COLLATERALISATION AND GHANA'S PETROLEUM REVENUE

"Any contract, agreement or arrangement to the extent that it encumbers or purports to encumber the assets of the Petroleum Funds whether by way of guarantee security, mortgage or any other form of encumbrances is contrary to this Act and is null and void." Section 41(2) of Act 815.

In April 2011, the Parliament of Ghana passed the Eight Hundred and Fifteenth Act known as PETROLEUM REVENUE MANAGEMENT ACT, 2011. The Act received Presidential assent on 11th April 2011. Gazette notification was also issued on 15th April 2011.

The purpose of the act is **"to provide the framework for the collection, allocation and management of petroleum revenue in a responsible, transparent, accountable and sustainable manner for the benefit of the citizens of Ghana in accordance with Article 36 of the Constitution and for related matters".**

It cannot be gain-said that Act 815 attracted an unmatched public attention and interest. It thus generated hundreds of memoranda from the Parliament and general public alike.

Indeed the provision which caught the attention of most people is the provision dealing with encumbrances on the revenue derived from the petroleum. Understandably, the word collateralization became a household name, even though most people were not quite familiar with its actual meaning or incidence.

Indeed one wonders why people spent a lot of precious man hours debating on whether or not a portion of our petroleum revenue should be used as security or collateral for a financial facility granted Ghana or any of the State institutions or entities?

This is because the State had in the past waived its sovereign immunity as security for the due repayment of a facility or undertaking granted the State or any of its institutions, entities or agents. The said process is also referred to as SOVEREIGN GUARANTEE. A guarantee is defined as
"an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt or default ……. of another person whose primary liability to the promisee must exist or be contemplated" See PENN & SHEA ON "LAW RELATING TO DOMESTIC BANKING" 2ND Ed page 515.

Thus, by a sovereign guarantee, the State waives its immunity relating to attachment for the recovery of debts or collateralization of its assets. Under such circumstances there

could be no limitation or restrictions on what kind of assets or property of the state should be seized, attached or otherwise encumbered to ensure the discharge or performance of the state's obligation under a particular agreement.

In our respectful view, whether or not Act 815 provided specifically for a portion of the petroleum revenue to be used as collateral or mortgaged for the due repayment or discharge or performance of obligation is immaterial. The State could still achieve that purpose by issuing a sovereign guarantee which would then entitle creditors in appropriate cases to lay their hands on any asset of the State including the petroleum or its revenue to enable due performance of obligations by the State to be effected.

Be that as it may, the issue took "hostage" of majority of us and does not seem to have loosened its tentacles on the academia and especially, legal practitioners, to the extent that when we got the opportunity to acquire a copy of the Act, we immediately expended a lot of industry into locating the existence of the particular provisions on collateralisation.

Our discovery led us first to section 5 of the Act, with the sub-title: "PROHIBITED USE OF PETROLEUM HOLDING FUND", which reads that:
"The amount in the Petroleum Holding Fund earmarked for transfer into the Ghana Petroleum Funds shall not be used

- ***(a) to provide credit to the government, public, enterprises, private sector entities or any other person or entity, and***
- ***(b) as collateral for debts, guarantees, commitments or other liabilities of any other entity"***

Indeed the Act further prohibits the use of the oil reserve as collateral, as captured vividly by Section 5(2) that:

"In order to preserve revenue streams from petroleum and ensure the object of this Act, there shall not be any borrowing against the petroleum resreves"

We believe the law makers meant "reserve" and not "resreve", as appears in the Act.

It is not difficult to ascertain some inherent challenges or ambiguities in section 5 referred to above. First of all, the sub-title which "controls" the section refers to ***"Prohibited use of Petroleum Holding Fund"***

Interestingly, section 5(1) itself deals only with the prohibited use of ***"The amount in the Petroleum Holding Fund earmarked for transfer into the Ghana Petroleum Funds".***

What then is the Petroleum Holding Fund? (PHF)

The Act defines the PHF thus:

"*The transitory Funds established under Section 2".* Section 2 of the Act refers to the PHF as a designated Public fund at the Bank of Ghana to receive and disburse petroleum revenue due the Republic.

