

Annex "A"

Analysis of the Amended and Restated Concession Agreement Between the Republic of Liberia and Firestone Liberia, Inc., of 2008

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This analysis identifies the significant changes from the terms of the previous concession agreement and highlights the areas of policy concern that the present terms raise.

Reduced direct liability of the U.S. parent company: Preamble and Section 2; Section 4.10 and Appendix VII Supplemental Agreement

There has been a significant change in the parties bound by the Amended and Restated Concession Agreement between the Republic of Liberia and Firestone Liberia, Inc. (Amended Agreement), as compared with the previous concession agreement. The present agreement is between Firestone Liberia, Inc. (Firestone Liberia), a corporation organized under the laws of the Republic of Liberia, and the Government of Liberia (Government). Firestone Natural Rubber Company, LLC, a limited liability company organized under the laws of the State of Delaware, USA, is no longer a party to the contract. The parent company in the overall corporate group is now BFS Diversified Products (BFDP), LLC, a Delaware limited liability company. Firestone Natural Rubber Company, LLC is itself a subsidiary of BFDP. There is a separate agreement between the Government and BFDP (Appendix VII of the Amended Agreement), in which BFDP assumes certain obligations in relation to Firestone Liberia. This agreement is limited to undertakings by BFDP and commits BFDP to not hamper its Liberian subsidiary's assets with mortgages and similar instruments and not to sell the entity without the consent of the Government.

Section 3.3 of the previous agreement provided:

"Subject to the terms of this Section 3, Firestone and Firestone Liberia shall be jointly and severally liable for all obligations under this Agreement."

This provision had widened the potential liability of the parent company in favour of those damaged due to breach of the Agreement. If the sole party liable under the contract is Firestone Liberia Inc, then Liberian company law is likely, in keeping with most corporate laws around the world, to protect the parent company from liability for breach of the contract by its subsidiary. The rare circumstances in which this rule can be ignored are not likely to apply here. If it can be shown that the subsidiary is subjected to such stringent controls by the parent company over its decisions that it ceases to be independent; or that it is used by the parent company to deprive individuals of money owed to them; or finally that it is a shell company with no real operation of its own, then the corporate veil of the subsidiary can be 'pierced' to make the parent company liable for undertakings of its subsidiary. Firestone Liberia is not likely to fall into one of these categories, and so the parent company will be shielded from liability. The previous agreement went beyond these rules and would have improved the chances of compensation for those damaged. By making Firestone USA, jointly and severally liable, together with Firestone Liberia, for obligations under that agreement, there was no need to show any of the special reasons for piercing the veil of the subsidiary in order to hold the parent liable.

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The previous arrangement did have the fault that Firestone Natural Rubber Company LLC was in fact a shell company and hence would probably not have had the resources to meet its obligations under the earlier Agreement. For shell companies such as this, however, the Delaware courts are often willing to pierce the corporate veil. They would have placed the parent in its shoes as jointly and severally liable under the contract. Now that the US company has been removed, there is no longer this possible recourse. If the Amended Agreement is broken it will only be in the rare circumstances indicated that Firestone Liberia Inc can be ignored as a separate company and the assets of the parent company reached.

With the narrowing of contractual liability to that of Firestone Liberia alone, future claimants will be vulnerable to the parent company's ability to reduce resources in the Liberian subsidiary to the point that the latter might not be able to meet future large awards of damages that the contract may entitle plaintiffs to recover. So long as the parent does not withdraw assets from the subsidiary in order to try to evade a pre-existing obligation it will normally have that room for manoeuvre. Joint and several liability would have reduced that exposure for future claimants.

While the liability of the USA based companies in the Firestone group has been reduced in this way, it has not disappeared. The direct contractual responsibility of the USA based companies under the concession agreement has been reduced. However, that does not change the ability of plaintiffs within Liberia to complain of e.g. torts or regulatory violations under Liberian law committed by the US based companies in the Firestone group for any damage caused via, for example, the actions of their employees who may be working alongside the employees of Firestone Liberia.

Possible discrimination due to definition of 'dependent': Section 1.12

"A Dependent shall be a Person registered as such with Firestone Liberia and who is the spouse or a minor child of an employee of Firestone Liberia..."

Age is not a valid ground for indicating dependency in the family. Dependency often goes beyond the age in most countries. This exclusion of dependent children who are not minors could well cause discrimination when it comes to allocating medical care or education as the agreement provides.

