

NRGI COMMENTS ON GHANA'S PETROLEUM (EXPLORATION AND PRODUCTION BILL)

July 6, 2015

I. INTRODUCTION:

Ghana is in the process of updating the legal framework governing the petroleum sector with a new Petroleum (Exploration and Production) Bill (the "E&P Bill") to replace the Petroleum (Exploration and Production) Act, 1984. The Natural Resource Governance Institute ("NRGI") was invited by the Parliamentary Select Committee on Mines and Energy to submit comments on the E&P Bill as part of the Committee's solicitation of views from petroleum industry stakeholders. We were pleased to submit our comments at a stakeholder meeting on July 6, 2015, and to participate in the strengthening of governance of Ghana's petroleum industry for the benefit of its citizens. This document is an adapted version of the comments that were submitted to the Committee.

The current draft of the E&P Bill is fairly comprehensive in scope, providing for some public participation in opening and closing of areas for petroleum activities, establishing a fiscal regime in general terms, and providing for local content and environmental management. The bill also includes many strong governance provisions, including: provisions for interested persons to present views to the Minister on the opening and closing of areas for petroleum activities, a public petroleum register and open, competitive bidding for licenses. However, we suggested a number of improvements that could be made in the areas of: (1) award of contracts, (2) transparency and access to information, (3) fiscal provisions, (4) clarity of roles and responsibilities, and (5) drafting clarifications.

II. SUMMARY OF MAIN RECOMMENDATIONS

• Award of Contracts

- Section 9-The law should specify that a reconnaissance license does not provide preference for the award of a petroleum agreement.
- Section 10-The law should set forth the reasons that the Minister may disregard or bypass the bidding process, should require the Minister to publish the reasons, should clearly require publication of an invitation for direct negotiations following an unsuccessful bidding process and should require a bidding process among those expressing interest where more than one party submits an expression of interest within a prescribed period of time.

- The law should provide for pre-qualification of potential contractors and should require pre-qualification criteria to be issued by regulation.
- Section 17-Rather than a requirement for written approval of sub-contracts, the law should provide for notification to the Commission and deemed approval unless the Commission provides notice of disapproval within a prescribed period of time for prescribed reasons.
- Section 20-The law should provide more explicit limiting language on the conditions that will allow for a review of contract terms, such as material changes resulting in extreme economic fairness. Any resulting amendments should be subject to parliamentary ratification and published.
- **Transparency and Access to Information**
 - The law should provide for transparency of:
 - Bidding documents- pre-qualification criteria, a list of pre-qualified companies, bid criteria, list of bidders, the winning bid, a bid evaluation report justifying the winning bid based on the criteria
 - Full text contracts, along with their amendments and annexes, and beneficial ownership of license holders
 - Environmental impact statements, environmental management plans and annual reports
 - Local content plans and annual reports and allocation of loans from the Local Content Fund, including criteria for allocation and the identity of recipients, including their beneficial ownership.
- **Fiscal Provisions**
 - The law should require issuance of regulations within a given time frame following the implementation of the law specifying the terms of the fiscal regime.
 - The law should provide clarity on the application of the Petroleum Income Tax Law, 1987 and the Internal Revenue Act, 2000. An included statement that “rules from the Internal Revenue Act, 2000 on tax avoidance and tax administration, unless otherwise addressed by the Petroleum Income Tax Law, 1987, shall apply to taxation of petroleum activities” may suffice. Ring-fencing should be addressed via mandatory issuance of regulations or amendment to the Petroleum Income Tax Law.
- **Clarity of Roles and Responsibilities**
 - The law should include a statement on the overall allocation of roles among the Minister, the Commission and the Corporation and should list their specific responsibilities under the law.
- **Drafting Clarifications**

- Language should be clarified for the provisions set forth in Section E of this memorandum.

III. MAIN RECOMMENDATIONS

A. Award of Contracts¹

Section 9 (Reconnaissance License)

Under the draft E&P bill there are limited explicit requirements for acquiring a reconnaissance license. Therefore the bill should be clear that a reconnaissance license does not provide a means to enter into a petroleum agreement except as provided under section 10. Under Norway's Act 29 November 1996 No. 72 relating to petroleum activities, exploration licenses may be granted under section 2-1, but the section also specifies that the license "does not give exclusive right to exploration in those areas that are mentioned in the licence, nor any preferential right when production licences are granted." The E&P Bill should include such language to make absolutely clear that the provision for reconnaissance licenses may not undermine the competitive processes for award of a petroleum agreement under section 10.

Section 10 (Petroleum Agreement)

International Good Practice



Precept 3: "Well-designed auctions are preferable since competitive bidding should secure greater value for the country and auctions can also help overcome information deficits that the government may have relative to international companies. Auctions are also inherently more transparent than direct negotiations, helping to mitigate the risk of inappropriate companies or individuals receiving exploration and extraction rights."

See more here: www.naturalresourcecharter.org.

The Chatham House Report on Good Governance of the National Petroleum Sector is the product of a facilitated dialogue between participants from government, national and international oil companies, NGOs and financial institutions from 23 developing and developed oil and gas producing countries, supplemented by research.

