



SECRET

**PARLIAMENTARY MEMORANDUM**

**MINISTER:**

Mr. Seth Terkper, Minister for Finance

**TITLE:**

US\$3 BILLION TERM LOAN FACILITY AGREEMENT BETWEEN CHINA DEVELOPMENT BANK CORPORATION (CDB) AND GOVERNMENT OF GHANA (GOG) – UPDATE ON CABINET DIRECTIVE TO CAP THE FACILITY AT US\$1.5BILLION

DATE: 16 JULY, ..... 2014

**EXECUTIVE SUMMARY**

## Parliamentary Decision Requested

Parliament is respectfully invited to consider and ratify Cabinet's directive to Government to cap the China Development Bank (CDB) loan facility at US\$1.5billion, and engage with the Chinese Government on a higher political level, and approve the recommendations contained at the end of this memorandum.

## BACKGROUND

1. At an emergency meeting on Sunday, 30<sup>th</sup> March 2014, Cabinet considered an update brief on the CDB US\$3Billion loan facility under the Master Facility Agreement signed between GoG and China Development Bank (CDB) on December 16<sup>th</sup> 2011 (the MFA), and recommended that Ministry of Finance (MoF) cap the loan at US\$1.5billion and engage with the Chinese Government at a higher level.
2. MoF consequently, on 16<sup>th</sup> May 2014, sought the opinion of the Hon. Attorney-General on the legal implications of GoG capping the loan as recommended, by letter of same date.
3. On 3<sup>rd</sup> June 2014, the Hon. Attorney-General provided the requested legal opinion to MoF; (copy attached).
4. A summary of the legal opinion and an update on the current status between GoG and CDB follows, for Parliaments' consideration:

### Summary and Update

5. The Attorney-General concluded that GoG has a right under the clause 2.2.2 of the MFA to request a cancellation or a reduction of the total commitment of US\$3billion up to zero, in accordance with the Facility Agreements; which are defined as the MFA and a Subsidiary Agreement (SA);
  - i. GoG therefore has a right under the MFA to cap/reduce or cancel the facility;
  - ii. *Clauses 7* of both SAs give GoG the right to cancel all or part of the loan for the particular project in accordance with *clause 7* of the MFA.
6. *Clause 7.2* of the MFA permits voluntary cancellation, and requires GoG to give CDB not less than ten (10) business days' prior notice of a cancellation;
  - i. Cancellation may be of all or part of the facility, but may not be of an amount less than US\$25million, and higher amounts must be in multiples of US\$25million.
7. *Clause 7.2.2* provides that any cancellation will be applied pro rata between the two tranches of the loan, Trance A and Tranche B, and also pro rata across all SAs;
  - ✓ The entire loan facility was to be disbursed in two tranches of US\$1.5billion each;
  - ✓ To date only two SAs have been signed by CDB, being the Western Corridor Gas Infrastructure Project (WCGIP) and the ICT Enhanced Surveillance Project for

- the Oil & Gas enclave (ICT). Both SAs are Tranche B facilities for a total a commitment of US\$1billion: WCGIP - US\$850million; ICT - US\$150million;
- ✓ No Tranche A SA has been signed.

