Africa Centre for Energy Policy

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OCTOBER 2013

VOL.1

BETWEEN A BLESSING AND A CURSE

THE STATE OF OIL GOVERNANCE IN GHANA





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THE STATE OF OIL GOVERNANCE IN GHANA

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PREAMBLE

Oil governance has become the toast of national and international advocacy. It has also become a defining principle by which the performance of oil producing countries is measured. In the last decade, Ghana has shown significant commitment to good governance which has now been extended to the oil and gas sector. In this paper, an attempt has been made to catalogue important steps Ghana has taken in governing its new oil and gas industry. The paper also shows how a nation with initial zeal for governance reforms could suddenly "fall asleep". It also shows that incentives for high governance standards could be stalled by institutional weaknesses.

At the height of the global financial and economic crises in 2007, Ghana discovered oil and gas in commercial quantities estimated at 1.8 billion barrels reserves. But Ghana was yet to see many blessings in addition to being a new oil producer. Soon after this development the tap was opened and many wondered how God could bestow so much on a country at the same time - a new oil producer, a new middle income country, a nation that emerged unscathed from a very competitive elections in 2008 and has recently consolidated its democracy following a landmark Court hearing of an election petition challenging the legitimacy of the incumbent President; and the second highest growing economy in the world in 2011 (growing at 14% of GDP) as well as becoming the third largest recipient of Foreign Direct Investments in Africa the same year, US$3.2 billion, following Nigeria and South Africa[1].

By the end of 2012, more than 50 million barrels of crude oil was produced form the Jubilee Fields since it commenced production in November 2010. Production in 2011 stood at 24,195,895 barrels (average of 66,290 barrels per day) against a target of 30,929,005 barrels (average of 84,737 barrels per day) and of which Ghana's share was 3,930,189 barrels (about 16.24%). In 2012, there was an improvement in production by 8.9% with a total volume of 26,351,278 barrels out of which Ghana's lifting of oil was 4,931,034 barrels.

Ghana's share of crude oil has been described as inadequate by most people in Ghana, and some have called for renegotiation of oil contracts. The Government has not expressed its willingness to renegotiate the contracts, but instead has developed a new Petroleum Bill to be passed into law which has proposed an increase in the fiscal terms for new oil contracts[2].

In spite of these modest production levels, oil has now become the second largest export of Ghana – US$2.7 billion in 2011 to US$3 billion in 2012; following gold and overtaking cocoa[3]. Ghana is also gradually becoming a net exporter of crude oil with oil imports of US$3.3 billion in 2012 versus oil exports of US$3 billion. This is just a matter of time as oil production increases and new oil discoveries have been made. To date, 23 oil discoveries have been made in Ghana giving the country an exploratory success rate of about 78%, one of the highest in the world.

[1]The UN Conference on Trade and Development (UNCTAD), World Investment Report, 2012.

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The positive impact of oil is already being felt in the budget. With oil revenues flowing into the country since 2011, the annual budget has seen an important fiscal relief, and oil taking off part of the fiscal burden on tax revenues. In 2011, the country received US$444 million and US$541 million in 2012. These revenues will increase in the years ahead but the fiscal impact could be offset by growing debts and large fiscal deficits especially around election time[4].

Thus far, so much is happening in Ghana, which many people consider a new paradigm of countries in Africa determined to break away from the resource curse. Ghana is indeed being tested and whether she will pass the test or become another victim of the curse is still an open question. The governance of oil resource will play an important part in how Ghana can escape from the curse and instead transform her oil into tangible development outcomes for her people.

The effect of poor governance is underdevelopment. Evidence suggests that countries with poor governance are also the least developed. The Transparency International's Corruption Perception Index, 2010 shows that about 50 out of 178 countries are most corrupt. These compare with about 42 of the same countries scoring below average in the Human Development Index for the same year.

In its attempt to avoid the "mistakes" of the mining industry and those of other oil producing countries which got entangled in the curse of resource wealth, the Government of Ghana embarked on far reaching policy and legislative development built on public consultations and greater openness never seen in the policy discourse around any sector in the country. These efforts led to the passing of important legislations such as the Petroleum Revenue Management Act of 2011 (Act 815), and the Petroleum Commission Act 2011 (Act 821). A new Petroleum (Exploration and Production) Act is going through consultations whilst regulations on local content and local participation with encouraging disclosure requirements have been laid in Parliament.

The most important dividends from the process described above is the extensive transparency and accountability provisions in the law on petroleum revenues, which require that oil receipts, production lifting, sales prices, and expenditure from oil must be published quarterly and annually.

Perhaps, the most unique feature of Ghana's petroleum revenue management regime is the creation of the Public Interest and Accountability Committee (PIAC) with responsibility for exercising independent oversight on petroleum revenues. The Committee is composed of 13 members of non-governmental actors including the Ghana Bar Association, the Civil Society Platform on Oil and Gas, the Christian Council, the Muslim Council, to mention a few.

Ghana also signed on to the Extractive Industries Transparency Initiative (EITI) in 2003 and is now a compliant nation. It has also already issued a reconciliation report on oil two years into production. The country's commitment to

[2]The new Petroleum Bill proposes an increase in carried interest from 10% to 15% and introduced bonuses, and capital gains tax.

[3]Standard Chartered Bank, May 2013

[4]The last 2 election years recorded very high fiscal deficits, 14% of GDP in 2008 and 12% of GDP in 2012.

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transparency in the extractive industries was recently rewarded in the Revenue Watch Resource Governance Index which placed Ghana top among 15 countries examined in Sub-Saharan Africa.

The foregoing shows that Ghana has already achieved a lot as a new oil producing country particularly on the governance front. But serious challenges remain as well as many outstanding issues that hold the key to consolidating the country's efforts at good oil governance.

In this paper, “Between a Blessing and a Curse - the state of oil governance in Ghana”, some important conclusions have been drawn.

First, the Government of Ghana has not shown interest in the Public Interest and Accountability Committee (PIAC) created under Act 815 to monitor the compliance of Government and other institutions with the law, as the Committee has been left to operate without a budget; making it difficult to comply with its statutory obligations. Government has also not demonstrated enough capacity to hold oil companies to their statutory fiscal obligations. Oil Companies undertake self assessment which are not subject to any serious audit and are just accepted by the Government for the purpose of determining their tax liability to the state.

