



Submission on Land Rights and Involuntary Resettlement in the World Bank Proposed Environmental and Social Framework

February 25, 2016

Every year, millions of people are displaced from their homes and land in the name of development.¹ Involuntary resettlement is inherently discriminatory, as with few exceptions it is the poor and marginalized who are required to move out of the way for mega-infrastructure and other projects. The impact on families and communities is devastating: displacement and loss of resources have led to impoverishment, food insecurity, psychological trauma, diminished access to basic services such as schools and health facilities and the breakdown of social networks and cultures. It is by now well recognized that any international finance institution committed to sustainable development must have in place robust policies and procedures to safeguard against the devastating impacts of physical and economic displacement and the raft of associated human rights abuses.

It is also well established that security of tenure for all is a crucial foundation for poverty reduction² and the enjoyment of human rights, particularly the right to an adequate standard of living, including the right to adequate housing and the right to food.³ Security of tenure that confers in land users a degree of confidence that they will not be deprived of their current arrangements without adequate legal safeguards enables families to invest in their homes and livelihoods, and thereby actively contribute to economic development and enjoy its benefits. Equitable tenure systems, that enable all people to have access to and control over an adequate supply of land for their homes, livelihoods and other basic needs, provide another essential underpinning for poverty reduction and inclusive and sustainable development. Yet without concerted measures to strengthen the tenure rights of poor and marginalized groups and promote equitable tenure systems, development projects can have profoundly detrimental impacts on people's access to land, housing and natural resources, exacerbating inequality and conflict and harming the most vulnerable. The Voluntary Guidelines on the Responsible Governance of Tenure of Land (VGGTs) provide a strong framework for promoting such tenure systems and recognizing this, President Kim has made a commitment to ensure that Bank policies align with the VGGTs.⁴

The final phase of the World Bank's consultation on the review of its safeguard policies presents a critical opportunity to incorporate the VGGTs and to develop the strongest possible policies and standards and to ensure that development projects facilitate secure access to land and natural

¹ Cernea M. "Compensation and Investment in Resettlement: Theory, Practice, Pitfalls, and Needed Policy Reform." In Cernea, M, and Mathur H.M. (2008). *Can Compensation Prevent Impoverishment?* Oxford: Oxford University Press, page 20. "Globally, the WB estimated in 1994 that, over a twenty-year period and counting only three economic sectors, up to 190-200 million people were displaced by public sector projects alone, at an average of 10 million people annually. By now, this estimate is outdated. Considering the pace of displacements not only in three sectors, but in all economic sectors, and not only in public but also in private sector projects, the conservative estimate of development displacements rises to about 280-300 million over 20 years or 15 million people annually."

² The World Bank, *The World Bank Group on Land & Food Security*: <http://www.worldbank.org/en/news/feature/2012/10/02/world-bank-land-food-security>

³ See, Committee on Economic, Social and Cultural Rights, General Comments 4 (1991) and 12 (1999); and "Access to Land and the Right to Food", Report presented to the 65th General Assembly of the United Nations by the Special Rapporteur on the Right to Food (A/65/281), 21 October 2010.

⁴ <http://www.worldbank.org/en/news/press-release/2013/04/08/world-bank-group-access-to-land-is-critical-for-the-poor>

resources for poor and vulnerable people; that displacement is avoided wherever possible; and that when it cannot be avoided, no harm is done. The second draft Environmental and Social Framework (ESF) goes some way towards incorporating such policies and standards, including through expanding the scope of ESS5 to cover land titling projects in certain circumstances, and strengthening gender language. However, major gaps and weaknesses remain, which this submission focuses on.

Given the rapid increase in the number of World Bank projects resulting in resettlement – from 8 percent of the portfolio in 1993 to 41 percent of the new projects in the pipeline – and the “significant potential failures in the Bank’s system for dealing with resettlement” that were identified in the Bank’s June 2014 Involuntary Resettlement Portfolio Review, communities simply cannot afford for the Bank to leave these gaps and weaknesses unaddressed.

Inclusive Development International and Oxfam’s joint submission on land rights and involuntary resettlement in the proposed ESF contains 18 points that must be addressed for the World Bank to adhere to its own public commitments, respect human rights and achieve its twin goals of eliminating extreme poverty and boosting shared prosperity. The submission covers: (i) the scope and applicability of ESS5; (ii) appraisal, due diligence, monitoring and evaluation; (iii) avoidance and mitigation measures; and (iv) land and natural resource tenure.

