

A Rights-Based Approach to Foreign Agro-Investment in Cameroon: Enhancing the Protection of Local Communities' Rights

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Abstract

This article investigates and illustrates the role and importance of a rights-based approach to foreign agro-investment for the government of Cameroon when it is required to govern foreign agro-investment activities. In doing so, the article offers an analytical framework based on human rights norms, principles and standards emerging from relevant international and regional human rights instruments. It aims to provide clarity on how local communities' rights could be respected, protected and fulfilled when and where foreign agro-investment occurs. Consequently, because a rights-based approach requires states to respect their minimum human rights obligations, its use in the foreign agro-investment context is crucially important to help compel the government of Cameroon to ensure the respect, protection and fulfilment of local communities' rights.

Keywords

Foreign agro-investment, rights-based approach, access to information, public participation, access to justice, Constitution of Cameroon, transparency and accountability

INTRODUCTION

Foreign agro-investment (FAI) as defined below, is a phenomenon that has emerged predominantly in developing countries, notably in sub-Saharan Africa,¹ including Cameroon. Among other benefits, it offers a possible

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1 This activity is not likely to decline in sub-Saharan Africa because of the perceived abundance of empty and unoccupied fertile farmland, which is needed to produce the food crops required to feed the world's rapidly growing population.

solution to food and energy insecurity. Regrettably, FAI often severely impacts the human rights entitlements of people in Cameroon. This article investigates and illustrates the role and relevance of a rights-based approach (RBA)² to FAI to the government of Cameroon when it is required to respond to FAI, and advances proposals for reforms relating to the governance of FAI activities in the country.

Although researchers have already documented the role of human rights in addressing FAI concerns generally,³ few have done so specifically with regard to Cameroon.⁴ This contribution adds to the existing literature, canvassing the role and importance of procedural rights in relevant international and regional legal frameworks to evince their use and importance in the context of FAI in Cameroon, in order to strengthen respect for and protection of local communities' rights. The reason for advocating procedural rights approaches is that they have the potential to contribute to the effective

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- 2 A rights-based approach denotes the responsibility of states to adhere to certain minimum human rights standards in order to respect, protect and fulfil people's rights at the domestic level through the use of human rights standards, norms and principles. The RBA can be realised in two ways: through substantive and procedural human rights approaches. See Ashukem *A Rights-Based Approach*, above at note * at 114. Also see "Frequently asked questions on a human rights-based approach to development cooperation" (2006, Office of the UN High Commissioner for Human Rights (OHCHR)), available at: <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>> (last accessed 14 June 2019); C Nyamu-Musembi and A Cornwall "What is the rights-based approach all about? Perspective from international development agencies" (IDS working paper 234, 2004) 1 at 2.
- 3 See for example C Golay and I Biglino "Human rights responses to land grabbing: A right to food perspective" (2013) 34 *Third World Quarterly* 1631; O De Schutter "Large-scale land acquisition and leases: A set of minimum principles and measures to address the human rights challenge" (2009) at 3–17, available at: <<http://www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf>> (last accessed 14 June 2019); O De Schutter "How not to think of land grabbing: Three critiques of large-scale investment in farmland" (2011) 38/2 *Journal of Peasant Studies* (2011) 249; L Cotula (ed) *The Right to Food and Access to Natural Resources: Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor* (2008, Food and Agriculture Organization (FAO)); P Claeys and G Vanloqueren "The minimum human rights principle applicable to large-scale land acquisition or leases" (2013) 10/1 *Globalizations* 193.
- 4 See for example JCN Ashukem "Included or excluded? An analysis of the application of the free, prior and informed consent principle in land grabbing cases in Cameroon" (2016) 39 *Potchefstroom Electronic Law Journal* 1; Ashukem *A Rights-Based Approach*, above at note *; L Cotula, S Vermeulen, R Leonard and J Keeley *Land Grabbing or Development Opportunity? Agricultural Investment and International Land Deals in Africa* (2009, FAO); JAS Mope "Land grabbing and social peace-building issues in Cameroon: Case study of the role of elites in land deals and commoditisation in the northwest region" (2011, Land Deal Politics Initiative); E Freudenthal, T Lomax and M Venant "The BioPalm oil palm project: A case study in the Department of Ocean, Cameroon" in M Colchester and S Chao (eds) *Conflict or Consent? The Oil Palm Sector at a Crossroads* (2013, FPP, Sawit Watch and Tuk Indonesia) 337; CF Achobang, S Nguiffo and B Schwatz "SG Sustainable Oil Cameroon PLC in South West Cameroon" in Colchester and Chao (eds) *Conflict or Consent?*, id, 355.

realization of substantive rights, since they are often a prerequisite to and a final remedy for properly protecting, respecting and fulfilling substantive human rights generally, particularly in the context of development activities such as FAI.⁵ In this light, the determination of the government of Cameroon to ensure their vigorous implementation in and during FAI practices could ultimately contribute to the realization of people's substantive rights, and is arguably a valuable approach in this regard.

The second part of this article discusses the regulation of FAI in Cameroon. The article then provides an analytical framework based on human rights norms, principles and standards from relevant international and regional frameworks. It then distils benchmarks from these instruments, while demonstrating the relevance of an RBA for the government of Cameroon. This shows the contribution such a framework could make within an FAI paradigm to strengthening the protection of local communities' rights in Cameroon, including by requiring the government to respect, protect and fulfil people's rights in that context. Next the article examines Cameroon's procedural legal framework and outlines the procedural impacts of FAI activities on local communities in Cameroon, giving examples of how substantive rights have been affected by a lack of respect for and protection of procedural rights. It further assesses the legal framework to determine if it aligns with the distilled international benchmarks, in order to make recommendations for reforms that could serve to address the current negative impacts and regulatory deficiencies of the FAI activities in question. The last section provides a conclusion and recommendations.

THE REGULATION OF FAI IN CAMEROON

In general terms, FAI is investment in agriculture that is directed towards increasing agricultural food crop yields.⁶ It is defined as: "[i]nvestment in the agricultural sector of a host country by a foreign investor, which could be a foreign government or a corporation, and it is directed towards the production of agricultural produce for use in, among others, the food and energy sectors".⁷

Although FAI serves as a strategic response for increasing food and energy security,⁸ it has also been considered a neo-colonial attempt to annex key

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- 5 LJ Kotzé "The application of just administrative action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence" (2004) 7 *Potchefstroom Electronic Law Journal* 58; M Mason "Information disclosure and environmental rights: The Aarhus Convention" (2010) 10 *Global Environmental Politics* 10 at 14–15; Ashukem *A Rights-Based Approach*, above at note * at 14.
 - 6 H Liverage "Responding to land grabbing and promoting responsible investment in agriculture" (International Fund for Agricultural Development occasional paper, 2010) 3 at 3.
 - 7 Ashukem *A Rights-Based Approach*, above at note * at 61.
 - 8 D Hallam "International investment in agricultural production" in M Kugelman and SL

natural resources in various sub-Saharan countries,⁹ including Cameroon. The prevalence of under-investment in the agricultural sector in developing countries generally¹⁰ and Cameroon in particular is a concern that FAI could address. The Cameroon government's Vision 2035 supports investment initiatives, including agriculture, since this is a strategic sector for the country's economic development.¹¹ This vision has led to the concession of large swathes of land to foreign investors for agriculture-related investment purposes. Examples of these investments include: rice cultivation in Nanga Eboko by a Chinese company, Shaanxxi State Farm, operating in the country as Sino-Cam Ltd; palm oil production in Ndian, Manyu and Kupe Manenguba Divisions by an American company, Sithe Global Sustainable Oil, operating in the country as SG Sustainable Oils Cameroon / Herakles Farms; and the palm oil project in the Ocean Division, by a Singapore company Biopalm / SIVA.¹²

In Cameroon, FAI occurs in two ways. It happens when the government solicits foreign investors to invest in the country in order to boost the agricultural sector and increase economic growth.¹³ It also occurs when the government forcibly takes land from local communities and leases it to foreign investors for agricultural purposes.¹⁴ In both cases, it has been indicated that the process is regulated by contractual agreements¹⁵ and can be enforced through either a convention of establishment or a memorandum of understanding (MoU).¹⁶ A contractual lease transfers land from the lessor to the lessee and determines issues such as the price per hectare, the area or quantity of land, the duration of the lease agreement and the possibility of renewal. For example, article 2 of the contractual lease between the government of Cameroon and Herakles Farms originally stated that the contract would last for 99 years, covering an area of about 730,863 hectares. It further stated that the company will make annual payments of USD 1 per hectare for developed state land and USD 0.5 per hectare for undeveloped state land. As a result

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Levenstein (eds) *Land Grab? The Race for the World's Farmland* (2009, Woodrow Wilson International Centre for Scholars Asia Programme) 27 at 27.

