IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA AD. 2012

CORAM: ATUGUBA AG. CJ (PRESIDING)
DR. DATE-BAH, JSC
ANSAH, JSC
ADINYIRA (MRS), JSC
YEBOAH,JSC
GBADEGBE,JSC
BAMFO,(MRS) JSC

REFERENCE
No. J6/1/2012

16TH MAY,2012

THE ATTORNEY GENERAL **PLAINTIFF**

VRS.

1. BALKAN ENERGY GHANA LTD

2. BALKAN ENERGY LLC

3. MR. PHILIP DAVID ELDERS **DEFENDANTS**

J U D G M E N T

OPINION ON A REFERENCE

DR. DATE-BAH JSC:

The task of this Court in this case is to interpret the phrase or term "international business or economic transaction to which the Government is a party" as it is used in article 181(5) of the 1992 Constitution. The responsibility to interpret this phrase has arisen as a result of this Court deciding to refer to itself constitutional issues that had arisen in proceedings before the High Court (Commercial Division). The learned High Court judge refused an application from the plaintiff to refer the said constitutional issues to this court. The plaintiff accordingly invoked our supervisory jurisdiction to quash the decision of the learned High Court judge not to refer the issues to this Court. This Court, in a unanimous ruling delivered on 2nd November, 2011, quashed the decision of the High Court judge not to refer the constitutional issues. To avoid a multiplicity of suits and to save time, this Court decided to exercise the powers of the High Court, which it has under Article 129(4) of the Constitution, to refer the following questions to this Court:

1. "Whether or not the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.
2. Whether or not the arbitration provisions contained in clause 22.2 of the Power Purchase Agreement dated 27th July 2007 between the Government

of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution".

The reference itself is, of course, made under article 130(2) of the Constitution. Article 130 provides as follows:

> "(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -
>
> > (a) all matters relating to the enforcement or interpretation of this Constitution; and
> >
> > (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.
>
> (2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

Article 181 of the Constitution, within which the phrase to be interpreted is located, reads in part, as follows:-

> "(1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
>
> (2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.
>
> (3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.
>
> (4) ....
>
> (5) This article, shall with the necessary modifications by Parliament apply to an international business or economic transaction to which the Government is a party as it applies to a loan...."

The Facts

The factual context within which the Court's task of interpretation is to be carried out is as follows: the third defendant, Mr. Phillip David Elders, a businessman resident in Texas, USA, identified a business opportunity in Ghana and persuaded the owner of the second defendant to invest in it. The business opportunity was

as follows: the Government of Ghana wanted to generate electricity urgently from a power barge located in its Western Region. The barge needed rehabilitation and the Government wanted to negotiate with a private investor to achieve this and bring its generating capacity urgently on stream. With a view to achieving this, Balkan Energy LLC, the second defendant, entered into a Memorandum of Understanding ("MOU") with the Government of Ghana on 16th May 2007. Because of advice that was given to the third defendant relating to the statutory licensing requirements in Ghana for power generation, the investors in the business opportunity decided to incorporate the first defendant in Ghana and to make it the party to a Power Purchase Agreement, the interpretation of a provision in which constitutes the subject matter of the reference to this Court. Accordingly, on 27th July 2007, Balkan Energy (Ghana) Limited, the first defendant, which had been incorporated in Ghana 11 days previously, entered into a Power Purchase Agreement ("PPA") with the Government of Ghana. Subsequently, a dispute arose between the parties to this PPA. The Government of Ghana claimed that the second and third defendants had misrepresented to it that they could make the power barge operational within 90 working days and that it was on the basis of this misrepresentation that it had entered into the MOU and the PPA. However, this had not happened.

The dispute led to the first defendant initiating, by a Notice of Arbitration dated 23rd December 2010, arbitration proceedings against the Government of Ghana under the auspices of the Permanent Court of Arbitration at the Hague, the Netherlands. At these proceedings, the Ghana Government raised the point that the PPA needed Parliamentary approval under article 181(5) of the 1992 Constitution, but that this approval had not been sought and therefore the PPA

was invalid, as having been executed in breach of a constitutional provision. The Government of Ghana argued before the arbitration tribunal that non-compliance with the constitutional provision made the PPA invalid, including its arbitration clause, and consequently the arbitral tribunal had no jurisdiction over the dispute before it. However, the arbitral tribunal held that it had jurisdiction, but expressed a willingness to take account of this Court's interpretation of the constitutional provision in question.

The Attorney-General, the principal legal adviser to the Government of Ghana and the nominal party expected to represent the State in litigation before the Ghanaian courts, in June 2010, issued a Writ of Summons in the Commercial Division of the High Court, Accra, claiming a declaration that the PPA is an international business transaction that needed Parliamentary approval and was unenforceable because it did not have such approval. The plaintiff also claimed that the arbitration agreement contained in clause 22.2 of the PPA was an international business transaction and was also in breach of article 181(5) and therefore unenforceable.

After the institution of the suit, the plaintiff applied to the High Court to refer to this Court for interpretation the two questions already set out in this Opinion, which for ease of reference are repeated below:

1. "Whether or not the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.

2. Whether or not the arbitration provisions contained in clause 22.2 of the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution."

When the High Court refused to do so, the plaintiff applied to this Court to exercise its supervisory jurisdiction over the High Court to quash the decision of the High Court. As already indicated in this Opinion, this Court in its Ruling of 2nd November, 2011 did indeed quash the decision of the learned High Court judge and referred the two questions set out above to this court. Furthermore, before the oral argument on the two questions before this Court, the Court requested counsel for the parties to address in their Statements of Case the following issues which are relevant for the determination of the two principal questions posed above:

1. The definition of an international business transaction within the meaning and context of Article 181(5) of the Constitution
2. Can a Government of Ghana contract with a Ghanaian legal person or entity ever be an international business transaction?
3. If so, how are we to distinguish an international business transaction of a Ghanaian legal person from its other contracts with the Government of Ghana? Are you able to formulate any clear indices or criteria?

