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Ghana and the Belt and Road Initiative (BRI)

Ghana is a West African country with a population of about 34.1 million (2023, World Bank). Ghana shares borders with Togo in the east, Cote d’Ivoire in the west, and Burkina Faso to the north. Ghana is a constitutional democracy that boasts an independent judiciary, and the rule of law. There is a multiparty political system with two dominant political parties: the current ruling New Patriotic Party (NPP) led by H.E. President Nana Addo Dankwa Akufo-Addo; and the opposition party, National Democratic Congress (NDC) led by former President John Dramani Mahama.

According to the World Bank, “due to the lingering effects of the macroeconomic challenges, growth in 2023 was low at 2.9% albeit higher than initial projections, while inflation declined to 23.2% in December 2023 from a peak of 54.1 in December 2022” (see Press Release No: 2024/007/AFW).

The Ghana Ministry of Foreign Affairs and Regional Integration reported on 5 September 2018 that Ghana and China had signed eight cooperation agreements and memoranda of understanding. These agreements are: One Belt One Road Memorandum of Understanding; Memorandum on Regional Aviation Cooperation; Agreement for Cooperation in the Peaceful Use of Nuclear Energy; Cooperation to Carry

Out Maternal and Child Health Project; Framework Agreement on Financing Insurance Cooperation (USD 2 billion Sino-Hydro deal); Economic Cooperation on Phase 2 Project of the University of Health and Allied Sciences in Ho; Cooperation on the Expansion of the Cape Coast Stadium; and Cooperation on the Supply of Police Vehicles to the Ghana Police Service.

The projects covered under the BRI are ambitious and daring, and they involve investments in a wide range of sectors in Ghana, including roads, landfill sites, industrial parks, hospitals, extension of electricity to rural areas, and construction of courts and residential buildings for the judicial service.

The USD 2 billion Sino-Hydro deal has “drawn criticism from environmental activists, political opposition, and international government investment partners, with a new report from risk consultancy EXX Africa highlighting a lack of transparency and increasing threat to debt sustainability” (see Elliot Smith, “China’s \$2 billion deal with Ghana sparks fears over debt, influence and the environment”, 21 November 2019). As part of the deal, China is going to finance USD 2 billion worth of rail, road and bridge networks in exchange for access to 5% of Ghana’s bauxite. This is directly linked to the plans of the government of Ghana to commence bauxite mining in the Atewa Forest.

This USD 2 billion deal was preceded by several years of trading between China and Ghana. “In 2015, China-Ghana trade volume hit a historic

➔ high of USD 6.6 billion, increasing by 18.2% over the previous year” (see Keynote Speech by Chinese Ambassador to Ghana H.E. Mdm Sun Baohong at the CEIBS China-Africa Seminar, 4 May 2016). The Ambassador went on to explore the relationship between Ghana and China as follows: “The projects such as Africa World Airlines (AWA) invested by Hainan Airlines, China-Africa Development Fund and the Ghanaian partner, National Communication Networks constructed by Huawei and ZTE, Western Corridor Gas Infrastructure Development Project built by SINOPEC, are all the key projects in improving the regional inter-connectivity. The cooperation in power generation, transmission and distribution between Chinese and Ghanaian enterprises is continuously expanding. The integration of Chinese technology, advanced equipment and expertise with Ghanaian private sector is becoming closer and closer. The Ghanaian enterprises such as Africa Slipway, Prefos, Danadams, Kantaka, Jospong, are the pioneers in the industrial capacity cooperation between China and Ghana. During his visit to Ghana, Chairman Yu visited the Jospong Vehicle Assembly Plant and attended the inauguration of Sunon Asogli Power Plant Phase II Project and sang high praise of the cooperation level in industrial capacity cooperation between our two countries.”

Thus, it is to be expected that the BRI will lead to more cooperation and infrastructure development between Ghana and China. As recently as 3 May 2024, it was reported on the website of the Ministry of Interior of Ghana that the Minister of Interior, Honourable Henry Quartey, had acknowledged the support of the Chinese government in providing training and capacity building programmes for the Ghana Police Service and other security agencies under the Ministry.

II Investing in Ghana

As a result of its political stability and independent judiciary, Ghana has become an attractive destination for foreign direct investment.

