# ISDREPORT

# Making Investment Work for Africa: What role for parliamentarians?

Written by Carin Smaller, Advisor on Agriculture and Investment, IISD

A discussion note on foreign investment in agricultural land and water

Prepared for the seminar *Making Investment Work for Africa*, July 21–22, 2011, organized by the Pan African Parliament in collaboration with the International Institute of Sustainable Development (IISD) and the Institute for Poverty, Land and Agrarian Studies (PLAAS).

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## Making Investment Work for Africa: What role for parliamentarians?

September 2011

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#### Written by Carin Smaller, Advisor on Agriculture and Investment, IISD

Carin Smaller is Advisor on Agriculture and Investment to IISD. She is actively engaged on the legal issues arising from foreign investment in agricultural land and water. She is former head of the Geneva office for the Institute for Agriculture and Trade Policy (IATP) where she monitored WTO negotiations, wrote the bimonthly bulletin Geneva Update, and provided information and analysis on agricultural issues to developing country trade negotiators and civil society groups. Carin also developed alternative approaches to agriculture trade using a human rights approach. Prior to working with IATP, she worked with 3D, a trade and human rights NGO, and on development projects for UNDP, the Australian Aid Agency for International Development (AusAID) and the German Development Service in Nepal.

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# 1. 0 Introduction

After decades of neglect, agriculture is back in fashion. There is a new wave of foreign investment in land and water, predominantly in Africa. An explosion of media reports and a series of studies confirmed the scale and consequences. A key driver for investment is the growing global demand for food and biofuels coupled with increasing water shortage and scarcity, forcing some governments to look abroad. The financial sector, particular private equity and hedge funds, is seizing these new opportunities.

The investor rush was triggered in response to the biofuels boom that began in 2003 and the global food and financial crises in 2008. But in January 2011 the Food and Agricultural Organization (FAO) warned of another "food price shock" that could lead to a prolonged food crisis. The food price index rose 32 per cent from June to December 2010. Food riots broke out again in a few African countries.

Rural areas and the agriculture sector desperately need investment. One billion people go to bed hungry every night. Seventy per cent of those people live in rural areas and depend on agriculture for their livelihoods. Furthermore, new sources of investment could support the statement made in 2003 by African Heads of State in the African Union's Maputo Declaration which committed "to the allocation of at least 10 percent of national budgetary resources to agriculture and rural development policy implementation within five years."

# 1.1 Parliamentarians' response

At the Third Ordinary Session of the Second Parliament, October 2010, Midrand, South Africa, the Pan African Parliament approved the recommendations of the Permanent Committee on Rural Economy, Agriculture, Natural Resources and the Environment (CARENRE), to prioritize issues around investment in agricultural land and the implication for food security and peace, including:

- That sensitization on land grabbing be carried out through workshops and regional and continental fora to inform parliamentarians and citizens about this issue;
- That the equivalent of the African Ministerial Conference on the Environment (AMCE) and the African Ministerial Council on Water (AMCOW) be set up by African Ministers in charge of land;
- That directives on good land governance be developed (to support the operationalization of the African Union's Framework and Guidelines on Land Policy, adopted by Heads of State in Tripoli in June 2009;)
- That rules on these special investments be developed so as to secure the benefits of these investments for the African countries and citizens.

To support these efforts, the International Institute for Sustainable Development (IISD), presents this discussion paper to contribute to the discussion about identifying roles for parliamentarians to consider and to support actions and efforts at the national, regional and pan-African level. Examples from a number of countries are used to illustrate what is happening across the continent. The paper concludes with a series of questions for parliamentarians to consider and a list of reading materials on a country-by-country basis.

# 2.0 Basic Facts & Figures

A rapidly growing body of research has been published since 2009 that documents foreign investment trends in agricultural land and water. The research includes information on the scale and size of land deals, target countries, investor countries, the nature of the contracts between States and investors, the type of private sector investors, particularly private equity and hedge funds, the social, economic and human rights impacts on communities, as well as ways to respond, including through alternative business models. A list of research papers is provided below.