### Legal implications of capping the loan

8. Per *Clause 7.3* of the MFA, upon voluntary cancellation GoG shall pay a cancellation fee of **1% of the amount cancelled**. In addition, *clause 11.2.2* of the MFA requires GoG to pay **the accrued commitment fee on any amount cancelled at the time the cancellation is effective**;
- ✓ Under the original terms of the MFA, GoG's commitment fee liability was on the undrawn and un-canceled portion of the total facility. Following several discussions with CDB about the inequitable effects of this requirement in the face of CDB's consistent failure to sign additional SAs and disburse the loan, CDB agreed to apply the fee to only the undrawn and un-canceled balance of amounts actually committed under signed SAs.
  - ✓ GoG requested the new formula to be retroactive to the first commitment fee payment, but CDB disagreed and made the new formula effective with the commitment fees due after August 2013. This reduced the February 2014 commitment fee payment from US\$12,588,389.13 to US\$2,366,166.91.
  - ✓ CDB reserved the right to reinstate the commitment fee terms under the MFA. However, CDB has currently submitted a draft Side Agreement to GoG for negotiation, which includes amongst other provisions, an amendment to clause 11.2 of the MFA to change the commitment fee formula to the new agreed formula.
9. With regard to the Offtaker Agreement between GNPC and Unipet Asia for the supply of 13,000 barrels of oil a day (bbpd) in support of the MFA, the Hon. Attorney-General is of the opinion that the effect of any capping of the loan will be minimal. This is even more so considering that per the Minutes of meeting between CDB and GoG in Beijing, China in March 2014 (the 'Minutes') (the March meetings), CDB now claims that the current supply of crude oil only supports a loan amount of US\$840million.
- CDB's position during the March meetings was that according to their financial model, assuming a crude oil price of US\$85 per barrel, under the current structure for the Transaction the supply of 13,000 bpd was only sufficient to support a total loan of US\$840 million;
  - GoG requested to review CDB's financial model, but this was not made available. GoG expressed surprised at CDB's position, which is contrary to discussions and financial modeling reviewed at initial negotiations with CDB for the facility. GoG countered that using US\$85.00 as the benchmark crude oil price was inconsistent with the reality that from the inception of the Offtaker Agreement, GNPC has sold crude oil to Unipet at a price over US\$100.00; with the average price being about US\$110.00;



- GoG also requested CDB to respect the agreement for 13,000 bbpd, as in the event that GoG needs to make up any anticipated debt servicing shortfall, the Five Party Agreement (FPA) provides GoG the opportunity to use other sources of revenue to do so. GoG suggested liquefied petroleum gas (LPG) as an option for meeting the anticipated debt servicing shortfall when principal repayments begin in 2015. CDB was, however, skeptical about LPG and insisted that they would need to do additional research before considering that option;
  - CDB agreed to sign two additional SAs to bring the total committed loan amount to US\$1.350billion, and cap the loan at that amount, provided GoG will transfer an amount equal to 49% of each Offtaker Payment from the 10th shipment of oil to the Collection Account (CA) from 2014 to 2021 (both years inclusive) and maintain same in the CA and the Debt Service Reserve Account (DSRA) for the period. CDB's position is that as far as they are concerned, the transaction is an oil-backed transaction and GoG should live up to that.
10. The pending two additional SAs (Coastal Fishing Landing Sites (Coastal Fishing) and AMA Intelligent Traffic Management (AMA Traffic)) are US\$200million each. Cabinet's option to cap the loan at US\$1.5billion allows GoG the opportunity to negotiate the signing of a third SA for US\$100million. During the March meetings, the US\$100million SME Projects Incubation Facility SA for the development of small and medium enterprises (SME) in Ghana, which has been outstanding with CBD for signing since April 2012, was considered for signing, but flagged by CDB for later consideration.

### The Side Agreement

11. CDB submitted the proposed Side Agreement to GoG in June, together with the drafts of the two pending SAs for negotiation and subsequent signing, and has made the signing and parliamentary approval of Side Agreement a condition precedent to the signing and effectiveness of the two pending SAs;
12. The draft Side Agreement proposes to amend the MFA, FPA and Accounts Agreement (AA) and other Finance Documents, to among other things:
- ✓ Amend the current formula for determining debt service transfer amounts to the CA after each offtake of crude by Unipet and replacing this with the obligation to transfer 49% of each crude oil payment to the CA;
    - GoG disagreed, as this would be contrary to the *Petroleum Revenue Management Act, 2011 (Act 815)* (PRMA) and offered other sources of revenue, such as LPG to meet the 49% benchmark
  - ✓ change the formula for calculating the commitment fee as agreed between the parties following meetings in Accra in January 2014;
    - GoG agreed

