

Complaints Receiving Officer  
Accountability Mechanism  
Asian Development Bank  
6 ADB Avenue  
Mandaluyong City 1550  
Philippines  
Email: cro@adb.org

29 August 2014

Dear Complaints Receiving Officer,

1. We, the undersigned complainants are matais and high chiefs, who are deeply concerned about the individualization, financialization and alienation of customary land that is occurring under the guidance of the Asian Development Bank (ADB)'s Technical Assistance *Promoting Economic Use of Customary Land* project,<sup>1</sup> which has been carried out without meaningful consultations across Samoa. We also object to the *Agribusiness Support Project*,<sup>2</sup> which appears to be aimed at further encouraging the financialization of arable land under customary tenure, without appropriate mechanisms to ensure that benefits flow to local families and villages.
2. The cumulative long-term impact of these ADB interventions will be severely detrimental to our people, including land alienation and dispossession. These reforms are incompatible with the indigenous culture and political institutions of Samoa, and they are inconsistent with the needs and aspirations of the Samoan people.
3. We believe that these harms and anticipated harms have resulted from ADB's failure to comply with its policies and procedures. We note in particular that the ADB failed to conduct appropriate environmental and social due diligence, to undertake meaningful consultation, and to trigger the policy on Indigenous Peoples in non-compliance with the *Safeguard Policy Statement (SPS)* and *OM C3: Incorporation of Social Dimensions into ADB Operations*. This failure has meant that critical procedural and substantive protections have been absent throughout the reform process, despite the fundamental and adverse changes being imposed on *fa'aSamoa*, our way of life. Moreover, it has meant a missed opportunity to achieve the laudable goal of promoting economic use of customary land, through culturally, socially and politically appropriate development inputs and support, without meddling with our tenure system.
4. We request that you send all correspondence on this matter to Mr. Fiu Mata'ese Elisara ([fiuelisara51@yahoo.com](mailto:fiuelisara51@yahoo.com)); Mr. Leluaialii Tasi Malifa ([yaoga@yahoo.com](mailto:yaoga@yahoo.com)); Mr. Lilomaiava Ken Lameta ([kslameta9585@gmail.com](mailto:kslameta9585@gmail.com)); and Dr. Tele'ai Sapa Saifaleupolu ([s\\_saifaleupolu@yahoo.com.au](mailto:s_saifaleupolu@yahoo.com.au)). We have prepared this complaint with support from Inclusive Development International (IDI). We request that you also include Natalie

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<sup>1</sup> Technical Assistance Project Phase I, II and II numbers 37234, 41173-01, 46512. These TAs build on an earlier set called *Facilitating Land Mobilization and Securitization*.

<sup>2</sup> Financial Intermediary Project number 46436-002

Bugalski, Legal Director at IDI, ([natalie@inclusivedevelopment.net](mailto:natalie@inclusivedevelopment.net)) in correspondence regarding this complaint.

5. The complaint is organised as follows: Section I describes the projects that are the subject of this complaint; Section II explains the anticipated harms; Section III sets out ADB's non-compliance with its policies and procedures; Section IV describes the remedies we are seeking from ADB; and Section V describes our unsuccessful effort to address our grievances with the ADB, resulting in the submission of this complaint.

## **I. The Projects: Promoting Economic Use of Customary Land TA and Agribusiness Support Project**

6. In 2013 the ADB approved the provision of technical assistance (TA) on a grant basis to the Government of Samoa for Promoting Economic Use of Customary Land, Phase III. The TA follows two preceding TAs, Phase I and II, which make up the overall project. The first TA of the series aimed to “increase the efficiency and effectiveness with which landowners and investors (domestic and foreign) implement agreements to utilize customary land for economic purposes.”<sup>3</sup> Specific expected outputs included legislative reform and public education towards this end.<sup>4</sup> The expected outcome of Phase II was an improved customary land-leasing framework to be reflected in an expansion in the types of collateral available, and the increase in the number of leases awarded and the amount of leasable customary land available to be utilized for economic purposes.<sup>5</sup> A main output of Phase II was the establishment of the Customary Land Advisory Commission (CLAC), to advise the Government on customary land reforms, lead the implementation of activities and coordinate all customary land stakeholders.<sup>6</sup> Other expected outputs included the establishment of a “one-stop shop to improve services to the community on customary land matters and to be the primary source of information on options for economic development” and a “functional database of leased and leasable land, through developing a registry of customary land.”<sup>7</sup>

