



13 February 2009

RECOMMENDATIONS FOR FUTURE CONCESSION CONTRACT NEGOTIATIONS AND FOR THE CONSIDERATION OF THE CHINA UNION CONTRACT BY THE LIBERIAN LEGISLATURE

Global Witness^A and Green Advocates^B have commissioned an in-depth analysis of the China-Union (Hong Kong) Mining Company Limited and China-Union Investment (Liberia) Bong Mines Company Limited (China Union) Mineral Development Agreement with the Government of the Republic of Liberia (the Agreement) by practitioners from the mining sector and experts in human rights and tax law.^C The objective of this memorandum is to highlight specific provisions that should be considered by the Liberian Legislature when reviewing this contract and also issues that should receive more attention in future concession agreements. This memorandum focuses on the most important positive aspects of the contract and also areas where there is room for improvement.^D

On January 19 2009, China-Union (Hong Kong) Mining Company Limited and China-Union Investment (Liberia) Bong Mines Company Limited (China Union), signed a 25 year Mineral Development Agreement with the Government of the Republic of Liberia for the exploration and mining of iron ore in the Bong Range of Liberia. The deal is reported to be the largest ever foreign investment in Liberia. The contract was the result of an international competitive bidding process following the publication of a general solicitation for bid proposals on 23 January 2008. China Union submitted its bid on the 23 May 2008 along with a number of other companies, and was accepted by the Government on 8 December 2008.

As a result of the current financial crisis the Government agreed to make certain modifications in the terms and conditions of the granting of rights and other related terms and conditions with respect to the Bong project. Green Advocates and Global Witness have been unable to obtain copies of the general solicitation for bid proposals, original bidding documents or modified bidding documents and cannot therefore make any assessment of these documents. Annexes and schedules (specifically schedule 6) to the contract were not submitted to the Legislature, therefore a full analysis of the fiscal implications of the contract is impossible to complete. To ensure that the Legislature is able to assess the implications of the contract for the Liberian people, they must also be provided with information on the company's management and mining experience. It is critical that in all future reviews of contracts and concessions by the Legislature the full contract and all associated materials are examined.

^A Global Witness exposes the corrupt exploitation of natural resources and international trade systems, to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was co-nominated for the 2003 Nobel Peace Prize for its leading work on 'conflict diamonds' and awarded the Gleitsman Foundation prize for international activism in 2005. For more information on Liberia, see other Global Witness reports and briefing documents, available at www.globalwitness.org

^B The Association of Environmental Lawyers of Liberia (Green Advocates) was founded in 2001 by a group of progressive law school graduates. Green Advocates is Liberia's first and only public interest environmental law organization. Through advocating for strong environmental laws, working to enforce existing laws, and empowering citizens to participate in environmental decision-making, Green Advocates is helping to build a sustainable future for Liberia.

^C This can be provided to parties who are interested.

^D This memorandum does not examine every positive and negative aspect of the contract.

The contract is a significant improvement over recent contracts signed by the Liberian Government and many of the fiscal provisions represent current international best practice. Positive aspects of the contract include the requirement that the company joins the Liberia Extractive Industry Transparency Initiative (LEITI^E), the disclosure of information on payments to the Government and the fact that the contract is published. Furthermore, the agreement contains robust transfer pricing provisions and the Concessionaire and the Operating Company are made jointly and severally liable.

Despite the various positive aspects of the contract, the Agreement is vague in parts, potentially leaving it open to abuse. Greater clarity and rigour is required to prevent serious problems from arising in the future. Negative aspects of the contract which the Legislature should consider amending are the provisions relating to the resettlement of communities, the fiscal stabilisation clause and the provisions governing the feasibility study. Ultimately, the contract is only as effective as its implementation. As such, it is critical that significant international support is given to develop state capacity, local civil society and legal avenues to provide the checks and balances needed to ensure oversight of the contract's execution.