In determining these issues, we have been greatly assisted by the painstaking Statements of Case filed by the Plaintiff and the Defendants. On the 1st March

2012, Zenith Bank Ltd applied to this Court to be joined to this suit as an interested party. Although its application was dismissed, it was granted leave to file an *amicus curiae* Statement of Case, which it duly filed on 9th March, 2012. This Statement of Case is largely an endorsement of the Defendants' Statement of Case.

The Plaintiff's arguments

The plaintiff contends that two main criteria may be used, either alone or in conjunction, to define the term "international", in the context of an international business or economic transaction. The first criterion relies on the *nature of the business or economic transaction*. On the other hand, the second focuses attention on the *parties*: what is their nationality or habitual place of residence or, in the case of a corporate entity, the seat of its central control and management.

International nature of the business or economic transaction

The plaintiff cites, by way of analogy, practice in the field of international arbitration by which the nature of the dispute between the parties has been used to decide whether the mechanism for its resolution can be described as an international arbitration. The plaintiff points out that the International Chamber of Commerce ("ICC"), which established its Court of Arbitration in Paris in 1923, was quick to adopt the *nature of the dispute* as its criterion for deciding whether or not a commercial arbitration was an international arbitration under its rules. He draws attention to the fact that since 1927 the ICC rules have defined

international arbitration to encompass disputes which contain a foreign element, even if the parties are citizens of the same country. He cites ICC Rules, Article 1.1 which defines the function of the Court of Arbitration of the ICC as being "to provide for the settlement by arbitration of business disputes of an international character in accordance with these Rules." In para. 22 of his Statement of Case, the plaintiff states, in relation to the ICC, that:

> "It is prepared to give a wide interpretation to the term "international" so as to encompass arbitrations involving any foreign element. If, for example, the subsidiary of a foreign company doing business in a state was incorporated in that state (as would often be the case) any arbitration between the company and the state concerned would be classified as international under the ICC Rules."

Nationality of the parties as indicative of the international nature of the business or economic transaction

As already mentioned, the second alternative criterion proposed by the plaintiff is that which focuses on the parties. He illustrates this approach by citing the European Convention on International Commercial Arbitration of 1961, which states its scope as follows (in Article I):

> "This Convention shall apply:
>
> (a) To arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States;

(b) To arbitral procedures and awards based on agreements referred to in 1(a) above."

He further illustrates the "parties" approach by reference to the statutory scheme embodied in the English Arbitration Act, 1996. He quotes a summary of this scheme from Redfern & Hunter, The Law and Practice of International Commercial Arbitration (1986) as follows:

> "A domestic arbitration agreement is an agreement which does not provide, expressly or by implication, for arbitration outside the U.K. and to which there was no foreign party at the time when the agreement was made. A foreign party in this sense is an individual who is a national of, or habitually resident in, any state other than the U.K.; or a corporate entity incorporated outside the U.K. or whose central control and management is exercised outside the U.K. It is sometimes suggested that this definition means that, for an arbitration to be domestic, both parties must be of British nationality. This is not correct. Nationality is one, albeit important, criterion used in the definition. However, where an individual Is concerned, that individual's habitual place of residence is also taken into account. More importantly, where a corporate entity is concerned, the criterion is not simply its place of registration or incorporation – but that of the place in which its central management and control is exercised."

After praying in aid of his argument, other statutes on arbitration from Singapore and Ghana, the plaintiff concludes his submission as follows:

> "The Applicant accordingly submits that the foregoing analysis of the nationalities of the parties as indicative of the nature of a domestic or international business or arbitral transaction shows that Ghanaian legal persons are at liberty to enter into either domestic or international business (including arbitral transactions) with the Government of Ghana. The Applicant has already argued and will contend further in this statement of case that the structure and substance of Article 181(5) of the Constitution does not proscribe such transactions between a Ghanaian legal person and the Government of Ghana. Furthermore, nothing in the structure, scheme and substance of the Arbitration Act, 1961 or the current Alternative Dispute Resolution Act, 2010 proscribes a Ghanaian legal person from entering into international business or arbitral transactions with the Government of Ghana."

In his quest to cast light on the meaning of international business transaction, the plaintiff conducts a review of the literature on international business. He states that international business is an important professional and academic discipline and deals with the special features of business activities that cross national boundaries. He explains that international business activities may be through foreign direct investments or portfolio investments.

Drawing on the materials assembled in his Statement of Case, the plaintiff concludes as follows:

> "41. We have sought to use the nature of the business or commercial transactions and the nationalities of the parties to business or commercial transactions as criteria for drawing a distinction between international

business or commercial or economic transactions and purely domestic business or trade transactions. This is by no means always a clear-cut distinction in its application as naturally inevitable penumbra cases run into each other and have to be decided upon the peculiar facts of the case. We have also tried a review of the literature on international business as a field of study to show how international business and economic transactions may be characterized, categorized and formed for purposes of modern international trade as distinct from domestic trade.

42. The foregoing exposition and analysis demonstrates that there are several circumstances in which the Government of Ghana may enter into international business or economic transactions with Ghanaian physical or legal entities. They also demonstrate that like any natural or physical science or social science phenomenon penumbra cases make it difficult to conclusively formulate in advance any clear indices or criteria for distinguishing penumbra international business transactions from domestic business transactions."

