The Eni-Vitol – Ghana Arbitration: A Total Embarrassment!

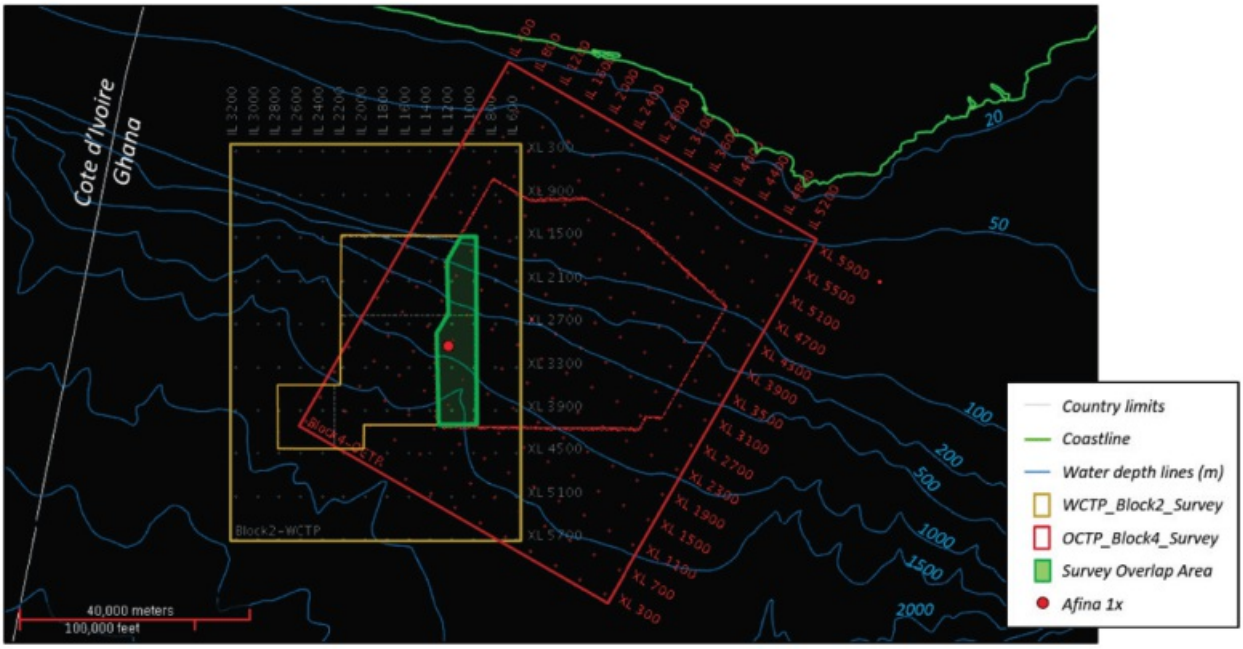
The Attorney General of Ghana is trying desperately to spin serious embarrassment to the Republic of Ghana in an international tribunal using all the tools in his propaganda toolkit.

On 16th August 2021, two investors in Ghana's petroleum sector, Eni (an Italian multinational) and Vitol (a Swiss multinational) filed notice under the UNCITRAL rules of their intention to jointly pursue international arbitration in response to directives issued to them by the government of Ghana that they felt breached their petroleum agreements with the country. Eni-Vitol had come to the conclusion that the political context in which these directives were issued made it impossible for them to obtain fair hearing and justice in the domestic jurisdiction.

The origin of the controversy

The government of Ghana had ordered them to merge their oil field, which had been successfully producing oil for a number of years, after investments exceeding $6 billion, with an oil block next door that has never produced oil and seen in total roughly $100 million of investments.

Furthermore, the government wanted Eni-Vitol to also hand over roughly 55% of the combined entity to the owner of the said oil block next door. Ghana's domestic laws allow the government to do this. However, petroleum exploration and production constitute an international domain in which certain global business and technical logics operate and have operated for many decades.



Base map showing the two side by side petroleum blocks at the center of the dispute.