- 9 S Leahy "Agriculture: Foreigners lead global land rush" (2009) *Inter Press Service*, available at: <<http://www.ipsnews.net/2009/05/agriculture-foreigners-lead-global-land-rush/>> (last accessed 14 June 2019).
- 10 P Liu "Introduction" in P Arias et al (eds) *Trends and Impacts of Foreign Investment in Developing Countries Agriculture: Evidence from Case Studies* (2012, FAO) 3 at 3.
- 11 Ashukem *A Rights-Based Approach*, above at note * at 219.
- 12 Id at 42.
- 13 Id at 40. SM Borrás and J Franco "Towards a broader view of the politics of land grabs: Rethinking land issues, reframing resistance" (Initiative in Critical Agrarian Studies working paper series no 001, 2010) 2 at 4; S Narula "The global land rush: Markets, rights, and the politics of food" (2013) 49 *Stanford Journal of International Law* 101 at 103.
- 14 Ashukem *A Rights-Based Approach*, above at note * at 40–41.
- 15 Cotula et al *Land Grabbing*, above at note 4 at 15–16.
- 16 See Ashukem *A Rights-Based Approach*, above at note * at 222–31.

of pressure from the international community, non-governmental organizations (NGOs) and civil society organizations, including local communities, a 2013 presidential decree reduced the number of hectares to 19,843, while increasing the price per hectare to USD 6.¹⁷ Although some contractual leases may be for the establishment of new agreements, others may be for the extension of pre-existing contracts. One example of the latter is article 2 of the 2006 agreement between the government of Cameroon and the French Company Vilgrain, which was operating in Cameroon under the aegis of the Cameroon Sugar Company (Sosucam).

Where the investor and host government enter into an MoU, the foreign investor agrees to provide basic services such as roads, hospitals, potable water, jobs and electricity to the local communities, and the government provides land for the proposed investment. MoUs can also be concluded between local communities and the foreign investor, or a tripartite contract may involve the government, local communities and the foreign investor. For example, the Herakles Farms palm oil plantation MoU was signed with the government of Cameroon and also with the local communities in the area concerned.¹⁸ The BioPalm MoU of 2011 was only signed by the government of Cameroon and the SIVA Corporation.¹⁹ However, it has been indicated that MoUs are often vague and characterized by bribery and corruption, intimidation and a lack of proper consultation and public participation, because influential people in the community, particularly chiefs, are paid large sums of money in order to facilitate and precipitate the implementation of the proposed project, as was the case with Herakles Farms.²⁰

Generally, MoUs are informal instruments often used by states to enter into confidential agreements.²¹ Although concluded by states, MoUs are not governed by international or any other law.²² They are expressions of interest

17 Ashukem “Included or excluded”, above at note 4 at 16; F Mousseau “Understanding land investment deals in Africa: Massive deforestation portrayed as sustainable development: The deceit of Herakles Farms in Cameroon” (2012, Oakland Institute) at 7–8, available at: <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Land_deal_brief_herakles.pdf> (last accessed 14 June 2019).

18 See SM Teclaire and S Geenen “Discourses, fragmentation and coalitions: The case of Herakles Farms’ large-scale land deals in Cameroon” (2015, Institute of Development Policy and Management, University of Antwerp) at 7, available at: <<https://docman.docman.phtml?file=.irua.851767.4b503f7d.pdf>> (last accessed 14 June 2019).

19 Freudenthal, Lomax and Venant “The BioPalm oil palm project”, above at note 4 at 337; “BioPalm plantation and Bagyéli community, Cameroon” *Environmental Justice Atlas*, available at: <<https://ejatlas.org/conflict/biopalm-energy-oil-palm-plantation-and-bagyeli-indigenous-community>> (last accessed 14 June 2019).

20 F Mousseau “Herakles exposed: The truth behind Herakles Farms false promises in Cameroon” (2013, Oakland Institute and Greenpeace), available at: <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_Herakles_Exposed.pdf> (last accessed 14 June 2019) at 2.

21 A Aust “The theory and practice of informal international instruments” (1986) 35/4 *The International and Comparative Law Quarterly* 787 at 788.

22 A Aust *Modern Treaty Law and Practice* (2007, Cambridge University Press) at 32.

used by states to record their *understandings*, thus excluding the creation of reciprocal rights, duties and obligations between them.²³ Thus, MoUs are not legally binding.²⁴ Consequently, it is reasonable to suppose that MoUs are soft law instruments insofar as parties to them undertake to exclude every intention of making binding commitments. Several reasons, such as confidentiality, non-registration with the United Nations under article 102 of the UN Charter, the protection of commercial information or state security concerns, and the fact that they can be easily amended, explain why states prefer to enter into MoUs.²⁵ Disputes are not settled through an appellate body, third party, court or tribunal, but through consultation or negotiation between the parties.²⁶ Thus, should there be a dispute in the BioPalm project for example, it is evident that the matter would be settled through negotiations between the government of Cameroon and SIVA Corporation, not through a third party, tribunal or court.

This article now discusses the international and African regional human rights framework and determines how the application of an RBA to FAI could help to strengthen respect for, protection of, and the fulfilment of local communities' rights generally and specifically in Cameroon.

THE INTERNATIONAL AND AFRICAN REGIONAL LEGAL FRAMEWORKS OF THE RIGHTS BASED APPROACH

This part focuses principally on what is popularly called the International Bill of Rights (IBR), consisting of the International Covenant on Civil and Political Rights (ICCPR) of 1966,²⁷ the International Covenant on Economic Social and Cultural Rights (ICESCR) of 1966²⁸ and the Universal Declaration of Human Rights (UDHR) of 1948. The rights contained in the IBR are thought to provide an international benchmark, to the extent that they must be respected, protected and fulfilled by state parties, and require states to take steps to ensure that people's rights are not violated, including when large-scale development projects such as FAI occur in their jurisdictions.²⁹ The IBR provides for both

23 Id at 20. Also see C Ahlstrom *The Status of Multilateral Export Control Regimes: An Examination of Legal and Non-Legal Agreements in International Cooperation* (2000, Uppsala) at 45–51 and 102–298; H Hillgenberg “A fresh look at soft law” (1999) 10/3 *European Journal of International Law* 499.

24 See “Treaties and memoranda of understanding (MOUs): Guidance on practice and procedure” (2000, Foreign and Commonwealth Office), available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/293976/Treaties_and_MoU_Guidance.pdf> (last accessed 14 June 2019). Also see UN Charter (1945), art 102.

25 Aust “The theory and practice”, above at note 21 at 789–93; Aust *Modern Treaty Law*, above at note 22 at 42–47.

26 Aust *Modern Treaty Law*, id at 46; Aust “The theory and practice”, id at 791.

27 Ratified by Cameroon on 27 January 1984, entered into force on 27 April 1984.

28 Ratified by Cameroon on 27 January 1984, entered into force on 27 April 1984.

29 See ICESCR, art 2 and ICCPR, art 2 respectively. Also see UDHR, preamble.

substantive and procedural rights but, as indicated above, this article only examines the procedural aspects of these rights. The procedural aspects of the RBA contained in the IBR include the rights to access to information, public participation and access to justice. It must be noted that most of the procedural rights contained in the IBR have subsequently been expanded on in other international law instruments, ranging from soft law to multilateral environmental agreements.³⁰ At the African regional level, the focus is on the African Charter on Human and Peoples' Rights (African Charter) of 1981.³¹ Like the IBR, most of the procedural human rights aspects contained in the African Charter are also duplicated in other African regional and sub-regional instruments.³² For the sake of brevity, this article only examines the IBR and African Charter. Before analysing the procedural rights in the international and African regional legal instruments, it is important to provide a synoptic description of each of these rights in order to have a comprehensive understanding of their use and relevance in these legal instruments and how they could be used to provide and ensure adequate protection of people's human rights generally and particularly in the context of FAI.

The right to access to information

The right of access to information has a long history that can be traced back to the Swedish Freedom of Press Act of 1766. Today, over 50 countries have established legislation regarding the right to access to information,³³ with most African constitutions³⁴ either entrenching specific provisions that provide

30 These include the UN Declaration on Human Environment (1972); the UN Conference on Environment and Development (1992); the Convention of the Rights of the Child (1989); the UN Declaration of the Rights of Indigenous People (2007); the International Labour Organization Convention of Indigenous and Tribal People (1998); the UN Convention Framework Convention on Climate Change (1992); the Kyoto Protocol to the UN Framework Convention on Climate Change (2007); and the UN Convention on Biological Diversity (1992).

31 Cameroon ratified the African Charter on 20 June 1989.

32 These include the African Union (AU) Convention on Preventing and Combating Corruption (2003); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); the AU Convention on the Conservation of Nature and Natural Resources (2003); the African Charter on Democracy, Elections and Good Governance (2007); the AU Framework and Guidelines on Land Policy in Africa (2009); the Johannesburg Principle on National Security, Freedom of Expression and Access to Information (1995); the East African Bill of Human Rights (2009); the African Charter Values and Principles of Public Service and Administration (2011); and the African Charter Values and Principles of Decentralisation, Local Governance and Local Development (2014).

