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Land Governance for Equitable and Sustainable Development

POLICY BRIEF **02**

Governing large-scale farmland investments in sub-Saharan Africa

Challenges and ways forward

George C. Schoneveld

Key points

- Large-scale farmland investments in sub-Saharan Africa have to date produced largely negative local socio-economic and environmental outcomes.
- This study attributes these outcomes to eight interrelated factors, namely, (1) deficiencies in the law, (2) elite capture, (3) conflicts of interests, (4) capacity constraints, (5) modernist ideologies, (6) limited contestation, (7) incompatibility of production systems, and (8) misalignment of corporate accountability.
- The findings also highlight the risks associated with decentralisation, and the need for greater caution when adopting free, prior and informed consent (FPIC) principles.
- The apparent ease with which existing statutory safeguards are ignored suggests that greater emphasis should be placed on institutional, rather than legal reform in host countries.

Background

Large-scale land investments in Africa

Since the food and energy price crises of the mid 2000s, farmland has become an increasingly important asset. Many private investors have sought access to large areas of land suitable for agriculture. Often, they seek to capitalise on favourable long-term prospects within international food and biofuel markets or speculate on rapidly rising land values. This ultimately leads many investors to Africa, where land is comparatively cheap and ostensibly abundant. Since the onset of the commodity price crises in 2005, an estimated 21.73 million ha has been acquired for such purposes across sub-Saharan Africa (Figure 1).

Although these investments could potentially make valuable structural contributions to rural poverty alleviation objectives, early evidence instead suggests that most investments are synonymous with poor labour conditions, dispossession, and environmental degradation. Since most lands in Africa are governed by customary institutions and laws, as opposed to legal statutes, user rights over land are often insecure and thus subject to involuntary expropriation.[1] These threats are exacerbated by the relatively weak implementation and enforcement capacity of the state. Moreover, deregulation and market liberalisation reforms of the 1990s have encouraged many African governments to compete for Foreign Direct Investment (FDI), thereby undermining efforts to more stringently regulate corporate conduct.[2]

The importance of host country governance

Much of the academic and political debate on the governance of farmland investments has focused on private international

1 Alden Wily, L. 2012. Looking back to see forward: the legal niceties of land theft in land rushes. Journal of Peasant Studies, 39(3-4): 37-41.

2 Jenkins, R. 2005. Globalization, corporate social responsibility and poverty. International affairs, 81(3): 525-540.

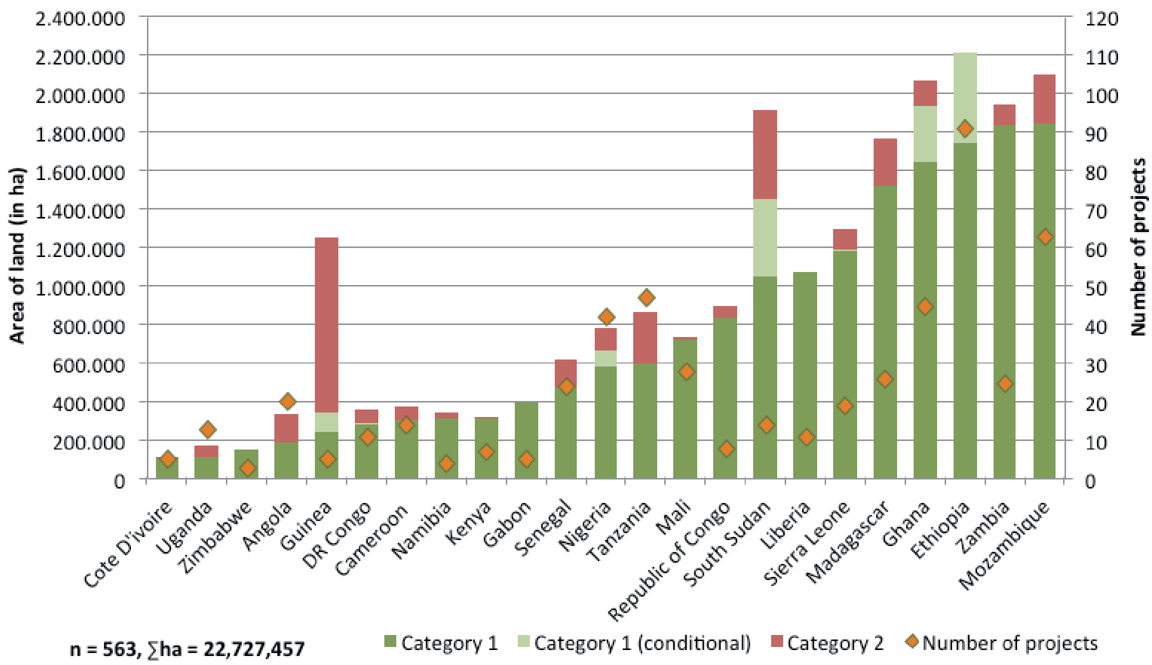

Figure 1: Major investment destinations (> 2,000 ha), by total land area acquired