Under section 16 of the Act, only three (3) "objects" qualify to be disbursed from the PHF kitty. These are:

a) a portion into the consolidated funds to support national budget, also known as the Annual Budget Funding Amount.
b) to the Ghana Petroleum Funds for purposes of savings and investments.
c) for exceptional deductions.

It should be noted that the Petroleum Holding Funds contains, among others, two (2) very important Funds namely:

(a) The Stabilisation Funds
(b) The Heritage Fund.

These two funds are together referred to as the Ghana Petroleum Funds mentioned in Section 5(1). Indeed, the confusion earlier adverted to is even enhanced by the placement of the "Petroleum reserves" under the sub-title "Prohibited use of Petroleum Holding Funds"

This is because the petroleum reserve is defined by the Act as:
"The petroleum that can be economically extracted from petroleum resources and which is anticipated to be economically recoverable by the application of a development project to known discoveries from a future date" is not one of the components of the Petroleum Holding Fund.

We are not by this oblivious of the unending debate on principles of Interpretation in relation to subtitles, preambles and the like. It is however not the purpose of this submission to wade into the debate and will therefore not allow it to detain us any further.

At this stage therefore, it is safe to conclude that:

a) A portion of the petroleum revenue designated "the stabilization" and "the Heritage Funds" and which together are known as the Ghana Petroleum Funds, and

b) The Petroleum reserve cannot be collateralized or used as security for the payment of the State's indebtedness or that of another the due discharge or performance of an obligation by the State, its agents or that of any other person or entity.

At this point one would have thought that the above conclusions would have resolved the issued which has engendered this submission. Interestingly, more hurdles will be encountered in the course of the journey to finding a final resolution to the issue under resolution.

Section 41 of the Act makes very interesting reading. The said section comes under a sub-title: **ENCUMBERANCES ON THE ASSETS OF THE PETROLEUM HOLDING FUNDS AND GHANA PETROLEUM FUNDS**

It needs to be noted here that, what is of importance to us here is section 41 sub sections (2) and (3). Section 41 (2) reads that:
"Any contract, agreement or arrangement to the extent that it encumbers or purports to encumber the assets of the Petroleum Funds whether by way of guarantee, security, mortgage or any other form of encumbrance is contrary to this Act and is null and void."

What then is the Ghana Petroleum Funds?
The Act defines Ghana Petroleum Funds in section 61 thus:
"Ghana Petroleum Funds means the Ghana Stabilization Fund and the Ghana Heritage Fund".

It is also critical at this juncture to distinguish between
a) The Ghana Petroleum Funds, explained supra, and
b) The Petroleum Funds.

As earlier explained, the Ghana Petroleum Funds comprises
a) The Ghana Stabilization Funds and
b) The Ghana Heritage Funds derived from the Petroleum Holding Fund.

The Petroleum Funds however comprises
a) The Petroleum Holding Fund
b) The Ghana Stabilisation Funds
c) The Ghana Heritage Funds, and subsequently
d) The Ghana Petroleum Wealth Fund

It can be gleaned from the above that the Ghana Petroleum Funds is distinguishable from the Petroleum Funds. Indeed, the Ghana Petroleum Funds is a subset of the Petroleum Funds. In view of the possibility that this submission is likely to wake up the

"sleeping dogs" of this very sensitive issue, we endeavoured to procure copies of the various Working Drafts and the subsequent Memorandum to the Bill which later became Act 815. In the course of our search, we came across two "Working Drafts" prepared by the Ministry of Finance and Economic Planning, dated 17th March 2010 and another dated 10th May 2010 respectively.

