



RECOMMENDATIONS FOR FUTURE CONCESSION CONTRACT NEGOTIATIONS DRAWN FROM THE AMENDED FIRESTONE CONTRACT

Updated December 2008

On 28 January 2005, Firestone Natural Rubber Company LLC and Firestone Plantations Company, which own the world's largest industrial rubber plantation in Liberia and are now part of the Japanese group, Bridgestone Corporation, signed a new 37 year agreement with the National Transitional Government of Liberia^A even though the previous agreement still had 20 years left to run. A national contract and concession review was carried out of all contracts and concessions signed during the transitional period, under the auspices of the Governance Economic Management Assistance Programme.^B On 31 January 2007 the final report of the concession review was published; it concluded that "...considering rubber price's bullish tendency, state benefits could be significantly enhanced without reducing Firestone profits through good faith renegotiation."¹ Renegotiations started between the Government of Liberia (Government) and Firestone Liberia Inc (Firestone Liberia), and on 28 February 2008, the Government announced that it had signed the Amended and Restated Concessions Agreement with Firestone Liberia (Amended Agreement). The contract was the result of a private renegotiation: despite appeals from local civil society for a three-month public review period, the Government proceeded to ratify the Amended Agreement after only two days of public consultation.

A number of clauses in the Amended Agreement^C deserve careful attention as they may carry undesirable implications for the Government and the Liberian people in the mid-to-long term. This overview and attached report (Annex "A") examine the significant changes in the new contract with the purpose of highlighting issues that the Government and the Liberian people may wish to consider when negotiating concession contracts in the future.

^A The contract with Firestone was negotiated and signed by a transitional government of the former warring factions. A senior official within the Government of Liberia told Global Witness that the transitional government (NTGL) did not have the authority to negotiate and ratify this agreement (Global Witness interview with senior member of the Government of Liberia, May 2006). However, this argument has been disputed by other public official sources, who suggested that, according to article XXII of the 2003 Comprehensive Peace Agreement (Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, August 2003) the transitional government had the legitimacy to carry out "normal state functions". Nevertheless, it is questionable that the signing of a long term contract with such implications for the country constitutes normal state functions. This contention appears to be substantiated by the Liberian Supreme Court ruling in 1995 on the mandate of the then Liberian National Transitional Government (LNTG), which suggests that the transitional government was only a government of necessity and was not established by the "free will and consent of the Liberian people". (Excerpt from Liberian Law Report, 38, p.130, heard: April 1995, decided: 28 July 1995.)

^B The transitional period extended from 14 October 2003 until President Johnson Sirleaf took office on 16 January 2006

^C The Firestone contract, the Amended Agreement and a more in-depth analysis of the Amended Agreement contract and can be downloaded from Global Witness's website www.globalwitness.org

Problem One: Parent company no longer party to contract

Firestone Natural Rubber Company LLC, a company organised under the laws of the State of Delaware, United States of America, is no longer a party to the contract that governs the plantation. Under the previous agreement, the US-based parent company of Firestone Liberia was stated to be "*jointly and severally liable*". As a consequence of this change if in the future Firestone Liberia is unable to pay compensation or otherwise meet its obligations under the Amended Agreement, the US parent company will not be required to step in and fulfil its subsidiary's obligations under the contract. Liability for the parent company would only arise in special circumstances as, for example, if the Liberian subsidiary is subject to such stringent controls by the parent company over its decisions that it ceases to act independently. This is quite rare. The overall result is that, in the event that Firestone Liberia does not do what it promises to do under the contract, it will now be more difficult for the Government to pursue a remedy against the US-based parent company.

Recommended Action: In future negotiations, the Government should seek to expressly include the parent company as a party to the contract and as "*jointly and severally*" liable for contractual defaults of the subsidiary.

Problem Two: Confidentiality clause favours non-transparent payments

The confidentiality clause (section 22.5) within the Amended Agreement is drafted so as to give the Parties a broad discretion when determining which materials and information will be considered confidential. The ban on disclosure to third parties could include a number of transactions such as financial payments made by Firestone Liberia to the Government. This would be detrimental to citizens' interests as once a contract is signed and operations commence, transparency of payments will be critical to ensuring that the revenues generated are used as a basis for sustainable development in Liberia. While a certain level of commercial confidentiality is legitimate, it cannot be as sweeping as it is in this Agreement without prejudicing the flow of information necessary to hold both government and company publicly accountable.

