

Special Issue

GHANA'S PETROLEUM INDUSTRY: THE PROSPECTS AND POTENTIAL IMPEDIMENTS TOWARDS GOOD GOVERNANCE STANDARDS

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ACCOUNTABILITY MECHANISMS IN GHANA'S 2010 PROPOSED OIL LEGISLATION

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ABSTRACT

In mid-2010, the Ghanaian government introduced to Parliament two pieces of legislation that promised to be critical to the country's efforts to transform its petroleum resources into an engine for national development. Despite being introduced at the same time, the Petroleum Revenue Management Bill (PMRB) and the Petroleum (Exploration and Production, E&P) Bill demonstrated vastly divergent commitments to public accountability. Principles of good governance and accountability were enshrined throughout the PMRB, from its core motivation as a vehicle for responsible long-term management to the procedural and reporting requirements it established for day-to-day implementation. The E&P Bill, by contrast, failed to reflect the vibrant debate taking place both internationally and within Ghana on oil-sector good governance, and included provisions providing for weak oversight, unaccountable institutions, and opaque sector management. The authors examine the strength of each bill's commitment to accountability, and argue that the process by which they were developed and presented had a major impact in their divergence, as well as in the legislative result, which saw the PMRB passed into law in early 2011 and the E&P Bill forced to be withdrawn.

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1. INTRODUCTION

Among the many challenges that Ghana faces in reinvigorating its petroleum-sector institutions, one of the most important revolves around the need for accountability. The onset of production brought into sharp focus the critical importance of mechanisms to ensure that oil companies and the Ghanaian government are held accountable to the population. In mid-2010, as first oil loomed, the government introduced to Parliament two major pieces of legislation with divergent approaches to public accountability.

The Petroleum Revenue Management Bill (PRMB) submitted to Parliament in July 2010, itself a product of extensive public consultations, represented a careful attempt to enshrine well-established norms of good governance and rules to promote sound oversight. The fundamental revenue management scheme embedded in the law is itself an attempt to enhance long-term economic accountability and insulate spending from oil price volatility and capricious political cycles. The Bill included clear rules on the division of petroleum revenues among the annual budget, a Stabilization Fund, and a Heritage Fund for future generations of Ghanaians. It provided careful procedural requirements on the executive's ability to withdraw petroleum revenues in excess of limits set by formula, and spelled out a clear role for Parliament in the exercise of expenditure policy. The Bill met international standards on public disclosures of fund assets and activities. Building on the experiences of Timor-L'este with a similar Petroleum Fund, it called for the establishment of a multi-stakeholder Public Interest and Accountability Committee, to monitor compliance, promote public debate on revenue management, and advise Parliament and the government.

Though it was introduced at the same time as the Revenue Management Bill, the Petroleum (Exploration and Production, E&P) Bill shared little of the former's careful attention to accountability issues. The E & P Bill ostensibly sought to revamp all elements of the system governing the exploration, development and exploitation of oil and gas, but in actuality it would have done little to promote more responsible or accountable oversight. The Bill provided for excessive levels of discretion on the part of the Ministry of Energy and the Ghana National Petroleum Corporation (GNPC). It left the award of petroleum contracts subject to the views of individual government officials, rather than systematic and open bidding processes. It did nothing to embed the government's stated commitment to publish petroleum contracts or to promote transparency of revenues, thereby threatening to place Ghana out-of-step with emerging international and African norms. It did not provide for increased standardization of the fiscal terms governing petroleum, leaving Ghana's share of the revenue pie subject to ad-hoc negotiations with international oil companies.

The two Bills took divergent paths once they reached Parliament. After a flurry of doubts expressed by members of parliament (MPs), the Exploration and Production Bill was rapidly withdrawn in November 2010, in large part because of concerns that it failed to provide for a stable, accountable framework that would give Ghana a strong opportunity to maximize the benefits of the sector and minimize the risks of corruption and volatility that can accompany it, and because of arguments that it was inconsistent with Article 269

of Ghana's Constitution. Debate over the Revenue Management Bill was intense, focusing principally on the original draft's prohibition of using expected future revenue streams as collateral for debt obligations and on the viability of the Public Interest and Accountability Committee. But the challenges to the Bill focused on specific details rather than the fundamental nature of the Bill, and it was passed by Parliament in early 2011, retaining most of its core components.¹

This article assesses each of the July 2010 Bills vis-à-vis its potential to contribute to accountable and effective management of Ghana's oil heritage. It asserts that the creative, forward-thinking elements of the Revenue Management Bill found their negative image in the Exploration and Production Bill, which reflected outdated conventional wisdom and failed to reflect the vibrant debate that has been going on within Ghana on petroleum accountability. We contend that the process by which the bills were formulated had a major impact on their content. The extensive consultations that fed into the Revenue Management Bill resulted in tangible changes to the document that made it simultaneously more palatable to a wide cross-section of Ghanaian society and a richer reflection of national and international perspectives on economic accountability. The E&P Bill, by contrast, appeared in Parliament with virtually no prior public vetting, which manifested itself in a text that was out-of-touch and devoid of effective strategies for enhancing accountability. The consultation process on Revenue Management was time-consuming and costly, but helped the government avoid the massive time-suck that will be experienced now that the E&P bill has been withdrawn and must be re-crafted.