7. The current phase of the TA builds on the previous phases by aiming to improve access to credit for business investment. The expected outcome of the TA is “the use of customary land leases as collateral.”<sup>8</sup> One of the main obstacles identified by the ADB to achieving the goals of the TAs is the reluctance of commercial banks to provide mortgages over customary land leases because of perceived “legal ambiguity.” The TA outputs are thus aimed at addressing this obstacle. Under the TA, the CLAC will work closely with the ANZ Bank, an unnamed overseas investor and the Government to broker a mortgage deal in order to establish a precedent.<sup>9</sup> The second output is the establishment of a leasing framework to, *inter alia*, facilitate registering and publicizing a security interest and repossessing and reselling the lease in the event of default.<sup>10</sup>

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<sup>3</sup> Phase 1 Technical Assistance Report (Project 37234) Dec 2005, at para 12.

<sup>4</sup> *Ibid.*

<sup>5</sup> Phase II Technical Assistance Report (Project 41173-01) Nov 2009, at para 9.

<sup>6</sup> *Ibid.*, at para 10 and 11.

<sup>7</sup> *Ibid.*, at para 10.

<sup>8</sup> Phase III Technical Assistance Report (Project 46512) Oct 2013, at para. 10.

<sup>9</sup> *Ibid.*, at para. 12.

<sup>10</sup> *Ibid.*, at para 13.

8. In 2014 the ADB approved a US\$5 million dollar grant to the Government of Samoa for agribusiness support. In addition to technical assistance and business support, the grant provides for \$2 million in collateral matching and \$1 million in equity to be lent by financial intermediaries for qualified loans to promote export oriented agriculture. The Project Administration Manual confirms that questions about land control and customary land tenure are central to this project. It states that: “land and questions of authority over it are very common sources of disputes within extended families, and of conflicts within villages. Recognition of these issues, and provisions for overcoming any obstacles they present to private enterprise, will therefore be essential for success for agribusinesses that depend on village land or small holders.”<sup>11</sup>

9. Essentially, the project will provide funds to financial intermediaries (FIs) to on-lend to agribusinesses. The Project datasheet (summary of environmental and social aspects) states that “any leasing of customary land for agricultural production will be undertaken through voluntary agreements between private agribusiness enterprises and landowners on a willing-buyer/willing-seller basis or with full consent of the landowners.” The project proposes to share risk with financial intermediaries to encourage collateralized lending for farming related businesses. Due to low levels of collateral in Samoa, the use of mortgages against leases of customary land can be expected to be a part of the collateral for these subsidized loans. This suggests a strong link between the proposed project and the series of TAs described above. It is clear that the proposed project aims to contribute to a system of individualization and financialisation of customary land through the provision of financing to promote commercial agribusiness on leased parcels. The project, in conjunction with the series of TAs, therefore has profound implications for customary land tenure in Samoa. Due to the strong linkages and interdependencies of these projects, and their anticipated cumulative impacts, both - the series of TAs and the FI project - are the subject of this complaint.

## **II. Anticipated Direct and Material Harm**

10. Land is an integral aspect of Samoan identity. The customary land tenure system guarantees a durable and lasting security for all Samoan people. It provides eligibility for all members of an aiga (extended family) to reside on and use family lands. The system disallows individual ownership of land even for the sa’o (paramount chief) of the family. Rather it treats land as the perpetual property of the whole family and regards the paramount chief as the trustee. The system allows for equitable allocation of family lands to all its members thus availing ample opportunities for all to provide for their needs through subsistence and commercial development.

11. Land alienation for economic development is incompatible with our system of customary land tenure. Leasing of customary lands is not forbidden *per se* and the practice is not new: leaseholds have been legally recognized and regulated by the 1965 Alienation of Customary Lands Act (the Act). However, leasing of land to outsiders for long durations - as would be necessary to secure a mortgage - comes perilously close to land alienation, forbidden by our customary laws as well as the Constitution of Samoa. Vesting unfettered power to enter into long-term lease agreements to be used as collateral in a single aiga member with authority, the matai or sa’o, in a manner that bypasses traditional consultative

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<sup>11</sup> Project Administration Manual (Project 46436), at para 135.

and consensus-seeking processes is tantamount to alienation of customary lands. This is the hidden danger.