OVERALL COMMENTS

1. Positive inclusion of transparency provisions and strong fiscal arrangements

In terms of transparency, the Agreement is a remarkable improvement on previous concession contracts, such as the one Liberia's transitional government negotiated with Mittal Steel.^F This is best illustrated by the provision that commits the company to join the *Liberia Extractive Industry Transparency Initiative (LEITI)* (17.5). The contract also includes other provisions that require high levels of transparency and complement the company's participation in LEITI. Provision 6.8, for example, commits the Concessionaire to comprehensive reporting requirements that would deliver much of the information needed for country by country reporting and the completion of EITI reports. Provision 32.1c, meanwhile, states that the Agreement and any amendments are not confidential and the Concessionaire cannot treat information on the timing and amount of royalties and other payments or taxes as confidential. These kinds of provisions should be included in future concession contracts. The contract again exemplifies best practice in provision 33.8, which states that the Government shall make the Agreement and any amendments of it public. Other positive features include robust measures to preclude the possibility of transfer pricing, the arrangements for the financial structuring of the company and provision 20.4, which places a limit on the company's ability to borrow.

2. There must be transparency in spending and accounting for the US\$40 million signature bonus

The agreement requires that China Union pays the Government of Liberia a US\$40 million up front signature bonus. The fact that the Liberian government has publicly announced this payment is positive, as in other resource-rich countries signature bonuses are often kept secret, thereby raising the risks of corruption.

Recommendation: To ensure that this money is used for the benefit of the Liberian people, the Government must ensure transparency in the way in which the US\$40 million is spent and accounted for.

^E The Extractive Industries Transparency Initiative (EITI) was launched in June 2003 by the UK government as a response to the growing international concern that lack of transparency in the flow of revenues from oil and mining companies to developing countries can hide gross corruption and waste of these revenues, contributing to political instability and even violent upheaval. The EITI is a coalition of governments, companies, civil society groups, investors and international organizations. The crucial feature of EITI is that companies disclose their payments, and governments disclose their receipts, enabling citizens to cross-check the accuracy of each set of figure. The EITI aims to strengthen governance by improving transparency and accountability in the extractives sector.

^F Global Witness also commissioned an expert legal analysis of the Mittal Steel and published the report "Heavy Mittal" in October 2006, the contract was subsequently renegotiated on 28 December 2008, and a memorandum on the Amended Firestone Contract published in November 2008.

3. International standards to maximise protection

The term International standards is defined in section 1 as the standards followed by prudent internationally recognized professionals conducting similar activities or services. Under this definition, it is possible that in some situations international standards provide less protection than is required by the various international obligations that bind Liberia. In other situations, international standards might be more protective than the particular treaties that bind Liberia.⁶

Recommendation: Future contracts should state, that wherever international standards or international obligations are referred to, whichever of these provides greater protection of the interests of those affected by the project would apply. Furthermore, where possible more detail of the international standard should be included and reference made to standards used by other international investors, both public (the project standards if the IFC/World Bank) and private (the standards applied by the Equator banks).

In this Agreement, the Governing Law [sec 29 (b)] should be made clearer and have the following clause added: "This agreement and the rights, obligations and duties of the parties hereunder shall be construed and interpreted in accordance with Liberian law and by such principles of international law including but not limited to International Human Rights law."

4. Third party rights and permitting access to remedies

The Agreement contains commitments that benefit local populations in respect of housing, medical care, access to water, etc. Some of these entitlements are over and above those provided by domestic Liberian law. As the Agreement stands these local populations, as third parties to the agreement, have no ability to enforce the terms of the contract by themselves. Instead, they would have to rely on the Government, as party to the agreement, to pursue remedy via arbitration.

Recommendations:

- i) Third parties should be granted standing before an arbitrator. (International Chamber of Commerce (ICC) arbitration can provide more scope for the inclusion of third parties than the International Convention on the Settlement of International Dispute (ICSID) rules.) Consideration should also be given to less expensive and more rapid methods of dispute resolution to deal with third parties' complaints; it is possible to use a process of 'expert determination' in order to assess whether or not there has been violation of the agreement.
- ii) Have the Liberian legislature enact a statute that gives the third parties intended to benefit from Sections 8-11 of the Agreement a separate entitlement under Liberian law to enforce those provisions. This would enable a separate action to be brought under Liberian law by those individuals and groups affected. As a separate legal right, not enforced by the Government but by these third parties; this should not affect the Government's obligations under the Agreement to pursue arbitration as an exclusive and final resolution to claims about its possible violation.
- iii) In addition, amend the Agreement to allow the Government itself the right to elect to enforce the entitlements under Sections 8-11 either by domestic remedies or via arbitration.