Clauses 32 and 42 dealt with the issue of encumbrance, in the case of the memorandum to the Bill also prepared by the Ministry of Finance and dated 12th July, 2010, the issue of encumbrance appears under clause 43.
It is again, critical to note that all three (3) documents Made references to ***"encumbrances on the assets of the Ghana Petroleum Funds".***

As we have pointed out earlier, section 41, apart from Section.5 of the Act deals specifically with the issue of encumbrances. It must be firmly noted that whilst the various Working Drafts and the Memorandum to the Bill deal with encumbrance on the assets of the ***Ghana Petroleum Funds***, the Act itself, per the subtitle deals with "Encumbrances on the assets of the Petroleum Holding Fund and Ghana Petroleum Funds."

Indeed the matter is even further clarified by the body of section 41(2) which says that: there ***shall not be any encumbrance on the assets of the Petroleum Funds"***. It should be remembered that the Act defines Petroleum Funds to include the Petroleum Holding Fund and the Ghana Petroleum Funds which also comprises the Ghana Stabilisation Funds and the Ghana Heritage Funds".

It is therefore incontrovertible that no portion of revenue from Petroleum regulated by Act 815 can be used as security or collateralized for the due payment of the indebtedness of the State or others or for the due performance or discharge of another's obligation.

Admittedly, the Finance Ministry and by extension the Government, as we can all recollect, intended that only a portion of the petroleum revenue designated as Ghana Petroleum Revenue comprising the Stabilisation Fund and the Heritage Fund should be insulated from collateralization or any other kind of encumbrance as clearly expressed under section 5 of the Act.

The point must be stressed however that, Parliament in its wisdom have decided by section 41(2) of the Act that ***"Any contract, agreement or arrangement to the extent that it encumbers or purports to encumber the assets of the Petroleum Funds whether by way of guarantee, security, mortgage or any other form of encumbrance is contrary to this Act and is null and void."***

We therefore recommend respectfully that Parliament may have a second critical look at the provisions of section 41 (2) as, in our respectful view its continuous existence in the form expressed precludes the Government from using any portion of the petroleum revenue as collateral for a financial facility or any other arrangement howsoever described. As for its consequences on previous and future agreements, that petroleum revenue might have been used or may be used as security or collateral is not difficult to guess.

Another controversial issue raised by the Act, which we shall fully address at another opportune time but which we wish to express our thoughts on briefly is whether or not Parliament can make a law as it has done under section 41(3) of Act 815 ousting the jurisdiction of the courts to issue orders leading to the attachment of any of the Petroleum Funds or revenue?

First of all, the 1992 Constitution under Art. 293(1) states:
"Where a person has a claim against the Government that claim may be enforced as of right by proceedings taken against the Government for that purposes…"

Again, under Art 126 of the 1992 Constitution, the Superior Courts
"In the exercise of the judicial power conferred on [them] by [the] Constitution… may…issue such orders and directions as may be necessary to ensure the enforcement of any judgment, decree or order of those courts."

It is well-known that the **"Orders"** referred to by the Constitution include orders for attachment of any properties, movable or immovable to enable enforcement of the court's judgments, orders etc to be effected. Thus granted that any portion of the Petroleum revenue may be used as security for the indebtedness of the State or any of its institutions which we vehemently deny, and the entity defaults in the performance of the obligation, the creditor would reserve the right to realize the security, in this case the assets or the Petroleum Funds.

In this case if the creditor decides to go to court, will it be right, just and equitable to shut the doors to the altar of justice to the said creditor who might have saved the state from some imminent crisis or insecurity?

Again, what will have been the effect of the agreement between the State and the creditor where a portion of the assets of the Petroleum Funds was used as collateral, that is if it is permitted? Will the provision of the agreement which, though had been approved by an Act of Parliament override the provisions of the Act in view of section

1(2) of the Act which makes the Act superior to all other enactments “on the collection, allocation and management of petroleum revenue?”

Our answer for now is that the 1992 Constitution and even good conscience and International law will not permit such a lame provision as in section 41(3) to prevail.

To these more anon.

DATED AT ACCRA THIS …… DAY OF …… 2011

YAW D. OPPONG