

Expanding the Scope for Social and Economic Rights Litigation in Ghana and South Africa

Ghana Workshop and Conference White Paper

“Equitable, Democratic and Sustainable Pathways of Oil Governance and Economic Development?”

INTRODUCTION

In 2010 Ghana joined other West African nations, notably Nigeria, in producing oil in commercial quantities. Since then extracting oil from the Gulf of Guinea has added only marginally to the nation’s economy, contributing less than five percent to the overall GDP. Yet this moment has opened a far reaching debate about the nation’s guiding visions of economic development, the shape of its jurisprudence, and the parts its peoples should play in their own constitutional-democratic governance. In this White Paper we will use the lens of Ghana’s evolving petroleum industry to explore these wider national – and global - debates in both legally grounded and normatively capacious ways.

As the Paper repeatedly shows, these national debates over law and development, democracy and constitutionalism are not separate. Rather, in each discrete policy question raised by Ghana’s oil industry, all of them are intertwined. Yet several common aspirations and large inquiries drive those particular policy contests. How can Ghana best harness its petroleum endowment to enhance its peoples’ well-being in the most inclusive and equitable ways? Is the

best path to this goal to stay closely within the current thrust of the global political economy, tweaking its regulatory frameworks and accountability regimes so as to improve its position in the global economy while maintaining an open door to international oil conglomerates' (IOCs') investment? Or does the best path toward increasing peoples' well-being today draw upon the storied past of nationalist vision and the state-building ethos of the decades immediately after independence. Such a vision is afoot in today's debates; it commends using the new oil resources to build oil and gas independence, to put the resources to use to light up the nation, secure regional economic clout and gain real power rather than mere presence in world-wide oil economies.

There are more questions. Are the risks of petroleum development simply too great for Ghanaians to tame, no matter how wise their petroleum laws? Is the shadow of the "resource curse" – the bleak scenes of Nigeria's oil-based devastation, and the notorious corruption, state capture, social and political violence, and dire poverty of most of Africa's most oil-rich nations – an inevitable outcome of petroleum development, no matter what policies the next oil rich nation might foolishly pursue? And even if the most scrupulous accountability might defer many of these risks, what about the environmental and social waste – from wetlands to abandoned boom towns – that oil development relentlessly leaves in its wake? Might the sanest pathway for the peoples' well-being be for Ghanaians to cap their oil rigs now, leaving this vast source of national wealth under the sea-bed and in the ground? For this wealth, after all, is in trust for all of its peoples, and they are beholden to future generations and the irreplaceable value of their fragile natural world.

These are the biggest questions that Ghana's petroleum production has opened. They are under explicit contest and debate in all sectors – among political leaders, policy experts, scholars

and public intellectuals, media outlets, civil society actors, lawyers, industry players, and grassroots activists. And they debate the biggest issues in explicit terms. They also work through the fine grained details of legislative proposals in day-long town meetings drawing scores of participants. This debate reflects Ghana's vibrant democratic culture that was nurtured by a recent deeply participatory process of Constitutional reform. It also reflects people's sense of the oil question's urgency, for Ghana is now at a cross-roads: it may turn into another oil-cursed African nation, or it just might become a global leader in a new Southern vision for energy justice.

In this White Paper we will explore these issues in both broad strokes and nuanced legal and policy analysis. We do so with three overarching goals. First is to address the policy choices Ghana faces regarding petroleum development in the present and future. The second is to offer perspective on the parallel Soros workshop in South Africa which considered visions of development and legal and policy strategies that would ensure broad societal capacitation and equitable development in the context of that nation's economic and political challenges. And the third goal is to look deeply at how lawyers and economically-minded scholars might come together to help mobilize constitutional democracies to rise to meet the real material challenges presented by the fundamental social and economic rights (SER) aspirations on which their very legitimacy is grounded.

The White Paper will have four parts. In the first, we will set out the context by surveying both Ghana's petroleum industry and the current legal framework for its governance and regulation. In the second, we will summarize the discussion in the two Ghana Soros Workshops from which this Paper's insights and recommendations are drawn. In the third, we will examine six key policy debates that emerged over the course of the Workshops, and in the

fourth, we will set forth several recommendations for how the nation might move forward both to capacitate the state and the people to insure against the “resource curse” that has affected so many of the other oil rich post-colonial nations and to ensure that Ghana’s oil wealth, if it is to be used at all, is harnessed to drive equitable growth.

It is worth underscoring that the first of these recommendations marks the success of these two Ghana gatherings in producing what we had set as one of our chief goals at the outset of the Ghana/South Africa/Extractive Industries and Social and Economic Rights Advocacy Project. We hoped that by drawing together seasoned community activists, legal advocates, policy analysts and policy makers, along with heterodox development economists, we might encourage discovery of common ground and the basis for longer-term collaborations. And so we did - in the form of Dr. Atuguba’s LADA (Law and Development Associates) Institute’s new project, bringing together a number of the two gatherings’ participants with the goal of mapping out, promoting and putting into practice the reconstruction of Ghana’s oil governance system.

THE CONTEXT – GHANA’S OIL INDUSTRY AND OIL GOVERNANCE SYSTEM

International policy makers now commonly refer to the West African coast of the Gulf of Guinea as the “New Gulf.” The term reflects the parallels that are now being drawn between its hydrocarbon deposits and those of the Middle Eastern states of the Persian Gulf. Several nations, notably Nigeria, Angola, and Equatorial Guinea are already major players in the international petroleum economies. Yet only recently have other nations – such as Ghana – been taken seriously as global oil producers. Indeed, around a third of the world’s new oil discoveries since 2001 are occurring in the Gulf of Guinea, including roughly fifty deep-water discoveries in the past decade. Thus the entire region is increasingly being recognized as a global hydrocarbon “hot-spot”, with the sea beds bristling with exploration wells.

Ghana is at the fore of this unprecedented attention in the Western Gulf. Prospecting and exploration, which actually began in the late nineteenth century, have finally been followed by substantial production. Many believe that this transition hinged on Ghana's establishment, in 1983, of a national oil company, the Ghana National Petroleum Corporation (GNPC). This parastatal took a leading role in re-establishing the industry after the withdrawal of multinational players during a period of economic and political instability. The GNPC brought back from the diaspora a cadre of petroleum scientists, engineers and economists and saw to the training of new ones. They, in turn, gathered geological and other data, and enabled state and private actors to negotiate and collaborate with foreign investors in a fashion that enjoyed a measure of informed bargaining and public oversight.

In 2007 a wave of new deep-water discoveries and a subsequent influx of oil multinationals led to a swift turn from prospecting to pumping, with commercial production online in 2010. Since then, Ghana's oil production has averaged about 100,000 or more barrels per day, translating into more than 130 million barrels exported from the Jubilee Field, the nation's first major oil producing Field. The Tweneboa-Enyenra-Notomme (TEN) Field which was recently commissioned, on August 18, 2016, has also come on the production stream as Ghana's second major oil field with estimated recoverable reserves of 245 million barrels (mmbbls) and 365 billion cubic feet (bcf) of gas. And work on the Sankofa-Gye-Nyame (SGN) Field has begun. Additionally, there are ongoing exploration activities, both onshore and offshore), including in the Voltaian Basin and the Hess Field.

A little over five years into oil production, more than seven thousand Ghanaians are reported to be *directly* employed in the oil industry, while countless others might have gained increased income from its many spin-off enterprises and activities. Oil revenue already

constitutes about four per cent of Ghana's total GDP. And the government of Ghana (GOG) has received roughly US \$3 billion from oil production, making oil the second biggest source of foreign exchange, catching up with gold and overtaking revenue returns from cocoa.