Whilst the Ghanaian courts have been focused purely on what the law allowed the government to do, and were inclined to rely on the curious technical testimony of the country's national oil company (GNPC), the truth of the matter is that there are international standards in these matters and any investor coming into any country to invest billions of dollars will ensure that they also have the protection of international law and technical regimes. Given the sheer amount of money they stood to lose (reckoned in billions of dollars), it came as no surprise when Eni-Vitol decided to take their case internationally.

We have discussed the issues at length elsewhere

In a previous essay on this site, I have chronicled carefully the history of the controversy in significant detail. In another essay I laid out the basis of my argument that GNPC's technical testimony in this instance was procured by political pressure as it simply didn't hold water.

As the reader would no doubt notice from these essays, civil society organisations (CSOs) in Ghana engaged in the petroleum sector, especially IMANI and ACEP, have exhaustively examined the matters in the controversy and, with deep patriotic concern, warned the government that its actions in the attempted forced "unitisation" of the two offshore petroleum sites **are completely against the national interest**. In this short essay, we shall show why the tribunal's final decision given this week, and the consequences of the unjustified "forced unitisation" directives, are all highly embarrassing for Ghana and completely detrimental to the country's reputation and economic position.

The case against the government of Ghana

When Eni-Vitol filed its arbitration notice, the government of Ghana initially didn't even bother to submit a detailed response.

> An overview of the dispute is set out at section 5.1(A) of the Terms of Appointment. The Respondents elected not to submit a response to the Notice of Arbitration or to provide a summary of their position in the Terms of Appointment. This is despite the Respondents having all the information necessary to explain both the basis upon which Ghana issued the Purported Directives and the Respondents' motivations for seeking unlawfully to force the Claimants to enter into an unjustified unitisation of the Sankofa Field and the Afina Discovery.

Eni-Vitol nonetheless proceeded to present their joint statement of claim. At the heart of their case is the simple fact that Ghana is trying to force them to merge a highly valuable, and proven, oil field with another one that has not yet been properly assessed, to international standards, in order to determine if there is even any oil in place.

> 11. This case concerns an unjustified attempt by Ghana, facilitated by GNPC, to impose a unitisation of the Sankofa Field with the Afina Discovery without first satisfying the mandatory preconditions for the imposition of unitisation terms under Ghanaian law, international law or best international oilfield practice, and in breach of the Petroleum Agreement.
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> 12. In particular, no appraisal has been carried out of the Afina Discovery and only limited data is available (the "**Afina Data**"). The Claimants' analysis of the Afina Data, supported by the expert evidence of Mr Wilks, shows that two central requirements for unitisation – of dynamic communication across the contract area boundary, and of commerciality – have not been met.
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> 13. Moreover, the unitisation terms that Ghana has sought to impose upon the Claimants bear no correlation to the (albeit limited) data that does exist. Despite all the evidence suggesting that the Afina Discovery is unlikely to be capable of producing oil at commercially viable rates, those terms unjustifiably seek to transfer a majority interest in the Sankofa Field to the WCTP2 partners.[1] The Claimants are not opposed to unitisation in principle, where a technical case is made out. However, that is not the case here and, in any event, any unitisation process would need to comply with the Claimants' rights under the Petroleum Agreement, Ghanaian law and international law.

In the circumstances, such an attempt amounts to a pure ruse to seize a large part of a highly lucrative asset and hand it over to another business without any sensible foundation. International law frowns on unjust expropriation of foreign-owned assets under different guises.

If the government was genuinely interested in merging the fields purely because it wishes to improve efficiency, it would first focus on ensuring that the other business owning the "greenfield" block undertakes the proper technical investigations to confirm if indeed there is oil on that block, and what quantity exactly. **This is at the heart of the whole matter**.

184. In the present circumstances, given the brownfield-greenfield nature of the unitisation (which is rare in practice), satisfying the optimum petroleum recovery requirement in Section 34 of the 2016 Petroleum Act also necessitates the analysis and consideration of the impact of the brownfield operations that are already in place. The OCTP Project is operated on the basis of an approved plan of development (covering both oil and gas on an integrated basis), which was created to optimise extraction of hydrocarbons from that specific area, rather than from any Unit involving the Afina Discovery. This objective is reflected in the Sankofa Field infrastructure, wells positioning, facilities design, and hydrocarbons produced to date. These factors (and the significant costs of adjusting them, to the extent possible) will have an impact on whether unitisation serves the purpose of optimising oil recovery from a single accumulation straddling the boundary, even if dynamic communication were to be proven.

