Africa Centre for Energy Policy

ADVISORY REPORT
ON

GHANA'S NEW PETROLEUM (EXPLORATION AND PRODUCTION) BILL 2014

MARCH 2014

Supported by Open Society Initiative for West Africa (OSIWA)

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ABBREVIATIONS

ACEP	–	Africa Centre for Energy Policy
BOP	–	Blow-out Prevention
DWT	–	Deep Water Tano
E&P	–	Exploration and Production
EC	–	Energy Commission
EPA	–	Environmental Protection Agency
FPIC	–	Free Prior and Informed Consent
GNPC	–	Ghana National Petroleum Corporation
HSE	–	Health, Safety and Environment (HSE)
IPA	–	International Petroleum Agreement
PNDC	–	Provisional National Defense Council
PNDCL	–	Provisional National Defense Council Law
PURC	–	Public Utilities Regulatory Commission
WCTP	–	West Cape Three Points

1.0. INTRODUCTION

Ghana's draft Petroleum (Exploration and Production) Bill 2014 is progressive in many ways and is a major improvement on the PNDC Law 84. The draft Bill seeks to ensure that upstream petroleum operations are conducted in accordance with the principles of good governance, transparency and sustainable development. It particularly covers new areas including provisions for reconnaissance licenses and open public tender process, improved fiscal terms including provisions on thin capitalization and transfer pricing, regulations on infrastructure installation and operations, Health, Safety and Environment (HSE) standards and good governance. However, there are areas that need to be reviewed, whilst other areas need to be strengthened.

The draft Bill has witnessed several changes. It was previously introduced into Parliament in 2013 and attracted intensive comments from Civil Society Organizations (CSOs) including ACEP for improving its content. The latest version of the draft Bill has recently been approved by Cabinet for consideration by Parliament, which is expected to deliberate upon and enact the Bill into law.

On enactment and upon coming into force, the Bill will repeal PNDCL 84, save existing regulations, notices, orders, directives, appointments or acts lawfully made or done under PNDCL 84, all of which shall be deemed as valid acts emanating from the Bill unless subsequently revoked, cancelled or terminated in accordance with law.

The substantive content of the draft Bill is, without doubt, comprehensive. In the paragraphs that follow, this report takes cognizance of the comprehensive nature of the draft Bill as well as its contextual significance and is intended to critique the draft Bill by providing general but critical analysis into salient provisions straddling open contracting provisions, legal and fiscal regimes, and institutional, environmental and other regulatory reforms.

2.0. PETROLEUM GOVERNANCE

Section 4 of the draft Bill lays the foundation for good petroleum governance. It states that, "The management of petroleum resources shall be conducted in accordance with the principles of good governance, and transparency". The main features of good governance in the draft Bill are:

a. Publication of decision to open or close an area (S.7)

ACEP has in its possession a copy of the draft Bill for purposes of this report.

Petroleum (Exploration and Production) Act, 1984 (PNDCL 84) (Published in the Official Gazette on 29th June 1984). The first direct legislation governing the Petroleum industry in Ghana, this Act principally governs all facets of exploration and production, including contractual relations between the State, GNPC and petroleum investors (i.e., IOCs). Until 1984 when PNDCL 84 was enacted, the Minerals Act, 1962 (Act 162) which was a broad legislation governed all mineral resources, including petroleum.

a. Open and competitive public tender (S.10(2))

b. Mandatory Contract Disclosure (S.56(2))

However, in opening and closing an area for prospectivity, S.7 also requires the Minister of Energy and Petroleum to give hearing to any person who will be affected or have interest in the area to be heard. This is a major improvement as it introduces the right of persons to Free Prior and Informed Consent (FPIC) before an area is opened for prospectivity.

The shortcoming of this provision is that it does not provide for an appeal process when persons affected are dissatisfied with the decision of the Minister. *In our view, a provision that allows interested parties to seek redress in Court will be appropriate if they are not satisfied by the decision of the Minister.*

The draft Bill addresses the problem associated with the application of administrative processes in petroleum licensing and contract disclosure. Ghana at the moment does not apply open and competitive process in oil concessions, and has no requirement for the mandatory disclosure of petroleum contracts.