Recommended Action: In future contracts, confidentiality should be waived *inter alia* for all information concerning payments to the Government and disclosed for the public interest.

Problem Three: Government's restricted ability to regulate in the public interest

The contract narrows government policy options in a sector of central importance to its economy and society for the next 37 years.

The Amended Agreement is in place until 2041 (section 3.2). Before 2041, the Government cannot alter the 30% corporate tax payable by the company (section 18.1); cannot alter the amount of rent charged for land used, apart from adjustments due to inflation (section 19.1); and cannot increase the requirement that the workforce comprises at least 50% Liberian citizens (section 11.1).

These and other similar restrictions on policy alterations are the result of section 28, a clause which states that any application of new law that would alter the obligations of the company under the contract will carry a charge that the government must pay in order to compensate the company for extra costs involved in meeting the new requirements.^D The company promises to comply with the new law, (section 30.1), but the

^D The objective of stabilisation clauses such as this one is to create a protective environment for a company's investment. They aim to protect contracts "*from being subject to legislative or administrative measures occurring after the conclusion of the contract*" (Gaetan Verhoosel, "Foreign direct investment and legal constraints on domestic environmental policies: Striking a 'reasonable' balance between stability and change", 1998). Stabilisation clauses recognise the fact that uncertainty regarding changes to the regulatory framework can deter investment and that, in long term investment projects, there is a need for stability to ensure that the projects perform. However, these same stabilisation clauses can raise social and environmental concerns elaborated on further in the text (see Mekong Watch, "Memorandum of legal issues in relation to the concession agreement", Ozgur Can and Sheldon Leader, May 2005; see Sheldon Leader, "Human Rights, Risks, and New Strategies for Global Investment" (2006) 9 (3) *Journal of International Economic Law* 657-705).

government promises to pay it in return for doing so, when the change alters the company's initial expectations under the contract. (section 28). Liberia must compensate even for changes in its own Constitution that alter the company's contractual expectations. (section 30.2) This puts a straight jacket on local public policy that countries in a stronger bargaining position resist. Governments around the world change strategy to respond to economic downturns and other unforeseeable events, and will not allow their hands to be tied by contracts that try to hamper such adaptations in such a sweeping manner. ^E

The preservation of the ability to adapt domestic policy to future changes is of even greater concern for the poorest countries. It is important to improve – not to blunt - the tools available to governments to enable them to bring multinational investors into closer contact with changing social needs. Given the centrality of rubber production to Liberia, the amounts paid by the company in tax and ground rent, as well as the company's employment practices, are key elements in the management of any domestic policy. A contract between a company and government, such as this one, should not be allowed to create a further obstacle to that capacity building. ^F

This is particularly important in light of the research carried out by Global Witness which revealed that new laws are required in Liberia to better protect the public interest. In addition, in 2003, the International Legal Assistance Consortium conducted a review of Liberia's judicial system and concluded that there was a vital need for short and long term legal reform.² Global Witness interviewed United Nations Mission in Liberia (UNMIL) personnel in April 2006, who reported that international assistance was needed, and would be provided, to facilitate the review and updating of legislation.³ Global Witness also interviewed a senior figure in the Ministry of Labour, who noted that the existing labour laws were out of date.⁴ In the meantime, it is important that such initiatives not falter because one of the largest commercial undertakings in the country is able to place obstacles in front of important policy changes.^G

The price to pay for insulating Firestone's activity from legal and policy changes is that Liberia may find itself in breach of its obligation to respect, protect, and fulfil the internationally recognised social and economic rights of its population.^H

It is possible to achieve a balance which benefits all concerned parties and there exists an important precedent for this strategy, applicable to a developing region, in the form of the Human Rights Undertaking that now covers operations of the Baku-Tbilisi-Ceyhan and South Caucasus pipelines.^I

Recommended Action: In future negotiations, the Government should insist that stabilisation and indemnification clauses be subordinated to changes in law and regulation that Liberia needs to make in order

^E The Amended Agreement (section 31.1) calls for the parties to confer on revisions in the light of '*profound changes*' in circumstances. These are defined in section 1. 33 as changes in economic, political and social circumstances which are so extreme that they alter the assumptions on which the parties entered into the agreement. The difficulty is that any alteration proposed by the Liberian government resulting from such a change must be agreed by the company to be necessary (section 31.1). It may well refuse to agree, taking a different view than does government about the need for policy to adapt to such changes. This is an area in which governments need to retain unfettered their sovereign judgement about what the public interest requires.