12. A 1966 Amendment to the Act empowers the Minister of Lands, Surveys and Environment to grant a lease over customary land “for an authorized purpose approved by the [same] Minister” without the permission of the landowning group.<sup>12</sup> Under ADB-driven reforms, the Act has now been further amended to legalize mortgages over leases of customary land granted by the Minister.<sup>13</sup> This amendment, with undeniably fundamental implications for customary land tenure, was snuck in as a final provision of the Customary Land Advisory Commission Act (2012), which otherwise has no direct relevance to the 1965 Act. With the powers vested in the Minister already susceptible to significant risks, these reforms allowing leasehold mortgages - without any consultation whatsoever with the aiga - are exceedingly imprudent. In addition to destroying our time-honoured customary system of social welfare, the reforms expose land transactions to manipulation and corruption, as has occurred in the similar Special Agriculture and Business Leases (SABL) system in Papua New Guinea.<sup>14</sup>

13. We are also concerned about the complete silence in all documents on the issue of improvements to land made by the lessee, which are likely to be financed through a mortgage. Will the land-owning group be responsible for compensating the lessee for these improvements at the end of the lease as a condition for regaining control of the land? In cases in which the Minister enters into lease agreements on behalf of land-owning groups, communities will have no control whatsoever over terms of the lease, including in relation to such issues.

14. For the reasons above, the ADB-backed reforms aimed at establishing such a system in Samoa are repugnant to our customary land tenure laws, and their entrenched protection under the Constitution. We note with concern the ADB’s evident failure to respect or comprehend the importance of customary processes to ensuring equitable and sustainable access to and use of land and natural resources, as evident in the following passage from the phase III TA Report:

There is...high demand for customary lands from foreign investors. However, the landowners need to organize themselves to take advantage of this. The Alienation of Customary Land Act, 1965 recognizes that the *matiai* (family chief) can, on behalf of the family, offer to lease the family’s customary land should there be an interested investor. However, while the land is registered in the name of the *matiai*, the legal system recognizes all members of the group as owners. Any dealing with foreign investors therefore requires that all members of the landowning group are identified and have their names recorded on any land dealing, and all members of the landowning group (including absentee owners) must consent to any dealing. These requirements prolong the approval process and discourage long-term land development.”<sup>15</sup>

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<sup>12</sup> Alienation of Customary Lands Amendment Act (1966), section 5.

<sup>13</sup> Customary Land Advisory Commission Act (2012), section 15.

<sup>14</sup> See, <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/png-landowners-will-get-their-land-back-this-week-says-lands-dept-boss/1333088>

<sup>15</sup> Phase III Technical Assistance Report (Project 46512) Oct 2013, at para. 4.

15. We object to the ADB's determination to dispense with our customary laws and systems, which have successfully safeguarded the interests of the aiga for millenia, in the interests of expediently transforming land parcels into commodities to be absorbed by global financial markets. The risk runs high that benefits will flow not to local communities, but to foreign investors and national elites, with short-term monetary gains to individuals vested with unfettered powers over our lands. Meanwhile, members of our aiga will face dispossession from potentially large-tracts of land, foreseeably resulting in loss of income, threats to food security and impoverishment. It is also foreseeable that such fundamental transformations to customary land tenure will lead to social unrest, conflict and violence. We again point to recent scandals in Papua New Guinea to underscore the material nature of these risks.<sup>16</sup> Our customary systems of consensus building may be slow and frustrating in the eyes of the financial market, but they safeguard our rights and help ensure the equitable distribution of land and its benefits. It is these systems that have ensured our survival as a people into the 21<sup>st</sup> century. While financial markets thrive on systems that facilitate swift and seemingly simple land transactions, the Samoan *aiga* does not.

16. As observed of ADB project documentation by Samoan scholar Elora Raymond:

Nowhere in these reports is there a description... of the way in which communal tenure services as a social safety net, sits at the core of the political structure, and underpins social relations of familial and neighborly obligation. There is no discussion about how to constitute financial subjects, encourage educated borrowing and credit worthy behavior in a country where, to this day, even personal items such as jewelry, clothing and shoes flow like library books throughout the aiga. Cultural attitudes towards ownership are effaced and land tenure is presented as akin to a textbook case or a blank slate upon which reform will be enacted.<sup>17</sup>

17. Professor Iati Iati of the University of Otago, New Zealand, describes the deep-seated implications for Samoa of alienation of lands under customary tenure, beyond the anticipated direct socio-economic impacts for communities. Professor Iati explains that:

...the repercussions will extend beyond being a land ownership issue. Instead, it will have very significant implications for the traditional Samoan political framework. This comprises the customary socio-political practices and institutions that Samoans believe were in place prior to contact with Europeans, and which have been incorporated into their contemporary political framework on this basis. The traditional political framework applies primarily to the local governance sphere of the nu'u (polity), which is made up of āiga (extended families) whose origins and/or roots have been intertwined into the fa'alupega (constitution) of a nu'u. During pre-contact times, nu'u were autonomous political entities, and despite the formation of a national political domain in 1962, which introduced a national government, many still operate as if their autonomy and independence remains unchanged (Iati 2007). Land forms the foundation of this framework; it is attached to suafa (titles), which are owned and controlled by āiga and nu'u. Āiga and nu'u bestow these on individuals who they elect to be their matai, and the suafa gives the matai the

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<sup>16</sup> See the SABL Commission of Inquiry reports, available at: <http://pngexposed.wordpress.com/2014/01/13/the-sabl-commission-of-inquiry-reports-2/>

<sup>17</sup> Elora Raymond, "Financialization and Leasehold Mortgages on Customary Land in Samoa" (unpublished). Available upon request.

authority to govern the lands associated with the suafa. If land is separated from suafa, then the āiga and nu‘u lose control over these lands, because their ownership is based on their control of suafa. Consequently, their authority in the political arrangement pertinent to this governance sphere is undermined.<sup>18</sup>

18. Professor Iati concludes that without this authority, “the role and existence of the nu‘u and āiga as pillars of governance in Samoa will rest on precarious foundations.”<sup>19</sup>

19. We regretfully note that the superficial and depoliticized analysis contained in the ADB project documentation fails completely to grasp these socio-political dimensions and risks of the reforms. The passage (above) from the Phase III TA report expresses a clear intention to not only have land registered under the name of an individual, but for the legal system to empower the individual to unilaterally lease tracts of land, without limits to size or duration.<sup>20</sup> Pursuant to the Land Titles Registration Act of 2008, leaseholds over customary lands are to be registered in much the same way as ownership rights. Despite ADB’s attempts to differentiate this set of legal processes from those that would facilitate alienation of customary land through outright sale, we are convinced that the effect is one and the same.

20. The current TA’s objective of facilitating access to credit through the use of customary land leases as collateral - by establishing a precedent transaction between a foreign investor and a foreign Bank and establishing a framework to facilitate repossessing and reselling the lease in the event of default - serves to exacerbate the social, economic, cultural and political risks of the reforms to date. As one measure of the risks involved, we point to the high rates of default on loans by indigenous Samoans: The ADB reported that 46 percent of loans in its small business loan guarantee scheme were in arrears or foreclosed by completion of the project, and in the nine months after the project was completed the number of loans in arrears had increased by 50 percent.<sup>21</sup> If defaults occur, foreign banks that own the debt can seize decades-long leases over large tracts of customary land. This is not the path to economic and financial development of Samoa that we elect to take. Instead, this is the path to alienation; deprivation and marginalisation that is reflective of the experience of the Hawai’ian people, Tahitians and the Kanaks of New Caledonia.

21. With Project 46436, Agribusiness Support Project, the ADB seeks to vastly expand the scale of collateralized lending to businesses using customary land as a primary input. Through the project, ADB shares risk with financial intermediaries; will it also share risk with the custodians of customary land when trying new development? If customary land leases are used as collateral for sub-projects, the financial intermediary and the ADB should have effective safeguards in place to ensure that the leases are of a short duration and emerge from a truly voluntary agreement with the free prior and informed consent of the land-owning group. If leases of customary land are used as collateral, this security interest should have a lower priority than other collateral in the event of foreclosure – the ADB should not prioritize the risk faced by financial intermediaries over that of customary

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<sup>18</sup> Iatititi (2008), ‘Controversial land legislation in Samoa is not just about land’, p. 1-2. Available at: <http://www.devnet.org.nz/sites/default/files/IatititiLandLawSamoa.pdf>

<sup>19</sup> Ibid, p. 2.

<sup>20</sup> The Alienation of Customary Lands Act (1965) established a 30 year limit + 30 year renewal on hotel/industrial leases and a 20 year limit + 20 year renewal for other purposes. However, leases of much longer durations are routinely reported in the press.

<sup>21</sup> Samoa: Small Business Development Project (33167), Completion Report, Dec 2009, at para 9.

landowners, for both practical and cultural reasons. Since the Environmental and Social Management System documentation has not been made publicly available, we fear that the system will not ensure such safeguards or identify and appropriately manage related risks. Any institutional support systems created should be built with sensitivity to the nature of customary land.