Note: Category 1 includes all data that has been verified through reliable sources (involving also investments that have been allocated conditional leasehold titles); Category 2 data consists of data that has not been verified, though has been triangulated. Source: Schoneveld, G.C. 2014. The geographic and sectoral patterns of large-scale farmland investments in sub-Saharan Africa. Food Policy, 47.

regulatory instruments, such as codes of conducts, third party certification systems, and banking due diligence. While certification in particular is gaining reputational value and in some parts of the world is proving effective at influencing industry practice, in Africa adoption rates have been negligible – concerning at most 0.2% of the total area acquired since the commodity price crises. Similarly, sustainability standards imposed by some financial institutions relate primarily to project financing, which constitutes a negligible part of total corporate financing.[3] Various efforts to develop binding international regulations through the UN system on the conduct of transnational corporations have been foiled by corporate lobbyists and Northern governments.[4] Citing WTO rules on protectionism and violation of host country sovereignty, many investor country governments are reluctant to impose excessively rigid regulations on extra-territorial production and trade. Voluntary approaches and downstream regulations to date have less scope for impact than 'harder' host country regulations. Consequently, the burden of governing farmland investments lies largely with host governments, which in the African context tend to be disinclined or ill-equipped to provide the necessary oversight.

The study

This Policy Brief synthesises key findings from a series of studies conducted on the governance of large-scale farmland investments in Ethiopia, Ghana, Nigeria, and Zambia. Not only are these important investment destinations, but they

3 Gelder, J. van, and Kouwenhoven, D. 2011. Enhancing financiers' accountability for the social and environmental impacts of biofuels. CIFOR Working Paper 60. Center for Intentional Forestry Research, Bogor, Indonesia.

4 Clapp, J. 2005. Global environmental governance for corporate responsibility and accountability. Global Environmental Politics, 5(3): 23-34.

also constitute a diverse cross-section of African governance systems. Ghana and Zambia are some of Africa's most democratic and open economies, with comparatively far-reaching protection of customary property regimes. Ethiopia, on the other hand, is one of the most authoritarian, centrally planned, economies in Africa, with few customary claims to land protected by statutory law. Nigeria falls somewhere in the middle on these dimensions. A total of 38 projects were sampled across the four countries, ranging in size from 1,000 ha to 303,749 ha, involving the acquisition of a total area of 1,048,437 ha. The projects involve a diversity of crops, including food crops such as maize, wheat and rice, cash crops such as cotton, sugarcane, rubber and oil palm, and biofuel feedstocks such as jatropha.

Table 1: Impact mitigation measures adopted by investors

Type of initiative	Total
Contract farming schemes	0.0%
Provision of inputs	0.0%
Alternative livelihood initiatives	3.7%
Preferential hiring policies	3.7%
Community development funds	3.7%
Physical infrastructure	7.4%
Training and development	11.1%
Compensation	13.2%
Periodic royalties	40.7%
Investors that adopted one or more mitigation measures	*48.1%*

Investments have negative local outcomes

Despite the diversity of governance contexts, the studies show that local socio-economic and environmental impacts of investments are largely negative. All sampled projects involved the conversion of one or more ecologically and socially significant land uses. An estimated 68% of the area acquired by the sampled projects involves forest-agriculture mosaics, which are characterised by patches of secondary forests, herbaceous and woody fallow, and small-scale cultivated plots used primarily for subsistence agriculture. Investments in these types of landscapes typically involve extensive displacement of smallholder farmland and loss of access to forest resources. Usually the landholdings of between 75 to 200 households are displaced for every 1,000 ha converted. Most investments outside these mosaics were found to be located within high conservation value landscapes, which often are legally designated as nationally protected areas. This includes, for example, tropical high forests, wildlife abundant shrub- and grasslands, and wetlands.

