

# **Analysis of Some Contested Legal Issues Regarding the Herakles Farms/SGSOC's Oil Palm Plantation Project in Cameroon<sup>1</sup>**

## **The Land and Investments Group - Sciences Po Law Clinic**

The preliminary aim of this document is to contextualize the Herakles Farms Oil Palm Project in Cameroon, and to provide a comprehensive analysis of its main legal elements. Our ultimate goal is to contribute to expanding the existing body of knowledge on the legal dimensions of large-scale investments in Sub-Saharan African land. In light of that, the document provides relevant background information concerning the investor (Part 1), the implementation of the project in Cameroon (Part 2), and the manner in which the investor has interacted with the Cameroonian population, and local and national authorities (Parts 3 and 4).

### **1. The Land and Investments Group and the Herakles Farms' Project**

The Sciences Po Law Clinic,<sup>2</sup> an initiative of the Sciences Po Law School, recognizes that foreign investment has wide-ranging legal, social, and economic dimensions and

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The Sciences Po Law Clinic was created in September 2012 as an innovative pedagogical program which provides students at the Master level with the possibility to be directly involved in supervised legal research and advocacy related to social justice and public interest issues, in partnership with non-governmental organizations as well as local and international institutions. The clinic includes three programs, "access to justice", "corporate social responsibility and innovation", as well as "human rights economic development and globalization" (HEDG). The Land and Investment group emerged out of the HEDG program, and aimed to focus on the legal, social and economic dimensions and implications of the increasing number of Foreign Direct Investments specifically targeting African land. After a preliminary phase, in October 2012 the group decided to focus its attention and efforts on the Herakles Farms Palm Oil Project in Mundemba and Nguti Subdivisions, South West Cameroon. Under the supervision of Tomaso Ferrando, PhD Candidate at the Sciences Po Law School and Italian barrister, several students, both French and international, were introduced to the project, and began a process of research and analysis specific to this project within the context of the HEDG program. Further details about the the Sciences Po Law School Clinic can be found at <http://master.sciences-po.fr/droit/en/content/clinic>.

implications, especially in the case of large-scale and long-term investments in land. With this understanding, an international research group composed of professors, doctoral candidates, and graduate students was established within the framework of the Sciences Po Law Clinic, that is the Land and Investments Group. Since its inception, this group has engaged in analysing several cases of land concessions embedded in the framework of national economic development, with a specific focus on Sub-Saharan Africa. Over the past fifteen months, the group has been particularly active in the study of the Herakles Farms' Oil Palm investment in the Republic of Cameroon. This Report specifically focuses on this investment project.

The two main actors involved in this case are:

- Herakles Farms, an American private equity-backed investment fund; and
- Sithe Global Sustainable Oil Company PLC (SGSOC), the Cameroonian-incorporated subsidiary *via* which Herakles Farms indirectly exists and operates in Cameroon, by way of acquisition from a Cayman Islands company, SG Sustainable Oils Holdings Ltd.<sup>3</sup>

The central question of our research has been to investigate whether the investment of the U.S.- based fund is in compliance with applicable national and international laws. As we discussed throughout this document, this question is especially valid in light of the procedural and substantive requirements of international human rights law, Cameroonian land law, Cameroonian constitutional law, and of the national and international legal frameworks for investment, included the relevant Bilateral Investment Treaties concluded by Cameroon.

Although the factual matrix of the situation is complex, our research mainly refers to the

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Cf. Section 1 below and the certificate of incorporation in the Cayman Islands of 21 February 2011.

Source:

[http://loophole4all.com/?id\\_i=187499&id\\_e=216208&company=SG+SUSTAINABLE+OILS+HOLDINGS+LTD](http://loophole4all.com/?id_i=187499&id_e=216208&company=SG+SUSTAINABLE+OILS+HOLDINGS+LTD) [accessed 31 March 2014].

legal implications of:

- the Establishment Convention signed in 2009 between SGSOC LPC and the Cameroon's Ministry of Economic Planning (MINEPAT); and
- the relationship between the Cameroonian Government, the investor, local communities, and local NGOs.

In this preliminary conclusion, we underline that both the 2009 Convention and the relationship between the investor, the host State, and local communities **present numerous legal uncertainties, some of which may constitute violations, of national and international law that cannot should not be justified by the economic relevance of the project.**

Although it recognizes the sovereign authority of the Cameroonian government, the Land and Investment group firmly believes that contentious legal questions remain, despite formal approval of the project by the Cameroonian Ministry of Forestry and Wildlife and the President of the Republic of Cameroon. These concerns are especially valid since neither the company nor the government have adequately addressed them, despite continued invitations to do so from Cameroonian civil society and international NGOs.

In particular, our group considers it important to emphasize that an operation of this magnitude directly affects the population of the ceded area. SGSOC has been operating on this land since the 2009 Establishment Convention. However, under international law,<sup>4</sup> the conceded land shall not be developed without the proof of full respect of the right of the local communities to **Free, Prior and Informed Consent (FPIC)**. This is an internationally recognized principle which plays a crucial role in empowering local communities whenever large-scale operations may affect their livelihoods and rights, mainly by requiring the participation of the entire populations affected plays a crucial role

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Article 10, United Nations Declaration on the Rights of Indigenous Peoples *resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295. Also note Article 29(2) on storage or disposal of hazardous materials. International Labour Organisation Convention 169 on Indigenous and Tribal Peoples, *C169*, 27 June 1989, C169.

in empowering local communities whenever large-scale operations may affect their livelihoods and rights, mainly by requiring the participation of the entire populations affected, and invalidating projects which are initiated with the sole agreements of their leaders. Such legal requirement, which is more broadly discussed in point 4.3 below, goes beyond the current provision of Cameroonian national law, according to which Land Consultative Boards are composed of the villages' elders, and binding decisions can be made by the majority of the participants.<sup>5</sup>

As this report will highlight, in the case of Herakles Farms this necessary and substantial procedural requirement of participation and creation of a full and autonomous consent cannot be fully considered satisfied neither by the abstract possibility for the government not to renew the temporary concession after its three years period, nor by sporadic contacts between the investor and the local populations that are discussed below.<sup>6</sup> Therefore, no operation should have started in the absence of a full and effective consultation participation of and consent by the local communities, as well as a precise demarcation of the area involved in order to determine from *which* villages this consent is to be sought.

The Land and Investment Group believes that transparency and respect by all actors involved of the national and international legal requirements surrounding investment in land represent an avenue to uphold the rights and interests of the Cameroonian people. Moreover, transparency and adherence to legal requirements can help avoid potential future conflicts, which may negatively impact all the stakeholders and have lasting socio-economic consequences for the host State.

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<sup>5</sup> See point 4.3 below, making reference to Article 12 and ss. Of the 1976 Decree n. 76-166.

<sup>6</sup> Ministry of Forestry and Wildlife, Report of Sensitization of Local Administration and External Elites of the Nguti Council Area for the Establishment of the Nguti Council Forest, Nguti Town, 2008 <http://www.foretcommunale-cameroun.org/download/NgutireuinonsensiAutoriteelite.pdf> [accessed 31 March 2014].

The lack of adequate consultation, and the fact that operations were started without the appropriate involvement of the local communities, are also underlined by Ministry of Forestry and Wildlife itself. Cf. The Republic Of Cameroon, Ministry of Forestry and Wildlife, Department of Forestry in the *Autorisation d'abattage des arbres se trouvant sur le site de votre projet de palmeraie sis à Talangaye, Arrondissement de Nguti*, <http://cameroonveritas.files.wordpress.com/2012/11/minfof-authorization-2012.pdf> [accessed 31 March 2014].

Ultimately, the Sciences Po Law Clinic's Land and Investments Group seeks not only to draw the attention of policy-makers, economic actors, scholars, practitioners and of the wider public to Herakles Farms' operations in Cameroon, but also to participate in the increasing debate around the legal aspects of large-scale investments in farmland as a global phenomenon.

### **1. The Investor**

SG Sustainable Oils Cameroon (“**SGSOC**”) is a Public Limited Company (“**PLC**”), incorporated in Cameroon. It is owned at 100% by Herakles Capital Corporation, a venture-financing company incorporated in 1990 in the U.S. state of Delaware and now based in New York.<sup>7</sup>

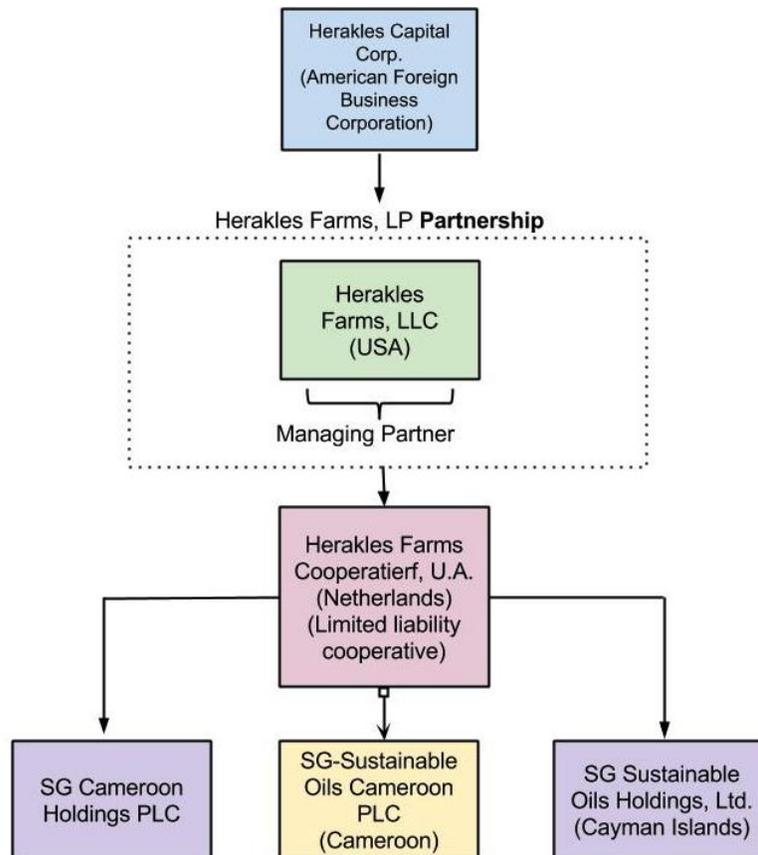
Herakles Capital Corp., the U.S. investor indirectly owning 100% of SGSOC, has standing under the Cameroon-USA Bilateral Investment Treaty of 1986 for claims relating to its interests as an American national. In addition, Section 19.2 of the 2009 Convention between SGSOC and Cameroon states that “Notwithstanding the incorporation in Cameroon of Investor, Investor shall be treated as a Person that is a national of the United States of America for purposes of the ICSID Convention and of this Convention.” SGSOC’s status as an American national opens up avenues of international investment arbitration, instead of domestic arbitration, which may be less favourable to a foreign investor.

