

Olkaria I and IV

Kenya

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

Complaint SG/E/2014/07
Complaint SG/E/2014/08

INITIAL ASSESSMENT REPORT

June 2015

EIB Complaints Mechanism - Initial Assessment Report

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The EIB Complaints Mechanism

The EIB Complaints Mechanism intends to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases whereby the public feels that the EIB Group did something wrong, i.e. if they consider that the EIB committed an act of maladministration. When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Mechanism Division (EIB-CM) - and one external - the European Ombudsman (EO).

Complainants that are not satisfied with the EIB-CM's reply have the opportunity to submit a confirmatory complaint within 15 days of the receipt of that reply. In addition, complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make a confirmatory complaint have the right to lodge a complaint of maladministration against the EIB with the European Ombudsman.

The EO was "created" by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism intends to not only address non-compliance by the EIB to its policies and procedures but to endeavour to solve the problem(s) raised by Complainants such as those regarding the implementation of projects.

For further and more detailed information regarding the EIB Complaints Mechanism please visit our website: <http://www.eib.org/about/accountability/complaints/index.htm>

The Initial Assessment Report

The objectives of this initial assessment are fact finding oriented and aim at:

- clarifying the concerns raised by the complainant(s), to better understand the complainants' allegations and the view of other project stakeholders (project promoter, national authorities, ...) views, as well as to have a view on the situation on the field;
- understanding the validity of the concerns raised for those projects that cause substantial concerns regarding social or environmental outcomes and/or seriously question the governance of EIB financing;
- assessing whether and how the project stakeholders (e.g. Complainants, the Bank's operational services and the project Promoter) could seek resolution of the allegations;
- determining if further work is necessary and/or possible from the EIB-CM to resolve the issues raised by the complainant(s) (such as, but not limited to, investigation, compliance review, facilitation or mediation between the parties).

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INITIAL ASSESSMENT REPORT

EXECUTIVE SUMMARY

In July 2014, the European Investment Bank – Complaints Mechanism (EIB-CM) received a complaint raising issues from individuals and representatives of the local communities involved in the involuntary resettlement that is taking place within the framework of the expansion of activities in the Olkaria geothermal field. The project is promoted by the Kenya Electricity Generating Company Ltd. (KenGen) and co-financed by the EIB together with other International Finance Institutions (IFIs). A second complaint with similar allegations was received by the EIB-CM in August 2014. In September 2014, the Bank's operational services informed the EIB-CM that lenders of the project had received two additional complaints concerning the same issues.

The allegations focus on issues related to the implementation phase of the involuntary resettlement plan that falls under the responsibility of the promoter; the EIB-CM is assessing, in the framework of its mandate, whether the European Investment Bank (the Bank or the EIB) would have failed to monitor that implementation phase. The main issues brought forward by the complainants concern the land titling, the identification of households entitled to compensation, the restoration of the livelihood of the resettled communities and the effectiveness of the project grievance mechanism that is in place. According to the complainants, many of the members of the community affected negatively by the resettlement are defined as vulnerable people, including elders, orphans and women. During their fact-finding mission, the EIB-CM also received allegations of retaliation against some of the individuals that had sent complaints to the lenders' accountability mechanisms.

After a preliminary analysis of the allegations, the EIB-CM carried out a fact-finding and stakeholder engagement mission to Kenya in January 2015. The mission was carried out together with members of the World Bank Inspection Panel (WB-IP), which had received a similar complaint in October 2014. The main objective of this mission was, amongst others, to meet with the complainants and other stakeholders in order to clarify the allegations raised and define the future course of action.

This Initial Assessment Report (IAR) presents the main findings and conclusions of the preliminary work carried out by the EIB-CM. The EIB-CM is following-up these cases in close coordination with the WB-IP for two main reasons: (i) the EIB has contractually engaged the borrower to follow-up the World Bank policy framework of involuntary resettlement; and (ii) this coordination is of particular importance for achieving synergies viz. the parties involved. Therefore, the EIB-CM proposes the following way forward:

- a) Concerning the investigation regarding compliance on structural issues such as the land titles and the census, the EIB-CM will coordinate with the WB-IP to follow-up and share the findings of the investigation that the WB-IP will carry out, including the assessment of the World Bank's Indigenous Policy. The EIB-CM will seek to complement this investigation whenever possible and to participate in the field work whenever appropriate; a member of the EIB-CM will be appointed

contact person to liaise with the WB-IP. At the end of this compliance review, the EIB-CM will prepare a report with its own conclusions and recommendation in accordance to its own mandate and in relation with the Bank's applicable policies and standards.