In fact, carefully analysed from that perspective, **Ghana itself STOOD TO LOSE** if a merger was forced between a lucrative and fertile oil block and a potentially infertile and valueless one since the merger will affect Ghana's own holdings in both blocks, which were not uniform at the time of the proposed merger.

In my earlier essay, referenced above, I lay out the various scenarios in which both Eni-Vitol and Ghana would lose massive amounts of money if the unitisation proceeded. The only beneficiary would have been the owner of the block next door, the optimistically named "Afina field". The question that has never been properly addressed is why the government of Ghana was willing to go to such lengths to benefit the Afina owners, even to the detriment of its own economic position and international reputation.

In light of its position on the matter, what specifically did Eni-Vitol want the international tribunal to do for them? Below are the reliefs they were seeking, produced in full.

X. **RELIEF SOUGHT**

225. The Claimants respectfully request the Tribunal to grant the following relief to the Claimants against the Respondents on a joint and several basis or as the Tribunal otherwise sees fit:

(a) ORDER that the First Respondent withdraw the Purported Directives.

(b) ORDER that the Respondents publish notices on the website of the Ministry of Energy, the Petroleum Commission and GNPC that the Purported Directives have been withdrawn;

(c) ORDER that the First Respondent notify the High Court, Court of Appeal and Supreme Court of Ghana that the Purported Directives have been withdrawn;

(d) ORDER that the Respondents do not rely on the Purported Directives in any way to take any steps, whether purportedly in accordance with the Petroleum Agreement or applicable laws or otherwise (and be that in relation to OCTP or any other existing or anticipated rights or interests of the Claimants in Ghana);

(e) ORDER that the Respondents take no further action to implement the purported unitisation of the Sankofa Field and Afina Discovery on the terms of the Purported Directives or otherwise without the Claimants' written agreement;

(f) ORDER that the Respondents do not procure or otherwise encourage any third party to take steps to enforce, implement or rely upon the Purported Directives or the unitisation that they anticipate;

(g) ORDER the Respondents to pay damages in an amount to be quantified for the losses suffered by the Claimants arising out of the Respondents' breaches of the Petroleum Agreement;

(h) ORDER the Respondents to pay all of the costs and expenses of this Arbitration, including the fees and expenses of the Claimants' counsel and any witnesses and/or experts in the arbitration, the fees and expenses of the Tribunal and the fees of the SCC;

(i) ORDER the Respondents to pay compound interest on any and all sums awarded to the Claimants at a rate and at such rests as the Tribunal may consider appropriate, both in relation to the periods prior to and after the issuance of a Final Award; and

(j) such further or other relief as the Tribunal may consider appropriate.

A careful reading of the reliefs should show that the bulk of Eni-Vitol's expectations are in the nature of a declaration that the government's directives for forced unitisation are unlawful and unjustifiable and should not proceed in the manner the government had sought to bring them about. That really is it.

The tribunal, even per the Attorney General's own atrociously uncandid summary, has declared the government of Ghana's attempt and approach at forced unitisation to be in breach of its petroleum agreement with Eni-Vitol and therefore unlawful and unjustified. Simple!

The government's attempt at defending its actions

What was the government's principal defense at the tribunal and how does it square with how the Attorney General is attempting to spin the outcomes of the proceedings?

The government's super-expensive international lawyers summed up its case in the paragraph below found in the opening of its statement of defense. ("Claimants" in the text extract refers to Eni-Vitol.)