Second, oil governance is further threatened by the fact that Ghana has no mandatory contract disclosure provision and petroleum contracts that have been disclosed so far were by Ministerial Directive. There is also no requirement for the disclosure of beneficial owners behind the companies involved in contractual relations with Government. Contracts for prospecting or exploration rights are awarded through an administrative process rather than through open tendering or bidding process, and thereby lending the contracting process to potential abuse. The delay in passing the Right to Information Law has further reduced the right of citizens to be informed about the management of their resources and consequently weakened the incentive for accountability in the oil and gas industry.

Third, institutional weaknesses continue to undermine the objectives of good governance. Institutions are not funded adequately by the national budget and the case of the Public Interest and Accountability Committee is a good example. Institutions do not have adequate technical skills to audit and conduct independent assessment of the management of public resources including petroleum cost auditing, and tax assessment. Parliament has limited capacity to scrutinize petroleum contracts before their approval and to monitor such important contractual issues as cost, production and revenues.

Therefore, whilst the Government of Ghana took important initial steps at establishing good governance in the oil and gas sector, such pale into insignificance when compared with what remain outstanding as well as recent proposals in the new petroleum bill that seeks to undermine oil governance in the country.

The next sections consider in details the state of fiscal governance, contract governance and institutional governance in the oil and gas sector. Some recommendations have also been provided to address the challenges facing Ghana in oil governance.

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SECTION 1 FISCAL GOVERNANCE IN GHANA

1.1 INTRODUCTION

Fiscal management and fiscal governance have become bed fellows as they are used interchangeably to describe the effective use of mechanisms to generate revenues and disburse revenues efficiently whilst protecting the integrity of the process. The evaluation of fiscal governance has often been done through rules and other governance indicators that seek to control fiscal indiscipline and mismanagement – corruption, resource diversion, resource misapplication, resource transparency and accountability.

1.2 FISCAL GOVERNANCE AND PETROLEUM REVENUES

Since the commencement of oil production in 2010, the Government of Ghana made significant efforts at providing a framework for the transparent and accountable management of petroleum revenues. Consequently, the Petroleum Revenue Management Act, which was passed to govern the inflows and outflows of revenues from Ghana's share of petroleum, made important but landmark provisions which will later form the basis for public resource management in the country beyond the oil era.

On the revenue side, the law provides for a strong disclosure regime covering the disclosure of production data, sales price, petroleum cost data, marketing cost, and eventually net cash receipts from oil, etc (See Table 1).

Some Transparency Provisions in Act 815

Section 8 requires the publication of records of petroleum receipts in the newspapers and online.

Section 16 requires the Minister of Finance to reconcile quarterly petroleum receipts and expenditures and submit reports to Parliament as well as publish the reports in the newspapers.

Section 46 to 48 provide for four different types of audits of the petroleum accounts– internal audits, external audits, annual audits and special audits. The procurement of the services of an independent auditor shall be in accordance with the Public Procurement Act 2003 (Act 663).

Clause 50 requires the Minister of Finance to submit an annual report on the Petroleum Account and the Ghana Petroleum Funds as part of the annual presentation of the budget statement and economic policies to Parliament. The report shall also be made 'readily adaptable for dissemination to the public'.

On the expenditure side, the law does not only provide for a strong disclosure requirement but also relevant accountability mechanisms to uphold the integrity of petroleum revenue management. The Accountability mechanisms in the law include independent auditing of the petroleum funds and independent monitoring and assessment of utilization by the Public Interest and Accountability Committee (PIAC). In the case of expenditure disclosures, the Minister of Finance

has complied with the law for the past three years providing information on the revenue distribution to the various accounts and for various uses, including information on projects funded with oil revenues, by priority projects and by location of the projects. These provisions no doubt put Ghana ahead of the requirements of the EITI, which in its original state did not cover public expenditure transparency.

The following Table is an example of data disclosed by the Minister of Finance under the Petroleum Revenue Management Act 2011 (Act 815).

Table 1. Ghana's Crude Oil Lifting

Item	Unit	1st Qtr	2nd Qtr		3rd Qtr	4th Qtr	Total
		5th Lifting	6th Lifting	7th Lifting	8th Lifting	9th Lifting	
Date of Lifting	dd/mm/yy	4-Jan-12	3-Apr-12	27-Jun-12	12-Sep-12	12-Nov-12	
Volume of Lift	Barrels	996,484	997,636	995,247	947,021	994,646	4,931,034
Selling Price	US$	111.63	125.90	90.29	112.56	108.44	
Marketing Cost	US$	79,719	-	-	-	-	79,718.72
Value of Lift	US$	111,157,790	125,598,382	89,863,837	106,592,896	107,858,418	541,071,323
	GH¢	186,678,393	219,809,728	169,878,598	199,659,153	202,245,319	978,271,191

Source: MOF, Budget and Policy Statement, 2013

In addition to the Minister of Finance, the Bank of Ghana, which has responsibility for the operational management of the Ghana Petroleum Funds – the Ghana Stabilization Fund and the Ghana Heritage Fund, is required to issue semi-annual reports on the management of the Funds both to Parliament and to the public. The Bank has also complied with the law and has issued three reports covering the 2012 fiscal year and part of 2013. The Tables below show data disclosed by the Bank of Ghana on the state of the Ghana Petroleum Funds.

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Table 2. Ghana Stabilization Fund Account at Euroclear Bank (US$) - 2012

Item	1st Jan – 30th June	1st July – 31st Dec
Opening book Value	54,805,352.73	54,908,838.25
Receipt during the period	-	16,883,547.53
Account Management Fees	(2,043.20)	(6,997.77)
Income from Investments	100,878.70	113,199.67
Closing book Value	54,904,188.23	71,898,587.68
Net Income for the Quarter comprised the Following		
Investment Income	100,878.70	113,199.67
Less: Account Management Fees	(2,043.20)	(6,997.77)
Net Return for the Period	98,835.50	106,201.90
Source: Bank of Ghana		

Table 3. Ghana Heritage Fund Account at Euroclear Bank (US$) – 2012

Item	1st Jan – 30th June	1st July – 31st Dec
Opening book Value	14,400,001.62	14,443,390.61
Receipt during the period	-	7,235,806.08
Account Management Fees	(1,281.42)	(1,728.61)
Income from Investments	43,455.73	16,753.02
Closing book Value	14,442,175.93	21,694,221.10
Net Income for the Quarter comprised the Following:		
Investment Income	43,455.73	16,753.02
Less: Account Management Fees	(1,281.42)	(1,728.61)
Net Return for the Period	42,174.31	15,024.41
Source: Bank of Ghana		

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1.3 CHALLENGES OF FISCAL GOVERNANCE IN GHANA

At the core of fiscal governance is a sound public financial management system, built on spending efficiency, transparency and accountability; and delivering real development outcomes to the people. This focuses on budget preparation, budget implementation, accounting, cash management, aid and debt management, revenue management, procurement and auditing.

