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Governance of Resource Revenues in Ghana's Mineral and Petroleum Sectors

by

Theodore Nsoe Adimazoya

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

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Abstract

This thesis is a critical comparative study of the governance frameworks for resource revenues in the Ghanaian mineral and petroleum sectors. It examines the law and legal institutions of both sectors with regard to transparency and accountability in the management of resource rents. In particular it argues that the experiences of the petroleum sector governance regime can be used to reform the mining sector.

The thesis further argues that the availability of legal mechanisms which ensure that citizens have timely and accurate information on the resources exploited and the utilization of rents is essential to good resource management. It concludes that while the petroleum sector may offer the mining sector ideas about how to reform its revenue governance system, if the reform is to be effective it needs to be carried out holistically, consistent with the mining context.

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CHAPTER ONE

GOVERNANCE OF RESOURCE REVENUES IN GHANA: BACKGROUND AND CONTEXT

1.1 Introduction

Many developing resource rich countries are criticised because the companies that operate within these countries and the host governments do not disclose what they earn and spend. As Karl observes there is "…no transparency regarding the amount of resources available to be exploited, their rate of exploitation, the funds that governments actually receive and the uses to which these funds are put."[1] Consequently, huge amounts of extractive sector revenues are being pilfered[2] because they are not subject to any form of oversight.

The resource curse phenomenon[3] which has plagued many developing resource-rich countries is partly attributed to the secrecy that surrounds both contracts and the revenues that flow from the

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[1] Terry Lynn Karl, "Ensuring Fairness: The Case for a Transparent Fiscal Social Contract" in Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz eds, *Escaping The Resource Curse*, (New York: Columbia University Press, 2007) 257 at 265.

[2] For example, according to the U.S. Senate Permanent Subcommittee on Investigations, the ruling Obiang family of Equatorial Guinea controlled American bank accounts containing over U.S $700million in allegedly misappropriated funds. See Minority Staff of Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Government Affairs, 108th Congress, Report on money laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act: Case Study Involving Riggs Bank Online <http://hsgac.senate .gov/public/index.cfm?FuseAction=Files.View&FileStore_id=52AD7316-F7CA-4031-BF49-75FB5B6BDF88>; Also according to Anti-corruption NGO Global Witness, President Nazarbayev of Kazakhstan controls a Swiss account containing over U.S $1.1 billion of money derived from that country's resource sector. See "Time for Transparency: Coming Clean on Oil, Mining, and Gas Revenues" Online <http://www.globalwitness.org/ media_library_detail.pdf/155en/time_for_transparency>; In the same Global Witness report about U.S $250 million per year goes unaccounted for in Congo Brazzaville.

[3] See Jeffery Sachs and Andrew Warner, "Natural Resource Abundance and Economic Growth" (1995) NBER Working Paper 5398, Online: <http: //www.nber.org>. The authors found in a study in 1995 that economies with a

extractive sector.[4] In recent years, researchers have found that resource-rich countries not only develop more slowly than others,[5] but also tend to be less democratic and more corrupt.[6] Most of these resource-rich countries in Africa have operated their governance regimes under closed doors where government activities, including revenue management, have been shrouded in secrecy and the governance space dominated by cronies who treat extractive resource revenues like family endowments. The political elite rely on natural resource rents to perpetuate their continued stay in power, leaving the citizenry with little leverage to demand improvements in governance. This creates an accountability deficit which is exacerbated by the lack of information available to the citizens about the actions of their leaders.

With few exceptions,[7] corruption and mismanagement of extractive revenues have become persistent problems confronting African countries today.[8] Al Faruque argues that the widespread

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high ratio of natural resource exports to GDP had lower growth rates during the period 1971-1989 than did other comparable economies that did not have natural resource endowments.

[4] Stephen Yeboah, ``Secrecy in the `model` of Transparency in Ghana's Extractive Industry``(2010) Online: GhanaWeb <.http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=180415>.

[5] See Richard Auty, "Political Economy of African Mineral Revenue Deployment: Angola, Botswana, Nigeria and Zambia Compared" (2008) Real Instituto Elcano Working Paper WP 28/2008 Online: <http://www.realinstituto elcano.org/wps/wcm/connect/688e22804f018a599c45fc3170baead1/WP28-2008_Auty_Political_Economy_Afri can_+Mineral_+Revenue_+Deployment.pdf?MOD=AJPERES&CACHEID=688e22804f018a599c45fc3170baead1 >. According to the Auty, the slow growth of resource-rich countries is attributed to what economists call rent cycling theory. This theory is premised on the observation that low rents confer incentives to create wealth because governments in low-rent economies expand their revenues by taxing to increase output. This encourages governments to invest in public goods and maintain efficiency incentives. The higher investment and accompanying growth strengthens three key sanctions against anti-social governance as (1) entrepreneurs protect their investments by lobbying for property rights and the rule of law; (2) unsubsidized urbanisation strengthens civic voice; and (3) early government reliance on taxing income and profits spurs the demand for accountable public finance. In contrast, cheap rents from natural resources deflect the incentive from wealth creation into rent distribution, which confers more immediate and often personal political returns.

[6] See Carlos Leite and Jens Weidmann, "Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth" (1999) IMF Working Paper WP/99/85 Online: IMF <http://ssrn.com/abstract=259928>.

[7] Botswana has had sustained economic growth since 1966 which is attributed widely to the prudent use of its mineral revenue. According to Transparency International in its 2005 report Botswana has a strong national integrity system which stems from the sum total of its laws, institutions and practices, Online <http://www.trans

incidence of corruption caused by a lack of transparency in revenue management in many resource-rich countries has made them highly indebted poor countries, with slow progress in human rights development and recurring social and political instability.[9] Where information about the size of oil or mineral wealth endowments in a country is typically protected from disclosure, (by confidentiality clauses in contracts) and the terms of agreements for monetization of those endowments are similarly withheld from public scrutiny, opportunities for corruption are vast.[10]

In response to calls for solutions to deal with the governance deficit in the resource sector, there have emerged global initiatives aimed at promoting transparency and accountability in the management of natural resource wealth.[11] Transparency and accountability have been viewed as

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parency.org/publications/gcr/gcr_2005#download>; see also Atsushi Iimi, "Escaping From the Resource Curse: Evidence from Botswana and the Rest of the World" (2007) 54 IMF Staff Papers 4.

[8] Abdula Al Faruque, "Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices" (2006) 24 J Energy & Nat'l Res L 66.

[9] *Ibid* at 67.

[10] Karl, *supra* note 1at 256.

[11] The calls for increased extractive sector transparency and accountability grew out of two agendas: the fight against corruption and the call on businesses to act responsibly. This has led to the creation of NGOs and NGO coalitions such as Global Witness, Pax Christi, Partnership Africa Canada, the Open Society Institute (OSI), the Publish What You Pay Campaign (PWYP). The UN Global Compact also adopted transparency as its tenth principle and at the 2002 World Summit on Sustainable Development, the then British Prime Minister, Tony Blair launched the Extractive Industries Transparency Initiative (EITI) as a UK foreign policy proposal. Thirty-eight countries in 1997 also signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United States of America has the Foreign Corrupt Practices Act (FCPA). President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") into law on 21 July 2010. Among other requirements, the Dodd-Frank Act imposes on companies involved in natural resource extraction/or purification to disclose all *non-de minimis* payments either made to the US Federal government or foreign governments for the purpose of commercial development of oil, natural gas and minerals. In September, 2012 Canada's mining industry joined forces with NGOs to develop a Canadian framework on mandatory disclosure of payments to governments. See CNW, "Canada's mining industry joins with NGOs to improve transparency" (2012) Online: CNW, <http://www.newswire.ca/en/story/1031311/canada-s-mining-industry-joins-forces-with-ngos-to-improve-transparency>.

key factors in reducing corruption and other dysfunctions that result in the resource curse phenomenon.[12]

The favoured approach to dealing with natural resource revenue governance failure has thus emphasized transparency and accountability. Traditional governance arrangements and institutional mechanisms that favour confidentiality in the management of the resource sector are not delivering the needed development outcomes. The disclosure of all revenues from the extractive sector and how these revenues are spent appears to be the only solution that will solve the governance lapses in the resource sector in developing countries.[13] Although there are global initiatives and efforts to promote the transparent and accountable management of resource revenues, host governments have the primary responsibility to take measures on revenue transparency as ownership of natural resources is formally vested in the state.[14] Legal and policy reform regarding public disclosure requirements relating to payments made to the governments by the companies and how governments spend revenues can contribute to the transparency and accountability in revenue management.[15]

The concealment of revenues from the citizenry raises fundamental problems of accountability and leads to disastrous outcomes in terms of development that do not inure to the benefit of the

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[12] See Jennifer Drysdale, "Five Principles for the Management of Natural Resource Revenue: The Case of Timor-Leste's Petroleum Revenue" (2008) 26 J Energy & Nat'l Res L 151at 166; Virginia Haufler, "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World" (2010) 10 Global Environmental Politics 53; Ivar Kolstad & Arne Wiig, "Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?" (2009) 37 World Development 521; Paul Collier, "Laws and Codes for the Resource Curse" (2008) 11 Yale Hum. Rts. & Dev't. L. J. 9 at 17.
[13] See Karl, *supra* note 1 at 266.
[14] Al Faruque, *supra* note 8 at 97.
[15] *Ibid.*

general populace. Host governments and extractive sector companies owe it to the people to disclose earnings from these sectors because the resources belong to the citizens. I argue that the governance of extractive revenues is a collective one between all stakeholders. That is, it is a process where the government, companies and the citizenry engage in constant exchange of information regarding the resource and the management of the revenues that accrue from it. Any distortion of the information asymmetry in favour of government and resource companies has the potential to create opportunism, corruption and mismanagement of the resource.

1.2 The Research Problem

Many resource-rich developing countries continue to grapple with resource sector corruption. Revenues that accrue from mineral and petroleum resources are wasted in the sense that they are captured by interest groups, bureaucracies and politicians instead of being used for the benefit of the public interest. Leite and Weidmann show that extractive capital intensive industries offer opportunities for corruption, especially in developing countries.[16] This is partly attributable to the fact that most developing countries, including Ghana, depend on foreign companies to exploit their natural resources because exploitation requires tremendous capital investment and technological know-how. Given that these resources are limited in supply, location specific and non-renewable, firms vie with each other for access and this offers opportunities and incentives

[16] Leite and Weidmann, *supra* note 6.

for corruption. O'Higgins notes that "…investing firms have less choice of location, and rent-seeking corrupt governments have the upper hand, through geographic luck…"[17]

The fact that natural resources are location-specific makes it very difficult for firms that do not like the rent-seeking behaviour of governments to just pack and leave. Thus to actually reap the rewards of the investment, the firms have to stay with the operation, probably continuing in the bribery mode that initially sealed the deal.[18] This can provide corrupt kleptocrats with steady income and insulate them from accountability to their citizens.[19] O'Higgins therefore argues that extractive resource industries provide the perfect conditions for corruption – monopoly and discretion without accountability.[20]

The nature of the extractive industry and the relationship between actors has created what I will term a transparency and accountability deficit. These actors have created an environment in which resource revenues are not necessarily used for the benefit of the citizenry because of the absence of oversight.

The petroleum industry in Ghana is nascent.[21] Nevertheless, Ghana has enacted a Petroleum Revenue Management Act, 2011 (Act 815) to provide the framework for the collection,

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[17] Eleanor O'Higgins, "Corruption, Underdevelopment, and Extractive Industries: Addressing the Vicious Cycle" (2006) 16(2) Business Ethics Quarterly 235.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] Commercial discovery of petroleum resources was made in mid 2007 and production started on 15th December, 2010. See BBC, "Ghana oil begins pumping for first time" Online: BBC <http://www.bbc.co.uk/news/world-africa-11996983>.

allocation and management of petroleum revenue in a responsible, transparent, accountable and sustainable manner for the benefit of the citizens. The law incorporates the highest internationally accepted standards of transparency and accountability in its framework for the management of petroleum revenue.[22]

In contrast, some aspects of the mining sector governance framework in Ghana do not promote transparency and accountability in the sector's revenue management process. Despite being Africa's second-largest gold producer, Ghana has experienced disappointing results in translating this mineral wealth into broad economic development.[23] The process of managing resource revenues is not open to the public. Information on how much government receives from mining and what it spends it on is hardly available to the Ghanaian public. This is because the legal regime does not compel disclosure of mining revenue related information. The issue is even worse at the sub-national level where part of the mineral revenue is paid to impacted communities through the Mineral Development Fund.[24] These revenues have for a long time

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[22] *Petroleum Revenue Management Act of 2011*, Laws of the Republic of Ghana, Act No. 815, ["PRMA"]. For example section 49(1) of the Act stipulates that the "management of petroleum revenue and savings shall always be carried out with the highest internationally accepted standards of transparency and good governance." Also, the Act provides for a Public Interest and Accountability Committee that is tasked to provide space and platform for the public to debate whether spending prospects and management and use of revenues conform to development priorities.

[23] Joseph Ayee et al., "Political Economy of the Mining Sector in Ghana" (2011) World Bank Africa Region Policy Research Paper 5730 at 6.

[24] In 1992 the Government conceptualized the idea of compensating the disadvantaged communities with the creation of the Mineral Development Fund to allocate portions of royalties paid by mining companies to impacted communities. The scheme became operational in 1994. Under it local government authorities were allocated 4.95% of the total royalties by mining companies within their area while the traditional authorities got 1.8% and stool land owners were allocated 2.25%. In percentage terms, the figures appear so meager but in quantum terms they are huge for certain communities.

been shrouded in secrecy and the amounts known only by the top hierarchy of the various local government units and traditional rulers.[25]

According to Heller and Heuty, there are several transparency gaps in Ghana's mineral resource sector that threaten to undermine public awareness of the management of the resource and accountability.[26] The authors contend that these transparency shortcomings are underscored by the Revenue Watch Index, which measures the degree of natural resource transparency in 41 countries.[27] Ghana scored only 32 points on a possible 100-point scale encompassing disclosure of mining sector revenues, contracts, licensing processes and institutional rules, earning the ignominious ranking of "Scant Revenue Transparency."[28]

Ghana's past record in managing its mineral wealth raises further questions regarding the deficit in transparency and accountability. Ghana still faces major challenges of transparency in the distribution of gold revenues for the public good. These revenues account to date for 90% of mining sector revenues, over 34.3% of total exports, and up to 40% of revenue in some mining area district assemblies.[29] The first audited report of Ghana's mining revenue under the Extractive Industry Transparency Initiative (EITI) which was published in January 2007 raised

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[25] EITI audit reports for years 2004-2008, reveal serious discrepancies in payments attributable to the non-transparent manner in which payments are made, Online: GHEITI <http://www.geiti.gov.gh/site/index.php?option =com_phocadownload&view=category&id=5:2010&Itemid=54>.
[26] Patrick Heller and Antoine Heuty, "Accountability Mechanisms in Ghana's 2010 Proposed Oil Legislation" (2010) Ghana Policy Journal 50
[27] *Ibid.*
[28] Revenue Watch Index 2010, Online: Revenue Watch <http://www.revenuewatch.org/rwindex2010/pdf/Revenue watchIndex_2010.pdf>. It is important to state here that at the time that this report was compiled Ghana had not yet started commercial production of petroleum resources. Therefore the ratings in the report could only be in respect of solid mineral resources.
[29] See Revenue Watch Institute's Transparency Snapshot- Ghana (2007) Online <http://caspianrevenuewatch.org /our-work/countries/ghana-transparency.php>.

serious concerns over royalty computations, payments by companies and the opacity of contract details.[30] The report revealed among other things the insufficient release of information to the beneficiary institutions regarding company payments for mining rights, failure of local institutions to publish the royalties received to their local constituencies, the lack of meaningful reporting procedures, or any method for auditing how the funds are used and limited participation by local communities in directing the use of the funds.[31] According to Yeboah, Ghana has lacked the capacity to properly collect revenues and audit payments for the gold-mining companies.[32] The latest report of the Ghana Extractive Industries Transparency Initiative (GHETI) indicates lapses in monitoring and scrutinizing disbursements of mineral revenues made to local government institutions.[33]

The above scenario entrenches the transparency and accountability deficit in Ghana and challenges the country's ability to deal with the intractable problems of resource revenue corruption. The all-too-common opacity of resource revenues exacerbates the resource curse. If one of the chief causes of the resource curse is lack of government accountability, transparency arguably represents a practical counterweight by giving citizens the information they need to

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[30] *Ibid.* Ghana acceded to the EITI principles in 2003 and was the first country to implement it in its mineral sector. Although the initiative has brought some improvements in the governance of mining revenues, the initiative will not considered in this thesis, save for periodic references to its reports, because it is a voluntary initiative which is not backed by law.
[31] *Ibid.*
[32] Stephen Yeboah "Ghana and the Extractive Industries Transparency Initiative - Matters Arising" (2010) Online: Ghanaweb <http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=178427>.
[33] GHEITI, "2009 Final Aggregated Report" Online: GHEITI, <http://www.geiti.gov.gh/site/index.php?option=com_phocadownload&view=category&id=4:2009&Itemid=54>.

make demands on their government for the responsible disposal of natural resource revenues.[34] But the citizenry cannot effectively make these demands if the leaders can easily hide under the cover of opaque laws. If the legal barriers are not removed, the citizenry will not realize the full benefits of mineral resource exploitation.

1.3 Research Question and Methodology

In light of the problem as formulated above, the legal question to be addressed by this thesis is: In what ways and to what extent can the legal regime governing mineral revenue management be made more transparent and managers of such revenue more accountable?

This thesis adopts a comparative and doctrinal methodology to respond to the research question outlined.[35] I use the doctrinal approach to review and analyse the literature[36] on public choice theory of interest groups and rent seeking behaviour. Additionally, I review the literature on

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[34] Matthew Genasci & Sara Pray, "Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice" (2008) 11 Yale Hum. Rts. & Dev. L. J. 37.

[35] See John C. Ritz, "How To Do Comparative Law" (1998) 46 Am. J. Comp. L. 617. The author argues that comparative methodology among other things focuses carefully on the similarities and differences among the two systems while taking account of the possibility of functional equivalents. This will lead to conclusions about the distinctive characteristics of each individual legal system and/or commonalities concerning how law deals with the particular subject matter. See also Jaakko Husa, "About the Methodology of Comparative Law: Some Comments Concerning the Wonderland", Maastricht Faculty of Law Working Paper No. 5, November 2007 at 4-19.

[36] See David N. Boote and Penny Beile, "Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation" (2006) 34(6) Educational researcher 3-15. The authors contend that the foundation of any research project is the literature review. The literature review sets the broad context of the study, clearly demarcating what is and what is not within the scope of the investigation, and justifies those decisions. It situates an existing literature in a broader scholarly and historical contest enabling the author to distinguish what has been learned and accomplished in the area of study and what still needs to be learned and accomplished. See also Joseph A. Maxwell, "Literature Reviews of, and for, Educational Research: A commentary on Boote and Beile's "Scholars Before Researchers" 35 Educational Researcher 28-31; Christine Bruce, "Interpreting the scope of their literature reviews: significant differences in research students' concerns" (2001) 102 New Library World 158-166.

resource revenue corruption as a kind of rent seeking behaviour as well as the principles of transparency and accountability in natural resource revenue management. My focus is the literature on how transparency and accountability can be used as tools to combat resource revenue corruption and negative rent seeking behaviour. I selected the literature on the basis of results of searches I undertook of specific terms in legal databases, references made to them in papers with similar subject matter and in secondary materials such as text books and journal articles.[37] I then analysed the literature to develop a framework or criteria for assessing good resource governance regimes. I then applied these criteria to the specific legislations pertaining to the mining and petroleum sectors to identify any similarities and/or differences between the governance regimes for petroleum and mining rents.

Because the method for this thesis is comparative, I have provided a legal analytical overview of the framework that governs petroleum revenue management in Ghana. I have reviewed the primary legislation governing petroleum revenue management, the *Petroleum Revenue Management Act 2011 (Act 815)*. This law has as its fundamental goal, the transparent, responsible and accountable management of petroleum revenues. I also reviewed all regulations made pursuant to this law and any directives therein, to the extent that they deal with transparency and accountability of petroleum revenue. This review of the petroleum sector and the analysis help to reveal whether Ghana's mineral revenue management regime is transparent.

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[37] I used search terms both in the Library Catalogue and online databases such as Westlaw, Quiklaw, Hein Online, Legal Trac, Rocky Mountain Mineral Law Foundation Digital Library, WorldLII, HG.org and Google Scholar. I selected articles and texts that deal with transparent and/or accountable management of natural resource revenues.

It also shows the governance challenges that confront the sector and provides the basis for making proposals for reform of the governance rules.

Additionally, I have critically reviewed Ghana's legislations and regulations that deal with mineral resource revenues. The review is limited to those aspects of the laws that have a direct or indirect impact on transparency and accountability of resource revenues. This is because these good governance standards are the main focus of this thesis.

1.4 The Choice of the Petroleum Sector as Comparator– A Justification

Transparency and accountability of natural resource revenue management is said to be a cardinal solution to bad resource governance. Without transparency and accountability in the management of resource revenues, any natural resource is likely to prove to be a curse rather than a blessing. Although the petroleum sector is quite a new industry in Ghana, it appears to be enjoying all efforts aimed at transparency and accountability of petroleum revenues. This has been evidenced by the institutionalization of transparency and accountability as cardinal principles in the management of petroleum revenues through the enactment of a petroleum revenue management law.

The law requires the management of petroleum revenues to accord with international best practice in transparency and accountability. Thus, the law adopts some novel approaches to managing petroleum revenues such as the establishment of a public interest accountability committee. This committee is, among other things, to monitor, evaluate and provide the

necessary platform for the public to debate spending prospects and whether the management and use of petroleum revenues conform to development priorities.

The Petroleum Revenue Management Act, contains many of the “Santiago Principles” relating to the appropriate framework for governance and accountability arrangements in the management of sovereign wealth funds (SWFs) such as public definition of the rules and procedures for managing revenues, publication of annual reports and other relevant information.[38] Additionally, the law meets most of the criteria laid out by Edwin Truman of the Peterson Institute for International Economics for *best practices* in sovereign wealth funds including accountability and transparency to citizens, publication of performance against benchmarks, making public the size of the fund and public disclosure of annual returns.[39] The overarching principle of the Truman blueprint is accountability which he says, if adopted, will allay many of the concerns of citizens regarding the use and investment of resource wealth.

Moreover, the Petroleum Revenue Management Act largely conforms to Lockwood *et al’s* governance principles for natural resource management which provides a guide to the design and assessment of natural resource management institutions. These principles are normative statements that make claims about how governing or steering should happen and in which

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[38] See International Working Group of Sovereign Wealth Funds,” Generally Accepted Principles and Practices (GAPP) – Santiago Principles” (2008) Online: International Working Group <http://www.iwg-swf.org/pubs/eng /santiagoprinciples.pdf>.
[39] Edwin M. Truman, “A Blueprint for Sovereign Wealth Fund Best Practices” (2008) Peterson Institute for International Economics Policy Brief, No.PB08-03, Online: <http://www.iie.com/publications/pb/pb08-3.pdf>.

direction – that is, how governance actors should exercise their powers in meeting their objectives.[40]

The choice of the petroleum sector for comparison also stems from the fact that both sectors are extractive in nature and Ghana is equally endowed with mineral reserves such as bauxite, diamond and gold but is particularly known for its gold industry.[41] A foreign system comparator was one option I considered but since there is a sector in the extractive industry that already embodies most of the principles of transparency and accountability in revenue management I think it will be apt to draw the comparison from its framework. Additionally, since the government has already made commitments to good governance in the petroleum sector there is the need to examine what has been done right and to study the kind of governance framework that has been put in place and how the mining sector may benefit from such framework.

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[40] Michael Lockwood et al, "Governance Principles for Natural Resource Management" (2010) 23 Society and Natural Resource 1. Lockwood et al in arriving at their principles used the following process (a) suggestions from an expert group; (b) consideration of principles from the literature; and (c) refining and testing draft sets of principles with the assistance of 13 Australian natural resource management governance authorities. These principles are (1) legitimacy –authority to govern conferred by statute; (2) transparency – the visibility of decision making processes, clarity of decisions and ready availability of information; (3) accountability – the allocation and acceptance of responsibility and the demonstration of whether and how these responsibilities have been met; (4) Inclusiveness – opportunities available to stakeholders to participate in and influence decision-making processes and actions; (5) fairness – the respect and attention given to stakeholders' view, consistency and absence of personal bias in decision making and consideration given to distribution of costs and benefits of decisions; (6) Integration –the connection between, and coordination across different governance levels, the connection between and coordination across organizations at the same level of governance and the alignment of priorities, plans and activities across governance organizations; (7) capability- the systems, plans, resources, skills, leadership, knowledge and experiences that enable organizations and their individuals who direct, manage and work for them to effectively deliver on their responsibilities; and (8) adaptability – the incorporation of new knowledge and learning into the decision making and implementation, anticipation and management of threats, opportunities and associated risks and systematic reflection on individual, organizational and system performance.

[41] Ghana is the second largest producer of gold in Africa and one of the leading producers in the world. The solid mineral sector has contributed enormously to the country's GDP for well over fifty years.

Furthermore, it should be easier for a government to accept the lessons drawn from a national comparison rather than an international comparison.

1.5 Structure/Framework of Thesis

This thesis has been divided into five chapters. Chapter One focuses on the research problem, the research question(s), a theoretical approach, the methodology and the framework of the thesis. The aim is to emphasize the need for transparency and accountability in managing government share of mining revenue.

Chapter Two contains a review of the literature on interest group theory and rent seeking activities. These models of public choice theory serve as the theoretical prism within which the problems of resource governance are viewed. This chapter also provides an overview of the debates on transparency and accountability and their role in reducing corruption and averting the resource curse. It further reviews the mechanisms for the effective implementation of transparency and accountability. The Chapter further deals with the following: the conceptual question of what accountability and transparency are; the analytical question of what types of transparency and accountability there are; and an evaluative question of how transparency and accountability mechanisms in resource revenue management can be assessed. This is the basis for identification of criteria on which to evaluate a good resource revenue governance regime.

The major concern of Chapter Three is a review and analysis of the legal regulatory mechanisms for revenue management of petroleum sector revenue. This includes an assessment of the legal

and institutional framework for enhancing the principles of transparency and accountability as well as their strengths and weaknesses. This Chapter briefly reviews background issues such as the ownership regime for petroleum resources; as well as the fiscal regulatory environment of the sector. The legal regime for the management of petroleum revenues is then evaluated using the criteria in chapter two. This sets the stage for a comparative analysis with the minerals sector. It also helps to determine the legal and regulatory ideals that can be adopted.

Chapter Four mainly deals with an overview of the legal and regulatory framework for the management of mineral revenues. It points out the numerous shortcomings in the legal framework that make it difficult for the system to achieve transparency and accountability in the management of revenues. This is done using the criteria identified in chapter 2. Thus, the legal barriers to transparency and accountability in minerals resource governance are identified and analyzed in this chapter.

Chapter Five summarizes the issues examined in the previous chapters. It reiterates the legal impediments to transparent and accountable resource revenue management in the mining sector. It then draws relevant conclusions and makes recommendations on how to enhance good governance standards in the resource sector in Ghana.

1.6 Conclusion

In this Chapter, I have sought to state the fact that legal regimes that do not compel the transparent governance of the natural resource sector and revenues run the risk of being captured

by persons (i.e. bureaucrats and governments) entrusted with the management of such resource for their parochial interest. I also point to the fact that in situations with scant transparency regarding the revenues from the resource sector, there is the likelihood that such resources will not be used to promote the public interest. These developments, I have argued, give rise to a transparency and accountability deficit where the self-interest of leaders supplants the public interest in how resource revenues are used.

I intend in the remainder of this thesis to present a coherent argument that the source of resource sector corruption or rent-seeking is the absence in the legal and regulatory framework of key mechanisms of transparency and accountability. I will demonstrate in the context of Ghana, how the absence of clear rules of transparent and accountable governance of mineral revenues creates an atmosphere conducive to the pursuit of self-interest in the form of corruption and rent-seeking. Finally, I will argue that the solution to resource sector corruption lies in the legal institutionalisation of mechanisms that promote oversight by the citizenry in the management of extractive sector revenues.

I do not by this thesis wish to suggest that transparency and accountability are a sufficient condition to promote the public interest in terms of broad developmental outcomes. Rather I put forth the position that transparency and accountability in the management of mineral revenues are a necessary component of good governance of the resource sector. I argue that where the rules governing the generation, collection and distribution of mineral revenues are opaque, a conducive atmosphere is then created for self-interest maximization by persons who are entrusted with the responsibility to manage the resource. To promote the public interest

therefore, there is the need for public oversight as a counterweight to secret deals in the extractive sector.

CHAPTER TWO

INTEREST GROUP THEORY, RENT-SEEKING AND GOOD GOVERNANCE NORMS

2.1 Introduction

General government failure in the management of resources and development policy has been attributed to several factors including the self-seeking behaviour of politicians and groups, corruption and rent-seeking.[42] Natural resource endowments constitute a large part of developing resource-rich countries' income. Therefore resource wealth is subject to these management failures that result from self-interested behaviour. With the mineral sector haven dominated the Ghanaian economy since independence,[43] the addition of the petroleum sector will buttress the statement that the extractive sector will for a long time contribute significantly to Ghana's domestic revenues and development.