> 2. Claimants' suit is a brazen attempt to subvert Ghana's legitimate exercise of its right to unitise the Sankofa Field and Afina Discovery through the threat of a US$ 7 billion claim.[1] Claimants themselves admit that they "are not opposed to unitisation in principle."[2] Their concern with the unitisation directed by the Ministry of Energy ("**Ministry**"), they say, is that the technical requirements for unitisation have not been satisfied. This position is refuted by a plain reading of the relevant legal provisions and contemporaneous technical analyses developed by Springfield Exploration & Production Limited ("**Springfield**"), the company that requested the unitisation; Ghana's Petroleum Commission; GNPC; and Claimants themselves. These analyses all evince a petroleum accumulation that extends across—*i.e.*, straddles—the contract area operated by Claimants, Offshore Cape Three Points ("**OCTP**"), and the contract area operated by Springfield, West Cape Three Points Block 2 ("**WCTP-2**"). The sole trigger for unitisation specified in Section 34 of Petroleum (Exploration and Production) Act, 2016 (Act 919) ("**Petroleum Act**") is thus satisfied.

Government of Ghana's primary aim in paying for these expensive lawyers to fight its baseless cause at arbitration was to get the tribunal to agree with its approach to the forced unitisation.

> 5. As the Statement of Defense demonstrates, Claimants' conduct and claims before the Tribunal are inconsistent with the laws of Ghana and international law, and implicate procedural issues arising from the law of the legal seat of arbitration, Sweden. The Tribunal should not only dismiss Claimants' claims against Respondents in their entirety, but also find Claimants liable for the breaches of the Petroleum Agreement and Ghanaian law that arise from Claimants' refusal to comply with the lawful directives to unitise.

The government knew that its case was not in the national interest

The Ghanaian government did not only want the tribunal to agree with its inherently disordered and self-detrimental approach to the merger, which would have damaged the interests of its own citizens, they also wanted the tribunal to find the investors guilty of breaching their agreement with Ghana by not lying down and rolling over immediately they were asked to hand over a juicy chunk of their asset to another business.

> 27. There can be no doubt that Claimants are obligated—under the contract terms, the laws of Ghana, and industry practice—to act in compliance with accepted industry practice to prevent waste and potential harm to the environment and ensure maximum recovery of petroleum in the most efficient and economical way possible.
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> 28. The fundamental nature of these obligations is further supported by Article 23.4, which grants Respondents the express right to terminate the Petroleum Agreement "upon the uncorrected occurrence of . . . substantial and material failure by Contractor to comply with any of its obligations pursuant to Art. 7.1."[18]

The true mindset of the government's agents in this matter, especially the Attorney General who instructed these lawyers, is exposed by paragraph 49 of the government's statement of defense.

> 49. *Finally*, Claimants go as far as to criticize Springfield for its alleged financial debts.[76] These debts, however, are of no relevance. They concern the Springfield group and are unrelated to Springfield's operations in Ghana. In any case, Claimants would bear low risk of Springfield's finances affecting them since Petroleum Costs incurred by contractors are recoverable and reimbursed by Ghana.[77] According to Mr. Owusu-Ansah, "Claimants are expected to recover most, if not all, the exploration and development costs from the accrued revenue by the end of 2022."[78]

What that paragraph simply says is that in the end even if the merger leads to losses, **Ghana is the ultimate bearer of those losses and so why is Eni-Vitol sweating?** Such a deeply unpatriotic and reckless argument to make!

> 33. Thus, while Claimants repeatedly emphasize the "billions" of dollars they have invested in the Sankofa Field—which they seem to believe entitles them to disregard the Directives[30]—they omit to mention a critical fact: the State ultimately bears all their Petroleum Costs. The "significant sums of money" that Claimants expended in relation to the OCTP Project are not charitable contributions.[31] Claimants are entitled to recover all of their petroleum costs from oil and gas revenue, and have been doing so since 2017.[32]

The government, egged on by the Attorney General, believes that it can proceed with technically reckless actions in Ghana's petroleum sector, actions that will impose losses on the citizens of the country, with no consequence at all. What it is essentially saying here to investors is that, "why are you crying more than the bereaved? We are willing to bear the losses."