I. Scope and Applicability of ESS5

- 1. The scope of ESS5 must be broadened to include physical and economic displacement that is caused, in whole or in part, by any or all project activities that affect people’s livelihood and food resources or access to these resources. The scope should not be limited to land acquisitions and land use restrictions, but include any activities that are directly and significantly related to the project that result in physical or economic displacement.** We are pleased that displacement resulting from a project-supported determination that the land in question is state land is now included in the scope of ESS5. However, we remain deeply concerned that other affected persons and communities that will be displaced by Bank-supported projects remain excluded from the protections of the involuntary resettlement standard. The risk of harm to these people is no different whether their displacement is caused by land acquisition or another type of activity and the same safeguards are necessary to prevent their impoverishment. Activities that cause displacement that should be covered by ESS5 include:

- ***Activities that reduce access to productive resources.*** Communities impacted downstream of dam projects are not covered by the draft ESS5. Dams can have disastrous impacts on the livelihoods, food security and way of life of communities living downstream. Fishing communities can have their source of food and income completely disrupted as a result of the depletion of fish stocks; rice cultivators and other farmers who depend on particular flood patterns can have their lands rendered unproductive; and pastoralists depending on lands for the grazing of their animals may no longer find grazing grounds. Under the draft ESF, these impacts would be addressed under the “mitigation hierarchy” in ESS1, which requires only compensation “when technically and financially feasible,” rather than the restoration of incomes and livelihoods that is required by ESS5. Bank experience, documented in volumes of scholarly research, shows that the lesser compensation standard provided under ESS1

will not prevent impoverishment.⁵ With the Bank planning more “transformational projects” such as large-scale hydropower dams, it is vital that the Bank ensure that affected people are not impoverished as a result of such projects.

- ***Land use regulation and natural resource management:*** We are also concerned that land use planning and natural resource management activities are expressly excluded from the scope of ESS5, without ensuring adequate protections elsewhere in the ESF. Zoning and spatial planning projects can change the tenure status underlying entire areas. Coastal management projects can undermine the tenure rights of fishers. Linear infrastructure projects such as railways or roads that establish rights of way, in some cases only require resettlement of people living in a narrower corridor of impact, but the tenure rights of all households within the newly established right of way are affected. Natural Resource Management Programs can result in the displacement of forest-dependent communities⁶ from lands they live on and/or depend on for their food or livelihoods. In cases in which tenure rights are weakened or temporally limited, for example, because of the creation of rights of way and planned future expansions of the project, anticipated displacement should be safeguarded through the development of a Resettlement Policy Framework or a Process Framework. The obligation to apply the framework(s), consistent with ESS5, should be included as a term in the credit agreement between the Bank and the borrower government. This should apply regardless of the source of financing for future activities that result in displacement, as long as it is directly and significantly related to the Bank-assisted project.

2. ESS5 must explicitly apply to all sub-projects that cause economic or physical displacement regardless of risk classification and including financial intermediary projects. The current Involuntary Resettlement Policy (OP 4.12) applies to all subprojects causing displacement,⁷ and thus a lesser requirement would be a major dilution. Under the proposed ESF, only subprojects classified as “High Risk,” for which the Procedure sets a very high bar,⁸ are required to comply with the ESSs.⁹ Subprojects classified as having a “substantial” or lower environmental and social risk only need comply with national regulations, unless the Bank deems otherwise. Since national laws on resettlement are weak and incomplete in the majority of borrower countries, this dilution could foreseeably lead to impoverishment and increased vulnerability of project-affected people. It would be an arbitrary and illogical distinction to require compliance with national laws only, and not ESS5, for sub-projects classified as substantial risk that cause physical or economic displacement. According to the draft Procedure, Substantial Risk subprojects could include, for example, one that has large-scale impacts, requiring substantial investment and time and some complex and/or unproven mitigation measures.¹⁰ A project can be classified as Substantial Risk, if there are concerns that the adverse impacts “may give rise to significant social conflict or harm or significant risks to human security”.¹¹ There may also be potential for trans-boundary impacts.¹² Yet, for sub-projects of this classification, only national laws are required. This dangerous loophole must be eliminated.

