



global witness

# Heavy Mittal?

A State within a State:  
The inequitable Mineral Development Agreement between  
the Government of Liberia and Mittal Steel Holdings NV

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Front Cover Image:  
Steel Plant  
Photographer: Gerd Ludwig/Panos Pictures

# Recommendations

## THE GOVERNMENT OF LIBERIA SHOULD:

- Ensure transparency in the awarding of concessions in natural resource related agreements which affect the public interest, and publish these agreements.
- Require full social and environmental impact assessments to be carried out prior to signing natural resource concession related agreements.
- Ensure that a public consultation is held with the local communities affected by any natural resource concession award to provide them with full information on the likely economic, social, environmental and human rights implications and ensure that there is a mechanism to address these concerns in any future agreement.
- The Government of Liberia (GOL) should establish whether the National Transitional Government of Liberia (NTGL) had the authority to negotiate the Mineral Development Agreement (MDA) and whether its signatories had the authority to sign it.
- Join and implement the Extractive Industries Transparency Initiative (EITI).

## MITTAL STEEL SHOULD:

- Review the current policies in order to adopt and implement clearer policy on human rights and the environment across the Mittal Group operations that reflects international human rights standards, including the Universal Declaration of Human Rights.
- Guarantee the performance, obligations and liabilities of all its subsidiaries in their worldwide operations.
- Join and implement EITI.

## THE INTERNATIONAL COMMUNITY SHOULD:

- Ensure information exchange on issues of taxation between all banks, financial institutions and countries to tackle the negative impacts of tax avoidance.
- Formulate a comprehensive multilateral regulatory framework to prevent and counteract the harmful consequences of strategies such as capital flight, transfer pricing, tax avoidance, tax havens, off-shores, and tax reduction.
- Encourage host countries, especially developing countries, to consider the implications of their foreign investment policies on their long term sustainable development.
- Fully support the efforts of the Special Representative of the United Nations (UN) Secretary-General on business and human rights.
- Promote transparency by continuing to support initiatives such as EITI.
- Provide expertise to developing countries to ensure that model agreements (in particular Mineral Development Agreements) balance the need to attract foreign investment while guaranteeing the long term sustainable development of the country.

Recommendations specific to the Mineral Development Agreement are included at the end of each section.

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Map No. 3775 Rev. 6 UNITED NATIONS  
January 2004

Department of Peacekeeping Operations  
Cartographic Section

# Acronyms

<b>AFL</b>	Armed Forces of Liberia
<b>BTC</b>	Baku-Tbilisi-Ceyhan
<b>EITI</b>	Extractive Industries Transparency Initiative
<b>FIC</b>	Foreign Investment Contract
<b>FOB</b>	Free on Board
<b>GEMAP</b>	Governance and Economic Management Assistance Programme
<b>GIHL</b>	Global Infrastructure Holdings Limited
<b>GOL</b>	Government of Liberia
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILO</b>	International Labour Organisation
<b>IMF</b>	International Monetary Fund
<b>LAMCO</b>	Liberian-American-Swedish Minerals Company
<b>LIMCO/LIMINCO</b>	Liberia Mining Company
<b>LNP</b>	Liberian National Police
<b>LNTG</b>	Liberian National Transitional Government
<b>MDA</b>	Mineral Development Agreement
<b>NGO</b>	Non Governmental Organisation
<b>NTGL</b>	National Transitional Government of Liberia
<b>NTLA</b>	National Transitional Legislative Assembly
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OTC</b>	Oriental Timber Company
<b>PPD</b>	Plant Protection Department
<b>PPF</b>	Plant Protection Force
<b>RUF</b>	Revolutionary United Front
<b>SPV</b>	Special purpose vehicle
<b>TNC</b>	Transnational corporation
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UNMIL</b>	United Nations Mission in Liberia
<b>US</b>	United States
<b>VAT</b>	Value added tax

# Mittal Steel:

## A case study for global change

While this report aims at highlighting the unbalanced nature of the MDA between Mittal Steel and the Government of Liberia, it is also a case study of a well-established pattern of behaviour by transnational corporations (TNCs)<sup>1</sup> around the world: to maximise profit by taking advantage of a regulatory void, which allows TNCs to structure their trade and investment policies through capital flight and aggressive tax avoidance or tax reduction strategies.<sup>1</sup>

Transnational corporations have emerged as increasingly dominant players in the world. Of the 100 largest economies in the world, 51 are corporations while 49 are countries.<sup>2</sup> Despite the increasing globalisation of markets and the prevailing role played by multinational corporations, there is no international legally binding regulatory regime that adequately controls their activities. Under international law, the private sector is obliged to promote international human rights, development and environmental standards.<sup>3</sup> In practice, TNCs are only guided by voluntary codes and self-regulation and are only accountable to their shareholders. As capital has become more and more 'geographically mobile', tax competition, tax avoidance and a lack of international tax policies have allowed TNCs – like Mittal Steel – to operate in extremely favourable financial conditions. Such conditions are not illegal and make perfect business sense. However, they are morally questionable.

### Some of the most widely used strategies are:

**Off-the-shelf companies:** a company formed without having a specific purpose in mind and available for sale to anyone who might request it. Frequently used at short notice to facilitate transactions in tax havens and often bearing unusual names. Many have nominee directors, shareholders and a company secretary.

**Liability sheltering:** the ability of a parent company to protect itself from liability for the debts incurred by its subsidiary company simply by being its shareholder. The parent company offers no guarantee to its subsidiary to settle its debts (which it is under no obligation to give). The result is that in large groups of companies, subsidiaries can be allowed to go bankrupt whilst the group as a whole has the means to settle their liabilities. The loss then arises to the creditors of the failed subsidiary, not the shareholders of the parent company.

**Tax havens:** places that offer low or no tax regimes and/or light regulation to attract business activities and transactions to be located in their territory which might not otherwise have reason to be there. They usually attract 'geographically mobile capital'. The increase in their number (the Tax Justice Network now estimates there are 72 in the world) has led to an increase in offshore activity.

<sup>1</sup> Throughout this report, transnational corporations and multinational corporations are used interchangeably.

## Continuation of Mittal Steel: A case study for global change

**Preferential tax systems:** tax regimes offered to attract inward investment of capital by countries by suspending the normal taxation rules of the country, e.g. by offering tax free periods or by offering increased opportunity to deduct expense from income and so reduce taxable profit.

**Tax holidays:** a form of preferential tax system. Many developing countries offer tax holidays to foreign companies which are not available to their domestic counterparts.

**Transfer pricing:** transfer pricing occurs whenever two or more businesses (whether corporations or not) which are owned or controlled directly or indirectly by the same people trade with each other. If a transfer price can be shown to be the same as the market price then it is always acceptable for tax. However, two entities that are part of the same group might not fix prices at a market rate but might instead fix them at a rate which achieves another purpose, such as tax saving.

The dominant position by multinational corporations, and the threat of relocation, has led many governments to respond by engaging in tax competition as part of their development strategies.

For many developing countries in particular, the response has been the creation of very attractive investment conditions for multinational corporations. This has effectively led to massive loss of tax revenue for developing countries. Revenue that should be used by host governments for basic social and economic infrastructures is being effectively diverted into corporate profit margins. Recent estimates suggest that the total annual loss to developing countries from tax abuse may amount to US\$385bn.<sup>4</sup> A recent UN Millennium Report estimates that it would be necessary to triple the world's aid budget to US\$195 billion a year by 2015<sup>5</sup> in order to meet the millennium development goals, which include halving world poverty by 2015. Unlike aid, however, this revenue could be an independent source of wealth for economic and social development.

Investment by transnational corporations in developing countries could, and sometimes does play a positive role in the provision of revenue, employment and economic and social development. However, the current paucity of international regulation of TNCs' operations allows companies to exploit vulnerable countries, by using some of the strategies described above with potentially devastating consequences for the population.



# Executive Summary

On 17 August 2005, the National Transitional Government of Liberia (NTGL)<sup>ii</sup> entered into a Mineral Development Agreement (MDA) with the world's largest steel company, Mittal Steel, to exploit Liberia's extensive reserves of iron ore, which could see Mittal Steel investing around US\$900 million over the next 25 years. This would appear to be exactly the kind of development Liberia needs, bringing benefits including revenues, employment and improved infrastructure.

However, the country has ceded important sovereign powers and economic rights over a strategic non-renewable resource to a foreign multinational – almost creating a state within a state. The combination of both the 'Mittal-friendly' and relaxed wording in the contract means that in most significant areas Mittal has control over all major decisions in project development, and thus its laudable publicly-stated aims are simply a matter of its own choosing within the provisions of the contract. Such areas are company and capital structure, taxation, royalties and transfer pricing, the transference of the state assets, the stabilisation clause, land rights, private security forces, rights to minerals and confidentiality. In an investment of this scale and of this strategic importance, this is not an acceptable position for a government.

Mittal's position provides a case study of the way in which multinational corporations seek to maximise profit by using an international regulatory void to gain concessions and contracts which strongly favour the corporation over the host nation.

Mittal was given a model MDA by the NTGL which worked to the advantage of the company, allowing it to use virtually every opportunity to maximise profit at the expense of a country trying to get back on its feet, after enduring 15 years of bloody civil war. Whilst Mittal's behaviour is not unusual or illegal, the company has a duty as the world's biggest steel company and a self-professed good corporate citizen to lead by example. Mittal's actions seem at odds with the ethos expressed in its 2005 annual report which avows that the company recognises that its "actions impact the people we employ, the communities and

*countries within which we work and society as a whole ... We seek to ensure that all major business decisions are driven as much by social considerations as by economic ones."*<sup>6</sup>

Probably the single biggest problem with this agreement is that it gives the company complete freedom to set the price of the iron ore, and therefore the basis of the royalty rate. In a mining operation of this scale, royalties payable to the government, together with tax revenues and employment, represent the greatest economic benefits that could be brought by such a deal. In this case, all the ore will be sold to Mittal affiliates and the price to be paid is not set by the market, but is under Mittal's control. Technically this is called a 'transfer price'. Under normal international taxation rules established to set fair transfer prices, as laid down by the Organisation for Economic Co-operation and Development (OECD), the iron ore would normally be sold at an 'arm's length price', which is usually the same as the current market price<sup>7</sup>. Any royalties due would also be based on that price. There is no reference in the agreement as to how the iron ore is to be priced and Liberia has been outside the mainstream of the world's economy for so long that it has not adopted OECD standard practices in this area. This omission is not illegal but leaves Liberia open to exploitation and creates the opportunity for Mittal to sell the iron ore below market value to an affiliate. This would reduce the actual royalties paid to the Government of Liberia (GOL), whilst simultaneously reducing the company's tax burden in Liberia once the tax holiday it enjoys there ends. Such an omission has the potential to

<sup>ii</sup> Liberia's transitional government at the time the MDA was signed which has since been replaced by a democratically elected government.

have even worse consequences for the GOL when the Concessionaire builds facilities to enrich iron ore. In this case the agreement dictates that a lower rate of royalty shall be negotiated. In a meeting with Global Witness, Mittal Steel confirmed its plans to build a concentrator at Tokadeh which will convert raw iron ore to 65% Fe fines with an output of 15 million tonnes per annum.<sup>8</sup>

Mittal has created a corporate structure that means that any liability which may arise from the contract is unlikely to impact on the parent company. Liability for breach of the obligations under the agreement is likely to extend only to Mittal Steel Liberia Limited, as an agent of the Concessionaire, or to the Concessionaire itself. Under English law, it would be possible to pierce the corporate veil and hold the parent company, Mittal Steel NV, liable, but this is a complicated and lengthy legal enquiry and would be of little immediate use to those who may be affected by the company's operations. This means that the parent company could be protected from any claims as a result of the performance of the Concessionaire.

Under the agreement there is no reference as to what level of funds the Concessionaire should have, and no requirement that the level of funds should be sufficient to pay out for any large claim that may arise as a result of, for example, a large-scale accident, or substantial work-related illnesses among a large number of employees. It seems that the parent company would be in a position to walk away from the operation, allowing its two companies directly involved in the Liberia project to go bankrupt.

Like many multinationals Mittal has utilised tax avoidance techniques to minimise its tax burden, both nationally and internationally. Under this agreement Mittal has a generous tax holiday in Liberia for at least five years which has the direct consequence that Liberia, a chronically poor country, is deprived of potentially valuable tax revenues. Some of the agreement's clauses relating to taxation fall far short of recommended international best practice. (see box: *The international communities increasing disapproval of tax holidays, page 19*).

The Concessionaire will need to obtain additional funds to operate. If the Concessionaire chooses to raise the money through equity and the Government of Liberia cannot contribute an equal amount, it would be required to sell its shares to the Concessionaire. Liberia has a national budget of just US\$84,5 million, a crippling external debt and massive reconstruction needs, and is therefore unlikely to be able to contribute any significant sum when it is required. Consequently, the GOL is at great risk, under the agreement, of seeing its share reduced from 30% to 15%. As a result the benefit it should expect to receive from any dividends paid out of the profit of the operation in Liberia is likely to halve.

The contract also transfers two major public assets of Liberia – the port of Buchanan, and the rail infrastructure between Yekepa and the port of Buchanan – to the Concessionaire. The GOL and others will be allowed to use these facilities only if there is spare capacity, at Mittal's discretion and for a cost.<sup>9</sup> This transfer will prevent the GOL from generating much needed revenue for the economic and social development of the country and safeguard access to external markets – a fundamental condition for the development of the local communities in that area.

The MDA contains a stringent stabilisation clause which has far-reaching consequences. The provisions have the potential to undermine Liberia's right to regulate on important public policy areas such as human rights, the environment and taxation. They could severely limit Liberia's ability to fulfil its current and future obligations under the Liberian Constitution, as well as its commitments under international law, by especially narrowing what counts as applicable domestic law. For example, Liberia could be prevented from relying on its own constitution, as clauses in the MDA prevent the application of fresh laws (the Constitution falls under the agreement's definition of law). Such restrictions on prerogatives of the state would not be accepted by governments in the developed world. These provisions could have an even more profound impact on local communities in Liberia. The ability of the

Concessionaire to pick and choose the new laws and regulations with which it will comply may lead to an erosion of the rights of those affected by, or working for, the project. This could create a division between citizens who will enjoy the benefits of developments of the law, and those who will not, creating a hierarchy of rights.

The abuse of land and property rights, especially those relating to the allocation of resource concessions, is widely recognised to be a major catalyst to both low and high-level conflict. Despite this, the MDA gives the Concessionaire rights to possess public land and compulsorily purchase private land without adequate compensation. This is one of the most far reaching consequences of the project. The interests of the communities are not sufficiently protected. There are provisions for them to be consulted if they face removal, or to access an effective remedy.

Provisions within the MDA allow the Concessionaire to operate a private security force. The provisions for the maintenance of a security force by the Concessionaire are vague and fail to adequately to establish the limits of Mittal Steel's authority. The inadequacies of the provisions would be a matter for concern in any country, but could be particularly harmful in Liberia, in view of the historic involvement of private security forces in human rights abuses. Given the human rights records of the former Armed Forces of Liberia (AFL) and rebel groups, appropriate standards for the selection of members of private security forces are critical. Details about the selection and recruitment of the security force are absent from this contract.

The contract commits the government to stringent provisions of confidentiality and non-disclosure of information. Transparency of revenue flows and contracts are a critical first step towards the responsible management



*Derelict machine left by the former Concessionaire LAMCO (the Liberian American Swedish Minerals Company), Yekepa,*

*Global Witness May 2006*

of Liberia's natural resources and towards their potential contribution to poverty reduction. It has been widely recognised that lack of transparency and poor governance create conditions for irregularities and corrupt practices to flourish.

The MDA in its current form represents a missed opportunity for Liberia. While the MDA will provide some employment opportunities, industrial mining has become much less labour intensive, so the most important benefit is the revenue that the government will be generating. This will provide much needed economic and social benefits to the country. Mittal equally needs Liberia as a partner. This MDA represents a significant step in Mittal's strategy to gain self-sufficiency and is vital to the Group's long term business interests: figures provided by the company to Global Witness show that in 2006, Mittal's iron ore capacity is 39.8 million tonnes. The company plans to expand that capacity to 66.7 million tonnes by 2010, of which 15 million tonnes will come from Liberia.<sup>10</sup>

Global Witness hopes that the company will act in good faith to address those provisions in the current agreement which are unbalanced. As part of the current renegotiation, the MDA should ensure that the interests of the GOL, the Liberian people, and Mittal Steel are adequately protected.

# Introduction

On 16 January 2006, Ellen Johnson Sirleaf, Africa's first elected female Head of State, was inaugurated as President of Liberia. This marked a new beginning for a nation shattered by 14 years of civil war, which killed an estimated 250,000 people, displaced around 850,000, and devastated the country's institutions and economy. From 1989, Charles Taylor financed his insurrection by using revenue generated by the sale of natural resources. When he gained power in 1997, Taylor proceeded to sponsor the Revolutionary United Front (RUF) in the civil war in neighbouring Sierra Leone, providing arms in exchange for diamonds.

After United Nations (UN) sanctions were imposed on diamonds from Liberia in 2001, the Taylor government focused its attention on timber as its primary source of revenue. The Liberian timber industry played a vital role in facilitating arms trafficking, until UN sanctions were finally imposed in 2003. In March that same year, the Special Court for Sierra Leone formally indicted Charles Taylor for war crimes. Taylor was arrested on 29 March 2006 and awaits trial in The Hague.