22. The ADB commits to supporting lending in a way that respects local context and custom, but also states: “Although land tenure no longer complies with traditional customs, no new laws have been established that define property rights in land classified as customary.”<sup>22</sup> If, as this comment suggests, the ADB considers Samoan land to be customary 'in name only', then how can the ADB respect local context and custom? Has the project considered and addressed the risk of displacement and foreclosure from customary lands? Will financial intermediaries require that leases used as collateral are entered into a torrens land registry, contrary to our customary tenure system? We fear that the lack of consultation in this and other projects has led the ADB to form incorrect assumptions about the political, social, economic, and cultural role customary land plays in contemporary Samoan society.

23. Finally, we wish to highlight that the ADB-backed reforms appear to be in breach of constitutional protections of customary land. Article 102 of the Constitution prohibits the alienation or disposition of customary land or any interest in customary land. This includes prohibition of sale or mortgage of customary land or interests in it, and prohibition of land or interests in it “being taken in execution or be assets for the payment of the debts to any person on his decease or insolvency.”<sup>23</sup> While Article 102 allows leasing of customary land, it prohibits alienation or disposition of the land from its rightful owners: the aiga – the entire kin group. The set of ADB-supported reforms that empower individual matai to enter into leases with outsiders and allow for the use of those leases as collateral to access credit violates the spirit and the letter of this fundamental constitutional provision. By virtue of Article 109 of the Constitution any amendment to Article 102 requires the approval of over two-thirds of the valid vote in a public referendum, in addition to the usual two-thirds support of Parliament. The importance of the protection of customary land tenure to the Samoan nation cannot be understated. Nonetheless, the ADB-supported reforms attempt to undermine and erode these Constitutional protections. Indeed, they violate the whole fabric upon which the Framers of the Constitution adopted Article 102 and doubly entrenched this protection of customary lands through Article 109.

### **III. Non-compliance with ADB Operational Policies and Procedures**

24. We believe that the harms and anticipated harms described above are the result of ADB’s failure to follow its operational policies and procedures, especially in relation to the following:

#### *Inadequate E&S due diligence:*

25. The Safeguard Policy Statement (SPS) states that for all projects proposed for financing, ADB will conduct safeguards reviews as part of its due diligence. ADB is to confirm that “all

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<sup>22</sup> Samoa: Agribusiness Support Project (46436), Project Administration Manual, at para 135.

<sup>23</sup> The Constitution of Samoa, art 102.

key potential social and environmental impacts and risks of a project are identified; that “effective measures to avoid, minimize, mitigate or compensate for the adverse impacts are incorporated into the safeguard plans and project design”, and that “consultations with affected people are conducted in accordance with ADB requirements.”<sup>24</sup>

26. ADB’s environmental and social due diligence for all TA phases was wholly insufficient and failed in respect of each of the above steps.

27. The Project Data Sheet for Phase 1 of the TA contains a short description of the Samoan system of customary land tenure and then goes on to describe the social issues related to the project as a “lack of public information on the practical workings of leasehold arrangements” and a “general perception that traditional landowners will not respect the rule of law if disputes arise.” Thus, it appears that the project designers identified the dearth of lease arrangements as the social issue rather than impacts on customary land tenure emanating from the TA. The treatment of social issues deteriorates in Phase II. The Project Data Sheet states in the section on social issues: “Promoting economic efficiency and enabling business environment, policy reforms and institutional development.” The section is left completely blank for Phase III. For all three phases the ADB determined that no issues arise relating to environmental aspects, involuntary resettlement and Indigenous Peoples.

28. Yet, social issues and concerns were identified early on during consultations undertaken under the TA projects. The Phase II TA Report cites, for example, “fears of alienation of customary ownership of lands”, “the rights of titleholders and heirs”, “rights of access to leaseholds”, and “the role of Government in the negotiation of leases” as concerns. These concerns, which should have been considered as having potential adverse social impacts and addressed accordingly, were not elaborated upon or dealt with through appropriate mitigation measures. The report states that the reform process must provide sufficient time for discussion with all stakeholders; however as explained below, the TA uses a community advocacy approach, rather than establishing a genuine process for meaningful consultations to shape reforms.