The inclusion of treaty obligations of the Government in the definition of the Law: Section 1.23

In Section 1.23 'Law' the definition has been amended to include the treaty obligations of Government. This amendment is a positive development and allows important treaties and agreements to which Liberia is or will be a party to in the field of human rights and environmental protection to potentially apply to the activities of Firestone Liberia. However, under the 'dualist' system in Liberia it is necessary to pass a separate law if the treaty is to take effect within the Liberian legal system. This can weaken the significance of the inclusion of treaty obligations as a basis for regulating the activities of the company. Caution is therefore necessary in reading section 30 of the Amended Agreement, which provides:

"Except as explicitly provided in this Agreement, Firestone Liberia shall be subject to Law as in effect from time to time, including with respect to labour, environmental, health and safety, customs and tax matters, and shall conduct itself in a manner consistent with Liberia's obligations under international treaties and agreements insofar as those have the effect of Law in Liberia"

Material change in circumstances: Section 1.33

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 Government resulting from such a change must be agreed by the company to be necessary (section 31.1). The latter 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.

The place of this industry in Liberia's future is closely linked to prevailing environmental conditions on which the industry has an impact. Therefore, it would make sense to include changes in environmental conditions within this section, as the alterations that would make it no longer practical to continue with the operations.

Replanting of trees: Section 4.8, Section 7.5 & Section 14.2

The company promises to maintain a *"sufficient programme of replanting of rubber trees to allow the permit the continuation of the commercial production of Rubber Trees from the Production Area on a going concern basis"*. Section 7.5 details this obligation to replant. The Amended Agreement is more concerned about the quantity of rubber trees but less about the quality, nor crucially whether the rubber tree should be native to Liberia. Thus, it is possible for Firestone to replant with genetically modified (GM) rubber trees. There could be strong commercial incentives for doing so. Research is underway and there is evidence that GM rubber trees have been experimented on in India and may carry environmental risks. The undertaking in Section 14.2 suggests that the quality of the replanted trees is a matter reserved to Firestone Liberia to decide (*"quality used by Firestone for replanting..."*). Commitments to satisfactory quality of the trees can therefore be implied, but would not cure the concerns raised above.

Firestone Liberia can make a profit from the sale of electricity to the Government: Section 5.3

The main change here concerns the terms of selling of Firestone Liberia's surplus electricity or water after the needs of the company have been met. In the earlier agreement, it was provided that Firestone Liberia could sell its surplus supplies to the Government or other Persons at rates not exceeding the higher of (a) the public utility rates, if any, then prevailing in Liberia or (b) rates based upon and derived from Firestone Liberia's own cost of producing such electricity or water. This ensured competitive and equal prices for the surplus. Besides its own cost of producing of electricity or water it can also include a mark-up 'which it deems appropriate' and 'reasonable' to profit from the sale of surplus electricity or water.

Given the importance of water and of electricity as a core resource for local populations, this is a potentially important change. This is not a good precedent for industries which generate these scarce resources or public goods that are often badly needed by a local population. The Government has weakened its ability to treat the surplus electricity or water as a public good to which all would have access on the terms the government sets for a public utility. The fact that Firestone Liberia has itself produced the supply of water or electricity does not detract from the state's obligation to see that there

is fair access to such a good once it becomes available. If, the levels of water supply to part of the population fall below levels required by international standards which Liberia has undertaken to respect, then the state might be considered to have failed to respect this right by allowing the tariff to be set by Firestone.

Failure to include reference to environmental considerations: Section 7.1

"...[Firestone Liberia] shall produce Rubber Products in such quantities as Firestone Liberia in its sole discretion deems appropriate taking into account world market conditions for Rubber Products, economic conditions in Liberia and abroad, and sound business practices in the Production of Rubber Products'.

Reference to environmental considerations could be included as factors which Firestone is obligated to consider, given the significant impact that its activities can have on the local environment. See also the recommendation above re section 31.1 that environmental changes be included within the category of 'profound changes' in circumstances.

The Government is prevented from regulating prices: Section.7.4

"Firestone Liberia shall have the right to sell Rubber Products to unrelated Persons of its choosing at prices it deems appropriate taking into account good, modern, competitive business practices..."

By this provision, the Government prevents itself from intervening to regulate prices charged and the conditions of sale that are imposed by Firestone Liberia, unless the vague provision concerning modern competitive business practice can be invoked. If Firestone Liberia is the dominant seller in rubber products nationally, this could prove to be a problem for future government policy.