## Poor Quality Contract

One recurring problem of the contract is the poor quality of its drafting. Absent definitions, ill-defined or vague concepts, insufficiently detailed provisions and inadequate punctuation are common throughout the contract. This is surprising considering that the contract was drafted by the world's largest steel company, which presumably has access to the best resources available. Mittal Steel confirmed that the company used a team of internal and external lawyers as well as a Liberian lawyer.<sup>21</sup>

The poor drafting inevitably affects the quality of the contract and could prove detrimental to both parties, for example by potentially conferring unpredicted powers, allowing unspecified activities or omitting decision-making mechanisms. This could have particularly negative implications in the case of a dispute between the Concessionaire and the GOL regarding the contractual rights and responsibilities of each party.

The poor quality of the drafting is evident in the section on definitions and general rules of construction (article I), which is fundamental to the understanding of the terms of the contract.<sup>iii</sup> Similar problems identified in the body of the contract are mentioned in the relevant sections of this report. One of the most obvious examples concerns the provision regarding the "choice of law" which sets out the parties' choice of law to govern the whole or part of their contractual relationship.<sup>iv</sup> Given the implications of "choice of law" clauses, it is reasonable to expect these to be quite specific in the contract. Unfortunately, this is not the case in article XXXIV. The clause states that the obligations and duties of the parties are to be construed and interpreted "in accordance with the laws of the United Kingdom of Great Britain". There is no such jurisdiction as "the United Kingdom of Great Britain"; contracts are governed by English, Scottish or Northern Ireland law, which are all different. In a meeting with Global Witness, Mittal Steel confirmed the mistake.<sup>22</sup>

<sup>iii</sup> For example in article I, section 7, which defines the "concession area", the use of wording such as "unencumbered contiguous areas" does not adequately detail what is included in these areas. Also, in article I, section 10, which defines "development", uses the wording "without limitation" and "any other improvements", which is unhelpful in determining the extent and type of activities that could be carried out by the Concessionaire.

<sup>iv</sup> A "choice of law" clause in a contract is based on the principle of free choice of law and is agreed between the contracting parties on a bona fide basis. It should not waive the application of the mandatory laws (such as public policy laws) of the host country.

Liberia faces the formidable challenges of addressing the most basic and urgent needs of its population, rebuilding its decimated infrastructure, reforming its institutions and reconciling its people. By 2005, unemployment affected over 80% of the population, most of whom live in and around the capital Monrovia (and, who, even there, have no access to running water or electricity). For most Liberians, the new government brings hope and the prospect of stability and development.

On 17 August 2005 the transitional government (NTGL, which was in power from 14 October 2003 to January 2006) entered into a MDA with the world's largest steel company, Mittal Steel, to exploit Liberia's extensive reserves of iron ore. On the face of it, this deal, which could see Mittal Steel investing around US\$900 million over the next 25 years, would appear to be exactly the kind of development Liberia needs. However, the agreement strongly favours Mittal. Liberia has ceded important sovereign and economic rights to a foreign multinational – almost creating a state within a state – placing the hard-won rights of Liberian citizens at risk, with little guarantees of the economic benefits it can expect in return.

The contract with Mittal Steel was negotiated and signed by a transitional government of the former warring factions, five months before the democratic election of a new government. A senior official within the GOL told Global Witness that the NTGL did not have the authority to negotiate and ratify this agreement.<sup>11</sup> However, this argument has been disputed by other public official sources, who suggested that, according to article XXII of the 2003 Comprehensive Peace Agreement,<sup>12</sup> the NTGL 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".<sup>13</sup>

President Johnson Sirleaf has decided to review all tenders carried out by the transitional government, including this MDA. The review of the MDA was concluded in September 2006 and the renegotiation is underway. Mittal Steel told Global Witness that it regarded the MDA as valid; it welcomed the review and has participated fully with the review process. The company added that it did not believe that there were any specific implications for Mittal's investment in Liberia.<sup>14</sup>

This report analyses the MDA and highlights the potential implications of the contract for Liberia's post-conflict reconstruction and development. The report draws on Global Witness's own work on Liberia, including a visit to Liberia in April/May 2006, and on the opinions of human rights, mining, corporate law and tax experts, both on foreign investment contracts in general and on this contract specifically.<sup>v</sup>

### The awarding of the MDA

In 2006, the Dutch National Police's International Corruption Project began an investigation into the circumstances surrounding the Mittal deal. In a letter dated 4 September 2006 to Global Witness, Mittal states that it is "unable to comment on matters relating to any enquires by the Dutch authorities." A June 2005 report on a complaint by Global Infrastructure Holdings Limited (GIHL), produced by a National Transitional Legislative Assembly committee on land, natural resources and environment, concluded that the government had "strayed from the legal process"<sup>19</sup> in the awarding of this MDA.<sup>20</sup> In a meeting on the 6 September 2006 with Global Witness, Mittal Steel said it regarded the MDA as valid. Global Witness believes that it is in the public interest that an investigation by the relevant authorities should be initiated and that the GOL should fully support the Dutch Police investigation.

<sup>v</sup> Taxation advice and analysis was provided by Richard Murphy of Tax Research LLP

## Foreign investment contracts

Liberia's Minerals and Mining Law, adopted in April 2000, encourages foreign investment. It includes a requirement for an MDA between the government and an eligible applicant for a Class A mining licence (section 6.6, p.15). Class A mining licences are open to foreign investors, with concessions awarded for up to 25 years and renewable consecutively if evidence of reserves is found.<sup>23</sup> Although MDAs are not the most common mechanisms through which governments regulate and operate their mines, they are often used to regulate very large projects and can even supersede a country's general mining code.<sup>24</sup> This is why they are increasingly found in developing countries which want to attract foreign investment.

When one of the parties involved in the agreement is a foreign investor, the MDA is effectively a Foreign Investment Contract (FIC). FICs are agreements between host governments and a foreign investor "(which may or may not itself be a direct party to the contract) with capacity to control important management decisions or associated impacts".<sup>25</sup> The contract establishes the terms, conditions and mutual responsibilities that apply to that investment project. Given the importance of these agreements, governments strive to create attractive and stable investment conditions for foreign corporations to invest in the host country. The removal of restrictions on foreign investment can represent a loss of policy autonomy by the government.<sup>26</sup> Therefore, the terms of these contracts have far-reaching implications for a country and its population.<sup>27</sup> Although these investment conditions aim at meeting investors' legitimate expectations, they should also incorporate the principles of sustainable development

that will ensure benefits for the host countries' populations.<sup>28</sup> Crucially, governments should not trade sovereignty in return for foreign investment.

Although FICs have the potential to generate significant and long lasting economic and social benefits for developing countries, they can also have serious negative impacts. A recent study by International Institute for Environment and Development, a United Kingdom (UK) non-governmental organisation (NGO), into a number of such agreements in developing countries has highlighted concerns about the negotiation processes, the terms of the agreements, and how the contracts impact on sustainable development. These concerns include a lack of transparency and a lack of opportunities for public input during the negotiation process, and concerns about the direct and indirect implications of some of the contracts' clauses.<sup>29</sup> Some countries attract investors by regulating protective foreign investment conditions and by reducing the government's potential equity share and tax revenues, which could be the main benefits to their economies.

In the case of minerals, these problems could be significantly exacerbated as most of the world's 20 least developed countries that have experienced civil unrest and conflict are rich in mineral deposits.<sup>30</sup> Furthermore, in countries where natural resources have played a role in fuelling civil wars, mechanisms to prevent illicit exploitation and ensure transparent management of natural resource revenues are often not secured in post-conflict situations.

In discussions with Global Witness, Mittal Steel stressed that it is committed to being a good corporate citizen, a good development partner for Liberia, and that on a whole range of issues – from setting the price of the iron ore to the establishment of a security force – it would follow best international practice and cooperate closely with the GOL. However, the combination of both the ‘Mittal-friendly’ and relaxed wording in the contract means that in most significant areas Mittal has control over major decisions in project development, and thus its laudable publicly-stated aims are a matter of its own choosing within the provisions of the contract.

Liberia’s greatest potential for development and economic recovery probably lies in its wealth in natural resources. Before the civil war, mining was the most important sector of the economy, accounting for two-thirds of the country’s exports.<sup>15</sup> Liberia’s iron ore began to be exploited in the mid-20th century and, until the war led to the closure of the ore mines, the country was one of the world’s leading producers. The country’s three major known deposits are the Wologisi deposit in Lofa County, Bong Mines in Bong County, and the Western Area surrounding Yekepa in Nimba County. (In Guinea, across the border from Yekepa, there are also rich deposits in Mifergui and Simandou). Until production ceased in 1991, iron ore from the Western Area accounted for half the government’s revenue from this sector.<sup>16</sup>

In post-conflict Liberia, the rehabilitation of mining activities in general, and of the iron ore sector in particular, carries expectations of much-needed employment and revenue. In principle, the revitalisation of the mining industry could generate revenue for the country and help to speed up the reconstruction of its infrastructure. If managed in a sustainable and transparent way, and as part of a broader and diversified economic strategy, iron ore extraction could be an important economic driver for post-conflict Liberia. In the mining sector, the majority of the benefits for a host country arise from the tax revenue and the royalties it can collect from the operation, not from the creation of jobs. As mineral production has increased over the years, mining employment has steadily declined. According to an International Labour Organisation (ILO) report, well over three million miners’ jobs have been lost between the late 1990’s and 2002 and there are likely to be further reductions before the end of this decade.<sup>17</sup> This is because the mining industry has evolved from a labour intensive industry to a capital intensive one. As the ILO report further emphasises, *“although this once intensive labour industry now employs well under one per cent of the world’s workforce, producers continue to satisfy a mineral hungry market, largely on the basis of opening new and highly efficient mines (usually in developing countries) and achieving extraordinary gains in productivity that exist in mines through flexible and intensive working shifts with highly skilled workers.”*<sup>18</sup>

**Rich man, poor man – the different worlds brought together by the Mittal deal**



Lakshmi Mittal's house in London



Former Lamco house in Yekepa

Global Witness, March 2006

Lakshmi Mittal is the chief executive officer and chairman of Mittal Steel. While not directly involved in the negotiation of the MDA with Liberia, Lakshmi Mittal is in a position of influence and could make his company into a leading responsible corporate citizen or the "world's most admired steel institution."<sup>33</sup> Lakshmi Mittal was quoted in an interview with the Sunday Telegraph Magazine in 2004 as saying he "never felt differently when I hadn't even £1m because, after all, what do you need?"<sup>34</sup> Despite Mr Mittal's self-professed modest needs, he has a fortune of around US\$25 billion.<sup>35</sup> If this fortune were divided among the Liberian people, each would get a little over US\$8,000. Mittal's 2005 annual report avows that the company "recognise[s] that our actions impact the people we employ, the communities and countries within which we work and society as a whole ... We seek to ensure that all major business decisions are driven as much by social considerations as by economic ones."<sup>36</sup> Mr Mittal is a man of superlatives: he is Britain's richest man and the world's 54th richest according to Forbes magazine<sup>37</sup>; in 2004 he bought what was then reported to be the world's most expensive house for US\$128 million;<sup>38</sup> and his daughter's wedding, which cost US\$60 million, was one of the most lavish ever.<sup>39</sup>

Like Mittal, Liberia is characterised by extremes, but at the other end of the scale, it fails to register on the UN's Human Development Index;<sup>40</sup> one in four children die before the age of five; current life expectancy suggests that over 47% of Liberians born between 2000 and 2005 will die before the age of 40; the country's annual budget, at US\$84.5 million, is US\$43 million cheaper than Mr Mittal's house and 295 times less than his personal wealth; the unemployment rate exceeds 80%; some 80% of the population are below the poverty line; the country has external debts of US\$3.2 billion;<sup>41</sup> and its infrastructure has been destroyed.



Lakshmi Mittal

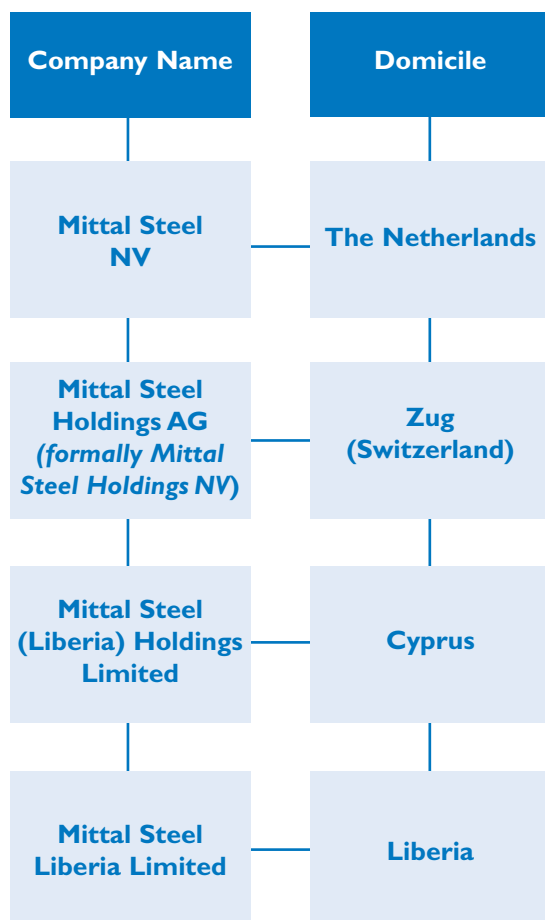


## Who is Mittal Steel?

Mittal Steel NV is the world's largest steel company. It was created in October 2004 from a merger of three companies: Polski Huty Stali, BH Steel, and Macedonian facilities from Balkan Steel.<sup>31</sup> Mittal Steel Holdings NV is a holding company within the Mittal Steel NV group. It was resident in the Netherlands Antilles but was re-domiciled to the tax-friendly canton of Zug in Switzerland on 28 December 2005 and renamed Mittal Steel Holdings AG. After a five-month hostile takeover bid, on 25 June 2006, Mittal Steel NV merged with Arcelor, the world's second-largest steel producer, to create a company with the capacity to produce 120 million tonnes of steel (a combined output of 10% of the world's steel). Following the merger with Arcelor, the group is to be incorporated, domiciled and headquartered in Luxembourg, and

named Arcelor Mittal.<sup>32</sup> Arcelor Mittal had pro-forma annual revenues of US\$71.9 billion and EBITDA (earnings before interest, taxes, depreciation and amortisation) of US\$13.3 billion, as well as leading positions in the North American Free-Trade Agreement (NAFTA), the European Union (EU), Central Europe, Africa and South America. Arcelor Mittal will retain listings on the New York Stock Exchange (NYSE) and on the Paris, Amsterdam, Brussels, Luxembourg and Madrid stock markets.

The Mineral Development Agreement was signed on 17 August 2005 between the GOL and Mittal Steel Holdings NV, acting on behalf of the Concessionaire: Montray Limited. Since that date both of these companies have changed their names: to Mittal Steel Holdings AG and Mittal Steel (Liberia) Holdings Limited respectively.



**For purposes of clarity and simplicity, this report will identify these companies thus:**

**Mittal Steel NV is the parent company,** incorporated in the Netherlands and is the ultimate holding company in the Mittal group of companies.

**Mittal Steel Holdings AG** is a wholly owned subsidiary of the Mittal Steel NV which was incorporated in the Netherlands Antilles as Mittal Holdings NV and moved domicile to the Canton of Zug in Switzerland when it became Mittal Steel Holdings AG.

**Mittal Steel (Liberia) Holdings Limited** was incorporated in Cyprus (initially called **Montray**.) It is 70% owned by Mittal Steel Holdings AG and 30% by the Government of Liberia. Mittal Steel Liberia Holdings Limited is the party to the MDA where it is referred to as 'CONCESSIONAIRE'.

**Mittal Steel Liberia Limited** incorporated in Liberia is the wholly-owned subsidiary of Mittal Steel Liberia Holdings Limited. The contract identifies Mittal Steel Liberia Limited as the agent of the Concessionaire and operating company in Liberia.

**"Mittal Steel"** or **"Mittal"** is the Mittal Steel Group.

# I. The MDA – what's it worth

## What is the problem?

- Mittal Steel has control over the amount of royalties paid to the government because the MDA does not specify the mechanism to set the price of ore.
- The MDA leaves open the basis for intra-company pricing arrangements and therefore creates a strong incentive for Mittal to sell the ore below the market value to an affiliate, which would reduce the actual royalties paid to the GOL.
- The MDA provides Mittal with a five year tax holiday, with a pre-agreed right to renew it; there are no restrictions on subsequent extensions.
- A lower rate of royalty may apply once the Concessionaire develops the necessary production facilities to enrich iron ore.
- Combined with Mittal's tax structure, the tax arrangements inherent in the arrangements dictate that Mittal could expatriate any profits it makes from Liberia.

The royalties and tax regime in this MDA present a clear advantage to Mittal but offer a raw deal to Liberia. While this is not unusual practice for a multinational corporation, it does not represent best international practice. The MDA also provides Mittal Steel with an extremely favourable preferential tax regime in Liberia, illustrating how the company has utilised international tax regimes to reduce its tax burden outside Liberia. The net result is that under the MDA, Liberia has signed away potentially extremely significant tax revenues, which represent one of the major benefits of such projects to host governments. In a meeting with Global Witness, Mittal Steel emphasised that most countries use such agreements to attract investment and that any company will look at what the country has to offer. Mittal Steel also told Global Witness that the company was given a model MDA by the GOL that already provided very good investment conditions for the company, to which the company said "thank you very much".<sup>42</sup> Mittal stated that it did not influence the drafting of the model MDA.

