

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

**Olkaria I and IV
Kenya**

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

CONCLUSIONS REPORT

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Complaints Mechanism

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The EIB Complaints Mechanism

The EIB Complaints Mechanism is intended to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases where the public feels that the EIB Group has done something wrong, i.e. if they consider that the EIB has 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-tiered procedure, one internal – the Complaints Mechanism Division (EIB-CM) – and one external – the European Ombudsman (EO).

Complainants who 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 EIB-CM's procedure 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 function was created by the 1992 Maastricht Treaty 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. Examples, as set by the European Ombudsman, include: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information and unnecessary delay. Maladministration may also relate to the environmental or social impacts of EIB Group activities and to project cycle-related policies and other applicable EIB policies.

The EIB Complaints Mechanism is intended not only to address the EIB's failure to comply with 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/cr/governance/complaints/index.htm>

Acknowledgments

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CONCLUSIONS REPORT

EXECUTIVE SUMMARY

In July 2014, the European Investment Bank's Complaints Mechanism (EIB-CM) received a complaint via email raising several issues concerning the involuntary resettlement that was undertaken in connection with the expansion of activities in the Olkaria geothermal field. In August 2014, a second complaint, with similar allegations, was received. The EIB-CM registered the cases under SG/E/2014/07 and SG/E/2012/08. In September 2014, the Bank's operational services informed the EIB-CM that the project lenders had received two additional complaints concerning the same resettlement. After an initial contact, the complainants requested that the first complainant be appointed as the contact point to coordinate all exchanges between them and the EIB-CM. The project is promoted by Kenya Electricity Generating Company Ltd. (KenGen). The complainants have requested that the enquiry be kept confidential.

The complainants made several allegations, including that people had been requested to move to the new land without being provided with the land titles and without the infrastructure being finalised. They also alleged that a number of people affected by the resettlement had been left out of the census carried out by the promoter. In addition, their socio-economic livelihood activities had not been restored to a level equal to or above the previous one as required by the international lenders' policies for involuntary resettlement. Finally, they alleged that the grievance mechanism in place was not working effectively and they felt that some of the complainants had been subject to retaliation after sending their complaints to the EIB-CM.

The project is financed by the Bank under the Mutual Reliance Initiative (MRI), whereby the French Development Agency (AFD) plays the role of Lead Financier amongst the EU International Financial Institutions, which also include the EIB and the German Development Agency (KfW). Other financiers of the project are the World Bank and the Japan International Cooperation Agency (JICA). All the EU lenders have adopted the World Bank's policies for land acquisition and involuntary resettlement as the framework for implementing the Resettlement Action Plan (RAP). The World Bank Inspection Panel (WB-IP) received a complaint with similar allegations in October 2014. Therefore, and in order to maximise synergies, the EIB-CM and WB-IP have worked together to assess the allegations, seeking complementarity whenever possible. A Memorandum of Understanding (MoU) was signed by the two parties to formalise this cooperation.

As a result, and after finalising the Initial Assessment in March 2015, the EIB-CM and WB-IP carried out a joint investigation mission to Kenya from 27 March to 2 April 2015 in order to complete the Bank's compliance review with respect to the resettlement policies. The compliance review on the implementation of the RAP concluded that some of the allegations were founded and that the project has only partially succeeded in implementing the resettlement in line with the World Bank's policies. At the appraisal stage, the project had failed to identify the Maasai community as an indigenous people that, according to the EIB's Environmental and Social Handbook and the other lenders' social guidelines, required special attention and protection during the involuntary resettlement process.

Based on those findings, the EIB-CM also reviewed the role of the EIB in guiding the promoter to implement the resettlement. This review shows that whilst the MRI arrangements are intended to

coordinate the action of the three lenders and facilitate the promoter's interaction with them through the Lead Financier, each EU lender was responsible for providing its non-objection to the RAP. In this context, the EIB-CM noted that the EIB's services had contributed meaningfully, under the MRI arrangements, to identifying critical areas for the successful implementation of the RAP. However, the review also shows the limitations of this arrangement because the Bank's interaction is limited to the lenders' group and it did not have direct contact with the affected people. The Bank therefore partially succeeded in guiding the promoter – directly or indirectly under the MRI – with respect to the successful implementation of the RAP.

During the initial assessment stage, the parties accepted the proposal of the EIB-CM to provide facilitation services to foster the dialogue between the complainants and the existing project organisational structures, including the promoter. The main objective of this problem-solving approach is to help to build trust and address the concerns raised by the complainants, with a view to resolving the issues identified. It should be highlighted that the complainants agreed to extend the process and the outcome of the mediation to the entire community affected by the resettlement. This should be seen as a positive signal from the complainants in terms of defending the general interests of the community.

This process was started in parallel with the compliance review. A preliminary mission by the EIB-CM mediation team took place in May 2015. As a result of that mission, the EIB-CM appointed two mediators, both of them residents of Kenya. A second mission by the EIB-CM mediation team took place in mid-June 2015 with the objective of introducing the mediators to the parties. The mediation was launched in August 2015, after the parties agreed on the representativeness of each side at the mediation table and the scope of the mediation. The mediation process is continuing under the leadership of the EIB-CM. The mediation gives an opportunity to the parties to discuss structural and recurrent issues such as the identification of the PAPs (the census), compensation for the moving or additional profit-sharing approaches taking into consideration the general laws that are under discussion in Kenya.

At the same time, KenGen and the lenders, including the Bank, are still responsible for implementing the RAP in accordance with the agreed policy. Measures that could be implemented in the medium term are: the award of land titles, the restoration/completion of the infrastructure (roads, water, electricity, access for the disabled, etc.), the means for restoring economic livelihoods in the long run (i.e. business plan for the cultural centre, exploration of microfinance as a way to finance economic activities), review of the housing structures, etc. The implementation of these measures could run in parallel, but in close cooperation, with the mediation process. In order to ensure proper implementation, the EIB-CM recommends that the Bank's services reinforce the monitoring of the implementation of the RAP and any related agreement reached by the parties under the mediation process. The Bank could explore, within the framework of the MRI cooperation with other EU-IFIs, the possibility of hiring a professional expert in social development for a period of time (to be agreed) which should be sufficient to ensure the complete implementation of the RAP. This expert could be located in Nairobi working under the supervision of the EU-IFI's social expert.

CONCLUSIONS REPORT

Olkaria I & IV Geothermal Extension

Complainants: individuals and representatives of communities affected by the project¹

Confidentiality requested: yes

Date received: between July and September 2014

Project status: under disbursement

Board reports: June 2010

Contract amount: up to EUR 119 million

1. INTRODUCTION

- 1.1 In July 2014, the European Investment Bank's Complaints Mechanism (EIB-CM) received a complaint via email raising several issues concerning the involuntary resettlement that was due to take place in connection with the expansion of activities in the Olkaria geothermal field. In August 2014, a second complaint - a letter sent via email and signed by representatives of the community - with similar allegations, was received. In September 2014, the Bank's operational services forwarded to the EIB-CM two additional written complaints concerning the same issues. During the first visit to the site in January 2015, the EIB-CM registered 40 additional petitioners that signed the complaints against the implementation of the RAP. The project is promoted by Kenya Electricity Generating Company Ltd. (KenGen).
- 1.2 The World Bank (WB) is co-financing the project and its Inspection Panel (WB-IP) received a similar complaint in October 2014². As a result, the EIB-CM and the WB-IP coordinated their efforts and resources to (i) maximise the interaction with all the parties, (ii) avoid duplications and overlaps and (iii) complement, to the greatest extent possible, each other's activities. A Memorandum of Understanding (MoU) sets out the general framework of the cooperation between the two accountability mechanisms (Annex 1). However, in consideration of the different mandates and in order to preserve the independence of each of the accountability mechanisms, it was agreed that the EIB-CM and the WB-IP would prepare separate reports with conclusions adapted to the policies and practices of the respective financial institutions³.
- 1.3 In March 2015, the EIB-CM prepared an Initial Assessment Report (IAR) after undertaking a preliminary analysis of the allegations presented. The IAR included proposals on the way forward with two main measures: (i) a compliance review of the issues identified during the preparation of the IAR, to be carried out together with the WB-IP; and (ii) a problem-solving approach, by providing independent facilitation services to foster the dialogue between the complainants and the existing project organisational structures. The proposed way forward was accepted by the stakeholders (complainants and promoter).
- 1.4 This report presents the main findings and conclusions of the EIB-CM compliance review, as well as some recommendations to the Bank's services to enhance the monitoring of the

¹ The individual complainants have requested confidentiality. Their names are therefore omitted from the report although there are references to some of the associations represented by them.

² It is noted that in July 2014 the first complainant intended to send his request as well to the WB-IP, however the email address was wrong and therefore the WB-IP only registered it in October 2014, after receiving a new formal request.

³ All the process followed by the WB-IP and WB Management Response can be consulted in the following link: <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaselId=102>

issues at stake. The mediation process is currently underway and it is subject to different processes and documentation.

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. In order to clarify the issues, the allegations are contextualised within the framework of the Bank's responsibility based on the allegations received from the complainants.

TABLE 1 – SUMMARY OF ALLEGATIONS

Failure to monitor the involuntary resettlement in accordance with the Resettlement Action Plan (RAP), the Bank's resettlement policies and its contractual obligations.

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

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

- Allegations concerning land titling: the complainants expressed concern about whether and when the affected Maasai community would be given the title to the RAP land as stipulated in the Memorandum of Understanding signed with KenGen;
- Identification of PAPs: the complainants questioned the procedure used to identify the PAPs who were to receive compensation; according to the complainants, the number of eligible households had been changed on several occasions, and some eligible members of the community - mainly vulnerable people like women, orphans and the elderly - had been left out;
- Restoration of livelihoods: the complainants allege that the livelihoods of the PAPs were not restored as planned in the RAP. Moreover, the resettlement has created additional burdens for some of them (e.g. payment of school fees; payment of transport; limited access to water; the houses were not built in keeping with Maasai customs, etc.). Concerning pastoral activities, the complainants allege that the pastures assigned to them are not suitable for pastoral activities; they also claim that KenGen has not given due consideration to non-pastoral activities, such as tourism.
- The consultation process during the implementation of the RAP and the grievance redress mechanism have not worked effectively: some complainants allege that the Council of Elders, which is the primary customary authority for resolving disputes in the Maasai culture, has been overruled by the RAPIC and that the role played by the Council of Elders in the implementation of the RAP is merely representative. The complainants also express their lack of trust in the mediation function embedded in the project grievance mechanism. On a related topic, some complainants express fear of retaliation after sending complaints to the accountability mechanisms of the IFIs, including the EIB-CM.

3. CLAIM

The complainants request that:

- the resettlement of the affected communities be performed in compliance with human rights, the RAP agreements and the IFIs' policies for involuntary resettlement;
- the EIB-CM and World Bank Inspection Panel (WB-IP) visit the site and talk with the complainants.

4. THE PROJECT AND THE BANK'S FINANCING

- 4.1 According to the Bank's appraisal documents, the project is aimed 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 constructing two 70 MWe units at the Olkaria Domes field (Olkaria IV power station), including the 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 In June 2010, the EIB Board of Directors approved a loan to the Government of Kenya of up to EUR 119 million. A Finance Contract was signed on 15 December 2010. The project is sponsored by KenGen, a Kenyan company established by the Ministry of Energy (MoE). The total project cost is estimated to be approximately EUR 1 billion (including contingencies). In addition to the EIB (12%), the project is being 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%) and the World Bank (7%), with the balance being provided by KenGen (14%).
- 4.3 The Bank has disbursed EUR 71.3 million 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 the 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 the 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 from both 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

The EIB's co-financing is primarily targeted at components 2, and 5 to 8.

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

5. BACKGROUND TO THE COMPLAINT

- 5.1 At the time of appraisal, KenGen estimated that a total of 1 460 acres of land was needed for constructing the power plants and associated infrastructure. The findings of the air quality and noise dispersion modelling carried out during ESIA studies indicated that approximately 240 acres of land adjacent to the power plants would be negatively impacted. Therefore, the total land that was required for the power plants was in fact 1 700 acres, of which a total of 35 acres was occupied by four villages inhabited by the Maasai community. Acquisition of this land required the involuntary resettlement of the local community living in the four Maasai villages (Olo Nongot, Olo Sinyat, Olomayiana Mayana Ndogo and the Maasai Cultural Centre), which consisted of approximately 335 Maasai families. To monitor and guide the implementation of the RAP, the parties constituted a RAP Implementation Committee (RAPIC) composed of members of the affected communities, officials of the provincial government and KenGen. KenGen and the RAPIC members signed a Memorandum of Understanding (MoU) setting out general guidelines for implementing the RAP. In August 2014, 150 households (about 1 000 people) were moved to the Kedong Ranch, where each family was given a two-bedroom house with a 0.41 ha plot of land.
- 5.2 On 16 July 2014, the EIB-CM received a complaint from a resident of the Narasha community with several allegations against KenGen mainly related to the involuntary resettlement. This complaint was registered with the reference number SG/E/2014/07. On 1 August 2014, the EIB-CM received a new complaint from the Maasai Council of Elders alleging *inter alia* that the MoU for the resettlement agreed between KenGen and the project-affected persons (PAPs) had not been fulfilled. This complaint was registered with the reference number SG/E/2014/08.
- 5.3 On 12 September of 2014, the Bank's services notified the EIB-CM that they had been informed of a total of four complaints. Two of the complaints were the same as those 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 of the Oloorkarian Maasai Cultural Centre and by the Oloorkarian Maasai Cultural Centre. In their complaints, they expressed their concerns about the way the resettlement was being carried out. As the allegations were similar to the other cases, the EIB-CM did not register new cases and is processing them together with the other cases.

6. FRAMEWORK OF THE COMPLAINTS MECHANISM INVESTIGATION

- 6.1 In the performance of its activities, the EIB is bound by the European Treaties and its Statute, as well as by the relevant legislative and regulatory framework of the European Union. The EIB must therefore operate in such a way as 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 for the performance of its activities. The EIB Complaints Mechanism Principles, Terms of

Reference and Rules of Procedures apply to complaints regarding maladministration of the EIB Group.

- 6.2 In analysing the possible failure of the Bank during the due diligence process, the EIB-CM will take into consideration the Bank's relevant project appraisal policies, including the Operational Policies and, in particular, the Environmental and Social Handbook.
- 6.3 Furthermore, §1.04A of the Finance Contract signed between the Government of Kenya and the EIB on 12 December 2010 stipulates as one of the conditions to be fulfilled prior to the 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".

- 6.4 In addition, §6.05 (e) i) of the same Finance Contract establishes the undertaking that the Borrower shall ensure 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 the 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.

- 6.5 The analysis of possible maladministration by the Bank will therefore be the result of the analysis of the compliance with the Bank's policies and procedures as well as the contractual arrangements with the borrower and the promoter during the assessment and implementation of the RAP.