As evident from the simplified diagram below, SGSOC’s ownership is structured through several layers of intermediary companies, which may be used to channel funds through fiscally advantageous jurisdictions, including the Netherlands and Cayman Islands.

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The Global Initiative for Economic, Social and Cultural Rights Joint Parallel Report to the United Nations Human Rights Committee, 1 November 2013, [http://www.ccprcentre.org/doc/2014/03/INT\\_CCPR\\_CSS\\_USA\\_16632\\_E.pdf](http://www.ccprcentre.org/doc/2014/03/INT_CCPR_CSS_USA_16632_E.pdf), [6] [accessed 31 March 2014].



**Figure 1 - Reconstruction of the ownership Structure of SG SOC PLC**

Herakles Farms, LLC is an operating arm of Herakles Capital Corp., and the managing partner of the Herakles Farms, Limited Partnership (LP). Herakles Farms, LLC and Herakles Farms LP are just two examples of the several corporate instruments utilized by the Herakles Capital Corp. to participate in foreign direct investment in different sectors, from energy to infrastructure.

Herakles Farms, LLC appears to be particularly geared toward the design and implementation of agricultural projects in sub-Saharan Africa. In particular, beside the Cameroon project it is also investing in Ghana. Despite the fact that the two projects are publicly described by the investor as aiming at 'meeting growing global demand for food,'<sup>8</sup> they are both focusing on the production of palm oil,<sup>9</sup> a complex flex crop which

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Herakles Farms official website, <http://www.heraklesfarms.com/sustainability.html> [accessed 31 March 2014].

can be used in multiple ways (agrofuel, cooking oil, ingredient for processed food and a range of other products, including cosmetics). Therefore, the attempt by Herakles Farms, a private equity fund, to depict its investment in oil palm production as a means to produce food for global consumption should be attentively scrutinized.

## **2. The Project**

On 8 September 2009, Herakles Farms LLC was registered in Delaware under corporation number 4728155.<sup>10</sup>

According to Herakles Farms' official statement, a few months later, Herakles Farms, LLC acquired the entire ownership of the Cameroonian company SGSOC PLC from Sithe Global, an affiliate of the Blackstone Group.<sup>11</sup> Since then, SGSOC was fully owned by Herakles Farms, with no direct link with the Blackstone Group.

On 17 September 2009, Louis Paul Motazé, Minister of the Economy, Planning, and Regional Development signed an Establishment Convention with SGSOC on behalf of the Republic of Cameroon. Under this Convention, a development project was envisaged in the Nguti, Mundemba and Toko Sub-divisions of the Ndian and Kupe Muanenguba Divisions of the Southwest Region,<sup>12</sup> extending over 73,086 hectares<sup>13</sup> and involving the replacement of the existing forest with an oil palm plantation.

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<sup>9</sup> Source, Herakles Farms website. Available from <http://www.heraklesfarms.com/locations.html> [accessed 21 April 2014].

<sup>10</sup> State of Delaware, General Corporate Information Name Search. Available at: <https://delecorp.delaware.gov/tin/GINameSearch.jsp> [accessed 31 March 2014].

<sup>11</sup> Herakles Farms Press Release, June 15, 2011. Available at: [http://www.heraklescapital.com/docs/PressRelease\\_%206\\_%2015\\_2011.pdf](http://www.heraklescapital.com/docs/PressRelease_%206_%2015_2011.pdf) [accessed 31 March 2014].

<sup>12</sup> A copy of the convention has been posted on the following website: <http://cameroonveritas.files.wordpress.com/2011/08/sgsoc-convention1.pdf> [accessed 31 March 2014].

<sup>13</sup> SG Sustainable Oils Limited Environmental and Social Impact Assessment, Available at: <http://www.heraklescapital.com/docs/SGSOC%20ESIA.pdf> [accessed 31 March 2014].

More precisely, SGSOC's original project based on cadastral records and on the concession received in 2009 involved the clearing of 60,000 hectares of forest and their transformation into oil palm nurseries, oil palm plantations, and palm oil processing plants. However, since the project was launched and became public, local, national and international protests arose, firstly because of the project's direct impact on the twenty-eight villages located in the conceded area, and on more than 45,000 people who are directly or indirectly dependent on the natural resources located in the concession area.<sup>14</sup> In addition, the area originally allocated for the concession lies on or near the borders of five protected areas, including Korup National Park. This is, according to an open letter signed by a group of leading scientists who conducted a survey, "an ecologically vital area—one of the largest surviving tracts of lowland forest in the Gulf of Guinea."<sup>15</sup>

Under the two available Common Commitments concluded in 2011 between SGSOC and the Senior Divisional Officer of the Ndian Division, and between the company and the Senior Division Officer of the Kupe Manuenguba Division,<sup>16</sup> SGSOC undertook to respect a three-kilometres buffer zone between Korup National Park and its activities. In addition, the same Commitments concluded with SGSOC also envisage buffer zones around Mount Bakossi National Park and the Bayang Nbo Wildlife Sanctuary, amongst

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Oakland Institute, *Understanding Land Investment Deals In Africa*, 2012. Available at: [http://www.oaklandinstitute.org/files/OI\\_Ethiopia\\_Land\\_Investment\\_report.pdf](http://www.oaklandinstitute.org/files/OI_Ethiopia_Land_Investment_report.pdf) [accessed 31 March 2014].

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J.M. Linder W.F. Laurence, T.T. Struhsaker, T.E. Lovejoy, P.R. Ehrlich, P.H. Raven, G. Fredriksson, C.J.A. Bradshaw, B.W. Brook, L.P. Koh, and M. Walter, 'An open letter about the environmental and social impacts of a massive oil palm development in Cameroon', April 2012. Available from: <http://newswatch.nationalgeographic.com/2012/03/20/open-letter-sounds-alarm-on-massive-oil-palm-development-in-cameroon/> [accessed 31 March 2014].

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More precisely, Art. 7.1(1) of the Common Commitment (Cahiers des Charges) concluded by the State of Cameroon represented by the Senior Divisional Officer for Ndian and SG Sustainable Oils Cameroon Ltd for the exploitation of parcels of national land in Ndian Division. The Commitment is subsequent to the 2009 Establishment Convention, and makes broad reference to the text of the concession. However, as clearly indicated by the title, it was concluded by the company with the local representative of the public authority, without the direct participation of the local communities. Cf. <http://www.heraklesfarms.com/docs/CommonCommitmentNdianAug%202011.pdf>, [accessed 31 March 2014].

others.<sup>17</sup> However, the project still represents a risk for the local and regional environment, because it will be implemented in what could be considered a 'corridor' between the Korup national park and other minor national parks, effectively preventing the migration of flora and fauna throughout these different areas. Moreover, the area has been recognized as highly relevant from an hydrological point of view, but in 2009 SGSOC was guaranteed the full right to exploit water resources with the sole limit being national legislation prohibiting the contamination of water resources.<sup>18</sup>

After months of continuous legal and political struggle between communities, the Cameroonian authorities and the investor, which in some extreme cases included physical attacks on and harassment of Cameroonian activists working with the communities,<sup>19</sup> the President of Cameroon issued three Presidential Decrees on November 25, 2013. These Decrees provided SGSOC with three different temporary concessions for a length of three years, each over a total surface area of 19,843 hectares of land situated in the localities of Mundemba, Toko and Nguti Subdivisions in South-West region of Cameroon.<sup>20</sup>

At the moment, therefore, the company holds administrative title to access the land, a significant first step toward the realization of the project. For that reason, and because of

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<http://www.heraklesfarms.com/docs/CommonCommitmentKMSept2011.pdf>, [accessed 31 March 2014].

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Such a limit is contained in the two Common Commitments concluded by SGSOC in 2011. Nothing is said about a quantitative limit or a specific price for water exploitation.

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Letter to UN Rapporteurs on Harassment of Cameroonian Activists, 28 January 2014, <http://www.greenpeace.org/international/Global/international/briefings/forests/2014/Letter-to-UN-Rapporteur-SEFE-and-Nature-Cameroon.pdf> [accessed 31 March 2014].

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Cf. Decrees 416/2013 etc. More precisely, Decree n. 2013/418 of 25 November 2013 attributes 5,384 hectares in the Arrondissement of Mudemba, Department of Ndian; Decree n. 2013 2013/416 of 25 November 2013 attributes 13,195 hectares in the Arrondissement of Nguti, in the Department of Kupe-Muanenguba; Decree n 2013/417 attributes 1,264 hectares in the Arrondissement of Toko, Department of Ndian. (Documents with the authors).

the unresolved issues on the ground, the Land and Investments group believe that guaranteeing the full respect of national and international legal requirements by all parties involved becomes even more pressing. Furthermore, the concession of the temporary land permit under the Presidential Degrees is formally in compliance with Article 7 of Decree 76-166 of 27 April 1976, which does not have the effect of attributing legality to the investor's actions before the date of the Decrees. Nor does it exempt the investor from mandatory compliance with all the pertinent legal requirements both at the national and international level.

### **3. SGSOC's activities in Cameroon: A legal analysis**

From a legal perspective, Herakles Farms' presence in Cameroon has been marked by a continuous struggle with the local judicial and executive authorities since commencement of operations. This situation belies the existence of deep tensions and of unresolved legal issues surrounding Herakles Farms' interest in Cameroonian land. At first, SGSOC first received a judicial injunction not to proceed with its operations on August 31, 2011,<sup>21</sup> on the basis of a violation of national and international law, and of the breach by SGSOC of the obligations under assumed by joining the Roundtable for Sustainable Palm Oil (RSPO), to which SGSOC was then a member.<sup>22</sup> The 2011 judgment was subsequently reversed, but a second injunction was issued on February 27, 2012 by the same High Court of Ndian Division, later also reversed.<sup>23</sup>

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2011.08.31 / HC of Ndian at Mundembra / HCN/003/OS/2011/1M2011 / SEFE v SGSOC High Court of the Ndian Division

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Herakles Farms withdrew its RSPO membership on February 15 2012, officially because of the NPP grievance policy and its effects on the company's activities. Source: <http://www.heraklesfarms.com/docs/NPP%20APPLICATION%20LETTER.pdf> [last accessed April 21, 2014]. See also: RSPO Code of Conduct, [http://www.rspo.org/files/resource\\_centre/keydoc/3%20en\\_Code%20of%20conduct%20for%20members%20of%20the%20RSPO.pdf](http://www.rspo.org/files/resource_centre/keydoc/3%20en_Code%20of%20conduct%20for%20members%20of%20the%20RSPO.pdf), [accessed 31 March 2014]. Note in particular Article 2.3: "Members will commit to open and transparent engagement with interested parties, and actively seek resolution of conflict."