5. Tax lost to Liberia

A) Exemptions: The existence of section 14 on taxation provides sweeping tax exemptions and represents a loss to Liberia.

Recommendation: The government should consider whether such clauses are in the interest of the Liberian people in future contracts and concessions negotiations.

⁶ For example: Liberia has not ratified the International Labour Organisation (ILO) convention 138 which sets a minimum age for child labour, nor convention 100 on equal pay for equal work between men and women.

B) Missing information: Schedule 6 on taxation is critical, but has not been disclosed to the public.

Recommendation: In future contracts, the full contract and appendices should be disclosed to the public.

SPECIFIC COMMENTS

6. Feasibility study process and need for improved implementation framework

The feasibility study process is an important phase of the project, as it sets the framework for assessing the social and environmental impacts in future years. Particular aspects to consider with respect to future revisions of this contract include:

A) Initiation of study: The initiation and control of this study should be in the hands of an impartial body. The Agreements makes this clear by providing that it be placed in the hands of an internationally recognised engineering consulting firm that is independent of Concessionaire's interests. However, the firm is to be appointed and paid for by the Concessionaire [sec 5(2)(a)]. This builds in a potential for bias. The fear is that "The credibility of independent assessors has been challenged when the company pays for their work".^H It could lead to a conflict of interest whereby the people paying for the study have a strong stake in its outcome.

Recommendation: In future agreements greater independence from influence by the Concessionaire would be secured by splitting the source of funding for the expert, which should be paid by Concessionaire, from control over the appointment and removal of the expert, which should be controlled by the Government, or jointly by the Government and the Concessionaire.

B) Conduct of Study: The feasibility study is to be prepared by a consulting firm [sec 5.2 a] (independent expert). This study will focus on "efficient and economic operations (other than Exploration)." However, three important components of the feasibility study are to be carried out by the Concessionaire itself: the environmental impact assessment (EIA) [sec 5.2(b-d) and 5.3], the social impact assessment (SIA) and the social action plan, (SAP) [sec 5.4 a]. This creates a situation in which, although the independent expert is ultimately responsible for approving the plan, they do not necessarily have control over the content of the EIA, SIA and SAP. Furthermore, the point at which the independent expert considers the EIA, SIA and SAP for approval comes quite late in the process, raising questions as to whether they would really have the scope to overturn any serious deficiencies in the studies and action plans. An additional concern is the fact that Liberia does not yet have laws setting out the standards to which SIAs and SAPs (nor skills and technology development plans, another requirement of the feasibility study) should be conducted.

Recommendations:

- i) All parts of the feasibility study dealing with environment and social impacts, as well as the social action plan, should be placed in the hands of independent experts with assistance from the Concessionaire in this and future contracts.
- ii) The Liberian government should prioritise the passage of legislation on requirements for preparation of social impact assessments, social action plans and skills and technology development plans, in line with international best practice.

C) Local consultation: It is essential that local consultation be meaningful and conducted on a non-discriminatory basis. It is not clear that hearings in Monrovia and Gbarnga [sec S. 5.4 c.], will suffice. It is important that the views

^H Report of John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises//Human rights impact assessments - resolving key methodological questions Feb 2007

of the most negatively persons be considered as part of this process. This should encompass those who live too far away to participate, or those who cannot afford missing several days at work to participate or cannot afford to travel.

Recommendation: The Government and the Concessionaire should develop an alternative method by which it can be assured that the opinions are collected as close to the potentially affected villages as possible. This could include on-site consultations in or around the village areas. In future agreements, efforts should be made to ensure adequate and meaningful local consultation. The Government could consider drawing on the procedure for public consultation and participation outlined in Regulation 101 under Liberia's Forestry Law.

D) Ministerial approval of feasibility study and granting of mining license: provision 5.7(b) implies that the Minister has the discretion to refuse to approve the feasibility study if he can give adequate reasons. However according to provision 5.7(d) once a feasibility study is approved the Minister must grant the mining license. This may prevent the Minister from taking into account issues such as intense local opposition that arises after the study has been completed or legitimate concerns with the company's proposed activities.

Recommendation: The Minister should have the same discretion to refuse the granting of the mining license as he or she retains with respect to the approval of the feasibility study in this and future agreements.

