

Amnesty International
Submission to the Asian Infrastructure Investment Bank
(AIIB)
Environmental and Social Framework Consultation
(ESF)
October 2015

Mr. Jin Liqun
President-designate
Asian Infrastructure Investment Bank (AIIB)
9 Financial Street
Xicheng District, Beijing, China

For the information of all AIIB's Prospective Funding Members (FFM).

1. Introduction: General Comments and Concerns

Amnesty International (AI) welcomes the opportunity to submit comments on the Draft Environmental and Social Framework (ESF). We appreciate the Asian Infrastructure Investment Bank's (from here on "the AIIB" or "the Bank") efforts to establish this ESF which provides the basis for its environmental and social standards to address relevant risks and impacts of the Bank's future activities. We also note that certain aspects of the AIIB's draft policies are good and in some instances stronger than other policies of more established International Financial Institutions (IFIs). For example the AIIB states in the ESF that its policies will apply to all its investments. AI strongly supports this position and considers it to be incredibly significant particularly if compared to the current draft of the World Bank's (WB) policies that only apply to investment lending despite this representing a shrinking percentage of the total of the WB's investment.

Despite this, and some other positive aspects, AI still has concerns with the current draft of the ESF, in particular related to: a number of loopholes and disclaimers in the policies; confusing or contradictory language; together with some significant gaps in the draft that, if not addressed, are likely to undermine the overall strength of the document. The result of these weaknesses is that there is a significant risk that the AIIB may fund projects that are likely to result in negative human rights impacts.

For example, paragraph 7 of the Vision states that "*AIIB believes that social development and inclusion are critical for sound development. For AIIB inclusion means empowering all citizens to participate in and benefit from the development process in a manner **consistent with local conditions.***" [emphasis added] Such a disclaimer clearly suggests that local conditions can override the Bank's own policy framework without any further consideration. This, for example, could mean that the Bank would not take into account the fact that communities likely to be affected by a given process, are unable to express their concerns on a certain project because a government's restriction on freedom of expression. Similarly,

at the end of the same paragraph the draft states, “*In this regard AIIB’s operations seek to be supportive of these human rights and encourage respect for them in a manner **consistent with the articles of agreements.***” [emphasis added] This reference to the AIIB’s Articles of Agreements (AoAs), seems to contradict the rest of the paragraph in so far as they potentially undermine the client state’s human rights obligations. Therefore AI strongly advises that the reference to the AoAs should be deleted. The Articles of Agreement of AIIB, and other Banks with similar provisions such as the World Bank, should not be used in a way that arbitrarily limits the scope of a client country’s international legal obligations. It has been widely raised as a concern by many governments, independent experts and academics as well as NGOs, that this approach is not sustainable¹ and that it does not improve development effectiveness regardless of the failure to adhere to human rights obligations.² Furthermore, an increasing number of member states of Multilateral Development Banks are themselves increasingly accepting that this approach needs to be redefined³.

Major gaps that we have identified in the current draft include (a) lack of sufficient references to human rights standards and the need for due diligence in policies and processes in order to identify all potential human rights impacts, accountability processes, sequencing and access to information, (b) lack of details on how to apply the country and corporate systems instead of the Bank’s policies, (c) lack of transparency in lending through financial intermediaries as well as (d) gaps in standards on resettlement and indigenous peoples, gender and labour. These concerns are detailed below together with concrete suggestions for the AIIB to take into consideration when revising the current draft.

While AI appreciates the opportunity to make this submission, we would also like to stress, that the consultation period should have been longer in order to allow for AI and many others to provide more detailed comments on the full documents (see further below). Should the AIIB decide to extend the consultation period or to develop a second phase for comments on the final draft, we would welcome the opportunity to provide further inputs.

We will also send this submission to Prospective Funder Members (PFMs) for their consideration.

2. Meaningful consultation process on the ESF and thorough review

Despite the two weeks extension granted, a 6 weeks consultation period is far too short to outreach to most stakeholders, particularly those who are the most vulnerable and marginalized, and, as such, cannot be considered a meaningful consultation. This is compounded by the fact that no notice was given to alert interested parties of exactly when the consultation period would start. Furthermore, restricting the consultation to the English language only and to video conferences instead of face to face meetings has further limited the participation of many Asian groups and community based organisations, together with

¹ http://www.law.nyu.edu/sites/default/files/Philip_Alston_Annual_Workshop_Keynote.pdf

² http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/274

³ https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/safeguard_statement_mcguire.pdf (WB US ED)

indigenous peoples (IPS) and other disadvantaged groups. This is not in line with the stated objective of the AIIB to strive to ensure participation in development processes. Similarly, whilst the upfront commitment to review the Policy, Standards and Procedures with a view to modifying them to reflect experiences from their application to individual operations appears promising, it is undermined by the fact that the expertise of organizations that have worked on similar policies for a long time (e.g. in relation to the World Bank and other financial institutions) might not be fully considered due to time limitations.