The elephant in the room in debates about the Revenue Management and E&P Bills was the institutional structure of Ghana's petroleum administration, which was barely addressed in either bill. Without revisions to the roles and responsibilities of the Ghana National Petroleum Corporation (GNPC), the Ministry of Energy, and other administrative bodies, and the implementation of stronger mandates for intra-governmental accountability and public reporting, the legislation could produce, at best, piecemeal improvements in accountability. In December 2010, the government took a step to attempt to rectify that shortcoming with the introduction of the Petroleum Commission Bill, which seeks to establish an independent regulatory body to monitor the sector. As of the writing of this article the shape of the debate on this legislation had not yet come into focus, but we provide some preliminary assessment of its likely impact on accountability.

After this introduction, this article proceeds in five additional sections. Section 2 reviews international experiences in promoting accountability in petroleum-sector management and the potential impact of these lessons-learned in Ghana. Section 3 discusses the accountability mechanisms embedded in the Revenue Management Bill. Section 4 examines the shortcomings of the Exploration and Production Bill, and how they would have impeded effective oil-sector management had the bill become law. Section 5 explores the role that the drafting and consultation process had in enhancing the Revenue Management Bill, and the impact of the corresponding lack of consultation on the E & P Bill. Finally, section 6 provides a preliminary assessment of the Petroleum Commission Bill and offers some

overarching conclusions on how Ghana can continue to build on its nascent legislative efforts to develop strong, transparent, and effective institutions.

2. INTERNATIONAL LESSONS LEARNED ON NATURAL RESOURCE ACCOUNTABILITY

There have been several attempts to crystallize lessons learned by developing countries trying to build effective and accountable systems that mitigate distortions and transform natural resource wealth into broad-based national development. One prominent new effort along these lines is the Natural Resource Charter, a policy framework developed by a consortium of politicians, technocrats, academics, and activists with deep experience in devising policy solutions to the challenges of natural resource extraction.² The Charter includes twelve precepts designed to give concrete guidance to policy-makers at all stages of the oil or mineral value chain, from the decision about whether or not to extract through the exploration and production processes to questions of revenue management and the effective expenditure of resource revenues. Other influential compilations of natural resource sector lessons learned include the IMF's Guide on Resource Revenue Transparency³ and the Santiago Principles on Sovereign Wealth Funds.⁴ In addition to these international guides, governments and civil societies have developed individual experiences at a national level that contribute to a rich tapestry of knowledge about building accountability in the sector.

It is outside the scope of this paper to review all of the rich observations made by these and other documents. For purposes of our discussion of the strengths and shortcomings of the legislation proposed in Ghana, three key priorities emerge as tools for accountable oversight – transparency, clarity of roles and responsibilities, and the enshrinement of core rules in law rather than in contracts. We discuss these in turn.

Transparency:

Precept 2 of the Natural Resource Charter puts things succinctly: “Citizens can only be confident about the integrity of the resource extraction process if they know about it.”⁵ Transparency gives the public the ability to monitor the performance of the government and companies, and to organize effective advocacy where change is needed. It reduces the information asymmetries that often exist among companies, governments, and the public and cause outcomes perceived as unjust. It spurs stronger administrative performance, by creating pressure on public officials to deliver results and eschew corrupt behavior. It reduces the risk of distrust and conflict, thereby enhancing political and economic stability.

Transparency is critical across the natural resource value chain. Public disclosure of the rationale for the award of natural resource contracts, and the contracts themselves, promotes awards to qualified actors, reduces the risk of corruption, and facilitates effective contract enforcement. The release of environmental impact assessments facilitates effective planning by community groups and local governments, and can help prevent some of the largest environmental risks posed by extraction. Publication of revenue data enables

citizens to understand how much the state is benefiting from extraction, ferret out potential points of corruption, and advocate for effective economic policy. Transparency in the macro-economic management of resource revenues and in public expenditure is crucial for accountable spending and a participatory national development process.

Clarity of Roles and Responsibilities:

The petroleum sector is typically managed by an array of public bodies with intersecting mandates, among them a panoply of ministries – including Energy, Mining, Finance, Environment, Labor, and Planning – independent sector regulators, national oil companies, tax collection bodies, the Presidency, and the legislature. To minimize the risk of inefficiencies, corruption, and policy or regulatory incoherence and to promote meaningful oversight, the roles of these bodies should be clearly established in law and well-understood by those both inside and outside government. Checks and balances should be built into the institutional framework at all stages, and chains of command and reporting should be comprehensive. Too frequently in the oil-sector one body – often a National Oil Company or sector regulator – operates as a fiefdom that overflows its ill-defined role and occupies a more and more powerful role in sector management with little accountability.⁶ This causes myriad distortions and inefficiencies. As with transparency, the need for clear rules has an impact on every stage of the extractive value chain – from well-defined procedures for contract award to clear steps for expenditure approval and oversight.

Enshrinement of Core Rules in Law Rather than Contracts:

Countries benefit by standardizing as many as possible of the core rules governing the balance of economic benefits between government and company, the work procedures and approvals necessary for project implementation, environmental protection measures, and other central considerations in laws and regulations, rather than leaving them subject to negotiation and variation from one contract to another. When too many elements of the legal and fiscal regime are left open to contractual variation, a state leaves itself vulnerable to the negotiating skills of experienced company dealmakers, which can produce suboptimal results for the state. Variation also increases the risk of corruption in contract negotiations. Finally, standardizing terms as far as is possible – while leaving in place scope for limited flexibility – strengthens government's ability to monitor and enforce terms effectively.