- ✓ convert the arrangement into an oil-backed transaction by making it mandatory for GoG to instruct GNPC to increase oil supply to Unipecc on the same terms, upon notification from CDB that current supply will be insufficient to support any pending SAs to be signed;
  - GoG disagreed
- ✓ mandate GNPC to give Unipecc priority over other oil sales agreements in the event of supply shortfall;
  - GoG has disagreed to this
- ✓ require GoG to acknowledge that the principal credit support for the facility are the proceeds from the sale of crude oil under the Offtaker Agreement;
  - GoG disagreed
- ✓ remove GoG's right to request CDB to transfer excess funds from the DSRA to GoG even where there is no current or impending default in debt servicing; and forbid any such transfer prior to year 2022 (when GoG's peak repayment period ends); and only with prior written consent of CDB after year 2022;
  - GoG disagreed
- ✓ make it mandatory to submit any other SAs that may be signed after the pending two, to Parliament if they contain any changes from the form approved by Parliament in March 2012;
  - GoG disagreed if the changes are not substantial
    - it should be noted that this is contrary to *section 11(2)* of the *Loans Act, 1970* which provides that changes within the terms and conditions of a loan already approved by Parliament need not be resubmitted to the House;
- ✓ change the 15 year and 10 year final repayment dates of the Tranche A and Tranche B facilities respectively and redefine these to be no later than 6 months before the maturity of the Offtaker Agreement which is currently December 12, 2027.
  - GoG disagreed and opted to maintain the current tenor of the tranches without extension

13. GoG requested that as a showing of good will, CDB sign the two SAs prior to submission of the Side Agreement to Parliament. CDB has however disagreed to this.

## CONCLUSION

14. It is evident from the foregoing that GoG may cap the CDB loan at US\$1.5billion without breaching either the Facility Agreements. The implications are:

- ✓ **Before Side Agreement and if CDB reverts to the old formula for calculating commitment fees:** GoG's liability will be US\$30million, being 1% cancellation fee of US\$15million on US\$1.5billion canceled, plus 1% per annum accrued commitment fee on the amount canceled of US\$1.5billion.

- Since interest repayment on the facility is every 6 months, the accrued commitment fee will be whatever portion has accrued on the cancelled amount within the 6 months interest repayment period when the loan is cancelled.
- ✓ **After Side Agreement and the two pending SAs only are signed and CDB has agreed to cap the loan at US\$1.5billion:** GoG's liability will be US\$15million cancellation fee, plus the accrued commitment fee on the undisbursed balances of WCGIP and ICT, Coastal Fishing and AMA Traffic;
  - Assuming CDB maintains the current US\$1.350billion cap it imposed during the March meetings, GoG's liability will be: US\$16.5million cancellation fee, plus the accrued commitment fees;

15. A table is attached with the various capping/cancelation options and scenarios for Parliament's consideration.

## RECOMMENDATIONS

16. Based on the foregoing it is recommended for Parliament to consider and approve the following:
- i. GoG negotiation and signing of the Side Agreement for onward submission to Parliament, if this can be done without breaching the PRMA;
  - ii. GoG signing of the two pending SAs;
  - iii. GoG negotiation with CDB to increase its cap set in March 2014, of US\$1.350billion to US\$1.5billion without requiring additional crude oil supply above the current 13,000bbpd, and sign in addition, the SME Incubation Facility project for US\$100million to bring the total signed projects up to three projects for US\$1.5billion;