^F "... [T]he negative effects of stabilization clauses are exacerbated in developing countries, where the need is for rapid legislative development and implementation — not for obstacles to the application of new laws." Stabilization Clauses and Human Rights : A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights by Andrea Shemberg, March 11, 2008 para 100. p.8.

^G See report by Global Witness, Heavy Mittal: A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV. October 2006

^H See report by Global Witness, Heavy Mittal: A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV, October 2006, section 4

^I The BTC Human Rights Undertakings, signed on 22 September 2003, are a legally binding deed and have been developed following discussions with Amnesty International and other NGOs to safeguard human rights. The Baku-Tbilisi-Ceyhan pipeline project is a large foreign direct investment project in the Caspian region and is an oil pipeline built between Baku (Azerbaijan) and Ceyhan (Turkey), connecting the Caspian Sea to the Mediterranean, via Georgia. An equivalent instrument has been created for the South Caucasus Pipeline by BP in 2005.

to comply with its evolving international obligations to its subjects, as well as evolving standards under its Constitution. Within those limits, stabilization clauses can take effect, but when those limits are reached, government should be able to make unilateral changes without compensating for extra costs. The BTC Human Rights Undertaking provides an example of this strategy.

Problem Four: Lack of redress for affected local people

Firestone Liberia makes a number of promises under the Amended Agreement that could potentially benefit communities within the concession area, assuming the promises are enforceable. For example, the company agrees to provide at least one well per 30 houses in divisions within the concession where there are no standpipes (section 8.3). Whilst this is obviously a positive addition to the contract, in reality, if Firestone does not fulfil this obligation to an acceptable standard, a house dweller cannot seek to rectify the failure even though it would be a breach of the Amended Agreement. This is because access to arbitration is limited to the parties to the agreement^J and cannot be brought by affected third parties.^K Section 32.3 states that "*No Person that is not a Party to this Agreement shall have any rights under it unless so provided by its terms*". There is no provision granting affected local people, such as employee and their dependants rights to challenge the company on issues such water supply, medical care (section 9); or free education (section 10.1), all of which are undertakings made in the Agreement. Similarly, there is no express provision that outlines an intention by the Government to support any claim by an affected group for non-performance of the socio-environmental contractual obligations made in the agreement. Local populations therefore have to rely on the willingness of the Government to take up their cause and sue for the enforcement of the company's commitments.

A further problem is that this can only take place in front of an international arbitrator, not in the national courts of Liberia. Because international arbitration is expensive and time consuming, it is likely this route would only be pursued if the Government is directly faced with serious contractual infringements which are detrimental to the Government itself. Therefore, in most cases the Government would be at best hesitant to pursue a claim against Firestone Liberia for damages arising from its failure to respect its specific undertakings to local communities and to its employees.

It would be possible for Liberia to enact legislation that would give local populations rights to pursue the company for breaches of these social undertakings, and the company specifically commits itself in section 30.1 to respecting all law in effect from time to time on labour, environment, health and safety, and custom and tax matters. At the same time, however, the granting of these rights alters the terms of the contract, and the government must pay the bill for any extra costs incurred in having the company opened up to this local litigation.

There is no provision in the Amended Agreement that provides public access to information relating to the performance of the company under the terms of the concession. Therefore, those in the community trying to get an accurate picture of the company's overall impact on social and environmental concerns will be obstructed by a lack of information.

Recommended Action: In future negotiations, third party rights to enforce corporate commitments on social, environmental and economic matters, as well as access to adequate information and redress should be expressly stated. These rights can be given force by, for example, including a community rights handbook in the agreement and providing a process for redress such as alternative dispute resolution or under domestic Liberian law for breaches of the Amended Agreement's undertakings. Arbitration over these matters will have to take place under a different venue than that provided by the International Center for the Settlement of Investment Disputes (ICSID), since this body does not deal with disputes between two private parties i.e. the company and groups or individuals claiming damages

^J These are the Government and Firestone Liberia

^K Communities on concession lands or others who may be affected by operations

Problem Five: The security and human rights implications of the use of company security forces

The actions of private security forces are of concern because of the recent historic involvement of private security forces in human rights abuses in Liberia.