29. Rather than addressing the underlying concerns about adverse social impacts, project documentation identifies citizen opposition to the reforms as posing a risk to successful implementation, if the Government’s commitment to necessary reform is not strong enough to withstand adverse reactions. This risk is to be mitigated through an effective communications strategy.<sup>25</sup> The ADB notes in relation to the Land Registration Act - the subject of a World Bank project, rather than the ADB TA - that:

Many fear that if the land is registered under the name of the *matai* of the day, the rest of the family risk losing their rights over the said land. The Government has continually assured the public that customary land will not be registered under the Torrens system as required by the Act. However, the Government should either incorporate such assurances through an amendment of the legislation, or propose an alternative registration mechanism like through a family trust arrangement. It is

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<sup>24</sup> SPS, Policy Delivery Process, General Requirements, at para. 56.

<sup>25</sup> Phase II Technical Assistance Report (Project 41173-01) Nov 2009, at para 12.



critical therefore that civil society and NGOs be engaged in discussions and consultations.<sup>26</sup>

30. However, the ADB fails to articulate that the very same fear exists in relation to long-term leasing of customary land in the name of the matai of the day. Consequently it fails to incorporate its own advice to the Government in relation to mitigating social concerns and risks into its own projects. Instead, it once again relies on a “communications strategy [to] convey the message that mobilizing customary land for economic purposes is designed to deliver benefits to customary landowners and will not deprive them of their rights.”<sup>27</sup>

*Lack of meaningful of consultation:*

31. The SPS states that for policy application meaningful consultation is a process that, inter alia, begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; provides timely disclosure of relevant and adequate information that is readily accessible to affected people; is gender inclusive; and enables the incorporation of all relevant views of affected people and other stakeholders into the decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues.<sup>28</sup>

32. The process of consultation has failed to meet this standard throughout the three TA project phases and in relation to the Agribusiness Support project. The Phase I TA completion report notes that the original budget allocation for consultation was inadequate and needed to be revised. Then, rather than describing the activity as a process of consultation it refers to a “public information and education campaign to encourage landowners to lease customary land for economic uses.”<sup>29</sup> The persuasive rather than consultative nature of the campaign is evidenced by the evaluation of outputs in the completion report, which opines:

While much has been achieved in stimulating debate on many issues concerning increasing economic use of customary lands, more must be done to *advance the agenda and provide support for those who share the view that this is necessary for the social and economic development of Samoa*. As the Government plans for changes are clarified, *the public need to be informed of these changes and landholders and investors made aware of the opportunities that open up by developing customary lands*. One of the priority recommendations of the program implementation plan is for *effective and continuing community advocacy*.<sup>30</sup>

33. The shift to the term “community advocacy” rather than ‘consultation’ persists throughout phase II of the project. The Phase II TA Report notes that one of the lessons from the first phase was “an appreciation of the sensitivity of land issues,” which, the report says, requires a “gradual approach” and the need for ongoing and effective community advocacy.”<sup>31</sup> This suggests the use of a public relations campaign to persuade Samoan citizens to support a predetermined set of objectives and outcomes rather than a meaningful

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<sup>26</sup> Ibid, at para 13.

<sup>27</sup> Ibid.

<sup>28</sup> SPS, Policy Delivery Process, General Requirements, at para. 54.

<sup>29</sup> TA Phase I, Completion Report.

<sup>30</sup> Ibid.

<sup>31</sup> Phase II Technical Assistance Report (Project 41173-01) Nov 2009, at para 7.

consultation process leading to the consideration of legitimate concerns about adverse social impacts relating to land tenure and cultural identity. Fears of changes to customary land tenure systems and attendant adverse social impacts are further minimized and belittled by the single indicator used to measure the effectiveness of community advocacy: “increased number of requests from the public for information per month.”<sup>32</sup> Although the Phase III TA Report states that consultations with civil society and NGOs will be done regularly, no detail or process is provided.<sup>33</sup>

34. In practice, such discussions have not occurred, but have rather been filtered and diluted through the CLAC, effectively an ‘echo chamber’ for ADB technocrats. While the CLAC is ostensibly an advisory body, with a statutory function of consulting and advising the public,<sup>34</sup> the reality is that there is no mandate for the CLAC to give advice that is contrary to the predetermined set of reforms - a condition of ADB loans - even if it finds there is a good reason to caution and advise Cabinet against the reforms.

35. Public consultation sessions that have been held were more like information sessions and did not solicit a range of views and opinions. These consultations occurred through the leadership of the Chairman of the National Council of Churches, which was not conducive to meaningful consultations because of the high degree of reverence to the church and respect for leaders, whose views people do not wish to directly oppose or challenge.