  
.....  
**MR. SETH TERKPER**  
MINISTER FOR FINANCE

**THE CLERK OF PARLIAMENT**  
**PARLIAMENT HOUSE**  
**ACCRA**



Scenarios on Cancellation assuming the Side agreement is signed and CDB adheres to the new formula for calculating Commitment fees

|  |                |
|--|----------------|
| Accumulated Commitment fees paid (31 May 2014) | 46,256,023.17  |
| Commitment fee payable on 12th August 2014     | 2,174,242.82   |
| Total Disbursement (31 May, 2014)              | 597,304,961.16 |
| Current Undisbursed balance (31 May, 2014)     | 402,695,038.84 |

|   |                  |
|---|------------------|
| <b>A. Voluntary Cancellation (1% of Amount Cancelled)</b> |                  |
| Amount to be cancelled                                    | 2,000,000,000.00 |
| Cancellation Fee of 1%                                    | 20,000,000.00    |
| Accrued Commitment Fee                                    | -                |
| Undisbursed - 402,695,038.84                              |                  |

|   |                  |
|---|------------------|
| <b>B. Voluntary Cancellation (1% of Amount Cancelled)</b> |                  |
| Amount to be cancelled                                    | 1,500,000,000.00 |
| Cancellation Fee of 1%                                    | 15,000,000.00    |
| Accrued Commitment Fee                                    | -                |
| Undisbursed - 902,695,038.84                              |                  |

|   |                  |
|---|------------------|
| <b>C. Voluntary Cancellation (1% of Amount Cancelled)</b> |                  |
| Amount to be cancelled                                    | 1,600,000,000.00 |
| Cancellation Fee of 1%                                    | 16,000,000.00    |
| Accrued Commitment Fee                                    | -                |
| Undisbursed - 802,695,038.84                              |                  |

|   |                  |
|---|------------------|
| <b>D. Voluntary Cancellation (1% of Amount Cancelled)</b> |                  |
| Amount to be cancelled                                    | 1,650,000,000.00 |
| Cancellation Fee of 1%                                    | 16,500,000.00    |
| Accrued Commitment Fee                                    | -                |
| Undisbursed - 752,695,038.84                              |                  |

Scenarios on Cancellation assuming CDB does not adhere to the new formula for calculating commitment fees

|   |                  |
|---|------------------|
| Accumulated Commitment fee paid (31 May 2014) | 46,256,023.17    |
| Commitment fee payable on 12th August 20:4    | 12,229,798.38    |
| Total Disbursement (31 May, 2014)             | 597,304,961.16   |
| Current Undisbursed balance (31 May, 2014)    | 2,402,695,038.84 |

|   |                             |
|---|-----------------------------|
| <b>A. Voluntary Cancellation (1% of Amount Cancelled)</b> |                             |
| Amount to be cancelled                                    | 2,000,000,000.00            |
| Cancellation Fee of 1%                                    | 20,000,000.00               |
| Accrued Commitment Fee @ 1% p.a on Amt Cancelled          | Not exceeding 10,200,000.00 |

|   |                            |
|---|----------------------------|
| <b>B. Voluntary Cancellation (1% of Amount Cancelled)</b> |                            |
| Amount to be cancelled                                    | 1,500,000,000.00           |
| Cancellation Fee of 1%                                    | 15,000,000.00              |
| Accrued Commitment Fee @ 1% p.a on Amt Cancelled          | Not exceeding 7,650,000.00 |

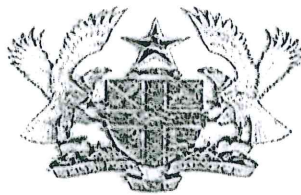
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| <b>C. Voluntary Cancellation (1% of Amount Cancelled)</b> |                            |
| Amount to be cancelled                                    | 1,600,000,000.00           |
| Cancellation Fee of 1%                                    | 16,000,000.00              |
| Accrued Commitment Fee @ 1% p.a on Amt Cancelled          | Not Exceeding 8,160,000.00 |

|   |                            |
|---|----------------------------|
| <b>D. Voluntary Cancellation (1% of Amount Cancelled)</b> |                            |
| Amount to be cancelled                                    | 1,650,000,000.00           |
| Cancellation Fee of 1%                                    | 16,500,000.00              |
| Accrued Commitment Fee @ 1% p.a on Amt Cancelled          | Not exceeding 8,415,000.00 |





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ATTORNEY-GENERAL'S DEPT  
P. O. BOX MB. 60  
ACCRA.

