

AAA Comments on World Bank Draft Guidance Note for ESS 5 *Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*

The Draft Guidance Note is intended to help explain the requirements of Environmental and Social Standard No. 5 (ESS5) but in our view, significant room for improvement remains in four main areas. We feel that:

- (1) The Draft Guidance Note requires considerably further clarity regarding certain core elements of the ESS5 that are key to achieving borrower compliance with the requirements that will assure safe and effective involuntary resettlement.
- (2) In several instances, the guidance will further benefit from the many of the lessons learned over several decades of international experience with involuntary resettlement. Lessons learned recently from shortcomings in the World Bank's and its borrowers' projects with resettlement components need to be better reflected in corresponding guidance on how to prevent such recurrent deficiencies in future projects that cause displacement and resettlement.
- (3) The single most important provision of the ESS5 states that resettlement activities must be:
"conceive(d) and execute(d)...as sustainable development programs, providing sufficient investment resources to enable displaced persons to benefit directly from the project, as the nature of the project may warrant." (3)

This ESS5 provision points directly to the **economics** and the **financing** of resettlement. The Guidance Note will be improved by providing additional explanation of the key concept of "sufficient investment resource" for resettlement, guidance on the method for the borrower to calculate correctly the "sufficient investment resources," and on how to enable the displaced families to access directly the "benefits" from the project that displaces them, rather than be limited to the compensation for assets expropriated or destroyed by the project itself, which are insufficient and often under-calculated.

- (4) The Guidance Note needs to acknowledge that "improvement" and "restoration" of livelihoods are not equivalent outcomes for displaced populations. Restoration to "pre-displacement levels of livelihood" is recognized in basic economic science as a form of relative impoverishment, because if left on their own, not expropriated and uprooted, the population displaced would likely have improved significantly its own livelihood over the average duration of the 7-8 years of the project, plus the duration of the many years between the "condemnation" of the area instituted by the project itself, which legally prevents the population from making new investments and the start of the project's construction itself. The draft Guidance Note should require that the RAP achieves a specific level of post-displacement income that improves livelihood above what would have been achieved without the project's intervention to avoid relative impoverishment that is concealed in the term "restoration to pre-displacement level." In our experience, the Bank routinely calculates the rate of return for every regular project before its approval by anticipating an explicit post-displacement outcome, which calculates the case both "with" and "without" the project.

To ensure the economic viability of the resettlement component, the Guidance Note needs to guide the Borrowers to use the same economic analyses, procedures, and feasibility tests of the World Bank's own projects, and apply them also to the Resettlement Action Plan (RAP). The draft Guidance Note needs to reference these key economic feasibility procedures.

The comments that follow are intended to strengthen the Guidance Note (GN for ESS5) by incorporating lessons learned from practical experience and decades of research by anthropologists and other professionals specialized in involuntary resettlement.

Legally-Binding Borrower Country Frameworks

ESS5 GN 12.1 and 12.2, ESS5 Annex 1, and in the ESS1 (Assessment and Management of Environmental and Social Risks) (para 21 and 22) provide that the Borrower's existing legal and policy frameworks for environmental and social assessment and management (ES) may be used, as long as any gaps with the provisions of ESS5 and ESS1 are addressed.

We are concerned that in many Borrower countries, legal and policy frameworks are inadequate or altogether absent. In our experience, legally-binding country systems are not born overnight and even when they are outlined on paper, it may take significant time for them to be able to be implemented at the level expected by the World Bank. It is recommended that the Guidance Note indicate that until effective country legal systems are in place, the borrower and the Bank will continue to rely on the Safeguard Policy, OP/BP4.12.

As the World Bank's Vice President and General Counsel, Ibrahim Shihata, noted in 2000, in the majority of countries the existing legal frameworks for land acquisition were "entirely silent on resettlement and re-establishment of people displaced by expropriation of properties upon which they depend."¹ Little has changed by the end of 2017. In Bangladesh, for example, the new "country system" recently adopted by the Bangladeshi Parliament adjusted only the compensation levels for land acquisition, but has failed to provide adequate resettlement and improved livelihood levels for forcibly displaced people.