However, given the huge quantum of revenues that the extractive sector contributes, it is prone to rent-seeking activities, interest group capture and corruption unless the legal regime guarantees the transparent and accountable management of such revenues. As I have already pointed out in

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[42] See generally, Tony Killick, *A Reaction Too Far: Economic Theory and the Role of the State in Developing Countries* (London: Overseas Institute, 1989)12.

[43] The mineral sector is currently the largest foreign exchange earner contributing about 41% of the country's foreign exchange earnings. Gold is the most important mineral accounting for about 90% of the total earnings of the mineral sector. see George B. K. Awudi "The Role of Foreign Direct Investment (FDI) in the Mining Sector of Ghana and the Environment" (paper presented at the conference on foreign direct investment and the environment, OECD headquarters, Paris – France, 7 – 8february 2002) [unpublished] online <http://www.oecd.org/dataoecd/44/12/1819492.pdf>; see also Daniel Nonor, "Mining Industry Powers the Economy" (2012) Online: The Chronicle, <http://ghanaian-chronicle.com/business-news/mining-industry-powers-the-economy> where the vice president of AngloGold Ashanti at the west Africa mining and exhibition conference in Accra noted that it is the mining sector that continues to power the economy of Ghana and that its contribution to the national economy is far from small.

the preceding Chapter, the problems of the sector are the lack of accountability and transparency in how revenues are managed.

In this Chapter, I examine the conceptual framework of interest group theory, and rent-seeking behaviour which are choice theoretic models and argue in line with this theory that since politicians and bureaucrats are self-interested, entrusting the management of resource revenues to them without the accompanying mechanisms of transparency and accountability will lead to rent-seeking behaviour, interest group capture and resource revenue corruption. I argue that constraints through rule reform (that allows for transparency and accountability) is the most desirable cure for negative rent-seeking and corruption in the resource sector.

2.2 Theme of the Interest Group Theory

Public choice theory has emerged as an intellectually satisfying approach to explain the problems of how bureaucrats and politicians manage the wealth that accrues to the entire society. This theory (and its legal variant, the economic theory of regulation) entails the application of theoretical assumptions and insights of microeconomics to political processes and outcomes. According to Mbaku "…public choice theorists apply the voluntary exchange paradigm of economic theory in which the individual is assumed to maximize his own self interest."[44] As interest or utility maximizers, individuals as well as politicians and bureaucrats hold the public

[44] John Mukum Mbaku, "Corruption and Rent-Seeking" in S. Borner and M. Paldam eds, *The Political Dimension of Economic Growth* (London: Macmillan/St. Martin's Press, 1998) 193 at 193.

space and resources captive to ensure that their preferred interests are satisfied.[45] Thus, politicians rather than serve the "public interest", use the distributive power of the state to serve their own interests and those of "special" interest groups.

In short, governing politicians and bureaucrats engage in the pursuit of private interests in their dealings with the affairs of the state. Tullock, a leading American public choice scholar and lawyer aptly captures this logic when he states that: "We must accept that in government, as in any form of commerce, people will pursue their private interests, and they will achieve goals reasonably closely related to those …of citizens only if it is in their private interest to do so."[46]

The public choice theorist models government officials as self interested and therefore not overly concerned with the public interest. And since the general public are likely to have limited information about how government activities are run, it is to the benefit of government officials to continue maximising their private interest. Tullock again captures this fundamental logic aptly when he states that:

> Because they (government officials) operate in an area where information is very poor (and the proof that the voters' information on political issues would be poor was one of the first achievements of the public choice theory), deception is much more likely to be a worthwhile tactic….[47]

Fundamentally, public choice theorists hold the view that elected representatives prefer to remain in office and this requires the continuous support of their constituents and considerable political

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[45] Dominic M. Ayine, "Democratic Deliberation of Trade Legislation in Ghana: Institutions, Interests and Accountability" (SJD Thesis, Stanford University, 2006) [Unpublished].
[46] Gordon Tullock, Arthur Seldon, & Gordon L. Brady, *Government Failure: A Primer in Public Choice* (London: Institute of Economic Affairs, 2000) 10.
[47] *Ibid.*

resources. Interest groups possess the very resources politicians require in the form of financial support and votes.[48] But since interest groups also have their own goals such as advancing the interests of their members, they give the politicians the necessary resources for their continued political survival and enjoy the benefits of regulatory policies.[49]

In simple terms, interest groups seek regulatory decisions that advance their selfish interest, and because they are small and their members individually have much at stake, they are able to overcome collective action problems that impede mobilization.[50] In return for the favours that these groups advance to government regulators, they trade favourable regulatory treatment for the needed political resources from the interest groups and constrain administrative agencies to deliver the regulatory treatment interest groups seek.[51]

The vote-maximising government, is in effect, constrained to make trade-offs and compromises with special interest groups in return for favours. This results in a demand and supply situation that operates to ensure that the interests of groups are satisfied. Peltzman and Posner for instance explain regulation as entirely a supply and demand for political outcomes.[52] Government in that sense engages in creating "legal arrangements that benefit well-organised and concentrated groups for whom the pro rata benefits are high at the expense of diffuse interests…."[53] While it

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[48] Steven Croley, "Public Interested Regulation" (2000) Florida State University Law Review 7
[49] *Ibid.*
[50] George J. Stigler, "The Theory of Economic Regulation" (1971) 2 Bell J. Economics 3
[51] Croley *supra* note 48.
[52] Richard A. Posner, "Theories of Economic Regulation" (1974) 5 Bell J. Economics 335; Sam Peltzman, "Towards a More Central Theory of Regulation" (1976) 19 J. Law & Economics 211; see also Neil Gunningham, "Public Choice: The Economic Analysis of Public law" (1992-93) 21 Fed. L. Rev. 117.
[53] Robert Tollison, "Public Choice and Legislation" (1988) 74 Virginia Law Review 339 at 343.

may be easy to see why groups demand favourable laws, it is less obvious why the government that is supposed to protect the public interest should supply the laws. Peltzman provides an answer. Peltzman argues that politicians desire to maximize electoral majorities, and that by using laws to benefit powerful interest groups, they obtain more votes and other benefits.[54]

The rationale for the interest group demands for favourable regulation is because of its rent-creating value. In other words, government regulation creates artificial rents that are then captured by interest groups who benefit from such regulation. Governmental regulation thus induces rent-seeking behaviour on the part of interest groups in society. This decreases societal welfare by imposing additional costs.[55] The effects extend beyond the individual groups to the greater society. As Macey puts it all economic actors "expend vast amounts of resources to obtain rent-seeking legislation, to comply with it, to avoid having to comply with it, to adjust to it, and to prevent it from being enacted in the first place."[56] The next section discusses the concept of rent-seeking and its implications for the resource sector.

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[54] Peltzman, *supra* note 52.
[55] See Jonathan Macey, "Chief Justice Rehnquist, Interest Group Theory and the Founders' Design" (1993-94) 25 Rutgers L. J 577. According to Macey the costs include: (1) the costs that the transfer-seeking interest group incurs to obtain the transfer; (2) the costs that opposing groups incur trying to either block or pay for the transfer; (3) the costs that arise as losing groups and firms avoid the transfer by diverting resources to less valued, but unregulated uses; and (4) the costs that participants in unregulated markets must incur to remain free of interest group wealth transfers.
[56] Jonathan R. Macey, "Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory" (1988) 74 VA. L. Rev. 471 at 47.

2.3 The Costs of Rent Seeking in Government

Rent seeking is one of the concepts that enjoy special attention in public choice theory.[57] According to Tollison, the theory of rent seeking involves the study of how people compete for artificially contrived transfers.[58] In the view of Mbaku, rent seeking involves attempts by political coalitions to subvert the rules in order to generate benefits for themselves at the expense of the general populace. He describes it as an opportunistic behaviour on the part of interest groups, that is designed to allow politicians and bureaucrats to use the redistributive power of the state to effect wealth transfers in their favour.[59]

Tollison observes that "Real" rents are different from "government" or "fake" rents because rent seeking has productive implications in the first instance but not in the second. He drives home the point that rent seeking involves the expenditure of scarce resources to capture an artificially created transfer and that the implications of the economic and social wastefulness of rent seeking are difficult to escape once an artificial scarcity has been created. Tollison further notes that rent seeking occurs at three levels. Firstly, he notes that the governments can allow individuals to compete for what he calls "the playing card monopoly"[60] and waste resources through such activities as bribery. This is the simplest and most understood level of rent seeking. Secondly, he

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[57] Nicholas Mercuro, "The Jurisprudential Niche Occupied by Law and Economics" (2009) J. Juris 61 at 83.
[58] Robert Tollison, "Rent Seeking: A Survey" (1982) 35 Kyklos 575 at 576.
[59] John Mukum Mbaku, "Democracy in Africa: Rent Seeking as a Constraint on Policy Reform" (1995) 41(2) Australian Journal of Politics and History 205 at 211.
[60] Tollison in distinguishing rent seeking from profit seeking uses the analogy of playing cards. He uses the example of a king who wishes to grant monopoly (exclusive) right in the production of cards. In this case artificial scarcity is created by the state and as a consequence, monopoly rents are present to be captured by monopolists who seek the king's favour.

argues that the state could sell the monopoly rights to the highest bidder and put the proceeds at the disposal of government officials in which case the rents will show in the wages of state officials and individuals will compete to become civil servants. And third, the monopoly right could be sold to the highest bidder and the resources dispersed through the state budget in terms of expenditure increases and/or tax reduction and rent seeking will arise as individuals seek to become members of the groups favoured by the tax expenditure program.[61]

Interest groups in government such as entrepreneurs, party ruling elites, civil servants and supporters of ruling regimes are said to be adept in influencing how resources are allocated or wasted. This is because they are more powerful, possess the financial means to influence or are well organised. Mbaku takes the concept of rent seeking further. Unlike Tollison who argues that rents may be put at the disposal of government officials which could result in pay rise, Mbaku thinks that these government officials have so much discretion that they will indeed appropriate the resources to their personal benefit and those of their associates. Arguing with respect to the African context Mbaku says that:

> In addition to the bribes received from the entrepreneurial class, bureaucrats, most of whom are members of the politically-dominant group, receive inflated salaries, and in addition, are usually given significant budgetary discretion, allowing them to appropriate public resources for their personal use.[62]

Therefore rent seeking individuals (i.e. politicians and bureaucrats) acquire for themselves, wealth which is beyond what they would have got in the absence of opportunism. Consequently, as Wiseman notes, unless the ability of "the governments is constrained by rules even a

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[61] Tollison, *supra* note 58 at 578.
[62] Mbaku, *supra* note 59 at 213.

democratic society can deteriorate…[and] powers will be used by special interest groups to effect inefficient wealth redistribution in their favour."[63]

The foregoing overview of the public choice theory of rent seeking makes it clear that its adherents argue that governments and bureaucrats are self-interest maximizers and this challenges the presumption that public officials in managing the wealth of the state act in the public or common interest. In other words the public sphere is not resistant to market forces and pressures. This is a direct challenge to the neoclassical basis for government provision of selected goods and services.[64]

The public choice theory of rent-seeking has been criticized on several grounds. A comprehensive review of these criticisms is beyond the scope of this thesis. Therefore, what follows is necessarily an outline of the critique.

Rent seeking is criticised as being an overly cynical concept because of the imputations it makes with respect to people's intentions and motives. Hillman and Riley observe that care needs to be taken when the concept of rent seeking is applied so as to avoid possible cynicism because an unqualified application of the theory of rent seeking would see all personal favours as investment in rent seeking.[65] The patently cynical view of politics inherent in the portrayal of politicians and

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[63] Jack Wiseman, "Principles of Political Economy: An Outline Proposal, Illustrated by Application to Fiscal Federalism" (1990) 1 Constitutional Political Economy 101.
[64] See Michael D. Wright, "A Critique of the Public Choice Theory case for Privatization: Rhetoric and Reality" (1993) 25 Ottawa Law Review 1.
[65] Arye L. Hillman & John G. Riley, "Politically Contestable Rents and Transfers" (1989) 1(1) Journal of Economics and Politics 17.

bureaucrats as motivated purely by rent seeking clearly demonstrates a preference for markets over other forms of social ordering relating to the allocation of resources. Kelman makes this point when he ascribes to public choice theory the view that: "[T]he 'market'…transforms private greed into social progress and harmony, mutual benefits, and positive sum games; democracy transforms (undistinguishable) private greed into stagnation, wasteful rent-seeking, and negative sum games."[66]

Others have focussed their criticism of the public choice theory on its lack of attention to other motivations for human action other than self-interest maximization and the resultant rent seeking behaviour. Kelman calls this a woefully inadequate picture of human behaviour.[67] He argues that the model of human motivation omits variables such as ideology, which may account for political actions other than the desire to engage in rent seeking. Ginsburg further argues that many legal scholars believe that the assumption of self-interest as an organising concept is itself self corrupting.[68] In this direction, Ostrom contends that the talk of self-interest will produce more self-interested citizens and thereby result in precisely the kind of behaviour the models predict.[69]

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[66] Mark Kelman, "On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement" (1988) 74 Virginia Law Review 199 at 202.
[67] *Ibid* at 202-203.
[68] Tom Ginsburg, "Ways of Criticising Public Choice: The Uses of Empiricism and Theory in Legal Scholarship" (2002) 4 U. ILL. L. Rev. 1139.
[69] See Elinor Ostrom, "A Behavioural Approach to the Rational Choice Theory of Collective Action (1998) 92 Am. Pol. Sci. Rev. 1. The author expresses the view that "We are producing generations of cynical citizens with little trust in one another, much less in their governments."

For those who disagree with the characterization of self-interested behaviour by governments and bureaucrats, public choice theorists suggest that they bear the burden of rebutting the presumption of self-interest, and of demonstrating that a "dramatic widening of personal horizons"[70] will occur with respect to government activities. Even though it is acknowledged by some theorists, such as Brennan and Buchanan that the use of the self-interested wealth-maximizing construct is not entirely appropriate for the empirical exercise of predicting the likely outcomes of political and bureaucratic interactions, it is still the apparently scientific basis for public choice theory because it describes a significant motive for political and bureaucratic actions. They contend that: "although we do not believe that narrow self-interest is the sole motive of political agents, or that it is necessarily as relevant a motive in political as well as in market settings, we certainly believe it to be a significant motive."[71] The authors categorically reject the view that political agents can be modelled as solely motivated to promote the public interest.

It can also be argued that because citizens are aware that their political institutions and agents are subject to the ills of rent seeking behaviour, they will become more vigilant of the phenomenon and become willing to expend time and resources to monitor their actions.[72] Some have even contended that the analysis contained in the self seeking construct might actually contribute to

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[70] James M. Buchanan, "Toward Analysis of Closed Behavioural Systems" in James M Buchanan & Robert Tollison eds., *Theory of Public Choice: Political Applications of Economics (*Ann Abbor: University of Michigan Press 1972)
[71] Geoffrey Brennan and James M. Buchanan, "Is Public Choice Immoral? The case for the "Nobel" Lie" (1988) 74 Virginia Law Review 179 at 181
[72] Ginsburg, *supra* note 68.

the formation of broad-based groups to monitor the activities of politicians and bureaucrats.[73] This makes public choice in general and the construct of rent seeking in particular "the best, and certainly the most rigorous available method of analysing governmental processes."[74]

2.4 Bureaucratic and Political Corruption as Rent Seeking Behaviour

Corruption exists (and persists) "below the radar screen" of many corporate officers, management researchers and even government officials.[75] Doh et al., define government corruption as "*the abuse (or misuse) of public power for private (personal) benefit*".[76] (Emphasis in original text) This definition has been adopted by the World Bank.[77] This definition focuses on public officials (i.e. public sector agents) who exercise the governing power rather than the companies or individuals who pay them the bribes. However, this definition recognises implicitly that public office can sometimes provide legitimate or legal benefits to politicians and bureaucrats. Thus it is only in the abuse of public office for private gain that corruption can arise.

A broader conception of corruption acknowledges that the perpetration of corruption is as "dependent on the actions of private business, especially corporations, and their agents as it is on

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[73] See Edward L. Rubin "Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes" (1991) 66 N.Y.U. L. Rev. 1.

[74] Jonathan R. Macey, "Public Choice and the Legal Academy" (1997-98) 86 Geo. L. J. 1075 at 1090-91.

[75] Jonathan P. Doh et al, "Coping with Corruption in Foreign Markets" (2003) 17(3) Academy of Management Executive 114.

[76] *Ibid.*

[77] See O'Higgins, *supra* note 17.

those of allegedly corrupt governments – whether developed or developing countries."[78] O'Higgins argues that corruption should be viewed as:

> the price one party pays to gain advantage in a transaction, an advantage which would not be available to the bribe-giver under competitive market conditions. Similarly, the recipient of the bribe creates an artificial benefit to the bribe giver. From the bribe giver's perspective, the price paid to the recipient of bribe is quite small when compared to the benefit gained.[79]

The public choice analysis of the bureaucracy was pioneered by Gordon Tullock and William A. Niskanen.[80] Their theories recognise that bureaucrats have relatively weak incentives to consider social welfare implications of the institutions they serve, namely the public interest, and, at the same time have relatively strong incentives to improve their own positions within the bureaucracy in which they serve. The thrust of their argument is that the incentives faced by bureaucrats are such that their actions will often produce perverse outcomes which will fail to align with the notion of the "public interest". Mercuro argues that while the models of Tullock and Niskanen have some subtle differences, they both employ the rational-actor models in an attempt to shed light on the supply side, bureaucratic decision-making process and its political-economic consequences essentially arguing that bureaucrats will make institutional decisions with the view to maximising their utility – subject to the institutional constraints they confront.[81]

In view of the fact that bureaucrats are utility maximizers, bureaucratic corruption is viewed as a practical issue involving, as Harsch puts it, "outright theft, embezzlement of funds or other

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[78] *Ibid* at 236.
[79] *Ibid.*
[80] See Gordon Tullock, "The Politics of Bureaucracy" (1965) in Charles Rowley ed., *The Selected Works of Gordon Tullock* (Indianapolis: Liberty Fund, 2005); William A. Niskanen, *Bureaucracy & Representative Government* (New Brunswick: Transaction Publishers, 1971).
[81] Mercuro, *supra* note 57 at 83.

appropriation of state property, nepotism and the granting of favours to personal acquaintances, and the abuse of public authority and position to exact payments and privileges."[82]

In many developing countries bureaucratic and political corruption has become a pervasive part of resource allocation. According to Mbaku, bureaucratic corruption in many African countries comes in the form of purchase of favours, using bribes, by entrepreneurs from civil servants whose job it is to implement state economic policies.[83] Thus, apart from the demand side where public officials misuse their office for private gain, on the supply side entrepreneurs who know that they can avoid huge legal and regulatory costs see bribery as a cost-avoidance mechanism.

Le Vine has examined corruption in Ghana.[84] He presents a bleak picture of post independence political and bureaucratic behaviour in Ghana. According to Le Vine, politically corrupt practices became standard operating procedures up and down the ranks of officialdom. He notes how relatively heavy reliance on the political system for the allocation of resources increased the level of rent seeking and created opportunities for bureaucrats to extort bribes from the entrepreneurs seeking access to public resources and the markets. He cynically notes that:

> The "dash" became the standard lubricant of transactions with even the most ordinary of public servants – the constable on the road block, the postal clerk, the typist-assistant dispensing official forms and the dispensing clerk. Thus, in such situations, what can be styled a "culture of corruption" develops before long, and the public quickly learns to expect corrupt dealings with officials as the ordinary price that must be paid in exchange for public services.[85]

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[82] Ernest Harsch, "Accumulators and democrats: Challenging State Corruption in Africa" (1993) 31 Journal of Modern African Studies 31 at 33.
[83] Mbaku, *supra* note 59.
[84] Victor Le Vine, "Corruption in Ghana" (1975) 47 Transition 48.
[85] *Ibid* at 59.

Although Le Vine does not assert that all officials or even most officials in Ghana and elsewhere in Africa, are politically corrupt, he makes the point that "corruption is sufficiently pervasive that in a good many African countries, the public expect their public servants to be generally dishonest and their politicians to be venal rogues."[86]

While bureaucratic and political corruption is not as widespread in Ghana as in many other African countries, corruption is still very pervasive. The US Department of State's 2009 Investment Climate Statement reports that American firms are often asked for "favours" from contacts in Ghana in return for facilitating business transactions.[87] Similarly, in the Index of Economic Freedom 2010, Ghana scored 39% in terms of freedom from corruption.[88]

Additionally, in the 2011 World Bank's Worldwide Governance Indicators, Ghana scored 62.1% in terms of control of corruption (this is a marked improvement from its score of 39.8% in 1996).[89] Many Ghanaians still perceive corruption to be pervasive, with more than 90% of respondents of urban households in southern Ghana stating that corruption is prevalent and a serious problem in the country.[90]

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[86] *Ibid.*
[87] US Department of State "Investment Climate Statement-Ghana" (2009) Online: US Department of State, <http://www.state.gov/e/eeb/rls/othr/ics/2009/117435.htm>
[88] Heritage Foundation, "Index of Economic Freedom-Ghana" (2010) Online: Heritage Foundation, <http://www.heritage.org/index/country/Ghana>.
[89] The World Bank, "Worldwide Governance Indicators (2011) Online: The World Bank, http://info.worldbank.org/governance/wgi/sc_chart.asp.
[90] Ghana Integrity Initiative, "Voice of the People Survey (Southern Ghana), Project Completion Report" (2005) Online: GII, http://www.afrimap.org/english/images/documents/GhanaVoiceofthePeopleSurvey05.pdf.

2.5 Rent Seeking and Corruption in Resource Industries

The analysis up to this point has provided a general theoretical discussion of interest group theory, rent seeking and corruption. In light of this general theoretical discussion, the most important inquiry is to ask whether and the extent to which the resource sector fits into my broad theoretical claim that resource revenues are subject to interest capture, rent seeking and corruption. This section examines that claim and provides justification for it.

Leite and Weidmann observe that given the fact that natural resource exploration is an extremely high rent activity, it has a high likelihood to foster rent seeking behaviour because of the associated increase in rent seeking opportunities.[91] They show that extractive capital intensive industries offer opportunities and incentives for corruption, especially in developing countries. This is because extractive resources are limited in supply and non-renewable; hence firms compete with each other to gain access to them. This unique feature of natural resources gives local leaders opportunities for bribes and causes what Lane and Tornell call the "feeding frenzy" in which groups fight for resource rents in windfall times.[92]

Rent seeking behaviour in natural resource sectors is said to be usually sought at the highest level, where decisions are made about who will obtain relevant permits and licenses as well as determining who will benefit from the use of rents.[93] Standing writes that the most notorious

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[91] Leite and Weidmann, *supra* note 6.

[92] See Aaron Tornell and Philip R. Lane, "The Voracity Effect" (1999) 89 American Economic Review 22.

[93] O'Higgins, *supra* note 17.

manifestation of corruption and rent seeking in the extractive industries "involves political elites and their families or cronies plundering resources for self-enrichment, or senior officials demanding large kick-backs when brokering deals with private companies."[94] It is important to note that because there is usually a line-up of enthusiastic multinational companies ready to exploit extractive resources, corrupt activities of the ruling elite become easy to execute. This makes natural resources prone to corruption and rent seeking behaviour.

Several other factors account for the resource sector being prone to negative rent seeking activities and corruption. First, in rentier states[95] governments generate wealth through undisclosed rents or sovereign rents rather than through taxation. This detaches the government and its activities from the citizens which lead to negative rent seeking behaviour and outright theft. This situation arises because citizens have less incentive to question government use of revenues because it is not tax money and the government either actively or inadvertently compromises institutions that serve as checks and balances such as the media, the justice system, civil society and even academia. Indeed, the fact that resource revenues are earned largely from exports and denominated in foreign currency makes it the more attractive and possible to hide in clandestine foreign accounts.[96]

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[94] André Standing, "Corruption and the Extractive Industries in Africa: Can Combating Corruption Cure the Resource Curse? (2007) Institute for Security Studies Issue Paper 153.

[95] See Hussein Mahdavy, "Patterns and Problems of Economic Development in Rentier States: the Case of Iran" in M. Cook ed., *Studies in the Economic History of the Middle-East* (Oxford: Oxford University Press, 1970) 428. Mahdavy defines rentier states as those countries that receive on a regular basis substantial amounts of external rent. External rents are in turn defined as rents paid by foreign individuals, concerns or governments to individuals, concerns or governments of a given country. Mahdavy views oil revenues received by the governments of oil exporting countries as external rents because oil royalties are compensations for the removal of certain exhaustible resources.

[96] O'Higgins, *supra* note 17.

Additionally, Becker demonstrates that individuals are relatively more likely to commit a crime (that is, steal resource revenues) when the potential payoff from the act is high relative to the individual's probability of being caught.[97] Thus, where governments know that the citizenry will not be able to trace their dealings, because they operate an opaque resource revenue regime, the payoffs are higher relative to the probability of being caught. In such a situation the incentive to be corrupt is great. Klitgaard drives this point home succinctly when he notes that opportunities for corruption arise whenever the officials' actions involve the exercise of discretion and are impossible to monitor.[98]

Moreover, Rose Ackerman points out that the potential bribe revenues available to any individual politician or bureaucrat depend upon his or her monopoly power and that where potential bribe payers have non-corrupt alternatives, bribes if they are paid at all will be low.[99] Kolstad and Søriede write that natural resources are frequently and typically under state ownership and this implies that decisions on licenses to extract the resources and distribution of rents are commonly under the authority of top government officials in resource-rich states.[100] This gives officials the monopoly authority that can be abused and result in the entrenchment of bribe-culture. In essence, when government is a direct beneficiary of a centrally controlled major

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[97] Gary S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 J. Pol. Econ. 169.
[98] Robert Klitgaard, *Controlling Corruption* (Berkeley: University of California Press, 1988).
[99] Susan Rose-Ackerman, "Corruption" in Charles K. Rowley and Friedrich Schneider eds., *The Encyclopaedia of Public Choice Vol. 1* (Boston, MA: Kluwer Academic Publishers, 2004) 67 at 69.
[100] Ivar Kolstad and Tina Søriede, "Corruption in Natural Resource Management: Implications for Policy Makers" (2009) 34 Resources Policy 214.

revenue stream, those who rule the state have unique opportunities for self-enrichment and corruption, particularly if there is no transparency in the management of revenues.[101]

But is it only bureaucrats and politicians who are the determinants in the corruption and rent seeking equation? The answer is certainly no. Bureaucratic corruption debates have often tended to emphasize that the private sector investor is a passive victim. This has led to definitions of corruption as the abuse of public office for private gain. Kaufmann and Vicente, however, have challenged this "conventional wisdom".[102] They used business surveys to show that companies operating in weak or transition countries are active parties to corruption as it gives them benefits. Corruption according to them is not only the abuse of public office for private benefit but also the abuse of public office for private gain by third parties.[103] In their view, the grabbing hand of the state is joined by the grabbing hand of the private companies.[104] This situation creates a very curious scenario and the question one may ask is whether corruption arises as a result of a public official extorting a company or of a company wanting to buy favours from the public officer?

Given the peculiar nature of extractive industries and the growing competition to explore petroleum and mineral resources, Standing speculates that bribe takers in the extractive sector

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[101] Standing, *supra* note 94.
[102] Daniel Kaufmann and Pedro C. Vicente, "Legal Corruption" (2005) World Bank Institute, Online <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf>. The authors in discussing the evidence of corporate corruption argued that "It is critical to recognize, from a political economy perspective, that these forms of corruption generate substantial gains…thereby challenging the premise that these firms are coerced and making it that much more difficult to develop effective constraints on such behaviour."
[103] *Ibid.*
[104] *Ibid.*

have strong bargaining power and that this may increase in the future.[105] Benson and Baden however, suggest that an obvious determinant of corruption is the private buyer's willingness to pay for an illegal governmental rights allocation.[106]

It is clear from the above review that corruption in a majority of cases may be beneficial to both the politician and bureaucrat as well as to the investor seeking to exploit the resource. Bureaucratic and political corruption is one of the most important rent seeking behaviours in developing countries. From a public choice perspective, bureaucrats who are charged with implementing the country's regulatory system are able to manipulate the process, largely due to its lack of effective constraint, to their benefit. On the other hand, private investors may bribe bureaucrats and politicians to eliminate or minimise taxes which their enterprises are supposed to pay the state or to acquire licenses to exploit the resources of the state. Bureaucratic and political corruption is thus primarily rent seeking behaviour.

2.6 Prescriptions for Rent Seeking and Corruption

There have emerged several approaches to dealing with rent seeking behaviour and bureaucratic or political corruption among public choice schools such as letting the market rule, the value of constraining by rules and the communitarian self-interest approach.[107] It is however, beyond the scope of this thesis to treat them in detail and what follows here is mainly a review of the work

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[105] Standing, *supra* note 94at 8.
[106] Bruce L. Benson and John Baden, "The Political Economy of Governmental Corruption: The Logic of Underground Government" (1985) 14 J. Legal Studies 391 at 400.
[107] For a comprehensive review of these prescriptions see Lionel Orchard and Hugh Stretton, "Public Choice" (1997) 21 Cambridge Journal of Economics 409.

of Brennan and Buchanan on the use of rules to regulate individual and institutional behaviour. The reason for this is twofold. First the focus of this thesis is on how the rules governing resource revenues in Ghana can be reformed to deal with resource corruption and mismanagement. And secondly the nature of resource revenues is such that they are not suitable for management by either market or communitarian self-interest approaches.

