for Development: Approaches in the 21st Century* (World Bank Policy Research Report 2026) <https://doi.org/10.1596/978-1-4648-2276-6> accessed 1 May 2026.

167 ibid xi–xiv.

PART 4: TOWARD REFORM: ADDRESSING GHANA'S ENERGY CRISIS

The present crisis in Ghana's electricity sector, driven in significant part by emergency procurement of PPAs, fiscal overcommitment, and persistent political interference, demonstrates that the incorporation of explicit renegotiation clauses alone might prove insufficient to resolve the deeper structural weaknesses of the sector. Without doubt, it is possible that a carefully designed renegotiation mechanism may improve contractual flexibility and reduce opportunistic bargaining. But the difficult question is whether such flexibility in contractual terms, in itself, can cure the institutional and developmental deficiencies that continue to undermine the sustainability of Ghana's power sector. It is to this difficult question that I turn.

The difficulties confronting the sector, perhaps, require more than contractual reform; they necessitate structural rethinking of the model through which electricity generation is procured and governed. In particular, the current crisis raises a fundamental question as to whether the existing emergency and impulsive PPA-driven framework serves Ghana's long-term developmental and fiscal interests in securing a sustainable electricity supply. But how might this rethink of the sector's structural reform be conceived?

As argued throughout this paper, one of the principal causes of Ghana's over-contracting problem has been the repeated resort to emergency procurement under conditions of inadequate planning and political urgency. Government and energy regulators must, therefore, continuously monitor grid capacity, projected demand growth, reserve margins, and generation adequacy to ensure that procurement decisions are grounded in realistic long-term demand forecasting rather than short-term political pressures. Effective demand planning is essential not merely for operational efficiency, but

for preventing the cycle of rushed procurement that has characterised significant portions of Ghana's recent energy expansion.

Even when emergency procurement becomes unavoidable, it should remain subject to stringent institutional safeguards and clearly defined, rule-based adjustment mechanisms. The absence of such safeguards has contributed to the fiscal opacity and long-term rigidity associated with several Ghanaian PPAs.

More fundamentally, however, the present moment requires a broader reassessment of the continued reliance on IPPs as the dominant mechanism for procuring electricity generation. This reassessment is particularly timely given the renewed global shift toward industrial policy and greater state involvement in strategic sectors of the economy. Indeed, institutions historically associated with privatisation and market liberalisation, including the World Bank, have now acknowledged the importance of state coordination and industrial planning in infrastructure development.[168]

What do I mean by industrial policy though? By this, I do not mean to suggest that private ownership or contracting is bad; nor am I suggesting that the state is the most appropriate entity to ensure the efficient and effective delivery of reliable access to electricity. Any such suggestion, of course, can easily be displaced. The version of industrial policy with which I am concerned here is one that requires integrated electricity planning in which generation, transmission, distribution, and industrial demand are coordinated as components of a unified developmental strategy rather than financed as isolated revenue-generating assets. What this means is that, under this development and enhanced coordination framework, it is possible to have private contracts for electricity generation provided such contracting models align with the framework designed for the sector.

168 ibid.

Under prevailing Ghanaian conditions, PPAs have tended to impose contingent fiscal obligations and long-term payment commitments that ultimately place the state in a weaker financial position than alternative procurement arrangements. In many instances, given the emergency nature of procuring such contracts, substantial risks are transferred to the government at material times when this may not have been preplanned due to a lack of development strategy and planning within the sector. In other words, electricity systems are inherently integrated public systems, whereas project finance fragments infrastructure into isolated contractual units. With this isolation, there is fragmented contracting to address specific instances of the sector's deficiencies, without concrete frameworks for integrated development.

Adopting industrial policy also requires addressing institutional weaknesses within electricity distribution entities. Both the Electricity Company of Ghana (ECG) and the Northern Electricity Distribution Company (NEDCo) have incurred recurring financial losses due to operational inefficiencies, technical losses, revenue collection challenges, and political interference. In particular, excessive political intervention has undermined managerial autonomy, distorted operational decision-making, and weakened institutional accountability within the sector.

The comprehensive coordination, which I advocate for in this paper, also calls for keen attention to the composition of Ghana's current generation mix. Thermal generation presently accounts for approximately two-thirds of electricity generation capacity, much of which was added through emergency thermal PPAs executed during the energy crisis. Yet the very conditions that produced this emergency procurements expose the vulnerability of overreliance on thermal power. The disruption of the West African Gas Pipeline, for example, was itself a major catalyst for emergency contracting and

demonstrated the extent to which Ghana's electricity system remains exposed to external fuel supply disruptions.

Moreover, contemporary geopolitical developments, particularly the Russia-Ukraine conflict, the US-Israeli war against Iran, and broader instability in global energy markets, reveal the long-term volatility associated with fossil-fuel dependence. Thermal generation exposes the electricity sector not only to fluctuating fuel prices and foreign-exchange pressures but also to geopolitical disruptions beyond domestic control.

These developments underscore the need to reconsider Ghana's overall energy generation strategy. Historically, as the discussion has shown, Ghana relied heavily on hydropower generation. However, changing rainfall patterns and climatic variability revealed the limits of excessive dependence on hydroelectricity, contributing to recurrent energy crises in the 1980s, 1990s, and 2000s. The subsequent transition toward thermal power addressed some immediate generation shortfalls but introduced a new set of fiscal, geopolitical, and contractual vulnerabilities. The current difficulties associated with thermal PPAs, therefore, illustrate that merely substituting one dominant generation source for another does not resolve the underlying structural problem.

A more sustainable long-term strategy requires serious integration of renewable energy sources into the national grid. Renewable sources such as solar and wind energy, at least for Ghana, are comparatively less vulnerable to geopolitical supply disruptions because their primary inputs are not internationally traded commodities subject to global political instability. Although substantial upfront capital investment remains necessary for renewable infrastructure development, the long-term operational costs and exposure to fuel-price volatility are significantly lower than under thermal generation models.

A coordinated national strategy to expand renewable generation capacity could therefore strengthen grid resilience, reduce long-term fiscal exposure, and improve energy sustainability. Such a transition, I believe, would also advance Ghana's international climate commitments under the Paris Agreement while positioning the country more favourably within the evolving global energy transition.

Accordingly, any meaningful reform of Ghana's electricity sector must extend beyond contractual restructuring and encompass deeper institutional reform. Sustainable sectoral reform, in my view, requires stronger regulatory capacity. It requires improved technical infrastructure, enhanced transparency, and greater insulation of sector institutions from short-term political control. Without such structural reforms, even well-designed PPAs and renegotiation frameworks will continue to remain insufficient to resolve the underlying governance and fiscal challenges presently confronting Ghana's electricity sector.

Conclusion

In this paper, I have sought to argue that bankability, as a basic component of project finance, in its contemporary articulation, is a choice about political-economy allocation rather than merely a technical requirement of private finance. Accordingly, the crisis confronting Ghana's electricity sector cannot be understood solely as a problem of poor contractual drafting, inefficient regulation, or isolated policy failure. The crisis also reflects a deeper structural tension embedded in the model of long-term infrastructure finance itself, through which electricity generation is carried out. The tension arises because project finance demands long-term stability, predictability, and credible commitment. At the same time, however, democratic governance is inherently dynamic and revisable in

character. This means that with a change in government, and without any permanent governance framework for the sector, priorities will shift.

PPAs and project finance, more broadly, have often rested on the assumption that private capital provides an efficient mechanism for states to overcome fiscal and technical constraints in developing large-scale infrastructure. On this view, risk is, thus, supposedly allocated to the party best positioned to manage it. This, it is believed, maximises efficiency and improves investment outcomes. The discussion in this paper has, however, sought to reveal the limitations of this account. I argued that, beyond efficiently distributing commercial risk, recourse to PPAs in Ghana has served to transfer substantial political, fiscal, currency, and demand risks onto the state while simultaneously constraining the future regulatory and policy autonomy of democratic institutions. As I argued, while this may not be a direct or express constraint from the terms of the PPAs, their application and resultant effects, over the years, as discussed here, justify the present conclusion.

I also drew on the incomplete-contracts literature associated with Hart and Grossman to demonstrate that long-tenor infrastructure agreements, while presented as complete allocation of rights and responsibilities, are necessarily incomplete. This is because, as argued, future political and economic contingencies are difficult to fully anticipate *ex ante*. Under such conditions, contractual arrangements inevitably become mechanisms for allocating residual control rights over uncertain futures. On this consideration, it follows that provisions such as take-or-pay clauses, hell-or-high-water obligations, sovereign guarantees, and arbitration clauses do more than secure investor returns; they structure authority over future political and economic decision-making. On this account, they function as mechanisms through which investors seek to insulate infrastructure assets from democratic uncertainty and sovereign intervention.

I have further shown, through the works of Guasch *et al*., the incomplete nature of PPAs, and that its attempt to insulate itself against democratic uncertainty has instead resulted in a wave of renegotiations of these agreements. This is because these contracts, spanning decades, inevitably collide with electoral cycles, macroeconomic shocks, changing policy priorities, and evolving fiscal realities. I also demonstrated, however, that renegotiation does not constitute a demonstrably self-evident good. In many instances, it merely redistributes risks, extends fiscal obligations, or otherwise intensifies contractual rigidity.

Against this background, the paper has argued that Ghana's continued reliance on fragmented emergency PPAs for power generation has resulted in long-term fiscal exposure, excessive debt burdens, and contractual opacity, while failing to resolve the persistent power-outage crisis in the country.

Given this account, I have, therefore, suggested that meaningful reform requires moving beyond purely contractual solutions toward broader institutional and structural transformation. While explicit renegotiation mechanisms in future PPAs may improve predictability and discipline future adjustment processes, they cannot substitute for sound sectoral planning, institutional independence, transparent procurement practices, and sustainable generation strategies. Effective reform will, therefore, require continuous monitoring of generation adequacy, transparent procurement safeguards, and stronger insulation of sector institutions from short-term political control.

Fundamentally, the current moment presents an opportunity to reconsider whether the existing PPA-centred framework remains the most suitable model for electricity generation procurement in Ghana. The global re-emergence of industrial policy and renewed recognition of the developmental role of the state invite a reassessment of whether

strategic infrastructure sectors can be sustainably governed through highly financialised contractual arrangements that subordinate long-term public flexibility to the imperatives of investor certainty. I am not suggesting that private participation should be abandoned altogether. My contention is that the existing balance between public authority and private contractual protection requires reconsideration in light of Ghana's developmental realities.

The analysis in this paper has also underscored the importance of diversifying Ghana's energy mix by integrating more renewable energy sources. Overdependence first on hydropower, and later, on thermal generation has exposed the electricity sector to climatic, geopolitical, and fiscal vulnerabilities. Renewable energy presents an opportunity not only for environmental sustainability but also for greater long-term resilience and enhanced energy security. A coordinated transition toward renewable generation, supported by coherent industrial and energy policy, may therefore provide a more sustainable foundation for the future development of Ghana's electricity sector.

In the final analysis, this paper has sought to demonstrate that PPAs are not just technical commercial instruments. They are governance structures that allocate authority, distribute risk, and shape the state's future capacity. Ghana's experience, as documented in this paper, reveals that project finance does not eliminate politics; rather, it reorganises politics through legal and financial mechanisms designed to stabilise investor expectations against democratic uncertainty.

Accordingly, the future of Ghana's electricity sector will depend not only on securing investment, but on constructing an energy governance framework capable of reconciling economic sustainability with democratic legitimacy.

IS THE CHIEF FISHERMAN A CHIEF? AN EXAMINATION OF NUUMO NYAKOMLE AND 7 ORS V NII TETTEH ASHONG.

Kweku Attakora Dwomoh[1*]

Abstract

The Supreme Court's decision in Nuumo Nyakomle v Nii Tetteh Ashong reignites debate over the constitutional meaning of chieftaincy and the legal status of the chief fisherman within customary law in Ghana. This paper critically examines the Court's conclusion that the Chief Fisherman of the Kpone Traditional Area is not a chief for purposes of the Constitution of the Republic of Ghana, 1992. It contends that the constitutional definition of a chief requires an examination of lineage, nomination, and election in accordance with the relevant customary law procedures, rather than assumptions based solely on the title or functions of an office. 1992. I argue that the Court, in relying principally on Eku alias Condua III v Acquaa without undertaking the customary law inquiry required by the 1992 Constitution of Ghana, it reached a legally unsustainable conclusion with broader implications for the interpretation of Ghana's chieftaincy jurisprudence.

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Introduction

It is axiomatic that chieftaincy is a traditional institution in Ghana that has endured over time. It has demonstrated resilience through the pre-colonial, colonial and post-colonial eras.[2] Sakyi asserts that chieftaincy is not only an institution that has endured the impact of colonisation and been weakened thereby, but also the oldest institution to have undergone such changes.[3] Chieftaincy is sacred;[4] it is embedded in culture;[5] traditional governance revolves around it.[6] It is a symbol of leadership and serves as a cornerstone for traditional governance and culture.[7] It has been given constitutional and other legislative backing.[8] The Constitution of the Republic of Ghana, 1992,[9] declares as an entrenched provision,[10] that "the institution of chieftaincy, together with its traditional councils established by customary law and usage, is hereby guaranteed."[11]

The identity of a chief is so profoundly rooted in the customary law and usage of the people to whom he belongs that even Parliament is bereft of authority to, by legislation, confer chieftaincy upon one who

2 *The Republic v The President, Central Regional House of Chiefs and the President, National House of Chiefs, Nana Ogyeedom Obranu Kwesi Atta VI, Ex parte Obrempong Nyanful Krampah XI* (Unreported, Civil Appeal No J4/90/2022, 21 June 2023); I Owusu-Mensah, 'Politics, Chieftaincy and Customary Law in Ghana's Fourth Republic' (2014) 6(7) *Studies* <https://www.jpanafrican.org/docs/vol6no7/6.7-12Owusu-Mensah.pdf> accessed 3 March 2025, *The Republic vs The President, Central Regional House Of Chiefs & 2 Ors Ex Parte: Obrempong Nyanful Krampah XI* [2023] DLSC 16114.

3 K Sakyi, *Gone but Not Forgotten: Chieftaincy, Accountability and State Audit in Ghana, 1993–99* (Research Reports).

4 *In Re Kwabeng Stool; Karikari & Another v Ababio II & Others* [2001–2002] SCGLR 515.

5 Joris Tieleman and Justus Uitermark, 'Chiefs in the City: Traditional Authority in the Modern State' (2019) 53(4) *Sociology* 707–723 <https://doi.org/10.1177/0038038518809325> accessed 10 April 2026.

6 A K P Kludze, *Ewe Law of Property* (Sweet & Maxwell 1973) 14–15.

7 Monika Różalska, 'Between Tradition and Modernity–the Role of Chiefs in the National Development and Local Governance in Ghana' (2021) 13 Politeja 379.

8 *Ex parte Obrempong Nyanful Krampah XI* (n 1).

9 It must be noted that the Constitution did not create the institution of chieftaincy. Chieftaincy even predates colonialism. *Nenyi Kobina Andakwei IV (Substituted by Nenyi Kwame Kotsia IV) and Others v Kow Larbie Kobina Abaka II (Substituted by Nenyi Kobina Affir) and Others* [2018] DLSC 183; *Amonoo and Others v Twaako and Others* [2023] GHASC 89 (19 July).

10 Constitution of the Republic of Ghana, 1992, art 290(1)(p).

11 Constitution of the Republic of Ghana, 1992, art 270(1).

is not so recognised under that custom.[12] In like manner, Parliament cannot divest a person of his status as a chief where that status is firmly anchored in tradition, nor may it enact any law that diminishes or derogates from the honour and dignity of the chieftaincy institution as a whole.

This position, though seminal, has not always been the state of our chieftaincy affairs.[13] This paper shall trace the historical antecedents of the chieftaincy institution from pre-colonial to the post-colonial era to establish the various phases and changes it has been through and establish how important this paradigm shift is to the chieftaincy institution.

Despite the independence and constitutional protection given to chiefs and the institution of chieftaincy under the Constitution of the Republic of Ghana, 1992, there are questions as to who properly qualifies as a chief. This difficulty is intensified where the traditional office holder performs functions and, in some instances, meets the constitutional criteria of a chief yet their legal status remains uncertain. One such traditional office holder is that of the chief fisherman.

In the case of *Nuumo Nyakomle and 7 Ors v. Nii Tetteh Ashong*,[14] the Supreme Court was faced with the question of the status or recognition of a chief fisherman and was required to determine whether a chief fisherman is a chief. In other words, does the constitutional definition of chief include a chief fisherman? The Supreme Court held, based on case law, that the Chief Fisherman of the Kpone Traditional Area is not a chief under our law.

12 Constitution of the Republic of Ghana, 1992, art 270 (2)(a).
13 Constitution of the Republic of Ghana, 1992, art 270(2)(b).
14 *Nuumo Nyakomle and 7 Ors v. Nii Tetteh Ashong* [2024] DLSC 17458.

This paper will not purport to make a pronouncement of whether the Chief Fisherman is indeed a chief.[15] Rather, it offers a critique of the decision, contending that the case presented a novel situation and a missed opportunity for the Supreme Court to articulate the customary law position on chief fishermen and, on that basis, determine whether they qualify as chiefs. It further argues, without equivocation, that the Supreme Court's decision in *Nuumo Nyakomle and 7 Ors v. Nii Tetteh Ashong* was rendered without due regard to the customary law and practices that underpin the constitutional criteria for determining who qualifies as a chief.

The paper is structured as follows. Section 2 examines the facts of the case and the respective decisions rendered at the various levels of the courts in *Nuumo Nyakomle and 7 Ors v. Nii Tetteh Ashong*. The third section traces the evolution of the institution of chieftaincy from the pre-colonial through the colonial to the post-colonial era. It reflects on the progressive limitations imposed upon the institution over time, as well as the various attempts by successive governments to subject it to political control, rather than allowing it to remain governed wholly by customary law. In the fourth section, the paper considers the definition of a chief under the Fourth Republican Constitution and juxtaposes it with that of chief fisherman. It argues that any proper determination of whether a chief fisherman qualifies as a chief must necessarily be grounded in the constitutional and customary criteria that define chieftaincy. The fifth section analyses the decision in *Eku Alias Condua III v Acquaa (the Condua case),*[16] which served as the principal authority upon which the Supreme Court relied in the *Nuumo Nyakomle* case to conclude that a chief fisherman is not a chief. It contends that such reliance was misplaced, particularly as the two cases are distinguishable and as the precedent was inapplicable to the circumstances at hand. The paper concludes by demonstrating

15 This is because the direct answer to that question is an empirical one which can be the subject matter of a subsequent paper.

16 *Eku Alias Condua III v Acquaa (the Condua case)* (1968) GLR 412.

that the Supreme Court, in *Nuumo Nyakomle*, missed a significant opportunity to establish a clear and authoritative precedent on the status of the chief fisherman within Ghanaian jurisprudence.

The Decision in *Nuumo Nyakomle And 7 Ors V. Nii Tetteh Ashong*[17]

The case of *Nuumo Nyakomle and 7 Ors vs Nii Tetteh Ashong* presented an unusual set of facts. The plaintiff (appellants) in the case sought, amongst others, a declaration that the respondent, who was a chief fisherman, had been removed as the Chief Fisherman of the Kpone Traditional Area on grounds of rudeness, arrogating priestly functions to himself that he was otherwise not entitled to perform. They further sought orders against the respondent to account for all monies received on behalf of the fisherfolks in the Kpone Traditional Area. The defendant (respondent), in his response, raised an objection claiming that he is the duly appointed Woleatse (the Chief Fisherman) of Kpone and had occupied that position since the year 1992. He further argued that his position as a chief fisherman had been gazetted and his name had been entered into the National Register of Chiefs. He argued again that there was no lawful customary procedure of destooling him, and as such his purported destoolment was unlawful. More importantly, he argued, by way of a motion to dismiss the suit, that the matter before the court was a cause or matter affecting chieftaincy[18] and as such the High Court did not have jurisdiction to hear it.

17 *Nuumo Nyakomle and 7 Ors vs Nii Tetteh Ashong* (2024) DLSC 17458.

18 Per Section 76 of the Chieftaincy Act, 2008, Act 759, a cause or matter affecting chieftaincy is as a cause, matter, question or dispute relating to any of the following:

(*a*) the nomination, election, selection or installation of a person as a chief or the claim of a person to be nominated, elected, selected or installed as a chief,

(*b*) the deposition or abdication of a chief,

(*c*) the right of a person to take part in the nomination, election, selection or installation of a person as a chief or in the deposition of a chief,

(*d*) the recovery or delivery of stool property in connection with the nomination, election, selection, installation, deposition or abdication of a chief, and

(*e*) the constitutional relations under customary law between chiefs.

The trial court dismissed the application of the Respondent and held that he did not meet the constitutional threshold for who a chief is. The trial court further held that after assessing *the Condua case*, the fact of the entry of the name of the defendant in the National Register is only prima facie recognition by the National House of Chiefs and does not give legitimacy to the office holder. The trial court concluded that when Article 277 of the Constitution and section 57(1) of the Chieftaincy Act 2008, Act 759 are construed, the provisions on who a chief is will exclude the position of a chief fisherman.

At the Court of Appeal, the learned Justices set aside the judgment of the High Court on grounds that the claim before the court was one which was a cause or matter affecting chieftaincy and, as such, the trial court did not have jurisdiction to hear the matter. The Court of Appeal was further of the view that, looking at the definition of who a chief is and looking at the categories of chiefs under the Chieftaincy Act, the respondent hailed from the appropriate lineage and as such met the requirement of being considered as a chief.

Upon further appeal to the Supreme Court, His Lordship Amadu Tanko, after construing various provisions and decisions on who a chief is and a "cause or matter affecting chieftaincy", was persuaded by the decision in *the Condua case* which is quoted in extenso for emphasis:

We are persuaded by the judgment of the Court of Appeal in *Eku alias Condua III v. Acquaa (1968)* GLR 412 which was extensively discussed by the trial court in its ruling on the motion to dismiss the suit:

There can be no doubt, therefore, that the fishing community of Aboasi to which both parties in this appeal belong have no proprietary interest whatsoever in any piece of land in the village called Aboasi.

They are strangers and licensees on that part of a land which they occupy within the Shama Site. It seems to me that a distinction must be drawn between the headman of the Fishing community of Aboasi village and the headman of Aboasi village who is the Odikro or Penin of the village. The former has no constitutional status, and is therefore not entitled to a seat on the state Council, whilst the latter is the aboriginal head of the entire people of the village... Surely, it is the latter type of headman who has a stool that can have constitutional rights and obligations in the aboriginal state and could take his place at the council.

The holding of His Lordship that the respondent was not a chief was not supported by the analysis in the Judgment. The determination of whether a person is a chief or not is a mixed question of the custom of the area supported by the constitutional and legislative definition of who a chief is. Merely relying on a legal precedent, completely different in context from that of the respondent, to establish the assertion that the respondent, as a chief fisherman, is not a chief is, with the greatest of respect, erroneous. Further, the reliance placed on the precedent overshadowed the peculiar customary and statutory context within which the Respondent's status as a chief fisherman ought to have been assessed. Even though the Supreme Court rightfully observed that differences exist in the customs and usages of the various areas and that may affect the chieftaincy status of a chief fisherman, it still concluded, being heavily persuaded by the decision in *Eku alias Condua III v. Acquaa,* that the chief fisherman of the Kpone traditional area's position is a position of trusteeship.

Chieftaincy Through Time

Chieftaincy is the primary form of governance in the various societies. In Asante communities, for instance, the traditional system of governance was one founded upon an ordered and reverent structure

of leadership, wherein authority flowed in a dignified hierarchy—from the paramount chief, through the divisional and village chiefs, down to the council of elders and the heads of lineages who anchored the very fabric of the community.[19] The chief in traditional society was an embodiment of religious and magical authority.[20] Now, as then, a chief, before he assumes his office, is made to participate in rituals to institute in the chief the powers of the land and to place him in the position to bridge the gap between the living and the dead as well as the gods.[21] The chief is regarded as a sacred figure, revered not merely as a temporal ruler but as a custodian of spiritual authority. In him, the precolonial people placed profound belief, attributing to his office influence over the fertility of the land, the coming of the rains, and even the delicate boundaries between life and death.[22] The chief did not govern by himself. He ruled with a council of elders or, in some instances, with the heads of the lineages of the town/village. The chief, through his council, made decisions on behalf of his people.[23]

In pre-colonial times, who was a chief was determined by the tradition of the people.[24] Such a person should have been nominated, elected, enstooled or enskinned as a chief or, in some cases, installed or appointed by the designated persons under custom.[25] Without these pre-requisites, a person was not considered a chief.

19 R S Rattray, *Ashanti Law and Constitution* (Clarendon Press 1929); Michael Crowder and Obaro Ikime, *West African Chiefs* (African Publishing Corporation 1970).

20 S Obianim, *Ewe Konuwo* (Macmillan 1957); M J Field, *Social Organisation of the Ga People* (Crown Agents for the Colonies on behalf of the Gold Coast Government 1940).

21 K A Busia, *The Position of the Chief in the Modern Political System of Ashanti* (Oxford University Press 1951).

22 C E K Kumado, 'Chieftaincy and the Law in Modern Ghana' (1990–1992) *18 University of Ghana Law Journal* 194–216.

23 In some communities there are opinion leaders whose task is to listen to the views of the people in the community and relay them to the council. Their role aids the council in their decision-making having in view the views of the people.

24 D Addo, *The Institution of Chieftaincy in Ghana: The Future* (Konrad Adenauer Foundation 2004).

25 Ibid

When the British assumed jurisdiction over the Gold Coast Colony, they wrongly assumed that the chieftaincy institution was the same; thus, they observed how chieftaincy amongst the Akans played out and replicated the same amongst the Ga. Thus, paramount chiefs were created where hitherto paramountcy was unknown in their custom.[26] This commenced an era of social disintegration. Because these newly created chieftaincy positions did not have roots in tradition, recognition and acceptability of these chiefs were always in issue.[27] For example, in the Ga traditional areas, the colonial creation and recognition of certain traditional offices generated disputes over legitimacy and succession, resulting in competing claims to authority, divided loyalties among subjects, and recurring conflicts over traditional leadership. This was because these newly created chieftaincy positions were not known to the native people.

To exacerbate matters, the colonial government introduced indirect rule, a system of government through which colonial authority was exercised through traditional rules and native institutions and by which the British sought to progressively adapt native institutions to Western ones.[28] In essence, the policy of indirect rule was designed to enable the British to consolidate and maintain effective control over the Gold Coast by governing through established indigenous institutions, particularly the chieftaincy system.[29] Indirect Rule required that the British have control over who would wield chiefly power, and to address that need, the colonial government turned to a process of recognition through gazetting.[30]

26 W C Hailey, *Native Administration in the British African Territories, Part III* (His Majesty's Stationery Office 1951) ch VIII, 194.

27 Kumado (n 24).

28 F D Lugard, *The Dual Mandate in British Tropical Africa* (Blackwood 1923); R L Buell, *The Native Problem in Africa* (Macmillan 1928); Margery Perham, 'A Restatement of Indirect Rule' (1934) 7 *Africa* 321–334; W C Hailey, *An African Survey* (Oxford University Press 1938) 413; David E Apter, *The Gold Coast in Transition* (Princeton University Press 1955) 120.

