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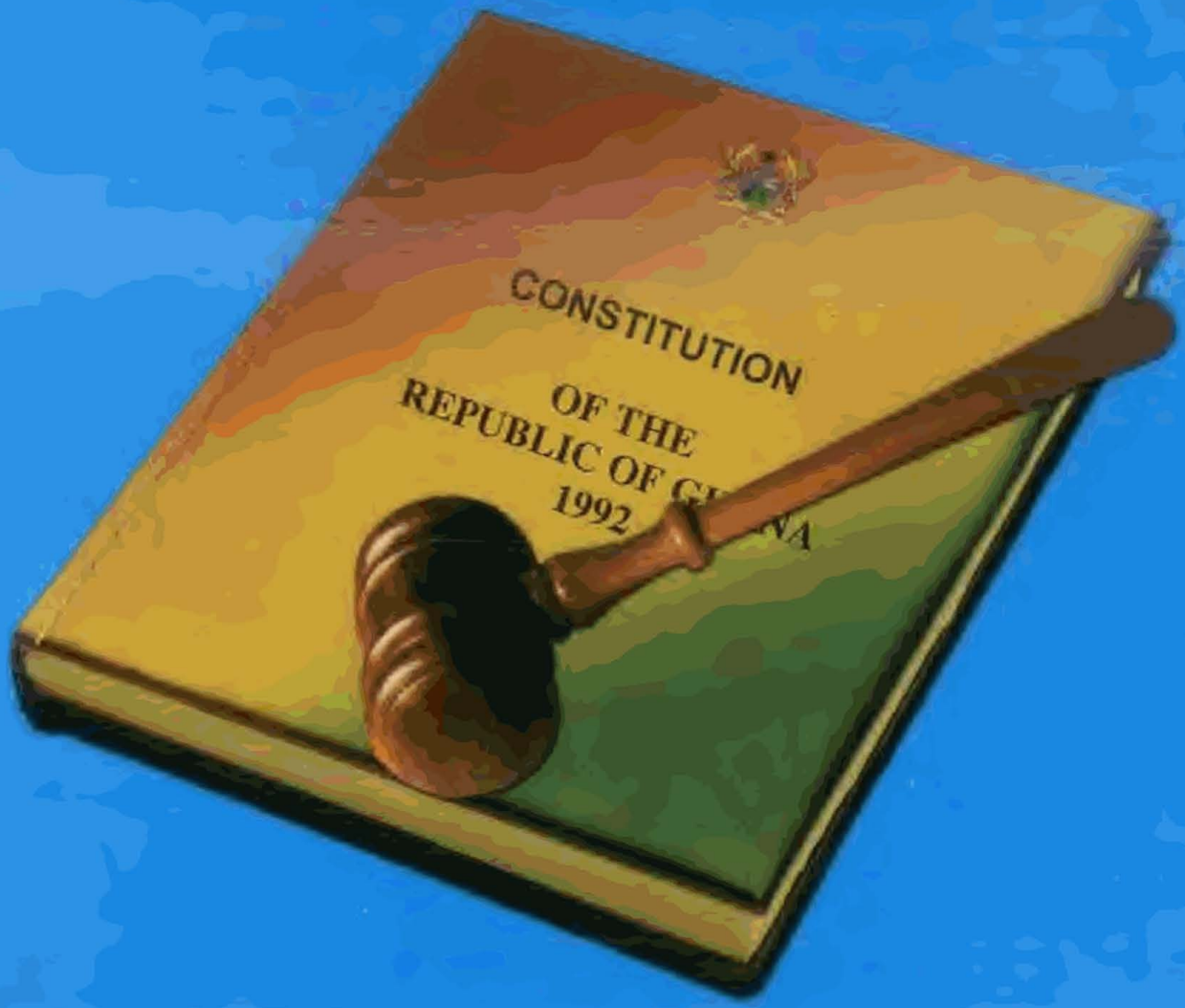
NATURAL RESOURCE MANAGEMENT IN GHANA: A CASE FOR CONSTITUTIONAL AMENDMENT



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NATURAL RESOURCE MANAGEMENT IN GHANA: A CASE FOR CONSTITUTIONAL AMENDMENT

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The Institute of Economic Affairs (IEA) Ghana was founded in October 1989 as an independent public policy institute dedicated to the establishment and strengthening of a market economy and a democratic, free and open society. It considers improvements in the legal, social and political institutions as necessary conditions for sustained economic growth and human development.