7 WORK PERFORMED BY THE EIB-CM

- 7.1 After declaring the complaints admissible, the EIB-CM prepared an Initial Assessment Report (IAR), which was submitted to the parties concerned in March 2015. The IAR was prepared taking into consideration the allegations received, the information and documents submitted by the complainants and the Bank's services, and the preliminary findings of a fact-finding and stakeholder engagement mission carried out jointly by the EIB-CM and the WB-IP in January 2015.
- 7.2 The information gathered during this phase provided sufficient elements for the EIB-CM to propose to undertake a full investigation of the issues at stake as well as to put in place a platform to facilitate dialogue amongst the parties.

- 7.3 As indicated in 6.3, the EIB had signed a Finance Contract with the Kenyan authorities, by which the parties agreed to implement the Resettlement Action Plan (RAP) in accordance with the World Bank's land acquisition and involuntary resettlement frameworks. In line with the MoU signed with the WB-IP, the EIB-CM proposed to allocate internal resources to the investigation team that the WB-IP would put in place to carry out the assessment of compliance issues arising from the same allegations.
- 7.4 The proposal made by EIB-CM was accepted by the parties and the investigation mission took place between 26 March and 3 April 2015⁴. During this mission, the EIB-CM met with representatives of the complainants, KenGen, the Ministry of Energy, the Council of Elders of the Olkaria RAP land, the RAPIC Chairmen, groups of affected people at the Maasai Cultural Centre (bringing together more than 80 people, including representatives of the most vulnerable groups such as the elderly, women and the disabled), representatives of MPIDO (an NGO dedicated to pastoralism issues), Maasai political representatives and Government representatives at Naivasha County.
- 7.5 During the following weeks, the team discussed the main findings of the investigation with a view to analysing the compliance of the implementation of the RAP with the relevant World Bank's policies, based on the input and advice of the team of external experts. The EIB-CM participated in a second mission from 14 to 19 May 2015, the main objective of which was to introduce the EIB-CM's mediation team to the parties. During that mission, the EIB-CM clarified further issues with the complainants and KenGen. On 12 June 2015, KenGen sent a memorandum summarising its official points of view on the issues that are the subject of the allegations made to the EIB-CM.
- 7.6 In the case under consideration, the relevant WB policies scrutinised by the investigation team are the Policy on Indigenous Peoples (OP 4.10), the Policy on Cultural Heritage (OP 4.11) and the Policy on Involuntary Resettlement (OP 4.12). The EIB-CM is of the opinion that the findings of the WB-IP independent experts concerning OP 4.12 are fully applicable to the EIB-CM's investigation taking into account the regulatory framework set out in 6.4 that obliges the EIB and the promoter to implement the resettlement according to the relevant WB policy framework. The EIB-CM also notes that the EIB does not have separate Indigenous People nor Cultural Heritage policies; however, issues related to these topics were taken into account in the Environmental and Social Handbook in force at the time of the Board approval (2010)⁵. Given that the allegations received by the EIB-CM refer to the resettlement, the issues identified concerning the indigenous people and cultural heritage were only considered in the EIB-CM's analysis if they are related to the allegations and the issues of the involuntary resettlement.
- 7.7 The following section 8 presents the main findings of the investigation. After providing a general overview, the section has been divided in three parts: the first presents the findings with regard to compliance with the WB's Policy on Involuntary Resettlement as presented in

⁴ In addition to the EIB-CM representative, the investigation team was composed of Mr. Jan Mattson, WB Panel Member, two independent experts, Mr Williams Partridge and Mr Peter Little, and two members of the WB-IP Secretariat. The mission team was accompanied during its meetings by two interpreters of Maa language. ("The Investigation Team")

⁵ During the course of this investigation, the EIB Services indicated to the EIB-CM that "Standard practice when co-financing with other Lenders is for there to be agreement on which set of standards is to apply. On that basis, analysis and due diligence adopted are carried out with those agreed standards in mind. EIB standards are to apply only if they are deemed more stringent than the ones proposed. In this case, at the time WB's O.P. 4.10 for Indigenous People was deemed significantly more comprehensive and stringent than EIB's respective Guidance Note and, as such, the latter was deemed inferior and not utilised in EIB services' due diligence".

The EIB-CM takes note that since January 2014, the new EIB's Environmental and Social Handbook includes clearer and more detailed Performance Standards with respect to these topics (http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf)

the IAR; the second one addresses considerations related to the Indigenous Group issues and their implications from the perspective of the EIB's own policies; finally, the third part examines the work carried out by the services of the Bank in connection with the implementation of the RAP from the appraisal decision until now.

8. FINDINGS

8.1 General Overview

8.1.1 As already indicated in the IAR, the EIB-CM fully appreciates that the project plays a key role at national level in increasing the energy generation capacity of Kenya, reducing dependence on hydropower (which is not reliable due to the recurrent droughts) and fossil fuels. The EIB-CM also notes and appreciates the constructive attitude of the Kenyan authorities (represented by the Ministry of Energy) with regard to understanding and supporting the objectives of the present investigation by the EIB-CM. The Ministry of Energy and KenGen management have stated on several occasions that this independent investigation would also help them to gain valuable experience for future involuntary resettlements. This cooperative attitude has been maintained throughout the investigation procedure. KenGen also accepted the proposal made by the EIB-CM to engage in a mediation process with representatives of the community.

8.1.2 The EIB-CM also notes that the complainants and the community members have expressed their support for the project and that their claims are aimed at ensuring the fair implementation of the RAP for the affected communities, while respecting human rights and the rights of the affected communities. The representatives of the community have said openly, *"The project should not harm the people and the people should not harm the project"*. The complainants have also repeatedly indicated that their claims have been made to benefit the entire community, not just their own personal interests. The proposal of EIB-CM to engage in mediation with KenGen has been accepted by the representatives of both the complainants and the community.

8.1.3 Notwithstanding the above, during its interaction with the different parties on the ground the EIB-CM noted that, whilst there is a consensus on the number and the complexity of the issues under consideration, there are tensions between some of the community members and KenGen and amongst members of the community itself. These tensions are mainly triggered by the current balance of power between the community members and by the different consideration given by each party to the issues raised by the allegations.

8.2 The compliance review carried out with respect to the World Bank's Involuntary Resettlement Framework

8.2.1 The main allegations related to the World Bank Involuntary Resettlement framework that have been identified by the EIB-CM and that were presented in the IAR are: (a) land titles; (b) identification of PAPs; (c) restoration of the livelihoods of the PAPs (housing and socio-economic livelihoods); (d) the functioning of the Grievance Complaints Handling Mechanism and (e) retaliation. In addition, issues related to supervision will be described in detail in subsection (f). Each of these main allegations will be treated separately indicating the allegation, the relevant WB policy statements and a summary of the main findings of the

investigation team. Each subsection will also indicate whether the relevant WB policy statement has been complied with.

a) *Land titles*

Allegations:

- 8.2.2 The complainants claimed that the resettled households had not received the land titles promised in the Memorandum of Understanding signed by KenGen and the RAPIC.

WB Policy statements:

- 8.2.3 The World Bank Policy on Involuntary Resettlement (OP 4.12) indicates that preference should be given to land-based resettlement strategies for displaced people whose livelihoods are land-based. These strategies have to be compatible with the cultural preferences of the PAPs, and prepared in consultation with them⁶. The resettlement plan must take into consideration legal arrangements for regularising tenure and transferring titles to resettlers.⁷ According to the Policy, the timing of resettlement is to be linked to the implementation of the investment component of the project to ensure that displacement does not occur before the necessary measures for resettlement are in place.⁸ The Policy requires infrastructure and public services to be provided as necessary to improve, restore, or maintain accessibility and levels of service for the displaced people.⁹

Findings

- 8.2.4 The 2012 RAP indicated that over 90 per cent of the PAPs had opted for land-for-land compensation within the Naivasha District¹⁰. After eliminating different site locations due to distance or unavailability,¹¹ KenGen identified a site, belonging to a company called Kedong Ranch Limited, known as Akira Ranch.
- 8.2.5 On 1 July 2013, the PAPs and KenGen concluded a formal MoU, in which they agreed that resettlement would occur only when land tenure had been secured through a communal land title.¹² By 13 August 2014, the land title had still not been secured and the PAPs and KenGen amended the agreement to allow resettlement prior to obtaining this title.¹³ In the Amendment, KenGen undertook to process the title deeds within six months from the date of relocation. The PAPs were resettled between 21 August and 2 September 2014.
- 8.2.6 The delays in securing the land title were due to a court injunction restraining the seller, Kedong Ranch, from *"selling, charging, disposing off and/or otherwise interfering with suit property."*¹⁴ In discussions with EIB and WB management in Nairobi, the investigation team was told that KenGen had decided to go ahead with construction on the resettlement land despite the court injunction, because it believed that there would be enough land available to resettle the Maasai, irrespective of the outcome of the court case.

⁶ OP 4.12, para. 9

⁷ OP 4.12, Annex A, para. 12(d).

⁸ OP 4.12, para. 10.

⁹ OP 4.12, para. 13.

¹⁰ RAP (2012), page 13-1. The investigation team was told that the PAPs felt that they had been treated like squatters on their ancestral lands for many years. They expressed their belief that receiving a land title was essential to them as it would help secure their identity and culture as Maasai for the generations to come.

¹¹ The investigation team learned that the selected site was identified after one of the sites initially suggested was rejected because the host community would not accept the PAPs.

¹² MoU signed between KenGen and the PAPs, page 7, para. 3(f) and page 8, Table 1.

¹³ Amendment No. 1 to the MoU signed between KenGen and the PAPs, page 2, para. 4(c).

¹⁴ In the High Court of Kenya at Nakuru, Civil Case number 21 of 2010 in the matter of LR 8396 (I.R. NO. 11977) in the matter of the Limitation of Actions Act (CAP. 22, Laws of Kenya).

- 8.2.7 A court order had set the date for an *interpartes* hearing on 5 February 2015. The investigation team learned that the court hearing took place on 31 January 2015, ruling in favour of Kedong Ranch.¹⁵ KenGen informed the investigation team that the title transfer had started. This was confirmed by a local government official who explained during the mission of March 2015 that the transfer process was expected to take between one to three months.
- 8.2.8 In May 2015, KenGen informed the EIB-CM that, due to fiscal matters related to the communal land title transfer, the process had been further delayed. KenGen added that it was pursuing the matter with the Ministry of Finance (as well as ministries relating to the public utilities available on the RAP land) and that the entire process of transferring the land titles to the PAPs and the relevant ministries could take up to one year.
- 8.2.9 Additionally, the complainants expressed anxiety and concern that just when they had been resettled on the RAP land, new geothermal developments would require them to move again in the future. During its site visit to the RAP land, the investigation team observed that there were several drilling and scoping activities taking place in the area. The team asked KenGen about the potential for future commercial developments and their impact on the community. KenGen informed the team that it was committed to avoiding any further relocation of the community. It also informed the investigation team that technology has improved in terms of emission and noise control, and thus any area of impact would be smaller, and that power plants can be placed as much as four kilometres away from a well. The PAPs, however, expressed serious concern about potential health and noise impacts on the resettled community if geothermal activities were expanded in the vicinity of the RAP land.
- 8.2.10 The EIB's services have indicated to the EIB-CM that the PAPs are not entirely without responsibility for this early move to the RAP land as they exerted some pressure on the promoter to organise the move earlier than later and that the move was not carried out against the will of the PAPs. In addition, and in order to meet the calendar agreed by the parties, the promoter had to accept certain trade-offs with respect to the PAPs.

Compliance with the WB Policy statement:

- 8.2.11 The **"land-for-land" principle** applied under the project is a positive, development-oriented compensation option for the involuntary resettlement of rural populations, and is **in compliance with OP 4.12 (paragraph 6b)**.
- 8.2.12 **The displacement of the PAPs occurred before the necessary measures for resettlement were in place (e.g. the land-title), and is therefore in non-compliance with OP 4.12 (paragraph 10).** Furthermore, given the Maasai's long history of land tenure insecurity, it is also considered that particular attention needs to be paid to securing the communal land title for the community (OP 4.12 Annex A paragraph 12).

¹⁵ Republic of Kenya in the High Court of Kenya at Nakuru. Civil Suit Number 21 of 2010. Decree issued at Nakuru on 5 February 2015. According to a complainant, the plaintiffs had filed an appeal on procedural grounds. They also informed the investigation team that another court case with the Maasai as plaintiffs was pending in the Nakuru High Court, involving, on the Defendant's side, KenGen, the Ministry of Energy and several other parties. The World Bank's management informed the team that no appeal had been filed within the legal timeframe and therefore KenGen was no longer restricted from transferring the title.

b) The procedure carried out to identify the PAPs

Allegations:

- 8.2.13 The complainants claim that KenGen built fewer houses than promised. 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 visits, the EIB-CM heard testimonies of members of the community alleging that they had been promised a house but they had not been moved on the due date.

World Bank Policy statements:

- 8.2.14 The Operational Policy on Involuntary Resettlement (OP 4.12) requires that, upon identification of the need for involuntary resettlement, a census be carried out to identify the persons that will be affected by the project. It also requires the establishment of criteria according to which displaced persons will be deemed eligible for compensation or resettlement assistance¹⁶. The Policy further requires the establishment of a cut-off date by which affected people in the area of resettlement would be considered eligible for compensation or assistance¹⁷.
- 8.2.15 Additionally, the Policy requires that, as a condition of appraisal, a resettlement document that conforms to the Policy be made available to the displaced community at a place accessible to them and local NGOs, in a form, manner, and language that are understandable to them¹⁸.

Findings:

- 8.2.16 The process of identifying the PAPs eligible for compensation and their entitlements took place over the period 2009 to 2013. It included different activities and brought about major changes in the identification of the PAP community.
- 8.2.17 In December 2009, a RAP was prepared, which included a set of socio-economic baseline data. Simultaneously, a census was carried out to determine PAP eligibility and entitlements. According to GIBB Africa, this census included three of the villages to be relocated (Cultural Centre, Olo Nongot, and Olo Sinyat).
- 8.2.18 The RAP was updated and finalised in July 2012. It included a new census conducted to take into account the fourth impacted village (Olo Mayana Ndogo) and cases of natural growth in the three previously covered villages.¹⁹ This census identified a large number of additional affected households, bringing the total number of PAP households from 93 in 2009 to 335.²⁰ GIBB Africa informed the investigation team that many PAPs had not taken the 2009 census seriously, as they did not believe that the project would actually be carried out, but this changed in 2012.

¹⁶ OP 4.12, para. 14.

¹⁷ OP 4.12, para. 16.

¹⁸ OP 4.12, para. 22.