Ghana's performance in budget transparency and accountability has been abysmal lately with the country falling in the Open Budget Index to 50% in 2012 from 54% in 2010[5]. This might have been due to long-standing failures of fiscal reform programmes. Budget information has been seen to be of poor quality, its presentation to the public is not reader friendly and information on planned expenditures diverges from actual.[6] Further, the budget process is highly fragmented whilst budget ceilings have become less credible and are mostly ignored by implementing agencies.[7] This has reflected in government overspending its approved budget by GHS1.3 billion in 2011 and GHS4.8 billion in 2012.[8]

Ghana is expected to inject substantial revenues from oil into the budget in the near future. With oil overtaking cocoa as the second largest export commodity, it is projected to generate revenues of about US$7.5 billion by 2018[9]. The current fiscal challenges however do not guarantee the prospects of a sound management of the expected revenues, thus, defeating the main objective of fiscal governance.

The difficulties associated with fiscal governance as explained above have increased the calls for Fiscal Responsibility Law especially following years of uncontrolled fiscal deficits and rising debts. In particular, the management of petroleum revenues in Ghana faces the risk of fiscal indiscipline as a result of loose and open ended

Public Financial Management

Ghana's performance in budget transparency and accountability has been abysmal lately with the country falling in the Open Budget Index to 49% in 2012 from 54% in 2011.

The budget process is highly fragmented whilst budget ceilings have become less credible and are mostly ignored by implementing agencies. This has reflected in the most recent budget management when in 2012, key ministries outspent their approved budget ceilings (See Examples from the Net including Office of the President).

[5]The Open Budget Index (OBI) provides a cross country assessment of public access to information on the receipts and expenditure of public funds, how civil society and members of the public participate in budget process and on the strength of the legislative as well as institutions that have responsibilities for overseeing the management of public funds.

[6]World Bank (2006) External Review of Public Financial Management Vol. II. Public Finance Management Performance Report and Performance Indicators

[7]World Bank (2009), Ghana: 2009 External Review of Public Financial Management, Report No. 47639-GH, Washington D.C

[8]See www.myjoyonline.com published on 9th July 2013.

[9]Phillip Liverpool, Kosmos Commercial Manager

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provisions in the Petroleum Revenue Management Act which could easily be abused. Some of these provisions are outlined as follows.

I. In Section 18(7), the law provides for the collateralization of the oil revenues designated as the Annual Budget Funding Budget Amount (ABFA) not more than 10 years from the date of commencement of the Act. However, the law does not provide the limits on how much can be borrowed against the ABFA.

ii. The law subjects the size of transfers to the Ghana Petroleum Funds to Government's estimation of the benchmark revenue and the full realization of the estimated ABFA. Only excess collection over the ABFA can be transferred to the Petroleum Funds, thus, in the event that the benchmark revenue is over-estimated, and the full realization of the estimated ABFA is not achieved, the Funds will not get any transfers. Therefore, a Government faced with fiscal challenges may be tempted to make estimates of oil revenues that neutralize the objective of setting up the Fund. In this case, the counter-cyclical objective of the fiscal model in the law is defeated.

iii. The Heritage Fund which receives petroleum revenues annually is not expected to be spent whilst the country still produces oil and gas. However section 10(4) of the law allows parliament to review the restrictions on the Fund every fifteen years and by simple majority sanction the transfer of part of the interest accrued to any other fund established by law.

These provisions give blank cheques to the Minister of Finance for fiscal discretion which could be abused in a fiscally indiscipline regime, and thereby undermine good fiscal governance.

In addition to the above, a number of practical challenges have been identified in the governance of petroleum revenues, which are very likely to affect the efficient and accountable management of the revenues.

First, the efficiency of spending petroleum revenues has become critical. The link between transparency and development has already been established[10]. Therefore, notwithstanding the high standards set in Ghana for petroleum revenue transparency, the real essence of this must reflect in the efficient use of revenues. In a recent report on the spending of petroleum revenues in Ghana, it was found that "*Ghana was not deriving value for money from the infrastructure projects funded with oil and gas revenues as most of the projects have been delayed, operating under costly extensions and leading to cost over-runs*"[11]. Since fiscal governance has the objective of ensuring that resources are translated into good development outcomes, the problems associated with the spending efficiency of petroleum revenues in Ghana reduces the prospects of achieving this objective.

Second, Government has not shown interest in the Public Interest and Accountability Committee (PIAC) created under the Petroleum Revenue Management Act. Considered a unique creation for providing direct public engagement with the petroleum revenue management process, the

[10]Esanov, Akram "Efficiency of public spending in resource rich post-Soviet States", Revenue Watch Institute.

[11]Adam, M. A., Amewu, J.P., Benjamin, B., Abanga, A., Salifu, A. (2013) "The Two sides of Ghana – How a good law does not stop oil money from going down the drain", Africa Centre for Energy Policy Report, Accra, July 2013.

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Fiscal Governance Challenges

The problems associated with the spending efficiency of petroleum revenues in Ghana reduce the prospects of achieving the development objectives of fiscalgovernance.

Government has not shown interest in the Public Interest and Accountability Committee (PIAC) created under Act 815 to monitor the compliance of Government and other institutions with the law, as the Committee has been left to operate without a budget; making it difficult to comply with its statutory obligations.

Oil Companies undertake self assessment which are not subject to any serious audit and are just accepted by the Government for the purpose of determining their tax liability to the state. This has questioned Government's capacity to effectively hold oil companies to their fiscal obligations to the state.