29 Ibid

30 Recognition in this context was the formal acknowledgment by the colonial government that an individual ought to be regarded as a chief and be given the entitlements and privileges of a chief in accordance with law. Where a chief's recognition was withdrawn, such person could not exercise any function of a chief. See Kwame Dzivenu, *Chieftaincy, Custom and the Administration*

As Kumado posits, the introduction of the requirement for gazetting to recognise a chief was not achieved easily. It came through much opposition from the educated Ghanaians who argued that the colonial government did not have carte blanche jurisdiction over all the chiefs-only those granted by treaty.

The system of indirect rule without doubt weakened the institution of chieftaincy. Beyond the recognition powers given to the colonial government over chiefs through gazetting, there was the introduction of the Supreme Court Ordinance of 1876. The ordinance introduced the formal court system, which limited the hitherto adjudicatory powers of the chiefs. The Supreme Court of the Gold Coast was to have the same jurisdiction as the High Court of Justice in England and adjudicate claims by the natives. The government also passed the Native Jurisdiction Ordinance of 1878 to define the powers of the chief. It was later repealed and re-enacted by the Gold Coast Native Jurisdiction Ordinance of 1883.[31] In addition to defining the powers of the chief as the 1878 Ordinance introduced, the 1883 Ordinance sought to regulate and control the powers of the native authority.[32]

Addo-Fening argues that the Native Jurisdiction Ordinance of 1883 took away the inherent judicial powers of the chief. The chief's judicial power became derivative.[33] The colonial government became the source of the judicial power of the chief. Further, the 1883 Ordinance made the chief susceptible to being removed from office or suspended by the colonial government (Governor-in-Council) where there was gross abuse of power or where the chief proved to

of Justice in Colonial Ghana (PhD thesis, University of Edinburgh 2011) <https://era.ed.ac.uk/server/api/core/bitstreams/bf5ee607-beac-4469-a452-2124179f9ea9/content> accessed 1 June 2026.

31 1 G & G 1(2d), pg 13.

32 Ibid.

33 R Addo-Fening, 'The Native Jurisdiction Ordinance, Indirect Rule and the Subject's Well-Being: The Abuakwa Experience c1899–1912' (1990) 6(2) *Research Review (Institute of African Studies)*

be incompetent or unsatisfactory to the colonial state.[34] The 1883 Ordinance supposedly conferred on the chiefs the powers to make bye-laws, but such bye-laws' validity came from the approval of the governor only where the bye-law was for the promotion of peace, good order and welfare of the people.[35] The Ordinance created the courts of the king as the court of first instance.[36] The presence of British courts in the protectorates was subversive of the authority of the chief. The chief, as Sarbah argued, in the mind of Africans carried with him the administration of justice;[37] thus, when the 1883 Ordinance took such powers away substantially, the chief was rendered partially impotent. The power of many of the chiefs in the protectorates became so diminished that they were considered merely as arbitrators.

To illustrate, in 1886 one Ayimadu, whose niece had been ordered to pay a five-pound fine by the Nifahene, forbade her to pay that amount. When Ayimadu was summoned to the chief's palace over his conduct, he refused to go and sent a message to the chief that the chief did not have any power to summon him to his court.[38] When the chief escalated the matter to the government, he was informed Ayimadu had done no wrong–he acted within the confines of the law. He was further told that he did not possess powers under the 1883 Ordinance. The Nifahene only acted as an arbitrator.[39] In other instances where the subjects flouted the authority of the chief

34 Native Jurisdiction Ordinance, s 29.

35 Ibid

36 G E Metcalfe, *Great Britain and Ghana: Documents on Ghana History 1807–1907* (Nelson and Sons 1964) 390–393; National Archives of Ghana, Adm 11/1/3, J T Hutchinson to Colonial Secretary, 20 December 1891; *Gold Coast Colony Ordinances* vol I (1874–1892) 399, cl 24 of the Native Jurisdiction Ordinance 1883, 401.

37 J M Sarbah, *Fanti National Constitution* (Frank Cass 1968) 128, 134.

38 National Archives of Ghana, Adm 11/1/3, Amoako Atta I to H E Griffith, 12 August 1886, cited in R Addo-Fening, 'The Native Jurisdiction Ordinance, Indirect Rule and the Subject's Well-Being: The Abuakwa Experience c 1899–1912' (1990) 6(2) *Research Review (Institute of African Studies)*.

39 National Archives of Ghana, Adm 11/1/3, W B G to Commissioner for Native Affairs, 31 August 1886; Colonial Secretary to King Amoaqua Atta, 17 September 1886.

in matters the chief had jurisdiction in, the King's court refused to uphold the power of the chief to punish. In the case involving Odikro Yaw Tawia of Kade, where he failed to attend a summons by the Okyehene for a matter in relation to an oath, the King's court refused to uphold the authority of the Okyehene.[40] As Addo-Fening asserts, towards the end of the 19th century, the chief's power had been so diminished that his sub-chiefs in some instances could even walk out on the chief without deference to his authority. In some instances, they could even publicly insult the chief.[41]

In 1902, there was the passage of the 1902 Ashanti Administration Ordinance after the Yaa Asantewaa War.[42] This law sought to bring the Asante under formal British rule and place restrictions on the recognition of chiefs such that a person could not serve as a chief in Asante until the governor had formally recognised him.[43] In fact, it was unlawful for any head chief to exercise the powers of a head chief when he had not been recognised as such by the governor.[44]

The Ordinance also placed heavy restrictions on the adjudicatory powers of the chief by the establishment of the Chief Commissioner's Court,[45] where the Chief Commissioner had powers to stop the hearing of any case pending before a native tribunal and direct it to be heard in his court.[46] Similar restrictions were placed on chiefs in the Northern Territories under the Northern Territories Administration Ordinance, 1902, where the adjudicatory functions of the chiefs in Northern Ghana were heavily impaired.[47]

40 National Archives of Ghana, Adm 11/1/1094, Kade Chief to Smith, 11 December 1888.
41 Ibid
42 Ashanti (No. 1. 1902) This was an ordinance which was to provide for the administration of the government of Ashanti after Ashanti was annexed to and became part of His Majesty's dominions.
43 Thaddeus Ulzen, 'March 27, 1952: Local Government Ordinance Reduces Role of Chiefs in Local and Municipal Affairs' (29 March 2018) <EAUMF Blog> accessed 7 April 2026.
44 Ashanti Administration Ordinance, 1902, s 22.
45 Ashanti Administration Ordinance, 1902, ss 5–12, 17.
46 Ashanti Administration Ordinance, 1902, s 20.
47 Northern Territories Administration Ordinance, 1902, ss 5–16.

In 1904, the Chiefs Ordinance was passed, which granted power to the governor to grant recognition to the chiefs. Under the Ordinance, the chief obtained recognition as a chief by the state where the chief applied to the governor for a confirmation of his/her election as a chief. The Ordinance's preamble read as follows: "An Ordinance to facilitate the proof of the election and installation and the deposition of chiefs according to native custom."[48] Even though some authors have argued that under this law the colonial government rather sought to bring modernity to the chieftaincy institution and redesigned them in accordance with the models of the English monarchy,[49] the effect of the law was to further create legislative barriers to the independence the chief enjoyed in the exercise of his authority under custom. This not only weakened the chieftaincy institution, but it made the validity of title dependent on the government of the day, thus eroding the customary independence and procedures of the native communities.

Under the Guggisberg Constitution of 1925, three provincial councils were established in the colonies. The provincial councils had the power to elect members to the legislative council, whose duty was to discuss matters of ethnic interest and to consider and advise government on any bill from the government which would affect the local people.[50] Even though this appeared a laudable step, it rather metamorphosed the Chieftaincy institution from a traditional institution to one that aligned with the government of the day.[51] There was also the passage of the Native Courts (Colony) Ordinance 1944,[52] which provided for the composition, administration and powers of native courts in the colony.[53]

48 Chiefs' Ordinance, 1904, preamble.

49 Owusu-Mensah, *Politics, Chieftaincy and Customary Law in Ghana* (Konrad-Adenauer-Stiftung) <Konrad-Adenauer-Stiftung PDF> accessed 6 April 2026.

50 F M Bourret, *Ghana: The Road to Independence, 1919–1957* (Oxford University Press 1960) 48.

51 Harvey, W.B., Law and Social Change in Ghana (Princeton, Princeton University Press, 1966) Ch. 2.

52 No 22 of 1944, 1 G & G 1 (2d) 73.

53 This law had immediately been preceded by the Native Administration Ordinance, 1927.

Towards the end of the colonial administration, the Coussey committee was formed to deal with many structural problems, including problems of native administration. It recommended that the native authorities be given powers in relation to native customary constitutional disputes regarding their stools.

To a considerable extent, the colonial era witnessed a marked diminution of the power and authority of the chief, as the institution was significantly weakened and subordinated. The chief's role and authority no longer emanated solely from the customary law of the people. Even though the chief exercised customary powers, those powers could be exercised with the approval of the government of the day, as approved by a statute. In some respects, the chief was no longer the customary head. He had to survive by pleasing the colonial power.

The 1957 Constitution supposedly brought relief to the institution of chieftaincy by boldly returning the institution as it existed under customary law and usage. This provision was not made in isolation. It further maintained that the House of Chiefs was to be established in each region.[54] In 1958, the House of Chiefs Act[55] was passed, which formally set up and sought to operationalise the House of Chiefs, sought to regulate the affairs of chiefs and even their disputes. Consequently, the Chiefs (Recognition) Act[56] was enacted. This law gave power to the Governor-General to have the last word on the enstoolment or destoolment of a chief such that when a person is enstooled or destooled per the custom in the area, that enstoolment or destoolment will not be effective if it is not recognised by the Governor-General.[57] The Act further placed restrictions on the chief by giving powers to the Governor-General to prohibit anyone

54 Ghana (Constitution) Order in Council, 1957 pt IX, ss 66–68, 88, 1 G & G 128.
55 House of Chiefs Act 1958 (No 20 of 1958), as amended by the House of Chiefs (Amendment) Act 1959.
56 The Chiefs (Recognition) Act 11, 1959.
57 The Chiefs (Recognition) Act, 1959 (No. 11 of 1959), s 2.

from exercising the functions of a chief and to place a residence ban on him. The effect of these provisions was that even though the Constitution of the Republic of Ghana, 1992, guaranteed that the institution of chieftaincy must be regulated by the customary law and usage of the traditional area, the Governor-General, under legislation, had the power to determine who should be the chief in a traditional area or otherwise.[58] This meant that where a person is enstooled in accordance with the customary law and usage of the area where such person was a person who opposed the ideology of the government of the day, such a person's enstoolment was most likely to be disapproved by the Governor-General. Kumado asserts[59] that many of these legal provisions against chiefs were because of the opposition some chiefs gave to the constitutional struggle before independence. Some Asante and Akyem chiefs supported the opposition parties against the Convention People's Party (CPP), and this resulted in laws made against their interests, including laws to affect their financial interests, so their financial resources to finance opposition parties were limited.[60]

Subsequently, in 1966, after the overthrow of Kwame Nkrumah's CPP government led by the National Liberation Council, the National Liberation Council (which was heavily opposed to the ideology and ways of the Nkrumah led administration) passed laws to guarantee the freedom of the chieftaincy institution. There came the passage of the Chieftaincy (Amendment) Decree, 1966 (NLCD 112)[61] which sought to guarantee the administration of chieftaincy under the appropriate customary law and usage. The NLCD 112 still maintained some powers in the government to withdraw recognition from some chiefs. This was because there were some persons appointed

58 *Asor II and Others v Ameghoe and Others* [1978] GLR 153-169.

59 Ibid

60 The Akim Abuakwa (Stool Revenue) Act. No. 8 of 1958 was an example of such laws made which brought their financial resources which was hitherto under their traditional authority under the control of government

61 This law was an amendment to the Chieftaincy Act, 1961 (Act 81).

by the erstwhile government as chiefs who didn't qualify as chiefs under their custom. More clearly, under the amendment decree, some chiefs were specified in the schedule to the decree as having been promoted to paramountcy by the Nkrumah government where such paramountcies were not known under the custom of the place. Per the amendment decree, such paramountcies were reduced to the status they had before the elevation.[62] Also, some chiefs who were listed in the second schedule to the decree lost their recognition as chiefs by the government since such people did not qualify as chiefs in their respective customary areas.[63] It further reinstated all deposed chiefs who ought to have been the lawful occupants of the stool or skin. These processes did not come without challenges. As Mensah-Brown has pointed out, there were huge challenges of reverting some stools which had been elevated to paramountcies to their original statuses.[64]

In 1969, based on the Akuffo-Addo constitutional commission proposals, the 1969 constitution came into force, ushering in the 2nd Republic. Under the 1969 constitution, the rhetoric of guaranteeing the institution of chieftaincy under custom was provided for.[65] The constitution maintained the various houses of chiefs at the regional levels and further maintained the national house of chiefs with an option of an appeal from their decisions to the Supreme Court. The National House of Chiefs also had significant functions, although much couldn't (no contractions in formal speech) be achieved under it to undertake studies on the customary law with the view of having a unified system of rules of customary law.[66] The constitution had no provision on the recognition of the chief by a minister for the validity of the position of the chief. In the case of *Republic v. Boateng; Ex*

62 National Liberation Council Decree 112 para 2.
63 National Liberation Council Decree 112 para 1(2).
64 A K Mensah-Brown, 'Chiefs and the Law in Ghana' (1969) 13(2) *Journal of African Law* 57 <JSTOR> accessed 10 April 2026.
65 Constitution of the Republic of Ghana 1969 arts 153–159, 169.
66 Ibid

Parte Adu-Gyamfi II,[67] the Court reaffirmed the position thus: "With the coming into force of the Constitution, 1969, recognition by the minister is no longer essential to the validity of enstoolment of chiefs. A chief under Act 81 after the promulgation of the Constitution, 1969, is one who has been nominated, elected and installed as a chief according to customary law. The recognition given by the minister of the enstoolment of the respondent did not operate to cure the defect in his enstoolment."

Notwithstanding the above–stated position, when the Chieftaincy Act, 1971 (Act 370) was passed after the coming into force of the 1969 Constitution, the recognition of chiefs by the Minister was maintained even though the constitution had provided for the fact that the institution of chieftaincy shall be governed by the customary law and usage of the area. The Chieftaincy Act defines who a chief is as follows: an individual who has, in accordance with customary law, been nominated, elected and installed as a Chief or as the case may be appointed and installed as such and whose name for the time being appears as a Chief on the National Register of Chiefs. Provided that no person shall be deemed to be a Chief for the purposes of the exercise by him of any function under this Act or under any other enactment, unless he has been recognised as such by the Minister by notice published in the Local Government Bulletin[68] (sic)

The Act further mandated the entry of the name of the chief in the National Register of Chiefs.[69] The Minister was further given powers to prohibit any person purporting to act as a chief from doing so and could impose a residence ban on any such person he so prohibits.[70]

Intriguingly, the power of the government to recognise or detract from recognising a person as a chief, even though such chief would

67 *Republic v. Boateng; Ex Parte Adu-Gyamfi II* [1972] 1 GLR 317.
68 Chieftaincy Act 1971, (Act 370), s 48(1).
69 Chieftaincy Act 1971, (Act 370), s 48 (2)
70 Chieftaincy Act, 1971 (Act 370), s 52.

have been validly enstooled or enskinned, was given to the Minister, which is an affront to the return of chieftaincy to the customary set-up.

Remarkably, the return of the institution of chieftaincy to its pristine form at custom was seen under the 1979 Constitution. The Constitution, beyond merely declaring that chieftaincy shall be governed in accordance with the relevant customary law and usage, went ahead to define who a chief is. It defined a chief as a person who, hailing from the appropriate family and lineage, has been validly nominated, elected and enstooled, enskinned or installed as a chief or queen mother in accordance with the requisite applicable customary law usage.[71] This definition replaced the statutory definition contained in Section 48 (1) of Act 370. It is significant for a number of reasons. This was the first time that the Constitution, the fundamental law itself, expressly defined a chief. Since 1957, the constitutions of Ghana have guaranteed chieftaincy according to custom and usage but have left the identification of a chief to the legislature. The definitions in the various statutes have been at variance with the constitutional guarantee because they invariably involved central government in the process of attaining or losing chiefly status.[72]

The victory the 1979 constitution brought was short lived when the 1979 constitution was overthrown by the Provisional National Defence Council (PNDC) government in 1981. Upon the assumption of government, the PNDC government abrogated the 1979 constitution but by the proclamation being the Provisional National Defence Council (Establishment) Proclamation 1981 as amended by PNDC Law 42, section 53 (2) maintained the definition of who a chief is under the 1979 constitution. That victory was Pyrrhic. In 1985, the PNDC government passed the Chieftaincy

71 Constitution of the Republic of Ghana 1979 art 181.
72 Ibid

(Amendment) Law, 1985, P.N.D.C. Law 107. In that rather two (2) paragraphed law, the PNDC government took the institution of chieftaincy back to legislative control. It maintained the definition under the 1979 constitution but further went ahead to impose limitations on the chief. It provided as follows:

(1) A chief is a person who, hailing from the appropriate family and lineage, has been validly nominated, elected and enstooled, enskinned or installed as a chief or queen mother in accordance with the requisite applicable customary law and usage.

(2) Notwithstanding any law to the contrary, no person shall be deemed to be a chief for the purposes of the exercise by him of any function under this Act or any other enactment unless he has been recognised as such for the exercise of that function by the Secretary responsible for Chieftaincy matters by notice published in the Local Government Bulletin.[73]

Subsection 2 inserted into section 48 subjected the validity of the chief's authority to recognition by the Secretary for Chieftaincy Matters by notice published in the Local Government Bulletin.

Then came the current Constitution of the Republic of Ghana, 1992. Who is a chief in Ghana is given a constitutional definition just as was done in 1979. The determination of who a chief is or is not has not been left to the whim and caprice of any person. Neither was it, under the Constitution of the Republic of Ghana, 1992, left to be given validity by a person (a minister or government official). It is not for the court to decide based on its discretion whether a person "looks" like a chief or not.

Under the Constitution of the Republic of Ghana, 1992, the institution of chieftaincy in Ghana is governed by the customary law

73 PNDCL 107.

and usage of the area in question or the group of people. Thus, article 270 of the Constitution of Ghana, 1992, boldly pronounces that the institution of chieftaincy, together with its traditional councils established by customary law and usage, is hereby guaranteed.[74] This, in essence, means that the Constitution of the Republic of Ghana, 1992, by an added clause, placed the institution of chieftaincy fully under customary law and usage, demonstrating an appreciable penchant to place a limit on the extent of statutory influence on the institution of chieftaincy. Rightfully, to substantiate the added layer of limit, the Constitution provided conclusively that Parliament does not have the power to pass any law which confers on any person the status of being a chief or has the power to withdraw recognition given to any person as a chief.[75] To further demonstrate how protected the sacrosanctity of the institution of chieftaincy is, Parliament is further restricted from passing any law which in any way detracts or derogates from the honour and dignity of the institution of chieftaincy.[76] Thus, the Chieftaincy Act, 2008, Act 759, in providing for the regulation of chiefs, did not confer on any person the status to recognise or detract from recognising a chief. It only provided for a register[77] for the administration of the functions of the chief under the Act such that all chiefs must be duly registered with the register provided.[78]

Without doubt and following the trajectory, the 1992 followed the 1979 approach of providing customary autonomy to the institution of chieftaincy, restoring it where it belonged before the introduction of British Jurisdiction in the Gold Coast.

74 Constitution of the Republic of Ghana, 1992, art 270.
75 Constitution of the Republic of Ghana, 1992, art 270(2)(a).
76 Constitution of the Republic of Ghana, 1992, art 270(2)(b).
77 Chieftaincy Act, 2008 (Act 759), s 57(5).
78 The said section provides as follows:

(5) A person shall not be considered to be a chief for the performance of a function under this Act or any other enactment, unless that person has been registered for the performance of that function in the National Register of Chiefs and that person's name has been published in the *Chieftaincy Bulletin*.

Who Is a Chief in Ghana?

A chief in Ghana is a person who hails from the appropriate family and lineage, and such person has been validly nominated, elected or selected and enstooled, enskinned or installed as a queen mother or as a chief in accordance with the relevant customary law and usage.[79] This definition is repeated at section 57 of the Chieftaincy Act, 2008, Act 759.

The constitutional definition of the chief acknowledges that in some traditional areas the queen mother in the area is the recognised chief; as such, in such circumstances, such persons should be given the due recognition as the chief. For a person to qualify as a chief under article 277, such a person must meet three main indicators being:

a. Whether the person, who claims to be a chief, hails from the appropriate family and lineage.

b. Whether the person, who claims to be a chief, was validly nominated, elected or selected.

c. Whether the person, who claims to be a chief, has been enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage.

The satisfaction of the above stated indicators is construed in accordance with the customs of the people in the community for whom the chief is being considered.

A chief must hail from the appropriate family and lineage

For a person to qualify properly as a chief under the constitutional definition of who a chief is, that person must meet the first criterion of whether the person hails from the appropriate family and lineage.

79 Constitution of the Republic of Ghana, 1992, art 277.

Such a person must be a royal or heir to the stool. Such royal status, according to the case of *Darko v. Brako and others*[80] is obtained from birth, which is never lost by the royal or his descendants by law unless the royal took positive steps to renounce that royal blood-line, or he did acts which in law could result in him and his descendants being disqualified from their royal status and actual steps were taken to debar him.[81]

His Lordship Appau rightly observed in the case of *Nana Ofori Appiah & Ors v Nana Akua Ameahene & Ors*[82] that "since chiefs are selected or chosen from royal families, those chosen must hail from the appropriate family and lineage from which the selection is made." In Akan custom, there may be instances where some people who were not royals could ascend to the throne. His Lordship Brobbey lists some instances where a non-royal could ascend to a throne. When such a person ascends to the throne, the person is not considered a chief but as a caretaker. Such instances include where the royal family is matrilineal, and there is no male in that royal family to ascend to the throne, so a distant relative is made to occupy the throne.[83] Another factor could be where a person is made to ascend to the throne as a security for a debt[84] or, in some instances, where a strong overlord is made to ascend to the throne of a place he/she is not a royal in order to protect them from an invading force.[85] When such a caretaker ascends to the throne, such a caretaker is not considered a chief properly so called under the constitutional requirement of who a chief is. That ascension also does not create a rotational system to the ascension to that stool.[86] Where his descendants claim they

80 *Darko v. Brako and others* [1982-83] GLR 345.
81 *Ibid* 346.
82 Chieftaincy Appeal No J2/02/2017 (unreported).
83 S A Brobbey, *The Law of Chieftaincy in Ghana* (Advanced Legal Publications 2008).
84 These instances occur where the community in need of money for a pressing matter and the one who provides the money is made to made to occupy the stool as security for the debt till the debt is paid.
85 Ibid
86 *Essilfie & Anor v Anafo VI & Anor* [1993-94] 2 GLR 1.

qualify to also ascend to the throne because their ancestor was once an occupant of that stool. What the descendants must establish is whether their ancestor hails from that appropriate family or lineage to qualify as a chief. Having an ancestor once ascend to the stool does not automatically catapult a person as meeting the first requirement of hailing from the appropriate family or lineage.

In sum, even where a stool has not had its royal occupant ascend to the stool for several years, even in excess of 150 years, that does not serve as a bar to the rightful person ascending to the throne by the person from the appropriate family and lineage.[87] Common law concepts like estoppel and acquiescence cannot override such entrenched customary (constitutional) principles.[88]

A chief must be validly nominated, elected, or selected.

Nomination refers to the formal act by which a person is identified and put forward for consideration for election or selection as a chief. Nomination of the candidate must ensue before any of the subsequent processes can take place. If the nomination is faulty/defective, the other processes of election and selection of the chief will be of no consequence. The process of nominating the candidate for consideration as a chief is not a process open to just any person or to royals. The customary law of the area dictates who is mandated to nominate a candidate for the occupancy of the stool. Nominating a person for consideration for the stool in Akan is the preserve of the queen mother.[89] The queen mother has three chances to nominate a chief.[90] In most of these communities, there is one queen mother,[91]

87 *Darko v. Brako* (n 81).
88 *Nana Ofori Appiah & Ors v Nana Akua Ameahene & Ors.*
89 *Darko v. Brako* (n 81). Also see the case of *In Re Kwabeng Stool; Karikari & Another v Ababio II & Others* [2001-2002] SCGLR 515.
90 *Boampong v. Aboagye* [1981] GLR 927, SC.
91 *Nana Atoaa Sramangyedua III, Nana Dr. Abrefa Mensah Abrampa, Nana Owusu Achiaw Kusi*

and where the election or selection process bypasses the nomination of the queen mother, such process is considered a nullity.[92] As noted by His Lordship Brobbey, Nomination is the sine qua non to the election of a chief.[93] This points to the fundamentality of the nomination process.[94] The exception to queen mothers nominating a candidate for consideration by the king-makers lies where the queen mother, with the customary right to nominate, deliberately refuses to nominate, which gives the king-makers the right to nominate a candidate in that vein.[95] The queen mother must, however, be given a reasonable time to act or refuse to act–usually she must refuse to act on three occasions.[96] The queen mother nominates the candidate after consulting extensively, including her advisors and the elders.[97] Emphatically, it is only when there has been a valid nomination that the king-makers can proceed to make a valid election or selection of the candidate preferred to be the chief of the customary area.

The chief must be enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage

Article 277 recognises that females (queen mothers) can qualify as a chief in Ghana. Indeed, in the Dagbon traditional area in the Northern Region of Ghana, the overlord is not restricted to gender. The chief can be male or female. Thus, whoever is nominated and elected or selected as the chief must go through the necessary rites

II And Oheneba Dr. Krabiri Boateng I vs. Kwadwo Nyam Nketia, Wenchi, Nana Owusu Ansa Kokroko And Nana Kumi Adusi Poku [2011] DLSC 4106.

92 The case of *Macfoy v United Africa Trading Company Ltd* [1961] 3 All ER 1169, at pages 1172-1173, PC: establishes the fact that "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad... And every proceeding which is founded on it is also bad and incurably bad."

93 Ibid

94 Ibid

95 Ibid

96 *Republic v Boateng; Ex parte Adu-Gyamfi II* [1972] 1 GLR 317.

97 R S Rattray, *Ashanti Law and Constitution* (Clarendon Press 1929) 1443. See also the case of *In Re Kwabeng Stool; Karikari and Anor. V Ababio &* Others [2001-2002] SCGLR 515.

required in that customary area to enstool, enskin or install such chief or queen mother. It is imperative that the customs of the various communities vary from each other;[98] thus, the process for enstoolment or enskinment will differ from community to community. In most Akan communities, the process of enstoolment commences with a period of confinement. Among the Akuapems (those from Akropong), confinement takes place at *mmogyannwe.*[99] Whereas amongst the Asantes, confinement takes place at apatamu.[100] The period of confinement can take seven days, fourteen days, twenty-one days, and even in some instances, forty days. The chief-elect at that stage is taught the traditions of his people, the spirituality surrounding the office, how to lead the people, taught about the stool, how to behave in public as a chief, how to dance as a chief and how to respond to the drum.[101] After the period of confinement, the next stage is oath swearing. The chief elect, under oath, makes a solemn pledge to his constituents, invoking the gods as witnesses to serve the people diligently and to commit to them.[102] After the chief swears the oath, if there are sub-chiefs, they also swear an oath of allegiance to the chief. The oath swearing places the chief under the law of his people and signifies his formal coming into office.