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Preface

This publication is a product of a research undertaken at The IEA as part of an ongoing Oil and Gas Project.

Mining (mineral extraction) in Ghana has a long history and that history is a love-hate one. Mining has been regarded with suspicion and has been attacked for several reasons, chief among which is the often leveled charge that the adverse environmental and social effects of mining are hardly ever addressed and that mining activity has detrimental consequences on the health, lives and livelihood of mining communities. Another accusation is that mining has not made a positive impact on the economic fortunes of Ghana because fiscal terms are all too often poorly or improperly defined. The third charge is that transactions, contracts and decisions about mining undertakings are not transparent, with limited or no public oversight. Given the problems which have beset Ghana's foremost income generating activity and the different dimensions and expectations that the discovery and exploitation of oil and gas presents, it is imperative that appropriate provisions are incorporated into the Constitution to remedy the problems.

The proposed review of the 1992 Constitution provides this opportunity. Proposed amendments relate to Articles 257, 268 and 269 of the 1992 Constitution and seek specifically to (a) broaden the remit of Article 257 to cover all extractive natural resources and not just minerals, (b) strengthen State ownership rights and the fiduciary duty of the State in the use of natural resources; (c) embed in the Constitution measures for transparency, accountability, equity, environmental protection, and public oversight in all transactions, contracts, and undertakings regarding the exploitation and

management of natural resources and the revenues derived from them; and (d) suggest that provisions that may undermine the demands for transparency and accountability in the management of natural resources, be expunged from Articles 268 and 269. The proposed amendments signal Ghana's efforts to overcome the tragedy of its mining history.

We look forward to receiving your feedback and hope you find this publication useful.

Thank you.

Jean Mensa
Executive Director

1. Introduction

Mining (mineral extraction) in Ghana has a long history and that history is in general not a happy one for three reasons:

(a) Transactions, contracting and decisions about mining undertaking are not transparent and have limited to no public oversight;

(b) Fiscal terms are all too often poorly or improperly defined and have not ensured maximum benefits to the citizens of Ghana; and

(c) The environmental and social effects have not been major considerations in any of the stages of mining activities, with detrimental consequences on the health, lives and livelihood of those who live in areas within which mining activities occur.

Mining activities for the most part have not been for broad and sustained improvements in living standards of citizens, enriching only mining companies, their foreign affiliates, and a narrow local elite. The Ghana Extractive Industries Transparency Initiative Aggregator reports – the Inception Report (Sept. 2006), the 1st Aggregated Report (Feb. 2007) and the 2nd Aggregated Report (July 2007) observed that Ghana is not benefitting as much from its mineral resources as it should and pointed to legislative lapses, institutional coordination problems, and policy weaknesses as the contributory factors.

With the discovery of oil and gas and its subsequent exploitation, it is imperative that appropriate provisions to ensure the prudent management of Ghana's oil and gas resources are incorporated into the Constitution in order to avoid the historical mistakes of the country reflected in the mining industry. Without such provisions, Ghana cannot be said to have learnt from its history of mining activities and to be making a serious effort to overcome the tragedy of that history.

Without entrenching transparency and accountability as a national policy, policymakers can continue to transact and contract out resource exploitation under terms that in the long run are detrimental to the people of Ghana, evade financial accountability, and divert resource revenues for their own purposes at the expense of the wider population. So it is that with petroleum production, failure to ensure equitable distribution of the benefits from petroleum revenues may result in dissatisfaction amongst various groups. Unless regulation is entrenched in the Constitution to ensure that Ghana's petroleum and natural resource revenues, generally, are prudently managed and saved, they may continue to be spent hurriedly and unwisely to the detriment of both current and future generations, who also have equal ownership of the resources.

The constitutional review provides an opportunity to help Ghana avoid many of these problems and rise above partisan politics by embedding measures for transparency, accountability, equity, environmental protection and public oversight in the new Ghanaian constitution. Additional questions on how the petroleum industry should be organized can be answered through industry-specific legislation. However, certain basic principles should be secured in the constitution to provide the basis for protecting petroleum revenues as well as revenue from other natural resources, against later abuses.