In fact, the government spends the overwhelming proportion of its defense arguing against "commerciality" as an important logic in any regulatory directive that affects the economic structure of a petroleum transaction in which Ghana is involved. It attempts, in breathtaking elaborateness, to make the case that even if the Afina block does not have any oil, it is fine to merge it with the oil producing Sankofa – Gye Nyame field (the one in which Eni-Vitol have majority interest) even though the inevitable result will be the dilution of economic returns for both Ghana and Eni-Vitol, and even if the only one who stands to benefit is the third-party private business next door.

> **c. Commerciality is not a prerequisite for unitisation under accepted international practice**
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> 93. Claimants' argument that international practice requires evidence of commerciality through appraisal prior to unitisation is also meritless.[169]

The disorganised logic of the government's case

Perhaps, in a belated recognition that their longwinded arguments making the case that commercial logic is irrelevant and all that matters is the discretion of government ministers, the government's expensive lawyers began to moderate their tone somewhat when it came to defending the decision of the government **to award 54.5% of the merged field** to the private owner of the next-door Afina block.

> 283. Similarly, the tract participation proposed by the Ministry is still under negotiation. The October Directive directed a redetermination of tract participation within 18 months from 14 October 2020.[692] Since Claimants decided not to comply with the Unitisation Directives, that redetermination did not happen.[693] Nevertheless, negotiations about a redetermination continue. In fact, as explained in Section II.E.3.g above, negotiations around the unitisation issue have progressed beyond disagreements over whether communication between the two contract areas exists, as Claimants have admitted there is communication, and have focused almost exclusively on tract participation and redetermination.[694]

What they are saying here, in essence, is that the precise allocation of acreage in the combined block is still in the works. The illogicality of that argument is inherent in fact that any such decision has to be based on knowledge of how much oil is in the separate blocks. Without knowing how much oil each party is in essence "bringing to the combined table", there is no technically sound way to divvy up the combined block. Since determining "commerciality" is how you confirm that the owner of the non-producing oil block is bringing anything to the table at all, the hollowness of this belated concession about the exact split of the combined field becomes crystal clear, laid side by side with the claim that commerciality is an irrelevant factor.

335. Claimants claim that they would lose the "majority" of revenues of the Sankofa Field.[770] Their attempts at quantifying their alleged deprivation of interest is premised on the initial tract-participation percentages set forth in the October Directive. But the October Directive specifically described those percentages as "initial," meaning preliminary, and directed a redetermination of those percentages within 18 months from 14 October 2020.[771] Had Claimants complied with that Directive, the 18-month redetermination process would have concluded in April 2022.

After all this turning and twisting, how did the government want the tribunal to rule? Ghana's counter-claims offer a good view.

Ghana wanted the tribunal to punish Eni-Vitol

V. COUNTERCLAIMS

375. Pursuant to Article 19(3) of the 1976 UNCITRAL Rules and the terms of the contractual dispute resolution clause, Respondents have the right to present a counterclaim arising out of the OCTP Petroleum Agreement (**Section V.A**). Claimants' persistent failure to comply with the Unitisation Directives contravenes their obligations under the Petroleum Agreement to conduct operations with utmost diligence, efficiency, and economy (**Section V.B.1**). Claimants' non-compliance with the Directives also constitutes a separate breach of their obligation under Ghanaian law to comply with directives of the Minister (**Section V.B.2**). Compensatory damages and administrative penalties follow from Claimants' wrongdoing and the harm they have caused and continue to cause (**Section V.C**).

The government also wanted damages. Yes, it wanted to be paid by the investors for the pleasure of being robbed of their petroleum assets.

C. Respondents are entitled to damages resulting from Claimants' continuous breaches of the Petroleum Agreement and Ghanaian law

385. The OCTP Petroleum Agreement establishes grave consequences for Claimants' failure to comply with their obligations under Article 7.1 thereunder.[915] Under Article 23.4(f) of the Petroleum Agreement, Respondents may terminate the Petroleum Agreement for "substantial and material failure by Contractor[s] to comply with any of [their] obligations pursuant to Article 7.1."[916] While Respondents do not presently seek to invoke this contractual remedy, they do request compensation flowing from their rights under Ghanaian law. First, Ghana seeks general compensatory damages for the harm suffered as a result of Claimants' failure to implement the Unitisation Directives (**Section V.C.1**). Second, Claimants are required to pay administrative penalties under Ghanaian law for their contravention of the Unitisation Directives (**Section V.C.2**). Finally, as indicated in the Request for Relief, Respondents also seek an Award that declares Claimants in breach of the Petroleum Agreement and Ghanaian law.