Who Is a Chief Fisherman?

Having examined the institution of chieftaincy in its historical and constitutional dimensions, and having delineated the criteria that define who qualifies as a chief under the Constitution of the Republic of Ghana, 1992, it becomes both necessary and instructive to turn attention to the parallel but contested traditional office of

98 *The Republic v. Nana Osei Bonsu II Mamponghene Ex Parte: Obaapanin Afua Amadie* (2007) JELR 68404 (SC).

99 This means the place where blood is dried up.

100 This means inside the hut.

101 M Kwadwo Ntiamoah, 'Indigenous Leadership Formation Structures: Insights from Akan Chieftaincy System in Ghana' (2025) <ResearchGate> accessed 7 May 2026.

102 K Agyekum, 'Ntam "Reminiscential Oath" Taboo in Akan' (2004) 33(3) *Language in Society*.

the chief fisherman. This transition is central to the inquiry at hand. For if chieftaincy is anchored in customary law and usage, then any determination of whether a chief fisherman falls within that constitutional conception must begin with a clear understanding of the nature, origin, and functions of that office within the customary framework of the communities that recognise it. It is against this background that the institution of the chief fisherman must be examined.

The chief fisherman is inextricably bound to Ghana's coastal life, drawing its authority and relevance from the rhythms and sustenance of the sea. Ghana's coastline of five hundred and fifty (550) kilometres and a continental shelf area of twenty-four thousand three hundred square (24,300) kilometres is dotted with fishing communities. The fishing industry has been an active industry in Ghana since the early 1700s,[103] and the craft of some tribes in Ghana since their migration to Ghana. Fishing communities have their own leaders who steer the affairs and are typically led by the chief fisherman.

Incidentally, in recent times, there have been calls from a section of traditional leaders on the government to abolish the chief fisherman concept because it undermines the traditional chieftaincy institution. One such person is Torgbiga Adamah III, the Makorsor of Somey, who appealed to the Ministry of Fisheries and Aquaculture Development (MoFAD) and argued that the position of the chief fisherman is not backed by law and that its occupants merely arrogate to themselves power to equate themselves to "traditional authorities".[104] Intriguingly, he well admits that the traditional chiefs in such communities do not have a say in the activities of the fisherfolk because the fishing

103 Barbara Walker, 'Dividing and Conquering the Sea: The Colonial History of Marine Fishing and Property Rights in Ghana' (Paper presented at the Marine Environmental Politics in the 21st Century Conference, Institute of International Studies, University of California Berkeley, 1999) <FAO PDF> accessed 7 February 2026.

104 Emmanuel Ajarfor Abugri, 'Scrap Chief Fisherman Concept–Somey Chief' *Modern Ghana* (1 August 2020) <Modern Ghana> accessed 27 January 2026.

community has its chief (the chief fisherman) who superintends their affairs.[105] The Minister of State, in response to the appeal, rightfully raised doubts about the authority of the ministry to scrap the position of the chief fisherman. She argued that since the legitimacy of the chief fisherman did not come from the Ministry, the Ministry may lack the power to scrap that customary office.[106] Thus, the question remains: is the chief fisherman a customary position unknown to our customary laws?

Adjei asserts that in the canoe fishing communities, the community is governed by local institutions such as the paramount chief of the area, the chief fisherman, chief fishing trader, typically known among Akan as the Omanhene, Apofohene and the Konkohemaa, respectively.[107]

Nunoo *et al* concur, asserting that the Chief Fisherman is the overlord of the fishing community.[108] They describe the chief fisherman as an institution in the community where a primary role of the chief fisherman is to assist with fishing resources.[109] The chief fisherman is therefore not merely an individual, but an office or a structure.[110] In the surveyed fishing areas of Adina, Chorkor, Dixcove and Elmina, the members of the community considered the institution of the chief fisherman as the foremost institution to be resorted to for resolving disputes amongst fisherfolk.[111] The adjudication is not done solely by the chief fisherman. He does it with a council of elders. Additionally, his office has jurisdiction over conflicts between

105 Ibid
106 Ibid
107 M Adjei, 'Governing the Ocean Space for the Coexistence of Fishery and Petroleum Industry in Ghana's Western Region' (Master's thesis, University of Bergen 2017) <Academia.edu> accessed 11 May 2026. (bora.uib.no)
108 F K E Nunoo, B Asiedu, J Olauson and G Intsiful, 'Achieving Sustainable Fisheries Management: A Critical Look at Traditional Fisheries Management in the Marine Artisanal Fisheries of Ghana, West Africa' (2015) 2(1) *Journal of Energy and Natural Resource Management* <DOI Link> accessed 27 January 2026.
109 Ibid
110 Ibid
111 Ibid

fishermen and fishmongers over debts on the sale of fish.[112] The chief fisherman also collects, supervises, and shares fishing inputs to the fishermen so scarcity in resources does not plague the fishermen.[113]

The chief fisherman is the only institution which supports the management of fishing resources and serves as the primary institution to enforce fishing regulations and rules in the area and serves and grants permissions for entrants into the fishing industry of the area.[114] Where there are migrant fishermen within the community, there is sometimes appointed the migrant chief fisherman who serves as the point of contact between the fishing community and the migrant fisherfolk–which sometimes include non-Ghanaians.[115] [116]

Odotei also asserts that the chief fisherman has a role in solving the occupational hazards of the fishermen and providing security (physically and spiritually) for the fishermen.[117] For instance, the chief fisherman has the duty of pacifying the sea by banning fishing for some days.[118]

In some areas, however, the chief fisherman serves as a liaison between the paramount chief of the area and the fishing community.[119] He communicates the problems of the fishermen to the paramount

112 Ibid
113 Ibid
114 Ibid
115 Irene Odotei, 'The Migration of Ghanaian Women in the Canoe Fishing Industry' (1992) 5(2) *Maritime Anthropological Studies* 88–95 <PDF Copy> accessed 6 February 2026.
116 Migration is a common phenomenon amongst the fishing folks. This is because in the fishing industry, there is a belief backed by data that fishes migrate thus the fishermen depending on the season and the migration trend of the fishes move from community to community which has the bumper fish season to fish. This movement is seasonal and after the fishing season in that community is over, they move back to their original community.
117 Irene Odotei, 'Gender and Traditional Authority in the Artisanal Marine Fishing Industry in Ghana' (1999) *Studies on the Fishing Industry* <https://fishcomghana.ucc.edu.gh/wp-content/uploads/2017/04/Gender-and-Traditional-Authority-in-the-Artisanal-Marine-Fishing-Industry-in-Ghana.pdf> accessed 5 February 2026.
118 Ibid
119 *Fisheries Governance Institutions in Ghana* (unpublished document, *Governing the Ocean Space for the Coexistence of Fishery and Petroleum Industry in Ghana's Western Region* 2016) <https://9pdf.net/article/fisheries-governance-institutions-in-ghana.q052ovol> accessed 3 February 2026

chief and communicates any concerns from the paramountcy to the fisherfolk.[120] He also deals with external governmental matters that concern the community.[121] Where a person wants to take up fishing as a profession or to join the fishing business, it is the chief fisherman who determines whether the person is admitted. Also, where migrant fishermen come into the community, it is the chief fisherman who accepts the beach drink or beach fees from the migrant fisherman.[122]

Eligibility Criteria as A Chief Fisherman

Who qualifies for the position of the chief fisherman is determined by the practice and history of the fishing community involved. In some communities, the chief fisherman is appointed based on the experience of the fisherman (by merit). For instance, amongst the Fante, the criteria for the appointment in such places of merit include owning a canoe and gear, being an accomplished person and a person of honour, patience, bravery and a person who can command respect from the fisherfolks.[123] Even though being a chief fisherman is by appointment, there are still some distinctions created. In areas such as Elmina and Komenda, any fisherman qualifies to be appointed as a Chief Fisherman. In other areas, such as Dixcove and Anomabo, the appointment is reserved for some selected groups in the community.[124] In recent times, the educational background of the nominee has been quite critical in being appointed as a chief fisherman.[125]

In other areas in the Greater Accra Region and Central Region– as Winneba, Cape Coast and amongst the Ga-Adangbe–the chief

120 Ibid
121 Ibid
122 Irene Odotei. (n118)
123 Ibid
124 Ibid
125 Bryan Maddox and Ragnhild Overå, 'New Technologies, New Demands and New Literacies: The Changing Literacy Practices of Fishing Communities in Bangladesh and Ghana' (2009) 8(2) *Maritime Studies (MAST)* 35 <https://www.researchgate.net/publication/261144890_New_technologies_new_demands_and_new_literacies_The_Changing_Literacy_Practices_of_Fishing_Communities_in_Bangladesh_and_Ghana> accessed 30 May 2026.

fisherman's position is hereditary. Thus, in those areas, the question of who qualifies as the chief fisherman is determined by a lineage rather than the experience of the individual.[126] The chosen lineage ought to have been the family which introduced marine fishing to the community or might have been the first fisherfolks in the area. The other reason is that that lineage would have been the lineage acknowledged as the fishing experts over time. This further means that there is a possibility of having a chief fisherman who lacks professional expertise in fishing.[127]

The system amongst the Anlos is quite different. They do not have a separate traditional system for the installation of the chief fisherman, unlike some Fante areas and Ga-Adangbe areas, where the position is either by appointment or through the family lineage. Amongst the Anlos, the position of chief fisherman was created recently. Historically, the general traditional authorities were also the authorities who managed and administered the fishing community. The position was created to help deal with fishing-related matters.[128] When the chief fisherman is selected, whether by appointment on merit, rituals are performed to initiate him into office. He is confined for a period; he is made to swear an oath of office, and there is jubilation to signify his installation as the chief fisherman.

Is A Chief Fisherman Comparable To A Traditional Chief?

The decision of the various courts in the *Nuumo Nyakomle* case in determining the matter which was central to the nature and scope of who a chief fisherman is, failed to properly expose the nature of

126 Ibid

127 Ibid. What is typically done in such situations is that a deputy chief fisherman is appointed (who is a professional fisherman) to assist the chief fisherman in the performance of his duties. He is also supported by a strong or mature fishing council.

128 Ibid

the office of the chief fisherman to determine whether, in line with its nature across the various communities, that office will meet the threshold of being a chief or not. Whether the chief fisherman of an area is a chief or merely an administrative head cannot be determined without considering the cultural history and practices of the people involved. The decision of the court in *Nuumo Nyakomle* rather ought to have focused on whether

d. The Respondent, who claims to be a chief, hails from the appropriate family and lineage

e. The Respondent was validly nominated, elected or selected

f. The Respondent has been enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage.

The unconventionality or non-traditionality of the office of that chief must not in any way sway a court to think that that position of the person does not qualify such person as a chief. Indeed, the Chieftaincy Act under section 58 recognises that beyond the Asantehene, the paramount, divisional, and sub-divisional chiefs, and the Adikrofo[129] which are widely known, other chiefs who are recognised by the National House of Chiefs. Such chiefs cannot be denied their status or recognition if they meet the requirements of being recognised as a chief, although such chiefs have not hitherto been recognised as such. Rightfully so, in fishing communities, there are public structures (similar to the traditional chieftaincy institutions), with authorities, which haven't been subjected to legal analysis to determine whether they ought to be recognised as chiefs or not within the confines of the law.

As an example, one study observed that practically all fishing communities in Ghana along the coast have a public authority

129 Chieftaincy Act, 2008, (Act 759), s 58(a)-(d).

structure for the administration of matters amongst the fisher folks, where this structure is headed by a figure known as a chief fisherman- just like the traditional communities.[130][131] The chief fisherman does not operate by himself. He is assisted by a council in the performance of the duties of the office. He fisherman performs religious and spiritual roles, as well as roles of solving occupational problems of fisher folks in the form of accidents at sea, conflict resolution, and sharing of government allocations.[132] These roles performed aren't different from the roles performed by the chiefs of the traditional communities.

As noted earlier, in some communities such as the Ga-Adangmes, Cape Coast and Winneba, it is hereditary, based on the lineage of the person.[133] In other areas like Anomabo and Dixcove, eligibility as a chief fisherman is limited to some selected groups in the town. After eligibility is settled, the person selected is made to go through rituals such as ritual confinement and taking oaths in accordance with the ceremony ritual of the area.[134] For emphasis, the chief fisherman does not operate or work alone. He works in consultation with a council who assists him with his work.

The history and the nature of his office do not appear to be radically different from the "traditional chiefs" we know. They both act as spiritual heads of their people; they serve their people with a council, and they (depending on the area) are enstooled as chiefs from appropriate families rooted in custom. They are confined after the period of selection, and they swear an oath of office and allegiance to their people.

130 Irene Odotei, 'Gender and Traditional Authority in the Artisanal Marine Fishing Industry in Ghana' (1999) 15(1) *Research Review of the Institute of African Studies* <https://doi.org/10.4314/rrias.v15i1.22878> accessed 3 March 2025.
131 Odotei (n 137).
132 Odotei (n 137) 22-23.
133 Odotei (n 137).
134 Odotei (n 131).

Thus, the Supreme Court had an opportunity to analyse this unique office of the respondent as a chief fisherman to determine whether, in accordance with the customary practice of his area, he qualifies as a chief. Since customary law is a question of law[135] the Supreme Court had the power to invite both parties to make submissions on the customary practice and nature of the chief fisherman in the Kpone area,[136] or consider appropriate textbooks or even request the appropriate house of chiefs to provide their opinion on the relevant customary practice[137] to aid their final decision. This the Supreme Court failed to do but rather relied on a decision which has no equal footing to the case before them. This clearly renders the holding unsubstantiated and without legal basis.

Distinguishing The Case of *Eku Alias Condua I I I Vrs Acquaa*[138]

The Supreme Court, as the final appellate court, is not bound to follow the decision of any court[139] such that it can depart even from its own previous decision when it appears right to do so.[140] Nonetheless, it can apply any decision it finds persuasive, albeit such application must be made in law.

The Supreme Court in the *Nuumo Nyakomle case* relied heavily on the dictum in *the Condua case* to conclude that a chief fisherman was not a chief. The *Condua case*, though similar to the case in question, involved a declaration to recognise the plaintiff as the headman of the fishing community of Aboasi Village in the Shama Traditional Area and, as headman, his entitlement to collect fishing tolls.

135 Courts Act 1993 (Act 459), s 55(1).
136 Courts Act 1993 (Act 459), s 55(2)(a).
137 Courts Act 1993 (Act 459), s 55(5)
138 *(1968) GLR 412*
139 Constitution of Ghana 1992, art 129(1)
140 Constitution of Ghana 1992, art 129(3)

In the judgment of Azu Crabbe JA, he emphasised that the question was about a headman of the community in the following words: "In this appeal it is common ground that a headman is not a chief as defined by the State Councils (Colony and Southern Togoland) Ordinance, 1952 (No. 8 of 1952)."

And indeed, in the judgment the court aptly defined the headman to mean: "any person chosen by the community of a village, and confirmed or approved by the paramount chief of the State wherein the village is situated in accordance with native customary law, and includes an Opanin, Onukpa, Hanua, Hafia, and Nokotoma."[141]

Thus, *the Condua case,* which formed the basis for the decision of the trial court and the Supreme Court in *Nuumo Nyakomle,* was one where the issue was whether a headman of a fishing community was a chief and not whether the chief fisherman is a chief.

Again, the determination of the court in *the Condua case,* in concluding that the headman of the fishing community was not a chief, was based on a specific statute, i.e. the State Councils (Colony and Southern Togoland) Ordinance, 1952 (No. 8 of 1952).[142] The State Councils (Colony and Southern Togoland) Ordinance, 1952 (No. 8 of 1952) at that time was a law which Kulendi JSC noted had been passed to expressly limit the traditional authorities' residual judicial function in settling customary law disputes.[143] It formed part of a coordinated attempt to phase chiefs out of the local government administration. This process commenced with the passage of the Local Government Ordinance (No. 29 of 1951), where, under this law, the functions the chiefs had under the Native Authority laws were taken from them and allocated to a set-up local government council. This process, in essence, destroyed the native system of

141 (n 139) 423.
142 See its application in *Ahenkora II vs. Ofe* [1961] DLSC 546.
143 *Elorm Kwami Gorni v Attorney-General and National House of Chiefs* [2022] DLSC 15121 (SC Ghana).

administration.[144] Thus, such a law in just a restricted area of eroding the power and authority of the chief cannot be one on which the Supreme Court, with the greatest of respect, could base its decision. That era of treatment of chiefs no longer exists

This then meant that at best, the decision in *the Condua case* was not of general application and that era of darkness for the chieftaincy institution should not be revisited without proper justification. With the greatest respect to their Lordships, basing a decision on chieftaincy today on a decision like that in *the Condua case* without ascertaining and appreciating the context, the laws at that time and the political hindrances against chiefs invariably rendered the basis for the conclusion inaccurate. Indeed, it is submitted that their Lordships ought to have construed the question of the chieftaincy title of a chief *fisherman* as a novel case and should have discussed the nature and scope of it, thoroughly testing it in the light of the constitutional definition of a chief under article 277. Merely relying on *the Condua case* and merely discussing the definitions of a chief could not have properly analysed the office of the chief fisherman in the light of the nature of the reliefs sought.

Conclusion

This paper has sought to assess the office of the chief fisherman through the lens of the chieftaincy institution and to posit that the court ought to have considered the unique nature of the office of the chief fisherman to have laid down the law on whether the chief fisherman in the Kpone traditional area ought to be considered as a chief. We have traced the historical evolution of the institution of chieftaincy as it has existed from pre-colonial times, through colonial times, its post-independence period and to its current status under the 1992 constitution. I have demonstrated that in pre-colonial times

144 Ibid

the authority and legitimacy of a chief was determined and/derived from the customary law/practice of the relevant community until colonial rule altered the inherent authority of the chief. However statutory control of the institution did not weaken the status of the chief in the community.

Post-independence Ghana still retained powers to recognise and/otherwise regulate chiefs statutorily. The 1992 constitution made a deliberate attempt to preserve the customary foundations of the institution of chieftaincy. It defines who a chief is and expressly proscribes the law maker from withdrawing or conferring a chief status on a person who is otherwise not entitled to. Constitutionally, a chief is meets three main indicators namely appropriate family and lineage; valid nomination, election or selection and enstoolment/enskinment/installation as a chief or queen mother in accordance with the relevant customary law and usage. We have seen that in many communities, the chief fisherman's office is embedded in the traditions of the fishing communities, and he is considered a chief in his own right. He performs functions comparable to a traditional chief, his qualification to the office is determined by hereditary lines (in some communities) or by merit. Thus, an assessment of whether a person is a chief fisherman or not (in this case, of the Kpone traditional area) can only be done through the evaluation of the customary practice of the community in question vis-à-vis the constitutional criteria of a chief.

The judicial function, particularly within the context of chieftaincy, requires proactivity- not a mechanical application of precedent. It calls for a meaningful exposition and engagement of the relevant customary laws of the various communities. The Supreme's decline to take the thorough inquiry into the customary nature of the office of the chief fisherman was an abdication of an opportunity to clarify a key area of Ghanaian jurisdiction The judicial function,

particularly within the context of chieftaincy, requires proactivity– not a mechanical application of precedent. It calls for a meaningful exposition and engagement of the relevant customary laws of the various communities. The Supreme Court's decline to take the thorough inquiry into the customary nature of the office of the chief fisherman was an abdication of an opportunity to clarify a key area of Ghanaian jurisdiction. The unconventionality of the office of the "chief" should rather serve as a clarion call on the courts, especially the Supreme Court, to perform its constitutional and statutory role of establishing precedent. Merely relying on a decision of a court as the basis may not suffice. The test for determining whether a person is a chief or not should always be whether it meets the constitutional criteria under article 277 of the Constitution of Ghana, 1992.

COORDINATING AFRICA'S EXTERNAL VOICE: THE CASE FOR AN EXTERNAL ENGAGEMENT PROTOCOL UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA

Emmanuel Amoah[1*]

Abstract

The African Continental Free Trade Area has created a sophisticated framework for internal trade liberalisation, yet it contains no mechanism to govern how its fifty-four Member States engage the world beyond Africa's borders. Each Member State retains the legal capacity to conclude bilateral trade and investment agreements with external partners on terms that progressively undermine the AfCFTA's customs union trajectory, without any obligation to notify the continental framework, without compatibility assessment, and without any mechanism for developing a common continental position on external trade matters. This paper argues that it is vital and urgent that we adopt an External Engagement Protocol under the AfCFTA Agreement before too many cross-continental bilateral obligations make it legally impossible to do so.

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Introduction

The African Continental Free Trade Area has created a sophisticated framework for internal trade liberalisation, yet it contains no mechanism to govern how its fifty-four Member States engage the world beyond Africa's borders. Each Member State retains the legal capacity to conclude bilateral trade and investment agreements with external partners on terms that progressively undermine the AfCFTA's customs union trajectory, without any obligation to notify the continental framework, without compatibility assessment, and without any mechanism for developing a common continental position on external trade matters. Existing scholarship has diagnosed this fragmentation; none has proposed a legally grounded institutional remedy. This paper fills that gap. It argues for the adoption of an External Engagement Protocol under the AfCFTA Agreement, grounding the proposal in three legal foundations that do not require interpretive innovation: the AfCFTA's treaty text, the Abuja Treaty's continental customs union mandate under Article 6(2)(d), and the AU Constitutive Act's overarching institutional obligations. The Protocol's design draws on ASEAN's demonstrated feasibility of non-supranational collective external engagement, corrects for MERCOSUR's enforcement failures, and adapts the converse of the WTO Appellate Body's Turkey-Textiles necessity test as its incompatibility standard. More broadly, the article contributes to international economic law by identifying the role of transitional governance instruments in staged integration systems, a dimension that has received limited doctrinal attention. It argues that coordination mechanisms are not merely ancillary to integration but constitutive of its progression, particularly in the transition from free trade areas to customs unions. The AfCFTA provides a uniquely salient case through which to develop this broader theoretical insight. The case for action is urgent: the window for preventive institutional design closes as cross- continental bilateral obligations accumulate, make it legally impossible to do so.

The paper develops as follows. Part 2 situates the AfCFTA within the Abuja Treaty's six-stage trajectory, arguing that pre-CET coordination is constitutive of customs union formation rather than merely preparatory to it. Part 3 documents the institutional vacuum's four functional consequences, tariff divergence, rules of origin divergence, regulatory fragmentation, and eroded bargaining leverage, illustrated by the Kenya-EAC, Ghana-EPA, and AGOA episodes and situated within a TWAIL/LPE account of structural asymmetry. Part 4 grounds the Protocol in three foundations requiring no interpretive innovation: the AfCFTA's treaty text, the Abuja Treaty's Article 6(2)(d) mandate, and the AU Constitutive Act's Article 3(i) obligation, with VCLT Articles 31(1) and 26 as supporting threads. Part 5 selects among comparative models: the EU's common commercial policy as the appropriate long-run trajectory but premature template, ASEAN's consultative architecture as the present design reference, and MERCOSUR's enforcement failures as the cautionary constraint. Part 6 proposes the resulting architecture, Secretariat-anchored coordination, pre-negotiation notification, compatibility standards drawn from the converse of Turkey-Textiles, a three-stage graduated enforcement mechanism, and EPA-calibrated transitional provisions. Part 7 establishes WTO compatibility under GATT Article XXIV, the Transparency Mechanism, and the Enabling Clause. The paper concludes by situating the Protocol within the broader category of transitional governance instruments.

Fragile harmony

In February 2020, Kenya announced its intention to negotiate a bilateral free trade agreement with the United States.[2] The East

2 Office of the United States Trade Representative, 'President Trump Announces Intent to Negotiate Trade Agreement with Kenya' (USTR Press Release, 6 February 2020) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya> accessed 30 June 2026; Luke Anami, 'Kenya Will Be in Breach of EAC, AfCFTA Rules in Proposed Trade Deal with America' *The East African* (Nairobi, 16 February 2020) <https://www.theeastafrican.co.ke/news/ea/Kenya-

African Community Secretariat raised compatibility concerns, noting that the EAC's treaty obligations required member states to adopt common negotiating positions in trade agreements with third parties.[3] The negotiations proceeded regardless.[4] Kenya was characterised at the time as being on the brink of becoming the first violator of AfCFTA commitments before their fruition.[5] The negotiations were ultimately never concluded, but the structural problem they exposed was not resolved by their failure: no continental coordination mechanism had existed to interrupt them, and none emerged from the episode.[6]

The Kenya episode was not an isolated event. Africa's formal admission as a permanent member of the G20 through the African Union marked a significant shift in its global economic standing,[7] yet that presence has not been matched by any coordinated continental trade position. Individual African states continue to engage major trading partners bilaterally, on their own terms, without reference to the AfCFTA's integration objectives, while the AU's G20 seat remains an institutional achievement without the technical and legal coordination machinery necessary to give it substantive trade

US-trade-deal-sparks-dispute-with-EAC-partners/4552908-5456950-55r9wrz/index.html> accessed 30 June 2026.

3 Protocol on the Establishment of the East African Customs Union (adopted 2 March 2004, entered into force 1 January 2005) art 37(2), (4)(b); Protocol on the Establishment of the East African Community Common Market (adopted 20 November 2009, entered into force 1 July 2010) art 37(3)(a), (4)(b); *Christopher Ayieko and Emily Osiemo v Attorney General of the Republic of Kenya and Secretary General of the East African Community*, Reference No 5 of 2019 (East African Court of Justice, First Instance Division, 2 December 2022) paras 21, 67, 69, 108(a), (c), (e); United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 153, fn 310.

4 *Ayieko* (n [2]) paras 64, 98.

5 Luke Anami (n [1])

6 Jamie MacLeod, David Luke and Jonathan Bashi, 'Africa's Trade Arrangements with the United States, the United Kingdom and Other Prominent Partners' in David Luke (ed), *How Africa Trades* (LSE Press 2023) 85; Office of the United States Trade Representative, 'United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership' (USTR Press Release, 14 July 2022) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-kenya-announce-launch-us-kenya-strategic-trade-and-investment-partnership> accessed 30 June 2026.

7 G20, 'New Delhi Leaders' Declaration' (G20 India Presidency, 9-10 September 2023) para 76.

content. The pattern is systemic: Africa's formal negotiating presence consistently outstrips its practical bargaining capacity, because the AfCFTA's internal architecture does not extend to the external trade domain.

This institutional incompleteness is not incidental to the AfCFTA's design. The AfCFTA is a framework agreement whose protocols are intended to develop incrementally as the integration process deepens.[8] Existing protocols have progressively elaborated disciplines on goods, services, investment, intellectual property, and competition. None addresses external trade engagement.[9] The gap exists because external trade policy is politically sensitive and Member States, at the AfCFTA's formation, were unwilling to accept binding coordination obligations on their bilateral trading relationships.[10]

The scholarship on this structural gap has been predominantly diagnostic. The fragmentation threat has been identified with precision in the AfCFTA literature;[11] the institutional limitations of the AfCFTA's external engagement architecture have been catalogued;[12] and the specific implications for the African Growth and Opportunity Act context have also been examined.[13] Each of these contributions is diagnostic; none proposes a legal design. This paper fills that gap.

