

R60-16
20 July 2016

Chair's Summary of the Board Compliance Review Committee and Compliance Review Panel's Report on Eligibility of the Compliance Review Request for TA 4712, 7387, and 8481: Promoting Economic Use of Customary Land and Grant 0392: Samoa Agribusiness Support Project (Samoa)

1. In accordance with paragraph 182 of the Accountability Mechanism Policy, the Compliance Review Panel (a) has determined that the complaint relating to the above-referenced technical assistance numbers 7387 and 8481 is eligible for compliance review, (b) submits its eligibility report, attaching the complaint and Management's response, and (c) recommends that the Board authorize a compliance review.
2. After carefully considering the eligibility report of the Compliance Review Panel, and Management's response, the Board Compliance Review Committee reported to the Board of Directors in a memorandum dated 19 July 2016, which recommends that (a) the Board should not authorize compliance review at this time, and (b) the Board approve the disclosure of the Chair's summary of the aforesaid memorandum of the Board Compliance Review Committee to the public in accordance with ADB's Public Communications Policy 2011.
3. In the absence of any request for discussion and in the absence of a sufficient number of abstentions or oppositions (which should be communicated to The Secretary by the close of business on 10 August 2016), the recommendations of the Board Compliance Review Committee in paragraph 2 above will be deemed to have been approved, to be so recorded in the minutes of a subsequent Board meeting. Any notified abstentions or oppositions will also be recorded in the minutes.

Chair's Summary of the Board Compliance Review Committee

**REPORT ON ELIGIBILITY: Compliance Review Panel Request N. 2016/2
on the SAM: Promoting Economic Use of Customary Land Project and Samoa
Agribusiness Support Project in Samoa**

1. At its meeting on 14 July, the BCRC discussed the above-mentioned report on eligibility set against ADB's Accountability Mechanism Policy 2012, notably sections 179-182. The Committee received presentations from representatives of the Compliance Review Panel and ADB's Office of the General Counsel and then met.
2. On the eligibility of the complaint, the Committee concluded as follows:
 - i) The Committee agreed with the CRP that there is evidence that ADB was not in compliance with its Public Communications Policy, notably OM Section L3. Specifically, ADB did not ensure all affected sections of the community were fully consulted; and
 - ii) On the issue of whether ADB's noncompliance has caused or is likely to cause direct and material harm, the Committee received detailed but conflicting opinions from the CRP and OGC. The Committee was unable to reach an agreed conclusion.
3. In these circumstances, the Committee agreed that in view of current indications, confirmed by the CRP (paragraph 42 of the CRP report on eligibility), that the Government of Samoa will propose legislative changes that would substantially remove material harm to the complainants, it should recommend to the Board that such a review should not proceed at this time.
4. However, if, as the legislative process progresses, it becomes clear that a risk of material harm directly attributable to ADB's noncompliance with its Public Communications Policy remains, the Committee agreed that it may reconsider this recommendation.
5. The Committee further concluded that ADB Management should be asked to remind staff of the importance of full compliance with ADB's Public Communications Policy, including for technical assistance.
6. Accordingly, the Chair recommended that the Board endorse the Committee's conclusion that a compliance review should not proceed at this time.
7. On behalf of the Committee, the Chair also recommended that the Board of Directors approve the disclosure of this Chair's Summary in accordance with paragraph 86 of the Public Communications Policy.



**Asian Development Bank Accountability Mechanism
Compliance Review Panel**

REPORT ON ELIGIBILITY

**To the Board of Directors
on
Compliance Review Panel Request No. 2016/2
on the SAM: Promoting Economic Use of Customary Land Project and Samoa
Agribusiness Support Project in Samoa
(Asian Development Bank Technical Assistance Project Numbers 4712/7387/8481
and Grant 0392)**

20 July 2016

Distribution of the attached document is restricted until it has been approved by the Board of Directors. Following such approval, ADB will disclose the document to the public in accordance with ADB's Public Communications Policy 2011.

ABBREVIATIONS

ADB	–	Asian Development Bank
AMP	–	Accountability Mechanism Policy
CLAC	–	Customary Land Advisory Committee
CRP	–	Compliance Review Panel
DMC	–	developing member country of ADB
PARD	–	Pacific Department
SABS	–	Samoa AgriBusiness Support project
SPF	–	Special Project Facilitator
SPS	–	Safeguard Policy Statement
SUNGO	–	Samoa Umbrella for Non-governmental Organisations Inc.
TA	–	technical assistance

NOTE

In this report, “\$” refers to US dollars.

In preparing any country program or strategy, financing any project, or by making any designation of or reference to a particular territory or geographic area in this document, the Asian Development Bank does not intend to make any judgments as to the legal or other status of any territory or area.

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I. BACKGROUND

1. A request for compliance review of the SAM: Promoting Economic Use of Customary Land Projects (TAs 4712/7387/8481) and Samoa Agribusiness Support Project (SABS Project or Grant 0392) in Samoa (Appendix 1) was forwarded by the Complaint Receiving Officer to the Compliance Review Panel (CRP) on 20 April 2013. In accordance with the Accountability Mechanism Policy (AMP) of the Asian Development Bank (ADB) and its operational procedures,¹ the CRP initially assessed the complaint and determined that it fell within the mandate of the compliance review function.
2. Subsequently, on 27 April 2016, the CRP forwarded the complaint to ADB Management (Management) with a copy to the Board Compliance Review Committee (BCRC), and requested that a response to the complaint be submitted to the CRP by 27 May 2016. The CRP also informed the Board member representing Samoa about the receipt of the complaint.
3. Prior to filing the request for compliance review, the complainants filed a request for problem solving before the Special Project Facilitator (SPF) on 9 September 2014. The SPF declared the complaint eligible and proceeded to problem solving. In March 2015, the SPF issued a summary of the review and assessment report and in April 2016, issued a summary of the problem solving completion report.² It was thereafter that the complainants requested the Complaint Receiving Officer to refer their complaint to the CRP.
4. This report summarizes the CRP's findings on its determination of the eligibility of the complaint for compliance review.

II. DESCRIPTION OF THE PROJECTS

5. The complaint was about:
 - i. a series of technical assistance (TA) projects on promoting the economic use of customary land in Samoa (TAs 4712/7387/8481) and
 - ii. a financial intermediation grant, SABS Project (Grant 0392).
 - iii. TA 4712, the Phase I of the project which was approved on 5 December 2005 and was completed on 28 February 2009 using a total amount of \$293,992.17, established and supported a working group on the economic use of customary land with representatives from the Government of Samoa (Government), the private sector, and the community which submitted a report to Cabinet recommending activities to promote the economic use of customary land. This TA primarily assisted the Government to implement the Cabinet's decisions in approving the report.
 - iv. TA 7387, which is Phase II in this series of TAs, paved the way for changes in the customary land leasing framework through the (i) national coordination of customary land stakeholders; (ii) capacity building to support customary land

¹ Asian Development Bank (ADB). 2012. *Accountability Mechanism Policy*. Manila; and ADB. 2012. *Operations Manual on Accountability Mechanism* (Section L1: Bank Policies and Operational Procedures), issued on 24 May). Manila.

² These summaries are available at <http://www.adb.org/sites/default/files/page/42458/sam-final-rar-summary-23-march-2015.pdf> and at <http://www.adb.org/sites/default/files/page/42458/sam-completion-report-grant0392.pdf>.

administration reforms; and (iii) effective community advocacy. These activities were part of the project implementation plan for customary land reform developed under the earlier TA 4712. The establishment and operationalization of the Customary Land Advisory Commission (CLAC), with its secretariat effectively coordinating and managing project implementation, and which strengthened the use of a database of leasable land in Samoa was an output of Phase II (TA 7387) which was approved on 23 November 2009 and was completed on 30 September 2013 utilizing \$481,963.62 for its activities.

- v. Phase III (TA 8481), which was approved on 10 October 2013 and is ongoing has a total of \$550,000 earmarked by ADB for its activities. Outputs of Phase III are the (i) establishment of an inclusive and consultative process for developing customary land policy; (ii) a Customary Land Security Bill; and (iii) a registration process to formalize landowning groups in Samoa. These are eventually geared toward the use of customary land as collateral and organization of customary landowners into legal entities in Samoa.
- vi. On the other hand, the Samoa Agribusiness Support Project (SABS or Grant 0392) was approved on 17 June 2014 with a project amount of \$5 million. Activities for SABS, which aims to promote commercializing and exporting agricultural produce and processed products along agro-value chains to stimulate agriculture's role in economic growth and poverty reduction in Samoa, are expected to close by 31 January 2022. This financial intermediation grant, which has selected private banks in Samoa as intermediaries, will provide business support services and financing to agribusinesses.

III. THE COMPLAINT

6. The complaint was filed by (a) Mr. Leuluai Tasi Malifa - *Matai* (chief) of Afega village, Upolu/lawyer/Libra Law, (b) Mr. Lilomaiava Lavea 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, (c) Mr. Telei'ai Sapa Saifaleupolu – chief of the villages of Samatau, Upolu/consultant, and (d) Mr. Fiu Mata'ese Elisara – chief of the village of Sili, Savaii/Executive Director of Ole Siosiomaga Society Incorporated. The complainants are *Matai* (chiefs) of villages in Samoa. As *Matai* of their *aiga* (extended families), the complainants are holders and managers of customary lands in Samoa. The complainants described the alleged likely harm done by the ADB projects to themselves and other affected persons and attributed those to ADB's failure to adhere to its operational policies and procedures.

7. The four complainants did not ask the CRP to keep their identities confidential.

8. In their request letters (see Appendix 1) the complainants alleged, among others, that owing to ADB's noncompliance with its Safeguards Policy Statement (SPS) and Operations Manual (OM) Section C3: Incorporation of Social Dimensions into ADB Operations, the projects have directly, materially, and adversely affected them as follows:

- (i) As a direct result of ADB-funded TAs 4712, 7387 and 8481, Samoan laws relating to customary land were changed. The changes established a Torrens land registration system, requiring the registration of leases and licenses of customary land and the recording of customary lands. The changes also

authorized the mortgaging of leaseholder interests relating to such lands and their registration;

- (ii) These changes altered the customary land tenure system, which the complainants allege are integral and traditional aspects of Samoan identity. According to the complainants, customary land in Samoa provides eligibility for all members of the *aiga* to reside on and use family lands. The customary land tenure system disallows the individual ownership of land in favor of common ownership, and land is treated as perpetual property of the whole family. The system allows for equitable allocation of family lands to all its members, in keeping with customs and rules applicable to that family and to its *Matai*;
- (iii) While leasing of customary lands was not forbidden and was practiced for a long time, they were legally recognized and regulated by the Alienation of Customary Lands Act of 1965. The complainants allege that the new legal changes from 2008 onwards (in particular, the amendments to the 1965 Act, the Land Titles Registration Act of 2008 and the Customary Land Advisory Commission Act of 2013) facilitate the leasing of land to “outsiders” for long durations. They allege that the legal changes also facilitate the mortgaging of such leasehold interests as collateral for loans without the consent of the customary landholders. They contend that these changes come “perilously close” to the alienation of customary lands, forbidden by Samoan customary laws as well as by entrenched provisions in the Samoan Constitution;³
- (iv) The complainants further allege that under the new laws, the mortgaging of leasehold interests in customary lands is not subject to the customary consultative and consensus-seeking processes associated with the family ownership and management of customary lands. They allege that in the absence of specific legal protections, customary land leases that are mortgaged (and therefore the possession and occupation of customary lands) could pass into the hands of outsiders without the agreement or consent of the customary land holders;
- (v) The complainants contend that as a result of the mortgaging of leases of customary land and the impact of the registration of leases under the Torrens system, outsiders will be able to come onto these lands without the consent or agreement of the customary land owners and dispossess them, disturb the land and fundamentally transform such lands leading to social unrest, conflict, and violence;
- (vi) For the above reasons, the complainants state that their ownership rights over their customary lands (together with the rights of other customary land holders over their customary lands) have been abridged and/or curtailed and/or restricted and/or jeopardized, likely causing loss and direct, material and adverse impacts to them;
- (vii) The complainant’s main grievance is that the ADB failed to widely, adequately, and meaningfully consult with affected customary landowners and stakeholders under the cited projects, when the ADB closely collaborated with the Government

³ Constitution of the Independent State of Samoa 1960, Articles 102 and 109.

to develop and draft the above customary land legislative and policy reform proposals. They contend that more than 80% of the land in Samoa is customary land and as such, consultations ought to have been more extensive, widespread, inclusive, accountable, and meaningful. They allege that because the consultations held were inadequate and not in compliance with ADB's operational policies and procedures, the resulting advice and draft Bills presented to the Government under the TAs disregarded legitimate concerns and traditional and entrenched legal rights of customary landholders, which could have been constructively and responsively addressed. They also allege that such inadequate information dissemination and public communication has led to a lack of public awareness of the law reforms, their impact and importance; and has given rise to a genuine fear that the reforms will eventually lead to a dismantling of the customary land tenure system as has happened in Papua New Guinea and other Pacific nations.

