GHANA AND THE IDEAL OF THE CITIZEN-SHAREHOLDER: A CORPORATE-LAW RESPONSE TO THE RESOURCE CURSE

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ABSTRACT

This Note assesses Ghana's legal regime for managing revenues from its newfound petroleum reserves as a means of combatting the resource curse—the well-documented political and economic phenomenon wherein resource-rich countries experience greater levels of corruption and poor governance and weaker democracy and economic growth than resource-poor nations. The Ghanaian regime fails to provide systemic protections against the resource curse by (1) supplying insufficient economic development and poverty relief, (2) lacking incentives and mechanisms for overseeing and holding accountable the powers responsible for managing petroleum revenues, and (3) providing insufficient channels for spreading the economic benefits of extraction beyond the petroleum sector. This Note undertakes a comparative study of a representative group of petroleum revenue-management regimes—those of Alaska, Norway, Indonesia, and Trinidad and Tobago—in search of an effective regime that might be transplanted to Ghana. Finding that none of these regimes are adequately applicable to Ghana's economic, social, or political context, this Note goes on to propose a novel regime for petroleum revenue management in Ghana, drawing on principles of U.S. corporate law.

INTRODUCTION

Substantial oil reserves were discovered in Ghanaian waters just west of Cape Three Points in 2007, the culmination of a search that

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began in earnest in the 1960s.[1] Named commensurate with the size of the find, the Jubilee oil field was discovered by a joint venture between the Ghana National Petroleum Company (GNPC),[2] Kosmos Energy, and Tullow Oil, and was thought to signal Ghana's "potential transformation into a dynamic middle-income nation, free to choose its own development path."[3] This discovery was certainly cause for jubilation, with estimates that the Jubilee field contains recoverable reserves of 615 million barrels of crude oil and 769 billion cubic feet of natural gas,[4] discovery of twenty-three new oil fields since 2007,[5] and International Monetary Fund projections that Ghana will bring in around US$20 billion in oil revenues.[6]

In the meantime, the nation and its private-sector partners have been plowing ahead in developing Ghana's reserves. Indeed, a number of events that seemed to threaten the stability of the relationship between the government and the developers did little to slow down progress. Not even a dramatic ouster of the New Patriotic Party (NPP) in the 2008 national elections by the National Democratic Congress (NDC), nor boundary disputes with the Ivory Coast could stop the parties from bringing the Jubilee field to production on schedule in December 2010.[7] Nor could a GNPC official's apparently baseless allegations that Kosmos violated the

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1. Ransford Gyampo, *Saving Ghana from Its Oil: A Critical Assessment of Preparations So Far Made*, 4 AFR. RES. REV. 1, 1–2 (2010).

2. The GNPC is a state-owned corporation that currently holds title to Ghana's petroleum reserves and represents the government in development projects and negotiations. IAN GARY, OXFAM AM., GHANA'S BIG TEST: OIL'S CHALLENGE TO DEMOCRATIC DEVELOPMENT 38 (2009), http://www.oxfamamerica.org/static/oa3/files/ghanas-big-test.pdf [http://perma.cc/2CZR-Q5JY]. The GNPC maintains the government's financial stake in the projects and serves as a de facto regulator of the industry through contractual-monitoring rights. *Id.* The existence of this de facto regime is largely attributable to the fact that the nation's petroleum expertise is concentrated in the GNPC. *Id.* at 36.

3. William Wallis, *Oil: Nation Eager to Remain Master of its Own Destiny*, FIN. TIMES (Dec. 14, 2011, 3:10 PM), http://www.ft.com/intl/cms/s/0/f39dba34-236a-11e1-af98-00144feabdc0.html#axzz3GoFDXr8E [http://perma.cc/KK4R-VCHU].

4. PUB. INTEREST & ACCOUNTABILITY COMM., REPORT ON MANAGEMENT OF PETROLEUM REVENUES FOR THE PERIOD 1ST JANUARY 2013 TO 30TH JUNE 2013, at 6, http://www.piacghana.org/2013PIAC_Semi-Annual_Report.pdf [http://perma.cc/4XW8-VKSY] [hereinafter 2013 SEMI-ANNUAL REPORT].

5. *Id.* at 25.

6. Dominik Kopiński, Andrzej Polus & Wojciech Tycholiz, *Resource Curse or Resource Disease? Oil in Ghana*, 122 AFR. AFF. 583, 594 (2013). The GNPC estimates that the government revenues will amount to at least 38 percent of gross oil production. *Id.*

7. Wallis, *supra* note 3. The ouster of the NPP was of special concern to developers, as they had very a strong relationship with the party and the president. *Id.*

Foreign Corrupt Practices Act.[8] In fact, so eager were the parties to get the oil and money flowing that production began, and has continued for several years, without any comprehensive regulation of petroleum extraction and maintenance. Ghana's Petroleum Exploration and Production Law remains a work in progress, though the government did manage to have the Petroleum Revenue Management Act (PRMA) in place to at least regulate the flow of revenues from petroleum production.[9] The Ghanaian Ministry of Energy has also attempted to bring some direction to the exploration and production process by putting together an Energy Sector Strategy and Development Plan; however, "so far the results have been, at best, mixed, as the implementation of the development plans seems to focus more on economic growth and short-term revenue generation and less on sustainability."[10] It is within this context that oil production grew to 99,685 barrels per day by the end of 2013, closing in on the target peak-production level of 120,000 barrels per day.[11]

Amid the jubilation and the rush to create much-needed revenue, many commentators received the news with trepidation, fearing that the "resource curse" will beset the emerging democracy.[12] The risk of a resource curse is especially troubling to commentators because Ghana is widely considered to be a beacon of hope for functional African democracies.[13] The "resource curse"—the well-

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8. Tensions were understandably running high after Kosmos had to undertake great expense to prove to regulators that the allegations were false, which U.S. authorities ultimately accepted. Henny Sender, *Bribery: Lines Less Blurred*, FIN. TIMES (July 18, 2011, 4:08 AM), http://www.ft.com/intl/cms/s/0/382eb374-b0a7-11e0-a5a7-00144feab49a.html?siteedition=intl#axzz3HqVxn5nT [http://perma.cc/N3WY-U7DE].

9. Kopiński et al., *supra* note 6, at 591–92.

10. *Id.* at 590.

11. PUB. INTEREST & ACCOUNTABILITY COMM., REPORT ON MANAGEMENT OF PETROLEUM REVENUES FOR YEAR 2013, at 14, http://www.piacghana.org/2013PIACAReport.pdf [http://perma.cc/4KAF-EBJ2] [hereinafter 2013 ANNUAL REPORT].

12. *See generally* Peter Arthur, *Avoiding the Resource Curse in Ghana: Assessing the Options*, *in* NATURAL RESOURCES AND SOCIAL CONFLICTS: TOWARDS CRITICAL ENVIRONMENT SECURITY 108, 108–27 (Matthew A. Schnurr & Larry A. Swatuk eds., 2012) (considering ways to avoid the resource curse for petroleum in Ghana); Clemens Breisinger, Xinshen Diao, Rainer Schweickert & Manfred Wiebelt, *Managing Future Oil Revenues in Ghana: An Assessment of Alternative Allocation Options*, 22 AFR. DEV. REV. 303 (2010) (same); Gyampo, *supra* note 1 (same); Todd Moss & Lauren Young, *Saving Ghana from Its Oil: The Case for Direct Cash Contribution* (Ctr. for Global Dev., Working Paper No. 186, Oct. 2009), http://www.cgdev.org/sites/default/files/1422981_file_Saving_Ghana_FINAL.pdf [https://perma.cc/SN9W-GYW5] (same).

13. *See, e.g.*, WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014, at 96 (2014), http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

documented phenomenon that "resource-rich developing states are more prone to bad governance, corruption, and rent-seeking behavior that can lead to a weaker democracy"[14]—is of special concern given the economic stagnation and civil unrest surrounding nearby Nigeria's large oil-extraction industry,[15] where the curse has become so severe as to inspire militant groups to rise up against the Nigerian government in the Niger River Delta.[16] Moreover, Ghana has additional cause for concern, as the former "Gold Coast" has already battled a resource curse for much of its history with the gold-mining industry.[17] As such, recommendations have come pouring in from commentators on how Ghana may avoid a petroleum-based iteration of the resource curse.[18]

This Note evaluates Ghana's existing legal regime, determines that Ghana is at risk of succumbing to the resource curse, and offers a new remedy. Part I explains the resource curse and Ghana's existing legal regime for managing petroleum revenues, concluding that the latter is not well-suited to prevent the former. That determination is based on three abstract problems found in the current Ghanaian system: (1) a failure to provide for sufficient economic development and poverty relief, (2) a lack of incentives and means for overseeing and holding accountable the powers responsible for managing petroleum revenue, and (3) an absence of channels through which to

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[http://perma.cc/J389-T3R4] (ranking Ghana as the country with the second-best rule of law in its eighteen-country region); Gyampo, *supra* note 1, at 2 ("Ghana is recognized as an oasis of peace in a sub-region bedeviled with several violent conflict [sic] related to elections, natural resources, like oil, diamond, gold, etc."); Moss & Young, *supra* note 12, at 2 ("By most of the common political and economic measures, Ghana has been highly successful, especially relative to other developing countries or its own West African neighbors."); *Worldwide Governance Indicators*, THE WORLD BANK, http://databank.worldbank.org/data/databases/rule-of-law [http://perma.cc/D7RF-YNTZ] (last updated Sept. 27, 2013) (ranking Ghana many percentage points higher on all of the World Bank's rule-of-law variables than its regional neighbors).

14. Kopiński et al., *supra* note 6, at 584.

15. *See generally* Xavier Sala-i-Martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria* (Nat'l Bureau of Econ. Research, Working Paper No. 9804, June 2003), http://www.nber.org/papers/w9804 [http://perma.cc/X579-DPCZ] (linking the socioeconomic woes of Nigeria with the resource curse).

16. *See Oil Workers Flee Attacks by Militants in Nigeria*, N.Y. TIMES, Sept. 16, 2008, at A13 ("Insurgents, known as the Movement for the Emancipation of the Niger Delta, or MEND, started a campaign of violence in early 2006 seeking more local control of the impoverished region's oil wealth."); BIG MEN (Rachel Boynton 2014) (interviewing militants actively fighting the Nigerian central government in the Niger River Delta).

17. Kopiński et al., *supra* note 6, at 585.

18. *See supra* note 12 (recommending how Ghana can best manage its oil revenue to avoid the resource curse).

spread the economic benefits of extraction beyond the petroleum sector. Part II presents a comparative study of alternative legal regimes for managing petroleum revenues—those of Alaska, Norway, Indonesia, and Trinidad and Tobago. None of these options provide an optimal solution for Ghana, but they do suggest two key principles for combatting the resource curse: (1) any entity controlling petroleum resources and revenues should be accountable to a constituency with the means and incentive to check its power, and (2) this constituency must be able to stay informed through transparent disclosure of the state of the industry and revenues. Finally, Part III builds these principles into a proposed legal regime for managing Ghana's petroleum revenues.

The proposed regime is based on what this Note terms the ideal of the citizen-shareholder, by which Ghanaian citizens would be given a direct stake in the nation's petroleum profits and governance. This would essentially involve disaggregating a large part of petroleum revenues and governance from the existing political regime by vesting them in GNPC, which will then issue the rights to the revenues and governance directly to the Ghanaian people in the form of stock. Though it is not without its difficulties, this proposal would help facilitate economic development, reduce the risk of an enclave petroleum economy,[19] and provide transparency and oversight by giving Ghanaian citizens an incentive to ensure proper management by means of a direct financial stake in the outcome. In doing so, this ideal of the citizen-shareholder specifically addresses those weaknesses in the current Ghanaian legal regime that place the nation at risk of developing a resource-cursed economy and society. Ghana should therefore leave the property rights in its offshore oil with the GNPC and relinquish its shares to the Ghanaian citizens.

I. GHANA AND THE RESOURCE CURSE

As massive amounts of money begin to flow into government coffers from the oil business,[20] it is worth asking, what exactly is the

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19. An enclave petroleum economy is one in which the production of a nation's petroleum resources provides few positive externalities to the economy writ large, thus depriving that nation's citizens of many of the benefits of their natural resources. *See infra* note 24 and accompanying text.