Brennan and Buchanan in their work The Reason of Rules: Constitutional Political Economy argue that rules that regulate the actions of individuals in a society are important and a major determinant of how individuals and institutions behave.[108] Therefore, political and bureaucratic behaviour in the form of rent seeking and corruption can be analysed effectively only within the context of existing rules.[109] Thus any attempt to solve the problems of society must take into account the existing rules. Brennan and Buchanan observe that it is rules that define how individuals can interact with each other, provide a means of settlement of conflict, and place constraints on individual behaviour and that of the group.[110] Therefore, bureaucratic corruption and rent seeking can be seen as a problem of rule maintenance that can only be handled appropriately through rule reform.[111]

The rules need to be self-enforcing if they are to be successful in dealing with bureaucratic and political corruption especially in the resource sector. Making the rules self enforcing will

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[108] Geoffrey Brennan and James Buchanan, *The Reason of Rules: Constitutional Political Economy (*New York: Cambridge University Press, 1985)
[109] John M. Mbaku, "Bureaucratic Corruption in Africa: The Futility of Cleanups" (1996) 16(1) Cato Journal 99.
[110] Brennan and Buchanan, *supra* note 110.
[111] Mbaku, *supra* 109.

eliminate negative rent seeking and other opportunistic behaviour.[112] This requires transparency and accountability not only in the process of rule making but in the processes that the rules establish.

2.7 Implications of the Theory of Rent Seeking for Resource Revenue Governance

It is evident from the review of interest group theory and rent seeking that the model of self-interested behaviour has some implications for the governance of resource revenues. A couple of inferences may be drawn from the model. The first inference is that, in the absence of adequate constraints through rules, politicians and bureaucrats are likely to appropriate resource revenues to themselves or maximise their interest at the expense of the public good. This is because the model shows that persons who are charged with the management of resources or the regulatory process are likely to be self interested.

Although the theory of rent seeking has been described as cynical, it brings to light the fact that the public space, regulatory processes as well as the administrative spectrum may be captured by groups (including politicians and bureaucrats) to perpetuate their interest. This is particularly revealing in the context of developing countries where institutions are relatively weak and the political elite and bureaucrats seem extraordinarily powerful. Therefore, there is the need for rules to constrain the relevant actors in the governance of resource revenues.

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[112] *Ibid.*

A second inference and implication of the theory for resource revenue governance is that it drives home the need for the rules to require transparent processes for the exploitation, management and use of natural resources and any resulting revenues. The need for transparency and accountability in the governance of resource revenues, is not only an ideal for promoting democratic values in economic affairs of the state but a serious counterweight to opacity which promotes negative rent seeking behaviour and corruption. Citizens are suitably placed to monitor compliance regarding the effective use of resource revenues and to demand from their leaders accountability in the use of those revenues. But where the information asymmetry favours the ruling elite and bureaucrats, the citizens cannot demand accountability and the ruling class will then have the upper hand to maximise the wealth derived from natural resources for their personal interest. As Gillies and Heuty argue:

> Concentrations of information accompany concentration of power. Information asymmetries facilitate rent-seeking behaviour and permit those in charge to utilize the country's resource wealth to advance their personal and political aims. In such a context, where informational asymmetries are key characteristics of power differentials, transparency is both difficult and a potential agent of change. In the rentier state…, the gains from opacity are high and the costs of avoiding transparency are low. Demystifying the extractive sector and financial flows dilutes some of the center's power by enabling other actors to participate more fully. It eliminates informational enclaves where incentives favour self-interested behaviour.[113]

I will argue in the rest of this chapter that the principles of transparency and accountability hold the key to dealing with negative rent seeking behaviour and resource sector corruption. The emphasis is that the rules that govern resource revenues must on their own be self-enforcing and

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[113] Alexandra Gillies and Antoine Heuty, "Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries" (2011) 6 Yale J. Int'l Aff.25 at 31.

less dependent on counteracting institutions of state.[114] This strategy will both reduce the corrupt incentives facing bribe payers and recipients and facilitate effective oversight by the citizenry. Obviously, a model of open governance of resource revenues aims to limit ex ante, resource revenue theft and bad governance in the resource sector.

In the next section, I examine the normative concepts of transparency and accountability. I argue that if applied to the process of natural resource revenue governance, they will minimize the transparency and accountability deficit that bedevil the management of natural resource revenues and leads to revenue corruption and negative rent seeking behaviour.

2.8 Transparency and Accountability as Tools that Minimise Rent Seeking and Resource Corruption

2.8.1 Introduction

This part assesses the norms of transparency and accountability. It explores the concept of transparency by tracing briefly its emergence in recent times as a good governance norm. This part also examines the content of this principle and its usefulness in managing resource wealth.

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[114] Some strategies for dealing with bureaucratic corruption and negative rent seeking behaviour depend primarily on counteracting institutions of state such as the police, the judiciary, national legislatures and such similar institutions of state. The assumption of these strategies is that these institutions are properly constrained by law and as such free from corruption. Unfortunately, most of these institutions in developing countries are pervaded by high levels of corruption that they are victims of the same canker that they are mandated to deal with. Where the rules themselves are self enforcing in that they provide for transparent disclosures of revenue and expenditures, there is less incentive to appropriate resources for the purpose of maximizing self-interest. The threat of exit alone can be a powerful constraint on political and bureaucratic actions thereby reducing corrupt opportunities and limiting the scope of waste.

The analysis in this part will further examine the principle of accountability. It will show that accountability mechanisms are important to making transparency work. It will also outline the criticisms of these concepts in dealing with resource corruption and mismanagement and provide compelling arguments, why despite these criticisms, the concepts are still the most useful tools for resource governance. The rest of the chapter is devoted to establishing criteria to measure these good governance norms in legal frameworks for the management of resource rents.

2.8.2 The Concept of Transparency

Transparency is not just the latest buzzword but also a subject that has garnered serious academic attention.[115] Hood observes that transparency has "attained quasi-religious significance in debate over governance and institutional design".[116] In his view the term transparency has become so pervasive that it has become a "jargon of business governance as well as that of governments and international bodies, and has been used almost to saturation point in all of those domains over the past decade."[117] In a search carried out by Professor Guy Seidman in Journals and Law Review databases primarily of United States and Canadian publications, the term transparency is said to have "mushroomed" in recent years in the regular vocabulary of jurists. He found that the term appeared in these legal writings 87 times in 1990, increasing in ten years to 1,023 in 2000 and more than tripled to 3,431 in 2010.[118]

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[115] Suzanne J. Piotrowski, "Is Transparency Sustainable" (2009) 69(2) Public Administration Review 359.
[116] Christopher Hood, "Transparency in Historical Perspective" in Hood and Heald eds., *Transparency: The Key to Better Governance?* (Oxford: Oxford University Press, 2006) 3.
[117] *Ibid.*
[118] Guy Seidman, "Lawyers are from Mars, Political Scientists are from Venus: Who Gets Transparency Right?" (Paper presented at the First Global Conference on Transparency Research, 2011, Rutgers University-Newark, New

Although transparency pervades legal writing, its definition and content are elusive. According to Fenster the concept of transparency has two intertwined meanings as an administrative norm. First, it can refer to those constitutional and legislative tools that require governments to disclose information in order to inform the public and create a more accountable, responsive state. Secondly, the term can be used metaphorically to recognise and decry the distance between the public and the state, and to call for efforts to make the state thoroughly and constantly visible to the public.[119]

While Fenster sees the concept of transparency as describing both the need for legal tools to compel government disclosure and as a metaphor expressing the distance between the state and the populace, others define the term more narrowly to mean information disclosure that creates a more accountable and responsive state. Adopting varied approaches, Piotrowski and Van Ryzin[120] and Alastair[121] explain transparency to include the ability of the general populace to access government information. To them the extent of government transparency is both a legal construction and a perception. Alastair judges transparency by the degree to which secrecy is written into law while Piotrowski and Van Ryzin judge it by the public's desire for transparency. However, there is little explanation by Van Ryzin on how this public desire can be measured.

Jersey, 19-20 May 2011 Online: <http://spaa.newark.rutgers.edu/images/stories/documents/Transparency_Research_Conference/Papers/Seidman_Guy.pdf>. Seidman attributes the current rise in the use of the term transparency to the consistent growth in article coverage in Westlaw databases, the expansion of the academic community and the rising interest in the topic.

[119] Mark Fenster, "Seeing the State: Transparency as a Metaphor" (2010) 62 Adm. L. Rev. 617.

[120] Suzanne Piotrowski and Gregg Van Ryzin, "Transparency in Local Government" (2007) 3 American Review of Public Adm. 37.

[121] Roberts Alastair, *Blackout: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006).

Others have described transparency as encompassing the need for clarity of government rules and decisions as well as the need for government actions to be visible, predictable and understandable. The Asian Development Bank defines the term as "the availability of information to the general public and clarity about government rules, regulations and decisions."[122] This definition is similar to that preferred by Transparency International (TI) (the Berlin based anti-corruption organisation founded in 1993). According to TI, transparency means "a principle that allows those affected by administrative decisions, business transactions or charitable work to know not only the basic facts and figures but also the mechanisms and processes."[123] They view transparency as a duty of civil servants, managers and trustees to act "visibly, predictably and understandably."[124]

The above views on the meaning of the concept transparency show that conceptually it has more than one characteristic. Therefore when the concept is used as a doctrine of governance, its users mean several things that relate to the openness of governmental institutions. Hood acknowledges this fact when he suggests that those who believe in transparency have more than one characteristic in mind. These characteristics according to him include established and published rules and procedures, public reporting that clarify who gains from and who pays for any public measure, and governance that is intelligible and accessible to the general public.[125]

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[122] Asian Development Bank "Governance: Sound Development Management" (1995) Online: ADB http://beta .adb.org/sites/default/files/pub/1995/govpolicy.pdf.
[123] Transparency International, Online: <http://www.transparency.org/new_room/faq/corruption_faq#faqcorr2>.
[124] *Ibid.*
[125] Hood, *supra* note 116 at 5.

2.8.3 Categorizing Transparency

It is far from clear what the different types of transparency are, given that there is very little guidance on the subject that could be drawn from one source. But one thing which is clear is that in broad terms, persons, institutions, and processes must act openly for any type of transparency to be successful. Several authors categorize transparency by the different dimensions that it takes and the manner in which it is approached. Fox for example distinguishes between what he terms opaque and clear transparency. According to him opaque or fuzzy transparency involves the dissemination of information that hides the institutional behaviour in practice. Opaque transparency is said to arise where the information that is divulged is nominal or otherwise unreliable. To Fox clear transparency refers "both to information-access policies and to programmes that reveal reliable information about institutional performance, specifying officials' responsibilities as well as where public funds go."[126] Clear transparency is said to shed light on institutional behaviour and to permit interested parties to make inputs. The distinction between Opaque and Clear transparency, Fox argues is grounded on the premise that for transparency to achieve its goals of transforming behaviour, there is the need to make explicit "who does what and who gets what".[127]

Heald on the other hand, contrasts event transparency and process transparency with reference to public service production. Event transparency according to him makes information about inputs,

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[126] Jonathan Fox, "The Uncertain Relationship between Transparency and Accountability" (2007) 17 Dev't in Practice 667.
[127] *Ibid.*

outputs and outcomes accessible while process transparency involves making available information about the transformations that take place between inputs, outputs and outcomes. Thus, process transparency involves the use of procedural and operational mechanisms that collectively reveal how the rules, regulations and procedures were adopted by an organisation and the application of those rules to particular cases. Heald also makes a distinction between transparency in retrospect (information made available only after time delays) and transparency in real time (open access to information as soon as it is available to an institution). Heald adds another categorization to these – nominal and effective transparency. Transparency is nominal when there appears to be increasing availability of information but the reality on the ground may be quite different. This Heald describes as the "transparency illusion". Also transparency is termed effective if there are "receptors capable of processing, digesting, and using the information."[128]

Several other analysts have also categorized transparency from an economic theory of principal-agent perspective. Lindstedt and Naurin within this context argue that transparency can be categorized as agent controlled transparency and non-agency controlled transparency. To the authors non-agent controlled transparency arises when secret information is made available to the public by a third party rather than the agent itself. Agent controlled transparency, on the other hand refers to information released by the agent in response to legal and other requirements that mandate the agent to release the information about its activities. They argue that agent controlled

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[128] David Heald, "Varieties of Transparency" in Hood and Heald eds., *Transparency: The Key to Better Governance?* (Oxford: Oxford University Press, 2006) 25.

transparency reduces corruption better than non-agent controlled transparency because it "makes it more complicated to engage in corrupt behaviour."[129]

Finally, Hood makes a distinction between direct and indirect transparency. Transparency is direct when the openness comes from activities or results that are directly observable by the public at large or from face-to-face encounters between officeholders and those they serve and indirect transparency is the sort of information or reporting procedure that makes activities or results visible or verifiable but only to agents or technical experts.[130]

2.8.4 The Concept of Accountability Defined

Transparency is not an end in itself. It provides a means to accountability. Accountability is said to be one of those golden concepts that no one can be against.[131] People usually accept the idea that public authorities should account publicly for the way they exercise their mandate and use public money.[132] However, what this evocative concept means and how to determine whether public officials or institutions are accountable is elusive. In a broad sense, accountability is often considered as an inherent part of good governance or even sometime used interchangeably with

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[129] Catharina Lindstedt and David Naurin, "Transparency is not Enough: Making Transparency Effective in Reducing Corruption" (2010) 31 International Pol. Science Review 301.
[130] Christopher Hood, "What Happens When Transparency Meets Blame Avoidance? (2007) 9(2) Public Management Review 191.
[131] Mark Bovens, Thomas Schillemans & Paul Hart, "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225.
[132] *Ibid.*

good governance.[133] Thus, from a good governance perspective the absence of accountability of government results in bad administrations and poor provision of services.[134]

A narrow conception of accountability however, limits it to a relationship between an actor, a forum and the obligation of the actor to explain and justify his actions for judgement to be passed and consequences imposed.[135] According to Dawn Oliver, accountability is "…about requiring a person to explain and justify …against criteria of some kind…their decisions or acts, and then to make amends for any fault or error, whether by reversing the decision, or paying compensation or in some other way – even resigning from office."[136] Thus accountability involves the duty to give account for one's actions to some other person or body.[137] These views of accountability show that those who govern must take responsibility for their actions and suffer the consequences if any. In the context of managing resource revenues, government officials and bureaucrats must exercise a reciprocal power relationship in which the officials have power to manage the resources and the citizens have power to call erring officials to order. But this reciprocal relationship can only be made possible by the availability of information.

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[133] See Yash Ghai, "Constitutions and Governance in Africa: A Prolegomenon", in Alderman, S. and Paliwala, A. eds *Law and Crisis in the Third World* (Scotland UK: Zell Publishers 1993) 52. Where he says that good governance advocates often draw a distinction between governance, which encompasses values and processes such as pluralism and accountability, and government or administration which does not; see also Jonathan Koppell, "Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder" (2005) 65 Public Administration Review 94, where he identifies about five different dimensions of accountability- transparency, liability, controllability, responsiveness and responsibility.

[134] Lenahan O'Connell, "Program Accountability as an Emergent property: The Role of Stakeholders in the Program Field" (2005) 65 Public Administrative Review 86.

[135] Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 European Law Journal 447.

[136] Dawn Oliver, "Law, Politics and Public Accountability: The Search for a New Equilibrium" (1994) Public Law 238 at 246.

[137] Colin Scott, "Accountability in the Regulatory State" (2000) 27 Journal of Law and Society 38 at 40.

Schedler distinguishes two dimensions of accountability which reveal the role of transparency in the accountability process. Accountability is considered by Schedler to consist of answerability, which is "the right to receive information and the corresponding obligations to release all necessary details"; and enforceability which is "the idea that accounting actors do not just "call into question" but also eventually punish improper behaviour and, accordingly that accountable persons not only tell what they have done and why, but bear the consequences for it, including eventual negative sanctions."[138] According to Schedler answerability is aimed at creating transparency. In his words, "[B]y demanding information as well as justification", transparency "sheds light into the black box of politics"[139] Schedler warns that "[E]xercises of accountability that expose misdeeds but do not impose material consequences will usually appear weak [and] toothless".[140] They will be considered as "acts of window dressing rather than real restraint on power".[141]

2.8.5 Forms of Accountability

Many commentators of the concept of accountability acknowledge that there are many different types of accountability processes. Dawn Oliver for instance, identifies several kinds of accountability such as legal, financial, democratic, political, administrative and electoral.[142]

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[138] Andreas Schedler, "Conceptualizing Accountability" in Schedler, Diamond and Plattner eds. *The Self-Restraining State* (London: Lynne Rienner Publishers, 1999) 15.
[139] *Ibid* at20.
[140] *Ibid* at16.
[141] *Ibid.*
[142] Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Milton Keynes: Open University Press,1991); see also Mark Bovens *supra* note 135 where he identifies about

Others have sought to classify accountability as vertical or horizontal, formal or informal, internal or external and direct or indirect.[143] Fisher argues that to make these different varieties of accountability work, there is the need to identify and utilize the right type of accountability in what is largely a mechanical process.[144] It is however clear from these different forms of accountability and accountability processes that the concept is expansive and extends beyond traditional notions of being called 'to account' before a formally established institution for one's actions.

Darby argues that accountability is usually categorized into three forms – horizontal, vertical and diagonal, and that the success of any accountability mechanism is not the singular operation of any of these approaches alone but in their interaction.[145] Firstly, horizontal accountability is said to consist of formal relationships with the state itself, where one state actor has the formal authority to demand explanations or impose penalties on another such as the executive explaining its decisions to the legislature and can in some cases be overruled or sanctioned.[146] The second form of accountability according to Darby is vertical accountability. This is the form of accountability in which citizens and associations play direct roles in holding the powerful to account. It manifests itself formally in elections but informally arises through processes where

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fifteen types of accountability – political, legal, administrative, professional, social, corporate, hierarchical, collective, individual, financial, procedural, product, vertical, diagonal, and horizontal accountability.

[143] See Colin Scott *supra* note 139; see also Richard Mulgan, "Accountability': An Ever-Expanding Concept?" (2000) 78 Public Administration 555.

[144] Elizabeth Fisher, "The European Union in the Age of Accountability" (2004) 24 Oxford Journal of Legal Studies 495.

[145] Sefton Darby "Natural Resource Governance: New Frontier in Transparency and Accountability" (2010) Open Society Foundation, Online <http://www.transparency-initiative.org/wp-content/uploads/2011/05/natural_resources_final1.pdf>

[146] *Ibid* at 9.

citizens organise themselves into associations capable of lobbying governments and private sector providers, demanding explanations and threatening less formal sanctions, such as negative publicity.[147] Thirdly, accountability can also be diagonal. This operates in the domain between vertical and horizontal dimensions and refers to the phenomenon of direct citizen engagement with horizontal accountable institutions in efforts to provoke better oversight of state actions.[148]

2.8.6 The Purposes of Transparency and Accountability in the Mining and Petroleum Industries

Whatever, the categorization that is put on transparency and accountability, most writers on these norms are agreed on their efficacy especially in the resource sector in combating bad resource governance. According to Truelove, "[D]isclosure is the first step toward the larger objective of government accountability. Once a government becomes accountable to its people, corruption may still occur but it can be identified so that it can be condemned or stopped."[149] In this view, transparency induces accountability. Thus, an institution's transparency or a government's transparency is said to increase its accountability and serve as a check on corruption. The extent to which this is achievable is dependent on how governmental processes are made open to the public as a way of facilitating public control of government and its decisions.

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[147] *Ibid* .
[148] *Ibid.*
[149] Andreana M. Truelove, "Oil, Diamonds, and Sunlight: Fostering Human Rights through Transparency in Revenues from Natural Resources" (2003-04) 35 Geo. J. Int'l L. 207.

Shauer argues that transparency as a vehicle for the control of the governors by the governed has two importantly distinct dimensions. Firstly, it ensures reduction in corruption, bribery, regulatory capture and other forms of governmental misbehaviour. Secondly, transparency as democracy involves public control not for the purpose of facilitating better decisions but "instead as an embodiment of public control as an end in itself."[150] This he contends is "about the right of the people to be wrong."[151]

A second important purpose that transparency and accountability serve is that they are a strong anti-corruption tool in the resource sector. A lack of transparency is said to increase the risks of corruption and embezzlement as well as inequity, distrust and false expectations.[152] This view touts transparency to have the power in the context of the extractive resource management to consolidate the democratic debate by providing accurate figures upon which stakeholders can negotiate, plan and ensure accountability.[153] This is because the public is not only given information on how the sector is governed but that they understand their essential content and can participate meaningfully. Kolstad and Wiig argue that the magnitude and nature of corruption varies across countries but political corruption is more prevalent in resource-rich countries because the political elite control huge resource rents and information. They posit that political and bureaucratic corruption persists due to the absence of transparency because

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[150] Frederick Schauer, "Transparency in Three Dimensions" (2011) University of Illinois law Review 1339 at 1348.
[151] *Ibid.*
[152] See International Institute for Sustainable Development, "Aid, Trading or Abetment? Managing Revenues from Natural Resources and Aid: Building Transparency, Accountability and Stability" (2005) Online: IISD <http://www.iisd.org/pdf/2005/tas_objective_6.pdf>.
[153] *Ibid.*

transparency "can reduce political corruption by helping make politicians more accountable to the public.[154]

Kolstad and Wiig however concede that transparency can be effective only if people can access the information and have the ability to process it and act on it. Though not a panacea to all resource management problems, its absence can facilitate embezzlement, breed corruption, strengthen authoritarian regimes and lead to misappropriation which can cause mass poverty and increase social inequity.[155] In a similar vein transparency is widely regarded as the key to resolving issues of waste and corruption.[156] Therefore a lack of transparency may facilitate government officials abusing their power by improperly diverting to personal uses payments which should properly accrue to the government budget.[157] Transparency and accountability are so foundational that Genasci and Pray even contend that one of the main contributors of the resource curse in recourse rich countries is the absence of transparency and accountability which provides cover for corruption on a massive scale.[158] The authors argue that "transparency of revenue streams and financial arrangements in the extractive sector is of particular importance for the prospect of good governance in resource-rich states."[159]

Thirdly, transparency and accountability has the capacity to promote increased investment in the resource sector. This is because opening the books has the capacity to build trust between

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[154] *Ibid.*
[155] Al Faruque, *supra* note 8 at 69.
[156] Drysdale, *supra* note 12.
[157] Collier, *supra* note12.
[158] Genasci and Pray, *supra* note 34.
[159] *Ibid.*

governments, companies and the citizenry. It is argued that foreign direct investment is affected negatively by the perception of corruption, and signs of increasing transparency have a very positive effect on investment in the resource sector.[160] Industry players in the extractive industry share this view that transparency fosters investment. In its 2006 Corporate Citizenship Report ExxonMobil stated that:

> Transparency initiatives are designed to increase disclosure of financial information and are fundamental to good governance. They can result in greater accountability by government leaders on how they spend their country's revenues. This helps stabilize the investment climate of a country, which is critical for attracting the large-scale investments necessary for meeting the world's growing energy demands.[161]

Mining giant Rio Tinto also shares this view. At the 2005 Extractive Industry Transparency Initiative conference held in London it stated:

> Without a high level of transparency, accountability is well nigh impossible. Civil society and other observers wish not only to be able to see what is going on, but also who is responsible for what. Transparency and accountability are the pre-requisites of an enabling environment into which long term extractive investment can be made.[162]

Institutional investors have also called for greater transparency stressing that it reduces corruption and promotes investment by levelling the risks of business. These institutional investors and pension managers from Europe and the United States, representing some US$8.3trillion state that:

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[160] Peter Eigen, "Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and gas Industry" (2006-07) 29 Hous. J. Int'l Law 327.

[161] ExxonMobil 2006 Corporate Citizenship Report Online: ExxonMobil <http://www.exxonmobil.com/corporate/ccr06/docs/ccr06_fullreport.pdf> at 40.

[162] Henry Parham, "Promoting Transparency in the Extractive Industries" (Paper presented at the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 5th Regional Anti-Corruption Conference, 2005, Beijing China, 28-30 September, 2005) [unpublished]. Online: <http://www.oecd.org/dataoecd/0/0/35592802.pdf>.

> Legitimate, but undisclosed, payments to governments may be accused of contributing to the conditions under which corruption can thrive. This is a significant business risk, making companies vulnerable to accusations of complicity in corrupt behaviour, impairing their local and global "licence to operate", rendering them vulnerable to local conflict and insecurity, and possibly compromising their long-term commercial prospects in these markets.[163]

As to the basic goals of transparency and accountability, Haufler identifies two main ones. The first goal is that transparency will lead to better management of natural resources because of its capacity to reduce corruption, ensure more equitable distribution of the revenues and less waste and fraud. Secondly, transparency ensures that governments and corporations are more accountable since disclosure of natural resource revenues empowers civil society to hold both governments and companies accountable. Thus transparency arms the powerless to hold the powerful actors accountable and by so doing improves trust and legitimacy in the relationship between all the stakeholders.[164]

Those critical of transparency and accountability, have pointed to difficulties and complexities of implementing these norms in the resource sector governance process. For instance, Standing has argued that greater transparency in the extractive sector faces the complex challenge of misinformation by governments and extractive sector operating companies. She observes that:

> Unless levels of policing rise dramatically and become highly invasive, there may always be methods available to corrupt parties to circumvent the rigours of disclosure and drive for greater transparency will be matched by novel ways of hiding corrupt practices, which others will not predict….Transparency therefore does not guarantee that information is accurate, nor does it diminish the need for closer scrutiny of facts. What follows is that in the worse-case scenario, transparency that claims to be effective but is not, may posture as a strong endorsement for those who

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[163] *Ibid.*
[164] Haufler, *supra* note 12.

> are engaged in corruption. The mistaken stamp of approval becomes a distraction to further investigation or it may lull others into a false sense of security.[165]

According to Standing, transparency of resource revenue flows, no matter how detailed, will reveal little about the political economy of corruption because there are several ways in which companies may capture resource revenues such as through donations.[166]

There has also been a further argument that transparency and accountability mechanisms are likely not to succeed because secrecy is viewed as a strategic characteristic of the mining and petroleum industry and therefore it is naive to assume that it is in the interest of participants in this industry to disclose all information relating to their financial dealings. Florini agrees with this argument. She contends that it is unwise to assume that all stakeholders necessarily want to use information solely for the public good. In her words:

> For those on whom the spotlight shines, transparency can threaten more than mere discomfort. It is not wise to assume that international organisations, governments, firms, financial markets, NGOs and others necessarily want to use information solely for the public good or for mutually beneficial economic exchange. In arms control, the same information that reassures others that your military forces are not massing for attack can enable those others to locate and attack your forces. In economics, misinterpretation or deliberate misuse of information by national or corporate rivals can spark unfavourable headlines, plunges in stock prices, and capital flight.[167]

Additionally, transparency and accountability mechanisms in mining and petroleum industries is said to rely heavily on the ability of third parties to process, understand and use the information that is made available about resource revenues. This necessarily involves time, money and the

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[165] Standing, *supra* note 94 at 19.
[166] *Ibid.*
[167] Ann Florini, "Does the Invisible Hand Need a Transparent Glove?" (Paper presented at the 11th Annual World Bank Conference on Development Economics Washington, DC June 1999) [Unpublished] at 8.

right technical skills to understand financial matters. This is said to be the only way in which malpractices in the resource sector can be exposed. Florini again argues that too much disclosure can produce a white noise effect, "making it difficult to know what is significant or even to have the time to sort through all the data."[168]

Moreover, some commentators think that the success of transparency and accountability in the resource sectors is dependent on an active civil society. Delescluse for example endorses this view when he argues that transparency cannot cure bad resource governance and the resource curse in the absence of a strong civil society to hold the government accountable for misappropriations that are brought to light.[169] Kardon in support states that a commitment by host governments to transparency "will be fruitless if civil society is not prepared to do its part."[170] Lindstedt and Naurin in their study on the effectiveness of transparency in reducing corruption have concluded that "just making information available will not prevent corruption if such conditions for publicity and accountability as education, media circulation and free and fair elections are weak."[171]

In spite of these criticisms of transparency, none of the critiques have potently displaced the argument that transparency addresses issues of corruption that affect many developing resource-rich countries. Lowenstein has shown that apart from the other benefits of transparency "good disclosure has been a most efficient and effective mechanism for inducing managers to manage

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[168] *Ibid* at 9.
[169] Aude Delescluse, "Chad-Cameroon: A Model Pipeline? (2004) 5 Geo. J. Int'l Affairs 43
[170] Alex Kardon, "Matthew Genasci and Sarah Pray, "Extracting Accountability: Implications of the Resource Curse for CSR Theory and Practice" (2008) 11 Yale Hum. Rts. & Dev't L. J 59 at 63.
[171] Lindstedt, and Naurin, *supra* note 129.

better."[172] Al Faruque, in the context of resource revenues has argued in favour of transparency in the management of resource revenues. According to him transparency and accountability is required in activities regarding revenue management, revenue collection and revenue distribution.[173] Therefore, for transparency to be effective, managers of resource revenues must be accountable to the people on how, when and what they use resource revenues for.