IV. MANAGEMENT'S RESPONSE

9. Management responded to the complaint on 27 May 2016 (Appendix 2). The Management's response raised three preliminary issues (see paras. 31 to 41 below) and also addressed the issues raised by the complainants. The Management's response contends, among others, that the SPS does not apply to TAs. The response also contends that TA 4712 and TA 7387 have both been closed for more than 2 years, prior to the submission of the complaint to the CRP and should therefore be excluded from compliance review in terms of para. 142(iv) and 148 of the AMP, and para. 33(iii) of OM Section L1/OP. The Management's response also contends that the cited TA projects have complied with OM Section D12 (Technical Assistance) as well as OM Section L3 (Public Communications) and the Public Communications Policy (PCP). The response also states that the SABS complies with all applicable policies and procedures in its design and implementation, specifically the SPS, OM Section F1/OP (Safeguard Review Procedures), the Public Communications Policy, OM Section L3 (Public Communications) and OM Section C3 (Incorporation of Social Dimensions into ADB Operations). The Management further contends that neither the TA projects nor the SABS project triggers the Indigenous Peoples Safeguards as set out in the SPS. The CRP has considered the details provided in the Management's response and other material submitted by Management in assessing the evidence of noncompliance and related harm presented in section V (A and B) below.

V. ELIGIBILITY

10. The complainants gave considerable information for determining whether the complaint is within the mandate of the compliance review function of the AMP. To fully understand the complaint and determine its eligibility, the CRP reviewed the complaint; the Management's response to the complaint; the relevant documents including further material submitted by both the complainants and the Management; and interviewed (via teleconference) the complainants; relevant ADB staff; counsel from the ADB's Office of the General Counsel; staff from the Ministry of Finance of Samoa; staff from the Ministry of Natural Resources and Environment; a representative of the Samoan Farmers Association; a representative of SUNGO (Samoa Umbrella for Non-governmental Organisations Inc.); and a staff member from Inclusive Development International (an international NGO assisting the complainants).

11. According to para. 138(i) of the AMP, any two or more people in a borrowing country where the ADB-assisted project is located who are directly, materially and adversely affected

can file a complaint. For a complaint to be considered eligible for compliance review, para. 179 of the AMP states that "...The CRP must be satisfied that (i) there is evidence of noncompliance; (ii) there is evidence that the noncompliance has caused, or is likely to cause, direct and material harm to project-affected people; and (iii) the noncompliance is serious enough to warrant a compliance review." The CRP must also be satisfied that the exclusions set out in para. 142 and 148 of the AMP do not apply to the complaint before it becomes eligible for compliance review.

12. Under the AMP, a compliance review has two stages. Eligibility is determined by the CRP in the first stage. A request that is determined as eligible by the CRP, on authorization of compliance review by the ADB Board of Directors (Board), proceeds to the second stage, involving a full investigation. In both stages, the CRP is required to address much the same issues enumerated in para. 11 above. The AMP does not provide guidance on the weight of evidence required for an eligibility determination. But consideration of the scheme of the AMP makes it clear to the CRP that what is required at the eligibility stage is adequate (*prima facie*) evidence to establish the elements set out in para. 11 above, to warrant further investigation. It is important to note that the CRP's determination of eligibility is based on *prima facie* evidence, as full evidence would require more extensive work during the post-eligibility investigation phase and that the determinations made by the CRP at the eligibility stage will not, in any way, prejudice its findings after a full compliance review, should that be recommended and authorized by the Board.

A. Evidence of Noncompliance

13. Based on available *prima facie* evidence, the CRP is satisfied that TA 7387 (TA Phase II) project and TA 8481 (TA Phase III) project were not in compliance with OM Section L3 (Public Communications) which expressly covers TAs. In particular, the CRP is satisfied that there is *prima facie* evidence that (a) TA Phase II did not comply with para. 1(iii) and 1(iv) 2 and 5 of OM Section L3/Bank Policies (BP) issued on 19 December 2008 and paras. 16, 17, and 31 of OM Section L3/Operational Procedures (OP) issued on 19 December 2008; and (b) TA Phase III did not comply with OM Section L3/BP issued on 02 April 2012 paras. 3 and 6, and OM Section L3/OP issued on 02 April 2012 paras. 14, 15, 26 and 71. OM Section L3 (2008) specifically applies to "ADB-assisted projects and programs financed under loans and grants, *including technical assistance (TA) projects* (emphasis added)." OM Section L3 (2012) applies to "(A)ny project financed by a loan, grant, or other financing arrangements that is (i) extended to a member state, or (ii) guaranteed by a member state" and expressly includes TAs.

14. The *prima facie* evidence for noncompliance, referred to in para. 13 above, is listed below.

- i. The technical assistance completion report for TA 4712 (TA Phase I)⁴ acknowledged that the key lessons from the implementation of that project, included (i) appreciation for the sensitivity of land issues requiring a gradual approach and (ii) the need for ongoing and effective community advocacy. The completion report recommended continuation of support for the Government for promoting the economic use of customary land.

⁴ ADB. 2009. Technical Assistance Completion Report, TA 4712-SAM: Promoting Economic Use of Customary Land.

- ii. The completion report for TA Phase II⁵ stated that one of the three priority areas for implementation was national coordination of customary land stakeholders and effective *community advocacy*.⁶ The completion report further stated that a community advocacy strategy had been developed and that the newly established CLAC had conducted *public consultations* on customary land reforms, but that this had been “the most challenging output” of the project.⁷ Among the major lessons emphasized in that report was the need for *community consultations*. The report stated that “while the use of customary land is of economic importance for the people of Samoa, it is culturally sensitive, and this requires community consultations. As government continues in its reform plans, the public will need to be continuously consulted...”⁸
- iii. These statements in the completion reports acknowledge the critical need for continuous stakeholder, community and public information dissemination and consultations while emphasizing that these have been challenging. However, an examination of the ADB’s website⁹ shows that no project documents relating to the TA Phase II and TA Phase III, beyond the basic Project Data Sheets and TA Report and TA Completion Report for TA Phase II have been posted for public and stakeholder consumption. Para 26 of the Public Communications Policy (2012) states that “final consultants’ reports generated from a TA project will be posted on the ADB website upon completion.” Para 14 of that Policy states “to facilitate dialogue with affected people and other interested stakeholders,...the project team will work closely with the borrower or client to ensure that (i) information about sovereign...projects and programs...is disseminated to them in a manner, form, and language(s) understandable to them and in an accessible place; and (ii) feedback on the proposed project design is actively sought and responded to...”. Under Phase II and Phase III draft Bills, public communications strategies and minutes of the legal working group and other working papers are referred to in these documents. None of these documents have been proactively disclosed by the ADB on its website, even though the TA reports repeatedly acknowledge that customary land reform is a sensitive issue and ought to be done with stakeholder consultations and communication and the disclosure of such documents might have facilitated and encouraged meaningful and informed stakeholder feedback and participation in decision-making.
- iv. The complainants state that under TA Phase I, emphasis was placed on *community advocacy* mostly involving an information and education campaign to encourage landowners to lease customary land for economic uses, rather than on meaningful *consultations* with relevant stakeholders to hear and address concerns. A reading of the completion report of TA Phase II and Phase III supports that view as it emphasizes the need to inform the public of the proposed land reform changes and of the opportunities that opened up for the economic use of customary lands and proposes “effective and continuing *community advocacy*” (Emphasis added). This language is seen in TA Phase II as well,

⁵ ADB. Technical Assistance Completion Report, TA 7387-SAM: Promoting Economic Use of Customary Land, Phase II.

⁶ See footnote 5.

⁷ See footnote 5.

⁸ See footnote 5.

⁹ See <http://www.adb.org/projects/41173-012/main> and <http://www.adb.org/projects/46512-001/main#project-overview>

highlighting the emphasis of the ADB on “*advocacy*”, “rather than on meaningful “*consultation*”.”¹⁰

- v. The TA Phase III report states that consultations with civil society and NGOs will be done regularly.¹¹ In its interviews with the complainants, the CRP was informed that the public consultation sessions that have been held under TA Phase II and TA Phase III were more like information dissemination sessions rather than opportunities for dialogue; exchange of views; the expression of concerns by stakeholders; and the development of an accountable response to concerns. The complainants’ statements have been supported by representatives of the Samoa Farmers Association as well as SUNGO.
- vi. In interviews with staff from the Pacific Department (i.e., the relevant ADB operations department), it was stated that 20 community consultation workshops had been held on both the main Samoan islands under the TA Phase I, and a further four consultations had been held under the TA Phase II. The CRP was provided with a list of approximately 250 people from over 80 villages across Samoa who attended the TA Phase II consultations. However, representatives of the Samoan Farmers Association and SUNGO (a federation of NGOs) when interviewed by the CRP said that they had not been invited as an organization to the consultations held. They acknowledged that individual members of their organizations had attended consultations. They also asserted that the consultations were very limited in nature; were not meaningful in accordance with ADB’s policies and procedures; and were not conducted in a manner that was accountable to the participants.
- vii. To verify this assertion, the CRP requested (during interviews) copies of minutes, notes or records of the consultations held from the Pacific Department staff, but was only provided with a list of participants, as stated above. In a separate interview, the SPF also confirmed with the CRP that it had not been provided with minutes, notes or records of consultations. The inability of relevant ADB staff to produce an adequate record of consultations as evidence of the proceedings is hugely problematic. Consultations become meaningful when submissions and issues raised by participants are recorded, taken seriously and responded to in an accountable manner, with feedback provided to the participants as to what happened to their concerns and suggestions. Good practice in this area¹² would require at the minimum an adequate record of the consultations, capturing what happened, who was present and what was stated and any decisions made. Good consultation practice also requires the development of a response document addressing the suggestions made and documenting decisions as to what was done with regard to the suggestions that are accepted and giving reasons why suggestions were rejected. Best practice¹³ suggests that this response and accountability document should be proactively made public by the ADB so that participants can know the fate of their suggestions. These basic steps increase credibility and trust in the consultative process and help fulfil the goals of OM

¹⁰ See footnotes 4 and 5.

¹¹ See footnote 5.

¹² For example of good practice on consultation see page 25 of ADB’s Strengthening Participation for Development Results at <http://www.adb.org/sites/default/files/institutional-document/33349/files/strengthening-participation-development-results.pdf>.

¹³ See Footnote 12, para. 104.

Section L3 (2012 and 2008). The Pacific Department has not produced any such evidence as at the date of this report.

- viii. As described below in paras. 14(xii) and 15(vi), there appears to be uncertainty among customary landowners in Samoa over the intent and meaning of the law reforms supported by the TAs. Perhaps, had there been a well-structured series of meaningful consultations under the TAs, held in a timely manner and supported by widespread, appropriate, and user-friendly information dissemination as expected under OM Section L3 (2012 and 2008), that sense of uncertainty among customary landholders would have been significantly reduced or removed. As this does not appear to be the case, it seems that the projects conducted inadequate consultations and public communications, especially on what the ADB itself acknowledged to be a sensitive issue.
- ix. There is *prima facie* evidence that there had been a public communications strategy drafted under TA Phase I and II but that this had not been implemented.
- x. In the course of interviews it became clear to the CRP that several meetings termed “consultations” had been held, but these meetings have been mostly to disseminate information about taking advantage of the legal changes and putting customary land to economic use. The CRP did not find evidence that shows that the meetings were “consultations” in the sense that there was an opportunity and space for stakeholders to raise concerns about the intended reforms and to have those recorded and addressed. Nor was there evidence of feedback being provided to participants as to the fate of their objections or concerns or how they might have been addressed.
- xi. The Pacific Department staff explained to the CRP that under the TA Phase III a major workshop with businesses had been held, supplemented by separate consultations with civil society organizations. The CRP was informed that many NGO representatives were also business owners and had been consulted in this capacity. This is contradicted by what the CRP was told by SUNGO and the Samoan Farmers Association, namely that these organizations had not been invited to the consultation but some of its members had. It is clear that consultations were generally conducted with invited participants. Meetings or consultations, where members of the concerned public or customary landowners can respond to a public advertisement and attend, self-register and participate, does not seem to have been used.
- xii. *Prima facie*, it appears that the ADB’s reports under the TAs recommended piecemeal changes to customary land laws leading to uncertainty and an abridgement of some customary land rights. Well thought out advice given after wide, accountable and meaningful public consultations might have highlighted the concerns and fears expressed by the complainants and other customary landowners and allowed for them to be adequately addressed as part of the advice given and reports produced by ADB under the TAs. There is *prima facie* evidence that suggests that inadequate consultations under the TAs have deprived the customary landowners in Samoa of the opportunity to surface these concerns in a timely fashion and to have them properly addressed in the advice, consultant reports, draft legislation, and draft papers developed under the TA Phase II and Phase III projects.

B. Has Noncompliance Caused Material Harm or is it Likely to Cause Such Harm?

15. There is *prima facie* evidence that noncompliance is likely to cause direct and material harm to the complainants and project affected people:

- i. More than 80% of land in Samoa is customary land commonly owned and managed by *aiga* led by their *Matais*.¹⁴ Customary land and their close relationship to it is so dear to the people of Samoa that they see it as an intrinsic part of their cultural identity and way of life. Customary land cannot be alienated or disposed of by anyone.¹⁵ It is held in perpetuity by the family and transmitted from generation to generation. Land can be allocated by the *Matais* to an individual or family for their use but such individuals in the family cannot claim or own title to those allotments. The number of family members who commonly own such customary lands can change from time to time as members die, are born and travel abroad. These lands have been the natural resource upon which Samoan civilization was built over thousands of years. The customary rights were respected even when Samoa was under colonial rule.¹⁶
- ii. When Samoa became independent, the rule that customary lands could not be alienated was entrenched in its Constitution.¹⁷ Article 102 of the Constitution states:

It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage, or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payments of the debts of any person on his disease or insolvency:

Provided that an Act of Parliament may authorise:

- (a) The granting of a lease or license of any customary land or of any interest therein;
- (b) ...