20. The Ghanaian government reported petroleum revenues totaling US$978,017,692 in 2014. PUB. INTEREST & ACCOUNTABILITY COMM., REPORT ON MANAGEMENT OF PETROLEUM REVENUES FOR YEAR 2014: ANNUAL REPORT 27–28 (2014), http://

risk? What is it about money from natural resources that has proven such a curse for developing nations, especially in Africa? Answering these questions is key to understanding both potential problems that might arise as Ghana manages extractive industries and how to formulate an effective response.

A. Petroleum and the Resource Curse

Much of the literature on the resource curse arises from the proven, counterintuitive observations that resource-rich economies tend to be outperformed by resource-poor economies, and that the abundance of natural resources is negatively correlated with economic growth.[21] The problem is especially exaggerated in oil economies.[22] This phenomenon is explained by two major macroeconomic observations. First, natural-resource extraction carries few positive externalities.[23] Indeed, "[e]xtractive industry investment creates enclave economies where the investments have few linkages to the rest of the economy and few jobs are created."[24] Second, the world price volatility associated with natural resources drags economies dependent on them.[25] Therefore, from the outset, it would seem that an effective response to large-scale natural resource extraction would require a means of spreading natural-resource profits to other sectors of the economy to reduce enclaving and dependence.

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piacghana.org/2014PIAC.pdf [http://perma.cc/4BCX-HHEC] [hereinafter 2014 ANNUAL REPORT]. This is up from US$846,767,184 in 2013. 2013 ANNUAL REPORT, *supra* note 11, at 20.

21. *See generally* Jeffery D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (Ctr. for Int'l Dev. & Harvard Ctr. for Int'l Dev. Working Paper, 1997), http://www.cid.harvard.edu/ciddata/warner_files/natresf5.pdf [http://perma.cc/6LZW-4S6B] (discussing several theories explaining this counter-intuitive result).

22. *Id.* at 14–15.

23. *Id.* at 4.

24. GARY, *supra* note 2, at 12. The extractive industries create enclave economies because they require little labor from the locality and the local labor that they do require does not result in significant amounts of skill accumulation by individual employees. Sachs & Warner, *supra* note 21, at 4–7. As such, extractive industries do not generate many externalities, and social wealth does not grow much beyond the return on private investment. *Id.* This stands in contrast to manufacturing, which produces social good well beyond the return on private investment by creating many jobs, which teach skills that increase overall productivity in society. *Id.* at 5. In fact, extractive industries tend to push more capital and labor *away* from the economic sectors that do create broad positive externalities (manufacturing) and into nontradable sectors (services), which support the extractive industries but generate little social benefit. *Id.* at 6.

25. Sachs & Warner, *supra* note 21, at 9.

Such macroeconomic problems with natural-resource abundance, however, are exacerbated by problems of political economy. For example, "[w]ith 'easy' money rolling in, many countries often reduce their efforts at non-oil revenue collection. When this happens, petrodollars replace more stable and sustainable tax revenue streams."[26] Moreover, there is a widespread perception that "natural resource abundance inevitably leads to greater corruption and inefficient bureaucracies; or that high rents distract governments from investing in the ability to produce growth supporting public goods, such as infrastructure or legal codes."[27] Such behavior is compounded by what economists Philip Lane and Aaron Tornell have termed the "voracity effect," in which multiple powerful groups within a resource-rich society clamor to obtain resource rents, leading to widespread rent-seeking behavior and attendant deadweight economic loss.[28] Additional troubles arise from the tendency of such governments to waste rents through ill-advised consumption or poor investment.[29] Indeed, the public spending that such governments do undertake tends to be financed by a "borrowing spree[] based on their new 'credit worthiness,'" and ultimately feeds into wasteful patronage systems.[30] Finally, it appears that economic growth in such nations is further burdened by mismanagement and kleptocratic governments.[31]

As might be expected from the economic stagnation attending natural-resource abundance, the resource curse also negatively impacts a democracy's ability to effectively govern itself in the absence of strong, preexisting governmental institutions.[32] Indeed, an empirical study by Michael Lewin Ross finds strong statistical

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26. GARY, *supra* note 2, at 11; *see also* BIG MEN, *supra* note 16 (filming Norwegian Minister of Environment Erik Solheim giving a speech to stakeholders in Ghana's oil business in which he urged the government not to become lazy when it comes to collecting other sources of revenue).

27. Sachs & Warner, *supra* note 21, at 9.

28. Philip R. Lane & Aaron Tornell, *Power, Growth, and the Voracity Effect*, 1 J. ECON. GROWTH 213, 239 (1996).

29. Sachs & Warner, *supra* note 21, at 10.

30. GARY, *supra* note 2, at 11.

31. *See* BIG MEN, *supra* note 16 (documenting widespread and large-scale theft of Nigerian oil through the process of "bunkering" (stealing oil directly from pipelines) by both criminal groups and government officials, and through oil-company employees illegally selling "condensate fuel" (low-grade gasoline) under the table to black-market purchasers).

32. *See generally* Matthew L. Norman, Note, *The Challenges of State Building in Resource Rich Nations*, 10 NW. U. J. INT'L HUM. RTS. 173 (2012) (describing the tendency of governmental weakness and failure in the presence of abundant natural resources).

evidence that the presence of oil and other types of mineral wealth tends to have a strong negative correlation with democratization and a positive association with repression and resistance to democracy.[33]

Much of this problem arises from the fact that leaders of resource-rich nations have no incentive to develop the sort of strong institutions that are critical to an effective state, such as those involved in taxation and protecting property rights.[34] In fact, the lack of effective state institutions can misalign the incentive structures of government leaders to the extent that "in some instances, a shrewd leader of a resource-rich nation will deliberately seek to shrink every other sector of the economy in order to prevent economic change and the social forces and competitors for power [that] economic change tends to produce."[35]

The incentives facing leaders of resource-rich nations can often point directly away from establishing a functioning democracy. What such leaders truly value—more than governing effectively or protecting individual liberties—is controlling the state and its attendant resource revenues: "Access to resource rents may make control of the state so valuable, and give winners such complete power to punish losers, that relations between the state and those mobilizing for representation degrade into violence."[36] In fact, there is concern that the leaders of resource-rich nations use government proceeds to subsidize potential human-rights abuses.[37] The presence of natural resources tends to increase the risk of rebellion and civil war, presumably because a government's natural-resource wealth provides a tempting target for dissenters.[38] Such violence, however,

33. Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 356–57 (2001).

34. Norman, *supra* note 32, at 43–44.

35. *Id.* at 42.

36. *Id.* at 45.

37. *See* IAN GARY & NIKKI REISCH, CATHOLIC RELIEF SERVS. & BANK INFO. CTR., CHAD'S OIL: MIRACLE OR MIRAGE?: FOLLOWING THE MONEY IN AFRICA'S NEWEST PETRO-STATE 42 (2005), http://www.internationalbudget.org/wp-content/uploads/Chads-Oil-Miracle-or-Mirage.pdf [http://perma.cc/5TPF-ZQJ7] (describing how President Idriss Déby of Chad used oil proceeds to purchase weapons); Annalisa M. Leibold, Note, *Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline*, 36 YALE J. INT'L L. 167, 168 (2011) (same).

38. Paul Collier & Anke Hoeffler, *On Economic Causes of Civil War*, 50 OXFORD ECON. PAPERS 563, 571 (1998). *But see* Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World*, *1960–1999*, 48 AM. J. POL. SCI. 232, 232 (arguing that "oil wealth is robustly associated with more durable regimes and significantly related to lower levels of protest and civil war"). However, where there are exceptionally large amounts of natural resources, the incidence of civil war tends to decrease, presumably due to the strength of the government

may be caused by other factors given the abject failure of most resource-rich nations to give dissenting voices an outlet through democratic institutions.[39]

Even when peaceful elections do occur, incumbents enjoy the massive advantage of being able to access the state's vast resources and pour them into patronage systems and public welfare in order to ensure their popularity and ultimate victory.[40] Moreover, when incumbents are at risk of losing their powerful stake they are incentivized to further loot the state while they have access to its coffers,[41] as happened in Nigeria,[42] leaving less and less money for running an effective democratic state.

Combatting the roots of the resource curse in political economy requires serious managerial oversight. Indeed, given the strong incentive for personal or factional aggrandizement in a resource-rich political economy, there likely needs to be a powerful, peaceful, institutionalized force to keep incumbents in check, the most obvious being democracy.[43] At its most basic level, this suggests a need for a means of popular control, a reason for the exercise of popular control, and a means of informing popular control. A strategy for combatting the resource curse in Ghana will need to address these issues, as well as those macroeconomic considerations noted above.[44]

B. Ghana's Efforts to Avoid the Resource Curse

Ghana is a nation of 25 million people with a gross domestic product of US$90.41 billion, or approximately US$3,500 per capita,[45] which translates into less than two dollars a day for around 80 percent

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funded by such wealth. Collier & Hoeffler, *supra*, at 571. Such nations include those with strong preexisting government institutions or the powerful autocracies of the Middle East. *See id.* at 573 (listing the surveyed nations that did and did not experience civil war between 1960 and 1992).

39. *See generally* Ross, *supra* note 33 (arguing that the increased risk of civil war in resource-rich countries is due to rebels' desire to capture a rich government treasury).

40. *See supra* notes 29–30 and accompanying text.

41. *See supra* notes 28, 31 and accompanying text.

42. *See* BIG MEN, *supra* note 16 ("Between 1960 and 1999, Nigerian officials stole or wasted more than $440 billion. The country is consistently ranked one of the most corrupt in the world.").

43. Norman, *supra* note 32, at 7.

44. Namely, the lack of positive externalities of natural-resource extraction and price volatility of the resulting commodities. *See supra* notes 23–25 and accompanying text.

45. *The World Factbook: Ghana*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html [https://perma.cc/75S3-TQ7C] (last updated June 22, 2014) [hereinafter *Ghana Factbook*].

of Ghanaians.[46] Its economy is based upon commodity exports, primarily gold, cocoa, and now oil, and is seen by some as a relatively strong economy,[47] and by others as one with serious cause for concern.[48] The nation has a winner-take-all two-party political system characterized by government overspending and pork-barrel politics.[49] This system nevertheless remains strong due to a small political class with a robust network of informal relationships that helps stabilize the system and widespread civic awareness of political issues.[50] Indeed, the strength of Ghana's civil society is primarily attributable to a large and active community of Nongovernmental Organizations (NGOs) that work to monitor the government and lend it their expertise.[51] Ghana is widely seen as a model for sub-Saharan African democracy despite poverty, reliance on natural resources, and contentious politics.[52] Indeed, the Ghanaian government remained stable throughout the highly contentious 2008 election of President John Atta Mills and the constitutional succession of John Dramani Mahama upon Mills's death in 2012.[53] With a stable government and serious poverty issues, it is little wonder that Ghana has been in a hurry to exploit its petroleum wealth.[54] At the same time, however, any legal regime for managing that wealth should carefully consider Ghana's strengths, like its democracy, and its weaknesses, like its undiversified economy and serious poverty.

Although Ghana will reap massive windfalls from its oil reserves, the nation has only a twenty- to thirty-year production period,[55] which means that the government will need to carefully manage its oil revenues in order to share that prosperity with future generations and

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46. GARY, *supra* note 2, at 2.

47. Kopiński et al., *supra* note 6, at 588–89.

48. *See generally* FELIX OPPONG, DILEK AYKUT & GREGORY SMITH, THE WORLD BANK, GHANA ECONOMIC UPDATE: OCTOBER 2014, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/10/27/000333037_20141027091747/Rendered/PDF/918090WP0Ghana043B00PUBLIC000web30.pdf [http://perma.cc/H3GE-BFVR] (explaining how the macroeconomic conditions have continued to deteriorate).

49. Kopiński et al., *supra* note 6, at 587–88.

50. *Id.*

51. *Id.* at 593 (describing the strong role that NGOs play in Ghanaian civil society).

52. *See supra* note 13 and accompanying text.

53. Adam Nossiter, *John Atta Mills, President of Ghana, Dies at 68*, N.Y. TIMES (July 24, 2012), http://www.nytimes.com/2012/07/25/world/africa/john-atta-mills-ghanas-president-dies-68.html?_r=0 [http://perma.cc/47C5-HNF9].

54. *See supra* notes 7–9 and accompanying text.