The rest of the paper is organized as follows: Section 2 briefly outlines the natural resource provisions in the 1992 Constitution. Section 3 draws on the existing literature and identifies possible areas that should be considered for revision in the Constitution and the rationale behind them. The proposed amendments follow in section 4.

2. Existing Constitutional Provisions on Natural Resources

Chapter 21, Articles 257-269, of the 1992 Constitution addresses

Lands and Natural Resources:

- It defines public lands and the authority over such lands.
- It stipulates the establishment of a Lands Commission and Regional Lands Commissions.
- It defines ownership of lands and the vestment of Stool and Skin lands and property.
- It addresses the issue of protection of natural resources with a provision requiring Parliamentary ratification of all agreements relating to natural resources.
- It provides for the establishment of natural resource commissions (e.g. Fisheries Commission and a Minerals Commission).
- It also, however, permits Parliament to exempt some transactions from the protection afforded by Parliamentary ratification.

3. Areas for Constitutional Consideration

(i) Citizens and State Ownership Rights

The Model Petroleum Agreement, in conformity with Article 257 (6), states that:

> "All Petroleum existing in its natural state within Ghana is the property of the Republic of Ghana and held in trust by the State"

The contract type utilized in the Ghanaian petroleum industry is the production sharing arrangement, whereby the development of an oil field is done jointly by private investors and the State. Agreements have been signed between the State (represented by the Ministry of Energy), the National Oil Company, (Ghana National Petroleum Corporation, GNPC) and private investors. GNPC, acting on behalf of the State, participates actively in operations as a commercial partner.

There are two important considerations that must be addressed to strengthen the ownership rights over natural resources. First, as noted by S.K.B. Asante, state ownership of natural resources is a fundamental principle of Ghana's natural resource law. The State therefore does not share that ownership with any other entity individual, corporate or traditional. When the State grants contractural rights under a resource agreement, the agreement does not constitute a qualification of the underlying citizens' ownership.[1]

Second, notwithstanding the interpretation that the Ghana National Petroleum Corporation (GNPC) 'acts on behalf of the State' when it participates as a commercial partner, the Ghana National Petroleum Corporation Act, 1983 (PNDCL 64) setting up the GNPC, essentially made GNPC a revenue collector and allowed GNPC to deduct its expenditure from the revenues collected before remitting the residual to the Consolidated Fund.

Effectively, under these provisions, GNPC, acting on behalf of the State, participates actively in petroleum operations as a commercial partner, a regulator, *and a fiscal agent.* Indeed, GNPC alone takes up the responsibility for assessing, collecting and commercializing the production share of petroleum due to the State.

Over time, by practice and not by law, GNPC, as a single multipurpose agent, has defined its **operational representation rights** as

[1] S.K.B. Asante and Associates in a presentation to the Parliamentary Mines and Energy Committee on the Ghana Petroleum Exploration and Production Bill, 2010.

synonymous with **ownership rights**, contrary to the Constitutional position that the resource belongs to the people of Ghana.[2] Moreover, by the provisions of PNDCL 64 (Clauses 4, 18 and 21), remitting petroleum revenues to the State (that is, payment into the Consolidated Fund (CF)) is a residual - not a proprietary obligation - in GNPC's accounting.

Together, Clauses 4, 18 and 21 state that petroleum revenue payments into the CF are possible only:

(a) after GNPC has accounted for all its expenditures (discretionary and non-discretionary) and declared profit or surplus;

(b) after making provision for income taxes;

(c) after meeting GNPC's reserve fund to meet long-term expenditure needs;

(d) after meeting GNPC's welfare or provident fund; and

(e) subject to the recommendation of the sector Minister.

These provisions indirectly make GNPC a resource owner and potentially, an absolute fiscal agent. In essence, GNPC retains virtually all revenues from various sources—with the probable exception of income taxes that may not accrue because of capital and other operations—in their original form. Furthermore, the possibility of paying dividends is also remote. This is inconsistent with the constitutional provision that the resource belongs to the people of Ghana. New constitutional provisions should reiterate and strengthen the Republic's ownership rights over the mineral and petroleum resources and revenues.

