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Articles

Reshaping Government's Fiduciary Role Under the 1992 Constitution of Ghana

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ABSTRACT

In Ghana and across many African States, the people—through the instrumentality of law or their respective Constitutions—have constituted their presidents trustees of the natural resources to be held in trust for the benefit of the people. With a few exceptions, mineral resource governance in Africa has been horrendous: Many African States have failed to leverage their natural resource endowments as a catalyst for much-needed socio-economic development.

This Article analyzes the 1992 Constitution of the Republic of Ghana which provides that all public lands and natural resources in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana. The question of whether the vesting of the ownership of all natural resources in the President designates the President as a fiduciary in the utilization and management of these resources was addressed in the 1994 case *Adjaye v. Attorney General*. The *Adjaye* Court held that the trust created by

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the Constitution concerning natural resources was not an enforceable trust and that citizens of Ghana lacked *locus standi* to sue the government on the basis of that trust.

This Article argues that contrary to the decision in *Adjaye*, the 1992 Constitution does require the President of Ghana to act as trustee having a heightened and enforceable fiduciary duty to manage the people's trust. This Article will further explore institutional innovations for streamlining mineral resource governance, specifically how and to what extent the Public Trust Doctrine ("PTD") developed by U.S. courts could be used to promote and enhance mineral resource governance in Ghana.

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INTRODUCTION

Natural resources rights date back to ancient times. The maxim *cujus est solum ejus est usque ad coelum et ad inferos* denotes that, to whom the soil belongs, to that person it belongs all the way to the sky and the depths.[1] This maxim has had limited application in the common law tradition because, customarily, gold and silver were prerogative mineral rights vested in the Crown as royal mines.[2] This regime has its origin in feudalism, but survives to this day in jurisdictions that still follow such feudal rules, under which individual persons are not likely to enjoy the fruit of their lands where such fruits are natural resources. Australia and Canada are prime examples of such systems. Additionally, some countries that were colonized by the United Kingdom, despite obtaining their independence, today maintain similar property rights rules. The Republic of Ghana offers one such example in its 1992 Constitution which provides that all public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana.[3]

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1. *See* DONALD N. ZILLMAN ET AL., THE LAW OF ENERGY UNDERGROUND 22 (2014); Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126, 128 (Miss. 1996) (transcribing doctrine as "ad inferos"); Samantha J. Hepburn, *Ownership Models for Geological Sequestration: A Comparison of the Emergent Regulatory Models in Australia & the United States*, 44 ENV'T L. REP. NEWS & ANALYSIS 10310, 10313 (2014) (translating phrase as "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to [Hell]").

2. ANTHONY SCOTT, THE EVOLUTION OF RESOURCE PROPERTY RIGHTS 20 (2008).

3. GHANA CONST. art. 257, cl. 1 (1992).

Clause 6 of Article 257 of the 1992 Constitution of Ghana broadens the government's prerogative rights by providing that:

> Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.[4]

On its face, Article 257 creates a trust for the people of Ghana for the utilization and management of their natural resources, but the Constitution articulates neither how the people of Ghana should benefit from the trust nor the duties imposed on government. Following the High Court's decision in *Adjaye v. Attorney General*,[5] Article 257 has been understood to not designate Ghanaians as beneficiaries under a trust managed by the President. Consequently, the rights that beneficiaries typically enjoy under a trust do not avail Ghanaians as far as Article 257 is concerned. In the *Adjaye* case, the Court adopted the reasoning of the English Courts in *Kinloch v. Secretary of State for India in Council*[6] and *Tito v. Waddell*[7] where it was held that the use of the term "trust" in relation to the Crown did not necessarily create a true trust enforceable by the Courts but might create a "trust in the higher sense" or governmental obligation, not enforceable in the Courts. Conversely, the Petroleum Revenue Management Act of 2011 (Act 815) ("PRMA") has created a regime of accountability for government in relation to the utilization of petroleum revenue. This regime holds the government accountable by treating it as a fiduciary in the management of natural resources. Despite the progressive features of PRMA, it needs to be observed that the limited operation of the Act could be an act of Parliament and could be subject to the vagaries of political calculations. Even if PRMA is repealed, its existence raises the issue of whether the fiduciary regime it has institutionalized should be raised to a higher level. This could be achieved by amending Article 257 to hold the government accountable as a fiduciary, consistent with the principles enacted by PRMA.

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4. *Id.* art. 257, cl. 6.

5. Adjaye v. Att'y Gen., No. C.144/94 (Ghana Sup. Ct. Mar. 30, 1994).

6. Kinloch v. Sec'y of State for India in Council [1882] 7 App. Cas. 619 (HL) (appeal taken from Eng.) (UK) (holding that a warrant which was given to the Secretary of State of India in Council for the distribution of booty of war did not transfer the property or create a trust enforceable by the High Court of Justice, and that with the Secretary of State being merely the agent of the Crown to distribute the fund, the action could not be maintained). The *Adjaye* Court held that the trust created was in the higher sense, not enforceable by the Courts. *Adjaye*, No. C.144/94, at 15.

7. Tito v. Waddell, (No. 2) [1977] 1 Ch. 106 (UK).

Such amendment would be guided by the notion that the nature of trust requires enforceable rights and obligations of the trustee vis-à-vis the corpus and the beneficiary. In addition to expounding on the foregoing arguments, this Article will first briefly explore the history of natural resources in Ghana and other common law countries such as Britain, Australia, Canada, the United States, Kenya, and Nigeria. A discussion of natural resources law in Ghana will be followed by an examination of general trust law, Public Trust Doctrine ("PTD"), fiduciary duty, and the rights and obligations of a trustee. To further elaborate on how Ghanaian statutes have operationalized the President's trustee role in regards to the disbursement and accounting of revenue from natural resources, this Article will next conduct a brief analysis of the legal regime governing mining in Ghana. Specifically, this Article will consider (1) transparency concerns in the governance framework, (2) the distribution of mining revenue for the public benefit, and (3) the remedies currently available to citizens for breaches of the government's obligations in relation to the mining governance framework. In addition, this Article will argue for a regime of natural resource management for all natural resources mirroring PRMA in that it holds the government accountable as a fiduciary for the proper management and utilization of petroleum revenue. It will also argue that the application of the United States' Public Trust doctrine to the trustee function of the President as regards to the management of natural resources promises further accountability and good governance dividends to maximize the chances of the use resources for the greater benefit of its citizens. Finally, this Article will offer recommendations, including possible third-party non-governmental trustees in the furtherance of transparency, ethics, and accountability. Alternatively, this Article will offer additional recommendations aimed at bolstering the role of government as a fiduciary in the utilization and management of natural resources.

I. HISTORY OF NATURAL RESOURCES IN GHANA AND OTHER COMMON LAW COUNTRIES

Throughout much of Europe, and especially in Great Britain, all land was historically categorized as the property of the Crown.[8] The Monarch would transfer land to friends, allies, the church, and buyers under a feudal system, thereby relegating the peasant class to the lowest echelon of society.[9] Despite the grants of land made by the Crown, there were still prerogative rights attached to the transfer,

8. SCOTT, *supra* note 2, at 20.
9. *Id.*

division, and exclusion of land to ensure that the Crown would enjoy exclusive rights to mines and any other natural resources.[10] This arrangement birthed the term "royal mines." In those days, the Monarch would claim the same rights in its colonies, meaning that the colony also belonged to the British Crown.[11] For instance, when England conquered Australia in the 18th century, the latter became the property of the United Kingdom, leaving the Aborigines with no right to the land that they had occupied before the conquest.[12] As such, the only way for individuals to own property in Australia was for the Crown to grant such property.

However, English property law provides that an owner of any land has right only to the surface and the Crown reserves the right to all mineral rights such as silver and gold.[13] The same concept also exists in Canada, another commonwealth country.[14] In modern days, however, some countries follow the aforementioned maxim that "to whom the roil belongs, to that person, it belongs all the way to the sky and the depths," otherwise expressed as *cujus est solum ejus est usque ad coelum et ad inferos*. The United States is one of the few countries that allow the landowner to own everything above and below the surface. Therefore, both government and private citizens may assume ownership of natural resources such as oil and gas and minerals.[15] Conversely, Kenya and Nigeria only permit the government to own natural resources, as is the case in many other African countries subject to the same historical facts as Ghana. Thus, an analysis of the ownership of mineral resources in Ghana merits closer examination in order to provide a basis for assessing the applicability of PTD to mineral governance in Ghana.

A. Ghana

Before Ghana attained independence in 1957, land rights were heavily intertwined with mineral rights and land-owning communities through chiefs and local leaders who had rights of allocation and use of mineral resources.[16] The regime of mineral ownership in Ghana bore notable resemblance to the concept of ownership described

10. *Id.*
11. *Id.*
12. Richard Cullen, *The Encounter Between Natural Resources and Federalism in Canada and Australia*, 24 UNIV. B.C. L. REV. 275, 282 (1990).
13. *Id.*
14. *Id.*
15. Yinka Omorogbe & Peter Oniemola, *Property Rights in Oil and Gas Under Domanial Regimes*, *in* PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES 115, 116 (Aileen McHarg et al. eds., 2010).
16. *See* Fui S. Tsikata, *The Vicissitudes of Mineral Policy in Ghana*, 23 RES. POL'Y 9, 10 (1997).

by *cujus est solum ejus est usque ad coelum et ad inferos*. Colonial policy did not attempt to introduce a radical change to this system of mineral ownership. Rather, it focused on establishing a legal and administrative framework to facilitate mineral operations, ensuring the security of mineral rights grantees' tenure, and helping to manage relationships between mining companies and local communities.[17] In 1958, the government appointed a commission of inquiry to investigate the terms under which mineral and timber rights were held and to determine their consistency with equity and the present profitability of the industries.[18] Based on the commission's recommendations, the government passed a series of laws. Prominent among these was the Mineral Act of 1962 (Act 126), which vested the ownership of minerals in the "President on behalf of the Republic and in trust for the People of Ghana" for the first time.[19] The Mineral Act further institutionalized a regime of mineral resource governance that entitled landowners to a percentage of mining royalties as determined by law. Since then, Ghanaian law has required that all mineral resources be vested in the President for and on behalf of the people of Ghana in conjunction with a regime of distribution of revenue of mineral resources that covers state entities, local government, and the landowning communities through their chiefs and local leaders.[20]

Presently, with respect to stool land,[21] a state body called the Office of the Administrator of Stool Lands ("OASL") has been set up with the mandate to (1) establish accounts for each stool into which all rents, dues, royalties, revenues, or other payments shall be paid whether they be income or capital from stool lands; and (2) to collect and disburse such revenue.[22] The Constitution further provides a formula for the distribution of stool land revenue. Ten percent is paid to the OASL to cover administrative expenses, and the remaining revenue is disbursed in the following proportions: 25 percent to the stool through the traditional authorities for the maintenance of the stool; 20 percent to the traditional authority; and 55 percent to the District Assembly within the area of authority of which the stool land is situated.[23] With respect to non-stool lands, the law requires the holder of a mineral right to pay an annual mineral right fee that may be prescribed to the landowner and the landowner's successors and/or assigns, excluding annual ground

17. *Id.* at 9.
18. *Id.* at 10.
19. *Id.*
20. GHANA CONST. art. 267, cl. 6 (1992).
21. Stool land refers to community land which is held by chiefs in trust for the people of the community.
22. GHANA CONST. art. 267, cl. 2 (1992).
23. *Id.* art. 267, cl. 6.

rent with respect to mineral rights over stool lands, which is paid to the OASL for application in accordance with the Office of Administrator of Stool Lands Act of 1994 (Act 481).[24]

The Supreme Court of Ghana has been emphatic that revenues from stool land mineral resources do not constitute stool land revenue under Article 267 of the Constitution.[25] Consequently, it remains the state's prerogative to determine how revenue from natural resources harvested from stool land should be apportioned and distributed.[26] In *Okofo Sobin Kan v. Attorney General*,[27] the plaintiffs claimed to be allodial owners of land on which some mining companies had concessions and were extracting gold. The plaintiffs sought a declaration stating that the third defendant, the Ghana Revenue Authority, should be restrained from collecting royalties from the mining companies operating on the stool land. The plaintiffs argued that this practice contradicted Article 267, clauses 2 (a), (b), and (c) and clause 6. However, the Supreme Court held by an eight to one majority that revenues derived from resources harvested in their natural state are not stool land revenue within the meaning of Article 267(2) (a), (b), (c),[28] and (6).[29] The Court further held that property vested in the State or the President exists outside of Article 267(2)'s purview and

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24. Minerals and Mining Act, 2006 (Act 703) § 23 (Ghana).