All of these core lessons about extractive industry management have been championed in varying degrees by civil society, technocrats, and the research community in Ghana. The debate around oil has been vigorous, attracting the attention of all elements of Ghanaian society. At a civil society level, the Publish What You Pay Coalition and the Civil Society Platform on Oil and Gas have coordinated the inputs of dozens of national and local organizations and generated a steady stream of advocacy. Revenue transparency has been concretized by the Ghana Extractive Industries Transparency Initiative (GHEITI), which has produced comprehensive data on mineral-sector payments from 2006 to 2008 and served as a forum for debates about the sector.⁷ There has been a significant push for contract transparency, particularly as advocates seek greater clarity on the terms governing the development of the Jubilee field.⁸ And Ghanaians have called for greater clarity in

the roles assigned to its oil-sector institutions, manifested in a vibrant public discourse around how to manage the Ghana National Petroleum Corporation and whether to create a Petroleum Regulatory Commission.⁹

3. THE PETROLEUM REVENUE MANAGEMENT BILL

The Petroleum Revenue Management Bill submitted to Ghana's Parliament in July 2010 represented, at its core, an attempt to promote accountability and responsibility in the government's use of Ghana's oil money. Petroleum revenue is exhaustible, which raises complex issues of sustainability and intergenerational resource allocation. It is also unpredictable (stemming in particular from price volatility), which complicates budgeting and fiscal management. The Bill is an attempt to establish a set of rules and institutions that enable the government to face these challenges in a predictable and effective manner.

The Bill provides a framework limiting how much oil revenue can be spent in a given year, and mandating transfers into (1) a Stabilization Fund to smooth public expenditure and protect against volatility; and (2) a Heritage Fund to provide income for future generations. The Bill calls for all petroleum revenue to be paid into a Petroleum Account at the Bank of Ghana. To determine how funds in the Account are to be disbursed, the government first is required to calculate the Benchmark Revenue, an average based upon recorded and expected petroleum receipts and production. A percentage of this Benchmark Revenue, the Annual Budget Funding Account, is available to be transferred to the budget. The percentage transferred to the budget may vary from year to year and is supposed to be guided by "a medium-term development strategy aligned with a long-term development framework, the economy's absorptive capacity, and the need for prudent macroeconomic management."¹⁰ For an initial three-year period, the allowable range for the Annual Budget Funding Amount is set at 50 – 70%. Of the revenues not transferred to the budget, a "minimum of thirty percent" must be transferred to the Heritage Fund, with the rest going to the Stabilization Fund.

The amounts allocated to the budget are to be used to promote an equitable distribution of the national wealth and to maximize the rate of economic development guided by the long term development strategy. Clause 22 requires that 70 percent of the annual funding amount will go towards public investment, cast broadly to include eleven priority sectors.¹¹ This focus on investment represents an attempt to direct the spending of Ghana's petroleum wealth to growth-enhancing sectors, which is critical for the long-term welfare of Ghana's citizens.¹² To date only one country in Africa, Botswana, has been able to maintain growth over a significant period, and it has done so only through sustained high savings and investment.

These central features of the Bill represent an attempt to promote a sort of ex ante fiscal accountability. The obligatory transfer of revenues to the Stabilization Fund commits the government to limiting spending on an annual basis, and setting funds aside to counter-act volatility and stabilize the economy in the event of a price downturn. Similarly, the Heritage Fund ensures that at least some oil and gas money will be saved for the use of

future generations once the resource has been exhausted. The requirement that 70% of revenues made available for spending via the Annual Budget Funding Amount must be directed at public investment is an attempt to prevent the spending of oil wealth to be dominated by consumption that will do little to promote Ghana's long-term growth.

This accountability to long-term development goals and fiscal prudence could easily be undermined if the Bill did not also pay attention to procedural accountability and transparency to ensure that citizens and parliament were able to monitor the revenue management process. A system lacking in rigorous reporting requirements would be at serious risk of corruption and mismanagement, no matter how well-intentioned. A system that provided for no flexibility in the event of changing economic circumstances would risk undermining the very sort of stability and growth-promotion it ostensibly sought to promote.

Fortunately, the authors of the Revenue Management Bill built a set of procedural checks that provide for strong oversight, adhering to many of the criteria elaborated in the Santiago Principles and by Edwin Truman of the Peterson Institute for International Economics for Best Practices in sovereign funds.¹³ The Bill calls for a public definition of the rules and procedures of the Funds and the publication of performance against benchmarks and the annual returns on the Funds.¹⁴ It requires an annual report to be submitted to Parliament and disclosed to the public. The Bill does allow for the Minister to keep confidential "information or data, the disclosure of which could in particular prejudice significantly the performance" of the Funds, but requires Parliament to approve such a declaration and that it provide "a clear explanation of the reasons for treating the data as classified."¹⁵ These transparency measures would provide the Ghanaian public with a strong sense of how their oil revenues are being invested and whether the returns they are generating are sufficient for stabilization and savings purposes.