[2] Constitution of the Republic of Ghana, 1992, Article 257(6).

(ii) Fiduciary Duty of the State

That the State must utilize the resources in the interest of the people involves three key elements:

(a) Using resource revenues to promote sustainable economic growth;

(b) Ensuring effective use of resource revenues and quality of spending;

(c) Signalling prudence, both to citizens and to international capital markets, about how the country spends its resource revenues.

Precept 7 of the Natural Resource Charter[3] states that resource revenues should be used primarily to promote sustained economic growth through enabling and maintaining high levels of domestic investment.

> Under the Namibian constitution, the state has a duty to use natural resources to "maintain the welfare of the people." The South African constitution uses a rights-based framework, stating that everyone has the right to the "use of natural resources while promoting justifiable economic and social development"
> *From: Protecting the Future: Constitutional Safeguards for Iraq's Oil Revenues, Revenue Watch MAY* 2005

The rationale is that revenues from resource extraction are intrinsically time-limited. Natural resources will be depleted with an uncertain potential production time path (Boadway and Keen, 2010). Hence, even where citizens' needs are acute, if all the resource revenues are consumed but not invested, the resulting increase in living standards

[3] The Natural Resource Charter has been written by an independent group of economists, lawyers, and political scientists to assist the governments and societies of countries rich in non-renewable resources to manage the resources in a way that generates economic growth, promotes the welfare of the population in general and is environmentally sustainable.

will not be sustained. If the revenues are to be harnessed for a sustained increase in living standards, then a substantial part must be invested outside the resource sector, in the nation's physical infrastructure, and in education, health care and social protection.[4]

The quality of spending is also important. The government should use resource wealth as an opportunity to secure effective public expenditure and to increase the efficiency of public spending. A gradual build-up of spending may be necessary to ensure the quality of spending and to avoid adverse macroeconomic consequences. Finally, signalling prudence requires smoothing of spending of resource revenues and restraint from borrowing against the resources themselves. Should borrowing be necessary, prudence requires building the country's defences against an inability to repay loans and against an unanticipated drop in commodity prices.

(iii) Natural Resource Funds

Natural resource funds can take the form of stabilization funds, heritage funds (under varying names) or a combination of both. The Petroleum Revenue Management Bill (PRMB), currently in Parliament for consideration, provides for the setting up of both a stabilization fund and a heritage fund for Ghana. For the avoidance of doubt and the protection of this requirement in the PRMB, the establishment of resource savings funds could be enshrined in the Constitution. For example, in Alaska, a constitutional amendment, not a legislative act, created the Alaska Permanent Fund (APF). The APF's constitutional status protects it from the economic and political changes that might otherwise prematurely deplete the fund, as has happened in Nigeria.

[4] Natural Resource Charter, www.naturalresourcecharter.org p. 20

(iv) Transparency

For public oversight to be successful, the Government needs to be transparent on its part about what occurs in the oil and gas industry. Citizens can only be confident about the integrity of the resource extraction process if they know about it. Governments should adopt transparent processes for establishing and implementing resource policies, for awarding contracts, for taxing, collecting and managing revenues and for taking spending decisions.

Constitutional provisions should stress the following elements:

a) Policies, legal, regulatory and contractual frameworks should be clear and public.
b) All resource revenues due to the State and all spending from the revenues be included in the public budgetary process.
c) Procedures for the award of contracts, where applicable, and final contracts should be public, and the true identity of contract or concession-holders should be known.
d) If there is a national resource company, it must also be clearly governed and shall be transparent.

Experience shows that public disclosure requirements improve the quality of data the government gathers and maintains. Wide dissemination of critical information about extraction increases the likelihood that all relevant officials including ministries of finance, energy, mining, environmental and regulatory agencies, will have the information they need to do their jobs. Making public information, such as company payments to the Government, will make it easier for the Government to know if it is collecting what it should and will make complex extractive concessions easier to enforce and monitor, overall.

Finally, provided the extractive regime enjoys public legitimacy – which is itself only possible with public information – having key

information in the public domain reduces the likelihood that successive governments will make arbitrary and ill-considered changes to a country's extraction regime.