25. *See* Okofo Sobin Kan II v. Att'y Gen., No. JI/2/2012 (Ghana Sup. Ct. July 30, 2014).

26. *See id.* at 7.

27. Okofo Sobin Kan II v. Att'y Gen., No. JI/2/2012 (Ghana Sup. Ct. July 30, 2014).

28. GHANA CONST. art. 267, cl. 2 (1992). This section provides:

> There shall be established the Office of the Administrator of Stool Lands which shall be responsible for-
>
> (a) the establishment of a stool land account for each stool into which shall be paid all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from the stool lands;
> (b) the collection of all such rents, dues, royalties, revenues or other payments whether in the nature of income or capital, and to account for them to the beneficiaries specified in clause (6) of this article; and
> (c) the disbursement of such revenues as may be determined in accordance with clause (6) of this article.

Id.

29. *Id.* art. 267, cl. 6. This section provides:

> Ten percent of the revenue accruing from stool lands shall be paid to the office of the Administrator of Stool Lands to cover administrative expenses; and the remaining revenue shall be disbursed in the following proportions-
>
> (a) twenty-five percent to the stool through the traditional authority for the maintenance of the stool in keeping with its status;
> (b) twenty percent to the traditional authority; and
> (c) fifty-five percent to the District Assembly, within the area of authority of which the stool lands are situated.

Id.

outside the purview of OASL's stool ownership and administration.[30] Therefore, in Ghana, mineral resource ownership has moved away from private to public ownership, thus rendering *cujus est solum ejus est usque ad coelum et ad inferos* inapplicable in Ghanaian law.

B. Nigeria

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

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[31]

The 1969 Nigeria Petroleum Act vests the ownership and all on-shore and off-shore revenue from petroleum resources in the federal government.[32] Section 1 of the Petroleum Act states: "The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State." Section 2 of the same Act specifies that ownership applies to all land (including land covered by water) which (a) is in Nigeria; (b) is under the territorial waters of Nigeria; (c) forms part of the continental shelfs; or (d) forms part of the Exclusive Economic Zone of Nigeria.[33]

Nowhere in the laws of Nigeria does it say that the federal government acts as a trustee over natural resources. While the federal government does not hold Nigerian property in trust, the question of whether different Nigerian states can actually own natural resources was settled in *Attorney General of the Federation v. Attorney General of Abia State*.[34] There, the Supreme Court of Nigeria ruled that ownership of petroleum is vested in the federal government only, and that state and local governments do not have ownership rights over oil and gas, even when these resources lie within the territory of States or local governments. However, the Court concluded that the states were entitled to receive a certain percentage of the revenue accrued from resources discovered within their boundaries.[35]

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30. *See Okofo Sobin Kan*, No. JI/2/2012, at 7.
31. NIGERIA CONST. ch. 4, § 44(3) (1992).
32. Petroleum Act, 1969 (Act No. 51) (Nigeria).
33. *Id.* § 2.
34. Att'y Gen. of Fed'n v. Att'y Gen. of Abia State [2006] 6 NWLR 542 (Nigeria).
35. Omorogbe & Oniemola, *supra* note 15, at 122.

C. Kenya

The Constitution of Kenya contains provisions that grant the government the right to own minerals and oil and gas resources, but the government's rights remain subject to the people's will. Article 61(1)(2) of the Kenyan Constitution classifies lands as public, community, or private. It states that "[a]ll land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals."[36]

Under Article 62 (1), public land includes:

> (f) all minerals and mineral oils as defined by law;
> (g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks government animal sanctuaries, and specially protected areas;
> (h) all roads and thoroughfares provided for by an Act of Parliament;
> (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
> (j) the territorial sea, the exclusive economic zone and the sea bed;
> (k) the continental shelf;
> (l) all land between the high and the low water marks;
> (m) any land not classified as private or community land under this Constitution; and
> (n) any other land declared to be public land by an Act of Parliament—
>
> (i) in force at the effective date; or
> (ii) enacted after the effective date.[37]

Clause 3 of Article 62 provides that: "Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission."[38] Clause 4 of Article 62 states that "Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."[39] It follows that under the Kenyan Constitution, there are checks and balances between the executive and the legislative branches because the government cannot dispose of public land, which includes mineral resources, without an Act of Parliament.

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36. KENYA CONST. art. 61 (2010).
37. *Id.* art. 62, cl. 1(f)–(n).
38. *Id.* art. 62, cl. 3.
39. *Id.* art. 62, cl. 4.

II. NATURAL RESOURCES LAWS IN GHANA

Ghana's natural resources legal regime is found in a host of laws, including the Constitution and the Minerals and Mining Act (Act 703) as amended.[40] As noted earlier, Article 257(1) of the Constitution provides that all public lands are vested in the President on behalf of, and in trust for, the Ghanaian people. Article 257(6) proclaims that:

> Every mineral in its natural state in or, under or upon any land in Ghana, rivers, streams, water course throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the president on behalf of, and in trust for the people of Ghana.[41]

To consolidate state control over the exploitation of mineral resources, Article 268 of the Constitution states that:

> Any transaction, contract or undertaking in connection with the grant of a right or concession by or on behalf of any person including the Government of Ghana to any other person or body for the exploitation of mineral, water or other natural resources of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.[42]

This regime of natural resource ownership is repeated in the Minerals and Mining Act of 2006 (Act 703)[43] and the Petroleum (Exploration and Production) Act of 2016 (Act 919). As noted previously, upon attaining independence, Ghana instituted a regime of public ownership of natural resources alongside a prescribed formula for distribution of revenue from mineral resources.[44] The fundamental premise for the allocation of revenue from mineral resources is

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40. Other laws include: Minerals and Mining (Amendment) Act, 2015 (Act No. 900) (Ghana); Minerals Income Investment Fund Act, 2018 (Act No. 987) (Ghana); Minerals Development Fund Act, 2016 (Act No. 900) (Ghana); Minerals and Mining (Licensing) Regulations, 2012 (LI No. 2176) (Ghana); Minerals and Mining (Explosives) Regulations, 2012 (LI No. 2177) (Ghana); Minerals and Mining (General) Regulations, 2012 (LI No. 2173) (Ghana); Minerals and Mining (Compensation and Resettlement) Regulations, 2012 (LI No. 2175) (Ghana); Minerals and Mining (Support Services) Regulations, 2012 (LI No. 2174) (Ghana); Minerals and Mining (Health, Safety, and Technical) Regulations, 2012 (LI No. 2182) (Ghana); Minerals and Mining (Local Content and Local Participation) Regulations, 2020 (LI No. 2483) (Ghana).

41. GHANA CONST. art. 257, cl. 6 (1992).

42. *Id.* art. 268, cl. 1.

43. *Compare* Minerals and Mining Act, 2006 (Act 703) (Ghana), *with* Petroleum Exploration and Production Act, 2016 (Act 919) § 1 (Ghana).

44. Tsikata, *supra* note 16, at 9–14.

the exclusive mandate of parliament in the light of the general laws of Ghana to specify how and to whom the distribution should be made. Under Act 703, Parliament has specified the modes of allocation of mining revenue and the beneficiaries of revenue connected to mining.[45] Act 703 stipulates, among other things, that the holder of a mineral right shall pay an annual ground rent to the owner of the land or their successors and assigns, except that this payment shall be made to the OASL in respect of mineral rights over stool lands.[46] The holder of a mineral right is also required to pay an annual mineral right fee to the Minerals Commission.[47] Additionally, a holder of a mining lease, restricted mining lease, or small-scale mining license must pay royalties—with respect to minerals obtained from its mining operations—to the Republic of Ghana, except that the rate of royalty shall not be more than six percent or less than three percent of the total revenue of minerals obtained by the holder.[48]

A. Ownership and Management of Natural Resources in Ghana

Section 1 of the Minerals and Mining Act reiterates the constitutional provision that every mineral in its natural state in, under, or upon land in Ghana, rivers, streams, water-courses throughout the country, the exclusive economic zone, and an area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and is vested in the President in trust for the people of Ghana.[49] The Act gives enormous power to the Minister to deal with matters pertaining to minerals and mining.[50] The Act vests in the Minister the power to negotiate, grant, revoke, suspend, or renew minerals on behalf of the President and on the recommendation of the Minerals Commission. All mineral activities require a license from the Minister.[51] The export, sale, or disposal of minerals requires a license from the Minister. Mineral rights cannot be assigned without the written approval of the Minister.[52]

The government, through the Minister, has the additional power to exercise the right of pre-emption of all minerals raised, won, or obtained in Ghana and from the territorial waters, the exclusive economic zone, or the continental shelf, including products derived from

45. Minerals and Mining Act, §§ 23, 25 (Ghana).
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.* § 1.
50. *See id.* § 5.
51. *See id.*
52. *See id*. § 6.

the refining or treatment of minerals extracted from these regions.[53] The Minister may, if he considers it desirable, appoint competent persons to investigate and report to the Minister on the ownership or control of the mining company.[54] The Minister may also require a mining company to issue a special company share to the republic without consideration. Furthermore, the surrender, suspension and cancellation of a mineral right requires the Minister's approval.[55] The Minister is assisted by the Minerals Commission which shall, under the direction of the Minister, generally supervise the proper and effective implementation of the provisions of the Act and regulations made under the Act.

The Parliament of Ghana has the authority to ratify a transaction, contract, or undertaking involving the grant of a right or concession for the exploitation of a mineral in Ghana with the caveat that parliament may, by a resolution supported by not less than two-thirds of all members of Parliament, exempt any class of transactions, contracts, or undertakings from the parliamentary ratification requirement.[56]

B. Challenges in the Mining Communities

It is generally accepted that mining communities in Ghana are faced with many developmental challenges despite the enormous mineral wealth generated from these communities. Poor socio-economic infrastructure, environmental degradation, loss of farmlands and livelihoods, insufficient budgetary allocation for the development of these areas, and the social impact of mining have all resulted in very low standards of living in many mining communities.[57]

Cases filed by the Centre of Public Interest Law in Ghana bring into sharp focus some huge developmental problems faced by these communities. These problems include poor regulatory oversight (leading to harmful effects for the environment); inadequately compensated farmland loss; deforestation; stockpiling of large quantities of sand, gravel, and stones; pollution of river bodies; cyanide leakage and dumped rock waste; and disputes over resettlement plans.

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53. *See id.* § 7.
54. *See id.* § 58.
55. Minerals and Mining Act, 2006 (Act 703) §§ 67–69 (Ghana).
56. *See* GHANA CONST. art. 268, cl. 2 (1992).
57. *See* CTR. FOR EXTRACTIVES & DEV. AFRICA, A REVIEW OF THE MINERALS DEVELOPMENT FUND ACT, 2016 (ACT 912) 4–6 (2018), https://tinyurl.com/3b4cjcea [https://perma.cc/3RAM-7J9L].

In *CEPIL & Anor v. Environmental Protection Agency, Minerals Commission and Bonte Gold Mines*,[58] a subsidiary of a Canadian mining company that was liquidated by an order of the High Court in 2004 undertook mineral prospecting operations along the Bonte River at Bonteso in the Ashanti Region. During its operations, the company inflicted massive environmental damage and precipitated the loss of crops and other private and communal property, but failed to reclaim the land after its liquidation.[59] The High Court in Ghana held that the Environmental Protection Agency and the Minerals Commission had failed to efficiently perform their duties and to ensure that the company undertook its mining activities in an environmentally friendly manner or to rehabilitate the damaged environment.[60] The Court further held that the company had failed to conduct its activities in a proper manner (causing environmental degradation), had failed to reclaim or rehabilitate the environment, and had further failed to post a reclamation bond as a security deposit against any default of reclamation bond.[61]

In *Nana Kofi Karikari v. GAG Ltd.*,[62] defendant GAG Ltd. unlawfully destroyed the homes of about 45 Nkwantakrom residents during mining operations. The Court ruled in favor of the plaintiffs and ordered the mining company to pay over $600,000 to the plaintiffs.[63] Similarly, in *Esther Osei v. Kibi Goldfields Ltd.*,[64] a mining company refused to pay adequate compensation to plaintiffs whose property and farms had been affected by mining operations. The Centre for Public Interest Law assisted the plaintiffs who sought fair and adequate compensation for the destruction of their cocoa trees and an order enjoining the defendants from continuing to pollute the plaintiffs' sources of drinking water that they shared with Chirano communities.[65]

The cases discussed above reflect key developmental issues plaguing Ghana's natural resource governance regime. These cases also raise the question of whether the aforementioned regime serves the interests of communities affected by mining. Despite major

58. *See* Ctr. for Pub. Int. L. v. Env't Prot. Agency, No. A (EN) 1/2005 (Ghana Super. Ct. 2009). The Centre for Public Interest Law is a non-governmental organization that seeks to promote, among other things, human rights of mining communities.