Committee was expected to monitor the Government and other institutions with specific mandate under the law and to assess them on the extent of their compliance with provisions of the law. But since there is no incentive to create a strong institution to check managers of resources as is the case with many resource rich countries, the Committee in Ghana's case has been left to operate without a budget. It has therefore neither issued some of its reports (2012 Annual Report and Half Year Report for 2013) nor held public hearings on its findings, two important statutory requirements. The most curious issue about the Committee is the failure of Parliament to provide in the law a funding mechanism for the Committee's operations except for allowances to be paid to Committee members. It is indeed an anomaly for a law to create an institution without providing for its funding. Whether the case of the PIAC was an omission or deliberate, it has undermined the institutional framework for ensuring public accountability of petroleum revenues.

Third, the implementation of the Petroleum Revenue Management Act itself could face serious challenges as more revenues are received. Some of the challenges include valuation problems in the Ghana Petroleum Holding Fund where the Government receives oil in kind in lieu of cash, the interpretation of the applicable provisions on transfers to the Ghana Petroleum Funds which could starve the Funds of revenues, the problem of determining the applicable reference price in the estimation of the benchmark revenue and the potential for overestimation of same, among others. To address these challenges, the Government has indicated its intention to develop appropriate regulations[12]. However, Government is yet to disclose the draft regulations for public comments.

Fourth, Ghana has not demonstrated significant capacity to hold oil companies accountable for their fiscal commitment. Oil Companies undertake self assessment which are not subject to any serious audit and are just accepted by the Government for the purpose of determining their tax liability to the state. Further as oil production increases Ghana will likely be confronted with abusive and aggressive tax planning by the oil companies most of which are also incorporated in secrecy jurisdictions. For example, the oil companies producing from the Jubilee fields -

[12] In Paragraph 19 of the 2013 Budget and Policy Statement of the Government of Ghana, the following is stated "His Excellency, the President has also directed that the Ministry of Finance and the Attorney General's Department complete the Petroleum Revenue Management Regulations, as part of a comprehensive review to improve the smooth implementation of the Petroleum Revenue Management Act".

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Tullow Oil is incorporated in Jersey whilst Kosmos Energy and Anadarko are incorporated in Cayman Islands. Ghana's Cabinet has also recently approved a new Petroleum Agreement in respect of the South Deep Tano Oil Block with AGM Petroleum Ghana, a company fully owned by AGM Gibraltar (a Tax haven jurisdiction) which is also owned by other companies including Minexco OGG (another Gibraltar company).

Fifth, the Petroleum Income Tax Law (PNDC Law 188) has also been found to have reduced Ghana's advantage for tax revenue maximization. At the time the law was enacted, its main objective was to attract investments and to reduce the bureaucracies and uncertainties of subjecting oil companies to the general law of taxation which were also found in different legislations and statutes. However, the growing effects of abusive tax planning by oil companies have changed the dynamics which have then exposed the inadequacies of the law. For example, the law does not provide for capital gains taxes in spite of the rampant practice of mergers and acquisitions (farm-outs and farm-ins) in the oil industry. Consequently, Ghana has lost several millions of dollars following the acquisition of EO Group interest in the Jubilee project by Tullow Oil; the acquisition of Sabre Oil and Gas by PetroSA, and part of TAP Oil interest by Ophir in the Accra Contract area, among others. The law is also silent on thin capitalization and provides room for interest deductibility which could lead to tax base erosion.

There is no doubt that Ghana has made some significant steps in defining a transparent and accountable framework for improving the fiscal governance of petroleum resources. However, important challenges remain to be addressed such as efficiency of spending and the general problem of poor public financial management; funding for PIAC, development of implementing regulations for petroleum revenue management and the eminent potential for tax revenue losses.

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SECTION 2 CONTRACT GOVERNANCE

2.1 INTRODUCTION

Contract governance relates to the governance issues involved in the contractual relationship between resource owners and exploration and development contractors. The subject of contract governance in the extractive industries has commonly become known as "Open Contracting". This must be expressed across the entire contract value chain. Thus, Contract Governance in the oil industry requires that:

i. The process for contracting/licensing of oil blocks must be open and competitive,

ii. Contract disclosure must be mandatory, and

iii. The products of Contracts (oil production data, sales price, revenues, costs) must not be held confidential.

Most of the emerging oil promising countries in Africa such as Sierra Leone, Liberia and Kenya; as well as producing countries like South Sudan; are adopting transparent mechanisms for the exploitation of their exhaustible resources including open and competitive bidding processes as well as mandatory contract disclosure requirements. Other countries have Freedom of Information legislations that give citizens room to demand legally allowable disclosures such as Nigeria and Uganda. There are yet other countries which are using the framework under the Extractive Industries and Transparency Initiative (EITI) to provide public information on the management of their resources.

Open Contracting

The process for contracting/licensing of oil blocks must be open and competitive. Contract disclosure must be mandatory. The product of Contracts (oil production data, sales price, revenues, costs) must not be held confidential.

As already stated, Ghana has shown that it is capable of raising the bar on contract governance. However, the steps taken so far have not translated into actionable mechanisms for achieving contract governance.

Even though an EITI compliant country and which has extended the initiative to the oil and gas sector, the country has not yet applied the new standards of the EITI which focuses on contract governance including requirements for mandatory contract disclosure and the disclosure of beneficial ownership in contracts. But this could also be due to the fact that the new standards are very recent.

Some Petroleum Contracts have been published for the first time since 2011, but this was by Ministerial Directive rather than a mandatory legal process. Other important public interest documents such as permits and authorizations are however still held in secrecy. There is also the discretion decision by the Minister of Energy to decide on which contract to publish since mandatory disclosure requirements are still not

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provided in law. There is also no requirement for the disclosure of beneficial owners in oil deals. Further, there is no open tendering or bidding process for acquiring prospecting or exploration rights. Companies and individuals are awarded licenses through an administrative process. Also, there exist extensive confidentiality clauses in all petroleum contracts signed by the Government, whilst the Right to Information Bill has been pending in Parliament for several years. Hence, there is no framework for the public to demand disclosure of vital information relating to petroleum contracts even under limits usually provided by law.

Contract Transparency in Ghana

The Petroleum contracts that have been disclosed so far were by Ministerial Directive.

There is no common registry for the publication of all petroleum contracts.

There is no requirement for the disclosure of beneficial owners.

There is no open tendering or bidding process for acquiring prospecting or exploration rights.

There exist extensive confidentiality clauses in all petroleum contracts signed by the Government, The Right to Information Bill has been pending in Parliament for several years.