Publishing information is a requirement in the PRMB and, if passed into law, information on *"all records of petroleum payments or receipts, including royalties, carried interest, additional interest, additional oil entitlement, dividends and corporate income tax, whether in cash directly to the Government, or in crude oil to GNPC or any other national petroleum company on behalf of the Government"* is to be published in the national dailies on a quarterly basis. Constitutional provisions can enshrine the broader issues of transparency at various stages of the extraction process and use of revenues as covered in the PRMB and the regulatory law.

(v) Public Oversight

While transparency is necessary, it is not sufficient for informed public understanding of what governments do. For a better understanding and assurance of what government is doing with inter-generational resources, it is important to have a representative body of the public to have a legitimate and formalized role overseeing and interacting with industry and government institutions charged with responsibility for contracting, transacting and extracting natural resources and for the use of revenues derived therefrom. Difficult as it is for politicians to acknowledge, our history is that parliamentary ratification has not been enough to safeguard the public interest. The Minerals and Mining Act, 2006 (Act 703) leaves much to be desired. Also, the fiscal arrangements in several of the nation's mining contracts and transactions for exploration and extraction are objectionable and detrimental to the State as the owner of the resource.

Extractive resources are public assets and decisions about their

exploitation should be transparent and subject to informed public oversight. It is for this reason that the PRMB provides for the establishment of a Public Interest and Accountability Committee (PIAC). The mandate of such an oversight committee should include the following primary elements:

(a) monitoring and ensuring procedural compliance with the law by government agencies that have responsibility in the management of the nation's natural resources;

(b) monitoring and ensuring substantive compliance with use of revenues derived from natural resources; and

(c) providing information to the public, giving citizens a voice in oil and gas revenue use and management.[5]

During nation-wide public consultations on the PRMB, it became clear that many Ghanaians welcomed this instrument of public oversight and viewed it as a new initiative that will need constitutional backing if approved by Parliament.

(vi) National Oil Company

Precept 5 of the Natural Resource Charter states: *National resource companies should be competitive and commercial operations. They should avoid conducting regulatory functions or other activities.* Because of its size and its preferred access to resources and finance, a national oil or mining company is often one of the most important political and economic actors in a resource-rich country. According to the Natural Resource Charter, this privileged position may lead to abuse by entrenched managers or favored government officials

[5] These principal elements are adapted from Sao Tome and Principe Oil Revenue Management Law, Columbia University, Earth Institute, Feb. 2004.

responding to their own personal incentives.

The best antidotes are transparency in structure and activity of the NOC and openness to competition. National resource companies sometimes take on regulatory functions for the sector but this can result in serious conflicts of interest between commercial and wider public interests. To avoid this, the Government should separate the national resource company from the licensing, and technical and regulatory supervision of the resource sector, placing those functions instead in independent governmental entities. Where the functions are retained within the national company, conflicts of interest can be reduced and better monitored if they are segregated from commercial operations and subject to separate supervision and reporting. A provision for the establishment of a Petroleum Commission or a Petroleum Regulatory Authority is needed in the Constitution.

(vii) Environmental Protection

Precept 6 of the Natural Resource Charter states: *Resource projects may have serious environmental and social effects which must be accounted for and mitigated at all stages of the project cycle.*

Because of their location, nature and often their scale, resource projects can have significant environmental and social effects and the government must account for those in any plan to initiate exploration or to develop the resource. The initial decision to explore or develop should be informed by an understanding of the possible environmental and social consequences, usually through a strategic or project impact assessment and these consequences need to be weighed in the decision of whether to invest. Public participation is an integral part of the process. If the decision is made to invest, then rigorous environmental and social assessments should precede the project, and monitoring of same maintained throughout the project's life consistent with a plan to minimize or mitigate possible adverse environmental and social consequences specific to the project.

The environmental costs of extraction are often borne disproportionately by those in the vicinity of the extraction process. These citizens have an overwhelming claim to be compensated through services or cash for these environmental costs. Indeed, without a clear commitment to provide reasonable compensation for these costs as well as equitable participation in the national benefits, local communities are liable to sabotage the extraction process and even assert ownership claims.