Legal agreements signed with the Bank by Borrowers are "governed by public international law and consequently the member concerned is under obligation to adapt its domestic law to the agreement with the Bank."² When gaps exist between a country's domestic legal framework and the international policy on involuntary resettlement agreed with the Bank, the former must be brought into alignment with the latter.

In our view, few countries have taken this obligation seriously – to bring domestic law into agreement with the resettlement policies agreed among the member governments of the World Bank (India and China are exceptions, as is the electricity sector in Colombia, Brazil, and Thailand). As a consequence, each project must generate anew a policy and legal framework in compliance with Bank policy.

This means in effect that resettlement planning is entirely a *sui generis* process. Every element of the resettlement plan - the objectives, the census and baseline studies, the cut-off date, the socioeconomic analysis, eligibility criteria, design of alternative measures to restore productivity and income streams, special attention to the vulnerable, grievance mechanisms, institutional responsibilities, participation of the affected people, implementation arrangements, transitional support, transportation allowances, costs estimates, budgetary and financing arrangements – all must be produced in the absence of legal statutes, norms, regulations, procedures, or requirements instituted and "owned" by the Borrower.

Almost all of the elements listed in the above paragraph were contained in the Bank operational procedures of the former OP/BP4.12. Replacing these procedures with ESF5 has not eliminated the need for these requirements in designing and implementing a safe and effective resettlement plan. Yet

¹ Shihata, I. F. I. (2000). "Involuntary Resettlement," in *The World Bank in a Changing World: Selected Essays by I.F.I. Shihata, Vice President and General Counsel, The World Bank*. Dordrecht/Boston/London: Martinus Nijhoff Publishers.

² Shihata, I. F. I. (2001). *The World Bank Legal Papers*. The Hague: Martinus Nijhoff Publishers.

many of these elements are no longer present. In our view, the Guidance Note needs to restore these key elements to assure an effective Resettlement Action Plan.

Expropriation, Economics, and Resettlement in the Guidance Note

We feel the draft Guidance Note for ESS5 can be strengthened by attending more directly to several core economic and financial challenges that the Bank and borrower governments must resolve when forced displacement becomes inevitable. In our view, when forced displacement is mandated by development investment projects, then the improvement of the displaced peoples' livelihoods must be equally mandated and achieved by development investments.

We recommend that the Bank include specific guidance for Borrowers in addressing the economics and financing of resettlement. Professional project economists and development anthropologists should be involved in the preparation and pre-project analyses of the economic and financial feasibility and robustness of RAPs. This guidance is now missing from the draft Guidance Note. Based on the experience of the World Bank's own financed projects, many RAPs are prepared and submitted by borrowing countries to the Bank without being assessed and verified in advance through professional economic and financial feasibility analyses.

Explicit language should be included about the borrowers' need to calculate and test analytically the economic and financial feasibility of the RAP before a RAP is submitted for Bank financing. The World Bank's due diligence in appraising projects including resettlement needs also needs to verify the existence and robustness of these economic and financial analyses.

Other economic and transparency aspects that need to be addressed in the Guidance Note for ESS5 refer to: livelihood surveys before the project starts; transparency about the number of people to be displaced; and collection at project completion stage of data on resettled peoples' livelihood levels. More specifically, the Guidance Note needs to address the following important issues:

1. Collecting economic information for assessing whether a specific project achieves livelihood improvement for the displaced people, only achieves restoration of their livelihoods, or does not achieve even restoration. The Guidance Note should explicitly guide the borrowers on carrying out a livelihood survey among the population to be displaced to help determine baseline livelihood levels before the project starts. Without such a baseline livelihood survey, the borrower and the Bank will lack the data to report whether the objective of resettlement was achieved.
2. A requirement for each project requiring involuntary displacement and resettlement is to report at project completion how many people were displaced. However, a large number of World Bank and Borrowers' completion reports do not contain this required information, because the borrower did not submit the data or the Bank did not ask for such data. The Guidance Note needs to be explicit about the need and the manner in which these data are to be collected and reported at the end of the project.
3. The Guidance Note also needs to include guidance for borrowers about the need to determine at the end of the project what elements of the involuntary resettlement were not completed and thus leave a post-project legacy of unresolved problems. The Guidance Note needs to set an expectation that borrowers will assess the legacies of such unresolved problems at the end of the project and report relevant findings both to the country's government and to the Bank, including what measures can and will be taken to address these residual problems.