55. GARY, *supra* note 2, at 3.

ensure its long-term success. Accordingly, the Ghanaian government prioritized the Petroleum Revenue Management Act,[56] which will help allocate the funds coming in through royalties, equity holdings, corporate income taxes, payroll taxes, duties, and the like.[57] All such revenues are managed by the Bank of Ghana,[58] which is responsible for allocating them according to a statutory formula between the government's general account in the Annual Budget Funding Amount (ABFA), the Ghana Stabilization Fund, and the Ghana Heritage Fund.[59] The ABFA is made up of oil revenues that go directly into the national budget[60] and can be spent for any purpose the legislature wishes.[61] "The government deliberately set up two separate funds to insulate long-term savings from short-term economic pressures: while the Stabilization Fund is structured to safeguard the budget against year-to-year fluctuation [in oil prices] . . . the Heritage Fund is intended to protect the livelihood of future generations . . . ."[62] The Heritage Fund operates as a typical sovereign-wealth fund, investing excess government revenues to produce economic returns that will support future generations. The Stabilization Fund "can be drawn down in the event of a sudden shortfall in petroleum revenues (but not one that stems from poor revenue collection) to provide financing for any ongoing projects and ensure budget sustainability."[63]

Consistent with Ghana's thriving democratic character, the PRMA sets out clear allocation rules for petroleum revenue as between the ABFA, Stabilization Fund, and Heritage Fund. When setting the nation's annual budget, the government must project its oil

56. Kopiński et al., *supra* note 6, at 591–92.

57. *Id.* at 594.

58. Petroleum Revenue Management Act § 2(1) (Act No. 815/2011) (Ghana), http://www.mofep.gov.gh/sites/default/files/reports/Petroleum_Revenue_Management_Act_%202011.pdf [http://perma.cc/737A-Y7J4]. The Bank of Ghana is a semi-independent government agency whose board of directors and governors are appointed by the President of Ghana in consultation with the Council of State. *About the Bank*, BANK OF GHANA (Feb. 7, 2011, 3:46 PM), http://www.bog.gov.gh/index.php?option=com_content&view=article&id=130%3Abank-of-ghana&catid=64&Itemid=137 [https://perma.cc/SV7Y-TSQC]. The Bank is primarily responsible for controlling the Ghanaian currency, regulating the financial sector, and serving as banker and financial advisor to the Ghanaian government. *Id.*

59. Kopiński et al., *supra* note 6, at 599–600. This system drew inspiration from the examples of Norway and Trinidad and Tobago. *See infra* Parts II.B, II.D.

60. *Id.* at 600.

61. *Id.* at 600 n.63.

62. *Id.* at 600.

63. *Id.*

revenues for the coming year—the Benchmark Revenue—70 percent of which then constitutes the ABFA.[64] At the end of the year, all actual excess revenues are then divided between the Stabilization Fund and Heritage Fund at 70 percent and 30 percent respectively.[65] The Ghana Revenue Authority oversees and regulates the allocation of these funds.[66] Moreover, the government has set up the Public Interest and Accountability Committee (PIAC) to monitor and evaluate the government's petroleum-revenue collection and management, and to ensure that the public is well informed of how the government is doing so.[67]

C. The Persistent Risk

The existing framework looks attractive but does not fully address the risks of the resource curse present in Ghana and leaves the nation vulnerable in certain respects. The PRMA does not do enough to pull money out of the oil industry to combat the macroeconomic aspect of the resource curse or, most importantly, to combat poverty—the very reason for the initial jubilation.[68] Additionally, the oversight and governance regimes do not appear to be functioning properly and threaten to exacerbate the dangers of the resource curse rooted in political economy. Indeed, the outstanding democratic progress made by Ghanaians needs to be further complemented by a petroleum revenue-management regime that will curb the risk of poverty, mismanagement, and macroeconomic weakness.

1. *Revenue Projection and Maintenance.* Although the petroleum revenue-allocation process may seem relatively straightforward and transparent, major questions and risks surrounding this process still persist. One element that remains unclear is the process by which Ghana reaches its annual oil-price assumption in calculating the Benchmark Revenue (and, thus, the ABFA).[69] That assumption is the

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64. *Id.*

65. *Id.*

66. *Id.* at 594–95.

67. *Id.* at 596–97.

68. *See supra* notes 1–6 and accompanying text.

69. GARY, *supra* note 2, at 45; *see also* PUB. INTEREST & ACCOUNTABILITY COMM., REPORT ON MANAGEMENT OF PETROLEUM REVENUES FOR YEAR 2012: ANNUAL REPORT, at vi (2012), http://www.piacghana.org/2012%20PIAC%20Annual%20Report.pdf [http://perma.cc/

key variable that could allow the Ghanaian government to seriously under- or overfund itself. The government has thus far not fared very well in projecting oil revenues that are reasonably close to the actual revenues.[70] The risks associated with overfunding are thus particularly acute given that the national budget lacks the capacity to absorb windfalls: the budget could handle an additional US$250–300 million, "but 'nothing like $400 million to $500 million.'"[71] That lack of absorptive capacity is one strong reason why oil funds outside of the government budget were needed.[72]

Ghana must carefully manage its petroleum revenues to ensure that it is able to achieve serious development on a long-term basis and to overcome widespread poverty. Under the current system, this specifically requires government planners to avoid the problems of absorptive capacity by projecting petroleum revenues accurately[73] and to ensure that the Heritage Fund can produce sustainable returns.[74] Satisfying both of these requirements is, however, extremely difficult

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HRB9-5QAM] [hereinafter 2012 ANNUAL REPORT] (recommending that the Ministry of Finance disclose such assumptions).

70. *See* 2014 ANNUAL REPORT, *supra* note 20, at 27–28 (underestimating revenues); 2013 ANNUAL REPORT, *supra* note 11, at 16 (underestimating revenues); 2012 ANNUAL REPORT, *supra* note 69, at 13 (overestimating revenues); PUB. INTEREST & ACCOUNTABILITY COMM., REPORT ON PETROLEUM REVENUE MANAGEMENT FOR 2011: ANNUAL REPORT 10 (2011), http://www.piacghana.org/PIACREPORT2011.pdf [http://perma.cc/3PGJ-B67W] [hereinafter 2011 ANNUAL REPORT] (overestimating revenues).

71. GARY, *supra* note 2, at 45. When a government lacks absorptive capacity, it often means that a government lacks enough economically viable projects to fund, or it lacks the staffing (both in quantity and quality) adequate to manage such a project. ROMEO A. REYES, ABSORPTIVE CAPACITY FOR FOREIGN AID 35–36 (1990), http://pdf.usaid.gov/pdf_docs/PNABE619.pdf [http://perma.cc/P9ZQ-9W4T]. Even if the government might be physically capable of spending its money, absorptive capacity includes an assessment of the government's ability to oversee such an expenditure so that the funds are not wasted or siphoned off through graft. *See id.* at 37–38 ("To ensure financial accountability in the use of foreign aid, the auditing office would need to regulate its use by prescribing certain accounting and auditing rules and regulations.").

72. *See* GARY, *supra* note 2, at 45 ("[I]t would appear that significant sums would have to be put into an oil savings or stabilization fund to avoid absorptive capacity problems.").

73. *See supra* note 70 and accompanying text. If a government is unable to absorb money into its budget, it effectively means that the government does not have the ability to spend or invest it, which prevents its citizens from realizing any immediate benefit from it. *Cf.* GARY, *supra* note 2, at 45 (noting that Gabon, a longtime producer, has high spending on social services in comparison with other African countries).

74. *See* Sony Kapoor, *Investing for the Future: Good for Norway – Good for Development* 20 (Nor. Church Aid, Discussion Paper 01, 2013), http://www.re-define.org/sites/default/files/sites/default/files/images/ReDefineReportonNorwaySWF.pdf [http://perma.cc/M74R-3RYD] (providing that sovereign-wealth funds need to generate sustainable returns at or above the level budgeted by the government).

and has proved problematic for Ghana so far. The Ghanaian government has had serious trouble accurately projecting its petroleum revenues, which prevents optimal utilization of those funds. The projections' best showing was in 2012, but this was still off by GHS 250 million (approximately US$78 million) of the actual amount of petroleum revenues, which resulted in an approximately 15 percent shortfall for the ABFA.[75] Figure 1 below demonstrates the historical difficulty the Ghanaian government has had in projecting its petroleum revenues over the first four years of production by comparing projected and actual petroleum revenues. The PIAC has consistently criticized the government in its annual reports for failing to accurately and transparently project the Benchmark Revenue.[76] With the continuing extreme volatility in oil prices baffling budget projectors across the globe,[77] the Ghanaian government—as any government would—will likely continue to struggle to project its budget accurately. Indeed, when projecting its revenue for 2015, the government assumed a crude oil price of approximately US$99 per barrel.[78] Prices have since been in free fall: the price of crude sat around US$48 per barrel on September 11, 2015, and Goldman Sachs predicts that it could drop as low as US$20 per barrel in the near future.[79] Although the Ghanaian Minister of Finance has taken the commendable step of revising the budget projections down since his

75. *See* 2013 ANNUAL REPORT, *supra* note 11, at 23 (underestimating petroleum revenues by approximately GHS 453 million); 2012 ANNUAL REPORT, *supra* note 69, at 13, 16 (overestimating petroleum revenues by approximately GHS 260 million, resulting in a roughly GHS 100 million shortfall of the GHS 614 million ABFA); 2011 ANNUAL REPORT, *supra* note 70, at 11 (overestimating petroleum revenues by approximately GHS 583 million).

76. 2014 ANNUAL REPORT, *supra* note 20, at 32; 2013 ANNUAL REPORT, *supra* note 11, at xiii; 2012 ANNUAL REPORT, *supra* note 69, at vi; 2011 ANNUAL REPORT, *supra* note 70, at viii.

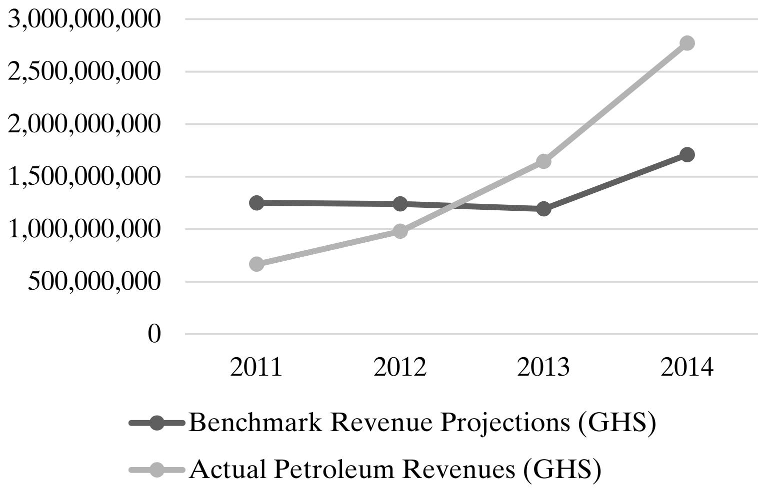
77. *See* Isabella Cota, Eric Martin & Carlos Manuel Rodriguez, *Mexico Dodged Oil-Price Rout After Big Banks Provided Hedges*, BLOOMBERG BUS. (June 11, 2015, 2:39 PM), http://www.bloomberg.com/news/articles/2015-06-11/mexico-beat-oil-price-rout-as-bankers-took-other-side-of-hedge [http://perma.cc/85R3-72TB] (describing how Mexico, a petroleum-revenue-dependent state, used derivative contracts to avoid some of the crash in oil prices affecting government revenue); Chris Giles, *Oil Rout Would Have Wrecked an Independent Scotland's Finances*, FIN. TIMES (Dec. 21, 2014), http://www.ft.com/intl/cms/s/0/d97d49ce-877d-11e4-bc7c-00144feabdc0.html [http://perma.cc/QV35-KZWP] (noting that the uncertainty and volatility in oil prices makes it incredibly difficult to project government oil revenues, and this difficulty imposes significant risks on economies like Scotland that rely heavily on oil revenues).

78. 2014 ANNUAL REPORT, *supra* note 20, at 55.

79. *Oil Prices "Could Sink to Near $20," Warns Goldman*, FIN. TIMES (Sept. 11, 2015), http://www.ft.com/fastft/390471/oil-prices-could-sink-near-20-warns-goldman [https://perma.cc/8PD5-T4PB].

initial projections,[80] this nevertheless highlights the struggle that any government faces when trying to forecast commodities revenues. The notoriously perilous process of projecting oil revenues makes it difficult for Ghana to manage this income stream in an optimally efficient manner, which, coupled with a lack of transparency, suggests that Ghana may have problems combating the resource curse.[81] These difficulties unfortunately hint at the very struggle that often characterizes the resource curse: managing and investing natural-resource rents.[82]

Figure 1. Projected v. Actual Ghanaian Petroleum Revenue[83]



Although it may seem that the current regime at least hedged the risk that it might not be able to efficiently spend and invest its budget through the use of the petroleum funds, those funds have not generated steady returns.[84] The returns are so low, in fact, that it will be virtually impossible for them sustain future generations without

80. 2014 ANNUAL REPORT, *supra* note 20, at 56.