Section 10(1) of the draft Bill establishes an open and competitive tender regime for the acquisition of oil blocks. However, there are exceptional clauses in the draft Bill that threaten to introduce significant governance risks in the proposed open and competitive tender process. For example:

a. The draft Bill gives the Minister the power to ignore the outcome of an open and competitive tender process and to use direct negotiations (10(2)). Without justifying why an open tender is ignored in a public notice, the potential for abuse of the process is high. *In Sierra Leone, an open tender 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. We recommend that this practice should be adopted by Ghana.*

b. The draft Bill gives the Minister power to apply a non-competitive process to any part of an area that has not become the subject of a Petroleum Agreement after a public tender process (S.10(3)). But why the Minister will use a public tender for part of an area and direct negotiation for another part of the same area that has not become a subject of a Petroleum Agreement is curious and creates room for unduly influencing demarcation of acreages for rent seeking.

The draft Bill gives the Minister power to enter into direct negotiations where the Minister deems direct negotiation to be the most efficient manner to achieve optimal exploitation (10(4)). But the draft Bill falls short of providing conditions for "efficiency"

a. in the optimal exploitation of resources. This subjects the process to too much ministerial discretion. 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, direct negotiation is entered into under the following conditions:

    a. Lack of bids;

    b. The submitted bids are considered unsatisfactory in view of the adopted criteria for the award.

However, *when a proposal for direct negotiations is received, the Angolan 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. In our view, this practice needs to be adopted by Ghana instead of the more clothed and blanket "efficiency" criteria.*

Another worrying feature in the bill relating to licensing is reconnaissance licensing which does not follow an open and competitive process. Proponents of the status quo, including Government, argue that a large part of the country's hydro carbon basins are unknown, hence the application of open licensing for reconnaissance and Petroleum Agreement are unlikely to attract investments. However experience in Liberia, Sierra Leone and Kenya show that investments can still be attracted to unknown areas through open and competitive process.

One of the most important provisions on governance relates to contract disclosure. Ghana already publishes petroleum contracts. However the process is not mandatory but based on ministerial discretion. The draft Bill provides for the establishment and maintenance of a register of petroleum agreements, licenses, permits and authorizations by the Petroleum Commission (S.56(1)) and opening of the register to the public ((S.56(2)). This is very important and responds to one of the highest transparency standards of general application in the oil and gas sector. However, a public register of petroleum contracts and other authorizations in some cases provides a list of these contracts but does not require the disclosure of the full primary contracts. There is no clear indication that this is not going to be the case in Ghana. Moreover, the bill is silent on other equally important disclosure requirements which could deepen good governance in the petroleum sector. These include but are not limited to information on beneficial ownership in petroleum contracts, marketing contracts, winning bids and justifications, financial accounts of the National Oil Company, etc. South Sudan's Petroleum Law, 2012 provides a comprehensive standard for mandatory contract disclosure, Section 79(1) of which provides in as follows:

> *"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:*

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 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;*

d. *Annual production permit;*

e. *Any model petroleum agreements;*

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*

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".*

The exception made under Section 79(1)(g) for non-disclosure of information and data specified under Section 76(5) of the South Sudanese 2012 Petroleum Law relates only to information that:

"(a) contains proprietary data belonging to the government, license or contractor; or

(b) must be kept confidential in order in order to maintain a climate of competition between the licensees and contractors participating in petroleum activities".

Ghana could do well adopting this robust practice.

3.0. Improved Fiscal Provisions

The draft Bill proposes an increase in the initial carried interest from 10% to a minimum of 15% (S.11a). This is expected following the commencement of commercial production of oil and the subsequent de-risking of the Cape Three and Tano basins. It also introduces bonuses (S.90) for

the first time, but does not show whether they are signature or production bonuses. Other new fiscal provisions in the draft Bill are:

1. Capital gain tax (S.89(6)) consistent with Internal Revenue Act, 2000 (Act 592);

2. Thin capitalization rules (S.89(5)) consistent with Internal Revenue Act, 2000 (Act 592); and

3. Transfer pricing rule (S.93) which is already provided for in the Petroleum Income Tax Act, 1987 (PNDC Law 188) and requires transactions between Contractor and affiliates to be based on prevailing international competitive prices including conditions that are fair and reasonable if the transaction was done between Contractor and non-affiliate (arm's length transaction).