Displacement
Investments that involve displacement of smallholder farmers resulted in declining agricultural outputs, which in turn undermined local food and income security. Loss of access to non-timber forest products (NTFPs) and other common pool resources further exacerbated these insecurities, since this reduces household capacity to maintain diversified livelihood portfolios and fall back on traditional consumption smoothing strategies. With suitable land becoming increasingly scarce, recovery of lost landholdings often became a function of one's capacity to engage in financial exchange or exploit social networks. As a result, traditionally marginalised groups, such as women, ethnic minorities, and migrants, were often least able to recover from dispossession. In more remote areas occupied by communities that rely primarily on land extensive pastoral and forest-based production systems, investments tended to upset seasonal production patterns and incited territorial disputes. Many affected communities were, for example, forced to encroach onto the land of neighbouring communities to regain access to lost resources.

Mitigation measures
Most companies failed to adopt the necessary remediation measures to mitigate or alleviate the negative impact of loss of access to livelihood resources (Table 1). For example, none of the companies developed contract-farming schemes to support smallholder integration into global commodity chains or provided inputs to enable intensification. The most common contribution to local communities was the payment of royalties, though in all but two cases these were appropriated by customary elites and not used for community development purposes. While compensation was occasionally paid, these typically covered individual landholdings, not common pool resources. Only one project offered replacement land in lieu of cash compensation.

Limited employment benefits
While investment projects generate employment, project-affected persons rarely considered this to adequately offset lost production. Casual labour is the most abundant and locally accessible form of employment, offering between two and five months of employment per year (typically during planting, weeding, and harvesting). Despite the relative abundance of such employment opportunities, participation of project-affected persons was limited. With many households expressing a disinterest in plantation employment, in practice it was often only 'idle' household members that were engaged in plantation employment. More secure and technical employment opportunities were largely allocated to 'outsiders' with specialised prior experience in plantation agriculture.

Eight outcome determinants

The findings suggest that large-scale farmland investments across the four countries have so far had only few benefits for affected communities and have led to the conversion of ecologically significant landscapes. This uniformity of outcomes can be attributed to eight interrelated factors.

1. Deficiencies in the law

All four countries have progressive environmental legislation, which requires most investors to conduct an Environmental and Social Impact Assessment (ESIA). This is intended to inform project siting and to ensure that communities are consulted and appropriate impact mitigation measures are adopted. Still, the study identified three structural deficiencies related to the legal regulation of farmland investments. Firstly, rules that govern customary land (use) rights are inadequate (Table 2). For example, all four countries lack sufficiently comprehensive provisions to consult and elicit the consent of land users about impending land alienations. The limited legal rights to subsequent land revenues, such as ground rent, which in all countries except Ghana is appropriated in their entirety by government, deprives project-affected persons from an opportunity to recover lost assets. The second issue relates to weaknesses in the procedures for identifying land. In Ghana, Nigeria, and Zambia, no formal regulations and procedures are in place to identify and allocate available land. The only areas off-limit to agricultural investors are protected areas, such as national parks. The third issue relates to the limited mechanisms to capture the potential developmental opportunities of investments. For example, except for the Agricultural Investment Land Administration Agency (EAIAA) in Ethiopia, there are no government institutions that are mandated to promote spillovers. None of the countries have legislation in place that either stipulate investors' obligations to community development or require provisions to such effect to be incorporated into leasehold contracts or investment permits.

2. Elite capture

In the absence of sufficiently rigorous checks and balances, in Ghana, Nigeria, and Zambia, customary authorities were found to reap substantial benefit from the alienation process. Chiefs typically received large one-off cash contributions, periodic royalty payments, new vehicles and 'palaces'. In all three countries, chiefs exhibited considerable personal entitlement to land and its proceeds. Governments tended

to foster chieftaincy relations (e.g., as a means to mobilise communities) and were reluctant to interfere in chieftaincy affairs. In Nigeria and Zambia highly placed politicians frequently supported investors in acquiring land and liaising directly with chiefs to encourage land alienation, often without clarity about the capacity in which they acted. In Ethiopia issues of elite capture were not apparent to the same extent. This can partially be credited to the recentralisation of land allocation functions to the federal level. Prior to 2010, when regional and district governments were still the primary agents of alienation, corruption in the alienation process was reportedly rampant.