81. Governments in resource-rich countries need to have a very effective revenue-projection system, not only in order to efficiently allocate resources, but also to avoid an all-out breakdown in fiscal responsibility. GARY, *supra* note 2, at 11 ("With booms often comes dramatically increased, and unsustainable, public spending based on unrealistic revenue projections.").

82. *See supra* notes 27, 29 and accompanying text.

83. *See supra* note 70.

84. *See infra* Figures 2–3.

drawing down the principal, which, naturally, defeats the funds' long-term viability. As Figures 2 and 3 demonstrate, although the book value of both funds has been growing at a frantic rate, on average more than 99 percent of this growth has been from contributions of new oil revenue and less than 1 percent from return on investment. With a nominal annualized rate of return of only 1 percent in 2014,[85] the Ghanaian funds likely rank among the worst performing sovereign-wealth funds in the world. Norway's fund was recently criticized for bringing in a nominal annualized rate of return of 5.25 percent.[86] Successful funds have generated significantly higher annualized rates of return than Ghana's: Abu Dhabi's fund has returned 7.7 percent, China's 5.02 percent, and one of Singapore's 4 percent.[87] As the PIAC has noted,[88] Ghana's petroleum funds are not earning sufficient returns to provide a viable source of income for future generations. Ghana's existing system for managing petroleum revenue does not fit the nation's need for sustainable development and poverty reduction, as it makes it difficult both to project revenue for purposes of efficient spending and to earn meaningful returns on its fund investments.

85. *See infra* Figures 2–3.

86. Kapoor, *supra* note 74, at 29.

87. *Id.* at 35. This is the Singapore Foreign Exchange Reserve Fund, which is among the more conservatively managed funds and still manages to greatly outpace the Ghanaian fund. *Id.*

88. *See* 2013 SEMI-ANNUAL REPORT, *supra* note 4, at 4 (noting that, because a lack of high returns has caused concern, "[t]he Government must release the Policy and Guidelines to assist the Fund Managers to better manage these funds as required by the [Petroleum of Revenue Management Act of 2011]"); Press Release, Pub. Interest and Accountability Comm., Statement by the Public Interest & Accountability Committee (PIAC) on the Current Debate on the Ghana Heritage Fund, at 2 (May 7, 2014), http://www.piacghana.org/pstatement.pdf [http://perma.cc/3MPC-GWWD] [hereinafter *PIAC May 2014 Press Release*] (arguing that the Heritage Fund should invest in "low-interest earning but safe investments for the long-term instead of high-yielding, gilt-edged securities which invariably are volatile"). Although protecting principal is undoubtedly important, the Heritage Fund cannot ignore yields altogether if it wishes to achieve sustainable status. The fund must at least outpace inflation to an extent that allows Ghanaians the ability to eventually withdraw from the fund without depleting its principal balance.

Figure 2. Ghana Stabilization Fund (US$)[89]

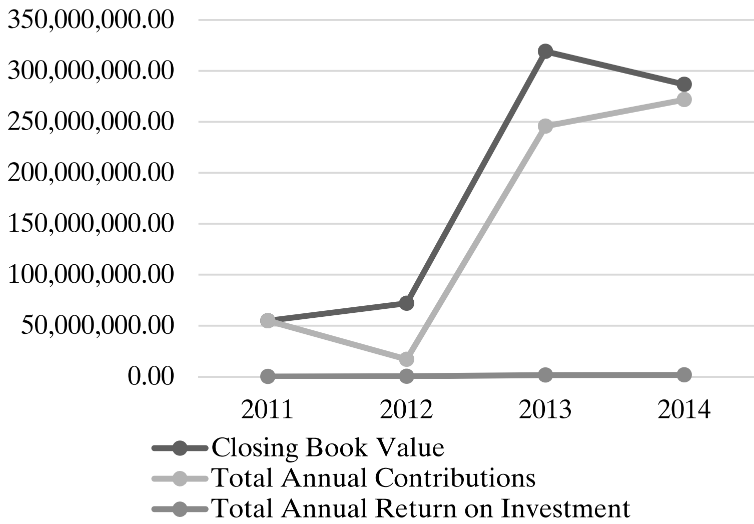
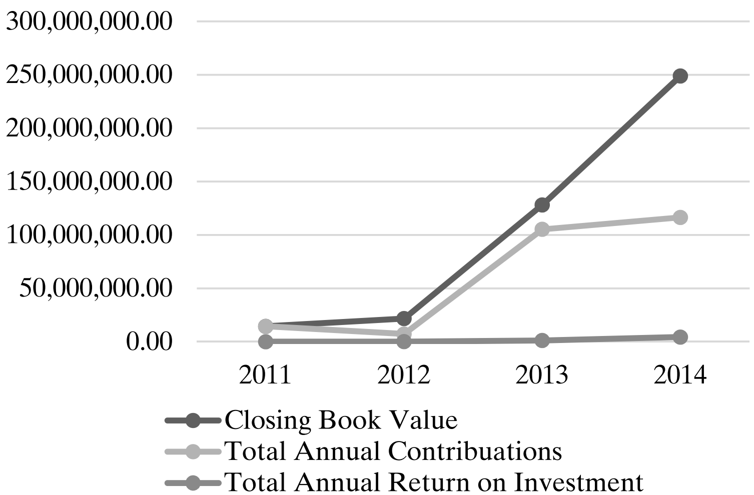


Figure 3. Ghana Heritage Fund (US$)[90]



89. 2014 ANNUAL REPORT, *supra* note 20, at 50; 2013 ANNUAL REPORT, *supra* note 11, at 48; 2012 ANNUAL REPORT, *supra* note 69, at 22–23; 2011 ANNUAL REPORT, *supra* note 70, at 29. Note that the decline in book value of the Stabilization Fund is due to government withdrawals during 2014. *See supra* note 28 and accompanying text; *infra* notes 91–93 and accompanying text.

90. 2014 ANNUAL REPORT, *supra* note 20, at 50; 2013 ANNUAL REPORT, *supra* note 11, at 48; 2012 ANNUAL REPORT, *supra* note 69, at 23; 2011 ANNUAL REPORT, *supra* note 70, at 29.

2. *Fund Protection.* In addition to engendering economic inefficiencies, the current system of allocating petroleum revenues between the government budget and the petroleum funds poses problems of political economy indicative of the resource curse. Consistent with Ghana's historical tendencies toward overspending and pork-barrel politics, it appears that the petroleum funds are tempting politicians who are hungry to access the hundreds of millions of dollars locked within them. For example, four years into the Heritage Fund's existence the General Secretary of the ruling NDC party, Johnson Nketia, has already proposed drawing it down[91] notwithstanding the fact that the law creating it specifically allows for the government to access the funds only "[w]ithin one year after petroleum reserves are depleted."[92] It appears that some Ghanaian politicians want to flout the avowed object of the Heritage Fund: to "provide an endowment to support the development for future generations when the petroleum reserves have been depleted."[93] Though the PIAC has publically condemned proposals to prematurely deplete the funds,[94] the risk of such depletion remains a source of concern given the possibility of the resource curse and symptoms like the voracity effect.[95]

Despite the PIAC's protests, parts of the Ghanaian government have already demonstrated a willingness to undermine the long-term viability of the fund system. In May 2014, the Minister of Finance blatantly violated the PRMA by retroactively capping the Stabilization Fund at US$250 million and withdrawing the excess of approximately US$176 million.[96] Of that money, US$16 million was placed in a "Contingency Fund" and the remaining US$159 million

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91. *Asiedu Nketia: Heritage Fund Makes No Sense, Let's 'Chop' It Now!*, EXPOSEGHANA.COM (May 2, 2014), http://exposeghana.com/2014/05/asiedu-nketia-heritage-fund-makes-no-sense-lets-chop-it-now [http://perma.cc/92GB-4EZM]; *see also PIAC May 2014 Press Release*, *supra* note 88, at 1 (rejecting such a proposal as contrary to Sections 13 and 20 of the Petroleum Revenue Management Act).

92. Petroleum Revenue Management Act § 2(1) (Act No. 815/2011) (Ghana), http://www.mofep.gov.gh/sites/default/files/reports/Petroleum_Revenue_Management_Act_%202011.pdf [http://perma.cc/737A-Y7J4].

93. *Id.* § 10(2)(a).

94. *PIAC May 2014 Press Release*, *supra* note 88, at 1.

95. *See supra* note 28 and accompanying text.

96. Press Release, Pub. Interest & Accountability Comm., Position of the Public Interest and Accountability Committee (PIAC) on Placement of Cap by the Minister of Finance on the Ghana Stabilisation Fund (Aug. 7, 2014), http://www.piacghana.org/PressStatementII.pdf [http://perma.cc/M6Z8-9BWY].

was used to repay some of Ghana's debts.[97] The law does grant the Minister of Finance the authority to cap the Stabilization Fund, but the statute's text does not suggest that such authority applies retroactively.[98] Moreover, although the Minister might have prospectively kept excess petroleum revenues from being deposited into the Stabilization Fund, once money is actually in the Fund it may only be transferred out "for the purpose of alleviating shortfalls in actual petroleum revenue."[99] Thus, Ghana's petroleum funds might seem like mechanisms for protecting some of the Ghanaian people's oil wealth from the reach of the government in order to avoid the corruption, mismanagement, and abuse of power that erode democracy in resource-cursed countries, but the funds' legal framework does not adequately alleviate these concerns. Examples like these indicate a lack of fiscal discipline, which could enable corrupt behavior. Indeed, some politicians may "see these funds as a panacea or substitute for strong public financial management systems and policy frameworks."[100]

Concerns about fiscal discipline also extend to the ABFA. To the government's credit, the PIAC provides a significant amount of transparency in how the ABFA is allocated in the budget.[101] However, transparency as to what sector of the government or what projects the money is going to does not necessarily reduce the risk of corruption, and the benefits of transparency are undermined by a lack of properly incentivized oversight. For example, "[t]he Serious Fraud Office has been underutilized and under-resourced and currently needs the approval of the attorney general to approve investigative cases."[102] The Nigerian example shows that lack of strict oversight can lead to corruption of state officials, especially those involved in the

97. *Id.*

98. The relevant portion of the law reads, "The accumulated resources of the Ghana Stabilisation Fund shall not exceed an amount recommended by the Minister and approved by Parliament . . . ." Petroleum Revenue Management Act § 23(3) (Act No. 815/2011) (Ghana), http://www.mofep.gov.gh/sites/default/files/reports/Petroleum_Revenue_Management_Act_%202011.pdf [http://perma.cc/2RQS-448J].

99. *Id.* § 12(5).

100. *See* GARY, *supra* note 2, at 46 (describing attitudes of governments around the world toward natural-resource funds, including budget-stabilization funds).

101. *See* 2013 ANNUAL REPORT, *supra* note 11, at 28–36 (providing data detailing the allocation and utilization of ABFA funds); 2012 ANNUAL REPORT, *supra* note 69, at 18–20 (same); 2011 ANNUAL REPORT, *supra* note 70, at 21–26 (same).

102. GARY, *supra* note 2, at 46.

petroleum industry itself.[103] Ghana would thus likely benefit greatly from a regime that incentivizes oversight.

3. *Enclave Economies.* The current petroleum revenue-management regime does not adequately address the resource curse's macroeconomic roots. Politicians are free to spend the ABFA however they like and are not committed to reducing the risk of developing an enclave oil economy, nor do they have the incentives to do so. From 2011 to 2013, the government allocated 10 percent of the ABFA to building petroleum production capacity, 20 percent to expenditures and amortization of the loans it took out to finance petroleum production, and 63 percent to roads and other infrastructure,[104] much of which went to energy infrastructure,[105] and much of which presumably went to the petroleum industry in some form or another.[106] Although it certainly makes sense that the petroleum industry will require extra capital as production ramps up, it should not come at the expense of spreading government money around to encourage growth in different sectors of the economy and to prevent the development of an enclave petroleum economy. The risks of an enclave economy are especially pronounced in Ghana, where an economy already over-reliant on commodity exports like gold and cocoa subjects the country to price fluctuations in the world market and makes it difficult to plan for development.[107] The problem is that government officials lack incentives to redirect ABFA money to other sectors of the economy. It makes logical sense for a politician, who is presumably not going to be in office much longer than the twenty- to thirty-year production window, to focus entirely on building up Ghana's capacity to make short-term gains. Doing so would maximize the amount of money she can put to use while she is still in office. Such concerns about incentives are well founded, as current policy appears to favor just such short-term gains.[108]

103. *See supra* notes 42–43 and accompanying text.