- iii. Leasing and licensing of customary land has been practiced for decades. Leases and licenses were entered into by the *Matai* on behalf of all the customary land owners with their consent. In 1965, the Alienation of Customary Land Act was passed and regulated such leases and licenses. For example, the Act made it illegal to grant leases and licenses of customary land for any agricultural or pastoral purpose to a person who was not a Samoan *Matai*.¹⁸ However, leases and licenses could be granted to others for a public, hotel, industrial, commercial, business or religious purpose.¹⁹

¹⁴ Ruiping Ye, *Torrens and Customary Land Tenure: A Case Study of the Land Titles Registration Act 2008 of Samoa*, 40 Victoria University of Wellington Law Review (2009), 827.

¹⁵ See footnote 14.

¹⁶ See footnote 14.

¹⁷ See footnote 14.

¹⁸ Samoa, Alienation of Customary Land Act of 1965, Section 3.

¹⁹ See footnote 18, Section 4.

- iv. Under the 1965 Act, leases and licenses of customary lands could be granted only by the Minister responsible for lands if in his or her opinion such a lease or license or any interest therein was (a) in accordance with Samoan custom and usage, (b) in accordance with the desires and interest of the customary land owners and (c) was in accordance with the public interest.²⁰ The Act made it clear that the Minister was required to act as a trustee for the customary landowners.²¹

Any Samoan customary landowner could make a written application to the Chief Executive Officer of the Ministry of Lands to invoke the Minister's powers to grant a lease or license of such land.²² However, in all such cases the Act requires the application to be duly advertised in the *Savali* (the official government newspaper) and provides for the filing of objections, and the hearing and determination of the same by the Land and Titles Court before the application can be considered by the Minister.²³ Once the Minister approved the lease or license the applicant was required to file a draft lease or license for approval by the Chief Executive Officer.²⁴ Once the lease or license was executed, the Act required that the same be registered with the Registrar of Lands.²⁵ Rents paid under such leases and licenses were held in trust by the Chief Executive Officer for the customary land owners of that land.²⁶

- v. At the time the 1965 Act was passed, Samoa had a deed registration system. Deeds executed with respect to land had to be registered but registration did not convey an indefeasible title.²⁷ An "indefeasible title" is ownership that cannot be defeated, revoked, or cancelled by reference to any past event, error or omission in the title.
- vi. As a result of the three TAs funded by ADB and advice, recommendations, draft Bills, and consultant papers developed and provided as a result, the Government enacted the Land Titles Registration Act of 2008, which introduced for the first time the Torrens system of land registration in Samoa. (See discussion below in section C.) The essentials of the Torrens system are to pass an indefeasible title to property on registration of land to the proprietor named in the register. This new Act required the registration of leases and licenses granted under the Alienation of Customary Land Act of 1965, to be made under the new Torrens system. The complainants claim that this new Act undermined the traditional role of the *Matai* in granting leases and licenses to customary land. They also claim that the registration of leases and licenses of customary land in the name of the Minister under the new Act undermined the common ownership of such lands by the customary landowners. They claim that the Torrens system which conveys indefeasible title or interests in land on registration is incompatible with customary land ownership attributes. They claim that this inconsistency arises because the owners of customary lands are ever changing whereas the owners or proprietors of a land transaction registered under the Torrens system is not.

²⁰ See footnote 18

²¹ See footnote 18

²² See footnote 18, Section 5.

²³ See footnote 18, Section 6-9.

²⁴ See footnote 18, Section 10.

²⁵ See footnote 18

²⁶ See footnote 18, Section 11.

²⁷ See footnote 18.

These changes, they claim, have brought uncertainty to the customary land ownership regime in Samoa. Their concerns are supported by academic journal articles that analyze the legal effect and impact of the 2008 Act which introduced a Torrens system to Samoa.²⁸

- vii. The Government – with support of advisory services provided under the ADB-funded TA activities (see paras. 19 and 20) enacted the Customary Land Advisory Commission Act of 2013. (See discussion below in section C) While the main purpose of this Act was to establish a Commission to encourage, facilitate, and promote greater economic use of customary land for the development of Samoa, a consequential amendment in the very last section of this Act, enlarged the scope of leases and licenses of customary lands.²⁹ This clause amended the Alienation of Customary Lands Act of 1965 by extending the meaning of “an interest in the lease or license of customary land” to include “a mortgage of the interest of the lessee or licensee”.³⁰ Furthermore, the amendment required the process of registration and discharge of mortgages in the Land Titles Registration Act of 2008 to be applied to such mortgages. The ability to use leasehold rights over customary lands as a collateral to raise funds through a secured loan was new to Samoan customary land laws.³¹
- viii. The complainants contend that the effect of this 2013 amendment was to further erode the inalienability of customary lands. The original granting of a lease or license is subject to the procedure involving advertisement, entertainment of objections and decision by the Land and Titles Court under the Customary Land Alienation Act of 1965 described in para. 15(iv) above. After the 2013 Act, it is unclear whether that process also now applies to the mortgaging of leasehold rights. Even if it did, it would appear that subsequent assignments of such mortgages for default may not be subject to such a transparent and participatory process involving the customary landowners. The complainants fear that mortgages of leases could be granted by the Minister without the consent of customary landowners and subsequent assignments of such a mortgage for default could put the customary land in the hands of unknown third parties.
- ix. These concerns and fears of the complainants are not unfounded because the CLAC (supported by TA Phase III) also recognized these dangers and is hoping to propose legislative amendments for consideration by Parliament, which if adopted, may help address some of these concerns. Among others, the amendments would require the written consent of customary landowners before a leasehold interest could be mortgaged.³² The proposed amendments will also protect the rights of customary landowners to refuse consent to an assignment of such mortgages and to ensure that money recovered by the mortgagees on a default would be applied to outstanding lease rents as a first priority.³³ Currently, mortgages of leasehold interests over customary lands are regulated by the

²⁸ See footnote 14. Some scholars have argued that the 2008 Act introduced a hybrid system consisting significant Torrens system as well as Deed registration attributes.

²⁹ Samoa, Customary Land Advisory Commission Act of 2013, Section 15.

³⁰ See footnote 29.

³¹ There is evidence to suggest that two such mortgages of leasehold rights had been given prior the 1965 Act but no such mortgages were granted thereafter.

³² Drafting instructions shared with CRP by ADB Pacific Department.

³³ See footnote 32.

Property Law Act of 1952 which also governs mortgages of freehold lands (private lands). Legislative amendments proposed by CLAC will place mortgages of leasehold rights of customary land under a distinct and separate regime established by regulations under the Land Titles Registration Act of 2008.³⁴

- x. It is likely that under the existing legal changes, mortgage of a leasehold right over customary lands may end up in the hands of third parties far removed from the original lessees or mortgagees without the consent of the customary landowners. It is likely that such persons may exercise their rights under the mortgage and take possession of customary lands and change its landscape through development activities over which customary landowners may have no control. In effect, this would be tantamount to a significant curtailment and restriction of customary landownership rights particularly in the absence of the many safeguards that are now being proposed by CLAC. These curtailments and restrictions would likely adversely affect the complainants (who themselves are customary landowners) and other customary landowner in Samoa. They would result in direct and material harm to the complainants and such customary land owners because these restrictions and curtailments, in effect, reduce the bundle of rights that constitute such customary land ownership.³⁵ Additionally, the diminution of the bundle of rights associated with customary landownership in Samoa, as a result of the above policy changes, constitutes likely harm to customary landowners.
- xi. The complainants have stated that they are not prepared to lease their customary lands or consent to mortgages of such leasehold rights under the current laws. They argue that the lack of adequate safeguards does not assure them that the leased land will remain with the contractual partner of the lease agreement. There is *prima facie* evidence that the legal and policy changes described above have enabled the creation and assignment of mortgages of leasehold interests without the consent of the customary landowners leading to unknown third parties acquiring rights of possession over such lands. The CRP was informed by the complainants that they consider it too risky to lease their customary lands under the current legal regime and this would constitute a financial loss to them and thus a direct and material harm.

C. Is there Evidence that the Harm Resulted from ADB-Funded Projects?

16. The Samoan law reforms concerning customary land adopted by its Government has a long and very close association with the ADB. Each of the three TAs referred to in the complaint built on the outcome of each other. The completion report for TA Phase I stated: “The technical assistance (TA) to promote the economic use of customary land was agreed upon by ADB and the Government during programming discussions in 2003 and was listed in the Samoa Country Strategy and Program Update 2004–2006. It follows on from exploratory work prepared under component 4 of the ADB Small Business Development Project (the Project), and the associated technical assistance for capacity building of financial and business advisory intermediaries which aimed to ‘improve the policy and legislative environment for small business development’”. The Project established and supported a working group on the economic use of customary land with representatives of Government, the private sector, and the community which submitted a

³⁴ See footnote 32.

³⁵ Also see footnote 14.

report to Cabinet recommending activities to promote the economic use of customary land. ***The main role of the TA was to assist the Government to implement Cabinet's decisions in approving the report*** (emphasis added).” Among the expected outputs of the project were “amendments to the Alienation of Customary Land Act 1965”.³⁶ The TA supported inputs included “stakeholders consultations” and “drafting of amendments to legislation relating to customary lands”. The purpose of these inputs and interventions by the ADB was, among others, to “encourage the economic use of customary land in Samoa” and to develop and support “the implementation of a ***public information and education campaign*** to encourage landowners to lease customary land for economic uses.” (emphasis added)³⁷

17. The TA Phase I completion report lists, among others the following successful output: “Output 1 – Amendments to the Alienation of Customary Land Act 1965 to further promote appropriate economic use of customary land: The draft amendments Bill has been approved by Cabinet. It was envisaged that the amendments Bill will be tabled in Parliament for first reading during the June 2009 session with second and third reading expected in October/November 2009. In the next phase, monitoring of the application of the reformed legislation will be needed to ensure the intended outcomes are achieved.”³⁸ It is clear from the completion report that the ADB and the Government worked very closely in collaboration with one another to develop the draft amendment Bill and to have it adopted by Parliament.

18. The expected outputs of the TA Phase II included “the establishment and operationalization of the Customary Land Advisory Committee (CLAC)”.³⁹ Among the successful outputs listed in the completion report for TA Phase II was “Output 1: CLAC was established through the CLAC Act, 2013 and the Alienation of Customary Land Act 1965 was amended to allow the mortgage of customary land leases.”⁴⁰ It was this 2013 amendment that enacted a legal framework to enable the mortgaging of leases over customary lands. The recommendations in the report state: “While the use of customary land as collateral for mortgages is still prohibited under Article 102 of the Constitution of Samoa, ***the mortgage of leasehold interests over customary land is now possible under Section 15 of the CLAC Act.***³ ***To support the mortgaging of leasehold interests over customary land, there is a need to put in place an appropriate legal framework that protects the rights of the mortgagors, the mortgagees and the customary landowners.*** The ongoing phase III of the TA will ensure a tangible result/transaction as a result of all the groundwork and investment. The conclusion of the project will help increase the economic use of customary owned land, and hence increase business, credit growth and employment.”⁴¹ (emphasis added)

19. The Technical Assistance Report for TA Phase III states the expected outputs.⁴² Among them is “Output 1: A functional legal working group established. Given that the legal framework is in place to allow the mortgage of customary land leases, CLAC will establish a legal working group (LWG) to work closely with the Banking Association of Samoa ***to discuss further actions required to enable commercial banks to take advantage of this legal framework and accept customary land leases as collateral.***”⁴³ (emphasis added)

³⁶ See footnote 4.

³⁷ See footnote 4.

³⁸ See footnote 4.

³⁹ See footnote 5.

⁴⁰ See footnote 5.

⁴¹ See footnote 5.

⁴² ADB. 2013. Technical Assistance Report, Independent State of Samoa: Promoting Economic Use of Customary Land, Phase III, Project Number: 46512 Capacity Development Technical Assistance (CDTA).

⁴³ See footnote 42, para. 12.

20. These documents make it clear that the ADB has been closely associated with, promoted and directly assisted the Government with a series of activities to develop the relevant concepts, draft laws and implement the laws, establish and develop the capacity of the relevant institutions under these laws and to advocate the benefits of the new laws allowing for leases and mortgages of leasehold interests over customary land. These and other ADB documents⁴⁴ that are publicly available make it amply clear that the ADB fully shared and supported the Government's strategy for increasing the economic uses of customary land and the connected reforms leading to the legal framework strengthening the leasing of such lands and facilitating the mortgaging of such leasehold interests. In each of the TA reports and TA completion reports on record and in other cited and publicly available documents, the stated project outputs clearly demonstrate that ADB's activities under the TAs had a direct causal link with the above cited legal reforms and ADB has taken credit for such enactments. Under TA Phase III, ADB is continuing to support the Government in these efforts and is developing further legal reforms to facilitate the ability to offer customary land leases as collateral to financial institutions.

21. Additionally, para. 187 of AMP states that "For assessing direct and material harm, the without-project situation will be used as the base case for comparison, ..." In the CRP's view, in the absence of the activities funded by ADB under the TAs, the policy and legal reforms referred to above would either not have been prepared or may have had a different content. In the CRP's careful judgment, the TA-funded activities were thus a condition without which the activities, outputs, and policy and legal changes described could not have occurred and led to the harm described in Section B above.