Yet several conditions challenge these gilded promises. Some are common to all post-colonial oil producing nations. We can see this risk played out in Africa's older oil producing nations like Angola, Chad, Equatorial Guinea, Libya, Nigeria, and Sudan. In spite of their oil-boosted national wealth, grossly inequitable distribution leaves these nations near the bottom of the UNDP's indices of social development. Oil based development has exacerbated civil conflict and left extreme poverty and inequality unremedied.

Hosts of legislative and regulatory inadequacies thwart effective governance in these oil-rich African nations, leading to the storied corruption, massive leakages in the revenue regime, a lack of transparency in resource management, and significantly compromised development outcomes. When these challenges are considered in light of the profound economic and geopolitical disparities of power favoring international oil conglomerates (IOCs) and globally northern-based trade regimes, we can understand the enormous challenges Ghana will face in harnessing its oil wealth for its own sustained development, even in the setting of a democratic constitutional order that has thrived in the face of the usual challenges since 1992.

Even in this early phase in its oil development, several looming risks have emerged. The short history of oil and gas contracting in Ghana already is littered with some important agreements made via processes that failed to meet basic transparency and accountability benchmarks. Often these processes were being either clouded in secrecy, or as many technocrats complain, they were concluded as sweetheart deals between investors and rent-seeking political appointees "at the top." Not surprisingly, given the absence of sterner, well-enforced measures to

ensure government transparency, at least until the recent past, revenues from oil and gas production have sometimes been known simply to vanish. And even when basic terms are released it is often difficult to identify the actual interests behind the “shell” companies that entered into the contracts on a formal basis.

Meanwhile, directly affected coastal communities are witnessing signs of environmental degradation and of myriad forms of small-scale corruption at regional and local levels. Furthermore, as oil production is seen to erode traditional livelihoods and to benefit other regions and social groups not their own, oil-affected coastal communities are inadequately consulted about oil and gas extraction and refining projects in their midst.

Worries also have begun to emerge about the possible failure of government monetary policy experts to manage the increased value of its currency in the face of oil-based economic expansion risks driving up the prices and injuring the competitiveness of other exports on global markets, thus shrinking those sectors and putting Ghana in the grip of the oil-price fluctuations on global markets, and locking the nation into the “Dutch disease.”

As the history of Ghana’s mineral production shows, these risks around oil production do not come in a vacuum. As an extractive economic enclave and a transnational complex, oil production bears many similarities to Ghana’s centuries-old gold mining industry. Ghana was historically known as the “Gold Coast”, but that industry has more often increased than alleviated poverty in mining communities. Mining production has been exploited by powerful multinationals. These vertically integrated foreign corporations, which often arose from colonial precursors, frequently dominate the entire value chain of the mining industry, dictating the terms of mining and tax laws and mining agreements, bilateral investment treaties, and the like.

In the face of all these new – yet eerily old – challenges, progressive lawyers, civil society leaders and grassroots activists – many of the most seasoned and thoughtful of whom came together at these two gatherings - have begun to fashion plans of action, whose overall shape and ambitions these two gatherings helped bring to light, deepen and sharpen – and whose nuances, insights and possibilities the remainder of this paper will explore. But let us put some broad outlines on the table.

First, and daunting enough but simplest of the three steps, have been ongoing efforts to survey, analyze map out and demand reforms of the nation’s current array of oil-related statutes and regulations. The general goal here has been at once to integrate, update and strengthen the laws, while also animating them with an overall “vision” of how the oil economy will fit into the nation’s overall economic development over the longer term.

The second front is to put in place and strengthen the institutions – such as the new, strikingly innovative and, we think, potentially quite significant government / civil society Public Interest and Accountability Committee (PIAC), which was created by the 2011 Petroleum Management Act. PIAC is comprised by civil society figures with the charge of monitoring all aspects of petroleum revenue management by both government and IOCs so as to keep the oil industry transparent and accountable, from top to bottom.

The third front is likewise a work-in-progress: to enable and actually empower the full *participation* of oil affected people and communities – and the public overall – in shaping and monitoring oil policies, production, downstream processing activities, and the distribution of overall benefits and costs.

The scope of these activities and the debates surrounding them will be fleshed out in the subsequent sections that detail the proceedings of the Workshops and outline the vectors of

debate. In this context section, however, it will be useful to set forth the overall framework of law and regulation that currently governs Ghana's overall oil economy. Therefore, the next brief section takes up that task.

GHANA'S OIL-GOVERNANCE LEGAL REGIME

Ghana's oil sector is currently governed by an array of ten statutes, amendments, and legislative instruments (i.e., regulations with the force of law). In addition, a number of peripheral laws, such as the Environmental Protection Act, the complex of laws on land valuation and compensation, the maritime law regime, local government law, and the Constitution itself, provide the broader legal context in which these ten laws function. In order to show the reach – and limits – of this scheme, they will be named and their basic functions set forth below. The laws, roughly ordered by the exploration // revenue use // clean up (which is mostly addressed by the Environmental Protection Regime) timeline, are as follows:

1. Ghana National Petroleum Corporation (GNPC) Act, which establishes the GNPC;
2. Petroleum (Exploration and Production) Act, 2016, which governs upstream petroleum operations, including exploration, production, concessioning and contracting, procurement, and the like;
3. Income Tax Act, 2015, which imposes the petroleum income tax in a subsection;
4. Energy Commission Act, 1997, which establishes a Commission to regulate energy resources, including natural gas;
5. National Petroleum Authority Act, 2005, and Product Marketing Regulations, 2012, which establishes a body to regulate the activities and stabilize prices in the downstream petroleum industry. Stabilization is accomplished through a product marketing scheme to ensure quality of petroleum products;
6. Petroleum Commission Act, 2011, which sets up a Commission to regulate the use of petroleum resources;

7. Petroleum Revenue Management Act, 2011, and Petroleum Revenue Management (Amendment) Act, which manages petroleum revenue collection, allocation and management and, in the Amendment, further specifies and refines the original Act's provision (The Revenue Management Act establishes the Public Interest Accountability Commission);
8. Natural Gas Pipeline Safety Regulations, 2012, which ensure standards of safety in gas facilities and installations;
9. Petroleum (Local Content and Local Participation) Regulations, 2013, which maximize the value-addition and job creation in the industry value chain and drive skill, expertise, and technology transfer through education, research and development programs.

THE GHANA WORKSHOPS

We convened two Workshops of legal scholars, government officials, international experts and observers, civil society leaders, and grassroots activists. In these workshops we were particularly interested in turning an interdisciplinary, intersectoral lens on the debates in oil governance, law, and policy which are often dominated by law trained experts. We were also interested in an in-depth consideration of the various – and optimal – ways to create, maximize, and *use* the value that oil production might generate, so as to sustain and promote Ghana's equitable development over the short and longer term. We were interested in community and ecological costs – and opportunities, where they might be identified. And, to the degree that there was uptake, we were curious about people's views with regard to the tapering off of production even before supplies were depleted so as to avert risks of the so-called resource curse and Dutch disease, and the risks of fossil fuel production in the context of global climate change. The first of our Workshops, held in mid-December of 2015, was an informal but deep and intense, two-day scoping and planning meeting. In it, key scholars, civil society leaders, and activists chiefly from Ghana but also from the US, the UK, and Australia, came together for high level debate of fundamental issues aimed at setting the agenda for the second, larger

gathering which was to follow the following year. In that second Workshop, in January of 2017, a larger group of about fifty high level Ghanaian government figures came together with these and other scholars, civil society figures, activists, and international guests to debate key industry challenges, development potentials, policy issues and pending Parliamentary bills from the perspective of the underlying visions of development that they might promote or undermine. What follow are brief summaries of the discussion at each of these Workshops.