It is important to note that the introduction of capital gains tax and thin capitalization and the reference to the Internal Revenue Act, 2000 (Act 592) is to harmonize the tax provisions in the petroleum sector with other sectors. This is probably because the sector specific law, the Petroleum Income Tax Act, 1987 (PNDCL 188), does not provide for capital gains and thin capitalization. However, the introduction of these tax tools in the draft Bill is likely to create two sector specific laws dealing with taxes, which could lead to uncertainty on which law to refer to since the draft Bill does not propose to repeal PNDCL 188. Uncertainties resulting from duplicity of petroleum tax legislations can make computation and compliance difficult for tax preparers and companies as well as government.

In our view, the preferred way is to harmonize the Internal Revenue Act with the Petroleum Income Tax Law. Alternatively, the harmonization could be done by simply stating in the draft Bill that, "In addition to the Petroleum Income Tax Law, other laws of general application including the Internal Revenue Act apply to the petroleum sector".

Also, the fiscal provisions in the Bill are a significant departure from Ghana's pre-jubilee regime. Ghana's pre-jubilee regime was more liberal as it was intended to attract upstream investments. However, with the commencement of commercial production of crude oil since 2010, the risk profile has significantly declined, hence the shift towards higher fiscal contribution.

It is important to state that with only about 20% of the basins under license, Ghana must be careful about its attractiveness. From a nationalistic perspective, the move towards higher fiscal terms is more attractive, but this could serve as disincentive to investments. However, one way to balance the interests between revenue capture and investment attraction is to introduce progressive terms in a more liberal fiscal regime such as windfall taxes based on rate of return or price cap. Ghana already has Additional Oil Entitlement in its fiscal regime and this must be encouraged.

4.0. Reconnaissance License

The draft Bill introduces reconnaissance licensing (S.9), with the aim to promoting investment in data acquisition. This is appropriate considering that most of Ghana's hydrocarbon basins are not licensed. Reconnaissance license will grant non-exclusive rights (S.9(2)) to applicants, consistent with the practice in some mature areas in Africa like Nigeria and Angola; and new frontiers like Liberia and Sierra Leone.

A significant advantage of reconnaissance licensing is that once significant data is acquired, the State can do any of the following:

a. Negotiate better terms

b. Undertake open and competitive public tender

c. Raise financing to develop the blocks on its own.

There are however conflicting proposals with regards to the granting of a reconnaissance license. For instance:

a. Whilst S.9 (2) proposes non-exclusive rights to reconnaissance license holders, S.9(3) proposes exclusive rights under some circumstances without providing conditions for those exceptional circumstances.

b. Whilst S.9(6) prohibits the granting of a reconnaissance license to look for data in an area under a Petroleum Agreement, S9(7) allows it in consultation with the Contractor provided such does not interfere with the activities of the Contractor. But granting of a reconnaissance license in an area under a Petroleum Agreement is itself interference on the exclusive rights of a Contractor and could be abused.

Apart from these problems, the draft Bill provides weak qualifications for a reconnaissance license. For instance, the draft Bill requires compliance with relevant statutory requirements on environmental protection prescribed in the EPA Act, 1994 (Act 490) to qualify for a reconnaissance license. *In other jurisdictions, more qualifications are provided. For example in Angola, the qualifications include recognized capacity, technical knowledge, and financial capability. In Sierra Leone, a proposed work and expenditure program, an assessment of the environmental impact of proposed reconnaissance and financial, technical and industrial resource capacity are important requirements.*

We however observe that, to promote investments in data acquisition, one important incentive is to grant a successful reconnaissance license holder the right to apply for and conclude a Petroleum Agreement on the area. *But this has the danger of undermining competitive licensing and the governance implications as well as the opportunity to attract other investors who could efficiently exploit the resources in the area under consideration*.

5.0. Petroleum Agreement

5.1. Duration of a Petroleum Agreement

The duration of a Petroleum Agreement has been reduced from 30 years to 25 years (S.14(1)). This increases the leverage of the State but may become a disincentive to investors especially on projects that have long gestation periods (e.g. gas projects). Even though gas production is treated under a different section (S.32), the duration is the same as crude oil.