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2012.02.27 / HC of Ndian at Mundembra / HCN/03/OS/2011 / SEFE v. SGSOC & Timti Isidore

In light of the situation, in April 2013 Cameroon's Ministry of Forestry and Wildlife (MINFOF) ordered that the Company cease preparing land near the Talangaye nursery, the resumption of activities "being subject to a declaration of public usefulness made to the zone where your entire project is located."<sup>24</sup> Consequently, on May 18, 2013 Herakles Farms announced that it was suspending its operations.<sup>25</sup> However, just eleven days later, on May 29, 2013 the same Ministerial authorities lifted the ban and allowed Herakles Farms to resume its operations on the condition that it obtain all the required authorizations and produce the requested documents, though in a reduced area of around 30,000 hectares.<sup>26</sup>

As mentioned above, in November 2013 SGSOC received three Presidential Decrees that attributes it temporary land rights on the basis of Article 7 of Decree 76-166 of 27 April 1976. More precisely, the President conceded a three-year temporary concession over the areas indicated in the decrees, which may be transformed into a permanent concession according to the limits and procedures provided by Cameroonian Land Law. Differently from the practice adopted by other Sub-Saharan States, the three decrees do not contain any specific indication of the investor's obligations vis-à-vis the environment, the local communities, and the Cameroonian State more generally. Rather, Article 4 of the three Presidential Decrees makes general reference to the existing national legal framework and the Cameroonian Constitution, and to the right of the Cameroonian State not to renew the concession in case the investor failed to "effectively realize the investments as required in the '*cahier des charges y afferent*'."<sup>27</sup>

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Palm Watch Africa: <http://www.palmwatchafrica.org/herakles-farms-releases-public-statement-operations-suspended/> [accessed 31 March 2014].

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Cf. Herakles Farm Press Release, 18 May 2013, available from <http://heraklesfarms.com/docs/HeraklesFarmsMINFOFOrderPressRelease18May2013.pdf> [accessed 31 March 2014].

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Article featuring the Ministry's declaration: <http://www.oaklandinstitute.org/cameroon-blasted-lifting-ban-deforestation-0> [accessed 31 March 2014].

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Art. 4 of the three Presidential Decrees issued on November 25, 2013. (Documents with the authors). It

#### Herakles Farms' Investment: A legal timeline

- September 17, 2009: Establishment Convention between SGSOC and the Minister of the Economy, attributing 75,000 ha for 99 years
- August 31, 2011: Common Commitment concluded between SGSOC and the Ndian Senior Divisional Officer
- September 11, 2011: Common Commitment concluded between SGSOC and the Kupe-Muaneguba Senior Divisional Officer
- November 25, 2013: Three Presidential Decrees attributing 20,000 ha for 3 years

The multiplication of agreements, which involve different representatives of the government at different administrative levels, increases the complexity of the investment, and the risk of legal inconsistencies. In particular, a number of issues can be highlighted regarding the decisions of the Cameroonian Government:

- the 2011 Common Commitment (Cahiers des Charges) between the State of Cameroon, represented by the Senior Divisional Officer for Ndian and SG Sustainable Oils Cameroon Ltd, for the exploitation of parcels of national land in Ndian Division, and the almost identical agreement concluded with the Senior Divisional Officer of Kupe-Muanenguba, were concluded without a proper involvement of the local communities, and were signed exclusively by local representatives of the public authority. The choice of the President to accept the existing Cahiers de Charges rather than launching a new process of consultation and inclusion, also in light of the difference between the 2013 Decrees and the original project, significantly reduces the respect of FPIC.

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reads: *"L'Etat du Cameroun se réserve le droit de résilier la présente concession si à l'expiration du délai de trois ans (03) visé à l'article 1er ci-dessus, le concessionnaire n'a pas effectivement réalisé les investissements prévus dans le cahier des charges y afférent."* (The State of Cameroon reserves the right to cancel the present concession if, upon the expiration of three years as provided by Article 1, the concessionaire has failed to effectively realize the investments as required in the attached brief.) (Translation by authors.) Available from <http://cameroun.eregulations.org/media/d%C3%A9cret%2076-166%20au%2027%20avril%201976%20fixant%20les%20modalit%C3%A9s%20de%20gestion%20du%20domaine%20national.pdf> [accessed 31 March 2014].

- the fact that the 2013 Presidential Decrees make reference to the already existing Commitments, and do not require the conclusion of new agreements that move beyond the 2009 Convention to introduce new and effective rights and obligations, raises a certain number of legal issues. . In particular, the fact that the 2013 Presidential Decrees indirectly make reference to the 2009 Convention, by directly referring to the 2011 Cahiers de Charges, appears inconsistent with the position adopted publicly by the Cameroonian Minister of Agriculture, who declared that every relationship with the investor would have been renegotiated.<sup>28</sup> Such tension between the political and legal framework risks to intensify the legal uncertainty of the entire project, and to negatively affect its compliance with national and international legal standards.
- one of the most problematic aspect is that two 2011 Commitments contain a clause of subordination to the 2009 Establishment Convention, in a way that deprives the two documents of any effective relevance. According to the introductory part of the two agreements concluded between the investor and the local authorities, “The dispositions of the present Common Commitment laid down here below shall not contradict or violate clearly defined rights and obligations of the company and those of the Republic of Cameroon as established in the Establishment Convention of 17th September 2009 and the laws and regulations governing the said convention.” Given that the Establishment Convention is expressed to override any conflicting laws with the exception of the Cameroonian Constitution, the undertakings in the Commitments do not protect local populations from SGSOC’s full exercise of the Establishment Convention which contains, as we discuss below, heavily investor-biased terms.
- the Commitments recognize a broad right of the investor to occupy land which earmarked for growth zones or areas already occupied by villages for farmlands or residence, which can be occupied when it is necessary for the project.

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<sup>28</sup> See point 4.2 below.

According to article I.1(3), in fact, “whenever it becomes topographically or *otherwise* impossible for the areas referred above to be avoided, the company shall pay adequate and full compensation to all interested persons or villages (*italics added*)” in conformity with the existing law. That means that the impact of the project may go beyond non-occupied forest, and directly concern people's land and houses.

- With regards to farmland, the Commitments affirm that “SC Sustainable Oils Cameroon Ltd shall avoid the damage of farms. However. Where its activities result in the total or partial destruction of farms and or farm products, the mechanisms of decree No.0003/418/PM of 25<sup>th</sup> February 2003 shall be applied to ensure the rights of victims.” The Commitments, therefore, expand the rights of the company vis-a-vis the community's agricultural land and production, attributing a price-tag to violation of the people's rights.
- the Commitments ultimately reduce the rights of local people to access non-timber forest products in areas which are demarcated for the project but which are not yet developed. According to article I.2(6), people have the right to access to these resources, but such right is subordinated to the economic right of the company to develop the land.<sup>29</sup>
- While it is true that the Commitments contain some obligations and limits for the company, including respect of the environment, use of water, occupation of agricultural land, employment, and land acquisition, it is also true that they mainly make reference to the existing Cameroonian legal framework, and do not introduce any further obligation. The *Cahiers de Charges*, therefore, do not adequately fulfill their function under Decree 76-166 to define ad hoc limitations specific to the investment.

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<sup>29</sup> Article I.2(6), which is identical in the two Common Commitments, states that: “Whereas the Company shall respect the rights of the local people to access non-timber forest products on lands not developed even though these products may be found in areas already demarcated for the concession, these rights shall not conflict with or limit the Company's development activities as stated in its business plan.”

The decision of the Government to specify in the three Presidential Decrees the right not to renew the concession in case of violations of the company's obligations, does not add anything compared to the existing national legal framework. As a matter of fact, Article 10 of Decree 76-166 of 1976 already provides the *préfet* with the right not to renew the concession in case the investment has not been realized as required by the decree granting the temporary concession.<sup>30</sup>

The Land and Investments group acknowledges and respects the sovereign authority of the Republic of Cameroon and the political choice of its President. However, this group believes that the lack of legal certainty and the need to respect the rule of law would have required the President not to grant the Decrees, but rather to conduct further investigations and analyses of the underlying situation and its legal implications. Now that the Decrees have been issued, the risk is to allow operations on a large and populated area of forest without having clarified the underlying legal uncertainties that have characterized the project since it began. Neither, in our analysis, has Herakles Farms demonstrated respect of relevant national and international law.

In the course of the last two years the company has not only been accused by national and international organizations of violating the judicial injunction and the temporary suspension of the operations issued by the Minister of Forestry and Wildlife,<sup>31</sup> but it has also been involved in a series of actions that may be in conflict with the legal framework that Herakles Farms committed to respect when it made the commercial decision to invest in Cameroon, finalized by signing the 2009 Establishment Convention.<sup>32</sup> Both from a

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The French text affirms that: “*Art. 10. Le préfet tient compte du montant des investissements réalisés et ne peut proposer l’attribution en concession définitive que si le terrain a été mis en valeur conformément aux conditions imposées par l’acte de concession et ses avenants éventuels.*” Article 10. The prefect takes into account the amount of the investments carried out and can only award a permanent concession if the conceded land was utilized according to the conditions imposed by the act of concession and any later addenda. (Translation by authors).

31 Cf. Cf. Greenpeace and the Oakland Institute, Herakles Exposed, available from [http://www.greenpeace.org/international/Global/international/briefings/forests/2013/Herakles\\_Exposed\\_Final.pdf](http://www.greenpeace.org/international/Global/international/briefings/forests/2013/Herakles_Exposed_Final.pdf)

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procedural and substantial perspective, the project, which is presented by Herakles Capital as a sustainable project and an example for future investments,<sup>33</sup> appears characterized by the tailoring of the existing legal framework primarily and its adaptation only to the needs of the investor, with minimal concern for the rights and the interests of the Cameroonian people, the Republic of Cameroon, and the environment.

The following section of this report aims to provide a list of the legal issues that the Land and Investment Group considers relevant and deserving of more attention both within and beyond Cameroon. The list does not pretend to be exhaustive, also given the lack of clear communications both from the investor and the Cameroonian government. By issuing and distributing this document, our aim beyond the specifics of this case is to stress the importance for national governments, specialists, practitioners and affected communities throughout the world to recognize that not all investments (and investors) are the same, and that some investor behaviour cannot be condoned even in the name of aggregate national economic growth.

The Land and Investment group believes in a sustainable and inclusive pathways toward the improvement of life's conditions, where an increase in GDP must be coupled with the respect for the rule of law and internationally enshrined human rights standards, including, among other elements, the right to self-determination of the local peoples, and their right to food and the right to water, which are all essential components of the right to life. The case of Herakles Farms and its subsidiary SGSOC appears to conflict with our vision, and with the vision of several other scholars, institutions, and local communities. For this reason, the case deserves enhanced scrutiny, which we set forth in the following legal analysis.