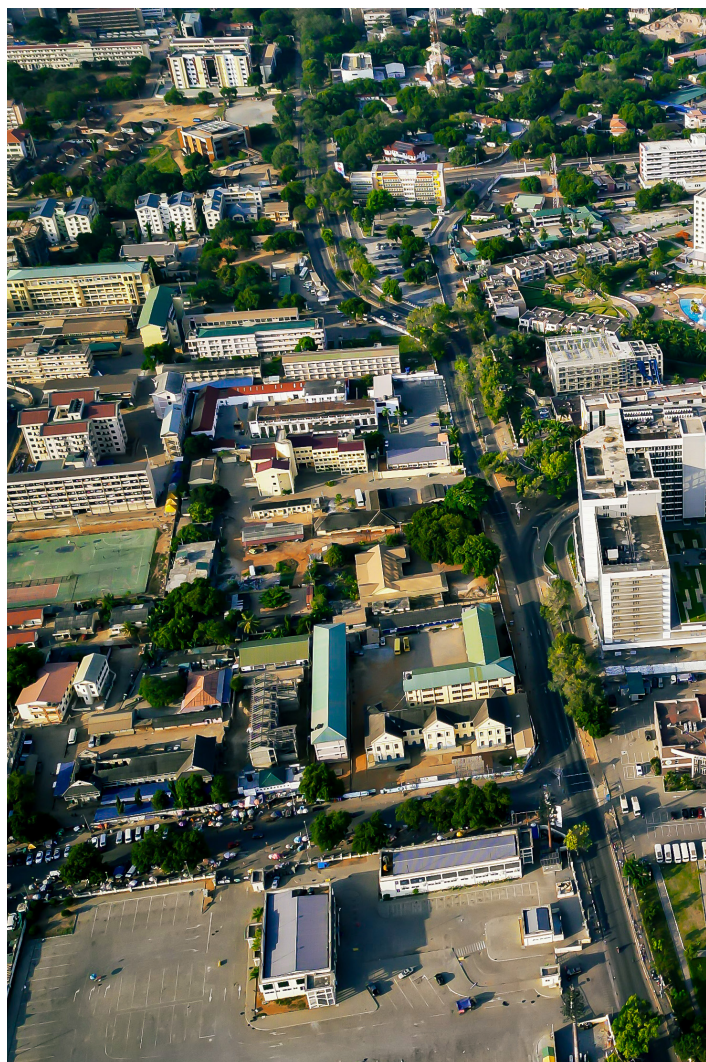
The Ghana Investment Promotion Centre (GIPC) is the agency of the Ghanaian government responsible for the encouragement and promotion of foreign investments in Ghana. A foreign company (an enterprise with foreign equity participation) seeking to do business in Ghana must be registered with the GIPC in addition to other incorporation requirements under Ghanaian law. A foreign person participating in a company in Ghana with a Ghanaian citizen is required to invest foreign capital of not less than USD 200,000 in cash or capital goods relevant to the investment or a combination of both.

Where the company is wholly owned by a foreign person, that person is mandated to invest foreign capital of not less than USD 500,000 in cash or capital goods relevant to the investment or a combination of both as equity capital in the enterprise.

In relation to a trading enterprise which includes the purchasing and selling of imported goods and services, a foreign investor is mandated to invest a minimum of USD 1 million in cash or goods and services relevant to the investment.

III Ghana's relationship with the international community

The BRI is an ambitious global project that has over 150 participating countries. Out of that number, Ghana has bilateral investment treaties (BITs) with the following countries: Turkey (signed in 2016 but not in force); Barbados (signed in 2008 but not in force); Botswana (signed in 2003 but not in force); Zimbabwe (signed in 2003 but not in force); Mauritania (signed in 2001 but not in force); Zambia (signed in 2001 but not in force); Benin (signed in 2001 but not in force); Guinea (signed in 2001 but not in force); Serbia (signed in 2000 but not in force); Cuba (signed in 1999 but not in force); South Africa (signed in 1998 but not in force); Italy (signed in 1998 but not in force); Egypt (signed in 1998 but not in force); Cote d'Ivoire (signed in 1997 but not in force); Malaysia (signed in 1996 but not in



force); Bulgaria (signed in 1989 but not in force); and Romania (signed in 1989 but not in force).

Ghana is a member of the World Trade Organization (WTO) and is a signatory to the WTO Trade Facilitation Agreement, which governs customs procedures and processes. Ghana is a member of the Economic Community of West African States (ECOWAS), a regional political and economic union of 15 countries located in West Africa. Ghana is one of the leading signatories to the African Continental Free Trade Area (AfCFTA), and host of the AfCFTA Secretariat in Accra.