One of the most comprehensive was a World Bank report that found reported land deals amounted to 45 million hectares in 2009 alone. More recent reports by the Oakland Institute and International Land Coalition estimate between 60 and 80 million hectares of land have been leased out to investors. That is compared with an average land expansion rate of 4 million hectares per year in the decade leading up to 2008. The top four targets for investors were Sudan (4 million hectares), Mozambique (2.7 million hectares), Liberia (1.6 million hectares) and Ethiopia (between 13 and 3.6 million hectares)

TABLE 1: LAND LEASED TO INVESTORS IN SELECTED COUNTRIES IN AFRICA

Country	Quantity of land leased to investors since 2004 (in hectares)
Ethiopia	Between 1.3 and 3.6 million
Ghana	Between 450,000 and 1 million
Liberia	1.6 million
Madagascar	Between 800,000 and 1.7 million
Mali	Between 160,000 and 545,000
Mozambique	2.7 million
Nigeria	793,000
Sierra Leone	500,000
Sudan	4 million (only covers 9 of 25 states)

Sources: World Bank, Oakland Institute, IIED, FAO, IFAD, Schoneveld et al., Görgen et al.

# 3.0 Economic and Social Issues

The research on large scale agricultural investments identified a number of economic and social issues. The World Bank report found that investors are targeting countries with weak land governance, resulting in land transfers that often neglected existing land rights. The World Bank report also found that investment projects failed to generate employment. These findings have been confirmed by subsequent studies from the International Land Coalition, Land Deals Political Initiative, Oakland Institute, IIED and others, making land rights one of the key concerns.

In Zambia, for example, the World Bank found that some areas allocated to investors were used by large numbers of shifting cultivators. In Mozambique, where there is a land reform process underway to recognize communal land title, the World Bank found that in 20 per cent of foreign investment projects, land title (direito de uso e aproveitamento da



*terra*, or "DUAT") had been awarded to the local community and the investors at the same time. Mozambique actually put in place a temporary moratorium to try and address some of these concerns.

There were also a number of issues arising from the notion that investors were being given "available" or "unused" land. Ethiopia's foreign investment strategy for agriculture is supposed to focus on "unused" lands where the population is sparse. However, evidence collected by the FAO, IFAD and IIED suggests that at least some of the lands allocated to investors in the Benishangul–Gumuz and Afar regions were previously being used for shifting cultivation and dryseason grazing, respectively. In fact, the term "unused" land may not refer to unoccupied land but rather land that is not perceived as productive. With a population of 74 million people and strong presence of pastoralists, the World Bank found that land was being used virtually everywhere.

Nearly all projects had strong gender effects, according to the World Bank. Women's livelihoods were negatively affected because of land access issues. The time required for women to gather water or firewood increased. In one case study, community leaders in Gaza Province, Mozambique, agreed to provide land to outside investors, but as a result, women lost access to forest and water resources critical to their families' livelihoods. In many cases, land rights were presumed to be in the name of men only, and consultations were limited to males in the community. Women and other vulnerable groups were also less likely to obtain employment from investors or be included in decision-making processes surrounding the investment.

Most of the studies point to a culture of secrecy where communities, parliamentarians and even government officials are either not consulted or informed about land deals until after they had been signed. In general, community consultations were either weak or non-existent. The Oakland Institute found that in Mali and Ethiopia, for example, there was either little or no opportunity for community consultations. However, in Mozambique, the World Bank found some positive experiences. In one case, consultations about the rights of shifting cultivators led to a mapping process that allowed farmers to move their fields to another area in return for agricultural inputs and other assistance.<sup>3</sup>

Finally, domestic environmental regulations, particularly those relating to Environmental Impact Assessment, were often not undertaken. Ethiopian law, for example, requires that environmental impact assessments be undertaken, but both the World Bank and the Oakland Institute found that not a single project had undergone one. The key reasons given were lack of capacity and a rush to approve projects. In Zambia, where environmental impact assessments (EIAs) are also required for land clearance for large-scale agriculture, the World Bank found that only 15 per cent of the projects in the country inventory were recorded as having an EIA. This contrasts with Nigeria, where around 85 per cent of the projects are recorded as having performed these assessments.