22. Management states that the legal reforms enacted by the Samoan Parliament are a sovereign decision of the authorities of Samoa and thus cannot be ascribed to the activities of the ADB-funded TA projects. The CRP is unable to agree with this position. In every ADB-funded sovereign project, the implementing agency is a government agency. All such projects seek to respect the sovereignty of the borrowing developing member country (DMC). In this context, the causal link between the ADB's project activities on the one hand and the harm to the complainants or other affected persons on the other, is always through a governmental implementing agency. In the CRP's view, Management's argument that the laws were passed by Parliament, and therefore that there is an interruption of a causal link runs contrary to the very foundations of the AMP. If that argument was right, no ADB project activity under a sovereign project could be causally linked to harm because they are invariably the result of an action/inaction by an implementing or other governmental agency or instrumentality. This is also true for nonsovereign projects where the harm is generally the result of an action/inaction by the private borrower concerned. In the case of some TAs (such as the TAs concerned in this case) and program loans, ADB can and does directly and indirectly deeply influence and help shape policies and laws of a DMC. What is required under the AMP is evidence that ADB's activities on the one hand directly relate to the action/inactions of the government agency or instrumentality executing or involved in implementing the project and that these actions together have caused the harm. In this case, as shown above, that seems to be the case. In the CRP's view, para. 148(iv) makes it clear that "complaints relating to the laws, policies, and regulations of the DMC government concerned" will be excluded from compliance review "unless they directly relate to ADB's compliance with its operational policies and procedures;..." In the CRP's view this makes it clear that complaints can even relate to the laws and policies of a DMC if there is noncompliance with ADB's policies and procedures. In this case, the complainant's grievance is that ADB's noncompliance with its own operational policies and procedures have

⁴⁴ For example, ADB, Reform Renewed, The Private Sector Assessment for Samoa, 2015.

resulted in the stakeholders not being adequately informed or consulted in a meaningful manner causing likely harm to them from the resulting ADB advice, draft Bills and activities. In the CRP's view, these matters fall squarely within the purview of compliance review of the AMP.

D. Is there Evidence that the Harm Resulted from the Noncompliance of these Projects?

23. The complainants argue that the likely harm set out above is the result of ADB's noncompliance described in Section A. They contend that because there was inadequate consultation under the Public Communications Policy, the TA Phase II and TA Phase III resulted in ADB providing advice, draft Bills, policy papers and other capacity building support to the Government which led to adverse and piecemeal changes in the laws governing customary land.

24. The complainants are not opposed to the economic use of customary lands. Their complaint is that they, and other customary landowners like them, have not had an adequate and meaningful opportunity to express their concerns and have them accountably addressed. The complainants argue that had that been done, there might have been many other good options for legislative reform that could have been considered and adopted, instead of the piecemeal approach, resulting in uncertainties and fears as to the destiny of long held and traditional customary land ownership and rights.

25. There is *prima facie* evidence to suggest that CLAC, a government entity established by the 2013 Act, has itself recognized the gaps in the current laws enacted as a result of activities under TA Phase I and TA Phase II. The CRP did not receive a convincing response during interviews as to why the legislative revisions that the CLAC soon hopes to present to the Cabinet, and later to Parliament (supported by TA Phase III), were not considered and proposed at that time when the 2013 Act was passed to enable mortgaging of leasehold interests over customary lands. Had adequate and meaningful consultations been conducted under TA Phase II and later under TA Phase III, the complainant's concerns are likely to have been addressed during TA Phase II and the draft legislation proposed under the TA is more likely than not to have addressed them. Instead, an issue that ADB itself considered "sensitive" from the time of TA Phase I ended up in legislation that did not address those concerns and resulted in creating the uncertainties in the customary landownership rights as discussed above. Management has not produced minutes or records of the consultations held under any of the three TAs, despite being asked for the same by the CRP. Nor was any documentation produced to show what concerns were raised by participating stakeholders and how these concerns were addressed. When considered as a whole, there is *prima facie* evidence that the noncompliance with information dissemination and stakeholder consultation provisions of the Public Communications Policies (2008 and 2012) resulted in ADB failing to address stakeholder concerns in a timely and meaningful fashion directly leading to policy and legal changes that are likely to cause material harm to the complainants and other customary landowners in Samoa. (See discussions in Sections A, B and C above.)

26. The CRP therefore finds that there is *prima facie* evidence that there is an adequate causal link between the likely harms referred to in Section B above and the noncompliance of the TA projects with ADB's operational policies and procedures. *Prima Facie*, the TAs have resulted in ADB providing the Government with draft laws (Bills), advice, capacity building activities and advocacy, the content of which might have been different and might have addressed stakeholder concerns had there been adequate and meaningful consultations during all phases of the TAs.

E. Samoa AgriBusiness Support Project (Grant No. 0392)

27. The complainants argue that with the “agribusiness support project, the ADB seeks to vastly expand the scale of collateralized lending to businesses using customary land as a primary input.” In the review of project documents and during interviews, the CRP did not find evidence that the SABS “seeks to vastly expand the collateralized lending”. The objective of the SABS project is to improve financing for agricultural value chain investments. The grant specifies that cash collateral will be used to secure up to 50 percent of the amount financial institutions lend to eligible sub borrowers for first time loans and up to 30 percent for second time loans. This supplemental injection of cash is intended to improve the sub borrowers’ equity position so that it would be eligible for a loan from the financial institutions. During the CRP’s interviews, the responsible implementing agency categorically stated that no leases of customary land would be used as collateral for any loan or financial facility extended under the SABS project. This position was expressly confirmed and reiterated by the staff of the Pacific Department. Additionally, the three commercial banks participating in the SABS project have confirmed in writing to the CRP that they have not taken any leases of customary land as collateral for the loans and financial facilities granted under the SABS project up to now, and further that they will not be taking such leases as collateral for any future loans and financial facilities under the SABS project either. Quite to the contrary to what the complainants assert, this grant is intended to diminish the need to use assets as collateral, by injecting cash to improve the borrower’s equity position. There is no indication that the grant is building on or using the customary land law reforms under the three TAs. Nor will the grant have an impact on the land regime in Samoa. The grant, as designed is consistent with other value chain projects supported by other multilateral financial institutions which intend to facilitate access to the financial system for integrated value chains, by providing financial support and assistance to business development. For these reasons, the CRP does not see a link between this project and the complaint regarding the three TAs or the customary land reforms in Samoa.

28. Staff from the Pacific Department informed the CRP that an environmental and social management system (ESMS) has been put in place with regard to the three participating commercial banks, and loans and financial facilities extended under the SABS project are scrutinized and evaluated through this system to ensure that potential environmental and social impacts are removed or mitigated appropriately.

29. The complainants have not been able to establish direct and material harm to themselves or to other customary landowners in Samoa on account of the SABS project.

30. For the above reasons, the CRP finds that the complaint regarding the SABS project is not eligible for compliance review.

F. Exclusions and Identified Policy Application

31. The CRP considered whether the exclusion provisions listed in para. 142 read with para. 148 of the AMP apply to this complaint. In this respect, the Management’s response raised three issues with regard to the complaint. These were:

- i. that the complaint with regard to TA Phase I and TA Phase II were time barred under clause 142(iv) as this complaint had been filed with the CRP more than 2 years after they were closed. TA Phase I was closed on 28 February 2009 and TA Phase II was closed on 3 September 2013;

- ii. that the alleged noncompliance with the SPS was not tenable because the SPS does not apply to TAs.
- iii. The Indigenous Peoples Policy does not apply to Samoa.

32. **Time Bar:** This complaint to the CRP was received by the Complaint Receiving Officer on 20 April 2016. This complaint was originally accepted to the Complaint Receiving Officer on 9 September 2014 seeking the involvement of the Special Project Facilitator in a problem solving process. After reaching step three of that process the complainants requested that the complaint be transferred to the CRP in accordance with para. 173 of the AMP. Admittedly, TA Phase I is time barred in that it has been filed before the SPF after the lapse of 2 years since 28 February 2009. TA Phase III is ongoing and is therefore clearly not time barred.

33. With regard to the complaint regarding TA Phase II, the Management argues that it is time barred since it was filed before the CRP on 20 April 2016 which is 2 years after the TA Phase II closure on 30 September 2013. The complainants argue that the complaint regarding TA Phase II is not time barred as it was filed by the complainants before the SPF on 9 September 2014 within 2 years of its closure on 30 September 2013 and that it is the same complaint that has now been transferred to the CRP under the AMP.

34. There is no doubt that when the complainants first approached the SPF for problem solving, the complaint regarding TA phase II was within time in terms of para. 142(iv). It is this same paragraph that is made applicable to complaints filed with the CRP under para. 179 of the AMP. The CRP is of the view that the time bar referred to in para. 142(iv) applies to a complaint when it is first filed before the SPF. When that complaint is subsequently transferred to the CRP (as in this case) at the request of the complainants, while proceedings before the SPF are continuing in terms of para. 173, the time bar has no application to such a transfer. If the CRP adopted the interpretation proposed by the Management, complainants who file before the SPF for problem solving within time but end up spending more than 2 years in proceedings before the SPF, will be time barred from transferring the case to the CRP due to no fault of their own. Such an interpretation would discourage complainants from first seeking problem solving as is envisaged under the AMP. To penalize complainants who first approached the SPF and in good faith engage in problem solving by preventing the transfer of their complaint to the CRP after step 3 of the problem solving process is to do violence to both the letter and spirit of the AMP.

35. In this case, the complainants first came to the SPF within 2 years of the closure of TA Phase II. The problem solving process continued over a period of 1 year and 7 months. After completing step 3 of the problem solving process, the complainants exercised their option to transfer the case to the CRP per para. 173 of the AMP. This is allowed and contemplated under para. 153 of the AMP. Under para. 148(iii) once a complainant enters the problem solving process, the complainants cannot approach the CRP until step 3 is completed. There could be situations in which a complainant goes before the SPF and proceedings do not reach step 3 before the lapse of 2 years from the closure of the project. In such a case, the interpretation proposed by the Management will entrap the complainant, out of no fault of their own and lock the complainants in the problem solving process to the exclusion of a transfer of the case to the CRP. The CRP is of the view that the plain reading of the AMP does not suggest such an interpretation. To adopt such an interpretation will render the express intent of the AMP nugatory. Besides, an interpretation should not be adopted which prejudices a party on account of the act of the decision-making forum. Nor should an interpretation be adopted that renders a provision nugatory when instead, it can also be made effective. For these cogent reasons, the

CRP is of the view that the complaint regarding TA Phase II is not time barred under para. 142(iv) of the AMP. Accordingly, the CRP finds that the complaint regarding TA Phase II and TA Phase III are within time and not excluded from compliance review.

36. **Application of the SPS to TAs:** The Management, in its response, has stated that “(T)he SPS does not apply to TAs”. The response asserts that: “(T)he SPS does not contain any provision that applies to technical assistance. OM Section D12 on Technical Assistance, which governs TA activities, does not refer to the SPS or its provisions. As such, the SPS and its provisions are not relevant for the compliance review of complaints concerning TAs.” At the CRP’s request, the Management further clarified its contention in a separate written submission.

37. In fairness, the CRP raised this same issue with the complainants as well who provided a written submission in response. The complainants submit that if it was the intention of the SPS to exclude TAs, it would have done so in express and plain language, such as in the OM Section C3/BP – Incorporation of Social Dimensions into ADB Operations. They contend that the SPS nowhere excludes TAs from its ambit. On the contrary they argue that para. 48 of the SPS expressly covers TAs. They contend that when ADB wants to exclude TAs from the operation of policies and related operations manuals, they do so explicitly and by express language.

38. The CRP gave earnest consideration to all the arguments submitted by the Management and the complainants and each of their legal counsel. The issue raised is important and a decision either way will have far reaching consequences. This is not an issue that should be decided at the eligibility stage. Besides, the issue of whether the SPS applies to TAs is not an issue that will dispose of this case fully because the CRP’s analysis shows that the case is eligible on grounds other than noncompliance with the SPS. For these reasons, there is no immediate and compelling necessity to decide on the application of the SPS to TAs at this time or for the purposes of determining the eligibility of this case.

39. **Indigenous Peoples Policy:** The Management contends that the Indigenous People’s Policy has no application to the SABS projects. The Management agrees that “Indigenous Samoans are ethnically and culturally homogenous group that speak the same language and have a close attachment to the land.” However, the Management states that Samoans are “not deemed vulnerable being the mainstream and dominant culture, economic, social and political group in Samoa.”⁴⁵ As such, the Management contends that affected Samoans do not qualify as needing protection under the indigenous people’s safeguards. The same arguments are equally applicable to the application of the Indigenous People’s Policy to TAs.

40. The complainants contend that the Indigenous Peoples Policy applies to this case. They state that “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 SPS), in relation to a project in Samoa called the Agriculture and Fisheries Cyclone Response Project.

41. While Samoans have been recognized as indigenous people by the International Labor Organization (ILO) and UN agencies for various purposes and under various international instruments, they do not appear to satisfy one fundamental criterion under the ADB’s Indigenous Peoples Policy. Samoans are the dominant culture and social and political group in

⁴⁵ ADB. 2009. Safeguards Policy Statement. Appendix 3, p. 56, para. 6.

that country. When that is the case, the Indigenous Peoples safeguards under ADB policy do not apply. This is not a new issue for Samoa as this has come up at ADB before. Most recently it was considered in ADB's Submarine Cable Project⁴⁶ and the conclusion was that the Indigenous Peoples Policy does not apply to Samoans. ADB is bound by policies adopted by its Board and while it may well be that Samoans are recognized as indigenous people by the ILO and other UN agencies, ADB is governed by its policies adopted by its Board. Under the current ADB Indigenous Peoples Policy, Samoans are the dominant culture and political and social group in that country, and as such they do not qualify for the safeguards provisions under ADB's Indigenous Peoples Policy. Accordingly, the CRP finds that the ADB's Indigenous Peoples Policy does not apply to the complainants and other customary landowners in Samoa in this case.

VI. CONCLUSION AND RECOMMENDATION

42. The CRP recognizes that at present, efforts are underway to prepare legislation, which if enacted by the Samoan Parliament, would likely address much of the likely harm referred to in para. 15(ix) above. However, in the absence of evidence at present that this legislation has passed into law, the likely harm identified by the CRP persists.