In some jurisdictions, gas contracts attract "retention periods" to allow for the contractor to identify market before the development of the field. This is intended to assure investors of the security of their investments. Thus, a reduction in the contract period works to the disadvantage of Contractors.
It is also not clear which phases are covered under the duration of the Petroleum Agreement. For instance, an area that has been confirmed to have petroleum accumulation through a reconnaissance license may require less exploration period than a completely unknown area, but the duration of a Petroleum Agreement appears to be the same for all agreements, which does not treat potential investors fairly.

A good example of leveraging on the duration of a Petroleum Agreement is to trade off time for benefits. In Libya's Exploration and Production Sharing Agreements (EPSA IV), the government increased its stake in exchange for increasing the duration of Petroleum Agreements. Ghana May want to adopt a differential contract duration regime as a negotiating tool but this could be associated with uncertainties among investors or abused by public officials to favour friendly oil companies.

5.2. Exploration Period, Minimum Work and Expenditure

Exploration Period is provided in the draft Bill as a 7 year exploration period with possible extension, consistent with international best practices.

The draft Bill takes a strong departure from what pertains to previous Agreements especially in the West Cape Three Points (WCTP) and Deep Water Tano (DWT) blocks. The difference between the proposals in the draft Bill and previous contracts are provided in the Table below:

WCTP block	In the case of the WCTP block, where a minimum work program for an extension period is not fulfilled, the Contractor pays off the minimum expenditure in respect of the remaining works and is therefore deemed to have fulfilled the program for the period. Thus, the Contractor has automatic right to move to the next sub-period.
DWT block	In the case of the DWT block, in spite of the payment of the minimum expenditure for the remaining work program, the Contractor has no automatic right to move to the next sub-period. Any such move is subject to the discretion of the Minister.
The draft Bill	In the draft Bill, S.23(2) requires that the Contractor pays the expenditure for remaining unfulfilled work; and under the circumstance, S23(3) empowers the Minister to terminate the Agreement. Thus, the Bill strengthens the hand of the Minister and puts the country in the driving seat.

In S.21(5), the Minister can extend Exploration Period beyond 7 years under the following conditions: (i). When a discovery is made in the last year of the exploration period and an extension is required for commerciality; and (ii). In exceptional situations as prescribed (*Exceptional situations need to be explained as this is the first time such a provision has been introduced).*

5.3. Review of Terms and Conditions

Section 20 provides that the parties to a Petroleum Agreement may review the terms of the Agreement if it can be established that there exist a significant change in the circumstances that prevailed at the time the Agreement was executed or the last review of the Agreement. *In our view, the circumstances that could cause a review should be set out either in the draft Bill or in all Petroleum Agreements to avoid arbitrariness. Alternatively, there should be a requirement that subjects such changes to parliamentary approval. .*

6.0. Notification of Petroleum Discovery and Appraisal

Section 25(11) places the responsibility on the approval of the appraisal process on the Petroleum Commission and section 25(13) also places the responsibility on the determination of commerciality on the contractor and state as follows: "*The contractor shall prepare and submit to the Commission not later than ninety days after completion of the appraisal programme the*

results of the appraisal programme stating whether the discover is commercial or not and the basis for the decision".

This approach to the determination of commerciality recognizes that Contractor is fully responsible for the development cost and also bears the risk, but this does not always meet the goals of most host countries. In the event that the Contractor has less expensive sources of crude oil, it may decide not to develop the discovery. It is therefore important to give the host country the right of review of commerciality.