In relation to Europe, the European Union (EU) Diplomatic Mission in Ghana has started its Joint Programming for 2021–2027, which was launched by the Minister of Finance, Hon. Ken Ofori Atta and the EU Commissioner for International Partnerships on her visit to Accra in April 2022. Under the Programme, Ghana will receive EUR 203 million spanning 2021 to 2024 towards the following priority projects: Green Growth and Jobs; Smart and Sustainable Cities; and Good Governance and Security. The EU is one of Ghana's most important trading partners. In 2022, Ghana's largest source of imports were from the EU, representing 17.4% of the imports of Ghana. Exports from the EU are the fourth-largest



of Ghana's exports, accounting for 11.3% of Ghana's exports. Ghana has executed an Economic Partnership Agreement (EPA) with the EU, which covers 78% of the tariff lines of Ghana. Following the conclusion of the EPA, Ghana began tariff reduction of goods imported from the EU in July 2021 and terminated tariffs on some of the goods.

IV Ghana's judicial system and legal tradition

The judiciary occupies a very important place in Ghana's democracy, being the third arm of the government created by the 1992 Constitution. The Constitution vests the judicial power of Ghana in the judiciary, which is to be independent and not be subject to the direction of the President or Parliament. The judiciary in Ghana comprises the Superior Courts of Judicature and the lower courts. The Constitution creates the Superior Courts of Judicature, namely: the High Court; the Court of Appeal; and the Supreme Court.

The Supreme Court is the apex court in Ghana. It is the final Court of Appeal in Ghana, and the decisions of the Supreme Court on questions of law are final. All other courts are bound to follow the decisions of the Supreme Court. The Supreme Court also has original jurisdiction relating to matters of the interpretation and enforcement of the Constitution. The Court of Appeal is above the High Court in the hierarchy of courts with appellate jurisdiction from decisions of the High Court and the Circuit Court and other statutorily created tribunals.

The High Court is typically the court of first instance with wide jurisdiction. The Constitution provides that the High Court has jurisdiction in all civil and criminal matters. The High Court will exercise jurisdiction over foreign natural persons in the following circumstances: (a) where they are present in Ghana and can be served; (b) if they are resident in Ghana; and (c) where they submit to the jurisdiction of the High Court. Regarding foreign companies, the court will assume jurisdiction if the foreign company is resident in Ghana or doing business in Ghana. If the parties to a transaction adopt an exclusive jurisdiction clause that seeks to exclude the jurisdiction of the Ghanaian courts, the High Court will likely uphold such a provision unless it finds that the transaction in question has a close connection with Ghana. This is a factual question that is determined based on the facts of each particular case.

Ghana is a common law country that applies the doctrine of judicial precedent in deciding cases. The Constitution recognises the rules of law generally referred to as the common law as a source of Ghanaian law. However, where the legislature has provided rules and laws regulating a particular event, the statute would be the first point of call. Where there are no specific laws regulating a matter before the courts, the courts typically draw guidance from other common law jurisdictions on best practices. In

➔ terms of international law, Ghana adopts a dualist approach where international treaties signed must first be incorporated into municipal law before such laws are directly applicable in Ghana.

Ghana is not a signatory to any international convention or treaty which governs recognition and enforcement of foreign judgments. Be that as it may, foreign judgments may be enforced in Ghana based on the principle of reciprocity or at common law. The Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (LI 1575) made under Section 81 of the Courts Act 1993 (Act 459) provides a list of countries and corresponding courts whose judgments will be enforced in Ghana based on reciprocity. The High Court will decline registration of a foreign judgment from a country listed in LI 1575 if the court that delivered the judgment is not part of the Superior Courts of Judicature of the countries listed in the schedule. The judgment must be conclusive and final between the parties to the suit. Where the foreign judgment originates from a country or court not listed under LI 1575, the party relying on that judgment must commence fresh legal proceedings relying on the foreign judgment as evidence of the claim.

The Centre for Democratic Development in their Afro Barometer Report in 2018 noted that 40% of Ghanaians believed that judges were corrupt, and that the efficiency of the courts was purely reliant on partisan considerations. However, the judiciary has accountability mechanisms in place to deal with corruption in the judiciary. For instance, in 2016 when a private investigator uncovered corruption in the judiciary, all the implicated judges were subjected to the constitutional process for the removal of judges. More recently, the Supreme Court referred a Court of Appeal judge to the Chief Justice for removal proceedings based on alleged misconduct on the part of the judge when he was in the High Court.