The most important risk Ghana faces with oil is the non-extension of transparency to the whole oil industry value chain. The absence of competition and transparency in the licensing regime also strengthens a perception of "too lucrative legal benefits for firms"[13]. Non-mandatory disclosure of petroleum contracts and beneficial ownership provides room for corrupt state officials to hide behind contract secrecy and promote rent seeking behaviour. Contract Governance no doubt remains Ghana's major challenge.

2.2 GHANA MAY FAIL THE TEST

Whilst it is not clear if Ghana will ever apply the new standards of the EITI, there remain considerable goodwill in the Government of Ghana to commence a process that could enhance contract governance. Government has accordingly drafted a new Petroleum (Exploration and Production) Bill 2013 with the aim of passing it into an Act of Parliament by the end of the year. The Bill makes specific provisions for open and competitive tender process for petroleum contracts and for mandatory contract disclosure.

However, in spite of the expressed goodwill by the Government, the Bill when passed into law in its current state may suffer an "administrative coup", as a result of the wide discretionary powers proposed for the Minister responsible for petroleum in the licensing of oil blocks. For instance, history has shown that open and competitive process for acquiring petroleum rights is not new in Ghana, but administrative failures robbed the country of the benefits of transparent mechanisms for the award of all the currently active and non-active petroleum agreements in the country. The first Petroleum (Exploration and Production Law) (PNDCL 84) enacted in the early 1980s and which is still operational, provides in Section 32(2m), "*Without prejudice to subsection 1 of this section, the*

[13]Joseph Ayee, Tina Soreide, G. P. Shukla and Tuan Minh Le"Political Economy of the Mining Sector in Ghana", The World Bank Africa Region, Public Sector Reform and Capacity Building Unit, July 2011.

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Secretary may prescribe regulations for or with respect to – competitive bidding procedures for petroleum agreements". However, such regulations that would have made it possible for the application of a competitive process for petroleum agreements were never prescribed.

Open and Competitive Bidding Process

The risk of non-application of the new progressive provisions in the Bill is deepened by the following reasons.

a. The Bill gives the Minister the power to ignore the outcome of an open and competitive tender process and to use direct negotiations (Section 10(2)). The Minister is not required to justify or give reasons in a public notice why an open tender process has been ignored.

> In Sierra Leone, which is yet to produce a drop of oil, the outcome of an open tender process is ignored if:
> (i) the final terms offered are unfavourable to the state and if,
> (ii) the reasons for tender process is unsuccessful. These reasons must be published when a tender is cancelled

b. The Bill gives the Minister power to enter into direct negotiations where the Minister deems direct negotiation to represent the most efficient manner to achieve optimal exploitation (*Emphasis mine*) (Section 10(4)). The Minister holds the sole responsibility to define conditions for "efficiency" in the optimal exploitation of resources since it is not defined in the Bill. This subjects the process to wide discretion. It is important to cite the system in Angola in this sense. Even though Angola has not been noted for high levels of transparency in its petroleum sector, it has one of the most transparent processes for entering into direct negotiation for petroleum acreages. For instance, the Angolan Petroleum Law defines conditions under which the Government can enter into direct negotiation to include lack of bids and when the submitted bids are considered unsatisfactory in view of the adopted criteria for the award. The Angolan law however further provides a disincentive for direct negotiation - "*When a proposal for direct negotiations is received, the Minister is required to declare it through public notice, and can commence negotiations with the company if, within fifteen days from the date of the notice, no other entity declares an interest in the area in questions. But if any entity declares an interest, a tender shall open for competitive process".* This by far provides a good framework for contract governance rather than the blanket "efficiency" criteria proposed by Ghana.

Mandatory Contract Disclosure

The Bill provides for the establishment and maintenance of a register of petroleum agreements, licenses, permits and authorizations by the Petroleum Commission (Section 56(1)) and opening of the register to the public (mandatory contract disclosure) (Section 56(2)). This is very

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important and responds to one of the highest standards of transparency in the oil and gas sector. However, *there remain many outstanding disclosure requirements which could deepen good governance in the petroleum industry*.

a. Summary of approved field development plans

b. Marketing Agreements

c. Financial Accounts of the Ghana National Petroleum Corporation

d. Reasons for preferring direct negotiations as opposed to open and competitive bidding

e. Winners in competitive licensing rounds, reasons for winning bids and beneficial ownership

f. Proceeds in the proposed Local Content Fund and list of beneficiaries

On mandatory contract disclosure, the Petroleum Act 2012 of the Republic of South Sudan provides one of the most progressive regimes, which Ghana could take a cue from. Section 79 of the Act states in part as follows:

"The Minister shall make available to the public, both on the Ministry's website and by any other appropriate means to inform interested persons:

a. All key oil sector production, revenue, and expenditure data, petroleum agreements and licenses;

b. Regulations and procedures related to the petroleum sector;

c. Justification of award of petroleum agreements, the beneficial ownership information for the contractor and document proof of the requisite technical competence, sufficient experience, history of compliance and ethical conduct and financial capacity of the contractor;

d. Annual production permit;

e. Any model petroleum agreements;

f. The key parameters of each petroleum agreements to the extent such parameters differ from an already published model petroleum agreement, including the cost oil management and limits, the production sharing formulas and mechanism, any bonuses, taxes or fees, royalties, any exemptions or favourable tax treatment any stability clauses; and

g. Except for the information and data referred to in Section 76(5)[14], information relating to petroleum activities, including information on petroleum agreements and relevant treaties as prescribed in the regulations".

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Government's Goodwill for promoting Contract Governance under threat

Recently, the Government of Ghana has sought to undermine its own efforts at institutionalizing open contracting by approving new petroleum agreements whilst discussions were on-going on the new Petroleum (Exploration and Production) Bill. In August 2013, Government negotiated and approved two petroleum agreements with two companies - AGM Petroleum Ghana Limited and Cola Natural Resources; under circumstances that did not follow transparent processes. Even though the National Oil Company, GNPC, said it opened its data room to over 900 companies and 10 companies actually responded but only 3 made offers, the names of the companies that responded apart from the winners are still unknown to the Ghanaian public on whose behalf the transaction was carried out and the reasons for selecting the winning offers have still not been published except to state that "the GNPC evaluated all the clarified offers and concluded that on the whole, the bid from AGM was superior to the other two in terms of the level of technical competence, the aggressiveness of the work programme, the highest returns to Ghana from a successful outcome and the most rapid holistic development of GNPC's operational capacities". Big words and adjectives, isn't it? But no one except the GNPC and the Minister know what constitutes "technical competence", "aggressive work programme", and "highest returns". This process certainly does not meet the requirement of a standard open and competitive tender.