The First Workshop, December 2015

In this workshop participants scoped out the fundamental themes that would guide the Ghana inquiry. The discussion was organized around short roundtable presentations designed to provoke rather than limit the deliberations. The discussion that came forth was intense and far reaching. Given the great social costs of petroleum development on communities and ecologies, both local and global, the vectors of debate were sometimes sharp. Over the two days of deliberation, five key themes iteratively emerged:

1. On Ghana's position in the international petroleum economy: How can Ghana as a post-colonial African nation in the global South play an equal role in an international petroleum economy dominated by powerful globally Northern nations and multinational oil conglomerates?
2. On the place of oil policy in alternative visions of Ghana's development: What overarching visions of development might guide Ghana's petroleum policies and how can those visions be debated and pursued in inclusive and pragmatic ways? What are the alternative visions? How can Ghana's current "political settlement" be shifted so that there is broad-based common interest in debating those visions across all sectors of the society and pursuing them through specific institutional and policy reforms?
3. On the social value of oil development: How can the net benefits of petroleum development be maximized for all Ghanaians, taking full account of the costs? How can the costs be diminished?
4. On oil development and democracy: How can the voices and interests of all stakeholders in oil development – including the environment and future generations – be fully

accounted for through viable political processes and institutional arrangements?

5. On democratic oversight of petroleum governance: How can oil governance be made transparent and thus accountable to democratic oversight?

We will now briefly summarize key points in the discussion of each theme.

On Ghana's Position in the International Oil Economy: The first theme came forth through the whole discussion. It was nicely framed by two participants, a lawyer specializing in the terms of petroleum contracts and a political scientist who studied alternative legal and policy frameworks for managing and spending oil revenues. The first speaker reported that virtually every oil contract between an IOC and an African nation that he had studied was heavily weighted toward the interests of the IOC. He noted that these features were often embedded in the contract's "fine print". He attributed this IOC-tilt in part to the greater expertise of the IOCs and their home nations in complex contract negotiation. But beyond that, he attributed these inequitable outcomes to the underlying disparities in bargaining power that the parties brought to the table. These inequities he in turn attributed to the near-monopoly on the part of rich nations of the expertise, equipment, capital sources, and risk taking capacities that the IOCs brought to the table, features that post-colonial nations, acting separately, were constrained to pay exorbitant rents for – in terms of unfavorable contract terms and financial practices (such as low royalty rates, low real tax rates, transfer pricing, the refinement of crude oil elsewhere), which ensured that the vast majority of the resource's value – just as in the colonial period – would go to IOCs and globally Northern nations, rather than the governments and people of the host nations which owned the resources under international law.

The political scientist added a policy dimension to the analysis, by pointing out that the legal framework guiding Ghana's policies for managing and using its oil wealth was one in

which the entire corpus of that wealth was considered to lie in the monetary value of the extracted oil on global markets. In this analysis, Ghana's portion of the total "pie" would be subject to global commodity price fluctuations (the commodity "super-cycle"), and Ghana's share would be constrained by contract terms, and the other dynamics outlined above. In the alternative analysis, which most – but as we shall see not all – participants endorsed, the major source of the oil's value would be in all of the value generated by the oil through its downstream, upstream, and lateral "spin-offs" and in the technology and human capital transfers referenced in an earlier section. To these open-ended sources of value (now captured chiefly by "Local Content" regulations), would then be added the value of the revenue that would come from the pie.

Shifting the focus in this fashion positions the oil industry as the anchor industry in a more or less overarching industrial policy, with public policy deliberately shaped both to maximize oil-centered spin offs and to nudge (through subsidies and other policies) the development of other industries that might either produce inputs or use outputs from oil production. This policy model would also privilege in-country refinement and marketing of oil components, such as natural gas that would otherwise be flared from rigs. One participant boldly claimed that refining national gas could *both* supply Ghana's much of own industrial and domestic power demand *and* supply the West African market more widely, thus positioning it as the region's central economic and political power. Here was the nationalist state-building vision in full flight.

The focus on spin-offs rather than exclusively revenues gave the group a sense that it was thus possible to redraw the often taken for granted map of North / South economic and political power. Yet several caveats were flagged, such as the technical know-how and capital infusion

that it has taken – through an oil-for-infrastructure loan with the Chinese government – for Ghana to build and operate a national gas refinery fueled by gas captured from oil rigs. Is this “spin off” a new form of unequal deal or a genuine South-South partnership?

The question of how Ghana could develop an internal base of expertise and bargaining power animated an extraordinarily rich presentation by the keynote speaker, who was a central public figure in Ghana in the early 1980s when the current legal framework for petroleum was put in place and continues to be a leading senior policy analyst and consultant in the oil and gas domain. He recounted how the Ghana National Petroleum Company (GNPC) was founded in 1983 in the context of a movement then afoot at the United Nations for developing nations to develop their own natural resources. The charge of this Company was to pull together the multiple forms of expertise and geophysical data that would enable Ghana to make better deals with international oil exploration investors from the global North and then to enter into formal partnerships with them in those efforts. By bringing back from the diaspora Ghanaian petroleum engineers trained in Eastern nations during the Nkrumah era, the GNPC was able to accomplish this goal, and the 1980s through mid-2000s was a time in which exploration projects proliferated, culminating in the discovery, in 2007, of the vast Jubilee field.

In the speaker’s judgment this IOC / GNPC spirit in the era of exploration was not adversarial; rather joint ventures were pursued in a spirit of cooperation, which the GNPC both giving and gaining expertise – and petroleum – from the effort. The question of whether the same level of collaboration could have taken place in a context of greater commercial oil production, as is the case today, remains uncertain. Others demurred, pointing to what they saw as some dismally one-sided agreements from those early years in the current saga of off-shore oil exploration and development. In the speaker’s view, however, the well-informed and

collaborative way of negotiating North / South power relations was undermined in the late 2000's by ideological and political rivalries, both within and outside of Ghana, which undermined the political legitimacy of a national petroleum company. Though the GNPC continues to have its place in Ghana's petroleum law as a player in the industry, the domestic political climate has recently turned in the direction of greater privatization of both the GNPC's internal corporate structure and the overall balance between the GNPC and the IOCs in Ghana's oil economy.

The above deliberations deepened the sophistication and opened up the conceptual boundaries of our discussions substantially. This is because too often discussions of the options for globally Southern nations either duck the issue of the nation's position in the wider global economy, thus framing utopian policy proposals or else consider the global contexts and conclude that, because of great North / South power disparities, there is nothing that the Southern nation can do to improve its situation.

Here, in contrast, the global context was always on the table. The debates were both provocative and creative. The contours of current power imbalances were drawn with nuance. And strategies for negotiating through and around those imbalances were both set forth from an historical perspective and critiqued as they are playing out in the present and toward the future. The bottom line is that the global context cannot be ignored, but with deliberate attention to *legal and policy design innovations*, such as the GNPC, expanded version of Local Content, and regulations on transfer pricing of IOCs tax-exemptible inputs, the constraints of power differences are not set in stone.

On the place of oil policy in alternative visions of Ghana's development: This theme also wove through the discussion: everyone noted that you cannot have a viable oil governance framework unless you take account of the nation's overall vision of development. But beyond that the participants did not move into a debate about competing personal visions so much as scope out the plausible alternatives that are subject to debate. A participant with decades of experience organizing in mining communities led off the discussion by asking whether Ghana's governing vision of development would build on people's traditional ways of life and other sources to seek sustainable pathways to peoples' well-being that would not demand the "infinite" consumption of an inevitably finite supply of natural resources, destroying environments and ways of life in the process. This participant put down a marker, in other words: Leave the oil under the sea, and go the sustainable energy route. Others pushed back, endorsing a vision of equitable industrially-based development, in which oil-based power, spin-offs, and revenues, well-spent, would be the best route to capacitate people across the society.