### 1.1 Royalties & transfer pricing

Article XXIII of the MDA sets out the royalty rate. Probably the single biggest problem with this agreement is that it gives Mittal complete freedom to set the sales price of the ore, and therefore ultimate control over the amount of royalties payable to the government and the company's level of taxable income in Liberia. In a mining operation of this scale, royalties payable to the government, together with tax revenues, represent the greatest economic benefits that could be brought by such a deal.

Royalties would generally be agreed under the 'arm's-length' rule<sup>vii</sup>, whereby they would be based on the market price of the ore. There is no reference in the agreement as to how the ore is to be priced: article XXIII, section I refers to the FOB (free on board) price but does not say how it is calculated. This is not mentioned in the Class A Mining Licence either.<sup>viii</sup> This omission is not illegal and is practised by multinational corporations worldwide. However, it can be seen as another example of the way

**Royalties:** In the mining sector the most common form of economic rent is in the form of a royalty and taxes. There are three types of royalty:

**Gross royalty:** where the royalty is determined with reference to the volume of production, or is determined with reference to gross revenues;

**Net smelter return (NSR)<sup>viii</sup> royalty:** when the royalty is expressed as a percentage of the enterprise's NSR;

**Net profits interest (NPI) royalty:** where the royalty is calculated as a percentage of the net profit.<sup>43</sup>

#### Article XXIII, sections 1 & 2, page 24

**“Section 1:** The CONCESSIONAIRE shall pay to GOVERNMENT in Dollars: a royalty at the rate of four point five (4.5%) percent of the invoiced sales of iron Ore FOB Yekepa.

**Section 2:** In the event that the CONCESSIONAIRE would build facilities to process iron Ore into higher added value products including but not limited to pellets, DRI and HBI, a lower rate of royalty shall be negotiated between the Parties prior to the commencement to the development of the necessary production facilities.”



Valuable asset: iron ore, Yekepa,

Global Witness May 2006

international business practice entitles multinationals to get the best deal possible for themselves, in this case potentially at the expense of Liberia.

Article XXIII, section 1 of the agreement determines that the royalties payable to the government will be 4.5% of the invoiced sales of iron ore, FOB (free on board) at Yekapa (which is not the port, but the mine area). Royalties on iron ore are typically around 4% to 5% of the market price (around US\$40 per tonne in early 2006) in situations when a government also collects a range of taxes such as tax on profits, income tax, service taxes, and value added tax (VAT) on contract costs. Given the lack of detail about how the iron ore is priced and invoiced, it cannot be assumed that royalties will be based on the market price of ore. The high tax rate once the tax holiday is over creates an incentive for Mittal to suppress any taxable revenue in Liberia, including the sales price of the ore. Thus, the GOL cannot ever estimate how much money it will receive from this deal, beyond the fact that it will get 4.5% of whatever Mittal decides the invoiced amount might be. Mittal Steel confirmed that the royalty will be priced FOB Yekepa.

**vi** The "arm's length rule" was developed by the League of Nations and is now maintained by the OECD. It assumes that in international tax, goods that are shipped across international borders are charged at their commercial price that would have been agreed between two independent third parties who are assumed to negotiate at arm's length, i.e. as free agents both out to achieve best advantage for themselves. Of course, in multinational groups this situation does not exist but they are expected to show, either by calculations or by reference to market data, that they have nonetheless used the price that such people would have negotiated so that the benefit of a deal is fairly attributed to each party to the arrangement.

**vii** The Mining Code states that mineral royalties should be no less than 3% and no more than 10% and that the Minister shall publish from time to time bases and rates for such royalties, based upon current prices of minerals, the return of the investment in minerals and other economic indices and measures (17.4).

**viii** NSR is generally defined to be gross revenues, minus shipping, smelting, refining and marketing costs.

However, the company stated that there is no agreement as to how this will be calculated. It stated that this will be a mutual decision between the GOL and Mittal but that had not been discussed yet.<sup>44</sup>

This failure to pin down the actual royalty payable is reinforced in article XXVII, section 4, which allows Mittal Steel Liberia Limited to "...market and sell the iron Ore and associated Minerals and products from the Concession Area within and outside Liberia, without restriction, Taxes and Duties or government approval...". Therefore Mittal Steel Liberia Limited has the unfettered right to sell ore at whatever price it chooses.

Furthermore, in article XXIII, section 2, the contract states that in the event that the Concessionaire builds facilities to enrich iron ore, "a lower rate of royalty shall be negotiated between the parties prior to the commencement of the development of the necessary production facilities." In a meeting with Global Witness, Mittal Steel confirmed its plans to build a concentrator at Tokadeh which will convert raw iron ore to 65% Fe fines with an output of 15 million tonnes per annum.<sup>45</sup>

The MDA also leaves open the option for pricing arrangements between separate units from the same corporate group; this is transfer pricing. Mittal Steel told Global Witness that it intends to sell the ore to its own affiliates<sup>46</sup>, which is not a problem in itself. In a recent report on taxation by Christian Aid, it was reported that the UK Government estimated that between 50 – 60% of the world trade are transactions between different parts of the same company.<sup>47</sup> However, entities from the same company might not fix the price at a market rate for tax saving purposes. The same report notes that 55 – 50% of such transactions are mis-priced and, in Africa, this rises to 60%.<sup>48</sup>

As with other multinationals in the mining sector, Mittal would have a strong incentive to sell the ore at below market value to an affiliate as this would reduce the actual royalties paid to the GOL, whilst simultaneously reducing the company's tax burden in Liberia once its tax holiday ends. Other Mittal affiliates, buying the ore at below market value, could accumulate profits in a more tax-friendly environment such as Cyprus (with the effective tax rate of a maximum of 10%, and perhaps as low as 4.5% [see page 23 on the Corporate structure of the Concessionaire](#)). This scenario is provided for in the agreement. When asked about this issue by Global Witness, Mittal responded that the sales price for the iron ore would be well known to those involved in the operations, such as shippers and government officials, but would not be formally published, which would make it hard to set unreasonable sales prices.<sup>49</sup> It is unacceptable and unrealistic to assume that the sales price will be fair just because it is well known, especially as this 'trickle-down' transparency will only make it well-known to those most closely involved. In terms of corporate responsibility, Mittal may have been expected to have negotiated a better basis for its transfer pricing, but according to representatives of Mittal Steel, this issue had not even been discussed by the company and the GOL. The MDA leaves all pricing options open, including what is called 'cost plus pricing', which means that the ore is sold for its cost of production plus a fixed percentage margin. In the current market for iron ore this pricing formula would be severely detrimental to the Government of Liberia and would result in a significant loss of royalty and tax revenue. For all the reasons above, this issue needs to be addressed by the GOL as soon as possible.

## The international community's increasing disapproval of tax holidays

International institutions have increasingly expressed disapproval of these kinds of tax incentives. The International Monetary Fund (IMF) has argued against such arrangements in some cases. The McKinsey Global Institute (2003) found, when reviewing the effectiveness of tax incentives in attracting foreign direct investment to intermediate developing countries, that:

*"Popular incentives to foreign investment are not the primary drivers of multinational company investment and instead have negative and unintended consequences. Without materially affecting the volume of investment in most cases, popular incentives such as tax holidays (...) serve only to detract value from those investments that would likely be made in any case. Many of these policies result in direct fiscal and administrative costs, as well as indirect costs, particularly reduced productivity."*

Furthermore, the Council of Economics and Finance Ministers of the European Union in its Code of Conduct for Business Taxation, Section B, states that:

*"...tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the [EU] member state in question are generally to be regarded as potentially harmful and therefore covered by this code".<sup>54</sup>*

It goes on to state under Section M, Geographical extension:

*"The Council considers it advisable that principles aimed at abolishing harmful tax measures should be adopted on as broad a geographical basis as possible. To this end, Member States commit themselves to promoting their adoption in third countries; they also commit themselves to promoting their adoption in territories to which the treaty does not apply."*

## 1.2 Taxation (Article XXII)

*"In this world nothing can be said to be certain, except death and taxes."* Benjamin Franklin

Article XXII of the MDA sets out the provisions on income taxation. Multinationals or transnational corporations can choose between locations to benefit from different tax regimes. They are also able to attribute ownership of assets or "the locations of transactions to paper subsidiaries in convenient jurisdictions or havens."<sup>50</sup> Liberalisation has increasingly led countries to offer lower tax rates on capital, in the battle to attract foreign investment. The offer of such benefits diminishes the ability of the developing country as a whole to finance poverty

reduction and development due to a reduction of funds available to them.<sup>51</sup> However, attractive tax regimes are not the only reason why transnational companies are attracted to developing countries. Some of the agreement's clauses relating to taxation fall far short of recommended international best practice (see box *The international community's increasing disapproval of tax holidays, above*), and indeed the spirit of Mittal's mission which, as stated in their 2005 annual report, is to "...seek to ensure that all major business decisions are driven as much by social considerations as by economic ones."<sup>52</sup> International initiatives, development NGOs, governments and independent experts have shown concern about how these practices impact on sustainable development, in particular in developing countries.<sup>53</sup>

### 1.2.1 We're all going on a tax holiday...

Article XXII of the MDA specifies that the maximum rate of tax that may apply to the profits generated by Mittal in Liberia will be 30%. This seems high, especially in comparison with the rates Mittal is accustomed to paying generally, but in practice the MDA provides Mittal with various avenues to reduce its taxable income in Liberia, and so reduce the effective rate of tax. Article XXII provides Mittal with a five-year tax holiday. The five-year holiday provision clause includes an extension option with a pre-agreed reason for granting it "...in view of the size of the investment...". There is no indication of how long the additional tax holiday might last. Most of the planned investment activity will take place during the first five-year tax holiday. There is likely to be little if any profit earned during this period, so the tax holiday provides little immediate benefit and an extension therefore appears likely. The fact that the tax holiday is so open ended leaves the GOL in a vulnerable position.

As discussed in Section 2.2 below, Mittal will need to raise additional capital of US\$650 million through loans from within the corporate group. There are no limits on the amount of borrowing on which tax relief can be given, or the interest rate that can be applied to it (sub-section (d) of article XXII). The company would therefore have the power to set a high interest rate, which would load costs onto its Liberian operations, thereby reducing taxable income at the direct expense of Liberia and its people. It is common for companies to load costs onto their operations in high-tax rate countries. If Mittal were to do this, the benefits to the company would only come into effect after the end of the five-year tax holiday allowed by the agreement.

Furthermore, article XXII, section 2 allows various deductions from gross income in order to compute net taxable income, but there is no requirement that these expenses be incurred for the project or be fairly priced if supplied by associates or affiliates. This absence of limits<sup>ix</sup> allows additional costs to be loaded onto this contract to further reduce tax paid in Liberia.

Either way, Mittal will benefit whether by enjoying a tax holiday, or exploiting various opportunities to reduce its taxable income in Liberia. Whilst this is legal and unfortunately the business practice of many of the world's multinationals, to obtain tax concessions at the direct expense of a chronically poor country raises serious moral and ethical questions and does not appear to accord with the spirit of Mittal's commitments to its partners, as stated in its 2005 annual report and mentioned above.

### 1.2.2 Mittal: a smooth operator

Mittal Steel is certainly not alone in utilising complex international tax regimes to reduce its overall tax burden, but in this case it is doing so at the expense of one of the world's poorest countries. Therefore it is important to understand Mittal's tax planning around the Liberia project because it has direct implications for Liberia, namely the reduction of tax revenues for the country. The declared tax rate of the Mittal Group in 2005 was just 17%. In 2004 it was less, at 13%.<sup>55</sup> These rates are unusually low for a company registered in the Netherlands where tax rates have until recently been around 30%. They are also lower than is normal for quoted companies. The average tax rate for the 50 largest companies quoted on the London Stock Exchange was 26% in 2004.<sup>56</sup>

There are several reasons for this advantage: Dutch corporation tax rates appear relatively high at 29.6% in 2006. This rate is applied to the income of Dutch resident companies, and therefore to Mittal Steel NV. However, Dutch companies benefit from "participation exemptions", whereby the profits from a "participation" are not taxed. This has an impact at two levels. Firstly, capital gains<sup>x</sup> are taxed at a low rate. Secondly, if a Dutch company (Company A) holds an interest at 20% or more in another company (Company B) which is not a Dutch resident, and its investment is held for operating reasons, and Company B pays tax under the normal tax rules of its resident country then the only tax paid will be by Company B in

<sup>ix</sup> The only limit is on tax paid for expatriate seconded employees, which is unusual, but not unreasonable.

<sup>x</sup> Capital gains are the profits arising on the sale of capital assets such as stocks and shares, land and buildings and businesses.



Mittal Steel Liberia Limited sign, Buchanan Port

Global Witness May 2006

its country of incorporation. No tax is paid by Company A or dividend income from Company B. It seems very likely that Mittal Steel will enjoy this benefit income from Cyprus-based Mittal Steel (Liberia) Holdings Limited. It should also continue to do so now that the Concessionaire is owned through a Swiss holding company (Mittal Steel Holdings AG) registered in the canton of Zug; that canton is well known for the tax breaks it allows including offering a participation exemption similar to the one operated by the Netherlands.

The value of the relief in either case is substantial. Cyprus has a general corporation tax rate of 10%. (see page 23 on the Corporate structure of the Concessionaire). In some cases it seems possible that this can be reduced to 4.5% although Mittal have said that the company does not expect to qualify for this rate.<sup>57</sup> It should be stressed that this tax would only have to be paid in Cyprus on dividends received from Liberia, but no more tax on these dividends is likely to be paid by either the Dutch parent company or the Swiss intermediate holding companies because of the participation exemptions they both enjoy. Given the tax holiday Mittal will enjoy in Liberia, this means that the maximum tax rate on profits earned may be 10% for some time.

The use of the intermediate holding company in Cyprus does not look like a matter of chance, as Mittal Steel suggested at a meeting with Global Witness. The 10% tax rate Cyprus offers was the lowest mainstream tax rate available in Europe on corporate profits when the choice was made. And by routing the profits to Switzerland and onto the Netherlands via Cyprus rather than sending them direct to those countries from Liberia, the participation exemptions can be used because the Liberian dividends will have been subject to normal taxation in Cyprus. However, they will have been subject to preferential taxation rates in Liberia because of the tax holiday and the other special tax provisions in the MDA. These tax arrangements in Liberia would have cancelled the benefit of the participation exemptions in Switzerland and the Netherlands if the dividend had been paid directly to either of those countries. The likelihood in that case would be that Dutch tax at 29.6% might have been due in the Netherlands when the profits reached there; by using the Concessionaire company in Cyprus this possibility appears

to have been eliminated. Despite these indications, Mittal assured Global Witness that the structure of this deal was not tax driven.<sup>58</sup>

Such a structure dictates that Mittal could extract any profits it makes from Liberia. The investment code of Liberia allows the repatriation of profits without tax being deducted at source. This is a tool used by

developing countries to attract investment. Mittal has utilised this provision. As the MDA puts no tax penalty on so doing, there would seem to be a high chance of repatriation. If Mittal chose to do this, it would benefit from the extremely favourable tax regime described above. In turn, such a revenue flow out of Liberia would undermine the country's chance of creating local long term investment for development.

## RECOMMENDATIONS

- 1 Transfer pricing rules need to be put into place for this contract which ensure that Liberia enjoys the benefit of market price based taxation and royalty revenues;
- 2 Liberia should consider the application of a withholding tax on the repatriation of profits from this project; 15% is a common international norm and is not significantly out of line with Mittal's average tax rate;
- 3 The GOL should reconsider whether it is appropriate to extend the tax holiday, and/or place limits on the length of the extension that the tax holiday can be extended for;
- 4 A requirement should be included in the contract that only costs incurred wholly and exclusively for this contract should be capable of offset against taxable income;
- 5 Any expenditure incurred on the purchase of goods or services from other Mittal group companies should be required to be on arm's length terms to ensure fair pricing is in operation; this provision should extend to interest charged if from a group company.
- 6 The GOL should require that all ore shipments should be priced at the prevailing market rate adjusted only to reflect transport costs from Liberia.
- 7 There should be an explicit mechanism in the MDA to determine how interest rates on loans are arrived at.
- 8 There should be limits on what deductions from gross profits can be set off against tax.



## 2. Company Structure – Mittal's Labyrinth

### What is the problem?

- It is unlikely that the operating company will have a sufficient level of assets to cover any large claim.
- The company structure created by Mittal protects the parent company from guaranteeing or bearing the risk of the activities and liabilities of its subsidiary.
- The MDA imposes no financial or other obligation on Mittal Steel NV or Mittal Steel Holdings AG.