59. *See id.* at 2.

60. *See id.* at 6.

61. *See id.* at 9.

62. Karikari v. Ghanaian Australian Goldfields, No. LS.34/97 (Ghana High Ct. of Just. W. Region, 2007).

63. *See id.* at 20.

64. Osei v. Kibi Goldfields of Osino, No. C12/116/2015 (Ghana High Ct. of Just., 2019).

65. *See generally id.*

challenges and questions, Ghanaian mining communities do still enjoy some benefits.

C. Benefits to Mining Communities

For example, the PRMA institutes a special regime for the distribution of revenue from the exploitation of petroleum resources. This Act is apparently predicated on the concept of sustainable development. This Act's provisions establish two main funds: the Petroleum Holding Fund and the Ghana Petroleum Funds.[66] The former serves as a petroleum holding receipt for all petroleum revenue. The latter is divided into the Heritage Fund and the Stabilization Fund. The purpose of the Heritage Fund is to support Ghanaian development through the setting aside of funds which prevent the dissipation of petroleum resources by the present generation at the expense of the future generation.[67] Interest accruing from this fund may be used for the country's budgeted expenditure in 15-year cycles.[68] The Stabilization Fund is to be used to stabilize the economy of Ghana in periods of economic uncertainty and oil price fluctuation when petroleum revenue falls below expected levels. The assets from the petroleum funds are not meant to fund annual government expenditures in the year that the funds are generated. Rather, they must have a futuristic purpose.

Also important to the distribution scheme is Article 252(2) of the Constitution which requires that, subject to the provisions of the Constitution, Parliament shall annually make provision for the allocation of not less than five percent of Ghana's total revenue to the District Assemblies (local government units) for development. Further, the funds shall be paid into the District Assemblies Common Fund in quarterly installments. In the recent case of *Kpodo & Anor v. Attorney General*,[69] the Supreme Court of Ghana construed the "total revenue of Ghana" available for allocation to the District Assemblies Common Fund, as stipulated in Article 252(2) of the Constitution, to include "Petroleum Revenue allotted as Annual Budget Support amount and non-tax revenue paid to Central Government."[70] However, the Court excluded "foreign loans and grants, Petroleum receipt paid into the Heritage and Stabilization Fund, retained Internally

66. *See* Petroleum Revenue Management Act, 2011 (Act 815) §§ 2, 9, 11, 12 (Ghana).
67. *See id.* § 10.
68. *See id*.
69. *See* Kpodo v. Att'y Gen., No. J4/34/2019 (Ghana Sup. Ct. 2019).
70. *See id.* at 41.

Generated Fund, and levies imposed by Parliament for specific purposes under an Act of Parliament."[71]

It is clear from the Court's holding that the Ghanaian regime of mineral resource ownership and utilization operates on the premise that such resources are owned by the public or the state. Designing a scheme for the distribution of the revenue depends upon the foregoing premise. Additionally, the state must also determine to whom distributions should be made, subject to certain constitutional controls.[72] Furthermore, owners of land on which mineral resources are found are only entitled to a portion of the mineral revenues as prescribed by law.[73] Accordingly, it is a fallacy to assert that they are entitled to the revenue from these resources by reason of their ownership of the land. The government, having the right over the management of natural resources and the right to distribute revenues or proceeds, has a fiduciary duty vis-à-vis the people of Ghana. This fiduciary duty exceeds mere government function as described in *Adjaye*. It is therefore prudent to examine the general principle of trust law and the Public Trust Doctrine within the context of the management and distribution of natural resources in Ghana.

III. THE PRINCIPLES OF GENERAL TRUST LAW IN UNITED STATES AND THE PUBLIC TRUST DOCTRINE

As this Article focuses on the government's role as a fiduciary pursuant to Article 257(6), it is vital to examine the general principles of trust law in relation to fiduciaries. In doing so, it is instructive to note that Ghanaian law—which is based on the English law—accepts case law from other common law jurisdictions as persuasive authority, particularly where there is no specific Ghanaian legal authority addressing a particular question of law. In addition, comparative analysis of the role of fiduciaries in other jurisdictions provides useful legal insights regarding the government's fiduciary duties under Article 257(6) which vests ownership of all natural resources in the government in trust for the benefit of the Ghanaian people. U.S. law and landmark cases have made a tremendous impact on Ghanaian law and constitutional changes.

The influence of U.S. law begins early in Ghana's history. At its independence in 1957, Ghana had a constitution modeled off of the British Westminster system which was quickly changed in 1960 to a republican constitution with a presidential system. The 1969

71. *See id.*
72. *See* GHANA CONST. art. 252, cl. 2–3 (1992); *id.* art. 267, cl. 1–9.
73. Minerals and Mining Act, 2006 (Act No. 703) §§ 23–25 (Ghana).

Constitution reverted to a republican constitution under a presidential system. In 1979, Ghana adopted another Constitution that mirrored the U.S. Constitution in many respects, containing concepts like writs of certiorari; a supremacy clause; balancing the powers of the judicial, executive, and legislative branches; due process rights; and other rights. Currently, the 1992 Constitution of Ghana is a blend of elements from the presidential U.S. style and parliamentary U.K. style systems of government.

Additionally, since the 1950s, U.S. cases have been cited and their rationales applied in the Ghanaian courts. In the infamous case of *Re: Akoto*,[74] the applicants relied on U.S. cases such as *Marbury v. Madison*[75] in support of their position that the Ghanaian Supreme Court had the jurisdiction to determine the constitutionality of the Preventive Detention Act. Moreover, the Supreme Court of Ghana has made numerous references to U.S. cases including *Youngstown Sheet & Tube Co. v. Sawyer*,[76] *J. W. Hampton, Jr. & Co. v. United States*,[77] *Panama Refining Co. v. Ryan*,[78] *Yakus v. United States*,[79] and *American Textile Manufacturers Institute v. Donovan*.[80] It thus follows that U.S. law's influence on Ghanaian law has been tremendous. As such, adopting the U.S. Public Trust Doctrine to ensure that Article 257(6) operates as a proper trust requirement would promote justice for all Ghanaians as beneficiaries of the natural resource trust under the law. This would represent another instance of U.S. law exerting a positive influence in a foreign jurisdiction.

At common law, an express trust is created when a settlor transfers property to another person who acts as trustee.[81] This transfer may take place while the settlor is alive, referred to as a "living or an inter vivos trust," or at the settlor's death, referred to as a "testamentary trust."[82] The same pattern is found in the U.S. Uniform Trust Code ("UTC"). According to the UTC, there are three ways to create an express trust: (1) a an inter vivos or testamentary transfer of property to another party to serve as trustee; (2) a declaration by the settlor holding the property as trustee in trust; and (3) the exercise

74. *See* Re: Akoto, [1961] G.L.R. 523 (Ghana Sup. Ct. 1961),

75. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

76. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

77. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

78. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

79. Yakus v. United States, 321 U.S. 414 (1944).

80. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981). *See also* Ndebugre v. Att'y Gen., [2016] G.H.A.S.C. 12, 35–41 (Ghana Sup. Ct. 2016).

81. B.J. DA ROCHA & C. H. K. LODOH, GHANA LAND LAW AND CONVEYANCING 106 (2d ed. 1999).

82. LAWRENCE H. AVERILL JR. & MARY H. RADFORD, UNIFORM PROBATE CODE AND UNIFORM TRUST CODE IN A NUTSHELL 681 (7th ed. 2021).

of a power of appointment which results in the appointive property being vested in a trustee as the legal owner.[83] In this regard, it is also important to note the U.S. Restatement (Third) of Trusts defines the word "trust" as:

> [A] fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.[84]

It is therefore plain that at common law, as articulated by the Restatement, the trustee acts as a fiduciary and owes fiduciary obligations to the beneficiaries of the trust.

Considering the above, it is submitted that the people of Ghana exercised their power of appointment under the Constitution to appoint the Ghanaian government as trustee over natural resources as articulated in Article 257(6). The Constitution, by vesting in the government the right to own natural resources to be held in trust for the benefit of the people, has plainly created a fiduciary relationship between the government and the people.

Contrariwise, the High Court has held in *Adjaye* that Article 257(6)'s text does not create a trust in the true, enforceable sense. This prompts the question of whether the Ghanaian Constitution contains all the required elements for the creation of a substantive trust relationship for the benefit of the people. Ghana's citizens are the settlors of the trust because they promulgated the 1992 Constitution, which was adopted through a national referendum with 92 percent support.[85] There exists a clear intent by the Ghanaian people for the government to own and manage natural resources in trust for their benefit. There is also identifiable property because the Constitution named the property in connection with the trust, to wit: "every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf. . . ."[86] In addition, the government of Ghana, particularly the President, is named the trustee to hold the natural resources in trust for the people's benefit. Finally, the constituents (i.e., the people of Ghana) are the beneficiaries of the trust that they created through

83. *Id.* (quoting UNIF. TR. CODE § 401 (UNIF. L. COMM'N 2010)).

84. RESTATEMENT (THIRD) OF TR. §2 (AM. L. INST. 2012).

85. *Permanent Sovereignty Over Natural Resources General Assembly Resolution 1803*, U.N. AUDIOVISUAL LIBR. INT'L L. (Dec. 14, 1962), https://tinyurl.com/yc3b96uj [https://perma.cc/387R-H2S3].

86. GHANA CONST. art. 257, cl. 6 (1992).

their adoption of the Constitution. It is therefore submitted that all the necessary elements for the creation of a trust exist in Article 257(6).

The Public Trust Doctrine provides particularly important support to the foregoing argument; PTD's framework is derived from private trust law principles. As its core, PTD reiterates the basic notion that a trustee acts as a steward of trust property.[87] As applied to the state and natural resources, the underlying principle of PTD is to allow the state to own and operate trust property for the benefit of the people to ensure sustainable development.[88]

PTD is derived from Roman civil law in the sixth century and was later adopted by the Magna Carta, leading to its eventual incorporation into the English common law.[89] Roman Law texts from the early centuries state that "by the law of nature these things are common to all mankind: the air, running water, the sea, and consequently the shores of the sea."[90] The interpretation of this Roman Law text means that sea, seashores, air, water, and beaches were common property that belonged to people.[91] As applied to the Ghanaian Constitution, it may be argued that, since the Ghanaian constitution vests in the government the right to own mineral resources, this vesting

87. *See* DOUGLAS QUIRKE, ENV'T & NAT. RES. CTR., THE PUBLIC TRUST DOCTRINE: A PRIMER 1–2 (2016), https://tinyurl.com/vm9rywfx [https://perma.cc/YU2M-QD2C].

88. *See generally* DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997).

> The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The Public Trust Doctrine is applicable whenever navigable waters or the lands beneath are altered, developed, conveyed, or otherwise managed or preserved. It applies whether the trust lands are publicly or privately owned. The doctrine articulates not only the public rights in these lands and waters. It also sets limitations on the States, the public, and private owners, as well as establishing duties and responsibilities of the States when managing these public trust assets. . . . The Public Trust Doctrine has been recognized and affirmed by the United States Supreme Court, the lower federal courts and State courts from the beginning days of this country to the present.

Id. at 3.

89. Brigit Rollins, *The Public Domain: Basics of the Public Trust Doctrine*, NAT'L AGRIC. L. CTR. (Apr. 6, 2021), https://tinyurl.com/4yzrfe4u [https://perma.cc/RKE2-YHMK].