8 AfCFTA Agreement art 8.

9 Melaku Desta, Guillaume Gérout and Jamie MacLeod, 'Safeguarding the African Continental Free Trade Area from Externally-Imposed Threats of Fragmentation' (Afronomicslaw, 14 March 2019) <https://www.afronomicslaw.org/2019/03/14/safeguarding-the-african-continental-free-trade-area-from-externally-imposed-threats-of-fragmentation> accessed 30 June 2026, 5–7.

10 Desta, Gerout and MacLeod (n 8) 5-7

11 Ibid

12 United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 228, 230–231, 244; David Luke (ed), *How Africa Trades* (LSE Press 2023) 63.

13 Emmanuel Kwabena Owusu Amoah, 'Reimagining AGOA in the Era of AfCFTA: Opportunities for Sustainable Economic Growth in Africa' in Katrin Kuhlmann (ed), *Next-Generation Approaches to Trade and Development: Balancing Economic, Social, and Environmental Sustainability* (CITD Georgetown Law 2023) 43.

The paper does so by developing and applying the concept of transitional governance instruments: legal mechanisms that operate between formal stages of economic integration to manage the structural gaps that arise during progression from one stage to another. Integration theory has traditionally focused on end-states, the characteristics of free trade areas, customs unions, and common markets.[14] Less attention has been paid to the institutional mechanisms that facilitate movement between these stages. This article argues that external coordination mechanisms constitute a distinct and under-theorised category of such transitional instruments, and that the proposed External Engagement Protocol under the AfCFTA exemplifies this function. The Protocol is not merely a technical addition to the AfCFTA's protocol architecture; it is an instance of a broader class of instruments whose role in staged integration systems deserves doctrinal attention in its own right.

The argument proceeds as follows. Part II establishes the Abuja Treaty trajectory and the AfCFTA's relationship to it, developing the concept of pre-Common External Tariff (CET) coordination as a constitutive element of customs union formation. Part III documents the institutional vacuum and its four functional consequences, illustrated by three empirical episodes. Part IV develops the legal case for the Protocol on three foundations that do not require interpretive innovation. Part V applies a comparative institutional logic to select the appropriate design model. Part VI proposes the Protocol's institutional architecture in detail. Part VII establishes WTO compatibility. Part VIII concludes.

14 Bela Balassa, *The Theory of Economic Integration* (George Allen & Unwin Ltd 1961) 1–17.

PART 2: THE ABUJA TREATY TRAJECTORY AND THE AFCFTA

The Sequencing Logic and the Continental Customs Union Mandate

The AfCFTA is not a terminus. It is a stage within an integration trajectory that the Abuja Treaty established over thirty-four years ago.[15] The Abuja Treaty's six-stage model traces a linear progression from strengthened regional economic communities through continental free trade area, customs union, common market, and monetary union to political union. [16]The AfCFTA operates at the third and fourth stages of that model, advancing the continental free trade area and laying the institutional foundations for the Continental Customs Union.[17]

The AfCFTA's Preamble cites the Abuja Treaty as foundational authority.[18] AfCFTA Article 3(d) commits Member States to 'lay the foundation for the establishment of a Continental Customs Union at a later stage.'[19] The AfCFTA does not establish the customs union objective independently; it inherits and advances it.[20]

The Abuja Treaty's fourth-stage obligation, under Article 6(2)(d), requires the coordination and harmonisation of tariff and non-tariff systems among the various regional economic communities 'with a view to establishing a Customs Union at the continental

15 Treaty Establishing the African Economic Community (Abuja Treaty) (adopted 3 June 1991, entered into force 12 May 1994) arts 6, 88; Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) preamble.

16 Abuja Treaty (n [1]) art 6(2)

17 Abuja Treaty (n [1]) art 6(2)(c)–(d); AU Assembly, Decision on the African Continental Free Trade Area (Assembly/AU/Dec.714(XXXII), 32nd Ordinary Session, 10–11 February 2019) para 8; United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 228–231.

18 AfCFTA Agreement (n 14) preamble, recitals 2-3

19 AfCFTA Agreement (n [14]) art 3(d).

20 AfCFTA Agreement (n [14]) art 1(j) (defining 'Continental Customs Union' by cross-reference to the Abuja Treaty); UNECA, *ARIA XI* (n [11]) 13.

level by means of adopting a common external tariff.'[21] This is a continental obligation, requiring the consolidation and progressive harmonisation of what the RECs have already built. While elements of the Abuja Treaty's sequencing framework have not been judicially enforced and may operate in part as programmatic commitments, their legal significance lies in establishing a directional obligation and institutional trajectory that the AfCFTA expressly adopts and must be interpreted and developed consistently with.[22] The Protocol does not create obligations that the Abuja Treaty does not already imply at the fourth stage; it gives operational institutional form to the coordination requirements that Article 6(2)(d) makes necessary but that existing instruments leave without expression.

The AfCFTA is also a stepping-stone toward a Continental Customs Union in the sense contemplated by Balassa's foundational typology. .[23] A customs union requires coordination of external commercial policy as a constitutive element: without a common external tariff and collective bargaining, the arrangement is a free trade area, not a customs union.[24] The AfCFTA is currently the former and is committed to becoming the latter.

21 Abuja Treaty (n [1]) art 6(2)(d).

22 Arinze B Okiche, 'Are African Regional Trade Agreements Intended to Create Legally Binding Obligations?' (2026 29(1) *Journal of International Economic Law* (advance article, 2026) doi:10.1093/jiel/jgag009; James Thuo Gathii, 'African Regional Trade Agreements as Flexible Legal Regimes' (2010) 35 North Carolina Journal of International Law and Commercial Regulation 571, 572–578; UNECA, *ARIA XI* (n [3]) 13; Gerhard Erasmus, 'Does Africa Have Two Trade Liberalisation and Economic Integration Strategies? Comparing the AfCFTA Agreement with the Abuja Treaty' (TRALAC Trade Brief No S24TB02/2024, 25 February 2024) <https://www.tralac.org/publications/article/16323-does-africa-have-two-trade-liberalisation-and-economic-integration-strategies-comparing-the-afcfta-agreement-and-the-abuja-treaty.html> accessed 30 June 2026.

23 Balassa (n 13) 1-17, UNECA, *ARIA XI* (n [11]) 403.

24 Gathii (n 21) 572-579; UNECA, *ARIA XI* (n [11]) 13.

Pre-CET Coordination as a Constitutive Element of Customs Union Formation

For Africa, the common external tariff presents a particularly acute challenge. The continent's fifty-four economies differ significantly in their tariff structures, their dependence on import duties as a source of government revenue, and the depth of their existing bilateral trade commitments with major external partners.[25] The UNECA has identified CET negotiation as the principal stumbling block in AfCFTA's customs union trajectory, requiring levels of political consensus and technical harmonisation that are not achievable in the near term and that no credible institutional timetable currently anticipates.[26]

The difficulty of negotiating a common external tariff does not mean that nothing can or should be done in the interim. This observation leads to what this paper identifies as the core theoretical insight of transitional governance in staged integration systems: customs unions are not created solely by tariffs; they are created by coordination.

Customs union formation comprises at least three distinct elements: the eventual agreement on a common external tariff schedule; the technical infrastructure for assessing and monitoring external obligations against that schedule; and the coordination practices that build the institutional habits and common positions without which neither the tariff negotiation nor its enforcement can succeed. Integration theory has focused primarily on the first element as the defining characteristic of a customs union.[27] This paper argues that the second and third elements are equally constitutive: a common external tariff cannot be negotiated without the coordination

25 United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa XI: Delivering on the African Economic Community* (UNECA 2025) 192, 228–231; Trudi Hartzenberg, 'Regional Integration in Africa' (WTO Staff Working Paper ERSD-2011-14, October 2011) 15–16.

26 UNECA, *ARIA XI* (n [11]) 192, 228-231; Trudi Hartzenberg, 'Regional Integration in Africa' (WTO Staff Working Paper ERSD-2011-14, October 2011) 15-16

27 Balassa (n [13]) 1–17; UNECA, *ARIA XI* (n [11]) 403.

practices that enable common positions, and it cannot be maintained without the institutional machinery that monitors external obligations for compatibility. Pre-CET coordination is therefore not merely preparatory to customs union formation; it is constitutive of it.

The habits of consultation, the institutional infrastructure for common position development, the compatibility standards that prevent external agreements from foreclosing future harmonisation, and the technical capacity to assess external engagements against continental objectives are all elements of customs union logic that can be built before the CET is negotiated. Building these coordination habits early may itself facilitate the CET negotiation: the confidence-building that standing consultation mechanisms generate gives member states assurance that their interests will be considered in collective frameworks, which is a necessary precondition for the sovereignty-sharing that a common external tariff requires.[28] An External Engagement Protocol does precisely this. It begins building customs union coordination infrastructure during the transitional period, moving the continent functionally closer to the customs union stage while the CET negotiation process develops.

The Institutional Vacuum

The AfCFTA's building bloc architecture was designed to accommodate precisely this kind of incremental institutional development.[29] The framework agreement does not define its protocols exhaustively; it expressly contemplates their expansion as the integration process deepens, with Article 8 providing the

28 Luke (ed), (n 11) 217

29 AfCFTA Agreement (n [14]) preamble, recital 10; Gerhard Erasmus, 'The Meaning of Building Blocks for African Integration Is Defined by the Applicable Legal Instruments and Subsequent Practice' (Tralac, 2021) <https://www.tralac.org/blog/article/15546-the-meaning-of-building-blocks-for-african-integration-is-defined-by-the-applicable-legal-instruments-and-subsequent-practice.html> accessed 8 March 2026.

institutional procedure through which new protocols are negotiated and adopted.[30] That architecture has unfolded across three phases. Phase I, concluded at the AfCFTA's formation, produced the foundational protocols on Trade in Goods, Trade in Services, and Dispute Settlement.[31] Phase II, adopted by the AU Assembly in February 2023, added protocols on Investment, Competition Policy, and Intellectual Property Rights.[32] Phase III, adopted in February 2024, introduced protocols on Digital Trade and Women and Youth in Trade.[33] None of these existing protocols addresses external trade engagements. The institutional vacuum this creates reflects the political sensitivity of external trade policy and the caution of states seeking to preserve existing bilateral trading relationships with major external partners.[34] That political explanation does not, however, eliminate the legal and functional consequences of the vacuum's existence.[35] The absence of a coordination mechanism means that the AfCFTA's internal integration ambitions coexist, uneasily and at increasing cost, with an external trade governance environment in which any individual state can at any time conclude an agreement that cuts across the continental framework.[36]

30 AfCFTA Agreement (n [1]) art 8(3).

31 UNECA, *ARIA XI* (n [11]) 339–340; AfCFTA Agreement (n [1]) art 8(1).

32 Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (adopted 19 February 2023, 36th Ordinary Session of the AU Assembly); UNECA, *ARIA XI* (n [11]) 350.

33 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade (adopted 18 February 2024, 37th Ordinary Session of the AU Assembly); Protocol to the Agreement Establishing the African Continental Free Trade Area on Women and Youth in Trade (adopted 18 February 2024, 37th Ordinary Session of the AU Assembly); UNECA, *ARIA XI* (n [11]) 350, 372.

34 UNECA, *ARIA XI* (n [11]) 228, 230–231; Luke (ed) (n 11) 63

35 Okichie (n 21)

36 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 230; MacLeod, Luke and Bashi (n 5) 88-89; Okiche (n [21]).

PART 3: THE EXTERNAL ENGAGEMENT GAP: CONSEQUENCES AND ILLUSTRATIONS

What the AfCFTA Agreement Does Not Do

The AfCFTA's agreement text is characterised by a significant asymmetry. The Agreement contains detailed disciplines for intra-African trade liberalisation: tariff reduction schedules, rules of origin frameworks, services liberalisation modalities, investment protection standards, and competition disciplines. It contains nothing that regulates, constrains, or even acknowledges the external trade negotiations of its Member States.[37]

The treaty's general objectives acknowledge the external dimension without operationalising it institutionally. Article 3(d) commits to laying the foundation for a customs union, which by definition has an external dimension. Article 3(a) directs the AfCFTA to create a single market to deepen economic integration. Article 3(f) commits to enhancing the competitiveness of Member States' economies within the global market. Article 3(h) commits to resolving the challenge of multiple and overlapping memberships. Article 4(d) obliges State Parties to cooperate on all trade-related areas.[38] At the foundational level, the AU Constitutive Act's Article 3(i) commits the Union to establishing the necessary conditions enabling the continent to play its rightful role in the global economy and in international negotiations.[39] The AU Assembly has reinforced this commitment through successive decisions requiring Member States to engage external partners collectively and to ensure that any third-party partnerships do not undermine the continental market vision.[40]

37 UNECA, *ARIA XI* (n [11]) 228, 230–231; Luke (ed) (n 11) 63

38 AfCFTA Agreement (n [1]) arts 3(a), 3(d), 3(f), 3(h), 4(d).

39 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) art 3(i).

40 AU Assembly, Decision on the AfCFTA (Assembly/AU/Dec.692(XXXI), 31st Ordinary Session, 1 July 2018); AU Assembly Dec.714(XXXII) (n 16) para 7, AU Assembly, Decision on Post-2020 Partnership with the European Union (Assembly/AU/Dec.715(XXXII), 32nd Ordinary Session, 10–11 February 2019) para 2.

Together, these provisions establish a clear directional commitment to collective external engagement. They do not, however, establish the institutional mechanisms through which that commitment is given operational form. That is the gap.

The Functional Consequences of the Gap

The absence of external coordination produces four distinct functional consequences, each of which impairs either AfCFTA's current objectives or its customs union trajectory. These effects are mutually reinforcing: fragmentation in one domain accelerates fragmentation in others, progressively increasing the institutional cost of transitioning to a customs union.[41]

First, tariff divergence undermines CET formation. When an AfCFTA Member State concludes a bilateral agreement with an external partner that grants preferential tariff access on terms more favourable than those available to other AfCFTA members, it creates a preference asymmetry that distorts the internal liberalisation project. More fundamentally, bilateral tariff commitments widen the divide between African states' tariff books and prevent the formation of a common external tariff, which is a prerequisite for the Continental Customs Union.[42] The ECOWAS groupings already demonstrate this problem at the regional level, their common external tariff disciplines having been undermined by separate bilateral agreements concluded by Côte d'Ivoire and Ghana with the European Union and replicated under the United Kingdom's post-Brexit trade arrangements.[43]

Second, rules of origin divergence generates trade deflection and value chain distortion. The AfCFTA has developed continental rules of origin covering the substantial majority of tariff lines, representing a

41 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 228, 230–231.
42 UNECA, *ARIA XI* (n [11]) 192, 230–231; Desta, Gérout and MacLeod (n [8]) 5–7.
43 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 230.

significant technical achievement designed to support regional value chain development.[44] When individual Member States conclude bilateral agreements with different and potentially conflicting rules of origin, they create incentives for trade deflection through the member with the most favourable external access, undermining both the coherence of the continental framework and the investment decisions that firms make in reliance on it.[45] The spaghetti bowl effect captures the systemic consequence: as bilateral agreements proliferate with divergent rules of origin, the resulting regulatory complexity progressively renders preferential arrangements inoperable in practice.[46]

Third, regulatory divergence fragments investment patterns. The proliferation of bilateral investment treaties and economic partnership agreements concluded by individual states on divergent terms creates overlapping and conflicting regulatory disciplines that complicate the development of continental investment frameworks. Investors seeking to structure continental operations face inconsistent signals about the applicable regulatory environment, with the terms of investment protection, dispute resolution, and market access varying depending on which bilateral agreements the host state has concluded.[47] The AfCFTA's investment protocol, designed to create a coherent continental investment architecture addressing the continent's fragmented landscape of overlapping bilateral investment disciplines, faces a structural limitation: it governs only intra-African investment, leaving the accumulation of inconsistent extra-African bilateral disciplines, the larger source of investor uncertainty, entirely unaddressed.[48]

44 AfCFTA Agreement (n [1]) Protocol on Trade in Goods, Annex 2; UNECA, *ARIA XI* (n [11]) 339–340.

45 MacLeod, Luke and Bashi (n 5) 95; UNECA, *ARIA XI* (n [8]) 230.

46 Jagdish Bhagwati, 'US Trade Policy: The Infatuation with Free Trade Agreements' in Claude Barfield (ed), *The Dangerous Obsession with Free Trade Areas* (AEI Press 1995) 4–5; Gathii (n [8]) 656–664.

47 UNECA, *ARIA XI* (n [11]) 228, 244; Desta, Gérout and MacLeod (n [8]) 5–7.

48 Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment

Fourth, bilateral negotiation weakens collective bargaining leverage. The AfCFTA's most significant potential contribution to Africa's position in global trade is the aggregation of its member states' market size into a negotiating unit that external partners must engage collectively. A combined GDP exceeding three trillion dollars and a population exceeding 1.4 billion represents, in principle, a transformation of Africa's negotiating position.[49] The practice of allowing external powers to negotiate with each state individually, behind closed doors, represents a concession of collective leverage that AfCFTA's market aggregation should prevent. The structural constraints on developing country negotiating capacity in international trade forums confirm that this concession is not merely a diplomatic inconvenience but a structural transfer of advantage to better-resourced external partners.[50]

The same structural deficit operates at the multilateral level. Africa accounts for over a quarter of WTO membership, yet its collective engagement at the WTO has been characterised as nominal and largely ineffectual relative to that membership share.[51] The Africa Group, which coordinates African positions across WTO negotiations, is structurally ad hoc: its effectiveness depends on the capacity and initiative of whichever country holds the coordination role at a given moment, with coordination between Geneva missions

(adopted 19 February 2023, 36th Ordinary Session of the AU Assembly) (n [31]); Gerhard Erasmus, 'Substantive Issues The AfCFTA Investment Protocol Should Address' (Tralac, 27 March 2020) <https://www.tralac.org/blog/article/14468-substantive-issues-the-afcfta-investment-protocol-should-address.html> accessed 30 June 2026; Amani Khalifa and others, 'The AfCFTA Investment Protocol Will Change the Landscape of Investment Protection in Africa' (Freshfields Bruckhaus Deringer, 5 April 2023) <https://www.freshfields.com/en/our-thinking/blogs/risk-and-compliance/the-afcfta-investment-protocol-will-change-the-landscape-of-investment-protection-102ic8t> accessed 30 June 2026.

49 African Continental Free Trade Area, 'About The AfCFTA' <https://au-afcfta.org/about/> accessed 30 June 2026.

50 Luke (ed) (n 11) 63; UNECA, *ARIA XI* (n [11]) 228, 231.

51 World Trade Organization, 'WTO Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 30 June 2026 (Africa accounts for 44 of 166 WTO members, approximately 26.5 per cent); UNECA, *ARIA XI* (n [11]) 228.

and home capitals described as consistently challenging.[52] The AfCFTA Secretariat has been identified as a potential institutional anchor for Africa Group coordination. Without a legal mandate, however, that engagement remains informal and episodic.[53] The cumulative effect of both dimensions, bilateral and multilateral, is a continent whose formal negotiating presence consistently outstrips its practical bargaining capacity. That gap is structural, and the Protocol is a structural response to it.

Empirical Illustrations

The functional consequences identified above are not theoretical. They are visible in two documented episodes, each of which illustrates a different dimension of the external engagement gap.

Ghana's position as both a founding AfCFTA Member Party and an EPA implementing state illustrates the rules of origin and tariff compatibility problem with particular clarity. Ghana initialled an Interim EPA with the European Union in 2007, committing to progressive tariff liberalisation on approximately 80 per cent of EU imports over a 15-year period.[54] Both the EPA and the AfCFTA are simultaneously in force, creating competing legal commitments on tariff treatment and rules of origin that pull in structurally divergent directions.[55] The UNECA has identified the divergence between

52 Luke (ed) (n 11) 63; UNECA, *ARIA XI* (n [11]) 231.

53 United Nations Economic Commission for Africa, 'African Group Convenes in Chavannes-de-Bogis to Advance a Strong, Development-Centred Agenda for WTO MC14' (UNECA, 3 December 2025) <https://www.uneca.org/stories/african-group-convenes-in-chavannes-de-bogis-to-advance-a-strong%2C-development-centered> accessed 30 June 2026; Luke (ed) (n 11) 63.

54 EU-Ghana Joint Statement, 'Start of Trading under the EU-Ghana Interim Economic Partnership Agreement' (European Commission, 1 July 2021) <https://policy.trade.ec.europa.eu/news/joint-statement-eu-and-ghana-start-trading-under-eu-ghana-interim-economic-partnership-agreement-2021-07-01_en> accessed 8 April 2026; European External Action Service, 'The European Union and Ghana' <https://www.eeas.europa.eu/ghana/european-union-and-ghana_en?s=101> 8 March 2026.

55 AfCFTA Agreement (n [1]) Protocol on Trade in Goods, Annex 2; Jamie MacLeod, David Luke and Jonathan Bashi, 'Africa's Trade Arrangements with the United States, the United Kingdom

EPA liberalisation schedules and AfCFTA tariff schedules as one of the most technically complex implementation challenges facing West African AfCFTA states.[56]

The AGOA reform process illustrates the institutional consequence of coordination without legal backing. The December 2022 Memorandum of Understanding between the USTR and the AfCFTA Secretariat created a formal channel for collective engagement on US-Africa trade policy, positioning the Secretariat to advocate for AGOA reform aligned with the continent's integration objectives, including harmonisation of rules of origin that would have supported regional value chain development.[57] What it lacked was the legal mandate to require Member States to coordinate their engagement with the AGOA renewal process collectively. The programme expired in September 2025 and was reauthorised only through December 2026 under a short-term extension.[58] Capacity without legal mandate produced consultation without consequence.

The TWAIL and Law and Political Economy Dimension

The fragmentation described above is not accidental. From a Third World Approaches to International Law and Law and Political Economy perspective, the structural conditions under which African states negotiate externally have historically reproduced rather than disrupted patterns of external dependency, precisely because African integration frameworks have addressed internal liberalisation while

and Other Prominent Partners' in David Luke (ed), *How Africa Trades* (LSE Press 2023) 95; UNECA, *ARIA XI* (n [11]) 230.

56 UNECA, *ARIA XI* (n [11]) 228, 231, 244.

57 MacLeod, Luke and Bashi (n [41]) 91–92.

58 Consolidated Appropriations Act 2026 (P.L. 119-75) s 5019 (signed 3 February 2026); United States Trade Representative, 'Statement from Ambassador Jamieson Greer on the Reauthorization of the African Growth and Opportunity Act' (USTR, 3 February 2026) <https://ustr.gov/about/policy-offices/press-office/press-releases/2026/february/statement-ambassador-jamieson-greer-reauthorization-african-growth-and-opportunity-act> accessed 8 April 2026.

leaving external asymmetries intact.[59] Formal sovereign equality does not produce substantive equivalence where the conditions of negotiation, including market size, technical capacity, economic vulnerability, and institutional sophistication, are asymmetric: African states are formally equal as negotiating parties but structurally disadvantaged as negotiating actors.[60] The external engagement gap is not merely an institutional oversight but a structural feature of AfCFTA's architecture that perpetuates the asymmetries the continental project was designed to address.[61] The Protocol is a structural response to a structural problem.

PART 4: THE LEGAL AND INSTITUTIONAL CASE FOR THE PROTOCOL

What Existing Law Clearly Supports

At its most defensible, the legal case for the Protocol rests on three foundations that do not require interpretive innovation or doctrinal extension.

The first is the AfCFTA's treaty text itself. Article 3(d)'s commitment to laying the foundation for a continental customs union, read alongside Articles 3(a), 3(f), 3(h), and 4(d)'s obligations of cooperation on all trade-related areas, establishes a clear directional commitment to collective trade governance that extends to the external dimension. These provisions provide the positive law foundation upon which a Protocol can be grounded.[62]

59 James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade Law and Development 26, 30; James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) 2–17; 'Okiche (n 21)'.

60 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 245–268; 'Luke (ed) (n 11) 63'.

61 Desta, Gerout and MacLeod (n 8) 5-7; UNECA, *ARIA XI* (n [11]) 228, 230–231.

62 'AfCFTA Agreement (n 14) arts 3(a), 3(d), 3(f), 3(h), 4(d).

The second is the Abuja Treaty's sequencing logic. The AfCFTA Preamble explicitly cites the Abuja Treaty as foundational authority, and the AfCFTA's Article 3(d) commitment to laying the foundation for a Continental Customs Union is the direct treaty-level expression of what the Abuja Treaty already mandates at the fourth stage.[63] Article 6(2)(d) requires the coordination and harmonisation of tariff and non-tariff systems among the various regional economic communities 'with a view to establishing a Customs Union at the continental level by means of adopting a common external tariff.' That consolidation logic is reinforced by the REC-level provisions of the Abuja Treaty: Articles 29(b) and 32(1)–(2) committed Member States to building REC-level customs unions and common external tariffs at stage three and to eliminating differences between those tariffs at stage four, while Article 34(2) required Member States to notify the Community of prior bilateral agreements that conflict with those obligations and to refrain from extending or renewing them.[64] Reading these provisions together, the Abuja Treaty establishes a clear directional principle: integration progresses forward and is not reversed by bilateral agreements with third parties. The Protocol operationalises that principle at the continental level. It does not create obligations that the Abuja Treaty does not already imply at the fourth stage; it gives institutional form to the forward-progression logic that the treaty's sequencing architecture already demands.

The third is the AU Constitutive Act's overarching institutional mandate. Article 3(i) commits the Union to establishing the conditions enabling the continent to play its rightful role in international negotiations.[65] These provisions establish a structurally grounded institutional authority rather than merely aspirational commitments: they generate obligations of means and direction

63 AfCFTA Agreement (n [14]) preamble, recitals 2–3; 'Abuja Treaty (n 14) art 6(2)(d)
64 Abuja Treaty (n [49]) arts 6(2)(c), 6(2)(d), 29(b), 32(1)–(2), 34(2).
65 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) art 3(i).

that subsequent instruments, including the AfCFTA, are expected to advance. The AfCFTA Secretariat, as the AU's primary trade integration instrument, is the appropriate body through which this mandate is given operational form in the external trade context. The Protocol delegates to the Secretariat the specific authority necessary to discharge this mandate, converting structurally grounded legal obligations into institutional machinery with enforceable disciplines.[66]

What Existing Law Plausibly Implies

Beyond what existing law clearly supports, two interpretive arguments provide additional grounding for the Protocol. Both are advanced with appropriate qualification as supporting threads rather than primary foundations.

The first is the purposive interpretation argument under Article 31(1) of the Vienna Convention on the Law of Treaties, which requires treaty interpretation in light of the treaty's object and purpose. [67]The object and purpose of the AfCFTA, as established by Article 3(d) read in conjunction with the Abuja Treaty's Article 6(2)(d) continental customs union mandate, is progressive continental economic integration culminating in a customs union achieved through the coordination and harmonisation of tariff systems across the RECs.[68] A customs union's essential attributes are by their legal nature external-facing: a common external tariff and coordinated external commercial policy are not optional features but constitutive elements of what a customs union is.[69] An interpretation

66 AfCFTA Agreement (n [14]) arts 3(d), 4(d), 8(1); AU Assembly Dec.714(XXXII) para 7; AU Assembly Dec.715(XXXII) (n 39) para 2.

67 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1).

68 AfCFTA Agreement (n [14]) art 3(d); Abuja Treaty (n [49]) art 6(2)(d).

69 General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art XXIV:8(a); Balassa (n 13) 1-17.

of the AfCFTA that treats its obligations as entirely confined to the internal dimension fails to give adequate weight to the treaty's own stated trajectory. This interpretive argument supports the Protocol's legal coherence; it does not establish a justiciable present duty of coordination.

