

**SAFEGUARDING TENURE:
LESSONS FROM CAMBODIA AND PAPUA NEW GUINEA
FOR THE WORLD BANK SAFEGUARDS REVIEW**

NATALIE BUGALSKI AND DAVID PRED
Inclusive Development International, USA
natalie@inclusivedevelopment.net ~ david@inclusivedevelopment.net

**Paper prepared for presentation at the
“ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, April 8-11, 2013**

Copyright 2013 by authors. All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.

Abstract

With a view to operationalizing the recently adopted Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries, this paper identifies gaps in existing World Bank safeguard policies with respect to tenure. The paper explores the adverse impacts on security of tenure for vulnerable groups resulting from a land administration project in Cambodia, and explains how oil palm projects in Papua New Guinea resulted in a shift away from a flexible and equitable tenure governance system to a more rigid individualized system that has made some land users more vulnerable. In both cases, existing Bank safeguard policies did not effectively avoid and mitigate the adverse impacts on tenure or the consequential harms to affected people and communities. The paper outlines new safeguard measures proposed by Oxfam and Inclusive Development International that aim to prevent and mitigate negative impacts on tenure, whilst promoting greater security across the continuum of tenure forms and more equitable access to and control over land, housing and natural resources.

Key words: Cambodia, Papua New Guinea, Safeguards, Tenure, World Bank

INTRODUCTION

The UN Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik, warns in her report to the twenty-second session of the Human Rights Council (2012, p. 1) that we are “in the grip of a global tenure insecurity crisis.” This crisis has manifested itself over the past decade in forced displacement from development projects affecting an estimated 15 million people annually (Cernea, 2007), and large-scale land deals over an area the size of Western Europe (Oxfam, 2011) dispossessing millions of the world’s rural poor of their use and access rights to land and natural resources. Coupled with droughts, natural disasters and other climate change-related factors, Rolnik asserts that rural land grabs have been a major driver of migration to cities, where an inadequate supply of affordable land and housing results in the swelling of urban settlements with insecure tenure arrangements. Unless this crisis is tackled at its roots, we may soon face a world where there is simply nowhere secure for the poor to live.

In recognition of this urgent situation, 125 member countries of the UN Committee on Food Security adopted the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests* in May 2012. The Guidelines affirm that secure tenure rights and equitable access to land provide

a crucial foundation for poverty reduction, sustainable development and the enjoyment of human rights. Grounded in international human rights law, the Guidelines represent an important development in clarifying the responsibilities of States in improving governance of tenure “for the benefit of all, and with an emphasis on vulnerable and marginalized people” (FAO, 2012, 1.1). Yet without concerted measures by States and intergovernmental organizations to implement the Guidelines, private investments and public development projects will continue to have profound deleterious implications on people’s access to land, housing and natural resources, exacerbating inequality and harming the most vulnerable.

Over the past thirty years, the World Bank and other international financial institutions have developed and adopted binding operational policies and procedures known as “safeguard policies” that aim to prevent and mitigate adverse impacts of their investments on people and the environment. In late 2012, the Bank commenced a two-year review of its suite of existing safeguard policies, and also committed to considering “if and how it could potentially address a number of emerging areas that stakeholders have asked to be considered” (World Bank, 2012a). One of the areas the Bank has identified for consideration is “land tenure and natural resources”.

In parallel to this initiative, the Bank asserts that it is “actively engaged with multiple partners...in supporting implementation of the [Voluntary Guidelines] at the country level,” maintaining that it considers the Guidelines a “major international instrument to guide specific policy reforms” (World Bank, 2012b). While the Guidelines are voluntary in nature, despite their basis in international human rights law, binding operational policies that reflect the Guidelines would have greater potential to improve the governance of tenure vis-à-vis Bank-financed projects. The safeguards review process provides an ideal opportunity for the Bank to use the Voluntary Guidelines to reform its own policies regarding tenure for the benefit of all people affected by its investments

In view of this opportunity, this paper identifies the gaps in existing World Bank safeguard policies with respect to tenure through a review of relevant Bank operational policies and an examination of two case studies in which Bank investments have had unintended negative implications for tenure rights and systems. We explore the adverse impacts on security of tenure for vulnerable groups resulting from a land administration project in Cambodia, and explain how a series of oil palm projects in Papua New Guinea has resulted in a shift away from a flexible and equitable tenure governance system to a more rigid individualized system that has made some land users more vulnerable. In both cases, existing Bank safeguard policies did not effectively avoid and mitigate the adverse impacts on tenure or the consequential harms to affected people and communities. We conclude by outlining new safeguard

measures proposed by Oxfam and Inclusive Development International (IDI) that aim to infuse the spirit and the objectives of the Voluntary Guidelines into the Bank's updated safeguard policy framework. The measures we propose aim to prevent and mitigate negative impacts on tenure, whilst promoting greater security across the continuum of tenure forms and more equitable access to and control over land, housing and natural resources.

