This memo offers general and specific comments from USAID’s Land and Resource Governance Division on the proposed draft.

**General Comments**

USAID appreciates the importance of promoting equitable, non-discriminatory access to land for individuals and communities as a precondition to exercise other human rights and to conserve increasingly scarce natural resources. USAID also recognizes that a variety of factors are increasing competition for land and that these competitive pressures are likely to continue and expand. Competition that occurs under conditions where the rule of law and land governance is weak, where corruption is common, and where markets are thin or poorly regulated may lead to elite capture, opaque and non-participatory land allocations, deforestation and use of land for money laundering or other illegal purposes. Securing the land and resource rights of individuals and local communities better enables the exercise of human rights by promoting inclusive land allocations that protect and benefit local communities, support sustainable livelihoods, conserve ecosystems and enable locally driven development decisions.

The draft notes in several places the important principles of non-discrimination and equal treatment. As currently written however, the draft does not do enough to clarify and limit cases where “positive” discrimination and “special” measures should be used. Recognizing the reality of historic injustices and the harms associated with these actions, this clarity is important to avoid unintended consequences. In addition, some of the draft’s text could be interpreted as limiting the self-determined choices of women, men and communities.

For example, appreciating that for billions the right to food and livelihoods is tied to their ability to access land and water, it is nonetheless the case that this access can be provided in several ways including by community allocation, government allocation and market systems. In some countries, reforms may be needed to create equitable, inclusive legal frameworks for land. This may include recognizing and protecting the collective land rights of some communities. We are concerned, however, that the draft calls - in several places - for *“encouraging agrarian reform that leads to more equitable distribution of land for the benefit of smallholders in small-scale agriculture”* (Para. 10).  This language could be interpreted to support involuntary land redistribution, which would violate non-discrimination and equal treatment principles and likely generate conflict. This is a particular concern in contexts where the rule of law and processes for compulsory acquisition of land are weak. “Public benefit” provisions under compulsory acquisition laws should not be interpreted as enabling the violation of the legitimate property rights of some land holders at the expense of others. We recommend this language be revised to clarify that reforms should seek to increase the tenure security of all smallholders and encourage voluntary exchanges that enable more efficient and effective use of land.  The same concern exists for Paras. 35 and 36.

In Para. 14, the draft states that:  *“State parties must...adopt specific measures, including legislation, aimed at prohibiting discrimination, including both public and private actors in relation to Covenant rights in land-related contexts, and take temporary special measures to ensure that disadvantages groups have access to relevant goods and services.”*  While “special measures” may be needed and desirable to address historic injustice and discriminatory treatment, the text as written creates ambiguities (i.e., how long is “temporary?” Which goods and services are “relevant?”), and so could support rent-seeking behavior among those who make such determinations or provide such goods and services. We recommend this language be revised to:  *“In line with existing commitments and after review of legal and policy frameworks, States should adopt specific measure to prohibit discrimination in land-related contexts.”*

Other problematic language occurs in Para. 33 where the draft states:  *“States should adopt laws and policies to guarantee that titling programmes are not implemented solely to support the sale of land and the commodification of land tenure. If such laws or regulations are missing, titling of pre-existing, customary forms of tenure may result in more conflict rather than more clarity, and in less security rather than improved security.”* This language is misleading and counterproductive. Existing titling programs are not only about supporting the sale of land, although the creation of accessible and transparent land markets can provide benefits to rural people. Instead, titling programs are typically about increasing tenure security to reduce conflict and promote longer-term investments that enhance productivity and well-being. Importantly, as migration patterns make clear, not all rural residents wish to remain in rural areas or in the agriculture sector. Limiting market transactions through law and policy would potentially consign these families to livelihoods they no longer wish to follow in places they prefer to leave.  Constraining such self-determined choices is problematic at best and would potentially discriminate against those who wish to sell land or move to pursue other rights. Further, as climate impacts make land more and less desirable and valuable, individuals, families and communities should be able to pursue these self-determined opportunities to sell, purchase, rent-in or rent-out lands.