The second is the non-frustration principle derived from VCLT Article 26, which provides that every treaty must be performed in good faith.[70] The ILC's commentary on this principle confirms that good faith performance encompasses a duty to refrain from acts calculated to frustrate the object and purpose of the treaty.[71] Applied to the AfCFTA, the conclusion of bilateral agreements that progressively widen the divide between Member States' tariff books and prevent the formation of a continental common external tariff is precisely the kind of conduct the non-frustration principle addresses. Notably, the Abuja Treaty itself recognised this dynamic at the REC level in Article 34(2), which required Member States to refrain from extending or renewing prior agreements that conflict with the integration obligations.[72] Whether Article 3(d)'s directional commitment to a customs union, in the absence of express institutional machinery, generates a justiciable present duty of coordination is a contested question in international law that this paper does not require to be resolved. The non-frustration principle is invoked as an interpretive support rather than a primary legal foundation.

A structural analogy from the ERTA doctrine provides further support. In *Commission v Council*, the Court of Justice held that internal Community rules generated restrictions on Member States' capacity to conclude external agreements affecting those rules.[73] The

70 VCLT (n [66]) art 26.

71 ILC, 'Draft Articles on the Law of Treaties with Commentaries' [1966] II Yearbook of the International Law Commission 169, 211 (commentary to draft art 23, para 4).

72 Abuja Treaty (n [19]) art 34(2).

73 Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, paras 17–22.

value of this analogy for present purposes is limited but real. The ERTA doctrine emerged in a legal order fundamentally different from the AfCFTA's, and its specific requirements of direct effect, supranational institutional competence, and established jurisprudence of competence allocation are not replicated in AfCFTA's design. The analogy is confined to the structural observation that when states commit to a particular form of integration, that commitment tends to generate corresponding considerations about external conduct inconsistent with that form.[74] That structural logic is independently supported by the Abuja Treaty's own Article 34(2) obligation.

What the Protocol Supplies That Existing Law Does Not

The Protocol's functional necessity is established not by proving that existing law already demands it but by demonstrating that existing law, together with the functional consequences of fragmentation and the institutional logic of the integration trajectory, makes inaction irrational. Existing law provides the directional commitment and the interpretive support. What it does not provide, and what the Protocol supplies, is the institutional machinery through which that commitment is given enforceable operational form.

Without the Protocol, the AfCFTA Secretariat has no authority to require notification of external negotiations, no mandate to assess compatibility between external agreements and AfCFTA objectives, no mechanism for developing common continental positions on external trade matters, and no legal basis for addressing the cumulative fragmentation that is progressively undermining the customs union trajectory.[75] The AU Constitutive Act's Article 3(i) mandate, the AfCFTA's Article 4(d) cooperation obligation, and the

74 Balassa (n [13]) 1–17; Hartzenberg (n [10]) 2.
75 AfCFTA Agreement (n [48]) art 8; Desta, Gérout and MacLeod (n [47]) 5–7.

Abuja Treaty's Article 6(2)(d) continental customs union mandate together provide the foundational legal basis for these functions.[76] The Protocol converts those foundations into operational authority, institutional machinery, and enforceable disciplines. That is the function of transitional governance instruments: they give legal and institutional form to the coordination requirements that the transition from a continental free trade area to a Continental Customs Union already implies but that existing law leaves without operational expression.[77]

PART 5: COMPARATIVE INSTITUTIONAL LOGIC: SELECTION, NOT DESCRIPTION

Three comparative models illuminate the Protocol's design. The analytical question is not what each model does but which is appropriate for the AfCFTA at its current integration stage and which represents the appropriate trajectory. Separating these questions produces a selection argument rather than a descriptive survey.

The European Union model is the appropriate trajectory. Under Articles 206 and 207 of the TFEU, the Union exercises exclusive competence over the common commercial policy.[78] As documented in the comparative literature, this exclusivity developed incrementally from *ERTA* through *Opinion 1/94* to the Lisbon Treaty, tracking the deepening of internal market integration over five decades.[79] The EU model is the logical legal endpoint of a customs union's external dimension: full common commercial policy, single negotiating

76 Constitutive Act (n [38]) art 3(i); AfCFTA Agreement (n [24]) art 4(d); Abuja Treaty (n [49]) art 6(2)(d).

77 UNECA, *ARIA XI* (n [11]) 228, 230–231; Hartzenberg (n [10]) 2.

78 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) arts 206, 207; TFEU art 3(1)(e) (exclusive competence).

79 Commission v Council (ERTA) (n 72) paras 17-22; Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (signed 13 December 2007, entered into force 1 December 2009) [2007] OJ C306/1, amending TFEU art 207.

authority, and exclusive competence over external trade agreements. It is not, however, the appropriate design model for the Protocol's current stage. It required a degree of political and legal integration, including supranational institutions, legal hierarchy, and judicial enforcement, that Africa has not yet achieved and that the AfCFTA's gradualist methodology does not contemplate. The distinguishing feature of the EU model is the availability of supranational institutions and legal hierarchy as enforcement mechanisms from the outset, neither of which the AfCFTA currently possesses. The Protocol should be designed as the first institutional building bloc toward the EU model's structural logic, not as its premature replication.

The ASEAN model is the appropriate design reference for the Protocol's current stage, though not an unqualified success story. ASEAN has demonstrated that meaningful coordination of external trade engagement is achievable without supranational authority, through a consultative culture, consensus-based decision-making, and institutional channels enabling unified external positions without formal competence transfer.[80] The negotiation of the ASEAN Plus frameworks with China, Japan, South Korea, Australia, New Zealand, and India resulted from precisely the kind of institutionalised consultation that the Protocol proposes for the AfCFTA Secretariat.[81] The AfCFTA context is structurally similar in three respects: both blocs involve heterogeneous economies at different levels of development; both operate through institutional centres that must work by consensus rather than by legal compulsion;

80 ASEAN Charter (adopted 20 November 2007, entered into force 15 December 2008) art 20 (consensus-based decision-making); UNECA, *ARIA XI* (n [11]) 228, 231.

81 ASEAN–China Free Trade Agreement (Framework Agreement on Comprehensive Economic Co-operation, signed 4 November 2002); ASEAN–Japan Comprehensive Economic Partnership Agreement (signed 14 April 2008); ASEAN–Korea Free Trade Agreement (signed 13 December 2005); ASEAN–Australia–New Zealand Free Trade Agreement (signed 27 February 2009); ASEAN–India Free Trade Agreement (Framework Agreement on Comprehensive Economic Cooperation, signed 8 October 2003); ASEAN Secretariat, 'Regional Comprehensive Economic Partnership (RCEP)' <https://asean.org/our-communities/economic-community/integration-with-global-economy/regional-comprehensive-economic-partnership-rcep/> accessed 8 April 2026.

and both face the challenge of translating aggregated market size into negotiating leverage without the formal competence transfer mechanisms available in supranational systems. However, individual ASEAN members have simultaneously pursued bilateral agreements alongside collective ASEAN-level negotiations, generating divergent rules of origin and overlapping obligations that reproduce the fragmentation problem the collective framework was designed to address.[82] ASEAN therefore demonstrates both the institutional feasibility of non-supranational collective external engagement and the structural weakness that results when coordination obligations lack enforcement architecture. The Protocol draws on the former as its design model and addresses the latter through its graduated enforcement mechanism. Its transferability to the AfCFTA context rests not on institutional identity but on structural similarity, tempered by the lessons of ASEAN's limitations.

MERCOSUR supplies the cautionary constraint. Established in 1991 with an explicit commitment to a common external tariff and coordinated external trade policy, the Southern Common Market was systematically undermined from within by individual members' pursuit of separate external arrangements and persistent deviations from the agreed tariff schedule.[83] Around thirty per cent of MERCOSUR's tariff lines have been subject, in at least one member country, to external deviations from the common external tariff, leading commentators to characterise the arrangement as an incomplete customs union rather than a functioning one.[84] Individual members pursued unilateral trade measures while failing to coordinate external tariff policy toward third parties, and Uruguay's attempt to negotiate an independent free trade agreement

82 Gathii, *African Regional Trade Agreements as Legal Regimes* (n [58]) 2–17; Bhagwati (n [45]) 4–5.

83 Treaty Establishing the Southern Common Market (Treaty of Asunción, adopted 26 March 1991, entered into force 29 November 1991) art 1.

84 Marcelo Olarreaga and Isidro Soloaga, 'Endogenous Tariff Formation: The Case of Mercosur' (1998) 12 World Bank Economic Review 297, 297.

with China created tensions that exposed the absence of any binding coordination mechanism.[85] MERCOSUR's failure is not one of ambition but of enforcement architecture: coordination obligations were adopted without the institutional mechanisms necessary to give them operational effect. The Protocol must be designed with this failure mode directly in mind.

PART 6: THE PROTOCOL: LEGAL DESIGN

Legal Basis and Institutional Architecture

The External Engagement Protocol should be adopted as a formal protocol under the AfCFTA Agreement, utilising the framework agreement's building bloc architecture for incremental legal development. Its composite legal basis, Articles 3(d), 3(f), 3(h), and 4(d) of the Agreement, AU Constitutive Act Articles 3(i) and 3(l), the Abuja Treaty's Article 6(2)(d) continental customs union mandate, and the interpretive support of VCLT Articles 26 and 31, points toward a Protocol that does not require amendment of the framework agreement and can therefore be initiated through the Council of Ministers without triggering the more politically demanding process of treaty revision.[86]

The Protocol's adoption would follow the AfCFTA's institutional procedure under Article 8 of the framework agreement.[87] The Council of Ministers would adopt a negotiating mandate and

85 Wilson Center, 'Uruguay, China and South America's Most Talked-About Trade Talks' (Wilson Center, 12 August 2022) <https://www.wilsoncenter.org/blog-post/uruguay-china-and-south-americas-most-talked-about-trade-talks> accessed 30 June 2026; Silvia Laens and María Inés Terra, 'MERCOSUR: Asymmetries and Strengthening of the Customs Union: Options for the Common External Tariff' (IADB, 2005)

86 AfCFTA Agreement (n [14]) arts 3(d), 3(f), 3(h), 4(d); Constitutive Act of the African Union (n [48]) arts 3(i), 3(l) (coordination and harmonisation of existing and future REC policies); Abuja Treaty (n [49]) art 6(2)(d); VCLT (n [66]) arts 26, 31.

87 AfCFTA Agreement (n [48]) arts 8–13; UNECA, 'Deepening the AfCFTA: Celebrating the Adoption of New Protocols on Investment, Intellectual Property Rights and Competition Policy' (UNECA, 16 March 2023) <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C> accessed 30 June 2026.

terms of reference, specifying the Protocol's scope, objectives, and institutional design parameters. A negotiating committee of senior trade officials would then develop the Protocol text through a process of consultations with Member States, RECs, and the Secretariat. The completed Protocol text would be submitted to the Assembly of Heads of State and Government for adoption. The Protocol would enter into force upon ratification by a defined minimum number of State Parties, consistent with the threshold approach adopted for the AfCFTA framework agreement itself. [88]States that have signed but not yet ratified may be expected to apply the Protocol's first-stage notification and consultation obligations on a good faith basis pending formal ratification, consistent with VCLT Article 18.[89]

The Protocol should vest primary coordination functions in the AfCFTA Secretariat. The Secretariat is the appropriate institutional home for four reasons. First, it is the AfCFTA's permanent operational centre and the natural focal point for coordination across Member States and RECs.[90] Second, it already exercises coordination functions in the AfCFTA-RECs interface, giving it both the institutional relationships and the technical expertise the Protocol requires. Third, its technical orientation and functional independence from individual Member State political pressures make it better suited than the Council of Ministers to perform compatibility assessments. Fourth, the December 2022 USTR-AfCFTA Secretariat Memorandum of Understanding confirmed the Secretariat's capacity and credibility to engage external partners on behalf of the continent; the Protocol converts that demonstrated capacity into legal authority.[91] The Council of Ministers retains

88 AfCFTA Agreement (n [48]) art 23(3).

89 VCLT (n [53]) art 18

90 AfCFTA Agreement (n [14]) art 13; Erasmus, 'The AfCFTA's Institutions are Vital for Effective Implementation' (TRALAC, 28 July 2020) <https://www.tralac.org/blog/article/14805-the-afcfta-s-institutions-are-vital-for-effective-implementation.html> accessed 30 June 2026.

91 USTR, Statement from Ambassador Greer on AGOA Reauthorisation (USTR, 3 February 2026) (n [44]); MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–92.

policy oversight and the authority to adopt binding determinations at the Protocol's second and third enforcement stages. Decision-making at those stages should proceed by consensus but structured as negative consensus: a Secretariat compatibility determination takes effect unless a consensus of Member States votes to set it aside. This design, modelled on the WTO Dispute Settlement Understanding's adoption mechanism, ensures that individual dominant states cannot unilaterally block assessments while preserving the formal consensus architecture that AfCFTA's intergovernmental structure requires.[92]

Scope and Definitions

The Protocol's scope should extend to all trade, investment, and economic partnership agreements between a State Party and a third party or group of third parties. The key definition is that of an 'external agreement' subject to the Protocol's disciplines: any treaty, agreement, arrangement, or understanding between a State Party and a non-AfCFTA party that creates obligations relating to tariffs, rules of origin, services market access, investment protection, intellectual property, or competition, being areas covered by the AfCFTA's existing or prospective protocols.[93] The breadth of this definition, extending to arrangements and understandings as well as formal treaties, is deliberate: instruments that fall short of treaty status can generate obligations with equivalent practical effect and must therefore fall within the Protocol's institutional awareness.[94]

92 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, art 16(4); AfCFTA Agreement (n [48]) art 14.

93 AfCFTA Agreement (n 14) arts 3(a), 3(b), 6–8; Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Goods (adopted 21 March 2018, entered into force 30 May 2019); Protocol on Investment (n 31); Protocol on Digital Trade (n 32); AfCFTA Protocol on Intellectual Property Rights (adopted 19 February 2023, 36th Ordinary Session of the AU Assembly; AfCFTA Protocol on Competition Policy (adopted 19 Februiary 2023, 36th Ordinary Session of the AU Assembly)

94 VCLT (n [66]) art 3; MacLeod, Luke and Bashi in Luke (ed) (n [5]) 91–92; Desta, Gérout and MacLeod (n [47]) 5–7.

The scope should be prospective: it applies to new negotiations and agreements, not to external obligations already in force at the time of the Protocol's adoption. This prospective limitation addresses the conflict-of-laws problem posed by existing EPA obligations while avoiding the legally and politically untenable position of requiring retrospective modification of binding international commitments.[95]

Notification Obligations and Proactive Engagement Mandate

The Protocol's foundational obligation requires State Parties to notify the AfCFTA Secretariat of any intention to enter into negotiations for an external agreement before formal negotiations commence. Notification should include: the identity of the negotiating partner; the proposed scope and subject matter of the agreement; the State Party's preliminary assessment of the agreement's relationship to its AfCFTA commitments; and the proposed timeline for negotiations. This obligation is designed not to prevent bilateral engagement but to bring it within the continental framework's institutional awareness before compatibility conflicts arise and become entrenched. The notification requirement operationalises, in binding institutional form, the political commitment already made at the highest AU level: the January 2019 Assembly decision that Member States wishing to enter into partnerships with third parties should inform the Assembly with assurance that those efforts would not undermine the vision of one African market.[96]

Beyond its reactive compatibility review function, the Protocol should vest in the Secretariat a proactive external engagement mandate in defined circumstances of continental significance. Where an external negotiation affects the trade interests of multiple

95 VCLT (n [66]) art 30; Desta, Gérout and MacLeod (n [8]) 5–7; UNECA, *ARIA XI* (n [11]) 228, 230–231, 244; MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–95.

96 AU Assembly Dec.715(XXXII) para 2 (n [39]).

Member States or has implications for the continental customs union trajectory, the Secretariat should be empowered to engage the external partner directly, developing and advancing a common continental position on the continent's behalf. This function is distinct from the exclusive competence model of the European Union: it does not displace Member States' bilateral negotiating capacity but supplements it with an institutional voice that aggregates continental interests where individual state engagement would be structurally disadvantaged. [97]The AGOA renewal process illustrates the mandate's practical application: without a proactive engagement mandate, the Secretariat's expertise remained advisory rather than authoritative. The Protocol supplies that authority.[98]

The same mandate should extend to multilateral forums. The Secretariat should serve as the institutional backbone for African delegations at the WTO and other multilateral trade bodies, providing technical support, common position papers, and institutional memory to the Africa Group.[99] The Secretariat's permanent technical capacity, if given a legal mandate to support multilateral African delegations, would convert the Africa Group's ad hoc coalition into an institutionally grounded collective voice, consistent with the AU Constitutive Act's Article 3(i) commitment to establishing the conditions enabling the continent to play its rightful role in international negotiations.[100]

Notification should trigger a thirty-day Secretariat compatibility assessment, calibrated to allow meaningful review without creating procedural delay sufficient to function as a de facto veto over bilateral negotiations. At the first stage, that assessment carries persuasive rather

97 TFEU (n [17]) arts 206–207; *Commission v Council (ERTA)* (n [72]) paras 17–22; cf Constitutive Act (n [38]) art 3(i).

98 MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–92; USTR, Statement from Ambassador Greer (n [57]).

99 UNECA, 'African Group Convenes in Chavannes-de-Bogis' (n [52]); Luke (ed) *How Africa Trades* (n [14]) 63.

100 Constitutive Act (n [38]) art 3(i).

than binding authority. Its function is informational and diplomatic: to surface potential conflicts, to create a record of engagement with the continental framework, and to enable the development of a common continental position where multiple Member States are engaged with the same external partner. Where a State Party fails to notify, the Secretariat may initiate a review on its own motion and the failure to notify constitutes a first-stage breach.[101]

Minimum Compatibility Standards

The Protocol should establish minimum substantive standards that external agreements must satisfy to be regarded as compatible with AfCFTA obligations. These standards define the boundary between bilateral engagement consistent with the integration trajectory and bilateral engagement that undermines it. They address three areas of legal sensitivity.

First, tariff commitments. External agreements should not require a State Party to apply tariff rates to third-party goods that undercut the preferences extended to AfCFTA members or that would lock in tariff levels structurally inconsistent with any future common external tariff schedule under Article 3(d).[102] The specific risk is that a bilateral agreement commits a Member State to tariff rates that it could not later adjust to align with a continental CET without breaching its bilateral obligations, thereby making that state a structural obstacle to CET formation rather than a building bloc within it.

Second, rules of origin. External agreements should not adopt rules of origin that conflict with the AfCFTA's continental framework, creating incentives for trade deflection or undermining the coherence

101 Jennifer Hillman, 'Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO — What Should WTO Do?' (2009) 42 Cornell International Law Journal 193, 195.

102 AfCFTA Agreement (n [14]) art 3(d); AfCFTA Agreement Protocol on Trade in Goods, Annex 2; Abuja Treaty (n [14]) arts 29(b), 32(1)–(2), 37; UNECA, *ARIA XI* (n [11]) 228, 231.

of the continental rules of origin regime.[103] Secretariat assessment of any external agreement's rules of origin provisions before entry into force should be a standard Protocol requirement.

Third, regulatory disciplines. External agreements should not impose investment protection, intellectual property rights, or services regulation standards that would prevent a Member State from fulfilling its existing AfCFTA obligations or from participating in future rounds of AfCFTA protocol deepening.[104] The practical risk is that investment protection disciplines in bilateral agreements, particularly stabilisation clauses and broad expropriation standards, may constrain a Member State's regulatory space in ways that make it legally or financially impractical to implement future AfCFTA disciplines.

The legal standard of incompatibility should be formulated as follows: an external agreement is incompatible if it creates obligations that materially impede a Member State's ability to fulfil its AfCFTA commitments or to participate in the progressive realisation of the customs union objective under Article 3(d).[105] This standard adapts established WTO jurisprudence to the AfCFTA context rather than creating a novel legal construct. The WTO Appellate Body's necessity test in Turkey — Restrictions on Imports of Textile and Clothing Products established that customs union formation generates corresponding constraints on Member State external conduct: measures are permissible only to the extent necessary for customs union formation.[106] The Protocol applies the converse of that logic: an external agreement that would prevent or materially impede the AfCFTA's customs union trajectory is incompatible

103 AfCFTA Agreement Protocol on Trade in Goods, Annex 2; Bhagwati (n [45]) 4–5; Gathii, *African Regional Trade Agreements as Legal Regimes* (n [58]) 2–17.

104 Protocol on Investment (n [31]); Erasmus, 'Substantive Issues the AfCFTA Investment Protocol Should Address' (TRALAC, 2020) (n [47]); UNECA, *ARIA XI* (n [11]) 350.

105 AfCFTA Agreement (n [14]) art 3(d).

106 *Turkey — Restrictions on Imports of Textile and Clothing Products* (Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999) paras 58–62.

with the framework for the same structural reason that the Turkey-Textiles test identified in the positive direction. This reliance is analogical and structural rather than doctrinally determinative. An agreement that creates competing obligations manageable through good faith interpretation does not meet this threshold; an agreement that structurally forecloses a Member State's capacity to align with a future common external tariff does.[107]

A Graduated Enforcement Mechanism

The Protocol's enforcement architecture operates across three stages. At the first stage, notification triggers a Secretariat compatibility assessment within thirty days. The assessment carries persuasive authority: its function is transparency, record-creation, and diplomatic signalling. The WTO's Trade Policy Review Mechanism demonstrates that transparency obligations generate reputational and diplomatic pressure that shapes state behaviour even in the absence of binding legal consequences.[108] A Member State that proceeds notwithstanding a negative assessment must provide a formal written explanation to the Secretariat and all Member States, creating a documented record of engagement with the continental framework, triggering the second stage, and activating the Secretariat's proactive mandate to develop a common continental position on the external negotiation concerned.

107 'Turkey - Textiles (n 105) para 58', on the necessity test for customs union formation. The Protocol applies the converse of that logic: an external agreement that would prevent or materially impede the AfCFTA's customs union trajectory is incompatible with the framework for the same structural reason that the Turkey-Textiles test identified in the positive direction. This reliance is analogical and structural rather than doctrinally determinative. AfCFTA Agreement art 3(d); Abuja Treaty art 34(2).

108 Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154'Annex 3 (Trade Policy Review Mechanism), para A(i); World Trade Organization, *The History and Future of the World Trade Organisation* (WTO, 2013) ch 8

At the second stage, the matter is referred to a Committee of Permanent Representatives and Senior Trade Officials, constituted under the authority of the Council of Ministers and composed of the ambassadors and trade diplomats who represent Member States on a continuous basis at the AU and AfCFTA institutional level. This Committee performs the technical and diplomatic work of engaging the Member State, examining the compatibility concerns identified in the Secretariat assessment, and attempting resolution before the matter escalates to adjudication. The Committee issues its recommendation by negative consensus within forty-five days: the recommendation stands unless a consensus of Member States votes to set it aside.[109]

At the third stage, where the Committee's recommendation has not produced resolution, the matter proceeds directly to the AfCFTA Appellate Body for final and binding determination. The panel stage is dispensed with because the Secretariat assessment and the Committee proceedings have already generated a sufficiently developed factual and legal record for appellate determination. The Appellate Body issues its determination within ninety days and may order modification of the external agreement, termination, or where neither is immediately possible, defined mitigation obligations with a fixed compliance timeline. The Appellate Body's determination is final, binding, and directly enforceable under the AfCFTA dispute settlement framework.[110]

Dispute Settlement, Standing, and Remedies

The Protocol's dispute settlement provisions should vest jurisdiction in a streamlined mechanism within the AfCFTA's existing institutional framework. Where all prior stages have been exhausted, the matter

109 AfCFTA Agreement (n [14]) arts 10–11; DSU (n [91]) art 16(4).

110 AfCFTA Agreement Protocol on Rules and Procedures on the Settlement of Disputes (adopted 21 March 2018); DSU (n [91]) arts 17, 19–21.

proceeds directly to the AfCFTA Appellate Body for final and binding determination. The panel stage is dispensed with because the Secretariat's compatibility assessment and the Committee's formal recommendation have already performed the equivalent function of first-instance factual and legal analysis.[111]

Standing to initiate dispute settlement proceedings under the Protocol should extend to two categories of complainant. First, any Member State with a demonstrated trade interest may initiate proceedings in relation to substantive compatibility disputes after the staged enforcement process has been exhausted. Second, any Member State irrespective of demonstrated trade interest may initiate proceedings in relation to notification failures, reflecting the systemic character of the notification obligation: every Member State has an institutional interest in the integrity of the Protocol's transparency architecture regardless of whether it is directly affected by the specific external agreement in question. The Secretariat participates in Appellate Body proceedings as amicus rather than as a party.[112]

The Appellate Body's remedial powers should include: an order requiring modification of the external agreement to address identified incompatibilities within a defined timeline; an order requiring termination of the external agreement where modification is not possible; and where neither modification nor termination is immediately achievable due to obligations owed to the third party, an order requiring defined mitigation measures and a fixed compliance schedule. Monetary compensation between Member States is not an appropriate remedy under the Protocol; the objective is prospective compliance with the integration trajectory, not retrospective compensation for harm already done.[113]

111 AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (n 109), Hillman (n 100) 195-200.

112 AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (n 109), Gathii (n 6) 285-290.

113 Gathii (n 58) 285-290; Hillman (n 51) 195-200.

Transitional Clauses and EPA Provision

The Protocol's transitional provisions must address the most politically sensitive design question: the treatment of external agreements already in force at the time of the Protocol's adoption. A Protocol that purported to require immediate modification or termination of existing bilateral commitments would not attract the minimum ratification threshold necessary for entry into force. The transitional framework must therefore distinguish between three categories of existing external agreement. First, agreements that are fully compatible require no action beyond registration with the Secretariat. Second, agreements that are partially compatible require defined modification within a negotiated transitional period, with the Secretariat providing technical assistance. Third, agreements that are fundamentally incompatible but whose modification or termination is prevented by obligations owed to the third party require a managed non-compliance pathway: the Member State must notify the Secretariat of the incompatible obligations, refrain from extending or renewing the agreement when it expires and implement defined mitigation measures. Ghana's simultaneous operation of an interim EPA with the European Union and AfCFTA membership is the paradigm case for the third category.[114] This approach is directly modelled on the Abuja Treaty's Article 34(2) obligation, operationalising at continental level what the Abuja Treaty already prescribed at the regional level.[115]

The Protocol should include a specific provision addressing Economic Partnership Agreements concluded between AfCFTA Member States and the European Union. EPAs represent the most systemically significant category of existing external agreement affecting AfCFTA's integration trajectory. They are simultaneously in

114 EU-Ghana Interim Economic Partnership Agreement (signed 28 July 2016, entered into force 5 March 2021); MacLeod, Luke and Bashi in Luke (ed) (n [5]) 95; UNECA, *ARIA XI* (n [8]) 230, 244; Desta, Gérout and MacLeod (n [47]) 5–7.