¹⁹ According to the 2012 RAP, natural growth includes: i) cases where a man married a new wife and established a residential structure for the new household; ii) cases where young men moved out of their parent's house through marriage or coming of age to establish their own household; iii) new teachers at Olo Nongot Primary School; and iv) new teachers at Olkaria Primary School. RAP (2012), page 2-3

²⁰ The 335 affected households (RAP (2012), para. 5.3.2) include 164 resident land and house owners, 12 non-resident landlords, 65 non-resident landowners with no assets, 70 tenants, 14 land tenants owning houses, and 10 teachers.

- 8.2.19 The French Development Agency (Afd)²¹ commissioned a review of the 2012 census. The report indicates that the different RAPs submitted to the financiers *"were not easy to follow and understand."* It adds that the reports included an *"incomplete presentation of the census which does not allow clear comprehension of the level of life of the PAPs, and to consider the adequacy of the proposed compensations."*²²
- 8.2.20 In 2013, the RAPIC members of the project conducted a validation exercise (which does not constitute a separate census) to address concerns regarding eligibility for the different types of compensation and assistance. This exercise resulted in the removal of some households which had been recorded eligible to receive a house on the RAP land in the 2012 census, and it changed the status of other households from land and house owners in 2012 to tenants owning a house but with no rights to the land. The number of houses to be distributed as compensation for loss of land and assets went down from 164 in 2012 to 150.
- 8.2.21 Some PAPs, including the Elders, informed the investigation team that they had never had access to the two RAPs or the census reports. It is noted that these documents are available only in English and not in Maa, the language of the affected communities (for further details on the importance of Maa language for the PAPs, see below). The investigation team learned that the data of the censuses had been collected by consultants who did not speak Maa and operated through translators, a methodology that is prone to inaccuracies and not in line with best practice. Therefore, the process whereby PAPs were to be informed of their eligibility or lack thereof for resettlement assistance failed to produce meaningful consultations with many affected people.
- 8.2.22 Without timely access to the RAPs and census documents, in a form, manner, and language that is understandable to the PAPs, they and the village Elders (the traditional decision-making body) had had little knowledge about the inclusion or exclusion of PAPs in the various censuses or in the validation process.
- 8.2.23 The investigation team notes that the process undertaken, from the identification of PAPs through both censuses and the 2013 validation exercise to the award of the final compensation, does not permit a definitive confirmation or rejection of the complainants' specific claim regarding the exclusion of some families. The investigation team also notes that the census exercises were methodologically flawed and culturally incompatible, resulting in inconsistencies and contradictions. The project's failure to engage an independent, internationally-recognised panel of resettlement specialists to provide advice on effective census methods and culturally compatible consultation and decision-making mechanisms contributed to the difficulty of this situation.

Compliance with the WB Policy statement

- 8.2.24 **The process of identifying PAPs (through the two censuses, the validation and the award of compensation) did not provide satisfactory assurance of a reliable outcome due to methodological flaws, and is therefore in non-compliance with OP 4.12 (paragraph 14).**

²¹ Agence Française de Développement.

²² The Final Census Report, Agence Française de Développement, Olkaria I and IV Geothermal Power Generation Project: Census of the Project-Affected Persons (2012), page 3.

c) *Restoration of livelihoods (housing & infrastructure and socio-economic activities)*

Allegations:

- 8.2.25 According to some of the local Maasai families, the new housing clashes with the traditional lifestyle of the Maasai, and the relocation process had not met the expectations 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 the top of a slope were not convenient for their everyday lives. Complainants also alleged that the communities relocated were facing several problems in terms of accessing water and transport.
- 8.2.26 In principle, KenGen had agreed to provide a bus, but this came later than expected and some community members, particularly the vulnerable and poor, have to pay for these transport services. Some people also complained that due to the relocation they now had to pay the school fees of the new school in the RAP land. The complainants allege that the RAP did not take due account of non-pastoralist activities, such as tourism. Most residents of the Maasai Cultural Centre live from tourism (e.g. serving as guides for 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 has not provided income restoration measures. Other complainants said that the agreed compensation amounts had not been paid out. There were also claims that the proposed resettlement did not respect cultural and sacred sites of the Maasai.

World Bank Policy statements:

- 8.2.27 Concerning housing and other infrastructure, resettlement plans should, according to OP 4.12, include measures to ensure that displaced persons are "*offered choices*" and "*provided with technically and economically feasible resettlement alternatives*."²³ In addition, the timing of resettlement is linked to the implementation of the investment component of the project to ensure that displacement does not occur before the necessary measures for resettlement are in place. The Policy requires that infrastructure and public services be provided as necessary to improve, restore, or maintain accessibility and levels of service for the displaced people²⁴.
- 8.2.28 Concerning Livelihood restoration on socio-economic activities, the WB Policy on Involuntary Resettlement (OP 4.12), recognises that resettlement, if unmitigated, "*often gives rise to severe economic, social, and environmental risks: production systems are dismantled [and] people face impoverishment when their productive assets or income sources are lost*."²⁵ It adds that involuntary resettlement may cause severe long-term hardship and impoverishment unless appropriate measures are "*conceived and executed*

²³ OP 4.12, para. 6(a) (ii).

²⁴ OP 4.12, para. 13

²⁵ OP 4.12, para. 1.

as sustainable development programs," and that displaced people should be assisted to improve or restore their livelihoods to pre-displacement or pre-project implementation levels, whichever is higher.²⁶

- 8.2.29 According to the Policy, projects should include measures to ensure that displaced people receive compensation at full replacement value for losses of assets.²⁷ The Policy states that for losses that cannot easily be valued or compensated (e.g., access to grazing), attempts need to be made to establish access to "equivalent and culturally acceptable resources and earning opportunities."²⁸ Displaced persons need to be provided with land with "productive potential (...) at least equivalent to the advantages of the land taken."²⁹ When there is a lack of adequate land, this "must be demonstrated and documented to the satisfaction of the [World] Bank."³⁰
- 8.2.30 To achieve the objectives of OP 4.12, the Policy requires that particular attention be paid to vulnerable groups, including the poor, the landless, the elderly, women, and children.³¹ Regarding those with no recognisable legal right to claim the land they are occupying, resettlement assistance in lieu of compensation for land, and other assistance, is required.³² The Policy also requires, where necessary to achieve its objectives, the inclusion of measures, including "moving allowances," to ensure that displaced persons are "offered support after displacement, for a transition period, based on a reasonable estimate of the time likely to be needed to restore their livelihood and standards of living."³³

Findings:

- 8.2.31 Concerning housing and infrastructure, the newly-built residential houses on the RAP land are composed of two bedrooms, a living space and an outside kitchen. Not far from the house are latrines. These structures are made of bricks with cement floors. During its field visit, the investigation team noted that many PAPs were satisfied with their new houses. Others, however, raised concerns about the cultural compatibility of the houses with the Maasai's specific lifestyle and culture³⁴. The complainants told the investigation team that "the RAP land made collective people into individualistic people."
- 8.2.32 The investigation team observed that the houses are designed to standards that are new and unfamiliar to the rural Maasai people who are accustomed to dwellings made of wood, cow dung and mud. The traditional Maasai dwellings (*enkaji*) are easily and cheaply subdivided or expanded to accommodate changes in household composition. The RAP land houses, however, are built of expensive manufactured materials which make modifications, maintenance, and repairs costly. A culturally-appropriate house for traditional Maasai would be based on the concept of an *enkang*³⁵, with fenced-off *kraals* for different types of livestock - cattle, goats/sheep and calves. Multiple families may reside in an

²⁶ OP 4.12, para. 2.

²⁷ OP 4.12, para. 6(a) (iii).

²⁸ OP 4.12, para. 6(a) (iii) and footnote 11.

²⁹ OP 4.12, para. 11 and para. 6(b) (ii).

³⁰ OP 4.12, para. 11.

³¹ OP 4.12, para. 8.

³² OP 4.12, para. 16.

³³ OP 4.12, para. 6(c) (i).

³⁴ The team's independent experts note that traditional Maasai houses (*enkaji*) are frequently built by women, or recovered with mud and thatch every five to ten years. While the Maasai's cattle herds move for large parts of the year, especially in the dry season, the community is largely sedentary. The Maasai in the area would traditionally rebuild their houses in the same general location and would not move more than a few hundred meters, if at all.

³⁵ The Maasai *enkang* (a fenced cluster of houses) is commonly referred to today as a *manyatta*. *Manyatta*, strictly speaking, refers to a ceremonial village (cluster of dwellings) used during male age-set rituals.

individual *enkang* and shelter their herds together at night in these *kraals*. The current layout of housing on the RAP land does not allow for flexibility and manoeuvrability in terms of rooms, size and location. Several people complained about the limited number of rooms.

- 8.2.33 PAPs were offered a choice among alternative masonry house designs or traditional *enkaji* houses³⁶, but were not offered a choice among alternative housing solutions (construction types and materials). The team's experts note that best practice in resettlement requires that PAPs be given choices among housing solutions and desirable improvements to traditional housing, such as impermeable roofing, movable interior walls, pit latrines that can be relocated when full, sustainable cooking technology, piped water to standpipes near house clusters, etc. Such options might have been attractive to the poorer households³⁷. The investigation team did not find any evidence that the cost of house maintenance and other recurrent costs, such as for electricity, had been properly conveyed to the community.
- 8.2.34 The PAPs met during the site visit expressed their concern to the investigation team about the poor condition of the roads to and within the resettlement site. A September 2012 mission report states that the main access road to the site had been completed and that the site could now be accessed by vehicles, except when it rains. The road leads directly to the site of the school, health facility, and social hall. The March 2013 RAP Implementation Status Report states that the construction of an internal all-weather road network was ongoing. In meetings with the investigation team, KenGen explained that it was scheduled to award the contract in April 2015 and to complete implementation within six months. During the site visit of May 2015, the EIB-CM witnessed the very bad state of the road on the RAP land after the heavy rains had washed away parts of the road structure. Maintenance works began the following week.
- 8.2.35 The complainants explained to the investigation team that there was a shortage of water supply at the resettlement site. According to them, sometimes there was no water available at the water kiosks for several days³⁸. KenGen, in a meeting with the investigation team, acknowledged that there was a water supply issued due to the drought. As a long-term measure, KenGen is now pumping three times as much water from a lake and told the team that, in addition to the rainwater tank for each house, there are four water kiosks on the RAP land, two of which are mostly in supply and one of which is located next to the school. KenGen fills these kiosks with trucks when the supply goes down. KenGen is also constructing eight water troughs for cattle, instead of four as originally planned.

³⁶ KenGen (2012), Environmental and Social Impact Assessment Study Report for the Proposed Construction of Houses and Other Facilities for Resettlement of Olkaria IV Project-Affected Persons at Olkaria Domes, Naivasha District, page 61.

³⁷ Examples: i) In a project in Costa Rica, seven different house options were given to PAPs involving distinct designs and construction materials (see: Partridge, W. L. (1993): *Successful Involuntary Resettlement: Lessons from the Costa Rican Arenal Hydroelectric Project*. In *Anthropological Approaches to Resettlement*, edited by M.M. Cernea and S.E. Guggenheim, pages 351-374. Boulder, Colorado: Westview Press (1993); ii) In the Zimapan Hydroelectric Project in Mexico, PAPs were given four different house options involving distinct designs and construction materials; in the Aguamilpa Hydroelectric Project in Mexico, PAPs were given the option of improved house materials such as tin roofs rather than traditional palm thatch while keeping the existing Huichol Indian adobe/wood house materials for the remainder of the structure (see: Guggenheim, S. E. (1993): *Peasants, Planners, and Participation: Resettlement in Mexico*. In *Anthropological Approaches to Resettlement*, edited by M.M. Cernea and S.E. Guggenheim, pages 201-228. Boulder, Colorado: Westview Press; and iii), in Colombia, a project allotted PAPs serviced plots - water, electricity, sewers, etc. - upon which they constructed their own houses of variable designs and combinations of materials. (see: Molina Prieto, C. and Morales, I. V. (2000): *En Búsqueda de un Lugar Donde Habitar*. In *Reasentamiento en Colombia*, edited by W. L. Partridge, pages 37-76. Bogotá, Colombia: World Bank, UN High Commissioner for Refugees, Corporación Antioquia Presente, and Office of the President, Government of Colombia. 2000).

³⁸ In October 2013, some RAPIC members raised the issue that KenGen had not discussed the distance to the water points with the community, and expressed their fear that the water points might be too far away from the houses. Observation by the AFD-led Mission on 26 September 2013; AFD-Led Joint Mission (AFD, KfW and EIB) to Olkaria on 26 September 2013. During the payment of cash compensation to different categories of PAPs, the PAPs expressed concern about the considerable distance of two clusters of houses from water points. World Bank BTOR from Mission to Observe Payment of Cash Compensations to Various Categories of PAPs, 18 August 2014.

8.2.36 During its field visit, the investigation team received a claim that a mosque should be constructed on the RAP land. During a RAPIC meeting in January 2013, the issue of the mosque was discussed and it was agreed that there had never been a mosque in the former settlements. The team notes, however, that a mosque was foreseen in a letter from KenGen in December 2009 stating that it was "agreed with the PAPs" that KenGen "shall provide the necessary infrastructure in the resettlement area such as residential housing, schools, health centre, social hall, church, water, roads, church, and mosque."³⁹ The investigation team noted that, even though there was previously no mosque in any of the four villages, given that the distance to the mosque used as a place of worship for some community members had increased significantly since the relocation, providing a mosque on the RAP land could have been an opportunity to address the concerns about the added transport costs and inconvenience claimed by these PAPs.

Compliance with WB Policy statements:

- 8.2.37 **The failure to ensure that the displacement of the PAPs did not occur before the necessary measures for resettlement were in place is in non-compliance with OP 4.12 (paragraph 10).**
- 8.2.38 The PAPs were offered a choice among alternative masonry house designs. However, **the housing solution offered to the PAPs, without providing each household a choice among different construction types, material and sizes, is in non-compliance with OP 4.12 (paragraph 6a). While the houses provided suited many PAPs, they are inconsistent with the cultural preferences and lifestyles of others.**
- 8.2.39 Concerning the restoration of socio-economic livelihood, the investigation team has looked at the following issues: (i) vulnerable PAPs; (ii) pastoralism and productive potential of the RAP land; (iii) tourism and decrease in income-generating opportunities; (iv) livelihood restoration, transitional assistance and benefit-sharing opportunities.
- 8.2.40 **(i) *Vulnerable PAPs*:** the poor are especially vulnerable to the negative impacts of resettlement. Reasonable welfare measures for the PAPs community are cash incomes and livestock assets. Data on these indicators are provided in the Annexes to the 2010 ESIA, which allows poverty levels to be determined relative to the common poverty measure of USD 1 per day or its equivalent in cash expenditures. Of the 106 PAPs' households for which cash income and livestock ownership data are available, 28 percent are considered to be very poor, with the largest concentration being in the Cultural Centre. The poorest households often are headed by women or non-Maasai, and they can be owners of a house and/or land, or tenants.
- 8.2.41 A second category of PAPs includes those who owned a house but are landless and therefore ineligible to receive a house on the RAP land. These PAPs were given cash compensation to be able to rebuild their houses and re-establish their livelihood elsewhere. GIBB Africa explained that they had conducted the initial valuation of the houses according to Kenya's Land Acquisition Act, and valued each structure at between KES 5 000 and

³⁹ Letter from KenGen Managing Director to National Environment Management Authority, dated 17 December 2009. This letter was copied to the World Bank and the PAPs.