Currently, competitive bidding for petroleum agreements is not required under Ghanaian law, therefore the inclusion of an open, competitive public tender process under section 10(3) is a welcome change that has the potential to help Ghana get the best deals possible for its petroleum. For example, in Iraq in 2009, the difference between ExxonMobil’s initial bid for the Rumaila oil field and the winning bid by a consortium led by China National Petroleum Corporation and BP was \$2.80 per barrel, which at a production rate of one million barrels per day would mean approximately \$750 million in extra revenues flowing to the government per year.

However, subsections (4) and (5) give the Minister the power to disregard the results of the tender process and enter into a petroleum agreement via direct negotiations. Subsection (6) also grants the Minister discretion, in consultation with the Commission, to skip the tender process altogether where direct negotiations represent the most “efficient manner” to achieve optimal exploitation of the resources. These provisions have the potential to undermine the benefits that a statutory requirement for competitive bidding are meant to provide. While there may be good reasons for bypassing the competitive bidding process under specific circumstances, it is important that the law set forth broadly (with the possibility of greater detail in regulations) those circumstances under which competitive bidding may be skipped or disregarded and provide for strong transparency requirements when such a decision is taken by the Minister.

We strongly suggest, therefore, that the draft E&P bill include the reasons that the Minister may disregard the bidding results or skip the bidding process altogether. When bidding will be disregarded or skipped, the Minister should be required to publish the reasons. Finally, a decision to enter into direct negotiations following an unsuccessful public tender process should be published and if the Minister receives more than one expression of interest within a prescribed time frame, a competitive tender should be held, limited to the parties expressing interest. Currently the draft E&P bill is not clear that initiation of direct negotiations following an unsuccessful bidding process is still subject to a published invitation.

Country Examples

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| <p>Angola Petroleum Activities Law, 2004</p> | <p>4. The status of associate of the National Concessionaire may be awarded through direct negotiation with the interested companies, but only in the following cases:</p> <p>(a) Immediately following an open tender procedure which has not resulted in the awarding of the status of associate of the National Concessionaire because of the lack of bids;</p> <p>(b) Immediately following an open tender procedure which has not resulted in the awarding of the status of associate of the National Concessionaire due to the supervising Ministry, after consulting with the National Concessionaire, considered the submitted bids unsatisfactory in view of the adopted criteria for the award.</p> <p>5. In the event of receiving a proposal for direct negotiations under the preceding paragraph, the National Concessionaire, if the supervising Ministry decides to go ahead with the award of the petroleum concession, shall declare the same through a public</p> |
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| | <p>notice, and may commence direct negotiations with the company involved if, within fifteen days from the date of the notice, no other entity declares an interest in the area in question.</p> <p>6. If other entities declare an interest in the same concession area, a tender shall be held limited to the interested companies.</p> |
| <p>Liberia Draft Petroleum Law, 2013</p> | <p>Section 14(3): “Petroleum agreements may be applied for, negotiated and executed outside of an international competitive bidding process only in exceptional circumstances based on national interests as decided by the President, and only with companies pre-qualified under section 15. The decision of the President shall be in writing, shall state the grounds for which an international competitive bidding process is not followed and shall be published in two newspaper of national circulation prior to the commencement of negotiations.”</p> |
| <p>Sierra Leone Petroleum (Exploration and Production) Act, 2011</p> | <p>30. (1) Subject to this Act and such rules as the Minister may prescribe, a petroleum licence shall be acquired through a call for tenders.</p> <p>....</p> <p>31. (1) Subject to subsection (2), where –</p> <p>(a) the Minister, on the advice of the Directorate, is not satisfied that the terms and conditions offered pursuant to the tender process are the most favourable to the State; or</p> <p>(b) the tender process is for any prescribed reason unsuccessful, the Minister shall not grant a petroleum licence pursuant to the call for tenders but may within a reasonable period after that issue a call for direct negotiations for a petroleum licence.</p> |
| <p>Uganda Petroleum (Exploration, Development and Production) Act, 2013</p> | <p>53. Direct applications.</p> <p>(1) Notwithstanding section 52, the Minister may, in exceptional circumstances, in consultation with the Authority, receive direct applications for a petroleum exploration licence.</p> <p>(2) For purposes of subsection (1), the exceptional circumstances are—</p> <p>(a) where invitations for bids have been sent out three times and no application has been received;</p> <p>(b) where the application is in respect of a reservoir within a licensed block which extends into an unlicensed block; or</p> <p>(c) enhancement of the participating interest of the State in the promotion of national interest.</p> |