115 Abuja Treaty (n [49]) art 34(2).

force with AfCFTA obligations for a significant number of Member States,[116] they impose tariff liberalisation schedules and rules of origin disciplines that diverge structurally from AfCFTA's internal framework, and they were negotiated with individual RECs before the AfCFTA framework existed, making the resulting conflicts structurally inevitable.[117] The EPA-specific provision should operate on three levels: requiring notification of conflicting EPA provisions at the individual Member State level; requiring structured engagement with the European Union at the collective level, supported by Secretariat technical assistance; and empowering the Secretariat to advance a common African position in any renegotiation of EPA disciplines at the continental level. This provision transforms what is currently an unmanaged conflict between two simultaneously operative legal frameworks into a structured process with defined obligations, timelines, and institutional support.

PART 7: WTO LAW COMPATIBILITY

The Protocol's WTO compatibility must be established on two dimensions: whether the Protocol itself is consistent with WTO obligations; and whether the compatibility standards it imposes on Member States' external agreements introduce any new WTO-inconsistent obligations. Both dimensions yield favourable conclusions. The Protocol neither restricts trade with third parties nor imposes new barriers to market access; it creates an internal coordination mechanism that governs how AfCFTA Member States manage their external trade diplomacy collectively. That distinction, between internal coordination and external restriction, is the foundation of the WTO compatibility analysis.

116 European Commission, 'Economic Partnerships' (DG Trade, 2024) <https://policy.trade.ec.europa.eu/development-and-sustainability/economic-partnerships_en> accessed 30 June 2026 (fifteen African countries party to EPAs in application as of 2024).

117 Vusi Gumede, 'The African Continental Free Trade Agreement and the future of regional economic communities' (2021) 39(3) Journal of Contemporary African Studies 470.

The Protocol is consistent with GATT Article XXIV. Article XXIV:5 permits departures from the MFN obligation for customs unions and free trade areas provided that the duties and other regulations of commerce applied after formation are not on the whole higher or more restrictive than those applicable before formation.[118] The Protocol does not impose any new tariffs, quotas, or other restrictions on trade with third parties. It creates notification, assessment, and coordination obligations running between AfCFTA Member States and the Secretariat. These are internal governance disciplines, not external trade restrictions. The strongest counterargument is that the Protocol's compatibility standards could in practice discourage AfCFTA Member States from concluding market access agreements with third parties, producing an indirect chilling effect. While coordination mechanisms may indirectly influence the content of external agreements that Member States conclude, such effects do not constitute WTO-relevant restrictions unless they translate into measures directly affecting third-party market access rights.[119] The compatibility standards are calibrated to the customs union trajectory under Article 3(d) of the AfCFTA Agreement and Article 6(2)(d) of the Abuja Treaty, not to protectionism; and GATT Article XXIV expressly contemplates the formation of customs unions with corresponding external tariff coordination.[120]

The Protocol's notification obligations are consistent with and complementary to WTO transparency disciplines. WTO Members are already subject to notification obligations under multiple WTO agreements, including the obligation to notify regional trade agreements under GATT Article XXIV:7 and the WTO Transparency Mechanism for Regional Trade Agreements adopted

118 GATT 1994 (n [68]) art XXIV:5.

119 GATT 1994 (n [68]) arts III:4, XI; *Turkey — Restrictions on Imports of Textile and Clothing Products* (n [105]) paras 58–62.

120 AfCFTA Agreement (n [14]) art 3(d); Abuja Treaty (n [14]) art 6(2)(d); GATT 1994 (n [68]) art XXIV:8(a).

in 2006.[121] The Protocol adds a layer of continental notification running to the AfCFTA Secretariat that operates in parallel with, not in substitution for, these WTO obligations. Moreover, the Protocol's pre-negotiation notification trigger addresses a structural weakness in the WTO Transparency Mechanism, which has been criticised for generating notifications after agreements are already in force. A continental mechanism that requires notification before negotiations commence represents a more effective model of transparency governance consistent with the preventive logic that the Protocol is designed to advance.

The Protocol is additionally supported by the WTO Enabling Clause, which permits developing country Members to enter into differential and more favourable arrangements among themselves without extending equivalent treatment to all WTO Members.[122] All AfCFTA Member States have self-designated as developing or least-developed countries in their WTO schedules, satisfying the Enabling Clause's personal scope.[123] The Protocol's coordination disciplines apply exclusively among AfCFTA Member States and impose no obligations on third party WTO Members, satisfying its substantive scope. The Enabling Clause therefore provides an independent WTO law basis for the Protocol's differential treatment architecture, supplementing the GATT Article XXIV analysis.

Conclusion

Africa's external trade governance presents a structural paradox. The AfCFTA has created the largest free trade area by number of

121 AfCFTA Agreement (n [14]) art 3(d); Abuja Treaty (n [14]) art 6(2)(d); GATT 1994 (n [68]) art XXIV:8(a).

122 GATT Contracting Parties, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (Decision of 28 November 1979) L/4903 (Enabling Clause) paras 1, 2(c).

123 WTO, 'Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 April 2026; UNECA, *ARIA XI* (n [11]) 228.

participating states, aggregating fifty-four economies into a single market framework with the explicit trajectory of a Continental Customs Union.[124] Yet each of those fifty-four economies retains the legal capacity to conclude bilateral trade and investment agreements with external partners on terms that progressively undermine that trajectory, without any obligation to notify the continental framework, without any assessment of compatibility, and without any mechanism for developing a common African position on external trade matters. The AfCFTA's internal architecture is increasingly sophisticated; its external architecture is non-existent.

This paper has argued that the gap is not merely a policy preference but a legal and institutional deficit with measurable functional consequences. Ghana's simultaneous EPA and AfCFTA obligations, and the AGOA renewal process each illustrate a different dimension of the same structural problem: the absence of a coordination mechanism that gives AfCFTA's integration trajectory institutional expression in the external trade domain.[125] The legal case for an External Engagement Protocol rests on three foundations that do not require interpretive innovation: the AfCFTA's treaty text, the Abuja Treaty's sequencing logic and continental customs union mandate under Article 6(2)(d), and the AU Constitutive Act's overarching institutional obligations.[126] Interpretive support is provided by the purposive interpretation principle under VCLT Article 31(1) and the non-frustration principle under VCLT Article 26.[127] The Protocol's institutional design draws on ASEAN's demonstrated feasibility of non-supranational collective external engagement while correcting for MERCOSUR's enforcement failures.[128] Its incompatibility

124 AfCFTA Agreement (n [48]) arts 1, 3(d); UNECA, *ARIA XI* (n [11]) 13, 228; ISS African Futures <https://futures.issafrica.org/thematic/08-afcfta/> accessed 30 June 2026.

125 EU-Ghana Interim Economic Partnership Agreement (n [95]); MacLeod, Luke and Bashi in Luke (ed) (n [29]) 91–92; USTR, Statement from Ambassador Greer (n [44]).

126 AfCFTA Agreement (n [14]) arts 3(d), 4(d); Abuja Treaty (n [14]) art 6(2)(d); Constitutive Act (n [38]) art 3(i).

127 VCLT (n [66]) arts 26, 31(1).

128 ASEAN Secretariat (n [80]); 'Olarreaga and Soloaga (n 83)

standard applies the converse of the *Turkey-Textiles* necessity test, grounding a novel African institutional instrument in established WTO jurisprudence rather than self-created legal constructs.[129]

The normative stakes of this institutional gap extend beyond trade law. From a Third World Approaches to International Law and Law and Political Economy perspective, the external engagement deficit is not an oversight but a structural feature of international economic law that systematically reproduces asymmetric bargaining conditions for African states.[130] The AfCFTA was designed to change those conditions by aggregating market size and political weight into a collective negotiating presence. That design is progressively defeated by the bilateral engagement practices it was intended to displace, because no mechanism exists to convert the AfCFTA's collective potential into collective practice. The Protocol is not merely a technical instrument. It is the institutional expression of the AfCFTA's deepest ambition: to ensure that Africa negotiates with the world as a continent, not as fifty-four separate economies whose individual vulnerabilities are systematically exploited by better-resourced external partners.

The paper's contribution extends beyond the AfCFTA context. It identifies a broader category of transitional governance instruments whose role in staged integration systems has received insufficient doctrinal attention. The claim that customs unions are created by coordination and not merely by tariffs is not specific to Africa: it applies to any integration arrangement whose members have committed to a common external tariff but must traverse the institutional distance between a free trade area and a functioning customs union. The pre-CET coordination problem is structural and recurring; the design solutions proposed here are generalisable. In this sense, the AfCFTA

129 *Turkey — Restrictions on Imports of Textile and Clothing Products* (n [91]) paras 58–62.

130 Gathii, 'TWAIL: A Brief History' (n [45]) 30; Anghie, *Imperialism, Sovereignty and the Making of International Law* (n [46]) 245–272; Okiche (n [59]).

provides not only a problem to be solved but a case study through which to develop a broader analytical framework for understanding how integration progresses between its formal stages.

The case for action is urgent. The AfCFTA's tariff liberalisation schedules are operational. Rules of origin negotiations are substantially complete. The investment protocol has been adopted.[131] Each passing month in which Member States conclude external agreements without continental coordination is a month in which the customs union trajectory becomes harder to achieve, not because the legal commitment has weakened but because the practical landscape of bilateral obligations becomes more complex and more entrenched. The window for preventive institutional action is finite and closing. A Protocol adopted now, before the common external tariff becomes negotiable, establishes the coordination habits, the institutional infrastructure, and the compatibility disciplines that the CET negotiation will itself require. A Protocol adopted after bilateral obligations have proliferated beyond manageable complexity addresses a problem that has already become structural rather than preventing one that is still preventable. The AfCFTA's foundational legal instruments provide the authority. The Secretariat provides the institutional home. The comparative models provide the design template. The time for this instrument is now, and the institutional machinery to adopt it already exists.

131 Protocol on Investment (n [31]); AfCFTA Agreement (n [14]) arts 8–13.

JUST NEW JARGON, OR REAL CULTURAL CHANGE? ON THE IMPACT OF GHANA'S FIRST 'HUNG PARLIAMENT' ON ITS MULTIPARTY DEMOCRACY.

Maame A.S. Mensa-Bonsu[1*]

Abstract

Ghana's 2020 general election produced the country's first hung Parliament under the 1992 Constitution, creating an unprecedented opportunity to evaluate the operation of Ghana's multiparty constitutional democracy. This paper examines whether the absence of a parliamentary majority strengthened the constitutional functions that political parties are expected to perform or merely exposed longstanding structural weaknesses within Ghana's political system. I argue that while the hung Parliament enhanced legislative bargaining and scrutiny in some respects, it did not fundamentally transform Ghana's political culture. Instead, it revealed persistent deficiencies in party ideology, internal party democracy, campaign finance transparency, and the dominance of the two major political parties. It concludes by proposing legal and institutional reforms to strengthen political party governance, improve democratic accountability, and enhance the effectiveness of Ghana's constitutional framework, while drawing broader lessons for emerging multiparty democracies across Africa.

1 * Associate Professor of Law, Ashesi University, Ghana. My heartfelt thanks to Joojo Afun for his invaluable research assistance and comments; to Patrick Dadey for editorial assistance; to Alfred Berkoh for helpful comments on earlier drafts; Dr Dominic Ayine for his candour and insightful views; and Charles Fombad whose invitation to write on multiparty politics in Ghana led me to write this paper.

Introduction

Ghana's 1992 Constitution is the country's longest lasting configuration of state and government. Her preceding history is filled with military juntas and colonialism. The longest period of democratic governance prior to 1992 was the period 1957–1966. But even that short nine-year period of democracy was not accompanied by rich multiparty political activity. For in 1960, a slide towards constitutional authoritarianism began with the republican Constitution that abandoned parliamentary government and named Kwame Nkrumah life president with unlimited power.[2] Four years later, Nkrumah's party, the Convention People's Party (CPP), was by constitutional amendment made the official state party; all other political parties were banned and thus multiparty political activity in Ghana ceased.[3] Between then and 1992, there were only five years of multiparty democracy. Unsurprisingly, therefore, when, in 1992,[4] the ban on political party activity was lifted, there was much joy but little understanding what exactly a political party does beyond participating in elections. This gap in knowledge has been evident in the functioning of Ghana's political culture. In between elections, what is a political party good for? How do its members show their loyalty to the party while in office?

This paper discusses Ghana's eighth Parliament under the 1992 Constitution (2020–2024); novel for being the nation's first 'hung parliament'. It documents and discusses the imprint of this novelty on Ghana's governance and political culture. While this study engages with previous Parliaments of this constitution, its focus is always on the Parliament in office from 2020–2024. The paper develops as follows: it begins with a theoretical discussion on the

2 Egon Schwelb, 'The Republican Constitution of Ghana' (1960) 9(4) AJCL 634.

3 Wilson Kwame Yayoh, 'Resurgence of Multi-Party Rule in Ghana, 1990-2004: A Historical Review' (2006) 10 Transactions of the Historical Society of Ghana 125 accessed 15 November 2024 <http://www.jstor.org/stable/41406736> accessed 15 November 2024.

4 On 18 May 1992, PNDCL280 was passed, lifting the 11-year ban on political parties, though specific parties remained banned, nevertheless.

role political parties play in the governance of a constitutional state. The second section then gives a brief contextualising overview of the legal framework under which political parties operate in Ghana. In the third section, I introduce the reader to the lived experience of multipartyism during this fourth republic juxtaposing the situation on the ground with what the law expects. I turn then to the hung parliament of the 2020–2024. What have been its victories and what its failures. What accounts for them? Has the hanging of Parliament allowed political parties to fulfil the roles identified in the first section? The fifth section assesses the hung parliament's performance in respect of each of the roles political parties play in governance identified in the first section I conclude by extrapolating from this experience what changes should be made to Ghana's legal framework to improve political party functioning in the democratic state and extract the wider insights of constitutional design that Ghana and other African democracies should draw from this forerunner experience.

Of the value of political parties in democratic constitutions

Political parties are curious creatures because they are private bodies of public interest. Outside of one-party states where the state apparatus and the lone legal political party are inextricably intertwined, the political party is a private institution, privately populated, privately funded. It has no compulsion power; neither over members nor to compel membership. Its agenda is, to the extent that it does not violate the Constitution, entirely within its remit to determine. It can have a holistic posture about the governance and direction of the society, or it can pursue a singular objective.[5] However, its purpose being always public, it, and all its business, is the business of the public. Provided

5 Such as was… a British political party whose sole purpose was to prevent the sale of Manchester city fc to ….

a political party has enough sway in the society to have a realistic chance of acquiring the reins of government or taking a noticeable number of the legislature's seats, its trajectory and interests are public matters.

Yet remaining a private body, the general public has no say in how it runs its affairs. For example, who wins the primaries of the Republican Party in the United States significantly affects every American's voting options and therefore the collective direction. But non-Republican Americans do not have a say in how or who the Republicans choose as their candidate. The palpable frustration and disbelief of wide sections of American society as Donald Trump pulled into the lead in the 2024 presidential primaries is a testament to both the private nature—which is why they were helpless—and the public nature—which is why they cared—of the political party. It is perhaps tempting, in view of how significantly political parties affect even those outside its membership, to think that it might be good to exert some public control over them. But this would be misconceived. Allowing political parties to stay entirely private, deciding what causes they will espouse, who will lead them and what they will achieve is what gives democracy any real bite.[6] This is why the democracy of one-party states is underwhelming. They allow citizens to choose, as the popular saying goes, any colour as long as it is black. One is not really choosing when one votes if the choice is simply between agents rather than ideologies, bundles of incidents and policy choices. That is what multiparty politics offers citizens; real choice.

Nevertheless, they ought not to be beyond scrutiny. While their content ought to be entirely within their purview and the limits of the Constitution, their methodology should not. How they expel their members, choose their candidates, and raise funds, at the very

6 N W Barber, 'Sovereignty, Parties, and Principles: A Partial Reply' (2021) 24(1) Jerusalem Review of Legal Studies 123.

least, should be regulated by the state and their burden of fairness and reasonableness should be equivalent to that of public bodies.[7] To achieve this delicate balance of private-public, the ability to litigate affairs of the party should be limited to its members. But its decision-making procedures should not be *in camera*.

For the longest time viewed as problems a constitution had no choice but to navigate,[8] political parties, have finally in recent times, been accorded a new respect by the literature. It is now accepted that they are necessary elements without which democracy cannot function.[9] This section illustrates some of the key roles political parties play in a truly functional representative democracy. Firstly, political parties put together manifestos, which are party agenda items for when in power. The belief that party representatives will stick to it make the manifesto a useful tool. But it conflicts with the delegate view of representation. In non-parliamentary democracies, party discipline is often intensely distrusted[10] and viewed as incompatible with the very idea of representation. After all, how is a person to vote according to her conscience and understanding of what is best for their constituents if their first instinct is to vote according to what the manifesto says the party thinks. Yet, it is not as devious and self-serving as it can at first thought appear. It is impossible to know every candidate closely and so know exactly what they stand for. Manifestos allow for voters to know the bundle of commitments that a candidate will pursue,[11] and it is on the basis of this that they vote. Therefore, fidelity to party lines is an important accountability mechanism in the relationship of represented and representative. For this reason, I hold firmly that when a Member of Parliament (MP) crosses carpet[12] i.e. changes side,

7 Ibid.
8 Barber (n6) 123.
9 Ibid.
10 Barber (n6).
11 Ibid 124.
12 As was common in the first Republic. By... most opposition MPs had either fled the country or crossed carpet by waving a handkerchief and walking across the room to sit on the government side. See...

they should have to resign. They were not elected simply because of their high moral fibre or their superior appreciation for ideological soundness. Once they have become party candidates, a vote for them is as much for the bundle of party commitments as for their personal appeal. If therefore they change affiliation, they are no more who their constituents voted; they no longer intend to push the interests the constituents sent them there to advance. They have, then, no moral authority to continue representing them. Therefore, if an MP finds themselves no longer able to support the party's agenda, their remedy is resignation. Party MPs ought to pay serious attention to party discipline as an act of respect to their constituents.

Of course, like nearly every tool of governance, its excess corrupts it. MPs should not take the manifesto and therefore party lines as their mandate. For, if they do, they lose sight of their primary goal as legislators, which is to advance the welfare of the members of the state.[13] Instead, they become consumed in bringing the manifesto to reality and are unable to engage in the vital exercise of assessing the manifesto items' continued utility or benevolence to the people. Simply because it is in the manifesto, such MPs will seek to carry it out. There is no benefit in this doggedness. Though the representative owes a duty of accountability to those who voted her not to deviate so dramatically from the set of commitments they chose her for, she ought, at the very least, to be able to discern whether a party policy is against the interest of her particular constituents and ought to be willing to stand against it in that case. For instance, a government project that could generate significant revenue in tax for the country may threaten many small local shops in a constituency. The MP for that constituency should not be more wedded to the manifesto's tax generation plan than to her constituency's economic welfare, and so should be able to vote against it. That said, the general lines of party thought represent ideology and remain important to governance and the public's capacity to assess government.

13 Barber (n6) 125.

A legislature full of independents would not only be a raucous institution, it would be an ineffective one too. With no clear lines of common cause, the process of arriving at a decision would be impossibly slow. It would be akin to teaching a class in which everyone was studying a different subject. Greater progress would be made faster if the students were divided into subject groups and taught accordingly. Similarly, the presence of parties in the legislature groups the representatives into ideological, interest, or methodological caucuses and thereby allows the business of negotiation which is legislation to get on. This is a vital role for political parties in representative democracy.

Again, as Barber has pointed out, without parties, each representative's voice is vanishingly small. But as a party caucus, their individual voices acquire the amplification of party machinery and increases each MP's impact.[14] This is what allows them to deliver on any promise of representation. Alone, the MP would merely be present. In the context of a party caucus, the MP gets a meaningful say in the decisions of the House and so actually represents. This is clearly seen in the way that Independents in the house tend to side with a party caucus on matters of importance to their constituents. Independents are voted in on a platform they do not actually have the capacity to deliver on their own. Their advantage over party MPs is the flexibility to cherry-pick from among the agenda items of the various parties when deciding when to vote with any of them. However, this parasitic advantage, while useful to individual independents, does not outweigh the ill effect of the chaos of a legislature of independents.

Political parties are the non-authoritarian state's solution to factions. Being, as Madison described them,"'a number of citizens, whether amounting to a majority or minority of a whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate

14 Barber (n6) 124.

interest of the community".[15]Factions are inherently dangerous to the continuity and harmony of the state. Wherever people are allowed to hold individual opinions, they will invariably both have some ideas that are adverse to others' interests[16](whether about access to some public good, tax or even when they should be allowed to make noise), and associate with others who share those views. Political parties create benign associations of what would have been factions. By articulating a vision for the whole society, about what should it be and how to attain it, they redirect the energy of factions from the negative focus of the interests of their members only. For example, a separatist faction is concerned only with the future and welfare of the section of society they want to pull out of the state. But a political party cannot articulate a vision for only one section of the state and expect to win the votes of those not in that section. In this way, political parties are really the glue by which democracies are held together or as Peele put it the 'life and blood of democracy.'[17]

Furthermore, political parties allow likeminded citizens to meet, discuss ideas and create and refine policy. As no person is likely to have thought through carefully every single issue of societal importance—defence, health, the war in Gaza, the UN, Free SHS, juvenile justice etc. Political parties allow people who agree on certain matters broadly to form thinking groups and develop detail to the broad ideas.[18] This not only improves the quality of policymaking, it enables wider coherence across policies[19] and thus ensures cross-issue ideological consistency in public life.

15 James Madison, 'Federalist No 10' in Charles R Kesler (ed), The Federalist Papers (Signet Classics 2023) 118.

16 Danica Fink-Hafner, *Party system changes and challenges to democracy* (Palgrave Macmillan 2024) 21.

17 Gillian Peele, 'British Political Parties in the 1980s' in Anthony Seldon (ed), UK **Political Parties** Since 1945, (Phillip Allan 1990) 138–148.

18 Jesse Norman, *Edmund Burke: The First Conservative* (Basic Books 2013); Jonathan White and Lea Ypi, 'On Partisan Political Justification' (2011) 105 American Political Science Review 381, 387-389.

19 Nancy L Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton University Press 2008) 306–311, 356–362.

Political parties are also a key tool of democratic control of government. They provide structures through which the people choose their executive leader and through which that leader chooses her team. A new occupier of executive office needs people she can trust to subscribe to her agenda, and so will exert themselves to fulfil it. The party offers her a pool of likeminded competence from which to draw her team and is therefore important for efficient and effective government formation.[20] By extension, who is in that talent pool becomes a fore notice to the public of the direction, energy and productivity that can be expected from the executive leader's term. This allows the people, though expressly choosing only their executive leader, to control indirectly but accurately, who executes the mandate they have chosen to give.

In between elections, governments can appear quite unaccountable, for in the interest of stability (a non-trivial good), prudent constitutions make the removal of the executive mid-term cumbersome and unlikely. It is political party activity then that acts as a countervailing force to the public unaccountability that security of tenure inevitably breeds. They do this by being an instigator, medium for and historian of citizen engagement with policymaking and general governance in the period between elections.[21] Because the central aim of political parties is to win the next election, they campaign relentlessly in between elections, positioning themselves as the better alternative at the next polls. This means that they raise policy issues, question government policy choices, engage with the public to rouse support for or opposition to proposed policies. This ensures that the public is constantly abreast of developments, issues, the range of viable options in every situation, and government action. In this way, political parties prevent executive leaders from becoming self-standing while in power and so keep the principal-agent dynamic alive between the people and their leaders.

20 NW Barber, 'Populist leaders and political parties' (2019) 20 German Law Journal 129 at 135
21 Ibid 136.

Finally, the existence of a range of vibrant political parties prevents the rise of a populist leader.[22] A full discussion of populism and why it might not be desirable is beyond the scope of this paper. What is important to note is that populist leaders claim to be representing the people or the voice of the people etc. though they, in fact, rarely do other than impose their will on the people and compel them to accept it as theirs and, critically, the occasion for them to arise often lies in the absence of public outlets for dissent or dissatisfaction and any sense of public control overruling class decision-making. Vibrant multipartyism is not only a good in itself, it is also a preemptory environment against dictatorship.

A Historical Overview Of Political Party Activity In Ghana

The 1992 Constitution ushered into Ghana a completely new political culture, notwithstanding the rhetoric of continuity that all the major political parties of its earliest days claimed[23]. Together with the statutes and regulations issued under its auspices, it not only provides the sort of guidelines on political party formation and activity that are common in democratic countries, it also articulates some of the rules that are ordinarily developed over time through conventions or by political necessity.[24] Article 55 of the

22 Barber (n20) at 137.

23 It is unclear why no party was willing to admit that it was a new creation in the Ghanaian legal world. Each party claimed to be the successor of a major political party from a previous republic. The New Patriotic Party (NPP) claimed to descend from the United Party, nearly every other party claimed to be Nkrumaist. Ie following the school of thought of Kwame Nkrumah, Ghana's First President. See Joseph Aryee, The Evolution of the New Patriotic Party in Ghana 2008) 15(2) South African Journal of International Affairs 185; Kwesi Jonah, "Political Parties and the Transition to Multi-Party Politics in Ghana," in Ghana: Transition to Democracy, ed., Kwame A. Ninsin (CODESRIA and Anthony Rowe Ltd., 1998), 83-107.

24 For example, PDCL 280, §9(c) (repeated in toto in Act 574 §9(c), required a political party to be organised in each region of Ghana and in 2/3rds (i.e. one hundred and seventy-four) of the districts to be eligible for registration. Barring ethnic, religious or gender or other sectional fixation, there should be no need to issue this edict. A political party that does not have national reach is unlikely to ever acquire national force and is therefore unlikely to do much or survive long. The absence of this rule would have in time looked no different than its presence. However,

Constitution sets out the representation rights and the parameters of the surrounding infrastructure. The importance of a multiparty character to this new order is articulated forcefully in article 56, which states that Parliament shall have no power to pass a law that purports to impose a common political or religious agenda on the country. The implication of this provision is that political agenda of varying forms and foci are necessary to the small-c constitution[25] of the fourth republic.

After the traumatising experiences of the one-party state and military rule,[26] the value of multiparty democracy in Ghana, has been enshrined in all its constitutions.[27] The Akan[28] expression for multiparty democracy, developed by broadcast media at the beginning of the Fourth Republic *'kamamekabi amanbuo',* translates as 'governance by saying your piece and letting me say mine.[29] It shows how closely, in the minds of the Ghanaian public, the idea of real choice is tied to the variety of viewpoints which political parties offer and represent, and therefore how invested in multipartyism we are.

The Political Parties Law 1992, PNDCL280, revised into the Political Parties Act 2000 (Act 574), and Election Regulations, issued periodically via Constitutional Instrument, are the main tools by which the constitutional provisions for multipartyism are elaborated. Article 55 of the Constitution guarantees all citizens the

because of the extremely limited national exposure to multiparty activity, the earliest framework for multiparty politics found it necessary to spell out what a few cycles of elections would have taught the legal order.

25 For a full discussion on the distinction between small-c and big-C constitutions, see eg Adam Chilton, Mila Versteeg, 'Small-c constitutional rights' (2022) 20(1) *International Journal of Constitutional Law* 141–176.

26 Ghana has had five coups d'etat: 1966, 1972, 1978, 1979, 1981.

27 Articles 42 & 43,1979 Constitution, article 3, 1969 Constitution (expressly states Parliament shall not have the power to turn Ghana into a one party state)

28 Though native of only about 50% of the country, it is the local lingua franca and most widely spoken Ghanaian language cluster. https://wisc.pb.unizin.org/lctlresources/hon./about-akan-twi/#:~:text=Akan%20is%20spoken%20in%20the,Ivory%20Coast%20and%20central%20Togo.