90. SLADE ET AL., *supra* note 88, at 4. The origins of the PTD are often traced to sixth century Rome's "Institutes of Justinian," which recognized certain natural resources ("the air, running water, the sea . . . the shores of the sea") as owned "in common." *Id.* at 3, 4. The Institutes were likely regarded by sixth century Romans as "the re-codification of ancient law," perhaps dating back to second century Rome and "the natural law of Greek philosophers." *Id.*

91. Rollins, *supra* note 89.

mandate falls under the Public Trust Doctrine thus imposing upon the government a fiduciary duty to manage the properties enumerated under Article 257 (1) and (6) in the best interest of present and future generations. It should be noted that under PTD, the government is not the only trustee; the legislatures, as well as the Courts, constitute trustees to ensure that no particular branch of the government abuses its powers in the management of the trust property.[92]

In the United States, PTD was first articulated in *Martin v. Waddell's Lessee*.[93] There, the United States Supreme Court ratified the Public Trust Doctrine.[94] In that case, the Supreme Court held:

> The dominion and property in navigable waters and the lands under them being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund entrusted to his care for the common benefit. In such cases, whatever does not pass by the grant remains in the Crown for the benefit and advantage of the whole community. Grants of that description are therefore, construed strictly, and twill not be presumed that the King intended to part from any portion of the public domain unless clear and special words are used to denote it.[95]

However, *Martin v. Waddell's Lessee* dealt with the British conquest and grants to individuals. A more relevant case is *Illinois Central Railroad Co. v. Illinois*.[96] There, Justice Field restated the doctrine, citing *Pollard's Lessee v. Hagan*[97] below:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the state.[98]

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92. *See* Priewe v. Wis. State Land & Improvement Co., 67 N.W. 918, 922 (Wis. 1896). "[T]he Wisconsin Supreme Court held that it was the role of courts to make the final determination of whether a certain act is done for a public or a private purpose." Rollins, *supra* note 89.

93. Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842).

94. *See id.* at 410 ("[T]he people . . . hold the absolute right to all their navigable waters and the soils under them for their own common use.").

95. *Id.*

96. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

97. Pollard's Lessee v. Hagan, 44 U.S. 212 (1845).

98. *Ill. Cent. R.R. Co.*,146 U.S. at 435 (citing *Pollard's Lessee*, 44 U.S. at 229).

In *Illinois Central Railroad Co.*, the State of Illinois had granted three million acres of land to a railroad to create a North-South railroad.[99] As a result, the railroad Company had the right to enter upon the land and construct the railroad.[100] Subsequently, the State passed a law granting the railroad company further rights to use and control a large portion of the harbor.[101] The Attorney General of the State of Illinois sued the railroad company as well as the United States in the name of its people.[102] The Court noted that the United States never appeared in the suit. The Supreme Court held that the State did not have the power to grant title to the railroad company where the grant would preclude exercise of public right to commercial navigation and fishing in navigable waters.[103] To that issue, the Court stated:

> The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.[104]

The same limitation on the State's power to give away trust lands was articulated in *People v. California Fish Co*.[105] There, the people of California brought an action against U.S. Attorney General Webb and the California Fish Company. When judgment was awarded to the people, the defendant requested a new trial, which the court denied, thus affirming the lower court's ruling.[106] The Court determined that it is trite law "that the lands lying between the lines of ordinary high and low tide, as well as that within a bay or harbor[,] and permanently covered by its waters, belong to the state in its sovereign character[,] and are held in trust for the public purposes of navigation and fishery."[107] The Court in *California Fish Co*. noted that the State has control inherent in the management of the trust

99. *Id.*
100. *Id.* at 440.
101. *Id.* at 442.
102. *Id.* at 433.
103. *See id.* at 454.
104. *Id.*
105. People v. California Fish Co., 138 P. 79, 83 (Cal. 1913).
106. *Id.* at 81.
107. *Id.* at 82; *see* Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842) ("When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use."); *see also Ill. Cent. R.R. Co.*, 146 U.S. at 452 ("It is a title held in trust for the people of the state that they may enjoy the

purpose.[108] However, the Court also noted that the land is held by the State in trust, and for the benefit of the People and the right of the State, is subservient to the rights of the people.[109]

Given that Ghanaian laws allow the judiciary to borrow common law concepts from other jurisdictions, PDT, if adopted, would represent a step in the right direction that could provide the Ghanaian people legal standing to challenge the government on its management of property held in trust.

A. Fiduciaries

There is no doubt that when a trust is created, there exists a fiduciary duty between the trustee and the beneficiaries of the trust. The issue that this Article seeks to clarify is whether a constitution naming the President as trustee to manage property for the people creates the same binding fiduciary obligations found in private law. Since general trust principles are present in PTD, it could be argued that the fiduciary duty of the Ghanaian President under Article 257(6) conveys the same rights and responsibilities for private and public trusts and that the President of Ghana should be subject to the standard duties and powers of trustees under PTD.

The common law and the UTC enumerate the duties and powers of trustees. Amongst those duties are the duty to administer the trust, the duty of good faith and loyalty, the duty of impartiality, and the duty of prudent administration.[110] The duty to administer the trust is three-fold: the trustee must administer the trust (1) in good faith, (2) in accordance with the trust terms and provisions,[111] and (3) in accordance with the interests of the beneficiaries.[112]

The most important duty is the duty of loyalty. The blanket rule is that a trustee must administer the trust solely in the interest of the beneficiaries.[113] UTC Section 802(a) obliges that the trustee to

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navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties. . . .").

108. *See California Fish Co.*, 138 P. at 87.

109. *See id.* at 82 (quoting Ward v. Mulford, 32 Cal. 372 (1867)) ("Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned.").

110. UNIF. TR. CODE §§ 801–04 (UNIF. L. COMM'N 2000).

111. *See In re* Betty G. Weldon Revocable Trust, 231 S.W. 3d 158, 180 (Mo. Ct. App. 2007).

112. AVERILL & RADFORD, *supra* note 82, at 763–64.

113. *Id.* at 764.

place the interest of the beneficiaries above the trustee's interest and the interest of a third party. In *Adjaye*, when the people of Ghana asked the government not to sell property to a third party and the government refused, the government placed the interest of the third party above the rightful beneficiaries: the Ghanaian people. However, under UTC Section 802(b), rightful beneficiaries may void a sale, encumbrance, or other transactions involving trust property. Remember, when the government holds the property in a trust, the government acts as trustee and acts as the legal owner over the trust. As such, the government has a heightened duty of loyalty to act in good faith and fair dealing, and the government must be a reasonably prudent investor when investing trust property.[114] A trustee must also be a reasonably prudent investor who acts with reasonable care, skill, and caution.[115] Failure to act as a reasonably prudent trustee may result in the exercise of the beneficiaries legal rights to even remove the trustee.

B. The Rights of the Beneficiary and Options if Trustee Breaches Their Fiduciary Duty

Under traditional trust law, the beneficiaries have many options when the trustee breaches their fiduciary duties. For example, the beneficiaries can bring an action to remove the trustee, ratify a transaction made by the trustee and waive the breach, sue for resulting loss (also called "surcharge"), seek damages in a self-dealing case, and claim property bought with trust funds for the trust.[116] UTC Section 706(b) enumerates the grounds for removal of a trustee by the Court. In *In Re Wells Revocable Trust*,[117] a trustee was removed for failure to keep the beneficiaries reasonably informed or to respond to their request for information.[118] Presumably, the people of Ghana have a similar legal right under their Constitution to challenge the government when there is an issue with the property or natural resources

114. RESTATEMENT (THIRD) OF TR. § 90 (AM. L. INST. 2007) ("The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust."); UNIF. TR. CODE § 804 (UNIF. L. COMM'N 2000) ("A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust.").

115. UNIF. PRUDENT INV. ACT §§ 2(a)–(b) (UNIF. L. COMM'N 1994). Subsection (a) describes the trustee's duty to exercise reasonable care, skill, and caution, while subsection (b) introduces the "portfolio theory," which provides that the performance of the trustee will be evaluated not on the basis of each individual investment but rather on the overall performance of portfolio as a whole. *Id.*

116. *See* Minerals and Mining Act, 2006 (Act 703) §§ 67–69 (Ghana).

117. *In re* Wells Revocable Trust, 734 N.W.2d 323 (Neb. Ct. App. 2007).

118. *Id.* at 335.

held in trust. The courts cannot sign away the people's constitutional rights, especially when the constitutional text explicitly uses the word "trust." As such, it is submitted that *Adjaye* was wrongfully decided.

C. Rights of Beneficiaries of Revenue of Natural Resources Under Ghana Law

As a matter of general principles of Ghanaian law, beneficiaries of revenue from natural resources have the capacity and standing to sue in relation to these revenues. Under Act 703, a non-stool holder of a land for which annual rent has not been paid is entitled to sue to ensure payment.[119] The District Assemblies have the authority to sue the government for the non-release of funds under Article 252(2) of the Constitution or the OASL Act 481 in the event of non-payment of their portion of stool land revenue.[120] Given these facts, it is obvious that while the beneficiaries of revenue from natural resources do not have a general right to determine how revenue from these resources should be used, there are institutional and legal mechanisms that permit beneficiaries to sue the government to ensure compliance with payments owed to them under the provisions of applicable laws.

Additionally, a citizen of Ghana has the legal right under Articles 2[121] and 41(b)[122] of the Constitution to sue to ensure compliance with the laws of Ghana, regardless of whether the citizen has any special interests in ensuring legal compliance with such laws. The Supreme Court of Ghana has held that Ghanaian citizens have public interest rights and the capacity to ensure compliance with the human rights provisions of the Constitution without needing to demonstrate that they have been personally affected by a violation of these privileges.[123] In connection with the use of revenue from stool lands, the Land Act subjects Chiefs to processes of accountability to

119. The action could be mounted for breach of statutory duty.

120. Local Governance Act, 2016 (Act 936) § 4(1) (Ghana) ("A District Assembly shall be a body corporate with perpetual succession.").

121. GHANA CONST. ch.1, art. 2, § 1 (1992) ("A person who alleges that– a. an enactment or anything contained in or done under the authority of that or any other enactment; or b. any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.").

122. *Id.* ch. 6, art. 41 ("The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen– a. to promote the prestige and good name of Ghana and respect the symbols of the nation; b. to uphold and defend this Constitution and the law. . . .").

123. Adjei-Ampofo v. Accra Metro. Assembly & Att'y Gen. (No. 1) [2007-2008] S.C.G.L.R. 611 (Ghana Sup. Ct. 2008).

their subjects.[124] This is a natural development from case law that has recognized the right and capacity of stool subjects to sue to ensure accountability from stools and traditional authorities.[125] Additionally, according to the Head of Family (Accountability) Act of 1985, heads of families who at customary law could not be called upon to account for the use of family property are made accountable to their families and other members while they remain in office as family heads.[126]

All the major segments of Ghanaian society—chiefs, heads of families, and state bodies—have become subject to certain accountability processes to the benefit of subjects, family members, and citizens. This shows an evolving and expanding approach to the issues of capacity and standing for commencing legal action intended to exact accountability from persons who hold property in trust. This development further undermines the *Adjaye* decision.

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124. Land Act, 2020, (Act 1036) § 13 (Ghana) ("A chief, tendana, clan head, family head or any other authority in charge of the management of stool or skin, or clan or family land, is a fiduciary charged with the obligation to discharge the management function for the benefit of the stool or skin, or clan or family concerned and is accountable as a fiduciary."). Such a person is to be "transparent, open, fair and impartial in making decisions affecting the specified land." *Id.* The law also makes the provisions of the Head of Family (Accountability) Act apply to this Act with the necessary modifications, except that:

> [In connection with actions] against the occupant of a stool or skin or tendana the action shall not be brought unless that person (a) has first exhausted the established customary procedure for making the occupant of the stool or the skin or the tendana to render account or maintain records of the stool, skin or clan lands, where a procedure exists; (b) is qualified under the relevant customary law to bring an action against the occupant; or (c) is a subject of the stool or skin or a member of a clan of which the chief or tendana or clan head is the administrator of the stool or skin land and has been granted leave by a court upon proof that the person qualified to institute an action failed to take action within thirty days after being informed of the need to take action.

Id.

125. Owusu v. Agyei, [1991] 2 G.L.R. 493 (Ghana Sup. Ct. 1991). In this case, Wuaku JSC observed that:

> The fear of embarrassment to a chief should not be the ground for a chief not to account when a genuine demand for an account is made by his subjects. . . . It was Mensah Sarbah who enunciated the principle of immunity of the head of family from accountability which was later extended to occupants of stools. Now that by the Head of Family (Accountability) Law, 1985 (PNDCL 114) a head of family is made accountable to his family, I would recommend a similar law to be made by the legislature to cover occupants of stools.