Pre-Qualification

| <u>International Good Practice</u> | |
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|  <p>NATURAL RESOURCE CHARTER</p> | <p>Precept 3: “The government should pre-qualify bidding companies to ensure that potential license-holders have sufficient technical and financial capacity to execute a resource development program, and sufficient experience in managing the environmental risks associated with the project and related infrastructure.”</p> |
|  <p>CHATHAM HOUSE</p> <p>Report on Good Governance of the National Petroleum Sector</p> | <p>“Pre-bid qualification is a key process to ensure the most suitable candidates for licenses have a chance to bid.”</p> |
|  <p>CHATHAM HOUSE</p> <p>Guidelines for Good Governance in Emerging Oil and Gas Producers</p> | <p>“It is critical for the government to establish strong prequalification criteria for investors. General terms for prequalification should be laid out in the petroleum law, with more detailed rules to be included in regulations.”</p> |

Currently, **Section 10(10)** provides that “[t]he Republic may enter into a petroleum agreement with a person who has the requisite technical competence and financial capacity to fulfill the obligations of the petroleum agreement and other requirements as prescribed.” **Section 92 (Authority to issue Regulations and Stipulate Conditions)** subsection 2(l) provides that the Minister *may* (emphasis added) make regulations concerning “procedures and conditions for the granting of petroleum agreements, including qualification requirements....”

Under the current draft E&P bill there is not a clear requirement for a pre-qualification process and the provision authorizing regulations currently does not *require* regulations for each of the issues listed in section 92 and provides no specific time frame for issuing of regulations. The result is that under the draft E&P bill there is no clarity on whether there will be a formal pre-qualification process, when it will come into effect, what it will require and whether the pre-qualification criteria will be transparent. Given the importance of pre-qualification to the quality and transparency of the overall license allocation process, we suggest explicit language providing for a pre-qualification process and *requiring* more specific criteria to be spelled out in regulations.

Country Examples

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| <p>Liberia Draft Petroleum Law, 2013</p> | <p>15. Pre-qualification of applicants</p> <p>(1) Any company wishing to apply for a Petroleum agreement in a bidding round through direct negotiations shall apply for pre-qualification in accordance with pre-qualification guidelines prepared by the Petroleum Directorate and approved by the Minister.</p> <p>(2) The pre-qualification guidelines shall provide: (i) the amount of the pre-qualification processing fee, (ii) the requirements and supporting documentation required for technical qualification, (iii) the requirements and supporting documentation required for economic and financial qualifications and (iv) the required legal documentation evidencing the organization, good standing of the applicant, its directors, shareholders and beneficial owners. The guidelines will provide specific technical and financial requirements for participants and for operators, which may take into account the specific onshore, or offshore environment and other specific operating conditions relevant to the block(s) applied for, or under offer in the bidding round.</p> <p>(3) Technical qualification shall take into account the past and current worldwide experience of the applicant, the size, nature and scope of the Petroleum projects in which the applicant has been involved as operator or as participant, and the quality of its health, safety and environmental processes, provided that no applicant shall be excluded from the pre-qualification process solely on account of its size.</p> <p>(4) Where the Petroleum Directorate is satisfied that the applicant qualifies as an operator or a participant, as the case may be, it shall issue to the applicant a notice of qualification. The qualification will be limited to any specific onshore or offshore environment or other specific operating conditions referred to in the relevant pre-qualification guidelines pursuant to which the application was made.</p> <p>(5) Pre-qualification as an operator or as a participant shall be valid for 5 years from the effective date of the notice.</p> |
| <p>Sierra Leone Petroleum (Exploration and Production) Act, 2011</p> | <p>Pre-qualification of Applicants for Petroleum Rights.</p> <p>16 (1) Any person may, upon payment of a prescribed fee, apply to the Minister to qualify as an applicant for a petroleum right or operator thereunder and the application shall include -</p> <p>(a) the name and address of applicant;</p> <p>(b) description of the project;</p> <p>(c) evidence of satisfaction of pre-qualification criteria;</p> <p>(d) such other information as may be required by the Minister.</p> <p>(2) Where the Minister is satisfied on the advice of the Directorate, that the applicant for a petroleum right or to be an operator thereunder has been evaluated and accepted to possess such technical, financial, operational, industrial or other expertise to qualify as a permit holder, licensee or an operator, he may issue to the applicant a notice of qualification.</p> <p>(3) Subject to section 18, no person shall apply for a petroleum right or qualify to be an operator this Act [sic.], unless such person possesses a notice of qualification.</p> <p>(4) Any person in possession of a notice of qualification shall give written notice to the Minister as soon as practicable, regarding any material change in status, corporate or otherwise, financial, technical or operational capabilities.</p> <p>(5) The Minister may cancel a notice of qualification where –</p> <p>(a) there is an adverse material change in the status or capabilities of the person; or</p> <p>(b) the person or its representatives supply false or misleading information or</p> |


fails to supply material information, in respect of the application for qualification.

Section 17 (Sub-contracting)


Section 13 of the Petroleum (Local Content and Local Participation) Regulations, 2013 provides for notification of proposed contracts or purchase orders to the Commission with deemed approval if the Commission does not communicate its decision within ten working days. However, as currently written, section 17 of the draft E&P bill would supersede this provision in the local content regulations and require written approval from the Commission *before* a contractor may enter into a sub-contract. Approval of each sub-contract may prove a cumbersome process that causes delays, a point raised in 2013 by industry stakeholders. A notification requirement, with deemed approval unless the Commission provides notice of disapproval within a prescribed period of time may be more appropriate. We therefore recommend that this provision be revised to align with the process provided for under the local content regulations. Subsection (2) should also be clarified. It is not clear whether this is meant to provide that the Commission will set the threshold value of sub-contracts for which approval is required. If so, the language should be revised. If not, we would recommend such a provision so that all contracts do not require review regardless of the value.