TENURE¹

For the purposes of this paper, tenure refers to the relationship amongst people and groups with respect to rights and interests in land, housing and natural resources. The rules of tenure in a given society govern how these rights are created or determined, allocated and enjoyed, and conversely, the way they are constrained and extinguished. Land tenure systems are an invisible but powerful web of relationships underpinning society, determining where people live, access to sources of livelihoods, and the terms on which people can enjoy and utilize spaces for social, cultural and spiritual activities. Forms of tenure and the systems that govern them vary from one society to another since they reflect the particular relationships and rules that have emerged due to specific demographics, geography, cultures and socio-economic systems. Land tenure is deeply influenced by power dynamics within and between households and communities, and between the citizen and the state and global economic forces. People with a weak tenure status are thus often the most vulnerable and marginalized in society; and their vulnerability is exacerbated and reinforced by the lack of recognition, respect and protection of their tenure rights, and their associated inability to access productive resources. Women, in particular, commonly face this cycle of marginalization due to entrenched discrimination in land governance systems.

Tenure systems and tenure security are not 'one-size-fits-all concepts' (Sietchiping, Dyfed, Bazoglu, Augustinus and Gora, 2012). A multitude of diverse tenure arrangements apply to millions of people around the world who, for example, live in squatter settlements, on rooftops or on city pavements, or who enjoy gathering rights, herders' rights, or collective use rights of communal land and resources (ibid). A variety of tenure forms have the potential to ensure secure, efficient and sustainable access to housing and productive resources in different contexts. Thus, while in mainstream development discourse "security of tenure" has become essentially synonymous with registered private ownership, this is in reality only one

¹ This section is adapted from the Oxfam and Inclusive Development International *Discussion Paper on New World Bank Safeguards on Tenure* [Draft] (2013, February), authored by Bugalski and Pred.

form of tenure, which may or may not be best suited to securing the rights to land, housing and natural resources of a particular group and in a given context.

According to the Committee on Economic, Social and Cultural Rights (1991), “notwithstanding the form of tenure,” security of tenure that provides legal protection against forced eviction is an essential element of the right to adequate housing (para. 8). Secure access to, and effective control over, land and natural resources is also vital to the enjoyment of the right to adequate food, particularly for rural and forest dwellers, pastoralists and fisher folk (OHCHR, 2010). In view of the international human rights law obligations that bind the World Bank and its Member States, the safeguard measures proposed by Oxfam and IDI seek to ensure that the Bank is not complicit in human rights violations with respect to the impacts of its investments on tenure of land, housing and natural resources. They also aim to ensure that its investments support the fulfillment of human rights, particularly the rights to adequate housing and food, to the fullest extent possible.

“TENURE” IN EXISTING SAFEGUARD POLICIES

The issue of tenure is addressed to a limited extent in existing safeguard policies. The way a proposed Bank-financed project affects tenure and the social aspect of these impacts could be analyzed as a part of the environmental assessment required under Operational Policy (OP) and Bank Procedures (BP) 4.10; however, the policy does not explicitly require an assessment of tenure. OP/BP 4.04 aims to avoid adverse impacts on natural habitats by discouraging the Bank from supporting projects that involve significant conversion of natural habitats, and where unavoidable, by requiring unspecified conservation and mitigation measures. While the application of this policy could certainly have implications for land use and access to natural resources, it does not deal with tenure rights and systems *per se*. Similarly, while OP/BP 4.17 addresses some aspects of water resource management for projects that entail support for the provision of potable water, sanitation facilities, flood control, and water for productive activities, beyond requiring these projects to be “socially equitable,” it does not deal with tenure rights to water. OP/BP 4.11 is aimed at avoiding or mitigating adverse impacts on physical cultural resources, including resources with cultural significance to local communities. The policy can thus have implications for tenure rights over such resources but does not address tenure rights directly.

Three safeguard policies have more significant potential to protect against adverse impacts on tenure. Tenure rights and governance systems in relation to forests are addressed in OP/BP 4.36. The policy

applies to Bank-financed projects that may have impacts on forests; that affect the rights and welfare of people and their level of dependence upon or interaction with forests; and that aim to bring about changes in the management, protection, or utilization of natural forests or plantations, whether they are publicly, privately, or communally owned (OP 4.36, para. 3). The policy therefore has direct implications for tenure governance systems and use and access rights to forests. In particular, the policy prohibits the Bank from financing industrial-scale commercial harvesting operations unless they are certified under an independent forest certification system that requires, *inter alia*, “recognition of and respect for legally documented or customary land tenure and use rights as well as the rights of indigenous peoples and workers” (*ibid*, para. 10(b)). The policy also stipulates that the environmental assessment of projects must address the potential impact upon the rights of local communities who live in or near a forest, and who have a significant level of dependence upon or interaction with the forests. This includes the potential impacts of the project on “their legal rights of access to, and use of, designated forests areas” (BP 4.36, para. 4).

Tenure rights of Indigenous Peoples (IPs) are addressed fairly comprehensively in OP/BP 4.10. Most importantly, any project proposed for Bank financing that affects IPs requires “a process of free, prior, and informed consultation [...] to ascertain their broad community support for the project” (OP 4.10, para. 6), a safeguard measure that falls short of the right of IPs under the UN Declaration on the Rights of Indigenous Peoples’ to grant or withhold their consent (article 32(2)). The policy has a dedicated section on lands and natural resources in recognition of their special significance to IPs. For projects that affect the ties of IPs to land, forests, water, wildlife, and other natural resources, special considerations apply. The borrower-government is required to pay “particular attention” to the customary rights of the IPs “pertaining to lands or territories that they traditionally owned, or customarily used or occupied” and “the need to protect such lands and natural resources against illegal intrusion or encroachment” (OP 4.10, at para. 16).