War victim: derelict Lamco building, Yekepa

Global Witness May 2006

### 2.1 Corporate structure of the Concessionaire and impacts on liability

The corporate structure protects Mittal Steel Holdings AG, the company that signed the MDA, from any claims as a result of the performance of the Concessionaire. The ultimate parent company of the Mittal Steel group, Mittal Steel NV, is not a party to the MDA. As mentioned earlier, international initiatives, development NGOs, governments and independent experts have highlighted how these practices impact on sustainable development in particular of developing countries.<sup>59</sup>

In common with many business agreements Mittal Steel has set up a company structure that creates a barrier between the parent company and its subsidiaries. Mittal Steel Holdings AG made the agreement on behalf of the Concessionaire, Montray Limited, a company registered in Cyprus. Mittal Steel has confirmed that Montray Limited was an off-the-shelf company used as a special purpose

vehicle (SPV) for this deal.<sup>60</sup> Montray was registered on 2 August 2005 and incorporated on the 16 September 2005, a month after the date the MDA was signed.<sup>61</sup> Montray was re-named Mittal Steel (Liberia) Holdings in the same year. Its board comprises two directors, Panagiota Papademetriou and Michaelides Charalambos, and its secretary is listed as Coly Secretarial. Mittal Steel confirmed that these individuals were simply employees of the management company that set up Montray at the time.<sup>61</sup> Mittal also confirmed that they were no longer directors of Mittal Steel (Liberia) Holdings Limited.<sup>62</sup> However, when Global Witness checked this at the time of publication, the above names were still listed as the directors.<sup>63</sup>

<sup>xi</sup> According to the 15 August draft of review of the MDA by the Public Procurement and Concessions Committee, the fact that Montray was not incorporated at the time of the signing of the MDA is in breach of the interim guidelines for concession agreements in Liberia (July 2005), which provide for the disqualification of unincorporated associations from participating in any concession process. The review further requires the MDA to be ratified by the Board of Directors of Montray without which the subsequent ratification by the National Transitional Legislative Assembly (NTLA) has little legal significance.

Article XXVIII, section 2 of the MDA defines the rights and duties of the Concessionaire. Liability for breach of the obligations under the agreement is likely to extend only to Mittal Liberia Limited, as an agent of the Concessionaire, or to Mittal Steel (Liberia) Holdings Limited. Under English law, it would be possible to pierce the corporate veil and hold Mittal Steel NV as the parent company, if it can be established that Mittal Steel (Liberia) Holdings Limited is a shell company, with no independent board of directors in charge of exercising independent judgement about the day to day business of the company. However, this is a complicated and lengthy judicial process and is of little immediate use to those who are affected by the mining operations of the company.

Even if this liability for breach of obligations under the agreement were sought from Mittal Steel Holdings AG, there are limitations due to the fact that this is a Swiss corporation registered in the Zug Canton. Under the laws of that Canton it is almost certain that Mittal Steel Holdings AG is itself a passive holding company, i.e. its sole function is to hold shares in other group companies and it does not trade in its own right. The shares that Mittal Steel Holdings AG owns in the Concessionaire are, of course, of value but could be easily transferred to the ownership of other group companies in other jurisdictions (after all, they were recently redomiciled in their entirety from the Netherland Antilles). Therefore, it is unlikely that there would be any assets available to settle a claim against Mittal Steel Holdings AG after a protracted dispute.

Under the agreement there is no reference as to what level of funds kept by the Liberian subsidiary should be, or requirement that this should be at a sufficient level to pay out for any large claim. This company may have sufficient funds to deal with regular, ongoing obligations, but it is equally possible that they are insufficient to satisfy claims that could arise as a result of, for example, a large scale accident, substantial work-related illnesses among a large number of employees, or significant environmental damage. As discussed above, these claims would not be the liability

of either Mittal Steel NV or Mittal Steel Holdings AG but that of either Mittal Steel Liberia Limited or Mittal Steel (Liberia) Holdings Limited. However, the level of funds kept by or available to the Concessionaire and in turn Mittal Steel Liberia Limited is likely to be controlled by Mittal Steel Holdings AG. In a meeting with Global Witness, Mittal Steel stated that Mittal Steel Holdings AG has lots of assets and that money could be found within the group.<sup>64</sup> Mittal Steel NV could well want to put further resources into the operation so as to carry on with the project, but equally they may not. The result is that while the Liberian government is held to comprehensive legal controls on the nature of regulation it can bring to bear on the project due the stringent stabilisation clause, the company is able to treat compensation for injuries to people or the environment as matters of its choosing. It is questionable how the creation of this structure is of benefit for any claimant. It also reflects that the current international business system favours the protection of the assets of multinational corporations rather than the rights of host states, affected local communities or individuals.

Mittal Steel Holdings AG should be responsible for, and stand behind, the operations of its subsidiary. It would be difficult to procure Mittal Steel Holdings AG accountability for the activities of Mittal Steel Liberia Limited either for contractual obligations or for any tortious or wrongful acts. It is likely that the parent companies would be able to walk away unscathed and let their Liberia-specific subsidiaries go bankrupt. Issues of liability and guarantee require contractual and regulatory certainty. In a meeting with Mittal Steel, Global Witness asked if the parent company would be liable for the operations of Mittal Steel Liberia Limited and was told that Mittal Steel as a group was liable for the operations as the MDA is signed by Mittal Steel Holdings AG.<sup>65</sup> Mittal representatives further stated that Mittal Steel Holdings AG would “intervene responsibly” and that there would be “appropriate insurance.” Given the level of investment by Mittal Steel in Liberia, it would not benefit the Group’s stated aim of self-sufficiency to fail to ensure the liabilities of its Liberian subsidiary.

Article I, section I.6, allows the Concessionaire to assign any part of its interest under the Agreement to "...other persons...", the only caveat being that it would need the permission of the GOL to dispose of its interests to any person other than an affiliate, but that this consent "...shall not be unreasonably held and/or delayed" (article XXVIII, section I). In a worst case scenario, Mittal appears to be free to sell its stake to anyone it likes, which could lead to the GOL being a minority partner without minority protection in an agreement with anyone Mittal chooses. It would be expected that such a transaction could only occur with a company with the adequate financial profile. Surrendering such a right puts the GOL at significant economic and reputational risk.

## 2.2 Capital structure of the project: financing the project

Article XVI deals with the capital structure of the Concessionaire. The structure is:

- Mittal Steel Holdings AG invests US\$35,007,000 in cash;
- The GOL invests US\$15,003,000 in kind, by contributing the Class A mining licence and the assets within the concession area (specified in Appendix F of the MDA).

The total planned capital spending is US\$900 million (Appendix D of the MDA) of which US\$700 million is spent by year five and which cannot be funded out of revenue generated in that period since the mine is not expected to be in operation until 2008. Therefore, taking into account the proposed initial capital investment of US\$50 million, there remains US\$650 million to be raised during this period. It is not clear what the debt/equity ratio will be for the additional US\$650 million required during the first five-year period.

Article XVIII specifies that Mittal Steel Liberia Limited will be governed by a board of 11 members: the Chairman and five members to be nominated by the Concessionaire, the remaining five members by the GOL. It can be assumed

that Mittal Steel Holdings AG, through the Concessionaire, controls this company, on behalf of Mittal Steel NV both by way of share capital and through the Board; this was confirmed by Mittal Steel in its meeting with Global Witness<sup>66</sup>. The Contracts and Concessions Review Subcommittee (CCRC) review of the MDA stated that "the Government has no representation on its [Mittal Steel (Liberia) Holdings Limited] board of directors although it has substantial interest".<sup>67</sup> Global Witness asked Mittal Steel for the by laws of Mittal Steel (Liberia) Holdings Limited to confirm this, but had not received a reply at the time of publication.

### Article XVI, section 3, page 18

"From time to time during the term of this Agreement, the CONCESSIONAIRE shall procure to obtain additional equity financing from its shareholders, or, at its option, additional debt financing, as may be necessary in order to implement the Tentative Development Program set forth in Appendix C and finance the capital expenditures set forth in Appendix D. In the event that such financing is provided by the shareholders by way of capital increase, new shares shall be issued to the contributing shareholders in proportion to their respective contributions. In the event that the GOVERNMENT is unable to provide in a timely manner its proportionate contribution to any share capital increase of the CONCESSIONAIRE, the PRINCIPAL shall have the right to require the GOVERNMENT to sell its shares in the CONCESSIONAIRE to the PRINCIPAL at a reasonable price. In no event, however, the equity participation of the Government in the capital of the CONCESSIONAIRE shall become less than fifteen (15) percent on a fully diluted basis."



Derelict Lamco Machine

Global Witness May 2006

As discussed, the Concessionaire will need to raise US\$650 million to satisfy planned expenditure. According to section 3 the Concessionaire will try to obtain this additional equity financing from its shareholders, including the GOL. Because Mittal Steel controls the board of the Concessionaire, it is free to set both the level of equity increase in the project and the timing of such an increase. The GOL has no control over this process. This is significant because according to article XVI, section 3 of the MDA, if the GOL cannot put in the necessary investment “in a timely manner” (which term is undefined in the MDA), it would be required to sell up to 50% of its shares to the Concessionaire “at a reasonable price” (also undefined in the MDA and with no arbitration mechanism specified). Its share cannot be reduced below 15%. With a national budget of just US\$84.5 million coupled with crippling external debt and a huge reconstruction effort necessary, the GOL is unlikely to be able to contribute any significant sum. Thus, the government is at great risk, under the

agreement, of seeing its share in the Concessionaire reduced. Mittal Steel reported to Global Witness that during the negotiations there was a concern to ensure that the GOL would not see its share diluted.<sup>68</sup> The company added that the GOL is protected because it will always have 15%.<sup>69</sup> Global Witness asked Mittal Steel whether the company would exercise its right under the MDA to buy out the GOL’s share if the government was unable to make a proportionate contribution to increase the capitalisation of the

Concessionaire. The company emphasised that the bottom line is that Mittal is putting in the money.<sup>70</sup> Given that the iron ore deposits are a strategic national asset, this may be considered an unacceptable position for the government and further illustrates the unbalanced nature of the agreement.

When asked how the additional capital would be raised, Mittal stated that this is a commercial decision and that it was premature to provide details.<sup>71</sup> Mittal may decide to raise the equity through loans (if Mittal puts in more cash, as share capital, this could benefit the GOL as it would own 15% of any excess Mittal paid in for shares). Mittal Steel told Global Witness that it was the company’s recent practice to raise cash from banks on the strength of its balance sheet, and then provide intra-group loans on which the company charges a “slight mark-up” on the interest rates.<sup>72</sup> Nowhere in the agreement does it regulate what

interest rate might be allowed to be charged on these loans. The wording of the agreement does not preclude the possibility of profit extraction by excessive interest charges to the Concessionaire if it were thinly capitalised. When the tax holiday is over, possibly in year six, the effective tax rate of Mittal Steel Liberia Limited in Liberia could be reduced as a result of overcharging interest and depreciation. Given that there is no mechanism to prevent this abuse and given that article XXII, section 2d does not cap interest, this is an obvious area where legitimate tax revenues could be denied to the Liberian people.

In the course of renegotiation of the contract another financing option could be adopted. Financing the project through bank loans means that Mittal Steel Liberia Limited

may have a large loan against little equity and that it will become “highly leveraged”. Highly leveraged companies are vulnerable to collapsing unless the parent company provides support, which under the terms of this agreement Mittal Steel Holdings AG is under no obligation to do. The obligation to pay back the banks means that the company has to generate large amounts of profit at a steady rate, which may explain the stringent stabilisation clause.

## RECOMMENDATIONS

- 9** The GOL should have sufficient control over key decisions that affect matters of national public policy.
- 10** The MDA should include a list of issues on which GOL consent should be required before action could be taken in the national public interest, for example; the terms of all loans, the setting of sales prices of ore (subject to their not exceeding arm’s length terms) and the sale of the company.
- 11** There should be a requirement to establish and maintain a reserve fund, held by the operating company for the purposes of any and all compensation found in law to be owing.
- 12** A revised MDA should enshrine direct liability for Mittal Steel NV for the actions of its subsidiaries in the event that the reserve fund is not adequate to cover the required compensation figure.
- 13** A revised MDA should assign the GOL greater rights in any future partnership should Mittal decide to sell its stake in the investment.
- 14** GOL should have the right to buy out Mittal in the event that Mittal wishes to sell at a price agreed by arbitration (which is normal in such cases).
- 15** Should Mittal raise necessary capital through intra-group loans, limits should be placed on the rate of interest that can be charged on loans made to the project.
- 16** Mittal Steel Holdings AG and Mittal Steel NV should guarantee in the MDA the performance, obligations and liabilities of the operating company.

### 3. Asset-stripping the state: the transfer of the Buchanan port and railroad facilities

#### What is the problem?

- The MDA transfers two major public assets of Liberia to Mittal Steel.
- The GOL will only be allowed to use these facilities if there is spare capacity and stands to lose out on significant potential revenues.

Article IX, section 3 of the MDA refers to the transference of assets listed in Appendix F, including two major public assets of Liberia, the rail infrastructure between Yekepa and

Buchanan, and the port of Buchanan. The GOL and others will be allowed to use these facilities only if there is spare capacity, and at the company’s discretion. They will have to pay Mittal for the privilege (except for use of roads and highways). Given the extensive investment that the Concessionaire will have to make in restoring these dilapidated facilities, it is reasonable to expect some concessions from the GOL, but for Mittal to take effective ownership of public assets is not reasonable. This transfer will be at the expense of the people of Liberia. By retaining the railway and Buchanan port as public assets accessible to other operators, the GOL could not only generate substantial revenue, but also safeguard access to external markets, a fundamental condition for the development of the local communities in that area. Mittal Steel told Global Witness that it was rebuilding the railway and therefore could not be held hostage. Mittal Steel noted that wording of the agreement is very good and allows for third party use.<sup>73</sup> Given that the railway is a single track and that Mittal estimates that 50 to 60 thousand tonnes of iron ore a day will be transported on six trains a day, it is reasonable to ask whether there will be much excess capacity on the railway.<sup>74</sup>

#### Article IX, section 3, pages 11 & 12

- a "The assets and facilities which are listed in Appendix F shall be transferred unencumbered to the CONCESSIONAIRE, irrespective of their conditions..."
- b 4 "To the extent that the CONCESSIONAIRE does not utilize its Infrastructure to full capacity, the GOVERNMENT shall have the right to use said Infrastructure on reasonable Notice to the CONCESSIONAIRE provided that such use does not impair the efficient and economic conduct of the Operations. The GOVERNMENT shall pay reasonable compensation to the CONCESSIONAIRE (other than in the case of roads and highways unless the use causes material damage thereto) within a reasonable period after invoice from the CONCESSIONAIRE in connection with such use."

In Appendix F Asset Register includes the railroad facilities and equipment and Buchanan Port and general facilities.

President Johnson-Sirleaf has stated that, although she welcomes the investment which the contract represents, she is concerned with some of its provisions, specifically the management of the railway and port by Mittal Steel. She has described this as unacceptable, arguing that "these facilities are national assets, which cannot be put under the control of anyone".<sup>75</sup>

## The Mirfergui project – is the railway a means to an end?

The control over the Yekepa railway and Buchanan port could bring potential revenue to either the GOL or Mittal, depending on who runs these infrastructures, for example by providing use of these facilities to companies involved



Derelict railtrack between Yekepa and Buchanan Global Witness May 2006

in two major mining projects just across the border in Guinea. Guinea's iron ore is regarded as potentially among the world's most important deposits. The Mirfergui project is a 246 million tonne iron ore project located in Mount Nimba.<sup>76</sup> The project, which was signed in April 2003, is owned by the Société des Mines de Fer de

Guinée.<sup>xii</sup> In a separate project, Rio Tinto has been exploring and evaluating the iron ore potential of the Simandou mountain range in south-eastern Guinea, north of Mirfergui.<sup>xiii</sup>

The realisation of both of these projects depends on the development of the relevant infrastructure, in particular a 1,050 km railway across almost the whole of Guinea, and the construction of a deepwater port. In 2005, sources reported to Global Witness that the Government of the Republic of Guinea wanted the iron ore to be transported through Guinea. However, the Concessionaires would prefer to transport the ore over the shorter – and far cheaper – Liberian railway.<sup>77</sup> Mittal informed Global Witness that it had not received approaches from any other company about use of these facilities.<sup>78</sup>

A feasibility study by German consulting company Deutsche Eisenbahn-Consulting estimated that the railway line and the rolling stock alone would cost US\$1.8 billion.<sup>79</sup> Although Rio Tinto's head of exploration, Tom Albanese, said in February 2006 that the group was "fully committed to the trans-Guinean railway project" for Simandou's development,<sup>80</sup> the other stakeholders have not yet expressed a commitment.

## RECOMMENDATION

- 17** The agreement should be renegotiated to reflect a fair use of state assets. This balance should guarantee the Concessionaire's entitlement to use the infrastructure, which it will pay to rebuild and which is necessary for its operations, but it should also safeguard the GOL's control over the country's strategic public assets and future revenues therefrom.

**xii** Société des Mines de Fer de Guinée is partly owned by Euronimba (85%) – a consortium formed by UK-BHP Billiton (43.5%), US-Newmont Mining Corporation through Newmont-LaSource (43.5%) and the Areva/Cogema Group of France through its subsidiary Cominor (13%) – and by the government (10%) and Mifergui-Nimba (5%, a mining company in which the Government of the Republic of Guinea retains a 50% stake). Sources: Omayra Bermúdez-Lugo, *The Mineral Industries of Guinea*; *US Geological Survey Minerals Yearbook*; <http://minerals.usgs.gov/minerals/pubs/country/2004/gvmyb04.pdf>. <http://www.nationsencyclopedia.com/Africa/Guinea-MINING.html>

**xiii** Using exploration licences granted in 1997 through its locally incorporated subsidiary Société des Mines de Fer de Simandou (SIMFER SA). On 1 June 2006 Rio Tinto signed the Simandou Iron Ore Mining Concession (Rio Tinto Press Release, "Guinea Signs Simandou Iron Ore Mining Concession for Rio Tinto", 1 June 2006).