Plaintiff's response to the first issue referred to this Court

The plaintiff next proceeds to apply this understanding, discussed above, to the first issue referred for interpretation. In doing this, he stresses the fact that the first defendant is a wholly foreign-owned Ghanaian entity whose central control and management is outside Ghana. In support of this fact, he adduces the following evidence on the record:

(a) The first defendant was incorporated only eleven days before the execution of the PPA;

(b) The first defendant is wholly owned by Balkan Energy Limited, a company incorporated in the United Kingdom. Balkan Energy Limited is in turn wholly owned by Syntek West, a company incorporated in the United States of America;

(c) Syntek West is wholly owned by Gene Phillips, a national of the United States of America; and

(d) The managing-director of Balkan Energy (Ghana) Limited, the first defendant, is Philip David Elders, the 3rd defendant, who is resident in the United States of America.

He also identifies certain salient provisions in the PPA which, in his view, demonstrate that it is an international business transaction. In this connection, he lists the following clauses in the PPA:

i. "2.6 GoG shall promptly facilitate the acquisition of all Government approvals for the duty-free importation and transportation of equipment to the site, and for operating permits, licenses and approvals for the Project, and for visas and work permits for foreign personnel and for full compliance with all local and other regulations and GoG hereby guarantees that BEC shall have the exclusive right to generate electricity from the site subject to meeting the Milestone in Schedule 3."

ii. Clause 12.1 provides that all sums payable to Balkan Energy (Ghana) Limited "shall be payable in US dollars."

iii. Clause 15.4 provides that the Government of Ghana "shall indemnify and hold harmless BEC (and its officers and employees) from and against all damages, losses and reasonable expenses suffered or paid by BEC as a result of any and all claims for the personal injury, death or property damage to third parties ... and resulting from any act or omission of GoG or its agents or employees."

iv. "22.2 If any dispute arises out of or in relation to this Agreement and if such matter cannot be settled through direct discussions of the Parties, the matter shall be referred to binding arbitration at the Permanent Court of Arbitration, Peace Palace, Carnegieplein 2, 2517 KJ in the Hague, The Netherlands. Unless the Parties to this Agreement agree otherwise, the arbitrator shall not have power to award nor shall he/she award any punitive or consequential damages (however denominated), Each side shall pay its own attorneys fees and costs no matter which side prevails and each Party shall share equally in the cost of any mediation or arbitration. Applications may be made to such court for judicial recognition of the award and/or an order of enforcement as the case may be. Arbitration shall be governed by and conducted in accordance with UNCITRAL rules."

v. "24. To the extent that GOG may in any jurisdiction claim for itself or its assets or revenues immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other process and to the extent that any such jurisdiction there may be attributed to the GOG or its assets or revenue such immunity (whether or not claimed) GOG agrees

not to claim and irrevocably waives such immunity to the full extent permitted by the laws of such jurisdiction."

vi. "29.2 GOG represents and warrants that:

'(g) No Taxes. There is no Tax other than stamp duty at a nominal rate imposed on or in connection with:

(A) the execution, delivery or performance of this Agreement;

(B) the enforcement of any of this Agreement; or

(C) on any payment to be made to the BEC under this Agreement. In connection with Letters of Credit, no Government Authority shall impose any reserve, special deposit, deposit insurance or assessment affecting BEC.

No Foreign Exchange Controls. There are no foreign exchange or other restrictions in effect in the Republic of Ghana adversely affecting the ability or right of GoG to acquire and to remit to BEC foreign currency to pay and satisfy GoG's obligations under this agreement."

Whilst the plaintiff notes that in *Attorney-General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 this Court interpreted an international business or economic transaction to include a business transaction between the Government of Ghana and a company incorporated abroad, he contends that there is no provision in the Constitution which proscribes Ghanaian companies from entering into international business or economic transactions with the Government of Ghana.

He therefore concludes that on the facts of this case the PPA is an international business transaction. He supports his conclusion with the following argument, in paragraphs 57 and 58 of his Statement of Case:

> "57. It is further submitted that it cannot be the case that the only factor that must be taken into account in determining whether or not a particular business or economic transaction to which the Government is party is international is the place of incorporation of the counterparty. It is submitted that the transaction as a whole and its characteristics must be looked at in making this determination. Characteristics that expose the Government to obligations or liabilities in other jurisdictions or subject to the laws of other jurisdictions give a transaction its internationality and must be taken into account. These characteristics are gleaned from the provisions of the agreement between the parties and include the provisions already referred to in these submissions as the salient provisions of the PPA which demonstrate at face value that the PPA is a non-domestic business transaction. These features include those provisions that require contact by the Government and its assets with other jurisdictions (such as the choice of forum).
>
> 58. It is also submitted that the nationality of the counterparty and its sponsors are relevant. To require Parliamentary approval in respect of a company incorporated outside Ghana but not to require it where the company merely incorporates an entity in Ghana effectively for form's sake is, with respect, to subvert the constitutional provision and its substantive

objective of promoting checks and balances between the executive and the legislature in relation to the substance of certain types of transactions."

Moreover, the plaintiff points out that there are a few English cases which establish that the nationality of a company is not determined necessarily or solely by the place of incorporation of the company, citing *Daimler Co. Ltd. V Continental Tyre and Rubber Co. (Great Britain) Ltd.* [1916] 2 AC 307, *R v LCC, ex p. London and Provincial Electric Theatres Ltd.* [1915] 2 KB 466 and *Re F.G. (Films) Ltd.* [1953] 1 All ER 615. He also cites the dictum of Akuffo JSC in *Morkor v Kuma (No. 1)* [1999-2000] 1 GLR 721 at 733 where she says:

"Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control it. This will be done not only where there is fraud or improper conduct, but in all cases where the character of the company, or the nature of the persons who control it is a relevant feature. In such cases the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company."

The plaintiff accordingly urges that in the light of the facts that the first defendant is wholly-owned by a foreign entity; formed at the direction of that foreign entity for the purpose of entering into a contract with the Government; managed by the same officers as manage its foreign parent; and the contract was to be performed by foreign contractors retained by the company, rather than by domestic

employees or contractors, this is a case where the formal separate legal personality of the first defendant is rendered insignificant and irrelevant.