After these brazen demands, the government proceeded to list its requested reliefs.

VI. REQUEST FOR RELIEF

392. For the reasons set forth herein, Respondents Ghana and GNPC respectfully request that the Tribunal issue an Award finding, ordering, and declaring that:

a. All of Claimants' claims are denied with prejudice in their entirety because they are inadmissible or otherwise impermissible;

b. Should the Tribunal conclude that Claimants' claims are admissible, Respondents have not breached any obligation owed to Claimants and Claimants' claims are denied in their entirety with prejudice;

c. Should Respondents be found to have breached any obligation owed to Claimants, (1) Claimants' request for damages is denied because Claimants have not met their burden to prove actual loss proximately caused by Respondents, and (2) Claimants' request for injunctive relief is denied because such relief improperly intrudes on the sovereignty of Ghana to manage its natural resources and because an award of injunctive relief would be unenforceable;

d. Claimants have breached the OCTP Petroleum Agreement and violated Ghanaian law;

e. As a result of Claimants' breach of the OCTP Petroleum Agreement and violation of Ghanaian law, damages are due to Respondent in an amount to be quantified at a later stage of these proceedings;

f. Claimants are ordered to adhere to the Ministry of Energy's lawfully-issued Directives, including the April 2020, October 2020, and November 2020 Directives;

g. Claimants are ordered to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of the Stockholm Chamber of Commerce, and all costs of Respondents' legal representation, witnesses, and expert assistance; and

h. Granting any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

The government failed to secure any of its principal reliefs

The judges at the tribunal must have had a good laugh. But deep down they were not amused. The government's punitive claims against Eni-Vitol were totally dismissed. By even the twisted accounts of the Attorney General, it is clear that the tribunal did not so much look at them twice.

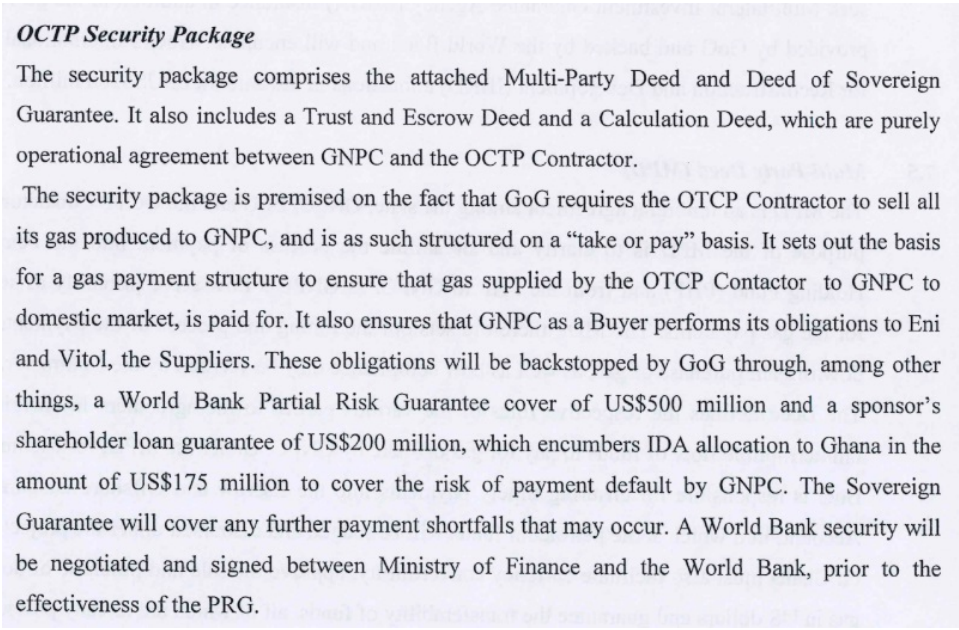
Whilst the Attorney General is celebrating the decision of the tribunal not to award large damages against Ghana, and its instructions for Ghana to only pay half of the arbitration costs, the truth is that the government's attempt to get the tribunal to sympathise with its positions **was wholly unsuccessful.** Eni-Vitol on the other hand got what they mostly set out to achieve: a ruling by an

international tribunal that the government's conduct is unlawful, on the basis of international standards and a more expansive reading of the country's own laws.