- b) Concerning the issues related to restoration of economic livelihood and the effectiveness of the project Grievance Mechanism in place, the EIB-CM proposes a problem solving approach, by providing independent facilitation services to foster dialogue between the complainants, the wider resettled communities and their customary authorities and the existing project organisational structures. The problem solving approach aims at building trust to address the concerns raised, and at contributing to the resolution of the issues identified. This approach will reinforce the Bank's monitoring, making use of independent expertise and will improve the dialog amongst the different parties, notably the promoter and the complainants. The independent expertise will also provide advice to the relevant parties, including the Bank, on ways to improve the existing project Grievance Mechanism, thus contributing to improved governance and cohesion at both project and community levels.

INITIAL ASSESSMENT REPORT

Olkaria I & IV Geothermal Extension

Complainants: Individuals and representatives of communities affected by the project¹

Confidentiality requested: Yes

Date received: July and August 2014

Project Status: Under disbursement

Board Reports: June 2010

Contract amount: up to 119 Million EUR

1. INTRODUCTION

- 1.1 In July 2014, the European Investment Bank – Complaints Mechanism (EIB-CM) received a complaint via email raising several issues from individuals and representatives of the local communities affected by the involuntary resettlement that is taken place within the framework of the expansion of activities in the Olkaria geothermal field. The project is promoted by the Kenya Electricity Generating Company Ltd. (KenGen) and co-financed by the EIB together with other International Finance Institutions (IFIs). A second complaint with similar allegations was received by the EIB-CM in August 2014. In September 2014, the Bank's operational services informed the EIB-CM that lenders of the project had received two additional complaints concerning the same issues.
- 1.2 After a preliminary analysis of the allegations presented, the EIB-CM carried out a fact-finding and stakeholder engagement mission to Kenya in 2015 to meet with the complainants and other stakeholders. The objectives of this mission included the clarification of the allegations raised by the complainants and the definition of the future course of action.
- 1.3 The present report presents the main findings of the initial assessment, including the mission, and a proposed course of action.

2. THE ALLEGATIONS

Table 1 shows a summary of the allegations received by the EIB-CM and discussed during the Fact-Finding mission of January 2015.

¹ The individual complainants have requested confidentiality. The report will then omit their names although there are references to some of the associations represented by them.

TABLE 1 – SUMMARY OF ALLEGATIONS

Failure to monitor the involuntary resettlement in accordance to the Resettlement Action Plan (RAP), the Bank's policies for resettlement and its contractual obligations. This is the contextualisation of the complaints allegation – failure to properly implement the Resettlement Action Plan – in the framework of the Bank's responsibility.

The allegations concern issues related to the implementation phase of the involuntary resettlement that falls within the remit of the promoter; the EIB-CM is assessing whether the European Investment Bank (the Bank or the EIB) would have failed to monitor the said implementation.

The complainants allege that the involuntary relocation of the Project Affected People (PAPs) was not implemented in accordance to the RAP. According to the complainants, some PAPs would not have been relocated or were left behind without compensation. The initial complaints made reference to the poor consultation during the RAP discussions and the rapid implementation of the relocation, which created problems to some PAPs. The list of allegations, which are described in more detail in the document, can be summarised as follows:

- **Allegations concerning the land titling:** The complainants raised concerns on whether and when the affected Maasai community will be given the land title to the RAP land as established in the Memorandum of Understanding signed with KenGen;
- **Identification of PAPs:** The complainants put into question the process followed to identify the PAPs that have received compensation; according to the complainants, the number of eligible households has been changed in several occasions, and some eligible members of the community - mainly vulnerable people like women, orphans and elders - would have been left out;
- **Restoration of Livelihood:** The complainants allege that the livelihood of the PAPs would not have been restored as planned in the RAP. In addition, the resettlement has created additional burdens for some of them (i.a.: payment of school fees; payment of transport; limited access to water; the houses were not built respecting the customs of Maasais...). Concerning the pastoral activities, the complainants allege that the pastures assigned to them are not suitable for pastoral activities; they also say that KenGen has not taken due consideration of non-pastoral activities, such as tourism.
- **The Grievance Redress Mechanism has not worked effectively:** some complainants allege that the Council of Elders, which is the primary customary authority to resolve disputes in the Maasai culture, has been overruled by the RAPIC and that the power given to the council of elders is merely representative. The complainants also expressed their distrust in the mediation function embedded in the project Grievance Mechanism. In a related topic, some complainants have expressed the fear of retaliation after they had sent complaints to the accountability mechanisms of the IFIs, including the EIB-CM.

3. CLAIM

The Complainants request:

- To perform the resettlement of the affected communities respecting human rights, the RAP agreements and the IFIs policies for involuntary resettlement;
- The EIB-CM and World Bank Inspection Panel (WB-IP) to visit the site and talk to complainants

4. THE PROJECT AND THE BANK'S FINANCING

- 4.1 According to the Bank's appraisal documents, the project aims at expanding the electricity generating capacity of the Olkaria geothermal steam field by extending the existing Olkaria I station by two 70 MWe units (units IV and V) and implementing two 70 MWe units at the Olkaria Domes field (Olkaria IV power station), including required infrastructure, transmission lines and substations. The project area is located some 85 km northwest of the capital Nairobi, partly in the Hell's Gate National Park, where other power stations (Olkaria I, II and III) are already in operation.
- 4.2 The Board of the Bank approved a loan to the Government of Kenya of up to EUR 119 million in June 2010; the Finance Contract was signed on 15 December 2010. The project is sponsored by KenGen, a Kenyan company established by the Ministry of Energy (MoE). Total project cost is estimated to be approximately EUR 1 billion (including contingencies). In addition to the EIB (12%), the project is co-financed by the Government of Kenya (22%), the French Development Agency, AFD (15%), the Japan International Cooperation Agency, JICA (23%), the German Development Agency, KfW (7%), World Bank (7%) and the balance by KenGen (14%).
- 4.3 The Bank has disbursed EUR 71.3 million up to date. According to the Bank's appraisal documents, the project comprises the following main components:
- 1 Civil works and all electro-mechanical equipment for Olkaria I Extension (2 x 70 MWe)
 - 2 Civil works and all electro-mechanical equipment for Olkaria IV (2 x 70 MWe)
 - 3 Steamfield development for both Olkaria I and IV
 - 4 Drilling and equipping the outstanding geothermal and reinjection wells
 - 5 New substations at Olkaria I Extension, Olkaria IV and extension of the Suswa substation
 - 6 Adaptation of the existing substation at Olkaria II
 - 7 New 220 kV transmission lines each from Olkaria IV and Olkaria II to Suswa substation
 - 8 Upgrading of the existing 132 kV transmission line from Olkaria I to Olkaria II to 220 kV
 - 9 Project infrastructure

EIB co-financing is primarily targeted at points 2, and 5 through 8.

- 4.4 The Bank's appraisal reports highlighted the environmentally sensitive location, in a national park, along with the use of World Bank guidelines to mitigate the impact originated by the involuntary resettlement of the affected Maasai communities.