43. The CRP finds *prima facie* evidence of noncompliance with ADB's operational policies and procedures described in this report and *prima facie* evidence that this noncompliance with ADB's operational policies and procedures will likely cause direct and material harm to the complainants and to other affected people. Given the *prima facie* evidence of noncompliance discussed in section V(A) above and the seriousness and widespread nature of the resulting harm discussed in section V(B) above, the CRP concludes that the *prima facie* evidence of noncompliance is serious enough to warrant a full compliance review.

44. Pursuant to para. 179 of the AMP, the CRP determines the complaint eligible. As such, the CRP recommends that the Board authorize a compliance review of the Samoa TA Phase II (TA 7387) and TA Phase III (TA 8481) projects.

/S/Dingding Tang

Chair, Compliance Review Panel

/S/Lalanath de Silva

Part-time Member Compliance Review Panel

/S/Arntraud Hartmann

Part-time Member, Compliance Review Panel

⁴⁶ ADB, Indigenous Peoples Due Diligence Report, Proposed Grant, Samoa: Submarine Cable Project, July 2015 (Available at <http://www.adb.org/sites/default/files/project-document/162098/47320-001-sddr-01.pdf>)

REQUEST LETTER

11 April, 2016

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

Dear Complaints Receiving Officer,

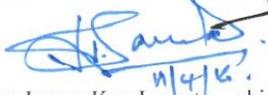
Subject: Transferring our complaint to the CRP

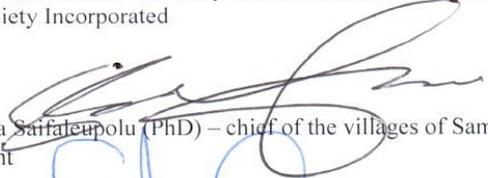
We the undersigned complainants wish to transfer our complaint (see attached) to the Complaints Review Panel (CRP) and we have the following supporting comments:

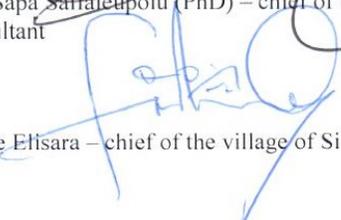
- In August 2014, we submitted a complaint to the Accountability Mechanism regarding the *Samoa: Promoting Economic Use of Customary Land project* and the *Samoa: Agribusiness Support Project* and asked for the complaint to be sent to the OSPF.
- Soon afterwards, our complaint was deemed eligible and OSPF commenced a problem solving process in November 2014.
- OSPF has now completed Step 3 of the problem solving process. While we appreciate the efforts of the OSPF and that a consultant has commenced work to design a consultation process on the ADB-financed project, and we fully intend to actively and constructively engage in the consultation process, a number of limits have been placed on the scope of the consultation that will mean our concerns that form the very heart of our complaint to the Accountability Mechanism will not be addressed.
- Most importantly, the consultation has been defined as “forward-looking” only, addressing issues in the current phase of the ADB-financed project, and our grievances also relate to reforms that have already taken place under preceding phases of the ADB-financed project, in addition to the current phase.
- We also have concerns that the consultation process will not be meaningful as defined by ADB’s Safeguard Policy Statement, but will continue to use our own best efforts in this regard.
- Finally, we believe that the harms and anticipated harms that we describe clearly in the attached complaint document relate to serious non-compliance by the ADB, warranting a full CRP review.
- We therefore request that you transfer our complaint to the Compliance Review Panel for a full and independent investigation into all phases of the projects that are the subject of our complaint and we want the CRP to conduct its investigation in parallel to the implementation of Step 4 (implementation and monitoring) of the OSPF problem solving process.

Yours sincerely,


Leuluaialii Tasi Malifa – matai (chief) of Afega Village, Upolu/lawyer/Libra Law


Dr Lilomaiava Lavea Ken Lameta – chief of the villages of Vaimoso, Upolu
Island/Safotu, Savaii Island/Veterinary Doctor/Chairman of Board of Director for Ole
Siosiomaga Society Incorporated


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


Fiu Mata'ese Elisara – chief of the village of Sili, Savaii

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,¹ which has been carried out without meaningful consultations across Samoa. We also object to the *Agribusiness Support Project*,² 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); Mr. Leuluaialii Tasi Malifa (vaoga@yahoo.com); Mr. Lilomaiava Ken Lameta (kslameta9585@gmail.com); and Dr. Tele'ai Sapa Saifaleupolu (s_saifaleupolu@yahoo.com.au). We have prepared this complaint with support from Inclusive Development International (IDI). We request that you also include Natalie

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

² Financial Intermediary Project number 46436-002

Bugalski, Legal Director at IDI, (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.”³ Specific expected outputs included legislative reform and public education towards this end.⁴ 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.⁵ 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.⁶ 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.”⁷

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.”⁸ 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.⁹ 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.¹⁰

³ Phase I Technical Assistance Report (Project 37234) Dec 2005, at para 12.

⁴ *Ibid.*

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

⁶ *Ibid.*, at para 10 and 11.

⁷ *Ibid.*, at para 10.

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

⁹ *Ibid.*, at para. 12.

¹⁰ *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.”¹¹

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

¹¹ 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.¹² Under ADB-driven reforms, the Act has now been further amended to legalize mortgages over leases of customary land granted by the Minister.¹³ 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.¹⁴

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 *matai* (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 *matai*, 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.”¹⁵

¹² Alienation of Customary Lands Amendment Act (1966), section 5.

¹³ Customary Land Advisory Commission Act (2012), section 15.

¹⁴ 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>

¹⁵ 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.¹⁶ 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 21st 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.¹⁷

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

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

¹⁷ 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.¹⁸

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.”¹⁹

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.²⁰ 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.²¹ 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

¹⁸ 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>

¹⁹ Ibid, p. 2.

²⁰ 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.

²¹ 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.”²² 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.”²³ 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

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

²³ 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.”²⁴

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.²⁵ 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

²⁴ SPS, Policy Delivery Process, General Requirements, at para. 56.

²⁵ 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.²⁶

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.”²⁷

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.²⁸

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.”²⁹ 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*.³⁰

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.”³¹ 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

²⁶ Ibid, at para 13.

²⁷ Ibid.

²⁸ SPS, Policy Delivery Process, General Requirements, at para. 54.

²⁹ TA Phase I, Completion Report.

³⁰ Ibid.

³¹ 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.”³² Although the Phase III TA Report states that consultations with civil society and NGOs will be done regularly, no detail or process is provided.³³

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,³⁴ 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:

³² Ibid, Appendix 1.

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

³⁴ 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."³⁵

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

³⁵ Available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/09/02/000442464_20130902140023/Rendared/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.³⁶ 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."³⁷ 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

³⁶ SPS, Policy Delivery Process, Special Requirements, at para. 65.

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

Sunday Samoan Observer of 29 December 2013,³⁸ 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,

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

Lilomaiava 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. Tele'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

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

ADB MANAGEMENT'S RESPONSE

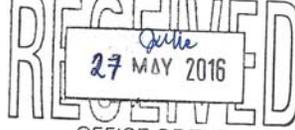


Asian Development Bank

Memorandum

Office of the Vice-President (Operations 2)

ASIAN DEVELOPMENT BANK



27 May 2016

OFFICE OF THE COMPLIANCE REVIEW PANEL

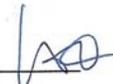
To: Dingding Tang
Chair, Compliance Review Panel

From: Stephen Groff
Vice President (Operations 2)



27 MAY 2016

Subject: **SAM: Promoting Economic Use of Customary Land (TAs 4712/7387/8481) and Samoa AgriBusiness Support Project (Grant No. 0392)**
- Management's Response



With reference to your letter dated 27 April 2016 forwarding the request for compliance review on the above TAs and project, please find enclosed ADB Management's response.

cc: VPKM
DG, PARD

**ADB MANAGEMENT'S RESPONSE TO THE COMPLAINT REQUESTING COMPLIANCE REVIEW ON
TECHNICAL ASSISTANCE FOR PROMOTING ECONOMIC USE OF CUSTOMARY LAND
AND
SAMOA AGRIBUSINESS SUPPORT PROJECT**

1. The Complaint

1. The Compliance Review Panel (CRP) has requested ADB Management's response to the complaint requesting compliance review in relation to the Technical Assistance (TA) on Promoting Economic Use of Customary Land (TA 4712); Promoting Economic Use of Customary Land, Phase II (TA 7387); and Promoting Economic Use of Customary Land, Phase III (TA 8481) and the Samoa AgriBusiness Support (SABS) Project (Grant Number 0392) in Samoa.

2. The Complainants originally submitted a complaint (dated 29 August and received on 9 September 2014) to the Accountability Mechanism (AM) seeking the involvement of the Office of the Special Project Facilitator (OSPF) in a problem solving process.¹ On 11 April 2016, the Complainants requested that the complaint be transferred to the CRP for their investigation, in parallel to the implementation of the OSPF recommendations. Detailed responses to specific issues raised by the Complainants are in [Annex 1](#). A history of the complaint and key milestones is provided in [Annex 2](#).

2. Compliance with Policies and Procedures

3. Because the complaint refers to three separate TAs and the SABS project, the issue of compliance is addressed below by distinguishing between, and making reference to, the ADB policies and procedures that apply to the TAs, and those that apply to the project.

4. **Technical Assistance.** A basis for the complaint is alleged non-compliance with ADB's *Safeguard Policy Statement 2009 (SPS)*. The SPS does not apply to TAs. The SPS does not contain any provision that applies to technical assistance. OM D12 on technical assistance, which governs TA activities, does not refer to the SPS or its provisions. As such, the SPS and its provisions are not relevant for the compliance review of complaints concerning TAs. In addition, TA4712 and TA7387 have both been closed for more than two years prior to the submission of the complaint, and should be excluded from the compliance review function consistent with paragraph 148 and 142(iv) of the *Accountability Mechanism Policy* and 33(iii) of OM Section L1/OP.

5. ADB has complied with OM D12 (Technical Assistance), the key policy governing TAs. In designing and implementing the current TA 8481, ADB has also complied with the Public Communications Policy 2011 (PCP) and OM L3 (Public Communications). ADB's TA reports and TA completion reports for all TAs have also been posted on ADB's website. Although not a requirement under applicable policies, the TAs have supported extensive public consultations concerning Government-led reforms for over a decade. Most recently, as part of the OSPF problem solving process, ADB provided additional resources to expand consultations on the Government-led reforms even further. The Complainants were involved in developing the TOR ([Annex 3](#)) for a consultant to support these expanded consultations, they participated in the consultant selection process, and they endorsed the outcome. ADB remains committed to continue consultations in collaboration with the government and to implement all recommendations from the OSPF problem solving process.

6. **SABS Project.** ADB has complied with all applicable policies and procedures in the design and implementation of the SABS project, specifically the SPS, OM F1/OP (Safeguard Review Procedures), the

¹ While an original complaint submitted in September 2014 was determined eligible for OSPF problem solving, OSPF's mandate (paragraphs 141-142 of ADB's *Accountability Mechanism Policy*) is broader than the eligibility criteria for the compliance review function (paragraphs 145-147 of the *Accountability Mechanism Policy*).

PCP2011 /OM L3 (Public Communications) and OM C3 (Incorporation of Social Dimensions into ADB Operations). Responses to the Complainants' allegations of non-compliance with respect to safeguards for financial intermediaries and Indigenous Peoples (IP), as well as with consultation requirements, are summarized below.

7. *Financial Intermediaries.* The SABS project complies with the safeguard requirements for projects involving investment of ADB funds through financial intermediaries (paragraph 65 of the SPS).² ADB has classified the SABS project as category FI (for environment safeguards), and category FI-C for both involuntary resettlement (IR) and IP safeguards. In line with OM F1/OP para 55, following screening and categorization of the SABS project as C for IR and IP safeguards, further requirements of SPS were not applicable. Since there could be potential impacts on the environment, SABS developed an Environmental and Social Management System (ESMS),³ in compliance with both the SPS and Samoa national laws. The ESMS has been adopted by all participating financial institutions. The ESMS: (i) identified criteria for screening and selecting loan applications based on their likely environmental impact; and (ii) established procedures to ensure that the SPS and relevant Samoan laws are complied with. The ESMS also clarifies the Grievance Redress Mechanism,⁴ safeguard monitoring, and institutional responsibilities for project management, resources and capacity building. As a result, the safeguard procedures incorporated into, and applied under, the SABS project comply with the SPS, as also stated in the OSPF summary report (paragraphs 10-12).⁵

8. *Indigenous Peoples.* The SPS is applicable to the SABS project, but the project itself does not trigger IP safeguards as set out in the SPS. Indigenous Samoans comprise an ethnically and culturally homogenous group that speak the same language and have a close attachment to the land. They are, however, not deemed vulnerable being the mainstream and dominant cultural, economic, social and political group in Samoa (SPS 2009, Appendix 3, page 56, paragraph 6). For purposes of SPS policy application, and in the context of the SABS project, therefore, affected Samoans do not qualify as needing protection under the IP safeguards.

9. *Meaningful Consultation.* The SABS project has complied with "meaningful consultation" requirements of paragraph 54 of the SPS as well as with policy guidance provided by the PCP 2011 and OM L3 (Public Communications). During project preparation, which extended over more than 12 months, ADB staff and consultants undertook extensive consultations with a broad cross-section of individuals and organizations, including civil society groups, businesses, development partners, industry associations and commercial banks. The MOF conducted a broader consultation workshop in August 2013, several consultation and feedback rounds were also organized in cooperation with the Chamber of Commerce, Samoa Association of Manufacturers and Exporters and Samoa Farmers Association. An in-depth agribusiness survey was conducted. Individual meetings were organized with civil society organizations, commercial banks and sector support organizations. A separate gender action plan (GAP) was developed for the project and a gender workshop was held in March 2015. A project launch was organized by MOF in May 2015. The facility manager conducts regular briefings at industry functions, such as the Chamber of Commerce. Three workshops focusing on the safeguards requirements of the project were delivered to participating financial institutions (ANZ Bank, Bank of South Pacific (then Westpac), and Samoa Commercial Bank) in 2015. A project website has been set up to disseminate project information.