Beyond the public reporting requirements, the Bill also includes several internal oversight mechanisms likely to enhance its management. Parliament is to oversee the reconciliation of actual petroleum revenues with the Annual Budget Funding Amount,¹⁶ disbursements of the Annual Budget Funding Amount through the budgetary process,¹⁷ and the percentage of benchmark revenue allowed to be allocated for annual spending.¹⁸ The Funds and the Petroleum Account are subject to internal audits by the Bank of Ghana, external audits by the Auditor-General or his designee, and "special audits" in the public interest. A Public Interest and Accountability Committee, composed of representatives of eleven non-governmental groups including social and professional associations and civil society,²⁰ is charged with monitoring compliance with the Act, creating the space and platform for public debate on "whether spending prospects and management of revenues adhere to development priorities," and providing independent assessments to help Parliament and the executive in the oversight and performance of revenue management programs. If effectively managed, this Committee, which represents an expanded version of a broadly-similar body that has overseen petroleum revenue management in Timor-L'este, has the potential to enhance public accountability and management of petroleum revenues.²¹

In order to allow for the revenue management system to adapt to evolving economic circumstances, Clause 19(3) provides for review every three years of the percentage range of receipts in the Petroleum Account allowed to be transferred to the budget. This will be crucial, since high levels of uncertainty and the evolution of Ghana's economy will require periodic adjustments of formulas to ensure that spending and saving decisions accurately reflect the country's needs and capabilities. Once the Stabilization Fund reaches a healthy level and as the spending capacity of the public sector grows it may be in Ghana's interest to make more money available for spending by increasing the range above its initial 50 – 70% level.

These features combine to make the Bill a strong force for accountable management of Ghana's petroleum revenues, but it is not without shortcomings and risks. Principal among them is that successful management of the amounts transferred to the annual budget will depend on Ghana's ability to articulate a development plan linked to a medium term expenditure framework (MTEF) and annual budgets. This alignment is critical to ensure that the oil and gas sector plays a positive role in Ghana's development strategy and that the resource windfall is spent effectively. The Bill implicitly recognizes the risks associated with the expiration of Ghana's Poverty Reduction Strategy in 2009 and the weak alignment between the MTEF and annual budgets. The Government of Ghana urgently needs to address this issue to define a sustainable, effective and coherent investment path, otherwise the risk of wasteful spending remains high. This risk is exacerbated by the breadth of the eleven categories of expenditure which are permitted by Clause 22 to receive petroleum funding – the list extends beyond such traditional growth-producing sectors as health, education, and infrastructure to cover such issues as public safety, environmental protection and social welfare. While they are undeniably important for Ghana, the inclusion of these sectors increases the risk that the Annual Budget Funding Amount could be directed toward populist or unsustainable measures rather than being focused on expenditures that will promote long-term development. Thus the success of the revenue management strategy is very dependent upon development of appropriate development plans and budget implementation.

Some small changes would also have made the Bill even more transparent. The Bill does not clarify that the government's ability to declare information confidential can under no circumstances be used to withhold information disclosure of which is a mandated part of the annual report. In addition to the disclosures required under Clauses 48 and 50, the government should also have required that the annual report include information on the composition of the categories of investment and their geographic location.

4. THE PETROLEUM (EXPLORATION AND PRODUCTION) BILL

The contrasts between the Revenue Management Bill and the Petroleum (Exploration and Production) Bill are stark. In some sections, the E & P Bill failed to take advantage of opportunities to correct shortcomings in the current system for managing petroleum operations. In other sections, the Bill actually threatened to make the system less accountable than the status quo. Throughout, it failed to reflect the vibrant debate about oil-

sector accountability that has been going on in Ghana for several years. It also did not seem to benefit from the international lessons learned discussed above regarding responsible and effective extractive-sector institutions.

The Bill threatened to leave the contracting process – so crucial for the selection of effective partners and the effective monetization of underground resources – subject to broad discretion. Clause 19 would have empowered the Minister to award a contract based on a simple application by an oil company, with no requirement for competition, disclosure of other proposals, any standard for company qualification, or any showing of why a particular award was made. Article 49(3)(n) subsequently indicated that the Minister “may” make regulations in respect of “competitive bidding procedures for petroleum agreements,” but this was left totally at the Minister’s discretion.²²

International best practice suggests that countries most successfully find strong private partners and secure the best terms for the state when awards are made via open and competitive bidding procedures. The Natural Resource Charter states: “Competition in the award of contracts and development rights can be an effective mechanism to secure value and integrity.”²³ By giving the government a range of offers to compare against one another, competition enables a country to select the option that best suits its development needs, and obligates companies to make more attractive offers. Transparent competition in the award of contracts also provides citizens with vital information about the rationale behind the selection of partners and the terms those partners will be obligated to follow. The system proposed by Article 19 did not offer any of the benefits generated by an ordered and competitive system. Perhaps more troubling, the sort of discretion afforded to the Ministry under the Bill would have exposed Ghana to the risks of corruption and ill-informed decision-making that have plagued too many petroleum-rich countries.