Section 20 (Review of Terms)

International Good Practice



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Guidelines for Good Governance in Emerging Oil and
Gas Producers

Precept 4: “Tax regimes and contractual terms should enable the government to realize the full value of its resources consistent with attracting necessary investment, and should be robust to changing circumstances.”

“Governments should revise or renegotiate contracts only in the event of extreme economic unfairness or destabilizing social or environmental provisions. Governments should respect existing contracts, but remain committed to modifying the licensing terms in future contracts.”

Section 20 provides that the terms of a petroleum agreement may be reviewed by the parties to the agreement where there is a “material change in the circumstances that prevailed” either at the time of execution of the agreement or since the agreement’s last review. This term is fairly similar to section 13 of the 1984 E&P bill, also providing for a term in all petroleum agreements allowing for a review of terms in the case of a “significant change...in the circumstances prevailing....”

Generally, review of terms should be avoided. Instead, contract terms and the overall legal framework should be designed to allow for flexibility over a range of circumstances, without the need for review of the contract terms themselves.² An overly broad provision for review of terms may provide uncertainty to investors. During the review of the 2013 draft of the E&P bill, industry stakeholders had expressed concern that such a provision could be used to violate the sanctity of agreements. As written, the section does not specify which party may initiate the review. It is therefore conceivable that such a term could also be used by investors to extract advantageous terms at a later stage of the duration of the contract, without such new deals being open to public scrutiny. If included, the section should be drafted to limit the risk of abuse by either party. The law may benefit from limiting language specifying the kinds of material changes or, more importantly, the results of such changes (for example, extreme economic unfairness) that could trigger a review. Further, any resulting amendments should be subject to parliamentary ratification and should be published to the same extent and via the same means as the original contract.

Country Examples

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| Angola Petroleum Activities Law, 2004 | Article 50 (Amendments to contract) Any amendments which the parties may wish to make to the contract referred to in the preceding Article may only be made by means of approval by decree of the Government. |
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International Good Practice



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Precept 2: “Resource governance requires decision makers to be accountable to an informed public.”

B. Transparency and Access to Information

A pre-requisite for good governance of natural resources is accountability for decision-making and transparency is a pre-requisite for accountability. The draft E&P bill explicitly acknowledges the

² For example, a fiscal regime that allows for a higher government share when projects are highly profitable and a lower share when prices or profits are low to ensure projects remain viable and terms in contracts that require compliance with the current environmental and social laws or regulations.

importance of transparency for the effective management of Ghana’s petroleum. **Section 4 (Management of Petroleum Resources)** provides that the management of Ghana’s petroleum resources “shall be conducted in accordance with the principles of good governance, *transparency* and the object of this Act” (emphasis added). In order to give effect to this important provision, the law should explicitly provide for disclosure of documents and information related to: (1) bidding; (2) contracts and beneficial ownership; (3) environmental and social impacts; and (4) local content.

Bidding

International Good Practice



Precept 3: “The government should pre-qualify bidding companies to ensure that potential license-holders have sufficient technical and financial capacity to execute a resource development program, and sufficient experience in managing the environmental risks associated with the project and related infrastructure.”



CHATHAM HOUSE

Report on Good Governance of the National
Petroleum Sector

“Benchmarks for transparency

...

- Criteria for awarding licenses are published and licensing decisions are explained.

...

Pre-bid qualification is a key process to ensure the most suitable candidates for licences have a chance to bid. This is especially important for projects with specific technical needs. Whichever system a country chooses, the selection criteria (e.g. the investment commitment, operations record, transfer of technology, best practices, standards of business conduct, etc.) and reasons for the choice of winning company should be explained publicly.”



CHATHAM HOUSE

Guidelines for Good Governance in Emerging Oil and
Gas Producers

“The government should disclose bidding information to the public to discourage corrupt bidders.”

Norway (Oil for Development)

A check-list for the state of petroleum-related governance in OfD-Countries*




*The list provides principles and indicators “meant to constitute an ideal for governance of the petroleum sector, based on international best practice.”

“Criteria for awarding licenses are published well in advance of the actual awarding, and licensing decisions are justified according to the criteria and made publicly available.”