36. According to ADB’s website, the Government and civil society organizations (including the Chamber of Commerce, the Samoa Association of Manufacturers and Exporters, and the Samoa Farmers Association) were consulted during preparation of the Agribusiness Support Project. Despite the potential implications for customary land tenure, matai, crucial stakeholders, were not provided with any information or consulted prior to the approval of the project.

37. Even now that the project has been approved, several crucial pieces of information remain undisclosed, including the Environmental and Social Management System Arrangement and the Due Diligence of ANZ (Samoa). These documents represent important information for stakeholders, since without them we are unable to assess whether ANZ and other financial intermediaries are equipped to deal with social risks - including adverse impacts on land tenure or default on loans that could lead to the dispossession of aiga from parts of their customary land. The failure to make this information available to the public impedes meaningful consultation throughout the project cycle as required by the SPS.

38. As matais and concerned members of civil society, we have been patently marginalized from decision-making processes and have absolutely not been meaningfully consulted about these reforms.

*Failure to apply Indigenous Peoples Safeguards:*

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<sup>32</sup> Ibid, Appendix 1.

<sup>33</sup> Phase III Technical Assistance Report (Project 46512) Oct 2013, at para. 15.

<sup>34</sup> Customary Land Advisory Commission Act (2012), section 6.

39. The Indigenous Peoples Safeguards were not triggered for any of the TA phases nor the agribusiness project.

40. Pursuant to the SPS, the Indigenous Peoples Safeguards are to be triggered if a project *directly or indirectly* affects the dignity, human rights, livelihood systems, or culture of Indigenous Peoples or affects the territories or natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as an ancestral domain or asset. The ADB Indigenous Peoples Good Practices Sourcebook clarifies that the Indigenous Peoples safeguards are triggered when a project has either positive or negative effects on Indigenous Peoples. There can be no question as to whether the TAs and the proposed agribusiness project affects customary territories, as they explicitly aim to do so. The *fa'a Samoa* and the customary tenure systems of the people of Samoa, and of each aiga, are extremely vulnerable to the very reforms being conducted by the TA.

41. The Samoan people self-identify as an Indigenous Peoples, and are regarded as such by the United Nations Permanent Forum on Indigenous Issues and by the World Bank, which has recently triggered its Indigenous Peoples Policy (containing an identical definition of 'Indigenous Peoples' to the ADB SPS), in relation to a project in Samoa called the Agriculture and Fisheries Cyclone Response Project. This project aims simply to assist farmers and fishers to repair/replace damaged and lost farm assets, and thus has far fewer implications for customary land tenure than the ADB's projects that are the subject of this complaint. The World Bank's Integrated Safeguards Data Sheet for the project states: "The inhabitants in Samoa are indigenous to the islands with customs and traditions that have largely remained intact and which are reflected in their current political and economic institutions such the village system and the traditional land ownership system based on customary laws."<sup>35</sup>

42. By failing to trigger the Indigenous Peoples Policy and take the appropriate measures that the policy requires, ADB has not complied with the requirements of the Safeguard Policy Statement (2009) and Bank Procedures on the Incorporation of Social Dimensions into ADB Operations (OM Section C3/OP).

*Financial Intermediary Safeguards:*

43. The ADB is required to conduct due diligence to assess potential social impacts and risks associated with a financial intermediary's likely future portfolios. This should include potential impacts of subprojects (agribusinesses) on customary land tenure. According to the Initial Poverty and Social Analysis of the Agribusiness Support Project, the ADB categorized the Project as FI-C for involuntary resettlement and indigenous peoples indicating an assessment that there are minimal or no risks. The form asks whether the proposed project has "the potential to directly or indirectly affect the dignity, human rights, livelihood systems, or culture of indigenous peoples"; and whether it affects "the territories or natural and cultural resources indigenous peoples own, use, occupy, or claim, as their ancestral domain." According to the form, Management does not believe that that the proposed project has the potential to have such affects. This is a clear mis-categorization given the

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<sup>35</sup> Available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/09/02/000442464\\_20130902140023/Rendered/PDF/807890ISDS0Agr0igned0for0disclosure.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/09/02/000442464_20130902140023/Rendered/PDF/807890ISDS0Agr0igned0for0disclosure.pdf)

obvious impacts on customary lands of the project, both alone and in connection with the set of TAs.