33 See *inter alia* the South African Promotion of Access to Information Act No 2 of 2000; the Ugandan Access to Information Act No 6 of 2005; the US Freedom of Information Act No 5 of 1966; the Canadian Access to Information Act of 1982; the Australian Freedom of Information Act of 1982; and the New Zealand Official Information Act of 1982.

34 See for example sec 32(1) of the Constitution of the Republic of South Africa, 1996; sec 41 of the Constitution of the Republic of Uganda, 1995; sec 21(1)(f) of the Constitution of the

for this right or making provision for the right in the guise of the right to freedom of expression and opinion. The reason is that one needs information in order to express an opinion,³⁵ without which public views would not be expressed. Although the right to information is mostly formulated as an access right in international and domestic legal systems,³⁶ there is a difference between the right to information and the right to access to information, especially as the latter is a means of realising the right to information by gaining access to information.³⁷ This article relies on the right to access to information because, without access to information, one cannot exercise a right to information. The right to access to information relates to the right of an information seeker to have access to information held publicly or by government, as well increasingly as privately held information, including information held by investors of FAI land deals when this information is required in relation to the protection of other rights and interests.³⁸ The right also involves the need for an individual to be informed and kept abreast of the latest events that could affect him / her or that pertains to his / her interests.

The right to access to information places two duties on government. It requires government to collect and disseminate relevant information about the functioning of governmental departments with regard to the management of public affairs. It also requires government to make information available to the public on request,³⁹ which can be achieved through letting the public view either the original documents requested or copies of government-held information.⁴⁰ The right to access to information evokes a close relationship with government transparency and accountability, in the sense that it provides the public with an opportunity to be able to scrutinize government-held information and monitor the decisions that governments make,⁴¹ such as those relating to FAI land deals. Conversely, transparency and accountability, which are manifestly facilitated by and through access to

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Republic of Ghana, 1992; art 18(d) of the Constitution of the Republic of Tanzania, 1977, as amended in 2005; sec 79 of the Constitution of the Republic of Kenya, 2008 (revised constitution).

35 G Devenish *A Commentary on the South African Bill of Rights* (1999, LexisNexis) at 439.

36 D Hunter, J Salzman and D Zaelke *International Environmental Law* (2002, Foundation Press) at 1316–17.

37 For details of this distinction, see *ibid*.

38 I Currie and J de Waal *The Bill of Rights Handbook* (6th ed, 2013, Juta) at 684.

39 JCN Ashukem “Access to environmental information in the context of development activities in the legal framework of Cameroon” (2017) 4/5 *Verfassung und Recht in Übersee Law Journal* 435 at 436.

40 W du Plessis “Access to information” in LJ Kotzé and AR Paterson (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009, Juta) 197 at 198; E Louka *International Environmental Law: Fairness, Effectiveness, and World Order* (2006, Cambridge University Press) at 130.

41 Louka, *ibid*.

information, would remain “mere chimera due to lack of information”.⁴² Consequently, it is apposite that the right to access to information could help facilitate accountability, inclusivity and transparency during FAI land deals. The right to access to information is gaining currency within the environmental field,⁴³ and access to environmental information in some cases has, on balance, led to a shift in environmental governance towards openness, transparency and accountability through the disclosure of vital environmental information to the public on matters that affect or could significantly affect the environment. However, like other rights,⁴⁴ the right to access to information is limited by certain circumstances, such as commercial interests and the privacy of individuals, confidentiality clauses and protection of national security.⁴⁵

Articles 19 of the UDHR and the ICCPR provide for the right to access to information in the guise of the right to freedom of opinion and expression, which as indicated above relates to the core right to access to information. They grant people the right to seek and receive information from a government official or the state.⁴⁶ In principle, the right must be exercised without public interference, to the extent that states cannot withhold vital information, presumably including information on FAI activities, from the public when it is requested, except in certain exceptional cases such as information relating to the rights or reputation of others and for the protection of national security.⁴⁷ These provisions do not limit the exercise of this right to particular categories of information, but include all kinds of information that is of public interest and held by the state. This could include information regarding FAI transactions. As a party to these instruments, the government of Cameroon is under an obligation freely and timeously to disseminate information about proposed FAI activities to the public in order to permit members of the public to make informed decisions and to be able to assert the protection of their rights, except when the rights or reputation of others are concerned⁴⁸ or for the purpose of protecting national security.⁴⁹ It has been suggested that

42 Devenish *A Commentary*, above at note 35 at 439; Currie and de Waal *The Bill of Rights Handbook*, above at note 38 at 684.

43 See principle 10 of the Rio Declaration on Environment and Development (1992); the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998); and the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010).

44 For example, the right to property.

45 See du Plessis “Access to information”, above at note 40 at 204–05.

46 ICCPR, art 19(2).

47 *Id.*, art 19(3)(a) and (b).

48 *Id.*, art 19(3)(a).

49 *Id.*, art 19(3)(b). Also see the Global Principles on National Security and the Right to Information (Tshwane Principles) (2013), available at: <<https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>> (last accessed 14 June 2019); JM Ackerman and IE Sandoval-Ballesteros “Global explosion of

state security concerns or national security could prevent disclosure of information only when the harm to be protected far outweighs the public interest in the disclosure.⁵⁰ Thus, public interest acts a check to the national security clause. Withholding information on FAI land deals may constitute interference with and infringement of people's right to access to information under these articles and a breach of the government's obligations and commitments under international human rights law. It is important to bear in mind that a confidentiality clause could greatly restrict the disclosure of vital information, including information on FAI land deals.⁵¹

The position of human rights protection during FAI in international law is mirrored by African regional law. The African Charter, also known as the Banjul Charter, is the cornerstone of human rights protection in Africa and contains the detailed provisions regarding the procedural human rights to access to information, public participation and access to justice.⁵² While article 9 focuses on the right to access to information, articles 13 and 26 deal with the right to public participation and access to justice respectively. These rights must be respected, protected and fulfilled by state parties, including the government of Cameroon, in their domestic jurisdictions so that everyone enjoys the rights and freedoms set out in the charter.⁵³ Article 9 provides for the right to access to information⁵⁴ and affords individuals the right to express and disseminate opinions within the law.⁵⁵ It implies that the government of Cameroon is duty bound to ensure the exercise of this right at the domestic level by disseminating information to the public, including information about FAI activities, to enable members of the public to assert their rights and interests in the context of FAI. It further implies that the government of Cameroon would be in breach of this provision and its commitment under the African Charter should it withhold information from the public.

The right to public participation

Public participation has been defined as the effective and full involvement of all actors in socio-political decision-making processes that potentially affect

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freedom of information laws" (2006) 58 *Administrative Law Review* 101 at 101–02; AO Salau "The right of access to information and national security in the African regional human rights system" (2017) 17 *African Human Rights Law Journal* 367 at 379.

50 Salau, *id* at 28; Tshwane Principles, *id*, preamble and principles 3 and 10 (A)–(H).

51 Ashukem "Included or excluded", above at note 4 at 19; L Cotula *Land Deals in Africa: What is in the Contract?* (2011, International Institute for Environment and Development) at 1.

52 See African Charter, arts 9, 13 and 26.

53 *Id*, art 32.

54 *Id*, art 9(1).

55 *Id*, art 9(2). Also see AU Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted at the 32nd ordinary session of the African Commission, Banjul, The Gambia, 17–23 October 2002, to supplement the right to access to information enshrined in art 9 of the African Charter.

the communities in which they live and work.⁵⁶ It essentially entails the facilitation of an all-inclusive process that enables and provides an opportunity for all interested and affected parties to deliberate on matters that pertain to or affect their rights, with the aim of making an informed decision in order to protect their rights and interests. This concerns, for instance, the ability to have access to, to understand, to evaluate, to formulate and to comment on proposals, plans and programmes that are designed to concretize a project development.⁵⁷ Thus the rationale for public participation is that it attempts to influence policies and individual decisions made by governmental bodies. This could be achieved by broadening the base of the decision-making processes for development activities to involve local communities, with the hope of influencing and increasing the efficacy and acceptability of the eventual outcome of decision-making and policy implementation in matters that may affect their lives. Some fundamental human rights could be worthless if not guaranteed by means of public participation. The right to participate in decision-making processes is heavily dependent on the right to access to information, which forms a necessary prerequisite for interested and affected parties, including local communities, to be effectively represented and participate fully in decision-making on matters affecting their rights. The increased involvement of members of the public in decision-making processes reflects an expansive notion of democracy.⁵⁸ Public participation enhances the legitimacy of decision-making against the de-legitimizing effect of a lack of participation.⁵⁹ As such it continues to strengthen further a country's democratic processes of transparency and accountability, which could lead to greater legitimacy. Enhancing legitimacy in decision-making requires the full, active and effective participation of local communities and affected stakeholders, as restricted participation could provoke dissatisfaction and possibly violent protests from those excluded. In the environmental context, public participation is necessary among other things to assert everyone's right to live in an environment that is adequate for human health and well-being, and accordingly could help to ensure and enhance effective environmental protection. This is predicated on the fact that input from local communities about the gravity of environmental degradation, at the local level, may reinforce government measures to regulate environmental concerns properly and human health in general. Importantly, for there to be effective public participation, attention

56 R Picolotti and JD Taillant *Linking Human Rights and the Environment* (2003, University of Arizona Press) at 50; D Pring and SY Noe "The emerging international law of public participation affecting global mining, energy, and resource development" in DM Zillman, A Lucas and G Pring (eds) *Human Rights in Natural Resource Development* (2002, Oxford University Press) 11 at 16.