29 developed by Peace FM, the first Twi-speaking news station in Ghana, it has become the widely accepted local expression for multiparty democracy.

right to join[30] or form[31] any political party, and parties can adopt any cause or position that is not incompatible with the Constitution.[32] The main limitation on the freedom of association as manifested by political parties is the prohibition on ethnically, religiously, or regionally focused parties[33] or party symbols or tokens.[34] This is an important multipurpose limitation. Ghana is a very diverse country with over eighty languages[35] and three major religious groupings[36] as well as several minor ones.[37] Additionally, its borders, decided inorganically by colonial experience, contain several historical enemy groups, further complicating the internal cohesion and national integration challenges. Thus, the prohibition serves not only to ensure that political parties become vehicles of national life, not tribal, ethnic or regional interest; it insures the longevity of the nation-state by forcing different groups to associate and collaborate.

Political parties are also obligated to adhere to democratic principles in the management of their internal affairs.[38] The provision may, at first glance, appear redundant since the idea that a political party, established to participate in democratic governance would be naturally inclined to democratic conduct seems obvious. However, the long exposure to dictatorship combined with the cultural deference to authority prominent in most Ghanaian traditional cultures[39], made the drafters of the Constitution hesitant to leave

30 Constitution of the Republic of Ghana, 1992, art 55(1).
31 Constitution of the Republic of Ghana, 1992, art 55(2).
32 Constitution of the Republic of Ghana, 1992, art 55(3).
33 Constitution of the Republic of Ghana, 1992, art 55(4).
34 Constitution of the Republic of Ghana, 1992, art 55(7).
35 D R Sabirova and R Tenkorang, 'Preservation and Development of Indigenous Languages in the Republic of Ghana' (2021) 4(1) Казанский лингвистический журнал 93.
36 Tim Heaton, Spencer James, and Yaw Oheneba-Sakyi, 'Religion and Socioeconomic Attainment in Ghana' (2009) 51(1) Review of Religious Research 71–86.
37 Elom Dovlo, 'New Religious Movements in Ghana' (2002) 4(1) Journal of Religion and Theology in Namibia 1–34.
38 Constitution of the Republic of Ghana, 1992, art 55(5).
39 Joseph Taabazuing et al, 'The Relationship Between Traditional Authorities and Decentralized Structures in Ghana: Conflicting Roles or a Struggle for Power and Legitimacy' (2012) 2(03) International Journal of Development and Conflict 1250017.

this rule implied, and their caution has been proved wise. The three decades of the Constitution's life have seen several cases challenging undemocratic and/or unconstitutional action by party leadership.[40] In the lead-up to the 2024 elections, Majority Whip in Parliament, Hon. Habib Iddrisu, said on national television that a member who stood for election as an independent could, if the National Council decided so, retain their party membership, despite the party constitution listing that act as one which automatically and immediately terminates membership.[41] It is very concerning to think the leaders of one of the two biggest political parties; a party that has run the state for a cumulative period of sixteen of the democracy's thirty-one years of life should take this undemocratic view in respect of its own affairs. Without the constitutional obligation for parties to be internally democratic, the democracy would have been reduced to superficial acts of election at the national level.

Thirdly, an organisation cannot hold itself out as a political party unless it is registered as such by the Electoral Commission.[42] This provision allows the Electoral Commission (EC) to properly supervise the operations of political parties and, thereby, the obligations of inclusivity and national cohesion the Constitution imposes on them. Without active supervision, the deep fault lines that run through the nation would have splintered political activity into religious or ethnic or perhaps even gendered groupings. Even so, the danger remains that the Electoral Commission is able to end political opposition to government by revoking the registration or refusing to register a political party or refusing to allow them to contest an election. In the 2024 elections, the EC's disqualification of several presidential aspirants including the Progressive People's Party (PPP) candidate

40 *Afoko v NPP* (2016) JELR 107359 (HC*); Zigar v* NDC [2016] DLHC 4007*; NPP v Ibrahim Felix* [2016] DLCA 4461.

41 Habib Iddrisu on Joy Newsfile, 19 October 2024 edition

42 Constitution of the Republic of Ghana, 1992, art 55(6); Political Parties Act, 2000 (Act 574), s 4(1).

for errors in their filing documents which it refused to identify[43] shows that the danger is not merely hypothetical. It appears then that though multipartyism is guaranteed by the Constitution, the fate of individual parties is not nearly as well protected.

In awareness of the public-private nature of political parties, the Constitution attempts to balance the need for public accountability with the right to privacy and freedom for political parties. Thus, rights more obviously suited to public bodies are granted them. In exchange for this, they are subject to interference private bodies do not normally have to endure. For example, despite a party's right to populate its ranks as it chooses (subject, of course to the restrictions discussed earlier), it cannot have a person not eligible to be a Member of Parliament (MP) as a founding member or party officer;[44] a requirement which excludes citizens of unsound mind(a term no longer as uncontested and obvious as it once was),[45] dual citizens, and formerly criminal citizens- including those convicted of minor traffic offences.[46] It can also not refuse or impose membership to any sane, non-criminal Ghanaian, however offensive, or in the alternative, desirable, party leadership or even the entire membership might find them. This interference is counterbalanced by the equal access to state media guaranteed all political parties even though they are private entities.[47] This delicate effort to limit the excesses that political parties could, as purely private entities, indulge in, while also expanding their reach as public entities is useful and has generally proved successful.[48]

43 Leroy Hawkson, 'EC Disqualifies 11 Presidential Candidates Ahead of December Polls' (*Asaase Radio*, 20 September 2024) <https://www.asaaseradio.com/ec-disqualifies-11-presidential-candidates-ahead-of-december-polls/> accessed 15 November 2024.

44 Constitution of the Republic of Ghana, 1992, art 55(8).

45 are citizens on psychiatric prescriptions for depression, insomnia etc who take their medications religiously caught in this category or is it limited to lunatics roaming the streets unkempt? What about a respectable, high achieving citizen who had a nervous breakdown three years ago?

46 Constitution of the Republic of Ghana, 1992, art 94.

47 Constitution of the Republic of Ghana, 1992, arts 55(11), (12).

48 Gaining such resonance that they have been enforced by constitutional litigation in landmark cases like New Patriotic Party v Ghana Broadcasting Corporation (equal access to state media)

Not all the frameworks the Constitution has sought to build around political party activity have managed to rise off the sheets they are written on, however. In August 2019, GN Bank, the financial powerhouse founded by Dr Paa Kwesi Ndoum, Founder and then presidential candidate of the PPP, had its banking licence revoked. The downturn in its fortunes led to a drying up of the party's funding and its near asphyxiation.[49] The effect of Groupe Ndoum's fall on the PPP illustrates the importance of regulating and scrutinising political party financing in Ghana. Who is powering the two major political parties (hereafter, 'the Big Two')? What do they do? What do we know about them? Why do they do it? How much should they be allowed to give? etc.

The answers to these questions should have been known, for article 55 sets out clear and detailed accountability mechanisms for the people to keep track of how financiers are impacting election outcomes. It requires all political parties to declare their assets, revenue and the sources thereof,[50] and to publish their audited accounts annually. It also prohibits parties from taking donations from non-citizens.[51] The Political Parties Act 2000(Act 574) elaborates on these provisions by adding timelines for compliance. It requires a publication of assets and revenue at least twenty-one days before an election, and of expenditure in an election not later than six months after the election.[52] All these requirements notwithstanding, party finances remain shrouded in mystery. Efforts to obtain the financials reported for the election cycle of 2020 for this paper have proved futile.[53] Nor

and Sumaila Bielbel v Adamu Dramani.

49 See Emmanuel Debrah, Isaac Owusu-Mensah, Alex D. K. Frempong, Maame Gyeke-Jandoh, and Samuel Okoto Amankwa, *Needs assessment of political parties in Ghana* (Danish Institute for Parties and Democracy) para 3.6.4.

50 Constitution of the Republic of Ghana, 1992, art 55(14).

51 Constitution of the Republic of Ghana, 1992, art 55(15).

52 Political Parties Act, 2000, s 14.

53 Electoral commission head office directed my team to go to the corporate office, which sent them back to head office, which reiterated that corporate was the right place to go. After a bit of tag, I was instructed to write a letter addressed to the Electoral Commissioner with the data request and the reason therefor. As at the time of writing this, the letter is yet to be acknowledged.

is any mention made in the media of reported figures. Such writings as can be found on the topic of campaign financing all indicate that their information is unconfirmed.[54] It is, thus, beyond doubt that these provisions are not, in fact, governing party financial decision making.

The incredible levels of corruption in government officials and the clientelism that has become so known that even banks ask for a declaration of political affiliation to decide creditworthiness[55] are the result of this unsupervised arena of party activity. In 2022, President Akuffo-Addo appeared incapable of sacking his finance minister and cousin, Ken Ofori-Atta, even in the face of multiple calls for him to be sacked, a petition by 98 MPs from his own side to that effect, and eventually a Parliamentary censorial hearing.[56] Similarly, President Mills, when his own Attorney-General, Martin Amidu, exposed a corrupt deal to siphon money to a major party financier through judgment debts, declared his intolerance of corruption and then fired Amidu.[57] These incidents, only two in a long list over the decades, demonstrate just how captive to their financiers Ghana's politicians become. This critical gap must be plugged if the democracy is to mature into a truly transparent, accountable state. Nevertheless, despite its not insignificant failings, the 1992 Constitution can be said to provide for the flourishing of multipartyism as an integral element to this democratic quest.

54 William Nyarko (lead consultant), *Understanding How Dirty Money Fuels Campaign Financing in Ghana* (Adam Smith International and CDD-Ghana, 11 June 2021) <https://cddgh.org/wp-content/uploads/2022/02/Final-Report-CDD-Campaign-Financing-FCDO-11th-June-2021.pdf> accessed 15 November 2024.

55 Maame AS Mensa-Bonsu, 'Why Electoral Reforms are Urgently Needed in Ghana' (2021) 29(2) African Journal of International and Comparative Law 185.

56 Government was falsely ruled to be a judgment debtor to Alfred Woyome to the tune of over GHS 52 million (about $9million) https://dailyguidenetwork.com/woyome-still-owes-ghana-gh%C2%A232-7m/JoyNews,19 Jan 2012, 'Amidu was sacked after making press statement about it. https://www.myjoyonline.com/attorney-general-martin-amidu-has-been-sacked/ last accessed 21 November 2024.

57 Cornelis Kweku Affre, '98 NPP MPs to boycott budget presentation, Finance Ministry business if Ofori-Atta is not sacked immediately' (MyJoyOnline 15 November 2022) https://www.myjoyonline.com/98-npp-mps-to-boycott-budget-presentation-finance-ministry-business-if-ofori-atta-is-not-sacked-immediately/ accessed 21 November 2024.

The Political Party Situation On The Ground

For all thirty years of the 1992 Constitution's life, Ghana's government has been formed by either the National Democratic Congress (NDC) or the New Patriotic (NPP). But unlike many other democracies with two towering political parties, Ghana also has a slew of political parties of varying degrees of viability. They include the Convention People's Party (CPP), the Progressive People's Party (PPP), the People's National Party (PNP) and the Ghana Union Movement (GUM). There is also, in each election cycle, a small number of individuals who run for office—presidential and parliamentary—as independents. Few of them win. Increasingly, the space for independent candidates to win in parliamentary elections has shrunk toward zero.[58] As for presidential elections, there is not an independent who has ever done well enough to be known by name.

The language of political left, centre and right is not in common use here. Despite some half-hearted rhetoric to the contrary, there is no discernible ideological posture that can be attributed to either party in their activities and policies.[59] In the earliest days of this Fourth Republic, the NPP claimed it believed in a property-owning democracy[60] and the NDC claimed to be Nkrumahist.[61] To the

58 For a discussion of independents in Ghana's parliament over the last 30 years, see why electoral reforms are urgently needed in Ghana.

59 For example, though they claim different ideologies, Obeng-Odoom's analysis of their 2012 campaigns shows that both parties adopted an economic liberalist posture. Kweitsu & Akuamoah's data which included interviews with leading members of both parties found a wide chasm between the espoused political ideologies and the understandings of members of same. See Richard Kweitsu and Ernest Mensah Akuamoah 'Social Democrats or Property-Owning Democrats? Contending Political Ideologies in Ghana's Fourth Republic' (2021) 6 Journal of African Political Development 18; Franklin Obeng-Odoom, 'The nature of ideology in Ghana's 2012 elections' (2013) 12 (2) Journal of African Elections 75.

60 K D Fordwor, *The Danquah-Busia Tradition in the Politics of Ghana: The Origins, Mission, and Achievements of the New Patriotic Party* (Unimax Macmillan 2010); J Ayee, 'The Evolution of the New Patriotic Party in Ghana' (2008) 15(2) South African Journal of International Affairs 185-214.

61 R Kweitsu and E M Akuamoah, 'Social Democrats or Property-Owning Democrats? Contending Political Ideologies in Ghana's Fourth Republic' (2021) 6 Journal of African Political Economy and Development.

extent that Nkrumahism is a meaningful ideology,[62] it connotes socialist inclinations. The Convention People's Party (CPP), being supposedly successor party to Nkrumah's own party, the original CPP, had the strongest claim to Nkrumahism. But it has yet, three decades later, to articulate what that means in practical terms, and its place on the political landscape is increasingly dwindling.[63] Over the course of the 1992 Constitution's life, many political parties have been formed and disappeared[64] and much longing for a viable third party has been expressed.[65] Yet the space for these tinier parties has gotten smaller, and, I have argued elsewhere that it is critical to reform our electoral system to create greater space for minority parties.[66] The result is that the small parties in existence are not real political parties in any serious sense of the word. For instance, GUM, which was the third best performing party in the 2020 elections,[67] has no known senior members. There are no known public figures affiliated with it who could be expected to be deployed in government. It has issued no public statements about any happenings in the country in the past four years. Only its presidential candidate is known. Its manifesto, though publicly launched,[68] cannot be found in the public domain.

62 For a third party and ex post facto attempt to articulate nkrumaism G M Brophy, 'African Socialism: The Theory and Practice of Kwame Nkrumah' (PhD Thesis, The Australian National University 1972).

63 It has gone from 2 parliamentary seats in the 1st 4 parliaments, to 1 in the 5-6 parliaments to none in the last 2. Its presidential candidate has gone from the third best performing in 2008 to the 6th best performing party in the 2020 elections.

64 E.g. Democratic Freedom Party which contested the 2008 elections and then merged in 2011 with the NDC, Every Ghanaian Living Everywhere (EGLE) which has not contested any elections since 2004, People's Heritage Party which did not survive its defeat in the 1992 elections, & the National Reform Party, New Vision Party, Power Unity Party and the Yes People's Party

65 Eric Yobo, & Ransford Gyampo, 'Third parties and electoral politics in Ghana's fourth republic' (2015) 8(2) Journal of Politics and Law 8; Enoch Randy Aikins, 'Can the Movement for Change break Ghana's biparty democracy?' (Institute for Security Studies Africa 14 May 2024) <https://issafrica.org/iss-today/can-the-movement-for-change-break-ghana-s-biparty-democracy> ; John Osae-Kwaponng, 'The NDC-NPP Duopoly in Ghana's Multiparty Democracy' https://cddgh.org/wp-content/uploads/2023/03/The-NPP-NDC-Duopoly_blogpost-O-.pdf

66 M A S Mensa-Bonsu, 'Why Electoral Reforms are Urgently Needed in Ghana' (2021) 29(2) African Journal of International and Comparative Law 185-203.

67 0.04% of the vote, https://ec.gov.gh/2020-presidential-election-results/

68 Timothy Ngnenbe and Juliet Akyaa Safo, 'GUM launches manifesto' (Graphic Online, 10

For the brief period of 2011-2017, the PPP, under Dr Nduom, showed promise of becoming a viable third force. It campaigned actively against the 'wasted vote syndrome'. i.e., the fear many Ghanaians have of wasting their vote by giving it to a minority party only to have the majority party she/he less prefers win the election.[69] But, as noted earlier, with the downturn in the fortunes of the Nduoms, the Party's activity has shrunk significantly and it cannot seriously be said to be the third force in Ghanaian politics anymore.[70] Be that as it may, the point to note here is that despite the proliferation of parties on the ballot every election year, the political landscape of Ghana has been fully captured by the Big Two. Multiparty existence is rich in Ghana. But actual political party activity has become in essence a duopoly.[71]

Section 4: The Eighth Parliament of the 1992 Constitution

Against this background, it is easier to understand the expectations of the public about the hung parliament's potential and assess its performance. The official tenure of the 8th Parliament of the 4th republic was 7th January 2021- 6th January 2025. However, in practice, it worked from 7th January 2021- November 2024,[72] when

Februray 2020) <https://www.graphic.com.gh/news/politics/gum-launches-manifesto.html>.

69 Effah, 'Don't fall for wasted vote propaganda- PPP' https://www.pulse.com.gh/ece-frontpage/election-2016-dont-fall-for-wasted-vote-propaganda-ppp-tells-ghanaian-voters/0zc157z; A vote for the PPP will be wasted? https://www.peacefmonline.com/pages/politics/politics/201210/138998.php

70 Indeed, without de-registering them, and with no notice to them the Electoral Commission left them out of the balloting for positions on the ballot sheet for the 2024 elections. Information revealed in discussions with Brigitte D zogbenuku, September 2024

71 For a discussion of the statistics of political party participation in governance, see John Osae-Kwapong, 'The NDC-NPP duopoly in Ghana's Multiparty Democracy', https://cddgh.org/wp-content/uploads/2023/03/The-NPP-NDC-Duopoly_blogpost-O-.pdf

72 Normally, in elections years, Parliament recesses in early November until January 3rd of the next year to allow members to campaign. In 2024, however, an unprecedented standoff between the Supreme Court and Parliament which could have led to a violent constitutional crisis was averted by the Speaker of Parliament adjourning the House indefinitely. https://citinewsroom.com/2024/10/bagbin-adjourns-parliament-indefinitely/. It reconvened in January only to conclude the formalities of its term and be officially dissolved.

in an unprecedented and tragicomic constitutional crisis,[73] Speaker, Alban Bagbin suspended it *sine die*. It was a pioneer in Ghanaian political history, being the first ever Parliament with no majority. The ruling NPP lost thirty-two seats in the 2020 elections to bring its seat strength down to 137. The opposition NDC gained thirty-one seats to bring its seat strength up to 137. Then a lone independent won the seat of Fomena and thus completed the population of Parliament. Ghana's parliament has grown from 200 in 1993[74] to 230 in 2005[75] and finally to 276 in 2013.[76] A petition against the results for the Santrokofi-Akpafu-Likpe-Lolobi (SALL) constituency which remained unresolved throughout that Parliament's term left it with an odd 275 seats. A hung parliament was always, previously, merely a theoretical possibility. Indeed, the vocabulary of hung parliament was not known in Ghanaian public discourse. It is an odd twist of fate, that it was only when the structure of Parliament was altered to render a hung parliament seemingly impossible that it became reality. How has this Parliament performed? What has been the effect of the even split on party politics, interparty relations, and government business? Has this helped or prevented them from performing the functions of political parties in a democracy? The answers to these pertinent questions will be the subject of this section.

As noted earlier, the eighth Parliament contained a single independent MP from Fomena, Andrew Asiamah Amoako. Though he won the seat as such, it must be stated that Amoako's independent status does not reflect a lack of historical political affiliation. He was the MP for

73 in which the Supreme Court overstepped and stayed an administrative declaration by the Speaker and to avoid a head-on collision of either the two arms or the two. Sides of the House, Speaker Bagbin adjourned that Parliament until its last day in office. https://citinewsroom.com/2024/10/bagbin-adjourns-parliament-indefinitely/#google_vignette

74 D Nohlen, M Krennerich, and B Thibaut, *Elections in Africa: A Data Handbook* (Oxford University Press 1999) 435.

75 'Election Results' (Parliament of Ghana, December 2004) <https://repository.parliament.gh/handle/123456789/585>

76 S Brierley and G Ofosu, 'The Presidential and Parliamentary Elections in Ghana, December 2012' (2014) 35 Electoral Studies 382-385.

that constituency on the NPP's ticket but lost the primaries. He left the party after alleging that the constituency chairman manipulated the primaries in favour of his protégé against the general will of the members.[77] Whether true or not, he stood as an independent in an NPP stronghold and defeated the party candidate. In view of the way in which he came to be independent, it had not been thought that he would automatically toe the line of the NPP in Parliament, and so there was much excitement about the hung Parliament.

In some quarters, the excitement was uneasy. It was felt that without a clear majority, the deep and seemingly acrimonious divide between the two sides would cripple the House and no business would get done.[78] In others, there were high expectations and eager anticipation. Many scholars, I myself included, considered it a new and unparalleled opportunity for the NDC, which had lost the presidential race to be a stronger and more effective opposition. The historical trend has been that with a clear majority and the dangling of ministerial appointments; the executive always got its way in Parliament.[79] That strong executive power had kept multiparty activity from being able to offer much beyond elections. With the hung parliament, it was earnestly hoped that the opposition would be able to hold the ruling party more accountable.

The term has not been without its victories for the opposition and by extension, accountable governance. Most notably, the party was able

77 Nana Yaw Gyimah Mensah, 'NPP MP for Fomena files nomination as an independent candidate' (MyJoyOnline.com 7 October 2020) <https://www.myjoyonline.com/npp-mp-for-fomena-files-nomination-as-an-independent-candidate/ > accessed 8 August 2024.

78 The Afrobarometer team in Ghana, led by the Ghana Center for Democratic Development, interviewed a nationally representative sample of 2,400 adult Ghanaians in April 2022 on the effects of a hung parliament on the democracy of Ghana. https://www.afrobarometer.org/wp-content/uploads/2022/08/R9-News-release-Ghanaians-split-on-impact-of-hung-Parliament-Afrobarometer-26august2022-final.pdf

79 Rasheed Draman, 'Parliamentary Oversight and Corruption in Ghana Policy Brief, Presenting Key Issues & Lessons Learned' (mcgill.ca,) <https://www.mcgill.ca/scs-parliament/files/scs-parliament/ghana_policy_brief.edited.pdf > ; Rick Stapenhurst, Rasheed Draman, Brooke Larson, and Anthony Staddon 'Anti-Corruption Evidence: The Role of Parliament in Curbing Corruption' (Springer 2020) 51.

to prevent the entering into force of a new constitutional instrument that would have affected the right to vote of a substantial number of Ghanaians. The draft Constitutional Instrument, laid before the House in 2023 by the Electoral Commission,[80] abolished the guarantor method of voter verification[81] and instituted the Ghana card—Ghana's recently introduced ECOWAS identity card—as the only form of verification acceptable for voter registration. With all the problems of the guarantor system,[82] it would not have been difficult to sell the new rules to the Ghanaian public. But by the National Identification Authority's own estimation at the time, more than 2.5 million Ghanaians remained without the Ghana card.[83] The NDC was able to get the CI withdrawn because Adwoa Safo, NPP MP for Dome's absence meant the NPP could not get it passed without the opposition. Though the Opposition ought to be commended for this firm resistance, the self-serving nature of this victory engenders some cynicism about it. After all, they stood to collectively and individually lose significant numbers of the voters they cultivated in the previous election. Still, it was a heartening example of the opposition party exerting a check on unpopular or undesirable government action.

Another noticeable way in which the opposition was useful to the democratic venture in this hung parliament was in the way it kept public discourse on government action alive. In a country with such low literacy rates and economic urgency, people lose interest

80 Public Elections (Registration of Voters) Regulations 2023

81 A system where a registered voter who can provide personal details that link them to the person they are guaranteeing, vouches for, or guarantees that the information provided by the individual seeking to register, or vote is accurate. This is to help individuals who may not have proper documentation, register and vote in elections.

82 Such as groups of foreign settlers and nomads standing as guarantor for each other and acquiring Ghanaian citizenship thereby etc. see Center for Democratic Development-Ghana, Voter Registration: guarantor System most abused, needs brainstorming https://cddgh.org/2023/04/voter-registration-guarantor-system-most-abused-needs-brainstorming-cdd-ghana.

83 Kizito Cudjoe 'Over 800,000 Ghana Cards uncollected' (thebftonline.com, 6 July 2023) <https://thebftonline.com/2023/07/06/over-800000-ghana-cards-uncollected/#:~:text=Meanwhile%2C%20the%20NIA%20said%20it,registered%20and%20issued%20their%20cards>

in specific political affairs quickly. Issues that look like they will decide the government's fate do not even come up during election cycles unless they happened that year.[84] A 2007 report noted that political parties had become electioneering machines interested only in gathering votes, not in disseminating information or shaping the political will of the people as per the Constitution[85]. Party politics therefore hit a sad low where it 'moved away from the politics of principles and ideas to the politics of insults and defamation'.[86] Parliament's work has been, in this term, under significant media scrutiny and in the public discourse. The need to break the tie in seat strength meant every edge, however minor, was viewed as useful for the next elections. This motivated opposition MPs to engage more fully with the public, make talk show appearances, issue press releases and statements and generally try to rouse public opposition to the present government. In doing so, they forced government to respond to matters of importance to the public in ways that, for previous governments, their sound parliamentary majorities rendered unnecessary.

Furthermore, never has a single MP's voice echoed so loudly across the legislative chamber as in this hung Parliament. As the incidents of the E-levy and approval of the KT Hammond batch of ministers (discussed below), demonstrated, every MP's vote has remained equal to everyone else's. In previous Parliaments, the majority was so clear that neither side lost much for the absence of a number of MPs in any regular business of the House. In the Hung Parliament, each MP's vote has counted in ordinary as in extraordinary business. Even more importantly, each MP's absence has, in the hung parliament, proved significantly weightier than ever before. Indeed, for the first

84 For a discussion of this phenomenon, see Maame A.S. Mensa-Bonsu, 'The Presidential Prerogative of Mercy' (2021) 15 Journal of Parliamentary & Political Law 25.

85 Open Society Initiative for West Africa, *Democracy and Political Participation* (Open Society Institute Network Publication, 2007).

86 Kwesi Aning, *Legal and Policy Frameworks Regulating the Behaviour of Politicians and Political Parties-Ghana* (International IDEA 2013).

time in Ghanaian history, the Speaker of Parliament referred three MPs to the Privileges Committee for absenteeism.[87]

Similarly, a dissent by an MP could have serious implications for his party's side. Every matter before the House therefore required every MP to take a stand. Of course, with such power in one's vote and presence, a new space for corrupt trading opened up. With so much influence on the outcome of a vote in the House, each MP became more vulnerable to bribery. Either interest groups external to the House could entice him with luxurious bribes,[88] or one side could make underhanded deals with individual members of the other side and thus undermine the posture of the party.[89] Even so, it cannot be overlooked how influential the parties have been in giving real teeth to the voice of each MP in this hung parliament.

A related benefit the political sphere received from the hung parliament is the clarity of the talent pool on each side of the divide. As noted in Section 1, political parties act as a democratic tool of governance by providing a talent pool for government formation. That pool has, in our experience, unfortunately, often shrunk to contain only persons to whom a reward for party loyalty or campaign assistance is required, and so, unsuitable party influencers have been known to end up with important public servant jobs.[90] The hung parliament has done better than previous Parliaments in living up to

87 Paa Kwesi Schandorf, 'Bagbin Refers 3 NPP MPs to Privileges Committee for Continuous Absence' (My Joy Online, 5 April 2022) <https://www.myjoyonline.com/bagbin-refers-3-npp-mps-to-privileges-committee-for-continuous-absence/> accessed 15 November 2024.