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Cf. Section 22 of the Establishment Convention.

#### 4. Seventeen Unresolved Legal Issues Pertaining to SGSOC's Project

**4.1. Transparency, Free, Prior and Informed Consent** : The process that led to the issuance of the three Presidential Decrees on 25 November 2013 appears to be characterized by a general lack of transparency, and by the lack of substantive participation of local populations of the subdivisions where the project will be realized. However, international law requires that the company not start any activity without the obtaining the 'Free, Prior and Informed Consent' of every community which will be affected by a future (and not yet granted) concession.<sup>34</sup> Where appropriate FPIC does not exist at the moment of the concession, the decision of the Government cannot be considered to be in compliance with the international law framework, and any effort by the company to seek this consent after the concession does not retroactively legalize its actions (or omission thereof).

Moreover, even in the case of a pre-existing consent (which does not appear to be the case in the situation under examination) it is compulsory that the company take into account peoples' own decision-making processes, not only at the moment of the initial assessment, but also in planning, implementing, monitoring, evaluating, and at the closure of a project. Thus, a violation of these legal obligations can be the object of a judicial or quasi-judicial proceeding before national and international *fora*, including the U.N. Treaty Monitoring Bodies (including the Human Rights Committee and the Committee on the Elimination of Racial Discrimination),<sup>35</sup> the Organization for

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Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law," *Northwestern Journal of International Human Rights* 10, no. 2 (2011): 54-84.

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Article 27 of the International Covenant on Cultural and Political Rights has been interpreted by the Human Rights Committee as imposing over States Parties the positive obligation to 'ensure that the existence and exercise [of the rights protected under the Covenant] are protected against their denial or violation. [In particular] with regard to the exercise of cultural rights protected under article 27, the Committee observes that culture manifest itself in many forms, including particular way of life associated with the use of land resources.' Cf. CCPR, General Comment No.23: The rights of minorities (Art. 27): .08/04/1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments).

Economic Cooperation and Development (OECD), and the African Court on Human and Peoples' Rights.<sup>36</sup>

#### **4.2. The concessions may lose their temporary nature against the will of the Government**

Article 7 of Decree 76-166 provides the Government of Cameroon with the power to issue temporary land concessions for a maximum length of five years.<sup>37</sup> In the case of SGSOC, the Government has granted the concession for three years, following which the Government or the Minister can decide not to renew the concession. However, the combination of the concession, the Establishment Convention of 2009 and the Bilateral Investment Treaty (BIT) between Cameroon and the United States, may **reduce the regulatory autonomy of the Government to refuse to renew the concession, and force it to transform the temporary concession into a permanent one.**

Despite the three-year limit contained in the Presidential Decrees, and despite the abovementioned decrees making reference to the right of the Cameroonian authorities not to renew the concessions, the company could still try to invoke the rights contained in the 2009 Establishing Convention and claim legitimate expectations to continue its

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Similarly, the Committee on the Elimination of Racial Discrimination, has underlined that article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires government to represent the whole population, and that 'governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens.' Cf. Committee on the Elimination of Racial Discrimination, General Recommendation 21, the right to self-determination (Forty-eight session, 1996), U.N. Doc. A/51/18, annex VIII at 125 (1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/11Rev.6 at 209 (2004).

36

In 2012 the African Court on Human and Peoples' Rights ruled in favor of the Ogiek community in an ongoing trial regarding the tribe's customary land tenure in the Mau Forest. The Court placed an injunction on any further evictions until the case is decided, therefore suspending the continuation of the project.

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Art. 3 of the Decree 76-176: Art. 3. *La durée de la concession provisoire ne peut être excéder cinq (5) ans. Exceptionnellement, elle peut être prorogée sur la demande motivée du concessionnaire.* The duration of the temporary concession cannot exceed five (5) years. Exceptionally, it can be prorogued by the justified request of the concessioner. (Translation by the authors.)

operations according to the content of the original agreement. Similarly, as we discuss below, a purported decision by the Government to use Article 8 of Decree 76-166 of 1976 not to transform the temporary concession into a definitive one, could be presented by the investor as a violation of the Fair and Equitable Treatment clause contained in the U.S.-Cameroon BIT and utilized by Herakles Farms to oppose the legitimate and legal decision of the Government. We note that despite being incorporated in Cameroon, SGSOC is considered as an American national in the 2009 Establishment Convention, and fully owned by a U.S. company (although indirectly).

According to the Decree, the '*concession provisoire*' automatically expires ... in case of breach of the concessionaire's obligations; in case of voluntary abandonment of the area; in case of sale of the land without the authorization of the competent authority; in case of failure of the concessionaire or in case of liquidation of the company...'<sup>38</sup> Thus, a decision by the competent Minister or a Presidential Decree on the basis of one of these violations could certainly sanction the end of the temporary concession. However, such a legitimate decision according to Cameroonian land law could be challenged by SGSOC on the basis of a breach of the Establishment Convention through investment arbitration proceeding on the basis the US-Cameroon BIT, as we point out in §4.15. If this construction is accepted, it would subvert Cameroon's legislative sovereignty.

Therefore, the legal risk exists that, despite the declaration released by the Ministry of Agriculture on 12 June 2013, according to which the 2009 Establishment Convention should no longer be considered valid and that every commercial relationship with Herakles Farms will be redefined,<sup>39</sup> the combination of the BIT, the 2011 Common

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*Concession provisoire*, Article 8, Decree No. 76-176 of 27 April 1976 See: [http://www.relufa.org/documents/201310\\_Dispossessedatallcosts.pdf](http://www.relufa.org/documents/201310_Dispossessedatallcosts.pdf) and [http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=fr&p\\_isn=13788](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=fr&p_isn=13788) [accessed 31 March 2014].

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According to ECOFIN, the Minister of Agriculture affirmed that « Je ne connais pas tout ce qui a été signé avant. Tout sera désormais renégocié dans les règles de l'art, a confié à l'agence ECOFIN le ministre qui s'est saisi du dossier » (I am not aware of everything that was signed before. From now on, everything will be renegotiated according to the rules). Le Cameroun annule la première convention signée avec Herakles Farms, available at: <http://www.agenceecofin.com/industrie/2106-11871-le-cameroun-annule-la-premiere-convention-signee-avec-herakles-farms> [accessed 31 March 2014].

Commitments,<sup>40</sup> and international investment arbitration could lead to a decision contrary to the Government's statement. In addition, Herakles Farms have not confirmed the Minister's statement about the Convention, and only issued a statement that the company was in discussions with the Cameroonian State.<sup>41</sup> For this reason, it is our opinion that the allowing the establishment of the company's operations within the conceded area thus risks *either* irremediably subordinating the future exercise of Cameroon's sovereignty to the economic interests of the company *or* putting an elevated price tag on the power of Cameroon to exercise its authority in order to protect its people and the environment.

### 4.3 No proper FPIC before the Decrees

Looking at the last five years of the company's presence in Cameroon, it can be affirmed that, after a first attempt to start its operations without a proper, comprehensive consultative process, and after having being injuncted to stop its operations, SGSOC had attempted to remedy the previous violation of the FPIC requirement in the last months before obtaining the Presidential Decrees. One of the ways in which it decided to act was to adopt some of the procedures required by Cameroon Land Law, and in particular by Article 6 of Decree 76-166.<sup>42</sup> However, the national law standard for

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According to these documents, which were signed in 2011 but have never been discussed when it came to redefining the terms of the agreement between the Republic of Cameroon and SGSOC, "The state shall not unilaterally modify the terms of the convention in ways that may negatively affect the company's establishment in the concession area." Cf. Chapter III (3) available from <http://www.heraklesfarms.com/docs/CommonCommitmentNdianAug%202011.pdf> [accessed 31 March 2014].

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Cf. ECOFIN, Le Cameroun annule la première convention signée avec Herakles Farms, available at: <http://www.agenceecofin.com/industrie/2106-11871-le-cameroun-annule-la-premiere-convention-signee-avec-herakles-farms> [accessed 31 March 2014]. Stating that "Contacté par Ecofin pour confirmer ces affirmations, Herakles est longtemps resté muet, refusant de donner un commentaire à ces affirmations. Joint à nouveau hier, 20 juin 2013, par Ecofin, le responsable de la cellule de la communication d'Herakles Farms au Cameroun est resté sur la même position, déclarant que l'entreprise américaine ne peut réagir pour le moment. « Nous sommes encore en négociation avec le gouvernement camerounais. Nous ne pouvons faire aucun commentaire sur les déclarations du gouvernement », a-t-il déclaré en promettant de nous contacter quand Herakles décidera enfin de communiquer."

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The article reads that: "Après avoir recueilli tout les avis utiles, notamment ceux des services publics locaux intéressés par le projet, le chef de service compétant transmet le dossier pour examen à la commission consultative visée à l'article 12 du présent décret." ("After having collected all the useful

participation is significantly lower than the internationally accepted principle of FPIC. In particular, SGSOC established a dialog with the “Land Consultative Boards” established by local authorities. However, the structure of the Consultative Boards as required by Article 12 and followings of the 1976 Decree is concentrated primarily around the representatives of the public administration and chiefs and two elders of the villages (or of the local communities),<sup>43</sup> and simply requires the majority of the participants to the meetings in order to approve the concession.<sup>44</sup> In this procedure, the effective representation and participation of the local people, who have already manifested their concerns about the on-going process, is neither guaranteed nor required.

Moreover, from the information arising from the interested areas, the creation and operation of the “Land Consultative Boards” do not appear to be in accordance with Decree No. 76-176 of 27 April 1976, nor with the minimum requirements of FPIC of the whole community. More precisely, despite the fact that this appears to have been discussed and approved at the Land Consultative Board meeting of 8 June 2013,<sup>45</sup>

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opinions, in particular those of the local public utilities relevant to the project, the service manager will send the file for examination to the advisory commission referred to in Article 12 of the present decree.) Translation by the authors.

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Article 12 of the Decree states that: “Art. 12. Nommée par le préfet et siégeant au niveau du district ou de l’arrondissement, la Commission consultative comprend: - Le Sous-préfet ou Chef de district, président ; - Un représentant du service des domaines, secrétaire ; - Un représentant du service de cadastre ; - Un représentant du service de l’urbanisme, si le projet est urbain ; - Un représentant du ministère dont la compétence a un rapport avec le projet - Le chef et deux notables du village, ou de la collectivité où se trouve le terrain.”(Art. 12. Nominated by the Prefect and placed at the district level, the Advisory Commission is composed of: the Deputy Prefect or Chief of District as President; a representative of the public services as Secretary; a representative of the land titles system; a representative of the urban planning service, if the project is urban; a representative of the Ministry whose powers relate to the project; the leader and two representatives of the town, or of the local government of the concerned land.) Translation by the authors.