For certain projects, an action plan for the legal recognition of ownership, occupation and usage of IP traditional lands and territories is required. Such recognition may occur through the “full legal recognition of existing customary land tenure systems”; the “conversion of customary usage rights to communal and/or individual ownership rights” or, if neither is possible under domestic law, recognition of “perpetual or long-term renewable custodial or use rights” (*ibid*, para. 17). For projects that entail commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water, or hunting/fishing grounds) on IP lands or territories, a number of safeguards apply to ensure affected communities are informed and “share equitably in the benefits” (*ibid*, para. 18).

Involuntary resettlement of IPs or restrictions on their access to legally designated parks and protected areas are only allowed in exceptional circumstances, when avoidance is not feasible and there is broad community support. In such cases, the Involuntary Resettlement policy applies, with special regard to the IPs' cultural preferences and needs, and their traditional custodianship of the natural resources (ibid, paras. 20-21).

The Bank's policy on Involuntary Resettlement (OP/BP 4.12) covers direct economic and social impacts of physical and economic displacement that result from Bank-financed projects and are caused by the involuntary taking of land or other activities in certain circumstances. The policy therefore has important implications for tenure rights. Specifically, it aims to avoid and minimize involuntary resettlement where feasible, exploring all viable alternative project designs, and requires the provision of important due process rights and entitlements to affected persons. Different entitlements are extended to those with formal legal rights to land, those with a claim that is recognized under law, and those who have no recognizable legal right or claim to the land they are occupying. While the policy falls short in some respects of international human rights law, it nonetheless stands as an important safeguard against forced eviction. It also contains protections against adverse impacts on livelihoods due to involuntary restrictions on access to resources in legally designated parks and protected areas.

There are a number of significant ways in which Bank-financed operations can affect tenure that remain outside the scope of these safeguard policies. For example, land administration, zoning and spatial planning projects can jeopardize or weaken the pre-existing range of un-codified tenure rights, diminishing tenure security for affected groups. In particular, land-titling projects can strengthen ownership rights for those that receive title, while weakening the tenure status of those who are denied title. Zoning and spatial planning projects can change the tenure status underlying entire areas. Coastal management projects can undermine the tenure rights of fisher folk. 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. Programs that promote or foster industrial agriculture, including large-scale mono-crop plantations and contract farming, can change the way land and natural resources are used and controlled. In the long-term, this model of agricultural development can transform entire tenure systems, often to the detriment of local food security. Current safeguards do not sufficiently address these effects on tenure and their social and human rights implications. The sections that follow explore some of these impacts with regards to two particular World Bank projects in Cambodia and Papua New Guinea.

SECURING TENURE ACROSS THE CONTINUUM OF RIGHTS: LESSONS FROM THE CAMBODIA LAND MANAGEMENT ADMINISTRATION PROJECT

Bank supported land administration projects have commonly promoted the formal registration of private ownership rights as the primary means of securing tenure. While freehold registration can provide important clarity and security for those eligible for title in many contexts, frequently no equivalent efforts are made to secure the rights of those enjoying other types of tenure arrangements. This exclusionary approach means that large segments of the population, including those most vulnerable to forced eviction, are left insecure. Because of the adoption of a system that exalts ownership above all other tenure forms, an over-simplistic dichotomy of rights is created or reinforced, making “non-owners”, who may have been relatively secure under pre-existing “informal” systems, more insecure and vulnerable to eviction.

The risk of this adverse outcome of land administration projects on tenure security occurs most heavily in contexts in which there is intense competition for control over land and natural resources. This competition is exacerbated by the promotion of large-scale investment in rural land for agroindustry and urban real estate for commercial development. According to proponents of neoliberal approaches to development, codified private property rights are fundamental because they facilitate these very types of investments, which propel economic growth. Yet, the increased tenure insecurity and vulnerability to forced eviction that manifests for those unable to secure title entrenches structural inequality and leaves many poor and vulnerable households worse off.

This situation has played out in Cambodia over the past few years. The Bank-supported land management and administration project (LMAP) commenced in 2002 as the first phase of the Cambodian government’s land reform program, which aimed to strengthen land tenure security and land markets, prevent and resolve land disputes, manage land and natural resources in an equitable, sustainable and efficient manner, and promote equitable land distribution. The cornerstone of the project was the systematic registration of land plots and their owners in a central modernized cadastral database following the adjudication of ownership claims according to provisions of the 2001 Land Law. Many of the expected beneficiaries were those “vulnerable to being dislodged from the land where they live and

farm.” It was anticipated that these households would be provided with secure title, which would “sharply reduce the risks of dispossession” that they faced (World Bank, 2002, p. 10).

During the life of LMAP more than a million titles were issued to Cambodian households (World Bank, 2011), in many cases providing much needed clarity and legal security under Cambodia’s Constitution, Land Law and Expropriation Law.

However, the project’s sole focus on securing one form of tenure – private freehold, meant that it did not improve tenure security for the large segments of Cambodian society that were most vulnerable to displacement. A social assessment conducted as a prelude to the design of LMAP identified the risk of eviction from State land of individuals who occupied the land prior to the passage of the law (World Bank 2002, Annex 12, p. 82). It also identified the problem of “a large number of squatters in Phnom Penh and other major cities” who settled on the land after the passage of the law, which marked the cut-off date for eligibility for title (ibid, p. 19). The project envisioned applying the prepared Resettlement Policy Framework (RPF) to protect the former from forced eviction when there was no agreement by the government to register the land in their names (ibid, Annex 12, p. 82). In practice, the RPF was never applied. As a result, LMAP did not address the insecure tenure situation of the most vulnerable groups - leaving potentially hundreds of thousands of households without any opportunity to strengthen their tenure status, and subject to forced evictions without any safeguards. The project omission was particularly stark in an environment characterized by escalating incidents of violent evictions and dubious State claims to large swathes of prime urban and rural real estate for re-allocation to elites and investors.