The plaintiff concludes his submission on the first issue referred to this court by summarizing the factors which make the PPA an international business transaction. He lists these as:

i. The purported place of incorporation and residence of the project sponsor, Balkan Energy LLC
ii. The place of incorporation, ownership and residence of the sole shareholder of the Ghana company
iii. The management, ownership and control of the first defendant
iv. Fees payable to the first defendant under the PPA are required to be paid in foreign currency and therefore bound to be a charge on Ghana's foreign currency receipts
v. The indemnity provisions of the PPA potentially apply to foreign persons
vi. The relevance of the Ghana-UK Bilateral Investment Treaty by virtue of who is the sole shareholder of the 1st Interested Party
vii. The provisions of the PPA regarding international arbitration and waiver of jurisdiction.

The plaintiff's conclusion is thus that:

> "If all the above factors can be disregarded simply by incorporating a company in Ghana, article 181(5) would be rendered practically nugatory. The better interpretation is that the mere fact that the legal entity with whom the Government has entered into a transaction is incorporated in

Ghana does not, by itself, mean that the transaction is not an international business one within the meaning of article 181(5). The constitution of the parties, the provisions of the transaction and its elements must all be looked at in determining whether or not the transaction is an international business one."

Plaintiff's response to the second issue referred to this court

The plaintiff contends that the arbitration agreement contained in the PPA constitutes an international business transaction within the meaning of article 181(5) of the Constitution. Because there are authorities which hold that an arbitration agreement is separate, distinct and severable from the agreement in which it is embodied, except where the primary contract is null and void *ab initio*, the plaintiff finds it necessary to argue that in addition to, and regardless of the PPA as a whole, the agreement to go to international arbitration which is contained in clause 22.2 of the PPA itself constitutes an international business agreement which requires Parliamentary approval. This is thus the plaintiff's answer to the second issue referred to this Court for authoritative interpretation.

Obviously the plaintiff's general discussion, already set out above, on what constitutes an international business or economic transaction applies to this second issue as well. Regarding the unconstitutionality of the arbitration clause, the plaintiff makes the following argument in paragraph 18 of his Statement of Case:

"The question of a possible breach of article 181(5) of the Constitution was raised after the Balkan Group had submitted this dispute to arbitration on 23 December 2009 pursuant to the arbitration clause contained in the PPA. This is a fundamental constitutional question because should this Court hold that the PPA to which the Government of Ghana was a party is an international business or economic transaction which was never operative because it had not been laid before and approved by Parliament the consequence will be that the whole transaction between the parties was null and void ab initio in accordance with article 1(2) of the Constitution. The further consequence which will usually flow as a matter of course from an unconstitutional PPA is that the arbitration clause contained in such a null and void ab initio agreement could never have also become operative and grounded a cause of action in an international arbitration expressly stated to be governed by the laws of Ghana (See *Heyman v Darwins Ltd.* [1942] AC 356 at 370-371; and Article II(3) of the New York Convention). This position is consistent with the decision of this Court in *Attorney-General v Faroe Atlantic Co. Ltd.* [2005-6] SCGLR 271 in which this Court, not only declared the PPA as null, void and without effect, but also ordered the foreign company to refund the monies it had been unconstitutionally paid pursuant to that contract. It would appear absurd if an international arbitral tribunal could thereafter have assumed jurisdiction, adjudicated an alleged dispute and made a binding award based on Ghanaian law. As the Applicant's application for judicial review already indicated, the 1st Interested Party *(sic, but more correctly the first defendant)* has commenced international commercial arbitral proceedings against the

> Applicant and the arbitral tribunal has purported to assume jurisdiction while expressing a willingness to take account of the authoritative determination of this Court should the decision be made before it concludes its work. It is in this context that the second question posed for this reference becomes relevant to deal with the assumption of jurisdiction by the arbitral tribunal which, in our submission, is based upon the erroneous premise that a PPA declared by this Court to be null and void ab initio in terms of Articles 1(2) and 181(5) of the Constiution can still be survived by the arbitration clause contained therein to ground jurisdiction in an arbitral tribunal to decide upon its jurisdiction and settle a dispute."

This extended quotation from the plaintiff's Statement of Case explains why the second issue is before this Court for interpretation.

The defendants' arguments

To the excellent submissions made by the Honourable Attorney-General in his Statement of Case, the defendants also filed a well-argued and detailed riposte in their Statement of Case. The first point that the defendants make is to question whether article 181(5) requires Parliamentary approval of international business or economic transactions to which the Government is a party. They argue that the text of article 181(5) needs to be interpreted to establish whether the "necessary modifications" referred to in it are a condition precedent to the effectiveness of the article. They suggest that, without those modifications, article 181(5) does not come into effect or has effect only to the extent that it

authorizes Parliament to undertake the required modification. They urge, in paragraph 33 of their Statement of Case, that:

> "My Lords, it would appear that even a consideration as to what amounts to "an international business or economic transaction" would fall within Parliament's legislative determination under Article 181(5). It would also appear to be within Parliament's constitutional remit to decide how and by which procedure such agreements would be authorized and/or approved, and whether some of such agreements would not require any parliamentary action at all."

In *Attorney-General v Faroe Atlantic Co. Ltd.* [2005-6] SCGLR 271, Date-Bah JSC said (at p. 297):

> "Even though clause 5 of article 181 enjoins Parliament to make the necessary modifications to article 181, I do not interpret clause 5 as rendering that clause ineffective until the Parliamentary modifications to article 181 have been made. Such statutory modifications are, to my mind, intended to assist the clarity of clause 5 in the context of article 181, but the clause has effect even before Parliament carries out its task."