104. 2013 ANNUAL REPORT, *supra* note 11, at 29.

105. *Id.* at 32–35.

106. Although it is difficult to track the dollars down with any degree of scientific exactitude through the publically available reports, it seems quite logical that much of the infrastructural investments would be to facilitate petroleum production, such as the provision of electricity, which is necessary for many elements of the productions process.

107. GARY, *supra* note 2, at 2.

108. *See supra* note 10 and accompanying text.

In fact, the legal regime that Ghana has adopted to manage its petroleum revenues carries too many perverse incentives that encourage the sort of behavior characteristic of the resource curse. Though it serves a legitimate purpose by insulating the government budget from price fluctuations in the global oil market, the Stabilization Fund reduces incentives to manage the budget responsibly. After all, this safety net, which apparently can be drawn down by the Minister of Finance whenever he wishes,[109] insulates politicians from immediate budget constraints that might otherwise prompt prudence. This problem is compounded by the fact that the government can obtain loans by collateralizing future oil production.[110] Furthermore, despite claims that it will not happen,[111] politicians have a strong incentive to spend ABFA money on patronage systems in order to maintain power, which is particularly troubling given the nation's tendencies toward pork-barrel politics. All of this foreshadows behavior indicative of the resource curse.[112]

It should be emphasized, however, that Ghana still has a strong, young democratic tradition, which helps to combat the resource curse.[113] Ghana has undertaken to provide transparency in the industry—that much of the data used in this Part was sourced from publicly available government reports speaks to the success of such transparency efforts,[114] as does the statutory declaration of transparency as a fundamental principle of petroleum-revenue management.[115] However, as alluded to above, the persistent difficulty is that the present legal regime does not adequately incentivize open and accountable governance going forward. As is common in

109. *See supra* notes 91–93 and accompanying text (discussing proposed withdrawals from the Heritage Fund).

110. Kopiński et al., *supra* note 6, at 592.

111. *Id.* at 587–88.

112. *See* Gyampo, *supra* note 1, at 7 ("[W]hoever won the election was going to have an 'ATM machine on his veranda . . . .'" (citation omitted)).

113. *See supra* note 32 and accompanying text.

114. However, this data is largely limited to financial reports and excludes operational information that is of great public importance, such as environmental impact reports, information about how the petroleum is marketed (to ensure Ghana is receiving top dollar), or how the assumed oil price is calculated for budgetary purposes. *See generally* 2013 ANNUAL REPORT, *supra* note 11 (reporting primarily on the budgeting and allocation of petroleum funds); 2012 ANNUAL REPORT, *supra* note 69 (same); 2011 ANNUAL REPORT, *supra* note 70 (same).

115. Petroleum Revenue Management Act § 49 (Act 815/2011) (Ghana), http://www.mofep.gov.gh/sites/default/files/reports/Petroleum_Revenue_Management_Act_%202011.pdf [http://perma.cc/2RQS-448J].

resource-cursed countries, when extractive industries pay into the government, wealth and power are increasingly concentrated in the government's hands.[116] In a nation like Ghana whose democratic strength is due largely to its network of civil-society organizations,[117] high levels of transparency are needed to allow these organizations to effectively check the government and counteract a concentration of power and wealth.[118] Although part of this can be remedied by making additional disclosures—such as of the signed contracts with private companies like Kosmos, Tullow, or Anadarko[119]—this does not remedy the structural problem of incentives. Providing optimal levels of transparency is neither convenient nor desirable for Ghanaian leaders under the current system.

Indeed, perverse incentives are already eroding transparency. For example, the Ghana Extractive Industries Transparency Initiative was created to encourage transparency in the sector but actually provides little meaningful information and accountability.[120] Moreover, it is "difficult for citizens to hold government accountable for its management of the public's money" and "[o]pportunities for citizen participation in budget debates could be increased."[121] Input of civil-society organizations has also been largely circumscribed on matters of policy,[122] and the Ghanaian government already has a poor track record of allowing such organizations access to information,[123] which does not bode well for Ghanaian democracy.[124] Thus, Ghana's misaligned incentives cast considerable doubt on the democratic efficacy of its legal regime for managing its petroleum resources and facilitate the undisciplined, pork-barrel spending that may stop

116. *See supra* note 36 and accompanying text.

117. *See* Kopiński et al., *supra* note 6, at 591 (highlighting the role of civil-service organizations in creating oil policies).

118. *See, e.g.*, Arthur, *supra* note 12, at 122 ("[T]he absence of political transparency and accountability, coupled with the high incidence of corruption, have all combined to undermine the ability of the various levels of government in a country like Nigeria from putting in place policies and programmes that would contribute to the overall socio-economic development of the oil producing areas.").

119. GARY, *supra* note 2, at 30–31.

120. *See id.* at 15 (noting some of the Initiative's weaknesses, including its voluntary nature and that it does not cover disclosure of contracts).

121. *Id.* at 45.

122. Gyampo, *supra* note 1, at 6.

123. GARY, *supra* note 2, at 48.

124. *See* Gyampo, *supra* note 1, at 7 (noting a threat to Ghanaian democracy from this trend).

Ghana from addressing the macroeconomic roots of the resource curse.

The current legal regime that Ghana has adopted for managing its petroleum revenues simply does not do enough to alleviate the risks of the resource curse. The structure of the Ghanaian regime facilitates rather than frustrates the macroeconomic and political economy roots of the resource curse. The Ghanaian system suffers from three main problems: (1) it fails to provide for sufficient economic development and poverty relief, (2) it does not adequately incentivize or facilitate strict oversight and control of the powers responsible for management of petroleum revenue, and (3) it does not provide an appropriate channel for passing the economic benefits of petroleum extraction to the rest of the economy. Though there are signs of hope in the Ghanaian system given its growing democratic strength, much of the problem is attributable to the government's attempt to institute a type of system that, although similar to systems effective in Norway and countries with similar levels of democratic accountability, is not feasible in Ghana. A strategy for preempting the resource curse in Ghana must take account of the country's limitations and strengths and focus on aligning incentives with good governance and social benefit from petroleum extraction.

II. ALTERNATIVE LEGAL REGIMES

Given that the current Ghanaian legal regime for managing petroleum wealth is insufficient to protect against the resource curse, this Part examines and compares systems from Alaska, Norway, Indonesia, and Trinidad and Tobago, which Ghana might consider implementing. None of these systems can be transplanted in its entirety to Ghana, as a solution must be tailored to the nation's political and socioeconomic realities. But the comparison nonetheless helps illuminate certain principles that a Ghanaian legal regime should embrace in order to defeat the resource curse: (1) the regime should include a constituency with the means and incentives to oversee and to keep in check whatever institution is empowered to manage petroleum revenues, and (2) it should also entail a high level of transparency to allow that constituency to effectively oversee and restrain the managerial institution.

A. Alaska

Beginning in 1967, the state of Alaska discovered substantial oil reserves beneath state-owned land, which gave rise to hefty rents for the government.[125] The Alaska legislature "decided that a portion of income from oil reserves and other natural resources should be invested to maximize long-term revenue from the state's natural resources, and in 1976 the Alaska Constitution was amended to establish the Alaska Permanent Fund."[126] The constitutional amendment requires that at least 25 percent of all state revenues from mineral extraction be invested in the Alaskan Permanent Fund (APF).[127] The APF is then managed by a state-owned corporation, the Alaskan Permanent Fund Corporation.[128] The Corporation must make income-producing investments according to the "prudent-investor rule," which requires it to use the care of an ordinarily prudent institutional investor.[129] This rule is especially important to the Alaskan legal regime because, since 1980, qualified Alaskan residents have been entitled to receive dividends from the fund.[130] In 2014, Alaskans received a dividend of US$1,884.[131] The amounts have fluctuated, but the dividend has not fallen below US$800 since 1988.[132]

The APF, especially the dividend program, appears to have been remarkably successful at combating the resource curse because it reduces the concentration of oil wealth in the hands of the state and gives Alaskans an incentive to ensure proper management of the Fund.[133] Indeed, one of the motivating factors for enacting the dividend program in the first place was the common perception that politicians had wasted large amounts of oil revenue.[134] The Alaskan government's mismanagement was facilitated by a lack of serious

125. Harrod v. Alaska Dep't of Revenue, 255 P.3d 991, 994 (Alaska 2011).

126. *Id.* (footnote omitted).

127. ALASKA CONST. art. IX, § 15.

128. *About the Fund*, ALASKA PERMANENT FUND CORP., http://www.apfc.org/home/Content/aboutFund/aboutPermFund.cfm [http://perma.cc/6S8S-F6MX].

129. ALASKA STAT. § 37.13.120 (2012).

130. *Harrod*, 255 P.3d at 994.

131. *Annual Dividend Payouts*, ALASKA PERMANENT FUND CORP., http://www.apfc.org/home/Content/dividend/dividendamounts.cfm [http://perma.cc/76WM-BXG7].

132. *Id.*

133. *See* Moss & Young, *supra* note 12, at 9 (noting that with the dividends, Alaska artificially created an empowered constituency interested in "responsible resource management").

134. *Id.*

political accountability for its use of oil revenues.[135] The dividend program solved this problem by "creating a political constituency for the Permanent Fund that did not previously exist."[136] In fact, some scholars have argued that receipt of Permanent Fund Dividends is premised on membership in the Alaskan political community.[137] The Alaskan system of oil-revenue management has been so successful that commentators have suggested that Ghana adopt a modified version of it through direct cash distribution of petroleum revenues, which would result in a payout of approximately US$50 per capita per annum.[138]

Although the proposition of a population-wide revenue-sharing scheme in Ghana is a potentially attractive solution to the resource curse (as will be addressed later),[139] it is not altogether clear that an Alaskan-style system will fit the Ghanaian context given the lack of a highly developed, longstanding democratic infrastructure. Of course, Ghana has made wonderful progress in developing democratic institutions;[140] it would be naive, however, to expect nascent institutions to respond positively to large influxes of cash. In Alaska, simply providing dividends was enough to establish a constituency with a vested interest in exacting proper management from a government that was a part of one of the world's most stable democracies.[141] The reform was thus operating from a much higher accountability and rule-of-law baseline than exists in Ghana. Indeed, even if the proposal were passed notwithstanding the retrenched interests of political factions seeking to retain a hold on oil wealth,[142] the example of the PIAC suggests that government administration of such a program would be significantly hampered by institutional weaknesses.[143] Simply put, Ghanaian citizens are unlikely to exact sufficient accountability from an Alaskan-style fund managed

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135. *Id.*

136. *Id.*

137. *See* Christopher L. Griffin, Jr., *The Alaska Permanent Fund Dividend and Membership in the State's Political Community*, 29 ALASKA L. REV. 79, 81 (2012) (arguing that dividend receipt is related to membership in the state's political community).

138. Moss & Young, *supra* note 12, at 13–16.

139. *See infra* Part III.

140. *See supra* note 13 and accompanying text.

141. *See* Norman, *supra* note 32, at 176 (listing the United States among stable democracies).

142. Moss & Young, *supra* note 12, at 18.

143. *See supra* notes 85–97 and accompanying text.

through their elected representatives.[144] As such, a direct-distribution system based on the Alaskan model would not likely be of significant aid in helping Ghana to avoid the resource curse.

B. Norway

When Norway discovered large offshore oil reserves in the Norwegian Continental Shelf in the late 1960s and early 1970s, the government established a national petroleum company, Statoil, to develop the nation's offshore reserves.[145] Since 1985, Statoil has shared custodianship of the state's large participating equity interest in petroleum ventures with the State's Direct Financial Interest, a government entity.[146] In addition, the Norwegian government established a separate regulatory authority, the Norwegian Petroleum Directory, which was seen as crucial to avoid confounding the state's commercial and regulatory interests.[147] In 2001, the government gave up part of its stake in Statoil when the company went public, but it still maintains large participating interests in the oil reserves and the company.[148]

All the government's oil revenues are deposited in the Norwegian Government Pension Fund, the nation's massive sovereign-wealth fund, which is insulated from political interference and managed by independent government financial institutions such as the central bank.[149] Though the Norwegian government is allowed to set the Fund's investment policy,[150] the Fund is structurally insulated by a ban on collateralizing oil revenues to increase government borrowing capacity[151] and by a requirement that the Fund

144. *See supra* notes 91–103 and accompanying text.