57 Ashukem A *Rights-Based Approach* above at note * at 131.

58 J Ebbesson "Public participation" in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Environmental Law* (2007, Oxford University Press) 681 at 687.

59 D Bodansky "Legitimacy" in Bodansky, Brunnee and Hey (eds) *The Oxford Handbook*, id, 704 at 717.

must be given to the disparities in society and the need to remove obstacles that may, for instance, hinder or obstruct minority groups or the poor from participating in environmental decision-making.⁶⁰ Public participation can take various forms, including: broad-based participation through representative bodies such as NGOs that speak on behalf of individuals and affected communities; stakeholder participation through which formulated proposals are circulated for comment to parties that are interested in and affected by a development project; and deliberative participation that entails agreeing the rules of decision-making.⁶¹

Under the IBR, article 27 of the UDHR provides that everyone has the right to participate in cultural life. Arguably this provision could be interpreted to include broader public participation in the decision-making processes of FAI activities that have the potential to impact negatively on the cultural identity of local communities. The fact that women, not men, constitute the majority of agricultural workers in developing countries like Cameroon,⁶² suggests that it is appropriate for them to participate in FAI projects to protect their cultural and related rights. This would require the government of Cameroon to undertake to ensure and follow an integrated gender-based participatory approach, so that discriminatory practices against women are avoided during the decision-making relating to FAI plans, programmes and activities.⁶³ On a similar point, article 25 of the ICCPR provides for the right to political participation. Like article 27 of the UDHR, article 25 of the ICCPR encompasses a broad approach to the actual exercise of political power, particularly the exercise of legislative, executive and administrative power, as well as the formulation and implementation of policies, laws and strategies at the domestic level. This suggests that the government of Cameroon is required to allow the public to participate meaningfully with regard to the formulation and implementation of policies, laws and strategies relating to FAI projects.

Article 13 of the African Charter provides for a broad spectrum of public participation rights. It sets out the right for all citizens, whether individually or through chosen representation, to participate freely in the governance of their country.⁶⁴ In 2001, for example, the decision of the African Commission on Human and People's Rights in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, *African Commission on Human and Peoples' Rights*⁶⁵ reiterated the rationale for public

60 MCC Segger and A Khalfan *Sustainable Development Law: Principles, Practices and Prospects* (2004, Oxford University Press) at 156.

61 Ashukem A *Rights-Based Approach* above at note * at 132.

62 "Cameroon: Women, agriculture and rural development" (FOA), available at: <http://hubrural.org/IMG/pdf/fao_wia_cameroun.pdf> (last accessed 14 June 2019).

63 See for example art 2(1)(c) of the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at the 2nd ordinary session of the AU Assembly, Maputo, Mozambique.

64 African Charter, art 13(1).

65 Comm no 155/92 (2001).

participation in decision-making processes and ordered Nigeria to undertake scientifically and technically sound environmental and social impact assessments, to publish the results and to provide meaningful opportunities for the affected people to be heard and participate in the decision-making process.⁶⁶

Under the African Charter, public participation is not limited to decision-making processes but also involves participation in the formulation of laws, policies and their implementation. This is indicative of the fact that public participation by local communities in the context of FAI cannot be restricted to FAI decision-making processes per se, but should also extend to a higher strategic governance level where FAI-related laws and policies are formulated. Similarly, realizing the rights to development, property and natural resources incorporates a participatory approach. Under the African Charter, people are guaranteed the right to their economic, social and cultural development, such that due consideration must be given to ensure their participation in decision-making processes, while promoting and protecting their freedom and identity and the equal enjoyment of the common heritage of mankind.⁶⁷ This right therefore bestows an obligation on the government of Cameroon to allow local communities to take part in the cultural life of their community and provide the opportunity for them to do so. It also entails the need to promote and protect the moral and traditional values of local communities in the context of development projects, such as FAI activities, that could negatively impact on communities' socio-cultural rights.⁶⁸ To be sure, the African Commission on Human and Peoples' Rights reiterated the importance of this right in its celebrated decision in *Centre for Minority Rights Development v Kenya (Endorois)*.⁶⁹ Although the commission emphasised the free, prior and informed consent principle (FPIC),⁷⁰ the decision underlined the relevance of a participatory approach in safeguarding the socio-economic rights of local communities within the context of development activities, including FAI.

The right to access to justice

Respect for, and promotion of, human rights can only be effectively guaranteed by means of access to justice. The right to access to justice is based on the fact that the infringement of rights can be remedied through judicial recourse. For the right to access to justice to be meaningful, it must correspond to the notions of substantive justice and fairness, as substantive justice

66 Ibid.

67 African Charter, art 22(1).

68 Id, art 17(2) and (3); Ashukem, "Included or excluded", above at note 4 at 11.

69 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya* 2009 AHRLR 75 (ACHPR 2009).

70 FPIC has been distilled to embody procedural measures of access to information and public participation. For details see Ashukem "Included or excluded", above at note 4 at 3–5.

is only achieved if there is respect for the rule of law. This presupposes that the right to access to justice is an essentially procedural construct with significant positive impact design to ensure the protection and realization of related rights, such as the protection of property, environmental rights, and the right to food and water.⁷¹ The right to access to justice in this regard is a means to an end, since it provides individuals as well as public interest groups with the opportunity to protect through court actions their rights to information and participation, and to contest decisions that do not take into account their rights and interests. The right to access to justice may also be exercised through public interest litigation, which involves providing a very wide *locus standi* [right to bring an action] and appears to be the most popular method of seeking judicial redress for the violation of rights,⁷² as in the context of FAI for example. The right to access to justice may also be strengthened and enforced through judicial review processes, as judicial review is a useful way of curtailing a government's exercise of arbitrary power,⁷³ thus rendering this right an important and expedient intervention to curtail maladministration and promote transparency and accountability.⁷⁴

Under the UDHR everyone has the right to be recognized before the law⁷⁵ and is equal before the courts.⁷⁶ The UDHR also provides everyone with the right to an effective remedy by a competent national tribunal for acts that violate fundamental rights,⁷⁷ such that the person is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his or her violated rights.⁷⁸ Articles 14 and 16 of the ICCPR make provision for and guarantee people's right to access to justice. While article 14 provides for the right of everyone to be equal before the courts and to have a fair, public hearing before a competent, independent and impartial tribunal established by law,⁷⁹ article 16 stipulates the right of everyone to be recognized before the law. Collectively, these provisions reinforce people's right to access to justice and bestow an obligation on state parties, including the government of Cameroon, to ensure that the right is guaranteed domestically in order to enable citizens to seek and obtain judicial redress⁸⁰ in the likely situation that their fundamental rights are violated when FAI activities occur.

71 A Gordillo "Access to justice, legal certainty and economic rationality" in G Anthony, JB Auby, J Morison and T Zwart *Values in Global Administrative Law* (2011, Hart Publishing) 363 at 363–64.

72 J Razzaque "Linking human rights, development and environment: Experiences from litigation in South Asia" (2007) 18/3 *Fordham Environmental Law Review* 587 at 587.

73 C Hoexter *Administrative Law* (2007, Juta) at 60.

74 *Id* at 63; C Plasket *The Fundamental Rights to Just Administrative Action: Judicial Review of Administrative Action in Democratic South Africa* (2002, LLD thesis, Rhodes University) at 70.

75 UDHR, art 6.

76 *Id*, art 7. Also see ICCPR, art 14(1).

77 UDHR, art 8.

78 *Id*, art 10.

79 ICCPR, art 14(1).

80 The right to access to justice goes beyond judicial redress, to include quasi-judicial

The African Charter provides for the right to judicial redress, which seeks to ensure the recognition of and respect for the rights to information and public participation, as mandated by law.⁸¹ Article 7 provides citizens with the right to have their causes heard, including the right to appeal against the violation of their rights.⁸² In sum, this provision suggests that the government of Cameroon has a responsibility to provide an effective means of judicial redress at the domestic level that enables local communities to seek and obtain judicial redress for violations of their human rights caused by FAI activities. The right to access to justice is supplemented and complemented by a broad *locus standi* through which non-state parties such as NGOs could institute claims for the violation of human rights at the AU Human Rights Commission.⁸³ In the context of FAI, interested and affected NGOs could rely on a broad application of *locus standi* to bring actions against foreign investors for the violation of human rights on behalf of others who are not able to do so on their own.⁸⁴

Collectively, the procedural human rights obligations of member states emerging from the international and regional instruments canvassed above must be observed by host states, including Cameroon, during FAI activities,

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mechanisms such as ombudsmen. There are General Comments on the scope of the right. See, for example, UN Human Rights Committee General Comment no 32 on article 14 of the ICCPR (90th session, 2007), available at: <<http://hrlibrary.umn.edu/hrcommittee/gencom32.pdf>> (last accessed 14 June 2019); OHCHR “Committee on Economic, Social and Cultural Rights holds general discussion on state obligations in the context of business activities” (2017), available at: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21210&LangID=E> (last accessed 14 June 2019); Organization for Security and Cooperation in Europe High Commissioner on National Minorities “Graz recommendations on access to justice and national minorities and explanatory note” (2017), available at: <<https://www.osce.org/hcnm/graz-recommendations?download=true>> (last accessed 14 June 2019). On women’s access to justice within the context of development activities, see: Committee on the Elimination of Discrimination Against Women “General recommendation on women’s access to justice” (2015), available at: <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf> (last accessed 14 June 2019).