The defendants take note of this interpretation, but nevertheless raise the following issues in their paragraph 34:

> "Some questions that are unanswered are as follows: (i) what is that effect? And (ii) do the different procedures in Article 181(1)-(2) on the one hand and Article 181(3)-(4) on the other hand apply automatically to all *international business or economic transactions* in the absence of the

necessary modifications by Parliament, or will only apply after Parliament has made the authorised modifications?"

The defendants then go on to propose a 3-stage test for determining whether article 181(5) applies. They say (at paragraph 37):

"Be that as it may, My Lords, we respectfully propose the following 3-stage test with respect to the application of Article 181(5):

i. Is the activity or venture a "transaction" to which the Government is a party?
ii. If so, is it "business or economic" in nature?
iii. If so, is it "international" in nature?"

They maintain that it is only if all three questions are answered in the affirmative that Article 181(5) would apply.

In relation to what is a transaction, the defendants note that the word "transaction" is not defined in the Constitution. They refer to the definition in Black's Law Dictionary (4th Ed.) of transaction as an "act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair." They also quote that same Dictionary as referring to "something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves is altered." The defendants state that parties to a transaction may choose to reduce their agreements into a contract and insert an "Entire

Agreement" clause into the contract so that the contract and its terms would constitute the relevant transaction between the parties. They point out that the PPA has in its article 27 such an "Entire Agreement" clause in the following terms:

> "This Agreement, including the Schedules hereto contains all the understandings and agreements of whatsoever kind and nature with respect to the subject matter of this Agreement and the rights, interests, understandings, agreements and obligations of the parties relating thereto …All prior written or oral undertakings, offers or other communications of every kind concerning the subject matter hereof are hereby abrogated and withdrawn and shall not affect or modify any of the terms or obligations set forth in this Agreement."

The defendants, therefore, contend, based on the considerations set out above, that the relevant "transactions" to be construed are those contained in the PPA. They stress that article 181(5) makes it clear that its provisions apply only to a transaction to which the Government is a party. They argue, accordingly, that once the Government is not a party or privy to any other agreements, understandings or arrangement that the other party to the transaction may enter into with any other persons, the nature of those other agreements, understandings or arrangements will not affect the nature of the original transaction to which the Government is a party.

As to what is a business or economic transaction, the defendants again note that neither "business" nor "economic" is defined in the Constitution. They refer to the definition of "business" in Black's Law Dictionary as: "A commercial enterprise carried out for profit, a particular occupation or employment habitually

engaged in for livelihood or gain" and to its definition in the Chambers English Dictionary as: "dealings, commercial activity: a commercial or industrial concern." They further state that though Black's Law Dictionary does not directly define the term "economic", its various uses of the term indicate that it refers to "the management or administration of the wealth and resources of a community, city, state, or country." Similarly, they report that the Chambers English Dictionary says an activity is "economic" if it relates or pertains to the management of a household; the administration of the material resources of an individual, community, or country." The defendants therefore conclude in paragraph 49 of their Statement of Case that:

> "Therefore, where a transaction is commercial in nature, or pertains to or impacts on the wealth and resources of the country, it would be a "business or economic transaction" and a subject of interest in any examination of Article 181(5)."

The defendants also analyse the meaning of "international" in the provision under discussion. Again, they note that the Constitution does not define the word. They point out, however, that the word is used in contradistinction to the word "national" in Articles 21(1)(e), 36(9) and 37(5) and that it is used to describe the relationship between Ghana and other nations in Articles 40 and 73. They then examine provisions in the 1980 United Nations Convention on Contracts for the International Sale of Goods, the 1956 Convention on the Contract for the International Carriage of Goods by Road, the 1944 Convention on International Civil Aviation and the 1929 Convention for the Unification of Certain Rules

Relating to International Carriage by Air from which they conclude that a transaction may be considered international if:

i. It is between two or more countries;
ii. Involves parties who are nationals of or resident in two different countries, and/or
iii. It involves crossing national borders.

They then submit that the transaction between the Government and the first defendant does not meet any of the criteria listed above and is therefore not international.

The defendants oppose the plaintiff's argument that this Court should lift the veil of the first defendant's incorporation in Ghana. They cite the words of Sanborn J in *United States v Milwaukee Refrigerator Transit Co.* 142 Fed. 247, 225 that:

> "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, until sufficient reason to the contrary appears: but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

The defendants rely on this statement of the law to contend that the concept of the lifting of the veil of incorporation is applied by the courts only where the facts proved show some misuse of the corporate entity, or there is the need to lift the veil in order to do justice. They also cite the Ghanaian case relied on by the

plaintiff in this connection, namely, *Morkor v Kumah (No. 1)* [1999-2000] 1 GLR 721.

The defendants contend that the plaintiff has not been able to show any illegal, fraudulent or unfair purpose for the incorporation of the first defendant. Accordingly, the concept of lifting the veil of incorporation should not be applied to it. In paragraph 64 of their Statement of Case, the defendants make the following submission:

> "Our humble submission is that incorporating the 1st Defendant as a private limited liability company just before the execution of the PPA was in compliance with the Energy Commission Act. The incorporation was an act of obedience to Ghana law, not some last minute device to evade parliamentary approval, as the Plaintiff which was an active party to all the events leading up to the execution of the PPA (and with full actual knowledge of all the surrounding circumstances), belatedly and erroneously seeks to suggest. The only way to lawfully implement the provisions of the anticipated transaction was to incorporate a company in Ghana."

The defendants go on to assert that for the plaintiff to succeed in persuading this court to disregard the obvious residence of the first defendant in Ghana, the onus rests upon it to prove in which way the real business of the first defendant is carried on outside Ghana. They insist that there is no evidence that the real business and central management and control of the first defendant is anywhere else but in Ghana.