5. BACKGROUND OF THE COMPLAINT

- 5.1 On 16 July 2014, the EIB-CM received a complaint from a resident in the Narasha community with several allegations against KenGen mainly related to the involuntary resettlement that was taken place in the context of the EIB's financed project. The complainant also referred to future plans of KenGen to develop Olkaria V and VI. The complaint was sent via email to several parties, including the client (KenGen), the grievances mechanisms of some lenders of the project and the European Ombudsman's office. The complainant attached a copy of the Olkaria V full ESIA and the comments submitted by Nature Kenya - a Kenyan conservationist society - to the Kenyan National Environment Management Authority concerning the implementation of the Olkaria V project. This complaint was registered with the reference number SG/E/2014/07.
- 5.2 On 1 August 2014, the EIB-CM received a new complaint from the Maasai Council of Elders alleging, amongst others, that the Memorandum of Understanding (MoU) of the resettlement agreed between KenGen and the Project Affected Population (PAPs) had not been fulfilled. This letter was sent in the light of the imminent resettlement of the affected population that took place in the following days. The letter, which was received via email, was addressed to the EIB, the World Bank and AFD and it was signed and stamped by the Council of Elders. This complaint was registered with the reference number SG/E/2014/08.
- 5.3 On 12 September of 2014, the Bank's services notified to the EIB-CM that they were alerted to 4 complaints in total. Two of the complaints were the same that had already been received by the EIB-CM and the other two had been forwarded to the EIB team by other lenders, who had received the complaints via email. The two new complaints were sent by the Project Affected Women for the Oloorkarian Maasai Cultural Centre and by the Oloorkarian Maasai Cultural Centre. In their complaints, they expressed their concerns regarding the way the resettlement was being carried out. As the allegations were similar to the other cases, the EIB-CM did not registered new cases and is treating them together with the other cases.

6. FRAMEWORK OF THE COMPLAINTS MECHANISM INITIAL ASSESSMENT

- 6.1 When performing its activities, the EIB is bound by European Treaties and its Statute as well as by the relevant legislative and regulatory framework of the European Union. The EIB, thus, shall operate in order to ensure that its various activities support and implement EU policies. In addition, the EIB periodically reviews its internal policies and procedures with a view to further refining the policy framework in which its activities are performed. The EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedures apply to complaints regarding maladministration of the EIB Group.
- 6.2 The EIB Complaints Mechanism is competent for any of the EIB Group's activities with the exclusion of complaints concerning allegations of fraud or corruption, which fall within the mandate of the EIB Inspectorate General – Fraud Investigation Division, as well as of complaints brought by the EIB Group's staff.

- 6.3 In analysing the possible failure of the Bank during the due diligence, the EIB-CM will take into consideration the relevant policies of the Bank in assessing projects, including the Operational Policies and, specially, the Environmental and Social Handbook, amongst others.
- 6.4 In addition, §1.04A of the Finance Contract signed between the Government of Kenya and the EIB the 12 of December 2010 establishes as one of the conditions precedent of disbursement of the first tranche :

“(h) the finalised Resettlement Action Plan for the Project, in form and substance satisfactory to the Bank as well as evidence satisfactory to the Bank on the implementation of the Resettlement Action Plan demonstrating acceptable progress in the resettlement of the people affected by the Project, in accordance with World Bank’s Land Acquisition and Resettlement Policy Framework”.

- 6.5 In addition, § 6.05 (e) i) of the same Finance Contract establishes the undertaking that the Borrower shall procure that KenGen *implements and operates the Project and the works financed by the Subsidy, in conformity with Environmental Law*. The definitions of Environmental Law and Environment are as follows:

“Environment” means the following, in so far as they affect human well-being: (a) fauna and flora; (b) soil, water, air, climate and the landscape; and (c) cultural heritage and the built environment and includes occupational health and safety and the Project’s social effects.

“Environmental Law” means EU law to the extent implemented by the law of Kenya or specified by the Bank prior to the date of this Contract and Kenyan national laws and regulations, as well as applicable international treaties, of which a principal objective is the preservation, protection or improvement of the Environment.

7. WORK PERFORMED BY THE EIB-CM

- 7.1 After conducting a preliminary review², the EIB-CM confirmed the admissibility of the first complaint because of the links to the involuntary resettlement associated to the developments of Olkaria I and IV power stations. On 11 August 2014, the Bank acknowledged receipt of the case SG/E/2014/07, indicating that due to the complexity of the case, the Bank will reply no later than 19 February 2015. The complaint was notified to the services on 28 August 2014. The receipt of the second complaint, directly linked to the resettlement of the Bank’s project, was acknowledged to the complainants on 8 August 2014, and it was indicated that the reply of the EIB-CM will be sent no later than 10 March 2015.
- 7.2 Given that complainants of both cases were raising similar issues under the same project, the EIB-CM sent emails to both complainants proposing (i) to discuss the details of the allegations on the phone, (ii) to clarify the mandate of the EIB-CM and (iii) to talk about the possible coordination of the two complaints. The complainant of the case SG/E/2014/08 referred the EIB-CM to discuss the issues with the complainant of the case SG/E/2014/07. The telephone conversation with the first