Citizens' ability to monitor behaviour improves the outcomes of the governance process and ensures that public goods such as resource revenues are managed efficiently and effectively. Florini aptly captures this when she says that: "…the accountability made possible by transparency leads to better results. Without transparency, there is no way to know whether institutions are pursing their goals efficiently and effectively, or even whether they are pursing the right goals."[174] According to Florini, the principal-agent [citizen-government] framework provides a powerful response to normative questions about the value of transparency. She notes that if the politician and bureaucrat are employed to serve the interest of the citizens, the prevailing presumption should be in favour of transparency to the citizens.[175] Brito and Perrault make similar arguments when they suggest that there arises a misaligned incentive when people cannot adequately monitor their political agents or if there is little recourse to punishment.[176]

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[172] Louis Lowenstein, "A Governance Tool That Really Works, Directors and Boards" (1997) Online: <http://find articles.com/p/articles/mi_go2446/is_nl_v22/ai_n28695337>.
[173] Al Faruque, *supra* note 8.
[174] Ann M. Florini, "Increasing Transparency in Government" (2002) 19 International Journal on World Peace 3 at 15.
[175] *Ibid.*
[176] Jerry Brito and Drw Perrault, "Transparency and Performance in Government" (2009) 9 Mercatus Center Working Paper 38.

They reveal that allowing officials to act in secret will give them “a greater incentive for self-dealing at the expense of their principals, the people.”[177]

There is a growing body of research that suggests that transparency enables more effective use of resources. A recent World Bank study found that countries with greater public access to information have better governance scores and higher economic growth.[178] This research finding can be used as a basis to extend the argument that transparency in the resource sector will promote better governance of revenues than secrecy. International Monetary Fund research suggests that more transparent countries have better fiscal discipline, less corruption and are associated with higher credit ratings even after controlling for various economic fundamentals.[179] The converse is the situation where less transparent countries have low per capita GDP, lower foreign direct investment and higher capital costs.[180] Transparency and accountability of mining and petroleum resource revenues is important since it allows governments to obtain informed views by allowing the citizens to participate in the debate on how to best manage these resources. It can therefore, reduce the opportunities for corruption, highlight mismanagement, punish those culpable either through the formal legal process or informally through negative publicity and help build public trust in how the government manages these resources.

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[177] *Ibid* at 4.

[178] Islam Roumeen, “Do More Transparent Governments Govern Better?” (2003) World Bank Policy Research Working Paper 3077.

[179] Hameed Farhan “Fiscal Transparency and Economic Outcomes” (2005) IMF Working Paper WP/05/225 Online: <http://www.imf.org/external/pubs/ft/wp/2005/wp05225.pdf>.

[180] Joel Kurtzman, and Glenn Yago *Global Edge: Using the Opacity Index to Manage the Risk of Cross-Border Business.* (Cambridge, MA: Harvard Business School Press, 2007).

2.9 Toward A Synthesis: Criteria for Evaluating Good Governance Regimes for Managing Resource Revenues

2.9.1 Introduction

The thesis advanced so far here is simply that resource rents are prone to interest group capture and corruption and that transparency and accountability guaranteed by rules have the potential to operate as counterweights to these interest group impeding activities. The interesting question becomes, then, under what criteria or circumstance are the rules more likely to be considered transparent and be able to yield public-interested outcomes. While an exhaustive treatment of this issue is beyond the present scope, it is possible to begin to identify and derive criteria by which a resource revenue management regime can be evaluated to determine how it promotes transparency and accountability. In this part I seek to identify and derive criteria by which the revenue management frameworks can be evaluated to determine if they promote good governance values, foster the efficient use of resource revenues, reduce the risk of corruption and capture as well as promote credibility with respect to the collection and distribution of resource revenues.

There are many publications that attempt to define the criteria for good governance of natural resources generally and resource revenues in particular. This results in several criteria on what constitutes good governance of natural resource revenues. The criteria in this section will be partly derived from the definition of transparency and accountability outlined in the literature. Additionally, this part reviews various texts and guidelines on resource revenue transparency and

accountability which also outline some core elements which need to be present in a good resource revenue regime.[181] This section will justify the criteria selected by defining them, locating them within the literature and establishing their importance to resource revenue governance. The criteria below are not organised in any form of priority (i.e. superiority in rank, position or privilege).

2.9.1.2 Open Competition in the Award of Contracts and Development Rights

Competition in the award of mineral and petroleum development rights can be an effective mechanism to secure value and integrity.[182] Open competition involves the advertisement, pre-qualification, bid solicitation, evaluation and contract award processes.[183] The information about the award process should be published, simple, transparent, and clearly defined.[184] There has been a trend toward countries integrating competitive bidding provisions for mineral rights

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[181] See Natural Resource Charter Online: NRC, <http://naturalresourcecharter.org/sites/default/files/NRC%20Eng_2011.pdf>; The Natural Resource Charter which is an academic-civil society initiative has been adopted by the New Partnership for Africa's Development (NEPAD), a programme of the African Union spearheaded by African leaders to pursue new approaches to the political and social-economic transformation of Africa. It has also been adopted by the African Development Bank as a practical guide to improving natural resource extraction. See also International Monetary Fund, Guide on Resource Revenue Transparency (2007) Online: IMF, <http://www.imf.org/external/np/pp/2007/eng/051507g.pdf>; GAPP-Santiago Principles, *supra* note 38; Truman, *supra* note 39; Lockwood et al, *supra* note 40.

[182] *Ibid.*

[183] Michael Stanley and Ekaterina Mikhaylova, "Mineral Resource Tenders and Mining Infrastructure Projects Guiding Principles" (2011) World Bank Oil, Gas, and Mining Policy Unit Working Paper 22, Online: The World Bank, <http://siteresources.worldbank.org/INTOGMC/Resources/EITI22weboct17.pdf>. Competitive bidding and auctions face a limitation where relatively little is known about the resource endowment and there is no competition for the deposits. In such cases alternative approaches such as open access (first-come-first-serve) or negotiation is used.

[184] *Ibid.*

allocation into their national legislation and regulations.[185] This is because competition between firms has the potential to deliver maximum returns to a government which may possess less information than the bidders and prevents public officials from awarding rights to firms in which they or relatives and proxies have a financial interest.[186]

Efficient and effective mineral rights allocation policies and laws therefore provide for transparent, competitive and non-discriminatory procedures for the award of exploration, development and production rights.[187] For instance, good practice calls for a transparent competitive bidding process that can be accomplished by ensuring that as much information as possible is made public prior to the awarding of contracts.[188] These underlying principles of awarding contracts must be imbedded in a regime to enhance good governance.

2.9.1.3 Contract Transparency

Just as the information prior to the award of a resource contract, the contents of the contracts or agreements themselves must be made public. As the Revenue Watch Institute has argued, contract transparency provides incentives to improve on the quality of contracting because:

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[185] Columbia University "Review of Competitive Bidding Frameworks for Natural Resource Rights" Online: Columbia University, <http://www.vcc.columbia.edu/content/review-competitive-bidding-frameworks-natural-resource-rights>; see also Extractive Industries, "Granting Mineral Rights – A Good Practice Note" (2010) Final Report of the World Bank Project – Extractive Industries Source Book Program, Online: Extractive Industries, <http://www.eisourcebook.org/cms/files/good_practice_note_for_granting_mining_rights.pdf.>.
[186] Natural Resource Charter, *supra* note181.
[187] Stanley and Mikhaylova, *supra* note 185. Competitive bidding and auctions face a limitation where relatively little is known about the resource endowment and there is no competition for the deposits. In such cases alternative approaches such as open access (first-come-first-serve) or negotiation is used.
[188] EI Source Book, "Good-Fit Practice Activities in the International Oil, Gas & Mining Industries" Online: EI <http://www.eisourcebook.org/650_56TheAwardofContractsandLicenses.html>.

> government officials will be deterred from seeking their own interests over the population's and, with time, governments can begin to increase their bargaining power by surveying contracts from around the world. Secrecy hides incompetence, mismanagement and corruption—but only from the public, not from the industry that typically comes to know the terms of a deal or even the text of the putatively secret agreement.[189]

The legal regime should allow contract terms, including fiscal terms, to be promptly disclosed and easily accessible.[190] This is because transparency in contractual arrangements is an important first step towards revenue transparency.[191] The IMF *Guide* notes that good practice for transparency requires the publication of all signed contracts.[192] The International Council on Mining and Metals' (ICMM) emphasized the importance of contract transparency to good governance when it stated that its members will "engage constructively in appropriate forums to improve the transparency of mineral revenues- including their management, distribution, or spending or of contractual provisions on a level-playing-field basis."[193] The advantage of incorporating detailed contract transparency rules and measures in legal instruments is that they help deal with the problems created by information asymmetry such as the government having less information as compared to the investor and thereby avoid dubious, controversial or excessively one-sided arrangements.[194] Imbedding contract disclosure requirements in rules also

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[189] Revenue Watch Institute "Contract Transparency" Online: RWI <http://www.revenuewatch.org/training/resource_center/backgrounders/contract-transparency>.; See also Erin Smith and Peter Rosenblum, "Government and Citizen Oversight of Mining: Enforcing the Rules" (2011) Online: RWI, <http://www.revenuewatch.org/sites/default/files/RWI_Enforcing_Rules_full.pdf>.

[190] Natural Resource Charter, *supra* note 183, precept 2.

[191] Al Faruque, *supra* note 8.

[192] IMF Guide, *supra* note 181.

[193] International Council on Mining and Metals, "Position Statement on Transparency of Mineral Revenues" (July, 2009) Online: ICMM, <http://www.icmm.com/page/14652/position-statement-on-transparency-of-mineral-revenues> at 3.

[194] Peter Resenblum and Susan Maples, "Contracts Confidential: Ending Secret Deals in the Extractive Industries" (2009) Online: RWI, <http://www.revenuewatch.org/sites/default/files/RWI-Contracts-Confidential.pdf>. The authors advance four main reasons why contract transparency is necessary. Firstly, they argue that it is undemocratic

enables citizens to assert their rights and be able to assess whether companies are paying what they ought to pay as well as monitor compliance with the contract.[195]

Many countries are now adopting contract transparency norms in their regulation of the resource sector. The United States, Timor-Leste and Peru all share resource contracts publicly, and other countries such as Columbia and to some extent Mexico allow for disclosure under freedom of information laws and policies.[196] In Iraq, the Kurdistan Regional Government has published all of its petroleum production-sharing agreements.[197] Niger's 2010 Constitution mandates the publication of all oil contracts, while Sierra Leone, Sao Tome and Principe and Guinea all have embedded contract transparency requirements in oil sector legislation and Codes.[198] Additionally, the Democratic Republic of Congo has published dozens of its mineral and

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for contracts to be kept secret because contracts are essentially the law of a public resource project and a basic tenet of the rule of law is that laws should be publicly available. Secondly, they contend that in the legal framework that regulates the extractive industries, contracts are an essential piece to understanding the "value chain" of multiple, interconnected points for natural resource development and therefore a full picture of the value chain is impossible, and meaningful citizen participation in the process is undermined if such contracts are secret. Thirdly, they posit that without a legal guarantee of contract transparency, mistrust and conflict are magnified among stakeholders because failure to disclose implies having something to hide. Finally, they argue that contract transparency will help governments get a better deal for their resources, provide an incentive for governments and companies to make more durable deals, and deter corruption. This is because extractives are imperfect markets where governments are often at a disadvantage when negotiating with companies. The asymmetry of information can lead to sub-optimal deals, even if the government is negotiating in the interest of its citizens. Contract transparency is one important factor in creating a level playing field between companies and governments.

[195] Publish What You Pay, "Contract Transparency" Online: PWYP, <http://www.publishwhatyoupay.org/about/advocacy/contract-transparency>.

[196] Revenue Watch Institute, "Contract Disclosure through the EITI: Background paper for the EITI Strategy Group" (2012) Online: RWI, <http://eiti.org/files/SWG/RWI_SWG_Paper_Contract_Transparency_April_2012.pdf>; See also Bureau of Ocean Energy Management, "Leasing Information" Online: BOEM, <http://www.data.boem.gov/homepg/data_center/leasing/leasing.asp>. Leasing Information which includes information on the status of leases along with the geographic locations, effective date, surface acreage and other data elements specific to the lease are published online; Petro Peru, the petroleum sector regulator in Peru, publishes all hydrocarbon agreements and licenses on its website. See Petro Peru, Online: http://www.perupetro.com.pe/relaciondecontratos/. The Republic of Congo provides a large quantity of its petroleum contracts on the Ministry of Finance website. See, Mefb, Online: Mefb, <http://www.mefb-cg.org/petroles/production/contrats.html>.

[197] *Ibid.*

[198] *Ibid.*

petroleum contracts while Liberia's 2009 Extractive Industries Transparency Initiative legislation requires not just the publication of revenue information but also the public disclosure of all contracts.[199]

2.9.1.4 Public Availability of Information on all Revenue-Related Transactions

The visibility of decision-making processes; the clarity with which the reasoning behind decisions is communicated; and the ready availability of relevant information about governance of the resource and its revenues are necessary for the effective management of resource revenues.[200] These must be included in the legal regulatory scheme and not left to the discretion of administrative bodies and government officials. There should be detailed regulatory prescriptions for government to report adequately and promptly on spending of resource receipts, contingent liabilities that are contracted against resources as well as resource and reserve estimates.[201] The approach should be to make these pieces of information comprehensible and widely disseminated. Where possible the information should be translated into local languages for people who have no formal education but who are invariably affected by effects of exploiting these resources.

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[199] See *Liberia Extractive Industries Transparency Initiative (LEITI) Act of 2009*, Laws of the Republic of Liberia, s 5; see also LEITI, "Concession-Contracts and Agreements" Online: LEITI, <http://www.leiti.org.lr/2content.php?main=65&related=65&pg=mp>.
[200] Lockwood et al, *supra* note 40; Fox, *supra* note 126
[201] IMF Guide, *supra* note 181.

2.9.1.5 Government Accountability to the Public

The foundation of good governance in the resources sector is accountability. As such, to say that a regime mirrors the tenets of good governance, accountability should be its hallmark. The regulatory institutions involved in the management of the resource should demonstrate whether and how the responsibilities allocated to them have been met.[202] This is because accountability to an informed public can mitigate the mismanagement of resource revenues.[203] According to Lockwood et al compliance with regulatory requirements is an important component of good governance for resource management entities. This means that the entity must observe relevant legislation, standards, and codes; has systems to monitor conformity, and sanctions individuals and entities for non-compliance.[204] The accountability arrangements should cover the entire governance process of resources (whether central or regional) and be clearly defined in legislation.[205]

Additionally, as demonstrated in the literature review, the exercise of accountability that exposes misdeeds but does not impose material sanctions will amount to mere window dressing. The legal regime must provide institutional arrangements for holding erring officials to account, in addition to other forms of accountability in which citizens and civil society groups play direct roles in holding managers to account. Failure to meet this criterion could result in the abuse of the resource revenue management process.

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[202] Lockwood et al, *supra* note 40.
[203] Natural Resource Charter, *supra* note 181.
[204] Lockwood et al, *supra* note 40.
[205] Where transfers are made by the central government to the regional or local level such transfers should be authorized by law, made transparent and frameworks for beneficiaries to account clearly spelt out.

2.9.1.6 Effective Oversight and Safeguards

A good governance regime should provide for effective oversight and safeguards in the management of resource rents. The potential risk of corruption associated with the resource sector especially in developing countries requires that the regime makes room for internal controls as well as independent audit of all resource rents. Resource revenue should be subject to scrutiny by a national audit body which is independent of the executive and its reports should be made available to the legislature and published widely. To ensure integrity, the legal framework should provide for mechanisms to monitor follow-up actions.[206]

It is necessary to provide for civil society participation in the oversight mechanisms, in addition to Parliamentary scrutiny of the annual audited accounts. But to ensure effective oversight and safeguard resource revenue, the revenue administration process should be legally protected from political discretion and timely reports should be publicly available.[207]

2.9.1.7 Clear and Effective Roles and Responsibilities for Institutions

To promote good governance, a regime should ensure institutional responsibility for all resource-related revenue is clearly spelt out in law. Legislation should clearly state which institution has the mandate to disclose resource-related revenues and expenditures.[208] The legislation should

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[206] IMF Guide, *supra* note 181.
[207] *Ibid.*
[208] *Ibid.*

address such questions as: which agency calculates and assesses resource revenue payments? Which agency collects the revenues? Which accounts house the revenues? Which agency is charged with disbursement and who are the beneficiaries? What purposes may disbursements be used for? And who monitors the disbursements and expenditures? These are all important governance questions that must be answered by the legal regime.

2.10 Summary and Conclusions

In this Chapter, drawing insights from the public choice theory of rent seeking, I have sought to establish that resource revenue corruption thrives under legal rules that are less transparent. I suggest that rule reform to incorporate transparency and accountability are adequate to deal with self-interested behaviour that leads to corruption and rent-seeking in the resource sector. I have argued that transparency and accountability are important in solving most of the ills of natural resource management in developing countries.

Although the mechanisms of transparency and accountability do not guarantee a zero level of corruption in resource rich countries, the thrust of my argument is that it will go a long way to minimise resource corruption and mismanagement. Citizens' ability to monitor behaviour will improve outcomes of the governance process and ensure that public goods such as resource revenues are managed efficiently and effectively. In spite of the promise that these values of good governance show, the challenge in the literature has been to find common ground on the practical value of these normative prescriptions. This chapter has also sought to synthesize the

views into criteria to measure the level of good governance in a resource revenue management framework.

CHAPTER THREE

EXAMINATION OF THE LEGAL AND REGULATORY REGIME FOR MANAGING PETROLEUM REVENUES

3.1 Introduction

The purpose of this chapter is to explore the primary disclosure rules on petroleum revenue governance in Ghana. This chapter seeks to do the following. Firstly, it examines some background issues related to the petroleum sector in Ghana such as the ownership regime of petroleum resources as well as the fiscal regulatory environment of the petroleum industry. Secondly, this chapter will evaluate the governance regime using the criteria identified in chapter two. From the analysis of the transparency and accountability measures and standards and the evaluation based on the identified criteria, this chapter concludes that the petroleum regime largely promotes good governance principles especially from the time of collection of revenues to the final utilization.

3.2 Petroleum Resources in Ghana: An Overview

Ghana is the newest oil producing country in Sub-Saharan Africa. After decades of oil and gas resource exploration activities,[209] Kosmos Energy, a small Dallas-based exploratory company

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[209] For a history of exploratory activities see Osei Bonsu Dickson, "A Concise History of Oil and Gas Exploration in Ghana" (2011) Online: Ghana Oil Watch, <http://www.upublish.info/Article/A-CONCISE-HISTORY-OF-OIL-

announced on 18th June, 2007 that its offshore exploration well in the West Cape Three Points Block had a significant oil accumulation based on the results of drilling and wire-line logs and a sample of the reservoir fluid.[210] This marked the beginning of commercial oil and gas exploration and production activities in Ghana. The first oil field was named Jubilee Field because the discovery was made in the Jubilee year of Ghana's attainment of independence from British colonial rule. On 15th December, 2010 the first oil was delivered from the Jubilee Field, the fastest full-scale comprehensive deep water development in the world.[211] In addition to the Jubilee Field, the Owo and Tweneboa Fields hold large oil and gas prospects, which by some accounts will produce for an additional twenty five years.[212]

Exploration and production operations of various degrees are ongoing in Ghana's four main sedimentary basins namely the Cote d'Ivoire-Tano Basin (including Cape Three Points Sub-basin), Central (Saltpond) Basin, Accra/Keta Basin and Inland Voltaian Basin.[213] Currently, there are twelve (12) offshore licences with various companies operating in the basins.[214] The figure below shows the oil fields in West Cape Three Points and Deep Water Tano Blocks.

AND-GAS-EXPLORATION-IN-GHANA/552309; See Also Open Oil, "History of Oil and Gas Industry In Ghana" (2012), Online: Open Oil <http://wiki.openoil.net/index.php?title=History_of_Oil_and_Gas_Industry_in_Ghana>.

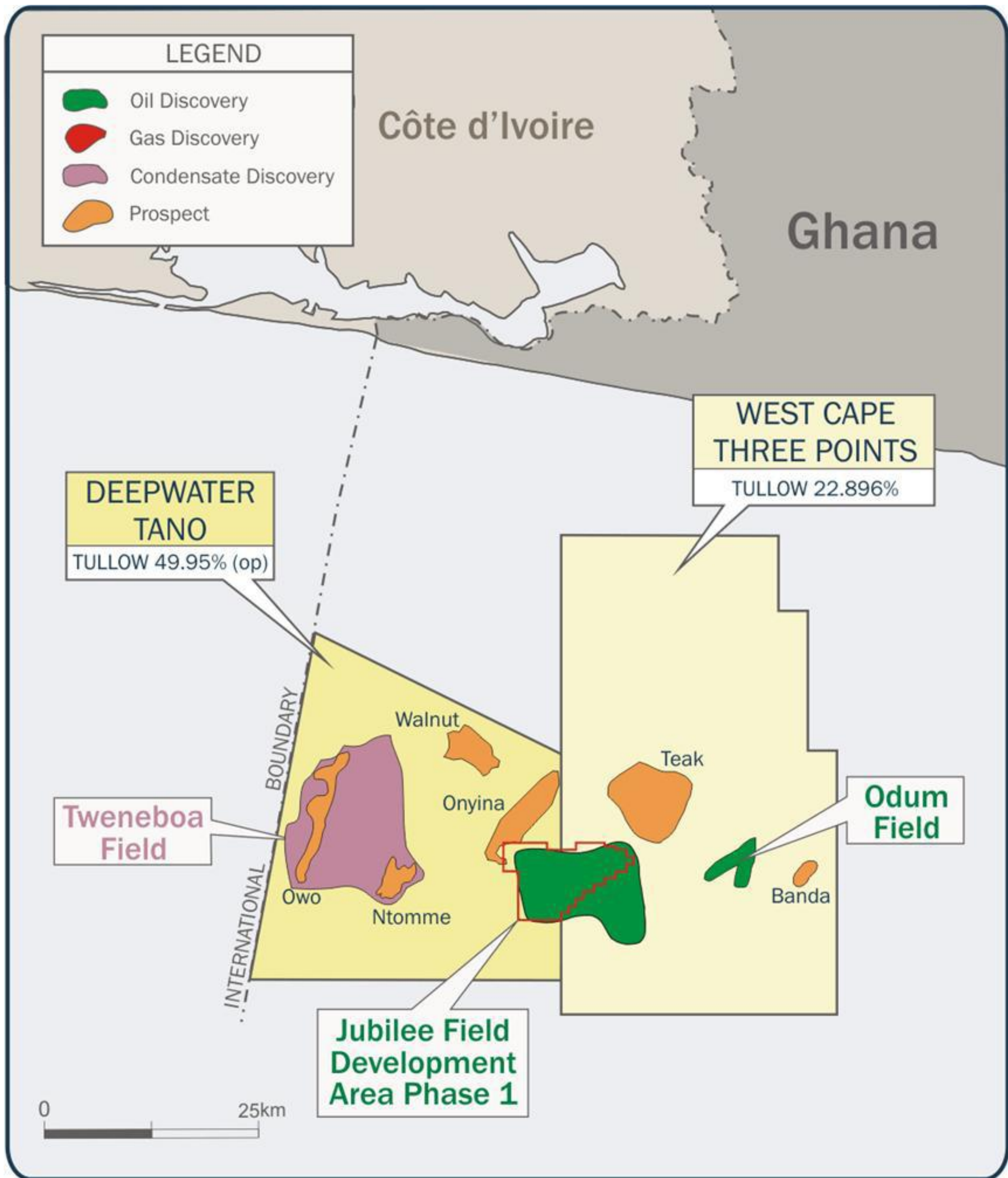
[210]See, Kosmos Energy, "Kosmos Energy's Mahogany-1 Well Discovers Oil Offshore Republic of Ghana" Online: Kosmos Energy < http://www.kosmosenergy.com/press/kosmos_PR_071807.pdf>.

[211] Tullow Oil Ghana, "First Oil" Online: Tullow Oil Ghana, <http://www.tullowoil.com/GHANA/index.asp?pageid=53>.

[212] Dai Jones and Staurt Wheaton, "The Significance of First Oil" (2010) Online: Tullow Oil Ghana, <http://www.tullowoil.com/GHANA/index.asp?pageid=55&issue=5#togglecontent>.

[213]Ghana National Petroleum Corporation, "Exploration and Production" Online: GNPC, <http://www.gnpcghana.com/activities/details.asp?expID=10>.

[214] *Ibid.*



Source: Public Interest and Accountability Committee

Ghana's Jubilee Field is reported to have about 800 million barrels of proven reserves and an upside potential of about 3 billion barrels of high-quality crude oil.[215] A World Bank study has noted that at its peak (mid 2011 – mid 2016), some 120,000 barrels of oil per day [bopd] could be extracted – making Ghana a net oil exporter for a short time while the overall period of activity could span more than two decades.[216] The study further projected that based on the fiscal regime in place at the moment, and a price assumption of US$ 75 per barrel, potential government revenue will reach US$1.0 billion on average per year between 2011 and 2029.[217]

A lot of the forecasts are yet to be realised. In the first half of 2012, production from the Jubilee field (the only producing field now) averaged approximately 67,000 bopd and cumulative production to date is now just over 33 million barrels.[218] Gross production is expected to average between 70,000 and 90,000 bopd in 2012 and field capacity is expected to be reached in early 2013.[219]

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[215] See Public Interest and Accountability Committee, "PIAC Annual Report on the Management of Petroleum Revenues in 2011" ["PIAC 2011 REPORT"] Online: PIAC <http://piacghana.org/PIAC%20REPORT_2011%20annual_final%20for%20website.pdf>. The current reserves are far less than Nigeria's 37.2 billion barrels and Angola's 10 billion barrels. But for a country of just twenty-four million people, according to Ghana's 2010 Population and Housing Census, with a GDP per capita of only US$ 2,500 per year, the oil revenues are significant. The revenues that will be generated from the petroleum sector alone are roughly the same as Ghana currently receives in development assistance and aid.

[216] The World Bank, "Economy-Wide Impact of Oil Discovery in Ghana" (2009) Online: World Bank <http://siteresources.worldbank.org/INTGHANA/Resources/EconomyWide_Impact_of_Oil_Discovery_in_Ghana.pdf>. Note that the Jubilee Field started by producing an average of 24,395 barrels per day for the three final days of November 2010. The production levels increased up to an average level of 37,932 barrels per day in December, 2010. According to Tullow Oil projections Ghana was supposed to be producing approximately 120,000 barrels of oil per day by June 2011. Unfortunately, this production level was not achieved by the end of 2011 due to technical production challenges with the wells.

[217] *Ibid.*

[218] Tullow Oil Ghana "Interim Management Statement" (2012) Online: Tullow Oil Ghana, <http://www.tullowoil.com/GHANA/index.asp?pageid=43&category=&year=Latest&month=&newsid=761>.

[219] *Ibid.*

Ghana's new petroleum resource is a key export commodity and source of revenue for government. Total receipts for 2011 from petroleum resources in the form of taxes and government participation amounted to GH¢666 million[220] (equivalent of US$ 444,124,723.7 at the time). This fell below the projected value of GH¢1.25 billion largely due to actual production levels falling below the initially estimated 120,000 bopd and the failure to take into account the non-tax paying positions of some of the oil companies.[221]

3.3 Ownership and Control of Petroleum Resources

Ownership and control of petroleum as with hard rock mineral resources vest in the president, in trust for the people of Ghana because these resources are the property of the state.[222] Thus, the right to engage in exploration, development and production of petroleum resources can only be acquired with the permission of the state through the Petroleum Commission.[223] Therefore there is no private ownership of petroleum resources in Ghana as the law vests them in the state.

Petroleum is defined to mean "crude oil or natural gas or a combination of both".[224] The *Petroleum (Exploration and Production) Law*, (PNDCL 84) further defines crude oil as

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[220] See the *PIAC 2011 REPORT*, *supra* note 217.
[221] *Ibid.* The government could not collect corporate taxes because the Petroleum Income Tax Law allows for capital cost recovery and since the operators had just started production, huge capital cost is still being recovered.
[222] *Petroleum (Exploration and Production) Law,* Laws of the Republic of Ghana 2004, Act No. 84 ["PNDC LAW 84"] s 2.
[223] Until 2011 the regulatory function with respect to the award of agreements for the exploration, development production of petroleum resources was undertaken by the Ghana National Petroleum Corporation (GNPC) which was the country's national oil company and doubled as the regulator in charge of licensing and ensuring compliance with regulations by operators.
[224] See *PNDC LAW 84*, *supra* note 222, s33.

"hydrocarbons which are solid or liquid under normal atmospheric conditions and includes condensates and distillates obtained from natural gas"[225] and natural gas is defined as "all hydrocarbons which are gaseous under normal atmospheric conditions and includes wet gas, dry gas and residue gas remaining after the extraction of liquid hydrocarbons from wet gas."[226] In this thesis petroleum and oil and gas are used interchangeably.