⁵ See: *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit Sharing* (2008), Eds, Cernea & Mathur, Oxford: Oxford University Press.

⁶ In this case, we are referring to non-Indigenous forest-dependent peoples and communities who would not be covered under ESS7 on Indigenous Peoples.

⁷ OP 4.12, para 29.

⁸ Procedure, para 24.

⁹ Policy, para 35(a).

¹⁰ Procedure, para 25(a) (b) and (c).

¹¹ Procedure, para 25(d).

¹² Procedure, para 25(f).

3. **The definition of associated facilities in ESS1 should be expanded, so that ESS5 applies to people who are displaced for facilities or activities that are directly and significantly related to the Bank assisted project and necessary to achieve its objectives as set forth in the project documents.** The current Involuntary Resettlement Policy (OP 4.12) contains a clause that expands the policy’s application to associated facilities defined in this way, as long as the activities are carried out contemporaneously with the project.¹³ This clause is removed altogether from the draft ESS5, which is a clear dilution because it significantly restricts the scope of ESS5. Associated facilities are addressed in ESS1, but the definition is much narrower than the definition in the current OP 4.12. For ESS5 to apply, ESS1 requires that the facilities or activities that cause displacement are “necessary for the project to be viable and would not have been constructed or expanded if the project did not exist.”¹⁴ This definition is unreasonably restrictive. It should be expanded to ensure that if the associated facilities or activities are necessary to achieve the objectives of the Bank project, and those activities cause displacement, ESS5 will apply regardless of when the displacement occurs.

4. **Only Borrower Frameworks that, in both law and practice, provide entitlements and protections to displaced persons that are consistent with ESS5 should be considered. The Bank should also work with countries to strengthen weak national legal frameworks and institutional capacity on resettlement, and other environmental and social issues.** When assessing a Borrower’s Framework on land acquisition and resettlement, the Bank should consider whether national laws and practices are consistent with ESS requirements, not just whether their use *would enable the project to achieve objectives materially consistent with the ESS5* – a vague and highly discretionary standard of measurement. In many Bank client countries, the legal and regulatory framework on eviction, resettlement and displacement is weak or incomplete. Rarely will they achieve objectives materially consistent with ESS5. For example, households and communities without title are often not adequately protected by domestic laws, and in many jurisdictions, residents of informal settlements, or squatters, can be legally subject to forced eviction. The requirements of ESS5, like the current Involuntary Resettlement Policy, while not perfect, are based on extensive sociological studies of the experiences of resettlement and are aimed at avoiding the manifestation of identified impoverishment risks of physical and economic displacement. Based on this empirical evidence, the policy sets out the range of measures necessary to meet the objective of ensuring that the livelihoods and living standards of affected people are restored. If the Borrower framework does not provide for such measures, it is unlikely to be effective at preventing impoverishment and achieving the ESS5 objectives.

5. **ESS5 now applies to voluntary land transactions that lead to the displacement of persons, other than the seller, who occupy, use or claim rights to the land in question.**¹⁵ This should be expanded to include leasehold and other types of land concessions, which lead to displacement of communities that occupy, use or claim rights to the land in question. It is apparent from the text in footnote 23 that the intention is to include leaseholds, so the language in ESS should be adapted accordingly.

¹³ OP 4.12, para 4.

¹⁴ ESS1, para 10.

¹⁵ ESS5, para 6.

6. **Despite pushback by some borrower governments on this longstanding principle, ESS5 must provide an adequate level of protection to those people without formal rights who are economically or physically displaced as a result of a Bank-financed project.** Households and communities lacking legal title or other recognized legal rights to their land are immensely vulnerable to being impoverished when the land they are using is impacted or taken from them. They are at risk for being labeled as squatters or encroachers, even though they may have settled on land for years and established community structures such as schools and health clinics, as well as farms and markets. But because they have no formal title to the land, and the land is sought by others - often much more powerful - it can be both convenient and cheap to classify them as squatters and subject them to forced eviction. Affected persons falling into category 10(c) of ESS5 (those without formal rights) must continue to receive protections and entitlements including resettlement and livelihood assistance, and these entitlements should be strengthened to ensure fulfillment of the human right to adequate housing, including security of tenure, access to services, facilities and adequate employment or other livelihood opportunities suited to the skills and capacities of affected people. People and households without recognizable legal rights to the land they occupy or use are almost always poor and vulnerable due to, inter alia, their tenure insecurity, and, in line with ESS5 objectives, their resettlement should be conceived and executed as a development opportunity with compensation, assistance and support measures sufficient to ensure they are able to improve their livelihoods and living standards.
7. **The Bank must acknowledge and protect the rights of all individuals and communities with customary (including collective) land tenure regardless of whether or not those rights are recognized in national laws.** ESS5 must protect those with customary land tenure systems who may be excluded from ESS7. As is established in the VGGTs, ESS5 should explicitly recognize all people and communities that have customary tenure rights as having legitimate land claims. The Borrower should treat such communities with the same protections and provisions as are required for those with formal land rights.