Purchase Price of Rubber: Section 7.6

"...The purchase price ... shall be the export sales price for Rubber... for the same grade and type of Rubber shipped during the calendar month prior to the month in which the purchase takes place less all costs of sale incurred and a reasonable mark-up. Firestone Liberia shall provide to the Minister each month a summary of the basis on which it calculated its purchase prices of Rubber and Rubber Products for the prior month, including (i) any allocations used in computing deductible costs and the basis for Firestone Liberia's determination of mark up..."

Disputes may arise between the Minister and the company over the purchase price of rubber. Differences can be brought to an expert appointed by the parties or by the secretariat for international arbitration (ICSID), but in the latter case it is not clear that the needs of local businesses and communities will be given sufficient weight.

Extensive Powers of the Plant Protection Department: Section 8.2

When analysing the previous version of the Agreement, the concern was expressed that the provisions dealing with establishment of a Plant Protection Department (PPD)^B for the purpose of

^B Also referred to as Plant Protection Force.

protecting the Concession Area (Section 8.2) may lead to the establishment of a private army with powers that may infringe on the human rights of the local community. Given that Liberia was ravaged by several years of civil war involving militia working for companies in the natural resource sector, such a provision for the establishment of a PPD may be necessary to provide adequate security for the activities and personnel of Firestone Liberia. Nevertheless, the establishment of a PPD for maintaining law, order and security may result in corporate complicity in human rights abuses. The PPD is given wide powers to *“search and exclude or evict unauthorised persons from the Production Area, and from such other areas as may be properly restricted for economic, operational or security reasons...”* This may entitle the Management of Firestone Liberia to direct the PPD to prevent employees from demonstrating in the Concession Area in the exercise of their rights to freedom of assembly and association. It may also entitle the PPD, on economic, operational or security grounds, to evict community protesters, who may be protesting against damage to their local environment.

The contractual provision also gives Firestone the right to put *‘reasonable restrictions’* on the use of Farm Roads roads and trails^C 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 allegedly disconnected community roads by digging trenches to prevent community members from using the roads.^I

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 Liberian American Swedish Company (LAMCO), in Yekepa, Nimba County, a large number of people were slaughtered.^D

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. These militias were involved in human rights abuses and in destabilising the region.^E

The May 2006 UNMIL report *“Human Rights in Liberia’s Rubber Plantations: Tapping into the Future”* 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.”*^F 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), which provides private security for a rubber company.^G

Clean Water and inability of local populations to enforce entitlements: Section 8.3

There are two concerns with this clause. First, in the event that domestic laws do not specify a standard of cleanliness, it is left to the parties to fix such a standard. This provision is too open ended

^C Farm Roads constructed by the company with the Concession Area (s.4.3 (a)(i)) and other Roads in the Concession Area other than Farm Roads (s.6.1), and all trails across the Production Area, which were immemorially used by the population, (4.3(b)),

^D Lawyers Committee for Human Rights, “Liberia: A promise betrayed”, 1986, Page 62.

^E Global Witness, “The Usual Suspects: Liberia’s weapons and mercenaries in Cote d’Ivoire and Sierra Leone”, March 2003, Page 24.

^F UNMIL, “Human Rights in Liberia’s Rubber Plantations: Tapping into the Future”, May 2006, Page 21.

^G UNMIL, “Human Rights in Liberia’s Rubber Plantations: Tapping into the Future”, May 2006, Page 59.

and open to abuse and could result in water cleanliness falling below an internationally acceptable level. There are international standards that can be used as a benchmark.

Secondly, this undertaking by Firestone Liberia is to provide at least one well per 30 houses in divisions where there are no standpipes. If that obligation is not met, those whom the wells are meant to serve will have no right under the Amended Agreement to enforce their entitlement as only the parties to the Amended Agreement can seek redress based on deficiencies or a lack of fulfilment of clauses.

No definition of who is entitled to housing: Section 8.5

"... Firestone Liberia shall provide one house for each Firestone Liberia employee entitled to housing by the end of the Rehabilitation Term in 2015..."

It is not clear who will be considered as entitled to housing, thus leaving the determination of this issue to the discretion of Firestone Liberia. A clear criterion is needed.