In South Sudan, the law requires the publication of justification of award of petroleum agreements, the beneficial ownership information for the contractor and document proof of the requisite technical competence, sufficient experience, history of compliance and ethical conduct and financial capacity of the contractor. Even in Liberia's new Petroleum Bill 2013 (now before the Congress), the bid evaluation report will be required to be published on the website of the Ministry of Petroleum (when established) and in two national News Papers. Certainly, the supposed competitive bidding conducted by the GNPC on the recently approved Petroleum Agreements falls short of the standard procedure.

From the foregoing, it appears that Ghana has achieved so little in the area of contract governance. The efforts of the country at institutionalizing a strong governance regime in the petroleum sector therefore amounts to "window dressing" if attention is not put on open contracting. It really does not make sense to have higher governance standards for managing petroleum revenues whilst promoting poor governance in processes that generate the revenues. Ghana will therefore set a good example by extending good governance across the entire petroleum value chain, an important requirement for escaping the "curse of oil".

[14]Section 76(5) provides that "Information received pursuant to this section shall not be made public if such information: a. contains proprietary data belonging to the government, license of contractor; or b. must be kept confidential in order to maintain a climate of competition between the licenses and contractors participating in petroleum activities". Thus, the only information that cannot be disclosed is one that has proprietary implications.

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SECTION 3 INSTITUTIONAL GOVERNANCE

3.1 INTRODUCTION

Institutional governance has become an important requirement for facilitating the quick transformation of natural resources to development. Particularly for oil producing countries, political and institutional arrangements are the most important determinant of how countries with oil perform (World Bank, 2009)[15]. Also, the difference in the growth performance of resource rich countries is primarily the result of how oil resource rents are distributed through institutional arrangement (Eifert et al, 2006) and countries that ignore the importance of these arrangements and have weak institutional environment will likely see their oil resources turned into a curse (Eifert et al., 2002)[17].

Thus, whilst Ghana has developed transparent legal frameworks for regulating the oil and gas industry and revenues generated from it, the resource curse might be expressed in terms of poor implementation of regulations, abuse of regulations through regulatory capture, and weak accountability institutions capable of checking rent seeking behavior and vested interest. These factors are within the control of Government but impunity and political patronage have often undermined Government's ability to act.

Ghana's public governance institutions are weak for several reasons. They are not funded properly by the national budget. They do not have adequate technical skills to audit and conduct independent assessment of the management of public resources. They are also still largely controlled by the Executive through presidential appointments and political patronage. Parliament's own institutional capacity to monitor and review petroleum revenue inflows, outflows, investments and impacts is grossly inadequate; and this is compounded by the patronage that goes with the 'whip' culture in its standing orders.

This is where civil society becomes the hope and voice of accountability; but civil society organizations have also come under heavy criticisms because some of them have not demonstrated high levels of transparency and accountability. Some Government officials have not hesitated to ask about the source of civil society funding and the interest of those providing the funds. However, just as there are good and bad public officials, there are equally good and bad civil society actors. Moreover, what distinguishes

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of public resources. They are still largely controlled by the Executive through presidential appointments and political patronage.

[15]World Bank (2009b) Economy-Wide Impact of Oil Discovery in Ghana, Report No. 47321-GH, November 30, 2009. PREM 4 Africa Region
[16]Eifert, B., Gelb, A., and Ramachandran, V (2006) " Business Environment and Comparative Advantage in Africa: Evidence from the Investment Climate Data." Working Paper 56. Center for Global Development.
[17]Eifert B., A. Gelb, and N. Tallroth (October 2002) "The Political Economy of Fiscal Policy and Economic Management in Oil-Exporting Countries" World Bank Policy Research Working Paper 2899, Washington D.C.

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bad public officials from bad civil society actors is that, where as the former abuses public resources entrusted to him by citizens, the latter abuses resources donated for the purpose of protecting public integrity and building citizens' voice. Both examples are signs of weak and corrupt institutional arrangements.

It is still important to recognize that significant investments in institutional capacity and independence at both the state and civil society levels are important steps to limiting abuse and mismanagement of resources, removing impunity in the application and enforcement of regulations and promoting accountability in society.

3.2 INSTITUTIONAL FRAMEWORK FOR GHANA'S OIL AND GAS SECTOR

The institutions that have responsibility to manage Ghana's petroleum wealth can be grouped into four:

a. Policy Institutions - the Ministry of Finance and the Ministry of Energy and Petroleum

b. Commercial Institutions - the Ghana National Petroleum Corporation (GNPC) and the Ghana National Gas Company (GNGC)

c. Regulatory Institutions - the Petroleum Commission, the Environmental Protection Agency, the Ghana Standards Authority, the Ghana Revenue Authority (which has Petroleum Tax Unit) and the Ghana Maritime Authority, the Bank of Ghana, among others.

d. Accountability Institutions - Parliament, the Auditor General Department, the Attorney General Department and the Public Interest and Accountability Committee

A critical analysis of the institutions in Ghana shows that even though a new oil producer, Ghana is already faced with weak institutional arrangements for managing the oil and gas resources. This paper focuses on three institutions – Parliament, the Public Interest and Accountability Committee; and the Petroleum Commission, which have some relationship with oil and gas industry management and oversight.

The Parliament of Ghana

Parliament has responsibility for the final approval of petroleum agreements. This is a constitutional requirement[18]. However, most of the petroleum agreements were signed at the time Parliament did not have particular capacity to scrutinize petroleum contracts. In its current state, the ability of Parliament to closely analyze petroleum deals is still severely limited as it has no standing technical wing to assist it. The Parliamentary Committee on

Civil society organizations

Have come under heavy criticism because some of them have not demonstrated high levels of transparency and accountability.

Some Government officials have not hesitated to ask about the source civil society funding and the interest of those providing the funds.

[18]Article 268(1) of the 1992 Constitution of Ghana

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Mines and Energy has a few individuals who have worked in related industry, but this is still woefully inadequate to get the full impact of parliamentary scrutiny on petroleum agreements. Further, parliamentary ratification of petroleum agreements has largely followed partisan lines (e.g. as we saw in the debate on the agreement between Ghana and Vanco in 2009 over the Cape Three Points Deepwater Block).