From here, the emphasis shifted away from the substance of rival visions of development to the processes and institutional forms through which such competing development visions could be discussed and debated by ordinary Ghanaians and their representatives and advocates in the most deeply democratic ways. Participants observed that proposed amendments to the 1992 Constitution would invigorate the existing national development planning provision to make it a more deeply democratic process. A seasoned civil society leader, also a scholar, cautioned that Ghana's overall "political settlement", now weighted to the interests of elites, must be shifted toward a "coalition" of public interested minded Ghanaians in order for either such national deliberation over vision or, indeed, the implementation of resulting legislation, to take place in good faith. A US comparative constitutional scholar then rejoined that such shifting and

deliberation could only take place in a “democratic” way if the institutional structures for such contest and deliberation could be nested within the framework of a broadly representative political party structure. Furthermore, he added, the means of integrating the roles of government expert regulators (e.g., the GNPC and Petroleum Commission) and political leaders (e.g., the Ministries and Parliamentarians) must be institutionally devised so that neither can be “captured” by industry or elite interests.

Another participant, a US legal scholar who heads an international think tank on the corporate interface with national governments around extraction industries and development policy, then mapped out an array of different stakeholders who must be involved in such debates. Such “stakeholders” in her view must include not just the IOCs, national government, communities and the like. It must also include “the environment” itself, as well as “future generations.” Institutional pathways must then be designed to enable each of these stakeholders, both virtual and actually present, to have their respective interests addressed in even-handed debate.

On the social value of oil development: Here the discussion emphasized the importance of a probing inquiry into all of the costs as well as benefits of oil development beyond the obvious. This depth is needed on both fronts. With respect to benefits, the value of all of the real and potential spin-offs must be accounted for. What pathways of industrial development and skill / technology transfer might be developed, for instance, with smart policies in place? How might the value of revenues be maximized by better tracking of industry capital expenditures (thus minimizing the net cost to the nation of transfer pricing), on the one hand, and better use of revenues for enhancing such sectors as agriculture, infrastructure, health, education,

and the like. How should these decisions about revenue use be made? How narrowly should legislation confine alternatives, and who should make the choices among them? How can the quality of thus funded projects be maximized, and their location best targeted, and through what monitoring protocols?

With respect to costs, how can the existing processes, of Environmental and Social Impact Assessments and the like, be both implemented and improved? How can community capacitation ensure that the perspectives of community members are included in these evaluations? How can the costs to land and crops and livelihoods be assessed, and if necessary compensated?

And what about the problem of incommensurable costs? As the community organizer eloquently put it to an international petroleum economist: how can you put a money value on a sunset? His rhetorical response that if you are willing to pay a high enough price, people will sell their access to sunsets, overlooked the earlier call for “the environment” and “future generations” to be included in the deliberations.

On oil development and democracy and democratic oversight of petroleum governance:
Each of these last two themes was a subject of focused conversation. At the same time, though, they both intersected and linked back to the earlier discussion of institutional structures for the debate of overarching development visions. The thrust of the first discussion was the importance of deep grassroots engagement with oil governance decisions by ensuring that communities have robust rights of consultation – and indeed, some thought, veto – of oil linked development projects before they begin.

The community-based group members gave accounts of how these rights, some already in formal law, had beoften been subverted or ignored in the mining context. Both better laws and better resources for community education and capacitation are called for to activate those rights. Other dovetailing themes included the balance between the Ministries, with their political ties and constraints, and technical regulatory agencies, a theme that would dominate the subsequent larger workshop, and the importance of not just *talking* about the importance of community input and empowerment, but on providing the legal frameworks, institutional structures, and resources – for example for basic education about environmental impact statements – that would capacitate people to play those important monitoring – and policy making–roles.

With respect to democratic oversight, the parameters of the discussion were well established. People agreed that transparency was needed to ensure accountability of political elites, high level bureaucrats, and industry insiders to the law and the public interest. The risks of corruption of all sorts in the petroleum industry is painfully familiar. In the context of “spin offs” for instance, efforts to legislate “local content” requirements have created opportunities for self-enrichment by domestic elites who are awarded contracts by government officials to provide IOCs goods and services. In the context of contract negotiation, secret bidding and unpublished contracts make the process and outcomes hidden from public scrutiny. The list goes on.

In the end the sort of reworked political settlement referenced above is a sine qua non for rooting out the problem. But short of that a robust and informed civil society, press, public interest lawyers, and other sectors; strong and easily enforceable transparency laws; legal arrangements that check the discretionary power of Ministers and other officials; and strong, and sometimes hybrid monitoring institutions such as the Commission for Human Rights and

Administrative Justice (CHRAJ) and the Public Interest Accountability Commission (PIAC), which check the activities of the state and IOCs from both within and outside the state, are critical. Undergirding all of these specific monitoring institutions, though, a culture of democracy must be prized, sustained and strengthened, so that people come together to root out elite self-interest in the interest of equitable development of the nation's oil reserves.

The Conference, January 2017

The second event was a larger conference. Rather than a small gathering pitched toward conceptual debate, this was a more formal public event which drew fifty people, from government, leading national and international civil society organizations, advocacy groups, community-based collectives, and universities, for the most part in Ghana. [The list of participants, with brief biographies, is attached as Appendix ____.] That said, the project's US and South African organizers and a few other participants came from those and other nations. The conference was designed primarily by the project's Ghanaian organizer, Dr. Raymond Atuguba, a Senior Lecturer at the University of Ghana and leading Ghanaian lawyer and intellectual in the development field, with backing from the Law and Development Associates' (LADA) non-profit Institute. Its goal was to offer a structured public space for multiple relevant stakeholders to debate the major vectors of current oil-policy debate within larger thematic contexts as the nation reworks the outmoded policy framework put in place for the petroleum industry in the 1980s. What is at stake in the policy debates that divide even the community of even progressive petroleum experts and activists? How are those choices sometimes hidden in the dense language of legislation? What are the best ways forward, both in terms of underlying vision and in terms of overarching policy design?

The workshop began with a keynote by Dr. Atuguba, an expert on many subjects, including the minutiae of statutory design. Dr. Atuguba used the 2016 Petroleum Act (see above) to illustrate how subtle language in a statute can make a massive difference in how power is distributed between the nation’s watchdog technical experts, on the one hand, and highly placed political appointees vulnerable to pressures from both national elites and IOC interests. Dr. Atuguba’s message was sobering, for the “Devil” that loomed in the “Details” could hardly be detected except by public-minded legal experts willing to comb through the law’s arcane language with a keen sense of the clues they were searching for. Thus, the keynote offered an emphatic message that there is a great need for *legal expertise* as well as more conventional forms of public interest advocacy, public mobilization, and grassroots sensitization to provoke the “shift in the political settlement” that was called for in the December 2015 workshop.

After the keynote forged a link between legal details and big, divisive policy debates, we launched into the fray. A panel of various stakeholders debated the major policy fissures set forth below. Then three multi-stakeholder small groups discussed issues arising at each key stage in the oil production timeline (i.e., exploration and production; value-use extraction; community / environmental protection). After report-backs, a roundtable of government officials, experts, civil society leaders, and activists set out their own reflections on the day.