The Bill did little to advance the cause of public disclosure of key oil-sector data and documents. As was discussed above, transparency of a wide range of information is critical to ensuring public oversight. Ghana is developing a strong international reputation for transparency and good governance, but in the natural resource sector there remain several major transparency gaps that threaten to undermine public awareness of the management of the petroleum sector and to damage accountability. These transparency shortcomings are underscored by the Revenue Watch Index, which measures the degree of natural resource transparency in 41 countries. Ghana scored only 32 points on a possible 100-point scale encompassing disclosures of mining-sector revenues, contracts, licensing processes and institutional rules, earning the ignominious ranking of “Scant Revenue Transparency.”²⁴

President Mills attracted positive international attention in 2009, when he announced his intention to publish Ghana’s extractive-sector contracts, but as of this writing no concrete actions have been taken to follow up on this announcement, and contracts remain opaque.²⁵ The E & P Bill represented a perfect opportunity to enshrine this commitment in law, but no provision for contract transparency was included.²⁶ Similarly, the Bill did nothing to deepen Ghana’s commitment to make transparent its receipts from the oil sector.

Ghana's Extractive Industries Transparency Initiative (GHEITI) has published extensive information on the revenues that are being generated by the country's mineral sector. But in the absence of enshrinement in law, EITI remains subservient to political cycles and lacks guarantees of reliability, predictability, and regularity. Future regimes with weaker commitments to transparency of public revenues could retrench on the commitment to revenue reporting in the absence of a firm legal requirement. Both Liberia and Nigeria have mandated revenue reporting in law – the E & P Bill disregarded the opportunity to do so in Ghana.

The Bill did not provide for a strong oversight role for Parliament, which is particularly crucial in the petroleum industry, given (1) the complexity of the industry; (2) the large size of the revenues contemplated; (3) the risks of environmental destruction if management is not effective; and (4) the high level of public scrutiny of the industry and risk of conflict if it is not perceived to be serving the public interest. Many other countries have included in their Exploration and Production legislation firm rules requiring periodic reports to Parliament by the Ministry, the regulatory body, and/or the National Oil Company, covering issues such as progress on exploration profiles, production levels, state revenue, community relations, and environmental management. Ghana's E&P Bill did not include any explicit rules on executive reporting to Parliament. In fact, besides reaffirming the Constitutional requirement that agreements are subject to legislative approval, the word "Parliament" did not appear once in the Bill.

The fiscal terms in Ghana's oil sector have heretofore been allowed to vary on a contract-by-contract basis rather than being enshrined in law, with the concomitant risks discussed above – sub-optimal financial outcomes, corruption, and difficulty of enforcement. Most countries leave some terms up for negotiation on a contract-by-contract basis; this can facilitate competition among bidders and the tailoring of fiscal relationships to the peculiarities of individual fields. But it tends to serve the interests of producing countries best when the number of negotiable terms is small, and a core is established firmly in law. In Angola, for example, the law establishes the tax and royalty rates, and leaves the production-sharing split (which serves an economic purpose somewhat akin to Ghana's Additional Oil Entitlement), area fees and bonuses subject to contract-by-contract variation. The E & P Bill did virtually nothing to attempt to alter the status quo, leaving most of the key fiscal terms variable from one contract to the next, including royalty,²⁷ acreage fees,²⁸ Additional Oil Entitlement and income taxes.³⁰

A final concern was perhaps the most significant in the frosty parliamentary reception that led to the E & P Bill's withdrawal: it did nothing to address the current confusion that surrounds the institutional relationships among the public bodies charged with managing the petroleum sector. Situating and establishing the rules for the regulatory/monitoring function often proves particularly complex – and particularly crucial – for new oil producers. Different governments have chosen different models for the regulatory function, with some situating it in the sector ministry, others giving the National Oil Company (NOC) *de jure* or *de facto* regulatory power, and still others creating a separate independent regulatory body.

Whichever model is selected, it is crucial for the regulatory role to be clearly established, and for the rules on the relationship between various government actors to be firm. In its report on Good Governance in the National Petroleum Sector, Chatham House articulated international best practice as follows: “Whatever the organizational model for governing the petroleum sector, clarity of goals, roles, and responsibilities between agencies is crucial.”³¹

The role of institutional actors in Ghana’s oil sector has been hotly debated for several years, with critics charging that GNPC had assumed an oversized role relatively unconstrained by intra-governmental accountability mechanisms. The E&P Bill offered no significant clarification of the rules of the game. The Bill offered the Ministry of Energy broad regulatory powers – Clause 4 explicitly stated that the Minister “shall regulate petroleum operations,” and further clauses explicitly empowered the Ministry to inspect operations (Clause 5), request information from companies (7), make decisions on block maps and unitisation (8 & 10), review and approve decommissioning plans and production programmes (14 – 15), and issue regulations on safety, environment, economic impact, community relations and a host of other key issues (49).

Within the context of this assignment of regulatory responsibilities to the Ministry, the Bill provided no clear guidance on the relationship between the Ministry and the GNPC. The Corporation’s activities are currently governed by the GNPC Law of 1983 (PNDC Law 64), which provides little structure for the Corporation’s reporting structure and authorizes GNPC to “establish and maintain a reserve fund” to meet its expenditures.³² Several reports have indicated that in practice, GNPC has to date been performing most of the regulatory functions inherent in the management of the petroleum sector. The E & P Bill sought to formally transfer many of these functions to the Ministry without providing changes to the status quo on the relationship between the Corporation and the Ministry, GNPC’s level of decision-making autonomy in commercial issues, or the mechanisms by which GNPC will finance its activities.