In the area of petroleum revenue oversight, Parliament has again failed to play its role in debating the reports of the Public Interest and Accountability Committee, which is supposed to assist it (Parliament) in its oversight role. In passing the Petroleum Revenue Management Act in 2011, Parliament also failed to provide a funding mechanism for the operation of the PIAC in the law, which has led to difficulties in the Committee's ability to execute its statutory responsibility under the law.

The Public Interest and Accountability Committee (PIAC)

PIAC has been provided with important functions to perform but without operational powers. The Committee has mandate to monitor compliance of Government and Government institutions with the Petroleum Revenue Management Act. However, it cannot compel enforcement of its findings. It is also mandated to conduct independent assessment of the uses to which petroleum revenues are put. But it can neither compel institutions to provide it with documents relating to petroleum revenues nor compel sworn testimony in relation to officers involved in the management of the Petroleum Funds. It has an additional mandate to provide a platform for public debate on spending prospects of petroleum revenues in line with development priorities. Yet it cannot compel the Minister of Finance to use its findings from the public hearings to guide the spending of petroleum revenues as the Minister has a clear discretion in Section 21(5) of Act 815 on the choice of priority areas for spending the revenues. The funding challenges of PIAC have already been highlighted enough.

The Petroleum Commission

The Commission has faced serious financial and logistical challenges. This has led the Commission to change two offices in two years and is expected to move to a third location. Budget for the operations of the Commission was not provided by Government in 2011 and 2012. The financial challenges of the Commission could give it away to regulatory capture if it is not addressed.

The potential for weakening the Commission even further is very high as the new Petroleum (Exploration and Production) requires the Commission to consult the Minister in the exercise of many of its independent activities. In the case of the Local Content Fund, which has been proposed in the Bill, the Commission is required to administer the Fund with the Minister, a requirement that could influence the Commission in the choice of beneficiaries of the Fund and thereby undermine its independence.

Notwithstanding this, Ghana remains an important example of a country with functional institutions, but oil has the potential to weaken these

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institutions if extra efforts are not made to strengthen them and provide them with resources to check impunity. History has shown that Ghana's Government could undermine its own institutions. For example, whilst the 1992 Constitution of Ghana requires all Petroleum and Mineral Agreements to be ratified by Parliament, it became apparent that 21 mining agreements signed between the Government and international companies between 1994 and 2007 were not ratified by Parliament even though the agreements were operational. These agreements were ratified in 2008. But as already stated, whether Parliament can continue to assert itself and play a non-partisan role guided by the national interest remains a serious challenge.

3.3 INSTITUTIONS VERSUS MINISTERIAL DISCRETION

Another challenge to institutional building in Ghana is the wide uncontrolled discretion given to Ministers of State including the Ministers responsible for Finance and Petroleum. Some examples of discretionary powers given to Ministers in the oil and gas sector are:

i. Ministerial discretion to develop regulations for the application of competitive bidding procedures for petroleum agreements [Section 32 (23m) - Petroleum (Exploration and Production) Law - PNDC Law 84]

ii. Ministerial discretion to use open and competitive tender process or direct negotiations in petroleum agreement [Section 10 - Petroleum(Exploration and Production) Bill 2013]

iii. Ministerial discretion to prioritize not more than four areas for the spending of petroleum revenues [Section 21(5) – Petroleum Revenue Management Act 2011 - Act 815]

iv. Ministerial discretion to determine persons qualified to hold the minimum equity of 5% which must be reserved for Ghanaians in a petroleum agreement [Regulation 4(4) - Petroleum (Local Content and Local Participation) Regulations – LL2204]

These specific provisions promote rent seeking behaviour, corruption and bad decisions since the potential for their abuse is extremely higher. The exercise of these powers without regulations therefore exposes regulatory institutions to the danger of being ignored by powerful politicians and the subsequent dilution of the potency of these institutions. They also create uncertainty on the scope of jurisdiction by accountability institutions. This and perhaps the potential to abuse discretionary power are the reasons behind the control regime provided by the 1992 Constitution of Ghana to govern the exercise of discretion. Article 296 of the 1992 Constitution of Ghana provides as follows:.

> "Where in this constitution or in any other law discretionary power is vested in any person or authority –
>
> a. That discretionary power shall be deemed to imply a duty to be fair and candid;
>
> b. The exercise of the discretionary power shall not be arbitrary, capricious or biased wither by

[19]Republic of Ghana, 2008, Parliamentary Debates, Official Report, Fourth Series 61, no. 8 (October 20): cols. 194–276.

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resentment, prejudice or personal dislike and shall be in accordance with due process of law, and;

c. Where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this constitution or that other law to govern the exercise of the discretionary power"

As far as the oil and gas industry is concerned, there has not been the publication of a single constitutional instrument to govern the exercise of the many discretionary powers provided in various legislations. Ghana's oil and gas industry is young and promising but faces the risk of degenerating to the levels seen in mature oil producing countries that have fallen to the "curse of oil" unless efforts are made to strengthen institutions by adequately resourcing them within the available constraints and making them independent and free from the capture of Executive Office Holders and Oil Companies.

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SECTION 4 CONCLUSIONS AND RECOMMENDATIONS

4.1 CONCLUSIONS

It is no longer arguable that Ghana has joined the league of oil producing counties. Even with the current modest production levels, oil promises to provide fiscal relief to the budget, attract foreign direct investments, create jobs and contribute to the growth of the economy. However, many a nation often squanders such rare opportunities and rather than achieve economic growth, oil has led to unpalatable development consequences. One of the major causes of these unintended consequences is the level of poor governance of resources.

The revelations from the analysis in this paper expose Ghana's vulnerability to deviating into the "curse". Although several efforts have been made so far to facilitate the country's escape from the "curse", these efforts may not bear the intended fruits under a weak governance regime. From the perspectives of fiscal management, contractual settlement and institutional setting, important gaps remain. These gaps which are simplified into major challenges are stated as follows (also see Annex 1):

Fiscal Governance

Ghana's performance in budget transparency and accountability has been abysmal lately with the country falling in the Open Budget Index to 49% in 2012 from 54% in 2011.

There are problems associated with the spending efficiency of petroleum revenues and these reduce the prospects of achieving the development objectives of petroleum resource management.

Government has not shown interest in the Public Interest and Accountability Committee (PIAC) created under Act 815 to monitor the compliance of Government and other institutions with the law, as the Committee has been left to operate without a budget; making it difficult to comply with its statutory obligations.