81 African Charter, art 7(1).

82 Id, art 7(1)(a).

83 See Id, arts 55 and 56(1). Also see the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2000) AHRLR 60 (ACHPR 2001); app 022/2012 by the Pan African Lawyers’ Union and Southern African Litigation Centre; and app 001/2014 by the Coalition on the International Criminal Court, Legal Defence and Assistance Project, Civil Resource Development and Documentation Centre, and Women Advocates Documentation Centre, among others.

84 See African Charter, art 58. Also see *World Trade Organization Against Torture, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah v Zaire* comm 25/89, 47/90, 56/91, 100/93; *Krishna Achutan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi* comm 25/89, 47/90, 56/91, 100/93.

in order to protect people's human rights. The minimum human rights obligations distilled from these instruments require that states must inter alia: ensure respect for people's right to access to information, through reasonable legislative and other measures; ensure that a culture of inclusive and participatory governance and public participation is voluntarily exercised; and ensure that people have access to a judicial remedy.

The following section provides clarity on the relevance of the procedural aspects of the RBA for the government of Cameroon in relation to FAI regulation and implementation, with the goal of ensuring respect for, and protection and fulfilment of, people's fundamental human rights. The focus on the government of Cameroon is premised on the fact that states are generally duty-bearers (compared with citizens who are rights-holders) with a concomitant obligation under international and African regional laws, such as those discussed above, to respect, protect and fulfil people's human rights at the domestic level.

RELEVANCE OF A RIGHTS-BASED APPROACH FOR THE GOVERNMENT OF CAMEROON

Adherence to an RBA to FAI, expressed in the guise of the right to access to information, could significantly contribute to guiding the laws, policies and processes of FAI land deals in Cameroon through measures that compel the government to ensure that the public has access to contractual information about FAI land deals. This is motivated by the consideration that people need a thorough understanding of all proposed FAI activities, which they can gain from receiving relevant information from the state at the time a deal is being negotiated; this is necessary if they are to be able to identify threats to themselves in those proposals, and propose changes that would need to be made in the deals so that they are not to be prejudiced by them. This could require the government of Cameroon to inform the public periodically about such deals and their potential impact on local communities' rights and freedoms, to establish and publicize through the media a database for FAI land deals in an official government website, and to create an appropriate platform and mechanisms to promote and enhance public awareness among local communities about proposed FAI land deals.⁸⁵ Such measures could be relevant for two reasons. First, they could act as a catalyst to trigger stricter measures for respecting and protecting people's rights in that context, given that regulatory FAI processes are often exclusionary.⁸⁶ Secondly, they

85 Ashukem "Included or excluded", above at note 4 at 22.

86 Cotula et al *Land Grabbing*, above at note 4 at 68–70; Narula "The global land rush", above at note 13 at 106; M Kugelman "Introduction" in M Kugelman and SL Levenstein (eds) *Land Grab? The Race for the World's Farmland* (2009, Woodrow Wilson International Centre for Scholars Asia Programme) 1 at 1; C Smaller and H Mann "A thirst for distant lands" (2009, International Institute for Sustainable Development), available at: <http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/A_Thirst_for_distant_lands.pdf> (last accessed 14 June 2019).

could help to guide the FAI decision-making processes and compel the government of Cameroon to ensure that the processes are transparent, so that the people may hold the government accountable in instances where FAI land deals violate their rights and freedoms.

The fact that the RBA provides a set of principles (such as participatory and inclusive governance) that are crucial to guiding the work of government and other political and social actors means that their adoption within an FAI paradigm could potentially influence and change the processes, content and outcome of FAI land deals, resulting in a win-win situation for the states, the investor and the local communities. The reason for this is that an RBA could inform the development of an FAI-related legislative framework, policies, laws and programmes designed to regulate the activity, with the ultimate objective of protecting, respecting and fulfilling local communities' right and freedoms.⁸⁷ This could require and possibly compel the government of Cameroon to provide a platform that permits and encourages local communities and other interested and affected parties to articulate their interests, with the ultimate aim of seeking their protection during the decision-making processes of FAI land deals,⁸⁸ and to create both formal and informal institutions responsible for ensuring, promoting and enforcing transparent and accountable FAI decision-making processes through effective public participation. Conversely, without strict adherence to an RBA to FAI, where local communities are provided with an opportunity to make informed decisions on an activity that has a direct bearing on their rights and freedoms, these rights and freedom cannot be properly respected, protected and fulfilled when FAI occurs. The next section examines Cameroon's legal framework and determines its adequacy in ensuring the effective realization of local communities' human rights, based on the distilled benchmarks above, and supplies examples of cases in which substantive rights have been affected by the lack of respect and protection of procedural rights within the context of FAI.

CAMEROON'S PROCEDURAL RIGHTS LEGAL FRAMEWORK

The right to access to information

The Constitution of the Republic of Cameroon (the Constitution)⁸⁹ makes no explicit provision for the right to access to information.⁹⁰ Neither is there any enabling legislation to give effect to that right.⁹¹ However, people's fundamental rights and freedoms are provided in the preamble, which has binding force under article 65 of the Constitution. The preamble "affirms the country's

87 Ashukem *A Rights-Based Approach*, above at note * at 149.

88 Mope "Land grabbing", above at note 4 at 2.

89 It should be noted that the Constitution was amended in 2008 by Law No 2008/001 of 14 April 2008.

90 Ashukem "Included or excluded", above at note 4 at 13; Ashukem "Access to environmental information", above at note 39 at 442.

91 Ashukem "Access to environmental information", above at note 39 at 438.

attachment to the fundamental rights and freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and the African Charter on Human and Peoples' Rights, and all ratified international conventions relating thereto",⁹² mentioned above. This suggests that one could rely on these international instruments to assert one's right to access to information held by the state, as necessary to protect an infringed right in the context of FAI.⁹³ The preamble further provides for incidental rights, such as the right to freedom of expression, which complements the right to access to information, in that it provides people with the right to seek and impart information. This could also imply in an FAI context, for example, that people must be provided with the opportunity to be informed about FAI activities in order that they may be empowered to express freely their opinions about the potential impact an FAI activity could have on their substantive rights.

Law No 96/12 of 5 August 1996 Relating to Environmental Management (Law No 96/12) was enacted specifically to regulate environmental protection.⁹⁴ The law provides that environmental decision-making is to be opened up to public influence and scrutiny, through the right to access to information, particularly environmental information that is necessary to protect a right.⁹⁵ Under this law, everyone has the right to be informed of the effects of activities that are detrimental to human health and the environment, as well as of measures taken to prevent or offset these effects.⁹⁶ Section 6 requires public and private bodies to integrate adequate plans and programmes on environmental management into their published plans in order to permit the public to have knowledge or information about the possible impacts of their activities on the environment.⁹⁷ Furthermore, section 9 provides that people are to have access to environmental information that relates to dangerous substances and activities. It has been argued that, when read jointly with section 7, section 9 is highly supportive of the right to access to information,⁹⁸ insofar as it enables people to be informed of the detrimental impacts of activities such as FAI on people's health and the environment. It has therefore been suggested that supplying information of this nature, particularly in an FAI context, serves to enhance the environmental governance paradigm of the country, especially as it could promote the effective implementation of environmental laws and policies.⁹⁹

92 Constitution, para 5.

93 Ashukem "Included or excluded", above at note 4 at 13.

94 See Law No 96/12, sec 1.

95 *Id.*, sec 6(1).

96 *Id.*, sec 7(1).

97 *Id.*, sec 6(2).

98 Ashukem "Access to environmental information", above at note 39 at 443.

99 Ashukem "Included or excluded", above at note 4 at 14; Ashukem "Access to environmental information", above at note 39 at 444; Law No 96/12, sec 7(1).

Section 12 of Law No 2003/006 of 21 April 2003 to Lay Down Safety Regulation Governing Modern Biotechnology in Cameroon (Biotechnology Law) provides for the right to access to information and enumerates clear instances of the public right to access to information.¹⁰⁰ Under section 35, the competent national administration is required to foster and facilitate the sensitization and education of the public with regard to the use of genetically modified organisms (GMOs), and ensure that any person involved in modern biotechnology must sensitize and educate the public on the risks and benefits of the use of GMOs,¹⁰¹ particularly in relation to FAI.