<sup>&</sup>lt;sup>1</sup> Cotula L., Vermeulen S., Leonard R., and Keeley J., 2009, Land grab or development opportunity? A quantitative and qualitative analysis of landgrabbing in Africa, FAO/IFAD/IIED

<sup>&</sup>lt;sup>2</sup> World Bank, Rising Global Interest in Farmland: can it yield equitable and sustainable benefits? World Bank, September 2010

<sup>3</sup> ibid

# 4.0 The Legal Landscape

Three sources of law relate to foreign investment in agriculture. The primary source of law that should be used to govern all investment is the domestic law of the host country. This includes the body of laws and regulations relating to the admission of foreign investment, incentives, taxation, property laws, water rights and rates, human health and safety, environmental protection, labour laws and any other laws relating to the potential impacts on local communities. It also includes the constitution and the courts.

In addition, two sources of international law relate to investment in agricultural land and water: (1) the contract between the foreign investor and the state, known as the *host government contract*; and (2) investment treaties, either in the form of a Bilateral Investment Treaty (BIT), of which there are over 2,700 worldwide, a Regional Investment Treaty or an investment chapter of a Free Trade Agreement.<sup>4</sup>

These two sources of international law start from the commercial perspective with a view to protecting the investor's interests. They provide hard contractual rights and arbitration mechanisms for foreign investors against a range of state actions. However, they often fail to expressly address economic and social interests of local users or environmental dimensions related to the investment. Very few contracts or treaties include any investor obligations or provide express language recognizing the rights of states to regulate in the public interest.

# Why is it important for parliamentarians to be aware of the international legal framework for investment?

The legal framework is important because foreign investors might use the investment contracts and treaties to protect their investments, even when this might be to the detriment of local food security, environmental projection, labour rights and local access to land, water and other natural resources. It is vitally important that governments, with the help of national parliaments, get these legal instruments correct before they are signed and ratified into domestic law.

Many countries have already signed dozens of BITs and investment contracts that are heavily tilted in favour of the investor and are inadequate in addressing the interests and needs of the host country and its people. The only way to avoid future problems arising under these instruments is for these countries to re-negotiate the treaties and contracts, or to issue interpretations where possible. For example, Liberia and Sierra Leone are currently in the process of renegotiating existing investment contracts in agriculture and mining, in order to remedy past mistakes and improve the terms of the contracts for the government and local communities. And then there are other countries, like Swaziland and Botswana, where, according to reports, land deals have not yet taken place and so the terms of investment contracts for the future are still to be decided. For countries in these situations in particular, there is a huge opportunity for parliamentarians to get involved in shaping the terms of future agreements, both the treaties and the contracts.

There are a number of resources that can help inform these discussions. With respect to investment treaties, IISD has developed a model treaty on investment, which is designed to foster sustainable development. See http://www.iisd.org/investment/model/ for further information.

IISD has also been part of two global processes to develop guidelines and models for investment contracts. The first process was led by the UN Special Representative on Business and Human Rights, John Ruggie. The outcome document, *Principles for Responsible Contracts*, was approved by the Human Rights Council in May 2011.<sup>5</sup> The second

<sup>&</sup>lt;sup>4</sup> In addition, international human rights law and transboundary water-course law may also be relevant, but is not treated here in more detail.

 $<sup>^{\</sup>rm 5}$  See http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf

document is a model contract for the mining sector drafted by a group of investment lawyers as part of a project by the International Bar Association. The resulting document, the *Model Mining Development Agreement*, starts from the perspective of sustainable development. Several elements of this document may also be useful for the negotiation of agricultural contracts.<sup>6</sup> Both these documents can serve as useful resources.

# 5.0 Access to Information

Typically, it is difficult to find out who is behind these investments, not only before the investment is made but even afterwards because contracts and investors often remain secret. More recently, however, efforts have been undertaken to uncover some of the players behind the investment projects and to publish a number of investment contracts. Parliaments across the continent should demand to have access to such information early in the process. When investors are known, there is the possibility to check a company's or a fund's reputation in other countries and projects to learn from those experiences.

Access to investment contracts, which can take a wide array of forms, is crucial because it is typically the contract, or the set of contracts, that set out the terms of the investment in the land. This will allow the public and parliamentarians to know the most important elements of the investment, including the:

- · Size of land, duration and purpose of the lease agreement;
- Land rents to be paid by the investor;
- Investor's rights to build infrastructure to draw water from dams or boreholes;
- Investor's water drawing rights in terms of volume, etc.;
- Government guarantees to provide the land "free of any legal or other impediments"; and
- Applicable law and dispute settlement.