My Ref  
Your Ref No.  
Fax No. 0302-667609  
Tel. No. 0302-682106

3<sup>rd</sup> JUNE, 2014

THE HON. MINISTER  
MINISTRY OF FINANCE  
MINISTRIES  
ACCRA

Dear Sir,

**REQUEST FOR LEGAL OPINION - CHINA DEVELOPMENT BANK (CDB)  
LOAN FACILITY FOR US\$3 BILLION UNDER THE MASTER FACILITY  
AGREEMENT (MFA) SIGNED DECEMBER 16, 2011**

We refer to your letter dated May 16, 2014 with reference number MoF/OLA/dl/CDB in which you requested the Attorney-General's legal opinion on the above subject matter. We also acknowledge receipt of the attached Minutes of Meeting held on the 17<sup>th</sup> to 18<sup>th</sup> March, 2014 in the offices of CDB in Beijing, China.

Having reviewed the letter and the attached minutes, in relation to the MFA, we wish to advise that Government has the right under the MFA to request a cancellation or a reduction of the Total Commitment. It is our understanding that Clause 2.2.2 of the MFA clearly envisages that the Total Commitment under the Loan may be cancelled or reduced, because it provides that the Total Commitment is subject to cancellation or reduction. However, the cancellation or reduction is required to be done in accordance with the Facility Agreements.

The Facility Agreements are the MFA and the Subsidiary Agreements. So far Ghana has signed only two subsidiary agreements with CDB and they are the Western Corridor Gas Infrastructure Project (WCGIP) and ICT Surveillance Project, as indicated in your letter.

It is very clear from Clause 7.2 of the MFA that the Borrower may give not less than ten Business Days notice to the Lender to reduce the Commitment (Tranche A and or Tranche B) or cancel the Total Commitment agreed upon in the Agreement. In effect, the Borrower (Ghana), if it deems it fit to do so, may notify the Lender to cancel the loan voluntarily. Government thus has the

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option to cap/reduce or cancel the Commitment. The reduction of the Commitment could be done to zero or by a minimum of US\$25,000,000.00 or a higher multiple of US\$25,000,000.00

Additionally, any reduction of the Total Commitment will have to be applied pro rata between the two tranches of the commitment and pro rata across all Subsidiary Agreements. GOG seeks to reduce the loan by USD\$ 1.5 billion, and if it caps its obligations under the MFA at USD\$ 1.5 billion, then USD\$1.5 billion reduction of the Commitment will be applied pro rata between Tranche A Commitment and Tranche B Commitment and across the two Subsidiary Agreements which have been signed.

The cancellation of the loan has some legal implications, and these are stipulated in the MFA.

- a. Upon voluntary cancellation, Government is required to pay Cancellation Fee of one per cent (1%) of the amount cancelled under the Agreement.
- b. The Borrower is also required to pay an accrued Commitment Fee on the cancelled amount at the time the cancellation becomes effective. The Commitment Fee as seen in the MFA started accruing sixty (60) days after its execution date. The Commitment Fee is expected to continue to accrue on the undrawn portion of the loan until the loan is fully drawn. In effect, depending on the day/time that Government will request for the capping of the loan, Government may or may not pay commitment fee. If there is an accrued Commitment Fee that has not been paid at the time of capping the loan, then in our opinion, Government will have to pay the said accrued commitment fee in addition to the cancellation fee.
- c. The reduction in the Commitment may necessarily involve the amendment of the MFA, as well as the Subsidiary Agreements. The MFA imposes an obligation on the borrower to reimburse or pay all reasonable cost and expenses incurred by the lender in connection with the negotiation, preparation and execution of the amendment of the documents.
- d. The Borrower in requesting for capping of the Commitment, may also be required to indemnify the Lender against all Indirect Tax incurred by the Lender. Accordingly, where a Finance Document requires the Borrower to reimburse the Lender for any costs or expenses incurred (as stated above), the Borrower is expected to also at the same time pay and indemnify the Lender against all Indirect Tax incurred by the Lender in respect of the costs or expenses to the extent the Lender reasonably determines that it is not entitled to credit or repayment in respect of the Indirect Tax.