Also, the definition of what constitutes a commercial well is very important to the host nation. In this Bill, what constitutes commercial discovery has not been defined and may be subject to negotiation between Contractors and the host nation, a situation that works against the host nation especially if it has no strong negotiation position. To address this, an Egyptian International Petroleum Agreement (IPA) defines *"a commercial well"* as "*The first well in any geological feature which after testing for a period of not more than thirty consecutive days where practical, but in any event in accordance with sound and accepted industry production practices, and verified by the national oil company, is found to be capable of producing at the average rate of not less than two thousand (2,000) barrels per day. The date of discovery of commercial well is the date on which such a well is completed and tested according to the above".*

Although in most of the IPAs, the determination of commerciality is left to the Contractor, *our view is that the new bill should consider the determination of commerciality from the view point of the host nation as well as define what constitutes a "commercial discovery". This will allow for maximum conservation strategy and prudent exploitation of the petroleum resources in the country.*

7.0. Development and Production

Section 26 deals with prudent exploitation of the petroleum resources. The introduction of this section is a good idea but it is not sufficient in dealing with conservation issues in the exploitation of petroleum resources. The draft Bill provides that*:*

a. A Contractor shall develop and produce petroleum in a manner that will ensure the maximum long term recovery of the petroleum in place (S.26(1));

b. A Contractor shall ensure that the development and production of petroleum is conducted in accordance with the best international practice and sound economic principles and in a manner that that will ensure little or no waste of petroleum and loss of reservoir energy as possible (S.26(2)); and

a. The Contractor shall conduct continuous evaluation of the depletion strategy and technical solution and shall take the necessary measures to optimise petroleum resources (S.26(3)).

Most of the shortcomings in maximum recovery targets are due to lack of application of detailed conservation strategies in the production of petroleum resources. The question of what constitutes a "best international practice" and "sound economic principles" as indicated in the draft Bill is still not fully addressed in the industry. It is therefore important to introduce specific measures that will address some of the shortcomings in the conservation strategy. For instance, a conservation strategy must seek to achieve a rate of production that is sustainable without preventable waste and also seek to achieve the maximum economic recovery from petroleum reservoirs as well as the protection of correlative rights.

In our view, damage to fields containing more than one reservoir can be prevented if the bill includes an obligation to operate each reservoir separately or through commingling, which ever serves the maximum recovery objective better. For example an Angolan Model 2006 states that, "Petroleum shall not be produced from multiple independent oil production zones simultaneously through one string of tubing except with the prior approval of Sonagol".

8.0. Regulation of GNPC

The draft Bill prescribes regulations for the GNPC, an important development in the petroleum industry. The GNPC has rights on all open areas not covered by Petroleum Agreement (S.11(1)), and strategic areas or blocks are to be reserved for the corporation in an open area (S.7(9)). The latter is consistent with the practice in Brazil. However, in Brazil, the remaining areas that are not classified as strategic areas for the national oil company are subject to competitive bidding. But unlike Brazil, the GNPC does not participate in competitive bidding as it holds a carried interest in all Petroleum Agreements.

In our view, where the GNPC has rights on an open area, and may subsequently include a Contractor under a Petroleum Agreement as in S.11(4), the process of including a Contractor should be guided by an open and competitive bidding process, as failure to do so could open the flood gates for the GNPC to enter into Agreements without public scrutiny.

It is also possible for the Minister of Energy to allocate some open areas to GNPC as strategic acreage and then turn around to influence the Corporation's selection of contractors. This provides room for the Minister to avoid the open and competitive process provided in Section 10(1) of the Bill.

An important recommendation Ghana could adopt is to create a new Company with responsibility to hold and manage Ghana's carried interest. This would relieve the GNPC of this

duty and, in doing so, allow the GNPC to engage in purely commercial operation, entering into partnership to develop its strategic acreages and competing for a stake in other areas.

In S.11(2), the GNPC's activities are subject to applicable permits and approvals under "the Act" (when the draft Bill is finally enacted into law) or Regulations. This gives meaning to the Petroleum Commission Act, 2011 (Act 821) which already places GNPC under the regulatory umbrella of the Petroleum Commission.

9.0. Regulation of Subcontractors

Section 17 provides for the regulation of subcontractors. Subcontracts require written approval of the Petroleum Commission and the threshold for the value of subcontracts shall be determined by the Minister. This is to ensure that subcontracts are not concentrated in one subcontractor in what has become known as "contract mining". However, in doing this, care should be taken not to limit free conduct of business operations between contractors and subcontractors.

In our view, there should not be thresholds on the value of subcontracts, but the Petroleum Commission should be mandated to carry out investigations when it suspects unfair competition in the award of subcontracts and to punish perpetrators in proven cases.