Id.

126. Head of Family (Accountability) Act, 1985 § 1 (P.N.D.C.L. 114) (Ghana).

D. Adjaye Case and Its Challenges

The preceding discussions reveal that holding government as a fiduciary has far-reaching legal consequences for the management of revenue from natural resources and for accountability mechanisms that ensure compliance with the interests of citizens in the utilization and management of these resources. These objectives are in tandem with the notion of government as a fiduciary. As explained previously, in *Adjay*e, the Hight Court held that Article 257(6) does not designate the government as a fiduciary. This decision is of doubtful provenance as a matter of constitutional law in part because of its far-reaching and adverse policy implications.

In *Adjaye,* three plaintiffs sued, among others, the Attorney General and a gold mining company. The plaintiffs stated that the government of Ghana acquired 55 percent shares of a gold mining company—for and on behalf of the Ghanaian people—as an integral step in the government's desire "to capture the commanding heights of the economy." The plaintiffs also submitted that the gold mining company became fully established as Ashanti Goldfields Corporation with the Ghanaian people exercising control over the corporation with their representatives on the Board of Directors overseeing management of the 55 percent shares. The plaintiffs further claimed that, over time, the Ashanti Goldfields corporation became the most efficiently managed Ghanaian business and its profits contributed to 50 percent of the nation's foreign exchange earnings annually. The plaintiffs also claimed that the Ghanaian government had made a recent decision to sell 25 percent of the shares that it had held in the mining company.

In light of the above, the plaintiffs sought the following relief: (a) a declaration that the government's decision to sell 25 percent of its shares in the Ashanti Goldfields Corporation constituted a breach of trust; (b) an order of perpetual injunction to prohibit the government from proceeding with the sale of the shares until the Ghanaian people had been given the right of first refusal to acquire said shares; and (c) an order of perpetual injunction to restrain the second defendant from registering any transfer of the said shares.[127]

One of the fundamental issues the *Adjaye* Court sought to resolve was whether there was an enforceable trust relationship between the plaintiffs and the Ghanaian government by virtue of the acquisition of shares in Ashanti Goldfields Corporation. In addressing this issue, the Court drew a distinction between a trust in the true sense and a higher sense based on decided English cases such as

127. *See* Adjaye v. Att'y Gen., No. C.144/94, 10 (Ghana Sup. Ct. Mar. 30, 1994).

Tito v. Waddell (No. 2).[128] There, it was held that the use of the word "trust" did not create a true trust enforceable by the courts (a trust in the lower sense), but rather created a "trust in the higher sense" which is no more than governmental obligation not enforceable in the courts. In *Tito v. Waddell (No. 2)*, the Court held that there was nothing in the ordinances or in the various instruments or other documents which sufficed to show that the Crown had undertaken any enforceable trust or fiduciary obligation.[129] The Court in *Adjaye* also noted that if a trust relates to governmental obligations relating to duties and functions of government, that trust relationship would be unenforceable. The Court reasoned that, looking at Article 257 (6), it was clear that what was held in trust was minerals in their natural state.

The passages in the *Adjaye* opinion regarding the nature of the trust created by Article 257 should be considered as *obiter dictum* which do not lay any general or conclusive interpretation of the article as to the nature and enforceability of the trust mentioned therein. One of the fundamental issues before the *Adjaye* Court was "whether or not there is an enforceable trust relationship between the plaintiffs and the government by virtue of the acquisition of shares in Ashanti Goldfields Corporation by the government."[130] This was the issue raised by the first defendant. However, the second defendant raised a similar issue: "[W]hether or not the ownership by the Government of Ghana of the 55 percent shares in Ashanti Goldfields Corporation pursuant to the provisions of the Mining Operations (Government Participation) Decree 1972 (NRCD 132) created a trust which is enforceable in any court of [law]."[131] This is a discrete question of statutory interpretation that did not require any exposition by the High Court of the constitutional effects of Article 257(6). Therefore, to the extent that the *Adjaye* Court attempted to expound on the meaning and effect of the trust relation in Article 257(6), the Court overreached its powers since it had no jurisdiction to interpret Article 257(6), and its pronouncements on the legal effects of that article do not represent the state of the law as far as that article is concerned.

Again, when the *Adjaye* Court held that the plaintiffs had no *locus standi* to pursue their claim because they had "not demonstrated in their pleading that any private right is being invaded or as a result of the breach they would personally suffer special damage,"[132]

128. *See* Tito v. Waddell, (No. 2) [1977] Ch. 106 (UK); *see also* Kinloch v. Sec'y of State for India in Council [1882] 7 App. Cas. 619 (HL) (UK).

129. *See Tito,* [1977] Ch. 106 at 30.

130. *Adjaye*, No. C.144/94 at 12.

131. *Id.*

132. *Id.* at 21.

the Court failed to take into account the provision of Article 41(b) of the Constitution that places a duty on citizens to uphold and defend the Constitution and the law. Subsequent cases have made it clear that any citizen of Ghana can commence an action to enforce any provision of the Constitution.[133] Even in human rights actions where the person with the capacity to sue must personally be affected by the human rights violation, the Supreme Court of Ghana has held that a citizen of Ghana has the *locus standi* to sue to uphold the law on the basis of Article 41(b), which permits all citizens to uphold and defend the Constitution and the law. To this extent, the holding in *Adjaye* that the plaintiffs did not have *locus standi* should be regarded as *per incuriam*, as all citizens of Ghana by virtue of Article 41(b) of the Constitution have a legal right to sue to uphold the Constitution and any other law. In this vein, Article 41(b) departs from the general common law rule that "a private individual is only entitled to sue in respect of interference with a public right if either that is also an interference with a private right of his or an interference with the public right would inflict special damage on him."[134]

The view of the High Court in the *Adjaye* case that Article 257(6) does not create a trust in the true sense prompts the question of whether the Constitution contains all the required elements for the creation of a trust for the benefit of the people of Ghana. It is trite that, in order to create a trust, there needs to be (1) a "settlor," the person who creates the trust; (2) identifiable property, which is called "trust property;" (3) a "trustee," the person who holds property in trust; and (4) one or many "beneficiaries," a person or persons for whose benefit property is held in trust. The citizens of Ghana are the settlors of the trust because they promulgated the Constitution, which was adopted through a national referendum with 92 percent of Ghanaians supporting its adoption.[135] There is a clear intent that the people of Ghana want the government to own and manage natural resources in trust for their benefit. There is also identifiable property because the Constitution named the property in connection with the trust, to wit: "every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf. . . ." In addition, the Ghanaian government, in particular the President, is named the trustee for holding natural resources in trust for the people's benefit. Finally, the constituents

133. *See generally* SCOTT, *supra* note 2.

134. GHANA CONST. ch. 7, art. 41(b); *see Adjaye,* No. C.144/94 at 21.

135. *See* G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources (Dec. 14, 1962) (granting sovereignty to individual nations over their natural wealth and resources).

(the people of Ghana), are the beneficiaries of the trust that they created through their approval of the 1992 Constitution via the national referendum. Accordingly, based on traditional legal analysis, it may be argued that Article 257(6) creates an enforceable trust.

However, even if one proceeds on the basis that Article 257(6) creates an enforceable trust, the question remains of whether the Ghanaian government breached the trust by selling the shares without first offering the Ghanaian people the right of first refusal to acquire shares. As explained above, a trustee has a duty of loyalty to its beneficiaries, which implies that the trustee must administer the trust solely in the best interest of the beneficiaries.[136] It is trite law in the United States that the interest of the beneficiaries is superior to all other interests, including the interest of the trustee and any other third-party. Applying the best interest analysis, it is submitted that when the three plaintiffs in *Adjaye* merely sought the right to purchase the shares, such a request should have been viewed as being in the best interest of the people of Ghana considering that the Ashanti Goldfield was regarded as "the best[,] most efficiently managed Ghanaian business that significantly also contributes more than 50% of the nation's foreign exchange earnings annually."[137] This is particularly so to the extent that it could be demonstrated that the sale to *Lornho* was likely to be less beneficial to the people of Ghana. This would seem obvious since the government's duty of loyalty is to treat Ghanaian people's rights as superior to the rights of non-beneficiaries.[138]

A recognition of the Ghanaian people's right of first refusal with respect to mineral resource operations has allocative and distributional consequences and elevates local content and participation requirements from the creation of statutes to the level of constitutional imperatives. Currently, Ghana's local content and participation laws have not been conceptualized on a constitutional basis. The recognition of a constitutional basis for local content and participation as incident to the government's duty as a trustee would provide further grounds for challenging laws that violate the requirement that Ghanaians receive the right to first refusal in contracts for the exploitation of natural resources. It will further cast a constant affirmative

136. *See* RESTATEMENT (SECOND) OF TR. § 170(1) (AM. L. INST. 1959) (defining the interest of beneficiaries).

137. *Adjaye*, No. C.144/94 at 11.

138. *See generally* Minerals and Mining (Local Content and Participation) Regulations, 2020 (LI No. 2483) (Ghana) (providing for local participation by Ghanaians but falling short of requiring the Government to offer the right of first refusal to Ghanaians in the issuance of mining licenses or the sale of government shares in mining companies).

duty on the government to prescribe local content and participation requirements for the benefits of Ghanaians. Additionally, such obligations could extend to the cessation of mining operations where it could be established that they do not benefit Ghana's people. Such a reading of Article 257(6) would align with the promotion of the welfare of Ghanaians as the Article requires.[139] Apart from providing a basis for enforcing the trust relationship under Article 257(6) as an enforceable obligation of government, such approach would also harmonize with government best practices from around the world. Government ethics suggests that elected officials owe a fiduciary duty to their constituents to act in their constituents' best interests.[140] Allowing the Ghanaian to cloth itself under *Adjaye* with the idea that management of natural resources is a mere traditional government management function without accountability as fiduciary to the people may promote or encourage the notion of resource curse.

IV. RESOURCE CURSE, RENT-SEEKING BEHAVIOR AND ACCOUNTABILITY DEFICITS IN THE MANAGEMENT OF MINERAL RESOURCES

The concept of the resource curse is generally used to explain the inability of some resource-endowed countries to profit from their natural resources. It is generally accepted that the resource curse offers power in exchange for the inability to benefit from one's natural resources.[141] Countries in this situation become mired in a downward cycle of economic, political, and social degradation that results in poor economic conditions, stagnated development, perverse political incentives, and social and political agitations leading to civil strife and political chaos.

Three main reasons have been offered to explain the resource curse phenomenon. First, currency appreciation from natural resource revenues crowds out other sectors of the economy with disruptive effects on other industries. Second, cyclical fluctuations in the prices of commodities and other natural resources generate disruptive effects over time. Third, abundant natural resources generate political conditions that hamper overall good governance and economic growth over time.[142] Thus, rather than becoming drivers of

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139. *Id.*

140 *See* Hana Callaghan, *Public Officials as Fiduciaries*, MARRKULA CTR. FOR APPLIED ETHICS (May 31, 2016), https://tinyurl.com/36njf8aa [https://perma.cc/2N8J-HGQV].

141. *See generally* ESCAPING THE RESOURCE CURSE (Macartan Humphreys et al. eds., 2007).

142. *Id.* at xi.

economic transformation and political development for these countries, natural resources become a curse.

In response to the resource curse's complexities and multifaceted political, social, and economic dimensions, scholars and policymakers have proposed varying solutions to stem the tide of the resource curse. One key solution focuses on addressing the agency problem.[143] This approach identifies governments of resource rich countries as agents with the people as their principals. As agents of the people, governments have a duty to serve the people's interests faithfully.[144] The available evidence, however, shows that this is not the case; this is because governments, as agents, become enmeshed in rent-seeking behavior, harvesting massive rewards from foreign investors and other players at the expense of the people whose interests they ought to safeguard.

To overcome the agency problem, transparency and accountability have been proposed as effective antidotes.[145] In this view, virtually all the measures proposed to address the resource curse should promote greater transparency and accountability in the processes for the exploration, licensing, production, sale, and use of natural resources and their derived revenues. These measures must also promote government-citizen political engagements in the process for the purposes of fostering transparency and accountability in the exploration, production, and management of natural resources and use of their derived revenues.