² This requires safeguard due diligence to assess the potential environmental and social impacts and risks associated with the FI's existing and likely future portfolio, and its commitment and capacity for social and environmental management

³ <http://adb.org/sites/default/files/46436-002-esmsab.pdf>

⁴ ESMS, Chapter 5, page 19 <http://www.adb.org/sites/default/files/linked-documents/46436-002-esmsab.pdf>

⁵ ADB. 2015. Summary Review and Assessment Report of the Special Project Facilitator on TA 7387 (41173-012)-SAM: Promoting Economic Use of Customary Land, Phase II, TA8481 (46512-001)-SAM: Promoting Economic Use of Customary Land, Phase III Grant 0392 (46436-002)-SAM: Samoa AgriBusiness Support Project.

3. No Harm or Anticipated Harm

10. There has been no direct or material harm, nor is any harm anticipated, to the Complainants, or to any Samoan individuals, as a result of either the TAs or the SABS project.

11. **Technical Assistance.** Government-led reforms supported by the TAs have not resulted in and will not result in changes to the rights of customary land-owners. Leases of land have been allowed under Samoan law since 1965, and there have been a small number of historical cases of land leases being used as collateral. Reforms supported by the TAs are designed to provide a legal framework to give greater clarity to the process for using land leases as collateral. Critically, this includes strengthening requirements for full and informed consent by all members of a land-owning group prior to leases being entered into. The reforms introduced by the government with TA advisory support have not resulted in any change as far as substantive rights over land are concerned. More broadly, Government has been clear in all legislation and in policy guidance on reforms ([Annex 4](#)) that there will be no alienation of customary land, consistent with Samoa's Constitution.

12. **SABS Project.** The project will provide financing and business support services to Samoan agri-businesses to promote growth and jobs. It addresses key constraints of businesses in accessing finance. The project is not intended in any way to change customary land tenure arrangements. Rather than promote the use of land leases as collateral for the purpose of securing financing, the project is designed specifically to reduce collateral requirements for businesses to obtain funding. No land leases have been used as collateral for the eight loans obtained with project support, and participating financial institutions have confirmed that land leases will not be used as collateral for sub-loans.

4. Conclusion

13. As set out, ADB has complied with all applicable policies, as they apply separately to the SABS project and the current TA. The SABS project and the successive TAs have also not caused, and are not likely to cause, direct and material harm to either the Complainants or other affected people.

List of Annexes

Annex 1: Response Matrix

Annex 2: History of the Complaint and Key Milestones

Annex 3: Terms of Reference for the Consultation Design Specialist

Annex 4: Approved Government Policies Guiding Land Reforms

Annex 5: List of Key Acronyms

ANNEX 1

Response Matrix

1. Core Response

No Harm or Anticipated Harm	
TAs	<p>The purpose of successive phases of the TA has been to contribute to the Government's objective of increasing the economic use of customary land to promote growth and jobs in Samoa. The focus of the TA has been to assist the Government to strengthen legislative and other reforms to provide a clear framework to enable lessees of customary land, allowed in Samoan law since the <i>Alienation of Customary Land Act (ACLA)</i> of 1965, to use leases as collateral for loans. Currently, commercial lenders in Samoa are reluctant to accept leases of customary land as collateral.</p> <p>There has been no direct harm to the complainants, or to any Samoan individuals, as a result of the TAs. No leases of land owned by the complainants' <i>aiga</i> (extended family) have been used as collateral for a loan. More broadly, there have been a small number of historical cases of land leases being used as collateral prior to the TAs.</p> <p>Reforms are also not likely to cause direct and material harm to either the complainants or the Samoan community, but rather introduce proper protections to ensure that the rights of the landowners and the interests of lessees and lenders are protected under an appropriate legal framework. The basis for the complaint is that allowing the use of customary land leases is tantamount to a contravention of Section 102 of the Constitution, which explicitly prohibits the alienation of customary land, and would result in the dispossession of customary land owners. This anticipated outcome is not achievable based on existing legislation governing leasehold interests in Samoa:</p> <ol style="list-style-type: none"> i. Reforms will provide clarity to the pre-existing framework that allows only the leasehold interest – not the underlying ownership rights – to be used as collateral. This has been made clear by the Government in amendments to the ACLA. Section 15(4) specifically clarifies that customary land is not to be alienated in any way as provided under the Constitution. ii. Similarly, the Land Titles Registration Act (LTRA), introduced in 2008 to allow easier processing of matters related to various land interests and which changed the land registration from a deed to a Torrens system, emphasizes that the Act does not in any way change the inalienability of customary land and does not change the ownership of customary land [sections 9(4) and 9(5)]. The reforms introduced by the Government with ADB TA assistance have not resulted in any change as far as substantive rights over land are concerned. <p>The Government has been clear that customary landowners have full rights to allow or disallow the leasing of customary land, and the potential use of such leases as collateral. Policy principals set out by the Government are in Annex 4. Government led reforms on which the TA is advising intend to strengthen processes to ensure that any use of leases as collateral is based on prior informed consent of the <i>aiga</i>, and that customary land owners must have access to independent legal advice when consent is given for the lease to be used as security. The LTRA requires that leases be registered under the Act before they can be used as collateral. Registration requires that leases be fully compliant with thorough policies and processes administered by the Ministry of Natural Resources and Environment to ensure that there is full consent of <i>matais</i> to have their lands leased, and proper consultations are undertaken with the extended family. The requirement to register leases before they can be used as collateral is designed specifically to provide additional safeguards to avoid risks highlighted by the complainants in current arrangements where – despite the intent of Samoan law and custom – individual <i>matai</i> might bypass traditional consultative mechanisms.</p> <p>The Government has similarly been clear that planned reforms intend that, in the event that mortgaged leases are sold or reassigned as a result of default by the lessee, the customary landowners that originally entered into the lease will be "accorded rights that are not less than those ordinarily</p>

	<p>enjoyed by commercial lessors” including: (i) the power to approve or disapprove of sub-letting or the assignment of lease (whether as a default by the mortgagor or otherwise); and (ii) the right to receive lease payments strictly in accordance with the original lease (including retaining first priority for the application of funds obtained by the mortgagee in the event of a default)”. [Customary Land Advisory Committee (CLAC) <i>Draft Statement of Rights of Customary Landowners when Customary Lands are Leased and also when the Lease is used as Security by way of Mortgage</i> (June 2014) and <i>Fundamental Project Precepts</i> (June 2014)].</p>
SABS	<p>The project is intended to provide financing and business support services to 10-15 Samoan agribusinesses, generating employment and opportunities for Samoan farmers to supply inputs to new and expanding agribusinesses. The financing component is intended to overcome constraints facing SMEs in Samoa, including limited collateral and capital. Participating financial institutions will provide loans to eligible agribusinesses, with ADB funds providing cash collateral to secure up to 50% of such loans. ADB will also provide up to a further 25% of total project costs in repayable supplemental seed capital, provided as “quasi-equity” in the business.</p> <p>The project is not intended to change customary land tenure arrangements, but is designed to reduce the amount of collateral required from participating agribusinesses to secure commercial financing. Furthermore, the project was not designed for the participating agribusinesses to utilize land leases as collateral for loans, and participating financial institutions have confirmed that land will not be used as collateral for sub-loans under the project.</p> <p>The project has not resulted in any direct or indirect harm to customary land owners, and no harm is anticipated. The project has helped eight Samoan owned small businesses gain access to commercial finance to expand their business and hire new workers. None of these businesses have used leases of traditional land as collateral.</p>
Compliance with ADB Policies and Procedures	
	<p>ADB’s <i>Safeguards Policy Statement</i> (2009) applies to the SABS project but not the TAs. The applicable policies for the TA is OM D12 (Technical Assistance), the Public Communications Policy 2011 (PCP) and OM L3 (Public Communications).</p>
TAs	<p>ADB has undertaken extensive and meaningful consultations for successive TAs over the past decade.</p> <p>ADB’s <i>Safeguard Policy Statement</i> (SPS), alleged non-compliance of which is the basis for the complaint, does not apply to these TAs. Furthermore, TA4712 and TA7387 both closed more than 2 years ago and should be excluded from the compliance review function consistent with paragraph 148 and 142(iv) of the <i>Accountability Mechanism Policy</i>, 2012 and 33(iii) of OM Section L1/OP. In any case, the TA activities have caused no harm or anticipated harm and have been fully consistent with relevant policies governing TA activities.</p> <p>Under the first phase of the TA (TA4712), which commenced in January 2006 and closed in February 2009, 20 community consultations were held: 13 on the main island of Upolu and 7 on the second island of Savaii. Under the second phase (TA7387), from November 2009 until September 2013, a further 4 community consultations were held; 2 in Upolu and 2 in Savaii. TA Reports and TA Completion reports were posted to ADB’s website, consistent with OM L3.</p> <p>OSPF deemed this complaint to be eligible, and commenced a problem solving process in November 2014. In response to the initial August 2014 complaint, ADB has worked closely with the Government, OSPF, and the complainants to undertake additional consultations as part of the third phase (TA8481).</p> <p>ADB is implementing OSPF’s recommendations to ensure greater opportunities for meaningful and substantive consultations. In particular, ADB has provided an additional \$150,000 for the TA to hire a consultant to support the Government—through the independent Customary Lands Advisory</p>

ANNEX 1

	<p>Committee (CLAC) – to develop and implement a country wide <i>Stakeholder Involvement and Public Consultation Strategy</i>. The terms of reference for the consultant (Annex 3) were discussed extensively with the complainants, and the complainants were part of the selection process and endorsed the selection of the consultant hired to prepare the expanded consultation strategy. A draft strategy is currently being developed for consultation and inputs by key stakeholders. Implementation of the consultation strategy is expected to start in 3rd quarter of 2016, following its endorsement by relevant stakeholders.</p> <p>The complainants have requested that all previous legislative reforms be put in abeyance until additional consultations could be held to revisit reforms undertaken to date. This was not accepted by Government, given that all legislative changes have been undertaken in full compliance with Samoa's own democratic Parliamentary processes. While additional consultations will be forward looking, they will be meaningful, substantive and wide ranging. Expanded consultations on future reforms, for instance, will inevitably need to consider the current context and the evolution of reforms, as well as key issues emerging from previous consultations.</p>
SABS	<p>The project met the “meaningful consultation” requirements of paragraph 54 of the SPS, as well as policy guidance in the PCP 2011 and OM L3 (Public Communications).</p> <p>During project preparation, which extended over more than twelve months, ADB staff and consultants undertook extensive consultations with a broad cross-section of individuals, civil society organizations (including, <i>inter alia</i>, the Samoan Association of Farmers, the Samoa Umbrella NGO association SUNGO, and the Civil Society Support program), businesses, development partners, industry associations and commercial banks. The Ministry of Finance conducted a broader consultation workshop in August 2013, several consultation and feedback rounds were organized in cooperation with the Chamber of Commerce, Samoa Association of Manufacturers and Exporters and Samoa Farmers Association. An in-depth agribusiness survey was conducted. Individual meetings were organized with civil society organizations, commercial banks and sector support organizations. A separate gender action plan was developed for the project and the gender workshop was held in March 2015. A project launch was organized by MOF in May 2015. The facility manager conducts regular briefings at industry functions, such as e.g. Chamber of Commerce. 3 Safeguards workshops were organized with partner financial institutions in 2015. A project website has been set up.</p> <p>A safeguards specialist, who is a Samoan, is a core member of the project management unit (PMU); a key role/task of this specialist is to ensure that the consultations are undertaken as required in the various project documents.</p> <p>Key project documents have been disclosed, including the Environmental and Social Management System (ESMS), including the Grievance Redress Mechanism (GRM). The PAM also includes a stakeholder communication strategy.</p>
Application of Indigenous Peoples' Safeguards	
<p>The SPS provisions on Indigenous People are not applicable when assessing project impacts on Samoans in Samoa. The SPS sets out 4 criteria that must be met for indigenous peoples. The Samoan people meet the first two criteria: (i) they identify as indigenous and (ii) have a collective attachment to their land. But Samoans do not meet the remaining two criteria: (iii) they are the dominant cultural, economic, social and political group in Samoa rather than distinct from the dominant society and (iv) Samoan is the national language. Because of this, the SABS project was rated as category C⁶ for Indigenous Peoples safeguards.</p>	

⁶ ADB approach to applying Indigenous Peoples safeguards in Samoa is consistent with the World Bank. World Bank no longer triggers its Indigenous Peoples safeguards in countries like Samoa where a cohesive indigenous population is the dominant cultural, economic, and social group.

Application of Safeguards to Financial Intermediary Projects

For projects involving investment of ADB funds through financial intermediaries (FIs), ADB conducts safeguard due diligence to assess the potential environmental and social impacts and risks associated with the FI's existing and likely future portfolio, and its commitment and capacity in social and environmental management (SPS paragraph 65).

ADB has met this requirement for the SABS. As stated in the OSPF report⁷ (paragraphs 10-12), procedures in relation to environmental and social safeguards have been developed by the project, in compliance with ADB's 2009 *Safeguards Policy Statement*. These procedures are elaborated in the Environmental and Social Management System (ESMS).⁸ The ESMS was established to (i) identify the criterion for screening and selecting loan applications based on their likely environmental, indigenous peoples, involuntary resettlement, and social impacts; and (ii) establish the procedures to follow to ensure that SPS and relevant Samoan laws are complied with.