LMAP faced another major problem, partly as a result of design flaws that allowed power holders to manipulate the project to their benefit. Households, and in some cases entire communities, with legitimate ownership claims to valuable sought-after plots were routinely denied title after the process of adjudication of their claims was aborted (World Bank, 2009; World Bank Inspection Panel, 2010).

A key design feature of LMAP was the sequencing of activities “so that systematic titling [did] not take place on lands with unclear status until after the status [was] agreed with all stakeholders and boundaries between private and state domains [were] demarcated” (World Bank, 2002, p. 12). In practice, the process and rationale for deciding that the status of a particular area or plot was “unclear” was not publicly disclosed. Thus, this design feature, while seemingly purposeful for avoiding conflict, when coupled with the lack of transparency in decision-making, vested undue discretion in authorities, known to be complicit in land-grabbing, to declare an area as having an “unclear status”. Manipulation of the project by power-

holders, to the detriment of ordinary Cambodians, was further facilitated by the lack of progress made in classifying and demarcating State-owned land. The result was that areas that the State wished to control due to their high economic value were declared as having an “unclear status” despite the existence of legitimate private claims, and thereafter treated as *de facto* State property (World Bank Inspection Panel, 2010; Grimsditch and Henderson, 2009). The interplay of the land-titling project with unchecked power dynamics therefore ultimately resulted in arbitrary exclusions from the titling system for households that lay in the path of planned urban developments or agro-industrial concessions (Bugalski, 2012). The arbitrary exclusions in turn increased the vulnerability of excluded households to forced eviction, as the World Bank Inspection Panel (2010) found in its investigation of a complaint submitted by the Boeung Kak Lake community in central Phnom Penh. More than 3000 Boeung Kak households were forcibly evicted after first being denied title when the area was marked on the cadastral map as having ‘unclear status’ and later being accused of illegally occupying State land (Bugalski and Pred, 2010).

While the most vulnerable households were excluded from the opportunity to strengthen their tenure status, the majority of beneficiaries of systematic titling were those living in rural areas that had not been sought after by developers or speculators. While many systematic title recipients have been poor households, they have not necessarily been those in most immediate need of security that a land title aims to provide (Grimsditch and Henderson, 2009). Conversely, as we have written previously, “by excluding households vulnerable to displacement and failing to implement a transparent rule-based process for titling decisions, LMAP effectively formalized, and arguably deepened structural inequality in land tenure administration in Cambodia” (Bugalski and Pred, 2010).

A major lesson from LMAP is that the impacts on tenure security not only for those who would receive title under a land administration system that promotes individual freehold, but also for those who would be *denied* title under such a system must be taken into account in the design of the project. The project and safeguard measures must be designed to ensure that vulnerable persons are prioritized and not excluded and consequently harmed. The mapping, recording, recognition and conferral of legal security for households and communities with a range of tenure forms that reflect their different legal, social, cultural and economic situations is thus essential. The triggering of safeguards under the involuntary resettlement policy for any household on State land whose tenure arrangements cannot be secured for genuine general welfare reasons must be made mandatory, and effective monitoring mechanisms must be established to ensure that resettlement safeguards are effectively implemented in these circumstances.

Furthermore, analyzing and tackling fundamental political-economy factors that will have implications for the tenure project, and the extent to which its development goals are met, is vital. No single project will be able to change the endemic abuse of power in relation to the control over land and natural resources in Cambodia or in similar political economy environments; however safeguard measures must be designed to protect people's rights to the fullest extent possible. Public disclosure of information pertaining to the classification of land and adjudication of claims is key to establishing a land administration project that is fair and accountable. The establishment of competent, rule-bound and accessible local land dispute resolution and accountability mechanisms is also a critical safeguard to challenge asymmetrical power relations that permeate tenure governance. Stronger Bank supervision to ensure that projects that it finances are not manipulated by elites to the detriment of the poor is also urgently warranted.

PROMOTING EQUITABLE TENURE SYSTEMS: LESSONS FROM THE PAPUA NEW GUINEA SMALLHOLDER AGRICULTURE DEVELOPMENT PROJECT

The need for increased attention to and investments in agriculture to address food insecurity and rural poverty is roundly acknowledged (Deinginger and Byerlee, 2011; De Schutter and Vanloqueren, 2011). There is, however, intense disagreement about the form such investments should take, the model of agriculture that should be promoted, and the principles that should guide the design and implementation of agricultural development programs. In particular, there is growing debate about development programs that promote large-scale investment in commercial agriculture, and escalating concern that such investments displace the rural poor in favor of trans-national investors (Borras and Franco, 2010; Zimmerle, 2012; Narula, 2012). A multitude of cases show how rural households and smallholder farmers can be put at risk of dispossession as a consequence of such programs (Cotula, et al., 2009; Daniel and Mittal, 2009; Horne, 2011; Geary, 2012; Narula, 2012). State and private interest in agricultural land in developing countries for the production of food, fodder and fuel – as well as capital gains – have skyrocketed since the food crisis of 2008 (Narula, 2012; De Schutter, 2009). Commentators have argued that agricultural development programs supported by the World Bank Group are designed in a way that facilitate these interests, even when this is detrimental to local communities (Borras and Franco, 2010; Narula, 2012; Daniel and Mittal, 2010; Zimmerle, 2012).