145. Mike Olsen, Note, *The Future of National Oil Companies in Russia & How They May Improve Their Global Competitiveness*, 35 HOUS. J. INT'L L. 617, 634–35 (2013) ("Norway eventually chose [to create a state-owned company to represent its interests in petroleum] largely due to the fear that a private company would be in control of the nation's resources and its interests would primarily promote international capital.").

146. *Id.* at 637.

147. *Id.* at 636.

148. *Id.* at 639–41.

149. *See* NOR. MINISTRY OF FIN., THE MANAGEMENT OF THE GOVERNMENT PENSION FUND IN 2013, at 6 (2014), https://www.regjeringen.no/contentassets/5434cb3d2ff04441a21a2c9b1d55ea06/en-gb/pdfs/stm201320140019000engpdfs.pdf [http://perma.cc/G4VN-64ZQ] (outlining the basic goals, structure, and strategy of the fund).

150. *Id.*

151. Kopiński et al., *supra* note 6, at 592.

cannot have any pension liabilities associated with it.[152] Instead, the government is allowed to budget for an average annualized *real* return of 4 percent to be spent as it will in order to share the benefits of oil production with future generations.[153] Though it has had some hiccups along the way,[154] the fund is now earning huge returns and is the world's largest sovereign-wealth fund with holdings of US$820 billion.[155]

The Norwegian centralized-fund system for managing oil revenues has been remarkably successful, due primarily to the Norwegian government's overwhelming sense of public accountability. It provides an unparalleled level of transparency in the investment and use of its oil revenues and invests with a focus on social policy both in Norway and abroad, which has made the Fund the envy of the world and the enemy of the resource curse.[156] Indeed, political commitment to the notion of the fund as a communal resource for the good of the nation is reinforced by the nation's extensive managerial capacity, contributing to an environment of stability, growth, and prosperity—the antithesis of the resource curse: "The high level of transparency in political and bureaucratic processes reinforces the general trust in the integrity of politicians as well as in the professional skills of the civil service—few Norwegians would question the government's ability to manage Norway's oil rents in an honest and efficient way."[157]

Indeed, in a speech to stakeholders in Ghanaian petroleum, the Norwegian Minister of Environment, Erik Solheim, made it abundantly clear that his country's oil revenue-management regime is driven by such a spirit of accountability: "Our philosophy in Norway

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152. *About the Fund*, NORGES BANK INV. MGMT., http://www.nbim.no/en/the-fund/about-the-fund [http://perma.cc/CP2G-EL8M] (last updated Aug. 21, 2014).

153. Kapoor, *supra* note 74, at 25.

154. *See id.* at 33 (criticizing Norway's fund management for failing to produce a real rate of return above 4 percent before 2013); Alan Cowell, *Is Norway's Oil Pool Deep Enough? Aging Baby Boomers Loom Over a Fund Financed by Petroleum*, N.Y. TIMES, Jan. 1, 2005, at C1, C3 (describing political pushes to draw down the principal of the fund to finance various endeavors such as entrepreneurship or infrastructure and education investment).

155. Stanley Reed, *Rise in Stocks Leads to surge in Norway's Oil Fund Profit*, N.Y. TIMES, Mar. 1, 2014, at B6.

156. *See, e.g.*, Benn Eifert, Alan Gelb & Nils Borje Tallroth, *Managing Oil Wealth*, 40 FIN. & DEV. 40, 43 (2003) (arguing that Norway's Fund's transparency and social awareness make it the gold standard for sovereign-wealth funds); Delia Velculescu, *Norway's Oil Fund Shows the Way for Wealth Funds*, IMF SURV. MAG. (July 9, 2008), https://www.imf.org/external/pubs/ft/survey/so/2008/POL070908A.htm [http://perma.cc/MAR6-WWS3] (same).

157. Eifert et al., *supra* note 156, at 43.

is that the oil revenue belongs to the people of Norway. No one else."[158] Given this egalitarian and clearly successful model, it is no wonder that Ghana has actively sought to model its legal regime for management of oil revenues on that of Norway.[159]

Although Ghanaian officials agree with Solheim's egalitarian notion that "the oil revenue of Ghana belongs pure and simple to the people of Ghana,"[160] Ghana lacks the institutional capacity to implement such an ideal by means of the Norwegian model. As discussed at length in Part I, the Ghanaian attempt at instituting a Norwegian-style legal regime for managing oil revenues is foundering and has placed Ghana at risk of succumbing to the resource curse. The Ghanaian government has not placed sufficient trust in the Norwegian notion that radical transparency,[161] strict adherence to the letter of the law,[162] and full democratic accountability in the management of oil revenues culminate to promote a stable and sustainable oil economy.[163] Indeed, the Ghanaian government was unable to resist the urge to collateralize its petroleum proceeds,[164] with the resulting debt creating a threat of funds being used to mitigate increased budget deficits. Nor has the Bank of Ghana been able to catalyze the returns needed to make its funds sustainable.[165] Therefore, though Ghana can learn a great deal about ideals for governing petroleum revenues from Norway, an outright Norwegian system is simply not feasible for Ghana.

C. Indonesia

Unlike Alaska and Norway, Indonesia has been producing oil for well over one hundred years under Dutch, Japanese, and, as of independence in 1949, home rule.[166] Given the colonial context, Indonesia did not have the opportunity to develop any sort of legal

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158. BIG MEN, *supra* note 16.

159. *Gyampo*, *supra* note 1, at 8. As will be addressed *infra* Part II.D, Ghana has also drawn inspiration from Trinidad and Tobago.

160. BIG MEN, *supra* note 16.

161. *See supra* note 69 and accompanying text.

162. *See supra* notes 91–94 and accompanying text.

163. *See supra* notes 109–24 and accompanying text.

164. Kopiński et al., *supra* note 6, at 592.

165. *See supra* Figures 1–3; *see also supra* notes 70–82 and accompanying text (describing the Ghanaian government's struggle to accurately predict revenues and to create returns on its petroleum-fund investments).

166. Shannon Pallone, *Indonesia's Oil Crisis: How Indonesia Became a Net Oil Importer*, 10 J. INT'L POL. SOLUTIONS 1, 2 (2009).

regime for petroleum-revenue management until more than sixty years after reserves were discovered.[167] The government began by carrying a simple 50-percent participating equity interest in the reserves developed by private companies, but, in 1968, the government formed a national oil company, Pertamina, which has since dominated the Indonesian oil market and brought in substantial revenues.[168] With Pertamina in control of the oil industry and with virtually no transparency, Indonesian officials, by means of the nation's oil revenues, developed an extensive patronage system with alarming levels of corruption throughout the second half of the twentieth century.[169] The corruption subsumed what commentators have referred to as the policies of a "reformist autocracy," in which oil revenues were earlier spent to bring about measurable social gain.[170] The Indonesian technocrats ran the economy and used oil revenues to stabilize the food supply, reform the financial sector, invest in economic infrastructure, and diversify the economy, particularly through agriculture.[171] Indonesia has since stepped up its corruption investigation and enforcement in an effort to realize the substantial technocratic expertise that initially allowed the nation to flourish.[172]

Indonesia has also undertaken serious structural reforms of its oil revenue-management regime to improve its allocation of those revenues to their most beneficial uses. Beginning in the 1990s, Indonesia began implementing a large-scale natural resource revenue-sharing plan among the various levels of government and geographic regions, giving proportionately higher allocations to petroleum producing areas.[173] This de jure asymmetric program is

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167. *Id.*

168. *Id.*

169. *Id.* at 2–3.

170. Eifert et al., *supra* note 156, at 43.

171. *Id.*

172. Pallone, *supra* note 166, at 4.

173. Cut Dian Agustina, Ehtisham Ahmad, Dhanie Nugroho & Herbert Siagian, *Political Economy of Natural Resource Sharing in Indonesia* 2 (London Sch. of Econ. & Political Sci., Asia Research Ctr., Working Paper No. 55, 2012), http://www.lse.ac.uk/asiaresearchcentre/_files/arcwp55-agustinaahmadnugrohosiagian.pdf [http://perma.cc/37UR-NG5Q]. The levels of government are central, provincial, and district (local). *Id.* at 5. The central government still receives the lion's share of natural-resource revenues; however, the decentralizing program has given a substantial amount to the district governments as well. *Id.* At a geographic level, oil-producing regions receive 40 percent of all subnationally allocated oil revenues in proportion to their production levels, and another 40 percent is divided pro rata among all of the nonproducing regions. *Id.* at 14.

designed to combat the resource curse in two substantial ways. The first is reducing the risk of inter-regional conflict (and, hence, increasing political and economic stability) in a geographically and ethnically diverse nation by allowing different regions to see more of their perceived fair share of revenues generated through extraction on their land.[174] The second is that the revenue sharing increases government accountability by giving all constituents an incentive to ensure that the revenues are used most efficiently[175] and are tailored to the needs of specific communities via the local governments.[176] It is precisely the close relationship between the citizenry and their local governments that should boost awareness of and interest in the use of oil revenues.[177]

Although it remains too early to fully calculate the efficacy of Indonesia oil revenue-management reforms, especially in regard to efforts to combat corruption,[178] the structural reforms at least initially appear to be performing well. The district-level allocation system seems to be reducing inter-regional tensions,[179] and the accountability function seems to be doing well at least on a macro level.[180] However, as regards individual officials, accountability does not appear to have as much traction as the country is still mired in corruption.[181] Of course, patronage networks will take time to be dismantled given their long-standing status in Indonesia, so there may yet be hope that corruption will be eradicated, and an already-strong Indonesian economy will be able to truly soar and live up to its vast potential.[182]

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174. *See id.* at 6–7 (arguing that the asymmetric plan was instituted in direct response to calls for secession over the central government's perceived theft of regional resources).

175. *See id.* at 33 (discussing how increasing oil-revenue expenditure at the local level facilitates accountability for the use of oil revenues by local officials). Presumably, this logic extends up the chain of government as well. Just as it gives the citizenry an incentive to monitor local officials, so too would it provide an incentive for citizens to monitor revenue allocations made by the central government. Incentives for monitoring up the chain would also likely extend to the different levels of government, providing checks and balances to manage oil revenues.

176. *Id.* at 29–30.

177. *Id.*

178. *See* Pallone, *supra* note 166, at 4 (discussing the difficulties faced by increased efforts at combating corruption).

179. Agustina et al., *supra* note 173, at 6.

180. *See* WORLD JUSTICE PROJECT, *supra* note 13, at 102 (ranking Indonesia highly in constraints of government and government transparency).

181. *See id.* (ranking Indonesia in the bottom quartile for corruption).

182. *See* THE WORLD BANK, INDONESIA ECONOMIC QUARTERLY: SLOWER GROWTH; HIGH RISKS, at i–iv (Dec. 2013), http://www.worldbank.org/content/dam/Worldbank/document/

Given the strong technocratic base in Indonesia, that seems a real possibility.[183]

Although the Indonesian model—at least theoretically—has potential to provide a low-cost system for implementing structural protections from the resource curse, it will likely not be feasible or even desirable in Ghana. The Indonesian system addresses problems that Ghana does not have given the lack of local political infrastructure and of much inter-regional conflict. As a matter of fact, Ghana is a completely centralized state with no regional governments.[184] Indeed, regional[185] and local government is simply administered by agents of the central government at the pleasure of the Ghanaian president.[186] Thus, Ghana fundamentally lacks the sort of popular local and intergovernmental accountability that makes the Indonesian system attractive as a method of combating the resource curse. Such intergovernmental accountability could not realistically be implemented without a wholesale constitutional restructuring of the Ghanaian government. Moreover, a large part of what makes the Indonesian model a potentially effective means of combatting the resource curse is its ability to minimize inter-regional conflict—a manifest symptom of the resource curse in Indonesia which is not present in Ghana and that thus makes the Indonesian solution less relevant. Therefore, like the Alaskan and Norwegian models, the Indonesian model is not likely to offer much guidance to Ghana as it seeks to fight off the resource curse.