Vulnerable Affected People

The first time “vulnerable” affected people are mentioned (ESS5 para 2, footnote 4), vulnerability should be defined and examples provided by the Guidance Note. Vulnerability is reflected in a combination of many elements, including but not limited to the relative incapacity to defend or assert one’s own interests due to illiteracy or poor education, lack of marketable skills, poor health or disability, indigence or poverty, landlessness, homelessness, marginalization, indigenous identity and/or ethnic, cultural, religious, linguistic, or gender discrimination.

We feel this is important, since variable but high proportions of rural people being displaced in many countries are landless, working for the landowners, while among the urban people displaced by development many are jobless, slum dwellers. They receive no compensation because they do not own property, instead. The bulk of affected people in rural areas and urban slums in most developing countries are functionally illiterate, with few or no marketable skills and without legal title to the lands/houses upon which they depend for survival. Social, economic, and political exclusion of indigenous peoples and minorities and women is ubiquitous throughout the world. In short, the vulnerable displaced people are quite often the majority affected by involuntary resettlement.

The Guidance Note for ESS5 devotes a considerable amount of space to guidance for cash compensation paid to **property owners** (GN 4.1, 4.2, 4.3, 4.4, 4.5 4.6, 4.7, 4.8, 4.9,4.10, 4.11, 4.12, 4.13 and GN 6.1, 6.2, and GN 12.1, 12.2, 13.1), but relatively little specific attention is devoted to the most vulnerable, who by definition receive no cash compensation and are more often than not the majority of affected people physically and/or economically displaced.

We agree with the requirement in the Guidance Note that the vulnerable should be provided “assistance of some sort” to resettle and/or reestablish their socioeconomic productivity (GN 10.1). But the nature of this assistance needs to be described in concrete technical. The GN for ESS5 can be made much more precise in defining such “assistance” based on international practical experience and examples. We acknowledge that GN17.3 attempts to define “vulnerability,” but not in a way that offers concrete guidance to tackle such a critical problem. Examples of potential solutions that the Guidance Note could elaborate include: grants of arable land to the landless vulnerable,³ grants of apartments or houses close to work to those who had no title to their dwelling,⁴ subsidies for start-up small scale enterprises,⁵ and job training, education, and capacity building in too many projects to mention.

³ Euler-Hermes and Banco de Santander (2011). *Social Due Diligence Analysis of Resettlement and Downstream Impacts of the Sagamoso Dam, Bucaramanga, Colombia*. Hamburg and Madrid. World Bank (1991). *Daguangba Multipurpose Project*. Staff Appraisal Report. Washington, DC. Asia Development Bank (2008). *Completion Report. PRC: Shanxi Road Development II Project*. Manila. Partridge, W. L. (1993). “Successful Involuntary Resettlement: Lessons from the Costa Rican Arenal Hydroelectric Project,” in *Anthropological Approaches to Resettlement*, Pp. 351-369. Edited by M. M. Cernea and S. E. Guggenheim. Boulder, Colorado: Westview Press United Nations Environment Program. 2006. *Independent Monitoring of the Maguga Dam Resettlement*. Nairobi. Swaziland Federal Ministry for Economic Cooperation. 2008. *Dams and Development: The Komati Basin Water Authority Experience*. Mbabane..

⁴ World Bank (2002). *India: Mumbai Urban Transport Project*. Staff Appraisal Document. Washington, DC Partridge, W. L. (1993). “Successful Involuntary Resettlement: Lessons from the Costa Rican Arenal Hydroelectric Project,” in *Anthropological Approaches to Resettlement*, Pp. 351-369. Edited by M. M. Cernea and S. E. Guggenheim. Boulder, Colorado: Westview Press. Millennium Challenge Corporation (2015). *Logistical Infrastructure Project: Strategic Resettlement Action Plan*, FOMILENIO-Ministry of Public Works, San Salvador. World Bank (2008). *Peoples’ Republic of China: Hubei Shiyang- Manchuangan Expressway (Shiman) Project*. Project Information Document. Washington, DC.