The World Bank has made a public commitment to refrain from supporting “speculative land investments or acquisitions which take advantage of weak institutions in developing countries or which disregard

principles of responsible agricultural investment” and recognizes the need for “appropriate safeguards and inclusion of small holders and communities as beneficiaries” (The World Bank, 2012b). Along with a number of other organizations, the Bank has developed the Principles for Responsible Agricultural Investment that Respects Rights, Livelihood and Resources, known as the RAI-Principles. However, these have been roundly criticized and rejected for, inter alia, tolerating and facilitating human rights violations (Narula, 2012); legitimizing the corporate takeover of rural peoples’ farmlands (Land Research Action Network, 2010); and diverting attention “away from coming to terms how rural poor people’s land (and water) rights, interests and concerns must be prioritised and promoted, and not just recognized and protected” (Borras and Franco, 2012). Social movements and other civil society stakeholders have welcomed the Voluntary Guidelines as a more legitimate framework than the RAI-Principles because of their strong grounding in human rights principles in the context of tenure, and due to the active participation of civil society, including representatives of food producers themselves, in drafting them (see “The Guidelines”, 2012).

While most of the attention has been focused on projects and policies that promote large-scale land acquisitions, experts have also pointed to the adverse consequences of agricultural development projects that promote incorporation of smallholder farmers into global supply chains through contract farming (De Schutter, 2011). The Papua New Guinea (PNG) Smallholder Agriculture Development Project shows how such projects can change the way land and natural resources are used and perceived, and in the long-run, transform entire tenure systems, to the detriment of vulnerable groups.

The commercial development of oil palm has been an integral part of the PNG government’s program to implement its rural development objectives for decades. Oil palm cultivation is one of the key vehicles it has promoted for the transition from a subsistence to a market economy. The World Bank has been a key partner in supporting oil palm production since 1969 (World Bank Inspection Panel, 2011). A Bank-financed project, which commenced in 2007, seeks to increase the income and improve the livelihoods of smallholders already involved in oil palm production by supporting interventions that increase and sustain agricultural output and productivity in three districts in the West New Britain and Oro provinces (World Bank, 2007).

The *ex ante* social assessment (SA) of the project, conducted as a requirement of OP 4.10 on Indigenous Peoples, considered potential land tenure conflicts and problems at length (Curry et al., 2007). We note as an aside that this type of robust tenure analysis may not have been undertaken at all for similar projects in Africa, where OP 4.10 is often not triggered because of the political sensitivity of using the term

Indigenous Peoples (World Bank OPCS, 2011). This is despite the fact that similar tenure problems could emerge, indicating the need for a broader policy requirement for a comprehensive assessment of project implications for tenure.

The SA identifies several points of potential conflict that exist as a result of the juxtaposition of customary tenure systems and cash crop production predicated on more individualized control over land plots over long periods. One of the major problems relates to the changing perceptions of and relationship to land due to the introduction of the monetary incentive.

The SA explains that customary land tenure rules in the area were characterized by two general sets of principles:

First, exclusive individual land ownership and inheritance were almost unknown as all land was vested in landholding groups, usually kinship groupings such as clans and sub-clans... [A]n individual's gardening rights in an area of land waned as his/her garden reverted to fallow and ...there was a gradual reversion of rights to the group... This system...prevented individuals from acquiring exclusive control over large areas of land.

The second set of principles related to the flexible and pragmatic nature of customary land tenure. Rights to land were often modified to accommodate changing socio-political, demographic and environmental situations... Thus flexible tenure arrangements sustained a system whereby all households had access to land for the daily sustenance (pp.14 -15).

The SA describes how as more land is allocated to commercial agriculture, and particularly oil palm, usufruct rights are now vested in one individual or family for much longer periods (oil palm has a productive life of over twenty years). Due to this “long-term alienation of land for cash cropping” people are claiming more permanent, exclusive and inheritable rights to these resources. This has led to the gradual transformation of customary tenure into more individualized and less flexible forms of land tenure, accompanied by shifts in peoples’ attitudes toward land, “such that land is increasingly being seen by some clan members as a commodity that can be sold to people outside the land-holding group” (p. 15).

Thus customary land tenure principles that were well suited to subsistence food production and livelihoods have not been sustained with the transition to cash cropping of oil palm. The transition from

subsistence farming to cash cropping has fundamentally transformed the traditional land tenure system, undermining its equitable aspects, and resulting in deleterious impacts on vulnerable groups.

When oil palm was first introduced, the flexible customary tenure rules meant that clans that were land poor were allocated plots by the major landholding group to plant oil palm, just as they would have been provided land for food gardens. This land redistribution reduced potential income inequalities amongst village families. The SA explains:

Now, twenty or more years on, the distribution of landholdings that occurred when oil palm was introduced is increasingly being questioned by the present generation of the primary landowning groups. Some...are strongly opposed to the efforts of non-landowning...blockholders to replant their aging stands of oil palm... Also, members of many customary landowning groups are becoming more resistant to non-clan/sub-clan villagers developing new blocks on their customary land. The reasons for this shift in attitude are varied, but relate largely to increased demographic pressures, functional land shortages for oil palm production, increased reliance on cash, and a growing recognition of the potential of land to generate wealth for the individual (p. 16).

