FROM FRANKLIN'S DESK: OF PRESIDENTIAL COLLARS & “SOPHISTICATED” FALLACIES

Every President of Ghana comes to the office with a long train of courtiers. Some are senior advisers and strategists, with many years of experience. Some too, let us be honest about it, are minions and hangers-on.

What is true about all of them, from the days of Nkrumah to the Fourth Republic, though is that they are usually discreet and behind-the-scene operatives. After all, they are expected to be busy diligently wrapping their tentacles around the big, unwieldy, machine that the constitution, in its infinite wisdom, has entrusted to one man (in this case) to oil and ride.

And then there is Mr. Kow Essuman.

A man whose self-adulating tagline on his own hagiographic portal and personal website is: “Internationally Known and Locally Accepted”, along with a long list of ribbons he has kept from every station he has arrived in life, including having been crowned as a “smart suit and fine legal brain” by the broadsheets.

He is also an Assistant in the Office of the President in some capacity, which is no doubt the pinnacle of this vast and illustrious pedigree, and the obvious justification for his disdain for “dumbness”.

How can there be beneficial owners when Ghana is the sole shareholder of Agypa Royalties and there will be a public listing on the London Stock Exchange? Am I the one who is dumb or these CSO people are just ... ? Let me just keep quiet before I'm quoted inaccurately.

Like I said, as civil society activists and public policy advocates who have been active in this country for nearly two decades now, we rarely interact with the “inner” Presidential staff.
Consider it therefore unusual when a “presidential assistant” not part of the Government or the President’s public communications team, and especially one of such self-described renown, takes to Facebook and declares the CSO community as “dumb”.

Still, we are used to politicians calling us worse names, and so, unusualness aside, we would ordinarily not have taken much notice of Mr. Essuman, his flamboyant self-portraits and bowties notwithstanding, had he not sought to dismiss the very serious issues of beneficial ownership of the soon-to-be-privatised national assets in the form of gold royalties owned by future generations raised by the CSOs, and trivialise concerns about the decision to incorporate the privatisation vehicle in a tax haven.

Being a lawyer who works in the Presidency, some people may put weight on his totally unresearched and ungrounded comments and outbursts, hence the need for this short note to straighten up the kinks in Mr. Essuman’s ideas about Agyapa.

Mr. Essuman’s outbursts reflects three dangerous fallacies that are taking root, and which if left unchecked will fester and become cancerous to the unfolding public debate. We shall list out these fallacies shortly, but first a general observation.

**Misinformation Dressed as Sophistication**

It is shocking that people who claim to be titans in investment banking and IPO law would be confusing simple issues so thoroughly. Such confusions no doubt come from the tendency in this country of people putting more stock in titles and “claims of expertise” instead of in rigorous analysis and research.

It is curious that people who have never listed a company on any international exchange before want to pretend that merely because they have assumed some titles, other people who, like them, have also not listed a company on an international exchange, but who nonetheless have taken the time to research the process and interviewed those who have, cannot, in the national and public interest, offer rigorous, analytical, positions. This is abject drivel.

There are academic researchers and good governance campaigners who know far more about the governance problems of the capital markets and the problems of resource theft and misappropriation than capital market professionals and asset managers whose values and worldview are often simply about making a buck.
And, even if high-minded, are often too stuck in the rut to see the problems that afflict their industry.

To reduce a complex political economy subject such as how best to ensure sound governance of the royalties of a sovereign nation in the international arena to “finance technicians”, “legal drafters”, “investment bankers” and other such specialists when, very obviously, many disciplines intersect to properly x-ray the situation for analysis is the height of ignorance masquerading as sophistication, a common problem in the upper political classes nowadays.

**The Fallacy of “The Market will Set the Price”**

It is this misinformed view suited up in pompous titles that have led some to argue that Ghana’s royalties are to be valued by the market when the transaction itself is clearly not set up as such.

The Assignment/Investment Agreement itself values the entity (Agyapa Royalties Ghana Ltd - ARG) to which Ghana is allocating 75.6% of (all the country’s statutorily unencumbered) gold royalties at $1 Billion. This is not the entity that is being listed. So, there is no logic in the assertion that it is the listing price of this vehicle that will determine the value of the royalties. Rather, the agreement sets up a price at which the investment vehicle (Agyapa Royalties PLC - Agyapa) will buy ARG, and that is very explicitly $1 Billion.

However, it is also true that the Government is being paid in return with 51% of shares in Agyapa and $500m in cash. That means that half of the country’s unencumbered gold royalties has been determined independent of what happens on the London Stock Exchange. It is also a fact that even the 51% in-kind payment in shares is not entirely up to the market.

Many government spokespersons have been all over the place claiming that putting a company on the stock exchange simply means allowing the investor community to determine the valuation.

In fact, the advisors, brokers and sponsors the Government selects to manage the IPO have a huge role to play in setting the price, and therefore determining what Ghana gets in exchange for the 51% in shares.

Firstly, there is, of course, the offering price the promoters informally discuss with institutional investors as it racks up demand for the shares. The idea that in a book-building IPO, no one can influence the aftermarket price is abstract illogic.
Secondly, the very process of managing information and signalling intent over a significant length of time during bookbuilding actually enhances pricing power in the multi-level asymmetric arrangement between Ghanaians as the Principals, whose assets are being sold, and our Agents, the Government officials managing the process on our blindside, and their own sub-agents, the underwriters.

As such, the Government owes Ghanaians every duty to tell the country what informal offering price has been set for the stock and what valuation of the 51% shares in Agyapa it is thus most certain of getting. This can only be done through a disclosure of the agreements it has with these key role players.