II. Appraisal, Due Diligence, Monitoring and Evaluation

8. **There must be a clear requirement for draft resettlement plans and budgets to be prepared during project appraisal and made available in a manner accessible to affected persons, allowing them the opportunity to provide informed comments to the Board prior to project approval.** Current Bank policy and procedure require, as a condition of appraisal, the Borrower to submit to the Bank a draft resettlement plan, which is made publicly available, and for Bank staff to assess its compliance with the policy and feasibility of measures and the Borrower's commitment to and capacity for implementing it. Bank management must present a full resettlement plan and budget to the Board prior to approval. Without these requirements, the Board will not know at the time of its consideration of the project the full displacement impacts, the risks of impoverishing people, and costs of mitigation, which could amount to a significant project cost that renders the project economically unviable. ESS5, in paragraph 22, requires the full costs of resettlement activities to be included in total project cost. Full costs can only be ascertained against a resettlement plan (setting out the mitigation and compensation measures). Moreover, people who stand to be displaced by a Bank-supported project have the right to know and be consulted on resettlement plans before a project is approved, so that they can respond to the proposed plan before project approval and/or communicate their views and concerns to the Board.

9. The Bank’s due diligence minimum requirements must be strengthened and based on third party information and not just information provided by the Borrower about displacement impacts and mitigation measures. Due diligence should, inter alia,

- (i) verify that displacement impacts are reasonable and proportionate to the expected development objectives and general welfare benefits of the project;**
- (ii) confirm that all viable alternative project designs to avoid, where feasible, or minimize, displacement have been explored;**
- (iii) seek a range of views from a variety of sources, including project affected people and independent third-party specialists, to verify the Borrower’s assessment and the adequacy of resettlement plans.**

These due diligence requirements must be set out in a Bank procedure that is specific to involuntary resettlement, as per the current BP 4.12, which could be included as an annex to the proposed Environmental and Social Procedure. The ESF pre-supposes that the project development rationale justifies the displacement, regardless of its magnitude and impacts. The Bank does not assess whether the displacement impacts, and risks of harm and impoverishment in the given political-economy environment, are reasonable and proportionate to the expected development benefits. Current Bank procedure requires the Bank to work with the Borrower to assess all feasible alternatives. The removal of this requirement on the Bank would indicate a lack of intention to treat the objective of avoiding displacement seriously, with enormous cost implications for the project and affected people. Under the ESF, the Bank is only required to conduct E&S due diligence based on an assessment provided by the Borrower.¹⁶ It can at its discretion seek further information, but is not required to confirm the accuracy or rigor of the Borrower’s assessment.

10. The Bank’s monitoring and supervision responsibilities should be strengthened, including by requiring the Bank to support implementation of, and ensure compliance with, ESS5 (and other applicable ESSs). The Bank should be required to seek independent third-party verification of the Borrower’s monitoring reports. Resettlement monitoring and supervision requirements must be set out in a Bank procedure that is specific to involuntary resettlement, which could be included as an annex to the proposed Environmental and Social Procedure. Whereas current OP/BP 4.12 recognizes the “importance of close and frequent supervision to good resettlement outcomes,” and includes detailed requirements upon the Bank to conduct robust supervision from the beginning of project implementation through completion,¹⁷ the draft ESF contains little detail about the Bank’s monitoring role. The extent of monitoring will be “proportionate to the potential environmental and social risks and impacts,”¹⁸ and may be limited to reviewing reports provided by the Borrower.¹⁹ More robust Bank supervision is badly needed. In 2010 the Bank’s Independent Evaluation Group (IEG) identified the lack of adequate monitoring and supervision as a long-standing problem, noting that safeguards activities such as resettlement were regularly treated as an “add on”, marginal to the main operation.²⁰ In March 2015, the Bank released an internal Involuntary

¹⁶ Policy, para 29 -30.