Liberia is leading the way with their Extractive Industries Transparency Initiative, which publishes all investment contracts in mining, agriculture and forestry on their website Extractive Industry Transparency Initiative website: <www.leiti.org.lr>. This shows that contract transparency is indeed possible, and that confidential business information can be redacted where necessary.

While most countries do not systematically publish agricultural investment contracts, civil society is working on making an increasing number of contracts public. Indeed, a number of non-governmental organizations (NGOs) have started to publish investment contracts on their websites. One of these NGOs, Grain, has the largest collection of investment contracts published to date. It is available at http://farmlandgrab.org/home/post\_special?filter=contracts. The Oakland Institute has also published a number of contracts in the context of their recent investigation into land deals. They also provide extensive information about a number of investors, particularly private equity and hedge funds who are leasing land all over Africa. Further information is available at: http://media.oaklandinstitute.org/land-deals-africa.

Further information about potential or actual deals is available below (see Box 1 and reading materials).

<sup>&</sup>lt;sup>6</sup> See http://www.mmdaproject.org/

#### **BOX 1: EXAMPLES OF INVESTMENT PROJECTS IN ZAMBIA**

- 1. 155,000 hectares of land for a project for export-oriented crops. The government created a farm bloc but the original investor quickly lost interest.
- 2. At the end of 2010, the Times of Zambia reported that a new investor, Yuan Longping High-Tech Agriculture Company of China, signed a Memorandum of Understanding to take over another government large-scale farm bloc;
- 3. 20,000 hectares of land for large-scale commercial farming in Mkushi, Central Province of Zambia. The investor is a South African/U.K. firm, Chayton Africa. They were given a World Bank conditional guarantee of US\$50 million for the investment and World Bank assistance in negotiations with the government. In December 2009, an agreement was signed with the government which provides the investor with a 99-year lease, water rights and the ability to export 80 per cent of production;
- 4. 12,838 hectares for a sugar plantation and 13,860 hectares for contract farming. The investor, a South African/British multinational, leased land for 99 years. Rent is US\$5 per hectare. Roughly 300 smallholders engage in sugar cultivation either as independent producers or as labour tenants. However, there are allegations that the investor is putting pressure on locals to acquire land and water rights by requiring locals to pledge their land as collateral in exchange for loans. In addition, average wages are lower than alternative farming options;
- 5. 15,000 hectares for a sugar plantation in Kazangula district by the South African investor, AGZAM Project Developers. Promises of 4,000 jobs, including 3,000 jobs for local farmers, and investment of US\$251 million; and
- 6. 3,000 hectares for a banana plantation and other farming activities in Kalonga Estates. The investor is the U.K. equity fund Emergent Asset Capital and the project is the largest banana plantation in Zambia. The plantation also includes maize, wheat, soya, and teak production. Bananas are sold locally and exported.

Sources: World Bank, September 2010; Times of Zambia, *ZDA, Chinese firm seal agro deal*, August 21, 2010; World Bank, MIGA and *Chayton Capital LLP to support agribusiness investments in southern Africa*, May 10, 2010, and speech by Neil Crowder, Chayton Africa, Aglnvesting Conference in Geneva, November 9-10, 2010; Lusaka Times, *Zambia: 15, 000 hectares sugar plantation to be set up in Kazungula, April 2, 2011* 

In Botswana, for example, we know that two large private equity funds, Emergent Asset Management and Chayton Africa, have plans to acquire large tracts of farmland. Chayton Africa has stated their intention to acquire up to 20,000 hectares of land in Botswana to establish an agricultural hub for regional food production. Knowing about deals before they happen can provide the opportunity for parliamentarians to carve out a role in helping ensure that the deal will respect the environmental regulations in the country, for example, or allow parliamentarians to organize consultations with communities in their constituencies.