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For example, article 15 simply requires that “Les recommandations de la Commission sont adoptées à la majorité simple des membres présents, et valables si le chef du village ou de la collectivité et un notable ont participé aux travaux.” (The recommendations of the Commissions are adopted with the simple majority of present members, and valid if the leader of the town or of the local government and a representative of such participated in the deliberations.) Translation by the authors.

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See [http://www.cedcameroun.org/images/2013\\_RapportsCED/201310\\_en.pdf](http://www.cedcameroun.org/images/2013_RapportsCED/201310_en.pdf) [last accessed 31 March 2014].

representatives of the village of Ebanga continue to express concern that demarcation between two villages, Ebanga and Ndong, has been neglected.<sup>46</sup> Given that the 27 April 1976 Decree requires the meeting to establish the terms and conditions of management of national lands, a failure to demarcate areas to be developed would constitute a breach.

Neither does there appear to have been appropriate notice of the Land Consultative Boards meeting, where the Decree requires at least ten days' notice. In addition, no agenda was posted at least ten days before the meeting, again as provided by the Decree. Notably, questions on compatibility with community use of the land were not addressed. On the contrary, communities in Cameroon reported that "where consent had allegedly been provided by communities to the company it was usually based upon the signature of the chief only (some/many of whom do not actually live in the communities on a regular basis or have jobs), and rarely also with the full council of community elders (both groups typically dominated by older men), but certainly almost never with the signatures (or often knowledge) of the individual families whose fields and forest resources would be affected. This includes recent 'consent' provided to local consultative boards, which were rushed through at the beginning of June 2013."<sup>47</sup>

These allegations, if true, would also be in breach of the recommendations contained in a report produced in 2013 by the Ministry of Forest and Wildlife.<sup>48</sup>

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See [http://www.cedcameroun.org/images/2013\\_RapportsCED/201310\\_en.pdf](http://www.cedcameroun.org/images/2013_RapportsCED/201310_en.pdf) [last accessed 31 March 2014].

<sup>47</sup>

John Nelson and Tom Lomax, They Want to take our bush, July 2013, Forest People Programmes, available from <http://www.forestpeoples.org/sites/fpp/files/publication/2013/07/fpp-fpic-herakles-final-july-18-web.pdf>

<sup>48</sup>

According to the document, "Each agreement should be analyzed by a land consultative board composed of government officials, chief and notables from the village and civil society. The consultative board should ensure on the fairness and transparency of the negotiation process. The board should carefully review all the negotiation steps, land use maps, ESIA and local participatory impact assessments and benefit-sharing agreements, in particular clear conditions for the development of smallholder schemes (> 30 % of the area attributed to Herakles Farms (SGSOC), technical and financial terms). PSMNR should assist in the creation of such board and assist the community in developing a win-win agreement with the company and in particular in negotiating smallholder schemes contracts. PSMNR should also provide legal advice to the community regarding their customary land rights, compensation mechanisms and obligations of the company. Communities should not be bound for 99 years to this kind of MoU and agreements. They should have the possibility to review and updated and

#### **4.4. *Ultra vires* conclusion of the Establishment Convention**

The Convention was signed by the Minister of Economy, Planning and Regional Development, who certainly was a member of the Cameroonian Government, but who may have lacked the political and legal authority to represent his country according to the Cameroonian Constitution. More specifically, there are no documents proving that the Minister had received the authorization or approval from the competent Ministries regarding land issues and land concessions (included Agricultural and Forestry), nor of the Parliament, despite the fact that some of the issues contained in the Establishment Convention are constitutionally reserved for the legislative body.

In particular, Article 26 of the Constitution of the Republic of Cameroon lists the fields of legislative competence for the Parliament, which includes “financial and patrimonial matters: [...] land tenure, State lands and mining; natural resources.”<sup>49</sup> As the Project involves State land and natural resources issues, the Constitution designates the Parliament as the body vested with the exclusive power of dealing with them. It appears that no member of the executive power could have unilaterally taken the decision to sign the 2009 Convention. The continuation of the Project would thus be in multiple violations of the fundamental law of Cameroon.

#### **4.5. Contract, the Cameroonian Constitution, and international conventions ratified by Cameroon**

Article 9.3 of the Convention provides the investor with the contractual right to “search, apprehend, detain, exclude and evict”<sup>50</sup> anyone found within the boundaries of the land concession. Similarly, Chapter III (4)(5) of the Common Commitments concluded in 2011 affirm that: “The state shall protect and provide security for the company, its

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binding documents with the company periodically”. Source [http://www.cameroonveritas.files.wordpress.com/2013/04/03\\_01\\_2013\\_report-fact-finding-mission-sgsoc.pdf](http://www.cameroonveritas.files.wordpress.com/2013/04/03_01_2013_report-fact-finding-mission-sgsoc.pdf) [accessed 31 March 2014].

<sup>49</sup>

Article 26 Constitution of the Republic of Cameroon

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Article 9.3 Establishment Convention by and between the Republic of Cameroon and SG Sustainable Oils Cameroon PLC

personnel and property to the same extent as it provides to its citizens and their properties; (5) The state may however, authorize the company to setup its own security outfit in strict compliance to the laws and regulations governing the setting up of private guard services in Cameroon.”<sup>51</sup> Despite the reference to the national law, the combination of the concession and the Common Commitments provides for a private curtailment of personal liberties, which is contrary to:

- **The Constitution of Cameroon:** the Preamble of the Constitution reads as follows: “no person may be prosecuted, arrested or detained except in the cases and according to the manner determined by law” and “Every person shall have the right to settle in any place and to move about freely, subject to the statutory provisions concerning public law and order, security and tranquility.”
- **The Cameroon Penal Code:** according to Article 26, detention is a custodial sentence following a crime or a political offence.<sup>52</sup> An official intervention of State authority is therefore required before anyone can be put in detention. A privately concluded agreement cannot deprive individuals from their fundamental rights vis-à-vis the exercise of public authority.
- **The African Charter of Human and People’s Rights, incorporated into the Cameroonian Constitution:** Article 6 of this international agreement states that “every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”<sup>53</sup>

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Cf. Common Commitment (Cahiers des Charges) concluded by the State of Cameroon represented by the Senior Divisional Officer for Ndian and SG Sustainable Oils Cameroon Ltd, for the exploitation of parcels of national land in Ndian Division, August 2011, available from <http://www.heraklesfarms.com/docs/CommonCommitmentNdianAug%202011.pdf> [accessed 31 March 2014].

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Article 26 Cameroonian Penal Code

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Article 6 African Charter.

- **The International Covenant on Civil and Political Rights:** Cameroon is a State Party to the ICCPR since 27 June 1984. Article 9(1) provides that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Article 12(1) further provides for freedom of movement and freedom of residence.
- **The 1948 Universal Declaration of Human Rights:** Every individual, including but not limited to Cameroonian citizens, is entitled to the recognition of inherent dignity and certain inalienable rights, which make direct reference to the foundations of freedom and justice in the world. More specifically, Article 14 of the Declaration clearly stipulates, “everyone has the right to freedom of movement and residence within the borders of each State.”<sup>54</sup> Moreover, “the right to free movement, or the denial of it, within national and international borders can have profound effects upon other basic human rights also outlined in the Universal Declaration of Human Rights and other treaties.”<sup>55</sup>

#### **4.6. The enforcement of the 2009 Convention may violate Cameroon's commitment to respect, protect, and fulfill the right to food and the right to water**

Section 3.3 of the Establishment Convention provides that the company has the exclusive right within the Concession Area “to take and use, free of charge, such water [...] as Investor may consider necessary or useful for Investor Activities, *without the need to obtain any further authorization or pay any further fees (italic added)*.”<sup>56</sup> In the same way, the company has the right to “exclusively, within the Production area, to plant, cut and utilize timber, to the extent Investor deems necessary for the construction and maintenance of Infrastructure, without the need to obtain any further authorization or pay

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Universal Declaration of Human Rights: <http://www.un.org/en/documents/udhr/> [accessed 31 March 2014].

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[http://www.hrea.org/index.php?base\\_id=148](http://www.hrea.org/index.php?base_id=148) [accessed 31 March 2014].

<sup>56</sup>

Article 6.5 Establishment Convention by and between the Republic of Cameroon and SG Sustainable Oils Cameroon PLC, Constitution of the Republic of Cameroon

any further fees”<sup>57</sup>. Such dispositions appear in conflict with the international obligations assumed by Cameroon to respect the human rights of its citizens, and in particular to its obligation to protect, promote and monitor the respect of the right to food, right to water, right to a livelihood, and rights of children, women and minorities.<sup>58</sup>

In addition, and in conflict with the unlimited rights recognized in the Convention, the 2011 Common Commitments make reference to the company's obligation to respect the 2001 Decree (2001/164/PM) on the modalities of extracting water for industrial or commercial uses,<sup>59</sup> which subordinates the extraction of water to the concession of a preventive public authorization by the Minister in charge of water services (Art. 2),<sup>60</sup> and to the payment of taxes and prices defined by the 2001 Decree and by the Ministry of Finance.<sup>61</sup>

According to the 2001 Decree, the authorization is granted by the Minister only after the realization of an impact assessment conducted by the Ministry responsible for the protection of the environment, which has to be submitted to the Minister competent for

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Article 6.4 Establishment Convention by and between the Republic of Cameroon and SG Sustainable Oils Cameroon PLC, Constitution of the Republic of Cameroon.

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For example, the right to food is defined by the Committee on Economic, Social and Cultural Rights (Committee on ESCR) in its General Comment N°12 of 1999. “The right to food is realized when every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food or means for its procurement (para. 6).” In addition, it is important to take into consideration the ICESCR Article 11(1) on the right to food, 6(1) on the right work, and 10 on the rights of children.

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Décret n° 2001/164/PM du 08 mai 2001 précisant les modalités et conditions de prélèvement des eaux de surface ou des eaux souterraines à des fins industrielles ou commerciales. Available from <http://www.spm.gov.cm/fr/documentation/textes-legislatifs-et-reglementaires/article/decret-n-2001164pm-du-08-mai-2001-precisant-les-modalites-et-conditions-de-prelevement-des-ea.html> [accessed 31 March 2014].

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“Article 2.- Les prélèvements des eaux de surface ou des eaux souterraines à des fins industrielles ou commerciales sont soumis à une autorisation préalable.” (Exploitation of surface or underground water for industrial or commercial uses requires prior authorization.) Translation by the authors.