V International investment and commercial arbitration in Ghana

The Alternative Dispute Resolution Act, 2010 (Act 798) sets out the legislative regime for the conduct of arbitration in Ghana. Under the Act, parties to a dispute who are subject to an arbitration agreement can initiate arbitration proceedings under the auspices of any of the arbitral institutions in Ghana or on an *ad hoc* basis. In July 2024, the President inaugurated the Alternative Dispute Resolution Centre established under Act 798 with its board chaired by Justice Jones Dotse. The Ghanaian courts are generally friendly to the enforcement of arbitration agreements and would therefore generally enforce an arbitration agreement if a disputing party initiates litigation proceedings contrary to the terms of the arbitration agreement. The current jurisprudence of the Superior Courts in Ghana is that matters of the existence, validity and scope of an arbitration agreement

are to be determined by the arbitral tribunal. The law also creates a regime where disputing parties may seek assistance from the courts for the purpose of interim and provisional awards.

However, under the laws of Ghana, certain matters are non-arbitrable. In Ghana, the arbitrability of a dispute is premised on whether it falls under the four exceptions provided under Section 1 of Act 798. Matters concerning (a) national or public interest, (b) the environment, (c) the enforcement and interpretation of the Constitution, and (d) any other matter that by law cannot be settled by an alternative dispute resolution method are not arbitrable under Ghanaian law. Thus, disputes that typically fall within these categories may be the subject of a challenge when a foreign arbitral award is to be enforced in Ghana.

Ghana is a party to the New York Convention, which has been incorporated into Ghanaian law by Act 798. The party seeking to enforce the award must demonstrate that the award was made under the New York Convention or that a reciprocal arrangement exists between Ghana and the place of arbitration or that the award was made by a competent authority under the laws of the place of arbitration. The High Court would likely enforce a foreign arbitral award if an original award or an authenticated copy has been produced together with the arbitration agreement. However, the party to the dispute is at liberty to challenge the recognition and enforcement of the arbitral award. The High Court will refuse to enforce a foreign award if the award has been annulled in the country in which it was made, if the party against whom the award is invoked was not given sufficient notice to enable the party to present their case, if the party lacking capacity was not properly represented, or if the award exceeds the scope of the arbitration agreement.

As a result of several foreign direct investments in Ghana, there are quite a number of investor-state disputes against the government of Ghana that have been submitted to international arbitration fora, either *ad hoc* or with a recognised international arbitral institution. For instance, Beijing Everyway Traffic Lighting Technology Co. Ltd initiated UNCITRAL arbitration proceedings against the government of Ghana when the government of Ghana cancelled a traffic management contract worth USD 55 million. This arbitration was initiated pursuant to the 1989 China-Ghana BIT. According to the *Global Arbitration Review*, the arbitral tribunal rejected the investment treaty claim on the basis that it was for the Ghanaian courts to determine whether there had been expropriation. The GIPC Act, 2013 grants the High Court of Ghana the jurisdiction to determine the rights of an investor who alleges that their property has been expropriated and the amount of reasonable compensation that the investor is entitled to receive. Generally, though, the GIPC Act, 2013 permits a foreign investor to initiate arbitration against the government of Ghana after mutual discussions have failed. This may be done under the UNCITRAL Arbitration Rules or the preferred arbitration rules selected pursuant to an applicable BIT. **CDR**

Templars is a corporate and commercial law firm dedicated to helping businesses maximise the value of their investments in Ghana and across the West African sub-region. Our clients operate in all sectors of the economy, including oil and gas, renewable energy, finance, mining, construction, shipping, healthcare, and agriculture. Our disputes team focuses on local and international commercial arbitration and litigation (before national courts and the ECOWAS Court of Justice).

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Augustine B. Kidisil is the Managing Partner of the firm and leads the firm's Dispute Resolution, International Economic Law and Shipping practice. His experience spans the disparate yet connected fields of transactional work and dispute resolution. He has represented and advised multinational corporations like Google Inc., Asanko Gold, Kinross/Chirano, Volvo (Trucks and Equipment), Atlas Copco, Tullow, Halliburton, Eni, National Oilwell Varco, and Glencore Energy. He has advised the AfCFTA Secretariat on the operationalisation of the AfCFTA Protocols, and implementation of the Host Country between the government of Ghana and the African Union. Augustine is a graduate of Harvard Law School, the World Trade Institute (MILE 14), and the University of Southampton.

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Paa Kwame Larbi Asare is a Team Lead in the firm's Dispute Resolution practice. He represents clients in complex and challenging disputes in the firm's practice areas. He built his competence leading disputes in corporate and commercial law, commercial and investment arbitration, mining, construction and employment law. He was part of the team that represented GPGC Ltd in its successful UNCITRAL arbitration claim against the government of Ghana for breach of an emergency power agreement. Paa is a Harvard Law School graduate and a Barrister and Solicitor of the Supreme Court of Ghana.

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