E) No human rights impact assessment: This is distinct from the social impact assessment provided for, in that it requires the Concessionaire to examine the background human rights situation in the country. It can identify potential cases in which the Concessionaire's activities might make it complicit with human rights violations which originate with the state. It would also identify situations in which the Concessionaire's own conduct could directly cause damage that could trigger demands on the state that it take action on human rights grounds.

Recommendation: Human rights impact assessments should be carried out in all such agreements. A benchmark with clear operational guidelines is provided by the IFC. The IFC is in the final stages of finalising an assessment tool.¹

F) Action plans and potential weaknesses in commitments: The formulation of environmental management plans; social action plans and skills and technology development plan are subject to the proviso that they may be modified or nullified if the parties agree to this in writing. [sec 5/6 (a)]. This has the potential to seriously undermine the strength of these measures, to the detriment of local populations.

Recommendation: A proviso should be added to this agreement to the effect that any such agreement derogating from the provisions in the action plans must not result in a breach of any international obligations or standards that would otherwise apply to these plans.

G) No increased financial obligations for social action plan (SAP) and skills and technology development plan (STDP) There is a serious limitation in sec 5.6 (a) to the effect that any amendment of these plans cannot carry any increased financial obligation on the Concessionaire without its prior consent. Liberia may wish to insist on a revision, especially of the social action plan, in the light of new international obligations on the state that may arise.

Recommendation: This clause should be subject to the proviso that any changes to the SAP or STDP which are carried out as a consequence of any change in the applicable law, do not require the consent of the Concessionaire. If the two parties cannot agree on additional funding, a method of dispute resolution should be agreed upon.

¹[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_SocialResponsibility_HRIARoadTesting_v2/\\$FILE/HRImpactAssessment.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_SocialResponsibility_HRIARoadTesting_v2/$FILE/HRImpactAssessment.pdf)

7. Resettlement of local populations and requirement for free, prior and informed consent

There is a lack of clarity on the definition of International Standards when it comes to the option of resettlement of population living close to the production area, creating the risk of people being moved from their land with inadequate reason. [Sec 5.4.b]

Recommendation: It would be possible to use the IFC criterion of free, prior and informed consultation, as a requirement to assess the legitimacy of the removal of individuals and groups from their land in this and future contracts. It is also important that the requirement should be meaningful, and not just procedural, consultation. ^J

B) Hydroelectric power station: Sec. 19.3a does not explicitly consider the terms under which (possibly necessary) resettlement or expropriation is handled.

Recommendation: It is suggested that Liberia work towards compliance with its international human rights obligations, especially with regard to “shelter and livelihood continuity” (Sec. 5.4b) and the preservation of places with sentimental value (Sec. 6.3c) at least in the provisions and guarantees set out in the present contract.

8. Fiscal stabilisation and offence to democratic principle

Provision 14.4 is a fiscal stabilisation clause and gives rise to taxation by contract rather than by legislation. This is fundamentally contrary to the democratic principle of government accountability for taxation. This clause is profoundly unattractive in this respect and exempts the Concessionaire from any amendments to the revenue code of Liberia after the agreement is signed. The extension of these rights to associated companies in paragraph 14.5 only increases this effect, because the Concessionaire could exploit this to its advantage in the coming years.

Recommendation: In future there should be no stabilisation clauses for tax offering long term preferred treatment.

9. Tax exemption leads to revenue loss

Section 14.3 B exempts the company from a surtax on high yield projects which is included in Liberian tax law. This represents a possible loss to Liberia through the exclusion of the possibility of exceptional profits being subject to a windfall tax.

Recommendation: Once the Concessionaire has recovered its initial investment, exceptional profits should be subject to a windfall tax.

10. No export taxes and extraordinary restriction

Section 14.3 E states that there will be no export taxes charged upon iron ore shipped during the first 25 years. This appears to be an extraordinary restriction upon the future taxation possibility arising from this contract and assumes that all taxes can be collected through royalties and profit taxes, which the experience of some other states has shown not to be the case.

Recommendation: This provision should be removed or limited in length, for example to a ten year period.

11. Jointly and severally liable

Provision 33.8 makes the Concessionaire and the Operating Company jointly and severally liable.