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“Art. 4: Tout prélèvement des eaux de surface ou souterraines à des fins industrielles ou commerciales est assujéti au paiement d'une redevance dont le taux, l'assiette et le mode de recouvrement sont fixés par la loi de finances.” (Any exploitation of surface or underground water for industrial or commercial uses is subjected to the payment of rent, of which the amount, tax base and mode of recovery are to be fixed by the law on finance.) Translation by the authors.

the provision of the water authorization. At the moment, there is no available evidence that SGSOC has obtained such fundamental authorization, which implies that all activities already conducted should be considered violations of the 2001 Decree. The corollary is that there is still some scope for the Minister of Environment and the Minister competent for water services to scrutinize SGSOC's project and its compatibility with the local and regional hydrological system. In particular, Article 7 of the 2001 Decree gives the power to the Minister in charge of water to open a public consultation (at the expense of the applicant)<sup>62</sup> within one month from the date of the application.<sup>63</sup> In the public process, the community is informed of the company's project, and several Ministries (agriculture, health, environment) are consulted, with one month to express their opinion.<sup>64</sup> In any case, even if the concession is guaranteed, it cannot be for more than five years.<sup>65</sup>

In other words, by means of the 2009 Establishment Convention, the investor received full power over the natural resources in the production area, a situation that could negatively impact the right to food and water of the affected communities. As stated by

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*Article 13.- Les frais de l'enquête publique sont à la charge du demandeur de l'autorisation. Leur montant est fixé par arrêté du Ministre chargé de l'eau.* (The applicant will bear the costs of the public inquiry. The total sum is to be fixed by the Minister in charge of water.) Translation by the authors.

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*“Article 7.- (1) Dans un délai d'un (1) mois à compter de la date de dépôt de la demande, le Ministre chargé de l'eau peut, en tant que de besoin, ouvrir une enquête publique. Il nomme à cet effet des commissaires-enquêteurs.”* (Within one month commencing at the date the request is lodged, the Minister in charge of water may, if necessary, conduct a public inquiry. To this effect he shall select Superintendent-Investigators.) Translation by the authors.

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*“Article 9.- Avant l'ouverture de l'enquête, le Ministre chargé de l'eau communique pour avis un exemplaire de la demande d'autorisation aux administrations chargées de l'environnement, de la santé publique et, s'il y a lieu, de l'agriculture, de l'élevage, du développement industriel et commercial et des gestionnaires du service public de l'eau opérant dans la zone. Les administrations et organismes sus-cités doivent se prononcer dans un délai de trente (30) jours à compter de la date de saisine. Passé ce délai, leurs observations ne sont plus prises en considération.”* (Before commencing the inquiry, the Minister in charge of water must request opinions on the authorization request from the Ministries for the Environment, for Public Health and, if they exist, for Agriculture, Animal Husbandry, Industrial and Commercial Development; and from the operators of the public water service operating in the area. The above administrations and institutions must reply within thirty days from the date of notice, after which no response shall be taken into consideration.) Translation by the authors.

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*Article 14.- (1) L'autorisation de prélèvement est accordée par arrêté du Ministre chargé de l'eau, sous réserve des droits des tiers, pour une durée de cinq (5) ans renouvelable.* (The exploitation authorisation is granted by the Minister in charge of water, subject to third party subsisting rights, for a renewable period of five years.) Translation by the authors

the Committee on ESCR<sup>66</sup> and the African Commission on Human and People's Rights,<sup>67</sup> Governments must protect resources from any acts by a third party or a transnational corporation that would prevent people from having access to food. However, Cameroon national law, which represents the binding framework for SGSOC's operations, introduces procedural and substantive requirements that cannot be avoided nor eluded by means of a subsequent private agreement. Should the 2009 Establishment Convention not be declared void, as was assumed by the Minister of Agriculture, there would be a clear conflict between the 2001 Decree defining the modalities of water extraction and the content of the Convention. The 2011 Common Commitments are fully subordinated, in fact, to the content of the 2009 Convention, and could be interpreted as not introducing any further obligation for the investor. Such scenario demonstrates, once more, the incompatibility of the Establishment Convention with the international obligations assumed by Cameroon, and calls on national and international observers to pay particular attention to the way in which the 2001 Decree will be treated in the future. In light of the essential value of water, and of the extensive and profound environmental risks that SGSOC's project represent, it would be hazardous, to say the least, to allow the unlimited use of water by SGSOC without any possibility of intervention by State's authorities.

#### **4.7. A private agreement with Constitutional status**

Article 22.2 of the Establishment Convention posits that the Convention itself, a private agreement between the company and the state, is above all the other laws of Cameroon, except for the Constitution.<sup>68</sup> According to the document: "in the event of a conflict

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<sup>66</sup>

Committee on ESCR (12 May 1999), *General Comment N°12*, The Right to Adequate Food (art. 11), para 15.

<sup>67</sup>

In the case of the Ogoni People against the government of Nigeria. African Commission of Human and People's Rights, 155/96, *The Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (2001).

<sup>68</sup>

Article 22.2 reads in full "this convention (including its formation and any question regarding the existence, validity and termination of this convention) and the rights, obligations and duties of the parties under this convention shall be construed and interpreted in accordance with Law and by such rules and principles of international law as may be applicable, particularly with regard to an investment by nationals of one country in another country. However, in the event of a conflict between this convention and any Law, *except for the Constitution of Cameroon*, as in effect as of the date hereof, the rights, obligations, and duties of a party shall be deemed to be those set forth in this convention and each Party shall have such

between this Convention and any Law, except for the Constitution of Cameroon, [...], the rights, obligations and duties of a Party shall be deemed to be those set forth in this Convention." Such a legal statement, unique even in investment law, produces an illegitimate subversion of the key concept of hierarchy of legal norms, and generates a situation in which private agreements are granted the the same status as Constitutional norms. Core democratic principles such as the Rule of Law, the separation of powers, and the legitimacy of legislative procedures all clearly suggest that state-investor agreements cannot override Cameroonian law without ratification by the Parliament.

#### **4.8. The enforcement of the Convention may be in violation of Cameroonian labour law**

Section 9.5.a of the Establishment Convention states that "Compensation paid or provided to employees of Investor and Operator shall be based on the application of the occupational categories and minimum wage scales fixed on the basis of productivity and efficiency criteria. The terms and conditions of such compensation, employee benefits and working conditions shall be in accordance with international standards."<sup>69</sup>

However, Section 63 of the Cameroonian Labour Code stipulates that: "the rates of remuneration for piecework shall be so calculated that it provides a worker of average capacity, working normally, with a wage at least equal to that of the worker engaged in similar work and paid by unit of time".<sup>70</sup>

The Convention is thus in clear breach of Cameroonian labour law, as it it provides the company with the right not to pay minimum wage to all those workers who may not reach productivity and efficiency criteria autonomously defined by the company. Moreover, in case of a conflict between the content of the Convention and the international standards introduced by means of national law, Section 22.2 would subordinate the latter to the former, rendering international legal protections ineffective.

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remedies as are provided for in this Convention with respect thereto including the remedies set forth in this Article 22." (Emphasis added).

<sup>69</sup>

<sup>70</sup> Section 63 Cameroon Labor Code.

<sup>70</sup>

*Ibid.*

#### **4.9. The Establishment Convention violates the time-limits introduced by Decree N°76-166**

The ninety-nine (99) years concession granted by the original Establishment Convention violates Decree N°76-166 of 27 April 1976,<sup>71</sup> in particular with regards to the administrative procedure which has to be followed (and which has been discussed above - See point 3 above) and the five year maximum time extension. Therefore the concession and all the operations carried out on the basis of this document should be considered to be violating Cameroonian national law, and, by corollary, as an investment in breach of applicable national and international law. For this reason, and as discussed below ( See point 4.15), our analysis leads us to suggest that that this operation should not be accorded the protection of the USA-Cameroon Bilateral Investment Treaty , which recognizes that “the treatment, protection and security of investment shall be in accordance with applicable national laws and international law,” and should be read as guaranteeing these legal rights (privileges) only to those investments that are in compliance with the national and international framework.<sup>72</sup>

#### **4.10. The Ministry of Forestry and Wildlife has found the existence of cases of bribery and corruption**

The results of a 2013 fact finding mission conducted by a team composed of the Geographical Information System (GIS) officer of the Cameroonian Ministry of Forest and Wildlife of the South West Regional Delegation and a Geographical Forecast area (GFA)/Forest and Wildlife Expert<sup>73</sup> serve as State-endorsed evidence of the non-

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Decree No. 76-166 of 27 April 1976 to Establish the Terms and Conditions of Management of National Lands, Cameroon: Terms and Conditions of Management. Available at: <http://www.atangana-eteme-emeran.com/spip.php?article22286> [accessed 31 March 2014].

72

Cf. M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, Third Edition, 2012 (affirming that the protection provided by the Fair and Equitable Treatment should be reserved only to those investments complying with the existing legal framework).

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The team was accompanied in Ndiang Division by the KN TOU assistant conservator and GFA National Forest Expert. Source [http://www.cameroonveritas.files.wordpress.com/2013/04/03\\_01\\_2013\\_report-fact-finding-mission-sgsoc.pdf](http://www.cameroonveritas.files.wordpress.com/2013/04/03_01_2013_report-fact-finding-mission-sgsoc.pdf) [accessed 31 March 2014].

transparent approach with which the company is conducting negotiations with the local chiefs. The report, which surveyed 20 villages, concluded that SGSOC has questionable operating practices in a range of areas. In the report, the NGO and Ministry representatives underline that the negotiation has been conducted with consistent use of intimidation and bribery, targeting only chiefs and some influential decision-makers of the communities. Extortion and bribery, if proved, would not only demonstrate the lack of legitimacy of SGSOC's operations, but would also undermine any purported legality of the project in dispute.<sup>74</sup> We also refer to the above discussion of the procedural and substantive shortcomings of Land Consultative Board meetings in §4.3.

#### **4.11. Illegal land markers**

The company started to place boundary markers on the lands of Cameroonian citizens and members of the community without warning or publishing any advance notification and information in this respect, nor with requesting the consent of the communities. Unilateral demarcation violates Articles 6 and 14 of the Decree 76-166 by preventing the Land Consultative Boards from making a decision on the lands needed by local communities, and also fails to allow for consultation of all necessary parties. Under the Decree, as discussed above (See point 4.1) this would be limited to village heads and elder. On the contrary, the practice that has been developed on the basis of the principle of international law requires the involvement of the entire community, in order to reduce the risk of 'elite's capture' and reduce internal tensions.<sup>75</sup> In addition, the right of people to their customary land as recognized by the African Commission on Human and Peoples' Rights, the right to FPIC, and the right to self-determination in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (among others),<sup>76</sup> clearly affirm that the unilateral and non-participatory demarcation of land, whether publicly or privately owned, constitutes a violation of international law by the Government of Cameroon for not intervening in defence of its citizens.