# 6.0 Conclusions and Questions for Parliamentarians

Africa has become a top destination for foreign investors, particularly from the financial sector, looking to invest in agricultural land and water. Investment promotion agencies, relevant ministries and multilateral agencies such as the World Bank, The United Nations Conference on Trade and Development (UNCTAD) and donor governments are helping to facilitate the process. And yet there is growing evidence about the negative impacts on local communities' access to land, water and food. Parliamentarians can play an important role to ensure that the government's investment strategy contributes to food security, economic development, employment and a sustainable use of natural resources. Below are some key questions for parliamentarians to consider:

- A. What information is made available to the parliament about large-scale agricultural projects? Are contracts between governments and investors publicly available?
- B. Do agricultural land deals undergo a ratification process in the parliament?
- C. Do parliamentarians have access to the business plans of foreign investors? If yes, are they made available before or after they are approved? Do parliamentarians have any say in the approval process?
- D. Are the results of environmental impact assessments (EIAs) made available to the parliament? Are parliamentarians able to debate the findings of EIAs and make recommendations?
- E. Are parliamentarians informed about community consultations that take place in their constituencies? Do they participate? Do they have a say?
- F. Are parliamentarians able to monitor the progress of investment projects in their constituencies? Are they able to ensure that investors comply with their obligations related to employment, skills training and social responsibilities including health and education?

# 7. 0 Reading Materials

#### General

Smaller, C. & Mann, H., (2009). A thirst for distant lands: Foreign investment in agricultural land and water. http://www.iisd.org/pdf/2009/thirst\_for\_distant\_lands.pdf

Smaller, C. (2010, December). A global thirst: How water is driving the new wave of foreign investment in farmland. http://www.iisd.org/itn/2010/12/16/a-global-thirst-how-water-is-driving-the-new-wave-of-foreign-investment-infarmland/

Case studies and papers by the Futures Agriculture Consortium and Land Deal Politics Initiative (LDPI) (Covers many African countries): http://www.future-agricultures.org/index.php?option=com\_docman&Itemid=971

Case studies by the International Land Coalition (ILC) (Covers many African countries): http://www.commercialpressuresonland.org/ and http://www.landcoalition.org/publications

Cotula L., Vermeulen S., Leonard R., and Keeley J. (2009). Land grab or development opportunity? A quantitative and qualitative analysis of landgrabbing in Africa, FAO/IFAD/IIED, (Covers Ethiopia, Ghana, Madagascar, Mali, Mozambique, Sudan and Tanzania) http://www.fao.org/docrep/011/ak241e/ak241e00.htm

Görgen, M., Rudloff, B., Simons, J., Üllenberg, A., Väth, S. & Wimmer, L., (2009) Foreign direct investment in land in developing countries. Eschborn, GTZ, (Covers Madagascar and Mali) http://www2.gtz.de/urbanet/library/detail1. asp?number=7529

Graham, A., Aubry, S., Kunnemann, R., & Suarez, S.M. (2010). *Land grab study: The impact of Europe's policies and practices on African agriculture and food security*. FIAN. (Covers Burkina Faso, Burundi, Kenya, Mali, Mozambique, Senegal and Uganda) http://www.fian.org/resources/documents/others/report-on-land-grabbing/pdf

Hall, R. Land grabbing in Africa and the new politics of food (2011, June). Futures Agriculture. (Covers Kenya and Tanzania)

Merian Research and CRBM, (2010, November). The vultures of land grabbing: The involvement of European financial companies in large-scale land acquisition abroad. http://www.rinoceros.org/IMG/pdf/VULTURES-completo-2.pdf

Oakland Institute (2011, May). *Understanding land investment deals in Africa*. (Covers Ethiopia, Mali, Mozambique, Sierra Leone, South Sudan, Tanzania & Zambia) http://media.oaklandinstitute.org/land-deals-africa

To follow the latest news reports on foreign investment in land see Grain's blog: http://farmlandgrab.org/

To see a range of investor-state contracts: http://farmlandgrab.org/home/post\_special?filter=contracts

To see UNCTAD's database of Bilateral Investment Treaties see: http://www.unctadxi.org/templates/docsearch\_\_\_\_779. aspx

World Bank (2010, September) Rising global interest in farmland: can it yield equitable and sustainable benefits? (Covers Democratic Republic of Congo, Ethiopia, Kenya, Liberia, Mozambique, Nigeria, Sudan, Tanzania and Zambia) http://siteresources.worldbank.org/INTARD/Resources/ESW\_Sept7\_final\_final.pdf