Buchanan Port

Global Witness May 2006

## 4. Liberia in a straightjacket: the stabilisation cause

### What is the problem?

- The provisions of the stabilisation clause have the potential to undermine Liberia's right to regulate in important public policy areas such as human rights, the environment and taxation. They could severely limit Liberia's ability to fulfil its current and future obligations under the Liberian Constitution as well as its commitments under international law by especially narrowing what counts as applicable domestic law.

The previous section described how Liberia has signed away important economic benefits to Mittal. This section will describe how it has also ceded sovereign rights, and exposed its already vulnerable population, especially those living in areas covered by the MDA, to potential erosion of their human rights, as they will effectively become second-class citizens of Mittal's state within a state. Whilst the inclusion of a stabilisation clause is not unusual in a project of this size, the specific wording of the stabilisation clause is of concern and again points to the assertive nature of the Mittal negotiation.

Article XIX, sections 7 and 9 effectively establish a regulatory stabilisation clause. The inclusion of a stabilisation clause should provide Mittal only with a level of protection sufficient for it to operate in a stable regulatory environment. The provisions in the MDA go further than this. In response to a critique of the contract by Columbia University, Mittal argued that the stabilisation clause is "necessary for a 25-year project"<sup>83</sup>. However, the contents of this particular clause are not necessary for such a project to be viable.

Although the agreement recognises in several provisions that the Concessionaire is subject to domestic law, the definition of domestic law applicable to the project is a narrower range of laws than applies elsewhere in Liberia.

### Stabilisation clauses

The objective of stabilisation clauses is to create a protective environment for a company's investment. They aim at protecting contracts "from being subject to legislative or administrative measuring occurring after the conclusion of the contract".<sup>81</sup> 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.<sup>82</sup> Therefore, such clauses can play an important role in attracting investment to a developing country. Stabilisation clauses were developed to protect the rights of private investors following a wave of nationalisation of mining industries during the 1960s by governments throughout the world. However, the use of stabilisation clauses has evolved from its initial aim into a broader protection against future changes in any legislation that may harm foreign investments.



**Article XIX, section 7, page 20**

"The GOVERNMENT undertakes and affirms that it shall not nationalize, condemn or expropriate:..."

**Article XIX, section 9, page 21**

"(...) In particular, any modifications that could be made in the future to the Law as in effect on the Effective Date shall not apply to the CONCESSIONAIRE and its Associates without their prior written consent, but the CONCESSIONAIRE and its Associates may at any time elect to be governed by the legal and regulatory provisions resulting from changes made at any time in the Law as in effect on the Effective Date.

In the event of any conflict between this Agreement or the rights, obligations and duties of a Party under this Agreement, and any other Law, including administrative rules and procedures and matters relating to procedure, and applicable international law, then this Agreement shall govern the rights, obligations and duties of the Parties."

**Article XXI, section 3, page 22**

"The GOVERNMENT shall indemnify and hold harmless the CONCESSIONAIRE and its Affiliates from any and all claims, liabilities, costs, expenses, losses and damages ... as a result of any failure of the GOVERNMENT to honor any provision or undertaking expressed in this Agreement."

Under this provision, the Concessionaire can object to the application of existing laws as interpreted by Liberian courts and applied elsewhere in the country if it can show that government action has prejudiced the rights that it has been granted, or refuse to consent to the application of any fresh laws for the duration of the contract. Given the economic importance of this MDA for Liberia, these provisions could create a deterrent to the GOL's efforts to engage in bona fide regulation. For Mittal, the provisions mean that the company will be in a position to choose which new laws it will comply with.

The scenario becomes even more problematic given not only the length of the contract and its renewability but also the likely (and much-needed) legal reforms in Liberia. 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 reform.<sup>84</sup> 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.<sup>85</sup> Global Witness also interviewed a senior figure in the Ministry of Labour, who noted that the existing labour laws dated from the 1970s.<sup>86</sup>

The consequences of these provisions could be far-reaching. They could severely limit the ability of the GOL to fulfil its future or current obligations under the Liberian Constitution, and domestic and international law, including implementation of international treaty obligations.<sup>87</sup> For example, Liberia could be prevented from relying on its own Constitution, as clauses in the MDA with Mittal prevent the application of existing or fresh laws that will "derogate from or otherwise prejudice" the rights it has been granted (the Constitution falls under the agreement's definition of law). Such restrictions on constitutional prerogatives would not be accepted by governments in the developed world. The provisions would not be enforceable in English law, for instance, under the principle that the Crown cannot contract to fetter its own discretion or that the state cannot remove its own freedom of choice when it comes to acting in the public's benefit or interest.<sup>88</sup>



Liberia for all Liberians?

May 2006

#### 4.1 Indemnification, a “chilling effect” on the government

The implications of these stabilisation provisions need to be analysed in conjunction with article XXI, section 3, which provides for the indemnification of the Concessionaire as a result of the failure of the government to honour any provision in the contract. Presumably, this also applies if the GOL fails to comply with sections 7 and 9 of

article XIX. Through this clause, Liberians will potentially be left at the mercy of a lower level of protection than that set by international standards. However, Mittal will be able to claim a higher level of protection than international standards require. In normal situations a state is not required to compensate its subjects for their compliance with new laws unless that higher regulation might destroy the substantial value of a particular piece of property (though even this can go uncompensated in certain legal systems). Yet the Concessionaire is effectively given such right to compensation through the stabilisation clause, even in cases where there is a negligible impact on the viability of its investment. Moreover, this provision does not define which changes to the law would trigger this right to indemnification. This creates the potential for a wide range of claims by the Concessionaire.

This rule is based on the general principle that a contract will not be enforceable “where some essential governmental activity would thereby be rendered impossible or seriously impeded”<sup>89</sup> and that “courts in the UK, the USA and France – to take examples from countries of which international investors are often nationals – are in a position to declare both that the government cannot be required to perform its undertaking, and that either no compensation, or less than full compensation otherwise due under a contract, is payable for that refusal.”<sup>xiv 90</sup>

These provisions also challenge increasingly recognised responsibilities of companies for the human rights impact of their operations, particularly in countries where national legislation falls short of recognised minimum standards.<sup>91</sup> Such responsibilities have been endorsed internationally through initiatives and instruments such as the UN-led Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, and the OECD Guidelines for Multinational Enterprises.

<sup>xiv</sup> The UK Court of Appeal has said that “a government cannot fetter its duty to act for the public good. It cannot bind itself, by an implication in the contract, not to perform its public duties.” (Czarnikow Ltd v Rolimpex (C.A.) [1978] 1 All E.R. 81, 89 per Denning MR.) The US Federal Courts have said: “Actions of a general and public character, implementing programs in the national interest, are considered to be acts of the sovereign for which [the US] cannot be held liable in damages.” (Wunderlich Contracting Co v United States 351 F.2d 956 (Ct. Cl. 1965) at 967.) French law follows substantially the same principle. (Long, Veill, Braibant et al, *Les grands arrêts de la jurisprudence administrative*, 14th edition, Paris, 2003; Conseil d’Etat, CE 1912 Société des Granites Porphyroïdes des Vosges, D.1916.3.35, concl. Blum, S.1917.3.15, concl. Blum, RDP 1914.145 note jeze; CE 1973 Société d’exploitation électrique de la rivière du Sant, Rec. 48; CJEG 1973.239 JCP 1974.II.17629.)

Each challenge on these grounds by the Concessionaire could mean that the GOL could either have to enter reservations exempting this MDA from each new legal undertaking it makes, or apply new standards and face claims for damages. As Liberia begins its vital legal reform process, it will be ratifying a range of international human rights instruments. The combination of the stabilisation and compensation provisions may have a “chilling effect”<sup>xv</sup> on Liberia’s willingness to meet its human rights obligations and could create a disincentive for the country to become more integrated into international human rights norms.<sup>92</sup> The same could apply to the incorporation of other international environmental, health or safety standards. In response to similar criticism, British Petroleum agreed not to seek compensation under the stabilisation clause of the Baku-Tbilisi-Ceyhan (BTC) pipeline project when the host government changed the law applying to the pipeline as a result of its obligations to conform to international human rights, environmental or health and safety requirements.<sup>93</sup> The BTC Human Rights Undertaking<sup>xvi</sup> has put in place a standard which confirms that health, safety and environmental standards and human rights requirements are explicitly “dynamic”.<sup>94</sup> This means that they evolve when domestic law and applicable international treaty standards change, and requires that the conduct of the project’s activities is in accordance with such evolving standards, provided that they are not more stringent than international best practice.

#### 4.2 The creation of a hierarchy of rights

These provisions could have an even more profound impact on local communities. The ability of the Concessionaire to pick and choose the new laws and regulations with which it will comply could lead to an erosion of the rights of those affected by, or working for, the project. This could create a division between citizens who will enjoy the benefits of developments of the law and those who will not. As Liberia’s current and future

international obligations on human rights, the environment and health create entitlements to adequate domestic remedies, the guarantee of such remedies may not be available to those Liberians affected by the Concessionaire’s operation. Creating such a hierarchy of rights violates basic principles of human rights: non-discrimination, equality before the law and the right to an effective remedy. This is a striking example of how, in order to close this gap, the GOL would have to compensate Mittal in order to realise its international obligations. Liberia would thus have to pay a very high price in order to discharge its duty to Liberian citizens. The GOL can only try to force Mittal to comply with changes in national law by going to international arbitration and will be unable to take swift action to intervene with the operation of the mine to mitigate possible negative effects.

#### Equitable treatment clauses

Often found in international investment agreements,<sup>95</sup> equitable treatment provisions have become powerful components of protection standards for foreign investors in their contracts with states. In principle, they seek to secure an absolute minimum level of treatment for foreign investors and their investments against unfair or discriminatory treatment by the state. The underlying concept, which has been reiterated by jurisprudence in equitable treatment disputes, is that the foreign investor has legitimate expectations that cannot be frustrated by a state’s unreasonable actions.<sup>96</sup>

<sup>xv</sup> The concept of a “chilling effect” was discussed in depth in the Amnesty International reports *Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project*, May 2003 and *Contracting out of Human Rights – The Chad-Cameroon pipeline project*, December 2005.

<sup>xvi</sup> The BTC Human Rights Undertaking was the industry’s response to the critique provided by Amnesty International in *Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project*, May 2003.

### Continuation of Equitable treatment clauses

Different investment agreements formulate equitable treatment clauses differently. A survey on the origins and use of the fair and equitable treatment standards found that, although some agreements expressly define equitable treatment by reference to international law, others do not. This means that this standard is not understood in a uniform manner.<sup>97</sup> Therefore, the interpretation of such a clause will depend on how it has been drafted. This probably explains the increasing incidence of claims concerning equitable treatment in disputes between foreign investors and states.

### 4.3 Equitable treatment: more of the same

Article XIX, section 10 establishes an "equitable treatment" clause. As it is worded, this clause has the potential to restrict the government's ability to promote economic policies that could benefit the country as a whole. The government may have legitimate reasons to favour local businesses with respect to the exploration and production of iron ore. These may be part of a drive to improve the capacities of local businesses; to further local employment, or many similar objectives. It is acceptable that the state should show in any given case that the public interest is best served by favouring local enterprise; there are many examples of states which have done so.<sup>xviii</sup> The same considerations may apply when a government provides particularly favourable terms and conditions to another foreign enterprise. The state might be best placed to further its social policies or other aspects of the public interest. Again, the onus should be on the government to show that it is necessary, and not just convenient to proceed in this way. However, as the clause stands there is no room for identifying those cases of justified differential treatment that serve the public interest.

### Article XIX, section 10, page 21

"In the event that the GOVERNMENT grants to any other Person terms or conditions that are more favourable than those provided in this Agreement with respect to the exploration or production of the same Mineral(s) occurring in similar economic conditions, or in the event that the GOVERNMENT enacts any Law or adopts any practice or policy that permits more favourable treatment of any other Person than that accorded to the CONCESSIONAIRE by this Agreement with respect to the Exploration and Production of iron Ore being explored for, developed or produced by the CONCESSIONAIRE, then the GOVERNMENT shall grant the same more favourable treatment to the CONCESSIONAIRE, with effect from the date of its application to such other Person or of its entry into force, as the case may be."

## RECOMMENDATIONS

- 18** The provisions should be redrafted to ensure that they maintain their commercial objectives while removing obstacles to compliance with human rights standards.
- 19** In the footsteps of British Petroleum, Mittal Steel should recognise the dynamic requirements of human rights, environmental and health and safety standards and agree not to seek compensation in relation to the stabilisation provisions in this MDA.
- 20** The government should review any terms of the agreements that may discourage the state from fulfilling its human rights obligations under threat of penalties.

# 5.Threats to land rights

## What is the problem?

- The MDA gives the Concessionaire far-reaching authority to possess public and private land without providing adequate compensation or the means to seek effective redress.

Article IX establishes the parties' rights and duties regarding land and facilities. This article gives the Concessionaire far-reaching authority to possess public and private land without adequate compensation. The abuse of land and property rights, especially related to the allocation of resource concessions, is widely recognised to be a major catalyst to both low- and high-level conflict. It is common in traditional mining laws and agreements that clauses provide

access to land in the concession area and outside the area of operation with no additional cost. The clause also prioritises the rights of the Concessionaire.

The definition of the Concessionaire's right to public land "for purposes of, and incidental to, the Operations" is excessively vague. There is no definition or list which outlines the circumstances in which the Concessionaire

## Article IX, page 10

### Section 1

- a** "The CONCESSIONAIRE shall have the right to enter upon and utilize all public land within the Concession Area for purposes of, and incidental to, the Operations, without costs except as provided for by ARTICLE XXIV, Sections 1 and 2 below."

### Section 2

- a** "In the event that occupation of private land within the Concession Area will be required for or incidental to the Operations, the CONCESSIONAIRE shall endeavour, by direct agreement with the owner(s), to enter upon and utilize such private land."
- b** "If the CONCESSIONAIRE and the owner of private land in the Concession Area which the CONCESSIONAIRE reasonably requires for the Operations cannot agree, the

GOVERNMENT shall, at the request of the CONCESSIONAIRE, intervene to assist in the conclusion of such agreement, failing which the GOVERNMENT shall at the request of the CONCESSIONAIRE, use the rights conferred to it by Section 11.3 of the Minerals and Mining Law to acquire such land and all improvements thereon in the public interest. The CONCESSIONAIRE shall reimburse the GOVERNMENT for all reasonable cost paid in connection with such exploration, including just compensation paid to the prior owner; provided, however, that the amount paid by the GOVERNMENT to the owner shall not exceed the reasonable value of the owner's interest in such land (land and any improvements thereon) determined, without regards to the value of any Mineral which may be contained therein, by means of an appraisal conducted by a qualified person mutually agreed to by the Parties hereto." *xviii*

*xviii* Section 11.3 of the Minerals and Mining Law states that the landowner or occupants of the land shall be entitled to "just, prompt and adequate compensation".

has the right to enter and occupy the land. The Concessionaire is able to enter, utilise and possess public land outside the concession area, without cost. The only restriction is that the area must be “reasonably required” and should not involve “unreasonable interference” with the rights of other persons. Mittal Steel informed Global Witness that any group policy adheres to international best practice and that there were not many people living in the concession and adjacent areas.<sup>98</sup>

The Concessionaire is granted the right to request the GOL to compulsorily purchase land from citizens who are unwilling to sell it. The valuation of the land is to be conducted by a person agreed between the GOL and the Concessionaire, without any input from the owner. Furthermore, these conditions do not allow the GOL to consider whether the possession of the public or private land is in the public interest. Article IX, section 2b sets a limit on the amount of compensation that will be reimbursed by the Concessionaire to the Government. The lack of definition in the contract of what is the “reasonable value of the owner’s interest in such land (land and any improvements thereon)” allows for a narrow interpretation of what a reasonable compensation would be. It is not clear how the value of cultivated land will be determined given the dependence of the population in Liberia on subsistence farming.

Article 24 of the 1986 Liberian Constitution provides for the expropriation of private land where the security of the nation is at stake in the event of an armed conflict and where public health and safety are endangered. It is questionable whether commercial activity can be justified as a public purpose and as such this provision appears to be unconstitutional. Global Witness understands that a wider interpretation of expropriation rights has been traditionally accepted in the mining sector given the value of the resources. If expropriation were permissible then a court with competent jurisdiction should oversee the process.