3. Conflicts of interest

In all the countries except Zambia, lower levels of government are the primary recipients of most land revenues generated from investment. Within these decentralised governance structures – where district and regional governments are increasingly held accountable for revenue generation – district officials facilitate land-based investments, because these are more lucrative revenue sources than the rural subsistence economy. With most investors making commitments towards the construction of physical infrastructure, the alleviation of the burden of service delivery further reinforces this tendency. Local governments are thus tempted to respond to the needs of investors, rather than to the needs of local communities.

Table 2: Parameters on customary rights protection

Type of provision	Ethiopia	Ghana	Nigeria	Zambia
Customary ownership recognised	×	✓	×	×
User rights are protected from expropriation for investment	×	×	×	✓
Consent of community representatives required	×	✓	×	✓
Consent of community required	×	×	×	×
Community consultations required	×	×	×	✓
Right to compensation for loss of farmland	✓	×	✓	×
Right to compensation for loss of settlements	✓	×	✓	×
Right to compensation for loss of common pool resources	×	×	×	×
Right for communities to share in land revenues	×	✓	×	×
Performance conditionalities in title	✓	×	×	×
Maximum allowable size of title	✓	×	×	×

Within the central government, investment promotion agencies (IPA) often have conflicting mandates, being charged with promoting investment, as well as with providing regulatory oversight (e.g., issuing permits and compliance monitoring). Such conflicts of interest are often compounded by co-optation. For example, many cases were observed of ex-politicians being allocated senior management roles at projects or of project managers entering public service, and of government officials being hired on the side as 'consultants' or fully or partly owning investment projects. Moreover, chiefs and their kin were frequently allocated salaried positions at projects. In Ghana, chiefs also commonly received a share of company profits. This blurring of public-private boundaries confounds existing accountability and incentive structures.

4. Capacity constraints

In all four countries, environmental protection agencies (EPAs) tend to be understaffed and underfunded. As a result, none of the EPAs were in a position to adequately monitor whether projects had met their ESIA requirements or adhered to other environmental legislation. For instance, only 10 of the 38 sampled projects had completed an ESIA at the time of research, and 13 projects comprised lands located within protected areas. Other government agencies typically failed to liaise with or support environmental agencies in ensuring investor compliance, since these were perceived as 'obstructing development'. Despite ratification of relatively progressive environmental laws, in none of the countries are these sufficiently institutionalised. Most environmental policies and ESIA procedures are not products of internal domestic pressures, but largely of bi- and multilateral politics and technical support. This implies that context-specific realities are not adequately captured in procedural and institutional design, and that newly formed institutions like the EPAs are neither budgetary priorities nor adequately supported by other sectoral ministries.

5. Modernist ideologies

The actions by the state are typically justified and legitimised by rationalising narratives on the virtues of private sector investments. Without exception, agricultural investments are actively promoted for their potential to contribute to an array of official policy objectives; ranging from food security and foreign exchange earnings to poverty reduction and employment generation. Land without houses or permanent crops is seen as 'unproductive', land uses involving fire or itinerancy are 'environmentally destructive', and agro-pastoralism is 'backwards'. Particularly in Ethiopia, investments were also seen as a tool to gain greater territorial control over peripheral (tribal) communities by promoting integration into the formal economy and encouraging sedentarisation. While such discourses resonate strongly across the various layers of government, westernised notions of modernity also abound within affected communities. Almost all researched communities were sympathetic to investments. At least initially, communities held high expectations of well-remunerated employment, improved access to physical infrastructure, such as schools, hospitals, electricity and clean water, regional prominence, and urban amenities. Such expectations often serve to legitimise elite capture, undermine contestation, and discourage affected persons from demanding just compensation.

6. Limited contestation of rights infringements

Dispossession was rarely contested. While the high expectations of future development prospects formed an important inhibiting factor, collective action was also actively discouraged and suppressed by (alliances of) local district governments and chiefs. There were generally only few viable independent pathways for affected land users to seek redress beyond those through which land was originally acquired (chiefs and government). Although many communities in theory had legal grounds for contesting rights infringement, in only one case in Zambia (which was ruled in favour of the investor) were any actions taken before the judiciary. Moreover, since chiefs are typically considered to be the 'custodians of tradition', by holding the power to define what constitutes customary law, it is difficult to hold chiefs accountable through customary conflict resolution channels. Although civil society organisations (CSOs) could play an important role in assisting communities in overcoming these barriers to contestation, in practice they often missed the most important window for contestation, i.e., prior to alienation. This can partially be attributed to the opacity of the land negotiations.