# **Democratic Republic of Congo**

See World Bank, ILC and LDPI

#### Ethiopia

Fisseha, M. (2011). A case study of the Bechera Agricultural Development Project, Ethiopia. EDC & ILC. http://www.landcoalition.org/sites/default/files/publication/1021/EDC\_Ethiopia\_web\_11.03.11.pdf

Oakland Institute (2011, May). *Understanding land investment deals in Africa: Ethiopia*. http://media.oaklandinstitute.org/land-deals-africa/ethiopia

Weissleder L. (2009) Foreign Direct Investment in the Agricultural Sector in Ethiopia, Heinrich Böll Foundation and MISEREOR. http://www.boell.de/downloads/ecology/FDIs\_Ethiopia\_15\_10\_09\_c\_1.pdf

See also World Bank, Cotula et al, ILC and LDPI (above).



#### Ghana

Schoneveld, G.C., German, L.A., & Nutakor, E., (2010) *Towards sustainable biofuel development: Assessing the local impacts of large-scale foreign land acquisitions in Ghana*. http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/schoneveld.pdf

See also Cotula et al, ILC and LDPI.

# Kenya

FIAN (2009). Land grabbing in Kenya and Mozambique. http://www.fian.org/resources/documents/others/land-grabbing-in-kenya-and-mozambique/pdf

See also World Bank, Graham et al, ILC and LDPI.

#### Liberia

See World Bank, ILC and LDPI

# Madagascar

GTZ (2009, December). Foreign direct investment in land in Madagascar. http://www2.gtz.de/wbf/4tDx9kw63gma/gtz2010-0063en-foreign-direct-investment-madagascar.pdf

See also Görgen et al, Cotula et al, ILC and LDPI.

# Mali

GTZ (2009, December). Foreign direct investment in land in Mali. http://www2.gtz.de/wbf/4tDx9kw63gma/gtz2010-0064en-foreign-direct-investment-mali.pdf

Oakland Institute, (2011, May). *Understanding Land Investment Deals in Africa: Mali*, http://media.oaklandinstitute.org/land-deals-africa/mali

See also Görgen et al, Cotula et al, ILC and LDPI.

# Mozambique

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Cotula, L., Dyer, N., & Vermeulen, S. (2008). *Fuelling exclusion? The biofuels boom and poor people's access to land*. http://pubs.iied.org/pdfs/12551IIED.pdf

Nhantumbo, I., & Salomão, A. (2010). *Biofuels, land access and rural livelihoods in Mozambique*. http://pubs.iied.org/pdfs/12563IIED.pdf

Oakland Institute, (2011, May). *Understanding Land Investment Deals in Africa: Mozambique*, Oakland Institute, http://media.oaklandinstitute.org/land-deals-africa/mozambique

See also World Bank, Cotula et al, ILC and LDPI.

# Nigeria

See World Bank.

## Sierra Leone

Anane, M., & Yao Abiwu, C., (2011, June). Independent study report of the Addax Bioenergy Sugarcane-to-Ethanol Project in the Makeni Region in Sierra Leone. http://www.brotfueralle.ch/fileadmin/deutsch/01\_Service/Medien\_Texte/Mediencommuniques/Independent%20Study%20Report%20Addax%20Final.pdf

Green Scenery, (2011, May). The Socfin Land Deal Missing Out on Best Practices. Report on fact finding mission to Malen Chiefdom, Pujehun District, Sierra Leone. Green Scenery, Freetown. http://www.greenscenery.org/index.php/publications

Oakland Institute, (2011, May). *Understanding land investment deals in Africa: Sierra Leone*, Oakland Institute. http://media.oaklandinstitute.org/land-deals-africa/sierra-leone

#### Sudan and South Sudan

Oakland Institute, (2011, May). *Understanding Land Investment Deals in Africa: South Sudan*, Oakland Institute. http://media.oaklandinstitute.org/land-deals-africa/south-sudan

See also World Bank, Cotula et al, ILC and LDPI.

## Tanzania

Cotula, L., Dyer, N., & Vermeulen, S. (2008). Fuelling exclusion? The biofuels boom and poor people's access to land. http://pubs.iied.org/pdfs/12551IIED.pdf

Oakland Institute (2011, May). Understanding land investment deals in Africa: Tanzania. http://media.oaklandinstitute. org/land-deals-africa/tanzania

See also World Bank, Cotula et al, ILC and LDPI.



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