One relatively unexplored aspect of the agency problem solution is the promotion of greater accountability and transparency between the agent and principal through the application of the Public Trust Doctrine to the management of natural resources in the developing world. In some developing countries—including Ghana—national constitutions and laws designate the government as a trustee of natural resources. The legal recognition that the government is a trustee opens the possibility of applying PTD to natural resources governance in these countries. Given that Ghanaian laws allow the judiciary to borrow common law concepts from other jurisdictions, the judiciary's adoption of PTD would provide the people of Ghana legal standing to challenge government's management of natural resources.

143. *Id.* at xii.
144. *Id.*
145. *Id.* at xiv.

A. Revenue From Natural Resources and the Effect of Resource Curse on Illegal Mining

As previously noted, Act 703 further provides for the payment of royalties, rentals and fees. An applicant for a mineral right is required to pay prescribed fees. The holder of a mineral right must pay a prescribed annual ground rent to the landowner or the landowner's successors and assigns (except for stool lands where the annual ground rent must be paid to the OASL). There is also an annual mineral right fee as may be prescribed and payment made to the Commission. Holders of mineral rights are also required to pay royalties of not more than six percent or less than three percent of the total revenue of minerals obtained by the holder. The Act provides for the recruitment and training of Ghanaians designed towards the eventual replacement of expatriate personnel by Ghanaian personnel. Persons whose lands are affected by mineral operations are to be paid compensation based upon certain prescribed principles. Additionally, the Minister may determine the compensation payable subject to the right of the landowner to apply to the court for review.

One key characteristic of the aforementioned legal regime is the centrality of the role of the Minister or government who is vested with control over natural resource governance without sufficient safeguards to stem potential abuses of power. Indeed, Ghana has seen high profile cases where the government has abused its power or provided inadequate oversight over mining operations' harmful effects. Al Jazeera, in its "Gold Mafia" documentary, alleges that high profile Ghanaian politicians are involved in gold smuggling.

Additionally, Ghana faces mining challenges and environmental costs posed by small-scale mining, popularly called galamsey.[146] In 2018, the government set up a national anti-galamsey task force, called Operation Vanguard, spurred by the activism of the Media Coalition Against Galamsey, a collective of concerned Ghanaian journalists which had mounted intense political pressure on the government to take decisive action against galamsey. The government employed radical measures, including seizing and burning mining equipment and prosecutions. The task force's activities became mired in controversy. The government could not account for seized mining equipment, and there arose serious allegations of bribery and

146. *See Galamsey*, OXFORD LEARNER'S DICTIONARY, https://tinyurl.com/wp9s7xjw [https://perma.cc/7Q85-DN6R] (last visited Nov. 29, 2023) (defining "galamsey" as the Ghanian word for "illegal gold mining"); Richmond Aryeetey, *Small-Scale Mining is Changing What People Eat in Ghana*, AGRIC., NUTRITIONAL & HEALTH ACAD. (Apr. 17, 2023), https://tinyurl.com/muudwnn5 [https://perma.cc/JVK5-FMU4] (defining "Galamsey" as the Ghanian word for "unregulated small-scale and artisanal gold mining").

corruption by taskforce members who offered protection from arrest to illegal miners. Further, a former Minister of Environment issued damning allegations against key government officials for their participation in harmful and illegal galamsey operations. In sum, the overbearing presence of key government officials with enormous powers but insufficient transparency and accountability measures has generated regulatory opaqueness and created enormous opportunities for spoliation.

B. Minerals Development Fund Act of 2016 (Act 912) and the Office of Administration of Stool Lands (OASL)

Clearly, Ghanaian mining communities have not benefited sufficiently from mining operations. Damage costs incurred by these communities far outstrip the resources they receive for their development. Against this background, in 2016, the Ghana Parliament enacted the Minerals Development Fund Act of 2016 (Act 912) to "establish the minerals development fund, [and] to provide financial resources for the benefit of mining communities and for related matters."[147] The object of the fund is to "provide financial resources for the direct benefit of (a) mining community; (b) a holder of an interest in land within a mining community; (c) a traditional or local government authority within a mining community; and (d) an institution responsible for the development of a mining."[148] The sources of money for the fund are 20 percent of mineral royalty received from the Ghana Revenue Authority on behalf of the republic from holders of mining leases with respect to the holders' mining operations, the moneys approved by parliament, grants, donations, gifts, other voluntary contributions, moneys that accrue to the fund from investments, and other moneys that may become lawfully payable to the fund.

The fund has a governing body primarily comprised of public officials. The functions of the board include: (1) ensuring the effective performance of the fund's functions; (2) pursuing policies to achieve the fund's objectives, ensuring accountability of the fund's moneys by defining appropriate procedures for accessing and monitoring the fund; and (3) investing some of the fund's moneys in safe securities and disbursing money from the fund.[149]

The money that is accrued to the fund is to be disbursed to OASL and other institutions responsible for the development of mining in the country. The allocations include 50 percent to OASL to be disbursed as prescribed by law; 20 percent to the Mining Community

147. Minerals Development Fund Act, 2016 (Act 912), § 3 (Ghana).
148. *Id.* § 2.
149. *See id.* § 7.

Development Scheme; 4 percent to supplement the mining operations of the Ministry of Lands and Natural Resources; 13 percent to supplement the mining operations of Minerals Commission; 8 percent to supplement mining operation of the Geological Survey Authority; and 5 percent for research, training, and projects aimed at the promotion of sustainable development through mining of which at least 40 percent shall be allocated for the Geological Survey Authority. The bulk of the funds to be disbursed goes to public institutions, with only about 20 percent going to fund the activities of Mining Community Development Scheme, which is the body with the most local community or civil representation.

The fund is to be applied, *inter alia*, to address mining's harmful effects on affected communities and persons; to promote local economic development projects and alternative livelihood projects in communities affected by mining; to undertake minerals-related research and to develop human resource capacity for mining institutions and for other institutions that train manpower for the regulatory agencies; to undertake projects that promote the mining sector; and to support the policy planning, evaluation, and monitoring functions of the ministry in respect of mining related activities.[150] The Act further sets up the development scheme for each mining community to facilitate the socio-economic development in those communities. A local management committee administers and operates the mining community development scheme in each community, except that the Board determines the modalities for the disbursement of funds to the local management committee for its approved activities. Act 912 falls within the same legal scheme, vesting enormous powers in government officials with disregard to the a legal environment's susceptibility to rent-seeking behavior and spoliation.

C. Minerals Income Investment Fund Act of 2018 (Act 978) in the Global Market and Corruption of Public Officials

The minerals income investment fund enacted in 2018 establishes a fund to manage the government's equity interests in mining companies, to receive mineral royalties and other related income owed to the republic from mining operations, and to provide for the management and investment of funds. Its primary objective is to monetize Ghana's mineral wealth in a manner which brings Ghana long-term value.[151] According to the Act, its broader purpose is to maximize the value of dividends and royalties' income accruing to

150. *See id.* § 2.

151. Minerals Income Investment Fund Act, 2018 (Act 978), § 3 (Ghana).

the Republic of Ghana and to monetize mineral income in a beneficial, accountable and sustainable manner, and to develop and implement measures to reduce mineral income fluctuations.[152]

The fund may create a special-purpose vehicle in any jurisdiction; procure its listing on any reputable stock exchange; assign or transfer any of its rights to minerals income to the said special purpose vehicle; grant security or encumber assets of the fund; invest in, purchase, sell, or otherwise realize assets and investments of any kind; borrow and raise money from international financial markets; develop and implement financing structures aimed at leveraging income accruing to the republic of Ghana; and purchase and own shares in other companies.[153]

The main functions of the fund are to (a) manage, deal in, and invest minerals income accruing to the Republic received by the fund; (b) hold and manage minerals equity interest of the Republic and exercise all rights related to the minerals equity interest; (c) disburse 20 percent of minerals income received by the fund to the Minerals Development Fund; (d) seek the best possible financial returns on investments having regard to internationally recognized best practices for (i) asset allocation and risk management, (ii) protecting the long term economic value of the Fund and its assets, and (iii) the cost of capital of the Fund and other incidental costs related to the Fund; (e) manage other assets entrusted to the Fund or acquired by the Fund; (f) enter into transactions and contracts on an arm's length basis; and (g) engage in any other activity determined by the Board, in consultation with the Minister.[154]

The fund has a governing board comprised of public officials. The fund's sources of income include minerals income; income from investments; and moneys raised from the sale of shares, rights, and interests of the fund in a special purpose vehicle.[155] In 2020, the Act was amended to allow the special purpose vehicle to operate as a regular commercial company; to allow the Board to procure the services of an asset manager to manage the assets of the fund or a special purpose vehicle; and to provide for stability agreements with the fund, special purpose vehicle, and a stabilized party.[156]

With the passage of Act 1024 in 2020, the government proposed to create a new company—Agyapa Royalties Ltd.—as an "innovative

152. *Id.* § 2.
153. *See id.* § 3.
154. *Id.* § 4.
155. Minerals Income Investment Fund Act, 2018 (Act 978), § 27(c) (Ghana).
156. *Demystifying Ghana's Agyapa Royalties Deal*, NAT. RES. GOVERNANCE INST. (June 21, 2021), https://tinyurl.com/28hhrjwa [https://perma.cc/4ZFH-2QWK].

financing solution" that would not add to the country's debt.[157] The government's plan involves assigning a majority of gold mining royalties from all of Ghana's current industrial gold production to a new offshore company and selling 49 percent of the shares of this company in an initial public offering for an estimated $500 million in upfront cash. Analysis by civil society experts exposed important governance vulnerabilities and risks stemming from the deal, including the risk of undervaluation, the loss of control over gold sector governance, the loss of ability to repay existing loans, limited consultation requirements, and questions on transparency and accountability provisions and corruption risks.

Civil society, as represented by the "Alliance of CSOs Working on Extractives, Anticorruption, and Good Governance" (now consisting of 25 organizations), has decried the opaqueness of the transaction and the reported involvement of politically exposed persons. This transaction exposes the possible misuses of the mineral income investment fund in a manner likely to disserve the public interest. [158] Despite Civil Society's efforts to fight corruption, the *Agyapa Royalties Ltd.* case was still dismissed by the Economic Community of West African States ("ECOWAS") Court.[159]

The link between high levels of corruption and rent-seeking behavior in the management of natural resources in developing countries such as Ghana has long been acknowledged. These resources provide opportunities for public officials and political leaders to commit theft, and then escape accountability because of weak linkages between government and the citizens. In addition, inadequate or unenforced accountability mechanisms in the governance frameworks incentivize for misgovernance and insufficient oversight by public institutions, officials, and citizens in the management of natural resources. This sometimes results in scandals, corruption, and misgovernance that harms the genuine investors' and citizens' interests.

The Cassius Mining case also illustrates the inefficiencies, rent-seeking behavior, and misgovernance in Ghana's current natural resources governance framework.[160] In *Cassius*, the claimant acquired a gold prospecting license from Ghana on December 28, 2016. Regulations require a holder of a prospecting license to obtain an Exploration Operating Permit issued by the Inspectorate Division of the

157. *Id.*

158. *Id.*

159. Alfred Olufemi, *ECOWAS Court Sides with Ghana on Gold Deal*, AFRICA LEGAL (July 25, 2023), https://tinyurl.com/4cv7aad2 [https://perma.cc/5URN-K7EQ].

160. *Minister's Resignation: Investigate All Involved in Alleged Bribery – CDD*, GHANA REP. (Apr. 30, 2019, 11:50 AM), https://tinyurl.com/39s9dn97 [https://perma.cc/YLY4-CJ4X].

Minerals Commission prior to commencing exploration operations. Under the Mineral and Mining Act 2006 (Act 703), Ghana may refuse to extend a license where an applicant has breached the prospecting license's terms and conditions. Under common law, a license is not a right, but a privilege, and the holder of a license can assert a right in such license only when the holder has satisfied the pre-requisites to obtaining that license.