The Bill made several references to the (now downstream-only) Petroleum Regulatory Authority – giving it a role, alongside the Ministry in inspection, the review of plans, sub-contracting, auditing, and health and safety, without establishing the core provisions on the expansion of the Authority’s activities into the upstream sector or the chain of command between the Authority and the Ministry in these matters. In several instances a responsibility was allocated to “the Ministry or the Authority” (e.g., Clauses 5, 7, 38, 46) without spelling out how the two bodies were to interact or who would have ultimate responsibility.

A law that left in place so much confusion vis-à-vis the relationship between the major public actors in exploration and production would have exposed Ghana to several risks, including weak oversight of the activities of private companies, confusion in reporting, delays in approvals and inefficient sector development, opacity and corruption. Objections to the Bill’s treatment of these questions of institutional role were severe, with some analysts

charging that the failure to establish an independent regulatory body violated Article 269 of Ghana's constitution, which calls for the establishment of independent commissions to "be responsible for the regulation and management of the utilization of the natural resources concerned and the co-ordination of the policies in relation to them."

As of the writing of this article, the government had submitted a new Petroleum Commission Bill to address this question of regulatory structure. We touch on the implications of this Bill briefly in Section VI.

5. THE IMPACT OF PARTICIPATORY PROCESSES ON THE LEGISLATION

How did the same government simultaneously introduce two petroleum-sector bills with such divergent approaches to public accountability? Why did the Revenue Management Bill reflect the vibrancy of the policy debate that had been raging in Ghana for years, while the E & P Bill read like a generic document cut and pasted from a foreign land in 1990? A full exploration of the drafting processes of the two documents is beyond the scope of this paper, but one major difference bears special note. The drafters of the Revenue Management Bill, associated principally with the Ministry of Finance and Economic Planning, conducted extensive public consultations around the Bill from the earliest stages of its development. They held town hall-style meetings including experts and concerned citizens in Accra, and in all of Ghana's regions, some of which reportedly attracted upwards of 500 people. They conducted a nation-wide survey of revenue management options, focusing on "the twelve fundamental questions guiding the preparation of the law."³³ The Ministry published the full text of preliminary proposals on-line, fulfilling the demands of civil society groups and Ghanaian citizens for an opportunity to review the drafts directly.³⁴ The authors actively solicited comments on two drafts of the proposed legislation from international advisors, the diplomatic community, Ghanaian experts, and various government officials.

This large-scale public consultation was time-consuming and costly, but it served two crucial purposes in the build-up to the introduction of the Bill. First, it resulted in tangible improvements to the document that made it a better fit for Ghana's economic needs and reduced the risk of mismanagement. Paramount among these changes was a revision in the formula governing the balance between revenues available for budgetary expenditure and allocations to the Stabilization and Heritage Funds. The proposal circulated in March 2010 would have limited the amount available to the budget, and hence domestic investment, to an "Estimated Sustainable Income" (ESI), derived from a formula based on the system in place in Norway and Timor-Leste. The ESI would have restricted annual spending to less than 4% of the projected value of Ghana's petroleum wealth, directing the rest of annual oil earnings to be transferred to the Stabilization and Heritage Funds. This represented an extremely conservative strategy that makes perfect sense in an advanced economy like Norway's but likely would have resulted in extreme under-investment in Ghana and limited the country's ability to use oil revenue to promote broad-based development.³⁵ As a result of

the inputs received during the public consultation process, the authors revised the formula drastically, and ended up with the legislative proposal to allow 50 – 70% of benchmark revenue to be directed to the budget (with an investment focus), while allocating the rest to build a cushion in the Stabilization and Heritage Funds.

Another example of changes made as a result of the consultation process was the elimination of two programs included in preliminary drafts that lacked adequate oversight provisions and risked becoming sources of leakage and cronyism. Initially, 15 percent of Heritage Fund holdings were to be invested in “Economically Targeted Investments” in strategic sectors of the domestic economy on a “commercial basis,” but the proposals provided no guidance on implementation, creating a risk that these funds could be used for political patronage or for projects that did not efficiently advance medium-term development goals.

The Block Grants provisions of the May 2010 proposal provided for up to 5% of the Annual Budget Funding Amount to go toward financing “socio-economic and environment related mitigating activities in communities negatively impacted by petroleum operations” and to finance “targeted small and medium scale interventions, as defined by the Minister.” The draft provided limited guidelines on the procedures and criteria for allocating the grants, and did not indicate who specifically would have benefited from a grant or been accountable for the use of funds, threatening to generate massive political scrambles at the sub-national level for securing a larger share of the oil windfall. Conflicts ravaging the Niger Delta provide a stark reminder of the risks associated with discretionary allocation and opaque use of sub-national oil windfalls. As a result of the inputs received around these provisions, the drafters ultimately decided to eliminate them, and to promote the accomplishment of key development goals in a structured way via the requirement in Clause 22 to direct 70% of annual petroleum revenue spending to the eleven priority sectors.

The second key impact of the public consultation is that it familiarized Ghanaians with the contours of the government’s proposals, facilitated the formation of coalitions of support, screened out many of the most controversial ideas, and enabled the government to hone its arguments in favor of the approach. This did not trivialize the impact of legislators themselves over the Bill’s content, as is evidenced by Parliament’s decision to remove the prohibition on using projected oil encumbrances as collateral for loans. But it did help ensure that the Bill had the broad public support (or at least public understanding) to make it less likely to be rejected wholesale. This broad public support provided critical support for the ultimate passage of the legislation.