² The documents submitted by the first complainant made explicit reference to the development of Olkaria V, in which the Bank was not involved at that time. However, after a more detailed reading and research in the Bank’s project documents, it was identified that the issues listed in the email made reference to the ongoing resettlement under the Olkaria I and IV project.

complainant took then place on 19 August 2014. During the call, it was agreed, amongst others, that he would coordinate with other complainants the future communications as most of the affected people had limited fluency in English. Following the call, the complainant sent additional emails with more information, including a document concerning forced evictions that happened in 2013³ in the area adjacent to the RAP land.

- 7.3 On 27 August 2014, the EIB-CM contacted the Inspector General of the AFD, which is the leading financier of the EU financing institutions (AFD, KfW and EIB) in this project under the Mutual Reliance Initiative (MRI). On 10 September 2014, the Inspector General of AFD indicated that the operational services of AFD were handling the complaints.
- 7.4 On 3 October 2014, the EIB-CM organised a meeting with the Bank's services to discuss the complaints received and the way forward. The EIB-CM was informed that the Bank's team was going on mission to Kenya in the following week to monitor the implementation of the RAP. A subsequent meeting was organised with the Bank's services on the 21 October, where the EIB-CM was briefed of the main outcomes of the mission. The Bank's services also submitted to the EIB-CM additional information and documents.
- 7.5 On 28 October 2014, the Inspection Panel of the World Bank (WB-IP) informed the EIB-CM that they had received a request from PAPs concerning the same project. A conference call was then arranged between the two accountability mechanisms to have a preliminary exchange of views and to coordinate future actions. During this call, the EIB-CM agreed to postpone a fact-finding mission, which was planned for late November / early December, in order to coordinate it with WB-IP should their request be declared as eligible. By mid-December 2014, the EIB-CM and the WB-IP agreed to carry out the joint mission in early January 2015. The main objective of the joint mission was to optimise the contacts with the parties concerned and discuss synergies and complementarities for future actions. The EIB-CM informed the complainants, as well as the EU lenders (AFD and KfW), of this strategy via email.
- 7.6 The joint fact-finding and stakeholder mission took place eventually from 10 to 17 of January 2015⁴. During the mission, the teams of the WP-IP and the EIB-CM visited Kenya and met with the complainants, government officers, the promoter, and the lenders of the project. Meetings with the government, KenGen and lenders took place in Nairobi. Meetings with complainants were arranged in Nairobi with a small group of complainants and on site with a larger community. A public hearing took place in the Cultural Center village with around 50-60 Maasai community members, some of which are relocated to the RAP land, while others claimed that they had been left out. During this public hearing, the EIB-CM received a list with 27 additional signatories supporting the allegations of the main complainants. The Maasai community members spoke in Maa language. Interpreters brought in by the WB-IP and EIB-CM carried out the interpretation to English.
- 7.7 The present report presents the main findings of the initial assessment, including the mission.

³ The document is a letter sent by the UK-based NGO denominated "minority rights group international" addressed to the African Commission on Human and People's Rights, based in Gambia. In the letter, the NGO makes a presentation of issues affecting Maasai ownership of land in Kenya and, more specifically, allege that KenGen has failed to comply with Human Rights Obligations.