D. Trinidad and Tobago

Trinidad and Tobago was allegedly, in 1857, the site of the world's first productive oil well while under British colonial rule; unlike Indonesia, however, petroleum production did not become a

EAP/Indonesia/IEQ-Dec13-ENGLISH.pdf [http://perma.cc/2RA8-ETN3] (arguing that Indonesia should adopt policies to retain its high level of economic growth in order to reach its potential as a powerhouse economy in Southeast Asia).

183. Eifert et al., *supra* note 156, at 43 (describing Indonesia's history of leveraging bureaucratic expertise to spend oil revenue efficiently and effectively).

184. *See* Victor Essien, *UPDATE: Researching Ghanaian Law*, GLOBALEX (Jan. 2012), http://www.nyulawglobal.org/globalex/Ghana1.htm [http://perma.cc/JFL2-X5KD] (discussing Ghana's general legal framework).

185. FRIEDRICH-EBERT-STIFTUNG GHANA, THE STRUCTURE OF THE GHANAIAN STATE 6 (2011), http://library.fes.de/pdf-files/bueros/ghana/10504.pdf [http://perma.cc/MB7H-YTXW].

186. *See id.* at 8–9.

major part of its economy until its independence in the 1960s.[187] Independence put the country in much greater control of its petroleum resources, and, hence, its petroleum revenue, which amounted to half of all government revenues as of 2008.[188] The country uses multiple state-owned corporations, partnered with private investors, to develop its petroleum resources and to bring in the government's nontax revenue.[189] The Trinidadian government has long had a policy of plowing its petroleum revenues back into the economy, primarily to fuel additional exploration, production, and expansion of natural-gas exploitation.[190] Though this government-led investment model remains in place, the government began implementing a fund-based system in 1999, first establishing the Interim Revenue Stabilization Fund and then, in 2007, the Heritage and Stabilization Fund—a fund designed to accomplish both national savings and budget stabilization.[191] The Heritage and Stabilization Fund has no mandatory funding amounts, only catching those revenues that happen to be in excess of the amount projected by the government for budgetary purposes.[192] The fund is managed by the Trinidadian central bank and the legislature is allowed to withdraw its funds if annual petroleum revenue falls below 10 percent of the budgeted projections.[193] Whether in the Fund[194] or in the expenditure

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187. Justine Ram, Distribution and Sustainable Development in a Natural Resource-Based Economy 12–13 (July, 2012) (unpublished Ph.D. thesis, London Sch. of Econ. & Political Sci.), http://etheses.lse.ac.uk/469/1/Ram_Distribution%20and%20Sustainable%20Development%20in%20a%20Natural%20Resource-Based%20Economy.pdf [http://perma.cc/7ZS9-G49L].

188. *Id.* at 13.

189. *Id.*

190. *See* Ronald Sanders, *Trinidad and Tobago: Time to Ease off the Gas*, GLOBAL: THE INT'L BRIEFING, http://www.global-briefing.org/2013/01/time-to-ease-off-the-gas [http://perma.cc/5Z3J-6GA9] (arguing that the Trinidadian government should abandon its practice of expanding its petroleum sector and instead invest petroleum rents in other sectors to diversify the economy).

191. Gregory McGuire, *Heritage and Stabilisation Fund: Did We Get It Right?*, *in* A REPORT OF THE TRINIDAD AND TOBAGO SUSTAINABLE DEVELOPMENT NETWORK (SDNTT) 88, 93 (Nov. 2009), http://thecropperfoundation.org/sdn/documents/Final_Guide.pdf [http://perma.cc/G6JH-SXJJ].

192. *Id.* at 94. To be precise, the government must deposit all revenues exceeding 10 percent of the projected levels and all amounts below 10 percent may be deposited at the discretion of the minister of finance. *Id.*

193. *Id.* at 95.

194. *See id.* ("[T]he rules provide for an annual audit by the Auditor General, as well as the submission of quarterly and annual financial statements to the Minister.").

of petroleum revenues in the national budget,[195] the government puts a strong de jure emphasis on transparency, requiring broad disclosures on finances as well as the financial interests of any government officials in the petroleum industry.[196]

As the similar names of its funds suggests, Ghana has also drawn inspiration from Trinidad and Tobago's regime for petroleum-revenue management,[197] but such reliance is likely misguided. Much of the Trinidadian success is premised on the expertise cultivated over decades of projecting and exploiting petroleum revenues, which is as of yet absent in Ghana. Moreover, the Trinidadian system is designed for a much smaller nation[198] with substantially larger hydrocarbon reserves[199] and substantially more per capita wealth,[200] which naturally suggests that it was designed with different priorities and to meet different objectives than might be best for Ghana.[201] As such, Ghana likely should not seek any further inspiration from the Trinidadian system.

Although none of these systems provide an off-the-shelf solution to Ghana's risks of the resource curse due to the different conditions prevailing in these countries, they do provide important lessons that inform the following proposal. Effective administration of petroleum

195. *See* Gregory McGuire, Dennis Pantin, Dale James & Navin Seeterram, *A Guide for Monitoring the Management of Oil and Gas Resources in Trinidad and Tobago*, *in* A REPORT OF THE TRINIDAD AND TOBAGO SUSTAINABLE DEVELOPMENT NETWORK (SDNTT), *supra* note 191, at 2, 62 (summarizing the laws mandating transparency in Trinidad and Tobago's oil-revenue scheme).

196. *Trinidad and Tobago: Resource Governance Index*, NAT. RESOURCE GOVERNANCE INST., http://www.resourcegovernance.org/our-work/country/trinidad-and-tobago [http://perma.cc/4TCT-S3LH].

197. Gyampo, *supra* note 1, at 8.

198. Trinidad and Tobago is a nation of approximately 1.2 million people. *The World Factbook: Trinidad & Tobago*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/td.html [http://perma.cc/TV3H-SKFZ] (last updated June 20, 2014) [hereinafter *T&T Factbook*]. Ghana has a population almost twenty-one times larger, at 25 million. *See supra* note 45 and accompanying text.

199. Trinidad and Tobago has reserves of approximately 728 million barrels of crude oil and 13.1 trillion cubic feet of natural gas. *Trinidad & Tobago*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/beta/international/analysis.cfm?iso=TTO [http://perma.cc/4TXY-D2H2] (last updated Oct., 2014). Ghana, on the other hand, has reserves of 615 million barrels of crude oil and only 769 billion cubic feet of natural gas. 2013 SEMI-ANNUAL REPORT, *supra* note 4, at 6.

200. Trinidad and Tobago's GDP per capita is approximately US$20,000, *T&T Factbook*, *supra* note 198, whereas Ghana's is US$3,500, *Ghana Factbook*, *supra* note 45.

201. For example, as one might expect of a wealthier nation, there is less need for the fund to serve as an independent generator of national wealth to support the public welfare. Indeed, it has been persuasively argued that the Trinidadian fund system subordinates the national-wealth objective to the budget-stabilization objective. McGuire, *supra* note 191, at 96–98.

revenues requires serious levels of transparency and monitoring in order to ensure that the funds are managed and spent appropriately and to avoid corruption. Indeed, to achieve such diligent monitoring typically requires either an institution with the kind of technocratic expertise and public charge of honesty as seen in Norway or Trinidad and Tobago, or parties with a clear and direct stake in the best administration of such funds, as in Alaska and Indonesia. Whether framed as public trust or public suspicion, effectively combatting the resource curse is premised on public confidence that those who manage their resources can and will be accountable for their success or failure.

III. THE IDEAL OF THE CITIZEN-SHAREHOLDER

What Ghana needs, therefore, is a system that gives Ghanaians the ability and incentive to keep account of the nation's oil revenues and ensure their use for public benefit and poverty reduction. Such a system should capitalize on Ghana's democratic spirit and expertise in the petroleum industry while guaranteeing that those national assets are protected by an honest and impartial government. This system would be best accomplished by drawing on principles from corporate law accomplishing widespread dispersion of the benefits of oil production, giving individuals a clear stake in the management of petroleum resources, providing transparent access to information needed to ensure proper management of those resources, and then actually giving interested parties a medium through which to effectively exact proper management.

Any legal regime that seeks to implement these principles in Ghana will have to be tailored to certain realities: the economy is largely based on commodity exports,[202] the democratic institutions in place are strong but still fledgling,[203] the government largely lacks the technocratic expertise and incentives to properly manage large amounts of excess capital,[204] and the GNPC has a great deal of expertise in managing oil reserves accumulated over decades of operation.[205] Both the political and economic risks of the resource curse can be mitigated through a system that keeps centralized

202. *See supra* note 47 and accompanying text.
203. *See supra* notes 12–13 and accompanying text.
204. *See supra* Parts I.C.1–2.
205. *See supra* note 2.

management directly accountable to the decentralized stakeholders,[206] provides those stakeholders economic benefits and incentives to remain engaged in governance and ensure a lack of corruption,[207] and mandates that stakeholders have full access to information.[208] In other words, Ghana should implement a system that resembles a corporation.

The Ghanaian government should leave its property rights in Ghanaian oil in the GNPC and divest itself of all of its shares in the GNPC, issuing them pro rata to all Ghanaian voters through the voter-registration channels. The Ghanaian people have a property interest in the nation's oil reserves, and this proposed system would allow them to bear the benefits and responsibilities thereof. Ghanaians would be entitled to receive the oil revenues through the dividend vehicle and to vote in elections for directors whose sole job would be to manage Ghana's oil. Directors would have disclosure requirements through a proxy system that would likely be strictly enforced by a jealous government, which, in turn, would allow the Ghanaian citizenry, keen on their own financial gain, to demand the most efficient use of funds. Money would thereby be pulled out of the oil sector and pumped into the economy writ large, allowing the Ghanaian people to invest their money in their own interests, which would reduce both poverty and the risk of an enclave oil economy.[209] Moreover, this would curb the government's overabundance of financial resources, incentivize it to manage its oil revenues more carefully, reduce the risk of corruption, and allow democracy to run properly.[210]

This regime could allow Ghana to reduce the comingling of politics and monetary gain by disaggregating them: governance (with politicians and regulators responsible to voters), and resource exploitation (with directors and managers responsible to citizen-shareholders). Because constituents of government and owners of Ghana's oil are one and the same, Ghana's use of a corporation would likely enhance democratic principles. Thus, the risks of the

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206. *Cf.* DEL. CODE. ANN. tit. 8, § 211(b) (2011) (requiring annual election of corporate directors).

207. *Cf. id.* § 170 (authorizing the issuance of corporate dividends to stockholders).

208. *Cf. id.* § 220(b) (granting shareholders the right to access corporate book and records).

209. *See supra* notes 131–33 and accompanying text (describing the individual benefits of Alaska's dividend payout system).

210. *See supra* notes 134–36 and accompanying text (noting the positive effects of Alaska's dividend-payout system on good governance and democratic accountability).

resource curse may be overcome by using the corporate form in tandem with democracy to increase popular control, transparency, and dispersion of petroleum rents.

Aside from the pragmatic justification that this corporate-law suggestion could help Ghana avoid the resource curse, there is a strong justification in the law of property as well. It is relatively uncontroversial to assert that the people of Ghana (as represented by their democratically elected government) own the nation's petroleum reserves. The warm reception to the Norwegian Minister of the Environment's assertion that the people of Ghana, like the people of Norway, own their country's petroleum resources makes this abundantly clear.[211] However, it is not necessarily obvious why title to these publicly owned resources should be vested in the government apart from the obvious practical reason that the government can efficiently represent the interests of all these "owners" as a party to a contract. Property rights, whether vested in an individual, family, or community, tend to be conceptualized in absolute terms,[212] which is often characterized as "dominion"[213] or the possession of "a bundle of legal relations—rights, powers, privileges, immunities."[214] So if the people of Ghana *own* their petroleum resources, why should their access to their bundle of rights be only tangential, through a government that has its own interests and might not be best equipped to manage their petroleum revenues effectively? Issuing shares would provide a much more efficient and fair means of recognizing the people's ownership of Ghana's petroleum by allowing everyone to share directly in the financial benefits of production, and by allowing for targeted voting aimed solely at the management of petroleum resources without other political considerations, which would make for more effective exercise of dominion over resources. It has already been persuasively argued that the international norm of permanent sovereignty over natural resources vests in peoples, not

211. *See supra* notes 158–60 and accompanying text.

212. *See* Frank K. Nyame & Joseph Blocher, *Influence of Land Tenure Practices on Artisanal Mining Activity in Ghana*, 35 RESOURCES POL'Y 47, 48 (2010) (describing how customary land holders, such as clan heads, hold absolute title to their lands on behalf of their people).

213. Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 331 (1980).

214. Arthur L. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922).

governments,[215] and that the resource curse is combatted by governments that grant strong individual property rights,[216] so issuing shares of the GNPC while leaving petroleum rights in the corporation is justified both under the law of property and as a matter of policy.

That a corporate board of directors is directly elected by shareholders would likely provide significant benefit to Ghana by helping to align the interests of managers with those of the people petroleum production is supposed to benefit.[217] This would help to counteract the risk of the resource curse by giving individuals a stake in the management of petroleum resources and by giving them a medium for exacting control. Under the current system, the GNPC is accountable to the government, which, in a sense, acts as proxy for the Ghanaian people.[218] However, the government has many conflicting incentives that produce the common symptoms of the resource curse, and is thus not optimally equipped to ensure that petroleum management inures to the benefit of the people.[219] Furthermore, it is logically more difficult for voters to keep institutions like the GNPC or the government itself accountable specifically for petroleum management when there are infinitely many other concerns which might influence voting decisions in general elections. By disaggregating the elections into votes for directors and votes for public officials, Ghanaian voters—these new citizen-shareholders—would not be forced to choose between candidates who might be best for their petroleum resources and those who might otherwise be best for the nation. This way, those whose interests are ultimately at stake would have direct say in the management of their resources, which would help reduce the significant agency costs that currently strain this resource-rich

215. Emeka Duruigbo, *Permanent Sovereignty and People's Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 49 (2006).

216. *See* Karol Boudreaux & Tiernan Mennen, *Reverse the Curse: How Can Oil Help the Poor?*, 93 FOREIGN AFF. 182, 183 (2014) (arguing that "strong property rights are critical to sustainable economic growth" because they empower individuals to live productively).

217. This would likely also entail a financial incentive for serving as a director, so that candidates would want to seek election by managing the revenues to the citizen-shareholders' benefit.

218. *See supra* note 2 and accompanying text.

219. *See, e.g.*, *supra* notes 49, 91–95 and accompanying text (noting Ghana's tendency towards pork-barrel politics and lack of sufficient limitations on spending from petroleum funds); *supra* notes 104–08 (recounting the incentives towards maximizing short-term profits while undermining any positive externalities which might accrue to the people of Ghana).

economy.[220] An additional benefit to the political economy of disaggregating voting in this manner would be a reduction in the importance of resource-related issues in the election of public officials, a reduction in the corrupting influence of oil, and a strengthening of Ghana's status as the brightest shining lodestar in Africa.

Ghana has the infrastructure to make such a system work. It has a pool of highly qualified and experienced professionals in the petroleum industry in the GNPC[221] who could serve on the board of directors. It has a sophisticated voter-registration and polling system,[222] which could be put to good use for registering GNPC citizen-shareholders and administering votes on directors, helping to reduce administrative costs and giving Ghana's people an effective medium for controlling their petroleum resources. Registering citizen-shareholders could be accomplished simply by issuing shares pro rata to all registered voters, which would have the further benefit of incentivizing voter registration. In addition to voting, corporate shareholders often keep management accountable by selling their shares, which requires a secondary securities market;[223] in this particular context, however, such infrastructure is neither necessary nor appropriate.[224] A major purpose of this proposal is to address the need for wide public participation in the management and benefits of petroleum resources. Fulfilling this purpose would require restrictions on transferability to keep the shares from concentrating in the hands of a concentrated group of wealthy buyers in urban centers.[225] Indeed,

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220. *See supra* Part II.

221. *See supra* note 2 and accompanying text.

222. *See generally* Representation of the People Law, PNDCL 284 (1992) (Ghana), http://www.ec.gov.gh/pndcl-284 [http://perma.cc/N2UX-J7M4] (detailing statutory procedures for registering voters and polling votes).

223. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 95 (1985).

224. It is useful here to reaffirm that this proposal does not suggest adopting a mirror image of a large corporation as might be familiar in the developed world. The circumstances of dealing with a nation's petroleum revenue are too unique for that. Rather, this proposal seeks to employ certain principles of corporate law to craft a solution to this public problem. Hence the term citizen-shareholder instead of simply shareholder.

225. Some might argue that absent free transferability of shares, the corporate analogy is not productive because it is so key to how corporations are run; however, it is important to remember that the formality of the corporate form provides additional benefits, which is why there are many closely held corporations that restrict alienation of shares. *See* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 273–74 (1986) (noting the common practice of restraining alienation of shares in close

this proposal is premised on the assumption that a corporate-law solution would provide citizen-shareholders an incentive to stay engaged in the voting process and exact best management of petroleum revenues.

A sort of proxy system will be necessary to reduce the administrative costs of voting and to help inform the voters about how the candidates align with citizen-shareholder interests.[226] Two main principles must be accounted for in such a proxy system in order to achieve the transparency needed to allow citizen-shareholders to effectively control their resources: avoiding hegemony of incumbents and ensuring widespread understanding of the key issues in any election.[227] These principles are necessary to avoid the retrenchment of leaders indicative of the resource curse and to facilitate the most efficient control exercised by citizen-shareholders. It would likely be most efficient and fair to make use of independent organizations like the PIAC to ensure full disclosure of the relevant issues on a widespread basis. Basic proxy disclosures provided by the PIAC could be complimented by the many NGOs active in Ghana,[228] in addition to individual candidates campaigning for election to the board. By injecting some independent and competing forces in the proxy-disclosure market, this system would likely help unseat poorly performing incumbents and to encourage widespread understanding. Preventing alienation of shares would force disclosure to rural citizen-shareholders the same as to urbanites, forcing candidates and organizations to consider how to overcome the problem of

corporations). Moreover, although concentrated ownership is commonly touted in America and elsewhere as one way of ensuring better corporate oversight given the incentives of passive investors to free ride on the efforts of others, these does not seem quite so relevant in this example where few Ghanaians are likely to have substantial, diversified investment portfolios and given the civic importance of oil. Transfer restrictions are well known as a matter of contract, *id.*, and securities regulation, *see, e.g.*, 17 C.F.R. § 230.502(d) (2015) (requiring that unregistered securities issued under Regulation D in the United States must include transfer restrictions). Using either method would likely be easy to implement in Ghana considering that the each share would be bound up with voter registration. *See supra* note 222 and accompanying text.

226. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 399–408 (1983) (arguing that voting and proxy systems are an integral part of the contracting that forms a corporation as shareholders seek to manage the agency costs associated with electing others to manage their assets).

227. The above comparative study implies a need for a countervailing force to restrain petroleum-revenue managers and for transparency in order to combat the resource curse. *See supra* Part II.

228. *See supra* note 51 and accompanying text.

widespread illiteracy in Ghana.[229] However it is ultimately structured, such a proxy system would help to provide the transparency needed to allow citizen-shareholders to hold management accountable to the best and most socially responsible use of petroleum resources and revenues.

The final component of this system is mandatory dividend distribution, which would help spread the benefits of petroleum widely throughout Ghana to avoid concentration of wealth and enclave economies, and to provide citizen-shareholders an incentive to exact good governance of petroleum revenues. Under this proposal, the GNPC board would be required to issue an annual dividend to its citizen-shareholders when its cash holdings surpassed a certain threshold. Payment of oil revenues directly to citizens is often seen as an important tool for combating the resource curse, and scholars have advocated direct cash contributions to the Ghanaian citizenry.[230] This is important because it takes the money out of the hands of the government, which may be corrupted by it, and instead puts it in the hands of ordinary citizens, on whose lives it would have a direct impact.[231] Pulling money out of the oil sector and putting it in the pockets of all Ghanaians reduces the risk of an enclave oil economy by enabling the people to spend or invest their money in whatever sector they choose. Moreover, adding a mandatory dividend to this corporate law proposal can further help to combat the resource curse by giving citizen-shareholders an incentive to vote and to ensure best management of petroleum resources—part of their livelihood depends upon it. When coupled with the robust, targeted governance system of the corporate form, the dividend should provide a highly effective means of curtailing the resource curse in Ghana, where democratic institutions are still growing.

There remains the issue of whether the Ghanaian government would actually accept such a proposal in which it cedes a major

229. *Cf. Ghana Factbook*, *supra* note 45 (noting a 76.6 percent literacy rate for Ghana). This is of course not to say that Ghana should legally mandate that shareholders be literate. Rather, it is simply an observation that literacy is necessary in order for disclosure and governance to be meaningful. Thus, this system could provide a structural inventive for overcoming illiteracy, or, at the very least, for finding effective means of transmitting information to the illiterate.

230. *See, e.g.*, Moss & Young, *supra* note 12, at 13 (recommending that Ghana adopt an Alaskan-style trust to pay dividends directly to citizens from oil extraction). Moss and Young suggest that this might be accomplished in several ways, including through a biometric-identification system, which is already within the Bank of Ghana's capability. *Id.* at 18–19.

231. *Id.* at 15–18.

portion of its revenue and power to another institution.[232] Although this may seem farfetched, Ghanaian leaders interested in good governance might be motivated by compelling policy rationales. First, it is important to note that the government would *not* be giving up sovereignty. By relinquishing its GNPC shares and leaving the corporation property rights in the nation's oil reserves, the government would give up ownership, not the right to regulate or tax. This is key because, with tax revenues on the line, the Ghanaian government would have an incentive to regulate the industry effectively and sustainably. Given the existence of a rival institution, the government would have an interest in exercising its sovereignty by jealously enforcing the proposed voting, proxy, and dividend rules; instituting a regulatory regime for oil extraction;[233] and ensuring full tax collection.[234] The government would still retain large petroleum revenues through corporate taxes[235] and would gain another large portion via personal income taxes, allowing it to build its taxation capacity. This would also reduce risks that Ghana might not be able to absorb excess capital or to get returns on its oil funds.[236] This regime would prove more beneficial to the government *and* people of Ghana alike by encouraging optimal utilization of oil revenues and by aligning incentives for sustainable democratic and economic growth through a regulated petroleum industry that is clearly separate from the government.

Therefore, in order to avoid the risks of the resource curse, Ghana should adopt the above corporate-law solution based in the ideal of the citizen-shareholder. This regime would eschew the risks of the resource curse by reducing the overall reliance on commodity

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232. The Ghanaian government might choose a middle-ground approach by issuing shares to its citizens, while retaining a stake in the company. This might be more palatable as it would still hold direct influence over the GNPC and have access to more petroleum revenues; however, this is not ideal, as it undermines the benefits of separating governance from petroleum production.

233. Ghana has not instituted a regulatory regime independent from the government's production interest. *See supra* notes 2, 9 and accompanying text. However, it is likely important to a sustainable petroleum economy, as seen in Norway. *See supra* note 147 and accompanying text.

234. One of the major symptoms of the resource curse is the tendency of resource-rich governments to put less effort into tax collection and other more sustainable sources of income in favor of relying on resource rents. *See supra* note 26 and accompanying text.

235. For example, in 2013, 25.63 percent of all government petroleum revenues came from corporate income tax on the private participants in the petroleum industry. 2013 ANNUAL REPORT, *supra* note 11, at 21.

236. *See supra* Figures 1–3.

exports and the risk of corruption and facilitating economic and democratic development by aligning the incentives of those in charge of petroleum with those of the people. Ghana has the infrastructure needed to make this work, and the introduction of a strong institutional rival to the government would incentivize better regulation and taxation of petroleum revenues while building on the democratic institutions that have made Ghana the envy of Africa.

CONCLUSION

The jubilation attending Ghana's discovery of large oil reserves has overshadowed the risk that the nation might succumb to the resource curse, and, to some extent, this is rightfully so. Ghana is one of the world's most promising democracies and has put in place a system for managing its petroleum revenues. Much can and should be made of Ghana's promise and capabilities, and this is precisely why Ghana needs a legal regime for managing petroleum revenues that is tailored to its strengths, but is also keenly aware that Ghana is still a young democracy with serious poverty problems and an economy rendered fragile by its reliance on commodity exports. The right system is needed to ensure that Ghana is able to fulfill its promise as a prosperous and stable democracy.

Sadly, the current system falls short in this regard and leaves Ghana exposed to the curse. This Note proposes a solution by drawing on principles of corporate law. This proposal, based on the ideal of the citizen-shareholder, draws on the efficiencies and incentives of the corporate form to foster sustained economic and democratic growth. By separating the government from direct participation in petroleum production and by giving the public a direct stake therein, Ghana can avoid the resource curse and remain a model for African democracy.