Currently the draft E&P bill does not provide for disclosure of documents related to the bidding process. We recommend including a provision requiring publication of:

- pre-qualification criteria,
- a list of pre-qualified companies,
- the bid criteria
- the list of bidders
- the winning bid
- a bid evaluation report justifying the winning bid according to the criteria

Contracts and Beneficial Ownership

| <u>International Good Practice</u> | |
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|  <p>NATURAL RESOURCE CHARTER</p> | <p>Precept 2: “Critically, authorities should also publish contracts and make them readily available online.”</p> <p>Precept 3: “The government should disclose information on allocation procedures; the contracts awarded, including fiscal and tax terms; the beneficial ownership of all license holders; the agreed work program; and financial commitments and any fiscal terms particular to the license.”</p> |
|  <p>CHATHAM HOUSE</p> <p>Guidelines for Good Governance in Emerging Oil and Gas Producers</p> | <p>“Governments should consider making contracts transparent.”</p> |
|  <p>EITI Extractive Industries Transparency Initiative</p> | <p>Beneficial ownership (s. 3.11) and contract disclosure (s. 3.12) encouraged.</p> |
|  <p>International Monetary Fund</p> <p>Revised Code of Good Practices on Fiscal Transparency</p> | <p>“Contractual arrangements ... should be clear and publicly accessible”.</p> |

Contract disclosure is well recognized under international good practice as a key component of accountability and good governance in the natural resource sector. A range of countries now require contract disclosure under their constitutions or laws (see below) and a growing number of companies in the extractive sector support contract disclosure and have voluntarily published their own contracts.³ Contract disclosure provides key information to citizens, allowing them to properly understand and interpret revenue data provided under EITI reports, and properly monitor company activity and hold companies accountable for fulfillment of their obligations. Contract disclosure also provides many advantages to the government, including building trust between the government and citizens and providing clarity and assurance to companies seeking to invest in the country.

While **Section 56 (Petroleum Register)** requires maintenance of a register of petroleum agreements, licenses, permits and authorisations, this provision does not provide assurance that the full contracts, as well as their amendments and annexes, will be made public, rather than a simple list of agreements. Further, while the provision requiring parliamentary ratification of petroleum agreements provides an important element of transparency and accountability in the licensing process, it does not suffice to ensure that the public has ongoing access to the full text and terms of contracts.

Further, the law does not mention disclosure of beneficial ownership of license holders, which is a key anti-corruption tool allowing all stakeholders (including the government) to understand who the real *natural person* beneficiaries are of Ghana's petroleum agreements. Increasingly, countries and international organizations are recognizing the importance of disclosure of beneficial ownership to combat corruption in the extractives sector. Disclosure of beneficial ownership is currently encouraged by the EITI⁴ and soon to be implemented in the U.K.⁵ and across EU countries under the fourth anti-money laundering directive.⁶

Currently, several of Ghana's petroleum agreements are already published. We strongly encourage Ghana to build on this positive development by requiring publication of contracts under the new E&P

³ For instance, BP published its production sharing contracts in Azerbaijan (SOCAR, Amaco, Lukoil, Elf and Statoil are among the parties to these contracts) and Kosmos and Tullow did the same in Ghana. Executives at Rio Tinto and Newmont have spoken out in favor of contract disclosure. The International Council on Minerals and Metals, whose members are 17 of the largest global mining companies, requires that its members "engage constructively in appropriate forums to improve the transparency of... contractual provisions on a level-playing field basis."

⁴ Eleven countries—Burkina Faso, Cameroon, the Democratic Republic of Congo, Honduras, Kyrgyz Republic, Liberia, Niger, Tajikistan, Tanzania, Togo and Zambia—are engaged in a pilot to assess the feasibility of requiring beneficial ownership disclosure through EITI, with a view to making such disclosure mandatory under EITI from 2016, subject to successful piloting.

⁵ At the 2013 G8 Conference, the U.K. government committed to implementing a public central registry of company beneficial ownership information. <https://www.gov.uk/government/news/public-register-to-boost-company-transparency>

⁶ <http://www.europarl.europa.eu/news/en/news-room/content/20150126IPR14918/html/Money-laundering-company-owner-lists-to-fight-tax-crime-and-terrorist-financing>

bill, as well as publication of the identity and beneficial ownership of all license holders. This information should be available online.

Country Examples

Contract Disclosure Required Under Constitution or Legislation

- Colombia (legislation)
- Democratic Republic of Congo (legislation)
- Guinea (legislation)
- Liberia (legislation)
- Mexico (constitution)
- Niger (constitution)
- Sao Tome & Principe (legislation)
- Sierra Leone (legislation)

International Good Practice



Precept 2: “Authorities should make available data and reports on licenses, geological surveys, cadastres and reserves, as well as economic, environmental and social impact assessments.”

Norway (Oil for Development)

A check-list for the state of petroleum-related governance in OfD-Countries*

*The list provides principles and indicators “meant to constitute an ideal for governance of the petroleum sector, based on international best practice.”

“Environmental and strategic impact assessments and decisions to issue permits (for instance pollution permits) are subject to a consultation process and made publicly available.”

Environmental and social impacts

Disclosure of environmental and social impact assessments, management plans and reports provides an important degree of transparency for stakeholders on the full costs of exploitation activities and how these costs are being managed. Such information is especially crucial for communities who may be directly affected by exploitation activities. The International Finance Corporation has recognized this importance in its Environmental and Social Performance Standards and Guidance Notes, requiring its

borrowers to disclose relevant information to affected communities, including, where appropriate, full environmental and social impact assessments and management plans.