88 For instance, the Office of the Special Prosecutor abandoned its investigation of a businessman it named as having attempted to bribe a number of majority caucus MPs to withdraw their demand for President Akufo-Addo to sack his finance minister Ken Ofori-Atta for lack of cooperation by the NPP caucus. See report on the OSP's official site https://osp.gov.gh/our_cases/case_profile/24/cases/ .

89 Myjoyonline "Interior Minister tried to bribe NDC MPs with police recruitment slots' – Asiedu Nketia'

(Myjoyonline.com, 15 August 2024) <https://www.myjoyonline.com/interior-minister-tried-to-bribe-ndc-mps-with-police-recruitment-slots-asiedu-nketia/>

90 eg Hawa Koomson, and Fiifi Kwetey who's nomination was resisted on grounds of integrity, https://www.peacefmonline.com/pages/politics/politics/202303/485376.php?storyid=100&;

the idea of a talent pool. The need to engage with the public and present themselves as the competent alternative on every possible front led to a class of opposition experts being developed. There were by the end of its term opposition voices in and out of Parliament that spoke to the public on legal affairs, financial matters, health, etc. This was useful both for assessing the government and evaluating the capacity of the opposition. The failed presidential campaigns of Dr Sam Ankrah and Alan Kyerematen illustrate the point. Without the political machinery of party to round up talent to execute their missions, it was impossible for voters to assess the chances of delivery or even the intended goods to be delivered. There could therefore not develop any trust in these candidates, notwithstanding their appealing campaign slogans. By contrast, the members of the Big Two increasingly sought niches to be associated with, and in so doing, built up a holistic image of their governance capacity and intentions.

Even so, the Hung Parliament has left negative footprints on the democracy, which are important to identify and reflect on if their damage is not to be lasting. One negative outcome of this hung parliament was the intensification of party discipline. For the first time, the opposition began articulating specific positions on matters before the House and sought to enforce it among their members.[91] That, in itself was beneficial. What was inimical is that when an MP voted for a position other than the party's, it was immediately obvious and the response was so sharp and so swift[92] that the idea of the parties as opposed to each other has taken on new and undesirable levels

91 eg. the party announced it opposed the electronic transactions Act and promised its MPs would resist it

Kingsley Hope, 'NDC resolves to vote against E-Levy' (ghaiantimes.com.gh, 26 January 2022) <https://ghanaiantimes.com.gh/ndc-resolves-to-vote-against-e-levy/; Sammy Wiafe,'Approval of Ministers-designate may be by secret ballot – Joe Wise' (citinewsroom.com 1 March 2023) <https://citinewsroom.com/2023/03/approval-of-ministers-designate-may-be-by-secret-ballot-joe-wise/>

92 Citinewsroom, 'NDC MPs who supported approval of ministers must be taken out- Gbande' (citinewsroom.com, 24 March 2023) <https://citinewsroom.com/2023/03/ndc-mps-who-supported-approval-of-ministers-must-be-taken-out-gbande/>

of intractability.[93] When party discipline becomes the ruling rod of voting in the House, it causes political party activity to degenerate, if not into, then at least, toward factionalism; the very development political parties are supposed to deflect. The intransigence the intense party discipline has caused is not healthy. It encourages power clusters to form within the party either to determine or resist the positions being articulated by the party that will become enforced in its caucus. With our already firm borders of ethnoreligious division, political parties' ability to prevent factions is critical to the sustainability of both the democracy and the state. So, to see the parties descend into factionalism in the competition for parliamentary seats is more than a little worrying.

The first opportunity the NDC had to show itself as a force in opposition came with the vetting of the president's ministerial nominations. The size and quality of ministerial corps have long been a subject of complaint in Ghana. It had been believed that the overwhelming majority that the president's party had always enjoyed in Parliament was what had made this sub-optimal situation possible. Indeed, Fiifi Kwetey, nominated as Deputy Finance Minister in 2009, was rejected by the minority at the committee level but was approved by the full house through the NDC majority vote.[94] Similarly, in 2020, when the minority in the vetting committee rejected Otiko Djaba, as Minister of Gender, the NPP used its majority to push the appointment through in the full house.[95]

93 Isaac Yeboah, 'Blows in Parliament over E-Levy voting' (GraphicOnline.com, 21 December 2021) <https://www.graphic.com.gh/news/politics/blows-in-parliament-over-e-levy-voting.html>; GhanaWeb, 'Two weeks after my vetting, they are saying they will not approve me – K.T. Hammond laments' (ghanaweb.com, 2 March 2023) <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Two-weeks-after-my-vetting-they-are-saying-they-will-not-approve-me-ndash-K-T-Hammond-laments-1723940>

94 Daily guide, 'Fifi Kwetey Gets Nod' (modernghana.com 31 March 2009) <https://www.modernghana.com/amp/news/209009/fifi-kwetey-gets-nod.html>

95 MyJoyOnline.com, 'Otiko Evades Minority Resistance to Secure Ministerial Appointment' (MyJoyOnline.com, 7 February 2017) <https://www.myjoyonline.com/otiko-evades-minority-resistance-to-secure-ministerial-appointment/ > accessed 8 August 2024.

Thus, it was expected that, without the ability to use a full house party vote to approve nominations, the president would not be allowed to appoint three deputies to one ministry or make other such obviously clientelist appointments. Moreover, the quality of approved nominees would improve. The seemingly firm and objective posture the NDC MPs adopted at the start of the process fed that public pleasure and anticipation of a truly controlled government. Disappointingly, despite the initial resistance by the NDC MPs, all the nominations went through,[96] including Hawa Koomson, nominated as Minister of Fisheries, who had to be taught by the Vetting Committee what a trawler was.[97] Public dismay about the mass approval was directed, not at the majority MPs, but at the NDC MPs.[98] Perhaps, accustomed to being blamelessly helpless, the NDC caucus had not expected public scrutiny of their choices. The public response to this incident suggested that the people were not only cognisant of the power the hung parliament had given the opposition, they expected the minority to use it to hold the government accountable.

If the first failure to hold government accountable was due to ignorance of their new power, the subsequent failures in the same regard cannot be thus explained. In 2022, the NDC roused hope in their government supervisory skills when public objection to the finance minister became impossible to ignore. NDC MPs began to pressure the president to remove him and eventually, Parliament

96 Kenneth Awotwe Darko, 'Parliament approves Akufo-Addo's nominees including Hawa Koomson, Oppong Nkrumah, Afriyie Akoto' (myjoyonline.com 4 March 2021) https://www.myjoyonline.com/parliament-approves-akufo-addos-nominees-including-hawa-koomson-oppong-nkrumah-afriyie-akoto/> accessed 8 August 2024.

97 Jessie Ola-Morris, 'Social Media Reacts to Mavis Hawa Koomson's Vetting' (18 February 2021) <https://www.myjoyonline.com/social-media-reacts-to-mavis-hawa-koomsons-vetting/> accessed 8 August 2024.

98 Jessie Ola Morris 'Social media reacts to Mavis Hawa Koomson's vetting' (myjoyonline.com 18 February 2021) https://www.ghanaweb.com/GhanaHomePage/NewsArchive/It-s-sad-Appointments-Committee-NDC-MPs-approved-Hawa-Koomson-as-a-minister-Awutu-Senya-East-NDC-1200874 accessed 8 August 2024>; BBC, 'New ministers in Ghana 2021 : Opposition NDC supporters get headache as President Akufo Addo swear in 28 ministers' (bbc.com 6 March 2021) <https://www.bbc.com/pidgin/tori-56303995; https://www.peacefmonline.com/pages/politics/politics/202103/440230.php?storyid=100&>

summoned him to a hearing in defence of a motion to pass a vote of no confidence in him. The summons was terminated by a House that, in a surprising volte-face, held itself to be without jurisdiction in the matter.[99] After winning public admiration for standing up against what was perceived as the President's intransigence about an incompetent minister, the opposition somehow came to heel, the motion disappeared, and the opposition allowed the matter to die out of the public discourse.

Another defeat for government supervision by the opposition was the successful passing of the Emissions Levy Act.[100] Government announced in early 2023 that it was introducing an emissions levy ostensibly to reduce carbon emissions. But in a country with no state transport system, no car industry and high rates of poverty that create perfect price elasticity,[101] people simply cannot afford green cars. At the same time, they cannot simply stay home forever. Consequently, the public response to the levy was negative. It was viewed as just another predatory move by an exploitative government.[102] In past parliamentary terms, the tenor of the public discourse would have been impotent anger. In light of the numerical weakness of the government side, the people, once again, turned their eyes to the opposition to resist the levy and when it successfully passed, it cost both the opposition and the democracy the people's faith.

99 Parliament was unable to get the required number of at least two-thirds of all members of Parliament as required under article 82 of Ghana's 1992 Constitution to pass the vote of censure against Ken Ofori-Atta. The ruling party lawmakers staged a walk out. Being unable to secure the votes however is a different thing from lacking jurisdiction to pass the vote.

100 Emissions Levy Act, 2023 (Act 1112).

101 Poverty rates are projected to be at 31.5% by 2025. https://www.worldbank.org/en/country/ghana/overview

102 Leticia Osei, 'Withdraw Emissions Levy, it'll worsen already acidic business environment – FABAG to govt' (citinewsroom.com, 2 Februaru 2024) < https://citinewsroom.com/2024/02/withdraw-emissions-levy-itll-worsen-already-acidic-business-environment-fabag-to-govt/>; Leticia Osei, 'GUTA kicks against VAT on electricity, Emissions Levy; Hamdia Mohammed, 'Emissions Levy is a nuisance tax – IES' (citynewsroom.com, 3 February 2024) <https://citinewsroom.com/2024/02/emissions-levy-is-a-nuisance-tax-ies/>

Dr Dominic Ayine, NDC MP for Bolga East and senior member of the Opposition attributes much of the failure of the NDC to live up to our supervisory hopes to structural deficiencies in the constitutional configuration of Parliament, and the Standing Orders of the House. Some of the bigger structural problems he identifies include the voting thresholds, which are constitutionally determined; and secret ballots, which spring from the Standing Orders.[103] Most of the business of Parliament does not require a supermajority. A simple majority suffices. Thus, for most of its work, 137 government MPs + 1 Independent could get government what it wanted. The initial posture of cooperation that the ruling party caucus adopted at the start of the term, quickly evaporated. According to opposition MPs, NPP worry about being straitjacketed by the opposition was evident in the conciliatory overtures the government MPs made to the opposition MPs. There were constant reminders of the need for the two sides to work together and other declarations of unity of purpose.[104] But by the middle of 2022, when government was able to get the budget, with its heavily despised e-levy through, despite initial opposition resistance,[105] a noticeable shift occurred in the posture of the ruling party's caucus.

The public response to the passing of the e-levy was, again, indicative of the understanding of Ghanaian voters of the role of the opposition. The NDC was severely criticised for not being able to prevent it. Ayine considers it the greatest loss of the opposition in that Parliament.[106] It cost not only the party, which lost much credibility as a check on government abuse, it cost the whole democratic enterprise because it made the public lose hope in the idea of Parliament as a check on government. Parliament being the main institution to which the 1992

103 Standing Orders of the Parliament of Ghana (27th June 2023) ord 140.
104 Dr Ayine, interview with author, 4 July 2024
105 https://mobile.classfmonline.com/news/politics/E-levy-vote-Gov-t-flew-Adwoa-Safo-down-on-a-private-jet-CoS-wired-120-000-to-her-Ken-Agyapong-30903
106 Dr Ayine, interview with author, 4 July 2024

Constitution entrusts executive supervision,[107] the NPP's insensitive inflexibility[108] and the NDC's blustering impotence, painted a bleak picture of the future of executive fetters.

The second structural problem is the secret ballot used to decide contentious issues.[109] I consider this practice one of the most constitutionally malevolent practices in our legal order. It should be abolished immediately. It allows MPs to conceal the direction in which they vote. The rationale, it is said, is to allow for political privacy and to protect voters from any means of unfair voter influencing, threats, or external attempts of bribery or coercion.[110] But this practice achieves exactly what it meant to prevent. It not only encourages corruption, but it also breaks the accountability loop between constituents and representative and thus renders the latter principal, when they were engaged as an agent. The secrecy allows nefarious horse-trading. Government, and indeed, interest groups, can bribe MPs and the knowledge that how they voted will never be known makes it easy for an MP to risk selling his vote. It also means constituents have no idea how the power they have delegated is being used. Like Burke, I reject the idea that the representative is like the waiter whose job is to fetch precisely what has been ordered even when they know it is bad for the customer. The representative is a trustee.[111] They must use their best judgment to decide what is best for their constituents and vote for that. There is a possibility that what they, in good faith, believe to be in their constituents' interests

107 For a full discussion on Parliament's intended supervisory role, see M A S Mensa-Bonsu, 'Who will bell the cat or rather who could?"

108 Ghana Web, 'Today in History: Osei Kyei-Mensah-Bonsu celebrates birthday with customized E-levy cake' (Ghanaweb.com, 9 February 2023) <https://mobile.ghanaweb.com/GhanaHomePage/NewsArchive/Today-in-History-Osei-Kyei-Mensah-Bonsu-celebrates-birthday-with-customized-E-Levy-cake-1711097 (MPs bought e-levy cake to celebrate)>

109 Constitution of the Republic of Ghana, 1992, art 109; ord 109(1).

110 GhanaWeb, 'Broad application of the Secret ballot system in the legislature does not promote legislative accountability' (ghanaweb.com, 16 May 2023) <https://mobile.ghanaweb.com/GhanaHomePage/features/Broad-application-of-the-Secret-ballot-system-in-the-legislature-does-not-promote-legislative-accountability-1768163>

111 Edmund Burke, 'Speech to the Electors of Bristol' (3 November 1774) *Works 1:446—48.*

is not in fact so. Or that what they chose is actually good for the constituents, but they are not grateful for it because it was not what they wanted. Constituents are entitled to assess how their trustee is using their power and vote her out if they are unsatisfied.

The secret ballot in Parliament resorted to, ironically, when transparency most matters, robs constituents of the information and therefore the power with which to make wise choices. It undermines the opposition's ability to be a firm force in resistance to government excesses by rendering it impossible to prove to the public its non-complicity in government policy or action failures. Thus, no matter how loudly the opposition may posture prior to the vote, they are unable to ensure the outcome they desire or prove their innocence in the undesirable outcome. This challenge was evident in the aftermath of the approval of the KT Hammond batch of ministers discussed earlier. Had the vote not been secret, the opposition would have had an easier time of distancing itself from the expansion of an already considered overlarge government. The independence of thought required in MPs for the multiparty democracy to actually offer home for differing views needs scrutiny to grow. The perniciousness of the secret ballot was obscured in earlier parliaments by the tyranny of the majority that prevailed before. The hung parliament has brought into sharp relief the weight of its effect on accountability, good governance and political party activity.

In each election cycle, the Big Two and a few of the smaller political parties issue manifestoes. But the election is hardly ever run as a battle of manifestoes.[112] More frequently, a catchy, pithy slogan or a single major issue is the focal point of the parties' social engagement. Indeed, some elections have been contested on no clear issues. For example, in the 2012 elections, John Mahama of the NDC won the election

112 So much so, that Kyerematen, once Minister in two NPP governments, declared on launching his independent bid that manifestoes are unnecessary.https://www.graphic.com.gh/news/politics/ghananewsghana-needs-plan-not-manifesto-alan-kyerematen.html

on the very vague platform of *'e dey be keke'*. The phrase translates roughly as 'it just rocks.' What rocks and for whom were not clearly articulated. Nana Addo Dankwa Akufo-Addo of the NPP lost that same election running an equally vague campaign of '*yeresesamu* (we are changing it up), move Ghana forward'. The manifestoes, generally launched to much fanfare, do not play much of a part in the electoral journey. This may perhaps have more to do with the general literacy levels across the country than with a deficiency in the parties themselves. But this, coupled with the unclear ideological positions of the parties, mean that voting has historically been based on matters other than the vision of the parties contesting or any important issue. The hung parliament offered an opportunity to bring clarity into that unrefined space of politics in Ghana. With such equal pull on public loyalties, the opposition could have, with a louder voice and greater, more clearly articulated resistance to undesirable government policies, created a coherent, alternative vision of state and government around which citizens could rally. But the opposition failed to take this opening.

While the force in Ayine's assertion about the inexact split is not denied, the opposition cannot blame their failure to organise the public into support groups for specific agenda bundles entirely on that. Yes, they raised objections to several issues throughout the term. But they did not attempt to draw the connections between their positions on each of those issues and their own governance strategy. For example, they objected to several taxes and the issuing of bonds with Bank of Ghana to raise funds for government, but the objection was always resisted as not necessary or insensitive. It was not situated in their own understanding of how a state should be run. They could have, in defining their principles in juxtaposition with the government's, crystallised for the country, the two ideologies of governance that dominate it. In sum, the hung parliament has, despite issuing elaborate manifestoes not brought any more ideological

clarity to citizens or furthered the interaction between adherents of similar ideological bent. Thus, all the advantages consequent to that interaction—policy revision and refinement, the continued alignment of government aims with government needs etc. —were lost to the nation.

One other development in Ghana's constitutional relations traceable to this hung parliament is the sharp rise in constitutional litigation on matters of the House by MPs. The earliest case under the 1992 Constitution in which the Supreme Court is invited into matters of the House *is JH Mensah v AG.*[113] In that case, the court held that it could only investigate allegations of improper procedure and unconstitutionality of legislative provisions. In every other way, the House was immune to judicial scrutiny. Thus, it held that a re-elected president's ministerial nominees all had to be approved expressly by Parliament even if they were ministers from the previous term of office being maintained in the same ministry. But whether that approval was done by tossing a coin or investigative reports, it was not in their purview to question. Between 1994 and 2020, there was very little litigation involving the legislature.[114] However, since 2021, when this hung parliament started work, there has been a considerable influx of cases before the Court, challenging legislative procedure, and legislative output. The litigation has included such landmark cases as *Ezuame Mannan v AG,*[115] *Nimfah v James Gyakye Quayson & 2 Ors,*[116] *Justice Abdulai v AG,*[117] and *Odoi v AG*[118] etc. In all these cases, the Supreme Court was called upon to overrule the legislature. To be sure, the court cannot be said to have overreached in handling these matters,[119] even where its decision was regrettable. However,

113 [1997–98] 1 GLR 227.

114 *Fewer than ten such cases can be found. Most notably Kpodo* v AG (2019) JELR 66405 (SC); (n 113).

115 (2022) JELR 109828 (SC).

116 (2022) JELR 109761 (SC).

117 (2022) JELR 109669 (SC).

118 (2024) JELR 112804 (SC).

119 Constitution of the Republic Ghana, 1992, art 2. gives the Court power to enforce the

this does not diminish the impact on the small-c constitution when Parliament is being so frequently called to order by the Court. It is telling of the weakness of the opposition in the House that their MPs have felt the need to solicit the help of the Court to resist the government side. What the long-term effect of such intense judicial supervision of the legislature will be is yet to be discernible. But it is something that should go neither unnoticed nor unscrutinised.

In the short term, what is immediately noticeable as a consequence of this spate of judicialization of parliamentary affairs is the greater interest both the public and the executive are taking in who is appointed to the Bench. It is concerning that some recent nominations to the Superior Courts do not commend themselves as based merely on merit.[120] Gaewu JSC, for example, was appointed to the High Court in 2020. Before he had even written a full judgment, and despite resistance by the opposition, he was elevated to the Supreme Court.[121] On what basis then was this promotion made? When such questions cannot be convincingly answered, it makes it hard to resist the accusations of court packing that have been repeatedly levelled at the NPP government.[122] Even if this perception (i.e. of court packing) were completely unfounded, the effect of its existence on the justice system is malignant. As I have long argued,

Constitution against every person or agency including Parliament and the President.

120 Maxwell Opoku-Agyemang was nominated to the Court of Appeal, despite having admitted that he made some irregular unilateral admissions while Acting Director of the Ghana School of Law, the statutory body that offers the mandatory Professional Bar training in Ghana. His appointment fell through but it reflects ill on the President and feeds negative perceptions about the judiciary that he was nominated at all. See Daily Graphic, 'Admission of 10 students to GSL: I didn't seek approval, but it was in the interest of the school- Opoku-Agyemang' (graphiconline.com, 28 March 2028) <https://www.graphic.com.gh/news/general-news/admission-of-10-students-to-gsl-i-didn-t-seek-approval-but-was-in-interest-of-school-opoku-agyemang.html>

121 Iddi Yire and Elsie Appiah-Osei, 'Parliament approves Koomson, Gaewu as Supreme Court Justices' (gna.org, 25 March 2023) <https://gna.org.gh/2023/03/parliament-approves-koomson-gaewu-as-supreme-court-justices/>

122 Abigail Arthur, 'Akufo-Addo packing courts with NPP loyalists to escape accountability – NDC' (citinewsroom.com, 4 July 2024) <https://citinewsroom.com/2024/07/akufo-addo-packing-courts-with-npp-loyalists-to-escape-accountability-ndc/>; Abigail Teye, 'Ackah-Yensu: Akufo-Addo is not packing the Supreme Court' (asaaseradio.com 18 October 2022) <https://www.asaaseradio.com/ackah-yensu-akufo-addo-is-not-packing-the-supreme-court/>

the judiciary is the last bastion of the republic. When people lose hope, confidence, and trust in it, all the conditions for an overthrow of the legal order are ripe.

It cannot at this time be stated with all certainty whether the hung nature of parliament intensified the politicisation of the judiciary or only drew our attention to how widespread it had become. But whichever it is, this is not a development to be welcomed. When the executive controls parliament and the judiciary, we have only established a very expensive dictatorship, that also disingenuously claims our civic obedience as the root of its legitimacy. The multipartyism the Constitution enshrines is not intended to be a Potemkin village. The hung parliament has alerted us to slopes we are slipping on or nearing, and we should take the alert to heart.

Lessons in constitutional design drawn from the hung eighth parliament

It seems that paradoxically, the Constitution has provided for multiparty existence and activity in public life. But in the actual governance, its structure encourages a sort of constitutional dictatorship by a ruling party. There are several lessons Ghana and Africa's younger democracies can learn from our first experience of a hung Parliament.

Firstly, our legislatures must not operate on mere simple majorities. The simple majority vote has, as its greatest commendation, efficiency. But the costs in bipartisanship may not justify it. While the two-thirds majority Ghana's Constitution requires for contentious issues may be too high for everyday house business, a single vote more than the other side is also too easy to achieve and, in a divided society, unhelpful for seeding inter-party and inter-interest group collaboration. Perhaps three fifths majority might be a good compromise. It is high enough

to require cooperation between the sides without being so high as to make one side hostage to the other.

Second, independent MPs should not be allowed to caucus with either side. In the first place, it is unfair to the electorate. Both sides had candidates in the election that the electorate did not vote for. There is no reason why having rejected both sides, they should be compelled by their independent representative to tow one or other side's line. Furthermore, as Ayine points out, a proper equal split in the House is better for the opposition's effectiveness. If the independent candidate had been required by the Speaker to vote independently in each instance, the opposition might have had a reasonable chance of swaying him on some issues while the government side would have been able to secure his vote on others. But to simply join the NPP and turn them into a majority was wrong and accounts in large part for the ineffectiveness of the opposition in the eighth parliament. In Switzerland, opposition parties frequently threaten to send policy choices to referendum to encourage government to negotiate.[123] As Papadopoulos has pointed out, the threat is so effective, the opposition has rarely ever had to make good on it.[124] In similar vein, a threat of government paralysis could give opposition MPs bite to their bark in a hung parliament without actually resulting in government paralysis. Insisting on the independence of independents is critical to the efficacy of the mechanism.

Relatedly, Electoral Commissions on the continent should avoid odd numbers in the total number of constituencies into which their countries are divided. This does not prevent hung parliaments. Indeed, it is possible in a 200-member legislature to have 2 independents or small party MPs and 98 MPs on each side. The aim is not to prevent hung parliaments from ever occurring. The aim is to ensure that a

123 Yannis Papadopoulos, 'How Does Direct Democracy Matter? The Impact of Referendum Votes on Politics and Policy-Making', in Jan-Erik Lane (ed.), *The Swiss Labyrinth: Institutions, Outcomes and Redesign* (London, Cass 2001).

124 Ibid.

single independent will not defeat the constituents' choices and allow one side to circumvent the other without the legitimacy to do so that a clear ruling majority confers.

Finally, all ballots in Parliament should be public. Those who dare not openly declare their stand should not be entrusted with collective decision-making. The visibility of public ballots will trigger a culture of greater reflectiveness on the nature and quality of representation citizens are receiving from MPs both in the public and in the MPs themselves. The downstream effect will be better, more accountable, more constituency-responsive more ideologically grounded representation.

Conclusion

Political party activity in Ghana has grown in leaps and bounds since the 1992 constitution returned the country to democratic rule for the fourth time. Its eighth parliament is its most unique thus far for being the first ever hung parliament in the nation's history and therefore greatly changing the way parties have functioned in the political sphere of public life. This paper has highlighted those changes, noting the victories and failures of the opposition in the hung parliament. On the victory front, we note that the opposition has done a good job of keeping the public engaged with parliamentary and government action in the focused effort to break the tie in seat strength in the 2024 elections. We noted also that it had forced representatives on both sides to find an area of expertise where they could build credibility for the party. On the negative side, we marked the sharp increase in blind party loyalty and party discipline and the factionalism that are creeping into party politics as a result thereof. A further important contribution this study makes to Ghana's political and constitutional theory is to have highlighted how the simple majority vote and the secret ballot methodologies of deciding

government business structurally undermine the accountability mechanism that multipartyism is intended to be in a democratic order.

Without doubt, the opposition has been disappointing in their use of the increased leverage the split house gave or at least could have given them. Nevertheless, it has not been an unprofitable situation. If government was able to spend irresponsibly[125] resulting in the current Domestic Debt Exchange Programme[126] with such a weak majority, it causes shudders the idea of what they could have done had they had the sort of majority previous parliaments contained. While the hung Parliament did not live up to the high hopes of accountability held in the eager school of thought, neither did it live down to the fears of government paralysis in the anxious school of thought. The increased public scrutiny the opposition put government under has been a great benefit of this parliament. Should another election yield hung parliament, it would actually not be a terrible thing.

125 Kofi Ahovi, 'Government might have over-borrowed – John Kumah admits' (businessweekghana.com, 6 December 2022) <https://businessweekghana.com/government-might-have-over-borrowed-john-kumah-admits/>; Kabah Atawoge, 'Reckless spending to blame for Ghana's economic woes, not only COVID-19 – Kwaku Kwarteng' (citinewsroom.com, 15 March 2024) <https://citinewsroom.com/2024/03/reckless-spending-to-blame-for-ghanas-economic-woes-not-only-covid-19-kwaku-kwarteng/>

126 Richmond Atuahene, K. B. Frimpong & Isaac Kofi Agyei, 'One year on: Lessons from Ghana's Domestic Debt Exchange and its impact on the economy' (myjoyonline.com, 6 December 2023) <https://www.myjoyonline.com/one-year-on-lessons-from-the-domestic-debt-exchange-and-its-impact-on-the-economy/>

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