In retrospect, what emerged from this workshop was a mosaic of insights into the challenges that confront progressive Ghanaians’ current efforts to craft a multilayered “constitution” for Ghana’s vision of petroleum-driven inclusive development and its *national development vision* as a whole.

The follow-on project that is now being launched by Dr. Atuguba and LADA, GOGID (Ghana's Oil Governance for Inclusive Development) aims to piece together this mosaic, translating it into both comprehensive policy blueprints and advocacy initiatives.

In order to offer a clear window into the rich discussion that unfolded at the conference, the next section sets out the key policy debates that arose.

The 2017 Conference's Key Debates and Recommendations

In this section we set forth six key policy debates that pervaded both the workshop and conference. We will include within the discussion of each debate recommendations that participants made in relation to them. In the case of some debates, such as transparency and accountability, there was consensus about the overall goal – to root out corruption and capture – but robust discussion and debate about the best means to get there. Thus the recommendations are for implementation. In the case of other debates, however, the most fundamental normative issues were up for grabs. In these cases, recommendations will be of two types: the best paths forward; and the best constitutional and institutional means for configuring and capacitating searching societal debate.

We will preface the detailed discussion of each debate with an overarching set of three structural themes in which they are nested. These are as follows:

1. The *respective governing roles* of the constitutional order; political leadership; technical expertise; and democratic guidance (whether through popular mobilization and participation, civil society input, or party politics), so as to provide optimal (oil and gas) governance;

2. The optimal place in the *global geo-political order* so as to realize Ghana's *own vision* for (oil and gas) development. For example, should it aim toward being an equal player in the current global capitalist trade-oriented economic order? Should it aim to acquire the power – through natural gas production, for example – to be a powerful economic and political force in regional or even larger political orders? Should it look toward phasing out oil dependence of any kind, and link laterally – from the “bottom up” – with other emerging institutionally innovative, densely participatory, and highly redistributive social democracies in the global South (and North)?
3. How to *constitute* Ghana's petroleum sector so as to nurture what we might call, tracking Amartya Sen and our own notion of democratic statecraft (See South Africa White Paper), a fully capacitated people both enacting and protecting a fully capacitated state.

Let us say more about this third goal in view of its overarching importance. It entails using petroleum wealth – *both the* spin-offs and the revenues – so as best to enhance human, community, and social development throughout the society. The vision and details here will be contested, as they should. But that said, both the democratic *means* to sustain this debate (through a participatory and well-structured economic development planning process, for example, as set forth in the recent constitutional revision process) and the long-term core *goals* of the development, writ large – to sustain the nation's inclusive and equitable forward motion – must be one.

But this third structural goal entails not just priorities and processes for maximizing and *using* petroleum wealth – or not – so as to achieve (competing visions of) inclusive development. It also must entail broad and deep strategies for *capacitating the state* to ensure that such “just use” of petroleum value can happen in the first place. For in the face of the enormous wealth

that petroleum yields – as history tragically shows – the great risk here is not just that the wealth itself will disappear, but that the society will be left much worse off than if the oil had never been discovered in the first place. To protect against this “curse” requires a host of related transformations – if we can use this admittedly vague but here also highly appropriate term. The sites for reform must include at a minimum the following: (1) the political process (e.g., public funding for political campaigns); (2) relevant constitutional, statutory, and regulatory frameworks (e.g., less discretion in the Revenue Management Act, a Freedom of Information Act and more); (3) adequate agency resources (e.g., full and secure funding for the PIAC and the EPA); skillful and public-minded civil servants and technical experts (through, e.g., more international and IOC partnerships for training and collaboration); (4) enforcement modalities for oil sector corruption (e.g., a targeted petroleum corruption portfolio within the Commission on Human Rights and Administrative Justice); (4) measures to minimize collusion by IOCs, domestic business elites, and every public official, from the President to local District Assembly members (e.g., contract publication, public contract bidding; disclosure of real contract parties and IOCs’ balance sheets and much more). Furthermore, the reforms must be calibrated to work in synch, through the entire timeline of oil and gas production, from the earliest exploration to the final stages of site close out and beyond. Such a nexus of measures will not avert the “curse” full stop, but it will certainly reduce the risk.

To recap: The most narrow of these questions involves optimal way to structure the roles of the agencies and officials that together govern the oil sector. The second involves the best place for Ghana’s petroleum industry to occupy in the geo-political and economic order. And the third big structural question is how Ghana can best use its oil wealth so as to *capacitate* – rather than *undermine* – the people and nation. With that backdrop we now turn to the specific

vectors of debate that animated the 2017 Conference and warrant further deliberation and debate by relevant Ghanaian stakeholders, notably those who attended the Conference. [An Technical Appendix elaborating on these questions is attached as Appendix 2.]

What is the Optimal legal relationship between the Government of Ghana and the IOCs?

Here the starting point was a dichotomy that few participants endorsed. In its terms Ghana was presented a clear choice between permitting IOCs to gain access to Ghana's offshore oil resources via "traditional concessions / royalties" or via regimes of "production sharing". Nations are roughly split between these two models in how they manage their oil resources and relations with IOCs. But Ghana and a number of other nations have moved toward different hybrids of the two. The parameters of Ghana's hybrid system are set forth in the detailed terms of its statutes and Model Contract. Together these instruments set forth each party's share of net benefits from the deal, taking into account such factors as surface rentals, taxes, and royalties (all of which are elements of concession agreements), as well as state participation in the form of GNPC involvement and other elements of production sharing.

A few of the Conference participants felt strongly that concessions / royalties agreements were the clear villains in this drama, giving up oil-producing nations' sovereign rights (through licenses or leases) to IOCs and leaving only small royalty payments for host nations like Ghana. A few others responded that pure concessions/ royalties regimes were actually better. Most participants, however, held that in light of the current complexities of amassing adequate capital and specialized expertise for the sort of ultra-deep water production that Ghana's Gulf of Guinea oil fields require, contracts' allocation of the risks and costs of exploration are complex and fraught with calculations that require intricate negotiation. Thus, to paraphrase one participant:

[F]iscal systems can be designed to yield the same government “take,” depending on how the rents are shared between the host government and the IOC and how costs are treated in the contract. Given the uncertainties that surround oil exploration and exploitation it is usually difficult to ascertain before exploration the actual amount of revenues that a particular field will generate. A state must balance its need and capacity to exploit its own resource against the need to attract investors who require a return on investment. The type of system matters much less than the micro-design of [contract] elements... and the macro-governance institutions that support the enforcement of the agreements which allow a state to derive as much benefit as possible from its hydrocarbon wealth.

Thus, such negotiation requires both artfully drafted Model Contracts *and* highly skillful legal teams to conduct these negotiations in Ghana’s national interest. It is in such details, however, rather than the label of the contracts’ generic form, that the value that accrues to Ghana will be determined. The only issue that remained, then, was the largely *symbolic* one of whether the “production sharing” rubric better represents the nation’s aspirations to hold oil reserves in trust for the people, with the hope of maximizing its wealth through every stage of the process.

1. How Can Ghana best Get its Fair Share of the Value of its Oil and Gas Reserves?

Ghana’s fiscal regime defines a range of economic benefits the parties (Treasury/ GNPC/IOCs) are entitled to under their specific contracts. These include items such as taxes and royalties (from the concession element of the contractual scheme) and oil entitlements due to be paid to the national oil company (from the production-sharing element). Many of the debates here involve issues within these arrangements like the balancing act of setting the tax levels and royalty ranges so as to maximize Ghana’s capacity to attract IOC investment – particularly at the risky exploration stage – while also ensuring maximum returns to Ghanaians. Included here is the question of whether legislation should have established fixed royalty rates or a range to be fixed in each separate contract negotiation. Other issues up for debate in this complex domain involve how to ensure the structural integrity of the process. For instance, should the GNPC’s

share of the output be paid in kind because it is simpler to measure? How should that share be marketed to ensure the fairest price? How should the tax regime be administered to ensure that companies deductions and depreciation for expenditures and capital investments are not inflated by “transfer pricing.” (Appendix 2 includes more detail).