The ESMS has been adopted by all participating financial institutions as required by the Grant Agreement (Schedule 4, paragraph 4.d.) and is also a covenant in the project agreement (Section 3.01.b). Only businesses and activities that are not included in the prohibited investment activities list and categorized as category C for involuntary resettlement or category B for environment will be selected for financing. A grievance redress mechanism (GRM)⁹ has been incorporated into safeguards documents and has been established for the Project. The GRM provides a process for the project to receive, evaluate, and facilitate the resolution of affected people's concerns, complaints, and grievances about the environmental and social performance of the Project and its activities and investments.

2. Clarifications on Specific Issues Raised

1. SABS project encourages financialization of arable customary land without ensuring that benefits flow to local families and villages (Para. 1)

The SABS project encourages agriculture to generate economic growth and jobs for Samoans. ADB has provided \$5 million in grants for the project to support agribusinesses that face difficulties to raise commercial finance due to insufficient collateral and owner's capital.

The project has helped eight Samoan owned small businesses gain access to commercial finance to expand their businesses and hire new workers. None of these have used leases of traditional land as collateral.

The project is not intended to change customary land tenure arrangements nor intended to expand the use of collateralized lending, and is in fact designed to reduce the amount of collateral required from participating agribusinesses to secure commercial financing.

Through the support of the project, the businesses supported so far managed to negotiate longer loan terms and more favorable interest rates.

The project does not foresee support of agribusinesses that use lease of customary land as collateral.

⁷ ADB. 2015. Summary Review and Assessment Report of the Special Project Facilitator on TA 7387 (41173-012)-SAM: Promoting Economic Use of Customary Land, Phase II, TA8481 (46512-001)-SAM: Promoting Economic Use of Customary Land, Phase III Grant 0392 (46436-002)-SAM: Samoa AgriBusiness Support Project.

⁸ <http://adb.org/sites/default/files/46436-002-esmsab.pdf>

⁹ Details on the GRM are found in Chapter 5, page 19 of the ESMS at <http://www.adb.org/sites/default/files/linked-documents/46436-002-esmsab.pdf>

ANNEX 1

2. ADB failed to conduct appropriate environmental and social due diligence (Para. 3)	
TAs	ADB complied with all relevant policies and procedures applicable to TAs, as set out in OM Section D12 (Technical Assistance) and, as noted above, with PCP/OM Section L3 on public communications.
SABS	<p>ADB complied with all applicable policies and procedures applicable to projects, as set out in SPS/OM Section F1, and PCP/OM Section L3, OM Section C3 .</p> <p>As outlined above, during SABS project preparation, which extended over more than twelve months, ADB staff and consultants undertook due diligence and extensive consultations with a broad cross-section of individuals and organizations.</p> <p>As the project is designed to be implemented entirely within the existing laws and customs governing land ownership, and does not affect the rights of customary landowners, specific consultations on land reform issues were not held. As noted, such discussions are being separately undertaken as part of the customary land TA.</p> <p>The due diligence is further explained in 3, below.</p>
3. Non-compliance with <i>Safeguard Policy Statement</i> (SPS) and OM C3: Incorporation of Social Dimensions into ADB Operations (Para. 3)	
TAs	The SPS is not applicable to TAs. The reforms being undertaken by Government with advice provided by the TA are based on the fundamental policy precept approved by the government that "there can and will not be any alienation of customary land". All legislative changes will be in accordance with approved policies of the government (see Annex 4). Any lease of customary land will be undertaken through voluntary agreement between customary landowners and individuals or firms, with any use of leases as collateral requiring free, prior and informed consent of the landowners.
SABS	<p>The SABS project fully complies with the requirements of the SPS/OM F1, PCP/OM L3 and OM C3.</p> <p>As per the requirements of SPS and OMF1, the SABS project was screened and classified as a category FI (financial intermediary) for environment, and Category FI (C) for both involuntary resettlement and Indigenous People.</p> <p>As required for category FI projects, an ESMS was prepared and will apply to each activity/transaction proposed for support under the project. The project is not permitted to support or undertake activities that would be classified as category A for environment and category A or B for involuntary resettlement, consistent with the ESMS. As noted previously, IP safeguards are not applicable to the project given that that indigenous Samoans constitute the overwhelming majority of Samoa's population, and the project will not have an adverse impact on distinct and vulnerable IPs. The project will not support activities that are included on the Prohibited Investment Activities List (Appendix 5 of SPS). Section 4 of the ESMS outlines the steps to be taken for the screening of investments and assessment where required. A grievance redress mechanism has also been established.</p> <p>The PMU includes a safeguards specialist to ensure that the provisions of the ESMS are applied. The PMU is required to prepare safeguards monitoring reports on the status of the project and sub-projects/ activities, which will be disclosed.</p> <p>The SABS project complies with the requirements for consideration and integration of social dimensions in projects as set out in OM C3. An Initial Poverty and Social Analysis (IPSA) was prepared, consistent with OM C3 requirements, and a Stakeholder Engagement (Communications) is included in the Project Administration Manual (PAM). During preparation of the project the social, poverty, cultural, and gender aspects were considered. A gender action plan, summary poverty reduction and social strategy were prepared for the project. As noted above, a stakeholder engagement strategy is</p>

	<p>included in the PAM and the project is subject to monitoring and reporting and project documents, including safeguard monitoring reports that are subject to disclosure.</p> <p>The SABS project further complied with requirements of OM C3 through establishment of eligibility criteria for agribusiness partnerships detailed in the PAM (paras 53-55) clearly state that to receive support, a sub-project must:</p> <ul style="list-style-type: none"> • make a beneficial contribution to the agriculture sector, economy or employment; • involve the production and/or purchase of raw or processed agro-industrial materials from rural areas, and/or operations in rural areas; and • take into consideration the likely improvement in the incomes, livelihoods, opportunities or living standards of local men and women. <p>Although the SPS provisions on Indigenous Peoples are not triggered, the eligibility criteria for agribusiness partnerships were established to ensure that the design of the project integrates key elements that will protect the Samoans from any adverse project impacts.</p>
<p>4. Leasing of customary land to outsiders for long periods comes close to land alienation (Para. 11)</p>	
<p>The government's position is that the right to makes decisions to enter into leases on behalf of communities is a matter for traditional leaders/ titleholders (matai) to decide in consultation with their families (aiga) given the sensitivities of custodial roles and responsibilities and to determine the sharing of economic and financial benefits that are likely to be derived. In addition, the Government has made clear its intention that customary landowners have full rights to approve or disallow the use of leased lands as security, that any such approval must be based on prior informed consent, and that customary land owners must have access to independent legal advice when consent is given for the lease to be used as security.</p> <p>Customary Land Advisory Committee (CLAC) <i>Draft Statement of Rights of Customary Landowners when Customary Lands are Leased and also when the Lease is used as Security by way of Mortgage</i> (June 2014) and <i>Fundamental Project Precepts</i> (June 2014)</p>	
<p>5. Vesting powers to enter into a long term lease in a matai, bypassing traditional consultations, is tantamount to alienation of land – a hidden danger (Para. 11)</p>	
<p>ADB and the Government fully recognize the rights of traditional owners. Any decisions to lease land or use it as collateral must be based on prior informed consent of customary owners. Reforms aim to formalize current informal practices in order to strengthen the process for seeking consent from all members of the aiga.</p> <p>The rights of customary land owners will be recognized and enforced by the reforms so that they enjoy all of the rights usually vested in commercial lessors, including:</p> <ul style="list-style-type: none"> • the right to approve or disallow the use of the lease as security; • the power to approve or disallow the assignment of the lease, whether as a result of a default by the mortgagor or otherwise; and • the right to receive lease payments strictly in accordance with the terms of the lease 	
<p>6. Minister for lands is empowered to grant leases for approved purposes exposes land transactions to manipulation and corruption (Para. 12)</p>	
<p>The reforms target issuance of leases with prior informed consent of all the traditional landowners.</p> <p>The proposed legislative changes will require consent of the beneficial owners for any leases to be signed by the Minister as a trustee. Under the proposed legislative changes, the customary landowners will have the power to require the Minister to enforce the lease agreement including recovery of rents or termination of leases for non-</p>	

ANNEX 1

payment of rents. They will also have the right to take legal proceedings themselves to enforce the lease even though technically they are not a party to the lease.

Under the existing provisions of ACLA (Sections 4, 5 and 8) the Minister is required to act in the interest of the customary landowners. The Minister has a fiduciary duty and cannot act against the interests of the landowners.

7. Silence on improvements to land by lease, rights of the lessee (Para. 23.)

The leasing framework is still being developed.

This is an issue that will be part of upcoming consultations followed by legislative changes clarifying rights of lenders, leases and the landowners.

8. Reforms appear to be in breach of constitutional protections of customary land (Para. 23)

There are guarantees in Samoa's supreme law that there can and will not be any alienation of land. This is a constitutional imperative and all aspects of the reforms will ensure that all policy, process and legislation will be consistent with the guarantees offered by the constitution.

Samoa's Constitution (section 102) prohibits the alienation of land in Samoa held under customary tenure. Consistent with the Constitution, the Samoan Government has focused on enabling leases of customary land to be used as security for loans – the underlying interests in the land itself will not and cannot be used as security.

Leasing of customary land has been undertaken in a few cases for some time. Leaseholds are legally recognized and regulated under the ACLA.

To allow leases of customary land to be used as collateral for loans, the Government introduced the LTRA. Section 9(4) and (5) of the Act emphasize that the Act does not change the inalienability of customary land as stipulated by the Constitution, and does not change ownership or affect interest in customary land. While not all leases need to be registered, the registration of leases provides greater certainty in order to allow registered leases to be used as collateral.

The ACLA was also amended to make clear that only leasehold interests on customary lands could be mortgaged. Section 15(4) specifically clarifies that customary land is not to be alienated in any way not provided for under the Constitution.

History of the Complaint and Key Milestones

1. The CRP complaint has been lodged by Fiu Mataese Elisara; Teleai Dr. Sapa Saifaleupolu; Leuluaialii Tasi Malifa; and Lavea Lilimaiava Ken Lameta (the complainants). The four complainants are assisted by Inclusive Development International (IDI). The four complainants are among the 16,787 *matai* (family chiefs) in Samoa.¹⁰

2. On 19 December 2013, the complainants wrote to the ADB South Pacific Sub-regional Office (SPSO) in Suva expressing concern about their perceived implications from ongoing ADB efforts to allow leases of customary lands to be used as part of collateral for mortgages in Samoa. Their complaint to ADB was publicized in the Samoa Observer, their local newspaper, on 29 December 2013¹¹. The Officer-In-Charge of SPSO then, Caroline Currie, responded on 21 February 2014 advising the complainants to approach the independent Customary Land Advisory Commission (CLAC) for clarifications on issues they raised. ADB referred the complaint to CLAC for the following reasons: (i) CLAC was formed to advise Cabinet on the facilitation, encouragement and promotion of economic use of customary land; (ii) CLAC has legal mandate to conduct public consultations on areas affecting customary land considered to be in need of reform, and; (iii) CLAC's mandate allows it to review all laws affecting customary land in Samoa and make recommendations to Cabinet for changes to such laws.

3. On 3 August 2014, the complainants wrote to the ADB SPSO; expressing concern that the SABS Project will weaken the customary land tenure system; and (ii) requesting disclosure of project documents. On 9 August 2014, the Regional Director SPSO (RD) responded to the complainants explaining that the SABS Project was unrelated to reform of Samoa's customary land tenure system and provided a web based link to project documents. There was no further correspondence by the complainants with SPSO.

4. On 9 September 2014, the OSPF received a complaint dated 29 August. The key element of the complaint was that "meaningful" consultations on the proposed reforms to allow use of land leases as collateral was lacking, and that reforms would potentially lead to the alienation of customary land in contravention of Section 102 of Samoa's Constitution, dispossessing Samoan land-owners. On 27 September 2014, through the Samoa Observer, the complainants warned of social unrest and violence if there was alienation of customary land¹². OSPF on 29 September 2014 found that the complaint met eligibility requirements for problem solving, which are broader than those of the CRP.