¹⁷ Policy, para 46 *Cf.* OP 4.12 para 24 and BP 4.12, paras. 13, 14.

¹⁸ Policy, para 53.

¹⁹ Policy, paras 53 and 54; World Bank, Operational Policy 10.00: Investment Project Financing (April 2013), para 21; World Bank, Bank Procedure 10.00: Investment Project Financing (April 2013), para. 40; ESS1, para. 51. The draft Procedure lists other review activities that the Bank may undertake as appropriate (Procedure, para 54.)

²⁰ World Bank, *Safeguards and Sustainability Policies in a Changing World* 28-31 (Independent Evaluation Group Study Series, 2010).

Resettlement Portfolio Review that revealed fundamental failures in implementation and supervision of resettlement, including a major absence of data in Bank documentation of who was displaced and what happened to them.²¹ In the absence of strong monitoring and supervision of the implementation of safeguard measures, including through processes that are independent from the Borrower's own reporting of the situation, it is difficult to see how the Bank will achieve better outcomes under the proposed framework.

11. An independent panel of resettlement experts (POE) should be required for all projects that cause large-scale displacement and require complex and long-term mitigation measures. It is well recognized that a POE to assist with resettlement plans, monitoring implementation, designing corrective actions where necessary and providing ongoing advice can improve resettlement outcomes. The draft Asian Infrastructure Investment Bank (AIIB) ESF requires an independent advisory panel to monitor implementation of all “very complex and sensitive operations.”²² In contrast, the World Bank ESF proposes that “where appropriate” the Bank will require the Borrower to engage “stakeholders and third parties”, such as independent experts, local communities or NGOs to verify monitoring information. For projects “that are High Risk or contentious, or that involve serious multidimensional environmental or social risks or impacts,” the World Bank’s ESS1 states that “the Borrower *may* be required to engage one or more internationally recognized independent experts.” POEs should not be optional, but rather should be compulsory, when it comes to large-scale resettlement and should be used throughout the project cycle.

12. The Bank and Borrower should be required to evaluate at the end of the project whether the objectives of ESS5 have been successfully realized and institute any corrective measures necessary to ensure their achievement. The evaluation should measure and assess against baseline data whether, inter alia, people who were displaced were sufficiently assisted in their efforts to improve, or at least restore, their livelihoods and living standards to pre-displacement levels; and whether the living conditions of poor and vulnerable persons who were physically displaced were improved.²³ Despite an expressed commitment to an “outcomes-based approach”, the Policy pays scant attention to evaluation of the outcomes: it states only that: “A project will not be considered complete until the measures and actions set out in the legal agreement (including the ESCP) have been implemented.”²⁴ This requires an evaluation of outputs – the *completion of measures and actions* - rather than outcomes: whether *ESS objectives have been achieved*. The Policy does not require Bank staff to evaluate whether or not the ESCP was sufficient to meet the objectives of the ESSs, and the impacts of any shortcomings for the living standards and livelihoods of displaced communities. The excessive discretion vested in Bank staff also extends to dealing with problems encountered in the Borrower’s environmental and social performance: in such cases, “the Bank will determine whether further measures and actions...will be required.”²⁵ ESS5 states that: “the mitigation of economic displacement will be considered complete when the completion audit concludes that affected persons or communities have received all of the assistance for which they are eligible, and have been provided with adequate opportunity to reestablish their livelihoods.”²⁶ It should be amended so that mitigation is considered complete when the

²¹ World Bank Involuntary Resettlement Portfolio Review Phase I (May 2012) and II (June 2014),

<http://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems>

²² AIIB 2nd draft ESP, para 61.

²³ ESS5, Objectives.

²⁴ Policy, para 53.

²⁵ Policy, para 53.

²⁶ ESS5, para 33.

adverse impacts of economic displacement have been addressed in a manner that is consistent with the objectives of ESS5, including through the provision of appropriate and sufficient support to restore or, in the case of poor households, improve their livelihoods.