That is the fair starting point in any debate about how much the country’s royalties are being sold for. Bearing in mind that in the long-term, the 51% may even fall below $500 million. There is therefore no assurance to Ghanaians to devolve responsibility to the market as if it is some abstract entity, when the government and its hirelings have been intimately involved in choosing the key actors whose actions and projections will determine the price.

The Fallacy of “Everyone Can Buy the Shares Too”

Another ignorant trope suited up and decorated with a cheap bowtie is the claim that because the Agyapa vehicle is being listed, “everyone” can also buy some of the shares.

As Binay and his colleague researchers have shown (corroborated since then by many other researchers), underwriters (think of them as “sponsors” who promote the stock to investors on behalf of Agyapa, and according to the agreement may even guarantee demand) more or less determine who can obtain shares in a new IPO, and are very critical when looking at under-priced IPOs in particular, where there is a chance to make a ton of money by buying under-priced shares and selling soon after the stock debuts and other investors rush in (flipping, spinning, etc.).

In case, the self-congratulating “professionals” who have been throwing their weight about haven’t heard of the practice of “book-building”, the mode of IPO chosen by the Government (in place of the retail investor favouring auction model), and how it ensures that only favourites of the underwriters and brokers get assigned/allocated shares in an IPO of this nature, they are invited to “humble themselves” and go and find Christine Hurt’s fine exposition on “moral hazards” in IPOs, which contains a nice assessment of book-building abuses.
Let us make it very clear: only friends of the promoters of the Agyapa deal shall be able to buy into the IPO because the promoters would have allocated virtually all the shares by the time the stock makes its official debut. So, our pompous members of the political class should please “clue up” and deal with the reality.

The Fallacy of “Tax Havens Are Normal for Transactions Like This”

We kept the best for last.

A frequent refrain in these times has been the claim that because the MIIF Act itself envisages the creation of tax-free structures to manage Ghana’s royalties income streams, the ownership of those income streams should also vest in obscure owners hiding in offshore corners. This is ridiculous.

The royalties themselves are a separate matter from the income that the vehicle that is being listed to own them shall make from investing and trading. The royalties have been allocated to a Ghanaian vehicle which is already shielded from tax by the MIIF laws - ARG. The extraneous step of selling the royalties to an entity listed in Jersey is what is being discussed.

But let us even grant the tax efficiency argument. Offshore havens are not merely tax-efficient jurisdictions. They are also hotbeds of secrecy, and with it, more often than most of us would wish, underhand business dealings.

The riposte that has been offered to this clear concern is that an entity listed on the London Stock Exchange automatically absolves itself of all suspicion. This here, once again, is evidence that many people dismissing others for not “understanding the issues“ are themselves quite ignorant of resource governance issues.

Of course, for those who think this whole affair is about performing “sensitivity analysis“ and drafting longform demat accounts, they are at liberty to avoid reading up and becoming abreast with the real issues of “beneficial ownership“ and its interplay with natural resource governance. But they should not have the effrontery to tell the rest of us keen on making sure the right concerns are raised to shut up and keep our shirts on.

Firstly, once a stock lists, its movement in the secondary market inevitably leads to shifts in ownership. But even before we get to that point, we know that the
The proposed book-building allocation method being chosen for Agyapa can be set up to be highly non-transparent\textsuperscript{viii}. Furthermore, there is a stark difference between legal and nominal shareholders, on the one hand, and \textit{beneficiary} shareholders on the other hand.

It is not the Stock Market or even the exchange regulator who has the primary duty of ensuring transparency of beneficial ownership but the custodian of the corporate registry itself, which is an authority in the jurisdiction of incorporation.

The concern that Ghanaian CSOs have raised about the planned Agyapo listing in relation to its incorporation in Jersey is that Jersey has not fully complied with the OECD - FATF\textsuperscript{ix} rules on publicising beneficial ownership of Trusts and other structures which may end up controlling entities listed in this jurisdiction.

Whilst the Bailiwick of Jersey has set a timeline of 2023 for compliance, three years is a very long time to hide assets and relationships. This fact alone elevates the risks of incorporation in Jersey for sovereign-owned or partly owned entities whose design and structuring have been dominated by politically exposed persons on the blind side of independent civic watchdogs. Especially when Jersey is particularly noted for allowing complex trusts designed to obscure beneficial ownership.

The “simple and short” of it is that: regardless what is disclosed by Agyapa to the London bourse, it will not illuminate a convoluted trust in Jersey designed to obscure the beneficial control of shares in Agyapa\textsuperscript{x}.

Of course, our bowtie-afficionado of a Presidential Assistant is such a guru in Jersey secrecy and illicit financial flows matters that we mere “non-investment bankers” must just defer to his Facebook ex cathedra proclamations about the safety and comforts of tax havens.
References

i “Unencumbered” because unlike the remaining 24.6%, the Government can do what it wants with it within the appropriations vote. The rest must go to statutory funds like the Minerals Development Fund and other fixed obligations.

ii See a discussion of some of the intricasies here: https://www.researchgate.net/publication/222840220_Bookbuilding_vs_Fixed_Price_Revisited_The_Effect_of_Aftermarket_Trading


iv See: https://www.jstor.org/stable/27647320?seq=1

v See: https://www.economist.com/business/2019/10/24/pos-are-a-racket-but-try-finding-something-better

vi See: https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1170&context=faculty_scholarship


viii See a discussion of this problem here: https://pdfs.semanticscholar.org/dd52/871c48158d4713770d07886b9a975d659975.pdf

ix Organisation for Economic Cooperation & Development (a “club” of the most industrialised countries in the world) and Financial Action Task Force, a separate intergovernmental body set up to develop policies for fighting financial crime at the behest of the G7.

x Read this paper for more details: https://fsi.taxjustice.net/PDF/Jersey.pdf