We recommend including a requirement under the draft E&P bill for the publication of the environmental impact statements, environmental management plans and annual reports required under the Environmental Assessment Regulations 1999.

Local Content

We recommend a provision requiring publication of local content plans and annual reports under **Section 63 (Local Content Plan)** to ensure that Ghanaian citizens are aware of company obligations under their plans and can participate in monitoring the fulfillment of these obligations.

We also recommend more transparency in the allocation of loans from the Fund under **Section 65 (Object of the Fund)**. The competitive process for the allocation of these loans should meet the similar standards of transparency as the competitive process for the allocation of petroleum agreements to avoid any corruption or favoritism or perceptions of corruption or favoritism. The law should provide that the process will be *open* and competitive, and the criteria for allocation and the identity of recipients, including their beneficial ownership, will be published.



Country Examples

Transparency and Access to Information

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| Liberia Draft Petroleum Law, 2013 | Requires publication of (non-exhaustive list): <ul style="list-style-type: none"> • Tender protocols (section 16) • Winning bidder and the winning bid assessment report (section 16) • All petroleum agreements and their annexes and amendments (section 18) • Environmental and social impact assessments and management plans and any amendments (section 57) |
| Sierra Leone Petroleum (Exploration and Production) Act, 2011 | Requires publication of (non-exhaustive list): <ul style="list-style-type: none"> • National Oil Company annual reports (section 13) • The results of tenders, including the content of winning and losing bids (section 32) • Petroleum licenses and agreements in their entirety (section 40) • Extensions of petroleum licenses (section 44) • Local content reports (section 88) • Environmental impact assessments and management plans (section 91) • Approvals of a transfer of license (section 114) • Notice of a relinquishment, surrender or revocation of a petroleum right (section 116) |
| Sudan Petroleum Act, 2012 | "79. The Minister shall make available to the public, both on the Ministry's website and by any other appropriate means to inform interested persons: <ol style="list-style-type: none"> a. All key oil sector production, revenue, and expenditure data, petroleum agreements and licenses; b. Regulations and procedures related to the petroleum sector; |

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| | <p>c. Justification of awards 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;</p> <p>d. Annual production permit;</p> <p>e. Any model petroleum agreements;</p> <p>f. The key parameters of each petroleum agreement to the extent such parameters differ from an already published model petroleum agreement, including the cost oil sharing formulas and mechanism, any bonuses, taxes or fees, royalties, any exemptions or favourable tax treatment, any stability clauses; and</p> <p>g. Except for the information and data referred to in Section 76(5), information relating to petroleum activities, including information on petroleum agreements and relevant treaties as prescribed in the regulations”.</p> |
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C. Fiscal Provisions

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| <u>International Good Practice</u> | |
|  <p>NATURAL RESOURCE CHARTER</p> | <p>Precept 4:” Contract negotiation processes that result in bespoke fiscal arrangements may place added burdens on administrators as well as negotiators.”</p> |
|  <p>CHATHAM HOUSE</p> <p>Guidelines for Good Governance in Emerging Oil and Gas Producers</p> | <p>Precept 4, Technical Guide: “The rules of the fiscal regime should be established in law and readily available to investors and the public.”</p> <p>“To simplify negotiations, emerging producers should move as many fiscal elements as possible into laws and regulations that apply across licenses....Tax obligations should be defined in the tax code rather than in contractual agreements.”</p> |

It is generally recommended that the fiscal regime be established in legislation, rather than in contracts. Establishing baseline fiscal terms (or fixed minimum and maximum terms) in legislation provides clarity and predictability to investors and transparency to the general public on the terms under which the country’s resources are being exploited. Moreover, fixing terms in legislation assists the government with negotiation of contracts. Generally, investors tend to be in a stronger bargaining position vis-à-vis

developing country governments due to access to more information across several markets and better access to technical and legal expertise. Fixing terms or limiting variation of terms across contracts simplifies negotiation by taking issues “off the table” and limits the scope for a disadvantageous deal to the government. Further, fixing terms in legislation rather than allowing terms to vary markedly across contracts facilitates tax administration. It is much more difficult for tax administrators to effectively monitor and audit a multiplicity of different fiscal arrangements than a fairly uniform fiscal regime.

Currently, none of the fiscal terms under **Sections 83 to 87** have been established in the draft E&P bill, which only states the types of payments that must be paid. While it is not uncommon for payments like bonuses and resource rent payments (such as the additional oil entitlement) to be left to bidding and negotiation, other payments are regularly prescribed in legislation or regulation. The bill states that amounts to be paid will be “as prescribed” except where they are not prescribed, they will be as provided “in accordance with the terms of a petroleum agreement.” Further, under **Section 92 (Authority to Issue Regulations and Stipulate Conditions)** the Minister *may* make regulations providing for fiscal requirements, but, as written, this provides the Minister with the prerogative to issue such regulations or not and provides no time frame for the issuance of such regulations. The result is that the entirety of the fiscal regime may well end up being established in contracts and varying from contract to contract. Combined with the lack of a clear requirement that full contracts will be disclosed, the consequence is a fiscal regime that may be opaque to both tax administrators and the general public.