Employment and Training: Section 11

Section 11.1 of the Amended Agreement guarantees that *"the employment practices of Firestone Liberia shall conform to Law"*. Given Liberia's relatively low level of ratification of International Labour Organisation (ILO) conventions, this provides little guarantee that international standards will be met. There are, however, two provisions in the Amended Agreement that could be viewed as positive developments:

- a) the provision guaranteeing that all unskilled labour shall be reserved only for Liberian citizens (the previous version of the Agreement allowed the company to hire non-Liberians as well); and
- b) the provision reserving a certain number of senior management positions for qualified Liberian citizens. This number is intended not only to increase over time, but it is not limited to the percentage indicated. (*"at least 30% of the ten most senior management positions within 5 years..., and at least 50% of such positions within 10 years..."*). The equivalent section in the previous version of the Agreement did not reserve a number of senior management positions for qualified Liberians.

However, neither the Agreements state that preference should be given to Liberians over non-Liberians when hiring for senior management positions.

Manufacturing: Section 13

Section 13.3 regarding sales of Rubber Wood to Liberian Manufacturers states that:

"...at market prices and terms (as determined by reference to those prices and terms Firestone Liberia has received or could receive from non-Affiliated purchasers at the time of the purchase order)..."

The term 'market prices and terms' does not appear to consider the differences in transaction costs that would affect prices charged to international non-affiliated purchasers, and which would be less for domestic sales. The result is a discrepancy between possible prices.

Community resources: Section 14

The undertakings in Section 14 regarding communities in the Production Area are subject to the qualification in Section 14.1 that: *"Nothing herein shall require Firestone or Firestone Liberia to make any expenditure or incur any cost (except for the cost of conducting the feasibility study referred to in this Section 14.1) beyond what it would have made or incurred in the ordinary course of its business."* This could remove much of the substance of this undertaking if, in order for the economic and social viability of communities not to be undermined by the company's activities in a particular situation, it is necessary for the company to spend more than it would do in its ordinary course of business.

Dominance of Firestone Liberia in the Rubber Development Fund: Section 14.4 (vi)

"...Entitlement of Producers to participate in such elections [to the Rubber Development Fund] shall be based on the amount actually paid into the Fund by such Persons... and the weight to be given to their votes shall similarly be based on the amount actually paid into the Fund by such Persons..."

Firestone Liberia is the biggest rubber producer and accordingly its voice will have more weight in making decisions on the rehabilitation and development of the rubber sector in Liberia. It is questionable whether it is good for the country that one company should dominate this part of policy making. The result could be biased decision-making in favour of Firestone Liberia.

Low environmental measures commit Firestone to standards observed elsewhere in the country: Section 15

Section 15 states that: *"Firestone Liberia's obligations with respect to the environment shall be as prescribed by Law including the Environmental Protection and Management Law"*

This is a positive addition, considering that the definition of 'Law' in the Amended Agreement includes the 'treaty obligations of Government' (Section 1.23) and that there was no special mention made of the *Environmental Protection and Management Law* in the earlier Agreement. If one were to accept that the legal framework of Liberia is sufficient to guarantee the protection of the environment in accordance with international standards, the following provisions render the quality of this undertaking uncertain:

Section 15(a) of the Amended Agreement makes provision for the protection of the environment as follows:

"Firestone Liberia shall take reasonable measures to ensure that production does not cause unreasonable risks to public health or unreasonable damage to the environment. Unless Firestone Liberia demonstrates that a particular measure is unreasonable, it shall employ measures as protective as those employed by Persons in Liberia and elsewhere engaged in the production and processing of Rubber on a basis similar to production under this Agreement".

Earlier in the Amended Agreement, Section.8.1 provides that:

"Firestone Liberia shall practice modern public health... procedures and precautions ... in accordance with modern rubber plantation and rubber processing practices and Law."

The commitment to protect public health from unreasonable risk and the environment from unreasonable damage in Section 15(a) could be seen as undertakings in the same spirit as Section 8.1: a commitment to high standards, whatever standards are observed elsewhere in the country. However, this is undercut by the rest of Section 15(a), committing the company simply to abide by the same standards as observed by all other businesses in the country. The clause is thereby rendered redundant. This provision may be relied upon by Firestone Liberia as justification for the adoption of those lower environmental protective measures applicable in post-conflict developing countries rather than the practices applicable in Organisation for Economic Co-operation and Development (OECD) countries, or the standards as established under international environmental law. Often this standard does not correspond with emerging best practice, which should be the goal.