Furthermore, while the intention of the Bank as expressed in the Articles of Associations⁴ to complete a draft of a disclosure policy and an accountability mechanism in the near future is very much welcomed, we still have not seen these documents and we hope that the AIIB will make them available as soon as possible so as to be consulted upon in a meaningful manner.

3. Robust human rights due diligence

While it is welcome and very important that the objectives of the ESF Framework sets out the AIIB's commitment to support its Clients in the implementation of their national legislation and related international agreements to which they are parties⁵ these commitments are not being fully and consistently integrated into the rest of the draft. In order to ensure that commitments made in the ESF are coherently mainstreamed throughout the policies, AI encourages the AIIB to put in place adequate human rights due diligence processes, in order to correctly identify, prevent and mitigate (if prevention is not possible) risks to human rights as a result of all activities that the Bank will support. Concretely these would translate into the following:

- 1) Ensuring its policies are fully aligned to the international obligations of its PFMs and that relevant international human rights law and standards are explicitly referenced, when appropriate, throughout the ESF
- 2) Ensuring that paragraph 7 of the Vision statement explicitly reflects the Bank's commitment to respect human rights and to take all reasonable measures to ensure that the Bank will ensure its project activities will not lead, facilitate, contribute to or exacerbate human rights violations.
- 3) Before financing projects or other specific activities, undertaking assessments of the client country's international legal obligations, their implementation into national legislation, policies and practices as well as a consideration of that country's past human rights performance record. The AIIB should also assess the Client's commitment to comply with the Bank's policies. These assessments should be used to adequately identify, prevent, and if prevention it is not fully possible, mitigate all potential human rights impacts of projects. It is important to stress that such a due diligence process should not aim to define whether or not the AIIB funds a project on the basis of a government's human rights record but to put in place strong enough safeguards, implementation and monitoring mechanisms with a view to preventing negative environmental and social impacts. In this respect we are

⁴ AIIB article of associations 34 and 26

⁵ AIIB consultation draft - Objectives of the ESF pay 2

not calling for Bank to be a human rights policeman but to ensure that it does no harm with its own interventions.

4. Verification implementation and monitoring

While the draft seems to recognize the importance of project implementation of projects, the AIIB's independent verification process and, in certain circumstances, the need to engage an independent advisory panel as a means to adequately identify and manage adverse impacts, the content of the framework does not live up to these commitments during the operational phase.

For example, it states in paragraph 22 of the Environmental and Social Policy (ESP) that "AIIB requires its clients to assess and prepare its operations so that it meets the requirements of the applicable ESS, *in a manner and a reasonable time frame acceptable to AIIB.*" This is a very open ended requirement which is likely to undermine the implementation of the project since decisions on whether to fund a certain project or how to address impact may be taken without the necessary verified ESIA's being carried out. This will also potentially dilute accountability for the impact of the project. Instead the text should be modified so as to explicitly require that adequate human rights due diligence processes are necessary and conducted within a reasonable time-frame acceptable to the AIIB and in any case before the project is approved. Without this pre-condition, it is possible that this important aspect may be overlooked and would expose the AIIB to financial and reputational risks and potentially violate the international human rights obligations of Member States. For these reasons as it is currently proposed, and unless it is revised, the ESF is not fit to prevent violations.⁶

5. Transparency: Disclosure of information and the phased approach

While it is noted and welcome that the ESF requires all relevant ESIA's and related documents, including a default requirement for Resettlement Actions Plans to be disclosed before the Board's approval, contradictory language exists in the rest of the document. In particular paragraphs 37 and 58 appear to allow that, in certain circumstances, crucial documents such as Resettlement Action Plans or other relevant documents defining impact on indigenous people, could be developed according to a 'phased approach' after the Board has already approved the project. When this phased approach will be permitted is not clarified at all in the draft. It is clear that approving an operation or a project without having an independent analysis of its full potential impact runs contrary to the need for due diligence and the right of affected communities to access information.