Of major import is how the details of both the legal regime and specific contracts can be made accessible *and understandable* – not just to technically trained lawyers and civil society experts – but also to the media, revenue monitoring organizations, urban elites *and community-based organizations in oil-affected areas* as well as other parts of the nation, particularly those which are least capacitated to respond to such materials right now. This is a huge challenge in the context of petroleum sector development because of the complex technical dimensions of the risks of oil exploration and production, the global industry players, and the value webs that span from the sea beds of the Western Region to the London Stock Exchange.

2. What is the Optimal Role for a Ghana National Petroleum Company?

Ghana’s national debate around the GNPC has generally been framed around two related vectors of discussion. The first is whether the nation should have a GNPC *at all*, or relate without mediation to international oil conglomerates? The second is whether, if it *does* choose to maintain a national oil company what should be its optimal role in the industry and the nation. For a detailed discussion of the GNPC’s role, both historically and in the current context, see the Technical Appendix. This section will focus on key current issues.

According to the December 2015 workshop’s keynote, summarized above, there was little dissent over Parliament’s decision in 1983 to establish the GNPC, for doing so tracked the popular outlook of the United Nations Center for Transnational Corporations (UNCTC) and

reflected the resurgence of economic nationalism in developing nations at the time. Nor has there been much public dissent from the GNPC's existence since then, with the exception of recent impulses for shifting the company in a more privatized direction in the context of a deeper contest about the nation's best ideological orientation in the global economic order. Greater debate has arisen over the precise contours of the GNPC's proper role.

The discussion here becomes relevant to larger structural issues. The popular perception has been that the debate is over whether the Company should be a "player" in or the "regulator" of the petroleum industry. The December 2015 keynote speaker, an actor deeply engaged in the GNPC's history, stated forthrightly that there was never any real debate on this issue: it was *always* understood as a participant in the industry rather than either a regulator or a potentially double-dealing player *and* regulator at the same time. (See the Technical Appendix for a much more detailed account of the history and specific legal framework of the GNPC, which follows the "Norwegian Model", vesting industry engagement in the GNPC, regulatory authority in the Petroleum Commission, and policy development, coordination, and monitoring with the Ministry).

The 2015 workshop's keynote speaker set forth a nuanced history of how the GNPC's role actually played out historically. In brief, the State Corporation, once established as a "player," leveraged its unique positional advantage in the global petroleum industry to create win / win dynamics that could improve Ghana's own power in the international petroleum market.

It is worth noting here that there is significant current interest in the development of a West African region-wide oil consortium that could leverage its combined – and substantial – petroleum resources, OPEC-like, to leverage real muscle in oil markets on an international scale. But to return to the intra-Ghana story, from the mid-1980s the GNPC took part in joint

exploration / production ventures. Yet it *also* collaborated with IOCs to facilitate investment and exploration in several other ways. These measures included gathering data on prior explorations that had been scattered across different national archives and foreign IOC databases and, as we have noted, drawing home its own corps of expert petroleum geologists and engineers. All this made exploration somewhat less risky for investors and also made joint venture and collaboration between the GNPC and IOC partners seem more substantive to the IOCs, and less of a nationalistically-mandated cost of doing business.

For Ghana, meanwhile, technical collaboration and joint venturing between the GNPC and IOCs seem to promise many obvious upsides. First, IOC / GNPC partnership may give Ghana a greater say in the modalities of production, thereby ensuring greater attention to environmental and other public interests in the production process. Second, it may ensure the GNPC an in-kind share of “off the top” oil production, which is generally a more reliable form of revenue than the cash that can be collected in the post-hoc royalty / taxation take-back phase. Third, in the best case scenario of real collaboration, at least, it would facilitate technology and skill transfer across the partners in both directions. And finally, it could build the nation’s capacity to engage in downstream activities, like refining on its own.

So given these potential benefits, what are the current debates around the GNPC besides the blunt, categorical objection that any national enterprise opens the door to corruption and price distortion? Though nuanced, this current debate shares a common focus: let us move beyond the glib rhetoric of “strong industry player” and work out the obstacles to achieving that goal. The discussion of that challenge then pivots around four themes. The first is how the GNPC can *gain adequate capital resources* to play its enhanced role. The second is how it can *develop specific niches and capacities* that will create demand for it as a partner within the

international oil economy. The third is how it can *increase its institutional capacity* so as to do its job. And the fourth is how the overall *political settlement* can shift so that its principals, now political appointees, do not exploit their power for personal gain.

The Technical Appendix offers a more in depth discussion of each issue. Yet key points of contest include whether the GNPC should be listed on Ghana's (or international) stock exchanges so as to raise capital beyond which the GOG currently allocates to it. This would have the added advantage of forcing greater accountability for the Company's financial transactions. On the second point discussion has centered on how the Company might tailor its core expertise – on deep water exploration, for example, or the development of downstream energy sources that might fuel the industrialization of both Ghana and the West African region. Examples of such specialization can be noted in both the Norwegian national company (Statoil) and other particularly successful national oil companies. It must be cautioned, however, that those successes often take place in state oil companies with stronger background institutional capacities and well-established cultures of publically-interested state-craft. The challenges of building GNPC's institutional capacity relates specifically to its technical and business functions as a complex internationally-focused petroleum company. Evolving into a state-of-the-art institution is a process that takes a deep base of earmarked national resources and international collaboration; rhetoric alone will not do the job. And the question of shifting the political settlement – building the peoples' and state's capacity to realize its national democratic potential – is one that infuses the entire White Paper.

3. How Should the Value Be Harnessed: through Spin-Offs or Revenue-Spending or Some of Both?

The question of how the value should be harnessed involves both how it should be maximized and as that is done, how it can be deployed. Let us first consider the issue of exploiting the potential of spin-offs – or upstream, downstream, and lateral linkages. The most limited version of this potential is to focus on the different activities that together comprise the overall oil / gas production chain itself, and that includes steps such as exploring, extracting, transporting, refining, managing environmental risk, and closing out production. In this view, maximizing value would be to ensure that the goods and services required for each of these activities – from the geologists to the rig workers to the IOCs lawyers to the caterers, welders, and truck drivers, from the high tech computers to the paper goods – be obtained from Ghanaian-owned enterprises: the money thus spent *by* foreign industry actors would thus, to the degree possible, stay in Ghana. Ghana now has a Local Content Legislative Instrument that seeks this end. It is replete with ambiguities and loop holes. At the very least, as a local content expert at the first workshop observed, it leaves open worries that Local Content further enriches domestic and foreign elites, rather than benefitting small and medium Ghanaian enterprises and democratizing regional economies.

A more capacious version of spin-offs would go in several directions. First it would affirmatively require IOCs to provide the skill training and even educational *systems* – from primary school through university education – to equip Ghanaians to take up these opportunities. It would affirmatively transfer technologies to Ghanaian enterprises, not only or necessarily in the petroleum sector, and not just through mentoring employees, but by direct methods like waiving intellectual property monopolies from which IOCs profit. It would look for opportunities to guide the development of areas contiguous to oil activity so that they would benefit from the spin off oil activity not in “boom town” fashion, but through the sort of planned

growth that might use temporarily increased local revenues and populations to drive the production and enhancement of public goods, from roads, to emergency services, to schools and hospitals, parks, and retail districts. Even after the close out of oil rigs, such investments could continue to drive regional development and benefit all.