⁵ Asian Development Bank. 2008. *Completion Report. PRC: Shanxi Road Development II Project*. Manila. World Bank. 2004. *Xiaolangdi Resettlement Project: Implementation Completion and Results Report*. Washington, DC. United Nations Environment

Resettlement assistance to the vulnerable is enormously more complex than simply handing out cash compensation to the privileged property owners. It invariably requires a technical and an economic analysis by professionals to determine the nature and levels of vulnerability, whether or not the proposed assistance is viable, desired and operable by the affected people, and actually has the potential to restore or improve livelihoods. Yet the need for technical and economic analysis of resettlement and re-establishment alternatives is nowhere mentioned in the Guidance Note for ESS5. We believe there is ample World Bank experience with economic analysis to draw upon that is not reflected here.

Customary or Traditional Rights

GN 10.1 Category (b) of eligibility regarding those with no formal rights to land or assets upon which they depend, but have customary or traditional rights, asserts that “national law often has legal procedures by which such claims can become recognized.” This observation bears closer scrutiny. While such may exist on paper, they are almost never implemented. A 2015 report notes that while local communities hold upwards of 65% of the world’s land area under customary tenure systems, national governments over decades and decades have legally regularized only a small fraction of this land.⁶ In a survey of 19 Sub-Saharan African countries, this study found that only 2.75% of community and indigenous lands are legally recognized as owned by local communities and indigenous peoples. In Latin America and the Caribbean, with the exception of Uruguay, most governments have failed for decades to issue ownership titles to between 50% (Colombia) and 70% (Honduras) of small peasant farmers, indigenous peoples, and Afro-Colombian communities. The same is true of much of the Asia-Pacific Region when it comes to ethnic minorities.

In most instances involving claims to customary or traditional land/resource rights the Bank itself has had to finance legal services to attempt to regularize such claims to permit the resettlement planning and implementation processes to go forward, but this is not mentioned in the Guidance Note. Rarely have Borrowers corrected this significant legal inequity as concerns customary or traditional rights, and without legal services to address this problem, there can be no viable resettlement plan. The present paragraph on Category (b) eligibility needs to be properly qualified.

In our view, GN 10.1 paragraph Category (c) needs to be strengthened by citing and including renters, tenants, sharecropper, and employees, many of whom have usufruct rights to resources they do not own. For example, it is customary throughout Central and South America for workers on livestock ranches, plantations, and other estates to receive only a small salary but traditionally they are granted rights to estate land to cultivate subsistence crops, rights to build a shelter, rights to graze their own animals on the owner’s pasture, in addition to a small subsidy to buy school uniforms for their offspring, rights to emergency loans in health crises, and other relatively large purchasing needs. Similarly, the instances of affected people being tenant farmers or share-croppers world-wide is large. In addition, in urban areas most affected people are employees of small and large businesses who have no recognizable legal rights or claim to the shops upon which they depend for their livelihoods and will require a different kind of “assistance” than the cash compensation paid to shop owners. In short,

Program. 2006. *Independent Monitoring of the Maguga Dam Resettlement*. Nairobi. Swaziland Federal Ministry for Economic Cooperation. 2008. *Dams and Development: The Komati Basin Water Authority Experience*. Mbabane.

⁶ Rights and Resources Initiative (2015). *Who Owns the World’s Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights*. Washington, DC: RRI.

Category (c) should be strengthened by including these kinds of affected people rather than just herders, grazers, and fishers.

Replacement Land

In ESS5 paragraph 14, paragraph 35, and in GN 12.1(d) and GN 14.1 reference is made to providing cash compensation to affected people traditionally dependent on land “only when it can be demonstrated that no feasible alternative measures are available.” However, The Guidance Note does not explain how a Borrower is supposed to “demonstrate” to the Bank that no land is available. Guidance is needed regarding the empirical criteria to be used to assess whether land can be made available.

In our view, the following may help to formulate the missing criteria:

- Has the Borrower examined irrigating host community land and thereby doubling its carrying capacity to absorb the displaced?
- Has the Borrower investigated the feasibility of reclaiming barren slopes through terracing, top soil rescue, and/or green manuring?
- Is the Borrower aware that in many urban areas government may be the largest landowner with significant amounts of government land remain unused or underutilized?
- Did the Borrower study the possibility of restricting land sales in newly irrigated command areas to displaced people, taking advantage of the fact that current owners always sell about one-third in order to finance land leveling, installation of sluice gates, and opening water channels on formerly dry lands?
- Is there empirical evidence to prove that there is no land market through which it would be possible to buy replacement land for the affected people?
- Has the Borrower exhausted the possibilities of re-apportioning land among hosts and the displaced and investing in intensifying and diversifying production to support both?