The tribunal ruled in Ghana's interest

In the end, though, especially for us in civil society, what matters is that the citizens understand clearly that the international tribunal was on their side and their government was acting in ways that would have considerably damaged their interests.

Ghana had to issue sovereign guarantees and tap the World Bank's guarantee facility in order to get the Eni-Vitol field operational.



OCTP Security Package

The security package comprises the attached Multi-Party Deed and Deed of Sovereign Guarantee. It also includes a Trust and Escrow Deed and a Calculation Deed, which are purely operational agreement between GNPC and the OCTP Contractor.

The security package is premised on the fact that GoG requires the OTCP Contractor to sell all its gas produced to GNPC, and is as such structured on a "take or pay" basis. It sets out the basis for a gas payment structure to ensure that gas supplied by the OTCP Contactor to GNPC to domestic market, is paid for. It also ensures that GNPC as a Buyer performs its obligations to Eni and Vitol, the Suppliers. These obligations will be backstopped by GoG through, among other things, a World Bank Partial Risk Guarantee cover of US$500 million and a sponsor's shareholder loan guarantee of US$200 million, which encumbers IDA allocation to Ghana in the amount of US$175 million to cover the risk of payment default by GNPC. The Sovereign Guarantee will cover any further payment shortfalls that may occur. A World Bank security will be negotiated and signed between Ministry of Finance and the World Bank, prior to the effectiveness of the PRG.

Extract from a Ghanaian parliamentary briefing on the Sankofa – Gye Nyame project ("Eni-Vitol field")

The Eni-Vitol field is now the major supplier of gas for the country's power plants. Ghana obtains significant revenues from its equity stake in the field. Forcing this lucrative project into a poorly thought through merger with an unproven, greenfield, block would have caused massive disruption, undermined the commercial viability of the whole enterprise, and therefore ultimately eroded the benefits of the producing and proven asset to the people of Ghana. It is very likely that the Eni-Vitol would have stopped gas production and plunged Ghana into dumsor should the situation had persisted down the path it was on.

Ghana has already suffered because of the government's actions

Already, the needless controversy over the forced unitisation has cost Ghana dearly. The development of major oil discoveries such as Eban and Akoma have stalled. There is evidence that some major international oil companies have been looking askance at the country since the government began this ill-fated expropriation agenda. Ghana hasn't brought a new oil field onstream for years (Jubilee South-East doesn't really count as it is merely the extension of an existing field). Oil output and state revenues from petroleum have been declining steadily and steeply.

Someone must be held accountable

The Attorney General's conduct in failing to properly advise the country, in promoting a baseless position in an international forum, in opting to engage hyper-expensive lawyers costing this country millions of dollars, and in the end failing to secure any of the principal reliefs sought by Ghana is atrociously bad on its own. Seeking to spin such a disastrous outcome as a victory is simply disreputable and ought not to pass without strong words from civil society and the citizenry.

As a starting point, citizens and civil society activists should demand complete transparency in respect of all monies paid to the likes

of Foley Hoag.

Foley Hoag has put a team of 7 lawyers on the Ghana case, including heavy-hitters, Paul Reichler, Carla Brillembourg & LawDragon winner, Tafadzwa Pasipanodya. At a blended fee of $350 to $450 an hour per lawyer, including research time, the assumed billable hours are within range of comparable briefs.

We are also hearing that White & Case, which partners a politically exposed local law firm, had a role to play at some point. If true, how much did they earn?

Were these expensive legal fees to *luxury* law firms a factor in the government's doggedness to pursue a matter completely in conflict with the public and national interest? In addition to the strong and inexplicable urge to divert public and paid-up investor stakes in Sankofa – Gye Nyame to a private business?

What a shame!