AI's considers that the AIIB should meet the highest standards of disclosure and ensure that high risk projects include additional requirements for full disclosure of ESIA's at least

⁶ For suggestions related to what a human rights due diligence process in financial institutions should look like please refer to WB and IFC submissions

<http://www.amnesty.se/upload/files/2014/08/07/AI%20Submission%20to%20the%20WB%20Safeguards%20Policies%20Review%20and%20Update%20April%202013.pdf>

<https://www.amnesty.org/en/documents/ior80/004/2010/en/>

120 days prior to the Board's approval and that relevant documents are made available to communities likely to be affected. Given that the AIIB also intends to fund the corporate sectors directly, exceptions based on Client's confidentiality agreements should be limited and be subjected to a do no harm test.

6. Financial Intermediaries (FIs).

While it is recognized that, under the ESF, the AIIB will be required to carry out due diligence in order to assess the FI's policies and procedures, implementation capacity, and project portfolio⁷, AI urges the AIIB to take into full account the recent reports which have highlighted the inherent risks of this lending practice⁸ prior to finalizing its proposed approach to this model of financing. As it is defined currently, the due diligence for this lending would need to be consistently expanded to include as a minimum, the requirement that all FIs clients publicly disclose all sub-projects that will receive financing early enough to allow public scrutiny.

7. The use of country and corporate systems.

The draft ESF does not provide adequate details on how and when the country system can be applied instead of the AIIB's policies. Clear criteria need to be developed to help decisions on the feasibility of the use of the country system. These criteria should also be based on ensuring that their use will not place communities likely to be affected by AIIB's activities at unnecessary risk. These should include measures for robust monitoring and effective implementation.

In relation to country systems, while action to strengthen the capacity of country institutions can be very valuable, there are a number of factors which the AIIB should consider and address in this process: enforcement of laws and regulations; the accessibility of judicial and non-judicial mechanisms for people affected by state and corporate actions; and the extent to which corporate influence affects both legal frameworks and enforcement. Regardless of which system the AIIB decides to apply, it should be clear that delegating responsibilities to the recipients' countries will not absolve the AIIB of its own human rights responsibilities. As an institution the Bank remains responsible for the human rights impacts arising from the projects and activities to which it decide to provides funds and this responsibility exists regardless of the country's own actions

As part of its methodology, the AIIB should conduct an assessment of the availability, credibility, independence, and track record of local and national authorities to implement an Operational-level Grievance Mechanism (see further below). Where the client does not have a positive track record or where gaps exist in grievance mechanism capacity, this analysis should then inform an action plan to implement and strengthen grievance response

⁷ ESP, para 20

⁸See eg Compliance Advisor Ombudsman (CAO), *Audit of a Sample of IFC Investments in Third Party Financial Intermediaries* (February 2013). IFC, management response to the CAO Audit of a Sample of IFC Investments in Third Party Financial Intermediaries: "E&S Risk Management of Financial Institutions." (4 September 2013).

capacity. This action plan should be in place prior to the appraisal of any project support before using Country and Corporate Systems. Further, the AIIB should provide clear guidelines and practical tools to support grievance mechanism implementation and borrower capacity. Grievance mechanism implementation, including budgetary allocation and capacity building, should also be included in the AIIB's assessment and action plan.

Additionally, AI has serious concerns about the lack of clarity around the use of Corporate Systems. Our experience has shown that many companies (or clients) involved in developing development projects, such as for example in the extractive sector,⁹ have failed to adequately manage the environmental and social risks of projects. Accordingly, reliance on Corporate Systems could lead to weakened protections for the environment and project-affected communities.

8. Accountability: the AIIB Oversight Mechanism

The draft Environmental and Social Policy¹⁰ states that people who have been adversely affected by the AIIB's operations will be able to submit complaints to the Banks oversight mechanism. In footnote 12, however, the AIIB notes that the Oversight Mechanism is currently being developed and will be reviewed by the Prospective Founding Members (PFM) before the Policy is finalized. **We strongly encourage the AIIB to hold meaningful and participatory public consultations on the mechanism's policy and procedures, to ensure lessons learnt from other accountability mechanisms and those who have submitted claims will also be taken into account.**

The UN Guiding Principles on Business and Human Rights set forth good criteria for best practices concerning grievance mechanisms or so called non judicial mechanisms.¹¹ AI encourages the AIIB and other PFMs to ensure this future mechanism is underpinned by such robust principles. Amnesty International believes that such principles should as a minimum be based on the following:

- (a) Legitimacy and independence:** enabling trust from the stakeholder groups for whose use the processes are intended;
- (b) Accessibility:** to all stakeholder groups for whose use the processes are intended, and providing adequate assistance for those who may face particular barriers to access; this would translate for example into ensuring that the ESP requires the Clients to communicate the existence of the mechanism to communities likely to be affected by the AIIB's operations.
- (c) Predictability:** providing a clear and known procedure with an indicative time frame for each stage of the process, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitability:** seeking to ensure that those using the processes have access to all relevant information, advice and expertise necessary to engage in remedial processes on

⁹ <https://www.amnesty.org/en/search/?q=shell>

¹⁰ Paragraph 51 and footnote 12 of the ESP

¹¹ <http://business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles>

fair and informed terms. The process should aim as far as possible to offset power imbalances;

(e) Transparency: keeping those using the process, and their representatives, informed about progress in their case, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness;

(f) Rights-compatibility, ensuring that the process and the outcomes are consistent with international human rights laws and standards together with relevant AIIB policies;

(g) Enforceability: recommendations by the accountability mechanism of appropriate steps to ensure remedy for affected persons should be implemented by the AIIB Board; and

(h) Enhancing effectiveness: drawing on relevant experiences and lessons for improving the mechanism and preventing the need for future grievances, as well as being able to address systemic issues with the AIIB's ESF and related policies.

9. Accountability: Operational-Level Grievance Mechanisms

The AIIB requires clients to establish Operational-Level Grievance Mechanisms to receive concerns from "people who believe they have been adversely affected by the Operation's environmental and social impacts."¹² However, the ESP fails to provide detail on the criteria on which the grievance mechanisms should be based on.¹³ The Policy says that they have to be "suitable";¹⁴ but this remains unspecified.

Without establishing clear operating requirements in the ESF based on best practice, project-level grievance mechanisms are likely to be an ineffective tool and consequently, lack the trust of affected communities to address and mediate concerns.

It is crucial that the AIIB should also include provisions to protect complainants from retaliation for raising concerns. These provisions should include, but not be limited to, allowing for complainants to remain anonymous, if necessary.

9. Upward Harmonization and consistency of AIIB standards with the international agreement of its Prospective Founding Members (PFMs).

We commend that the mandate of the AIIB stipulates that the institution will closely collaborate with existing multilateral development banks (MDBs) and other development partners and that it aims to ensure that its financing complements and supplements their efforts. AI believes that it is crucial that all MDBs work towards similar common standards reflecting best practice in order to eventually achieve a level playing field rather than a race to the bottom. In relation to this, however we have to underline that MDBs' standards still vary to a great degree.

For this reason, we would encourage the AIIB to always aim to meet the highest standards of all MDBs and work towards ensuring its own standards adequately reflect its members

¹² AIIB Environmental and Social Policy, para. 50.

¹³ *Id.*

¹⁴ *Id.*

states international environmental and social legal obligations, including those relating to human rights, as previously emphasized in the human rights due diligence section.

10. Labour rights

While AI welcomes the inclusion of basic provisions regarding conditions of employment, given the importance and potential complexity of the issues involved, AI recommends that requirements regarding working conditions and community health and safety in ESS1 be integrated within a separate environmental and social standard, with explicit reference to the eight core labour conventions of the International Labour Organization.

The scope of application of the ESF should be expanded to include sub-contracted, third party, and community labour workers. The requirements for labour management systems (p26) should apply to both public and private sector Operations. Clients should be required to guarantee the principle of non-discrimination on any prohibited ground in recruitment, treatment of workers, terms and conditions of employment, and remuneration. In particular, the ESF should require Clients to ensure safe working conditions for pregnant workers, fair, non-discriminatory terms of maternity leave, and protection against maternity-related discrimination.

The ESF should require Clients to comply with national laws recognising workers' rights to form and to join workers' organizations of their choosing and to bargain collectively without interference. Clients should put in place alternative mechanisms which are in accordance with ILO labour standards when national laws do not recognise those rights,.

The ESF lays down requirements for children under the age of 18 employed in connection with an operation (*Child Labor and Forced Labor*, p26). Hazardous forms of child labour should unequivocally be prohibited, along with the employment of children under minimum legal age. Generally, the ESF should require that borrowers comply with International Labour Organization (ILO) Conventions No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and No. 138 (1973) concerning Minimum Age for Admission to Employment.