The opportunity to exploit oil and gas offshore and onshore means that oil and gas activities could become an important sector of development in the country with all its attendant risks. As is presently the case with mining, onshore oil and gas activities may coincide with areas of important biodiversity like national parks, game and forest reserves, water bodies and so forth. The environment, environmental amenities, biodiversity and social effects in areas of extractive resource activities are fundamental to human development and survival and are worth constitutional protection.

4. Proposed Amendments and Additions

Proposed amendments (additions and deletions) relate to Articles 257, 268 and 269 of the 1992 Constitution.

(i) Article 257

(6) 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.

The interpretation of minerals can be problematic. The issue is whether

it includes oil and gas. For the avoidance of doubt, the clause may be amended to read as follows:

Proposed Amendment

(6) All extractive natural resources in their 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 are 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.

Proposed Addition to Article 257

(7) The ownership rights of the people of Ghana of all natural resources shall not be varied or qualified under any transaction, contract of undertaking, and or by any other person or body of persons.

(8) Natural resource development, including the decision to develop, the adoption of fiscal and regulatory reges, and the spending of resource revenues shall be designed to protect the interest of citizens, ensure economic growth, promote the welfare of the population and ensure sustainable development.

Protecting Natural Resources

Article 268

(1) Any transaction, contract or undertaking involving 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 of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.

(2) Parliament may, by resolution supported by the votes of not less than two-thirds of all the members of Parliament, exempt from the provisions of clause (1) of this article any particular class of transactions, contracts or undertakings.

Proposal:

Unless there are considerations of State interest, Clause 2 of Article 268 should be expunged from the Constitution. A governing party with a strong majority can undermine the demands for transparency and accountability by using this provision to engage in transactions or sign contracts that may not be in the long-term interest of Ghanaians. Parliamentary ratification should be a minimum requirement no matter how small the contract may be perceived to be. Otherwise, a supermajority requirement of three-quarters of Parliament's assent should be the minimum in all matters relating to natural resources. This is necessary to guard against the strong incentive of politicians to attempt to circumvent or weaken the constraints on the law.

To this end, clause (1) may be amended as follows:

(1) Any transaction, contract or undertaking involving 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 of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification ***by the votes of not less than three-quarters of members of Parliament.***

Proposed Additions to Article 268

Accountability and Transparency, Public Oversight

(2) All extractive natural resources are public assets and any transaction, contract or undertaking about their exploitation and

about the collection, use, and management of the revenues derived from them should be subject to

(a) the highest standards of transparency and accountability, and

(b) informed public oversight.

(3) Parliament shall provide for the establishment of a Public Oversight Body which shall be responsible for the oversight of the use and management of natural resources and the revenues therefrom.

(4) Resource revenues should be used primarily to promote sustained economic growth and promote sustainable development by maintaining high levels of domestic investment guided by a long-term national development plan.

Environmental Sustainability

(5) Natural resource projects may have serious and long-term environmental and social effects. The State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources, and biodiversity resulting from pollution or other causes associated with resource extraction activities.[6]

Article 269

(1) Subject to the provisions of this Constitution, Parliament shall, by or under an Act of Parliament, provide for the establishment, within six months after Parliament first meets after the coming into force of this Constitution, of a Minerals Commission, a Forestry Commission, Fisheries Commission and such other Commissions as Parliament may determine, which shall be responsible

[6] Adapted from Uganda, 1995 Constitution, Article 243.

for the regulation and management of the utilization of the natural resources concerned and the co-ordination of the policies in relation to them.

A provision for the establishment of a Petroleum Commission or Petroleum Regulatory Authority similar to the Minerals Commission is needed in the Constitution.

(2) Notwithstanding article 268 of this Constitution, Parliament may, upon the recommendation of any of the Commissions established by virtue of clause (1) of this article, and upon such conditions as Parliament may prescribe, authorize any other agency of government to approve the grant of rights, concessions or contracts in respect of the exploitation of any mineral, water or other natural resource of Ghana.

Again, as with clause 268 (2), this is a problematic clause. It echoes the discretionary provisions similar to 268(2). Unless there are overriding considerations for maintaining this clause, it should also be expunged from the Constitution. This will ensure, in the interest of good governance (transparency and accountability), that the responsibility to approve and the accountability for approving the enumerated rights remain with the Commission.

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