## 5.1 The need to respect the rights of those occupying land

Article IX gives the Concessionaire greater rights than the communities who occupy public or private land, and may be one of the most far-reaching consequences of the MDA. There is no provision for communities to be consulted if they face removal, or for any payment to be offered in restitution. In addition, it is possible that only a small proportion of rural land is formally registered or titled, as many farmers in Liberia gain access to land through customary rights.<sup>99</sup>

It is difficult to see how Liberia can reconcile these provisions with its international obligations. It is questionable whether these provisions are in line with the international human rights concept of “free prior informed consent.” The concept of free prior informed consent in the context of relocation of indigenous people from their land is recognised in the ILO’s Indigenous and Tribal Peoples Convention 1989 (No. 169) in article 6. The convention aims to ensure that states fully consult with indigenous people in the context of development, land and resources (articles 6.7 and 15).<sup>100</sup> <sup>xix</sup> The principle of free, prior informed consent recognises indigenous peoples’ prior right to their land and resources and expects their authority be respected to ensure that third parties enter into equal and respectful relationships with them. Procedurally this means that processes are put in place to allow and support meaningful choices by indigenous peoples about their development path.<sup>101</sup> Liberia has also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>102</sup> The UN Committee on Economic, Social and Cultural Rights <sup>xx</sup> has defined “forced evictions” as “the permanent or temporary removal against the wills of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.<sup>103</sup>

<sup>xix</sup> The principle is further recognised in the draft UN declaration on the rights of indigenous people ( Sub-Commission resolution 1994/45 annex), by several UN committees, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights in the 2002 Ogoni case, and in various other international institutions.

Furthermore the UN Commission on Human Rights has recognised forced evictions as a gross violation of human rights, in particular of the right to adequate housing.<sup>104</sup>

### 5.1.1 The right to an effective remedy

Private citizens whose land is compulsorily purchased or citizens who are evicted from public land have the right to an effective remedy, according to international standards, and must be reasonably compensated. Liberia has ratified the UN's International Covenant on Civil and Political Rights (ICCPR). Article 2(3) of the ICCPR states that contracting parties to the Covenant shall ensure that *“any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ... that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and develop the possibilities of judicial remedy.”*<sup>105</sup> **xxi**

The provisions in article IX of the MDA and in the stabilisation clause do not help to guarantee this right to an effective remedy. Independent legal aid must be offered to people affected by land acquisition; without this, fair negotiation is impossible. In Australia some mining companies, including Rio Tinto, have provided discretionary funds for legal and commercial advice for aboriginal communities to ensure that they are able to fairly negotiate agreement for their communities.<sup>106</sup> There is no special

grievance procedure for this MDA, so individuals must turn to the local court system and administrative procedures to obtain remedies. Liberia's crippled judicial system is unlikely to be able to cope with a significant number of cases or adequately ensure due process, and therefore would be unable to provide an effective remedy for all possible claimants. This would be the case not only for land rights disputes but also for those who may feel that their rights have been negated by the stabilisation clause (see page 34) or for any victims of human rights abuses.

## RECOMMENDATIONS

- 21** Ensure that individuals can obtain an effective judicial or other appropriate remedy for violations of their human rights arising out of the project. The MDA must be clarified to explicitly allow adequate reparation, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition, through a project grievance procedure or in local courts.
- 22** Mittal and the GOL should ensure that compensation for the expropriation of land reflects the genuine value of the use of land for that person.

**xx** The Committee on Economic, Social and Cultural Rights monitors states' compliance with the treaty.

**xxi** The right to an effective remedy is defined by the European Court of Human Rights, which stated that “the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.” *Aksoy v Turkey* (100/1995/606/694) 18 December 1996.

## 6. Private security forces and the threats they pose

### What is the problem?

- The provisions for the maintenance of a security force by the Concessionaire are vague and fail to adequately establish the limits of its authority.

#### Article X, section 3, page 14

“The CONCESSIONAIRE shall have the right in keeping with the provisions of the Laws, to directly or under contract with other persons, establish and maintain its own security force for the purpose of maintaining law, order and security, with power both of detention (any detained person to be handed over to the appropriate GOVERNMENT authorities as soon as practicable), and of search of and exclusion from the Concession Area and other areas as may be properly restricted for economic, operational or security reasons, always being subject to Law.”

Article X of the MDA, section 3 allows the Concessionaire to operate a private security force. Although private security forces are standard practice for companies in many mining operations around the world, they have become a major concern in natural resource-related operations, in particular in conflict-afflicted areas. <sup>xxii</sup>

The provisions for the maintenance of a security force by the Concessionaire are vague and fail to adequately establish the limits of its authority. They also fail to make reference to the internationally accepted *Voluntary Principles on security and human rights*, which set out the applicable international standards on the conduct of private security forces, the use of force, and standards of behaviour for companies in the extractive industries. <sup>xxiii</sup> Unlike other major companies from the extractive industries, such as

Anglo-American, BHP Billiton, and Rio Tinto, Mittal Steel has not signed up to these principles. The company told Global Witness that it continues to look at principles and international standards that will help the company conduct its business in a responsible manner.<sup>107</sup>

The provisions in article X, section 3 give the Concessionaire the power to detain, search and exclude, for economic, operational and security reasons. Worryingly, there is no indication of what limits might apply in the use of force necessary to make such detentions. Mittal Steel informed Global Witness that it would engage the security sector in accordance with Liberian laws and that Mittal Steel has a very stringent screening and recruitment process. It added that Mittal's private security forces would be standard unarmed industrial security guards and that their jurisdiction would be limited to the concession area. Mittal confirmed to Global Witness that it would be held accountable for the behaviour of its security forces but did not specify a mechanism by which this would work.<sup>108</sup>

Article X notes that any detained person should be handed over to the appropriate government authorities "as soon as practicable". Combined with the power of detention, the undefined timescale for handing over the detained person to the appropriate government authorities could create an opportunity for arbitrary and abusive behaviour by Mittal's private security force. The recent

<sup>xxii</sup> As in Indonesia, Nigeria, and Liberia. See Global Witness reports *Paying for Protection – The Freeport Mine and the Indonesian Security Forces (2005)*; *The Usual Suspects (2003)*; and *Logging Off – How the Liberian Timber Industry Fuels Liberia's Humanitarian Disaster and Threats Sierra Leone (2002)*.

<sup>xxiii</sup> The voluntary principles are sponsored by the governments of the US, the UK, Norway and the Netherlands. They are available at: <http://www.voluntaryprinciples.org/participants/companies.php>.



## Private security forces in Liberia

On 12 November 1985, there was an aborted coup attempt in Liberia. During extensive reprisals led by the private security force of Mittal's predecessor, Liberian American Swedish Company (LAMCO), in Yekepa, Nimba County, a large number of people were slaughtered.<sup>114</sup> This private security force, the Plant Protection Force (PPF), was led by Charles Julu, who was allegedly involved in human rights abuses, including rapes and massacres while in the employment of LAMCO.<sup>115</sup> Witnesses reported to the US-based NGO Lawyers' Committee for Human Rights that Mr Julu "directed a combination of soldiers in the national army and armed PPF officers in a systematic campaign of reprisals against Gios, [one of the ethnic groups in Nimba] ... he also reportedly engaged marked LAMCO trucks and vans to transport an undetermined number of Gio soldiers and civilians up to Sika Valley, in the Nimba mountain range above Yekepa, where they were executed."<sup>116</sup> Mr Julu has denied his involvement and remarked that those slaughtered "became victims of the aborted invasion."<sup>117</sup> Global Witness interviewed a LAMCO employee who reported that Mr Julu had been involved in many killings following the coup.<sup>118</sup> Global Witness has not conducted any further investigation into these allegations and therefore cannot verify them.

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.<sup>119</sup> OTC's boss, Gus Kouwenhoven, was charged with war crimes and sanctions violations. He was found guilty of breaking the UN arms embargo. Appeals by both the prosecution and the defence were under way in mid-2006. Global Witness's report *The Usual Suspects* reported that it was highly likely that some OTC militias had been absorbed into rebel groups in Côte d'Ivoire. Such transfers of men are common within Liberia's security apparatus.<sup>120</sup> These militias were involved in human rights abuses and in destabilising the region. Another major timber company operating in Liberia at the time was Maryland Wood Processing Industries (MWPI), which also had 500 private troops.

The May 2006 UNMIL report 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."<sup>121</sup> 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.<sup>122</sup>

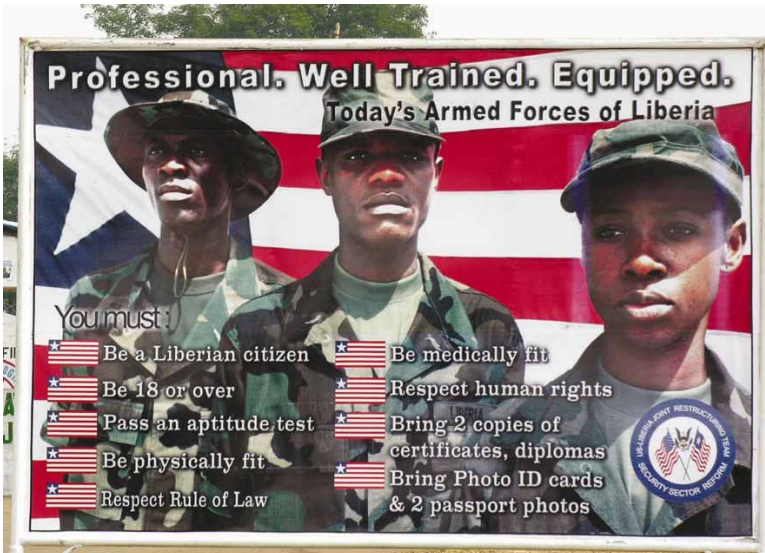
UNMIL report *Human Rights in Liberia's Rubber Plantations: Tapping into the Future* states that disregard for the principle of temporary arrest has led to the illegal detention of individuals by private security forces, which is not only a crime of false imprisonment under Liberian penal law but is also unconstitutional.<sup>xxiv</sup> This provision also appears contrary to the GOL's *Guidelines to Organize and Operate Private Security Agencies*.<sup>109</sup> These guidelines require the private security force to immediately inform the nearest Police Authority of the Liberian National Police (LNP) and

hand over the arrested suspect.<sup>110</sup> The UNMIL report also notes that "nowhere in the Guidelines is there any provision for private security firms to detain individuals".<sup>111</sup>

The exclusion powers could also be problematic. Powers could be used to forcibly remove people who have been living within the concession area. Furthermore, this article allows the security force to act for "economic" reasons. These reasons are left undefined and could be open to abuse. They could also create a deterrent effect to the unionisation of the labour force in the concession area.<sup>112</sup>

**xxiv** UNMIL, *Human Rights in Liberia's Rubber Plantations: Tapping into the Future*, May 2006. Article 21 of the Liberian Constitution states that: "Every person arrested or detained shall be formally charged and presented before a court of competent jurisdiction within forty-eight hours." Article 20 states that: "No person shall be deprived of life, liberty, security of the person, property, privilege or any other right except as the outcome of a

hearing judgment consistent with the provisions laid down in this Constitution and in accordance with due process of law." If the LNP or the court failed to hold a private security officer and the firm criminally and civilly liable for unlawful detention, this would be a violation of the right to liberty under Article 20.



AFL recruitment sign near Guthrie Rubber Plantation

April 2006

The inadequacies of the provisions in article X would be a matter for concern in any country, but could be particularly harmful in Liberia, in view of the historic involvement of private security forces in human rights abuses. Given the human rights records of the former Armed Forces of Liberia (AFL) and rebel groups, appropriate standards for the selection of members of private security forces are critical. This issue has been highlighted in the December 2005 UN Expert Panel Report on Liberia, which notes that “contracts must be explicit about issues related to security forces, such as training, accountability and the right to carry arms”.<sup>113</sup> Details about the selection and recruitment of the security force are also absent from the MDA.

## RECOMMENDATIONS

- 23** This clause must be significantly redrafted to bring it in line with applicable national and international standards. All relevant contracts with sub-contractors and state entities should be publicly available.
- 24** There must be clear standards for conduct, measures to prevent the excessive use of force, adequate training including human rights components and humanitarian law, and effective mechanisms for public oversight and accountability. Procedures of the security force should be consistent with the *UN Code of Conduct for Law Enforcement Officials* and the *UN Basic Principles on the Use of Firearms*.<sup>123</sup> In addition, Mittal's promise to be responsible for the behaviour of its security force must be legally enforceable.
- 25** Lessons should be learned from the processes used for the current recruitment of the armed forces and the police force to ensure that human rights abusers are weeded out. It should be made clear that human rights violations will not be tolerated. Any complaints about security personnel should be independently investigated and, if necessary, lead to prosecution.<sup>124</sup>
- 26** The Concessionaire should periodically report to the government on the operations of security personnel and the government should review the private security force's activities.
- 27** The Liberian Ministry of Justice should periodically review the operation of the private security firm to ensure that it fully complies with the government's *Guidelines to Organize and Operate Private Security Agencies*.

# 7. Transparency and good governance

## What is the problem?

- The MDA commits the government and Mittal to very stringent provisions of confidentiality and non-disclosure of information.
- There was a lack of public scrutiny of the MDA prior to its ratification.

### 7.1 Lack of public scrutiny

One prevalent criticism of foreign investment contracts is the lack of transparency and public scrutiny that surround them. In most cases, contracts are either not made public at all or are made public after they have been signed.<sup>125</sup> This lack of transparency and scrutiny has major implications: it curtails civil society participation, it encourages lack of accountability and it provides an opportunity for corrupt behaviour:

Despite the length of the contract and implications of the MDA between Liberia and Mittal, the opportunity for meaningful scrutiny was not given to the Liberian people. On 5 September 2005 the Sustainable Development Institute – a leading Liberian non-governmental organisation – called on the government to publish the agreement before commencing the ratification process. Despite this, the contract was ratified and was still not made available to the public.<sup>126</sup> Under article 7 of the Liberian Constitution there are specific provisions for public participation: *“The Republic shall, consistent with the principles of individual freedom and social justice enshrined in this constitution, manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia.”*

#### Article VII, section 1, page 9

“All information exchanged between Parties hereto in the context of this Agreement shall be considered and treated as confidential information, subject to Article VII, Section 2 below. The Parties hereto hereby agree not to divulge such information to any other Person without the prior written consent of any other party, which consent shall not be unreasonably withheld and/or delayed.”

Mittal Steel's position on the legitimacy of public scrutiny of this contract has been very clear. Earlier in 2006, in a public reply to the analysis of the contract made by the Columbia Law School Human Rights Clinic, Mittal stated that in *“any international agreement it is legal to protect proprietary and confidential information exchanged in the creation of the agreement ... the Mittal Steel Agreement was provided to the Liberian parliament for review and approval.”*<sup>131</sup>

However, this legislative review and approval has not been up to the standard foreseen by the provisions of article 7 of the Liberian Constitution. In September 2005 the Ministry of Foreign Affairs published the *Act to Ratify the Mineral Agreement between the Government of the Republic of Liberia and Mittal Steel Holdings NV*. The Act provides an unbalanced summary of the full contract. It is unclear

## International standards

International conventions and principles offer well-established standards on freedom of information and of expression. Additionally, the Principles on Freedom of Information and Legislation,<sup>127</sup> which focus on public bodies' duty to inform, have been endorsed by the UN Special Rapporteur on the right to freedom of opinion and expression:

*"Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; 'information' includes all records held by a public body, regardless of the form in which it is stored..."<sup>128</sup>*

*"Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public."*

The decision-making process associated with the negotiations and subsequent management of a contract of this nature is absolutely vital. This priority has been clearly stated in an expert analysis of the mining sector in relation to the challenges posed by sustainable development:

*"Various groups, acting in concert, need to evaluate the acceptability of, for example, sustaining minor environmental damage in exchange for major social and economic gain, or of sacrificing economic and social goals for a significant environmental benefit. In each case, the principle of subsidiarity should be adhered to, which recognised that decisions should be taken as close as possible to and with the people and communities most directly affected."<sup>129</sup>*

The lack of civil society consultation during the award and negotiation processes of foreign investment contracts is of particular concern, given the economic and social implications that these contracts have for the local communities – most likely to be affected by the project – and for the country in general. In a mining contract, the issues that are usually negotiated include the division of profits, the level and type of taxes, land access and/or ownership, environmental protection, arbitration, the exchange rate, offshore accounts and the rate of localisation.<sup>130</sup>

whether further information was provided during the ratification process. Public officials told Global Witness that the five-page Act was the only document available during the ratification by the legislature.<sup>132</sup> If this was the case, it is difficult to see how the legislature could have fully appreciated the implications of the contract for their country and for the lives of the Liberian people.

The Act states that Mittal Steel Holdings NV "for the purpose of creating more jobs and further strengthening the economy will not only explore iron ore but develop it into steel for local and foreign consumption, unlike the LAMCO Agreement of 1960 which only provided for the exploration and exportation of crude ore". When Global Witness met Mittal the company stated that it had agreed to look into the feasibility of a steel plant and that this would depend on a number of financial and economic factors, such as local demand and energy supply, neither of which supports the building of a steel plant at this stage.<sup>133</sup>

## 7.2 Confidentiality

Article VII, section I outlines the confidentiality requirement between the parties to the agreement. Once a contract is signed and operations start, transparency of revenue flows and contracts is a critical first step towards the responsible management of Liberia's natural resources and towards their potential contribution to poverty reduction. Transparency and accountability are fundamental to mitigating the negative impacts of the mismanagement of revenue, instead allowing revenue to become an engine for long term economic growth that contributes to substantial development and poverty reduction.