The Amended Agreement explicitly recognises human rights protections for local populations as *"treaty obligations of Government"* which have been added within the definitions section as part of the law applicable to the contract.^L On the face of it, this amendment is a positive development as these form part of the law governing the rights and duties of the Parties under the Amended Agreement. In section 30.1 of the Amended Agreement, Firestone Liberia commits itself to acting consistently with Liberia's treaty obligations *"insofar as those have the effect of Law in Liberia"*. The problem is that Parliament may have to integrate the Government's international obligations into domestic law for them to take effect within the context of the Amended Agreement.^M Without this occurring, the addition of treaty obligations to the category of 'Law' in the contract may fail to safeguard against potential human rights abuses.

In section 8.2, there is also a commitment to dealing with security matters in accordance with *"all Laws relating to apprehension and detention and human rights"* applicable to the operations of the company's security department, called the Plant Protection Department (PPD). In the Amended Agreement, the PPD has been given powers to *"apprehend, detain, search and exclude or evict unauthorised persons from the Production Area, and from such other areas ..."* This may entitle Firestone Liberia to direct the PPD to evict community protesters, who may be protesting against damage to their local environment. It may also entitle the PPD to prevent employees from exercising civil and political rights, such as demonstrating in the concession area. The right to apprehend and detain individuals contradicts the Liberian Government's Guidelines for the Establishment of Private Security⁵ and could enable the PPD to detain suspects for periods not in accordance with the law. The expansion of the PPD's area of operation to *"such other areas"* is also open to abuse as it potentially enables them to operate outside of the Production Area without geographically limiting them. In the Amended Agreement, there is no explicit reference to the accountability of the PPD should they commit any human rights abuses.

This contractual provision also gives Firestone Liberia the right to put *"reasonable restrictions"* on the use of farm roads in the interests of company security of assets. By implication, community use of the roads is secondary and could become a potential source of abuse of the rights of the local population. As reported in SAMFU's report, *"The Heavy Load"*, Firestone Liberia allegedly disconnected community roads by digging trenches to prevent community members from travelling along them.⁶

Historic involvement of private security forces in human rights abuses in Liberia.

On 12 November 1985, there was an aborted coup attempt in Liberia. During extensive reprisals, led by the private security force of the Liberian American Swedish Company (LAMCO), in Yekepa, Nimba County, a large number of people were slaughtered.⁷

In March 2003, Global Witness reported that the Oriental Timber Company (OTC) operated a 2,500-strong militia, which fought on behalf of ex-president Charles Taylor and was commanded by General Koffee. This militia was involved in human rights abuses and in destabilising the region.⁸

^L The definition of 'Law' (section 1.23) of the Amended Agreement has been changed to include the international treaty obligations of the Government. Liberia has signed and ratified a number of international treaties and conventions. However, it is currently unclear whether or not any additional law must be passed in Liberia to enforce the provisions of every treaty and agreement to which the country becomes a party.

^M Legal experts suggest that international treaties signed and ratified by the State of Liberia have to be domesticated for them to have the force of law in the country. Therefore, in order to become part of the national legal system or order, international treaties have to be approved and adopted by the legislature.

A May 2006 report by the UN peacekeepers in Liberia stated that the operation of private security firms by rubber companies *"has raised serious concerns regarding the right to security and liberty of person and the prohibition of ill treatment and punishment."*⁹ The report details human rights abuses and incidents of excessive use of force, assault, and illegal detention of individuals by the Plant Protection Department (PPD).¹⁰

Recommended Action: The use of any company security forces operating in Liberia should be strictly controlled. Regulation and sanctioning provisions should be provided. Their powers should be clearly and concisely defined in accordance with Liberian law (specifically the Liberian constitution) and international standards, and monitored regularly to ensure that they are restricted and security held accountable for any human rights violations.

Problem Six: Threatened access to surplus water and electricity supplies

Firestone Liberia can make a profit from the sale of water and electricity to the Government and local populations. In the previous agreement, Firestone Liberia could only sell its surplus supplies to the Government or other persons at rates not exceeding (a) the public utility rates, or (b) rates based upon and derived from Firestone Liberia's own cost of producing these amenities. In the Amended Agreement (section 5.3), Firestone Liberia is entitled to charge a higher price for any surplus, which can also include a mark-up *"which it deems appropriate"* and *"reasonable"* on top of its cost of production.