There is also a need for clarification on the application of the Petroleum Income Tax Law, 1987 and the Internal Revenue Act, 2000. **Section 85 (Tax)** provides for payment of taxes “including petroleum income tax and capital gains tax in accordance with applicable laws.” However, beyond the foregoing this provision does not make clear which tax rules not already provided for under the draft E&P bill or the Petroleum Income Tax Law, 1987 apply to the petroleum sector. The Petroleum Income Tax Law, 1987 addresses transfer pricing (section 3(c)), as does **Section 89 (Transactions between contractors and affiliates)** of the draft E&P bill. However, thin capitalization is only dealt with under the Internal Revenue Act, 2000. According to Ghana’s EITI report for 2012 and 2013, the Ghana Revenue Authority has already applied the thin capitalization rules under the Internal Revenue Act, 2000 to the petroleum sector. However, this application should be statutorily mandated. Moreover, none of the laws currently address ring-fencing, which per **Section 92** *may* be addressed via regulation.



It is important that the draft E&P bill provide clarity on which laws apply and to which extent. An included statement that “rules from the Internal Revenue Act, 2000 on tax avoidance and tax administration, unless otherwise addressed by the Petroleum Income Tax Law, 1987, shall apply to taxation of petroleum activities” may suffice. Ring-fencing may be more appropriately dealt with via amendment to the Petroleum Income Tax Law but should be addressed, as per the recommendations included in Ghana’s 2012/2013 EITI report.

Country Examples

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| Revenue Code of Liberia Act of 2000 | Includes separate chapters forth the fiscal regime |
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| | |
|---|--|
| | and tax rules applicable to the Petroleum and Mining Sectors |
| <i>Sierra Leone Petroleum (Exploration and Production) Act, 2011</i> | Section 104 lists the taxes for which a licence holder is liable “as prescribed” in the Income Tax Act 2000, the Customs Act or otherwise. |

International Good Practice

Report on Good Governance of the National Petroleum Sector

Precept 1: “The role of each institution must be well defined to avoid conflict of interest and gaps in responsibilities. Clarity concerning who makes the rules, who administers them, and who enforces them is very important.”

“Whatever the organizational model for governing the petroleum sector, *clarity of goals, roles, and responsibilities between agencies* is crucial.”

D. Clarity of Roles and Responsibilities

Under the current legal framework, Ghana has set forth the general responsibilities of the different institutions involved in the petroleum sector under separate legislation, for example the Petroleum Commission Act, 2011 and the Ghana National Petroleum Corporation Law, 1983. Nevertheless, the law should provide greater clarity on the division of responsibilities among the three institutions.

Specifically, there appears to be some inconsistency concerning matters that require the Minister to consult with or seek advice from the Commission. The Petroleum Commission Act requires the Commission to:

“(a) promote planned, well executed, sustainable and cost efficient petroleum activities to achieve optimal levels of resource exploitation for the overall benefit and welfare of citizens;

...

(d) ensure...(ii) optimum exploitation of petroleum resources;

...

(j) advise the Minister on matters related to petroleum activities including

- (i) field development plans;
- (ii) plans for the development of petroleum transportation, processing and treatment of facilities; and
- (iii) decommissioning plans for petroleum fields and infrastructure....”

In keeping with these responsibilities, some provisions of the draft E&P bill such as **Section 34 (Coordination of Petroleum Activities and Unitisation)** provide that the Minister “*in consultation with the Commission* may, for the purpose of ensuring optimum recovery of petroleum....direct the relevant contractors, to enter into an agreement to develop and produce the petroleum accumulation as a single unit” (emphasis added). **Section 43 (Decommissioning Plan)** requires contractors to submit decommissioning plans to the Minister who “shall seek the advice of the Commission.” However, **Sections 38 (License to Install and Operate Facilities for Transportation, Treatment and Storage of Petroleum), 39 (Application to Install and Operate Facilities)** and **40 (Conditions for Granting of a License to Install and Operate Facilities)** all relating to “transportation , treatment and storage” do not require the Minister to seek the advice of the Commission for approval of the applicable license, except that under **Section 41 (Landing of Petroleum)** the Minister may determine the manner and place at which petroleum is delivered by the contractor and the Corporation “in consultation with the Commission.”

There also appears to be overlap concerning who determines tariffs for third-party use of facilities. Under **Section 40 (Conditions for Granting of a license to Install and Operate Facilities)** (2)(a), the Minister may stipulate tariffs for such use when granting a license to install and operate a facility and “at any subsequent point in time” (emphasis added). However, under **Section 42 (Third Party Use of Transportation, Treatment and Storage Facilities)** the contractor may determine tariffs per subsection (5) and the Commission may determine tariffs per subsections (6) and (9).

Finally **Section 32 (Utilization of Associated Natural Gas)** provides that associated natural gas may be used in petroleum activities “as agreed between a contractor and the Corporation...”, which seems a role more appropriate for the Commission or Ministry.