The Petroleum (Exploration and Production) Bill’s introduction into Parliament was preceded by no such public vetting. In fact, many Ghanaians who monitor the oil industry closely were surprised by the introduction of the Bill, which was authored primarily by the Ministry of Energy. This undoubtedly impacted the prompt and forceful outcry against the Bill once it was read,³⁶ and Parliament’s decision that it was not workable and needed to be sent back rather than simply amended. Clearly the legislative process represents a crucial check in Ghana’s constitutional system, but the difference in the development of

the two Bills demonstrates the additional value of public scrutiny and public inputs before legislation is introduced into parliament.

6. CONCLUSION

Where Does The Legislation Go From Here?

The Revenue Management Bill laws approved by Parliament in early 2011, with changes made to the provisions on using expected future revenue streams as collateral for debt, but with the other core provisions of the Bill essentially intact. It is unknown at the time of this writing whether the government will soon introduce a new proposal to replace the E & P Bill. In December 2010, the government sought to address the major omission of the earlier Bills by introducing the Petroleum Commission Bill, which called for the creation of an independent Commission to “oversee the regulation and management of petroleum.” The Commission, whose design adheres largely to Ghana’s experience with similar bodies in the mineral and energy sectors, is called to provide a wide range of regulatory functions, including promoting well-designed and cost-effective exploration and exploitation; monitoring compliance with national policies, laws, and regulations, including on fiscal and environmental matters; auditing activities of oil companies; promoting local content; managing data; and assessing applications.³⁷

The Bill contains several features likely to have a positive impact on accountability in the sector. The situation of regulatory duties in the Commission may remove some of the risk of conflict of interest inherent in the current set-up wherein GNPC has broad regulatory powers. The Commission is to be governed by an independent board of directors, and technical expertise is a criteria for members’ selection.³⁸ The Commission is required to publish an Annual Report on “petroleum resources and activities in Ghana,”³⁹ report to Parliament, and its activities are to be audited by the Auditor-General.⁴⁰

As Parliament and Ghana’s citizens consider the Petroleum Commission Bill, however, they would be well-advised to reflect carefully on the strengths and shortcomings of similar commissions in other sectors, and to build those experiences into the design of this institution for the petroleum sector. They should also critically examine the relationship between the Commission and GNPC, which is not thoroughly spelled out in the Bill. Clause 23(3) states that “on the commencement of this Act the Ghana National Petroleum Corporation shall cease to exercise any function in relation to the regulation of petroleum exploration and extraction.” But it does not establish a chain of authority between the Corporation and the Commission, nor does it articulate a vision for what GNPC’s role will be if its quasi-regulatory responsibilities are removed. Many National Oil Companies that have not yet reached a stage of technical or financial maturity struggle to develop effectively when they have no administrative role. It is well and good to indicate that GNPC is to have a “commercial” role, but unless the contours of that role are fleshed out, particularly during the initial period where the company will not perform the roles of an operational oil company, GNPC risks becoming an empty shell subject to inefficiency and corruption.

Finally, it should be stressed that the while some version of the Petroleum Commission Bill could be a useful element of a reform package, it does not on its own obviate the need for revised legislation on exploration and production. The Bill says little on licensing procedures, fiscal terms, revenue or contract transparency, or the obligations facing international oil companies. It is not necessary or appropriate that all of these elements be included in the Commission Act, but if Ghana does not take steps to ensure that they are adequately legislated somewhere, the country risks sub-optimal results and serious accountability gaps.

The divergence between the Revenue Management Bill's attention to strong accountability measures and the E & P Bill's failure to reflect Ghanaian or international experience underscores the complexity of the challenge of melding technocratic details with openness and oversight, all the while building credible political constituencies to support the evolution of legislation and its effective implementation once enacted. Now that the oil from Jubilee has begun to flow, the task of building accountable institutions, rules, and procedures gets more difficult with each passing day that legislation is not enacted. As Ghana's leaders and citizens continue their quest for a stable and prosperous oil sector, the need for clear legislative frameworks for open and responsible oversight should remain at the forefront of the political agenda.

ENDNOTES

¹For an account of the Parliamentary debate surrounding the Bills, see Frederick Asiamah, "Parliament Divided," *Public Agenda*, November 22, 2010, available at <http://allafrica.com/stories/201012220240.html>.

²See Natural Resource Charter, November 2010, available at www.naturalresourcecharter.org.

³International Monetary Fund, Guide on Resource Revenue Transparency, 2007, available at <http://www.imf.org/external/np/pp/2007/eng/051507g.pdf>.

⁴International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds: Generally Accepted Principles and Practices – "Santiago Principles," October 2008, available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

⁵Natural Resource Charter, *supra* note 2, at 4.

⁶See the IMF Guide, *supra* note 3, at 24 – 31 for a more detailed discussion of this issue.

⁷For a full breakdown on the data produced by GEITI, see http://www.geiti.gov.gh/site/index.php?option=com_phocadownload&view=sections&Itemid=54.

⁸See, e.g., Mohammed Amin Adam, "Kosmos Deal and the National Interest – Slippery Steps of a New Petro-State," *Ghanaian Chronicle*, July 10, 2010, available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=185825>.

⁹See, e.g., ISODEC and Oxfam America, Ghana's Big Test: Oil's Challenge to Democratic Development, 2009, available at <http://www.oxfamamerica.org/publications/ghanas-big-test>, at 37 – 42.