It is also important to note that the environmental assessment report and the Environmental Management Plan (EMP) should have been prepared before commencement of operations by Firestone Liberia, and not "within twelve months after the Effective Date" as permitted by Section 15(b). Again, there should also be clear reference to international standards in the field of environmental protection as guidance for preparation of the EMP (presently there is no indication of any standards to be used for drafting the EMP).

According to the Amended Agreement the status of implementation of the EMP is to be reported by Firestone Liberia itself rather than by an independent third party. Section 22.4, of the Amended Agreement, gives the Government the right to inspect all facilities and areas related to the operation of the company. However, there is no clear indication that an inspection will be carried out to ensure that the operations are conducted with the applicable standards for environmental protection.

Though Section 25.2(a) allows the Government to terminate the Amended Agreement in the event that Firestone Liberia fails to comply with its material obligations under the contract, resulting in a materially adverse effect on the Government, there is no reference to non-compliance with applicable environmental standards as a default of a material obligation. A report on the compliance with applicable environmental standards would be good business practice and only natural for a good corporate citizen.

Development Plan does not need to be approved by the Government of Liberia: Section 22.2

"Beginning 90 days after the First Amendment Effective Date, and thereafter on or before June of each succeeding year during the term of this Agreement, Firestone Liberia shall submit a rolling 5-year development plan. Once submitted, the Development Plan shall be subject to review and comment, but not approval and modification, by Government."

It would be advisable for the Government to insist on a stronger role for itself in overseeing the Development Plan guaranteeing that it can introduce reasonable and necessary changes to the Development Plan.

Lack of redress for affected population: section 32.2

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^H and cannot be brought by affected third parties.^I 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. 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 should also be pointed out that if third parties were given rights of access to international arbitration on the contract, then it will have to take place under a different venue that that provided by the International Centre for the Settlement of Investment Disputes (ICSID) since this body does not deal with disputes between two private parties – the company and groups or individuals claiming damages.

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 may have to pay the bill for any extra costs incurred in having the company opened up to this local litigation.

There is, finally, also 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.

Force majeure threatens labour rights: Section 24.2

This entitles either the Government or Firestone Liberia to consider itself discharged from its contractual obligations upon the occurrence of a *force majeure* as determined by sub-section 24.2. However, the definition of force majeure in the Amended Agreement includes ‘strikes or other industrial, labor or employer-employee disputes’. Traditionally, force majeure clauses are not intended to include these types of actions. This can pose significant de facto threats to fundamental labour rights protected by international human rights conventions. Given that industrial disputes can undermine such an important contract, this might provide an incentive for the Government to take action that suppresses fundamental worker rights which the country has elsewhere committed itself to respecting. Section 24.2 should not include these rights, but limited force majeure to a discharging event which is not ‘reasonably foreseeable.’

^H These are the Government and Firestone Liberia

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

Force majeure is not applied in situations where the cause was within the 'reasonable control' of the party claiming suspension or that it could have been avoided 'through the exercise of due diligence' by that party. This falls short of the need to respect basic labour rights that are threatened.

The regulatory capacity of the Government is impaired: Section 28

Indemnification and Stabilisation

The indemnity provided by the Government to Firestone Liberia in Section 28 may have the effect of constraining the regulatory capacity of the Government especially in the introduction of new legislation which may impact negatively on the Agreement. According to Section 28 of the Amended Agreement:

"Any breach by either Party to this Agreement of an obligation provided for in this Agreement or any inability of Government to honour any commitment, undertaking, or other obligation expressed in this Agreement by virtue of a change in Law subsequent to the First Amendment Effective Date where such action of Government in the absence of a change in Law would have resulted in a breach of this Agreement shall entitle the Party aggrieved by such breach or inability to be indemnified by the defaulting Party in an amount equal to damage suffered by the aggrieved Party..."

Though the aim of Section 28 is to make sure that the terms of the contract are not subsequently altered to the detriment of Firestone Liberia, the scope of the section is narrower than classic stabilization clauses. The classic stabilization clause prevents, or calls for compensation for higher costs resulting from, all new laws and regulations applying to the project from the moment of signing an agreement. Here, however, since the Amended Agreement makes the fulfilment of the obligations of the Parties subject to Law, without restricting it to the Law in force at the date of signing of the Agreement, this would not prevent the Government from introducing new Laws in that particular sphere, and would not absolve Firestone Liberia from abiding by new Laws.