In relation to the third criterion for testing internationality set out above, the defendants point out that a complete and careful review of the PPA demonstrates that the transaction does not cross any national border. They say (in paragraph 79):

> "My Lords, that is why out of the 34 clauses of, and 11 Schedules to, the PPA (involving numerous aspects of the transaction), as well as the Lease Agreement "Attachment", the Plaintiff embarks on a selective exercise in 'hunting and pecking' at the PPA, and then contends that this Honourable Court should consider only one clause and five other sub-clauses of the entire PPA (namely 2.6, 12.1, 15.4, 22.2, 24 and 29.2(g)), and hold that on these bases, the PPA is an international transaction. In effect the Plaintiff is urging your Lordships to decide that the PPA is an international transaction by ignoring every other clause in the PPA, but these that it has identified. Yet the Plaintiff simply cites these clauses without demonstrating in what way or manner these involve the crossing of national borders, thereby making the PPA an international transaction. .."

Finally, the defendants respond to the plaintiff's argument that the arbitration agreement between the parties contained in clause 22.2 is, in and of itself, an international business or economic transaction which requires Parliamentary approval under article 181(5). Their position, expressed in paragraph 93 of their Statement of Case, is that:

> "Our respectful submission in response is that even if this Honourable Court was to hold that the arbitration agreement was 'international' in

nature, the agreement is not a "business or economic transaction". This takes it out of the scope and bounds of Article 181(5)."

The defendants pray in aid of their position the definitions of "arbitration" and "arbitration agreement" respectively, contained in section 135 of the Alternative Dispute Resolution Act, 2010 (Act 798), which are as follows: "the voluntary submission of a dispute to one or more impartial persons for a final or binding determination of a dispute" and "an agreement to submit to arbitration present or future dispute." They also refer to the definition of "arbitration" in Halsbury's Laws of England, 4th Edition, Re-issue (1991) at paragraph 601 in the following terms:

"the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law."

They submit that it is quite clear from these definitions that an arbitration agreement is nothing more than parties to an agreement determining beforehand how their disputes arising from that agreement are to be settled by some quasi-judicial or administrative process. Thus the process of arbitration does not of itself encompass any business or economic dealings. The defendants further argue that because an arbitration agreement is autonomous, separate and severable from the main contract in which it is embodied, it does not derive its nature from the main contract. Accordingly, even if the PPA were held to be an international business transaction, that would not, in the view of the defendants,

define the nature of the arbitration agreement under clause 22.2 as an international business transaction.

Thus the excellent arguments of the Attorney – General (Honourable Martin Amidu at the time of the argument) are countered by equally outstanding and carefully considered submissions by the defendants. The court's deliberations have been much facilitated by the thoughtful submissions made by both sides to this suit.

The arguments of the *amicus curiae*

In addition to the arguments of the parties summarized above, a Statement of Case was filed on behalf of Zenith Bank (Ghana) Ltd. The bank had applied to be joined to the suit as an interested party, but this court dismissed the application, but rather granted it leave to file a Statement of Case, as an *amicus curiae.* The *amicus curiae* indicated in its Statement of Case that it associated itself with the submissions made in the Statement of Case of the Defendants. It asserted that it was strange to suggest that any economic or business transaction ordinarily entered into by a Ghanaian legal person or entity could be considered or treated as an international business transaction.

The averment of the *amicus curiae* was that after *a*n irrevocable letter of credit had been issued to the first defendant by the Bank of Ghana and this had been accepted by the *amicus curiae* as collateral for a loan transaction with the first defendant, the Bank of Ghana had declined to honour the letter of credit because of the dispute between the Government and the first defendant on the validity of the PPA. It accordingly threw its weight behind the case of the defendants.

Our Interpretation

The phrase "international business or economic transaction to which the Government is a party", if purposively construed, should not lead necessarily to the result that only agreements between entities resident abroad and the Ghana Government can be embraced within the meaning of the term. Given the complexity of contemporary international business transactions, there will be transactions of such a clear international nature that they should come within any reasonable definition of an international business transaction, but which may have been concluded with the Ghana Government by an entity resident in Ghana. In such a situation, our view is that the substance, rather than the form, should prevail. What we have just said begs the question of what "international" means. In this connection, we think that there is the need to combine both the *nature of the business or economic transaction* criterion and the *parties* criterion proposed by the plaintiff in his submission, in order to formulate a test for determining what transactions come within the ambit of article 181(5) of the 1992 Constitution.

However, the complication which arises if a transaction between a Ghanaian company and the Ghana Government is purposively construed to be an international business transaction is the need to formulate a clear criterion for distinguishing such a transaction from other transactions (with foreign connections) between the Government and Ghanaian companies. On the other

hand, If an international business transaction within the ambit of article 181(5) is defined exclusively as one between an entity resident abroad and the Ghana Government, one has a ready rule of thumb for determining at least one dimension of what agreements come within the scope of article 181(5). If this mechanical rule is departed from, then one has to confront the task of defining a criterion or criteria for distinguishing between transactions entered into with entities resident in Ghana where such transactions are nonetheless to be regarded as international and other transactions that are to be regarded as non-international. In spite of the entailed implication of choosing complexity over simplicity, we think that this court has to accept that substance should rule, rather than form, and thus grasp the nettle.

Once this Court adopts the approach of substance over form, the following passage from the defendants' Statement of Case (paragraphs 121, 122 and 123) becomes poignantly relevant:

> "121. My Lords, therein lies, and with utmost respect to the Plaintiff, the inherent contradictions of its arguments before this Honourable Court. Taken to the extreme, the Plaintiff would be contending that even though British Airways is registered as an external company in Ghana, the Government of Ghana cannot purchase a ticket from that airline for the President or any public official to travel on the airline's plane, unless there has been specific parliamentary approval of the ticket purchase. What is worse, even the purchase of a ticket to fly a Government official from Accra to Kumasi would be an "international business transaction" if the local airline has foreign shareholders.