10.0. Transportation, Treatment and Storage

The Minister is required to grant a license to install and operate facilities for transportation, treatment and storage of petroleum unless there is an existing right to install and operate facility derived under a development plan (S.38). The powers of the Minister in infrastructure installation and operation are defined as follows:

a. Applications for licenses are to be made to the Minister (S.39(1))

b. The Minister may grant a license for a fixed period of time (S.40(3))

c. The Minister may appoint licensees as operator and may approve a change of operator (S.40(5)).

In our view these powers will usurp the powers of the Energy Commission mandated to do this under Section 2 of the Energy Commission Act, 1997 (Act 541); and could lead to regulatory conflict and uncertainty. If these powers of the Energy Commission will be given to the Minister, then the draft Bill will need to repeal similar powers contained in Act 541 and expressed to be exercised by the Energy commission.

11.0. Tariffs for the Use of Infrastructure

The Bill gives the Minister, the owner of a facility and the Petroleum Commission the power to determine tariffs for the use of infrastructure facilities as follows:

a. The Minister may stipulate tariffs for use of facility by the owner or third parties when granting a license (S.40(2a))
b. The owner or operator of a petroleum pipeline may charge a transportation tariff for the use of the pipeline by other persons (S.42(5))
c. Unless otherwise determined by the Petroleum Commission, the tariffs shall cover cost of construction, financing operation and maintenance and a reasonable rate of return on investments (S.42(6A))
d. The Commission may, as a condition for approval of agreements between parties for the use of facilities, change the tariffs and other conditions (S. 42(9)).

In our view, these powers are conflicting with the power conferred on the Public Utilities Regulatory Commission by the Public Utilities Regulatory Commission Act, 1997 (Act 538).

12.0. Health and Safety Security Requirements and Standard

Sections 71-86 of the draft Bill provides for some strong protections for safety and against environmental risk. For example the provision in section 71(1) that *"Petroleum operations will be conducted in a manner to ensure that a high level of safety is achieved, maintained and further developed in accordance with technological developments , best international practices and legislation relating to health, safety and labour"* is in the right direction.

Unfortunately as the result of the blow-out by BP and its partners in the Gulf of Mexico, our view is that the draft Bill must consider tightening provisions and protections in certain areas to avoid similar occurrences in Ghana. Additional provisions which might be helpful in this context for consideration are as follows:

a. *The selection of an independent third party certification for blow-out preventer (BOP) by the Petroleum Commission for the purpose of cementing and well design. This is very critical because the choice of the BOP has become the primary factor for most blow-outs in the oil and gas sector.*

The request in section 71(2) that: "A plan and related documents for implementation of safety measures of petroleum activities shall be submitted to the Petroleum Commission before the commencement of the relevant petroleum activities" is not sufficient to address oil spillage issues. It is therefore proposed for consideration that the draft Bill

a. *must include a provision for an adequate spill response plan as an additional requirement for approval of development plan.*
b. *The application of drilling a relief well is an important step in stopping blow-outs on the rigs. It should be a mandatory requirement for the provision of a plan for drilling a relief well promptly at the approval stage of the development plan. This is a recoverable cost but is very important to prevent the spread of pollution should a blow-out occur.*

13.0. Environmental Protection

The most significant provision in the Bill regarding environmental protection is in Section 82 (1)-(8) which deal with the extent of liability. In this provision, the operator is held primarily responsible (Polluter-Pays principle). The Bill permits reduction in the damages if they are the result of natural cause or war or force majeure. Legal action for damages will be brought in a high court. Additional provisions which might be helpful include:

a. *Power of the Minister to suspend a licensee's production until remedial measures a re taken;*
b. *Regular consultation with the Government to discuss environmental impacts where National Parks are involved or nearby;*
c. *Meetings between the Ministry and the licensee when a responsible third party complains about impact on a national park, sensitive area or critical infrastructure.*

14.0. Conclusion, Observations and Recommendations

Overall the draft Bill seeks to introduce several positive developments in Ghana's upstream petroleum industry ranging from the introduction of reconnaissance license and open public tender process to improved fiscal terms including provisions on thin capitalization and transfer pricing, regulations on infrastructure installation and operations, Health, Safety and Environment (HSE) standards and good governance. It is however worthy to note that the Bill proposes wide unregulated discretionary powers for the Minister of Energy. And, given no remedial checks and balances, an overbearing Energy Minister may abuse such wide discretionary powers.