However, while the company promises to comply with new law, (section 30.1), the 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. Our view is that it is wrong to make it more difficult for the Liberian government than it is for the government of a developed country to respond to the changing demands of its public interest. Governments around the world are concerned to respond to evolution in their policies as they are hit by economic downturns; climatic or demographic changes; and a host of other unforeseeable elements. Those which are in a stronger bargaining position are able to resist such sweeping restrictions – in this case lasting 30 years - on their ability to respond to these challenges. They will require the investor to absorb the costs of new law or regulation in the public interest, so long as the investor is not targeted for special discriminatory burdens.^J

^J 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.

The possible examples in which this constraint would take effect would be the introduction of new law 1) restricting the rights of Firestone Liberia to freely choose its senior executives by making it obligatory to have only Liberian citizens appointed to those positions when they are available (Section.11.1); 2) making it a duty of Firestone Liberia to provide different community services other than conducting a feasibility study for provision of such (Section.14.1); 3) increasing the income tax rate above 30% (Section 18.1); or 4) making it compulsory when determining/reviewing the amount of a land rental fee to take into account other factors besides the rate of inflation (Section.19.1), etc. . In addition the constraint would arise were Liberia to convert the contractual undertakings on health, education; housing; and water into third party rights under domestic legislation (see the separate analysis of these sections).

Independent reviews and research carried out by Global Witness reveal that new laws are required to better protect the public interest. 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 term and long term legal reform.^K Global Witness interviewed United Nations Mission in Liberia (UNMIL) personnel in April 2006, who reported that international assistance would be provided to facilitate the review and updating of legislation.^L Global Witness also interviewed a senior figure in the Ministry of Labour, who noted that the existing labour laws were out of date.^M

The Amended Agreement also contains several stabilisation clauses, which are similar to classic freezing clauses^N and which have the potential to undermine the Government's right to regulate on important public policy areas^O, such as taxation (see Section 18 and Section 20).

Furthermore, according to Section.20.15:

"If in any calendar year after the Rehabilitation Term and prior to January 1, 2042, ...any change in Taxes and Duties not otherwise stabilized through December 31, 2041 or the imposition of any Taxes and Duties that had not been enacted into Law by July 1, 2007 and that were not in effect on July 1, 2007 results in a total amount payable by Firestone Liberia to Government in such calendar year from such Unstabilized Taxes and Duties that exceeds 110 percent of the total aggregate amount which would have been payable if the only Ustabilized Taxes and Duties applicable were those that had been enacted into Law and were in effect and at the levels effective as of July 1, 2007... then Firestone Liberia may elect that such excess amount shall be: either (i) credited by Firestone Liberia against any Taxes and Duties payable during such or... any subsequent calendar year... or (ii) refunded to Firestone Liberia by Government..."

The Government is recommended to make sure that its power to make important policy decisions is not impaired by such clauses. Though Section 31.3 in the contract would allow the Government, together with Firestone Liberia, to review the Amended Agreement with a view of considering whether

^K International Legal Assistance Consortium, Liberia, December 2003.

^L Global Witness interview with senior UNMIL official, April 2006.

^M Global Witness interview with senior member of the Ministry of Labour, April 2006.

^N The objective of stabilisation clauses is to create a protective environment for a company's investment. They aim to protect contracts "from being subject to legislative or administrative measuring 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 (Mekong Watch, "Memorandum of legal issues in relation to the concession agreement", Ozgur Can and Sheldon Leader, May 2005).

^O 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

'profound changes' in circumstances have occurred would require making changes to it, criterion for 'profound changes' is not specified, and is usually interpreted very strictly. The Government might need to introduce changes in its policy in situations which do not meet the requirements of that section. It would again be possible to use analogies from the BTC Human Rights Undertaking^P, with suitable changes to fit the distinct issues here.

i SAMFU - Save my Future Foundation (June, 2008:7 and 13-14) "Liberia: The heavy load: a demand for fundamental changes" http://www.samfu.org/do%20files/The%20Heavy%20Load_2008.pdf accessed on 22.08.08

^P The BTC Human Rights Undertakings, signed on 22 September 2003 is a legally binding deed and has 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 a pipeline built between Baku (Azerbaijan) and Ceyhan (Turkey), connecting the Caspian Sea to the Mediterranean, via Georgia [BTC project].