Cassius Mining Corp. ("Cassius") began exploration without obtaining a permit, thus violating Act 703, and Ghana subsequently refused to renew its license.[161] However, it appeared that a minister issued a license to Shaanxi Mining, a Chinese Mining Company, in the same area occupied by Cassius. Cassius claimed that Ghana knew of Shaanxi's illegal trespassing and removal of assets from Cassius' license, and that Ghana had failed to protect its property interests. As a result, Cassius filed a claim for International Arbitration against the Ghanaian government and several public officials (including the President of Ghana, the Minister for Lands and Natural Resources, the Attorney-General, and the Minerals Commission).[162] At the same time, Cassius filed a parallel proceeding in the High Court of Ghana for an injunction against Shaanxi Mining to protect itself against Shaanxi's illegal sub-surface trespass and asset (gold) removal.[163]

The most interesting part in this case is the corruption aspect, because the Chinese company had allegedly bribed the High Court Judge to rule in its favor.[164] It is even more troubling that after the judge received the bribe, a journalist who was aware of it was approached by one of the government's ministers who attempted to stop him from taking the story public.[165] The following transcript of the recorded telephone conversation between the minister and journalist shows the minister pleading with the journalist to shred the story:

> The Shaanxi people we supported them all along. You know they are not reliable. Their hands are too hard. Don't publish that story,

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161. *See* Minerals and Mining (Licensing) Regulations, 2012, L.I. 2176, reguls. 104–12 (Ghana).

162. Alfred Chan, *Microcap Miner to Sue Ghana Government for $430 Million*, THE SENTIMENT (Apr. 17, 2020), https://tinyurl.com/4zhytprn [https://perma.cc/68RT-MHCN].

163. *Cassius Serves Notice of Intent to Take Ghana to International Arbitration Over the Gbane Gold Project*, CASSIUS MINING LTD. (Apr. 17, 2020), https://tinyurl.com/4uursrsk [https://perma.cc/C4FG-2GQZ].

164. *See EXCLUSIVE: Minister, Rockson Bukari, Caught on Tape Attempting to Bribe Starr FM Reporter*, DAILY MAIL GH (Apr. 25, 2019), https://tinyurl.com/8hpcb88z [https://perma.cc/SUQ9-4VQD].

165. *See id.* ("True to Bukari's words, on the appointed day, Shaanxi officials brought a bribe of Gh¢5,000 cash in a brown envelope and a brand new motorbike worth about Gh¢5,000 to the investigative journalist for him to kill the story.").

> because that judge [Justice Jacob B. Boon] is a very good friend of mine. When I was a registrar of the House they were all with me. Ambrose Dery, he Kolendi and then Avoka and others I gave them an office at the House of Chiefs. I beg you. In this world, it is a small world. I beg you. Talk to them. Monday I'll let them get something for you. I beg you. I'm kneeling down and begging you. Don't publish it. I beg you. I won't disappoint you. If I were to be there with you it won't be a problem but now I'm not there. I told them their hands are too hard and that is not good. . . . The [chief] said I should talk to you not to do it because it will affect them. I've told them to try to see you on Monday. Everything will be ok for you so I beg you. I'm now in charge of special duties and I'm to go to all the regions and next week I'll go to Brong Ahafo to solve problems. . . . So I'm assuring you that Monday, you'll here [sic] from Suade. Don't try and publish it. I'll be coming around and I'll call you so that we meet.[166]

Sadly, this represents but one of the many cases that impede the Ghanaian economy by staining Ghana's rule of law in sending the message that justice can be bought for a price. Crucially, Ghana's corruption index has progressively worsened since 2017.[167] Another misgovernance issue implicating the management of natural resources is the opportunistic use of laws to disadvantage genuine investors. It is trite law in Ghana that grants of mining leases and international business transactions or economic transactions involving the Ghanaian government must be ratified by parliament before they are implemented, and that failure to do so violates the Constitution.[168] Many of the Ghanaian Supreme Court's decisions have maintained that such agreements that do not receive parliamentary approval are null and void.[169] Legal commentators have argued that the Supreme Court decisions that deny investors restitution even where there is a lack of constitutional vigilance are unconscionable because they allow the government to discharge itself from its own contractual obligations and liabilities by taking advantage of its wrongdoing (not seeking parliamentary approval) to investors' detriment.[170]

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166. *Id.*

167. *See Corruption Perception Index Ranking in Ghana from 2011 to 2021*, STATISTA, https://tinyurl.com/bdzyxjrw [https://perma.cc/F6KN-UHNM] (last visited July 25, 2023).

168. *See* GHANA CONST. ch. 13, art. 181, cl. 5 (1992).

169. *See* Att'y Gen. v. Balkan Energy Ltd., No. J6/1/2012, [2012] G.H.A.S.C. 35 (Ghana Sup. Ct. May 16, 2012).

170. Ace Anan Ankomah, *The Foreign Investor Loses It All: A Cautionary Tale to Multinational Corporations?*, BENTSI-ENCHILL LETSA & ANKOMAH (May 24, 2023), https://tinyurl.com/yc879e3n [https://perma.cc/QQQ7-XG6B].

The case below demonstrates the injustice investors suffer for such government default. *Attorney General v. Faroe Atlantic Co. Ltd.*[171] illustrates the way that the Ghanaian government takes advantage of its own mistakes when it proves that a business transaction was not approved by the parliament as required by Article 181(5) of the Constitution. In this case, the government formed a contract with a company, and when the government defaulted on its obligations, the company sued the government. At issue before the Supreme Court of Ghana was whether the agreement was valid per Article 181, which provides:

> (1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account;
> (2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament;
> (3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament;
> (4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide
>
> (a) that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and
>
> (b) that any moneys received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan;
>
> (5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic *transaction to which the Government is a party as it applies to a loan.*[172]

In this case, the Court held that a business transaction involving Ghana's government and a foreign entity was transnational in character, and thus unenforceable for lack of parliamentary authorization pursuant to Article 181. In the judgment, Sophia Akuffo J.S.C. stated: "If the supplier [the plaintiff] is a non-Ghanaian entity and the party of the other part is the Government of Ghana, it is an international business or economic transaction."[173] His Lordship, Dr. Date-Bah J.S.C., stated that "[t]he agreement of this United Kingdom company

171. Att'y Gen. v. Faroe Atlantic Co. Ltd., No. J4/22/2004 (Ghana Sup. Ct. 2005).
172. GHANA CONST. ch.13, art. 181 (1992) (emphasis added).
173. *See Faroe Atlantic*, No. J4/22/2004 at 3.

to generate and supply electricity to the Government of Ghana in Ghana was clearly a transnational transaction which qualifies for characterization as an 'international business transaction' to which the Government of Ghana is a party within the meaning of article 181(5)."[174]

This principle was further established in the case of *Attorney General v. Balkan Energy Ghana Ltd.*[175] There, the Supreme Court of Ghana firmly held that beyond incorporation in a foreign country, other determinants of the international character of a transaction must be examined, including (1) the substance of the transaction, (2) the nationality of shareholders and investors, (3) the choice of foreign venues for the resolution of disputes, and (4) the currency of the transaction, among other things. The Court noted:

> The phrase "international business or economic transaction to which the Government is a party," if purposively construed, should not lead to the result that only agreements between entities resident abroad and the Ghana Government can be embraced within the meaning of the term. Given the complexity of contemporary international business transactions, there will be transactions of such a clear international nature that they come within any reasonable definition of an international business transaction, but which may have been concluded with Ghana Government by an entity in Ghana.[176]

In *Balkan Energy*, the Court held that a transaction is a "business transaction" where the transaction is commercial in nature or pertains to or impacts on the wealth and resources of Ghana. The invalidity of such international business transactions under Ghanaian law should enable the government to seek an indemnity against foreign companies who have filed international arbitration claims against the government for the latter's breach of Article 181(5). The basis for the request for indemnity is two-fold. First, under Ghanaian law, such companies are not entitled to make a claim under a contract that is illegal and null and void for breaching Article 181(5) of the Constitution. Second, such companies may be cast as equally guilty in the constitutional violation, since all prudent investors (together with their legal advisors) should know the consequences of violating Article 181(5). Thus, not being innocent parties, companies could be made to indemnify the government against any loss, claims, arbitral awards, costs, and/or any other liability whatsoever

174. *See id.* at 17.

175. *See* Att'y Gen. v. Balkan Energy Ghana Ltd., No. J6/1/2012, [2012] G.H.A.S.C. 35 (Ghana Sup. Ct. May 16, 2012).

176. *Id.* at 31.

that the government may be exposed to as a result of any person, institution and/or body relying on and giving legal effect to the business transactions that are invalid under Article 181(5) of the Constitution.[177]

It may be argued that Article 181(5) constitutes a mandatory rule of public law and reflects a compelling national public policy goal or purpose designed to safeguard the resources of Ghana, a developing country that has, on multiple occasions throughout the course of its history, come close to national bankruptcy due to the reckless, corrupt, or incompetent acts of its officials.[178] It is not uncommon in the developing world for government officials to collude with others to milk the coffers of the State for personal gain.[179] As noted by the Ghanaian Supreme Court, Article 181(5) was to "ensure transparency, openness and parliamentary consent in relation to [international economic transaction] obligations contracted by the State."[180] That being the case, Article 181(5) is a democracy-enhancing provision designed to prevent a young democracy like Ghana from being saddled with debt or obligations contracted by State officials outside of parliamentary scrutiny. In *Faroe Atlantic*, the Court noted that it is "analogous to a *jus cogens*[181] whose enforcement cannot be impeded by normal rules."[182]

Despite the merits in the preceding policy arguments which justify the Court's inflexible conclusion, an agreement in violation of Article 181(5) is per se null and void. It is unconscionable for Ghana's government to reap a contract's benefits while escaping its agreed upon liabilities on the mere basis that the agreement is invalid for the lack of parliamentary approval when it—not the contracting company—has the duty to obtain parliamentary approval.

Centre for Public Interest Law v. Environmental Protection Agency illustrates another aspect of misgovernance.[183]

177. *See id.*

178. *See Ghana: History of Lending Commitments as of May 31, 2018*, INT'L MONETARY FUND, https://tinyurl.com/38vt6jxn [https://perma.cc/T8AW-6FKV] (last visited July 25, 2023).

179. Ctr. for Pub. Int. L. v. Env't Prot. Agency, No. A (EN) 1/2005 (Ghana Super. Ct. 2009).

180. GHANA CONST. ch. 13, art. 181, cl. 5 (1992).

181. *Jus cogens* refers to principles of international law, and such principles cannot be set aside. *See Jus Cogens*, LEGAL INFO. INST. (2023), https://tinyurl.com/44mjm2a4 [https://perma.cc/FML8-BSZV].

182. *See* Att'y Gen. v. Faroe Atlantic Co. Ltd., No. J4/22/2004, at 18 (Ghana Sup. Ct. 2005).

183. Ctr. for Pub. Int. L. v. Env't Prot. Agency, No. A (EN) 1/2005 (Ghana Super. Ct. 2009).

The plaintiffs, the Centre for Public Interest Law and Centre for Environmental Law, sought to compel the defendants to perform their statutory obligations with respect to environmental damage caused by the mining activities of a third defendant, Bonte Gold Mines Ltd. The third defendant was a subsidiary company of a Canadian company called Akrokeri Ashanti Gold Mine Inc., registered in Ghana and operating as a mining company until it went into liquidation. An international non-governmental organization reported that the company had gone into liquidation and there was extensive degradation and uncovered ponds from the operations of the company in Ghana, posing dangers to children. River channels were blocked by sediment and many local business activities dependent on the company had ceased.

The issues for resolution before the Court were (1) whether the Environmental Protection Agency (EPA) had breached its duty of ensuring that Bonte did not cause harm to the environment and (2) whether the second defendant, the Minerals Commission, breached its statutory obligation to regulate the exploitation of mineral resources within the territorial jurisdiction of the Republic of Ghana by the third defendant. The Court held that the Defendants had failed to ensure that the third defendant's mining operations did not cause environmental harm and that they had breached their obligations. In particular, the EPA breached its obligations by granting a permit to the third defendant, Bonte, without exacting the statutorily required reclamation bond. This lack of vigilance by public officials is not an isolated event but pervasive in Ghana's natural resource sector. Therefore, adopting the PTD in Ghana by establishing government as fiduciary under the Constitution would promote stronger business relations between Ghana and the rest of the world. In addition, even if the 1992 Constitution is not amended, adhering to the PRMA fiduciary regime for all natural resources would be a step in the right direction.