Article VII, section I commits the government and Mittal to very stringent provisions of confidentiality and non-disclosure of information. The inclusion of a confidentiality clause is not unusual in terms of international commercial agreements; however, an excessive interpretation of confidentiality to include basic revenue information is not in accordance with best international practice such as the Extractive Industry Transparency Initiative (EITI). Mismanagement of natural resource revenues is of particular concern in vulnerable countries where corruption is endemic and governance is weak.<sup>134</sup> This is Liberia's profile.<sup>xxv</sup> Disclosure of payments would empower the citizens of Liberia and the international community to monitor revenues arising from the project. This would be a step towards reducing corruption in the country, to which the new government of President Johnson Sirleaf is fully committed. Mittal Steel said that it was in the process of exploring the usefulness of different international practices in improving disclosure, including the EITI.<sup>135</sup>

**xxv** The average wage of a civil servant in Liberia is US\$20 per month, and US\$50 for a high-ranking civil servant. A study on the dimensions of corruption in post-conflict Liberia found that these conditions seem to facilitate a lack of incentive for work ethics and an environment conducive to corrupt behaviour. Such conditions are coupled with the existence of weak accountability systems in government institutions and wider powers of discretion by some officials; Ekeanyanwu, Lilian and Osita Nnamani Ogbu, *The Dimensions of Corruption in Post War Liberia, Rebuilding the pillars of Integrity and Strengthening Capacities*, commissioned by UNDP Liberia, available at <http://www.lr.undp.org/UNDP's%20Anticorruption%20study%20-%20final%20report%20290106.pdf>, accessed June 2006.

### Extractive Industries Transparency Initiative (EITI)

The 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 brings together extractive companies and their investors, producer governments, the international financial institutions and civil society groups, including Global Witness. The crucial feature of the EITI is that companies disclose their payments, and governments disclose their receipts, enabling citizens to cross-check the accuracy of each set of figures. The EITI has a set of principles and minimum criteria which have to be adopted by all countries that implement it.

The EITI minimum criteria are that revenue streams from extractive companies to the government must be publicly declared and independently audited and verified, with discrepancies identified, and be made available for public discussion. Civil society groups, acting as the representatives of the wider society, take an active part in designing the mechanism for publishing and verifying revenues. Broad local leadership and participation are essential and active public engagement from a range of stakeholders is required. The EITI has been endorsed by more than 15 producer governments and many of the world's leading multinational oil and mining companies, as well as the World Bank, the IMF and the governments of countries such as the US, the UK, Norway and France.

Revenue transparency would also allow the Concessionaire to protect its corporate reputation and safeguard it against the misappropriation of legitimate payments, which could be squandered. This could lead to social divisions and instability, potentially threatening operations. A statement by ISIS Management <sup>xxvi</sup> notes that *"legitimate, but undisclosed, payments to governments may be accused of contributing to the conditions under which corruption can thrive. This is a significant business risk, making companies vulnerable to accusations of complicity in corrupt behaviour, impairing their local and global 'licence to operate', rendering them vulnerable to local conflict and insecurity, and possibly compromising their long term commercial prospects in these markets."<sup>136</sup>*

Increased transparency would contribute to a level playing field for companies and, by publicising payments to the government, demonstrate the contribution that they are making to the country.

Such stringent confidentiality provisions are bound to conflict with the government's commitment to join the EITI, which was agreed as part of the Governance Economic Management Assistance Programme (GEMAP).<sup>xxvii</sup> A failure to implement the EITI, owing to obstacles created by such provisions, would hinder the government's commitment to creating an open and positive business environment. On the other hand, the participation of Mittal Steel and the GOL in the EITI or a similar commitment to transparency would provide a signal to the national and international community of a commitment to break from the historical cycle of corruption and violence linked with natural resource extraction and to instil high standards of transparency and accountability in government and business operations.

### 7.3 Access to information

#### Article XIX, section I, page 19

"The GOVERNMENT hereby undertakes and affirms that the CONCESSIONAIRE, at basic cost, shall be entitled to use and to have access to all geological or other information relating to the Concession Area that is owned by the GOVERNMENT or may be in or subject to the GOVERNMENT'S control..."

Article XIX, section I defines the rights of the Concessionaire to information relating to the concession area. This provision gives the Concessionaire the right to use and access all *"geological or other information relating to the Concession Area"* held by the government, at basic cost.<sup>xxviii</sup> This suggests that the government has given away valuable economic and intellectual property rights, while the Concessionaire can obtain valuable information at minimum cost. To put this in perspective, in 2006 the US Geological Survey carried out a survey of Liberia's diamond deposits.<sup>137</sup> If any of these deposits fall within the concession area, and if the survey itself is owned or controlled by the GOL, the Concessionaire will have the right to this information, at the cost of reproduction alone. This in itself may not be a problem, but the fact that the Concessionaire has the right to this information means

**xxvi** ISIS Management is a coalition of 57 major North American, European and South African investment houses that manage US\$6.9 trillion in funds.

**xxvii** The international community is providing financial support through the Governance and Economic Management Assistance Programme (GEMAP), which aims to address Liberia's economic mismanagement and corruption.

**xxviii** This means either the costs of reproduction, or the costs incurred by the government in obtaining the information.

that an extremely rich multinational could directly benefit from a project funded by a donor government's aid budget. More importantly, this provision is of particular concern when coupled with the provisions in article VI, section 4, discussed below, which give the Concessionaire the right to additional minerals in the concession area. It is difficult to see how the GOL benefits from these arrangements.

In contrast, the information contained in the feasibility study commissioned by Mittal does not appear to be publicly available. Global Witness asked for access to this document, but was told that before the matter could be considered, we would have to sign a confidentiality agreement.<sup>138</sup>

## RECOMMENDATIONS

- 28** The GOL should publish the contract and make it available to the Liberian population.
- 29** The contract should be redrafted to ensure that nothing hinders the disclosure of payments to the GOL and to include provision for an independent oversight mechanism for disclosure of revenues and receipts from the project, such those recommended by EITI.
- 30** Anything which affects fiscal payments or revenues to the GOL should be disclosed for the public interest.
- 31** Article XIX, section I should be redrafted to ensure that the GOL maintains control over the conditions and charges for information it provides to the Concessionaire.
- 32** Only classified documents that would directly harm the company's or the government's proprietary business information should be treated as confidential.

## 8. Environmental issues

### What is the problem?

- The East Nimba Nature Reserve is included in the concession area.
- The MDA gives the Concessionaire rights to any additional mineral it discovers in the concession area.
- There is a lack of detail regarding the mitigating measures by the Concessionaire to address the environmental impacts of the operations.

### Article VI, section 4, page 9

"If the CONCESSIONAIRE discovers that the Concession Area contains Minerals other than those subject to Class A Mining License, it shall have the right to Mine such additional Minerals, subject to the provisions of Section 6.7c. of the Minerals and Mining Law."

Mittal's 2005 Annual report states that "[a]ll Group operations comply with local legal and regulatory requirements and every effort is made to anticipate new legislation by investing ahead of implementation."<sup>139</sup> However, provisions within the Liberian MDA seem at odds with this statement.

### 8.1 Inclusion of the East Nimba Nature Reserve in the concession area

Article IV states that the concession area includes the East Nimba Nature Reserve, which was established under the 2003 *East Nimba Nature Reserve Act*. The East Nimba Nature Reserve is one of the few fully protected areas in Liberia, and includes the Liberian portion of the Mount Nimba Massif. The 2003 Act recognises the biological

richness of the Nimba Mountain complex and notes that the World Heritage Council of United Nations Education Scientific and Cultural Organisation (UNESCO) has declared the Guinea-Côte d'Ivoire side of the Nimba Mountain complex a World Heritage Site.<sup>140</sup> During a meeting of the World Heritage Committee in South Africa in July 2005, Liberia was invited to request international assistance to prepare its tentative list of World Heritage sites for future nomination.<sup>141</sup>

Although additional mining licences and an environmental impact study are required for each proposed production area (article VI, section 1; article XV, section 1), resources will be needed for the regeneration of the railway, port and other infrastructures acquired by the agreement. These may be sourced from the East Nimba Nature Reserve. Given the ecological importance of the area, there is potential for significant environmental damage. Protected species will be protected only to the extent that this does "not interfere with or hinder operations" (article XXVII, section 1).<sup>142</sup> It is questionable whether the people of Liberia will benefit from this article. Mittal informed Global Witness that there were no planned "production areas" in any protected area.<sup>143</sup>



## Environmental standards in the mining sector

It is increasingly recognised that emerging standards on the environmental and social impacts of mining activities will pose new challenges on how to reconcile economic and social development, with the mineral policies of developing countries that want to encourage foreign investment.<sup>144</sup> It is fundamental that host governments do not perceive weaker environmental requirements as a sacrifice worth making in return for foreign investment. Many foreign investment projects by multinational corporations already comply with (and some go beyond) existing international environmental standards, industry codes and voluntary agreements for the extractive industries.

### 8.2 Environmental protection and management

These provisions establish the environmental responsibilities of the Concessionaire in the concession area. The Concessionaire agrees to conduct its operations in accordance with the Environmental Protection and Management Law of Liberia. There could be difficulties with the future interpretation of article XV.<sup>xxix</sup> There is a lack of clarity in the wording describing mitigation and environmental damage duties; it is unclear which “defects” must be mitigated. Furthermore, the proviso reflected in the wording “as much as possible” opens up the possibility for interpretation of what it is possible to mitigate and/or restore, which could fall short of an acceptable standard. It also poses the question of who decides what is “as much as possible”. Similarly, the wording “shall be warned to take preventative measures” is weak, and should be replaced by the more decisive “shall take”. Mittal Steel told Global Witness that an Environmental Impact Assessment had been initiated and that mitigating measures were being developed.<sup>145</sup>

When combined with the provisions in article XIX, section 9 (the stabilisation clause) the already ill-defined substantive performance and mitigation duties by the Concessionaire could be eroded. Although the Concessionaire is

**xxix** In a public response to the analysis of the contract carried out by Columbia Law School Human Rights Clinic, Mittal emphasised that Article XV clearly states that the Concessionaire is bound to comply with the Environmental Protection and Management Law and the specific environmental provisions in the Minerals and Mining Law of the Republic of Liberia. (Columbia Law School Human Rights Clinic, Legal Issues in the Mineral Development Agreement Between the Government of the Republic Liberia and Mittal Steel Holding, 22 February 2006; Daily Observer; “Misrepresentations of Mittal Steel MDA”, 19 April 2006, p.6.)

## Article XV, section 1 & 2, page 17

**Section 1:** “The Parties recognize that the Operations may result in pollution, contamination or other environmental damage to land, water and the atmosphere within the Concession Area and elsewhere. Accordingly, the CONCESSIONAIRE shall conduct its Operations in accordance with the Environmental Protection and Management Law of the Republic. Notwithstanding the foregoing, the CONCESSIONAIRE shall not be liable for pre-existing environmental damage within the Concession Area but shall be encouraged to take steps to remedy situations that may lead to environmental hazards.

The CONCESSIONAIRE shall submit to the GOVERNMENT an Environmental Impact Assessment Study in accordance with Law, for approval prior to the grant of a Class A Mining License.”

**Section 2:** “The GOVERNMENT may, at the expense of the CONCESSIONAIRE, conduct a periodic environmental audit and assessment, consistent with the Environmental Protection and Management Law of Liberia, of any or all areas encompassing the Concession Area to ascertain that the CONCESSIONAIRE'S Operations are conducted in conformity with generally accepted environmental practices and standards and with the Environmental Impact Assessment Study set forth in Section 1 above.(...)”

If any defects are caused to the environment consequent to its Operations, the CONCESSIONAIRE shall be required to mitigate and/or restore the environment as much as possible to its original and natural state within an agreed timescale and shall be warned to take preventative measures to avoid further damage to the environment.”

compelled to comply with the environmental protection and management laws applicable at the time of the signing of the contract, article XIX, section 9 could allow the Concessionaire to opt out of any future environmental legislation that the GOL may attempt to enforce. It is reasonable to assume that the GOL will adopt and enforce new environmental protection and management laws and adhere to more international instruments during the next



Mine tailing, Yekepa

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25 years. It is also likely that the GOL will seek to benefit from finance available from international financial institutions, which will require compliance with specific environmental guidelines. This will compel the government to update its legislation and regulation accordingly.

There is increasingly a best practice requirement for mine closures and land remediation. Modern projects have to plan for the environmental and social consequences of closure of their operations. The MDA fails to require that the land be returned in a condition similar to its original state upon closure of operations, or adequately plan for the environmental and social consequences of temporary or permanent closure at the end of the productive life of the operations.

Mittal's 2005 annual report states that health and safety performance will not only be benchmarked against steel industry standards, but against all leading global companies.<sup>146</sup> However, there do not seem to be any provisions regarding potential harmful effects of the Concessionaire's operations on human health. Health impacts in the mining sector are routinely identified in association with potential environmental impacts. Risks occur from exposure to dust, fumes and noise, as well as from the presence of chemical agents. The effects often manifest as chronic illnesses and can affect entire families.<sup>147</sup>

**Article IX, section 3 b I, page 12**

"The CONCESSIONAIRE shall have the right (... )free of charge, to cut, and utilize timber; to quarry and use stone or rock, and use water reserves, to the extent reasonably needed for the Operations;"

**Article XXVII, section 1, page 29**

"Except as otherwise provided in this Agreement, the CONCESSIONAIRE shall have the right to remove, extract and use water; gravel, sand, clay and timber (except for protected species, insofar as they do not interfere with or hinder the Operations)(..)."

**8.3 Right to additional minerals and natural resources with minimal restrictions**

The provisions in these articles establish the Concessionaire's rights to any additional minerals it discovers in the concession area and to make use of a number of natural resources for its operations, free of charge. Combined with the potential to lengthen the contract, to expand the area of the concession, and with the Concessionaire's free access to geological information,



Former LAMCO mine worker's house in Yekepa

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the Concessionaire may find itself in the possession of extremely valuable minerals. This could deny the GOL any rights to the discovery of new minerals in the concession area and could lead to the loss of significant revenue for the GOL.

Regarding the Concessionaire's free use of timber for its operations, articles IX and XXVII do not place any limit on the amount of timber that can be harvested and do not make any reference to ensuring that it is sustainably harvested. This effectively bypasses the entire forestry reform process in Liberia and gives the Concessionaire the right to log, without being held to the same stringent standards that will apply to logging companies in future. As the new forestry law had not been passed when the contract was signed, Mittal will be able to choose to opt out under the stabilisation clause (see above). The contract also makes no reference to how the Concessionaire will mitigate the environmental and socio-economic impacts of any logging activities.<sup>148</sup> It places no requirement on Mittal to return the land to an environmentally sound condition at the end of the contract.<sup>149</sup> Timber will be required for the renovation of former LAMCO housing facilities. Global Witness discussed the renovation of the railway with Mittal, which stated that it would not use timber to renovate the railway sleepers.<sup>150</sup>

## RECOMMENDATIONS

- 33** The nature reserve should either be removed from the concession area within the agreement, or it should be explicitly stated that resources will not be sourced from the nature reserve.
- 34** Mittal Steel's 2005 annual report<sup>151</sup> suggests that the company is preparing an energy and environment policy document to raise standards and ensure consistent application of these throughout the group. As this document will no doubt reflect existing international best practice standards, it is reasonable to expect that Mittal Steel's operations in Liberia should benefit from these improved environmental standards.
- 35** A new mining licence should be made a requirement, if Mittal found major deposits of minerals in the concession area.

# 9. Curbing the powers of the government

## What is the problem?

- The MDA restricts the government's ability to monitor the Concessionaire.
- The MDA limits the government's ability to enforce permit conditions and issue necessary authorisations.

### 9.1 Restriction of the government's ability to monitor the Concessionaire

#### Article V, section 3b, page 8

"(...)The GOVERNMENT shall have the right to monitor exploration and mining Operations from time to time and a reasonable number of GOVERNMENT personnel may, upon prior notice to the CONCESSIONAIRE, at reasonable time and subject to compliance with the CONCESSIONAIRE'S security and safety requirements, and without interfering with the normal conduct of their activities by the CONCESSIONAIRE, attend and inspect the exploration and mining Operations and activities conducted in Liberia."

Article V establishes the government's right to monitor the exploration and mining operations, thereby allowing it to control the health, safety and environmental conditions in which the Concessionaire operates. This right is to be exercised upon prior notice to the Concessionaire and may undermine the government's ability to freely monitor the Concessionaire.

This requirement is at odds with the legislation in force in the world's main mining centres, where inspectors have unrestricted rights to enter and inspect operations. For example, in Chile, Canada, Australia and South Africa, government-appointed inspectors have the right to inspect mining operations without notice. Following a government review, the South African mineral law<sup>152</sup> was overhauled to reflect global best practices in the sector. **xxx** Accordingly, an authorised person may during office hours, and without a warrant, enter any reconnaissance, prospecting, mining production, exploration or retention areas, in order to inspect. If they find a contravention or suspected contravention of the Minerals and Petroleum Resources Development Act, or other law, they can suspend or terminate the operations. In Canada, "at any time an inspector may inspect (a) a mine, or (b) a site considered by the inspector to be a mining activity site that is operating without a permit".<sup>153</sup> In Australia, "an inspector may enter any worksite at any time required for the purpose of his/her functions".<sup>154</sup>

**xxx** This has been recognised as incorporating best practices in integrating sustainable development in "The Community Development Toolkit," published in 2005 jointly by the International Council on Mining and Metals, World Bank and Energy Sector Management Assistance Program, [http://www.icmm.com/library\\_pub\\_detail.php?rcd=183](http://www.icmm.com/library_pub_detail.php?rcd=183)

## 9.2 Limits on the government's ability to enforce permit conditions and issue necessary authorisations

### Article VI, section 3, page 9

"The Class A Mining License for a Production Area selected by the CONCESSIONAIRE shall remain valid and effective for the unexpired portion of the term of this Agreement and any Extended Terms."