3.4 The Fiscal Regulatory Environment

The legislative framework governing the fiscal regime for the exploration, development and production of petroleum resources is similar to that for mining which will be outlined in the next chapter. *PNDC LAW 84* allows the government to acquire a participating interest in petroleum operations.[227] Additionally, companies operating in the petroleum sector are supposed to pay royalties,[228] annual rental charges,[229] and corporate income tax.[230]

However, unlike the mining sector where the percentages of these fiscal revenue requirements are stipulated, that for the petroleum sector allows the government to negotiate its participating interest, royalties and rental charges with oil companies. For example, section 20 of *PNDC LAW 84* provides that royalty shall be payable "in respect of any petroleum produced in Ghana, except

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[225] *Ibid.*
[226] *Ibid.*
[227] See *PNDC LAW 84, ibid*, s17.
[228] See *PNDC LAW 84*, *ibid,* s20.
[229] See *PNDC LAW 84*, *ibid,* s18.
[230] See *PNDC LAW 84*, *ibid*, s19.

as may be otherwise provided in accordance with the terms of a petroleum agreement".[231] Royalties are paid regardless of profitability on gross production in cash or kind (physical oil/gas). As indicated above, no fixed rate exists in laws of Ghana for royalties. However, the Ghana National Petroleum Corporation (GNPC) (the body that formerly was in charge of regulating the industry) used a 5% royalty rate for the government take and the petroleum agreements also list a royalty rate of 5% for oil produced in depths greater than 200 meters.[232]

Furthermore, the government's carried interest in oil and gas operations is subject to negotiation between the government and the oil and gas operator.[233] The government through the GNPC agreed with operators for a 10% carried interest with an additional paid interest the government may acquire with the consent of the oil company. Currently, the government holds an additional 3.75% interest.[234] This together with the carried interest puts the government entitlement in the Jubilee Field at 13.75% plus royalties and other taxes.

The *Petroleum Income Tax Law* puts a rate of 50% as the petroleum income tax payable yearly or quarterly in respect of petroleum operations.[235] However, the law allows for a petroleum agreement to override this rate by providing that an alternative rate in respect of petroleum

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[231] See *PNDC LAW 84, Ibid* s17 & 18.
[232] Ian Gary "Ghana's Big Test: Oil's Challenge to Democratic Development" (2009) Online: Oxfam America/ISODEC, <http://www.oxfamamerica.org/files/ghanas-big-test.pdf>.
[233] See *PNDC LAW 84*, *supra* note 222, s17.
[234] *Ibid.*
[235] *Petroleum Income Tax Law of 1988*, Laws of the Republic of Ghana, Law No. 188, s6.

income tax that will take precedence over the rate provided for in the law.[236] The current rate thus payable as petroleum income tax is 35%, the same as that for mining companies. [237]

Moreover, the petroleum agreements entered into between the government and oil companies contain provisions for additional or windfall profits tax. These profit taxes will accrue to the state when the profitability of an oil and gas activity exceeds a certain rate of return which is agreed on at the time of negotiating an agreement.[238] For example, on the Jubilee Field, the targeted rate of return for Kosmos Energy is 25 percent and that for Tullow Oil Plc is 19 percent. Hence, the net profits in excess of the targeted rate of return will be taxed at 5% for Kosmos Energy and 7.5% for Tullow.[239]

The other revenue source available to government is the annual rental charges. These rental charges are a small token of a fee paid by companies per square kilometre granted usually during the exploration phase but also apply to other phases of development of petroleum resources. According to Ghana's Petroleum Agreements, surface rentals for the initial exploration period is US$30 per square kilometre per annum; that for the 1st extension period is US$50 per square kilometre per annum and the 2nd extension period is US$75 per square kilometre per annum. At

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[236] *Ibid.*
[237] See "Petroleum Agreement for Deep Water Tano (Tullow/Sabre/Kosmos) – March, 2006", ["PETROLEUM AGREEMENT"] Online: Ghana Oil Watch, <http://ghanaoilwatch.org/images/laws/tullow_agreements/petroleum_agreement_deepwater_tano.pdf>. The agreement just like others that the government of Ghana signed with other operators provides for an income tax rate 35%. The agreement stipulates that where a new income tax rate comes into force anytime in the life of the agreement, the Contractor shall have the option of either applying the new income tax rate of 35% under the agreement or remaining under the Petroleum Income Tax Law of 1987 (PNDCL 188) which provides for a rate of 50%.
[238] "The Upstream Petroleum Industry in Ghana" Ghanaian Times (July 11, 2008).
[239] *Ibid.*

the development and production phase, the surface rental per annum is US$ 100 per square kilometre.[240]

As indicated above, all the fiscal terms in Ghana's oil and gas sector have been allowed to vary on a contract by contract basis rather than being specifically provided for by law. Leaving the fiscal terms for negotiation on a contract by contract basis has its advantages and disadvantages. It facilitates competition among bidders and allows for tailoring of fiscal terms to meet the specific needs or peculiarities of individual fields. On the other hand, allowing too much discretion to few officials (who most of the time have less information about the resource than the companies) is dangerous because it opens the entire fiscal process up for secret dealings and corruption. As Lorenzo Cotula has argued, in many lower and middle-income countries, natural resource contract negotiations are often affected by imbalances in negotiating capacity between investors and governments.[241] Besides differential access to skills and expertise, high staff turnovers in key government institutions, inadequate preparations, poor use of expertise and corruption may put the host government in an unfavourable position during the negotiations.[242]

3.5 Examining Good Governance Legislative Developments in the Petroleum Sector

Governance issues such as transparency and accountability in the petroleum regulatory regime became prominent when Ghana discovered commercial oil and gas resources in 2007. Soon after

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[240] See the *PETROLEUM AGREEMENT*, *supra* note 237, Article 12.
[241] Lorenzo Cotula, *Investment Contracts and Sustainable Development: How to make Contracts for fairer and more Sustainable Natural Resource Investments* (London: International Institute for Environment and Development, 2010).
[242] *Ibid.*

the discovery, the government established an Oil and Gas Technical Committee to, among other things, identify the requisite legal and regulatory framework for the governance needs of the new sector.[243] Following the establishment of the Technical Committee, the government held a National Forum on Oil and Gas Development under the theme "Oil – A Blessing: Not a Curse".[244] The purpose of the forum was to define the way forward for Ghana's management of the oil and gas sector. The government then made the commitment to learn from the experience of other oil producing countries, engage local and international expertise and consult widely to prepare a comprehensive national oil and gas policy and master plan as a basis for the new legislative framework.[245]

In June, 2009, the final draft of the policy and master plan dubbed "Fundamental Petroleum Policy for Ghana" begun to circulate in the public domain.[246] Highlights of the policy principles elaborated in the document include:

1. Government shall "ensure that all relevant institutions shall be organized so as to promote coordination [and] continuity, impose accountability, and create the necessary checks in the management systems for petroleum operations, revenues and resources".
2. "The petroleum legal framework established in Ghana shall be transparent and shall provide predictability in contracting and in operations."
3. "Government shall establish processes to maximize petroleum revenue collection in a transparent and cost-effective manner and without jeopardizing incentives for petroleum

[243] Gary, *supra* note 232.
[244] *Ibid.*
[245] *Ibid.*
[246] See Ministry of Energy Ghana, "Fundamental Petroleum Policy For Ghana" Online: Ministry of Energy Ghana, <http://www.energymin.gov.gh/wp-content/upLoads/Fundamental-Petroleum-Policy-of-Ghana.pdf>.

investors. Government shall promote fiscal discipline to ensure correct petroleum revenues are collected and accounted for, and establish mechanisms to facilitate and simplify fiscal administration."

4. "Government will … establish a transparent and predictable fiscal regime for the collection, verification, and utilization of petroleum revenues."
5. "Government shall … [provide] the public with accurate, proactive, and objective information on a timely basis."

Buoyed by these commitments to good governance, Ghana's normally splintered civil society groups galvanised into collective action to forge a common strategy for engaging constructively with other stakeholders on the governance of petroleum resource.[247]

In June, 2010 the government submitted to Parliament its first legislative proposal after the discovery of oil, the Petroleum Revenue Management Bill, which it touted as a product of extensive consultation and a careful attempt to enshrine well-established norms of good governance. That same month, over one hundred civil society groups in Ghana, under the umbrella group Civil Society Platform for Oil and Gas,[248] convened what it called a "Citizen Summit" that included influential groups outside its membership base – notably, chiefs, traditional leaders, the clergy and the media.[249] The Summit issued a communiqué offering proposals and recommendations for greater transparency and accountability in the areas of

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[247] See Gyimah-Boadi and Kwasi Prempeh, "Oil, Politics and Ghana's Democracy" (2012) 23(3) Journal of Democracy 94.

[248] The Platform has about 115 members, including Civil Society organisations, academic and research institutions and individuals. The Platform focuses on strengthening the ability of civil society to have their voices heard on oil and gas legislation, revenue collection and environmental protection.

[249] Gyimah-Boadi and Prempah, *supra* note 247.

revenue management and the regulation of exploration and production.[250] The proposals and recommendations of the Summit largely shaped initial legislative outcomes in the oil and gas sector. Gyimah-Boadi and Prempeh have argued that the “involvement of organized civil society and the media throughout the legislative process made the development of the initial legal framework for oil governance in Ghana exceptionally participatory and transparent.”[251]

Three major legislative reforms have been introduced by the government to reform the governance climate of the petroleum sector since 2010. These are the *Petroleum Revenue Management Act, 2011 (Act 815)* which establishes careful procedural requirements on how petroleum revenues are spent, the *Petroleum Commission Act, 2011 (Act 821)* which provides for an independent regulator for upstream matters and a failed Petroleum (Exploration and Production,) Bill 2010, which was meant to replace the *Petroleum (Exploration and Production) Law, 1984 (PNDCL 84).* The third piece of legislation, the *Petroleum (Exploration and Production) Bill 2010*, had to be withdrawn from parliament after its introduction because some members of parliament and civil society organizations rejected the Bill’s provisions that allowed the government to award licenses and contracts through negotiation instead of competitive bidding.[252] Secondly, the Bill was rejected because it did not require disclosure of oil and gas contracts and agreements between the government and operators in the industry.[253] In short, the

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[250] For a full content of the Communiqué see Civil Society Platform on Oil and Gas- Ghana, “Ghana Oil Boom: A Readiness Report Card” (2011) Online: Oxfam America, <http://www.oxfamamerica.org/files/ghana-oil-readiness-report-card.pdf>.
[251] Gyimah-Boadi and Prempeh, *supra* note 247 at 98.
[252] *Ibid.*
[253] *Ibid.*

Bill failed to provide for a transparent and accountable framework that would put the country in a strong position to minimize the risks of corruption.[254]

These developments in the petroleum sector since 2010 shows that good governance has been a priority both for the citizens of Ghana and the government. The incorporation of transparency and accountability mechanisms in policy and revenue management demonstrates the commitment to maximize the benefits from the sector. This section evaluates the governance regime of the petroleum sector using the criteria identified in chapter two. I will examine, the governance regime established for the management of revenues from the sector, paying particular attention to the Petroleum Revenue Management Act, 2011 (Act 815) and all relevant laws that have a primary or direct bearing on governance of petroleum revenues and the criteria developed in Chapter 2. The legal regime is evaluated below:

3.5.1 Open Competition in the Award of Contracts and Development Rights

Competition in the award of contracts and development rights can either be through competitive tender or auction as discussed above. Ghana's *Petroleum (Exploration and production) Law, 1984 (PNDCL 84)* stipulates the adoption of a "competitive bidding procedure" for the award of petroleum agreements.[255] Regulations governing the implementation and operationalization of this statutory requirement are yet to be made.[256] The commitment to an open and competitive

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[254] Heller and Heuty, *supra* note 26.
[255] See *PNDC LAW 84*, *supra* note 222, s2.
[256] The provision in the law requires that the Minister responsible for the sector should make regulations prescribing the procedure for competitive bidding for oil and gas rights. More than two decades after the coming into force of

bidding procedure has been further expressed in Ghana's 2009 Fundamental Petroleum Policy which stipulates that: "[G]overnment shall maintain a policy of healthy competition among licensees in an atmosphere of cooperation for the benefit of the nation."[257] In this regard, the Minister responsible for petroleum is tasked to oversee "the promotion and announcement of licensing rounds under the competitive bidding process."[258] This is meant to ensure that the petroleum legal framework in Ghana promotes the values of transparency, accountability and predictability in contracting.[259]

In spite of these commitments to good governance in licensing and contracting, Civil Society groups have expressed concern about the failure of the government to fully adopt a transparent and competitive licensing process in the oil and gas sector. The Civil Society Platform on Oil and Gas[260] has observed as recently as 2011 that:

> Since the Jubilee discovery in 2007, Ghana has received strong interest from international oil and gas companies. As of late 2009, it was reported that 41 companies had expressed interest in Ghana's oil blocks. Ghana has yet to move from a secret process of negotiated deals – more characteristic of a country yet to discover oil – to an open and competitive bidding round. Such a process of auctioning rights to new oil blocks would likely bring increased revenue to the country. As the Bank of Ghana has said, the government should consider ―an auction of resource extraction rights before contracts are signed to increase government returns from the sector.[261]

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this legislation such regulations have not yet been made. This is attributable largely to fact that post legislative rulemaking has been less open to Parliament and public scrutiny and participation.

[257] See Ministry of Energy, *supra* note 246.

[258] *Ibid.*

[259] *Ibid.*

[260] The Platform is an amalgam of more than 110 civil society groups, including policy and governance think tanks, and community based organizations, human rights and environmental groups. The Platform receives technical support from Oxfam America, the Revenue Watch Institute, and the World Bank. The Platform has spearheaded civil society's efforts to share knowledge about oil and gas governance, mobilize public input and advocacy on the formulation of oil and gas policy and laws as well as forge a common strategy for engaging constructively with key stakeholders such as the government, parliament, petroleum operators and oil affected coastal communities.

[261] See Oil Readiness Report Card, *supra* note 250.

The above observation demonstrate that Ghana's licensing and contracting regime for petroleum resources does not fully address the core issue of good governance identified in Chapter two—viz - transparent competitive bidding process for the award of rights. The use of closed door negotiations and wide latitude for government negotiators makes the contracting process vulnerable to corruption.[262]

3.5.2 Contract Transparency

Contract transparency is vital to the effective governance of resource revenues. The principal legislation that governs contracts in the petroleum sector is the *Petroleum (Exploration and Production) Law, 1984 (PNDCL 84).* This legislation governs all upstream matters but does not have mandatory rules on contract disclosure. Additionally, all the contracts entered into under this legal framework also contain non-disclosure (confidentiality) clauses.[263]

The 2010 Petroleum (Exploration and Production) Bill had the primary purpose of updating the upstream regulatory framework because *PNDCL 84* is a holdover decree from a military regime and was enacted before commercial oil activities had begun. This proposed legislation was to address several institutional issues related to the sector including the licensing of oil and gas activities. But as Patrick Heller and Antoine Heuty have observed, the Bill failed to take advantage of opportunities to correct shortcomings in the current system for managing petroleum

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[262] *Ibid.*
[263] Ghana Oil, "Government has no Excuse to Keep Confidentiality Clauses in Contracts" (2011) Online: Ghana Oil, <http://ghanaoilonline.org/2011/09/govt-has-no-excuse-to-keep-confidentiality-clauses-in-contracts/>.

operations.[264] Heller and Heuty further argue that the Bill actually threatened to make the system less accountable than the status quo:

> The Bill threatened to leave the contracting process – so crucial for the selection of effective partners and effective monetization of underground resources- subject to broad discretion. Clause 19 would have empowered the Minister to award a contract based on a simple application by an oil company, with no requirement for competition, disclosure of other proposals, any standard for company qualification, or any showing of why a particular award was made. Article [sic] 49(3)(n) subsequently indicated that the Minister "may" make regulations in respect of "competitive bidding procedures for petroleum agreements," but this was left totally at the Minister's discretion. [265]

This Bill has been criticised for creating confusion among the major public institutions and processes in the exploration and production of petroleum such as the risk of creating weak oversight institutions, confusion in reporting, delays in approvals, inefficient sector development, opacity and corruption.[266] There were also transparency gaps in the Bill which led to it being withdrawn from Parliament for further review.[267]

However, Kosmos Energy as part of the requirement for its Initial Public Offering (IPO) in May 2011 published all of its Jubilee Field contracts and the field's unitization agreement via the Securities and Exchange Commission (SEC) filings in the United States. Separately, Tullow Oil Ghana Ltd has also published its contracts and deeds of assignments and these agreements are now available on many websites.[268] Additionally, Ghana's Ministry of Energy has published on

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[264] See Heller and Heuty, *supra* note 26.
[265] *Ibid,* at 58.
[266] *Ibid,* at 60.
[267] See Parliamentary Centre, "Extractive Industries and Parliaments: Making the Link" Online: Parliamentary Center, <http://www.parlcent.org/en/wp-content/uploads/2012/06/Extractive-Industries-and-Palriaments-Making-the-Link.pdf>.
[268] See Ghana Oil Watch, "Ghana Petroleum Agreements Published" Online: Ghana Oil Watch <http://ghanaoilwatch.org/index.php/ghana-oil-and-gas-news/1246-ghanas-petroleum-agreements-published>; Revenue Watch

its website the most important petroleum agreements which can be downloaded online.[269] Although the petroleum legal regime in Ghana does not require mandatory contract disclosure, the US Securities and Exchange Commission regulatory requirements which compelled Kosmos Energy to make the disclosure of these contracts pushed the government to publish same.

3.5.3 Public Availability of Information on all Revenue-Related Transactions

As discussed in Chapter Two, transparency and accountability are key governance factors in the successful management of natural resource rents. Bell and Faria observe that the "requirement of transparency and the establishment of mechanisms that ensure such transparency are critical in any oil revenue management law."[270] They posit that as a general rule, all oil revenue related information should be made public and the law should provide a non exhaustive list of items subject to disclosure, and the parties responsible for making each piece of information public.[271]

The *Petroleum Commission Act* was enacted in 2011 to redress some of the information gaps in the previous regulatory framework. This law provides for very high standards of reserve and resource data disclosure in the oil and gas sector which previously did not exist. The *Petroleum Commission Act* requires the Petroleum Commission to issue annual public reports on petroleum

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International, "Ghana Jubilee Field Contracts" (2010) Online: RWI, <http://www.revenuewatch.org/training/resource_center/ghana-jubilee-field-contracts>.

[269] Ministry of Energy, "Agreements" Online: MoEn, <http://www.energymin.gov.gh/?page_id=106>.

[270] Joseph Bell and Teresa Maurea Faria "Critical Issues for a Revenue Management Law" in Macartan Humphreys eds. *Escaping The Resource Curse*, (New York: Columbia University Press, 2007) 286.

[271] *Ibid.*

resources and activities.[272] This report is to contain information on open areas for petroleum exploration and production; reconnaissance licences issued and petroleum agreements ratified; production permits issued; sales and transfers of interests; the volume of original hydrocarbon in place; recoverable reserves and remaining recoverable reserves of existing fields.[273] This represents a strict guideline for how the minister must disclose scientific and technical information about petroleum sector projects. The important aspect of this disclosure requirement is its imperative to make the report public which will provide information to stakeholders about future revenue flows from the sector. However, this law does not require that contracts entered into between the government and operators should be disclosed. Thus, legal backing for contract transparency still does not exist in Ghana's Petroleum sector.

The *Petroleum Revenue Management Act*, on the other hand, specifically promotes accountability and responsibility in the government's management of Ghana's petroleum wealth.[274] The *PRMA* takes the approach of making transparency the cardinal principle in the operations and management of petroleum revenues. The law adopts the "highest internationally accepted standards of transparency and good governance" as the test for petroleum revenue governance.[275] The Act does not define the standard nor the framework for determining its

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[272] See *Petroleum Commission Act, 2011*, Laws of the Republic of Ghana, Act No. 821, s 3(k).
[273] *Ibid.*
[274] See the *PRMA*, *supra* note 22, Long Title. The discovery of oil in commercial quantities in Ghana raised hopes as well as concerns about the prudent management of revenues that will accrue to the country from the oil and gas sector. Within the Ghanaian society, several individuals, groups and institutions pushed for the enactment of laws and regulations to ensure effective, efficient, equitable, transparent and accountable management and utilization of the financial resources that the state will derive from this new sector. The basic argument was that the absence of such legislation has been the cause of abysmal management of oil wealth elsewhere on the continent which has resulted in costly social conflicts, entrenched poverty and widespread gaps between the rich and the poor.
[275] See the *PRMA, ibid*, s 49(1).

contours. What is clear is that the law acknowledges that domestic systems of good governance and transparency are inadequate as tools to manage Ghana's oil wealth. It therefore allows the managers to invoke international best practice of transparency and accountability in managing the oil wealth of Ghana and allows individuals, civil society organizations and interest groups to question the quality of transparency surrounding the management of petroleum wealth by invoking international best practice.

The *PRMA* establishes two levels of transparency. On one level is the requirement to publish all payments received from oil and gas companies and all other petroleum revenues that accrue to the state. At a second level there is the provision of information about the management and utilization of funds by the state. Overall, the objective is that there must be public access to information about the decisions and transactions involving petroleum revenues. Thus, the government and other institutional actors must adhere to the principles of transparency and good governance and in this regard, they are required to take steps to entrench transparency mechanisms and ensure free access to non-classified information by the public.

3.5.3.1 Confidentiality of Information on Oil Revenues

The *PRMA* contains some narrow exceptions to the general disclosure requirements. It specifically allows the withholding of information where disclosure would create significant prejudice to the performance of the petroleum funds.[276] Although the law does not specifically

[276] See the *PRMA, ibid*, s 49(3).

prohibit the making of any payment information confidential, a close reading of its provisions show that it is only information relating to the management of the petroleum funds viz the Ghana Stabilization Fund and the Ghana Heritage Fund which can be declared as classified. This is understandable given that such information may disclose the particulars of the business or affairs of a private enterprise that the managers may engage. But to be able to declare confidentiality, the test of substantial or significant prejudice must be met before any information relating to the funds can be classified.

The law puts the burden of claiming confidentiality on the Minister of Finance and Economic Planning.[277] This is because a declaration of confidentiality must be accompanied by a clear explanation of the reason for treating the information or data as such taking into consideration the principle of transparency and the right of the public to information.[278] Thus the law balances the right of the public to information and the interest in business that will be affected if a particular piece of information is not declared confidential. In this regard the law requires that a declaration of confidentiality must be approved by Parliament and such declaration shall not limit access to information by Parliament or the Public Interest Accountability Committee to which the Act assigns oversight responsibility.[279]

Additionally, the law places a limit on the duration of time within which any information or data relating to the performance of the funds can be declared confidential. Information and data

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[277] *Ibid.*
[278] See the *PRMA, ibid,* s 49(4).
[279] See the *PRMA, ibid*, s 49(5).

pertaining to the petroleum funds that are declared confidential and approved by Parliament will cease to be treated as such after three years unless the reason for it being classified is still valid.[280]

3.5.4 Government Accountability to the Public

A legal regime that promotes good governance must prescribe procedures for accountability. The petroleum sector revenue management regime incorporates public participation and accountability mechanisms into the regulatory model through the creation of a Public Interest and Accountability Committee.[281] The Public Interest and Accountability Committee (PIAC) has three primary objectives. First, the Committee is to monitor and evaluate compliance with the provisions of the *PRMA* by government and other relevant institutions in the management and use of the petroleum revenues and investments of those revenues.[282] Secondly, the committee serves as the platform and space for the public to debate whether spending prospects, management and use of petroleum revenue conform to the priorities provided for under the law.[283] Thirdly, the Committee provides independent assessments on the management and use of petroleum revenues to assist Parliament and the executive in the oversight and performance of related functions respectively.[284] The Committee is therefore mainly concerned with monitoring and reporting on government's stewardship of Ghana's oil wealth.

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[280] See the *PRMA, ibid*, s 49(6).
[281] See the *PRMA, ibid*, s 51.
[282] See the *PRMA, ibid,* s 52(a).
[283] See the *PRMA, ibid*, s 52(b).
[284] See the *PRMA, ibid*, s 52(c).

To enable the Committee to perform its functions effectively, the law mandates it to consult widely on best practice related to the management and use of petroleum revenues.[285] This is because in the scheme of processes for managing oil revenues the Committee is the single cohesive human force that is capable of doing so. Membership of the Committee is drawn widely from various stakeholders to ensure that a broad range of interests are represented.[286] The Committee brings into the oversight function groups that might otherwise be excluded but for the provision of the law and who are capable of tapping best practice in resource governance in other countries. This oversight Committee is meant to enhance public trust and understanding.

The Public Interest and Accountability Committee, in May 2012 released its first report detailing government of Ghana's handling of petroleum revenues for the year 2011. This is in pursuance of the Committee's mandate under the *PRMA* to publish two reports - a semi-annual report and an annual report and submit a copy of each to the President and Parliament.[287] On the day that the report of the Committee was released the Chairman of the Communications Sub-Committee justified its work on the basis that the report was to among other things help "...avoid situation

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[285] See the *PRMA, ibid*, s 53(1).
[286] The following interests and groups are represented on the Committee: (1) a representative of independent policy research think tanks nominated by the think-tanks; (2) a representative of civil society organizations and community-based organizations nominated by civil society; (3) a nominee of each of the Trade Union Congress; the National House of Chiefs, the Association of Queen Mothers; the Association of Ghana Industries and Chamber of Commerce; the Ghana Journalists Association; the Ghana Bar Association; the Institute of Chartered Accountants; the Ghana Extractive Industries Transparency Initiative; the Christian groups namely the National Catholic Secretariat, the Christian Council on a rotational basis; the Federation of Muslim Councils and Ahmadiyya Mission on a rotational basis, and the Ghana Academy of Arts and Sciences.
[287] See the *PRMA, supra* note 22, s56. The Committee is also to publish the reports on the Committee's website and present same to the President and Parliament as well as hold public meetings twice each year to report on the Committee's mandate to the general public.

[sic] that we have had in other countries where oil has been found [to be a curse] and in our case we just want to be sure that we dispel all notions of stealing....We want to be transparent".[288]

The Committee in its report acknowledged that key players in the oil and gas industry were making effort to play their roles as required by law. However, it noted that "there were still gaps that need to be addressed."[289] Of the Committee's ten point key findings, two deal with failure to report and account for some revenues, five deal with general non-compliance with the statutory directives regarding revenues and the other three are concerned with consistent application of the revenue law and pre-*PRMA* dealings with revenue.[290]

The Committee found that not all payments required to go into the Ghana Petroleum Fund were reported on. These payments include surface rentals which were paid into the government of Ghana non-tax revenue account and not accounted for in the Petroleum Holding Fund as well as payments from the Saltpond Field[291] which were not included as part of government's petroleum receipts.[292] Additionally, the Ghana National Petroleum Corporation (GNPC), the state oil company, was found not to have published audited reports on the use of some GH¢ 315, 390,698

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[288] Joy FM "Ghana's Oil Revenue Goes Public Today" Online: MyJoyOnline, <http://business.myjoyonline .com/pages/news/201205/86733.php>.
[289] See the *PIAC 2011REPORT*, *supra* note 217.
[290] *Ibid.* See report for full finding and recommendations.
[291] These oil fields were in existence before the Commercial find in 2007 by the Jubilee Partners. The GNPC currently has a joint venture operation with Lushann Eternit Energy Limited, which was entered into on 11th November, 2004. The ownership interest of the joint venture partners who are operating under the Saltpond Offshore Producing Company Limited (SOPCL) are as follows: Lushann - 55% and GNPC - 45%. The level of production from the Saltpond fields is quite low. Daily average production stands at less than 1,000 barrels of crude oil.
[292] The Committee found that there are no records to show that the revenues from oil production from the Saltpond fields have been paid into the Ghana Petroleum Holding Fund.

which it received to cover its activities in 2011.[293] The *GNPC* has also been accused of failing to furnish the legislature with information on its spending activities sometimes even upon request.[294]

The *PIAC* report finding and follow up civil society pressure on the *GNPC* forced it to release a press statement dated 19th July, 2012, to reiterate its commitment to transparency and accountability.[295] In that press statement the *GNPC* took the opportunity to disclose the revenue allocated to the corporation and the expenditures that it made with those receipts.[296] The role assigned the *PIAC*, is novel in Ghana's resource governance arrangement and allows the body to complement traditional oversight institutions like Parliament and the Judiciary.

Additionally, because of the importance that the *PRMA* attaches to the right of the public to information, it imposes legal sanctions on persons and institutions who fail to comply with the obligation to make information regarding petroleum revenue public.[297] The law makes it a

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[293] See the *PRMA, supra* note 22.
[294] Frederick Asiamah, "MPs, experts fear GNPC is becoming a 'monster'" *Public Agenda* (9 July, 2012) 1.
[295] Ghana National Petroleum Corporation, "Recent Media Discussions on GNPC and Jubilee Oil" Online: GNPC, <http://www.gnpcghana.com/aboutus/newseventsdetails.asp?nwsiD=41>.
[296] *Ibid.* The Corporation stated that in 2011, Parliament allocated US$207.96 million from Petroleum Revenues to GNPC. During the 2012 budget hearings, the GNPC accounted to Parliament through the Honourable Minister for Energy and the Honourable Minister for Finance and Economic Planning on the use of these funds as follows:- (a) US$132,484,815 (or 63.7%) went to repay part of the money GNPC borrowed from the Jubilee partners to pay for US$165.8 million share of field development costs incurred since 2008; (b) US$30,315,185 (or 14.6%) went towards the acquisition, processing and interpretation of 2,612 km² of 3D Seismic Data for the Southwest Deep Tano block; (c) US$28,119,624 (or 13.5%) was used in fabrication and installation of 14 km of deepwater pipeline as part of the Natural Gas Infrastructure Project; (d) US$7,661,475 (or 3.7%) went to Staff costs; (e) US$9,383,204 (or 4.5%) went towards General Operational and Administrative Expenditure.
[297] See the *PRMA, supra* note 22, s 50.

criminal offence to fail to comply with the obligation to publish information or to prevent or hinder a person or institution from complying with its obligations to do so.[298]

3.5.5 Effective Oversight and Safeguards

The components of the effective oversight and safeguards are based on adequate legal provision for independent audits and reporting. The PRMA makes provision for clear oversight mechanisms, auditing, transparency and reporting obligations to safeguard the wise management of petroleum revenue. An important mechanism of accountability is the periodic auditing of petroleum revenues.[299] The Petroleum Funds are subject to dual audit requirements, with a mandatory internal quarterly audit by the Bank of Ghana and an annual audit by the Auditor-General.[300] Special audits can also be carried out by the Auditor-General on the petroleum fund for public interest purposes.[301] The reports of such audits are to be submitted to Parliament.