KES 15 000. KenGen, however, decided to also consider land value as a factor and therefore decided on higher replacement amounts to be given to the PAPs. The investigation team was informed that the PAPs of this category had received compensation of KES 126 000-KES 186 000 for their structures.

- 8.2.42 During its field visit, the investigation team heard several testimonies from affected people claiming that the amount received was insufficient, and that the cash compensation provided did not correspond to replacement value. On different occasions the team asked about the costs of buying land and building a house in the surrounding areas which was comparable to the one that the PAPs had previously owned. The team was told that the cost of a housing plot on which the PAPs could build a traditional Maasai house (*enkaji*) a few kilometres outside of Naivasha was substantially higher than the compensation amounts awarded to the PAPs. This may have made the PAPs vulnerable and placed some of them at risk of impoverishment, even if they were not poor before. The EIB-CM takes note of the comments of the Bank's services indicating that Naivasha may not be a good benchmark for comparing the prices of the land previously inhabited by the PAPs as prices in Naivasha are distorted due to the fact that it is an urban settlement, a very active market town and a popular tourist destination. The PAPs informed the investigation team that the level of the cash compensation was not determined on the basis of consultations, and was disclosed to them only in August 2014, a few weeks before they had to relocate. The investigation team was told that some of these PAPs were originally from other groups, such as the Turkana and Samburu, and had been there for a very long time (since the 1990s).
- 8.2.43 The investigation team inquired about the Ng'ati farm evictions of June 2013. A dispute over a Maasai settlement on the Ng'ati Farm had been going on for over 20 years. While a court order awarded the Maasai part of the land of the Ng'ati Farm, the Maasai allegedly failed to leave other parts of the Farm. According to the documents, negotiations took place prior to the evictions, and failed because the Maasai had insisted that Ng'ati Farm matched the compensation offered by KenGen under the Olkaria IV Project, which was refused. After the evictions were carried out, it was confirmed that 13 households covered by the RAP were adversely affected. According to the EIB's services, the event did not have a direct relation to the project, as the evictions were carried out by a private entity for reasons that were not related to the project. Consultations were held between the Government of Kenya and various stakeholders and it was agreed that the 13 PAPs would be resettled as part of the Olkaria IV RAP and would be compensated accordingly. The investigation team was told that the Government had awarded them a minimum of KES 50 000 in compensation to cover for the loss of property.
- 8.2.44 A third category of vulnerable PAPs are women, especially widows and single mothers. According to project documents, it has been estimated that 20% of the displaced people include vulnerable widows, single mothers and/or female-headed households. The team believes that a disproportionate number of those removed from the group eligible for resettlement assistance in the 2013 validation exercise were among the most vulnerable (widows, widowers, single mothers and one-person households), which as mentioned earlier, gives credence to the complainants' claim that some of the most vulnerable were impoverished by the resettlement. Several persons in this category were declared ineligible for resettlement assistance in 2013 on the grounds that they had migrated into the affected villages recently and/or did not own a house or did not have land rights.

- 8.2.45 The fourth category of vulnerable PAPs met by the investigation team is the disabled. During the eligibility mission, the team met a disabled woman whose new house was located on a hilly plot and she could not easily access the road or the latrine. During the investigation mission two months later, some construction was ongoing to help improve the situation, but the disabled person could not explain what the plans were.
- 8.2.46 Concerning claims of children dropping out of school, the investigation team learned that a Welfare Society had been established to assist the poorer families of the community who are in distress due to the loss of employment, severe illness, death of a breadwinner, etc. In this context, the Welfare Society later agreed to pay 50% of school fees for poor families that could not afford them. The other families are expected to cover school fees on their own, provided that they are able to re-establish their income-generating activities on the RAP land.
- 8.2.47 While the investigation team was conducting its investigation, it was informed that, on 6 April 2015, a teenage girl from Narasha primary school had drowned in an injection well of water pumped from the new plant of Olkaria I. The EIB-CM transmitted this information to the EIB's monitoring services for follow-up with KenGen.
- 8.2.48 The investigation team heard reports from PAPs of adverse impacts on the livelihoods of the most vulnerable, including food shortages, distress sales of cattle to meet subsistence needs, and loss of income because of reduced opportunities for selling handicraft items to tourists. Pastures available on the RAP land are very poor and, without investments to improve the productive capacity of the resettlement site, PAPs depending on pastoralism are likely to sell cattle out of distress and have declining incomes and livelihoods.
- 8.2.49 *(ii) Pastoralism and productive potential of the RAP land:* in accordance with the World Bank Policy, the project budgeted and planned for compensation on a "land-for-land" basis. As indicated in 8.2.11, the "land-for-land" principle is a positive, development-oriented compensation option for the involuntary resettlement of rural populations. Similarly, the principle of project investment resources being budgeted for better standards of living in terms of the quality of schools, roads, access to electricity, improved hygiene conditions, community social halls and the provision of health services is an excellent model which is consistent with the World Bank Policy.
- 8.2.50 The investigation team notes that the population of three of the four displaced Maasai villages (Olo Mayana Ndogo, Olo Nongot and Olo Sinyat) is mainly pastoralist, with cattle providing subsistence security (milk, meat, and blood) as well as cash income (sales of animals, milk, meat and hides). According to the socio-economic baseline survey conducted by GIBB Africa, in 2009 there were some 5 400 cattle and over 18 000 goats and sheep in these three villages⁴⁰. In the fourth village (Cultural Centre), livestock plays a secondary role, but 30 PAPs households still had 191 cattle and 1 031 goats and sheep.
- 8.2.51 The EIB's services indicated during the consultation phase to the EIB-CM that, in terms of the grazing land, it was agreed between KenGen and the PAPs that their old grazing grounds could continue being used as normal, save for areas featuring land-use change (carrying now infrastructure). According to the EIB's services this was deemed an appropriate solution by all lenders and GIBB's scope was compatible with said understanding. Lenders have been following the implementation of this agreement as well

⁴⁰ RAP (2009), Volume II, Annex 9, Livestock Number at Household Level for PAPs.

as that PAPs practiced their right to graze on their former lands, including maintaining passage rights. The lenders were also aware that the PAPs have felt unhappy over not receiving in writing confirmation of such passage and use rights, but the Bank's services appreciate the Promoter's constraints in delivering as much owing to zoning/land use regulations in place for the park they are obliged to observe – hence the tacit endorsement of the PAPs' use & passage rights alone.

- 8.2.52 The investigation team notices that the project does not document a comparative analysis of the suitability of alternative sites for pastoralism. According to GIBB Africa, the indicators used for carrying capacity were based on a wider area than the actual RAP site. The investigation team observed during its field visit that the pastures available on the 1 700 acres is very poor and the topography includes steep ravines or gullies scoured by seasonal flash floods. It was also noted that the resettled Maasai communities are for the most part unable to maintain milk cows, calves and small livestock (goats and sheep) close to their homes, mainly due to the poor pasture and steep and unsuitable topography, unless investments to improve productive potential are made.
- 8.2.53 A recent Strategic Environmental Assessment (SEA) of the area conducted for KenGen confirms that there was no adequate assessment of the suitability of the RAP land for livestock production and pastoralism in general. The experts of the investigation team observe that the SEA considers that: *"there is little information on the intensity of grazing, potentially overgrazed areas and availability of land in and around the programme area, so this impact has not been adequately addressed in the ESIs and RAPs prepared to date"*⁴¹. It adds that the *"main weakness of the RAP was the lack of a sustainable grazing strategy, including the areas used by each community in wet and dry years, the intensity of the grazing, the carrying capacity of the environment, etc."*⁴²
- 8.2.54 As indicated in 8.2.51, when the 1 700 acre resettlement site was accepted as equivalent to the 4 200⁴³ acres of land impacted by the Olkaria IV, it was assumed that the PAPs could continue to graze cattle in the acquired area not occupied by facilities⁴⁴. The investigation team notes that the requirement of equivalence stipulated in the World Bank's Involuntary Resettlement Policy is to be considered on the basis of the land's quality in terms of *"productive potential"*⁴⁵.
- 8.2.55 According to the independent experts of the investigation team, the RAP land cannot be considered to be equivalent in quality to the land where the PAPs were previously located. In addition, although the relevant livelihood-related data had been gathered by GIBB Africa, these appear not to have influenced (i) the resettlement site choice or (ii) the design of income-generating schemes, either by ensuring the continuation of existing activities or innovating new activities. The data also show that in the three PAPs villages where pastoralism is most important (Olo Nongot, Olo Sinyat, and Olo Mayana Ndogo), 30% of PAPs who owned more than 100 cattle could be classified as wealthy pastoralists in

⁴¹ SEA (2015), page 26.

⁴² SEA (2015), page 29. See also, page 391: *"local communities have complained that pasture in the areas developed by KenGen is more difficult to access and that there is less pasture in total, and (...) there might be conflicts (...) if the grazing areas of different communities overlap or if farmers and pastoralist communities are expected to share the same area. The relocation of several communities on the same area can potentially lead to overgrazing."*

⁴³ According to the EIB services, *"the reference of 4.200 acres is not reliably reflecting reality. The 4 villages' actual footprint was, in fact, much smaller, at 85 acres. In contrast to this, the land awarded under the RAP concerns 1500 acres, as well as a further 200 acres serving communal facilities"*.

⁴⁴ RAP (2012), para. 1-5.

⁴⁵ See, OP 4.12, para. 11 and para. 6(b) (ii).

Maasai terms⁴⁶. In terms of Tropical Livestock Units (TLUs), average household herds are 14.97 TLUs per capita⁴⁷, which demonstrates that the community is heavily dependent on livestock for their livelihoods when compared to other pastoral economies in Kenya, including other Maasai communities⁴⁸.

8.2.56 The independent experts note that, if the project had done a proper assessment of rangeland conditions on the RAP land, it could have considered some options enabling the PAPs to cope with the gap in grazing land quality⁴⁹. If the project had helped improve the productivity of the land, the size would have been irrelevant and its equivalence secured since this is measured in terms of the capacity of the land to maintain livestock. As there were no investments to increase productivity in order to meet the requirements of the Policy, then the area should have at least been the same size. The failure to take pastoralism into account when designing the resettlement operation, especially having surveyed the numbers of animals owned by PAP households, renders the project culturally and economically problematic for the Maasai community.

8.2.57 *(iii) Tourism and decrease in income-generating opportunities (Cultural Centre).* The Cultural Centre location was a tourist attraction partly because it was a living Maasai village where visitors could observe traditional Maasai homes, livestock and domestic life. Of those who depend on the Cultural Centre for their livelihood, the men work mainly as tour guides in the lower Ol Njorowa Gorge and Hell's Gate National Park and the women sell handicraft items to tourists. Today, it is mostly vacant because of the relocation to the RAP land. The project documents do not seem to have accounted for the impact of the vacant village on tourism and on the livelihood of this community.

8.2.58 The project assumed that the livelihood of PAPs depending on tourism would not be negatively affected if transport was provided between the Cultural Centre and the RAP land by using the 60-seater bus⁵⁰. The decision of the PAPs to lease the bus to a private company because they were unable to afford the maintenance and operating costs, including fuel costs, the hiring of an experienced driver, insurance payments, etc. is perceived as a wise business decision made in anticipation of the income that will be used to purchase, operate and maintain minibuses – the first one for the Cultural Centre, the most affected village and, in the future, one each for Olo Mayana, Olo Nongot, and Olo Sinyat. The purchase of the first minibus was expected in March 2014 but it was postponed to the third quarter of 2015. Until that time, many people in the Cultural Centre village will have lost revenue with resulting impoverishment over the 10-month period.

8.2.59 The project cannot be faulted for failing to ensure a means of transport to maintain accessibility to jobs, since it provided the community with a 60-seater bus. However, it has failed to ensure suitable assistance for the operation and maintenance of this bus during a transition period and until the PAPs' livelihoods are restored.

⁴⁶ This section is based on analysis of the data provided in Annex J, ESIA (2010).

⁴⁷ A TLU is a common conversion unit that is used for calculating herds with different livestock species. As defined here, 1 TLU = 1 head of cattle or 10 goats and sheep.

⁴⁸ McPeak, John, Peter D. Little, and Cheryl Doss (2012): *Risk and Social Change in an African Rural Economy: Livelihoods in Pastoralist Communities*. London and New York: Routledge; B. Butt. Seasonal space-time dynamics of cattle behavior and mobility among Maasai pastoralists in semi-arid Kenya. *Journal of Arid Environments* 74 (3), pages 403-413.

⁴⁹ According to the independent's experts, such options could have included range restoration work such as anti-erosion structures, grass planting, fodder/feed planting using irrigation and fertilizers, rotational grazing and tree planting. Until productivity is improved, supplies of fodder/hay could be provided to PAPs households to compensate for the lack of grazing for sedentary milk herds and calves. The Project could have also looked at other nearby areas where the PAPs could graze their milk cows/calves and other animals. Such measures could have been consulted with the PAPs as well as with a trained Range Ecologist.

⁵⁰ Kenya Electricity Expansion Project (KEEP), IDA Credit 4743-KE. IDA Implementation Support Missions. 17 – 19 December 2013, 11 January and 10 February 2014. Aide Memoire, page 201.