11. Gender

Certain aspects of the ESF in relation to gender could be strengthened. For example in paragraph 13 the language "considers it desirable" for Clients to look at adverse gender impacts is very weak. Consequently, there is nothing to ensure that gender inequality will not be potentially made worse by the Bank's projects. Likewise Clients are encouraged to promote equality of opportunity and women's empowerment only 'where relevant' thereby providing them with an opportunity to argue it is not relevant despite the fact that there are gender dimensions to all development projects.

In Part 2 – ESS1 the assessment process should ensure women's equal and effective participation in consultation. (p 22)

The Social risks and impacts section (p.25) assessing direct and indirect impacts should encompass how various groups within a community could be affected differently by a project (eg women & men, older & younger people, minority groups etc.). Hence it should be reframed to require an assessment of the diversity of the population potentially affected, paying particular attention to groups experiencing discrimination who may suffer increased or different adverse impacts .

In ESS2 para 3 – consultations – change vulnerable groups terminology. Specifically, the term ‘vulnerable group’ should not be applied to women.

12. Involuntary Resettlement

Amnesty International welcomes AIIB’s statement in the ESF that the Bank will not finance projects that involve or result in forced evictions, in paragraph 60. However, in order to provide increased protection against forced evictions which have been common in infrastructure development projects, it would be necessary to amend footnote 13 to include the need for evictions carried out in the course of the exercise of eminent domain. This would ensure not only compliance with national laws and provisions of ESS2, as mentioned in the footnote, but also with international human rights standards on evictions.

Furthermore, in paragraph 2 of ESS 2 on **Scope and Application, Amnesty International proposes the following changes in order to ensure that the negative impacts of involuntary resettlement are adequately mitigated:**

Scope and Application: Amnesty International calls for the application of ESS 2 to cover not only the past, present or future involuntary resettlement risks of the Operation but also similar risks created by interventions or projects related to the Operation.

With regard to Client requirements, in paragraph 3, Amnesty International proposes the following amendments:

Scope of Planning. Given that determining the scope of IR planning will be carried out before people are displaced, it is important that the terminology under this section is amended to recognize that the census will be of ‘persons to be displaced’ rather than of ‘displaced persons’, as is the current formulation.

Consultations. On the requirement of carrying out meaningful consultations, it is important that the Client not only informs persons to be displaced about their entitlements and resettlement options, as stated in ESS2, but also consults with them on the same.

Grievance Mechanism. While Amnesty International welcomes the requirement for the Client to put in place an effective mechanism for grievance redress, it is also important and necessary that the Client is required to inform project affected people about a complaints mechanism for non-compliance of the Operation with the ESS.

Resettlement Assistance. With regard to the provision of resettlement assistance, Amnesty International highlights the importance of providing not only ‘better’ housing as stated in point (a) but ‘adequate’ housing as has been defined by General Comment 4 of the UN

Committee on Economic, Social and Cultural Rights.

Persons without Title or Legal Rights. While it is important that people without title or any recognizable legal rights to land are entitled to resettlement assistance, in order to ensure that the Operation's impacts are adequately mitigated, they must also be entitled to assistance for restoration of their livelihood.

Amnesty International is concerned that ESS 2 does not acknowledge the negative impacts of the Operation on tenants and therefore makes no mention of this category of people who may be living or working in the area impacted by the Operation. Amnesty International therefore calls for ESS 2 to be amended in a manner that recognizes the entitlements of tenants in the Operation area to include resettlement assistance, compensation for loss of non-land assets and assistance for livelihood restoration.

Involuntary resettlement causes serious disruption to the lives and livelihoods of project-affected people. Its impacts are both immediate and long-term. An important step towards minimizing these impacts and ensuring that development truly benefits all people without discrimination would be for ESS2 to clearly require the Client to prioritize the provision of alternative land or housing as appropriate. Cash compensation should not be seen as a viable substitute.

13. Indigenous Peoples (see also Annex 1)

The ESF should state that when exercising eminent domain or similar principles on lands owned, occupied or otherwise used by Indigenous Peoples, all proposed actions must require compliance with ESS3.

ESS3 provides for an assessment to be made of potential impacts on Indigenous Peoples (para 3, bullet: Social Assessments). It is essential that the affected Indigenous People(s) participate in this assessment as only they are able to identify all of the potential impacts on their rights, interests and livelihoods.