⁴ <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaselId=102>

8. INITIAL FINDINGS

- 8.1 The EIB-CM fully appreciates that the project plays a key importance at national level to increase the energy generation capacity of Kenya, reducing the dependence on hydro power (which is not reliable due to the recurrent draughts) and fossil fuels. The EIB-CM also notices and appreciates the constructive attitude of the Kenyan authorities (represented by the Ministry of Energy) to understand and support the objectives of the present investigation by the lenders independent accountability mechanisms. The Ministry of Energy and KenGen management repeated on several occasions that this independent investigation would also help them to learn from this experience in future involuntary resettlements.
- 8.2 The EIB-CM also notices that the complainants have expressed their support of the project and that their claims aim at obtaining a fair implementation of the RAP for the affected communities, while respecting human rights and the rights of the affected communities.
- 8.3 Concerning the resettlement, KenGen estimated that a total of 1461 hectares of land was needed for putting up the power plants and associated infrastructure. The findings of the air quality and noise dispersion modelling carried out during ESIA studies indicated that approximately 242 hectares of land adjacent to the power plants was going to be impacted negatively. Therefore the total land that was required for the power plants was 1703 hectares. Out of these, a total of 35 hectares comprising of four villages inhabited by the Maasai community. Acquisition of this land necessitated involuntary resettlement of the local community that were living in four Maasai villages (Oloonongot, Oloosinyat, Olomayiana ndogo and the Maasai Cultural Centre), which comprised of 335 Maasai families.
- 8.4 To facilitate this involuntary resettlement, KenGen contracted Gibb Africa Ltd to prepare a Resettlement Action Plan (RAP) in accordance with international best practice. In addition, the company established a RAP Implementation Committee (RAPIC) to ensure that the rights of communities affected by the project were safeguarded. The RAPIC is formed from representatives of the affected communities, KenGen and government officials, as well as a Maasai elder and a representative of local group Maasai Cultural Centre Management Committee.
- 8.5 An agreement reached between KenGen and PAP representatives stipulates land-for-land compensation. In August 2014, 150 households (about 1,000 people) were moved to the Kedong Ranch, where each family has been given a two-bedroom house with a 0.41ha plot of land.
- 8.6 According to KenGen, the company has already spent more than USD 14 million in the resettlement. This figure has not been independently verified by the EIB-CM. KenGen also indicated that a team of 10 social safeguard experts are following-up on the ground the implementation of the RAP.
- 8.7 The main allegations communicated to the EIB-CM during this preliminary due diligence could be summarised as follows:
 - (i) *Land Titles:* The complainants claimed that the households resettled have not received the land titles promised at the Memorandum of Understanding signed by KenGen and the RAPIC. During the fact-finding mission, the EIB-CM team received additional documents

from the complainants that appeared to indicate that a court order limited the activities in the Kedong Ranch (part of it was used as RAP land) since June 2010. This order was apparently extended by several temporary injunctions⁵. The complainants also indicated that 13 households of the PAPs were affected by the forced evictions carried out in July 2013.

- (ii) *The process followed to identify the PAPs:* The complainants claim that KenGen has built fewer houses than promised, because the census carried out in 2012 identified 164 households but only 150 were built. Moreover, some families are allegedly not recognised as the legal owners of their new house. During the site visit, the EIB-CM heard testimonies of members of the community alleging that they had been promised a house but they were not moved at the due date. One PAP indicated how she was evicted from her house and left in the bush by a taxi with Ksh 2,000. Another PAP said that he and his brother had been awarded new separate houses in RAP land but only his brother received the house and his original house was demolished.
- (iii) *Restoration of Livelihood:* According to some of the local Maasai families, the new housing clashes with the traditional lifestyle of the Maasai, and the relocation process does not live up to the expectation of the local communities. The houses are isolated and secluded, with families reportedly finding it hard to socialise with their neighbours. In addition, the small yards adjacent to the houses are fenced and too small for animals to graze on. The yards are also too small for the cultivation of the land, which is stony and eroded. Houses awarded to some disabled people on top of a slope were not convenient for living. Complainants also alleged that the communities relocated were facing several problems in terms of accessing water and transport. In principle, KenGen had agreed to provide a bus, but this came later than expected and then some community members, particularly vulnerable and poor, have to pay for these transport services. Some people also complaint that due to the relocation they have to pay for school fees of the new school in RAP land. The complainants allege that the RAP did not take due account of non-pastoralists activities, such as tourism. Most residents of the Maasai Cultural Centre live from tourism (like guides of visitors to the National Park, selling beads or providing cultural amenities related to Maasai customs). They claim that their income and activities have been severely affected by the distance between the working and the living areas and that KenGen does not offer for income restoration measures. Other complainants said that the agreed compensations have not been paid out. There were also claims that the resettlement proposed was not respecting cultural and sacred sites for the Maasais.
- (iv) *Effectiveness of the Grievance Mechanism:* A Grievance and Conflict Resolution Process had been established for the project. In case of conflict or a complaint concerning the resettlement, this process includes several stages, starting by a meeting by the office of the Council of Elders; if they are not satisfied, the PAPs notify RAPIC Secretary of the grievance they have for discussion at RAPIC; if they are not satisfied with the outcome, the PAPs and KenGen could agree to take the grievance to an independent external arbiter, and if external arbitration fails to resolve the grievance, the aggrieved party is free to seek court