Government has not demonstrated enough capacity to hold oil companies to their statutory fiscal obligations. Oil Companies undertake self assessment which are not subject to any serious audit and are just accepted by the Government for the purpose of determining their tax liability to the state.

Contract Governance

There is no mandatory contract disclosure in Ghana's Petroleum legal frameworks. The Petroleum contracts that have been disclosed so far were by Ministerial Directive. Consequently, the country has no common register for the publication of all petroleum contracts.

There is no requirement for the disclosure of beneficial owners behind the companies involved in contractual relations with Government.

There is no open tendering or bidding process for acquiring prospecting or exploration rights.

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Contracts are awarded through an administrative process which lends itself to potential abuse.

There exist extensive confidentiality clauses in all petroleum contracts signed by the Government. This promotes secrecy in oil deals and could heighten public suspicion around the integrity of oil deals.

The Right to Information Bill has been pending in Parliament for several years, further reducing the right of citizens to be informed about the management of their resources.

Institutional Governance

Relevant state institutions are still weak in spite of the countless public sector reforms the country has gone through for about a decade now.

Institutions are not funded adequately by the national budget. In the case of the Public Interest and Accountability Committee, the law that establishes it does not even provide for its funding.

Institutions do not have adequate technical skills to audit and conduct independent assessment of the management of public resources including petroleum cost auditing, and tax assessment. Parliament has limited capacity to scrutinize petroleum contracts before their approval and to monitor such important contractual issues as cost, production and revenues.

Institutions are still largely controlled by the Executive through presidential appointments and political patronage. The potential for institutions to be captured in the near future by Oil Companies is also increasing.

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4.2 RECOMMENDATIONS

On the fiscal side, Government must develop a Public Investment Management Plan for the use of petroleum revenues. This should take root from a long-term national development plan. Projects funded from petroleum revenues must be guided by transparent procurement processes with strict timelines for completion of projects. There must be value for money audits on all projects funded with oil and non-oil revenues as condition precedent to the release of funds.

The funding policy for PIAC must be reviewed as a matter of urgency. Until, the law is reviewed and a funding mechanism provided, Government should provide funds to the Committee from the 30% of the Annual Budget Funding Amount (ABFA) dedicated to recurrent spending.

On petroleum tax maximization, whilst a review of the Petroleum Income Tax Law is appropriate, new tax avoidance policies should be introduced. This should include restrictions on interest deductibility, application of profit split to strengthen the Arms Length Principle in the law, and also setting up a register for the publication of information on the subsidiaries and affiliates of all oil companies incorporated in tax haven and secrecy jurisdiction.

On the contract side, the current state of the Petroleum (Exploration and Production) Bill on the governance component is inadequate and must be reviewed, removing the incentives for Ministerial abuse of the open licensing processes, providing a comprehensive contract disclosure regime including limitation on the scope of confidentiality and the disclosure of beneficial ownership in all commercial transactions in the oil industry through a public register.

The right to information bill has gone through many consultations and appears much better and enriched than the first draft. However, whilst Parliament should not wait any longer in passing the bill into law, an important amendment on the scope of information exemptions relating to third party economic interest is urgently necessary as it has the potential to undermine the global movement for corporate transparency particularly in the extractive industries.

Government should declare a moratorium on new petroleum agreements pending the finalization and passing of the new Petroleum (Exploration and Production) Bill into law; and the application of the transparent mechanisms in the new law to all petroleum licensing.

On institutions, Government must develop a 5 year grand strategy to upgrade all relevant institutions to appreciable standards. As statutory institutions, Government must prioritize allocation of budgetary resources to these institutions and insulate them from donor funding as that could also facilitate donor capture of the institutions and undermine their independence and primary duty to the Republic of Ghana

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ANNEX 1

SUMMARY OF THE STATE OF OIL GOVERNANCE IN GHANA

Governance Indicator	Status (Y/N)	Remarks
Payment Disclosure		
Mandatory Disclosure of Oil Revenues	YES	By Law (Sec of Act 815)
Compliance with EITI	YES	Voluntary subscription
Disclosure of Revenue Distribution	YES	By Law (Sec of Act 815)
Citizens participate in priority setting for revenue distribution	NO	The Minister of Finance exercises discretion to decide on 4 priority areas for spending oil revenues, reviewed every three years (Sec of Act 815)
Efficiency of Investments	NO	Oil revenues distributed thinly across many projects, projects suffer long extension periods, overrun costs.
Open Contracting		
Public Notice in Contract Initiation	NO	
Public Notice in Contracting Process	NO	
Open and Competitive Bidding in Contracting	NO	
Parliamentary Approval of Contracts	YES	A constitutional requirement (Article of the 1992 Constitution)
Citizens participation in contracting	NO	
Ministerial Discretion in Contract Awards	YES	
Mandatory Disclosure of Contracts	NO	Some oil contracts have been published through Ministerial directive
Wide Confidentiality clauses in Contracts	YES	
Oil Companies operate in Tax Haven jurisdictions	YES	Kosmos & Anadarko in Cayman Island; Tullow Oil in Jersy; AGM in Gibralter.
Disclosure of Beneficial ownership in Contracts	NO	

Independent & Accountable Institutions		
Appointments to relevant institutions approved by Parliament	NO	Institutions relevant to the sector are the GNPC, Petroleum Commission, Investment Advisory Committee, PIAC, Ghana National Gas Company, etc. Appointments are made by the President or Ministers but are not subject to Parliamentary Approval.
Relevant Institutions report to Parliament	YES	
Relevant Institutions report directly to the public	YES	
Relevant Institutions are adequately funded	NO	Institutional funding is set by the Minister of Finance and approved by Parliament. Since their establishment, the PIAC and Petroleum Commission have received limited funds. The Law (Act 815) does not provide for the funding of PIAC, an obvious anomaly.
Relevant institutions have adequate technical capacity	NO	Oil and gas production is new, hence, institutions are still faced with serious capacity gaps.
National Oil Company reports to Parliament	YES	By Law (Act 815) – Programme of activities are also approved by Parliament.
Accounts of NOC audited by the Auditor General	YES	
Parliament has significant Capacity to exercise oversight on oil contracts, oil revenues	NO	Oil and gas production is newhence, Parliament is still faced with serious capacity gaps.

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