And finally, the spin-off option could help drive a focused development vision. For instance, downstream industries producing inputs to oil production could receive subsidies for developing products that could input into other industries' needs. Or spin-off electrical power produced through natural gas refining could electrify substantial areas of the country, contributing to an industrially-based development vision while also serving domestic households, which itself would have enormous spin off benefits in terms of health, gender equity, education, and political stability. Even further, as noted above, the use of petroleum for spin-off natural gas production could give Ghana both foreign exchange and secure its already leading role in West Africa's political economy.

Thus the possibilities for smartly deploying the potential spin-offs of oil production are as open-ended as the capacity of the state to manage it and the vision of the democratic polity to guide it. Yet, as experience with the Local Content legislation on the books is already making clear, the challenges of translating these possibilities into adequate statutory frameworks are profound.

With respect to other avenue of using the petroleum's value – the big background issue is how to divide up the available “pie” of revenue among several earmarked funds. Right now, with one exception, these big spending categories are more or less uncontested. In keeping with best international oil governance practice, the current law provides for a “stabilization” fund to protect against fluctuations in global oil prices; a “sovereign wealth” – or in Ghana's case

“heritage” fund to make resources available for future generations; a fund for the national petroleum company; and, finally, a fund, replenished annually, that can be allocated for ongoing societal priorities. The one contested issue on the level of this overall allocation is whether a separate fund should be created to transfer special monies to the localities most directly affected by the extraction. This kind of fund has been used in mining for some time, with mixed social effects. Although regional and local interests advocate strongly for such a fund so as to offset the multiple costs of oil production that these communities cope with, the wider political risks of any policies that favor one region over another are seen by many as unwise, **particularly in light of the ethnic unrest in the far north in the context of the 2012 Presidential election.** With the exception of that issue though, the focus of background discussion regarding revenue spending is how the fine print of funds’ statutory language can be drafted so as to ensure that each fund’s value will be maximally preserved and increased while its overall objectives are achieved over the time span of the fund’s availability. [See Appendix 2 for more details.]

Once we get to fund implementation, a host of common challenges arise. These are hardly unique to oil-revenue spending; rather, they are of the same sort that bedevil any government-funded public works program. Thus the chain of implementation can raise the following sorts of questions: Are the funds directed toward useful projects? Are they geographically sited so as to avoid political and regional favoritism? And finally, are the projects actually *constructed* at all, and if so to what quality standards? Indeed, the last issue has become a big problem: the PIAC has therefore sought funds to monitor actual project construction of petroleum-funded projects on an ongoing basis.

But these issues of accountability raise issues of law design rather than policy choice. The real contest comes around questions of how the earmarked current funds should be spent in

the first place. Right now the governing Petroleum Revenue Management statute provides that the “Minister” rather than a more densely democratic process shall allocate funds across categories she chooses out of a list of several potential priorities. These priorities implicitly endorse competing visions of development. One is to build so-called human capacity by funding social-sector public goods (or SER entitlements) like education and health care directly. A second is to fund productive sectors like agriculture (where most people are still employed), so as both to offer more and better jobs through enhancing rural employment directly and to drive up GDP.

The agriculture option in turn opens up the deeper ideological contest of whether the funds shall be used for agricultural mechanization, corporatization, consolidation, and foreign investment (“land-grabbing”), on the one hand, or whether they be used to enhance the quality and sustainability of small holder farms, small scale irrigation infrastructure, marketing networks, agricultural co-ops, land trusts, and even arable land redistribution. This example highlights how ideologies of development – and opportunities for elite self-dealing -- are inevitably embedded into the setting of spending priorities in a seemingly straightforward statute. The design goal would therefore be to focus on how to achieve densely democratic *processes* through which spending choices could be mapped out, debated, and considered by a deeply democratized polity.

5. How Can Ecological Risks Be Identified, Prevented, and Managed?

The issue of environmental and social risk is often the first that comes to mind among civil society leaders and grassroots activists, and with good reason. Petroleum production, even offshore, creates irreparable damage to both natural ecologies – wetlands, marine life, flora and

fauna, farm land, and the like – and ways of life. It also creates risks of catastrophic damage, in the form of spills, for example – that cannot be averted with the best of our current technologies. Ghana has the usual array of legal frameworks – laws, regulations, agencies, enforcement mechanisms – to address them. It has a more or less robust civil society network to seek accountability. The legal regime is beset with the usual challenges – of inadequate legislation, inadequate enforcement resources, besieged and inadequately resourced affected communities, both government officials and agency functions “captured” by industry interests. For as we know too well, transnational oil is a powerful global industry. The drive for profit is enormous. Even Ghana’s national Oil Company, committed to pursuing the public interest, feels this pressure as it seeks to position itself in the industry.

So in the face of this picture, which is more or less typical of all economies in which oil production is sited, both wealthy and emerging, what new insights can be gleaned from the workshops we convened?

The first is straightforward. In assessing the big question of how petroleum development should figure in overall economic development over the long-term -- be it full-scale oil-driven industrialization, or keeping the oil under the seabed or something in-between) – it is *critical to weight all of the costs and benefits in a deeply probing way*. Thus, it was the consensus in both Soros Project events that the costs of oil production, in particular, can be too easily overlooked. Participants gave key reasons for this under-accounting of costs. The first is that many of these costs, particularly in downstream sites where byproducts might be produced or foreign oil workers might reside, might simply be overlooked in societal accounting. A second reason is that in the case of costs borne by socially marginalized groups – such as the costs to oil-affected communities and their indigenous life-ways and languages, the resources for doing the

accounting are scarce, the expertise required is great, and the results are incommensurable with compensation anyway. For if a sunset doesn't have a price tag, then how about a language? And third, as the long-time community activist in the mining sector reminded us through many detailed accounts, the personal risk to community members who dare to protest against unacceptable costs means that such costs are rarely reported at all.

So in the context of these challenges, what insights did the workshop and Conference participants have to offer? On the conceptual level, workshop participants observed that it is important for the “stakeholders” in oil-policy discussion to include both “future generations” and “the environment” (which includes, as does Ghana’s own Environmental Assessment Regulation, the comprehensive natural *and social* ecology). This symbolic gesture signals that constitutional vision, jurisprudence, legal institutions, civil society priorities, and social resources – both public and private – must be allocated for ensuring that both the political process and public debate takes account of these interests on the same level as those processes take account of short-term immediate interests. So yes “trees *should* have “standing” to bring human rights lawsuits,” to echo claims made by US environmental activists in the 1970s. It is not just that people should have rights to clean environments for themselves, and even their progeny. The environment itself must be a separate stakeholder when the balance sheets are drawn. The discussion of the issues in the first workshop in particular was always grounded in the realization, now mainstream in some Latin American oil-rich nations, that not extracting the oil at all is always an option.

A second theme involved the importance of astutely calibrating expertise on the one hand with policy guidance on the other. A first part of the task is to buttress the capacity and integrity of each of these players. Thus, with respect to the relevant Ministries (e.g., Environment,

Petroleum, and Energy), all possible steps must be taken to strengthen their capacity, thus minimizing the risk for self-dealing, capture, or negligent discharge of their duties. On the other side, the agencies charged to regulate the industry and advise the Ministry on technical issues (e.g., the Petroleum Commission and Environmental Protection Agency) must have both their technical and institutional capacities strengthened.