The result is increasing conflict over control of land between landowning groups, who now want to maximize profits from their land, and groups who were granted use rights to the land many years ago, have worked the land ever since, and now wish to continue cultivating oil palm. The latter group can be left landless or land poor if their use rights are extinguished, placing them in a highly vulnerable situation.

While these adverse impacts are a result of the decades-long introduction of and support to oil palm development, the SA recommended a number of mitigation measures to be incorporated into the current Bank project with the aim of strengthening the tenure rights and promoting more equitable access to oil palm.

None of the SA's analysis described above or the recommendations to mitigate harms were incorporated into the project design as described in the project appraisal document.

A major lesson from the PNG case is that the cumulative impacts on tenure systems of a series of development projects, whether Bank-financed or not, need to be rigorously assessed. Safeguard policies should require potential adverse implications, including the instigation or exacerbation of land conflict, reduced tenure security for some groups, and increased inequity in access to land and natural resources, to

be prevented or mitigated. The temptation of Bank task teams to ignore these complex and transformational impacts on tenure because of the difficulty in designing safeguard measures must be precluded by policy requirements.

A number of other serious problematic social impacts of cash cropping were identified by the SA, and later by the World Bank Inspection Panel, which investigated the project in 2011 after receiving a complaint from affected people. These included the dependency on mill companies by smallholders due to the credit arrangements for farming inputs and the monopsonistic (one buyer/many sellers) nature of the value chain; the reduction in the availability of land for subsistence food gardens relied upon for food security for millennia, leaving the farmers at the mercy of each mono-crop harvest and fluctuating commodity prices; and the reliance on cash for food security, which can result in decreased nutrition from purchased processed foods (Curry et al., 2007; World Bank Inspection Panel, 2011). This suggests that for agriculture development projects in particular, special safeguard measures are required to avoid harms, including regression in the enjoyment of the right to food. These should include requirements for full disclosure of information and clear explanations about the process, benefits and possible short and long-term risks involved in farming the crop, and the terms of any contracts that smallholders would be required to sign with companies. Safeguard measures should also include support to smallholder farmers in negotiating the terms of the contracts and processes for monitoring compliance by companies with contract terms. There should also be complementary incentives and support to diversify crops and livelihoods, including by maintaining a proportion of land sufficient for a subsistence food garden. Policy should compel the Bank and borrower-government to ensure that contract farming of high value crops for export is never prioritized over local food security and nutrition of the local population.

PROPOSED NEW SAFEGUARDS ON TENURE

The Cambodian and Papua New Guinean scenarios underscore the need for safeguards to be put in place to protect against the serious adverse social and human rights impacts that can result from project interferences with pre-existing tenure rights, arrangements and systems. They also highlight the importance of prioritizing vulnerable and potentially vulnerable groups through interventions that secure their tenure arrangements, improve access to land and natural resources, and promote equitable tenure systems.

In response to the lacunae in existing Bank policies, IDI and Oxfam have developed a concrete proposal for new safeguards on tenure of land, housing and natural resources.² The overall objectives of the proposed safeguards are to:

- (i) ensure that Bank-financed operations do not infringe tenure rights³ to land, housing and natural resources in a manner that violates the human right to an adequate standard of living, including the right to adequate housing and the right to food;
- (ii) strengthen, secure and prioritize the tenure of vulnerable and marginalized people so that they enjoy, at minimum, legal protection against forced eviction and illegitimate use by others of their land and natural resources;
- (iii) make every effort to ensure that Bank-financed operations do not instigate or exacerbate conflict over land and natural resources; and
- (iv) promote more equitable use of, access to and control over land, housing and natural resources.

In order to achieve these objectives, the proposed safeguards require an assessment and political economy analysis of a range of potential negative and positive implications for tenure rights, arrangements and systems of proposed projects. Particular attention must be paid to vulnerable and marginalized groups, including women, whose existing tenure arrangements could be weakened, infringed or restricted by the proposed operation. Where the risk of weakening or restricting tenure rights is identified during the tenure assessment, the proposed safeguards require the participatory and transparent mapping and recording of existing forms of tenure, including subsidiary use and access rights (often held by women), within the project's area of influence.

An action plan would then need to be developed for the conferral of legal security for the range of existing tenure forms, and in some cases, the legal recognition of the tenure rights of each affected person, household or community, as the case may be. The action plan would need to be developed with full and meaningful consultation of affected persons and communities. Under no circumstances should a tenure system, such as a system of individual ownership, be imposed on communities who oppose it and whose customary or pre-existing tenure rules, rights and arrangements are inconsistent with it. The requirement for conferral of legal security is perhaps the most prescriptive and thus, likely, controversial aspect of the proposed safeguards; however, as described above, a similar requirement already exists in the Indigenous Peoples' Policy (OP. 4.10, para 17). The conferral of a degree of legal security of tenure is an obligation

² The full proposal is available at www.inclusivedevelopment.net/landtenuresafeguards

³ We refer here to rights deriving from customary, formal, informal, and extra-legal systems.

under the International Covenant on Economic, Social and Cultural Rights (CESCR, 1991). As Bank policy, this safeguard would therefore be consistent with, and give effect to, borrower-governments' treaty obligations.