¹⁰Petroleum Revenue Management Bill, Clause 19(2).

¹¹The sectors are: agriculture and agro-business; human resource development; physical infrastructure and service delivery in education and health; water and sanitation; road, rail, and port infrastructure; rural development; the strengthening of the institutions of government concerned with governance and the main-

tenance of law and order; public safety and security; alternative energy sources; environmental protection, forest management, and the protection of water bodies; and provision of social welfare and the protection of the physically handicapped and disadvantaged citizens. Petroleum Revenue Management Bill, Clause 22(3).

¹²See Commission on Growth and Development, *The Growth Report: Strategies for Sustained Growth and Inclusive Development*, 2009, available at: www.growthcommission.org.

¹³Edwin M. Truman, *A Blueprint for Sovereign Wealth Fund Best Practices*, Peterson Institute for International Economics, 2008, available at <http://www.petersoninstitute.org/publications/interstitial.cfm?ResearchID=902>.

¹⁴Petroleum Revenue Management Bill, Clauses 50 – 51.

¹⁵*Ibid*, at Clause 51(3)-(4).

¹⁶*Ibid*, at Clause 16.

¹⁷*Ibid*, at Clauses 17, 20.

¹⁸*Ibid*, at Clause 18.

¹⁹*Ibid*, at Clauses 46 – 49.

²⁰Clause 56(1) of the Bill spells out the membership, to include representatives of “independent policy research think tanks;” civil society and community-based organizations; Trades Union Congress; National House of Chiefs; Association of Queen Mothers; Association of Ghana Industries and Chamber of Commerce; Ghana Journalists Association; Ghana Bar Association; Institute of Chartered Accountants; Ghana Extractive Industries Transparency Initiative; and academia.

²¹*Ibid*, at Clauses 53 - 56.

²²The system proposed under the E & P Bill can be contrasted with the contracting mechanism established in Angola’s Petroleum Activities Law. Article 44 of that law provides that rights are to be provided by open tender under published criteria, and that direct negotiation is only allowable where a tender was conducted and there were either (a) no bids; or (b) no bids that the Concessionaire deemed to meet the established criteria.

²³Natural Resource Charter, *supra* note 2, Precept 4.

²⁴Revenue Watch Index 2009, available at <http://www.revenuwatch.org/rwindex2010/index.html>.

²⁵See Revenue Watch Institute, “RWI Convenes Experts in Ghana to Push for Transparency of Oil and Mining Contracts,” June 24, 2010, available at <http://www.revenuwatch.org/news/news-article/ghana/rwi-convenes-experts-ghana-push-transparency-oil-and-mining-contracts>.

²⁶By contrast, Niger has enshrined a commitment to contract transparency at a Constitutional level, and Liberia, Timor-Léste, Peru, and Colombia have done so in legislation.

²⁷Petroleum (Exploration and Production) Bill, Clause 40.

²⁸*Ibid*, at Clause 41.

²⁹*Ibid*, at Clause 44.

³⁰*Ibid*, at Clause 42. The Bill provides for payment of taxes in accordance with the Petroleum Income Tax Law, 1987 (PNDCL 188), which sets a baseline tax rate of 50%, but provides that this rate can be varied where “the Petroleum Agreement...makes alternative provision” (Article 6).

³¹Royal Institute for International Affairs, *Good Governance of the National Petroleum Sector – The Chatham House Document*, 2007, http://www.chathamhouse.org.uk/files/9761_ggdoc0407.pdf, page 4.

³²Ghana National Petroleum Corporation Law, 1983, Clause 18.

³³Ghana Ministry of Finance and Economic Planning, *Ghana Petroleum Revenue Management – Preliminary Proposal*, March 17, 2010, available at http://www.mofep.gov.gh/documents/Ghana_Petroleum_RevenueMgmt_Outline.pdf; Sarah Wachter, “Oil: Precious Bane,” *Emerging Markets*, May 27, 2010, available at <http://www.emergingmarkets.org/Article/2580121/OIL-Precious-bane.html>.

³⁴Publish What You Pay, “Ghana: Recent Activities,” last updated June 10, 2010, available at <http://www.publishwhatyoupay.org/en/where/coalitions/ghana>.

³⁵For a more detailed discussion of the economic differences between the original and revised proposals, see Joseph C. Bell, Patrick R.P. Heller, and Antoine Heuty, *Comments on Ghana’s Petroleum Revenue Management Bill*, August 2010, available at http://www.revenuwatch.org/files/Ghana_revenue_management_brief_final.pdf.

³⁶For examples of public reaction to the E & P Bill, see Civil Society Platform on Oil and Gas, Press Statement on the Need for Transparency and Accountability in Ghana's Petroleum Laws, November 5, 2010, available at <http://www.sierraexpressmedia.com/archives/15796>; Christian Council of Ghana and Ghana Pentecostal Coalition on Oil and Gas Find, Communiqué Issued by the Christian Council of Ghana and the Ghana Pentecostal Council after a Two-Day Roundtable with CSOs at Osu Presby Conference Room, Accra, July 26, 2010, available at <http://ghanaoilwatch.org/images/Articles/communique.pdf>.

³⁷Petroleum Commission Bill, at Clause 2.

³⁸Ibid, at Clause 2.

³⁹Ibid, at Clause 2(2)(k).

⁴⁰Ibid, at Clause 16.

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