The consequence is that the Government and other persons may be forced to pay more for basic supplies. If the Government is forced to purchase surplus supplies at a higher price, it will need to subsidise the extra cost. Rather than selling to the Government, the company can choose to sell its surpluses to local communities, without any restriction on the price. Given the high levels of poverty in Liberia, it is wrong that Firestone, as a highly profitable company, is able to profit at the expense of very poor people.¹¹

Recommended Action: It is critical that fundamental rights, particularly the right to water and other essential resources, be protected. The Government should ensure that access to these scarce resources is prioritised. At a minimum, surplus water and electricity supplies must be guaranteed at public utility rates or rates based upon the costs of production of such electricity or water.

Problem Seven: Environmental commitment "*escape clause*"

Companies should ensure that their operations in Liberia are in compliance with national environmental laws and international standards. The Amended Agreement mentions environmental protections but the applicable standard is unclear. The inclusion of a specific reference to the *Environmental Protection and Management Law* (section 15) is a positive development. There is also a commitment to protect public health from unreasonable risk and the environment from unreasonable damage (section 15a). However, these are undermined by the rest of the provision (section 15a), which commits the company simply to abide by the same standards as all other businesses observe elsewhere in the country. The clause is thereby redundant.

In addition, in a post-conflict country like Liberia, investment is likely to come from smaller and less reputable companies that may not employ as strict environmental standards as those used by larger or more responsible/established companies. Overall, this provision may be relied upon by Firestone Liberia as a justification to adopt lower environmental protective measures than the practices applicable in OECD countries, or the standards as established under international environmental law.

In the Amended Agreement there is no provision that directly and clearly states that non-compliance with applicable environmental standards by Firestone Liberia would be a default of a material obligation (section 25. 2(a)) and, therefore, entitle the Government to terminate the agreement.

Recommended Action: In future negotiations, the Government should avoid clauses that could allow companies to undermine commitments to national and international environmental standards.

Problem Eight: Clean water

In the Amended Agreement (section 8.3), the Parties can agree to arbitrary standards of cleanliness without using international standards as benchmarks. This allows for deviation away from best practice standards that could otherwise be monitored and is especially dangerous if domestic law also does not specify a standard of cleanliness for the water. This discretion is too open-ended and may be detrimental to local populations.

Recommended Action: In future negotiations the Government should seek to fix the level of water cleanliness to a domestic legal standard where possible, which should correspond to prevailing international benchmarks. In the absence of a national law for water cleanliness, international standards and relevant treaties on the right to water should be referenced and adopted in future concession contracts.

Problem Nine: Force majeure threatens labour rights

Force majeure clauses should be limited to a discharging event which was not "*reasonably foreseeable*" such as natural disasters, terrorism etc. However, the force majeure clause (section 24.2) within the Amended Agreement entitles the Parties to consider themselves discharged from contractual obligations in instances including "*strikes or other industrial, labor or employer-employee disputes*". Industrial action is often "*reasonably foreseeable*". This inclusion of labour disputes can pose significant de facto threats to fundamental human rights, i.e. labour rights. The prospect of Firestone Liberia dissolving the contract on these force majeure grounds might provide an incentive to the Government to take action that suppresses fundamental worker rights which Liberia has elsewhere committed itself to respecting.

Recommended Action: Force majeure clauses should not include labour actions and should be limited to strictly unforeseeable events.

For greater detail see Annex A "Analysis of the Amended and Restated Concession Agreement Between the Republic of Liberia and Firestone Liberia, Inc., of 2008"

1 Republic of Liberia, "Public Procurement & Concessions Committee Contracts & Concessions Review Sub-Committee Review Of The Contracts & Concessions Executed By The National Transitional Government Of Liberia," CCRC Review Final Report, 31 January 2007

2 International Legal Assistance Consortium, Liberia, December 2003

3 Global Witness interview with senior UNMIL official, April 2006

4 Global Witness interview with senior member of the Ministry of Labour, April 2006

5 The Liberian Ministry of Justice, "The Guidelines for the Establishment of Private Security"

6 SAMFU - Save my Future Foundation, "Liberia: The heavy load: a demand for fundamental changes", June 2008 http://www.samfu.org/do%20files/The%20Heavy%20Load_2008.pdf accessed on 22 August 2008

7 Lawyers' Committee for Human Rights, "Liberia: A promise betrayed", 1986, Page 62

8 Global Witness, "The Usual Suspects: Liberia's weapons and mercenaries in Cote d'Ivoire and Sierra Leone", March 2003, Page 24

9 UNMIL, "Human Rights in Liberia's Rubber Plantations: Tapping into the Future", May 2006, Page 21

10 Ibid, Page 59

11 For more information see the UNDP website: <http://www.lr.undp.org/cprofile.htm>