Internal audits of the Petroleum Funds are conducted by the Internal Audit Department of the Bank of Ghana. The audited quarterly reports are to be submitted to the Minister of Finance and Economic Planning.[302] The *PRMA* requires that the Bank of Ghana submit its audits and relevant documents and reports to the Auditor-General for the purposes of preparing an annual audit report. The annual audit is to determine if the accounts have been properly kept, whether

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[298] *Ibid.*
[299] See Bell and Faria, *supra* note 270.
[300] See the *PRMA, supra* note 22, s 44- 45.
[301] See the *PRMA, ibid*, s 47.
[302] *Ibid.*

payments due to and disbursements from the Petroleum Funds have been made, and the extent to which the Petroleum Funds have been managed in accordance with the provisions of the law.[303]

The audited accounts and reports on the Petroleum Funds are then required to be published within thirty days after the Auditor-General submits the annual report to Parliament.[304] Thus, the law guarantees that the institutions involved in the audit of the petroleum accounts periodically report their findings to both the institutions mandated to exercise oversight powers and to the general public.

3.5.6 Clear and Effective Roles and Responsibilities for Institutions

Clear and effective assignment of roles and responsibilities on the management of resource revenues is a hallmark of good governance. The *PRMA* provides clear assignments of responsibilities from collection to final utilization of petroleum revenue within a transparent and accountable framework. Because the petroleum industry and its rents pose unique challenges to new economies and institutions, the legislation took away the option of leaving the revenue to be collected and accounted for as part of conventional government revenue or in the hands of the national oil company.[305] The lessons from oil-producing countries are that these options for the collection and management of petroleum revenue risk excessive waste, potential loss of control

[303] See the *PRMA, ibid,* s 46(3).
[304] See the *PRMA, ibid*, s 46 (4).
[305] See the *PRMA, ibid,* Memorandum.

of public expenditure, and most importantly, weaken the purpose of the national budget as the primary instrument to manage all the resources of the country.[306]

3.5.6.1 The Nature and Scope of the Petroleum Funds

The PRMA creates a custodial account, the Petroleum Holding Fund (PHF), at the Bank of Ghana to receive and disburse petroleum revenue due Ghana.[307] The PHF is to receive all royalties from oil and gas, amounts from direct or indirect participation of government, corporate income tax, amounts due the national oil company from petroleum operations, revenue due the government from its carried and participating interest in oil and gas operations. It also receives amounts due government from the sale or ownership of exploration, development and production rights.[308]

The Ghana Revenue Authority (GRA), formerly the Internal Revenue Service, has the primary obligation to assess, collect and account for all petroleum revenue for payment into the PHF.[309] Time lines are fixed for the payment of revenue assessed. The petroleum revenue assessed as due the government must be paid by direct transfer into the PHF by the fifteenth day of the ensuing month by the entities obliged to make payment.[310] Where the payment is not discharged on or before the due date, a penalty of five percent of the original amount is to be paid for each day of

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[306] *Ibid.*
[307] See the *PRMA*, *ibid,* s2.
[308] See the *PRMA*, *ibid*, s6.
[309] See the *PRMA, ibid*, s 3(1).
[310] See the *PRMA, ibid*, s3(2).

default.[311] Additionally, express provision is made to prohibit the GRA and any other government entity from treating the amounts paid into the PHF as normal tax revenue or to use monies in the account as the basis for the determination of any statutorily earmarked funds.[312] Furthermore, the PHF is not to be used for the provision of credit or collateral to the government, public agencies and private institutions and the government is not to borrow against proven petroleum reserves.[313]

To ensure that the assets of the PHF are efficiently managed and secure and to promote transparency and accountability the law mandates the simultaneous publication of the revenue received into the Fund in the *Gazette* and at least two state owned daily newspapers within thirty days after the end of each quarter of the year.[314] This information is also to be published on the website of the Ministry of Finance and Economic Planning and presented to Parliament.[315] This information is to include the total petroleum output and the reference price.[316]

From the PHF, two other subsidiary funds known as the Ghana Heritage Fund and the Ghana Stabilization Fund are created.[317] The latter is designed to shield the economy from the adverse effects of volatility due to the fluctuation in tax revenues generally and more specifically to reduce the uncertainty that arises from fluctuation in oil revenue as a result of volatile world

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[311] See the *PRMA, ibid,* s 3(4)
[312] See the *PRMA, ibid*, s 3(5).
[313] See the *PRMA, ibid*, s5.
[314] See the *PRMA, ibid*, s 8(1).
[315] See the *PRMA, ibid*, s 8(2).
[316] See the *PRMA, ibid,* s 8(3).
[317] See the *PRMA, ibid*, s 11(1).

market prices.[318] It is thus intended to ensure a stable level of budgetary support from the petroleum revenue and in so doing, help manage the potential short-term adverse effects on the economy due to fluctuations in oil prices. The Ghana Heritage Fund on the other hand, is meant to serve as an endowment to support development for future generations when petroleum reserves have been depleted.[319] This is to ensure inter-generational equity since petroleum revenues are finite.

3.5.6.2 Withdrawal and Spending Regime

(a) Withdrawal:

Three types of disbursements or withdrawals are permitted from the Petroleum Holding Fund account. These are disbursements out of the Petroleum Holding Fund for purposes of paying into the subsidiary Heritage and Stabilization Funds, payments into the Consolidated Fund for the purposes of the national budget and exceptional disbursements.[320] Exceptional disbursements are those expenses incurred for the fund itself, such as custodial charges, payment to investment advisors, transactional and management fees and refunds in the case of mistaken payment or overpayment.[321]

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[318] See the *PRMA, ibid,* s 9(2).
[319] See the *PRMA, ibid*, s10(2).
[320] See the *PRMA, ibid*, s16.
[321] See the *PRMA, ibid,* s 24.

Withdrawal from the stabilization fund is governed by a strict set of rules for the purpose of achieving the objects of the fund. Withdrawal from the fund is only allowed where the petroleum revenue collected falls below a predetermined value.[322] The law therefore sets caps and imposes hard limits on the amount of money that can be withdrawn from the Stabilization Fund. In the case of monies that accrue to the Heritage Fund, withdrawals are allowed only after the depletion of petroleum reserves in which case the Heritage Fund and the Stabilization Fund will be consolidated into what will be known as the Ghana Petroleum Wealth Fund.[323]

Disbursements to the national budget occur through a formula known as the Annual Budget Funding Amount (ABFA) is the amount of petroleum revenue allocated for spending in the national budget each year.[324] The PRMA provides a framework limiting how oil revenue can be spent in a given year. The actual amount is determined in accordance with a formula set by Parliament and reviewed every three years.[325] To ensure enough checks and monitoring, transfers to the national budget can only occur after the publication in the Gazette confirming the amount approved by Parliament for that financial year.[326]

(b) Spending:

With respect to spending, the *PRMA* provides that the use and expenditure of petroleum revenue must be integrated into the national budget in order to ensure efficient allocation, responsible use

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[322] See the *PRMA, ibid*, s 12.
[323] See the *PRMA, ibid*, s 20.
[324] See the *PRMA, ibid*, s 61 & 18.
[325] See the *PRMA, ibid*, s18 (3) & (4).
[326] See the *PRMA, ibid*, s 19.

and effective monitoring of expenditure.[327] Spending must be tied to the objectives of maximizing national economic development and the promotion of an equitable distribution of wealth and equality among Ghanaians.[328] Further spending decisions must be in accordance with a long-term national development strategy and must accord priority to specific areas of development.[329] However, some portion of the money allocated for the national budget and expenditure may be used for public investment expenditure consistent with the long-term national development plan and related purposes.[330]

In order to maximise the impact of the use of petroleum revenue, government is allowed to prioritize at most four areas when submitting a programme of activities to Parliament for the use of petroleum rents.[331] The programme of priority areas submitted to Parliament is to be reviewed every three years except in situations of a national disaster when the minister responsible for finance may make a special request to Parliament for the release of petroleum revenue to be used in areas outside the prioritized areas.[332]

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[327] See the *PRMA, ibid*, s 21(1).
[328] See the *PRMA, ibid,* s 21(2).
[329] See the *PRMA, ibid*, s 21(3). These priority areas are to include agriculture and agro-processing, human resource development, the development of infrastructure, water and sanitation, rural development, environmental protection, sustainable utilization and the protection of natural resources, developing alternative energy sources, strengthening the institutions of government concerned with governance and the maintenance of law and order as well as the provision of social welfare and the protection of the physically handicapped, people with mental disorders and disadvantaged citizens.
[330] See the *PRMA, ibid*, s 21(4).
[331] See the *PRMA, ibid*, s 21(5).
[332] See the *PRMA, ibid*, s 21(6).

3.5.6.3 Investment Policy Making Strategy and Oversight

The *PRMA* entrusts the responsibility of designing investment guidelines and strategy to the Investment Advisory Committee (IAC).[333] The Investment Advisory Committee is comprised of persons with varied experience and competence in finance, investment, economics, business management and law.[334] Its principal duty is to create and periodically review the investment policy and overall management strategies relating to the petroleum funds and advise the minister responsible for finance on the best securities to invest the money, taking into consideration international best practice of investments of similar funds.[335] The Committee has the further responsibility of developing the benchmark portfolio; the desired returns from and associated risks of investing the fund taking into consideration the investment guidelines of the Bank of Ghana for investments of similar nature.[336]

The Committee is tasked with the responsibility of establishing and reviewing general investment policy and strategy and advising the minister responsible for finance on the best options that will yield the most returns and not the actual investments. This presupposes that the Committee will have broad discretion in devising the policy. However, in giving its advice to the minister the Committee is to be guided by the principle that funds from the exploitation of non-renewable petroleum resources are for the benefit of current and future generations and must take account of the current conditions under which institutional decision-makers like the Bank of

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[333] See the *PRMA, ibid,* s 29.
[334] See the *PRMA, ibid*, s 31(1).
[335] See the *PRMA, ibid*, s 30(1)(b).
[336] See the *PRMA, ibid,* s 30(1)(c).

Ghana operate as well as the need to ensure that sufficient funds are available when needed for transfers to meet unanticipated petroleum revenue shortfalls.[337] Although the Investment Advisory Committee designs policy and investment strategy, the actual day-to-day operational management of the petroleum funds is the responsibility of the Bank of Ghana.[338]

To promote oversight and transparency the *PRMA* requires the Investment Advisory Committee to submit quarterly information reports and analysis on the performance and activities of the petroleum funds to the minister responsible for finance.[339] These reports are included in the annual budget and financial statements submitted to Parliament and are to be made available to the public.[340] Also, the minister is mandated to provide Parliament with any information on any advice that the Committee gives within seven days of receiving such advice.[341]

3.6 Conclusion

This Chapter has shown that for the petroleum sector there are certain standards or benchmarks for good governance through the *Petroleum Revenue Management Act*. The Act advocates a certain degree of openness in petroleum resource governance. To ensure that the Ghanaian public is aware of decisions being made about the management of petroleum resources and to promote public accountability, information regarding documentation and auditing of petroleum resource rents, the processes by which decisions are made in respect of priority areas of expenditure and

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[337] See the *PRMA, ibid*, s 30(2).
[338] See the *PRMA, ibid*, s 26(1).
[339] See the *PRMA, ibid*, s 40.
[340] *Ibid.*
[341] See the *PRMA, ibid*, s 39.

the entire chain of revenue flows are made available to the public. To fight petroleum resource capital flight and corruption it is essential that the public is provided with effective information on the management of the resource. This is what the *PRMA*, seeks to achieve.

This Chapter has also outlined some of the barriers to good governance in petroleum sector such as the lack of information regarding the processes by which decisions are made to award contracts for prospective oil and gas companies; and the absence of a clear definition of what information can be classified as confidential.

Notwithstanding, these barriers, the discussion in this Chapter shows that the current approach and legal framework for the governance of petroleum resource revenues is largely transparent and has some mechanisms for ensuring that those who manage the revenues are accountable to the people on both the exploitation of the resource and the manner in which the revenues are applied. This is not to suggest that the framework of governance is entirely perfect. There is still room for improvement in terms of the governance arrangements. However, the fact that the petroleum industry is new and given the context in Ghana (where there is still no access to information law) the disclosure requirements imposed by the *PRMA* are a good start.

CHAPTER FOUR

EXAMINATION OF THE LEGAL AND REGULATORY REGIME FOR MANAGING MINING REVENUES

4.1 Introduction

The primary purpose of this chapter is to explore the laws that govern the mineral industry in terms of how these legal rules inform the content of transparency and accountability obligations. This chapter examines the legal framework on mining revenue governance at the central government level and at the decentralised or local government level. The aim is to understand their disclosure requirements and to discover the extent to which these rules enhance or inhibit transparency and accountability in mineral resource governance.

The Chapter is organized as follows. A brief overview of the mining sector and ownership framework provides the context for discussing the disclosure rules with respect to mining revenues. Secondly, this chapter examines the revenue streams that flow to government from mining by closely reviewing the provisions contained in the *Minerals and Mining Act, 2006 (Act 703)* and tax related laws that affect the mining sector. Thirdly, the Chapter examines the governance framework for the management of mining revenues based on the evaluating criteria identified in Chapter 2. Essentially, the argument is that the absence of a transparent and accountable regulatory framework governing mining revenues in Ghana is a recipe for corruption, mismanagement and negative rent seeking behaviour.

4.2 Overview of Ghana's Mining Sector

Ghana is one of the largest mining countries in the world. It is the second largest gold producer in Africa after South Africa, the third-largest African producer of aluminum metal and manganese ore and a significant producer of diamond.[342] According to Tsikata, Ghana accounted for about 36% of total world gold output for well over a century but its share of mineral output had dwindled by the 1980s.[343] Aryee captures the reasons for the dwindling of the mining industry at the time in the following words:

> For four decades, up to the 1980s, no new mine was opened in Ghana due to a myriad of problems faced by mining sector investors and potential investors alike, as a result of the economic, financial, institutional and legal framework within which the mining sector operated.[344]

To stimulate investment in the mining sector, the government enacted a series of laws and implemented policy measures to create an effective regulatory framework for the mining industry.[345] This led to the liberalization of the mining sector in the 1980s with the government selling out the majority of shares of state owned mines to private foreign companies.[346]

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[342] See George J. Coakley, "The Mining Industry of Ghana" (1996) Online: U.S. Geological Survey <http://minerals.usgs.gov/minerals/pubs/country/1996/9213096.pdf>; see also Ekow Dontoh, "Ghana's First Quarter Gold Production Rises on High Prices" (2012) Online: Bloomberg <http://www.bloomberg.com/news/2012-07-25/ghana-s-first-quarter-gold-production-rises-64-on-high-prices.html>. Ghana has consistently ranked 10th in terms of world production of gold except in 2004 and 2005 when it ranked 11. It however maintained its enviable position as the second largest gold producer in Africa.

[343] Fui Tsikata, "The vicissitudes of mineral policy in Ghana" (1997) 23(1/2) Resource Policy 9.

[344] Benjamin Aryee, "Ghana's Mining Sector: Its Contribution to the National Economy." (2001) 27(2) Resource Policy 61 at 62.

[345] Garvin Hilson and Clive Potter, "Structural Adjustment and Subsistence Industry: Artisanal Gold Mining in Ghana" (2005) 36(1) Development and Change 103.

[346] Kwesi Amponsah-Tawiah and Kwasi Dartey-Baah, "The Mining Industry in Ghana: A Blessing or a Curse" (2011) 2(12) International Journal of Business and Social Science 62. Between 1984 and 1995, there were significant institutional development and policy changes to reflect the new liberalized paradigm. There was the establishment of the Minerals Commission in 1984 to foster efficient and effective regulation, management and

The process of reform resulted in huge investor interest in Ghana's mining industry. Currently, over 128 indigenous companies and about 51 foreign companies are engaged in various forms of reconnaissance and prospecting activities in different parts of the country with about 37 companies holding mining leases and engaged in commercial exploitation of gold, diamond, bauxite and manganese.[347]

The mining sector has consistently contributed to government revenue and exports. Since 1991, the mining sector has been the single largest contributor to total merchandise exports save for 2004 when it was overtaken by the country's cash crop, cocoa.[348] Over the period, the mining sector has provided an average of 42% of total exports.[349] Gold has been dominant in these contributions accounting for about 95% of total mining contributions.[350] For instance, gold exports totalled US$ 2.2 billion in 2008 alone.[351] In 2011 the entire mining sector contributed a total of GH¢1.645 billion (equivalent of US$1.1billion at the time) in tax revenue.[352] These revenues come in the form of corporate taxes, personal income taxes, dividends and royalties. Prior to 2011 the sector was the single largest contributor to government royalties. The sector

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utilization of minerals resources and the promulgation of the Minerals and Mining Code in 1986 and the Small-Scale Mining Law in 1989 to further boost investment in the mining industry.

[347] See "Ghana: A Supplement to Mining Journal" (2010) Online: Mining Journal, <http://www.mining-journal.com/__data/assets/supplement_file_attachment/0008/205892/Ghana_scr.pdf>.

[348] *Ibid.*

[349] *Ibid.*

[350] *Ibid.*

[351] *Ibid* at 9.

[352] See "Mining Sector Contribution in Tax Revenue" (2012) Online: Government of Ghana Portal, <http://www.ghana.gov.gh/index.php/news/general-news/14193-mining-contributes-intax-revenue->.

contributed an average annual of 98% of all royalties paid to the government of Ghana from 1993 to the year 2010.[353]

The mining sector continues to be robust in spite of the emergence of the petroleum sector in the past two years. Many of the minerals have recently increased in levels of production and prices and this has resulted in more revenue from the sector. Cumulative mineral revenue for the first half of 2012 was US$ 2, 757, 459, 946, up by 19% as against US$ 2,313, 415, 773 recorded in the half year of 2011.[354] During this same period gold production went up by 6%.[355] Also bauxite production increased significantly by 82% on account of the substantial rise in shipments of the ore which went up by 71%. Shipments rose from 173, 601 tonnes in half year of 2011 to 295, 993 tonnes for the same period in 2012.[356] However, diamond purchase dipped significantly by 33% from 185,557 carats in the first half of 2011 to 123,699 carats of the same period in 2012.[357] Manganese shipment also saw a decline by 25% and this translated into a reduction in manganese revenue, which slumped by 24% from US$ 61,489,236 in the first half of 2011 to US$46,981,229 for the same period in 2012.[358]

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[353] See Ghana Chamber of Mines, "Factoid 2010" Online: Ghana Chamber of Mines <http://www.ghana chamberofmines.org/site/publications/>.
[354] Ghana Chamber of Mines, "2012 Half Year Performance of the Mining Industry" (2012) Online: Ghana Chamber of Mines,<http://www.ghanachamberofmines.org/site/news/details.php?id=39>.
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.*
[358] *Ibid.*

4.3 The Mineral Ownership Regime

All natural resources in the soil and the subsoil, in territorial waters and in the territorial sea, on the continental self and in the exclusive economic zone are typically the province of the state.[359] The situation is not different in Ghana's land territory. Article 257(6) of the *Constitution* vests every minerals in its natural state in the president to hold "...in trust for the people of Ghana."[360] This is because the Constitution deems every mineral found in Ghana as the property of the Republic. Neither the *Constitution* nor the *Minerals and Mining Act* [MMA] define the term "natural state" but a "mineral" is defined as "a substance in solid or liquid form that occurs naturally in or on the earth, or on or under the seabed, formed by or subject to geological process including industrial minerals...."[361]

Therefore, regardless of whether the mineral is found on privately-owned land, ownership and control is vested in the Republic and the individual landowner will only be entitled to compensation.[362] This view of the law has been upheld by the Ghanaian High Court in *Asare v.*

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[359] See Jubilee Easo, "Licences, Concessions, Production Sharing Agreements and Service Contracts" in Geoffrey Picton-Tubervill (ed) *Oil and Gas: A Practical Handbook* (London: Globe Business Publishing, 2009) 27.

[360] *Constitution of the Republic of Ghana 1992, Laws of the Republic of Ghana,* c 21.

[361] *Minerals and Mining Act of 2006, Laws of the Republic of Ghana*, Act No. 703 ["MMA"] s.111.

[362] See MMA, *ibid*, s. 73; see also Asare v. Ashanti Goldfields Co. & Ors [1999-2000] 1 GLR 474 which only required that the owner of land affected by mining should be compensated for deprivation of his surface rights. However, the *Minerals and Mining (Compensation and Resettlement) Regulations,* Laws of the Republic of Ghana 2012, (L.I. 2175) has broadened the scope stipulated in *Act 703* and pronounced on by the courts in respect of the principles that must be considered in the assessment of compensation. Regulation 2 of *L.I. 2175* now requires that assessment of compensation should be based a four tier principle. In respect of crops on land granted for mining purposes, the assessment must take into consideration the loss of expected income, which depends on the nature of the crops and their life expectancy; loss of earnings or sustenance suffered by the farmer under any customary tenancy or any other interest the farmer may have; and other disturbances suffered as a result of the grant of the mineral right. With regard to the deprivation of use of the land, the Regulations provide that the assessment must take into account the disruption of the socio-economic activities of the claimant; change or conversion of use of the

Ashanti Goldfields Co & Others.[363] In this case, the first defendant, Ashanti Goldfields Company, was granted a mining lease by the government under the provisions of the then *Minerals and Mining Law, 1986 (PNDCL 153)*[364] over a large area of land, including the farm of the plaintiff. Upon entry by the first defendant onto the land, an assessment of all the plaintiff's crops was made and the plaintiff received compensation. Subsequently, the plaintiff sued the first defendant mining company and the government for compensation for his part of the land on which the mining activities were taking place. Heward-Mills J. held that the rights of the landowner were not completely divested but limited by the rights conferred on the mineral concessionaire. Therefore, the right to compensation was limited to loss by disturbance and for damage done to the surface only and since the plaintiff had received compensation for such loss by disturbance and damage he was estopped from demanding compensation for his land.

The implication of the Constitutional vesting of mineral resources in the state is, rights of ownership of the minerals are distinct from the ownership of land and the state has the power to grant leases for the purpose of exploiting the resource in accordance with the minerals and mining laws of Ghana even if the resource is not found on public land. Therefore, the landowner's consent is not a condition precedent for granting a lease to exploit a mineral

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land after mine closure; duration of the mining lease; diminution of the value of the land as a result of the diminution of the use made of or which may be made of the land; severance of any part of the land from the other parts and any surface rights access. Where there are commercial structures on the land subject to a mineral right, the compensation principles will be the cost of re-establishing commercial activities elsewhere in a similar locality; loss of net income during the period of transition; and the costs of the transfer and re-installation of plant, machinery and equipment. Lastly, in respect of immovable property, where there is a loss or damage, the payment of compensation must be based on full replacement cost.

[363] [1999-2000] 1 GLR 474.

[364] Note that this Law was repealed by the *MMA* but the provisions with respect to ownership of mineral resources and the rights of the surface owner to compensation for disturbance have not changed.

resource.[365] This is because the state does not share the ownership of natural resources with any individual, corporate entity or traditional authority.

The regime of public ownership established under the *Constitution* and the *Minerals and Mining Act,* has significant implications for the governance of mineral resources. First, it strengthens the hand of the state in respect of the allocation of property rights in mineral resources. Second, it gives the state wide supervisory powers in terms of how rights are exercised by those to whom they have been allocated and thirdly, given that mineral resources are a great source of income, vesting ownership of such resources in the state implies placing the governance of the rents in the hands of the state.

4.4 The Fiscal Regulatory Environment

4.4.1 Introduction

Over the years the state has had to engage private (mostly foreign) companies to exploit mineral resources largely due to the lack of the technical and human resources to do so. This requires the state to share the returns from the mining of mineral resources with the holder of a mineral right.

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[365] See the *MMA, supra* note 361, s2. The president has an option to compulsorily acquire any land which is the subject of mining activity. If the president chooses to exercise this right of compulsory acquisition instead of authorizing the occupation and use of the said land, the individual land owner will be entitled to compensation for such acquisition and the landowner's consent will not be required before the granting of the lease. On the other hand if the president only authorizes occupation and use of the land for exploiting minerals, the individual land owner's consent is required before the activity is started. However, the landowner cannot limit the state's right to exploit the resource because the landowner can only complain in respect of compensation for the disturbance of his/her surface rights.

This section reviews the law on the government take to allow an examination of what aspects of the available rent government manages. This section examines the legal provisions. It does not examine the exact quantum or amounts of the rents that accrue to the state on a year to year basis.

Most of the royalties, fees, taxes and other rents paid by mining companies are prescribed in the *Minerals and Mining Act, 2006 (Act 703).* However, taxation issues are also dealt with in the *Internal Revenue Act, 2000 (Act 592)* and other laws such as the *Local Government Act, 1993 (Act 462),* the *Stamp Duties Act, 2005 (Act 689)* and the *National Health Insurance Act, 2003 (Act 650).* The elements of the fiscal regime thus incorporate a wide array of revenues that accrue to government such as mineral application rights fees, annual ground rent, corporate tax, withholding taxes, capital gains taxes, dividends, taxes on interest payable to non-residents, stamp duties on transactions such as loan security documents, and national health insurance levies.

4.4.2 Annual Ground Rent

Section 23(1) of the *MMA* provides that a holder of a mineral right shall "pay an annual ground rent as may be prescribed."[366] The amount to be paid as annual ground rent is to be "prescribed"

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[366] For over 26 years the annual ground rent has not been reviewed. It still stands at a paltry 50 Ghana Pesewas per square kilometre. The Ghana EITI in its audited reports from 2004 to 2009 found that payment of ground rent for the period were not honoured by mining firms and little was done by the OASL to collect the rent. The Lands Commission is currently pursuing a legislation that would see a hike in ground rent for mining companies. The Draft Regulations provides for ground rent of Ghc 9,000 for a square kilometre each year. See Joy Fm, "Mining firms to

(i.e. by legislative instrument).[367] Unlike other rents which go to the central government, the annual ground rent is supposed to be paid to the landowner. Where the land affected by a mining right is owned by a chiefdom, the ground rent is paid to the Office of the Administrator of Stool Lands (OASL) for distribution in accordance with the *Office of the Administrator of Stool Lands Act (Act 481).*[368]

4.4.3 Property Rates

Property rates in respect of mining are levies imposed on fixed assets of mining companies such as buildings and plants. *The Local Government Act*[369] empowers District and Metropolitan Assemblies to levy rates on property within their jurisdictions.[370] The local government institutions have power to levy rates based on the value of immovable property within their areas. The valuation figures are determined by the valuation boards of the respective local government institution.[371] These rates are collected directly by the local government districts that host mining companies. Section 96(11) of the *Local Government Act* empowers the minister responsible for local government to make regulations to "prescribe...a basis for the assessment of rateable value."[372] The minister can also "issue guidelines for making and levying rates."[373] The

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pay Ghc9,000 as rent charges" (2012) Online: Myjoyonline.com, <http://business.myjoyonline.com/pages/news/201208/92550.php>.

[367] "Prescribed" means prescribed by Legislative Instrument.

[368] The Office of the Administrator of Stool Lands is a constitutional creature provided for under Article 267(2) of the Constitution and is responsible for the establishment of a stool land account for each stool so that rents, dues, royalties and revenues can be paid into for onward distribution to the beneficiary chiefdoms.

[369] *The Local Government Act1993, Laws of the Republic of Ghana, Act No. 462.*["ACT 462"]

[370] See *ACT 462*, *ibid,* s 94.

[371] See *ACT 462*, *ibid*, s 96(6) - (10).

[372] *Ibid.*

[373] See *ACT 462*, *ibid,* s100.

Immovable Property Rate Regulations of 1975 (LI 1049) as amended[374] which was made pursuant to these powers prescribes a procedure for valuation of property within local government districts and the procedure for objections to those valuations.[375]

4.4.4 Royalties

The *MMA* provides for the payment of royalty in respect of mining operations.[376] Royalty is a payment by the holder of a mineral licence based on production. The *MMA* provides for a royalty range of between 3 and 6 percent of the total value of minerals won from mineral operation.[377] The state had resorted to taking the lowest threshold of 3 percent royalty for over two decades. But amid growing concern that Ghana was not getting enough revenues from its resources, the government announced in its 2010 Budget Statement and Economic Policy that it was going to increase all royalties to 6% and engage all mining companies to address the whole mining sector fiscal regime[378] The Government subsequently revised the rate to 5%. Rutherford and Ofori-

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[374] *Immovable Property Rate (Amendment) Regulations of 1988,* Laws of the Republic of Ghana, Legislative Instrument No. 1359.