Nevertheless, FAI practices in Cameroon have reportedly violated people's rights significantly, and the impact of such violations has been felt hardest by the most vulnerable in the population.¹⁰² To be sure, the implementation of FAI has resulted in local communities being denied access to key information pertaining to leases and MoUs, since these agreements are often concluded behind closed doors,¹⁰³ and this has affected their ability to make informed decisions on those deals. For example, during the implementation of the Herakles Farms project, local communities in Nguti, where Herakles Farms also acquired land, sent a letter to the presidency saying that they "noted with dismay that 2,532 hectare of forest including farms have been mapped out ... without our consent" and complained that "the people of Nguti are not well-informed about a project that will affect their lives as well as the lives of future generations".¹⁰⁴ Similarly, vital information relating to the BioPalm plantation was not provided to local communities,¹⁰⁵ arguably because the MoU between the government and BioPalm contained a confidentiality clause that neither party was obliged to disclose.¹⁰⁶ It has been argued that, when agreements contain confidentiality clauses, only rarely are local communities adequately informed about their contents;¹⁰⁷ it is not surprising that this was the case with the BioPalm palm oil project. In general, the manner in which the government has engaged in FAI contracting has often denied indigenous peoples in the relevant areas their right to free, prior and

100 See secs 5(28), 12(1)–(2) and 5(2).

101 Also see id, sec 12(3).

102 Cotula et al *Land Grabbing*, above at note 4 at 15; W Sindayigaya "Foreign investments in agriculture: Land grabbing" (2011), available at: <http://www.entwicklungshilfe3.de/media/Bilder_ZSE/UEber_Uns_Dateien/Grundlagentexte/Land_grab_article.pdf> (last accessed 14 June 2019).

103 Cotula et al, id at 68–70; Narula "The global land rush", above at note 13 at 106; Kugelman "Introduction", above at note 86 at 1; Smaller and Mann "A thirst for distant lands", above at note 86.

104 S Nguiffo and MS Watio "Agro-industrial investments in Cameroon: Large-scale land acquisitions since 2005" (2015, International Institute for Environment and Development), available at: <<http://pubs.iied.org/pdfs/17571IIED.pdf>> (last accessed 14 June 2019) at 41; Ashukem "Included or excluded", above at note 4 at 17–18.

105 Freudenthal et al "The BioPalm oil palm project", above at note 4 at 348.

106 Id at 343; Ashukem "Included or excluded", above at note 4 at 19.

107 Ashukem, *ibid*; Cotula *Land Deals in Africa*, above at note 51 at 1.

informed consent, compensation and legal redress.¹⁰⁸ The lack of respect for people's right to access to information about FAI activities has greatly affected their ability to protect their substantive rights-based entitlements, including their right to a healthy environment, food and water. The lack of access to information about FAI land deals raises issues of transparency and accountability in the paradigm of FAI governance in Cameroon.¹⁰⁹ The lack of transparency and accountability that characterizes FAI practices in Cameroon arising from the failure to inform the public properly is a sufficient motivation for attempting to take steps to ensure that the government respects, protects and fulfils people's right to access to information relating to such matters.

Under section 12 of the Biotechnology Law, people's right to access to information is subjected to state security concerns, and could be limited if these concerns are invoked.¹¹⁰ Still, the law does not define exactly what is meant by state security concerns. As mentioned above, state security concerns only prevent disclosure of information to the public when the harm to be protected far outweighs the public interest in the disclosure.¹¹¹ It may be argued that the disclosure of information on FAI land deals may not in any way affect the security of the state, for which the clause could be invoked. Nonetheless, it may be possible to wonder if this could be a deliberate tactic employed by the state to stymie people's right to gain access to information, especially information about FAI-related activities. The state could interpret the clause in its own interests in order to avoid disclosing relevant information and thus prevent the public from asserting its environmental right during the planning and implementation of FAI activities.

The fact that people are still not informed of potential development projects and their impact suggests that the government has wholly failed in its obligation to respect people's right to access to information. This much has been illustrated by various examples of FAI activities in the country. Perhaps the problem is the conspicuous lack of a stand-alone provision in the Constitution on access to information, in addition to the absence of enabling legislation to give effect to the right. It has been suggested elsewhere that

108 N Ochalla "Ethiopia's land grabs: Stories from the displaced" (2013), available at: <<https://intercontinentalcry.org/ethiopias-land-grabs-stories-displaced-20830/>> (last accessed 14 June 2019). For details of the violation of the principle of FPIC in land grabbing cases, see Ashukem "Included or excluded", above at note 4.

109 Ashukem "Included or excluded", id at 16; Nguiffo and Watio "Agro-industrial investments", above at note 104 at 21 and 48.

110 JM Mengang "Evolution of natural resource policy in Cameroon" (1998) 102 *Yale Forestry and Environmental Studies Bulletin* 239 at 246; ON Fuo and SM Semie "Cameroon's environmental framework law and the balancing of interests in socio-economic development" in M Faure and W Du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa*, (2011, Pretoria University Press) 74 at 88.

111 Salau "The right of access to information", above at note 49; Tshwane Principles, above at note 49, preamble and principles 3 and 10 (A)–(H).

there is an urgent need for the government of Cameroon to enact such legislation to cater for the right through the provision of clearly delineated procedures and conditions of access as well as sanctions for its violation,¹¹² as is the case in other jurisdictions.¹¹³

The right to public participation

The Constitution has no direct provisions regarding the right to public participation. However, the right could implicitly be inferred from the preamble, which requires the state to harness its land and environmental resources in such a way that would be beneficial to Cameroonians. Also, in guaranteeing the right to a healthy environment, the preamble requires that the “protection of the environment shall be the *duty and responsibility* of every citizen” (emphasis added). Furthermore, the preamble affirms the duty and responsibility of the government to safeguard the effective protection of vulnerable populations, including local communities, minority population and indigenous communities. This suggests that the participation of the public is essential to ensure effective environmental protection, protection for the rights of vulnerable populations, and the harnessing of land and environmental resources for the benefit and prosperity of Cameroonians. The reverse would be true if the decision-making processes of large-scale land investment activities such as FAI were void of public participation.

Law No 96/12 provides for certain principles that are vital for effective and efficient environmental governance. Section 9 provides for the principle of public participation.¹¹⁴ This principle entails three things: the right of everyone to have access to environmental information; the right and responsibility of everyone to safeguard the environment and contribute to its protection; and that decisions concerning the environment shall be taken after consultation with and the participation of other actors concerned or through public debate.¹¹⁵ This implies that, to safeguard and protect people’s environmental and other related rights properly, it is pivotal for local communities and interested and affected parties to be actively involved in the decision-making, plans and programmes of environment-related activities, including EIA processes and procedures. Such participation in an FAI context is crucially important, as the inputs from local communities during decision-making processes could contribute significantly to enabling the public authorities to enhance environmental protection and other related human rights-based interests.

Section 72 of Law No 96/12 obliges the state to encourage and allow public participation insofar as environmental management is concerned. This obliges the state to: encourage and facilitate public participation through mechanisms that allow and promote free access to information; create a

112 Ashukem “Access to environmental information”, above at note 39.

113 For example, Uganda and South Africa.

114 Law No 96/12, sec 9(e).

115 *Id.*, sec 9(e)(i)–(iii).

consultative mechanism to allow the public to form an opinion; glean public opinion from public representatives serving on consultative organs on matters relating to the environment; establish mechanisms that ensure the dissemination of environmental information; and establish mechanisms relating to the sensitization, training, research and education of local communities on the environment and environmental issues.¹¹⁶

Article 9 of the Environmental and Social Impact Assessment Regulations (EIA Regulations)¹¹⁷ (adopted in accordance with section 17 of Law No 96/12), which regulates environmental and social impacts assessments in the country, provides for public participation as an effective measure for environmental management in the context of large-scale development activities, such as FAI, during the screening, scoping, assessment, reporting and monitoring of the activity. With the exception of projects on national defence or security,¹¹⁸ impact assessments for category I and II projects¹¹⁹ must be conducted with the participation and consultation of the inhabitants of the locality concerned.¹²⁰ This suggests that an environmental and social assessment for an FAI activity could be meaningless if void of effective public participation, as the public concerned would not have an opportunity to make inputs on proposed activities that would have a direct bearing on their environment-related rights. Under the EIA Regulations, an EIA's administrative processes must consist of three categories of actors: the developer, the public (including interested and affected communities as well as environmental organizations) and the state authority concerned.