D. PRMA (Act 815) and the Fiduciary Duty of Government

While the Court in *Adjaye* argued that there was no enforceable trust created (and therefore, no fiduciary obligation from the government) this Article argues that the regime of accountability and allocation of petroleum revenue under the PRMA lends legal viability to the President's fiduciary duty under the Constitution. PRMA was enacted to govern the utilization of petroleum revenue in Ghana. It seeks to provide a 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[184] of the Constitution and for related matters." In 2015, PRMA was amended to provide for, among other things, the composition of the Investment Advisory Committee for the investment of funds under the Act.[185]

Besides providing for various funds and their uses, PRMA creates a range of institutions to ensure the proper management of petroleum revenue. These institutions include the Investment Advisory Committee and the Public Interest and Accountability Committee ("PIAC"). As scholar Thomas Kojo Stevens has noted, "the Investment Advisory Committee was set up to formulate and propose to the Minister the investment policy and management of the Ghana Stabilisation Fund, as well as the Ghana Heritage Fund." [186] It is also required "to advise the Minister on the broad investment guidelines and overall management strategies relating to the Ghana Petroleum Funds and, subsequently, the Ghana Petroleum Wealth Fund."[187] On the other hand, the purpose of the PIAC is "to monitor and evaluate compliance with the PRMA (Act 815) by the government and other relevant institutions."[188] Steven notes further that the PIAC seeks "to provide a space and platform for the public to debate whether spending prospects as well as the management and use of the petroleum revenues conform to development priorities."[189] More importantly, the Committee is "required to provide independent assessments on the management and use of petroleum revenues to assist the Executive and Parliament in the oversight and performance of related functions."[190]

PRMA's framework manifests key government obligations in its fiduciary capacity for the management of petroleum revenue. The Act's institutions and funds seek to ensure proper management of petroleum revenue and the government's compliance with its duty of good faith and loyalty to the interests of Ghanaians in the utilization of petroleum revenue. As such, the government is under a heightened duty of loyalty to act in good faith to serve the Ghanaian people's interests in the management of natural resources. This is mediated through the PIAC. Additionally, through the PIAC,

184. *See* GHANA CONST. ch. 6, art. 36 (listing the Constitution's "economic objectives").

185. Petroleum Revenue Management (Amendment) Act, 2015 (Act 893) § 31 (Ghana).

186. Thomas Kojo Stephens, *Framework for Petroleum Revenue Management in Ghana: Current Problems and Challenges*, 37 J. ENERGY & NAT. RES. L. 119, 124 (2019).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

citizens can examine the uses and misuses of petroleum revenue for the purpose of holding government accountable for its management of the natural resources it holds in trust for the Ghanaian people. The PRMA has therefore institutionalized a regime of transparency and accountability for the use and management of petroleum revenue that holds the government accountable as a fiduciary, particularly in relation to rendering accounts of the use of petroleum revenue. This is contrasts sharply with the government's use of revenue from other natural resources, which do not enjoy the benefits of such robust transparency and accountability mechanisms.

E. Implications of Importing General Trust Law Principles Into the Interpretation of Article 257(6)

This Article contends that the *Adjaye* Court's holding—that Article 257(6) of the Constitution does not create a trust enforceable by the beneficiaries of the trust, the citizens of Ghana—does not represent the true state of the law. This Article faults *Adjaye*'s reasoning on various grounds and maintains that general principles of trust law should apply to the interpretation and application of Article 257(6). In addition, this Article argues that the Public Trust Doctrine should be adopted in Ghana. This calls into consideration the important question of the mineral governance benefits that may result from such an approach.

One key benefit from such an approach is that, independent of Articles 2[191] and 41(b)[192] of the Constitution, the Ghanaian people—as the beneficiaries of the government's fiduciary duty—can sue for breach of the duty and exercise the rights normally exercised by trust beneficiaries, either by themselves or through their elected representatives. In other words, once this approach is adopted, citizens of Ghana will have the capacity and *locus standi* to sue for breach of this trust, not only under Articles 2 and 41(b) of the Constitution, but also under Article 257(6).

As noted above, trust beneficiaries can bring an action to remove the trustee. In the Ghanaian context, this power may take the form of the people's representatives impeaching the President.[193] The possibility of mineral resource mismanagement serving as a ground for impeachment clearly escalates the legal consequences of such mismanagement. Additionally, consonant with the rights of trust beneficiaries, beneficiaries may through their representatives ratify a transaction made by the trustee or government and waive the breach.

191. GHANA CONST. ch. 1, art. 2 (1992).
192. *Id.* ch. 6, art. 41(b).
193. *See id.* ch. 8, art. 69.

They could also sue the government and its officers for any loss stemming from a breach of trust, seek damages in deserving cases, and claim property bought with trust funds for the trust's benefit.

Under UTC Section 706(b)(4), a court may remove a trustee where there exists a substantial change of circumstances or where the removal is requested unanimously by the qualified beneficiaries. The court usually looks at three factors: (1) whether the removal is in the best interest of the beneficiaries; (2) whether the removal is consistent with the material of the trust; and (3) whether there is a suitable co-trustee or replacement available.[194] The preceding obligations or potential liabilities of government and public officers further streamline and provide additional support for the many laws in Ghana that impose civil and/or criminal liabilities for malfeasance against the state committed by public and private actors.[195]

V. RECOMMENDATIONS TO STREAMLINE THE FIDUCIARY DUTY OF THE GOVERNMENT IN THE UTILIZATION AND MANAGEMENT OF NATURAL RESOURCES

This Article has argued that the Ghanaian Constitution vests in the government the right to own natural resources in Ghana, such mandate falls under the Public Trust Doctrine principle, and the government has a fiduciary duty to manage the resources in the best interest of the people. This Article proceeds to recall the purposive constitutional interpretation of Article 257, the regime of natural resource management under the PRMA that is governed by the overriding object of holding government accountable as a fiduciary for the proper management and utilization of petroleum revenue, and proposals to strengthen the fiduciary obligations of government in relation to mineral resource governance.

A. Purposive Constitutional Interpretation of Article 257 of the Constitution

Following the decision of the Supreme Court of Ghana in *Asare v. Attorney General*,[196] purposive interpretation has become the dominant approach to constitutional interpretation in Ghana. Under this approach, the object of interpretation is to effectuate the purpose of the constitutional provision through its plain meaning and underlying

194. *See* AVERILL & RADFORD, *supra* note 82, at 757.

195. *See* Criminal Offences Act, 1960 (Act 29) § 179(A) (Ghana) (criminalizing the causing of financial loss to the State); *see also* GHANA CONST. ch. 13, art. 187, cl. 7 (1992) (granting the Auditor General the power to disallow expenditures contrary to law and to place surcharges).

196. Asare v. Att'y Gen., No. J1/6/2011 (Ghana Super. Ct. 2012).

values or objects.[197] It is submitted that the purpose of Article 257 of the Constitution—read together with other provisions of the Constitution such as Article 1 (the Supremacy Clause),[198] Article 36 (dealing with the Ghanaian economy),[199] and Article 41 (outlining the rights of citizens of Ghana)[200]—creates enforceable trust obligations and ensures accountability and transparency in natural resource governance in the country.[201] Such a view is consistent with and requires the recognition that the President holds natural resources in trust for and on behalf of the people of Ghana as a fiduciary.

B. Regime of Natural Resource Management Under the PRMA (Act 815)

In *Kpodo & Anor v. Attorney General*,[202] the Supreme Court of Ghana gave a seal of approval to the PRMA as an effective mechanism of transparency and accountability in connection with the management of petroleum resources. According to the Court, the framework of the PMRA renders government accounting of use of petroleum revenue much easier by designating accounts for such revenue apart from the general basket of funds for public revenue. This Article has also argued that the PMRA is predicated on the notion of government as a fiduciary. The roles and purposes of PIAC, the Inter-Advisory Investment Committee, and the various funds aim to generate mechanisms of accountability and the use of petroleum revenue in a sustainable manner in line with the concept of sustainable development.

In spite of noted challenges in fully operationalizing the PRMA to achieve its intended objectives in full,[203] it has proven to be an effective tool and platform for public discussion on the uses and misuses of petroleum revenue. We recommend that the framework of the PRMA should be extended to cover all natural resources that are vested in the President in trust for the people of Ghana. This, at

197. *See generally id.*

198. GHANA CONST. ch. 1, art. 1 (1992). The article reads:

> (1) The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.
> (2) This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall. to the extent of the inconsistency, be void.

Id.

199. *Id.* ch. 6, art. 36.

200. *Id.* ch. 6, art. 41(b).

201. *See id.* ch. 1, art 1; ch. 6, art. 3; ch. 6, art. 41(b).

202. Kpodo v. Att'y Gen., No. J4/34/2019 (Ghana Sup. Ct. 2019).

203. *See supra* Part I.

least, will ensure that the accountability mechanisms in the PRMA are extended to cover all other natural resources. This will also better serve the role of government as a fiduciary of natural resources.

C. Constitutional Amendment of Article 257 of the 1992 Constitution of Republic of Ghana

As previously discussed, the management schemes as articulated under the 1992 Constitution are more susceptible to facilitating rent-seeking behavior of public officials.[204] One mechanism to curtail this rent-seeking behavior of public officials is the vesting of the management of natural resources in third-parties as opposed to the government with oversight responsibilities by the courts and parliament. This may create conditions for better linkages between citizens for citizens to engage meaningfully with the national economy as they will be dealing with non-governmental actors as trustees, who are least likely to engage in spoliation.

In the alternative, it is further proposed that Article 257 of the Constitution be amended to explicitly create an enforceable trust with fiduciary duties with the introduction of Clauses 7 and 8 as follows:

> The Government of Ghana acknowledges that it shall have a fiduciary responsibility for the management of all natural resources in their natural state or in any other form, and the Government also acknowledges that it has fiduciary responsibility for the safekeeping and use of all funds and assets derived from all natural resources in Ghana. The Government shall not employ, or permit another to employ, such funds or assets in any manner except for the exclusive benefit of the people of Ghana. The Government shall not enter into an agreement with any person, body, or entity or otherwise that seeks to contract away the fiduciary obligation owed to the People of Ghana. (Clause 7)
>
> All three branches of government are trustees under the notion of Public Trust Doctrine to ensure proper checks and balances in the management of natural resources in Ghana. There shall be no transfer of trust property to any third party without the prior agreement of Parliament. Ghanaian citizens are beneficiaries of the trust and have the legal standing to challenge the Government on its management. (Clause 8)

It is therefore submitted that these amendments will make the government's obligation as a fiduciary in the management of natural resources explicit, and the people of Ghana will have the right

204. *See supra* Part IV.

under the Constitution to challenge any mismanagement of the trust under regular trust law or under the notion of Public Trust Doctrine. In addition, these new clauses introduce a system of checks and balances where no branch of government would be able to make unilateral decisions on the management of the trust.

CONCLUSION

The dominant role of administration and regulators in developing countries such as Ghana has increased the spectre of corruption in the management of mineral resources. Public officials looking for bribes make it difficult for companies to operate and for investments to be safeguarded. Colonial and post-colonial legacies of who manages natural resources have created path-dependent trajectories in the management of these resources for the benefit of citizens. This Article has sought to explore other ways or legal conceptualizations of managing natural resources that are likely to maximize the benefits for citizens while also promoting the rule of law with respect to investor's rights and responsibilities.

When a country's Constitution vests in the President the right to own and hold natural resources in trust for the people, such mandate cannot be seen as merely aspirational and hortatory language without any legal consequences. The old feudal system that allows the government to retain the right to own all mineral and natural resources on both private and public land becomes more problematic in a democratic system if it is not clear that an enforceable trust is created to ensure that government owes a fiduciary duty to the Ghanaian people. This Article has argued that the *Adjaye* decision—to the effect that Article 257(6) creates only a higher order duty with no enforceable obligation of government—is at best an *obiter dictum*. In any case, the High Court lacked the authority to make such a pronouncement as far as Article 257(6) is concerned. The Court in *Adjaye* should have confined itself to the interpretation of National Redemption Council Decree 112.

This Article has argued for the recognition of a fiduciary duty of government under Article 257(6) of the Constitution and argues that such mandate falls under the Public Trust Doctrine. In order to expressly recognize and streamline this duty, a number of proposals, including purposive interpretation of Article 257(6) and constitutional amendments, have been put forward. Strengthening the government's fiduciary duty in Ghana in connection with natural resources will promote better government ethics, transparency and accountability in the management of natural resources in Ghana.