A much more daunting challenge, though, is not to strengthen each player separately, but to recalibrate the interaction between the expert regulatory agencies and political actors, so that the Ministries work pursuant to constraints imposed by expert judgment rather than groundlessly trumping that guidance to further partisan interests. The design challenge is particularly vexing here, as an astute exchange in the December 2015 workshop made clear, because expertise is always subtly laced with political interest at the same time that the best of public-interested statecraft will be shaped in part by its own sense of the best in expert judgment.

With regard to the third challenge – of overlooking communities’ information about environmental costs or tolerating retaliation against it, several measures were suggested. Agencies should be capacitated to have open-door presence in oil-affected communities on a daily basis. Community groups should be capacitated to generate information that is needed to make nuanced cost / benefit assessments. Environmental Impact Assessments must be shared with communities in meaningful formats, and opportunities for meaningful community input must be assured. Finally, the group noted that the relevant agency must accept and investigate that information that comes forth from disadvantaged voices (which are often the *closest* to possible costs) with its independent expertise, rather than relying on conclusory rebuttals that IOCs offer. In one well known example, oil industry spokespeople insisted to irate fisher-folk

that a shoreline algae infestation that immediately followed the onset of offshore oil production was a sudden result of “climate change”.

As we have seen in prior parts of this section, then, the debates are not so much around basic vision – except for the question of whether oil should be extracted at all. But rather, the debates now current in Ghana have to do with the question of means: how can a “sensible” level of oil safety and ecological protection best be achieved “under the circumstances.” This question is deeply fraught with normative and political judgments. For what should count as a cost? How should it be converted into a monetary value? On what scale should those values be compared? And once the measuring has thus been done ... what counts as “too much” anyway. Thus the balance between agency expertise and Ministerial oversight must be carefully drawn so that agency “discretion” – with its risk of corruption – does not juridically trump. The process must ensure that all stakeholders are represented. And the process must protect the disfavored from risk when they dare to come forth. But beyond all of that, the issue calls for reinvigorated constitutional imagination. A political process must be crafted which is deeply democratized, from the village to the Parliament, through which a capacitated people can debate the deep tensions over trade-offs and norms both safely and forthrightly.

How Can Transparency and Accountability best be Achieved?

This challenge spans across the entire scope of the White Paper. The goals are not contested. We will not revisit them here. Rather, five points will be briefly noted.

First, the means must not be restricted to post hoc enforcement of breach. Rather we must look deeply for the drivers of capture and corruption and then think creatively about how to disrupt them. Two of these sites were noted in the events with particular insight. One is the

overall political settlement, which drives public officials and elites to skim rents off of resources that they have access to by virtue of their positions in government, business or the like.

Strategies here involve nudging the political settlement itself in a more direct way. Specific measures might then be such actions as seeking public funding for Presidential elections so that politicians are not incentivized to seek funding through rents that they can secure through kickbacks and self-dealing. A second strategy is to work on many fronts to create a cross-party national coalition from every sector of society to unite around a culture of “good governance”. A third strategy is to strengthen political parties so that issue-based coalitions of members hold politicians accountable for the positions they take rather than the goods that they deliver.

A second driver of capture and corruption – in addition to the foundational problem of the current political settlement – is on a much different level. It lies in the subject of the Conference keynote: the ways that the shaping of relevant regulatory statutes, has sometimes been captured by partisan forces so as to subtly shift unfettered power to political actors – the Minister – in ways that can both open doors for corruption and undermine the best judgment of experts. Better statutes would not *prevent* capture and corruption. But they *would* make such wrongdoing harder to accomplish. But it is hard to mobilize democratic power to challenge the capture of the legislative drafting process itself, when the legislation is dense with complexity.

So what is required in the end is the capacitation of lawyers as *guardians, and translators, and educators* – in a sweeping sense – who are continually charged to empower the people to engage, on the ground, with the deep political stakes that are embedded in the interstices of the law.

A second insight about transparency and accountability is the importance of creative institutional design. The Public Interest Accountability Commission (PIAC) is one excellent

example, for it embeds a civil society dimension directly into the regulatory commission's scrutiny of petroleum spending. The proposal for public listing of the stock of the GNPC is another. The lesson here is that the creativity need not come solely in laws and institutions that explicitly target transparency and accountability – such as freedom of information laws and anti-corruption commissions.

And a third insight is that the domain of concessioning and contracting must be a particular priority – not just in obvious ways like the publication of contracts and the institution of competitive and open bidding processes. As important is the *translation* of contract terms into concepts and language that non-experts can understand. Right now the civil society organizations that monitor contracting are themselves staffed with experts. Their work is largely shielded from wider public view. Few workshops and meetings on these issues draw in wider groups of the people. There is little informed media coverage. Without such understanding it becomes impossible for people to debate issues that are critical to them. In this case it is not just the obvious question of how much value they are getting from the oil in the end. It is the further question of how the parties construe the risks of the exploration and extraction process and what obligations do they undertake – beyond what the law requires – to protect against them.

Concessioning and contracting are the points at which the people's most fundamental resources – the land and sea themselves and all the fruits that they bear – are turned over to foreign powers for exploitation. In addition to taking great wealth, this process causes immeasurable harm, often with suboptimal gain. Ghana's constitution makes clear that these resources are held in trust, by the government, but *for* the people, and not just for their own enjoyment, but also for the environment itself, and for future generations. Thus in the interest of Ghana's democracy, the most fundamental consensus among the workshop and conference

participants was that Ghana's people be capacitated to engage with the intricacies of the petroleum sector – particularly the concessioning and contracting phase of the process – through the sort of translation, education, and facilitation that can turn a maze of fine print into a nexus of contestable policy judgments and political choices.

Conclusion: Paths Forward

As specific recommendations are embedded in each of the six sections set forth above, they will not be repeated here. Rather, five overarching themes that cross-cut these comprehensive recommendations will be noted.

1. Endorse the LADA Institute's Proposal for a comprehensive "Legislative and Regulatory Audit of Oil Governance in Ghana":

At the outset, we enthusiastically endorse the proposal by Dr. Atuguba's LADA Institute, for a comprehensive program of activities with the goal of reconstituting Ghana's oil governance structure and practice. This Proposal, one outcome of this Project (as well as other deliberations), is attached as Appendix 3.

2. Link Transparency to Accountability, looking beyond policing to disruption and prevention.

Embed accountability into all features of Ghana's oil constitution with the goal of an equitable, public interested oil economy. Capacitate the people to discharge this obligation for the sake of themselves, their ecologies, and future generations.

3. Integrate all sectors of society and government to play their respective roles in enabling an inclusive energy policy.

No single sector can ensure equitable energy policy alone. The tensions are many, from the immediate risks of "corruption" to the hard choices about how to balance petroleum development against alternative energy sources and its long term costs. All stakeholders must be empowered to find their way into this deliberation, in the public interest, from their respective positions of responsibility and expertise.

4. Charge activists, civil society advocates, lawyers, economists, and other experts to be "translators" to permit robust public debate about energy policy.

The arcane discourse that shrouds energy policy – oil and gas in particular – must be stripped by a corps of “translators” who are specifically equipped to enable all sectors to deliberate about key issues with knowledge and confidence. This corps must be trained and resourced from within universities, philanthropy, the private sector, and government. This does not mean to eschew expertise. Rather it means to engage that expertise so as to capacitate a more vibrant democracy.

5. Pursue the “national” interest of Ghana in the international energy economy while also taking account of the widely varying economic and political situations of its people.

Recognize that energy policies that might be optimal for some do not respond to the needs of others, and that visions of development that might seem common sense to some might impose intolerable costs on others. Seek ways to amplify the interests and perspectives of those most likely to be closed out of the debates so that the resulting – always temporary – settlements are the best that can be made – in the moment – in the interest of the greatest capacitation of all.