III. Avoidance and Mitigation Measures

- 13. Consistent with international law, forced evictions in connection with World Bank projects should be strictly prohibited (rather than “avoided”) by the Policy and ESS1 under any circumstances, including when ESS5 is not applied because of its limited scope.** It has long been recognized by the United Nations that forced evictions constitute a gross violation of human rights. Evictions should only be carried out in exceptional circumstances, solely for the purpose of promoting the general welfare, after all feasible alternatives have been exhausted.²⁷ They must meet a range of due process and other standards set out in international law instruments in order to respect basic human rights. In contrast with the World Bank, AIIB’s second draft ESF contains a broad prohibition of forced evictions for all projects.²⁸ The World Bank’s draft ESF falls behind international law and even the standards of emerging DFIs on this matter and must be rectified.
- 14. In line with international human rights standards and a general principle of expropriation laws throughout the world, the first objective of ESS5 should be to ensure that involuntary resettlement is absolutely necessary to fulfill a legitimate public interest purpose and promote the general welfare. The displacement impacts should be reasonable and proportionate to the public good that will be achieved through the project.** The draft ESF pre-supposes that the development objectives of Bank-supported projects inherently justify eviction or restrictions on access to resources, and does not contain any requirements – even in the case of financial intermediary sub-projects – to ensure that the project genuinely serves the public interest. However, each project causing displacement needs to be assessed for its general welfare value and weighed against the displacement impacts and risks of harms to affected people, as stipulated in the *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement*. It should not be assumed that all World Bank-supported projects meet the threshold to justify involuntary resettlement, and particular attention should be paid to financial intermediary sub-projects and projects that involve the private sector.
- 15. People who will be physically and/or economically displaced should be offered a choice of economically viable resettlement site or replacement land options that are appropriate to their skill-base and capacities. Livelihood restoration and support programs should be appropriately tailored to the economic activity in the area and the skills of affected people.** A resettlement location or replacement land (with security of tenure) that provides access to suitable economic opportunities is perhaps the most important determinative factor to assist people to get back on their feet and restore their livelihoods. For example, households with coastal or riparian-based livelihoods must be offered replacement land options with equivalent access to the sea, river or other resources. Families who rely on the urban economy to derive their income must be resettled as near as possible to their former locations, or an alternative location with equivalent or better economic opportunities: the evidence shows that there is a direct correlation between income restoration and distance between original places of residence and the resettlement location. The current requirements in ESS5 on measures to support livelihoods are weak,

²⁷ UN Basic Principles and Guidelines on Development-based Evictions and Displacement, para 21.

²⁸ AIIB (2nd) draft ESP, para 71.

and in practice, Borrowers often do not provide effective livelihood support programs, leading to significant waste of resources and continued economic displacement. The livelihood support plans should include a range of appropriate measures for supporting poor economically displaced persons to improve their livelihoods and income-earning potential, and describe why these measures are expected to be effective, taking into account factors including their skill-base and capacities and local economic opportunities.

- 16. Required minimum conditions at resettlement sites should be made consistent with human rights standards to ensure that all affected people can meet their basic needs, including women, children, the elderly, people with disabilities and other groups with special needs.** In particular, ESS5 should be strengthened to require reasonable access to basic services and facilities, including health-care facilities and schools. The provision of adequate housing, while a welcome addition to ESS5, must be defined in a manner consistent with prevailing international standards: at a minimum, the housing should be of sufficient quality to protect inhabitants from weather conditions and environmental hazards and provide for their physical safety. Housing should also provide adequate space and privacy, taking into account the household size and the number of women and children. Special needs for persons with disabilities and the elderly, for example, to make the housing physically accessible, should be addressed in the design of resettlement sites and housing. Resettlement sites and housing must be designed in a manner that is culturally appropriate to affected persons. Resettled people must have access to affordable potable water, energy for household needs and sanitation. Where cash compensation is provided instead of housing, the compensation amount should be sufficient to secure adequate housing. In cases in which poor and vulnerable families previously lived in inadequate housing conditions, replacement cost compensation should be supplemented as necessary to ensure access to adequate housing.
- 17. For any displacement impacts that are covered by ESS1 because they fall outside the scope of ESS5, mitigation measures should improve and at minimum *restore* people’s livelihoods and living conditions to pre-displacement levels, and not merely compensate them where “financially feasible”.** While our strong preference is that the scope of ESS5 is expanded to cover all displacement impacts, at minimum the Policy, ESS1 and ESS5 should require the restoration of incomes and livelihoods that are adversely affected by Bank-supported projects (in addition to compensation for lost incomes and assets).