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- e. Under Clause 7.5 of the MFA, any notice of cancellation given by any Party under the Agreement is irrevocable. Additionally, if any amount of the Total Commitment is reduced in accordance with the Agreement, the amount of such reduction or cancellation may not be reinstated by the Lender.

The effect of the capping of the loan at US\$1.5 billion on the Offtaker Agreement in our opinion is minimal or non-existent, especially because the Offtaker Agreement is not considered a Subsidiary Agreement under the MFA and therefore has no direct bearing on the cancellation or reduction of the Commitment, unlike the Western Corridor Gas Infrastructure Project (WCGIP) and ICT Surveillance Project Agreements.

The effect of the capping of the loan even becomes more inconsequential on the Offtaker Agreement at this stage when CDB is alleging that the 13,000 barrels of oil per day that GoG/GNPC is supplying to Unipet Asia, under the Offtaker Agreement, to support the repayment of the loan can only support a loan of US\$840,000,000.00. Thus, even after the capping of the loan, CDB may still demand more barrels of oil a day to support repayment of the loan. If such a demand is made by CDB, Government must insist on the use of other sources as support for the repayment of the Loan as stipulated in the Five Party Agreement.

In order to avoid any situation where a possible conflict or dispute could arise with respect to the capping of the loan, we wish to inform you that this Office intends to employ the services of External Solicitor(s) for the negotiation of the capping of the loan and subsequent amendment of the MFA.

Unfortunately, copies of the Subsidiary Agreements were not made available to this Office, so we are unable to review them in relation to the capping of the Commitments under the MFA.

Please, do not hesitate to revert to us for any clarification on the information provided above.

Best regards,



**HON. MARIETTA BREW APPIAH-OPONG (MRS.)  
ATTORNEY-GENERAL & MINISTER FOR JUSTICE**



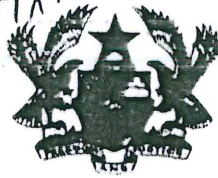


In case of reply the  
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My Ref. No.  
Your Ref. No.

OPCA 1/15

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FREEDOM AND JUSTICE

OFFICE OF THE PRESIDENT

P.O. BOX 1627

ACCRA

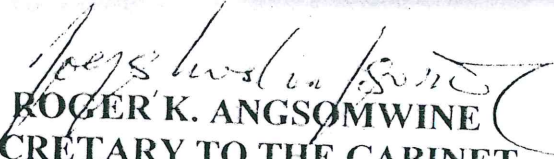
31<sup>ST</sup> MARCH, 2014

CONFIDENTIAL

**BRIEF ON THE US\$3MILLION TERM LOAN FACILITY  
AGREEMENT BETWEEN CHINA DEVELOPMENT BANK  
CORPORATION(CDB) AND GOVERNMENT OF GHANA**

At an emergency meeting held on Sunday, 30<sup>th</sup> March, 2014, Cabinet considered the above mentioned brief submitted by the Minister for Finance.

2. After discussing the issue, Cabinet endorsed the recommendation of the Ministry of Finance to cap the loan at US\$1.5 billion and engage with the Chinese Government at a higher political level.
3. It would be appreciated if you could take note of the decision by Cabinet.

  
**ROGER K. ANGSOMWINE**  
SECRETARY TO THE CABINET

**THE HON. MINISTER  
MINISTRY OF FINANCE  
ACCRA**

CC: CHIEF OF STAFF

EXECUTIVE SECRETARY TO THE PRESIDENT  
SECRETARY TO THE VICE PRESIDENT