⁵ The EIB-CM has received on 20 February 2015 a copy of the resolution of the High Court of Kenya at Nakuru dismissing the case brought against the Kedong Ranch by some members of the Maasai community.

redress. When asked whether they have attempted to resolve the alleged problems through arbitration, the complainants expressed their distrust in the process. Some members of the Council of Elders also alleged that this grievance mechanism conflicts with the Maasai culture, as the RAPIC supersedes the decisions of the elders.

- (v) *Retaliation*: The EIB-CM received testimonies of at least two people saying that they have been retaliated against because of complaining to the WB-IP and the EIB-CM. They expressed fears of further retaliation.

8.8 The above issues were discussed with KenGen and lenders, and the main responses are summarised below:

- (i) *Land titles*: During the fact-finding mission of January, KenGen confirmed that there some delays because there was a pending court case and the delays were already reflected in the amended MoU signed in August 2014 that provided for an extension of 6 months to obtain the titles. During the mission of January, KenGen indicated that a final resolution was expected shortly aAs indicated in the footnote 6 of this report, the resolution of the High Court of Kenya at Nakuru dismissed the claim against KenGen. KenGen also said that the forced evictions of July 2013 happened in an adjacent Ranch (N'gati Ranch), different from the RAP land of this project. This was a matter outside the responsibility of KenGen and the Government of Kenya took prompt action to clarify responsibilities and compensate the victims. KenGen confirmed that 13 PAPs living in Olomayiana ndogo had been affected by the evictions but were compensated – including the allocation of land in the RAP land - in accordance with the recommendations made by the Presidential Commission established to clarify those events.
- (ii) *The process followed to identify the PAPs*: According to KenGen and the lenders, the census followed an exhaustive consultative process, involving the RAPIC members, which started when the cut-off date was set up in September 2009 with 139 households. Following the request of some PAPs, the census was repeated in 2012 (and 164 households were identified) and revised in May 2013, when the final list with 150 households was completed. According to KenGen the RAPIC was involved in the two revisions of 2012 and 2013.

Concerning the restoration of livelihood, KenGen indicated that they were aware of most of the issues allegations presented and that corrective actions were being implemented where needed (i.a. improve the accessibility for the disable people to the houses; improve access to water). Concerning the use of the bus, it was indicated that this was the agreed responsibility of a committee established by the communities and that it was not the responsibility of KenGen to interfere in its management. Concerning the issues related to the school attendance, KenGen indicated that the new school provided for better school facilities to the communities and that the fees were only a consequence of the need to hire a larger number of teachers in order to meet the students/teacher ratio. KenGen was not aware of any drop-out at the new school caused by the need to pay fees but it said that the county government was committed to look into this matter. KenGen management emphasised to the EIB-CM its efforts to continue monitoring the implementation on the ground and react when needed to the claims of the PAPs. KenGen also informed that it is

expected that two separate audits will start in 2015 before closing the implementation of the RAP. An Independent Evaluation Panel (IEP) is to provide audit services for RAP implementation. The draft TOR for IEP was shared with the lenders and the contract will run for a period of 18 months. In addition, KenGen has requested M/s GIBB Africa to provide support services that includes preparation of a final close down report for the RAP process after all the entitlements as agreed in the MoU have been implemented.