The ADB Safeguard Policy Statements contains such a requirement:

“If potential adverse economic, social, or environmental impacts from project activities other than land acquisition (including involuntary restrictions on land use, or on access to legally designated parks and protected areas) are... found to be significantly adverse at any stage of the project, the borrower/client will be required to develop and implement a management plan to restore the livelihood of affected persons to at least pre-project level or better.”²⁹

The second draft AIIB ESF contains an even stronger requirement.³⁰

“If adverse environmental, social or economic impacts from Project activities

²⁹ ADB, SPS, Appendix 2, para 6.

³⁰ AIIB ESS2 (2nd draft), para 3.

involving loss of access to assets or resources or restrictions on land use that do not fall within the definition of Involuntary Resettlement are identified, such impacts are avoided, or at least minimized, mitigated, or compensated for, through the environmental and social assessment under ESS 1. If these impacts are found to be adverse at any stage of the Project, the Client is required to develop and implement a management plan to restore the livelihoods of affected persons to at least pre-Project level or better.”

As noted above, Bank experience, documented in volumes of scholarly research, demonstrates that compensation alone does not prevent impoverishment.

18. The “financial feasibility” qualifier in ESS1 should be deleted altogether. Footnote 3 to the clause in ESS1 that sets out the mitigation hierarchy states: “Financial feasibility is based on relevant financial considerations, including relative magnitude of the incremental cost of adopting such measures and actions compared to the project’s investment, operating, and maintenance costs, and on whether this incremental cost could make the project nonviable for the Borrower.”³¹ If downstream impacts of dams were addressed through this provision, as is currently the case under the draft ESF, conceivably a Borrower could argue that compensating them is not financial feasible. Compensation of fisher communities for adverse impacts of a dam to their livelihoods could be enormous, given the potential scale and depth of disruption to their incomes, food source and way of life. The magnitude of downstream impacts on communities has been well-documented, highlighting just how many people’s sources of livelihoods can be disrupted.³² The mitigation hierarchy and footnote appear to suggest that the Borrower could argue that the payment of such compensation would make the project unviable in order to repudiate its responsibility to these project-affected people. This extraordinary loophole must be eliminated.

IV. Land and Natural Resource Tenure

19. The ESF should contain much stronger and more robust safeguards on land and natural resource tenure. The World Bank states that “investment in agriculture and rural development is a priority for the World Bank Group.”³³ The Bank also has an extensive portfolio of projects supporting land tenure governance, including on land policy, management and administration.³⁴ Secure access to land underpins successful development. In addition to its social function, land is both the safety net for poor households and a foundation from which they can increase their economic potential. Indeed, the Bank recognizes that “securing access to land is critical for millions of poor people.”³⁵ While some Bank-supported projects have helped achieve tenure security for vulnerable groups, others have inadvertently had the opposite effect and weakened people’s tenure status,³⁶ contributed to conflict over land,³⁷ or led to real estate

³¹ ESS1, *supra* note 33, at footnote 3.

³² For example, Tanya Lee. (2015). Time to Re-assess Greater Mekong Subregion Energy Sector Investments, International Rivers and Mekong Watch, page 5.

³³ <http://www.worldbank.org/en/news/feature/2012/10/02/world-bank-land-food-security>

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ For example, the Cambodia Land Management and Administration Project. (See, World Bank Inspection Panel (2010), Investigation Report, Cambodia: Land Management and Administration Project; and Bugalski, N, and Pred, D. (2013). Safeguarding Tenure: Lessons from Cambodia and Papua New Guinea for the World Bank Safeguards Review. Paper presented at the Annual World Bank Conference in Land and Poverty 2013, World Bank, Washington DC.)

speculation and ultimately displacement of communities.³⁸ Robust mandatory safeguards are necessary to ensure that these extremely harmful impacts on poor and vulnerable groups to not occur.

Yet, the ESF pays scant attention to land and natural resource tenure: it attempts to address these wide-ranging and complex potential harms in a single sentence. ESS1 paragraph 26 states:

The environmental and social assessment, informed by the scoping of the issues, will take into account all relevant environmental and social risks and impacts of the project, including:... (b) risks or impacts associated with land and natural resource tenure and use, including (as relevant) potential project impacts on local land use patterns and tenurial arrangements, land access and availability, food security and land values, and any corresponding risks related to conflict or contestation over land and natural resources.