[375] The law provides that the valuation procedure must take into account the value of the plant and equipment and that valuation must be based on the replacement value. Replacement value or cost is the amount it would cost to provide the property as if the property were new on an undeveloped site at the time the property is being valued. Section 104 of the law requires that if the owner of the property disagrees he/she must go court. Where the person does not go to court and fails to comply with the assessment, the local government authority may apply to a court after forty two days of the assessment for an order to sell the property.

[376] See the *MMA*, *supra* note 361, s 25.

[377] *Ibid*

[378] Modern Ghana, "Budget Statement and Economic Policy of the Government of Ghana for the 2010 Fiscal Year" Online: Modern Ghana, <http://img.modernghana.com/images/content/report_content/2010budgetspeech.pdf>.

Mensah have suggested that the decision not to proceed with the full 6% rate of royalty appears to have been a reaction to pressure from the mining companies.[379]

A key challenge to determining the government revenue from royalties is the difficulty of determining the gross value of the extracted minerals. For example, gold mining companies produce ores which are sent to refineries outside Ghana for the grade to be determined. The mining companies make their own arrangements for the refining and marketing of the gold. Even though mining companies have on site assaying facilities, the final values from refineries outside Ghana are used to determine the royalty. And although the revenue agencies have representatives at the mine sites to check the quantity of the mineral won, only the weight component of the quantity is determined since they do not determine the grade at the sites.[380] Also there are no standardized guidelines for establishing the prices of minerals won. An independent audit carried out in 2007 on the mining sector in Ghana found that companies employ varying pricing methods and this resulted in different prices being obtained by different companies for gold exports made on the same day.[381]

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[379] Lucas Rutherford and Michael Ofori-Mensah, "Ghana's Mining Code: In Whose Interest?" (2011) 17(4) Governance Newsletter 1.
[380] Ghana Extractive Industries transparency Initiative, "First Aggregation/Reconciliation of Mining Benefits in Ghana" (2007) Online: GHEITI <http://www.geiti.gov.gh/site/index.php?option=com_phocadownload&view=category&id=1:2006&Itemid=54>.
[381] *Ibid.*

4.4.5 Carried and Participating Interest

The government in granting a mining lease is automatically entitled to a 10% carried interest in the mineral operations. This interest gives the government the right to participate in the share of dividends if declared.[382] The government can further participate in mineral operations with the consent of the holder[383] and this may increase the government take in terms of dividends.

4.4.6 Corporate Income Tax

Mining companies are required by law to pay corporate income tax on their chargeable income. This is because the *Internal Revenue Act*,[384] imposes a tax on the income of a resident person "accruing in, derived from, brought into, or received in Ghana".[385] The rate that used to be applicable to mining companies was 25%. However, the government announced in its 2012 Budget Statement and Economic Policy that it was increasing corporate income tax for mining companies from 25% to 35%.[386]

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[382] See the *MMA*, *supra* note 361, s 43(1).
[383] See the *MMA*, *Ibid,* s 43(2).
[384] *Internal Revenue Act of 2000,* Laws of the Republic of Ghana, Act No.592.
[385] *Ibid,* s 1(1) & 6(1) (a).
[386] Ministry of Finance and Economic Planning, "Budget Statement and Economic Policy of the Government of Ghana for the Fiscal Year 2012" Online: MOFEP, <http://www.mofep.gov.gh/sites/default/files/budget/2012_Budget_Speech.pdf> para 78; See also Alhassan Atta-Quayson, "Ghana's Mining Taxes: Are they Adequate?" (2012) Online: The Chronicle <http://ghanaian-chronicle.com/ghana%E2%80%99s-mining-taxes-are-they-new-and-adequate/>.

4.4.7 Withholding Taxes

The *Internal Revenue Act* provides for a withholding tax on dividends paid to shareholders, interest on loans and technical services fees paid to consultants at rates of between 8% and 15%.[387] However, the government grants exemptions for withholding taxes on the payment of dividends to non-residents. The reason for this is the mandatory 10% carried interest in mining operations in favour of the government.[388]

4.4.8 Capital Gains Taxes

The tax laws provide for the payment of capital gains tax on dispositions of interests in mineral operations at the rate of 10%.[389] Capital gains taxes are levied on mining plants and equipment which have been disposed of for amounts above their stipulated book value. In an audit carried out in 2007, it came to light that although mining properties and interests have frequently changed hands, the only evidence of payment of capital gains taxes was that involving Newmont Ghana Limited and Normandy Plc.[390] This revelation shows that government is losing substantial amounts of revenue. If the regulatory framework was transparent and the revenue institutions open in their activities these leakages would be easily dealt with and avoided.

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[387] See *supra* note 384, s 81-83.

[388] See *supra* note 360. Article 174 which requires that these exemptions be approved by Parliament before they become effective.

[389] See *supra* note 384, s 95.

[390] GHEITI, *supra* note 380.

4.4.9 Windfall or Additional Profits Taxes

Windfall or additional profits taxes are imposed by government to collect extra rent generated by mining companies during times of windfall profits arising from high mineral prices or the discovery of usually high quality deposits. The *MMA* removed the additional profits taxes that were provided for in the repealed *Minerals and Mining Law, 1986 (PNDCL 153)*. The additional profits tax which was provided for in the repealed *Law 153* were never applied. This was probably due to the depressed prices of minerals over the life of the law. However, in 2009 the Government of Ghana introduced a National Fiscal Stabilization Levy which imposed an additional 5% levy on profits (before tax) on companies in certain industries including mining. The levy was originally introduced for 18-months but was "extended for an additional year 'in lieu of bringing in Additional Profit Tax"[391] In the 2012 Budget Statement and Economic Policy, the government declared its intention to reintroduce what it called a "windfall tax" at a rate of 10%.[392] This tax is meant to take in more revenue for the government from mining activities.

4.4.10 Stamp Duty Charges, Other Fees and Exemptions

Stamp duty is chargeable on instruments that provide security for loans. The *Stamp Duty Act*[393] puts a rate of 0.5% duty in respect of the principal security and a 0.25% in the case of additional security.[394] Thus large mining project loan financings are subject to these duties. In addition to

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[391] See Rutherford and Ofori-Mensah, *supra* note 379.
[392] See Alhassan Atta-Quayson, *supra* note 386.
[393] *Stamp Duties Act of 2005,* Laws of the Republic of Ghana*, Act No. 689*
[394] *Ibid,* s 1.

the duties indicated above, concessions or mining leases granted under any law also require the payment of stamp duties.[395]

Also annual mineral rights fees are payable by holders or prospective holders of mineral rights to the Minerals Commission. This category of fees is paid to the Minerals Commission by holders of mineral rights. These can be categorized into fees for purchasing application forms; processing of applications for mineral rights; execution of mineral licences and mining leases and agreements; fees paid for obtaining approvals for assignments or mortgages of mineral rights or interests; and fees paid for searches in the records of the Minerals Commission to ascertain the status of a property.

The fees payable for these mineral rights differ depending on the type of mineral to which the fee relates or the scale of the operation (size of the cadastral unit) that is to be undertaken and as to whether the rights are held by a Ghanaian citizen or a non-Ghanaian. According to the *MMA* mineral rights fees are to be prescribed by legislative instrument issued by the minister responsible for mines and natural resources.[396] Therefore, the minister responsible for Lands and Natural Resources is given the power to make Regulations regarding the fees payable by mineral rights holders.[397]

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[395] *Ibid.* Various sums are indicated for different activities ranging from prospecting licenses to diamond digging licenses and mining leases.
[396] See the *MMA, supra* note 361, s 22.
[397] *Ibid.*

Additionally, the *National Health Insurance Act*[398] imposes a levy of 2.5% on production, supply or importation of goods and services.[399] Ordinarily, mining companies would be liable to pay this levy on the import of plant, equipment and spare parts. However, these are exempt because they are part of what is known as the "mining list". The mining list is a list of exempt items or items subject to concessionary duty prepared by the Minerals Commission. This list contains a wide array of exemptions for mining companies. In the 2011 Budget Statement and Economic Policy, the government stated its desire to review the "mining list". The rationale behind this move was to "reflect charges that fairly meet the needs of the industry, tighten exemptions, ensure fairness across industries, while safeguarding revenues."[400]

4.5 Examining Good Governance Issues in Mining Revenue Management

4.5.1 Introduction

This part of the thesis analyzes the existing legal regime for minerals in order to establish how the regime fosters good governance norms like transparency and accountability, by examining the existing regulatory framework against the criteria identified in Chapter 2. The goal is to find out the extent to which the revenue governance regime meets the criteria identified. Transparency and accountability in practice as demonstrated in Chapter 2 provides citizens with the tools they need to achieve responsible and sound management of natural resources and helps

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[398] *National Health Insurance Act of 2003,* Laws of the Republic of Ghana, *Act No.* 650.
[399] *Ibid,* s 86(1).
[400] Ghana Web, "The Budget Statement and Economic Policy for Fiscal Year 2011" Online: Ghana Web, <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=197733>.

to assure communities that they are receiving appropriate benefits from the resource and reduces instances of corruption and bribery.[401]

4.5.2 Open Competition in the Award of Contracts and Development Rights

There is no provision in the *Minerals and Mining Act* of Ghana that requires that the award process for mining rights should be based on open competition either through competitive bidding or auction. Therefore, prior to March, 2012, mineral rights were solely awarded on a first-come-first-served approach.[402] According to this approach, a particular mineral right is usually awarded to the applicant who tendered the first application for that right. Thus, where an application is made for a mining lease, the Mineral Titles Department of the Minerals Commission usually assigns a unique code to the application and records in the *Priority Register*[403] the details of the application including the date, hour and minute the application was submitted.[404] If the applicant fulfils the basic requirements of showing that it possesses the appropriate financial and technical skills as well as completing the necessary documentation, then that applicant is awarded the right.[405]

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[401] See CNW, "Canada's mining industry joins forces with NGOs to improve transparency" Online: <http://www.newswire.ca/en/story/1031311/canada-s-mining-industry-joins-forces-with-ngos-to-improve-transparency>.

[402] See Richard Kofi Afenu "Legal and Regulatory Issues in the Extractive Industries: Focus on Mining Sector of Ghana" (Paper presented at the 13th Africa Oil, Gas and Minerals Trade & Finance Conference, Bamako Mali 10-13 November 2009) [Unpublished].

[403] This register is kept at the Minerals Titles Department of the Minerals Commission. It records applications for mining rights. The determination of priority of application is based upon which applicant gets listed on the register first.

[404] *The Minerals and Mining (Licensing) Regulations of 2012,* Legislative Instrument No. 2176 r 173(1). ["L.I 2176"]

[405] See *L.I. 2176*, *Ibid*, r 174.

Notwithstanding, the first-come-first-served approach, the minister responsible for mining reserves the sole right on the basis of the recommendation by the Minerals Commission to either grant or reject an application for a mining lease.[406] Thus, the priority system makes little information available to the public. Information regarding an application is only made public due to the requirement imposed on the minister to give notice to affected land owners and the relevant District Assembly.[407] This notice discloses nothing more than the boundaries of the land for which the mineral right is sought, and requires the landowners to state their interest in the land proposed for mineral operations.[408] The notice is meant to identify persons who have interests in lands affected by mining activities so as to facilitate the payment of compensation. As Garvin *et al* observe that, "...proposals, acquisitions and mining rights are often conferred with little or no local input from communities and sometimes without the knowledge of local leaders. When communities are informed of potential development, it is usually by the mining companies themselves rather than by government agencies"[409]

Even Parliamentary ratification of these mineral rights does not give the public access to the mineral agreements or allow them to make any substantial input to their terms. According to Ayine *et al*:

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[406] See *L.I. 2176, ibid*, r 179 & 180.
[407] See the *MMA*, *supra* note 363, s 13(2); *ibid*, r 177.
[408] See *L.I. 2176*, *supra* note 406, r 177(2) - (3). Indeed a very problematic part of the landowner or lawful occupier submitting a statement to the Commission on his/her interest is that the law requires it to be in writing and must be received twenty one days after publication of the notice. This requirement denies a lot of people to effectively participate since majority of Ghanaian landowners are illiterate and the three weeks within which to state the interest to the Commission is also unreasonably short.
[409] Theresa Garvin et al, "Community-Company Relations in Gold Mining in Ghana" (2009) 90(1) Journal of Environmental Management 571at 573.

> ...the extent of the public right to comment is at least determined by a Parliamentary Committee. In practice though, the exercise of this discretion has rarely offered members of the public opportunities to make substantive inputs to contracts whilst substantive negotiations are still under way. Civil society groups and communities living in and around potential mining sites in Ghana rarely have opportunities to make inputs during the negotiation process.[410]

The first-come-first-served approach of granting mineral rights poses several challenges for effective governance of the industry. First, it allows the minister responsible for mines much discretion which could be abused. This is because the minister is the sole individual who takes the decision to grant or refuse to grant a mineral right. Although the minister is required to give reasons for refusing or granting a right to the applicant, these reasons are withheld from the public domain.[411] Secondly it opens the award process to manipulation by bureaucrats at the Minerals Commission who receive and advise the minister on applications for mineral rights. Thirdly, the non-competitive process of awarding rights means that the deals arrived at may not be in the best interest of the country. Ayee *et al* succinctly capture the result of this process when they posit that:

> This lack of competition and transparency strengthens a perception of too lucrative legal benefits for firms....In addition, the negotiations for a mining concession and the contract documents of leases are held confidential. The mining concessions and leases have nondisclosure clauses, which have been introduced to protect commercial interests. The nondisclosure clauses are a barrier against accountability and transparency.[412]

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[410] Dominic M. Ayine et al, "Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development" (2005) Sustainable Markets Briefing Paper 1 at 3, Online: IIED, <http://pubs.iied.org/pdfs/16007IIED.pdf>.

[411] See *MMA, supra* note 363, s 5(3) which stipulates that where the minister determines not to grant an application or determines to grant one, the minister shall give the applicant written reasons. This discretionary power is not circumscribed enough. An open and publicly available and objective criteria is necessary to circumscribe the determinations that are made by a single individuals on whether or not to grant a mining right.

[412] See Ayee *et al*, *supra* note 23 at 24.

A second approach to the award of mineral rights came into effect on 20th March, 2012.[413] This procedure requires a tender process for mineral rights under fair and transparent conditions in limited circumstances.[414] Competitive tender and transparent grants of mineral rights are to be conducted if any of the following conditions arise. First, where the Minerals Commission determines that there exists sufficient mineral information in respect of the area concerned. Second, where the Republic has carried out prior mineral exploration in respect of the area concerned; and thirdly, where an area becomes available through surrender, revocation or termination and two or more applications are recorded in the *Priority Register* within seven days of the area becoming vacant.[415] Where these conditions arise, the Minerals Commission is required to publish a notice inviting tenders and such notice shall among other things state the size of the area, location, closing date for receipt of tender and the tender evaluation criteria.[416]

The competitive tender approach of awarding mineral rights largely conforms to good governance values such as transparency and accountability. However, it has yet to be used since the Regulations are only a few months old and it may go largely unused because the conditions requiring its use will be rare. This is because the Commission which has power to make a determination that there exists sufficient mineral information in an area has no mandate to engage in exploratory activities for minerals and may find it difficult to make such a scientific determination. Secondly, since the liberalization of the mining industry, the Republic has not had direct or indirect (through a state mining company) engagement in reconnaissance, prospecting

[413] The Regulations that were made to allow for this process of awarding mineral rights came into force on this date.
[414] See L.I. 2176, *supra* note 404, r 257.
[415] See L.I. 2176, *ibid*, r 258(1).
[416] See L.I. 2176, *ibid*, r 258(4).

and other exploratory activities related to mining and it is unclear when the Republic will carry out prior mineral exploration to allow this tender process to be used. Thirdly, there is hardly any reported case of surrender, revocation or termination of a mineral right and it is difficult to see how often the tender process will be adopted in such cases. Therefore, all mining rights that have been granted and a majority of mining rights that will be granted in future will go through the first-come-first-served approach which is non-competitive and non-transparent and so subject to abuse.

This review of Ghana's process of awarding mining contracts has shown that the primary legislation that regulates mining activities, the Minerals and Mining Act, does not make provision for competitive and transparent award of rights. However, the new Regulations for the sector passed in 2012 offer a window of opportunity for mineral rights to be granted through a transparent tender process, albeit under limited circumstances. Thus, while the primary legislation on mining does not make provision for detailed, transparent and competitive award of mining rights, the secondary legislation allows the process. The reverse of the situation is the petroleum sector where the primary legislation requires the use of competitive bidding but leaves it to secondary legislation to provide the details but that secondary legislation has yet to be enacted.

4.5.3 Contract Transparency

Under Ghana's minerals and mining legal framework, mining contracts and agreements are not disclosed. This is because it is illegal to disclose them. The *MMA* stipulates that no data,

documents and information relating to a mineral right can be disclosed by the government except with the consent of the mineral rights holder.[417] Therefore, all mining leases as well as development and stabilization agreements entered into between the government of Ghana and mineral operators are still secret documents because they have non-disclosure clauses and are well protected by the *MMA*. For example, a typical confidentiality clause in Ghana's mining sector reads:

> Any information or material supplied by the Company to the Government pursuant to the provisions of this Agreement shall be treated by the Government, its officers and agents as confidential and shall not be revealed to third parties, except with the consent of the Company (which consent shall not be unreasonably withheld), for a period of 12 months, with respect to technical information, or 36 months, with respect to financial information, from the date of submission of such information.[418]

Revenue Watch's Index of transparency in the oil, gas and mining sector put Ghana at low 35th out of 41 natural resource producing countries, citing primarily a lack of access to investment contract documents.[419]

Mining industry contracts involve public resources and often act as instruments of public policy on fiscal, social, and environmental matters. On this premise, citizens should be entitled to access the contents of these contracts. The nature of mining revenue streams that are subject to contracts between the government and private companies which are mostly confidential may help explain the proclivity toward corruption. Companies and government have usually kept secret contractual terms and signing bonuses in the mining industry. Due to the lack of contract

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[417] See *MMA, supra* note 361, s20.
[418] See Rosenblum and Maples, *supra* note 194.
[419] See RWI, *supra* note 28.

transparency in the mining sector the people of Ghana have lost significant revenue that would have accrued to the country because the government compromised its fiscal stake in the industry even in the face of clear legal stipulations to the contrary.[420]

Additionally, section 103 of the *Minerals and Mining Act*, stipulates that the Minerals Commission shall, by Regulations made by the minister, maintain a register of mineral rights to promptly record applications, grants, variations and suspensions.[421] The mineral rights register is to be open to public inspection on payment of a fee. Indeed, even if this register were accessible it will not contain the leases and licences that are granted to mining companies because that information is prohibited from disclosure.

From the review in this section it is clear that there are low levels of contract disclosure for mining operations. This makes it very difficult for the citizenry and civil society organizations to provide any input or effectively monitor companies' obligations as well as calculate the government take and monitor how those rents are spent.

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[420] See Stephen Yeboah, "Has Mining served Ghana well? (2011) Online: Ghanaweb <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=216170>. According to the author the government has compromised its mandatory 10 percent carried interest in five mining companies and protected the agreements with confidentiality clauses.

[421] These Regulations are required to be laid before Parliament for twenty-one days before they are effective. During the time that they are before Parliament, Parliament has no power to amend them but can annul the Regulations in which case the Regulations would be deemed to have been wholly rejected.

4.5.4 Public Availability of Information on all Revenue-Related Transactions

4.5.4.1 Introduction

In managing its mining revenues, the government adopts a two-tier distributional regime. This distributional arrangement for mining revenues across levels of government has remained unchanged for almost two decades. It is regulated by the *Constitution of 1992*, the *Office of the Administrator of Stool Lands Act,* and administrative fiat. Overall the system of distribution centralizes most of the mineral revenues as well as information and assigns less than 10% of royalties derived from mining to the sub-national level which is made up of traditional authorities and local government institutions. This part explores the management and distributional arrangement for mining revenues and assesses how the regime fosters easy access to mineral information.

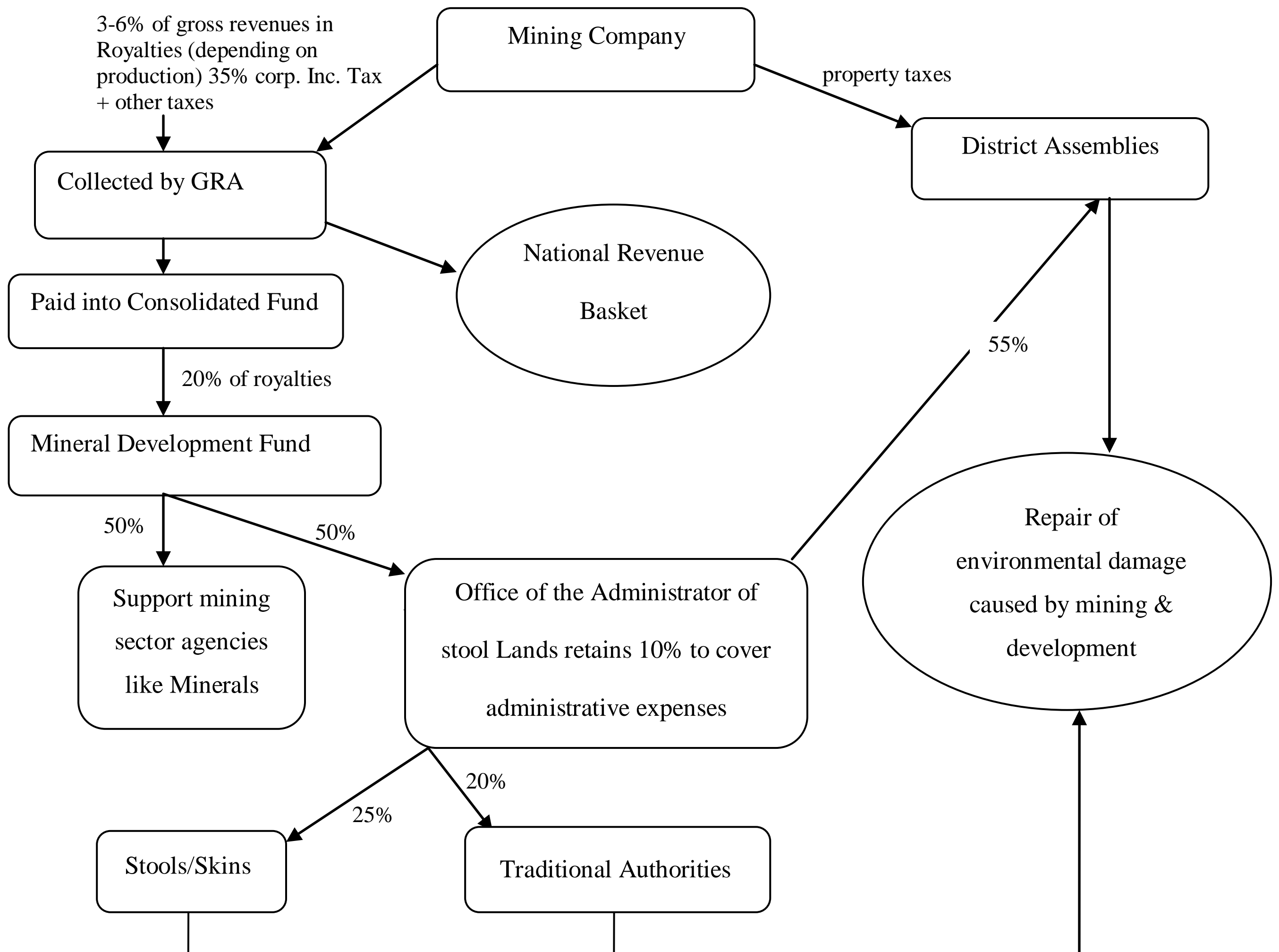
4.5.4.2 Collection and Sharing of Mining Rents

Mineral resource revenues are collected centrally by the Ghana Revenue Authority (GRA) and transferred to the Consolidated Fund[422] for distribution to other beneficiary institutions. Although the central government owns the resource, there is some compromise that results in the sharing of royalties between the central government authorities and producing areas. Part of the royalty

[422] The consolidated fund is a government account into which all taxes and government revenue are paid before appropriation is made by the budget and approved by Parliament for onward release to departments and agencies of government.

is therefore distributed on a derivation principle to producing communities and their district assemblies. The diagram below graphically illustrates how mining rents are shared in Ghana.

Figure 1: Ghana's Mining Revenue Allocations



Source: Author's Schematic representation of the various laws that deal with the distribution of Mining rents

As the figure above illustrates, all mining rents except part of the royalties and property rates are controlled by the central government and are paid into the Consolidated Fund, for further

distribution in accordance with planned government expenditure stipulated in the national budget.[423]

Revenue derived from royalties is divided between the central government and the Mineral Development Fund (MDF),[424] with the government receiving 80% of total royalties while the MDF receives 20%. The 20% paid into the MDF is further divided into two halves - 50% of the MDF (10% of the remaining royalties) is used to provide support to mining sector institutions such as the Minerals Commission[425] while the remaining 50% is paid to the Office of Administrator of Stool Lands (OASL). Stool and skin lands are lands that are owned by chiefdoms and such lands are commonly referred to as stool lands. Stool lands are vested in the

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[423] This diagram does not show compensatory payments that are made to land owners for disturbance of the surface rights as a result of mining activities nor annual ground rent which is paid to the owner of the land. This is because compensatory payments are not considered rents in the context of this thesis because they are one off payments and represent costs of development.

[424] The MDF has, since its establishment almost two decades ago, been operated on the basis of an administrative directive. Therefore, there is no law to back its existence and operation. Thus, disbursements and expenditures are largely discretionary. As already indicated, the administrative guidelines require that only 20% of mineral royalties are to be released to the MDF for onward disbursement to the beneficiaries. The MDF was managed by the Minerals Commission from 1993 to 1998 when again, by an administrative directive, these responsibilities were transferred to the Office of the Administrator of Stool lands to disburse according to the Article 267 formula. The only plausible explanation for this shift is to allow for administrative efficiency since the OASL is already engaged in such disbursements at the local level. The MDF has the principal objective of providing financial resources for the direct benefit of three groups of interests viz mining communities, holders of identified interests in land within mining areas, and traditional and local government authorities within mining areas. The MDF has several purposes which primarily include redressing some of the harmful effects of mining on affected communities in the course of mining operations, assisting in mineral related research, developing capacity in human resource for mining institutions, and to undertake development projects in communities hosting mining operations as well as support the budgets of mining sector institutions.

[425]There is currently a proposed Mineral Development Fund Bill with the aim of regularizing the operations of this initiative. The Bill only alters the allocations but does not change the governance arrangements. The Bill proposes that of the 50% dedicated to Mining sector institutions, 20% is to be allocated to the Mining Community Development Scheme provided for in the Bill; 10% is to supplement the operating budget of the Ministry of Lands and Natural Resources and its departments responsible for minerals and mining operations; 10% is to supplement the operating budget of the Minerals Commission; 5% is to supplement the budget of the Geological Survey Department; and 5% is for research, training and projects aimed at the promotion of the mining sector. Because the Bill does not significantly deal with the governance problems discussed in this thesis, it will not be reviewed since its passage will not alter the arguments put forth here.

stool and are held in trust by the collective authority, usually a chief, on behalf of a community of ancestrally related people.[426]

Ten percent (10%) of the royalties received by the OASL is retained for administrative purposes while the remaining 90% is distributed by the OASL to the district assemblies and traditional authorities. Of the remaining 80%, 25% is transferred to traditional authorities; 20% to the chiefs or their traditional leaders and 55% to district assemblies hosting mining companies to assist in controlling environmental damage caused by mining activities and for development within these communities.[427]

The transfer mechanism illustrated above demonstrates that for both statutory and policy-driven transfers a portion of total mining rents accruing at the national level is re-assigned to the producing communities and other state and decentralized government institutions. That notwithstanding, a large portion stays with the central government for allocations to debt repayments, annual national budgets and as conventional recurrent transfers to the local level for both producing and non-producing communities alike.

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[426] *supra* note 360, Article 267(1) .

[427] Note that that the basis of the distribution from the OASL is contained in Article 267(6) of the Constitution where it is provided that ten percent of the revenue accruing from stool lands are to be paid to the Office of the Administrator of Stool Lands to cover administrative expenses; and the remaining revenue is to be disbursed in the following proportions: (a) twenty-five percent to the stool through the traditional authority for the maintenance of the stool in keeping with its status; (b) twenty per cent to the traditional authority; and (c) fifty-five percent to the District Assembly, within the area of authority of which the stool lands are situated.