122. By way of further hypothetical illustration, if the Government was to enter into a contract with a Ghanaian individual for the supply of paper to the Government, and that individual supplies the paper but has to sue to recover unpaid monies, the Government could, on account of the supplier having imported the paper into Ghana, come to the Supreme Court for a determination that the contract to supply paper to the Government was an "international business or economic transaction" that required parliamentary approval, and that in the absence of that approval, the contract was invalid. It would also mean, Your Lordships, that every contract that the Government enters into for the supply of vehicles is an "international economic or business transaction" because it is a notorious fact that nearly all the cars plying our roads are imported.

123. My Lords, it was to avoid such untenable and flawed posture and arguments that the framers of the Constitution, under Article 181(5) left the matter to Parliament without even attempting to define the phrase "international business and economic transaction", thereby leaving Parliament to decide what it considers as an "international business and economic transaction" and how to apply Article 181 to such matters, by way of the necessary statutory modifications. Without those legislative modifications that the Constitution mandates, the 'assumed' interpretation of Article 181(5) that parliamentary approval is required for such transactions (even when the other party is a Ghanaian) would lead to absurd results. As things stand, the Government chooses which financial obligations to

honour, and which it would run to court to challenge on account of the Government's own position that parliamentary approval was not required."

This argument that, without the legislative modifications that the Constitution mandates under article 181(5), the provision is inoperative and cannot be enforced is erroneous and the defendants are precluded by *stare decisis* from re-opening that issue. We have already referred to the passage in *Attorney-General v Faroe Atlantic Co. Ltd.* [2005-6] SCGLR 271, where the Supreme Court held that even before Parliament acts on the modifications to article 181(5) it is enforceable. That position is supported, not only by authority, but also by principle. The framers could hardly have intended that Parliament should be able to stultify their purpose of achieving transparency in the Executive's international business deals through simple inaction. Such an interpretation of article 181(5) would be unreasonable and not in tune with the purpose of the provision.

However, the examples given by the defendants in the passage quoted above demonstrate the need to articulate a criterion for distinguishing between the international business transactions intended to be scrutinized, and approved, by Parliament and those which are not. For, clearly it would be impractical for Parliament to scrutinize and approve every single business transaction with international ramifications entered into by the Executive. The hypothetical examples given in the defendants' Statement of Case quoted above constitute a *reductio ad absurdum* of one perception of the principle embodied in article 181(5). In our view, to give effect to the framers' purpose, there is need to imply into article 181(5) an understanding that only ***major*** international business or

economic transactions are to be subject to its provisions. We do, however, agree with the defendants that Parliament needs to exercise its legislative power in relation to article 181(5) in order to clarify which transactions are to be viewed as major.

The interpretation that the international business or economic transactions that come within the ambit of article 181(5) should be limited to only major ones is a purposive one. It will be recalled that this Court, speaking through me, in *Asare v Attorney-General* [2003-2004] SCGLR 823, pointed out that there is a distinction between the objective and the subjective purposes of a constitution or statute. The court there said (at p. 834):

> "The subjective purpose of a constitution or statute is the actual intent that the authors of it, namely, the framers of the constitution or the legislature, respectively, had at the time of the making of the constitution or the statute. The objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values etc. of the society for which he is making law. This objective purpose will thus usually be interpreted to include the realisation, through the given legal text, of the fundamental or core values of the legal system."

One of the values of the 1992 Constitution is the promotion of probity and accountability. In the Proposals for a Draft Constitution of Ghana prepared by the Committee of Experts appointed in 1992 under PNDC Law 252 to draft the proposals that were placed before the Consultative Assembly that formulated the

1992 Constitution, the Committee makes the following important point in the General Introduction to its Proposals (paragraph 6 on p. 5):

> "With respect to the developments within the past 10 years, the guiding principle was that the essential attributes of institutions which are compatible with a constitutional order should be retained, subject to modifications as are appropriate. The committee feels that in this regard accent should be on substance not form. Thus, for example, the social or political values of accountability and probity and fidelity to the public interest should survive the inauguration of the constitution…."

This passage shows that the values of probity and accountability were among those that informed the Committee's decision-making in the framing of its proposals. These values clearly have a relevance to article 181(5). The sunlight of Parliamentary scrutiny of major transactions entered into by the Executive is likely to be a powerful spur to probity in such transactions. That is why it is unlikely that the framers would have intended to give to Parliament the veto power implied in the defendants' interpretation of article 181(5). The purposive interpretation we have given to this provision is therefore in accord with our reading of its objective purpose. Indeed, the framers' commitment to probity and accountability as a value of the Constitution is reflected in one of the Preambles to the Constitution, which reads as follows: "AND IN SOLEMN declaration and affirmation of our commitment to: Freedom, Justice, Probity and Accountability;…". On the other hand, the framers could not have intended the obvious and foreseeable paralysis from overload in Parliament that would ensue from interpreting the provision as covering every single business or economic

transaction with an international dimension. The implication into article 181(5) of the attribute of being "major" before a transaction enters into its ambit would thus seem to us to be necessary and reasonable and within the spirit of the provision.

Because of the practical consequences of determining that a transaction comes within the scope of article 181(5), an interpretation of the provision needs to result in practical guidance to the Executive, Parliament and parties to transactions with government to enable them to apply the constitutional vision of the framers. It is therefore imperative that Parliament takes up early the challenge of framing the modifications to article 181 needed to give greater certainty and clarity as to what categories of international business or economic transactions to which the Government is a party come within the ambit of article 181(5). In the interim, a certification by the Attorney-General that an international business transaction to which the Government is a party is "major" or not should be accorded great weight by the courts, although it cannot be conclusive. We are here, of course, referring to the Attorney-General's certification before a dispute has arisen between the Government and any party.

The formulation of this criterion of the implicit need for an international business agreement to be "major" before it comes within the ambit of article 181(5) goes some way to resolving what the plaintiff referred to in his Statement of Case as penumbra cases. In real life, there will be difficult borderline cases whose status within or outside article 181(5) will need to be determined.