It may be enough, such as in the case of a nation-wide land administration project, for the government to commit to an enforceable moratorium on evictions while the project is being rolled out. The project itself, however, would need to be designed to provide security of tenure across the continuum of rights in order to comply with the proposed safeguard requirements. In other situations, in which a limited group is affected in a particular way, such as a project that establishes a right of way but only removes people from a narrower corridor of impact, the tenure rights of each affected household or community remaining in the area may need to be legally recognized and secured. This can occur through a variety of possible means, such as enforceable contracts including leases or usufruct agreements, the conferral of titles,⁴ occupancy, access or use licenses or certificates, establishing community land trusts or cooperatives, or any other contextually appropriate means that provides security of tenure.

In cases in which legal recognition of existing tenure arrangements cannot be conferred and *in situ* tenure solutions are not feasible for genuine general welfare reasons, the Involuntary Resettlement Policy needs to be triggered to protect affected households against forced eviction and ensuing impoverishment, homelessness and landlessness.

For projects that could infringe on people's tenure arrangements or instigate or exacerbate conflict, the establishment of dispute resolution and accountability mechanisms that are rule-bound, impartial, fair and competent should be required. Such mechanisms should be socially and culturally appropriate, affordable and accessible to vulnerable groups. Other measures for averting and dealing with potential conflict over land and natural resources that are rooted in socially and culturally accepted norms and processes would need to be designed for projects in which the risk of conflict is identified.

We propose special safeguards for agricultural and other development projects that could directly or indirectly weaken, restrict or infringe the tenure rights and arrangements of people and communities with land and natural resource-based livelihoods, including smallholder food producers, fisher folk, herders

⁴ The Bank should be mindful however that titling on a small scale can be open to abuse by power-holders and can distort land and housing markets through sudden hikes in land values, indirectly resulting in displacement and landlessness.

and forest dwellers. 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 safeguards would make binding the Bank's stated commitment to refrain from supporting speculative land investments or acquisitions that disregard principles of responsible agricultural investment. We argue though, that the Bank should go further, and refrain from supporting or promoting land investments or acquisitions that reduce the availability of productive land, water or other natural resources for smallholder food producers and pastoralists to the detriment of their welfare and national food security.

The proposed measures require meaningful consultation of affected persons about the planned operation, its design, risks of harm and safeguards, with particular efforts made to ensure that women and vulnerable groups are able to actively participate in and contribute to consultation processes. They further recognize that for projects that affect indigenous peoples' territories and resources, and for projects that are not required for a public purpose, directly affected persons and communities should have the right to give or withhold their consent to infringements and restrictions on their tenure arrangements and freely negotiate terms upon which the transfer of rights could occur.

For all the proposed measures, particular attention must be paid to supporting and empowering vulnerable and marginalized groups in order to protect against any deleterious impacts on their tenure arrangements and maximize the benefits that they receive.

SAFEGUARDS AND THE BANK'S ROLE IN THE GLOBAL LAND RIGHTS CRISIS

The new safeguards we have proposed, on their own, can only go so far in addressing the global tenure insecurity crisis. There needs to be a fundamental shift in the dominant development paradigm that encourages economic growth through the commodification and privatization of land and natural resources and the promotion of large-scale investment in industrial, export-led agriculture. The record shows that this model overwhelmingly favors the interests of prevailing political and economic power holders, and usually comes at the expense of poor and marginalized people who are excluded both from decision-making processes about development and from enjoying its benefits. A mountain of cases in every region of the world demonstrates how this development model, overlaid by asymmetrical and distorted market forces, has resulted in dispossession, displacement and impoverishment on a massive scale.

The adoption by the World Bank of safeguard measures along the lines we have proposed would, however, be a critical step in the right direction for a global institution with a mission to deliver sustainable development results for the world's poor. These safeguards would compel Bank staff to work with governments to design projects that protect, promote and, indeed, prioritize the rights of poor and marginalized people to housing, land and natural resources. They would force the Bank to abandon its flawed approach to land management and administration in favor of a new model that places at its core increasing security of tenure across the continuum of tenure forms, emphasizing the rights of the most vulnerable. They would make the Bank rethink its approach to rural development and embrace alternatives to large-scale industrial agriculture, including agro-ecology and support for small-scale food producers. If the Bank were to adopt and implement such safeguard measures, it would send a message that it is serious about its commitment to support the implementation of the Voluntary Guidelines at the country-level. The safeguards review presents a once-in-a-decade opportunity for the Bank to play a leadership role in stemming the global land rights crisis. Will it seize the moment or continue its risky business as usual?