- (iii) *Effectiveness of the Grievance Mechanism:* KenGen management confirmed that the arbitration was not utilised during this period and the main reason was because there had not been any complaints and all issues have been discussed and resolved at the RAPIC meetings. During the mission of January 2015, the EIB-CM attended a RAPIC meeting and could take note of the openness and intensity of the discussions that took place.
- (iv) *Retaliation:* KenGen management and the lenders indicated that they were not aware of any retaliation.

9. PRELIMINARY CONCLUSIONS AND PROPOSED WAY FORWARD

- 9.1 The initial assessment of the current cases shows the complexity of the issues at stake. Involuntary resettlement is, under all circumstances, a complex task that requires keeping the balance between (i) the national interests to secure access to reliable and affordable energy; (ii) a deep understanding of the issues that will affect all and each of the members of the affected community and (iii) a careful management of expectations of the parties involved.
- 9.2 In this regard, the preliminary information collected by the EIB-CM would indicate that the promoter, with the support of lenders, has put in place resources (in terms of expertise, time, and funding) to facilitate that the resettlement is taking place in accordance to international best practices. However, KenGen's efforts are being influenced by specific socio-economic aspects of the region where the investment takes place.
- 9.3 The EIB-CM has also collected testimonies during the fact-finding mission that are in the same line as the allegations that the EIB-CM had received in writing. Some of these testimonies affect vulnerable people (elders, women, orphans). In addition, the initial assessment has also found contradicting information on some issues related to the socio-economic and political configuration of the affected communities that have a direct impact on the resettlement, like the land-titling and the identification of PAPs. The EIB-CM also collected testimonies of some PAPs that could put into question the effectiveness of the project's grievance mechanism.
- 9.4 From the EIB-CM's point of view, and whilst acknowledging the efforts of the promoter and lenders to effectively implement the RAP, it is equally important to address the concerns expressed in order to avoid that any person affected by the resettlement could result worse off than before the project was implemented. Furthermore, complainants need to be reassured that all reasonable efforts have been performed to ensure that the issues affecting the resettlement have been properly addressed. Such actions will contribute to reinforce the monitoring efforts of the Bank concerning the implementation of the RAP.

- 9.6 The EIB-CM is following-up these cases in close coordination with the WB-IP. This is of primary importance to maximise synergies viz. the parties involved. In addition, the EIB has contractually engaged the borrower to follow-up the World Bank policy framework of involuntary resettlement. The following way forward has been agreed with the WB-IP:
- a) Concerning the investigation regarding compliance on structural issues such as the land titles and the census, the EIB-CM will coordinate with the WP-IP in order to follow-up and share the findings of the investigation that the WB-IP will carry out - including issues related to the World Bank Indigenous Policy. The EIB-CM will seek to complement this investigation whenever possible; a member of the EIB-CM will be appointed contact person to liaise with the WB-IP, and to participate in the field work whenever appropriate. The EIB-CM will prepare a report with its conclusions and recommendations in accordance to its own mandate and policies.
 - b) Concerning the issues related to restoration of livelihoods and the effectiveness of the Grievance Mechanism, the EIB-CM proposes a problem solving approach, by providing independent facilitation services to foster the dialogue between the complainants and the existing project organisational structures. This problem solving approach should help to build trust and address the concerns raised, aiming to the resolution of the issues identified. This will contribute to reinforce the Bank's monitoring with independent expertise that could improve the dialog amongst the different parties, notably the promoter and the complainants, as well as promoting inclusive governance and cohesion within the affected communities. This expertise will also provide advice to the relevant parties, including the Bank, on ways to improve the existing grievance mechanism. The compliance investigation to be carried out by the WB-IP might bring additional issues concerning the restoration of livelihood. Should this happen, the EIB-CM will discuss with the concerned parties the most appropriate approach on a case by case basis.
- 9.7 Concerning the retaliation issues raised by some complainants, the EIB-CM would like to emphasise, for the benefit of all the parties, and without taking any particular view on the allegations raised at this early stage, that the international accountability mechanisms are part of the overall structure to resolve conflicts and grievances in the projects they finance. International lenders, like the EIB, are certainly very sensible to establish effective grievance resolution mechanisms at project level and privilege their use, whenever possible, for conflict resolution; however, if for whatever reason, the affected people contact international grievance offices, this right should be respected without exerting any type of pressure.

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