7. Incompatibility of production systems
Only few affected communities were able to effectively capture project benefits. In the case of employment, most households were unprepared to sacrifice traditional livelihood activities or considered employment to be socially undesirable. This can be attributed to social identities derived from traditional livelihood activities (notably hunting and pastoralism), negative social stigmas of plantation labour (in Ethiopia and Nigeria this was associated with poor, landless migrants), fear of loss of nutritional self-sufficiency, insecurity of casual employment, and low salaries. Since the more accessible forms of employment are most abundant during intensive local farming months, employment is largely a complementary livelihood activity taken up by those not actively engaged in other economic activities (e.g., women and youths). At the time of research none of the investors had implemented contract-farming schemes, largely for fear that such schemes would promote estate theft.

8. Misalignment of corporate accountability
The studies found a lack of meaningful accountability between companies and communities. Often the state was the only contractual counterpart of investors and it was typically the responsibility of the state to ensure that the land was free from encumbrance and that all existing interests in land were dealt with before allocation. In the absence of tripartite agreements, many investors were unwilling to accommodate or engage discontented communities. Since leasehold contracts rarely detailed any far-reaching commitments towards host communities, companies had few incentives to actively foster company-community relations. That said, powerful chieftaincy institutions did prompt many investors to actively seek a 'social license to operate'. Governments too actively sought chiefs' endorsement for alienation in order to absolve themselves from responsibility in case conflicts arise. As a result of an 'inequality of arms', lack of (state) intermediation, and elite capture, many investors were, however, able to negotiate highly one-sided contracts that would see social demands relegated to mere verbal commitments. Most sampled investors were disinclined to adopt elaborate and inclusive corporate social responsibility strategies when these were not contractualised.

Implications of the research findings

Institutional reform
While the studies revealed numerous deficiencies in land and investment laws, the apparent ease with which statutory safeguards are ignored points at more important underlying institutional issues. Findings suggest that reforms should address the following, mutually reinforcing, institutional conditions. Firstly, institutions require clearly defined legal mandates. Clarity of mandate will also deter conflict of interest – for example, IPAs with investment promotion and compliance monitoring mandates and district governments with regulatory and fundraising mandates will create situations where one of the two functions is compromised. Secondly, human and financial capacity are key to effectively carrying out legislated mandates. Inadequate manpower and funding severely limit the effectiveness of potentially valuable instruments such as the ESIA. Thirdly, perverse incentives that encourage the state to wrest away land from the customary domain should be removed, while incentives promoting inter-institutional collaboration, community representation, monitoring, and benefit sharing should be introduced. Lastly, accountability is crucial. This involves the implementation of rules that ascribe sanctions in case of failure to follow legal mandates. It also involves the development of appropriate frameworks and procedures that facilitate aggrieved actors to demand accountability in case of non-compliance.

Decentralisation vs. recentralisation
While decentralisation is widely supported for enhancing state responsiveness to society and enhancing downwards accountability, in the context of the studies discussed here few such benefits were apparent. Without meaningful popular participation, greater fiscal autonomy has given rise to decentralised rent-seeking and corruption. The centralised investment governance system in Ethiopia thus does have some merits; for example, in harmonising and simplifying land identification and allocation practices and compliance monitoring. This has also eliminated the conflicting interests of district governments and the opportunity for investors to engage in 'forum-shopping' – seeking out those local state and non-state actors most amenable to rent capture and co-optation. Centralised implementation, however, also has its risks, as it could serve to concentrate power and rent capture and undermine downwards accountability.

Cross-sectoral reform
When certain land users are better protected (e.g., through legal rights to compensation), the government may target common property resources, more vulnerable land users who have no legal claims (e.g., encroachers onto state land), and lands of high conservation value. Such leakage and

displacement effects can only be offset with comprehensive cross-sectoral reforms, involving the recognition of the entire system of rights, including secondary, overlapping, and periodic rights, and adequate enforcement of environmental protection laws. This is an important challenge, considering the piecemeal approach of most reform initiatives.