5. OSPF conducted an initial review and assessment mission to Samoa from 17 November to 1 December 2014. The OSPF, *inter alia*, found that:

- Only leases will be used as collateral, not the underlying interest in land
- Leases have been issued in Samoa since 1965
- The constitution protects the customary ownership of land
- There is fear associated with use of land as collateral in that mortgagees would acquire ownership by exercise of the power of sale or foreclosure
- The law allows a matai to receive rents on behalf of the direct beneficiaries but it does not provide safeguards on how the money will be used by the matai

¹⁰ Numbers based on the 2011 census

¹¹ <http://archives.pireport.org/archive/2013/december/12-30-02.htm>

¹² <http://pang.org.fi/group-warns-of-social-unrest-and-violence/>

ANNEX 2

- The agribusiness project uses strict procedures relating to environmental and social safeguards and has an appropriate grievance redress mechanism.
6. Based on its findings the OSPF, on 12 March 2015, with agreement from government and complainants recommended that:
- The TA8481 must allocate sufficient resources to engage an independent expert to design and implement a consultation/communication strategy to take into account views of the various stakeholders, including communities, on the proposed reforms
 - The Samoa Law Society should be consulted on the draft leasing framework
 - Government to explore a consultative process to ensure participation of the wider community
 - Government needs to ensure that CLAC is adequately staffed and funded
 - G0392 should be launched soonest and project awareness increased
7. The government and ADB have enlarged the scope and resources of TA8481 (\$400,000), to include extensive consultation. They have agreed to and are implementing all recommendations for expanded consultations with the communities. On 7 August 2015 ADB allocated an additional \$150,000 from TASF-V for an independent expert to design and implement expanded consultations and extended the TA closing date by 12 months to 31 December 2017.
8. During the OSPF's review and assessment mission (17 November – 1 December 2014), the complainants provided a consultation strategy to OSPF to be managed by themselves, with an anticipated consulting cost of \$500,000 (*Draft Action Plan, Strategy and Budget for Meaningful Consultations in the context of Samoa*). OSPF had then advised the complainants that they could not be hired to deliver the proposed consultations due to potential conflict of interest.
9. ADB sought wide input into the terms of reference for the independent expert, including incorporating suggestions from the complainants on the scope of work and to separate the consultation design and implementation activities.
10. On 9 June 2015, the complainants expressed concern to ADB management that the TORs for the consultation would be forward looking, and requested that previous legislative changes undertaken by the Government be placed in abeyance until further consultations had been completed. On 21 June, the RD provided revised TORs to the complainants but noted that ADB was not in a position to request the Government to hold in abeyance laws which had been passed through a democratic Parliamentary process. The RD stressed to the complainants, however, that in assessing the design and implementation of reforms, consideration will need to be given to the current context and the evolution of discussions. For instance, in designing new consultations, the consultant will need to consider how to reach a wide range of stakeholders, key issues that emerged from previous consultations, and whether there were gaps in previous consultations that need to be addressed. As a result, consultations will be meaningful, substantive, and wide ranging.
11. The complainants participated in the selection of the consultation design specialist, with all eligible applicants interviewed on 28 and 29 October 2015. The selection panel which included the government, complainants and ADB reached a unanimous decision.
12. The complainants participated in a stakeholder meeting organized by the OSPF on 27 January 2016 following the commencement of the consultation design consultancy. During this meeting, the complainants requested a full report on the details on processing and disbursement of the SABS project

to date. They were advised that due to the private nature of the detailed information this information will not be shared along with assurances that none of the 8 businesses supported so far under the project were set up on leased customary land. Businesses supported by SABS range so far include chocolate, virgin coconut oil, taro chips and poultry production. The project has so far facilitated \$0.94 million in commercial loans to entrepreneurs.

13. On 11 April 2016, the complainants decided to abandon the problem solving approach and seek a compliance review investigation. This is despite ADB and Government commitments to implement all recommendations emerging from the problem-solving process.

14. On 17 April 2016, the complainants issued an extensive press statement to the Samoa Observer expressing frustration with the OSPF problem solving process, claiming this failed to address their fundamental concerns¹³.

¹³ http://www.samoaoobserver.ws/en/17_04_2016/local/5047/Chiefs-not-satisfied--complaint-elevated.htm

**TOR for CONSULTATION DESIGN SPECIALIST
TA 8481-SAM: Promoting Economic Use of Customary Land, Phase III**

I. OBJECTIVE AND PURPOSE OF THE ASSIGNMENT:

1. The Government of Samoa's development strategies has consistently focused on increasing economic and social development opportunities for communities. The Government has targeted increased economic use of customary land for economic development in full consideration of ecological and cultural sustainability and as such reforms intend to facilitate this target and be relevant. The Government has also been clear that, consistent with Samoa's Constitution and tradition, reforms cannot, and will not, lead to the alienation of customary land. The Asian Development Bank (ADB) has supported Samoa through technical assistance (TA).

2. The ADB's *Economic Use of Customary Land* TA has been ongoing since 2006. The TA has assisted the Government develop the legal and institutional framework needed to enhance the use of customary land leases, allowed under Samoan law since 1965. Phases I and II, of the TA have been implemented. Phase I supported public consultations, drafting of legislative changes and development of a program, with six major components, to guide further reforms. Phase II of the TA supported national coordination of customary land stakeholders, capacity building for administrative reforms and community advocacy. Phase III, which is currently underway, will review laws relating to customary land through a legal working group, and is intended to establish a leasing framework that will allow use of lease interest in land as collateral. ADB is proposing to support the Samoan Government to consult the Samoan public on the future direction of the reforms for which the ADB financed TAs are providing advisory support.

3. ADB is seeking to recruit a Consultation Design Specialist for the design of a public consultation strategy to ensure wide community participation in the design of potential future legislative and other reforms, building on reforms previously endorsed by Samoa's Parliament. The specialist will be responsible for assisting the Customary Land Advisory Commission (CLAC) and the Ministry of Natural Resources and Environment (MNRE) as Implementing Agency to formulate a country-wide stakeholder involvement and public consultation strategy. The specialist is expected to be able to demonstrate impartiality, have wide knowledge and understanding of the intricacies of Samoan culture and customs and, ideally, of multilateral institutions' safeguards policies. The recruitment is open to national consultants.

II. SCOPE OF WORK:

4. The assignment is expected to end in December 2015 (3 person-months, intermittent). The stakeholder and community consultation specialist will actively collaborate and engage with the MNRE, CLAC and ADB to undertake the key tasks identified in section III below, and is expected to submit outputs to MNRE and ADB for comments and clearance prior to finalization.

III. DETAILED TASKS:

5. The specialist will meet with the project team to understand the background and scope of the project. He/she will collate and review all project experience, including grievances received by the ADB, and stakeholder and community consultation activities undertaken over the course of the project to

identify gaps and inconsistencies that need to be addressed when considering how best to undertake consultations around the design of future reforms.

a) Conduct Stakeholder Analysis

The specialist will conduct a stakeholder analysis to identify and map key stakeholders. The specialist will use this to identify the most appropriate channels to engage with the various stakeholder groups. The assessment will also determine the resources required from the MNRE and CLAC in implementing and supervising the stakeholder and village community consultation activities, for which ADB can provide additional support.

b) Develop Stakeholder Consultation Strategy

Based on the stakeholder analysis and in consideration of proposals available, the specialist will develop a forward looking country-wide *Stakeholder Involvement and Public Consultation Strategy*. The strategy should include, but not be limited to: the means by which information will be shared and disseminated with both external and internal stakeholders; an outline of proposed participation and consultation methodologies emphasizing two-way communication to ensure stakeholder input into the design of reforms; including options to improve the economic use of customary lands and detailing how information is best shared with each stakeholder, and in what forms. The strategy can highlight guidelines and activities for strengthening the government's capacity. More specifically, the strategy should address the following four questions:

- (a) Who needs to be reached by the consultation strategy?
- (b) How can they be effectively engaged in the consultation process?
- (c) Which channels of two-way communication will be most effective?
- (d) How will the consultation process be monitored and evaluated?

The specialist will ensure that the strategy and all planned activities are in accordance with and meet the requirements of ADB's Public Communications and Safeguards Policies, related procedures and guidelines and meet the requirements of the Samoan culture and values.

c) Assist the MNRE in Preparing to Deliver the Strategy

The specialist is also expected to support other activities necessary to deliver the strategy as needed, including but not limited to: (a) identifying mechanisms for continued interaction with the various stakeholders; and (b) supervising the design, production and pre-testing of consultation materials.

The Consultation strategy itself is anticipated to be started in the first half of 2016. ADB anticipates providing further assistance to the Government under a separate contract to implement a consultation program.

d) Develop an M&E Framework

The specialist will develop a monitoring and evaluation framework and tools to allow periodic feedback from key stakeholders once the consultation process begins.

IV. EXPECTED OUTPUTS and REPORTING REQUIREMENTS

6. The Consultation Design Specialist will submit the following reporting requirements and outputs to the Project Coordinator, MNRE and ADB:

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- 1) An inception report and detailed workplan to rationalize the activities and outputs outlined above. Stakeholder analysis report
- 2) Public consultation strategy
- 3) Preparation of information materials in accessible formats for the Samoan public to be disseminated ahead of and during consultations, to ensure informed discussions.
- 4) Monitoring and evaluation framework and tools
- 5) Final report that includes all the outputs and deliverables

7. The Consultation Design Specialist will report to the Project Coordinator and work closely with designated staff from the MNRE and CLAC.

V. QUALIFICATIONS AND EXPERIENCE

8. The Consultation Design Specialist is required to demonstrate the following qualifications and experience:

- The consultant will have a sound knowledge of traditional Samoan land tenure arrangements and government processes. He or she will have demonstrated skills and experience to coordinate and consult effectively with diverse groups and interests.
- At least 5 years of practical work experience in consultations, stakeholder engagement or related fields.
- A degree specializing in communications, social development or related disciplines is strongly desirable.
- Proven experience in designing consultation programs.
- Solid understanding of and ability to apply consultation tools and techniques, including both community level engagement and local/national media outreach.
- Demonstrated interpersonal and diplomatic skills, as well as the ability to communicate effectively with all stakeholders and to present ideas clearly and effectively.
- Proven ability to work in a collaborative and multi-stakeholder team environment.

Approved Government Policies Guiding Land Reforms

The following are the policy principles affecting these reforms which were approved by Government in 2015:

1. There can be and will be no alienation or disposition of ownership of customary land, as specifically required by the Constitution.
2. All dealings in customary land by way of lease or license (and the creation of mortgages over such leases and licenses) must be strictly in accordance with procedures specified in legislation made in accordance with the proviso in Article 102(a) of the Constitution.
3. The rights of customary land owners will be recognized and enforced by the reforms so that they enjoy all of the rights usually vested in commercial lessors, including:
 - (a) the right to approve or disallow the use of the lease as security;
 - (b) the power to approve or disallow the assignment of the lease, whether as a result of a default by the mortgagor or otherwise; and
 - (c) the right to receive lease payments strictly in accordance with the terms of the lease, and applicable statutory provisions.
4. The interests of lenders as mortgagees of customary land leases are to be respected and protected, taking account of the underlying rights of the customary landowners as beneficial and perpetual owners.
5. All leases of customary lands are to continue to be executed by the Minister as trustee for and on behalf of the beneficial landowners, but in certain cases the landowners will have authority to grant rights of access to and use of customary lands under licenses granted by them.
6. Leases of customary lands for agricultural or pastoral purposes can be granted to any Samoan regardless of whether they are a matai or not.
7. Customary landowners will be given powers to take action to recover rents and other payments due under the lease, irrespective of the doctrine of privity of contract.
8. Customary landowners of leased lands will be authorized to exercise a number of rights such as initiating a review of rents in accordance with the lease, and enforcing beneficial covenants and environmental protection obligations under the lease. As the Minister will sign the lease on behalf of the landowners, these new rights will be confirmed in the legislative amendments.
9. A range of other legal rights and powers are to be given to the customary landowners of leased lands to ensure that they enjoy the same rights and privileges ordinarily enjoyed by commercial lessors. These include the rights noted in paragraph 3. In some cases these rights will be terms of the standard lease document, and where necessary they will be stated in the legislative amendments.

ANNEX 4

10. Legislative reforms are to provide mortgagees of leased customary lands with a range of options in the event of a loan default. The reforms will replace the current provisions of Part VII of the Property Law Act which will not have application to such mortgages. Appropriate amendments will be made to the *Land Titles Registration Act 2008*, and further details can be prescribed by Regulations made under that Act.
11. A power for a mortgagee who has taken possession after a default to sell the lease will be provided for, but this will not be the only enforcement option. The sale of the lease will be subject to the consent of the landowners.
12. It will not be permissible under the legislative reforms for more than one mortgage to be registered against a customary land lease.
13. Mortgagees will be given power to take speedy action in the event of a default in the payment of a loan if there are reasons to believe that the mortgagor may act to the detriment of the mortgagee's interests. It will be a criminal offence for a mortgagor to allow any action which diminishes the viability of the development or the value of the security.
14. A mortgagee in possession after a loan default will have power to appoint a receiver of rents and profits, or a receiver and manager of the development, in addition to the power of sale.
15. A mortgagee in possession after a loan default will not have power to extract minerals on the land or to fell timber on the land, and appropriate amendments will be made to the *Property Law Act 1952* to ensure that these rights are not vested in mortgagees of leased customary lands.
16. When a mortgagee in possession of leased customary lands receives rents and profits, and proceeds of sale of the lease, the first priority for the payment of such monies will be given to the payment of rents due to the landowners under the lease.
17. Appropriate mechanisms will be available to permit the extension of the term of a lease prior to a sale or takeover by the mortgagee in possession so as to provide for the full term of the lease to apply but will be subject to the consent of the landowners. This will increase the value of the lease as a security and make it more saleable.

ACRONYMS USED

ACLA	-	Alienation of Customary Land Act
ADB	-	Asian Development Bank
AM	-	Accountability Mechanism
ANZ	-	Australia and New Zealand Banking Group
BSP	-	Bank South Pacific
CLAC	-	Customary Land Advisory Commission
CLLS	-	Customary Land Leasing Section
CRP	-	Compliance Review Panel
ESMS	-	Environmental and Social Management System
FI	-	Financial Intermediary
GRM	-	Grievance Redress Mechanism
IDI	-	Inclusive Development International
LTRA	-	Land Titles Registration Act
MNRE	-	Ministry of Natural Resources and Environment
MOF	-	Ministry of Finance
OM	-	Operations Manual
OSPF	-	Office of the Special Projects Facilitator
PAM	-	Project Administration Manual
PCP	-	Public Communication Policy
PMU	-	Project Management Unit
RD	-	Regional Director
SABS	-	Samoa AgriBusiness Support
SPS	-	Safeguards Policy Statement
SPSO	-	South Pacific Sub-regional Office
TA	-	Technical Assistance
TASF	-	Technical Assistance Special Fund
TOR	-	Terms of Reference