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<sup>74</sup>

*Ibid.*

<sup>75</sup>

Cf. Oxfam, Guide to Free, Prior and Informed Consent, June 2010, available from [http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent\\_0.pdf](http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf)

<sup>76</sup>

[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf), [accessed 31 March 2014].

The demarcation of land in violation of the Decree 76-176 is also contrary to the 2011 Common Commitments, and more precisely to Chapter I (1) according to which “The company shall fulfill the provisions of Decree 76-166 of April 1976. Consequently the company shall confide all works related to the survey, demarcation and the planting of beacons in the concession area to the statutory land consultative board and its technical services or to their supervision and fund all activities related thereto.”<sup>77</sup>

#### **4.12. Violation of the injunction issued by Cameroonian Courts**

On 31 August 2011, the High Court of Ndian Judicial Division, Southwest Cameroon issued an injunction against SGSOC in lawsuit No.: HCN/003OS/2011/1m/2011 ordering suspension of operations on the oil palm nursery. According to the court, SGSOC's operations were conducted against fundamental principles of international law and the company's commitment to comply with RSPO guidelines.<sup>78</sup> The injunction was then reversed in April 2012. However, SGSOC allegedly continued its operations after the injunction was issued, until February 2012.<sup>79</sup> Once more, if the evidence collected by local and international NGOs were to be confirmed,<sup>80</sup> the investment could not considered to be in full respect and compliance of Cameroonian law.

#### **4.13. Entrenchment over communities' land**

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<sup>77</sup>

Two Common Commitments concluded between the State of Cameroon and SGSOC are publicly available. One signed between SGSOC and the public authorities representing the Ndian Division (31 August 2011): <http://www.heraklesfarms.com/docs/CommonCommitmentNdianAug%202011.pdf> [accessed 31 March 2014] and one signed between SGSOC and the public authorities representing the Kupe-Muanenguba Division (15 August 2011): <http://www.heraklesfarms.com/docs/CommonCommitmentKMSept2011.pdf> [accessed 31 March 2014].

<sup>78</sup>

High Court of Ndian Division, Mundemba, Ruling No. HCN/003/2011/1M/2011.

<sup>79</sup>

See <http://newswatch.nationalgeographic.com/2012/03/20/open-letter-sounds-alarm-on-massive-oil-palm-development-in-cameroon/> [accessed 31 March 2014]. See also BBC Network Africa Radio April 20, 2012.

<sup>80</sup>

Cf. Cf. Greenpeace and the Oakland Institute, Herakles Exposed, available from [http://www.greenpeace.org/international/Global/international/briefings/forests/2013/Herakles\\_Exposed\\_Final.pdf](http://www.greenpeace.org/international/Global/international/briefings/forests/2013/Herakles_Exposed_Final.pdf)

In the illegal demarcation operations, the company appears to have encroached on the property rights of the communities affected. Reports include trespassing on private property<sup>81</sup> and on sacred sites and burial grounds.<sup>82</sup> The continuation of the company's operations would thus constitute a clear violation of the communities' collective property rights, as directly recognized by the African Commission on Human and Peoples' Rights,<sup>83</sup> the International Convention on the Elimination of all forms of Racial Discrimination<sup>84</sup> and the International Covenant on Civil and Political Rights,<sup>85</sup> and reaffirmed by the U.N. Treaty Monitoring Bodies (in particular the Human Rights Committee and Committee on Elimination of Racial Discrimination).<sup>86</sup>

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<http://www.greenpeace.org/international/en/news/Blogs/makingwaves/cameroon-communities-realise-what-herakles-fa/blog/46587/>, [accessed 31 March 2014].

82

[http://www.save-wildlife.net/downloads/save\\_the\\_forest/Response\\_C.\\_Fon\\_Achobang.pdf](http://www.save-wildlife.net/downloads/save_the_forest/Response_C._Fon_Achobang.pdf), [accessed 31 March 2014].

83

The Court has recognized the right to traditional property in a series of cases, where plaintiffs have not been defined as 'indigenous' but as 'people'. The right to traditional property is not, therefore, limited to indigenous communities. This happened in the case of the Ogoni, ex-slaves in Mauritania, all people of Southern Cameroon, and the Katangese. See, e.g., Communication No. 155/96: The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria (finding a violation of Article 21 and stating, at paragraph 58, that “the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs”); Communication Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98: Malawi African Association, Amnesty International, Ms Sarr Diop, *Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania* (finding a violation of Article 23 but not of Article 19); Communication No. 266/03: Kevin Mgwanga Gunme et al / Cameroon (finding violations of Article 19, among others), [http://www.achpr.org/files/sessions/45th/comunications/266.03/achpr45\\_266\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/45th/comunications/266.03/achpr45_266_03_eng.pdf); Communication 75/92: Katangese Peoples' Congress v Zaire (brought to the African Commission in terms of article 20(1) of the African Charter for an assertion of the Katangese peoples' right to self-determination – claim accepted, but no violation found).

84

Article 5 of the ICERD entitles all persons to freedom from discrimination and equality before the law, including with regards to the right to own property.

85

Article 27 of ICCPR protects the right of minorities to enjoy and develop the various attributes of their distinct cultures, including the right of indigenous peoples to maintain their cultural patterns relating to lands and resources (see Human Rights Committee General Comment 23).

86

The traditional rights of the people affected by Herakles Farms's project are protected, therefore, independently from their qualification as 'indigenous' communities, and for the sole fact of their relationship with the area. However, for a general overview of how international law protects

Moreover, the Common Commitments concluded in 2011 by SGSOC and the Cameroonian Government, specifically Article 1.1.3, declare that “the exploitable area of the company does not include... areas already occupied by villages for farmlands or residences”. It also stipulates full and adequate compensation where it becomes impossible not to encroach upon village land.<sup>87</sup> Thus far there has been no indication that SGSOC has respected either commitment. Rather, first-hand reports point the other way.<sup>88</sup>

#### **4.14. Unauthorized clearance of land**

In November 2012, the Minister of Forestry and the Wildlife, Philip Ngole Ngwese, authorized Herakles Farms to clear 2,500 hectares of land near the village of Talangaye, in the Nguti Subdivision, of the South-West division. On 22 April 2013, the Minister suspended authorisation of clearing of the site on account of the non-compliance of SGSOC with applicable rules and regulations.<sup>89</sup> In particular, the Minister found that SGSOC was felling trees without the permits required by relevant Cameroonian Forestry law.<sup>90</sup> In addition, between 14 and 18 May 2012, an Independent Observer from the European Union was authorized to join a mission conducted by the National Control Brigade in the sub-region of Kupe Muanengouba, in the South-West Region. During this mission, observations of the Independent Observer were consistent with those reported by other inspections: SGSOC has exploited land without authorization, and may have violated Articles 45(1) and 46(2) of Cameroonian land law. According to these Articles:

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indigenous people's rights to land and culture, See ILC scoping study, Indigenous peoples' rights to lands, territories and resources, available from <http://www.landcoalition.org/sites/default/files/DraftILCIndigenousPeoplesPeerReview.pdf> [accessed 31 March 2014].

<sup>87</sup>

<http://www.heraklesfarms.com/docs/CommonCommitmentNdianAug%202011.pdf>;

<http://www.heraklesfarms.com/docs/CommonCommitmentKMSept2011.pdf> [accessed 31 March 2014].

<sup>88</sup>

See above n 62 and n 63.

<sup>89</sup>

*Le Cameroun annule la première convention signée avec Herakles Farms.* Beaugas-Orain Djoyum, Agence Ecofin. Available online: <http://www.agenceecofin.com/industrie/2106-11871-le-cameroun-annule-la-premiere-convention-signee-avec-herakles-farms> [accessed 31 March 2014].

<sup>90</sup>

See <http://farmlandgrab.org/post/view/20496>, [accessed 31 March 2014].

**Article 45.**

*(1) Une vente de coupe dans une forêt domaniale de production est une autorisation d'exploiter, pendant une période limitée, un volume précis de bois vendu sur pied et ne pouvant dépasser la possibilité annuelle de coupe.*

[...]

(A Sales of Standing Volume over public production forest land is an authorization to exploit, for a limited period, a specified amount of unfelled wood not exceeding the annual amount permitted.)<sup>91</sup>

**Article 46.**

*(2) La convention d'exploitation forestière est conclue pour une durée de quinze (15) ans renouvelable. Elle est évaluée tous les trois (3) ans.*

(The Convention on Forest Management is concluded for a duration of fifteen (15) years and is renewable. It will be re-evaluated every three (3) years.)<sup>92</sup>

Accordingly, the violations of Article 45 and 46 would subject SGSOC to the penalties introduced by Article 158(2) and 159 of Law 94/01 of 20 January 1994 on the legal regime concerning forests<sup>93</sup>. More precisely:

**Article 158**

*Est puni d'une amende de 3 000 000 à 10 000 000 francs CFA et d'un emprisonnement de un (1) an à trois (3) ans ou de l'une seulement de ces peines l'auteur de l'une des infractions suivantes :<sup>94</sup>*

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<sup>91</sup>

Translation by the authors.

<sup>92</sup>

Translation by the authors.

<sup>93</sup>

*Observateur indépendant au contrôle forestier et au suivi des infractions forestières au Cameroun,* Mission Report N° 040/OI/AGRECO-CEW, June 2012.

<sup>94</sup>

USD\$6,372.57 to USD\$21,241.90 per exchange rate on 18 April 2014.

(The perpetrator of one of the following infractions will be fined between 3,000,000 and 10,000,000 CFA francs and be imprisoned for one (1) to three (3) years, or be sanctioned by only one of these:) [...]

*-l'exploitation au-delà des limites de la concession forestière et/ou du volume et de la période accordés, en violation des Articles 47 (4) et 45 ci-dessus, sans préjudice des dommages et intérêts sur les bois exploités, tels que prévus par l'Article 159 cidessous*

(Logging in an area beyond that allowed by the land concession and/or logging an amount exceeding that allowed and/or logging outside of the stipulated time period, in violation of Articles 46(4) and 45 above, without prejudice to damages for the felled wood, as provided by Article 159 below)[...]<sup>95</sup>

#### **Article 159**

*Les dommages et intérêts relatifs aux bois exploités de façon frauduleuse sont calculés sur la base de l'application de la valeur mercuriale entière en vigueur sur les essences concernées.*

(Damages for fraudulently felled wood shall be calculated according to the total market value of the concerned species.)<sup>96</sup>

However, on 29 May 2013, the Minister reversed his suspension, without mentioning the previous conduct of Herakles Farms and the illegal logging. In his communication, he stated that:

*"J'ai l'honneur de vous faire connaitre que la mesure suspensive de l'autorisation d'abattage des arbres sur le site de votre projet agro-industriel sis à Talangaye,*

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Translation by the authors.