The Biotechnology Law reinforces the requirement of public participation with respect to GMOs. Section 35 obliges the competent national authority to foster and facilitate active and effective public participation with regard to the safe movement, manipulation and use of GMOs. Because GMOs may be used to enhance food crop yields during FAI activities and consequently could be transported from an investor country to the host country, local communities and affected stakeholders are to be part of the decision-making processes relating to the safe movement, manipulation and final use of GMOs. Part III, entitled "Open testing and use of genetically modified organisms", provides for public participation in matters relating to the use and release of GMOs. Section 42(1) requires the competent national authority to hold a sufficient number of consultative and participatory meetings with the public that are devoted to the use, release and placing on the market of GMOs and their products.

116 *Id.*, sec 72(i) – (iv).

117 Decree No 2013/0171/PM of 14 February 2013 to Lay Down Rules for Conducting Environmental and Social Impact Studies in Cameroon.

118 See *id.*, art 12.

119 While category I projects require simple EIA, category II projects require full or detailed EIA.

120 EIA Regulations, art 9.

Law No 94/01 of 20 January 1994 (Law No 94/1) and its Decree of Implementation¹²¹ provide a framework for the integrated and sustainable use of forests, wildlife and fisheries, through promoting, ensuring and increasing the participation of local communities in sustainable forest management.¹²² Unlike Law No 96/12, Law No 94/01 specifically deals with forestry and wildlife issues, as is evident from its nomenclature. Under this law, in order to ensure the sustainability of forest resources, logging companies need to ensure the participation of local communities during the preparation of forest management plans (FMPs) before they can be approved by the minister of forestry.¹²³ The involvement and participation of local communities and affected stakeholders in the FMPs of FAI land deals that relate to carbon offset projects, for example, have the potential to enhance and ensure the sustainable use and exploitation of forest resources. In this regard, responsibility rests with the minister to ensure that foreign investors in FAI activities follow and adhere to a participatory approach, thereby providing local communities and affected stakeholders with the right to be actively and fully involved in FMPs during FAI land deals on forestry activities. Despite the desire to promote, ensure and increase the participation of local communities in sustainable forest management, in practice local communities rarely exercise this right because FMPs are often approved without due regard to legal prescriptions, such as those providing for the participation of local communities.¹²⁴

Ordinance No 76/166 of 27 April 1976 (Ordinance No 76/166), which lays down the management of state land in Cameroon, governs the organization and management of tenure rights with respect to land allocation for development activities in Cameroon. It stipulates that the Land Consultative Board (LCB) in any area must include a government representative, a prefect (a senior divisional officer), the chief and two village elders. Decisions on matters relating to land investment must be made with the participation of all the members of the board.¹²⁵ This board composition suggests two things. First, it suggests that, because decision-making on land-related matters must take place in this manner, an FAI entity cannot commence an investment activity without the effective involvement and participation of local communities and

121 Decree No 95-531-PM of 23 August 1995 Setting the Modalities for the Implementation of Forests Regulations; and Decree No 95/466/PM of 1995 Setting the Modalities for the Implementation of Wildlife Regulations.

122 See Law No 94/01, sec 1.

123 *Id.*, sec 23.

124 Fuo and Semie "Cameroon's environmental framework law", above at note 110 at 85; PO Cerutti et al "Sustainable forest management in Cameroon needs more than just forests management plan" (2008) 13 *Ecology and Society* (2008) 1; D Alemagi et al "Cameroon's environmental impact assessment decree and public participation in concession-based forestry: An explanatory assessment of eight forest-dependent communities" (2013) 6 *Journal of Sustainable Development* 8 at 9.

125 Ordinance Laying Down the Management of State Land, Ordinance No 76/166 of 1976, art 12.

affected stakeholders. It also suggests that the chief and the two village elders are the representatives of the local community who must ensure that proposed development activities on their land are performed with due regard to their cultural beliefs, customs, traditions and any other aspects of their way of life.¹²⁶

As established from the international and regional instruments discussed above, a culture of inclusive and participatory governance in decision-making processes is pivotal for the protection of local communities' rights in development-related projects such as FAI. Yet, it has been reported that local communities are not involved and do not participate in decision-making processes regarding FAI activities in Cameroon. In respect of FAI forestry activities, this lack of effective public participation by local communities in decision-making contrasts directly with the prime objective of the relevant law, namely "the involvement of local communities in the management and protection of forest".¹²⁷ For example, the Herakles Farms land deal was implemented without the effective participation of the local communities involved, given that concerns were raised by representatives of the village of Ebanga, who expressed dissatisfaction with the composition and functions of the LCB and the demarcation of the areas to be developed between the Ebanga and Ndonga villages with respect to the Herakles Farm palm oil plantation.¹²⁸ Similarly, article 15 of Ordinance No 76/166 appears to limit the effective participation of local communities and their representative in LCB decision-making, as it provides that "[t]he Commission's recommendations are adopted by a simple majority of members present and are valid if the head of the village or the community is present". This counters article 12, by implying that decision-making on land matters could be made without the presence of all the members of the Board. In this context it may be possible that the government of Cameroon could rely on article 15 to restrain the effective participation of local communities and affected stakeholders in decision-making on FAI land deals, as demonstrated by the example of the Herakles Farms project referred to above. For this reason, it has been questioned whether the right to public participation in Cameroon is a mere symbolic right of intent rather

126 Ashukem "Included or excluded", above at note 4 at 15.

127 See 1994 Forestry Law, sec 23; S Egbe "The concept of community forestry under Cameroonian law" (2001) 45 *Journal of African Law* (2001) 25 at 25–26; "Explanatory statement" to parliamentary Bill No 54/PJL/AN of November 1993.

128 J Dupuy and MA Bakia "Fact finding mission on Herakles Farms (SGSOC) oil palm plantation project" (2013, Programme for the Sustainable Management of Natural Resources) at 6, available at: <https://cameroonveritas.files.wordpress.com/2013/04/03_01_2013_report-fact-finding-mission-sgsoc.pdf> (last accessed 14 June 2019); Ashukem "Included or excluded" above at note 4 at 17; "Analysis of some contested legal issues regarding the Herakles Farms' / SGSOC's oil palm plantation project in Cameroon" (Sciences Po Law Clinic), available at: <<http://www.sciencespo.fr/ecole-de-droit/sites/sciencepo.fr/ecole-de-droit/files/Analysis%20of%20Some%20Contested%20Legal%20Issues%20Reviewed%20FINAL%20VERSION.pdf>> (last accessed 14 June 2019).

than a meaningful and powerful right designed to oblige both the state and investors to ensure and facilitate the effective participation of local communities in the decision-making processes of FAI.¹²⁹ It would be sensible for the government to create an enabling environment in which there are clear rules and procedures that guarantee people the freedom to participate freely in decision-making.

It has been reported that local communities and the local municipality were not consulted during the negotiation of the Nanga Eboko rice project and did not participate in the leasing of their land for the project, as evidenced by what the mayor of Nanga Eboko is reported to have said: “the municipality and our administration had not been consulted in the lands’ selling”.¹³⁰ The procedures and processes of public participation are deeply flawed with bribery and corruption, to the extent that they do not always align with the accepted practices of governance. It has been reported that, during the negotiation of the Herakles Farms project, some chiefs and elders were paid huge amounts of money in order to approve the project. At worst, local communities may not be consulted at all and may not be given the opportunity to participate in the decision-making processes pertaining to FAI projects.¹³¹ Even if they do participate, their views and opinions are not always taken into account.¹³² It has been reported that, during the Herakles Farms project, the environmental and strategic impact assessment processes were flawed and there was little or no community participation.¹³³ The lack of public participation restricts local communities from making informed decisions about the development priorities relating to activities that have the potential to impact negatively on their cultural values and traditions, and environmental, water, food and tenure rights when FAI occurs. The clearing of the forest had a huge impact on the environment, on the country’s rich biodiversity and on the food, water and tenure rights of local communities. It has been reported that the Herakles Farms project led to the displacement of over 14,000 people from their homes and farmland, which impacted negatively on their rights, including their right to food.¹³⁴ Similarly, the use of pesticides in the Nanga

129 Ashukem *A Rights-Based Approach*, above at note * at 247. Also see Egbe “The concept of community forestry”, above at note 127 at 26.

130 C Ngorgang “Chinese in Cameroon: An agricultural misunderstanding” *Afronline* (2009), available at: <<http://www.afronline.org/?p=2908>> (last accessed 14 June 2019).

131 Ashukem “Included or excluded”, above at note 4 at 17–18.

132 Ibid; Cerutti et al “Sustainable forest management”, above at note 124; Fuo and Semie “Cameroon’s environmental framework”, above at note 110; Alemagi et al “Cameroon’s environmental impact assessment”, above at note 124.

133 “Analysis of some contested legal issues”, above at note 128.

134 “Herakles Farms in Cameroon: A showcase of bad palm oil production” (2013, Greenpeace), available at: <<http://www.greenpeace.org/usa/wp-content/uploads/legacy/Global/usa/planet3/PDFs/HeraklesCrimeFile.pdf>> (last accessed 14 June 2019). See also, O De Schutter “Report of the special rapporteur on the right to food: Mission to Cameroon” (2012), available at: <<https://reliefweb.int/report/cameroon/report-special-rapporteur-right-food-olivier-de-schutter-addendum-mission-cameroon>> (last accessed 14 June 2019).