44. As an FI project, the FIs are required to have in place or establish an appropriate environmental and social management system (ESMS) commensurate with the nature and risks of the FI's likely future portfolio.<sup>36</sup> The project report states that the financing instruments will be open to all Samoan banks if they meet eligibility requirements and due diligence requirements including "adequate policies, systems, and procedures to assess and monitor the economic, social, and environmental impact of subprojects."<sup>37</sup> It also refers to the ESMS in paragraph 36 and 37, but no detail is provided. Given the fact that the key social risks - including the use of customary land leases as collateral without the free prior and informed consent of the aiga and default on loans that could lead to dispossession - have not even been identified in ADB project documentation, it is highly unlikely that an ESMS would apply effective safeguards to prevent these risks from materializing. Although we are not privy to ESMS documentation, we believe that it is probable that the ESMS of ANZ (Samoa), the predetermined FI for the project, is not appropriate or commensurate with the nature and risks of the likely portfolio, as required by the SPS, paragraph 65.

#### **IV. Remedies sought**

45. All further reforms should be halted and a full and meaningful country-wide consultation should be carried out by the ADB on reforms that it has supported and any future action or proposals, including actions underway or proposed under the TA *Promoting Economic Use of Customary Land* Phase III and *Agribusiness Support Project*. Consultations should ensure people across the country are aware of the reforms and actions and how they may be affected. People should have an opportunity to provide their opinions, which should be genuinely taken into account in decision-making. Importantly, the consultations should be structured in such a way as to encourage and facilitate the expression and discussion of a range of ideas and options for enhancing customary land productivity.

46. These consultations should be undertaken by an independent team, with financial assistance from the ADB. The consultation process must fully satisfy the requirements of ADB's safeguards for Indigenous Peoples.

47. We further seek disclosure of all relevant documentation, including the Environmental and Social Management System Arrangement and the Due Diligence of ANZ (Samoa), as well as a commitment that this documentation will be made publicly available for all other financial intermediaries of the Agriculture Support Project. ESMS Arrangements should be subject to consultation with representatives of customary landowners.

#### **V. Efforts to address our grievances with the ADB Operations Department**

48. We have previously raised our concerns with ADB staff but have not received a satisfactory response. In a letter to ADB dated 19 December 2013, published in full by the

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<sup>36</sup> SPS, Policy Delivery Process, Special Requirements, at para. 65.

<sup>37</sup> Report and Recommendations of the President to the Board of Directors (Project 26436), at para 20.

Sunday Samoan Observer of 29 December 2013,<sup>38</sup> we set out our concerns regarding ADB's efforts to dismantle our system of customary land tenure. The letter was acknowledged by Caroline Currie, Head of Economics and Programming Unit for the ADB South Pacific Subregional Office, on December 27. Following three follow-up emails, ADB finally sent a substantive response to the letter two months later on 20 February 2014. The one-page letter was dismissive of our concerns and directed us to "speak with the CLAC" about them rather than ADB.

49. In a letter to ADB dated 3 August 2014, we set out our concerns regarding the Agribusiness Support Project. We were not aware that by that time the project had already been approved, and we requested that we be furnished with information and provided with an opportunity to provide our views. ADB responded on 7 August. The letter states that "ADB's rigorous safeguards will be applied throughout the life of the project," but no invitation was extended to us to express our views and no mention was made of consultations about the project.

50. Our letters of 19 December 2013 and 3 August 2014 and ADB's responses of 21 February 2014 and 7 August 2013 are attached as annexes to this complaint.

51. We now request that the Office of the Special Project Facilitator attempt to find a solution to our grievances in the manner outlined in section IV. Should this process not be successful in addressing the problems to our satisfaction, we request that this complaint be forwarded to the Compliance Review Panel to investigate whether ADB has complied with its operational policies and procedures regarding the aforementioned projects.

Yours sincerely,

Leuluaialii Tasi Malifa - matai (chief) of Afega village, Upolu/lawyer/Libra Law

Lilomaiva Ken Lameta – chief of the villages of Vaimoso, Upolu Island/Safotu, Savaii Island/Veterinary Doctor/Chairman of Board of Directors for Ole Siosiomaga Society Incorporated

Dr. Telei'ai Sapa Saifaleupolu – chief of the villages of Samatau, Upolu/consultant

Fiu Mata'ese Elisara – chief of the village of Sili, Savaii/Executive Director of Ole Siosiomaga Society Incorporated

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<sup>38</sup> See <http://www.samoobserver.ws/home/headlines/8639-chiefs-fight-for-land>