4.5.4.3 Central Government Share of Mining Rents and Disclosure Obligations

There are three tiers to the formal government structure: the central administrative government; the ten regions which coordinate decentralization issues through regional coordinating councils;[428] and the metropolitan, municipal and district assemblies.[429] The administration operating at the local level is made up of the district assemblies, which in turn oversee Sub-metropolitan District Councils, Urban, Zonal, Town and Area Councils.[430]

Transparency does not feature prominently in the governance of mineral resource wealth within the formal government structure. Government revenue derived both from mining and other sources are required by law to be paid into the Consolidated Fund. The Constitution of Ghana provides that "all revenue or other moneys raised or received for the purpose of, or on behalf of, the Government" and "any other moneys raised or received in trust for or on behalf of, the Government" is to be paid into the Consolidated Fund.[431] However, exceptions are made for special purpose funds established by Parliament[432] and laws requiring that portions of revenues collected by departments and agencies of government are to be retained for the purpose of defraying departmental expenses.[433] The consolidated fund thus consists of accounts maintained by the Bank of Ghana for designated transfers to the Controller and Accountant-General.[434]

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[428] See *supra* note 360, Article 4 & 255.
[429] *Ibid*, Article 240 & 241.
[430] See *supra* note 369, s 3(2).
[431] See *supra* note 360, Article 176(1). Note that the same provision is repeated in the *Financial Administration Act of 2003,* Laws of the Republic of Ghana, Act No. 654 s6.
[432] *Ibid,* s 6(2) (a)-(b).
[433] *Ibid.* One such law that provides for retention of portions of internally generated funds by departments and agencies of government is the *Ministries, Departments and Agencies (Retention of Funds) Act of 2007,* Laws of the

Does the Constitution and other laws allow for transparency in the management of the consolidated fund, especially with respect to mining rents? A central feature of the financial administration laws is the centralization of information within government or state institutions. The *Financial Administration Act* and the *Financial Regulations* require the Controller and Accountant-General to prepare monthly statements of accounts for revenues and expenditures in respect of the Consolidated Fund and internally generated funds retained by government institutions. These monthly statements of accounts are to be transmitted to the Auditor-General and the Ministry of Finance and published in the Gazette.[435]

Presumably, the preparation of these monthly and yearly accounts is meant to assist the Auditor-General in preparing audited accounts and not as a source of information to the public on how much is received by the Consolidated Fund and the source of those amounts. This is because the monthly statement of accounts does not show revenue derived from mining operations. The statements do not identify the amounts collected from each sector but only categorize revenues received by the fund into direct taxes, indirect taxes, taxes on international trade, non-tax revenue, grants, and multilateral donor relief initiatives and so on.[436]

Republic of Ghana, Act No. 735, which lists certain institutions that are empowered to retain specified percentages of monies raised or received by them on behalf of government.

[434] See *Financial Administration Regulations of 2004*, Laws of the Republic of Ghana, Legislative Instrument No. 1802, r 11-18 & 22 which specifically prescribe how monies collected on behalf of government are to be paid into bank accounts maintained by the Bank of Ghana for transfers to the Controller and Accountant-General's Department.

[435] See *supra* note 433, s 40; *ibid*, r 188 .

[436] Fui Tsikata, "The Ghana Extractive Industries Transparency Initiative: A Review of the Legal Regime" (Draft Report Prepared for the Multi-Stakeholder Committee of the Ghana Extractive Industries Transparency Initiative, February, 2008).

Unlike the monthly statement of accounts, the financial administration laws do not impose an obligation to publish the annual statement of the Consolidated Fund in the Gazette.[437] Therefore, there are no avenues for the public to access information on the rents received from mining. This is because there are no legal provisions that require government or any state institution to publish information specifically about the revenue collected from mining operations and how those revenues are spent. The public is thus denied valuable information to hold government to account.

4.5.4.4 Are there any payment disclosure obligations for mining companies?

There has been increasing pressure on companies to publish royalties, taxes and bonuses paid to governments of the countries within which their operations are located because disclosure of payments to host governments is instrumental in combating corruption and improving accountability.[438] Ghanaian law and regulation provides no different disclosure requirements for mining companies than that for any other companies.[439]

Disclosure of benefits to government including royalties, taxes, dividends, bonuses, license and other fees are included as part of the annual return that a mining company files with the Registrar

[437] See *supra note* 433, s 41.
[438] Claire Woodside, *Lifting the Veil: Exploring the Transparency of Canadian Companies* (Ottawa: Partnership Africa Canada, 2009).
[439] The Minerals and Mining Act requires that before a company is granted a lease or licence to engage in mining operations it must first be registered in accordance with the *Companies Act of 1963 (Act 179).*

of Companies.[440] The Registrar is to publish a notice in the *Gazette* when the returns have been filed and a member of the public may inspect any document filed and ask for a copy on payment of a prescribed fee.[441] The laws and regulations appear to ensure some level of disclosure among mining companies in respect of payments to government. While the annual returns do include significant information about royalties, taxes, and other payments, this information is included not for the purpose of disclosing payments made to government but as a corporate regulatory requirement. Therefore, in looking for payments to government, one must review the entire accounts of the companies and have the requisite technical ability to decipher payments that go to government and those that do not.

The Ghana Chamber of Mines which represents the collective interests of companies involved in mineral exploration, production and processing in Ghana also publishes on its website payments made by mining companies to government.[442] However, my review found that the information available on the Chamber of Mines website on payments made by mining companies to government is quite dated. There is a two year time lag in the information that the Chamber provides about its members' payments to government. My last check on the Chamber's website in October, 2012 revealed that the latest information is for the 2010 financial year.[443] Additionally the Chamber's publications do not show disaggregated payments. They only reveal

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[440] See *Companies Act of 1963,* Laws of the Republic of Ghana, Act No. 179 s 122. This section requires that as part of the mandatory annual return that company must file with the Register, it attaches the profit and loss account and balance sheet of the company for that particular year. Natural a profit and loss account and balance sheet will contain the taxes that the particular company pays to the state an expense to its operations.

[441] *Ibid,* s 333 (1).

[442] The Ghana Chamber of Mines, Online: Chamber of Mines, <http://www.ghanachamberofmines.org/site/publications/>.

[443] The author last visited the Chamber's website on 25th October, 2012.

the total amounts that are paid in terms of how much was paid to government by way of royalties, corporate tax and other levies as well as mining company social responsibility activities.

It can be seen from the above review that public access is not permitted to the information filed with the tax authorities; however, such access is permitted at the Companies Registry and the Chamber of Mines.

4.5.4.5 Availability of information at the sub-national level

The trend of non-disclosure by the central government flows through to the local government level where parts of mining rents are spent. There is no legal framework that requires the publication of mining rents received by local government institutions and traditional authorities and how such monies are spent. The non-transparent and improper use of these portions of the rents has been a recipe for confrontation at the local level. The Ghana Extractive Transparency Initiative (GHEITI) underscores this point when they state that the system at the local level is "shrouded in secrecy and known only to the top hierarchy of the various District assemblies and the Traditional Rulers who are also beneficiaries by virtue of the fact that they are the custodians of the lands on which mining activities are undertaken."[444]

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[444] Ghana Extractive Industries Transparency Initiative, "Advancing EITI: Mining and Sub-national Issues" Online: GHEITI,<http://www.geiti.gov.gh/site/index.php?option=com_phocadownload&view=category&id=15:implementation-reports&Itemid=54>; see also Steve Manteaw, "Civil Society & Social Accountability in the Mining Sector" (Paper presented at the National Conference on Extractive Industries Transparency Initiative, Accra, Ghana 15th January, 2007). [Unpublished].

4.5.5 Government Accountability to the Public

This criterion is based on the ready availability of information, active participation of all stakeholders and a demonstration on how institutions fulfil their roles and responsibilities. As indicated in the previous criterion, there is no separate process for the central government to account for mining revenues. This is because mining rents received by government are accounted for in the same manner as any other tax revenue.

At the sub-national level involving the Mineral Development Fund, issues of accountability are not prominent. Several reasons account for this. First, there is no tracking system for expenditure and disbursement and it is difficult to say whether in practice all the allocated amounts have been disbursed. A World Bank study has revealed that the central government has failed to release earmarked royalties for the *MDF* for periods ranging from six months to about two years.[445] This has been attributed to the preference by the central government to favour funding of general government operations at the expense of the communities most affected by mining.[446] But it can be argued that the absence of a legal framework to compel payment into the fund for disbursement to beneficiaries accounts for this failure to transfer earmarked amounts. The fact that payments to the local institutions are not required by law weakens the ability of those institutions to assert and enforce the transfer of such earmarked amounts. This is exacerbated by

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[445] The World Bank, "Mining Sector Rehabilitation Project (CREDIT 192-GH) and mining sector Development and Environment Project (CREDIT 2743-GH)," (Project Performance Assessment Report Prepared by the Washington D.C Sector and Thematic Evaluation Group, Evaluation Department, World Bank July 1, 2003) para 72 pg 17.

[446] Michael Carson et al, "Mining Mineral Resources through Public-Private Partnerships: Mitigating Conflict in Ghanaian Gold Mining" Online: Princeton University, <http://wws.princeton.edu/research/final_reports/f05wws591c.pdf>

the limited participation in decision-making as to the use of the funds by members of the local communities.

Another reason for the lack of accountability regarding the management of mineral resources revenues is because traditional councils maintain a certain level of "sovereignty" and while they are supposed to be accountable to their people, the people can only call them to account through traditional fora. The courts are very reluctant to call a chief to account for revenues received on behalf of the stool except "[I]n the special situation where the natural rulers have disqualified themselves by permitting fraud to stain their hands." [447] The non-accountability of chiefdom is rooted in custom and traditions. For almost a century it has been the rule that an occupant of a stool, i.e a chief, cannot be called upon by his subjects to account during his reign as a chief.[448] The "immunity" from accountability is due to the deference that the local people accord the high office of chieftaincy. This translates itself to the people fearing that they might embarrass the chief should they ask for him to account resource revenues received on behalf of his people.

4.5.6 Effective Oversight and Safeguards

The regime for managing mining revenues is primarily concerned with the distribution of the revenues and not oversight and safeguards like auditing. Tsikata aptly catalogues the reasons for the absence of oversight and safeguards in the following words:

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[447] See *Owusu and Others v. Agyei and Others* [1991] 2 G.L.R. 493 at 507.
[448] See *Owusu v Manche of Labadi* [1933] 1 W.A.C.A. 278.

> …(c) insufficient information to the beneficiary institutions as to what has been paid by the mining companies in respect of mining operations in their areas; (d) the non-publication to their constituencies of amounts paid to the local institutions; (e) a lack of meaningful procedures for reporting by the traditional institutions as to the uses to which payments made to them have been put; (f) the non-existence of mechanisms for auditing the use made of funds by the traditional institutions; (g) the limited participation in decision-making as to the use of the funds by members of the local communities; and (h) the absence of legal backing for the operation of the Mineral Development Fund. [449]

As indicated above, there is no clear legal and regulatory framework within which financial management by the traditional councils and stools are managed. There is a lack of information to monitor whether the stools and traditional councils are receiving the correct amounts from the regional branches of the Office of Administration of Stool Land. And it is difficult to ensure accountability in the absence of information about the revenues and how they are spent. This is because no procedures are in place for traditional authorities to report expenditures and there is no mechanism to audit the utilization of these funds.

4.5.7 Clear and Effective Roles and Responsibilities for Institutions

The mining Regulatory regime comprising the *Minerals and Mining Act,* and its attendant Regulations, are primarily concerned with issues of ownership and regulating exploration of minerals. Thus there are no specific roles for institutions to make information available concerning the management of mineral revenues. The sub-national level distributions, for example, attempt to use a constitutional body, the OASL, to effect disbursements of the royalties that are meant for traditional authorities and district assemblies. However, this body

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[449] Tsikata, *supra note* 436 at 11.

has no clear mandate to make disclosure of resource-related revenues and expenditures. Indeed, the purpose of the disbursements to traditional authorities is not spelt out in any law. The Ghanaian Constitution and other laws do not require the traditional authorities to publicly share how they use mineral rents and royalties.

The lack of bank statements and financial documentation for royalties received by chiefs promotes confusion and reduced clarity on such transfers. Financial transfers within the chieftaincy or from the chieftaincy to the state are not public.[450] Even the OASL, who will provide royalty figures to the public, is slow to do so.[451] In addition, Belden suggests that the sub-chiefs do not typically know the royalty figures of their division, and the district assembly members do not know them for their district.[452] Where this is the case, opportunities for collusion and illegal exchanges between actors of the two institutions are high.[453]

When the Mineral Development Fund allocated part of mining royalties to District Assemblies, the administrative directive and guidelines indicate that it is supposed to be used for development projects and redress some of the harmful effects of mining activities.[454] The same is required of the chiefs and traditional rulers in respect of their portion of mineral

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[450] Cory Belden, "Examining Relationships between Customary and State Institutions in Ghana's Decentralized System" (2010) IFPRI Discussion Paper 01030, Online: IFPRI, <http://www.ifpri.org/sites/default/files/publications/ifpridp01030.pdf>
[451] *Ibid.*
[452] *Ibid*
[453] *Ibid*
[454] See Kwabena Sarpong Manu, "Use of Non-renewable Resources for Sustainable Local Development" (2007) Online: <http://www.un.org/esa/sustdev/sdissues/institutional_arrangements/egm2007/presentations/manu.pdf>.

rents.[455] This creates confusion of roles and responsibilities. Some district assemblies spend their royalty income on capital expenditures, while others apply them less efficiently to recurring expenditures.[456] Traditional rulers on the other hand, think that development is the preserve of central government institutions and agencies and so squander the royalty payments meant for the development of their communities.

Another aspect of the lack of clarity in roles and responsibilities is the fact that the central government after making the distributions to the decentralized institutions and traditional rulers feels relieved of the pressure of dealing with the negative impacts of mining and development in those communities hosting mining operations. This weakens the governance arrangement for mining revenues as central government institutions give little consideration to the wise use of mining revenues.

4.6 Conclusion

The review in this Chapter has demonstrated that the governance framework for mineral resource revenues is largely characterized by low levels of transparency and accountability. In other words, the legal framework governing how mineral rents are generated and utilized has largely made revenue governance a secretive activity both at the national level controlled by the central government and at the decentralized level involving traditional leadership. The amount of information on the rents received and their utilization is limited by laws and institutional

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[455] *Ibid.*
[456] See RTI, *supra* note 29.

arrangements. Thus, citizen participation in the resource governance process is minimized since access to the requisite information to make informed comments on the process is hardly available.

Moreover, access to mining leases and stabilization agreements which primarily provide the basis for what the companies pay (including exemptions and other revenue related incentives) are not accessible due to confidentiality provisions protecting these agreements. This does not make for thorough transparency as verification of the appropriateness of payments made with regard to mineral royalties, ground rent, dividends, profit taxes and mineral rights fees are difficult to undertake.

In addition to the absence of disclosure laws, there is the lack of accountability on how mining rents are used. There is no information on the utilization of mineral revenues. At the national level mineral rents are mixed with other government revenue such that it is difficult to separately hold government to account for how mineral rents are utilized. At the decentralized level, as indicated in this Chapter the concept of accounting is alien to the chiefdom system and thus mining rents received by these chiefs and traditional leaders are utilized to the benefit of the chiefs while the beneficiary communities are deprived of the opportunity to question leadership on the utilization of these rents.

CHAPTER FIVE

REMOVING THE BARRIERS TO GOOD GOVERNANCE OF RESOURCE REVENUES

5.1 Introduction

The challenges of managing natural resource revenues for a developing country like Ghana are many and varied. The review in this thesis has shown the challenges of governance in terms of transparency and accountability. This concluding Chapter draws an outline of a proposed regime for mineral resource revenue governance, informed by insights drawn from the preceding chapters of this thesis. Chapter 1 introduced the problem of mineral resource revenue governance in Ghana, providing an overview of the extent of the problem and the significance of good governance mechanisms. Chapter 2 explored the problem using the theoretical lenses of public choice models of interest groups and rent seeking, and concluded that for good resource revenue governance to prevail, there is the need for rule reform to provide for public disclosure of decision making processes regarding revenues and accountability. Chapter 2 then explored the significance and justification for the choice of the transparency and accountability norms. Finally, Chapter 2 outlined a set of criteria for evaluating the openness of legal regimes governing the management of resource revenues.

Chapter 3 turned to the petroleum resource management regime and evaluated its management mechanisms against the criteria identified in Chapter 2. The review in Chapter 3 revealed that although petroleum revenue management is backed by law and entrenches transparency and

accountability as governing principles there are still some constraints to good governance especially at the initial stages involving licensing and contracting. The Chapter concluded that these challenges to governance notwithstanding, the regime that governs the petroleum sector offers more in terms of good governance than the mining industry and therefore some lessons could be learnt from this governance framework.

The review in Chapter 4 revealed the numerous challenges of governance that bedevil the mining sector both at the central government level and the local level involving chiefs and traditional leadership. The review revealed among other things the lack of openness and accountability regarding licensing and contracting as well as the general failure to make information public on how the revenues are managed. Chapter 4 concluded that the accountability mechanisms are weak at the central government level and do not even exist at the traditional governance level and that disclosure rules are virtually non-existent in the governance process of resource rents. These challenges demonstrate the need for a new approach to governance that emphasises transparency and accountability.

This Chapter provides an answer to the thesis question: In what ways and to what extent can Ghana's mining sector revenue management regime promote good governance, i.e. transparency and accountability. The interest group analysis and rent seeking theory reviewed in Chapter 2, reveals why there is such a chronic problem of managing resource wealth well in many resource-rich countries including Ghana. The review demonstrates the inevitability of the problems that result from self-interest maximization and its implications for resource rents. One of such implications drawn from these public choice models is that in the absence of constraints (through

rules and counteracting institutions) the major incentive of resource managers is to maximise their personal and political interest at the expense of the public good. Additionally, given the nature of the extractive sector, the concentration of information results in the concentration of power and makes the benefits from opacity high because the risk of being made to account are low. This is because citizens lack the incentive and necessary information to exert pressure on government to manage the resource revenues well. Although data on the actual magnitude of interest group patronage, rent seeking and corruption in the resource sector in Ghana is poor, policies and reforms to improve good governance need to target the mechanisms that are likely to promote them. To be able to achieve this goal, a thorough understanding of the incentives of key agents such as politicians and bureaucrats is needed. It is in this understanding that we can devise ways to alter the incentives and hence behaviour in a more favourable direction that will result in good governance of resource revenues.

The author believes that the way to curtail the incentive towards promoting self-interest maximization in the resource sector is to ensure that the chain of decision making from the time of awarding contracts to the final utilization of the resource must not be shrouded in secrecy. The dictates of good governance requires that all stakeholders in the industry from the decision makers to the final beneficiaries of resource revenue must be informed on all the processes for managing resources rents. Working together and building trust and legitimacy requires adequate and timely information on rents and their utilization. It is the only way to avoid abuse in the form of corruption, embezzlement and other rent seeking activities that do not inure to the public good. In providing the answers and recommendations I am mindful of the mining sector context

in Ghana. Accordingly, the structure of the proposed regime for improving governance is considered below.[457]

5.2 Full and Open Disclosures at the Contracting Phase

The proposed legal regime would require full and open disclosures at every stage of the decision making process during the contracting phase. The lack of transparency in mineral licensing processes is the source of mistrust between the managers and local communities. The review shows that there is a two-prong process now in use for the award of mineral rights in Ghana. These are the first-come-first-served (or open access) method and the competitive resource tender method. The conditions that will trigger the competitive tender method have been considered in chapter four. This procedure which is akin to an auction allows for the disclosure of information regarding the licensing phase from the beginning when bids are invited to the end when a determination is made on which company gets the rights to exploit the resource. The first-come-first-served procedure on the other hand, internalises most of the decisions making processes for the award of mineral rights. Although it is acknowledged that the procedure to be selected in the licensing phase of mineral resources will depend on several factors including the type of mineral, the level of information available for the resource and the amount of potential investor interest, the laws and regulations should provide for a transparent and non-discriminatory application procedure.

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[457] These proposals are considered in brief but each one is worthy of further research.

This thesis does not recommend that the first-come-first-served process should not be used for awarding mineral rights. It may indeed prove to be suitable in certain circumstances such as situations of little or no geo-scientific information on the ground being offered for mineral operations. What this thesis recommends is the opening up of the process to public scrutiny by allowing for more transparency in the processes leading up to the award. Evidence that meaningful and transparent process has been followed includes:

- full access to information on which mining company met the first-come-first-served principle;
- a meaningful time frame within which communities affected by impending mineral operations can respond to notices of such applications. The prevailing system where notices are posted in these affected areas and communities are required to express their concerns to the minister through the Minerals Commission within twenty one days does not make for meaningful inputs to the process. Communities and landowners are denied access to expertise to understand and respond to the notice. The result is that although there are publications of impending operations in affected areas, the people do not have adequate time to respond and their concerns in most of the cases are left out in the negotiation process;
- the various levels of review of mineral rights applications by the Minerals Commission should be made accessible to the public at the time the Commission is making its recommendations to the minister;
- the written reasons for the ministerial decision to grant or refuse to grant an application should not only be made available to the applicant as is the case in the law now but also to the general public;
- access to mining rights such as reconnaissance licences, prospecting licences, mining leases and stability agreements that the government has granted or is a party to. Where the minister reaches a

decision to grant a right to an applicant and such rights are ratified by Parliament, the legal regime should mandate full disclosure of these agreements to the public without undue restriction.

5.3 One-stop access to mineral information body

My review also disclosed that there is no central body to obtain information on mineral revenues. A co-coordinating body that will collect and collate those issues relating to the mineral sector will provide a one stop shop for persons interested in transparency in the sector generally and revenues in particular. This will make the right to information more meaningful as people will know where to obtain more comprehensive information on mineral revenue governance without delay and at least cost. The cost of accessing the information on the mineral sector inhibits the ordinary Ghanaian from participating in monitoring and evaluating the revenue and expenditure from the sector. As demonstrated in Chapter four, no specific law requires the separation of issues relating to the reporting of revenue due or paid to Government for mineral operations in Ghana. Various heads of revenue and expenditure are lumped together, making it difficult to find information relating to the sector. Returns relating to the sector are also filed with a number of regulatory and revenue agencies with little or no easy access by the public to the records. Where information is not made available to the people or is made available in a way that it is perceived by the people to subvert the truth there will be mistrust between the government and the people.

The flow of information on revenues will be enhanced if the law not only requires disclosure but ensures that there are decentralized government or independent offices at the grass root level mandated to disseminate information on mineral revenues received and the utilization of such

rents. This should be in addition to the posting of such information on the web. It is important to create institutions that release information periodically but such decentralized bodies should also be able to respond to the concerns that the people may raise as well as transmit their concerns to the central government. The information required to be provided at the decentralised level could mimic the information disclosure requirements in the *PRMA*. In addition to supplying the information, it is important to create avenues for people to question the information provided and obtain answers to their questions.

Questioning and discussing information made available to the people on resource revenues requires some level of knowledge to be able to interpret the data provided in such reports. Given that a good number of Ghanaians are still illiterate, it is important that the legal instrumentation recognise this and require that the transmission of these reports and the explanations should be made in local languages. This will ensure that the people at the grass root level whose lives are affected by the exploration and development of mineral resources get useful information on the resource management process

5.4 Independent audit and reviews of mining revenues

An independent audit to complement the work of the Auditor General and provide avenues for double checking revenue and expenditure outcomes for the mineral sector will help make the information more credible and increase trust among the stakeholders. The EITI process already allows for the appointment of an independent accounting firm to annually audit mineral receipts.

However, there is no separate audit or reviews by the government on mineral revenues. This is because they are audited as part of government tax revenues. The separation of mining revenue from the usual government revenue, as has been done for the petroleum sector, will allow people to double check government figures with the independent audit that may be carried out. The independent reviews and audits will provide the citizenry and civil society organizations authentic information to be able to effectively contribute to the resource revenue governance process. This framework could equally be adopted for the petroleum sector to allow for periodic independent audits. This is because the law as it stands now only permits special audits on the orders of the Controller and Accountant General (who is the government auditor) and this may undermine the independence of such audits.

5.5 Accountability and integrity in revenue management

To effectively deal with acts of indiscretion like embezzlement and corruption by individuals and managers of resource revenue, there is the need for strict rules of accountability and a high level of integrity on the part of institutions that manage mineral resource rents. Although public oversight and disclosure is one way to ensure accountability, it is important that specific sanctions be attached to abuses of the process of managing mineral resource rents. Public accountability as a concept embraces the examination of the conduct of individuals, institutions and indeed even of the acts and omissions of the administrative and executive authorities of the

state in cases of complaints that such conduct, acts and omissions do not comply with the law.[458] The purpose of such examination is to subject improper and unlawful conduct to some form of sanction or corrective measure.[459] These sanctions or measures are devices calculated to neutralise the further undesirable effort of their offending activities, or to force violators of the legal order to reverse their actions and make reparation for the loss or damage if any, which their illegal conduct has caused.[460]

This review advocates the provision of sanctions or corrective measures for violations of the laws regarding revenue governance. This is the only way that the institutions that work to ensure transparency can execute their work with integrity. Thus, just like that for the petroleum sector, where misappropriation and fraud are punishable as criminal offences, the mining regime should require that mismanagement of mining rent should be sanctioned and where possible the persons or entities be required to restore the monies lost plus interest to the public purse. The ideal standard advocated would be to require that every member of society no matter his status in the political or constitutional set up in the country should be publicly accountable in all his actions related to revenue management on the premise of complying with a priori criteria specifically provided to superintend all actions.

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[458] Justice J.N.K Taylor, "The Concept and Problems of Public Accountability under Ghana Law" (1989-90) 17 Review of Ghana Law 70.
[459] *Ibid* at 70.
[460] *Ibid.*

5.6 Reform of sub-national level mineral revenue governance

This review advocates that transparency and accountability mechanisms should embrace not just company-to-government revenue transfers, but intra-governmental transfers especially those related to sharing of mineral royalty to chiefs and traditional rulers. Greater decentralization of mineral benefits requires greater transparency and accountability. As already indicated in Chapter four, there are no mechanisms for auditing the revenues that chiefs and traditional rulers receive as their share of mineral revenues nor are there guidelines on how they spend these resources.

Indeed, within the broader framework of governance these chiefs and traditional rulers are immune from accountability. Their subjects are not able to demand from them the records on the utilization of mineral rents nor does the central government audit system capture their activities.[461] This has created and continues to create discord between these leaders and their people. This review therefore advocates that a legal instrument should expressly give standing to individuals so that they can demand accountability through the judicial process from their traditional leadership. Also there is the need for such legal instrument to require disclosure of information regarding mineral rents received and the manner in which such rents are spent.

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[461] The amounts received by these chiefs and traditional authorities are supposed to be audited by the Office of the Administrator of Stool Lands. However, the audit carried out by this body encompasses other revenues received by stools and not only that for mining operations.

The author is aware that a Mineral Development Fund Bill was recently laid in Parliament.[462] In general, the Mineral Development Fund Bill proposes to regularize the two decade old practice of the central government sharing some mining rents with decentralised institutions and to make some improvements in the governance framework of that part of revenue allocated to the Fund. The Bill imposes an obligation on the Board of the Fund to "ensure accountability of the Fund by defining appropriate procedures for accessing and monitoring the Fund"[463] and "with the approval of the Minister prepare and publish criteria for the disbursement and utilization of money from the Fund".[464] The Board of the Fund is also to keep proper books of account and records in a manner approved by the Auditor-General.[465]

The proposal for reporting on the finances and activities of the Fund does not require that such information should be publicly accessible. Except for an annual report to Parliament, there is no proposal on how the public or members of communities affected by mining can access information on the Fund's activities.[466] The recommendation here is that the law should require the Board to make all its reports more accessible to the public by posting them on its website and releasing same to members of the public upon request. This will enable the citizenry to meaningfully participate in the governance process.

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[462]See *A Bill for AN ACT to establish a Minerals Development Fund, to provide financial resources for the benefit of mining communities, to provide for the management of the Fund and for related matters, Ghana, 2012* ["The Mineral Development Fund Bill, 2012"].
[463] See the *Mineral Development Fund Bill, 2012, ibid*, cl 8(c).
[464] *Ibid* at cl 8(e).
[465] *Ibid* at cl 28.
[466] *Ibid* at cl 29.

5.7 Effective civil society participation in mineral revenue governance

This review advocates the active participation of civil society in the management of mineral resource revenues. Civil society organizations serve as mediating agents of information from the central government to the local level. Their effective participation in the resource management process ensures that they have adequate and prompt information with which to do advocacy work and help members of society raise queries and questions about how the government manages mineral resources. Just as in the petroleum sector where there is active participation of civil society through their nominees serving on the Public Interest and Accountability Committee, provision should be made for civil society to actively participate in the mineral sector revenue management as well.

5.8 Conclusions

The most important question that must be asked is whether there is any likelihood that Ghana could be convinced to implement the regime suggested above. The key contribution that this thesis hopes to make is to unmask the problems that currently confront the governance of mineral resources and stimulate the needed discussions on the subject matter which will ultimately lead to better understanding of the issues and formulation of more effective policies and laws.

Indeed, indications are that the government is beginning to recognise the problem and the importance that transparency and accountability in the process of governing mineral resources

offers. The 2010 Draft Mining Policy of Ghana acknowledges the need to apply modern principles of transparency and accountability to mining sector administration (including the sector's laws and regulations) and stipulates that the dissemination of information to the public on all aspects of mining is the basis for informed participation.[467] If Ghana follows through on this commitment to good governance in this draft policy framework, it will set the stage for debates about re-evaluating and changing the governance paradigm in the mineral resource sector. The regime proposed here, could offer some answers to the questions of governance that may emerge.

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[467] See supra note 347; see also "Draft National Mining Policy of Ghana 2010" Online: Ghana Mining, <http://www.ghana-mining.org/GhanaIMS/LinkClick.aspx?fileticket=LmHT9VRIclI%3D&tabid=36&mid=930>.

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