^J Liberia has voted in favour of the Declaration on the Rights of Indigenous Peoples in the UN General Assembly (GA Resolution 10612). This suggests that Liberia accepts free, prior and informed consent for indigenous peoples as outlined in the declaration.

Recommendation: This is a very valuable provision and should be replicated in future contracts.

12. Delineating the powers of company security forces

A) Restricted patrolling area: According to sec. 9.2 (a), security forces are only allowed to operate in “production areas” and in the immediate vicinity in which the Concessionaire has or maintains property and assets. This is not equivalent to the concession areas, as defined in sec 3.1. It is necessary that this distinction is strictly maintained.

Recommendation: Production areas must be clearly delimited within the contract, so that the population living in the concession area, and any visitors, are aware of the difference. The law enforcement forces of Liberia remain responsible for maintaining law, order and public security in the rest of the concession areas.

B) No power to interrogate: Sec. 9.2 (b) outlines the powers given to the private security forces which are clearly limited to two activities: “The Concessionaire’s force will have (i) the power of apprehension and detention in accordance with applicable Law, and (ii) the power, subject to applicable Law, to search and exclude or evict unauthorized Persons from [the specified areas]”. The Voluntary Principles on Security and Human Rights, to which the parties subscribe, specify: “private security should provide only preventative and defensive services and should not engage in activities exclusively the responsibility of state military or law enforcement authorities.” This portion of the agreement therefore does not give any interrogation powers to the private security forces.

Recommendation: The limitations on the powers of the private security forces need to be made clear, including those related to matters of interrogation. This may be important as a preventive measure against the use of torture. Liberia is under the international obligation to prevent the use of torture by any person exercising public functions.

C) Eviction power: The private security forces are given the powers of eviction from the production area [sec 9.2 (b)].

Recommendation: Sec 9.2 (b) needs to be supplemented with legislation and/or policies, for the sake of clarity, with a proviso that all such evictions are carried out in compliance with Art. 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the right to adequate housing and forced evictions.

Good practice; in a post-conflict situation, it is especially important to ensure that the people employed for private security services comply with the following principles:

- i) individuals credibly implicated in human rights abuses should not provide security services for Companies;
- ii) force should be used only when strictly necessary and to an extent proportional to the threat; and
- iii) the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

13. Protecting local people’s water sources

Section 6.3.b , covering reasonable supply of water, lacks clarity as other benefits derived from the water bodies, such as fishing, have not been covered. This could eventually lead to deprivation and migration of communities from the area. This may be balanced with the provisions of section 8.1 of the Agreement, which require operations to be carried out “in a manner that is consistent with the continuing economic and social viability of centres of population...” However, this provision covers “centres of population” and may not necessarily protect small communities or group of people involved in subsistence activities.

There is currently no restriction on the use of water during times of water scarcity. This could have implications for surrounding industrial and local requirements.

Recommendation: As part of the guarantee to preserve traditional water sources, [sec 6.3 (b)] the fall of ground water should be *monitored*, and remedied by company, as it might result in a de facto deprivation of a source of usable water which is explicitly prohibited in the agreement.

In the event of lower than normal rainfall and insufficient water to meet all industrial and local requirements, an independent third party should be brought in to either allocate water and or establish a cost of water use above certain levels by the Concessionaire, during times of scarcity.

14. Value added metal processing in Liberia

Provision 6.5 commits the Concessionaire to working towards and assisting the Government in achieving the policy of the establishment or expansion of downstream metals manufacturing processing facilities in Liberia. This is a positive inclusion in the contract.

15. Preservation provision: Provision 8.1 makes a commitment to preserving the continuing economic and social viability of the centres of populations that form as a result of the Concessionaire's operations. This is a positive inclusion in the contract.

Recommendation: This is a very useful inclusion and should be replicated in future contracts.

CONCLUSION

The Liberian government should be congratulated on negotiating an Agreement which has the potential to play a very positive role in Liberia's development and is a significant improvement on other recent natural resource concession contracts between the state and international companies. We hope that this analysis will provide a useful tool for the Government in its negotiation of future agreements and for the Legislature in its consideration of this contract. We encourage Liberia's lawmakers now to use their voice to ensure that the ratified Bong Mines contract represents the best possible deal for Liberia and its people.