A related concern arises in Para. 46 where the draft suggests that States consider “freezing” the property market in situations of conflict.  We recommend removing this language entirely. First, in some cases people fleeing conflict may prefer to liquidate assets and relocate permanently.  Freezing markets would, ostensibly, make this impossible. Second, such a prohibition would not stop sales, it would only drive them into a black/informal market which would likely lead to the unintended consequences, including increased corruption. Third, as prohibition is likely to increase informal transactions, land information systems, registries and cadastres will no longer be accurate and investments made to support accurate, up-to-date land administration systems will be wasted. And finally, as a result of the foregoing, trust in property markets will be reduced with harmful economic and fiscal consequences. We recommend suggesting an alternative such as strengthening legal provisions related to sales under duress.

A final general concern is that the draft calls out the need to limit or prohibit the “commodification” of land. This language ignores the fact that many individuals and communities would like to participate in voluntary transactions with others, including investors, to lease out land or to sell land in some cases. Safeguards that promote more participatory and equitable transactions, that support communities to directly engage with prospective investors, should be encouraged; however, throughout the draft, language related to “commodification” should be modulated to make it clear that self-determined transacting in land is acceptable to fulfill ends that individuals and communities find important and so should be supported, subject to normal regulatory requirements.

**Specific Comments**

Para. 3 - Recommend the first sentence be reworded as:  *“Weak or unprotected tenure rights increase*…” and suggest adding a reference to supporting evidence.

Para. 5 - Recognizing the important role that land plays for many communities and peoples in relation to cultural heritage and as a store of social value and protection, it is nonetheless unclear as the Comment is currently drafted how states would operationalize a call that all States:   *“...should  guarantee that in all land governance processes, policies and institutions, land is not treated as a mere commodity, but that its role as a social and cultural good is recognized*.”  We recommend this language be clarified and consider implications not only for developing countries but as well for countries where land markets are active and functioning.

Para. 11 - States:  *“The right to water is infringed where communal grounds are enclosed, depriving people from access to water sources necessary to meet their daily needs.”*  Is this true if lands are voluntarily traded or leased by communities? We recommend that the language be modified to reflect that the risk being addressed is the involuntary loss of access to water.

Para. 15 - This paragraph raises an important point that some secondary users of land and resources may lose access in cases where customary registration places the right to exclude others in the hands of traditional or customary “holders,” and ignores other, traditional access rights. We recommend the language be modified to read: *“States have an obligation to ensure that the legal framework for customary land certification, if it exists, recognizes and guarantees the rights of legitimate secondary land and resource holders and users, particularly those whose livelihoods or health depend upon access to common or collective resources including water, forests and pasture lands.”*

Para. 17 - There is very limited evidence that securing rights to land in developing countries leads to increased access to credit. We recommend removing *“such as access to credit”* at the end of the first sentence, replacing it with:  *“such as agricultural extension.”*

Para. 18 - For English version of the Comment, the word *“overseen”* at the end of the second sentence should be replaced with *“overlooked.”*

Para. 20 - We recommend adding the words *“forced or arbitrary”* before *“eviction”* in the second sentence.

Para. 21 - Please clarify if the reference to *“lack of legal capacity”* refers to youth or mental capacity? If the former, there may be legitimate reasons to restrict access rights for youth. We recommend the addition of modifiers to clarify.

Para. 30 - This paragraph, on the issue of responsible land-based investing, could look beyond project implementation and payment of compensation and consider what responsibilities public and private actors should have in the cases where longer-term harms arise (or are only disclosed or discovered) after an investment comes to an end.

Para. 31 - We recommend adding an additional illustrative safeguard, *“ensuring community benefit sharing and equitable participation in investment projects,”* in the third sentence.

Para. 34 - It is not clear what obligations the language contained in the first sentence would create. We recommend it be revised to:  *“States should consider how best to…”*

Para. 40 - This paragraph would create an obligation to conduct human rights impact assessments as part of any public-private partnership that leads to acquisition of land rights. HRIAs are a valuable tool whose use should be encouraged or incentivized, but we recommend against language that creates a new legal obligation. Instead, we recommend the text strongly encourages the use of HRIAs. Similar concerns apply to Para. 42.

USAID appreciates the opportunity to review and provide feedback on the General Comment. We commend the authors on the good work it reflects and would be happy to discuss our suggestions should this prove useful.