- 8.2.60 **(iv) Livelihood restoration, transitional assistance, and benefit-sharing opportunities:** as noted earlier, the project appears to have underestimated the importance of pastoralism for the PAPs' livelihoods. The 2010 ESIA conducted by GIBB Africa considers that *"the cultural environment of the project site is mainly influenced by the Maasai community living in the project area. They are pastoralists and keep cows, goats and sheep as the main source of their livelihood."*⁵¹ The investigation team noted that income diversification (multiple streams of income) is very important for the household welfare of the PAPs. Nevertheless, the dependence on income generated from their traditional pastoralist activities is still central to their livelihood. The PAPs indicated to the investigation team their concerns about the future of pastoralism and grazing on the RAP land. This also appears widely in the minutes of different community meetings.⁵²
- 8.2.61 The independent experts of the investigation team note that the data relating to the sociocultural characteristics of the PAPs gathered by GIBB Africa appear not to have influenced the design of income-generating schemes, either by ensuring the continuation of existing activities or innovating new activities. An important missing element is the failure to take into account the specific socio-economic responsibilities of the men in the late-teens-to-middle-adulthood group which take them out of the villages to tend cattle on distant ranges for most of the year. GIBB Africa's 2009 baseline study provides a comprehensive set of data as required by the Involuntary Resettlement Policy, but it does not cover the entire PAP community.
- 8.2.62 The Project did not take account either of the impacts of a seemingly benign decision. During a RAPIC meeting, it was proposed and agreed with the PAPs that they would utilise the transitional allowance to cover the cost of connecting PAP houses on the RAP land to the national electricity grid. This allowance is an Involuntary Resettlement Policy requirement to support and assist the PAPs for a reasonable transitional period while restoring their livelihoods and standards of living after relocation, in addition to other compensation measures. While the amount seems small (KES 35 000 per household),⁵³ it was important to support the PAPs, especially the more vulnerable ones, over the transition period until their livelihoods were restored.
- 8.2.63 Subsequently, the SEA reported that the PAPs had complained that KES 35 000 was insufficient to help with their transition. The PAPs requested that the amount be increased to enable them to buy food for three months while finding other means of generating income on the new site. A figure of KES 300 000 was considered to be adequate.⁵⁴
- 8.2.64 Concerning training offered to PAPs to help them learn new or alternative means of income generation, KenGen informed the investigation team of a capacity-building programme for members of RAPIC and the different committees, including training in management skills, community development, accounting and civic issues. KenGen also pointed out that there was training to identify community-owned projects specific to the different villages (e.g. enabling the Cultural Centre to develop a vision specific to tourism). In the same

⁵¹ ESIA (2010), page 3-47.

⁵² The Olo Sinyat community voiced concerns that *"the resettlement terrain is not conducive."* See: Minutes of a meeting at Olo Sinyat, 24 February 2012, page 4.

⁵³ KES 35 000 is the equivalent of USD 360 (rate at 9 June 2015). The transitional allowance was awarded to *"assist in logistical costs for the move to the new areas of residence."* See RAP (2012), page 8-13.

⁵⁴ SEA (2015), page 390.

discussion, KenGen emphasised that the RAP did not create a situation where people required new income-generating schemes to sustain or improve their previous livelihood standards, contrary to the findings stated earlier.

- 8.2.65 According to documents received in the field, KenGen offered employment to PAPs. However, the PAPs argued that there was widespread disappointment about the actual availability of such opportunities. KenGen informed the investigation team that, by January 2015, eleven PAPs had been hired on a permanent basis and, in 2014, KenGen had hired another nine people on a 3-year contract. KenGen also indicated that 21 PAPs were employed under shorter-term contracts (3 months) from 2010 to February 2013. KenGen mentioned that during the construction phase there had been many more temporary jobs, and that they had encouraged their contractors to hire PAPs.
- 8.2.66 KenGen also explained that it is providing scholarships, on a yearly basis, to four children from the community. The best of the children in primary school is sponsored for secondary school, and the best of secondary school for university. Upon graduation, this student will automatically be offered a position at KenGen.
- 8.2.67 In this context, the World Bank's Involuntary Resettlement Sourcebook – Planning and Implementation in Development Projects, which emphasises that *"resettlement plans should be conceived as development opportunities,"* states that *"a narrow emphasis on compensation for lost assets or mitigation of adverse impacts leads planners to overlook significant development opportunities."* It further states that *"with careful and participatory planning, opportunities can be identified for the affected people to derive project-related benefits or to capitalize on opportunities to improve their incomes or productivity."*⁵⁵ The Sourcebook indicates that project-related benefits typically include *"access to resources, employment in the project, or a share of its revenues."* It considers that such opportunities can directly contribute to the restoration of income streams.⁵⁶
- 8.2.68 Scope remains for investing in improvements to the productive capacity of the RAP land, and in schemes for alternative income generation. The team indicates that opportunities for project-related benefits can still be considered and implemented, and these could contribute to the restoration of livelihoods as required by World Bank policy.

Compliance with the WB Policy

- 8.2.69 **The lack of sufficient attention and assistance to vulnerable PAPs, who require particular consideration as they are below the poverty line, widows and the disabled is in non-compliance with OP 4.12 (paragraph 2c and paragraph 8).**
- 8.2.70 **The lack of investments in the RAP land in order to improve its productive potential and in livelihood restoration measures is adversely affecting the PAPs' efforts to bridge the gap in their livelihoods between the time of their relocation and the time those livelihoods can be restored, and is in non-compliance with OP 4.12 (paragraph 6a and c).**

⁵⁵ World Bank, Involuntary Resettlement Sourcebook – Planning and Implementation in Development Projects, 2004, page xxvii.

⁵⁶ World Bank, Involuntary Resettlement Sourcebook – Planning and Implementation in Development Projects, 2004, page 171.

d) *Effectiveness of the Grievance Complaints Handling Mechanism and public consultation***Allegation:**

- 8.2.71 The complainants expressed their lack of trust in the Grievance Complaints Handling Mechanism process established for the project. Some members of the Council of Elders also alleged that this grievance mechanism conflicts with the Maasai culture, as the decisions of the RAPIC supersede those of the Elders. The complainants had also made references in their allegations to the poor consultation process during the implementation of the RAP. The investigation team examined these allegations together.

World Bank Policy statements

- 8.2.72 The World Bank Policy calls for the establishment of appropriate and accessible grievance redress mechanisms, and the preservation of the existing social and cultural institutions of the displaced persons⁵⁷. It also requires that the social and cultural characteristics of the target population be taken into account, including the formal and informal institutions, "ritual groups" and community organisations that may be relevant to the consultation strategy and to designing and implementing resettlement activities⁵⁸.
- 8.2.73 The Involuntary Resettlement Policy (OP 4.12) also stipulates that PAPs should be meaningfully consulted and have opportunities to participate in planning and implementing resettlement programmes.⁵⁹ The Policy also states that a draft resettlement plan must be made available at a place accessible to displaced persons and local NGOs, in a form, manner, and language understandable to them.⁶⁰

Findings

- 8.2.74 Concerning the Grievance Complaints Handling Mechanism (GCHM), in September 2012, the project created the Community Advisory Council (CAC), which includes two Elders from each of the four villages. According to the 2012 RAP, the CAC "*will advise the PAPs and RAPIC on matters of transfer of title to the PAPs*" and will "*assist in advising the RAPIC on other culture issues such as handling of graves.*" The 2012 RAP adds that "*the full Council of Elders in each of the three settlements will be actively involved in the proposed Grievance and Conflict Handling Mechanism.*" The 2012 RAP describes the village-level Council of Elders as a first step in Grievance Complaints Handling Mechanism (GCHM), after which, if not resolved, the grievance is passed on to RAPIC.
- 8.2.75 The GCHM includes three other levels. The second level is RAPIC itself (which may be a conflict of interest since decisions are taken by RAPIC). The third level was to be an agreed-upon "*independent external arbiter, e.g. The Kenya Institute of Arbitration, or, as suggested by the PAPs, NGOs such as the International Community Rights Organisation (ICRO) or representatives from the group of lenders such as the World Bank, to be contacted by RAPIC, through its Secretary.*" The fourth level is the Kenyan judiciary. The investigation team notes that despite problems encountered by the PAPs, there is no evidence that PAPs utilised the GCHM to its full extent. The investigation team was told by complainants, who had been made aware of the grievance mechanism, that they did not use it because of lack of trust in it.

⁵⁷ OP 4.12, para. 13.

⁵⁸ OP 4.12, Annex A, para. 6(b) (iv).

⁵⁹ OP 4.12, para. 2(b).

⁶⁰ OP 4.12, para. 22.

- 8.2.76 RAPIC is composed of five representatives elected from each of the four villages (including at least two women from each village). It also includes a youth and a vulnerable group representative, as well as one representative of the Cultural Centre Management Committee and a Maasai Elder. The total number of community representatives on the RAPIC is therefore 24. A KenGen team and the relevant line Ministry representatives are also members of the RAPIC. The RAPIC is chaired by the Deputy County Commissioner and is supported by a Secretary, appointed from KenGen staff, specifically designated to handle the RAPIC's administrative functions. The RAPIC was presented to the Naivasha Deputy County Commissioner at a round table meeting held on 30 April 2012.⁶¹ It was formally launched on 11 June 2012. RAPIC is therefore a well-intentioned effort to achieve a broad representation of the PAPs, covering women, youth, the Elders and the disabled, and is consistent with World Bank policy.
- 8.2.77 Concerning the consultation process, according to the 2012 RAP, the RAPIC is the mechanism which the project created to implement a social strategy for engaging beneficiaries in consultation and participation regarding project planning and execution. It entailed negotiations and decision-making between representatives of the PAPs and KenGen and local Government officials. The RAPIC is the channel used for consultation with PAPs, disclosure of the RAP, participation in the census validation, decision-making regarding eligibility for resettlement assistance and compensation, the choice of the resettlement site, approval of housing designs, the alternative use of the transitional allowance, and other functions.
- 8.2.78 As early as December 2012, some PAPs expressed their distrust of the RAPIC.⁶² An adversarial relationship had evolved over time between KenGen and the RAPIC vis-a-vis a group of PAPs and the Elders. The sidelining of the existing traditional, social and cultural institutions of the PAPs could be considered as the root cause of the tension. Elders told the investigation team that they lacked trust in the RAPIC and felt powerless to influence the resettlement process because *"they are not listened to."*
- 8.2.79 The RAPIC includes some members who belong to a group of wealthier, educated and multilingual PAPs, who seem to have more influence than other PAP representatives.⁶³ It is also noted that university-educated government and implementing agency officials are serving on the RAPIC. As a result, there appears to be opportunities on the RAPIC for undue influence to be exercised by some groups over others.
- 8.2.80 Furthermore, the RAPIC is a novel mechanism, unfamiliar to Maasai culture, which does not take sufficient account of the traditional authority structure of the strongly male-oriented age-graded Maasai society.⁶⁴ By including only one Elder, the RAPIC structure bypassed the traditional authority of the Maasai, the Elders, who are invested with legitimate powers of decision-making and conflict resolution. Age grades and their specific socio-economic, political, juridical and spiritual roles in Maasai culture are not mentioned in the RAPs, and this had a negative effect on the design of the resettlement planning and implementation processes. The RAPIC structure had the unintended consequence of marginalising the Elders of each village and undermining their traditional role and authority, instead of incorporating them into the resettlement process.
- 8.2.81 In addition, most consultations were performed in Swahili, while most resettlement-related reports were distributed in English. The independent experts' review of the baseline data

⁶¹ RAP (2012), page 10-2.

⁶² World Bank BTOR on acceptance of land by PAPs, 21 December 2012.

⁶³ Annexes to the ESIA (2010). 51% of household heads and spouses had no education, while 22% had some level of primary education, 12% had some level of secondary education, 8% had some level of technical training at a technical training institute, and only 3% had attended university.⁶³ Data shows that an additional 4% did not provide any information.

⁶⁴ For example, women traditionally do not participate in meetings when men are present and young people traditionally do not speak when Elders are present.

shows that a great majority of adult Maasai PAPs are effectively monolingual, speaking only the Maa language even if they have some knowledge of Swahili. The PAP community has a very low level of education and pursues a mainly pastoral livelihood in remote rural rangelands. Experts note that Maa is a Nilotic language with considerable tonal complexity and a unique grammatical structure that differs significantly from Swahili. The Swahili language does not include many of the different nuances possessed by the Maa language with regard to critical issues of importance for the PAPs, including land, livelihood, livestock and ecology. Therefore, the reliance on Swahili in consultations with the local community was not conducive to meaningful consultations.

8.2.82 The apparent lack of communication between the RAPIC and the PAP community, and the non-reliance on the Maa language in the consultation and disclosure processes may explain why community members seemed unaware of different aspects of the resettlement. Such aspects include the different levels of the grievance mechanism; the decision that furniture was not to be provided in houses on the RAP land; the fact that the identification picture taken of each PAP during the 2009 census did not mean that they would necessarily receive a house; and the fact that there would be costs and responsibility associated with maintaining the houses and the community water supply.

8.2.83 By creating the Stakeholder Coordinating Committee on 14 March 2012, the project responded to the need to include the wider Maasai community, thereby mitigating intra-community tensions. The creation of this Committee was adequate and timely. According to the "Management Response", the broad mandate of the SCC is to liaise with KenGen on behalf of the Maasai community in the broader Naivasha area, on (i) casual employment opportunities; and (ii) issues relating to the environment outside of the RAP.

Compliance with WB Policy statements

8.2.84 The establishment of the RAPIC appears to be a well-intentioned effort to achieve broad representation of the PAPs and is in line with the World Bank Policy.

8.2.85 Nonetheless, there are serious shortcomings in achieving meaningful consultations and inclusive participation in the project resettlement activities which are in non-compliance with OP 4.12 (paragraph 2b) due to the ineffective communication with the community, the sidelining from the RAPIC of the traditional authority structure of the Elders, the non-utilisation of the Maa language during consultations, and the failure to disclose documents to the affected community in a place accessible to them and in a form, manner and language understandable to them.

e) Retaliation

Allegation:

8.2.86 The EIB-CM received testimonies from at least two people alleging that there had been retaliations against them because they had complained to the EIB-CM and the WB-IP. They expressed fear of further retaliation.

Findings:

8.2.87 During its field visit, the investigation team met with a person who has a visible connection to the enquiry and who feels strongly that his remunerated position was terminated as a result. None of the project or local officials that the team met appeared to be aware of this

and indicated that the person concerned had resigned from his position. The investigation team could not find any conclusive evidence in writing to substantiate either of the two contradictory positions.

8.2.88 In December 2014, the EIB's services sent to the EIB-CM several documents from KenGen and the RAPIC members related to the allegations. Amongst the documents, there was a letter from the RAPIC and CAC members to the lenders responding to some of the issues that had been raised by the complainants. This letter is dated 23 October 2014 and the EIB-CM was informed that it had been emailed by KenGen to the EIB's services. This letter concluded by naming one of the complainants as the instigator of the letters inviting the EIB-CM to visit to the site to investigate the issues summarised in this report.

8.2.89 During the course of this investigation, the EIB-CM asked the EIB's services and KenGen for a copy of the signed document (which apparently included the signatures of ALL members of the RAPIC and the CAC). The EIB-CM did not receive a copy of the signed letter. In the memorandum submitted to the EIB-CM in June 2015, KenGen indicated that the PAPs' representatives in the RAPIC had declined to sign the draft RAPIC response because of, *inter alia*, the persistent intermittent water supply situation on the RAP land and not for any other reason such as threats or coercion.