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Translation by the authors.

*arrondissement de Nguti, région du Sud-Ouest, édictée par ma correspondance susvisée, est levée à compter de la date de la signature de la présente dépêche.*"<sup>97</sup>

(I am pleased to inform you that the suspension of logging authorization on the site of your agro-industrial project, situated in Talangaye, sub-division of Nguti, in the South-West region, decreed by my correspondence mentioned above, is lifted from the date of signature of this communication.)<sup>98</sup>

In any case, the reversal of the ban and the recent concession contained in the Presidential Decrees are conditioned upon the continued respect of applicable regulations, as indicated by the Minister in the same communication of May 2013:

*"Je vous rappelle à cet égard que les opérations d'abattage doivent se dérouler conformément aux lois et règlements en vigueur, sous la supervision du délégué régional des Forêts et de la Faune du Sud-Ouest."*<sup>99</sup>

(In this regard, I remind you that the logging operations must be carried out in conformity with the laws and regulations in force, under supervision of the South-West Regional Officer for Forestry and Wildlife.)<sup>100</sup>

The concessions, although legally granted, cannot retroactively legalize previous illegality and violations of Cameroonian law.

In addition, and in terms of Cameroonian forestry law, any further tree felling will require an *Autorisation d'enlèvement de bois abattus* (AEB) – provided by the Minister himself, which is only granted to accredited logging companies, and not to oil palm producers.

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<sup>97</sup>

<sup>98</sup> USD\$6,372.57 to USD\$21,241.90 per exchange rate on 18 April 2014.

<sup>99</sup> Translation by the authors.

<sup>100</sup> *Ibid.*

Translation by the authors.

#### 4.15 Investment Arbitration

Both the 2009 Establishment Convention and the recent ‘Common Commitments’ concluded between SGSOC and the Senior Divisional Officers of the two Divisions concerned<sup>101</sup> contain an a direct reference to the mechanism of dispute resolution indicated in the 2009 Establishment Convention.<sup>102</sup> Moreover, Cameroon and the U.S. signed a Bilateral Investment Treaty in 1986 for the mutual promotion of investments. As discussed above, the possibility for the company to unilaterally sue the Cameroonian State for a violation of the Treaty or of the Convention risks producing a chilling effect of the exercise of national regulatory authority.

However, as we discuss in a separate brief which has not yet been published, investment arbitration would provide the Government of Cameroon with a venue to denounce the breaches of the investor and its lack of good faith. If the alleged violations of Cameroonian law were proved (for example those indications that corruption and bribery of the local chiefs took place in order to obtain the land permits, the breach of the judicial injunction issued in 2011, or the clearing of forest in violation of the national environmental law), Cameroon could decide to stop the project for a legitimate cause, and the investor may not be guaranteed protection by an arbitral tribunal.

Looking at the precedents, in the *World Duty Free v Kenya* case the ICSID tribunal did not recognize its jurisdiction over a contract-based claim because of corruption. In the more recent *Metal-Tech v Uzbekistan* case, the ICSID tribunal affirmed that Metal-Tech's investment was not protected by the Bilateral Investment Treaty between Uzbekistan and Israel because the violation of Uzbek law by the investor amounted to a violation of the BIT, and in particular of the requirements that investments are undertaken in conformity with the law of the host country. Therefore, the panel decided that Metal-Tech could not

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<sup>101</sup>

Cf. supra n 64.

<sup>102</sup>

Article 6 states that: “Litigations between the state and the company shall be solved in accordance with the practice and procedure stated in the convention referred to here above.”

benefit from a provision in the BIT that incorporated more favourable standards of treatment found in domestic law.<sup>103</sup>

#### **4.16. Illegal detention of and repeated threats towards NGO members**

On the morning of 14 November 2012, Cameroonian Police officers raided the premises of Struggle to Economize Future Environment (SEFE) in Mundemba, an NGO that has publicly criticized SGSOC. Five members of SEFE, namely Mr. Nasako Besingi, Ms. Ekpoh Theresia Malingo, Mr. Isele Gabriel Ngoe, Mr. Mosongo Lawrence Namaso and Mr. Nwete Jongele were all arrested without warrant and were detained in squalid conditions for three days. According to the available data, on that day “over 15 heavily armed Gendarme officers led by Brigade Commandant Luc Evoundou raided the premises of SEFE in Mundemba, a private property, where over 50 members of the local population had come to get T-shirts that were prepared for a peaceful campaign against the company.”<sup>104</sup>

Their release was conditioned upon payment of bail of 750,000 FCA francs,<sup>105</sup> and they were required to appear before the *Gendarmerie*'s legal department on 4 December 2012. Since that day, the hearings, and in particular the hearing of the prosecuting witnesses, have been postponed five times, a conduct that can be characterized as judicial harassment. However, the detention for the organization of an allegedly illegal public meeting, is also contrary to Cameroonian law. According to article 26 of the Cameroonian Penal Code, detention is only prescribed following the commission of a crime or of a political offence,<sup>106</sup> yet those in question were not charged with neither of these.

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<sup>104</sup> *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3).

<sup>105</sup> *Cameroon: Arbitrary arrest of and judicial harassment against Mr. Nasako Besingi and four SEFE collaborators*. World Organization Against Torture. Urgent Appeal – The Observatory. CMR 001 / 1112 / OBS 111. Available at: <http://www.omct.org/human-rights-defenders/urgent-interventions/cameroon/2012/11/d22048/>

<sup>106</sup> USD\$1,593.14 based on exchange rate as of 18 March 2014.

Article 26 Cameroon Penal Code

Indeed, the arbitrary detention suffered by SEFE members was also contrary to the African Charter on Human and Peoples' Rights, an integral part of the Cameroonian Constitution.<sup>107</sup> Article 6 thereof states “every individual shall have the right to liberty to the security of this person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”.<sup>108</sup>

In order to defend the freedom of assembly and the physical integrity of the members of SEFE and Nature Cameroon, in January 2014 eighteen organizations, including the Sciences Po Law Clinic, signed a letter addressed to the U.N. Special Rapporteur on the Right to Food, the Independent Expert on Human Rights and the Environment and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, with the hope that their intervention will provide Cameroonian organizations with relief and with the full recognition of their rights.<sup>109</sup>

#### **4.17. The project itself may have serious consequences in terms of respect for human rights and the environment**

All the circumstances above demonstrate that there are several reasons for which the Herakles Farms projects should warrant further investigation, especially in relation to its operations in Cameroon. Economic growth cannot be unconstrained by considerations of human and social development, improvement of living conditions, the respect of human rights and the right to participate in the definition of one's future. Should the full project be started and the entire area cleared of trees and of local populations, it could have serious consequences in terms of fundamental human rights, most significantly on the local populations' right to food, right to livelihood, right to collective and traditional property, and the right to culture, all cited above.

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<sup>107</sup>

See above n 33.

<sup>108</sup>

Article 6 African Charter

<sup>109</sup>

Cf. La Clinic de Sciences Po s'engage. <http://master.sciences-po.fr/droit/contenu/projet-h-rakl-s-la-clinique-s-engage> [accessed 31 March 2014].

In fact, the current UN Special Rapporteur on the Right to Food, Olivier De Schutter, highlighted this imminent danger during his last visit to Cameroon. Firstly, Mr. De Schutter confirmed the studies showing that indigenous communities in Cameroon are particularly at risk when it comes to enjoyment of the right to adequate food. Although he welcomes the various efforts undertaken to combat discrimination against indigenous peoples and to ensure attention in addressing this issue in public policymaking, he encourages the Government to build upon these efforts and give specific recognition to indigenous groups as stipulated by international law .<sup>110</sup>

In terms of the national legal framework, the Special Rapporteur emphasized the importance of guaranteed essential rights (freedom of expression, peaceful assembly, access to an independent and impartial justice system, etc.) and noted that the right to food must also be respected as a compulsory component. For instance, he recalls “the obligations established under the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,”<sup>111</sup> adopted by the UN General Assembly Resolution 53/144 (1999).

Cameroonian citizens have both witnessed, and consequently become a target of, land acquisition strategies developed by international investors - specifically the transfer of 111,000 hectares of arable land, which are currently being transferred in the form of concessions to foreign investors. This is one quantitative example highlights the clearly insufficient protection of of hunter-gatherer and nomadic agricultural communities in Cameroon. . Moreover, the Special Rapporteur has been informed that traditional chiefs, at times, cede land occupied by communities according to customary law without any compensation being given to individual members of those communities. Moreover, legal ambiguities concerning the occupation of the land, the respect of the environment, the use

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<sup>110</sup>

A/HCR/22/50/Add.2 Section on Indigenous Peoples, p. 6

<sup>111</sup>

A/HCR/22/50/Add.2 Section on Legal Framework, p. 8

of water, the access to non-forestry products, and other issues highlighted in this report, could negatively impact the accomplishment of the promises in terms of revenues, jobs, and improvement of the life conditions that the investor made both to the communities and the Government of Cameroon. This may lead to the possibility of local communities not making a profit from the exploration activities because of competing claims on a given piece of land ceded in accordance with the concessions granted for agro-industrial plantations and mineral exploration. Therefore, the Rapporteur calls upon the parties involved to conduct a full review that studies the land tenure system with a view to guarantee the land users their rights, and to create a legal framework to avert the possibility of multiple title disputes in the future.<sup>112</sup>

## **5. Conclusion**

The Land and Investments Group and the Sciences Po Law Clinic strongly believe that economic growth cannot be pursued in a way which is detached from considerations for human and social development, improvement of living conditions, the respect for human rights and the right to participate in the definition of one's future. In this approach, law may be an instrument for powerful private interests, which have a stake in the development equation. It can however also limit those interests, and serve as a national and international normative foundation to uphold individual and peoples' rights. ...

This report has attempted to underline and comment on critical legal aspects that emerge from the analysis of Herakles Farms' operations in Cameroon. The situation is not yet irremediably compromised, but requires a rapid intervention by local and international actors in light of its urgency and exceptional character. This group hopes that this report will stimulate further legal reflections, considerations, and interventions by local and international actors, including in France, to encourage and enforce immediate corrective measures which would lead to the suspension of the project. At the minimum, this group calls for a Human Rights Impact Assessment of the Herakles Farms project by an

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A/HCR/22/50/Add.2 Section on Access to Productive Resources, p. 11-12.

independent expert. Lastly, we consider it extremely important to continue intellectual, practical and economic support in favour of African communities and their struggles for self-determination, starting with the Herakles Farms case, but more generally with regards to the the increasing number of large-scale investments in Sub-Saharan land.

Sciences Po Law Clinic – The Law and Investment Group