Our key observations are:

1. The new provisions on good governance in the petroleum industry are not adequate as there are other provisions that disable their relevance. In particular, the provisions for open and competitive public tender and contract disclosures are not strong enough.

The draft Bill seeks to promote investments as can be seen in the introduction of reconnaissance license, extension of exploration period, and regulations for transportation

1. infrastructure installation and operation. However, other provisions that seek to interfere with the rights of contractors as well as the introduction of new fiscal provisions could undermine investment attraction.

2. The draft Bill also firmly recognizes the role of the Petroleum Commission in regulating petroleum operations including regulations of the GNPC and subcontractors. But in many ways, the Commission's independence is reduced to consultations with the Minister.

3. The draft Bill introduces regulations for infrastructure installation and operations to promote the development of the domestic natural gas market. However, the role of the Minister and other agents in licensing and tariff determination conflict with the roles of the Energy Commission and the Public Utilities Regulatory Commission. This could create regulatory uncertainty.

4. The bill puts the responsibility for safety, health and environmental protection on the Contractor, but downplays the regulatory role of the State.

Our key recommendations are:

1. When the Minister ignores the outcome of a competitive public tender, the reasons for taking such a decision and the justification for direct negotiation must be published. When a proposal for direct negotiations is received, the Minister should be required to declare it through public notice, and can commence negotiations with the company if, within a specified period from the date of the notice, no other entity declares an interest in the area in question. But if any entity declares an interest, a tender shall open for competitive process.

2. Licensing for installing and operating facilities/infrastructure and award of reconnaissance licenses in known areas should be governed by open and competitive tender process.

3. The disclosure requirement must be extended to other public interest documents including the proceeds in the proposed Local Content Fund and list of beneficiaries, approved field development plans, marketing agreements, financial accounts of the GNPC, reasons for preferring direct negotiations as opposed to open and competitive bidding, and publication of winning bids and reasons supporting the winning bids.

There is need to harmonize the Internal Revenue Act, 2000 (Act 592) with the Petroleum Income Tax Act, 1987 (PNDCL 188). Alternatively, the harmonization could be done by simply stating in the draft Petroleum (Exploration and Production) Bill that, “In addition

1. to the Petroleum Income Tax Law, other laws of general application including the Internal Revenue Act apply to the petroleum sector".

2. The draft Bill should indicate the qualifications for a reconnaissance license beyond the statutory obligations in the Environmental Protection Agency Act, 1994 (Act 490). This should include recognized capacity, technical knowledge, and financial capability.

3. Although in most of the IPAs, the determination of commerciality is left to the Contractor, the draft Bill should consider the determination of commerciality from the view point of the host nation as well as define what constitutes a "commercial discovery" in line with the Egyptian model agreement.

4. Damage to fields containing more than one reservoir can be prevented if the draft Bill includes an obligation to operate each reservoir separately or through commingling, which ever better serves the maximum recovery objective.

5. Where the GNPC has rights on an open area, and may subsequently include a Contractor under a Petroleum Agreement as in S.11(4), the process of including a Contractor should be guided by an open and competitive bidding process, as failure to do so could open the flood gates for the GNPC to enter into Agreements without public scrutiny.

6. An important recommendation Ghana could adopt is to create a new Company with responsibility to hold and manage Ghana's carried interest. This would relieve the GNPCof this duty and, in doing so, allow the GNPC to engage in purely commercial operation, entering into partnership to develop its strategic acreages and competing for a stake in other areas.

7. There should not be thresholds on the value of subcontracts, but the Petroleum Commission should be mandated to carry out investigations when it suspects unfair competition in the award of subcontracts and to punish proven cases.

8. To protect the environment against pollution and other environmental damage, there should be provisions for the selection of an independent third party certification for blow-out preventer (BOP) by the Petroleum Commission for the purpose of cementing and well design; the submission of an adequate spill response plan as an additional requirement for approval of development plan and the application of drilling a relief well for purposes of stopping blow-out on the rigs.