It is implied in GN 12.1 and GN 35.2 and *inter alia* throughout the ESS5 Guidance Note that cash compensation in lieu of providing technically and economically viable alternatives for rebuilding livelihoods is to be avoided. Further rationale for this guidance should be provided.

Cash compensation is usually preferred by wealthier affected people, large landowners, owners of businesses, those operating corporate franchises, and other entrepreneurs who have the resources, political influence, and education to resettle themselves. Most such privileged displaced people prefer cash and self-resettlement to an organized resettlement operation executed by a government, an NGO, or a private sector entity. The Guidance Note for ESS5 needs to more clearly differentiate between such relatively privileged affected people and those who cannot survive without resettlement assistance, and present an analysis that reflects lessons learned over the last 40 years.

The Guidance Note for ESS 5 should perhaps be modified to say that cash compensation is generally not acceptable for restoring livelihoods of those who are vulnerable and those who are not wealthy and who require resettlement assistance in order to re-establish their livelihoods. This is because cash compensation is quickly stripped by moneylenders, shopkeepers, and landlords to whom small farmers, small businesspeople, and the poor are invariably indebted.⁷ Further, assessment of compensation is

⁷ Nagi Reddy, C. P. (1986). *Socioeconomic Survey of Project-Affected Persons Under the Lower Manair Dam*. Centre for Economic and Social Studies. Hyderabad, Andhra Pradesh. Nagi Reddy, C. P. (1986). *Rehabilitation of Srisaillam Project-Affected Persons*.

usually based on sales records over a period of several years, but sales records do not reflect replacement values because buyers and sellers usually collude to report smaller amounts to reduce taxes.⁸ Cash compensation is paid only to those with legal ownership rights, which leaves landless displaced people without resources to pay the expenses of resettling themselves in the absence of assistance.⁹ Cash compensation is not paid for common property resources expropriated (forests, grasslands, rangelands, fisheries, etc.) that may provide as much as 80% of the income of the poor derived from livestock, non-timber forest products, hunting, and fishing.¹⁰

Resettlement Specialists

Finally, ESS5 stipulates that “competent resettlement professionals” should be retained to carry out monitoring of the implementation of agreed resettlement plans and to conduct an external completion audit of resettlement outcomes (Paragraphs 23 and 24). In our view, it is unclear why ESS5 restricts professional input to monitoring and auditing, instead of involving professionals in other essential activities such as designing and implementing the RAPs, supporting the reconstructing of livelihoods, guiding the creation of new social services for the displaced, supervision of resettlement progress, and related activities, thereby reducing the risks of impoverishment and destitution and enhancing the prospects for success.

Since many countries lack any enforceable **legal** frameworks for handling involuntary resettlement, and because resettlement planning must be adapted to local physical and cultural contexts, competent resettlement professionals must be involved from the outset. We recommend that the Guidance Note addresses these and related issues such as the design of alternatives to improve livelihoods (GN 15.1), participation of the vulnerable (GN 17.3), inclusion of women (GN 18.1), interaction with host populations, and the evolution of family budgets post displacement (GN 22.1). We recommend that the Guidance Note outlines the expected multidisciplinary mix of professional skills necessary for Borrowers to plan and achieve sustainable involuntary resettlement.

Centre for Economic and Social Studies. Hyderabad, Andhra Pradesh. Mahapatra, L. K. (1986). *Resettlement and Rehabilitation Policy and Performance in Orissa II Irrigation Project*. Utkal University, Bhubaneswar, Orissa.

⁸ Bose, S. (1990). *India Land Acquisition and Resettlement: Processes and Procedures in Four States*. Asia Technical Department. World Bank. Washington, DC.

⁹ *Ibid.*

¹⁰ Jodha, N. S. (1986) “Common Property Resources and the Rural Poor in Dry Regions of India,” *Economic and Political Weekly*. July 5.