EIB-CM position

8.2.90 As indicated in the IAR, the EIB-CM would like to emphasise, for the benefit of all the parties, and without taking any particular stand on the allegations raised at this early stage, that the international accountability mechanisms are part of the overall structure for resolving conflicts and grievances relating to projects that the EIB finances. It is certainly very sensible for international lenders, such as the EIB, to establish effective grievance resolution mechanisms at project level and to give preference to their use for conflict resolution, whenever possible; however, if for whatever reason the affected people contact international grievance offices, this right should be respected without exerting any type of pressure.

f) Supervision

World Bank Policy statements

8.2.91 The World Bank requires the borrower to monitor and evaluate adequately the activities set out in the RAP. The Policy further requires that, for highly risky or contentious projects involving significant and complex resettlement activities, an "*advisory panel of independent, internationally recognised resettlement specialists*" be engaged to advise on all resettlement aspects, from the design to the monitoring of implementation⁶⁵.

8.2.92 The WB Policy also states that as part of the required socio-economic studies, the census survey should cover, *inter alia*, a description of the displaced households' production systems, the magnitude of expected losses, the extent of the physical or economic displacement, and information on vulnerable groups of persons. This should be

⁶⁵ OP 4.12, para 19, footnote 23

supplemented with means to update information on the displaced people's livelihoods and standard of living at regular intervals so that the latest information is available at the time of their displacement⁶⁶.

Findings

- 8.2.93 During the course of the investigation, it was noted that there was no effective, participatory monitoring system for ensuring that PAP communities are receiving benefits and livelihoods are not harmed. In addition, under the WB Policy, for "Category A" projects such as this one, an Independent Evaluation Panel (IEP) with internationally recognised resettlement expertise is normally engaged to advise on all aspects of the project relevant to the resettlement activities⁶⁷. The project provided for the recruitment of an IEP, which was appointed in April 2012, with "*extensive expertise and experience in: Social analysis, specifically in the context of Africa Region; Political and institutional analysis; Consultations and stakeholder participation*"⁶⁸. The IEP, composed of two members of an engineering consultancy company, was deemed to be non-performing and its contract was subsequently cancelled in 2014. A replacement was engaged in March 2015.
- 8.2.94 Therefore, and despite the efforts made by the promoter, the essential function of the IEP to provide advice from internationally-recognised experts on the design and preparation of resettlement operations which are complex and sensitive was not fulfilled. In addition, and while a baseline survey was conducted and socio-economic benchmarks were established by GIBB Africa for part of the PAP community in 2009, this data was never updated to cover the entire group of PAPs, nor was an adequate system established to allow KenGen, the RAPIC or the lenders to monitor the livelihood situation of PAPs.

Compliance with WB Policy statements

- 8.2.95 **The inadequate supervision of the project's resettlement activities, and insufficient monitoring (based on updated sociological data) of the PAPs' well-being and the restoration of their livelihoods to pre-displacement levels or better, are in non-compliance with the WB Policy on Involuntary Resettlement (OP 4.12 paragraph 24 and OP 4.12 paragraph 14).**
- 8.3 Other Issues: (i) issues related to the categorisation of the Maasai as indigenous people and its possible impact on the involuntary resettlement; (ii) impacts on cultural heritage; (iii) supervision of the resettlement process
- 8.3.1 During the course of this investigation, the team noted that the Indigenous Peoples Policy (IPP) of the World Bank had been applied by the World Bank management for certain components of the World Bank project as defined in the WB's appraisal report but that this was not the case for the Maasai community affected by the component which is the subject of this complaint. The other components affected indigenous communities in Kenya such as

⁶⁶ OP 4.12, Annex A, para 6(a)

⁶⁷ OPS 4.12, para 19, footnote 23

⁶⁸ RAP (2012), page 10-4

the Sengwer, Ogiek, Waata and Boni. As a result of the investigation, it was concluded that the WB should have triggered the application the IPP for this component of the project because the Maasai meet the criteria set out in its IPP.

- 8.3.2 Although the promoter is not contractually obliged to apply the WB IPP to the use of the EIB's loan, the content of this policy also has implications for the implementation of the involuntary resettlement programme as it provides stricter social safeguards for protecting the rights of the communities involved. It could then be said that the relevant parts of the IPP related to the resettlement process would have also influenced the involuntary resettlement framework mentioned in the EIB's Finance Contract⁶⁹.
- 8.3.3 A review of the EIB's Environmental and Social handbook in force at the time of the appraisal (2010) shows several references to the need to identify indigenous populations affected by the projects to be financed by the Bank. In particular the Handbook indicates *"There is no universally accepted definition of 'indigenous peoples'. The term is used in a generic sense to refer to those who are vulnerable because their livelihoods primarily depend on the customary use of unique land or natural resources in the project area. They have the following characteristics: close ties to the land of their forefathers and natural means of existence; identification with a particular cultural group and recognition by others as belonging to it; an indigenous language, often differing from the national language; primarily self-sufficient production; and the presence of social and political institutions determined by custom"*⁷⁰.
- 8.3.4 The handbook also emphasises, *"For projects supported by the EIB, dealing with such minorities requires particular attention to be given to their cultural rights to maintain control over ancestral territory and to secure access to culturally appropriate sustainable livelihoods"*. It continues, *"A focus on, for instance, indigenous groups... is a particular instance of the wider EU policies supporting social inclusion, non-discrimination and the rights of indigenous peoples expressed in the UN Human Rights Conventions. Where the presence of such minorities is evident, the Bank should ensure that appropriate arrangements for mitigating adverse impacts are put in place and that their customary claims are fairly addressed. This is a particularly difficult area often complicated by the approach of the State in the pursuit of either assimilation and integration policies, or the recognition of the rights of minority groups"*.
- 8.3.5 At the time of appraisal, the Bank therefore had the obligation to identify whether or not any indigenous communities were present that might be affected by the project. The Bank's documents that support the decision-making did not identify the presence of indigenous communities. The EIB-CM has not been able to find evidence that substantiate these views⁷¹. In subsequent exchanges with the Bank's services, the EIB-CM was informed that this matter was considered by lenders during the appraisal, although it was concluded that the consideration of indigenous was not triggered for this case based on the following reasons:

⁶⁹ EIB Environmental and Social Practices Handbook, Version 2 of 24/02/2010, page 112, "Where the Bank is one of a number of investment partners it may be possible to build on their existing social safeguard policy frameworks"

⁷⁰ EIB Environmental and Social Practices Handbook, Version 2 of 24/02/2010, page 112

⁷¹ EIB Social Assessment concerning the project dated 28 April 2010, page 19, identifies the presence of vulnerable groups but indicates *"no indigenous people present"*.

- a) At the time of the appraisal, in Kenya there were still ongoing constitutional processes over the determination of vulnerable groups and ethnic minorities and their protection. These processes had not concluded at the time of the appraisal.
- b) Already at the time of the appraisal, socio-economic analysis of the villages impacted confirmed that, although the populations met some of the 4 criteria of indigenous, their means of existence were not only natural and their production was not primarily self-sufficient. The Cultural Village on its own certainly does not fall into this category on the basis of its income-generation model. Also, several families had casual wage-earning members at the geothermal business.
- c) Last but not least, by the time of the appraisal the country was only emerging from the 2007-8 violent civil unrest which featured escalation of targeted ethnic violence. Tribal sentiments were still on the rise by 2010, hence the Lenders took this parameter also in consideration when reaching their decision on determining (or not) the PAPs as indigenous.

8.3.6 In light of all the above, the Lenders unanimously decided not to treat the affected persons as indigenous and not to trigger WB O.P. 4.10. Nevertheless, the Bank's services have indicated to the EIB-CM that "assessment of vulnerability and treatment of the PAPs as vulnerable people was introduced instead, with the resulting RAP being one that contains mitigating measures to this effect". In addition, the Bank's services pointed out to the CM that at the time of appraisal and until the drafting of the 2014 Natural Resources (Benefit Sharing) bill, still debated to this date in Parliament, there was never a discussion on benefit-sharing in a manner binding for Promoters in the geothermal business.

8.3.7 In this context, and whilst appreciating the political and economic sensitivities around this matter at the time of appraisal, the EIB-CM also notes that the Bank's policies are aimed at identifying elements that could distinguish a specific group or community as having particular "indigenous" characteristics. The "indigenusness" is not necessarily based on legal or official recognition and there are strong arguments that substantiate each of the characteristics defined in the Bank's handbook as spelled out in 8.3.3:

- ***Close ties to the land of their forefathers and natural means of existence:*** the entire central Rift Valley, from south of Lake Naivasha (including Olkaria) to Lake Baringo and the nearby plateaus in the north, was once part of the vast grazing lands which the Maasai controlled in the early nineteenth century. Researchers point out that Naivasha, due to its permanent supply of water for livestock, was traditionally Maasai land.⁷² In fact, different historical accounts suggest that Naivasha, including Olkaria, was the "*traditional heartland*" of Maasai territory.⁷³ Many Maasai continue to seasonally graze their cattle in the area.
- ***Identification with a particular cultural group and recognition by others as belonging to it:*** the Maasai in the project area identify themselves as an indigenous people and are also identified as such by international fora, including the United Nations and the African Union. The African Commission on Human and Peoples' Rights (ACHPR) of the African Union recognises that the Maasai of Kenya are "*examples of pastoralists who identify as indigenous peoples.*"⁷⁴ Maasai were

⁷² Chege, Ruth W., I. Tarus, and D. Nyakwaka (2015), Lake Naivasha, the Maasai and the British in the making of Naivasha Town, 1850-1911. *Journal of International Academic Research for Multidisciplinary* 3(1): 142-162, page 143.

⁷³ King, Kenneth (1971), The Kenya Maasai and the Protest Phenomenon, 1900-1960. *Journal of African History* 12 (1): 117-137, page 121.

⁷⁴ Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa, 2006, Banjul, the Gambia, page 10.

represented at meetings for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁷⁵ for which Kenya hosted a meeting and provided one of the special background reports.⁷⁶ The Maasai have also been recognised as indigenous people by several international and national civil society organisations.⁷⁷

- **An indigenous language, often differing from the national language:** the indigenous language of the Maasai is Maa, which is a Nilotic language with considerable tonal complexity and a unique grammatical structure that differs significantly from African Bantu languages.⁷⁸ The majority of adult Maasai PAPs are effectively monolingual, speaking only the Maa language.
- **Primarily self-sufficient production; and the presence of social and political institutions determined by custom:** the Project's 2010 Environmental and Social Impact Assessment (ESIA) documents the cultural resources of importance for the Maasai in the general area.⁷⁹ According to the team experts, such cultural resources include the Ol Njorowa (or Orjorowa) Gorge, sacred caves that have been used for initiation rituals and other ceremonies, and deposits of ochre (red and white clay) that are used for Maasai cultural practices and personal adornment. Furthermore, as is typical for the Maasai, the PAPs' villages depended to a large extent on pastoralism. Their cattle provide subsistence security (milk, meat, and blood) as well as cash income (sales of animals, milk, meat, and hides).⁸⁰ Their residence units (*enkaji*) have their own, distinct lay-outs. Furthermore, the PAPs rely on customary leadership institutions, such as the Elders, which provide ritual and political leadership in the strongly male-dominated and age-graded Maasai political system.

8.3.8 The implications on the resettlement plans resulting from the non-consideration of the Maasai as indigenous people can be summarised as follows:

- **Insufficiently informed consultations and broad community support.** Although the community broadly supports the project, this support was not achieved as a result of free, prior and informed consultations as the Policy requires. Interviews with members of the local community were not conducted in Maa, the local language of the community, but in Swahili, and project materials were not translated into Maa language. Therefore, not all members of the indigenous community had the opportunity to express their support (or not) based on informed consultations, and this could have had the implications discussed in more detail above.
- **Cultural compatibility of resettlement.** The pastoral ways of the indigenous community, their attachment to their land and ancestral territory, and its resources (including grazing and water resources for cattle) and its importance for their livelihood and culture were not carefully analysed and considered during the project design and implementation phases. The Policy required the preparation of a resettlement plan with the greatest care and attention to compatibility with the cultural preferences of the community. This had important implications for the implementation of the RAP.

Benefit-sharing from the commercialisation of natural and cultural resources. The World Bank's OP 4.10 requires that arrangements be made to enable indigenous

⁷⁵ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly on September 13, 2007.

⁷⁶ Stavenhagen, Rodolfo (2006), Mission to Kenya. UN Doc. A/HRC/4/32/Add. 3, 26 February 2007.

⁷⁷ Such organisations include the International Work Group for Indigenous Affairs (IWGIA), the Centre for Minority Rights Development, the Maa Civil Society Forum, the Mainyoto Pastoralist Integrated Development Organisation (MPIDO), the World Initiative on Pastoralism, and the Kenya Pastoralists Network.

⁷⁸ Mol, Frans (1972), Maa: A Dictionary of the Maasai Language and Folklore. Nairobi: Marketing and Publishing, Ltd.

⁷⁹ Environmental and Social Impact Assessment (the "ESIA"), (2010), page 3-49.

⁸⁰ Data from GIBB Africa indicate that in 2009 there were over 5 500 cattle and over 19 000 goats and sheep in the PAP villages. RAP (2009), Volume II, Annex 9, Livestock Number at Household Level for PAPs.

peoples to share equitably in the benefits to be derived from commercial development of natural resources on lands or territories that they traditionally owned, or customarily used or occupied, and that, at a minimum, arrangements ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation, and rights to due process.⁸¹ An Indigenous Peoples Plan (IPP) for the Maasai would have created an opportunity for due process for developing benefits that the community could claim even under the absence of a national regulatory framework as pointed by the EIB sieves to the EIB-CM as indicated in paragraph 8.3.6. Under the World Bank's Indigenous People Policy, in the case of commercial development of natural and cultural resources, sharing in the revenues of a project is of great importance.

- **Maasai-specific expertise.** Local experts on Maasai culture and pastoralism and well-qualified Maa-speakers were not involved in the project. No serious attempt was made to tap into the network of specialised individuals and organisations based in Kenya, and this oversight may have led to the omission of measures that could have prevented some of the damage that will be described in the subsequent chapters.

8.3.9 Concerning allegations about cultural heritage impacts collected during the investigation, the EIB's Environmental and Social Handbook makes several references to the need to identify cultural heritage sites and mitigate potential impacts. In this regard, it is noted that resources that are important for Maasai culture and cultural practices are located in the general area and were documented in the 2010 ESIA.⁸² GIBB Africa informed the investigation team that during its survey, it geo-referenced important cultural sites. These cultural resources include the Olo Njorowa Gorge, sacred caves used for initiation rituals and other ceremonies, and deposits of ochre (red and white clay)⁸³ that are important for Maasai cultural practices and personal adornment. They also include the Cultural Centre village, as it serves as a site of cultural significance for the Maasai to share their traditional ways and cultural identity with tourists.

