

COMMENTS ON SAMFU AND GLOBAL WITNESS REPORT
(November 25)

Global Witness and SAMFU have recently released a report entitled “Recommendations for future Concession Contract Negotiations Drawn from the Amended Firestone Contract.” Unfortunately, the report in making its judgments contains a number of serious mistakes based on a faulty understanding of the facts or a clear misreading of the agreement. The following comments address the most significant of these errors.

Government’s Restricted Ability to Regulate in the Public Interest.

The report concludes: “The price to pay for insulating the project from legal and policy changes is that Liberia may find itself in breach of its obligation to respect, protect, and fulfill the internationally recognized social and economic rights of its population.” The premise and hence the conclusion are simply wrong. The Agreement reaffirms in each of the substantive sections dealing with social and economic rights that Firestone is subject to “Law.”¹ Law is very broadly defined in the agreement and includes all sovereign acts of Liberia including “treaty obligation[s]” and is not limited to Law as it exists as of the date of the agreement.² Thus Liberia is free to adopt whatever policies it wishes in these vital areas. The Agreement does set standards in a number of these areas, but these standards are additive to Liberian law and do not prevent Liberia from adopting laws imposing additional requirements.³

In fact the Firestone Agreement is legally superior to the favorably cited BTC Human Rights Undertaking because the Firestone Agreement not only preserves the state’s right to legislate and enforce treaty obligations dealing with human rights, but goes further to preserve the same right of the state to act in other critical areas which the BTC agreements do not.⁴ Further, even in the key fiscal provisions Firestone provides a phasing out of certain incentives limiting to the initial rehabilitation period and provides even with the remaining incentives a range in which the government can amend the law without triggering a right on Firestone for compensation.⁵

¹ See, e.g., Section 8.1 (public health and safety), Section 8.5 (housing).

² “Law” is defined with complete generality: “Any constitution, treaty obligation, law, statute, decree, rule, regulation, judicial act or decision, judgment, order, proclamation, directive, executive order or other sovereign act of Government other than this Agreement.” Section 1.23.

³ Simply by way of illustration, the report is wrong when it asserts that under the Agreement Liberia cannot increase the requirement that the workforce comprises at least 50 % Liberian citizens. The first sentence of the cited article, Article 11.1, provides “Employment practices of Firestone Liberia shall conform to Law.” The 50 % is a floor not a ceiling.

⁴ The BTC Agreements have a broad economic stabilization clause requiring the government to reimburse the pipeline for any act that affects the economic equilibrium of the agreements excepting human rights and certain social rights which are governed by the undertaking. Further, unlike Firestone the BTC Agreement does not have a provision allowing the government to reopen negotiations in the case of a “profound change in circumstances.”

⁵ See, e.g., Sections 18.4., 20.15

The real lesson to be learned from the amended Firestone Agreement is that it is possible to have economic stabilization⁶ without limiting the state’s ability to protect itself now and in the future with respect to vital social, political and human rights issues. Firestone should be held up as a model, not for chastisement.⁷

Security and Private Security Forces

The report attempts to be critical of the stringently drafted security provisions, concluding that “their powers should be clearly and concisely defined in accordance with Liberian law (specifically the Liberian Constitution). . . .” Yet that is exactly what the Agreement does. There are no less than six references in the relevant section reiterating that company security forces must operate in accordance with Law (including the Constitution) specifying in particular the sensitive areas of detention and exclusion noted by the report. If Law does not provide sufficient protection, Firestone has also committed itself under the Agreement to observe the Voluntary Principles on Security and Human Rights. The government fully supports the report’s concern about possible human rights abuses and has addressed them exactly as “recommended” and with even more particularity.

Confidentiality Clause

The report claims that the confidentiality clause favors non-transparent payments. In fact the policy on disclosure is entirely within the control of the government. The first sentence of the section states clearly that the limits do not apply where disclosure is “required by Law.” Thus if the Government decides pursuant to its commitment to join the EITI to adopt a policy providing for the disclosure of individual company payments to the government, including those of Firestone, it is free to do so under the Agreement.