Free, prior and informed consent

The principles of free, prior and informed consent (FPIC) form the basis of many voluntary certification schemes, due diligence protocols, and international declarations. They have gained universal acceptance as a tool for strengthening indigenous rights, improving local bargaining power, and promoting more equitable outcomes when communities negotiate with more powerful state or corporate actors. However, findings show that because of unrealistic expectations there is a real risk that, even when well informed, many communities will be easily swayed into relinquishing their landholdings. In such cases, FPIC will only serve to legitimise land alienation. Moreover, in the context of common pool resources, what constitutes 'community consent' is a fuzzy concept. Communities are not homogenous and consist of social hierarchies with layers of rights that could have substantial bearing on consensus forming processes. The widespread deference to chiefly authority and subordination of minority groups brings numerous additional complications to operationalising and formalising FPIC. Hence, FPIC should not be used as the sole determinant for evaluating the legitimacy and social viability of land alienation. Additional safeguards are necessary to ensure that projects do not compromise food and income security or disproportionately disadvantage specific stakeholder groups.

Policy recommendations

1. Identification of legal and institutional reform needs within host countries.

Reform initiatives would benefit from application of participatory diagnostic tools such as the World Bank's Land Governance Assessment Framework (LGAF). LGAF indicators could, however, be better aligned with 'best practice' guidelines and codes of conducts, such as the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and the Principles for Responsible Agricultural Investment (PRAI), and should capture the four institutional reform priorities identified above.

2. Formation of multi-stakeholder platforms involving civil society, the private sector, and the government to identify reform priorities and design reform initiatives.

These platforms should act as focal points for channelling and harmonising related initiatives (e.g., VGGT, PRAI, African Land Policy Initiative, Global Land Tool Network, and projects falling under the Global Donor Working Group on Land).

3. Prioritisation of technical and financial support to initiatives that address structural institutional issues.

Rather than a narrow focus on 'capacity development' to promote legal reform (as is the case with many donor projects), projects should aim to alter established power and control structures that undermine regulatory reforms.

4. Establishment of new National Contact Points and exploration of synergies between initiatives to ensure corporate compliance with 'best practices'.

National Contact Points (NCP) that support the implementation of the OECD Guidelines on Multinational Enterprises could extend their mandate to promote corporate adherence to other related (and overlapping) initiatives such as VGGT, PRAI, the UN Guiding Principles on Business and Human Rights, and the Guiding Principles on Large-Scale Land Based Investment of the Land Policy Initiative (LPI) that are currently under development.

5. Promotion of 'articulated regulation'.

There is a need for greater complementarity between the different hard and soft regulatory approaches operating at various scales. This can be achieved through:

- Promoting adherence to voluntary guidelines, certification, and quality standard schemes by introducing tax credits and subsidies.
- Making access to finance and markets conditional on conformance to voluntary guidelines, certification, and quality standard schemes. This could be incorporated into national or regional trade regulations or through initiatives targeting financial institutions.
- Transposing guiding principles into international law through the UN system.
- Facilitating public scrutiny by introducing regulations or incentives in consumer countries to obligate Environmental, Social, and Governance (ESG) reporting, also of non-stock-exchange-listed corporations (e.g., based on the Global Reporting Initiative guidelines).

Research and publications

About

This Policy Brief is a synthesis of the author's Ph.D. dissertation, entitled *The governance of large-scale farmland investments in sub-Saharan Africa: A comparative analysis of the challenges for sustainability*, published by Eburon Publishers. The research was conducted as part of the IS Academy on Land Governance for Equitable and Sustainable Development (LANDAc), one of the Academies for International Cooperation sponsored by the Netherlands Ministry of Foreign Affairs, and with support from the Center for International Forestry Research (CIFOR). For more information, visit: **http://www.landgovernance.org**

Contact

George C. Schoneveld: g. schoneveld@cgiar.org

Selection of publications

- Schoneveld, G.C., German, L.A., and Nukator, E.D. 2011. Land-based investments for rural development? A grounded analysis of the local impacts of biofuel feedstock plantations in Ghana. Ecology and Society, 16(4): 10.
- Schoneveld, G.C. 2014. Politics of the forest frontier: Negotiating between conservation, development, and indigenous rights in Nigeria. Land Use Policy, 38: 147-162.
- Schoneveld, G.C. 2014. The geographic and sectoral patterns of large-scale farmland investments in sub-Saharan Africa. Food Policy, 47.

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Contact

LANDac is based at International Development Studies, Utrecht University

Address
LANDac, attn. Gemma Betsema
International Development Studies
Human Geography & Planning
Faculty of Geosciences
Utrecht University
PO Box 80 115
NL-3508 TC UTRECHT
The Netherlands

landac.geo@uu.nl
www.landgovernance.org