REFERENCES

- Borras, S. and Franco, J. (2010). From Threat to Opportunity? Problems with the Idea of a "Code of Conduct" for Land Grabbing. *Yale Human Rights and Development Legal Journal*. Volume 13. pp. 507-523.
- Borras, S. and Franco, J. (2012). A 'Land Sovereignty' Alternative? Towards a Peoples' Counter-Enclosure. *TNI Agrarian Justice Programme Discussion Paper*. The Hague: Transnational Institute.
- Bugalski, N. and Pred, D. (2010). Formalizing Inequality: Land Titling in Cambodia. *Defending the Commons, Territories and the Right to Food and Water. Land Struggles: LRAN Briefing Paper*. Series 2. Quezon City: Land Research Action Network.
- Bugalski, N. (2012). *Human Rights Approach to Development of Cambodia's Land Sector*. Phnom Penh: Equitable Cambodia & Heinrich Boll Foundation.
- Cernea, M. (2007) IRR: an operational risk reduction model for population resettlement. *Hydro Nepal: Journal of Water, Energy and Environment* 1(1).
- Committee on Economic Social Cultural Rights (CESCR). (1991). *General Comment 4: The right to adequate housing*: OHCHR
- Cotula, L., Vermeulen, S., Leonard, R. & Keeley, J. (2009). *Land Grab or Development Opportunity? Agricultural investments and international land deals in Africa*. London: International Institute for Environment and Development.
- Curry, G.N., Koczberski, G., Omuru, E., Duigu, J., Yala, C. & Imbun, B. (2007). *Social Assessment Report for the Smallholder Agriculture Development Project (SADP) Papua New Guinea*. Washington, DC: World Bank.
- Daniel, S. & Mittal, A. (2010). *(Mis)Investment in Agriculture: The Role of the International Finance Corporation in Global Land Grabs*. Oakland, California: The Oakland Institute.

- Daniel, S. & Mittal, A. (2009). *The Great Land Grab: Rush for World's Farmland Threatens Food Security for the Poor*. Oakland, California: The Oakland Institute.
- De Schutter, O. (2011). *The Right to Food*. A/66/262: United Nations.
- De Schutter, O. & Vanloqueren, G. (2011). The New Green Revolution: How Twenty-First-Century Science Can Feed the World, *Solutions*, 2(4). Retrieved from <http://www.thesolutionsjournal.com/node/971>
- Deininger, K. & Byerlee, D. (2011). *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* Washington DC: The World Bank.
- FAO. (2012). *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*. Rome: Author.
- FAO, IFAD, UNCTAD & World Bank Group. (2010). *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources, Extended Version*. Retrieved February 22, 2013 from http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf
- Geary, K. (2012). *Oxfam Briefing Note: Our Land, Our Lives: Time out on the global land rush*. London: Oxfam.
- Grimsditch, M., & Henderson, N. (2009). *Tenure Security and Inequality in the Cambodian Land Sector*, Phnom Penh: Bridges Across Borders Southeast Asia, Centre on Housing Rights and Evictions and Jesuit Refugee Services.
- Horne, F. (2011). *Understanding Investment Deals in Africa, Country Report: Ethiopia*. Oakland: The Oakland Institute.
- Inclusive Development International & Oxfam. (2013, February 02). *New World Bank Safeguards on Tenure of Land, Housing and Natural Resources: A Proposal for Discussion*. Unpublished Draft.

Land Research Action Network. (2010). *Why we Oppose the Principles for Responsible Agricultural Investment (RAI)*. Retrieved February 20, 2013, from <http://viacampesina.org/en/images/stories/pdf/whyweopposerai.pdf>

Narula, S. (2012, October). *The Global Land Rush: Markets, Rights, and the Politics of Food*. Paper presented at the International Conference on Global Land Grabbing II, Cornell University, Ithaca.

Office of the United Nations High Commissioner for Human Rights (OHCHR). (2010). *The Right to Adequate Food Fact Sheet*, No. 34. Geneva: Author.

Oxfam. (2012). *Land and power: the growing scandal surrounding the new wave of investments in land*. Oxford: Oxfam GB.

Rolnik, R. (2012). *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnick*. A/HRC/22/46: United Nations.

Sietching, R., Dyfed, A., Bazoglu, N., Augustinus, C., & Gora, M. (2012, April). *Monitoring tenure security within the continuum of land rights: Methods and practices*. Paper presented at the Annual World Bank Conference on Land and Poverty, World Bank, Washington, DC.

"The Guidelines on the Tenure of Land, Fisheries and Forests are a first step, but much more is needed to ensure people's rights to land and natural resources: Joint Statement of civil society organizations which have actively participated in the process of developing these Guidelines" ("The Guidelines"). (2012, May). Retrieved February 25, 2013 from http://www.csm4cfs.org/policy_working_groups-6/land_tenure-6/.

World Bank. (2012a). *Review and Update of the World Bank Safeguard Policies Consultation Plan*. Retrieved February 20, 2013, from <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:23275156~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>

World Bank. (2012b). *Land & Food Security*. Retrieved February 20, 2013, from <http://go.worldbank.org/S0D96SZZT0>

World Bank. (2011). *Implementation Closure Report on Land Management and Administration Project*. Washington, DC: Author.

World Bank. (2009). *Cambodia Land Management and Administration Project – Enhanced Review Report*. Washington, DC: Author.

World Bank. (2007). *Project Appraisal Document for a Smallholder Agriculture Development Project*. Washington, DC: Author.

World Bank. (2002). *Project Appraisal Document for the Land Management and Administration Project*. Washington, DC: Author.

World Bank Inspection Panel (2011), *Investigation Report, Independent State of Papua New Guinea: Smallholder Agriculture Development Project*. Washington, DC: Author.

World Bank Inspection Panel (2010), *Investigation Report, Cambodia: Land Management and Administration Project*. Washington, DC: Author.

World Bank OPCS. (2011). *Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006-2008)*. Working Paper. Washington, DC: Author.