8.3.10 The 2012 RAP states that access to the physical cultural resources will be maintained.⁸⁴ The Entitlement Matrix for the PAPs in the RAP refers to loss of access to the caves as well as red and white soil of cultural/historic value, and notes that compensation would be considered after further discussion.⁸⁵ During its visit, however, the investigation team observed that the Gorge and sacred caves are not impacted by the Project and the community currently has the same access to them as before. Regarding the Cultural Centre, the PAPs and KenGen agreed to maintain the village for tourism purposes. The "Management Response" states that the Centre would remain at its current location, with all its structures being retained, and that the PAPs would receive a communal title for the 14 acres donated by KenGen.⁸⁶

8.3.11 Concerning the graves located in the project-affected area, it was assessed at the time of appraisal that compensation for the loss of access to existing graves should be determined as part of the compensation package.⁸⁷ Some community members requested

⁸¹ OP 4.10, para. 18.

⁸² ESIA (2010), page 3-49.

⁸³ The ochre deposits are located in Narasha, which is outside the area affected by Olkaria IV.

⁸⁴ RAP (2012), page 8-8.

⁸⁵ RAP (2012), Table 8-8, page 8-17.

⁸⁶ Management Response, page 15.

⁸⁷ Kenya. Proposed Electricity Expansion Project. Preparation Mission, 16-26 February 2010. Appraisal Mission, 1-10 March 2010. Aide Memoire, page 27.

compensation for the graves they had to leave behind due to the resettlement,⁸⁸ and compensation was awarded. During the site visit, access to the graves was not raised as an issue of continued concern to the community.

- 8.3.12 It can be concluded therefore that the **resettlement plan took due consideration of the cultural heritage impacts**. Looking ahead, since important archaeological sites have been excavated nearby at Gilgil, Elementaita, and Hyrax Hill (near Nakuru town) by the National Museums of Kenya, the project should revisit the issue if important archaeological sites are found in the project area.⁸⁹

8.4 The role of the Bank in appraising and monitoring the involuntary resettlement issues and the Resettlement Action Plan

- 8.4.1 The Bank's documents for decision-making identified the risks associated with the resettlement as one of the key issues of the project: *"The most significant outcome of the [ESIA] studies have identified the need to resettle a number of Maasai households, and a Resettlement Action Plan has been established, which was developed together with the participation of the project-affected communities... The RAP will be implemented according to WB guidelines"*⁹⁰. On this point, the Bank's services indicated that *"two whole Maasai villages (Olo Nongot and Olo Singat), part of another village (Olo Mayana) and a cultural centre located within the area earmarked for expropriation will need to be resettled"*⁹¹. It indicated that the RAP had been developed and disclosed but also pointed out, *"it is not yet finalised as additional compensation for the loss of access to graves is still being discussed with the communities. In addition, the final relocation site still needs to be decided upon, depending on the availability of a consensus on compensatory land"*⁹².
- 8.4.2 This project was appraised and monitored by the Bank under the pilot phase of the Mutual Reliance Initiative (MRI), a cooperation arrangement between the EIB and the French and German development finance institutions, Agence Française de Développement (AFD) and Kreditanstalt für Wiederaufbau (KfW), respectively. Under an MRI arrangement, one of the institutions is appointed Lead Financier, and it takes the leadership in appraising/monitoring certain aspects of the project on behalf of the three EU International Financial Institutions (IFIs). For the Olkaria project, AFD was appointed Lead Financier. At the appraisal stage, it was decided that the assessment and monitoring of the social impacts of the Olkaria project was one of the areas of expertise delegated by the EIB to the AFD. All the EU IFIs adopted the World Bank's policy framework for land acquisition and involuntary resettlement as the benchmark for requesting KenGen to design and implement the RAP.
- 8.4.3 The MRI arrangement significantly limited the role of the EIB in the appraisal and initial assessment of social impacts. For instance, the EIB's social expert did not participate in the appraisal mission and did not participate in subsequent site visits with the other EU lenders (i.e. AFD environmental and social review mission of September 2010 and the AFD RAP

⁸⁸ The December 2012 BTOR refers to the concerns about the ongoing discussion on the compensation for graves, which was brought up at a public *Baraza* at Olo Nongot. See, World Bank BTOR on acceptance of land by PAPs, 21 December 2012, page 3.

⁸⁹ The ESIA (2010) recognises that *"the Nakuru-Naivasha basin is an important area for archaeological and cultural artefacts"* and states that, should archaeological artefacts be found, the National Museums of Kenya should be informed immediately. See, ESIA, pages 3-52 and 7-22. The 2015 Strategic Environmental Assessment (SEA), which was prepared by KenGen for the Olkaria Geothermal Development Programme (2012-2020) for the Olkaria Geothermal Field, states that *"[i]t is essential that a procedure is in place for all of Olkaria to ensure that if any chance finding take place, it is handled properly."* The SEA contains a proposal for mitigation measures, which includes training subcontractor and KenGen personnel about archaeological artefacts and the procedures to be followed upon discovery. See: SEA (2015), pages 395-396.

⁹⁰ EIB Board of Directors report, CA/437/10, 15 June 2010, Summary of the Proposal, Key Issues

⁹¹ EIB Board of Directors report, CA/437/10, 15 June 2010, Page 20, Annex 4, Environmental and Social Data Sheet

⁹² EIB Board of Directors report, CA/437/10, 15 June 2010, Page 20, Annex 4, Environmental and Social Data Sheet

review mission of November 2010). The EIB's social expert was only present at the wrap-up meeting organised in Nairobi by the AFD following its mission of November 2010. This limited presence in the field and interaction with the key stakeholders (community, promoter, lenders) did not prevent the EIB expert from making substantial and significant contributions during the post-approval process. The EIB-CM finds of particular interest an email dated 28 June 2010 (two weeks after the Bank's Board approval), addressed to the AFD [and indirectly to KenGen] in which he points out to them important gaps in the information in the RAP, some of which relate to the issues that triggered the complaints received by the EIB-CM⁹³ four years later.

- 8.4.4 The AFD mission of September 2010 focused on issues related to the environmental impacts, KenGen Environmental Management Systems and understanding *"the current status of the resettlement"*. The Aide Memoire prepared by AFD concluded with its non-objection to the two ESIA reports. From the information collected, it is not clear to the EIB-CM if this non-objection was provided by the AFD on its own or on behalf of the three lenders. The AFD Aide Memoire on its RAP field mission of November 2010 is the first detailed analysis made by AFD on the existing RAP⁹⁴. In the Aide Memoire, AFD confirms that WB OP/B 4.12 will be the reference document for population displacement issues and *"considers the RAP document drafted under supervision of the World Bank as the sole document needed to assess compliance to OP/B 4.12. KenGen will not be requested to produce a specific RAP for each donor. However, the non-objection of one donor on the resettlement documents does not automatically entail the non-objection for other donors involved in the project. Therefore, it is important that the RAP complies with the requirements of all donors involved"*⁹⁵.
- 8.4.5 The Aide Memoire signed only by AFD after the mission of November highlighted the incompleteness of the documents and recommended a more in-depth socio-economic comparison between the current site and the resettlement site. The analysis carried out by AFD was based on the terrain identified at the time of the mission (November 2010) which is different from the current RAP land. The recommendations made by the AFD to KenGen for the completion of the RAP included and expanded on the issues highlighted by the EIB's social expert in previous communications.
- 8.4.6 From the documentation provided to the EIB-CM, it appears that the presence and the role of the EIB's social expert increased after the AFD mission of November 2010. Whilst the responsibility as Lead Financier still remained with AFD, the EIB participated in a joint lenders' meeting with KenGen that took place in Nairobi in February 2011. The EIB also participated in a RAP update meeting that took place in November 2011. As KenGen had identified a new site for the resettlement in the last quarter of 2011, the EIB commented substantially on the Terms of Reference (ToR) for the RAP update but it also warned the Bank's operational services that it seemed that KenGen was not prioritising a series of

⁹³ Some of the comments concerning the housing are: *"The entitlement matrix only mentions the construction of better housing, but the RAP does not give any information on the types of existing structures in the villages – what are they made of? How many and by use, etc.? Will the PAPs be allowed to salvage the items from the structures that will be pulled down? What types of replacement housing will be provided? Will the structures be culturally appropriated and how will KenGen ensure this? Will the communities or the social amenities have access to electricity?"*.

Concerning the census, he points out: *"Please provide an update on the registered number of project-affected households because apparently during the census not all the potential households were accounted for"*

Concerning livelihood restoration, he said: *"In the new land – please make an assessment of the suitability of the land for grazing including access to water holes. How will the traditional dry season grazing lands of the PAPs be accessible?..."*. *"The baseline focuses mainly on the wage based livelihoods; however there needs to be a better understanding of the non-wage based livelihoods specially livestock keeping"*; *"Information on vulnerable groups or persons, for whom special provision will have to be made"*.

Concerning the grievance mechanism: *There is no mention of a grievance mechanism, process and accessibility and how concerns expressed are taken into account"*

⁹⁴ The RAP was composed of two documents: *"Olkaria (Domes) geothermal project in Naivasha district – Resettlement Action Plan for Olkaria IV power station (267 pages, GIBB Africa), KenGen April 2010"*, which was considered the reference RAP, and the *"KenGen OLKARIA IV PROJECT – Resettlement Action Plan Volume II (64 pages, anonymous, incompletely numbered), KenGen, October 2009"*.

⁹⁵ Aide Memoire – AFD Mission, November 8-12, 2010, page 5.

critical issues. EIB also commented on other issues to be covered during the implementation of the RAP (i.e. not for the finalisation of the updated RAP) including those related to the finalisation of the census. The updated RAP was finalised in June 2012 and on 31 July 2012, AFD provided a non-objection on behalf of the three EU IFIs to KenGen. The EIB-CM could not find any document that substantiated the non-objection from the Bank or any relevant exchange of emails with the EU lenders in the Bank's electronic folders system. The non-objection was sufficient for clearing the first disbursement under the loan. The EU lenders however established further requirements related to the reporting/implementation of the RAP, including - as indicated in §8.2.18 - the preparation of a new census. The main reason being that, despite the different updates, the reports that were submitted to the financiers were not easy to follow and understand. As a result, AFD provided KenGen with short-term technical assistance to update and revised the census in 2012.

- 8.4.7 During 2013, the Bank monitored the implementation of the RAP, which was rated as "satisfactory". Outstanding issues at the end of 2013 concerned (a) access to grazing lands, (b) the planned fencing of the resettlement site and (c) access to water points for daily consumption. The EIB-CM notes that the Bank monitoring reports explicitly mentioned the role of the Bank under the MRI: *"The project is co-financed by the EIB, the AFD, the KfW, JICA and World Bank. The AFD assumes the coordinating role between the European lenders for some project-related tasks i.e. implementation of the RAP, coordination of monitoring missions etc. Project monitoring, social and environmental issues and contractual compliance [reflecting EIB's own monitoring responsibilities] are performed by the EIB"*. On 30 June 2014, the Bank prepared a new monitoring report, which also rated the implementation of the RAP as "satisfactory". The rating was awarded on the basis of information gathered in an Aide Memoire of April 2014 and a lenders' meeting of June 2014. According to the Bank, one of the key milestones of the RAP – the identification of vulnerable PAPs - was achieved in early 2014. The EIB-CM also notices that since May 2012, the EIB's services have received monthly updates and quarterly reports from KenGen on the implementation of the project, including social and environmental matters. However, despite requests to the Bank's services, it did not receive the emails and other communications with the EU IFIs exchanged under the MRI.
- 8.4.8 In October 2014, and following the complaints received by the EIB-CM during the third quarter of 2014, the Bank, AFD and KfW carried out a supervision mission to Olkaria. According to the Aide Memoire, *"the lenders observe that the RAP's implementation made a good progress since last mission in April 2014"*. The lenders also noted that *"allegations and dissatisfactions were nevertheless voiced during the Lenders' interaction with the PAPs, part of them being the natural consequence of the changes that the PAPs had to undergo in recent months during their resettlement"*. Nevertheless, the lenders encouraged KenGen *"to consider and address areas of "quick wins" in assisting the smooth installation of PAPs, such as: attending to finalization of fencing/livestock gates works; ensuring all households have water tanks in good order; construction defaults in the PAPs' homes"*.
- 8.4.9 Concerning the complaints received by the EIB-CM, the EU IFIs said that whilst noting the contents of these complaints and touching on some of them in the RAPIC and the CAC plenary meeting held during their visit, the lenders consider that it is the role of the RAPIC and KenGen to establish in their ongoing dialogue the validity of these allegations, addressing and hopefully resolving these through the established RAPIC structures and grievance processes. The lenders requested that KenGen include all the elements raised across the four complaints in the agendas of the RAPIC meetings in the following weeks, so that open discussion is facilitated in this respect amongst PAPs and KenGen and duly minuted. The lenders asked KenGen to provide the minutes of those meetings. Following the October 2014 mission, the Bank's services forwarded a document from KenGen to the EIB-CM which appears to be the minutes of the RAPIC meeting of 10 October and the letter mentioned in §8.2.86.

9 CONCLUSIONS AND RECOMMENDATIONS

Conclusions

- 9.1 The compliance review carried out by the EIB-CM following the allegations received 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 interest in securing access to reliable and affordable energy; (ii) a deep understanding of the issues that will affect each and every one of the members of the affected community and (iii) careful management of the expectations of the parties involved.
- 9.2 On the positive side, it needs to be highlighted first and foremost that the affected communities do not oppose the development of the project. On the contrary, in general, and this includes the complainants, they see this project as an opportunity to further develop and improve the living conditions of the community. In addition, the promoter has put in place resources (in terms of expertise, time and funding) to facilitate the implementation of the resettlement in accordance with international best practices, including understanding the needs of the community to be relocated and taking corrective action when needed. The EIB-CM was informed that KenGen had spent USD 14 million on investments for the resettlement and had allocated a team of ten experts to ensure that its social safeguards were correctly applied. The lenders, including the EIB, have also provided advice to the promoter on key issues concerning the resettlement and helped the promoter with corrective measures.
- 9.3 This collective effort has had positive results, such as (i) the implementation of the land-for-land principle to resettle the community; (ii) KenGen's undertaking to provide land titles to the community, which had not possessed those titles in the past; (iii) the improvement of the social infrastructure (school, clinic, social centre, churches); (iv) the good quality of the materials used to build the structures on the RAP land; (v) the creation of a RAP Implementation Committee intended to represent, in an inclusive manner, the different groups of the community.
- 9.4 The analysis indicates also that, despite all the efforts and good intentions of the parties involved, the project has failed partially to implement the RAP in accordance with key provisions of the World Bank's policy framework for land acquisition and involuntary resettlement, as was agreed by the lenders, including the EIB. The investigation revealed that the actual resettlement of the PAPs was carried out before the necessary infrastructure - including land titles, water supply, roads and transport - was in place. The conversion of the moving allowance into a connection to the electricity grid also raises concerns. Shouldn't the electricity connection have been considered as part of the infrastructure investment? In addition, was this connection to the electricity grid the only option available to the PAPs, especially taking into consideration that some of them would have limited financial means to pay the costs associated with it? The EIB-CM noticed that the house of the only PAP that did not accept the connection to the electricity grid is equipped with a small photovoltaic panel for its energy supply.
- 9.5 There were serious shortcomings throughout the whole PAPs identification procedure since the first census in September 2009. The subsequent revisions of the census included additional people that went beyond natural growth, according to the information provided to the EIB-CM by the Bank's services during the investigation. In spite of the original census having been revised/updated on three occasions at least over the last five years, the EIB-CM was approached, during all the different missions to the site, by persons or community

representatives alleging that some PAPs had not been given a house on the RAP land despite being entitled to it.