If the Borrower identifies any such risks and impacts through its assessment (which requires a complex multi-faceted analysis including of the political economy of land), ESS1 would require it simply to apply the mitigation hierarchy (ie. avoid, minimize, mitigate, offset/compensate). While we welcome the mandatory inclusion of these types of risks in the social assessment, as currently written the ESF provides a dangerously low level of guidance on how to properly safeguard against the manifestation of such serious adverse impacts. Some additional requirements relating specifically to due process for the adjudication of competing tenure claims for projects supporting land titling and related activities only appear in a footnote to Annex 1 to ESS1.³⁹ These requirements should appear in the main body of ESS1 (or preferably in a separate standard on land tenure⁴⁰), along with other more detailed safeguards on land tenure.

The low level of attention to land tenure in the draft ESF is not commensurate to the importance of land and natural resources to people's lives and livelihoods or to the potential for adverse impacts of Bank-supported activities on people's secure access to land. Consistent with the Voluntary Guidelines on the Governance of Tenure (VGGTs), safeguards on land tenure should contain explicit and detailed requirements to ensure that Bank-supported projects:

- do not weaken but instead protect and secure a variety of tenure forms and arrangements, prioritizing the tenure of the most vulnerable groups, including women;
- do not create or exacerbate conflict over land and natural resources; and

³⁷ For example, the Papua New Guinea Smallholder Agriculture Development Project. (See, World Bank Inspection Panel (2011), Investigation Report, Independent State of Papua New Guinea: Smallholder Agriculture Development Project; and Bugalski, N, and Pred, D. (2013). op. cit.)

³⁸ For example, the Guatemala Land Administration Project. (See, Hurtado Paz Y Paz, L. and Grandia, L. (2013). Multi-Ethnic Communal and Collective Forms of tenure in Post-War Guatemala Lessons from Peten. Paper presented at the Annual World Bank Conference in Land and Poverty 2013, World Bank, Washington DC.)

³⁹ Footnote 10 to Annex 1 states: "Land titling and related activities are intended to confirm or strengthen land rights of project beneficiaries and to lead to positive social and economic outcomes. However, due to the complexity of tenure issues in many contexts, and the importance of secure tenure for livelihoods, careful assessment and design is needed in order to help ensure that such activities do not inadvertently compromise existing legitimate rights (including collective rights, subsidiary rights and the rights of women) or have other unintended consequences. In connection with such an assessment, the Borrower will at a minimum demonstrate to the Bank's satisfaction that applicable laws and procedures, along with project design features (a) provide clear and adequate rules for the recognition of relevant land tenure rights; (b) establish fair criteria and functioning, transparent and participatory processes for resolving competing tenure claims; and (c) include genuine efforts to inform affected people about their rights and provide access to impartial advice."

⁴⁰ See http://www.inclusivedevelopment.net/wp-content/uploads/2013/04/World-Bank-Tenure-Safeguards-Submission_FINAL1.pdf

- do not exacerbate inequality in access to and control over land, housing and natural resources (for example, through the promotion of large-scale industrial plantations as a rural or agriculture sector development model, discussed in paragraph 18 below).

IDI and Oxfam have previously submitted a [proposal to the World Bank for safeguards on land, housing and natural resource tenure](#), which contains details on what such requirements should look like.

20. The Bank’s ESF must make explicit reference to the need to protect and promote the tenure rights and arrangements of people and communities with land and natural resource-based livelihoods, including smallholder food producers, fisher folk, herders and forest dwellers, in Bank-supported agricultural operations. These land and natural resource users should be the primary beneficiaries of any such project, including through the strengthening of their tenure security and increasing their access to productive resources. The Bank should not support or promote commercial land investments or acquisitions that do not respect the pre-existing tenure rights, including subsidiary use and access rights, of land users in the vicinity of the area. This includes the right of affected people to give or withhold consent to any transfer or interference with their tenure rights. In addition, the Bank should codify, in its Environmental and Social Policy, its public commitment that: “The Bank Group does not support speculative land investments or acquisitions which take advantage of weak institutions in developing countries or which disregard principles of responsible agricultural investment.”⁴¹

⁴¹ <http://www.worldbank.org/en/news/press-release/2012/10/04/world-bank-group-statement-oxfam-report-our-land-our-lives>