Environmental Escape Clause

The report alleges that there is an environmental escape clause. It is simply wrong. The report’s conclusion is based on a careless reading of the agreement. Section 15—the relevant section on Environmental Protection—begins: “Firestone Liberia’s obligations with respect to the environment shall be as prescribed by Law including the Environmental Protection and Management Law and the following:” (Emphasis added). The other requirements of Section 15 are in addition to what is required by Law and not in lieu of those requirements.

“Parent Company” Guarantee

⁶ The report is ambiguous on economic stabilization, citing the need for it in a footnote but seeming to argue against even economic stabilization in the text.

⁷ As a matter of balance, the report might have noted that the health, housing, and educational benefits available to Firestone employees under the Agreement far exceed those available to most Liberian citizens.

The report claims that the Government is not adequately protected against default by Firestone Liberia because there is no parent guarantee, citing the previous agreement which provided for joint and several liability of Firestone Liberia and Firestone Natural Rubber Company, LLC. The report is appropriately concerned about mechanisms to protect the government against defaults, but what it does not realize is that the former provision provided only limited security since Firestone Natural Rubber Company, LLC is a junior subsidiary of the American group of companies without substantial assets other than Firestone Liberia and thus did not bring significant additional protection to the government.

The agreement embodies a different security package to guarantee the performance of Firestone Liberia. In particular, under the Agreement Firestone Liberia is not permitted to mortgage or otherwise encumber the rubber trees on the plantation, by far the most valuable asset, so that the trees would revert to Liberia in event of any continuing default by Firestone Liberia. Moreover, this obligation with respect to the trees is guaranteed in the Supplemental Agreement by BFS Diversified LLC, the parent of Firestone Natural Rubber Company LLC, and unlike the latter a substantial US entity with significant net worth. Structuring the agreement this way also facilitated a clear separation of Firestone Liberia from the other activities of Firestone permitting the establishment of new more stringent and readily enforceable transfer pricing provisions. It is a matter of judgment but the team's own analysis indicated that this was stronger protection than the government had before.

The report's authors should also recognize that there is substantial difference between a large agricultural concession and a mining concession such as Mittal. At the end of a mining concession there is no longer any asset in Liberia and indeed there may be significant reclamation and other liabilities. Upon termination of an agricultural concession, the government would succeed to an ongoing operation with the assets, particularly the rubber trees, passing without cost or charge to the government; the Cavalla Rubber plantation in Maryland County is a case in point.

Other Judgments

The portions of the report regarding the role of public comment in negotiating concession agreements and the provision for redress for individual citizens represent the value judgments of the writers where parties may differ.

The role of the public in these negotiations is a complicated matter because the very nature of negotiations, especially the renegotiation of an existing contract, requires give and take among the parties. It is not a unilateral act of the government as would be the issuance of regulations. In the case of Firestone there were numerous reports in advance of negotiations by governmental authorities, civil society, and the international community. All were critical of the prior agreement and a number provided detailed suggestions regarding changes. Thus the government entered the negotiation with a substantial body of public comment. Actual negotiations involve complicated trade offs in an effort to maximize the benefits and protections of the public while encouraging

investment that is critical to the wellbeing of the country. At the end it is not something that the public can then pick or choose what it likes. That is the reason public comment has to come at the beginning. An agreement of this importance should be reviewed after it is negotiated and approved or rejected by the legislature or other competent authorities. But it really has to be an up or down decision.

Another judgment item is the proper role of citizens' suits to enforce the agreement in Liberian courts. The Agreement is at base a contract between two parties, and it would be unusual for the two contracting parties to give rights to unidentified others. It is, however, fully in the power of the Liberian government to create the right for adversely affected citizens to directly enforce law and regulations in the critical areas of housing, safety, labor disputes, and health. Finding the right balance is difficult and undoubtedly judgments will differ, especially given current capacity constraints within the government and the practical limitations of the judicial system.

The Government of Liberia welcomes the efforts and recommendations of independent organizations such as Global Witness and Save My Future Foundation on these matters. We, however, believe that the many of the recommendations presented by Global Witness have inaccurately interpreted and characterized the legal requirements and provisions within the Firestone Agreement. To reiterate, we have addressed only the most important points in these comments.⁸ We are prepared, however, to comment on each and every issue raised in your report if warranted.

⁸ We did not address recommendations related to electricity and force majeure.