- 9.6 Concerning the restoration of livelihood, there are positive outcomes such as the good quality of the structures and the improvement of the infrastructure on the RAP land; however, the EIB-CM also notices that the PAPs were not given a choice of different housing solutions for the RAP land; from the socio-economic point of view, the project failed to plan how to restore the economic activity of some of the displaced people: for instance, the promoter and lenders assumed that the PAPs of the Cultural Centre would be able to continue to carry out their economic activities as usual without realising the implications of the increased distance to the Cultural Centre, which was both their home and workplace. The *manyattas* kept at the Cultural Centre for cultural purposes are currently occupied by displaced people. Concerning pastoralism activities, which according to the ESIA studies are key economic activities for the large majority of the resettled population, the quality of the grazing on the RAP land raises serious questions with regard to its carrying capacity. The benefits of the project for the affected community do not seem to have been taken into consideration in accordance with the World Bank's Policy. Although KenGen hired workers from the area during the construction phase, only a very limited number of workers are employed at present, and with short-term contracts; proper planning and training for future socio-economic development are also inexistent.
- 9.7 More importantly, the resettlement appears to have failed to fully take into account the interests of people belonging to vulnerable groups, in particular the elderly, the illiterate and women. Whilst the majority of PAPs may consider that the new infrastructure and structures are a positive development, this may not be the case for those that have less means or resources. One of the undesirable consequences of the resettlement seems to be an increase in the gap between vulnerable groups and those members of the community that are benefiting from contracts associated with the development of the geothermal industry in the region. This is one of the sources of the current mistrust and tensions amongst some members of the community.
- 9.8 Concerning the grievance mechanism structure, it appears that it has only partially fulfilled its role. From the different discussions held during the past months, tensions are palpable between the different groups of the community themselves and between some PAPs and the promoter. The circumstances that have prevented the grievance mechanism from fulfilling its role can be summarised as follows: (1) the apparent non-declared conflict of interests of the RAPIC: the RAPIC takes the main decisions on the implementation of the RAP and it is the second level of grievance resolution, superseding the Council of Elders (CAC); (2) the CAC was set up only after the creation of the RAPIC and its members have continuously complained to the EIB-CM that their opinions were not being taken into consideration in accordance with Maasai traditions. The EIB-CM also noted that some CAC members are RAPIC members, which introduces an additional conflict of interest; (3) the distrust of the members of the community if complaints are referred to an external mediator. The result is that the RAPIC, which was a well-intended structure to give a voice to and represent the interests of all the strata of the community, is increasingly becoming a contentious organ in itself.
- 9.9 The above problems identified during the course of this investigation appear to be the result of a combination of several factors. First, the limited experience of the promoter in carrying out involuntary resettlements of this nature and extent. KenGen has acknowledged several times during the past months that this was the first major resettlement implemented according to the World Bank's policies. Therefore, and whilst the project resettlement has adhered strictly to national laws, it might have misjudged some of the additional requirements included in the lenders' policies. The most obvious example is the construction of the structures on the RAP land, which are made of good materials and to

good construction standards. However, by offering the same product to everybody it missed the opportunity of taking into consideration the PAPs' needs and the future income-generating capacity required to maintain the houses of each household. Similar misjudgement could be said to apply to the restoration of economic livelihood: it appears that the role of KenGen to guide the economic activities of the PAPs ended once the PAPs were resettled and the welfare society was created.

- 9.10 A major issue related to this misjudgement is the non-categorisation of the Maasai community as an indigenous people in accordance with the lenders' policies at the time of appraisal. By not recognising the Maasai as an indigenous community, some members of the community, and particularly the most vulnerable, were prevented from having an in-depth consultation as stipulated in the involuntary resettlement policies and guidelines of lenders. Whilst the policies of lenders like the World Bank aim at obtaining broad community support of vulnerable and indigenous population, the EIB's Environmental and Social Handbook in force at the time of the appraisal refer to "effective consultation"⁹⁶. This would have required meaningful communication using Maa as the language to inform the people of the objectives of the resettlement and their individual rights. In addition, the customary structures (Council of Elders) would have needed more careful consideration and played a bigger consultative role during the resettlement process. Furthermore, PAPs would have had opportunity to choose from different housing alternatives; and ways in which the community could benefit from the project would have been discussed at length.
- 9.11 In fact, and whilst the creation of the RAPIC and the public meetings with the communities through the public barazas are considered to be good practice in terms of public consultations, the EIB-CM observed during the course of the investigation that most of the key decisions are made by a select group of people. This small group of people has been the main point of contact since KenGen started to prepare the RAP in 2009 (well before the creation of the RAPIC and the CAC). This might have resulted in creating an unintended cosiness between the promoter and this select group, which may have prevented the full implementation of free informed prior consultation with the rest of the community, resulting in additional distrust amongst them.
- 9.12 Concerning the role of the EIB during the implementation of the RAP, the EIB is responsible for ensuring that the borrower and the promoter designed and implemented the RAP in accordance with the relevant World Bank policy for resettlement. In addition, the RAP should also adhere to the EIB's guidelines set out in the Environmental and Social Handbook. Although the social assessment activities were delegated to the AFD in accordance with the understanding of the MRI in 2010, the Bank was responsible for providing its non-objection to the RAP as indicated in the Aide Memoire issued by AFD in November 2010.
- 9.13 EIB-CM notes that, as a result of the MRI arrangements, the social expert of the Bank did not participate in the appraisal mission of the project although he provided comments in the months following the Board approval. This prevented the Bank from engaging in a full discussion with the interested parties at an early stage, as demonstrated by the thorough list of issues sent to AFD and KenGen only after the Bank had approved the loan. This delayed participation may have prevented the Bank from engaging actively in discussions with other parties concerning key issues such as the categorisation of Maasai as an indigenous community and its consequences for the Bank's loan.
- 9.14 It seems, however, that as the project was being developed and the resettlement became more complex, the Bank's social expert increased his role and participation by providing

⁹⁶ EIB Environmental and Social Practices Handbook, Version 2 of 24/02/2010, page 66 "...standards for dealing with involuntary resettlement and standards for the treatment of vulnerable groups, including women and indigenous peoples. Bank staff will endeavour to ensure that appropriate arrangements for effective consultation with stakeholders are put in place".

advice and comments to AFD's team of social experts. From the information gathered, it appears that the relationship under the MRI evolved from an unclear delegation of tasks from the EIB to the AFD to a formal coordination of activities under the responsibility of the Lead Financier. This new role is reflected in the joint missions carried out by the three financiers since 2013 and the publication of joint Aide Memoires with the signatures of the three EU IFIs. At this point, it should be pointed out that the project was part of the pilot phase of the MRI. During this pilot phase, the roles and responsibilities of each financier in each project were discussed case by case. The terms and responsibilities of each financier under the MRI were subsequently formalised in 2012.

- 9.15 The Bank also relied heavily on the presence of the WB as a financier of the project to ensure the promoter's full compliance with the WB's policy framework for land acquisition and involuntary resettlement. Given that during the first phase the EIB assessed the social impacts and the RAP based on AFD's appraisal, it is difficult to ascertain to what extent the Bank interacted with the WB to exchange views on the successful implementation of the RAP. Joint lenders' meetings for monitoring purposes between KenGen and other lenders were registered in 2011 and 2014. The two banks (EIB and WB) would have had more informal contacts on this matter through their regional offices located in Nairobi.
- 9.16 Irrespective of the good coordination amongst the teams of the other IFIs and the alignment of policies for involuntary resettlement, the mixed results achieved in the implementation of the involuntary resettlement framework have shown the limitations of the EIB's involvement through third parties. Since each bank still retains its responsibility for ensuring the fulfilment of the contractual conditions negotiated with KenGen, the EIB-CM understands that it is the responsibility of the EIB's services to provide, directly or indirectly, the necessary guidance to its client to ensure the successful implementation of the RAP.
- 9.17 In this regard, and according to the documents reviewed, the services of the Bank did indeed identify key issues associated to the resettlement and provide appropriate advice to the parties (AFD and KenGen) following the first draft RAP. The Bank continued providing this "desk review advice" (without visiting the site and without interacting directly with the parties) in the following months. Most of the issues that have been investigated in the WB's compliance review were identified by the Bank during the reviews and update of the first RAP and this is a sign of the sound expertise warehoused in the Bank for analysing social impacts. The desk review approach also has its limitations. As indicated, the EIB-CM has not been able to trace any discussions on key issues such as (i) the indigenous considerations of the Maasai, (ii) the need to offer different types of houses to the PAPs or (iii) the use of the Maa language and the analysis of meaningful consultations with the affected people.
- 9.18 In terms of physical monitoring and supervision, the EIB-CM also acknowledges that the Bank has allocated substantial resources (staff, time and finance) to the project. It seems that the resources allocated are more than initially foreseen under the MRI arrangements, which may be seen as a sign miscalculation by the Bank of limitations of the MRI arrangements and the Bank's role in providing guidance for the appropriate implementation of the resettlement. In addition to the monitoring undertaken by the Regional Office, the number of the Bank's site visits increased to an average of two per year after 2012. The Bank also coordinated effectively with AFD in order to mobilise additional expertise to carry out an additional census in 2012. But as this compliance review has shown, the Bank's efforts in the context of the MRI were not sufficient to ensure the proper implementation of the resettlement policy. As already indicated, involuntary resettlement is a very complex task that involves efforts from different and diverse parties and requires very intense monitoring and continuous exchanges with all the people involved including the PAPs. The sporadic interaction of the Bank with the affected community, which is also limited to a group of decision-makers, prevented the Bank from having access to first-hand information

that would have been useful for helping the promoter to steer the process in the right direction.

- 9.19 It can therefore be concluded that, despite the resources and efforts dedicated by the Bank to supporting its client, some of the allegations are founded and therefore the Bank only partially succeeded in guiding the client effectively with respect to the implementation of the WB's land acquisition and involuntary resettlement policy framework, while failing to ensure adequate monitoring of the implementation of the RAP.
- 9.20 As mentioned above, the EIB-CM proposed at the IAR stage to provide independent facilitation services to foster the dialogue between the complainants and the existing project organisational structures; this proposal was accepted by the parties concerned. The main objective of this problem-solving approach is to help to build trust and address the concerns raised by the complainants, with a view to resolving the issues identified.
- 9.21 A preliminary mission of the EIB-CM mediation team took place in May 2015 with the objective of (i) contacting potential mediators; (ii) meeting with the parties involved (KenGen, the complainants and representatives of the community); and (iii) taking stock of the issues at stake. As a result of that mission, the EIB-CM appointed two mediators - both of them residents of Kenya - to facilitate the dialogue. It should be highlighted that the complainants agreed to extend the process and the outcome of the mediation to the entire community. This should be seen as a positive signal of the complainants in terms of defending the general interests of the community.
- 9.22 A second mission from the EIB-CM mediation team took place in mid-June 2015 with the objective of introducing the mediators to the parties and to discuss representation at the mediation table. The mediation process was launched in August 2015, after the parties reached an agreement in terms of representation of the community at the mediation table and the definition of the scope of the mediation.

Recommendations

- 9.23 The EIB-CM will continue with the implementation of the problem-solving approach. Whilst the scope of the mediation has been established by the parties, it may possibly address some of the structural and recurrent issues such as the identification of the PAPs (the census), compensation for the moving allowance or additional profit-sharing approaches taking into consideration the general laws that are being studied in Kenya.
- 9.24 At the same time, KenGen and the lenders, including the Bank, are still responsible for implementing the RAP in accordance with the agreed policy. Measures that could be implemented in the medium term are: the award of land titles, the restoration/completion of the infrastructure (roads, water, electricity, access for the disabled, etc.), the means for restoring economic livelihoods in the long run (e.g. business plan for the Cultural Centre, exploration of microfinance as a way to finance economic activities), review of the housing structures, etc. The implementation of these measures could run in parallel, but in close cooperation, with the mediation process.
- 9.25 In order to ensure proper implementation, the EIB-CM recommends that the Bank's services reinforce the monitoring of the remaining implementation of the RAP and any related agreement reached by the parties under the mediation process. The Bank's services could explore, within the existing arrangements under the MRI, and with the other EU-IFIs partners, the possibility of hiring a professional social development expert in for a period of time (to be agreed) which should be sufficient to ensure the monitoring of the complete implementation of the RAP. This expert could be located in Nairobi working under the supervision of the EU-IFIs social experts.

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F. Alcarpe
Head of Division
Complaints Mechanism
11 November 2015

A. Abad
Deputy Head of Division
Complaints Mechanism
11 November 2015

List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AfD	Agence Française de Développement (French Development Agency)
BP	Bank Procedures
BTOR	Back-to-Office Report
CAC	Community Advisory Council
EIB	European Investment Bank
EIB-CM	European Investment Bank Complaints Mechanism
ESIA	Environmental and Social Impact Assessment
EU	European Union
GCHM	Grievance and Complaints Handling Mechanism
IEP	Independent Evaluation Panel
IFI	International Financial Institution
IPP	Indigenous Peoples Plan
IPPF	Indigenous Peoples Planning Framework
ISDS	Integrated Safeguard Data Sheet
IWGIA	International Work Group for Indigenous Affairs
JICA	Japan International Cooperation Agency
KEEP	Kenya Electricity Expansion Project
KenGen	Kenya Electricity Generating Company Ltd.
KES	Kenyan Shillings
KfW	Kreditanstalt für Wiederaufbau (German Development Agency)
MoU	Memorandum of Understanding
MPIDO	Mainyoito Pastoralists Integrated Development Organization
NLC	National Land Commission (of Kenya)
OP	Operational Policy
PAPs	Project-affected persons
RAP	Resettlement Action Plan
RAPIC	Resettlement Action Plan Implementation Committee
RAP land	Olkaria IV Resettlement Site
SEA	Strategic Environmental Assessment
TLU	Tropical Livestock Unit
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WB	World Bank
WB-IP	World Bank Inspection Panel

ANNEX 1

MEMORANDUM OF UNDERSTANDING BETWEEN THE EIB-CM AND THE WB-IP

ANNEX 2

PHOTOGRAPHIC REPORT