The list of situations in which Free, Prior and Informed consent (FPIC) is required is overly restrictive. For example it would be essential to secure FPIC for processes of official legal titling of customarily owned land (as proposed in ESS3, under "Action Plan", in para 3) – titling processes must be very carefully designed, as part of an FPIC process, in order to avoid long-term harms to the sustainability of the community. The UN Declaration on the Rights of Indigenous Peoples states that FPIC should be sought whenever Indigenous Peoples are affected by a proposed measure. Not all situations will require the same level of consultation, however. The extent and degree of robustness of the FPIC process, and the obligation to respect the outcome of the decision-making process of the Indigenous People affected, is in direct proportion to the degree of potential harm to the rights of the people affected and to their identity and survival as a community.

The Bank has a duty to ensure that the FPIC process is inclusive. All sectors of the community, including women and different generations, must be able to participate in and influence decisions within the consultation process.

It should be stated here that in the process of FPIC, full information will be made available, in a format that is understandable to the Indigenous People, on: the nature of the proposed action; impacts on lands, rights and resources; proposed benefit sharing mechanisms; which alternatives were considered and why they were rejected; details on influx of workers and equipment from outside the community and how long they will be in the community; the identity of and the relevant rights of the Indigenous People under national and international law; identity of the primary contractor and sub-contractors and other projects they have been involved in. The process must also be free from coercion, threats, corruption, and unequal bargaining power (which may mean the provision of impartial technical assistance to the Indigenous People at the cost of the borrower).

It is very much to be welcomed that in the case of past severance of the people from their traditional lands, the ESS does not require that severance to have taken place in the lifetime of the community for the People to be considered as Indigenous.

Footnote 1 (to para 2) states that alternative terminology (in place of the term 'Indigenous Peoples') may be used. It is of great importance to Indigenous Peoples that their identification as Indigenous Peoples is accepted; this constitutes an element of their right to self-determination. If alternative terminology is used it must be recognised that this is likely to trouble the relationship (and consultations) with the affected Peoples. It must be made clear in all cases that the provisions of ESS3, and international standards relating to Indigenous Peoples, apply, whatever terminology is used.

There is only a brief mention of the need to obtain FPIC if there is a risk of impact on the cultural heritage of Indigenous Peoples that may be present on affected lands. The safeguard should provide for a process of identification of cultural heritage risks with full and effective participation of the Indigenous People potentially affected. There is no mention of risks to the biodiversity that Indigenous Peoples rely on for their spiritual, cultural and physical well-being and livelihoods, or to the need to protect the intellectual property rights that may be attached to such biodiversity. Measures to protect biodiversity and intellectual property rights must be developed as part of the Indigenous Peoples' Plan and be developed in meaningful consultation with affected communities.

Annex 1: ESS3 (Indigenous Peoples)

In this annex we provide certain specific recommendations which we believe will bring the safeguard policy into line with international standards on the human rights of Indigenous Peoples.

Para 1

Recommend to add (additional suggested text in italics):

“(c) can participate actively in Operations that affect them, *including in the design, implementation, monitoring and evaluation stages.*”

Para 2

The following should be deleted:

“and recognition of this identity by others;” as it implies that the state’s recognition (or failure to do so) will be relevant in the process of identification of Indigenous identity (which is contrary to international human rights standards on Indigenous Peoples).

If necessary a footnote can be included here: “Self-identification as Indigenous by the people concerned should be accepted, unless there is a considerable level of consensus, including among other Indigenous Peoples in the country and/or in neighbouring countries, international Indigenous movements, and national and international civil society, that the claim to Indigenous identity is fraudulent. It is not for a government to make a unilateral determination of Indigenous belonging (see Human Rights Committee, General Comment 23 on Article 27 of the International Covenant on Civil and Political Rights).

Para 3

Avoidance of Impacts

The situation described here does not seem to be considered as falling within the scope of impacts that would require the FPIC of the People concerned. However this situation may well involve a very considerable impact on the rights of the Indigenous People, possibly compromising the sustainability of their identity and survival as a collective group (for example if the protected area in question is one of great cultural or spiritual significance to the community). The applicability of FPIC to this situation needs to be recognised.

Proportionality

Recommend the addition of the following (in italics):

“... customary rights of *ownership*, use and access to land and natural resources”

“cultural and communal integrity *and heritage*”

“and indigenous knowledge *and intellectual property; and self-governance and decision-making structures and processes*”

(N.B.: the same modifications should be made to the identical text under para 26 in Part 2: Environmental and Social Policy and Environmental and Social Standards)