The law should provide greater clarity on the division of responsibilities among the three institutions by providing a statement on the overall roles of the Minister, the Commission and the Corporation and by listing their specific responsibilities under the law at the outset. This will help to ensure consistency and clarity and avoid duplication of efforts or confusion over which entity makes the final determination on particular issues. In particular, the role and responsibilities of the Ministry and the Corporation should be addressed. The role of the Ministry has not been otherwise set forth in legislation. The Ghana National Petroleum Corporation Law, 1983 is also now outdated, especially in light of the Corporation’s evolving role in the larger institutional framework governing the petroleum sector. The draft E&P bill should therefore specify the new overall role and responsibilities of the Corporation. It is also important that the rules for operations, governance structures and reporting requirements of the Corporation are revisited to ensure that they reflect the government’s current goals for the Corporation. Given the significant revenues retained by the Corporation, it is crucial that the transparency and accountability

requirements for the Corporation are strengthened to ensure effective management of these revenues. These details may be addressed in the draft E&P bill or left to amendments to the Ghana National Petroleum Corporation Law, 1983.

Country Examples

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|---|---|
| Sierra Leone Petroleum (Exploration and Production) Act, 2011 | Part III-Administration sets forth the responsibilities of the Minister, the Petroleum Directorate and the National Petroleum Company |
| Uganda Petroleum (Exploration, Development and Production) Act, 2013 | Part III-Institutional Arrangements sets forth the responsibilities of the Minister, the Petroleum Authority and the National Oil Company |

E. Drafting Clarifications

There were some provisions of the draft E&P bill that were unclear and below we flag areas that raised questions, with suggestions for clarification where applicable.

Section 14 (Duration)

It is not clear whether subsection (2)(a) is allowing for an extension with amended terms as “agreed by the parties” or on the same terms as provided for under the original agreement. Given that 2(b) provides the option of a new petroleum agreement, which already allows for new terms, part (a) should probably provide for extension on the original terms. The option under part 2(b) is not explicit as to whether a new petroleum agreement with the original contractor is contemplated or whether this allows for a new petroleum agreement with a third party. In either case, it should be clear that such an agreement is subject to parliamentary ratification: “execute a new petroleum agreement by direct negotiations, subject to parliamentary ratification, in accordance with section 10...” If direct negotiations with a third party are intended under this provision, the publication of the invitation of the invitation for direct negotiations should be published per section 10(7).

Section 21 (Exploration Period and Extension)

The terms “working period” and “extension period” are not entirely clear. Subsection (2) provides for an initial exploration period and up to three extension periods, seeming to suggest that each extension period shall be extension of the original work period. The difference between entry into an extension period and extension of any given working period (as provided under subsection (4)) is unclear.

Section 27 (Plan of Development and Operation)

Subsection (3) calls for the submission of an approved environmental and social impact assessment report along with the plan of development and operation. The accompanying environmental and social management plan should also be submitted.

Section 37 (Measurement of Petroleum Obtained)

Subsection (2) addresses approval by the Commission of the measurement system, but section 37 does not first address submission of the contractor’s intended measurement system to the Commission for approval. Is this to be submitted in the application for an annual production permit? Is this a separate submission? The law should specify.

Section 39 (Application to Install and Operate Facilities)

This section also omits submission of the environmental and social management plan. Subsections (2)(d) and (i) seem redundant. This may be an error.

It is also unclear why an exemption would be granted from the requirements of subsection (1) and what that would mean. Is it that a person may be exempted from applying at all? The entire section deals with the content of the application for the license. Exemption from subsection (1) seems to exempt a person from the entire application process.

Section 49 (Compliance)

Subsection (2) and (3) seems redundant except that subsection (3) is more specific.

Section 53 (Samples, Data and Information)

Subsection (1) is missing the second reference to the Corporation in the last half of the sentence. Subsection (4) does not mention the Corporation. The Corporation should be included if this was not intentional.

Section 91 (Offences and Penalties)

Subsection (4) refers to an “allied entity.” This term is not clear and is not otherwise defined.

Section 93 (Interpretation)

The meaning of “control” under the definition for affiliate should be specified either in the draft E&P bill or by reference to another law.

IV. CONCLUSION:

The draft E&P bill has the potential to strengthen governance of Ghana’s petroleum sector and includes a number of provisions in keeping with international good practice, particularly with respect to the new requirement for allocation of contracts via competitive processes. However, the law could be further improved to ensure clarity and coordination of roles and responsibilities of the different governing institutions, to safeguard the integrity of the competitive contract allocation process, to provide for publication of key information that will allow citizens to effectively monitor the sector and hold actors accountable and to provide clarity and transparency of the fiscal regime. We believe improvements in

this area will greatly enhance the law and help ensure that Ghana maximizes the benefits it receives from its petroleum. NRGi looks forward to further opportunities to contribute to the process of strengthening Ghana's petroleum sector governance and is available to the Committee to provide further input or comments on the draft E&P bill as requested.