Apart from implying the attribute "major", as outlined above, this Court needs to interpret "international" in the context of article 181(5) appropriately in order to

deal with issues such the *reductio ad absurdum* hypotheticals posed by the defendants above. What then is the meaning of "international" in this context? We think that a business transaction is "international" within the context of article 181(5) where the nature of the business which is the subject-matter of the transaction is international in the sense of having a significant foreign element or the parties to the transaction (other than the Government) have a foreign nationality or reside in different countries or, in the case of companies, the place of their central management and control is outside Ghana.

The word "significant" is used in the above definition to denote the fact that the foreign elements or contacts that lead to a judgment of internationality in relation to a transaction have to be subjected to a qualitative assessment before reaching that judgment. The significance is in relation to the purpose of article 181(5). Thus, for instance, the example given in the defendant's Statement of Case " that every contract that the Government enters into for the supply of vehicles is an "international economic or business transaction" because "it is a notorious fact that nearly all the cars plying our roads are imported" would not necessarily be correct because the fact only of the importation of the vehicles would not be significant enough in relation to the purpose of article 181(5) to justify the transaction being characterized as an international business transaction. The sale of cars domestically to the government would not be an international trade transaction, in spite of the incidental fact that the cars sold were imported. The fact of their importation, when qualitatively assessed by a court, may well result in a decision by the court that their importation is not a significant foreign element in the transaction in question. This qualitative assessment is important in separating business transactions which are international within the meaning of

article 181(5) from those that are not. The defendants' hypotheticals are only a sample of many other transactions which could literally be brought under the semantic umbrella of an "international business transaction", but which should not be so construed for the purposes of article 181(5). Examples would be documentary letters of credit and contracts for the international sale of ordinary goods or for the carriage of goods by sea. In our view, the framers did not have in their contemplation, subjectively or objectively, transactions of this nature: that is, transactions of ordinary commerce.

As to the meaning of business, we are willing to accept the defendants' interpretation of it that "where a transaction is commercial in nature, or pertains to or impacts on the wealth and resources of the country, it would be a "business or economic transaction" and a subject of interest in any examination of Article 181(5)."

The conceptual discussion thus far as to what international business or economic transactions come within the ambit of article 181(5) has been without prejudice to a determination, on the actual facts of the present case, of whether or not the PPA in issue here was required to be submitted to Parliament. Our next task, therefore, is to examine some of the specificities of the PPA in order to decide whether it is an international business or economic agreement to which the Government is a party within the meaning of article 181(5). Our general impression, upon reading the submissions of the parties, is that the overall transaction involved here was a foreign investment by a US investor in a power generation project to supply power to the Ghana Government and that the Government was a party to this transaction. We are viewing the transaction in the

round, without resorting technically to the piercing of the corporate veil doctrine. We interpret "transaction" in this context as meaning a series of agreements or acts united by their purpose of attaining the project objective of the parties to it. We will now set out the circumstances which support this impression and whether a transaction of this nature comes within the ambit of article 181(5).

The PPA between the Government and the first defendant was the result of negotiations between a foreign investor (the third defendant acting on behalf of owner of the second defendant) and the Government. This is a significant foreign element in the transaction. Secondly, the first defendant, though a Ghanaian company, is wholly-owned by a foreign entity, incorporated in the United Kingdom. Thirdly, the managing director of the first defendant is a foreigner, the third defendant, and control of the management of the first defendant is in foreign hands. Fourthly, the PPA contains a clause providing for international commercial arbitration. Lastly, there were other clauses in the PPA which are usually associated with foreign investment transactions, such as the waiver of sovereign immunity clause and the following clause set out in the plaintiff's Statement of Case:

"29.2 GOG represents and warrants that:

'(g) No Taxes. There is no Tax other than stamp duty at a nominal rate imposed on or in connection with:

(D) the execution, delivery or performance of this Agreement;

(E) the enforcement of any of this Agreement; or

(F) on any payment to be made to the BEC under this Agreement. In connection with Letters of Credit, no Government Authority shall impose any reserve, special deposit, deposit insurance or assessment affecting BEC.

No Foreign Exchange Controls. There are no foreign exchange or other restrictions in effect in the Republic of Ghana adversely affecting the ability or right of GoG to acquire and to remit to BEC foreign currency to pay and satisfy GoG's obligations under this agreement."

All these circumstances cumulatively lead us to the conclusion that the answer to the first question referred to this Court is that the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.

On the other hand, the answer to the second issue referred is that the arbitration provisions contained in clause 22.2 of the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited does not constitute an international business transaction within the meaning of Article 181(5) of the Constitution. This is because applying the interpretation of article 181(5) arrived at above, it is clear that the international arbitration provision cannot, in and of itself, constitute an international business or economic transaction. An international commercial arbitration is not by itself an

autonomous transaction commercial in nature which pertains to or impacts on the wealth and resources of the country. An international commercial arbitration draws its life from the transaction whose dispute-resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve.

The case is accordingly remitted to the High Court for this Court's interpretation of article 181(5) of the 1992 Constitution to be applied in the proceedings before it.

We would like to end this opinion by repeating our request to Parliament to enact a Bill indicating what modifications it wishes to make to article 181(5) of the Constitution. This step would bring greater certainty and clarity to the law.

(SGD) DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

ACTING CHIEF JUSTICE

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COUR

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO – BAMFO [MRS.]

JUSTICE OF THE SUPREME COURT

COUNSEL:

HON. BENJAMIN KUMBUOR, ATTORNEY-GENERAL (WITH HIM MRS. GRACE EWOOL) FOR THE PLAINTIFF

ACE ANKOMAH FOR THE DEFENDANTS.

NANA ATO DADZIE AS AMICUS CURIAE.