Eboko rice project reportedly led to pollution and ecological degradation as well as the contamination of ground water. Had local communities participated in the decision processes for these projects, they could have made informed decisions relating to the protection of their substantive rights. Given that the economy of Cameroon is dependent on agriculture, with women constituting the majority of agricultural workers,¹³⁵ their participation in decision-making regarding land-based investment projects could be crucially relevant to spur measures directed at protecting their rights to land, food, water, forest produce and means of livelihood generally. Yet in Cameroon, it has been reported that women are often excluded from the decision-making processes regarding land-based investment projects.¹³⁶ Women's lack of participation places them in vulnerable position where they are unable to protect their rights.¹³⁷

The right to access to justice

The preamble of the Constitution implicitly provides for the right to justice through the incorporation of the right to a fair hearing and guarantees every person the right to a fair hearing before the courts. This means that local communities and affected stakeholders have a right to a fair hearing before a court on activities and actions by foreign investors that may encroach on their fundamental rights. The Constitution implicitly refers to the right to access to justice through the right to life, to physical and moral integrity, and to humane treatment in all circumstances.¹³⁸ This means that the right to access to justice is a necessary prerequisite to ensure all of these rights, especially as the Constitution obliges the state to guarantee and protect the rights and freedoms of all citizens set forth in the preamble. Consequently, it makes sense that, in order to guarantee and protect these rights and freedoms, particularly in an FAI context, the government of Cameroon has a duty and responsibility to ensure that its citizens have adequate access to justice, through which they could seek legal redress for the violation of their fundamental rights and freedoms as espoused in the preamble of the Constitution.

The enactment of Law No 2009/004 of April 2009 to Organise Legal Assistance in Cameroon eased the financial constraints that prevent people from gaining access to the courts. This legislation facilitates the right to access

135 "Cameroon", above at note 62.

136 JMN Mewanu *Who is Not at the Table: Land Deal Negotiations in Southwestern Cameroon* (PhD dissertation, 2016, Iowa State University Capstones) at 118; FA Ndi "Land grabbing: A gendered understanding of perceptions and reactions from affected communities in Nguti sub-division of south west Cameroon", available at: <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/dpr.12351>> (last accessed 14 June 2019) 1 at 11.

137 Also see FA Ndi "Land grabbing, local contestation, and the struggle for economic gain: Insights from Nguti village, south west Cameroon" 2017 *SAGE Open* 1 at 7.

138 Constitution, preamble.

to justice through the provision of full or partial payment of the related legal fees for impoverished Cameroonians with the ultimate objective of enabling them to gain access to the courts in respect of the violation of their rights generally and particularly in the context of large-scale agricultural activities such as FAI. It has been indicated that, for people to gain effective access to the courts, legal aid services must be timeously provided.¹³⁹ However, the reverse is true in present day Cameroon, where the provision of legal aid is fraught with delays to such an extent that it does not assist indigents to have access to justice.¹⁴⁰

The concept of *locus standi* serves to complement the right to access to justice in environmental matters. It provides interested and affected parties, including local communities and authorized associations, with the right to protect their environment-related rights¹⁴¹ in the context of development through legal action. Section 8 of Law No 96/12 provides for this right with the effect that local communities and authorized associations and interested and affected persons have the right to institute legal action in courts against foreign investors in instances where environmental and other related rights are violated, as was the case in *FEDEV v China Road and Bridge Corporation*.¹⁴² In this context, this means that local communities and interested and affected parties have the right to institute legal proceedings against a foreign entity if an FAI land deal causes direct or indirect harm to the environment or other related rights of local communities.

However, effective access to judicial redress is still a major constraint in Cameroon. The Constitution lacks an explicit and broadly formulated provision for the right to access to justice, which has greatly affected protection of the procedural and substantive rights of local communities. State-controlled legal aid is fraught with delays and this makes it difficult for indigents to have access to justice when their rights are violated. At worst, the judiciary is tainted with corruption to the extent that the foreign investors in FAI activities disregard court orders, thereby rendering them ineffective. It has been reported that in Mundemba, a town in the South West Region of Cameroon where Herakles Farms also acquired land for their palm oil plantation project, the company violated a court order issued to suspend its activity in that locality, pursuant to a complaint filed by the local

139 Ashukem *A Rights-Based Approach*, above at note * at 245.

140 SM Sama "Providing legal aid in criminal justice in Cameroon: The role of lawyers" in Penal Reform International *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007, National Institute for Trial Advocacy) 153 at 157; "Access to justice for children: Cameroon" (2015, White and Case LLP), available at: <<https://archive.crin.org/en/library/publications/cameroon-access-justice-children.html>> (last accessed 14 June 2019).

141 Law No 96/12, sec 8(2).

142 2009 unreported decision no CFIB/004M/09; Fuo and Semie "Cameroon's environmental framework", above note 110 at 89.

people.¹⁴³ This means that Cameroonian courts in some instances, as in the FAI context, are evidently ineffective in ensuring the rights to life, physical integrity, moral integrity and humane treatment through the provision of appropriate legal redress for the violation of people's fundamental human rights. This event gives rise to two thoughts: that there is a failure of the government of Cameroon to meet its international and African regional human rights obligations; and that the actions of the state plainly violate its commitment to respect, protect and fulfil the fundamental rights and freedoms of people, as contained in the preamble of the Constitution, particularly as constitutionally entrenched human rights carry a firm obligation on the state to respect, protect and fulfil the fundamental rights and freedoms of its citizens. It would be laudable if the government were to undertake to ensure that court decisions are not violated by foreign investors, but rather are strictly adhered to in order to protect the fundamental rights of its citizens.

CONCLUSION AND RECOMMENDATIONS

This article has shown that FAI practices are a serious threat to the enjoyment of people's rights in Cameroon. As argued in this article, a rights-based approach to FAI appears to be the most convenient way to prevent the violation of Cameroonians' human rights arising from such activities. It has been demonstrated that the state has obligations arising from the international and regional legal instruments discussed above, which bestow a duty on it to respect, protect and fulfil people's rights generally and particularly, including in an FAI context. Thus, the government of Cameroon has a duty to ensure that FAI activities do not trump its human rights obligations when finalizing FAI land deals. It would be appropriate for the government of Cameroon to ensure that the regulation and implementation of FAI within its jurisdiction follows the precepts of international human rights instruments to the letter, in order to ensure that the rights of local communities are respected, protected and fulfilled as they should be. Yet, as is evident above, this does not seem to be the case.

From the discussion in this article, it appears that Cameroon's legal framework does not sufficiently provide for the right to access to information, public participation in decision-making processes or the right to access to justice, and implementation seems to be a major concern. In this light it is recommended that the government of Cameroon implement appropriate legal measures to ensure that its engagement in flawed FAI practices is not allowed to trump its human rights obligations.

143 "Herakles Farms in Cameroon", above at note 134 at 4; "Herakles Farms / SGSOC: The chaotic history of a destructive palm oil project in Cameroon" (2016, Greenpeace) at 6, available at: <https://archiv.solifonds.ch/sites/solifonds.ch/files/pdf/2016-EN%20Briefer%20HERAKLES%20FARMS-SGSOC%20Chaotic%20History_web%281%29.pdf> (last accessed 14 June 2019); Mousseau "Understanding land investment deals", above at note 17 at 6.

It is strongly recommended that the government enact specific national legislation relating to the right to access to information, to permit local communities and other interested and affected parties to have access to timely and accessible information, particularly as there is no explicit provision of the right in the Constitution.

There is also a need for the government of Cameroon to create a database of FAI land deals on official government websites relating to FAI transactions, providing information timeously and accessibly to local communities to enable them to assert their human rights. The government should also: create and provide consultative mechanisms and processes for effective and transparent public participation through which local communities could assert their fundamental rights during decision-making processes relating to FAI; facilitate and encourage effective public participation with local communities on matters that affect them; facilitate and encourage people's right to access to courts; and ensure that court decisions are effectively implemented so that they respect, protect and fulfil people's rights and freedoms.

Furthermore, it is recommended that, with the proposed revision of Law No 94/1, attention should be given to include provisions that allow an all-inclusive participatory approach designed to include and involve indigenous people and local communities in decision-making processes in FAI related to forestry projects, while acknowledging public views and opinions during participatory processes in order effectively to attain the objective of the law set out in the preamble to the Constitution.

It is also recommended that article 15 of Ordinance No 76/166 be repealed, since it conflicts with article 12 and appears to be an inherent limitation or barrier to the effective involvement and participation of local communities and affected stakeholders in decision-making processes related to land-related investment projects. This could serve to enhance the land governance system in the country in a bottom-up manner.

Finally, there is a need to strengthen the effectiveness of enforcement mechanisms in order to improve accountability. It is hoped that implementing these recommendations in the domestic legal regime of Cameroon during FAI regulation and implementation will result in a win-win situation for the investors, the host government and local communities.