### Article XIX, section 6, page 20

"The GOVERNMENT undertakes and affirms, that it shall issue all licenses, permits, mining titles, easements, and other authorizations, including but not limited to, the rights and titles referred to in Article IV, Section 1 and Article VI, Section 1 above and in Section 11.6 of the Mining Law, which are or may be necessary for the CONCESSIONAIRE or its Associates to conduct the Operations."

Articles VI and XIX establish the government's obligations to grant and renew Class A mining licences for the production areas selected by the Concessionaire. Article VI, section 3 does not make any reference to the need for the Concessionaire to meet the conditions required under the Liberian Mining Code before licences are granted, and does not allow the GOL to review whether the Concessionaire continues to meet these conditions during the concession period and any extended terms.

Article IX, section 3b entitles the Concessionaire to use natural resources and water as needed for operations. Article XIX guarantees that the necessary authorisations will be granted, but makes no reference to this being subject to compliance with standards of use of these resources under relevant legislation, and as approved by the competent agencies.

## RECOMMENDATIONS

- 36** Article V, section 3b should be brought in line with existing best practice by guaranteeing unrestricted rights to government-appointed inspectors to monitor the operation. The South African mineral law represents a useful best practice standard for other nations seeking to develop new law in the area.
- 37** The mining licence should only remain valid and effective if the Concessionaire ensures health and safety of the workers and environmental standards.

# 10. Corporate social responsibility

## What is the problem?

- The social benefits provided by the MDA are meagre when compared with the significant revenue the GOL will miss out on, as a direct result of the terms of this contract.

Under articles X, XI and XIV, Mittal will provide education and healthcare services, training, scholarships and an annual community fund. Given that the GOL does not have the capacity, money or infrastructure to provide widespread adequate education and healthcare, contributions to communities and contributions in kind through the provision of services are welcome. However, they must be evaluated against the wider economic implications of this project. Providing schools and health care does not replace the duty of Mittal to be a responsible operator. As highlighted throughout this report, Liberia is likely to miss out on significant revenue as a direct result of the terms of this contract. In the long term, the country would benefit more if the government had been able to ensure that this MDA provided less extensive tax breaks, guaranteed a higher royalty rate and safeguarded revenue sources from public assets. These sources of income would help the GOL to provide education and healthcare services to all Liberians.

Mittal's 2005 annual report refers to a new Group level corporate social responsibility function, which is developing reporting procedures in line with international best practice. This includes the Global Reporting Initiative standards and the UN Global Compact.<sup>155</sup> The transparency and good governance measures mentioned earlier in this report should be reflected in these provisions. The disbursement of funds in accordance with article XI and article XIV should be transparent, with sufficient oversight, and should be allocated according to merit.

### Article XI, page 14

**Section 1** (Education): a) "(...)the CONCESSIONAIRE shall provide, in the Concession Area, free primary and secondary education (in conformity with provisions of the Education Laws of Liberia (...)) for the direct dependants of the CONCESSIONAIRE'S own employees, and the GOVERNMENT officials assigned in the Concession Area in connection with the Operations."

**Section 2** (Skills and Training of Liberians): "The CONCESSIONAIRE shall provide on a continuing basis training for suitable Liberian citizens, in order to qualify them for skilled, technical, administrative and managerial positions..."

**c** "[The CONCESSIONAIRE shall provide] an aggregate amount of at least Fifty Thousand Dollars (US\$50,000) per year to fund new scholarships for qualified Liberian citizens to pursue advanced studies abroad..."

**Section 3** (Assistance to Mining and Geology Programs of the University of Liberia): "The CONCESSIONAIRE shall provide financial assistance up to Fifty Thousand Dollars (US\$50,000) per year to the Departments of Mining and Geology at the University of Liberia for capacity-building..."

**Article XIV, page 16 (Community Resources)**

"(...) the CONCESSIONAIRE shall provide an annual social contribution of US\$ three (3) million which shall be managed and disbursed for the benefit of Liberian communities by a dedicated committee to be formed between the Parties. It is agreed by the Parties that, for the first year only, a lump sum of US\$1.5 million shall be deducted from the foregoing amount and provided to the Liberia Mining Corporation ("LIMINCO"), subject to corresponding audited accounts, to liquidate outstanding wages and salary arrears of former LIMINCO workers."

**Article X, section 1, page 14 (Health Care)**

"In connection with Operations, the CONCESSIONAIRE shall furnish in the Concession Area free medical treatment, care and attention at acceptable standards to all of its employees and officials working in connection with the CONCESSIONAIRE'S Operations, and their spouses and immediate dependants..."

**Section 2 (Safety):** "In connection with the Operations, the CONCESSIONAIRE shall construct, maintain and operate safety devices and equipment and shall practice such safety procedures and precautions (including regular safety training instructions for its employees) as are in accordance with International Standards..."

Greater transparency and oversight would protect the Concessionaire and the GOL from the possible misappropriation of scholarships or money for community development.

Global Witness investigations into the operation of mining companies have identified a worrying trend concerning the mismanagement of community contributions. For example, in July 2005 Global Witness produced a report, *Paying for Protection*, on the controversial relationship between mining company Freeport McMoRan Copper & Gold and the Indonesian military. *Paying for Protection* discusses the apparent misuse of community funds. Freeport Indonesia appears to have paid US\$342,000 to the military for community programmes between April 1999 and February 2002 and has declined to provide evidence that this money was spent on community projects.<sup>156</sup> The company has confirmed that the US Department of Justice is inquiring into this issue.

The misuse of scholarships was described in an investigation into Riggs Bank in Equatorial Guinea (E.G) by the Minority Staff on the Permanent Subcommittee on Investigations in the US Senate. It reported that: "*many and perhaps all of these students were the children or relatives of E.G. officials, but the evidence is unclear regarding the extent to which each of the oil companies was aware of the students' status.*"<sup>157</sup>

In Nigeria, Shell contributed US\$25 million to community development in 2004.<sup>158</sup> Although this figure seems generous, close analysis of the impact of this development by Christian Aid found that the community development projects "*are frequently ineffective*" and "*sometimes even widen the divide in communities living around the oilfields*".<sup>159</sup> Christian Aid visited six "*community development*" projects in the Niger Delta; none of them functioned.<sup>160</sup> It concluded: "*The region is now a veritable graveyard of projects, including water systems that do not work, health centres that have never opened and schools where no lesson has ever been taught.*"<sup>161</sup>

Article XIV provides that Mittal will pay US\$3 million to local communities, which will be managed by a dedicated committee to be formed between the parties; this was confirmed to Global Witness by Mittal Steel.<sup>162</sup> In the first year, half of this will be used to pay the outstanding salary arrears of former Liberian Mining Company (LIMINCO) staff. The UN Expert Panel notes that “*local people may object strongly to being required to pay these salary arrears when they themselves live in dire poverty*”.<sup>163</sup> In discussion with Global Witness, Mittal said that the GOL had requested that the company pay half of the first year’s instalment to cover the outstanding salary arrears, but that Mittal would be happy for the GOL to take on this responsibility and for the company to pay the full US\$3 million to the local communities.<sup>164</sup>

Article X, section 2 establishes the Concessionaire’s safety duties in conformity with “*international standards*”. These are defined as “*generally accepted world mining industry standards and procedure, due allowance being made for any special circumstance*” (article I, section I.19). This benchmark is vague, as it is often not clear what constitutes generally accepted world mining industry standards. The reference to “*special circumstances*” usually calls for greater safety requirements. However, this article refers to “*special circumstances*” to allow the company to fall below the generally accepted industry standards. Industry standards should incorporate special safety provisions relating to any reasonably predictable special circumstances. Insofar as such special circumstances are reasonably foreseeable, they properly call for higher, not lower safety standards.<sup>xxxii</sup> This is contrary to Mittal’s 2005 Annual Report, which states that the new health and safety policy seeks to place Mittal Steel in the front rank of global companies.<sup>165</sup>

In the event that the GOL claimed a violation of adequate safety standards and the Concessionaire resisted that claim, the recourse would be through international arbitration. The vagueness of the “*industry standard*” and its vulnerability to being lowered to meet commercial pressures was the subject of criticism in the cases of the Baku-Tbilisi-Ceyhan (BTC) and the Chad-Cameroon pipelines. For the BTC pipeline, the standards were replaced by the provisions of the BTC Human Rights Undertaking.<sup>166</sup> The revised standards now benchmark safety requirements against international labour and human rights treaties to which the host state is party, as well as to World Bank standards to which the project adheres.<sup>167</sup>

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**xxxii** The only residual meaning to give to this qualification would be circumstances that were not reasonably foreseeable, in which case this might be an attempt to carve out an exemption from tort liability that would otherwise apply on strict liability principles.



## The creation of employment opportunities

One of Liberia's greatest challenges is the need to restart the crippled economy and create jobs for the thousands of unemployed. The unemployment rate is currently over 80%. As mining has become more capital and less labour intensive, the contribution of the activity as a source of employment has diminished. It is often argued that mining has a 'multiplier effect' and that it creates indirect jobs, but this must be proactively stimulated. This MDA will provide employment within the Yekepa and Buchanan areas. In a presentation given to Global Witness by Mittal Steel it was estimated that 476 people would be employed in Liberia by Mittal by the end of 2006, and that by 2008 the number would have risen to 3,200 direct and indirect

employees.<sup>xxxii</sup> 168 In an interview with Global Witness, a Mittal representative said that the company would contract out some jobs in an effort to stimulate the local economy. However, a proactive policy of local employment must be accompanied by intense local training. Mittal further reinforced that conditions of employment will be in accordance with Mittal's global human resources practices and Liberian Labour Law.<sup>169</sup>

In March 2006, Global Witness interviewed eight people from Nekren township, near Buchanan, who said that they were breaking rocks to rebuild the railway for Mittal Steel. They reported that they were sub-contracted by truck drivers, who had been contracted by Mittal. They were paid US\$49 for a small truck load. It takes five people about five days to fill one truck, and the remuneration worked out at just under US\$2 per person per day. There was insufficient safety equipment for all of those engaged in the work. Although the provision of jobs will have a positive impact on Liberia, it is important that adequate salaries and safety equipment are provided for Mittal employees and those it contracts. Responsibility to provide adequate working conditions and pay cannot be contracted out.



Hard labour: subcontracted workers crushing rocks for Mittal's railway, Buchanan

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<sup>xxxii</sup> It is unclear how the indirect jobs are calculated.

# 11. Extensive rights of the Concessionaire

## What is the problem?

- The MDA makes no allowance to review the contract in terms of any human rights or environmental concerns which the GOL may have.
- The rights of termination under the agreement are unequal.

### 11.1 Extended terms

Article III, section 2 establishes the conditions for the extension of the terms of this MDA. This article makes no allowance to review the contract in terms of any human rights or environmental concerns which the GOL may have. Although the 25-year extension is foreseen in the Mining Code, the possible extension of the contract from 25 to 50 years further extends the consequences of the project without any possibility to renegotiate, other than the fiscal terms and conditions of the contract.

### 11.2 Termination

#### Article III, section 2, page 6

- a** "Notwithstanding the provisions of Article III, Section 1 above, the CONCESSIONAIRE shall have the right to request an extension of the term of this Agreement for additional terms not exceeding twenty-five (25) years each (... )The revised Feasibility Report shall indicate that proven reserves exist..."
- b** "The GOVERNMENT shall grant its approval for the Extended Term through the Extended Date if the revised Feasibility Report reasonably complies with International Standards, the GOVERNMENT'S overall mineral development strategy and the provisions of this Agreement."

#### Article XXIX, section 1, page 31

"Notwithstanding any other provision of this Agreement, the CONCESSIONAIRE shall have the right to terminate this Agreement at any time, either in its entirety or as to any part of the Concessionaire Area, one hundred eighty (180) days after giving Notice to the GOVERNMENT or; if the GOVERNMENT shall have failed in a serious and prolonged manner to comply with its material obligations under this Agreement, sixty (60) days after giving Notice to the GOVERNMENT."

Article XXIX, section 1 establishes the conditions for termination. The rights of termination under the agreement are unequal. Under article XXIX, section 1, the Concessionaire has the right to terminate the agreement on giving 180 day notice without the need to show cause, or on 60 day notice if the GOL has "failed in a serious and prolonged manner to comply with its material obligations" under the agreement. If the Concessionaire terminates by giving notice, the GOL does not become the owner of permanent assets in the concession area (article XXX, section 1).

The GOL, however, does not enjoy a similar right of termination on notice. It has the right to terminate only in case of a defined “*event of default*”. These are very limited, comprising in essence:

- an event of insolvency affecting the Concessionaire;
- the Concessionaire ceasing production with respect to all production areas for 24 consecutive months; and
- the Concessionaire’s material failure to pay taxes and fees due to the government.

Even if an event of default has occurred, the Concessionaire is given an opportunity to put right the default; the GOL is given no such opportunity. It is required first to consult the Concessionaire, then to serve Notice of Intention to Terminate. Only after 60 day notice can it terminate the agreement, and then only if the Concessionaire has not referred the dispute to arbitration. Furthermore provision XXIX section 5, which outlines the details of the wind up of operations, fails to adequately address the issues of land remediation.

## RECOMMENDATIONS

- 38** The GOL should have the right to bring new conditions that reflect Liberia’s national interest.
- 39** The GOL and Mittal should be given the same right of termination.

# Conclusion

The MDA between the GOL and Mittal Steel could represent just the kind of investment that Liberia needs, a way to move the country away from 'the resource curse' towards truly beneficial and sustainable development. However, in signing the agreement, both parties have failed to achieve this. The NTGL ceded control over the economic benefits of a strategic non-renewable resource, together with significant sections of the national infrastructure, to a rich foreign multinational. Similarly, it diluted the government's constitutional and legislative powers in favour of Mittal, and has consequently undermined the rights of Liberia's population. Mittal Steel, on the other hand, has secured access to valuable iron ore deposits on extremely good terms, at the direct expense of Liberia and its people.

A mantra often heard in Monrovia, even under the administration of President Sirleaf, is that Liberia must not frighten off investors. Therefore the temptation is to compromise the country's best interests in dealings with potential investors. The MDA will undoubtedly bring some benefits to Liberia: revenue will be generated, jobs created and infrastructure improved, but the country has sold itself extremely cheaply.

It is hard to believe that in signing the agreement the NTGL was acting in the best interests of the nation, and Mittal seems to have taken full advantage of this. It is important to discover what vested interests were at play when the agreement was signed. This is important not just for Liberia, but for any developing country that Mittal invests in. If the company can reach a 'bad' deal in Liberia, then it can do so elsewhere. The MDA between Mittal and the GOL is comprehensible in terms of pure profit, but incomprehensible both in the light of Mittal's wealth and in a long-term view of sustainable investment, especially with the knowledge that the inequitable and predatory exploitation of natural resources in Liberia, as elsewhere in Africa, has underpinned some of the continent's bloodiest wars.

Like many extractive industries operating in the developing world, Mittal's corporate social responsibility machine has done no more than pay lip service to local developmental needs by making a few minor gestures towards, for example, health and education. In comparison to the scale of the project and the returns it expects, these gestures are insignificant. More importantly, these gestures were bought at the expense of a tax holiday, other tax concessions, and an unspecified royalty arrangement, making them very costly for Liberia. The GOL would have done better to secure legitimate tax revenues to be used for sustainable development throughout Liberia, which would generate far greater sums for development than Mittal's community projects.

Liberia is important to Mittal Steel. The Chairman's statement in the company's 2005 annual report says in reference to his company's strategy "...to increase its self-sufficiency in raw materials..." that: "*Perhaps the most significant development in this area is our mining development agreement with the Liberian Government...*"<sup>170</sup>

This acknowledgement gives the Liberian government significant leverage.

Liberia could be a success story. Peace has returned, there is a popular reformist president, the international community is providing essential foreign aid, and the country is rich in natural resources. These resources could be the passport to allow Liberia to cement its peace and to work on the monumental task of reconstruction. It is crucial that investors are welcomed into Liberia and that they strive for truly symbiotic partnerships. It is a shame that Mittal, possibly the largest potential investor that Liberia will see, did not choose this route, but it is not too late. If Mittal Steel chooses to amend the agreement as recommended in this report, the company could fulfill its ambition "*to become the world's most admired steel institution, demonstrating excellence across every aspect of our business operations.*"<sup>171</sup> and become a responsible corporate citizen and an equitable partner for Liberia.

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This report is compiled, published and distributed by Global Witness Publishing Inc. from the results of the Investigations carried out by Global Witness Limited and is used to brief governments, Inter-governmental organisations, civil society and the media.



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*Liberia's next generation  
Global Witness May 2006*

Global Witness Publishing Inc.  
8th floor, 1120 19th Street NW  
Washington DC 20036  
**email** [mail@globalwitness.org](mailto:mail@globalwitness.org)

ISBN 0-9772364-11-1  
© Global Witness Publishing Inc. 2006